IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

JB & ASSOCIATES, INC., a Nebraska corporation; ALINE BAE TANNING, INC., a Nebraska corporation; MAPLE 110 TANNING, LLC, a Nebraska limited liability company; TANNING HORIZONS LLC, a Nebraska limited liability company; WILSON BONN LLC, a Nebraska limited liability company; MAX TAN, INC., a Nebraska corporation; and CROISENED, LLC, a Nebraska limited liability company, Plaintiffs, vs. NEBRASKA CANCER COALITION, INC., DR. ALAN G. THORSON, M.D., and DR. J. DAVID WATTS, M.D., Defendants.	Case No.: CI 15-6370 **PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

INTRODUCTION

Plaintiffs, who provide approximately 84% of all indoor tanning services in the Omaha and Lincoln, Nebraska markets, filed suit against Defendants for false and misleading statements made by Defendants in connection with Defendants' "The Bed is Dead" Campaign, which is designed to destroy Plaintiffs' businesses, reputations, and livelihood. Defendants do this by making outrageous, false statements about Plaintiffs' services and causing baseless public fear, particularly concerning melanoma cancer. Defendants' intention is for the public to equate tanning salons with "Big Tobacco"—evil companies who sell products and services that cause cancer and death. In doing this, Defendants not only disparage Plaintiffs' services, but also defame their businesses and reputations. Defendants have carried out their plan by making false statements of fact, giving rise to this action.

Plaintiffs are not seeking monetary damages, but rather injunctive relief preventing Defendants from continuing to publish the false statements they have been peddling to the unsuspecting public, especially youth, as fact. This dispute is not about quelling public discourse, as Defendants attempt to paint it, but rather is about Defendants' injection of false, misleading, and malicious statements regarding Plaintiffs and their services into the public discourse. Plaintiffs afforded Defendants ample opportunity to correct the situation, but they refused to do so. Thus, this court action was Plaintiffs' only recourse. Defendants now attempt to put forth a nuanced position, which has been completely lacking in their malevolent "The Bed is Dead" campaign.

In response to Plaintiffs' detailed Complaint, Defendants filed a Motion to Dismiss, wherein Defendants make several baseless arguments. First, Defendants claim that none of the false statements are "of or concerning Plaintiffs" because the statements do not directly reference Plaintiffs or their services. This is patently untrue, and ignores applicable case law that requires defamatory statements be evaluated in light of the context of the statement and audience perception. Second, Defendants claim Plaintiffs have not asserted that certain statements are false—which is again patently untrue. Third, Defendants claim that the statements, which essentially accuse Plaintiffs of selling cancer to the public, are somehow not reprehensible enough to be defamatory per se, thereby requiring proof of special damages. Defendants only reach this conclusion by ignoring the plain purpose and effect of their statements.

Fourth, Defendants claim the statements are not actionable because they are statements of opinion, not fact. Interestingly, Defendants have never presented the statements as opinions, never told the public their statements are mere opinions, and never explained how they intend to "educate" the public with mere opinions. Finally,

Defendants errantly argue that the Plaintiffs have failed to allege that the statements were made in the course of Defendants' business, vocation, or occupation. As demonstrated below, all of Defendants' arguments are baseless.

STANDARD OF REVIEW

To state a claim for relief under Nebraska law, a party need only "allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face." *Doe v. Bd. of Regents of University of Nebraska*, 280 Neb. 492, 506, 788 N.W.2d 264, 278 (2010) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)). When facing a motion to dismiss under Neb. Rev. Stat. § 6-1112(b)(6), the non-moving party's "factual allegations, taken as true, are . . . plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the claim or element." *Doe*, 280 Neb. at 506, 788 N.W.2d at 278. The non-moving party only needs to allege facts that could allow a trier of fact to find in the non-moving party's favor. *Gonzalez v. Union Pacific R.R. Co.*, 282 Neb. 47, 62, 803 N.W.2d 424, 439-40 (2011).

Indeed, dismissal under § 6-1112(b)(6) "should be granted only in the unusual case in which [the non-moving party] includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Britton v. City of Crawford*, 282 Neb. 374, 379, 803 N.W.2d 508, 513 (2011) (*citing Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 727 N.W.2d 447 (2007)). Furthermore, courts in Nebraska freely grant leave of court to amend a pleading, and complaints vulnerable to dismissal for failure to state a claim should not be dismissed without allowing amendment. *See Gonzalez v. Union Pac. R.R. Co.*, 282 Neb. 47, 63-64, 803 N.W.2d 424, 440-41 (2011) (stating leave to

amend is freely given when justice so requires and should ordinarily be granted in lieu of a motion to dismiss).

STATEMENT OF FACTS

For the purposes of Defendants' Motion to Dismiss, the following well-pled facts must be taken as true:

1. Plaintiffs are independent businesses that operate indoor tanning salons in Nebraska. (Complaint, ¶¶ 1-7).

2. Collectively, Plaintiffs account for 68% of the known tanning salons in the Omaha and Lincoln market areas, and an estimated 84% of sales of tanning services in those markets, as well as a very significant percentage of total sales of tanning services in Nebraska. (Complaint, ¶ 8).

3. The NCC, led by Thorson (President) and Watts (Vice President) has orchestrated a campaign in Nebraska, entitled "The Bed is Dead," designed to destroy the businesses, reputations and livelihood of the Plaintiffs. (Complaint, ¶ 14). Defendants have, in fact, caused the NCC to devote a substantially disproportionate share of its time and efforts to the "The Bed is Dead" campaign. *Id.*

4. In the campaign, the term "Bed" refers to indoor tanning sunbeds through which Plaintiffs provide cosmetic tanning services, and to which some medical professionals refer clients for treatment of certain skin conditions, natural vitamin D production and treatment of Seasonal Affective Disorder. (Complaint, ¶ 15).

5. As part of its campaign to destroy Plaintiffs' tanning businesses, Defendants maintain a public website located at www.thebedisdead.org. Defendants promote this website in multiple publications, social media outlets, and advertisements. (Complaint, ¶ 16).

6. Multiple statements published and distributed to the public in Omaha and Lincoln and the state of Nebraska on the Defendants' website, Facebook account, Twitter account, posters, and in print publications, are false and scientifically unfounded, and are known by Defendants to be false or scientifically unfounded. (Complaint, ¶¶ 18, 21).

7. Defendants have made the following false and misleading statements, among others:

a. Statement 1: "Tanning Causes More Cancers Than Cigarettes." (Complaint, ¶ 24).

b. Statement 2: "Young women are hit hardest. New cases of malignant melanoma have soared 8-FOLD in young women since 1970, TWICE AS FAST as in young men!" (Complaint, ¶ 46).

c. Statement 3: "Tanning before age 35 raises your risk of melanoma by nearly 60%." (Complaint, ¶ 47).

d. Statement 4: "Tanning beds have been proven to cause skin cancer." (Complaint, ¶ 60).

e. Statement 5: "Your skin remembers EACH tanning session. Just one indoor tanning session increases risk of melanoma by 20%, and each additional use during the same year boosts risk by another 2%." (Complaint. ¶ 65).

f. Statement 6: "Malignant melanoma is now the most common cancer in young adults aged 25-29 years, second most common in young women aged 30-34 years and in teenagers." (Complaint, ¶ 66).

g. Statement 7: "Ultraviolet radiation and UV tanning devices are rated by the Food and Drug Administration (FDA) and the World Health Organization (WHO), among other agencies, as carcinogenic to humans (type-1 carcinogens), in the highest risk category alongside arsenic, radon, tobacco, and asbestos." (Complaint, ¶ 67).

h. Statement 8: "One person dies of melanoma every hour in the U.S." (Complaint, ¶ 70).

i. Statement 9: "Malignant melanoma is increasing more rapidly than any other cancer." (Complaint, ¶ 71).

j. Statement 10: "Tanning is addictive. One study produced withdrawal symptoms in frequent tanners with narcotic antagonists such as are used in emergency rooms. Studies find higher rates of alcohol, tobacco, and drug use in females that tan." (Complaint, ¶ 72).

k. Statement 11: "Of melanoma cases among patients under 30 who had tanned indoors, 76 percent were attributable to tanning bed use in a recent well-designed and conducted study." (Complaint, ¶ 74).

l. Statement 12: "Vitamin D is important, but exposure to UV more than about 10 minutes actually starts to break down the pre-vitamin D in the skin." (Complaint, ¶ 75).

m. Statement 13: "There is no such thing as a 'safe tan.' Any color the skin develops is a direct result of DNA damage to the skin cells." (Complaint, ¶ 77).

n. "Worse, to get a fast tan, many tanning beds emit ultraviolet (UV) radiation that far exceeds UV in natural sunlight. Human evolution

has not equipped even tanned skin to withstand such extreme UV exposures without injury." (Complaint, ¶ 85).

o. "You may be thinking that just a few indoor tanning sessions won't hurt—that they can't really be that harmful. But science shows that indoor tanning is much more dangerous than previously assumed, especially for young people. A single indoor UV tanning exposure as a young person is linked to an alarming 34-59 percent increase in the risk of melanoma." *Id.*

p. "Not only that, the skin remembers every single tanning session. Melanoma risk increases almost 2 percent for each additional indoor tanning exposure in a given year." *Id.*

q. "Melanoma is now the number one cancer in the U.S. among young adults aged 25-29 years, and is one of the most common cancers of teenagers." *Id.*

r. "Young women make up 70 percent of the 1 million people who tan indoors every day in the United States. So it is not surprising that a Mayo Clinic study showed that in recent years melanoma has increased twice as fast in young women as in young men." *Id.*

8. Plaintiffs have alleged that each of the above-statements is false and misleading. (Complaint, ¶ 23 ["Among the false and misleading statements are the following"], 27, 46-48, 59, 60, 65, 66, 68, 70, 71, 72-73, 74, 75, 77, 85, 90, 100).

9. The above statements were published in the Omaha and Lincoln markets and throughout Nebraska to numerous third parties and the general public, including readers and visitors of Defendants' website. Defendants' false and defamatory

statements were intentionally published to targeted demographic groups in an effort to reach Plaintiffs' customers. (Complaint, ¶ 101-02).

10. "The Bed is Dead" campaign, from which the above statements sprang, is part of a concerted effort funded in part by individuals and commercial entities having a direct financial interest in generating negative publicity about indoor tanning salons, including the sunscreen and cosmetic industries and those providing UV light treatments in medical facilities. (Complaint, ¶ 20).

11. Defendants disparaged the services and goods of Plaintiffs in the course of their business, vocation or occupation. Defendants engaged in the business, vocation or occupation of promoting the professional services of themselves as well as their financial contributors and members, including numerous dermatologists and providers of therapeutic UV light treatment and equipment who are competitors of Plaintiffs. Defendants further engaged in the business, vocation or occupation of the Nebraska Cancer Coalition, Inc. as set forth in its organizational documents and policies. (Complaint, ¶ 91).

12. Defendants' statements have damaged Plaintiffs' reputations, so as to lower them in the esteem and standing of the community and to deter third persons from associating or dealing with them. (Complaint, ¶ 105).

13. Defendants' statements prejudice Plaintiffs in their profession and trade and, through the use of shocking and false allegations, falsely impute Plaintiffs' services as responsible for death and disease. (Complaint, ¶ 106).

ARGUMENT

I. PLAINTIFFS HAVE PROPERLY PLED A CLAIM OF DEFAMATION AGAINST DEFENDANTS; THUS, DEFENDANTS' MOTION TO DISMISS MUST BE DENIED.

A. In Count II, Plaintiffs Properly Assert a Defamation Claim, Not a Product Disparagement Claim.

In an effort to require Plaintiffs to prove special damages, Defendants attempt to recast[1] Plaintiffs' defamation claim as a product disparagement claim. (Defendants' Brief, p. 9). Defendants' attempt to recast Plaintiffs' allegations, however, must be rejected for multiple reasons, including the fact that Plaintiffs are the masters of their complaint. *See Brown v. Medtronic, Inc.*, 628 F.3d 451 (8th Cir. 2010) ("[A] plaintiff is the master of his own complaint . . .").

In Count II, Plaintiffs do not seek damages for the reduced marketability of their services (as argued by Defendants), but instead seek to protect their interests in their character and reputation. This is a classic defamation claim under both Nebraska law, see *Moats v. Republican Party of Nebraska*, 281 Neb. 411, 424, 796 N.W.2d 584, 595 (2011) (quoting Restatement (Second) of Torts § 559 at 156 (1977)) ("A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."), and even under the far-flung authority cited by Defendants. *See U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914, 924 (3d Cir. 1990) ("[D]efamation is meant [to] protect an entity's interest in character and reputation.").

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[1] Defendants' attempt to reshape the claims in Plaintiffs' Complaint is even more strained considering that they rely only on authority from other jurisdictions to argue for treating Plaintiffs' claims as product disparagement claims and not defamation. (Defendants' Brief, p. 9). Indeed, Defendants admit that they could find no authority in Nebraska on product disparagement. *Id.*

Thus, to survive Defendants' Motion to Dismiss, Plaintiffs need only have pled "sufficient facts, accepted as true, to state a claim to relief that is plausible on its face," which is to say the facts suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the claim or element. *Doe v. Bd. of Regents of University of Nebraska*, 280 Neb. 492, 506, 788 N.W.2d 264, 278 (2010). The elements of Plaintiffs' defamation claim are: (1) a false and defamatory statement concerning Plaintiffs, (2) an unprivileged publication to a third party, (3) fault amounting to at least negligence on the part of Defendants, and (4) either actionability of the statement irrespective of special harm (i.e. the statement is defamatory per se) or the existence of special harm caused by the publication. *Norris v. Hathaway*, 5 Neb. App. 544, 547-48, 561 N.W.2d 583, 585 (1997). Plaintiffs have clearly alleged sufficient facts to state a plausible claim of defamation—meeting their minimal burden at this stage. Despite this, Defendants ask the Court to make factual determinations as to nearly all of the key elements of the claim, as if this were a motion for summary judgment. Defendants' request is wholly inappropriate at this stage of the proceedings.

B. Plaintiffs Have Asserted That Defendants' Statements Are False.

Defendants claim that the defamation cause of action, as it relates to Statements 1, 4, 7, 8, 10, and 11, must be dismissed because Plaintiffs do not allege that the statements are false. (Defendants' Brief, p. 10). This is incorrect. In fact, as shown in the Statement of Facts, Plaintiffs have alleged that all of the statements in question are false and misleading. *See* Statement of Facts, ¶ 8. Without belaboring the point, Defendants' position is contradicted by at least the following specific allegations:

- Statement 1: Alleged to be false in Paragraph 23 ("Among the false and misleading statements are the following:"), Paragraph 27 ("was clearly

designed to mislead, and is both qualitatively and quantitatively incorrect."), and Paragraph 100 ("Defendants made false and defamatory statements regarding Plaintiffs as specifically outlined in all preceding paragraphs.").

- Statement 4: Alleged to be false in Paragraph 23, Paragraph 60 ("Causal statements cannot be legitimately made from epidemiological data on UV exposure and sunbeds...Accurate information, however, is and has been available to Defendants), Paragraph 61 ("However, the few epidemiological studies that have been carried out to date have not provided any consistent results."); Paragraph 62 ("Also contradicting Defendants' claims is this..."), Paragraph 63 ("But in terms of looking at specific [causes] of that, it's still difficult to determine."), and Paragraph 100.
- Statement 7: Alleged to be false in Paragraph 23, Paragraph 68 ("This statement is designed to mislead."), Paragraph 69 ("To suggest, as Defendants have, that UV is in a category with arsenic, radon, asbestos and tobacco without acknowledging that UV is also the only item in the category essential for life is intentionally misleading."), and Paragraph 100.
- Statement 8: Alleged to be false in Paragraph 23, Paragraph 70 ("This statement is misleading because it fails to mention that the overwhelming majority of those who die from melanoma are men over age 50 who never once used a sunbed. Instead, when viewed in the context of the overall "The Bed is Dead" campaign, Defendants imply that sunbeds are the cause."), and Paragraph 100.
- Statement 10: Alleged to be false in Paragraph 23, Paragraph 72 ("This statement is designed to be misleading, as it infers that the body's natural

attraction to UV exposure is a harmful addiction, and that tanning causes people to engage in other potentially harmful activities."), Paragraph 72 ("The study referenced does not purport to establish such causation. Failure to mention these caveats shows intent to mislead."), and Paragraph 100.

- Statement 11: Alleged to be false in Paragraph 23, Paragraph 74 ("This statement is not based on any reliable scientific evidence. The referenced survey study was conducted in Australia and is not capable of showing causation, nor can it be applied to sunbed usage in the United States."), and Paragraph 100.

In short, Defendants' claim that the statements in question have not been adequately alleged as false is baseless.

C. Plaintiffs Have Alleged Sufficient Facts to Plausibly Establish That Defendants' Statements "Are Concerning Plaintiffs."

Next, Defendants argue at length that their statements were not "of or concerning Plaintiffs." (Defendants' Brief, pp. 7-10). Again, Defendants only reach this conclusion by ignoring the content of the statements, the context of the statements, the intended audience, and the small number of businesses who provide indoor tanning services in Nebraska. When the content, context, and audience is considered, as required under Nebraska law, it is clear that Plaintiffs have alleged sufficient facts to plausibly establish that the false statements were "spoken of" or were "concerning" Plaintiffs. Neb. Rev. Stat. § 25-839 ("In an action for a libel or slander it shall be sufficient to state, generally, that the defamatory matter was published or spoken of the plaintiff, and if the allegation be denied, the plaintiff must prove on the trial the facts, showing that the defamatory matter was published or spoken of him."); *Norris v. Hathaway*, 5 Neb. App. 544, 547-

48, 561 N.W.2d 583, 585 (1997) (listing the first element of a defamation claim as "a false and defamatory statement concerning Plaintiffs"). As shown below, Plaintiffs have alleged sufficient facts to state a plausible claim of defamation; thus, Defendants' Motion to Dismiss must be denied.

Although no Nebraska case directly addresses the question of when a statement is "of or concerning" Plaintiffs, Nebraska case law is abundantly clear that a defamatory statement must be evaluated in light of the full context of the statement and how it was understood by the audience: "[T]he circumstances under which the publication of an allegedly defamatory communication was made, the character of the audience and its relationship to the subject of the publication, and the effect the publication may reasonably have had upon such audience must be taken into consideration." *Moats v. Republican Party of Nebraska*, 281 Neb. 411, 422-23, 796 N.W.2d 584, 594 (2011). *See also Steinhausen v. HomeServices of Nebraska, Inc.*, 289 Neb. 927, 940-41, 857 N.W.2d 816, 828-29 (2015) ("And context is important to whether an ordinary reader would view a statement as one of fact or opinion. In addition to the content of the communication, a court looks to the knowledge, understanding, and reasonable expectations of the audience to whom the communication was directed, taking cues from the broader setting in which the statement appears."); *Hennis v. O'Connor*, 223 Neb. 112, 120, 388 N.W.2d 470, 476 (1986) ("In determining whether an alleged statement is defamatory, Nebraska law requires that the statements complained of not be isolated and that they be considered in the context of the entire broadcast.").

Here, Plaintiffs have alleged that the false statements were intentionally targeted at and published to Plaintiffs' customers (Complaint, ¶¶ 16-18, 21, 86, 102), that the term "Bed" in the "The Bed is Dead" campaign refers to the indoor tanning sunbeds

used by Plaintiffs (Complaint, ¶ 15), "The Bed is Dead" campaign is a concerted effort and plan to destroy Plaintiff's businesses and reputation (Complaint ¶¶ 20), the statements provided false information regarding the indoor tanning services provided by Plaintiffs (Complaint, ¶¶ 23, 27, 46-48, 59, 60, 65, 66, 68, 70, 71, 72-73, 74, 75, 77, 85, 90, 100), the statements were publicized throughout Lincoln and Omaha, including at Omaha's Fashion Week (Complaint, ¶¶ 18, 20), Plaintiffs account for 68% of known tanning salons in the Omaha and Lincoln market areas and 84% of sales of tanning services in those areas (Complaint, ¶ 8), the statements harmed the reputation of Plaintiffs so as to lower them in the esteem of the community and/or deter third persons from associating or dealing with them, thereby indicating that the audience understood the statements to be concerning Plaintiffs (Complaint, ¶¶ 105, 108), and the false statements falsely impute Plaintiffs' services as responsible for death and disease (Complaint, ¶ 106). Even though the statements do not refer to Plaintiffs by name, the allegations are sufficient to plausibly establish that the statements were "of and concerning" Plaintiffs and their services—both by the context of the statements and how the audience received them. Defendants may contend that Plaintiffs will not be able to establish these facts at trial, but that is a factual dispute for another day. At the motion to dismiss level, the Complaint and its allegations are clearly sufficient.

Defendants imply that the statements must specifically reference Plaintiffs in order to be "of and concerning" Plaintiffs, but this has no basis in law, even under the authority cited by Defendants.[2] The applicable rule—which is fully consistent with

[2] Defendants go to great lengths in attempting to convince the Court that Plaintiffs must be named in the statements in order for the statements to be "concerning" them, citing far-flung jurisdictions such as courts in Maine and Massachusetts. *See* Defendants' Brief, p. 7. However, even the cases they cite do not support their argument. In

Nebraska case law that emphasizes the importance of evaluating the context of the statements and how they are understood by the audience—is aptly described by our neighbors in Iowa: "Although defamatory words must refer to an ascertainable person, the plaintiff need not be named if the alleged libel contains matters of description or other references therein, or the extraneous facts and circumstances . . . show that plaintiff was intended to be the object of the alleged libel, and was so understood by others." *Wisner v. Nichols*, 165 Iowa 15, 143 N.W. 1020, 1025 (Iowa 1913) (adopted and applied by the Eighth Circuit United States Court of Appeals in *Ball v. Taylor*, 416 F.3d 915, 917-18 (8th Cir. 2005) and *Brummett v. Taylor*, 569 F.3d 890, 891-92 (8th Cir. 2009)). Applying this rule, the Eighth Circuit has determined that whether or not the audience understood the statements to be "of and concerning" the plaintiff or whether the publication gave rise to a reference to a particular plaintiff was ultimately a factual matter, to be decided at trial or on summary judgment. *See, e.g., Brummett*, 569 F.3d at 893 ("Having carefully reviewed the trial court record, we agree with the district court that plaintiffs presented insufficient evidence "to establish that anyone in Taylor's audience understood the individual plaintiffs to be the object of his statements.") (affirming grant of judgment as a matter of law after trial).

Robinson v. Guy Gannett Publ'g, 297 F.Supp. 722, 725-26 (D.Me. 1969), the Court actually states: "**Although it is not necessary that the publication on its face mention the plaintiff by name**, if its application to the plaintiff depends upon extrinsic circumstances, he must show that it was actually understood as referring to him." (emphasis added). Defendants conveniently omit the underlined clause in their Brief—which significantly alters the applicable ruling and effectively undermines Defendants' entire argument.

The Maine Court continued: "In this respect, the test is neither the intent of the author nor the recognition of the plaintiff himself that the article is about him, but rather the reasonable understanding of the recipient of the communication." *Id.* Again, this is consistent with the rule described by Plaintiffs in this section, and does not support dismissal.

The approach adopted by the Eighth Circuit and Iowa courts is also wholly consistent with Restatement (Second) of Torts, § 564A (1977), which provides:

> One who publishes defamatory matter concerning a group or class of persons is subject to liability to an individual member of it if, but only if,
>
> (a) the group or class is so small that the matter can reasonably be understood to refer to the member, or
>
> (b) the circumstances of publication reasonably give rise to the conclusion that there is particular reference to the member.

Subsection (b) is a restatement of the rule adopted by Iowa and the Eighth Circuit, and is consistent with Nebraska case law. Subsection (a) provides another basis for Plaintiffs' defamation claims—because the group of businesses operating tanning salons in the State of Nebraska is small, with Plaintiffs representing some 84% of tanning services in the Lincoln and Omaha markets. (Complaint, ¶ 8). As a result, Defendants' statements can be reasonably understood as referring to Plaintiffs.

As demonstrated above, the allegations in the Complaint, including those relating to Defendants' defamatory statements, the context of those statements, and how those statements were understood by the audience to apply to Plaintiffs, plausibly establish that Defendants' defamatory statements were "of and concerning" Plaintiffs. Defendants' arguments to the contrary are baseless.

D. Plaintiffs Have Alleged Sufficient Facts to Plausibly Establish That Defendants' Statements Are Defamatory Per Se.

Defendants' also argue that their false statements are not defamatory per se, but require proof of special damages to be actionable. (Defendants' Brief, p. 13-14). Defendants generally accurately describe Nebraska law on what constitutes a statement that is defamatory per se, but then completely misapply it. Likewise, Defendants improperly ask the Court to make a factual determination at the motion to dismiss

stage, as if this were a mini-trial or summary judgment motion—both of which would be premature.

The Nebraska Supreme Court has explained what constitutes defamation per se and how it should be determined (when that factual determination is made):

> Spoken or written words are slanderous or libelous per se only if they falsely impute the commission of a crime involving moral turpitude, an infectious disease, or unfitness to perform the duties of an office or employment, **or if they prejudice one in his or her profession or trade** or tend to disinherit one. . . . In determining whether a communication is libelous or slanderous per se, the court must construe the questioned language in its ordinary and popular sense. . . . Further, the circumstances under which the publication of an allegedly defamatory communication was made, the character of the audience and its relationship to the subject of the publication, and the effect the publication may reasonably have had upon such audience must be taken into consideration.

Matheson v. Stork, 239 Neb. 547, 477 N.W.2d 156 (1991) (emphasis added). *See also Rimmer v. Chadron Printing Co.*, 156 Neb. 533, 56 N.W.2d 806 (1953) ("'A publication is libelous per se if the nature and obvious meaning of the language is such as to . . . subject him to public ridicule, ignominy, or disgrace, or to render him contemptible or ridiculous in public estimation, or to expose him to public hatred or contempt, or to hinder virtuous men from associating with him"); Restatement (Second) of Torts § 573 (1977), comment b (stating that this form of defamatory per se statement protects the corporation itself from slander and libel). Even Defendants agree that statements that impute "reprehensible conduct in its business in relation to said goods or products" are per se defamatory. *See* Defendants' Brief, p. 10 (citing *U.S. Healthcare*, 898 F.2d at 924).

Regarding the question of when a statement prejudices the operations of one's business, the Nebraska Supreme Court has further stated: "As applied to libel of one in his business or occupation, it is elementary in the law of libel and slander that defamatory words falsely spoken (or written) of a party which prejudice such party in his occupation or trade are actionable per se." *K Corp. v. Stewart*, 247 Neb. 290, 295, 526 N.W.2d 429, 434 (1995) (quoting *DeLay First Nat'l Bank & Trust Co. v. Jacobson Appliance Co.*, 196 Neb. 398, 410, 243 N.W.2d 745, 752 (1976)). Applying this principle, the Nebraska Supreme Court has found that statements even as innocuous as a pool and hot tub being unclean are defamatory per se because it imputes "unfitness to operate its facility." *K Corp.*, 247 Neb. at 297, 526 N.W.2d at 435.

Here, the statements at issue clearly prejudice Plaintiffs in their profession and trade, especially when viewed in the context of the entire "The Bed is Dead" campaign, as required by the Nebraska Supreme Court. As alleged in Plaintiffs' Complaint, Defendants' false statements have been made as part of concerted campaign to convince the public in Nebraska, particularly young women, that indoor tanning is dangerous, that Plaintiffs' services cause cancer, and that consumers should not utilize Plaintiffs' services. All of Defendants' statements, which include statements such as "Tanning Causes More Cancers Than Cigarettes" (Complaint, ¶ 24), "Young women are hit hardest. New cases of malignant melanoma have soared 8-FOLD in young women since 1970, TWICE AS FAST as in young men!" (Complaint, ¶ 46), "Tanning before age 35 raises your risk of melanoma by nearly 60%." (Complaint, ¶ 47), and "Tanning beds have been proven to cause skin cancer." (Complaint, ¶ 60), are designed to cause the public to equate Plaintiffs with "Big Tobacco"—evil companies who sell products and services that cause cancer and death. In short, the entire point of the campaign is to

prejudice Plaintiffs in their profession, trade, and business by spreading misinformation about Plaintiffs and their services and convincing the public not to use the services. To be blunt, Defendants' statements paint Plaintiffs as unscrupulous peddlers of cancer and death, who target young women. Nothing could be more reprehensible or untrue. If this is not defamatory per se, then nothing is.

Because Plaintiffs have sufficiently alleged that Defendants' statements are defamatory per se, Defendants arguments regarding the need for proof of special damages and their non sequitur on general damages and retraction (as no compensatory damages are sought by Plaintiffs) are mere distractions and do not serve as the basis for any action by the Court.

E. In the Context Alleged in the Complaint, Defendants' Statements Can Only Be Intended and Understood as Statements of Fact, Not Opinion.

Finally, Defendants argue that Plaintiffs' defamation claim fails because the statements complained of by Plaintiffs are "not factual assertions but are expressions of opinion." This is perhaps the most disingenuous argument posited by Defendants.

The U.S. Supreme Court has held that there is no "wholesale defamation exemption for anything that might be labeled 'opinion.'" *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990). The *Milkovich* Court expressly refused to create an "artificial dichotomy between opinion and fact." *Id.* at 19. *See also Moats v. Republican Party of Neb.*, 281 Neb. 411, 424, 796 N.W.2d 584, 595 (2011) ("It is well settled that there is no constitutional right to espouse false assertions of facts."). Yet, Defendants urge this Court to adopt such an exemption for what they now claim are scientific "opinions," despite labeling the statements as facts prior to litigation and in publishing them to the public. When viewed in context, it is patently obvious that Defendants intended their

statements to be accepted as facts and not as mere opinions intended to further scientific debate. They clearly intended the statements to be accepted by the general public, and specifically young women under 18, as statements of fact, and encouraged that audience to act on the alleged facts. Importantly, Plaintiffs have alleged just this. *See* Statement of Facts.

Plaintiffs agree with Defendants that the Court should utilize the totality of the circumstances test in determining whether Defendants' statements constitute "subjective impressions" that are not defamatory or "objective expressions of verifiable facts." *Steinhausen v. HomeServices of Neb., Inc.*, 289 Neb. 927, 940, 857 N.W.2d 816, 828 (2015). Plaintiffs even agree with Defendants that the "[r]elevant factors include: (1) whether the general tenor of the entire work negates the impression that the defendant asserted an objective fact, (2) whether the defendant used figurative or hyperbolic language, and (3) whether the statement is susceptible of being proved true or false." *Id.* (citing *Moats*, 281 Neb. 411, 796 N.W.2d 584). The Nebraska Supreme Court has stated:

> ***[C]ontext is important*** to whether an ordinary reader would view a statement as one of fact or opinion. In addition to the content of the communications a court looks to the knowledge, understanding, and reasonable expectations of the audience to whom the communication was directed, taking cues from the broader setting in which the statement appears.

Id. (citing *K Corp. v. Stewart*, 247 Neb. 290, 297, 526 N.W.2d 429, 435 (1995) (emphasis added). Likely due to the Nebraska Supreme Court's clear direction that context of the specific statements must be considered, Defendants attempt to entirely redefine and re-characterize the context of their statements—ignoring the operative allegations of the Complaint and reality. When viewed in the proper context (i.e. the

context provided by the allegations in the Complaint and materials embraced by the pleadings), it is absolutely clear that Defendants asserted the statements as facts and not subjective opinions.

The majority of Defendants' defamatory statements are, or have in the past been, asserted on their website, www.thebedisdead.org (the "Website"). (Complaint, ¶¶ 16, 18, 23). Specifically, the statements are or were generally found on the "FACTS" section of the Website, www.the bedisdead.org/***facts***. (emphasis added). At the top of the FACTS section of the Website is the statement "LEARN THE FACTS ABOUT TANNING." As conceded by Defendants, their "campaign" is intended to "educate Nebraska girls age 18 and under, and their parents."[3] (Defendants' Brief, p. 3). The Website is clearly part of this campaign given its design, which includes a pink background with bright pink and blue text, a photo of a young woman, and a heading of information for "TEENAGE GIRLS AND YOUNG WOMEN." *Id.* at p. 3. Defendants' defamatory statements were also contained in the LiveWell section of the Omaha World Herald, other portions of the Website, written publications from Defendants, an article in the Omaha Fashion Week magazine, and social media, none of which typically contain scientific material or would be considered by a reasonable reader or viewer as a scientific publication. (Complaint, ¶¶ 16, 18, 20-23).

Defendants asserted these statements as statements of fact and not merely as "scientific" opinion. There are no words in the "FACTS" section of the Website or in the other publications that are "obviously understood as an exaggeration, rather than a statement of literal fact," which would suggest statements of opinions. *See Steinhausen,*

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[3] Defendants fail to explain how they intended to "educate" young women and their families on the dangers of indoor tanning with mere opinions.

289 Neb. at 941. Likewise, there is no disclaimer in any of the publications that would suggest the statements are mere opinions. In the LiveWell article, Defendant Watts wrote, "Parents must know the facts . . . ." He then proceeds to provide the "facts" in the remainder of the article, which echo many of the statements found on the Website. The "reasonable expectations of the audience" for Defendants' statements are that the statements are demonstratively true. For Defendants to now claim that they intended their statements as "opinions" is entirely disingenuous, and cannot be accepted at this stage, or for that matter, any stage of the litigation. *See K Corp.*, 247 Neb. at 294 ("the falsity of the contents of the [alleged statements] is assumed for the purpose of this analysis.").

Defendants next attempt to argue that there is a per se rule that scientific statements are always opinions, by again citing cases from other jurisdictions. Much like their attempt to ignore the context of their own defamatory statements, Defendants utterly fail to provide the Court with the necessary context for the cases they cite. A reading of these cases reveals that they are each clearly distinguishable from the case at hand. *See Freyd v. Whitfield*, 972 F.Supp. 940 (D. Md. 1997) (on a motion for summary judgment, statements made by a professor during academic lectures at three professional conferences for psychologists and social workers found to be opinion when considered in the "broader social context of an academic lecture," when the speaker "makes it clear that [the statements] represent his personal views," and when viewed in context "a reasonable listener would recognize [the statements] subjective character and discount them accordingly."); *Spelson v. CBS, Inc.*, 581 F.Supp. 1195 (N.D. Ill. 1984) (considering a motion under the summary judgment standard, the court reviewed the entire context of a television broadcast that used hyperbole and rhetoric such as

"medical quackery," "cancer quackery," "cancer con-artists," "practitioners of fraud," "purest form of quackery," "tools of the quackery trade," and "such treatment as that is unethical, unprofessional, inhuman, and totally worthless," and determined the broadcast as a whole contained statements of opinion); *Ezralison v. Rohrich*, 65 S.W.3d 373 (9th Cir. 2001) (reviewing the grant of summary judgment in which the trial court concluded statements in a medical/scientific journal were not libelous because, in part, the statements were "communicated to the appropriate medical community."); *ONY, Inc. v. Cornerstone Therapeutics, Inc.*, 720 F.3d 490 (2d Cir. 2013) (concluding statements in a peer reviewed scientific journal that the court described as the leading journal of neonatology [the study of newborn infants] were statements of scientific opinions and therefore not defamatory); and *Stevens Inst. of Tech. v. Hine*, 2007 WL 2188200 (N.J. Super. July 31, 2007) (on a motion for summary judgment, the appellate court overturned the trial court's determination that letters to the editor and to the city's mayor by a member of the public that alleged plaintiff's activities posed a "serious health crisis" were statements of opinion because the trial court granted the motion prior to the close of discovery, and plaintiff had not had an opportunity to depose the author of the statements).

Despite Defendants' citation to inapplicable case law from other jurisdictions, an application of Nebraska's totality of the circumstances test to Defendants' statements prevents a finding, that as a matter of law, the statements were asserted as opinion. While Plaintiffs attempted to open a dialogue with Defendants concerning the science behind the statements, Defendants did not intend to have a similar scientific discourse with the consumers in its intended audience when it published the defamatory statements. The intended audience was not a group of scientists or professionals in a

given industry. The audience was admittedly consumers, primarily women under the age of 18 and their parents. The statements were not published in an academic journal or uttered to a scientific audience. They were published on social media, in a fashion magazine, and on a colorful website that targeted a specific audience. Ultimately, the Court should accept Defendants' own labels of the statements, which are "FACTS," and therefore, find such statements to be actionable under Nebraska law. At a minimum, the allegations in the Complaint plausibly establish that the statements were fact, not opinion.

II. PLAINTIFFS HAVE PROPERLY PLED A VIOLATION OF THE NEBRASKA DECEPTIVE TRADE PRACTICES ACT; THUS, DEFENDANTS' MOTION TO DISMISS MUST BE DENIED.

A. Defendants' Statements are "False or Misleading Representations of Fact" under the Nebraska Deceptive Trade Practice Act.

Similar to Defendants' attempted re-characterization of their statements as mere opinion, Defendants claim that the statements are not representations of fact under the Nebraska Deceptive Trade Practice Act ("NDTPA"). For the same reasons outlined above, the Court should also reject Defendants attempted re-characterization of their statements under the NDTPA. *See* Argument § I(E), above.

B. Plaintiffs have Alleged that Defendants' False and Misleading Representations of Fact were Made in the Course of Defendants' "Business, Vocation, or Occupation."

Defendants' assertion that Plaintiffs have not alleged that the false and misleading representations of fact at issue were made in the course of Defendants' business, vocation, or occupation is entirely without merit. Plaintiffs have alleged that Defendants' campaign is a "coordinated scheme [that] is funded in part by individuals and commercial entities having a direct financial interest in generating negative

publicity about indoor tanning salons, including the sunscreen and cosmetic industries and those providing UV light treatments in medical facilities." (Complaint, ¶ 20). This allegation clearly asserts that NCC derives a portion of its funding from those interests. Also, Plaintiffs alleged that "Dr. Watts and other members of the NCC have a financial interest in destroying Plaintiffs' businesses, as Dr. Watts and others in his industry seek to offer cosmetic dermatology services to Plaintiffs' customers, in place of those services provided by Plaintiffs." *Id.* Additionally, NCC was a corporate sponsor and had a booth at the Omaha Fashion Week at which numerous of the false and misleading statements were published. *Id.* Finally, Defendants' themselves recognize that NCC is in the business of purportedly educating the general public. (Complaint, ¶ 14; Defendants' Brief, p. 19). The "campaign" waged on the Website and in the other publications is clearly part of that business. Plaintiffs have thus properly alleged that Defendants' false and misleading representations of fact were made in the course of Defendants' business, vocation, or occupation.

III. TO THE EXTENT THE COURT FINDS ANY OF PLAINTIFFS' CLAIMS TO BE IMPROPERLY OR INSUFFICIENTLY PLED, THE COURT SHOULD GRANT PLAINTIFF LEAVE TO RE-PLEAD.

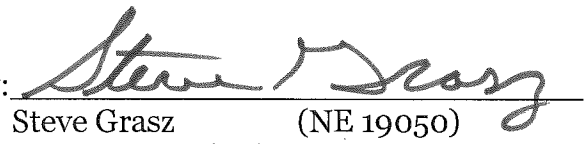
As noted in the Standard of Review section of this Brief, courts in Nebraska freely grant leave for a party to amend a pleading, and complaints vulnerable to dismissal for failure to state a claim should not be dismissed without allowing amendment. *See Gonzalez v. Union Pac. R.R. Co.*, 282 Neb. 47, 63-64, 803 N.W.2d 424, 440-41 (2011). To the extent the Court finds that any portion of Plaintiffs' Complaint, in either the claim for violations of the Nebraska Deceptive Trade Practices Act or the claim for defamation, is not properly pled, Plaintiffs respectfully request leave to re-plead to address any deficiency identified by the Court.

CONCLUSION

Plaintiffs have adequately pled claims of defamation and violations of the Nebraska Deceptive Trade Practices Act. Defendants have made and published, and continue to make and publish, false and misleading statements of fact regarding Plaintiffs, their business, and their services, and cannot now avoid the consequences of those actions. For the above and foregoing reasons, Defendants' Motion to Dismiss must be denied.

DATED: October 14, 2015.

JB & ASSOCIATES, INC.; ALINE BAE TANNING, INC.; MAPLE 110 TANNING, LLC; TANNING HORIZONS LLC; WILSON BONN LLC; MAX TAN, INC.; and CROISENED, LLC, ,
Plaintiffs

By: 

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 14th day of October, 2015, the foregoing document was hand delivered to the Chambers of the Honorable W. Russell Bowie, and a true and accurate copy of the foregoing instrument was served, by e-mail, on the following:

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