

STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE

) COURT OF COMMON PLEAS  
) C.A. No.: 2014-CP-23-04432

RICHARD A. GORMAN

PLAINTIFF,

v.

JOHN C. MONARCH; DIRECT OUTBOUND  
SERVICES, LLC; AND SHIPCHAIN, INC.

DEFENDANTS.

ORDER

**RECEIVED**  
JAN 17 2019  
SC Court of Appeals

MOTIONS BEFORE THE COURT

In its current posture, this case involves a complaint (the Second Amended Complaint, or “S.A.C.”), in which plaintiff Richard A. Gorman (“Mr. Gorman”) alleges four causes of action against three defendants. The defendants are John C. Monarch (“Mr. Monarch”); Direct Outbound Services, LLC (“Direct Outbound”); and ShipChain, Inc. (“ShipChain”).<sup>1</sup> The causes of action alleged are for (i) defamation, (ii) civil conspiracy, (iii) violation of South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10 *et seq.* (“SCUTPA”), and (iv) intentional infliction of emotional distress. The latter two causes were added for the first time by the S.A.C., which also added for the first time defendant ShipChain.

Mr. Monarch and Direct Outbound have moved under Rule 12(b)(6)<sup>2</sup>, to dismiss the civil conspiracy claim (for failure to plead additional facts in furtherance of the conspiracy and failure to identify additional special damages) and the SCUTPA claim (for failure to allege any acts within

<sup>1</sup> By separate Order, this Court has recently dismissed three other defendants from this case without prejudice, for want of personal jurisdiction.

<sup>2</sup> Except as otherwise noted, references to numbered Rules in this Order are to SCRCivP.

“trade” or “commerce” and failure to allege acts that have an impact on the public interest), and under Rule 12(f), to strike Paragraphs 41 through 45 and 51(m) of the S.A.C. (as the statement alleged there by Mr. Monarch is not defamatory as a matter of law).

ShipChain has requested in its Answer to the S.A.C. (“Answer”) and by its Motion that each cause of action be dismissed against it under Rule 12(b)(6), or in the alternative that judgment be awarded in its favor either on the pleadings under Rule 12(c) or as summary judgment under Rule 56. Regarding the claims for civil conspiracy and unfair trade practices, ShipChain raised the same issues as Mr. Monarch and Direct Outbound. Regarding the claim for civil conspiracy, ShipChain also argued that the alleged conspiracy was with its owners, officers, and directors, and that a corporation by law cannot conspire with such persons. With regard to intentional infliction of emotional distress, ShipChain argued that the S.A.C. was generalized and conclusory, merely repeating the elements of the tort as set forth in case law and Restatement (Second) of Torts without including the required allegations of specific facts constituting those elements. With regard to all claims, to the extent that they related to acts taken before November 28, 2017, ShipChain noted that it was not formed until that date, and so could not be held accountable for any acts before that date under any theory. With regard to defamation, ShipChain noted that only one act of defamation occurred after November 28, 2017, that that allegedly defamatory statement was true, and that its truth was evident from Mr. Gorman’s own statements in the pleadings in this case and from matters of which the Court could take judicial notice.

Having received and reviewed the foregoing motions and related memoranda, affidavits, and exhibits, the Court heard argument on these motions from counsel for all parties on October 31, 2018.

## HISTORY

The allegations of the S.A.C. make quite clear that this is a very personal dispute that has arisen, in essential character, between two individuals. The present lawsuit is, in fact, but one of at least four lawsuits filed between Mr. Gorman and Mr. Monarch and various associated individuals and businesses of each of them.<sup>3</sup> Those suits have been filed in state and federal courts in Pennsylvania, in state and federal courts in Arizona, and here in Greenville County Circuit Court. Mr. Gorman has been plaintiff in two such lawsuits, and Mr. Monarch has been plaintiff in the other two. Each lawsuit alleged that the plaintiff in that lawsuit was defamed and interfered with by, and suffered reputational and business harm caused by, the defendant in that lawsuit. Each of the four lawsuits was initiated in 2014. Two of the three lawsuits other than this present one ended in voluntary or court-ordered dismissal of either Mr. Gorman or Mr. Monarch (whichever was the defendant) for lack of personal jurisdiction. The third of the other three ended in a settlement by which, in the words of the U.S. Magistrate Judge, “[Mr. Monarch] recovered a substantial amount of money” from Mr. Gorman. See p. 6 of Dkt. No. 180, in E.D.Pa. Case 2:14-cv-05980-GAM.

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<sup>3</sup> In addition to the present lawsuit, those cases are:

Filed January 24, 2014: *Gorman v. Monarch, et al.* (Pennsylvania Court of Common Pleas, Philadelphia County, Case No. 14-0102501); removed on February 11, 2014, to U.S. District Court for Eastern District of Pennsylvania, 2:14-cv-00890-GAM; voluntarily dismissed as to Mr. Monarch June 2, 2014 for want of personal jurisdiction;

Filed April 2, 2014: *Monarch et al. v. John Does, I-X et al.* (Arizona Superior Court, Maricopa County, CV2014-001469), removed on July 22, 2014, to U.S. District Court for Arizona as *Monarch et al. v. Richard A. Gorman et al.*, 2:14-cv-01655-SRB, dismissed October 14, 2014 for want of personal jurisdiction; and

Filed October 21, 2014: *Monarch et al. v. Gorman, et al.* (U.S. District Court for Eastern District of Pennsylvania, 2:14-cv-05980-GAM); settled December 7, 2016.

This case was filed on August 8, 2014. The intervening four years have been taken up with procedural wranglings of various sorts, during which Mr. Gorman and Mr. Monarch have both changed counsel. Initially, the case involved two parties, Mr. Gorman as plaintiff and Mr. Monarch as defendant, and two causes of action, defamation and civil conspiracy. On October 5, 2016, the undersigned granted Mr. Gorman's motion to add Direct Outbound as an additional defendant, which was done through the First Amended Complaint ("F.A.C."), filed on October 10, 2016. The F.A.C. was followed by at least four unsuccessful mediations on May 24, 2017; June 6, 2017; July 17, 2017; and November 7, 2017. See ADR Reports filed July 31, 2017, and December 31, 2017. On July 3, 2018, this Court, by the Honorable Letitia Verdin, granted Mr. Gorman's motion to add ShipChain and three other now-dismissed individual defendants, and to add the additional causes of action for unfair trade practices and intentional infliction of emotional distress. Mr. Gorman filed the S.A.C. to that end on August 28, 2018.

#### APPLICABLE RULES AND STANDARDS

##### *SCRCIVP RULE 12(b)(6)*

Every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state facts sufficient to constitute a cause of action . . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . . .

In considering this defense, a court must consider whether the facts alleged in the complaint, and inferences drawn from those alleged facts, viewed in the light most favorable to the plaintiff would entitle the plaintiff to relief. *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006). See also *Paradis v. Charleston County School District*, Op. No. 5583 (S.C. Ct. App., filed August 1, 2018) (Shearouse Adv. Sh. No. 31, at 43) (2018 WL 3636581). The allegations to be

considered must be allegations of specific facts, not mere conclusory or generalized allegations. *Id.* A court may, however, take judicial notice of matters pursuant to SCRE Rule 201 without thereby converting its consideration into one for summary judgment. *Doe v. Bishop of Charleston*, 407 S.C. 128, 135 at fn. 2, 754 S.E.2d 494, 498 at fn. 2 (2014).

*SCRCIVP RULE 12(c)*

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Judgment under SCRCivP Rule 12(c) is appropriate “where there is no issue of fact raised by the complaint that would entitle the plaintiff to judgment if resolved in plaintiff’s favor.” *Home Builders Ass’n of S.C. v. Sch. Dist. No. 2 of Dorchester Cty.*, 405 S.C. 458, 460, 748 S.E.2d 230, 231 (2013), citing *Sapp v. Ford Motor Co.*, 386 S.C. 143, 687 S.E.2d 47 (2009) and *Russell v. City of Columbia*, 305 S.C. 86, 406 S.E.2d 338 (1991). The rule of *Doe v. Bishop of Charleston*, *supra*, applies in this context as well.

*SCRCIVP RULE 12(f)*

Upon motion pointing out the defects complained of, and made by a party before responding to a pleading or, if no responsive pleading is required within 30 days after the service of the pleading upon him or upon the court’s own initiative, at any time the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

“Bare legal conclusions” are insufficient and are therefore properly susceptible to a motion to strike. *Monster Daddy LLC v. Monster Cable Prod., Inc.*, No. CA 6:10-1170-HMH, 2010 WL 4853661, at \*8 (D.S.C. Nov. 23, 2010) (applying the analogous federal rule). However, that determination is “discretionary with the trial judge.” *Briggs v. Richardson*, 273 S.C. 376, 380, 256 S.E.2d 544, 546 (1979). Moreover, as with a Rule 12(b)(6) motion, “[w]hen presented with a

motion to strike, ‘the court must view the pleading under attack in a light most favorable to the pleader.’” *Monster Daddy, supra*, at \*6.

*SCRCIVP RULE 56*

(b) A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof. (c) . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

“‘The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.’. . . . [T]he evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party.” *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438–39 (2003) [*internal citations omitted*].

**RESOLUTIONS OF ISSUES RAISED**

*SHIPCHAIN AND PRE-NOVEMBER 28, 2017 ACTS AND EVENTS*

ShipChain was not in existence prior to November 28, 2017. The S.A.C. does not allege that ShipChain was in existence prior to that date. The date of ShipChain’s formation is established by ShipChain’s Answer, ¶ 2 and Ex. A to that Answer<sup>4</sup>, and the Verification attached to ShipChain’s Motion, ¶¶ 4 and 5(a)). That date is additionally confirmed by the Exhibit recorded by Mr. Gorman with this Court on October 29, 2018, that being ShipChain’s corporate filing with

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<sup>4</sup> Exhibit A is a printout from the readily and publicly ascertainable website of the Delaware Secretary of State. That government website is self-authenticating, and a court may take judicial notice of its contents. See Rules 201 and 902(5), SCRE; and Rule 803(8), SCRE. See also *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534, 551; 2007 U.S. Dist. LEXIS 33020, \*\*64; 73 Fed. R. Evid. Serv. (Callaghan) 446 (D.Md. 2007) and *Paralyzed Veterans of America v. McPherson*, 2008 U.S. Dist. LEXIS 69542, \*21-23 (N.D.Cal., September 8, 2008) (government website documents are self-authenticating under Rule 902(5), FRE, which is identical to Rule 902(5), SCRE). As noted above, this Court may rely on judicially-noticeable facts without converting the motion to dismiss into a motion for summary judgment. *Doe v. Bishop of Charleston, supra*.

the South Carolina Secretary of State. Moreover, counsel for Mr. Gorman admitted this fact at argument on October 31, 2018. See Transcript of hearing, p. 37, lines 22-23.

All acts complained of in the S.A.C. that were in the original Complaint (dated August 8, 2014) or in the F.A.C. (dated October 10, 2016) pre-date the formation of ShipChain. Prior to its creation, ShipChain could have had no agents, could not itself have been an agent, could not have acted, and could not have conspired. Moreover, for the reasons set forth below in the discussion of THE CIVIL CONSPIRACY CHARGE, ShipChain cannot have become a part of any pre-existing conspiracy here. Thus, ShipChain can have no responsibility, vicarious or otherwise, for those acts on any theory or cause of action; and this portion of ShipChain's motion is therefore granted.

Therefore, pursuant to each of Rule 12(b)(6), Rule 12(c), and Rule 56, all causes of action set forth in the S.A.C. are hereby dismissed as against ShipChain to the extent that they are premised on any pre-November 28, 2017, acts and events.<sup>5</sup> The only factual allegation that the S.A.C. makes against ShipChain is that ShipChain, on or about March 19, 2018, included an allegedly defamatory statement by Mr. Monarch in a company email update. S.A.C., ¶¶ 41 - 45 and Ex. J to the S.A.C. Consequently, to the extent that any claim may be proven against ShipChain, Mr. Gorman must rely upon that allegation solely.

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<sup>5</sup> ShipChain also argued that all factual allegations in the original Complaint and the F.A.C. pre-dated the original Complaint; that all S.A.C. causes of action are premised on defamation for which the statute of limitations is two (2) years (S.C. Code §15-3-550(1)); and that therefore all acts and events encompassed within the original Complaint and the F.A.C. would be time-barred as against ShipChain because ShipChain did not become a party until more than two years after the date of the original Complaint. In light of the foregoing decision that there is no corporate liability for acts and events that pre-date the creation of the corporation, it is not necessary to address this additional argument.

*THE DEFAMATION CHARGE*

With regard to ShipChain, the defamation charge hinges on the March 19, 2018 email referred to above. ShipChain argues that the statement contained therein is incontrovertibly true, and is demonstrably so based on the record in this case and matters of which this Court may take judicial notice.<sup>6</sup> I find, however, that viewing all allegations in the light most favorable to the non-moving party, sufficient facts are alleged to constitute a cause of action as to which there remain at this time and on this record one or more genuine issues of material fact. That portion of ShipChain's motion is therefore denied.

With regard to Mr. Monarch and Direct Outbound, insofar as the S.A.C. alleges defamation based on matters other than the March 19, 2018 email, no motion was made. Consequently, those allegations remain for trial.

With regard to Mr. Monarch and Direct Outbound and the March 19, 2018 email, those defendants requested that the allegations be stricken under Rule 12(f) as irrelevant and immaterial, because, they argue, Mr. Monarch's statement was a contradiction of an unidentified person within a large group of people and was fair criticism or comment on a public matter. I find, however, that viewing all allegations in the light most favorable to the non-moving party, sufficient facts are alleged to constitute a cause of action as to which there remain at this time and on this record one or more genuine issues of material fact. Consequently, the allegations set forth in S.A.C., paragraphs 41 – 45 and 51(m) are not irrelevant or immaterial; and striking them under Rule 12(f)

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<sup>6</sup> ShipChain also incorporated Mr. Monarch's and Direct Outbound's argument that Mr. Monarch's statement in the email was not defamatory as against the plaintiff Mr. Gorman. This issue is discussed below regarding the defamation charge against Mr. Monarch and Direct Outbound.

is not appropriate at this time. That portion of Mr. Monarch's and Direct Outbound's motion is therefore denied.

*THE EMOTIONAL DISTRESS CHARGE*

Mr. Monarch and Direct Outbound have not moved with respect to the cause of action for intentional infliction of emotional distress. As to them, therefore, this cause remains undisturbed.

ShipChain contends that this cause of action must be dismissed as it alleges no facts but merely recites the elements of the tort. As noted above, to the extent that this cause of action is stated against ShipChain based on acts other than the March 19, 2018, email, it has been dismissed. To the extent, however, that it is based on the March 19, 2018 email, I find that the allegations regarding intentional infliction of emotional distress have sufficient factual specificity to meet the requirements of *Paradis, supra*, at 43, and therefore state facts sufficient to state a cause of action as to which there remain at this time and on this record one or more genuine issues of material fact. ShipChain's motion to dismiss this cause of action to the extent that it arises from the March 19, 2018 email is therefore denied.

*THE CIVIL CONSPIRACY CHARGE*

The Motion by ShipChain and the Motion by Mr. Monarch and Direct Outbound offer different rationales for dismissing the civil conspiracy charge; and I address those separately.

ShipChain

ShipChain posits two facts in this regard, which I find to be uncontroverted, as they are alleged by Mr. Gorman in the S.A.C. First, ShipChain is a corporation organized under the laws of Delaware. S.A.C., ¶ 5; Answer, ¶ 2. Second, the alleged co-conspirators with ShipChain (Mr. Monarch and now-dismissed defendants Messrs. Evans, Kelly, and Rusani) are officers and

directors of ShipChain. S.A.C., ¶ 10; Answer, ¶ 5. The remaining defendant/co-conspirator, Direct Outbound, is conceded by Mr. Gorman to be owned and operated by Mr. Monarch. S.A.C. ¶ 15.

A corporation and its agents, including its officers and employees, are considered to be juridically one entity; and that entity cannot conspire with itself. *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 565, 626 S.E.2d 884, 887 (2006); *Pridgen v. Ward*, 391 S.C. 238, 244, 705 S.E.2d 58, 62 (Ct. App. 2010). Consequently, the purported cause of action against ShipChain for civil conspiracy must be dismissed. ShipChain's motion with respect to the civil conspiracy cause of action is therefore granted.

#### Mr. Monarch and Direct Outbound

Mr. Monarch and Direct Outbound argue that the civil conspiracy charge does not meet the requirements for pleading such a cause, in that it does not include any allegations of fact or damages in support of the civil conspiracy cause of action that are different from the elements alleged for the other causes of action.<sup>7</sup> I agree.

“In a civil conspiracy claim, one must plead additional acts in furtherance of the conspiracy separate and independent from other wrongful acts alleged in the complaint, and the failure to properly plead such acts will merit the dismissal of the claim.” *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 115–16, 682 S.E.2d 871, 875 (Ct. App. 2009). “[B]ecause the quiddity of a civil conspiracy claim is the special damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action.” *Id.*, 385 S.C. at 115, 682 S.E.2d at 874.

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<sup>7</sup> ShipChain also made arguments regarding the civil conspiracy charge similar to those made by Mr. Monarch and Direct Outbound. Were it necessary to address those issues in relation to ShipChain, the same analysis set out below with regard to Mr. Monarch and Direct Outbound would obtain.

Regarding the additional acts, there are simply none alleged that are not part of the defamation cause of action.

Regarding special damages, Rule 9(g) states that “[w]hen items of special damage are claimed, they shall be specifically stated.” This requirement is “to avoid surprise to the other party,” as special damages are “not the necessary or usual, consequence of the defendant’s conduct.” *Benedict Coll. v. Nat’l Credit Sys., Inc.*, 400 S.C. 538, 548, 735 S.E.2d 518, 523 (Ct. App. 2012) [*internal quotations and citations omitted*].

Alleging the same damages under a conspiracy claim as under other causes of action does not satisfy Rule 9(g)’s requirement. *Paradis, supra*, at 50 (“[i]f a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed,” quoting *Hackworth, supra*); see also *Gordon v. Busbee*, 397 S.C. 119, 136, 723 S.E.2d 822, 831-32 (Ct. App. 2012) (“They allege the same damages as they do under the other causes of action. This is insufficient to establish special damages.”).

The alleged civil conspiracy “special damages to Gorman’s business interests and reputation, . . . including . . . investigatory expenses and legal fees, loss of revenue to Gorman’s business, mental anguish, and emotional suffering” (S.A.C. ¶ 62) restate the defamation damages to “Gorman’s reputation among the public . . . and . . . business interests,” which are alleged to include “lost business opportunities, stress, and anxiety” (S.A.C. ¶¶ 52 and 55). These “are precisely the damages one would expect from defamatory statements;” and therefore Mr. Gorman has “failed to plead any damages other than the general damages which arise from alleged defamatory acts.” *Paradis*, Op. No. 5583 (Shearouse Adv. Sh. No. 31 at 50-51).

Mr. Gorman's claim for "investigatory expenses and legal fees" does not satisfy the requirement to plead specifically special damages. In *Paradis*, "[t]he only mention of special damages in Plaintiff's complaint, beyond the conclusory statement that she sustained them generally, is that she has been ostracized or blacklisted from the profession of education and that she incurred legal fees to pursue the claims set forth in her [c]omplaint." *Paradis, supra*, at 50 [change in original]. See *AJH Holdings LLC v. Dunn*, 392 S.C. 160, 168, 708 S.E.2d 218, 223 (Ct. App. 2011) ("Every litigant represented by a lawyer incurs attorney's fees and costs.").

Accordingly, the claim for civil conspiracy against Mr. Monarch and Direct Outbound is dismissed for failure to state facts sufficient to constitute a cause of action. At trial, however, Mr. Gorman may at the close of his case move to amend the S.A.C. to request relief for civil conspiracy should evidence support additional acts and special damages as required by law.

#### *THE UNFAIR TRADE PRACTICES CHARGE*

All defendants have moved for dismissal of this cause of action.

Under SCUTPA, "unfair or deceptive acts or practices in the conduct of any trade or commerce are . . . unlawful." S.C. Code Ann. § 39-5-20(a). "Trade" and "commerce" "include the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State." S.C. Code Ann. § 39-5-10(b).

The intent of the legislature in enacting SCUTPA was not to provide treble damages for private disputes. *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 639, 743 S.E.2d 808, 816 (2013). Rather, it was to "control and eliminate the large scale use of unfair and deceptive trade practices within the state of South Carolina." *Noack Enters., Inc. v. County*

*Corner Interiors of Hilton Head Is., Inc.*, 290 S.C. 475, 478, 351 S.E.2d 347, 349 (Ct. App. 1986) [internal quotations and citations omitted]; *Woodson v. DLI Props., LLC*, 406 S.C. 517, 530, 753 S.E.2d 428, 435 (2014) (“SCUTPA is not available to redress a private wrong because an unfair or deceptive act that affects only the parties to the transaction is beyond the scope of the SCUTPA”).

The legislature’s intent to limit the application of the UTPA to only those unfair or deceptive acts or practices in the conduct of trade or commerce that affect the public interest is made even more clear when one considers the language used by Section 39-5-10 in defining the terms “trade” and “commerce,” particularly, the language “and shall include any trade or commerce directly or indirectly affecting the people of this State.”

*Noack Enters., Inc.*, 290 S.C. at 478, 351 S.E.2d at 349. Therefore, the alleged act must be both conducted as part of a “trade” or “commerce” and must “injuriously affect ‘the people of this State,’ *i.e.*, the public interest . . . .” *Id.* (quoting S.C. Code Ann. § 39-5-10(b)).

As noted in HISTORY above, however, the allegations of the S.A.C. make quite clear that this is a very personal dispute that has arisen, in essential character, between two individuals. The alleged conduct is not the type that is contemplated by SCUTPA or the case law bearing upon it. Mr. Gorman’s SCUTPA claim incorporates the S.A.C.’s prior allegations and rests solely on the claim that defendants tried to ruin his reputation and business interests by making defamatory statements about him. It does not allege any act of advertising, offering for sale, the sale or distribution of any services or property, or any other act that constitutes a business or consumer transaction. An “act, which is alleged to have been unfair, does not fall within the definition of ‘trade or commerce’ as it did not involve advertisement, sale, or distribution of services or property within a business context.” *Health Promotion Specialists, LLC*, 403 S.C. at 639, 743 S.E.2d at 817.

*Sunshine Sportswear & Electronics., Inc., et al. v. WSOC Television, Inc., et al.*, 738 F. Supp. 1499, 1503-05 (D.S.C. 1989), is very similar to the present case. There, the District Court

dismissed the plaintiffs' SCUTPA claim against a business competitor pursuant to Rule 12(b)(6), FRCivP, because "the [statutory] definitions of the terms 'trade' or 'commerce' . . . do not include" the plaintiffs' allegations that "defendants damaged the reputation and business interests of the plaintiffs by making defamatory statements which were broadcast...into a 'market area' serviced by plaintiffs." In *Sunshine*, the plaintiffs were an owner and his business; and the defendants included not only the television station that broadcast the alleged defamatory statements, but also the plaintiffs' business competitor, Camera World, Inc., and its owner, Jack King, who gave the station the allegedly defamatory statements that plaintiff was "running a scam on consumers" and was engaging in a "rip-off of some kind." *Id.* at 1503. The fact that Jack King was in competition with the plaintiffs did not convert a private tort against a business owner and his business into the conduct of "trade" or "commerce."

SCUTPA is further circumscribed by the requirement that allegedly unfair or deceptive acts or practices must "affect the public interest." *Noack Enters., Inc.*, 290 S.C. at 478, 351 S.E.2d at 349. The actual phrasing of the statute is not "the public interest," but is instead "the people of this State." S.C. Code § 39-5-10(b). Mr. Gorman, a citizen and resident of Delaware County, Pennsylvania, is not included within that category. S.A.C. ¶ 1.

"SCUTPA is not available to redress a private wrong because an unfair or deceptive act that affects only the parties to the transaction is beyond the scope of the SCUTPA." *Woodson v. DLI Props., LLC*, 406 S.C. 517, 530, 753 S.E.2d 428, 435 (2014).

An impact on the public interest may be shown if the acts or practices have the potential for repetition. The potential for repetition may be shown in either of two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by showing the company's procedures created a potential for repetition of the unfair and deceptive acts.

*Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 379, 595 S.E.2d 461, 466 (2004).

In an attempt to satisfy the “public interest” requirement, Mr. Gorman alleges only that “[t]hese actions are capable of repetition. Defendants in this case have engaged in similar blackmail schemes and attacks in the past.” S.A.C. ¶ 67. That non-specific allegation is unsupported “by any particularized allegations of fact.” *Skywaves I Corp. v. Branch Banking & Tr. Co.*, Op. No. 5557 (S.C. Ct. App. filed May 2, 2018 at 17 n.9) (citing *Jones v. Gilstrap*, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct. App. 1986), for the proposition that “even under the liberal standard applicable on a motion to dismiss, a mere conclusory allegation, unsupported by any particularized allegations of fact, is insufficient.”). “In the course of human endeavor, every action has some potential for repetition. The mere proof that the actor is still alive and engaged in the same business is not sufficient to establish [the potential for repetition].” *Jefferies v. Phillips*, 316 S.C. 523, 529, 451 S.E.2d 21, 24 (Ct. App. 1994). In the absence of a showing that any member of the public was adversely affected, “conduct cannot be said to affect anyone other than the parties to this controversy, in which case the conduct falls outside the scope of the UTPA.” *Id.*, 316 S.C. at 528, 451 S.E.2d at 23.<sup>8</sup>

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<sup>8</sup> With particular regard to ShipChain, Mr. Gorman does not allege that ShipChain is involved in any business dealings with him; nor does he allege that ShipChain is in competition with him. The only action that he alleges against ShipChain is that it published an allegedly defamatory statement made by the original defendant, Mr. Monarch. That one act was, as alleged in the S.A.C., taken in response to a statement by Mr. Gorman’s media outlet that was directed at ShipChain and its personnel. Such an act is inherently not capable of repetition, as ShipChain cannot control what statements might be made about it, by whom, and in what circumstances.

The S.A.C. attempts to meet the public interest requirement only by stating that “[d]efendants in this case have engaged in similar blackmail schemes and attacks in the past.” S.A.C. ¶ 67. That allegation, however, refers to conduct alleged in the S.A.C. that pre-dates the formation of ShipChain

The Unfair Trade Practices Act charge against ShipChain therefore fails to meet the requirement that the act be repetitious or capable of being repeated. *Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 595 S.E.2d 461 (2004); *Daisy Outdoor Adv. Co., Inc. v. Abbott*, 322 S.C. 489, 473 S.E. 47 (1996).

Accordingly, the claim under SCUTPA against all defendants is dismissed for failure to state facts sufficient to constitute a cause of action. At trial, however, Mr. Gorman may at the close of his case move to amend the S.A.C. to request relief under SCUTPA should evidence support a finding of unfair or deceptive acts in trade or commerce affecting the people of this State, as required by law.

**CONCLUSION**

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Motions of Mr. Monarch, Direct Outbound, and ShipChain are granted in part and denied in part, to the extent and for the reasons stated above.

**SO ORDERED THIS \_\_\_ DAY OF \_\_\_\_\_, 2018.**

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**JUDGE ROBIN B. STILWELL  
THIRTEENTH CIRCUIT**



Greenville Common Pleas

**Case Caption:** Richard A Gorman vs. John C Monarch , defendant, et al

**Case Number:** 2014CP2304432

**Type:** Order/Other

So Ordered

s/ Robin B. Stilwell 2158

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