

DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 South Potomac Street Centennial, Colorado 80112 <hr/> Plaintiff: SEAN HAKES et al., v. Defendant: JOHN VARGO.	DATE FILED: September 8, 2017 CASE NUMBER: 2017CV31003 <hr/> <p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> Case Number: 2017CV31003 Division: 202
ORDER RE: DEFENDANT’S MOTION TO DISMISS THE COMPLAINT PURSUANT TO C.R.C.P. 12(b)(5), MOTION TO STRIKE THE AMENDED COMPLAINT AND ENTER JUDGMENT AGAINST PLAINTIFFS, AND MOTION TO STRIKE PLAINTIFFS’ UNTIMELY RESPONSE TO MOTION TO DISMISS AND REQUEST FOR A STATUS CONFERENCE	

THIS MATTER comes before the Court on Defendant’s Motion to Dismiss the Complaint Pursuant to C.R.C.P. 12(b)(5) (“Motion to Dismiss”), Motion to Strike the Amended Complaint and Enter Judgment against Plaintiffs (“Motion to Strike Complaint”), and Motion to Strike Plaintiffs’ Untimely Response to Motion to Dismiss and Request for a Status Conference (“Motion to Strike Response”). For the reasons set out below Defendant’s Motions are DENIED:

INTRODUCTION/BACKGROUND

1. On May 4, 2017, Plaintiffs, Sean Hakes and Altitude SEO, filed their Complaint and Jury Demand. Plaintiffs allege that Defendant, John Vargo, made defamatory and libelous statements about Plaintiffs. Compl. 2-3, May 4, 2017. Plaintiffs further allege that Defendant registered a domain name using a name similar to Plaintiffs’ business and redirected the visiting internet traffic to Defendant’s employer’s website. *Id.* at 3-4. Specifically, Plaintiffs raised the claims of trade libel; deceptive trade practices – disparagement under the Colorado Consumer Protection Act; trade name, trademark, and domain name infringement; unfair competition; and deceptive trade practices – trade name infringement under the Colorado Consumer Protection Act. *Id.* at 2-4. Plaintiffs also requested declaratory relief seeking a court order to remove certain webpages from Google’s search results. *Id.* at 5.

2. After being granted an extension of time to answer, Defendant filed the instant Motion to Dismiss on June 23, 2017. Defendant argues that Plaintiffs failed to plead with specificity which statements made by Defendant were defamatory or libelous. Answer 2-3, June 23, 2017. Defendant further argues that Plaintiffs’ claims concerning

the domain name fail because registering a domain name without use in connection to a commercial enterprise does not give rise to a valid claim for relief. *Id.* at 3. Finally, Defendant alleges that Plaintiff refused to amend the complaint upon request by Defendant, instead necessitating the need to file the Motion to Dismiss and incur attorney fees and costs. *Id.* at 12. Defendant requests he be awarded those fees and costs. *Id.*

3. On July 10, 2017, Plaintiffs filed an Amended Complaint and Jury Demand. The Amended Complaint specified the statements made by Defendant that are alleged to be defamatory, and modified some of the language of the claims concerning the use of the similar domain name. See Am. Compl. 2-6, July 10, 2017.

4. Thereafter, on July 24, 2017, Defendant filed the instant Motion to Strike Complaint, arguing that Plaintiffs needed leave of the Court to file an amended complaint and that their failure to respond to the Motion to Dismiss acts as a confession pursuant to C.R.C.P. 121 §1-15(3). Def.'s Mot. 2-3, July 24, 2017. Defendant also reiterates his request for attorney fees and costs. *Id.* at 3.

5. On August 14, 2017, Plaintiffs filed Plaintiffs' Response to Defendant's Motion to Strike the Amended Complaint. Plaintiffs argued that they were entitled to file an amended complaint as a matter of right pursuant to C.R.C.P. 15(a) because Defendant's Motion to Dismiss is not a "responsive pleading" as contemplated by the Rule. Pls.' Resp. 3, Aug. 14, 2017. Plaintiffs go on to address the specific arguments raised in Defendant's Motion to Dismiss and arguing that no grounds exists for ordering attorney fees and costs. *Id.* at 4-8.

6. Defendant then filed the instant Motion to Strike Response on August 19, 2017. Defendant argues that Plaintiffs' response is untimely as it was filed nearly two months after the Motion to Dismiss. Def.'s Mot. 3, Aug. 19, 2017. Defendant also reiterates his stance on the award of attorney fees and costs. *Id.* at 2-3. Finally, Defendant requests a status conference to address the Motions at issue in this Order. *Id.* at 1.

FINDINGS & ORDER

6. First, the Court finds that Plaintiffs' Amended Complaint and Jury Demand was filed appropriately as a matter of course pursuant to C.R.C.P. 15(a). "Here, [defendant's] C.R.C.P. 12(b)(5) dismissal motion was not a 'responsive pleading' within the meaning of C.R.C.P. 15(a) and therefore, did not terminate plaintiff's right to amend their complaint against [defendant] as a matter of course." *Grear v. Mulvihill*, 207 P.3d 918, 922 (Colo. App. 2009). Even if Plaintiffs were not permitted to amend their complaint as a matter of course, the Court likely would have granted any motion to amend the complaint. Further, even if the Court dismissed this action for failure to adequately plead, the dismissal would have been without prejudice, allowing Plaintiffs to file a new case with an amended complaint. For these reasons, the Court finds

Plaintiff's Amended Complaint appropriate pursuant to C.R.C.P. 15(a). Accordingly, Defendant's Motion to Strike Amended Complaint is DENIED.

7. Next, the Court finds that Plaintiffs' Response to Defendant's Motion to Strike the Amended Complaint was timely filed. The Response was filed within 21 days of Defendant's Motion to Strike Complaint. Further, in his Motion to Strike Complaint, Defendant renews his Motion to Dismiss and requests the Court consider Plaintiffs' filing of their Amended Complaint and their lack of response as a confession. Plaintiffs are entitled to timely respond to the Motion to Strike Complaint as well as the renewed request to dismiss. Even if the Court were inclined to strike the Response, such action would not change the outcome of the Court's ruling on the Motion to Dismiss, discussed *infra*. Accordingly, the Court DENIES Defendant's Motion to Strike Response.¹

8. Finally, the Court finds Plaintiffs' Amended Complaint sufficient to withstand scrutiny pursuant to C.R.C.P. 12(b)(5). C.R.C.P. 12(b)(5) is a defense concerning the complainant's failure to state a claim upon which relief can be granted. In reviewing a motion to dismiss pursuant to C.R.C.P. 12(b)(5), the courts must accept all matters of material fact in the complaint as true and view the allegations in the light most favorable to the complainant. *Ybarra v. Greenberg & Sada, P.C.*, 2016 COA 116, ¶ 6. Taking Plaintiffs' allegations as true, they have alleged sufficient facts to support moving forward on the claims raised.² Accordingly, the Court DENIES Defendant's Motion to Dismiss.

9. Defendant requests attorney fees and costs due to Plaintiffs' unwillingness to amend the complaint prior to Defendant filing the Motion to Dismiss. The Court makes no ruling on the issue at this time, but will consider the issue upon a timely filing of an affidavit of reasonable costs and fees in connection with filing the Motion to Dismiss. Such Affidavit must be submitted within fourteen (14) days of this Order. Plaintiffs will then have an additional twenty-one (21) days to file any objections.

CONCLUSION

The Court finds Plaintiffs' Amended Complaint sufficiently pleads claims upon which relief may be granted. Accordingly, Defendant's Motion to Dismiss is denied. Defendant is instructed to file an answer to Plaintiffs' Amended Complaint within fourteen (14) days of this Order.

Defendant's Motion to Strike Amended Complaint and Motion to Strike Response are denied.

¹ Including Defendant's request for a status conference. This Order addresses all outstanding issues. Therefore a status conference is not necessary at this time.

² The parties dispute whether Defendant's statements/publications are matters of public concern. The Court finds that the dispute concerns the burden of proof rather than the burden of pleading. Accordingly, the Court does not address the issue here.

SO ORDERED THIS September 8, 2017.

BY THE COURT:



Elizabeth Beebe Volz
District Court Judge