IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

VALLEY MEAT COMPANY, LLC,
RICARDO AND SARAH DE LOS SANTOS,

Plaintiffs,

No. 1:12-cv-1265

v.

HSUS,
FRER,

Defendants.

DEFENDANT HSUS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

COMES NOW Defendant The Humane Society of the United States ("HSUS"), by its attorneys, the Eaton Law Office, P.C. (by P. Scott Eaton), and moves for an Order dismissing Plaintiffs' Complaint against HSUS for failure to state a claim under Rule 12(b)(6), Fed.R.Civ.P.

As grounds for this motion, Defendant would show that Plaintiffs' Complaint merely recites legal theories shrouded in mysteriously vague and conclusory references, and fails to allege facts sufficient to state any causes of action, grounds for the causes of action or the elements of the supposed causes of action. Plaintiffs' Complaint against Defendant HSUS therefore should be dismissed pursuant to Rule 12(b)(6), Fed.R.Civ.P.

BACKGROUND

Because Plaintiffs' Complaint is so intentionally vague and ambiguous so as to offer virtually no clue as to the dispute at issue, including even the nature of Plaintiffs' aborted business venture, some basic context may be helpful.

For many years before 2012 in the United States, many organizations and people, including HSUS, publicly spoke out against the slaughter of horses for human consumption. In

May 2012, Plaintiff Valley Meat Company applied to the United States Department of Agriculture for approval to begin slaughtering horses for sale as human food. At the time of Valley Meat's application, there were no horse-slaughter facilities operating in the United States, and none had been in operation for about four years.

Several organizations and individuals, including Defendant Front Range Equine Rescue ("FRER"), the American Society for the Prevention of Cruelty to Animals, HSUS, New Mexico Gov. Suzanna Martinez, Attorney General Gary King and state land commissioner Ray Powell, opposed Valley Meat's proposal to begin slaughtering horses for human consumption.

According to a media report (attached as Exhibit A), in August 2012, a USDA spokesman stated that it would take a significant amount of time for the USDA to develop an appropriate inspection regimen for horse-slaughter plants, which was a prerequisite to any horse-slaughter plants being approved and allowed to begin operating. Counsel for Plaintiffs was quoted in the same media report as saying that the Plaintiffs could not wait any longer for government approval, that approval probably would not be forthcoming anytime soon, and that Plaintiffs therefore would abandon their horse-slaughter plans and return to beef processing. (See Ex. A, attached.)

This suit against two of the many organizations and people who opposed Valley Meat's plans followed about two months later.

PLAINTIFFS' COMPLAINT

Plaintiffs' Complaint lists four legal theories or causes of action: prima facie tort; defamation, including "self-defamation;" presentation to the public in a false light; and civil conspiracy. However, the Complaint is devoid of facts or factual allegations to the point that Defendant is unable to divine the substance or nature of the claims against it or how to respond

to them. In addition, Plaintiffs have failed to allege grounds or facts to even minimally support the necessary elements of the causes of action asserted. Instead, Plaintiffs make bald, conclusory legal allegations or mysteriously vague, ambiguous and confusing assertions without reference to facts, including the following:

- Defendants acted through correspondence and communications to interfere with Plaintiffs' business. Defendants, pursuant to their organizational policies, openly opposed the business of Plaintiffs and acted to halt the business of Plaintiffs. (Complaint, Para. 5, Doc. 1-2)
- Defendants have publicly taken credit for the destruction of Plaintiffs' business and intended to harm Plaintiffs "in order to meet their organizations [sic] policy beliefs." (Complaint, Para. 6, Doc. 1-2.)
- Defendants could have sought recourse through the legislative process to have "their belief system recognized," but instead chose "to seek relief outside of the proper procedures." (Complaint, Para. 8, Doc. 1-2.)
- Defendants interfered with Plaintiffs' business "by threatening lawsuits against government officials, protest, false reports, defamatory statements and intimidation." (Complaint, Para. 12., Doc. 1-2)
- "Communications or public postings described above" caused the loss of Plaintiffs' business. (Complaint, Para. 17, Doc. 1-2.) However, no communications or "public postings" are "described above" or identified in the Complaint.
- "The statements made by Defendants describe Plaintiffs as criminal, uncaring, and bad business operators." (Complaint, Para. 22, Doc. 1-2.)

- "Defendants conspired with each other and on behalf of each other to accomplish the results described in the foregoing counts." (Complaint, Para. 27, Doc. 1-2.)

Plaintiffs' Complaint does not quote, identify or even allude to even one statement, one publication, one piece of correspondence or communication, or one "public posting" by HSUS that Plaintiffs allege to be defamatory. Plaintiffs' Complaint does not allege when or how the alleged statements by HSUS were made, who made them or to whom they were made. The Complaint does not attempt to identify which of the unidentified statements or conduct were made or performed by which Defendant. Moreover, Plaintiffs do not allege that any of these mysterious and unidentified statements were false, a key element of every defamation claim.

I. Plaintiffs' Complaint Fails to Meet the Standard for Pleadings Under Rule 8(a)(2), Fed.R.Civ.P. and Should Be Dismissed Pursuant to Rule 12(b)(6), Fed.R.Civ.P.

A court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). The sufficiency of a complaint is a question of law. *Moore v. Guthrie*, 438 F.3d 1036, 1039 (10th Cir. 2006). In order to withstand a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, 'to state a claim that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662,678, 129 S. Ct. 1937, 1949 (2009), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also, Mink v. Knox*, 613 F.3d 995, 1000 (10th Cir. 2010). To survive a motion to dismiss for failure to state a claim, "a plaintiff must allege sufficient facts to make her claim for relief plausible on its face…If the allegations are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs have not nudged their claims across the line from conceivable to plausible." *Peterson v. Grisham*, 594 F.3d 723, 727 (10th Cir. 2010)(internal quotation marks and ellipsis omitted).

Under Fed.R.Civ.P. 8, a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." The pleading standard of Rule 8 does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Bell Atlantic Corp. v. Twombley*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 , 127 S.Ct. 1955 (2007), citing *Papasan v. Allain,* 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986). A plaintiff's obligation to provide the "grounds" for his entitlement to relief requires more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Twombley, supra*, 550 U.S. at 555, 127 S.Ct. at 1965. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.* at 557.

A complaint fails to state a claim when it makes conclusory allegations of liability without supporting factual content. *See Bell Atlantic Corp. v. Twombly,* 550 U.S. at 555; *Aschroft v. Iqbal,* 556 U.S. at 678–79.

Furthermore, while the court must accept all the factual allegations in the complaint as true, it is "not bound to accept as true a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal,* 556 U.S. at 678–79. Rather, a court should disregard statements that are "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal,* 129 S.Ct. at 1949. In sum, the complaint must describe the claim in sufficient detail to give the defendant fair notice of what the claim is and the grounds upon which it rests and its allegations must plausibly, not just speculatively, suggest that the plaintiff has a right to relief. *Robbins v. Oklahoma,* 519 F.3d 1242, 1247 (10th Cir. 2008), quoting *Twombly*, 550 U.S. at 570) (internal citations omitted).

In the case at bar, Plaintiffs' Complaint is devoid of factual content or factual allegations to support any grounds for the legal causes of action recited. Instead, the Complaint lists legal theories and incomprehensibly vague allegations such as Defendants opposed Plaintiffs' proposed business because of Defendants' organizational beliefs; Defendants sought "recourse" outside of the legislative process to have "their belief system recognized"; Defendants interfered with Plaintiffs' proposed business by somehow protesting and threatening governmental agencies; and that unspecified, unidentified statements made by unidentified people to unidentified people at an unknown time and in an unknown manner were defamatory toward Plaintiffs.

II. Plaintiffs' Complaint Fails to Allege Facts or Factual Allegations for Each of the Causes of Action Stated in the Complaint.

A. Plaintiffs' Complaint Fails to State a Claim for Defamation.

To establish a claim for defamation under New Mexico law, a plaintiff must allege and prove at least nine elements, which are:

(1) The defendant published the communication; and

(2) The communication contains a statement of fact; and

(3) The communication was concerning the plaintiff; and

(4) The statement of fact was false; and

(5) The communication was defamatory; and

(6) The person receiving the communication understood it to be defamatory; and

(7) The defendant knew that the communications was false or negligently failed to recognize that it was false or acted with malice; and

(8) The communication caused actual injury to the plaintiff's reputation; and

(9) The defendant abused its privilege to publish the communication.

NMRA, UJI. Civ. 13-1002.

In addition to these elements, if Plaintiffs are found to be public figures, Plaintiffs would have to allege and prove actual malice in the constitutional sense, meaning reckless disregard or knowledge of falsity, which Plaintiffs have not alleged in the Complaint. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

In the instant case, Plaintiffs' Complaint fails to identify any communications by HSUS, and fails to allege that HSUS made any statements of fact concerning Plaintiffs, or even that any such statements were false. The Complaint fails to allege that any person understood such communications to be defamatory or that HSUS knew or should have known that any factual statements about Plaintiffs were false. On its face, Plaintiffs' Complaint fails to allege facts or grounds supporting a cause of action for defamation. Moreover, HSUS cannot decipher or determine from Plaintiffs' Complaint which of its alleged public statements is alleged to have been defamatory, or how, when or where such statements were made, or by whom and to whom.

Where a plaintiff failed to identify which of defendant's statements were defamatory, the plaintiff's defamation claim failed to state a claim under Rule 12(b)(6). *Carpenter v. Northwest Airlines, Inc., 47 Fed.Appx. 424 (8th Cir. 2002), citing Schibursky v. Int'l Bus. Machines Corp.*, 820 F.Supp. 1169, 1181 (D.Minn.1993).

A complaint that contains nothing more than vague and conclusory statements rather than allegations of fact is not sufficient to state a claim for defamation. *Harris v. Commerce City*, 2010 WL 3307465 (not reported in F.Supp.2d) (D.Colo. 2010)(court cannot ascertain from complaint what the contents of the allegedly defamatory statements were or who they were published to, much less determine that the allegations sufficient pled the elements of a claim for defamation). *See also, Greenspan v. Random House, Inc.*, 859 F.Supp.2d 206 (D.Mass

2012)(defamation claim dismissed under Rule 12(b)(6)); *In re Oxford Expositions, LLC*, 466 B.R. 814 (N.D.Miss. 2011(dismissal appropriate where counterclaim for defamation failed to allege specific facts).

Plaintiffs' claims for defamation should be dismissed.

A. Plaintiffs Have Failed to State a Claim for 'Self-Defamation'

Plaintiffs' Complaint for defamation includes in the title of the cause of action a reference to "self-defamation." Self-defamation is not a term that has been addressed in any reported New Mexico state cases. A federal court concluded in 1992 that New Mexico had not recognized such a claim, which led to the court dismissing the claim under Rule 12(b)(6). *Yeitrakis v. Schering-Plough Corp.*, 804 F.Supp. 238, 250 (D.N.M. 1992). The court noted that only a minority of jurisdictions had recognized such a claim, and even they were divided as to the basis on which liability could be found. *Id.*

A California court defined "self-defamation" to require proof that the originator of the defamatory statement had reason to believe that the person defamed would be under a "strong compulsion" to disclose the contents of the defamatory statement to a third person. *McKinney v. County of Santa Clara*, 110 Cal.App.3d 787, 796, 168 Cal.Rptr. 89, 93-94 (1980). Plaintiffs have offered no facts or even any hints as to how this unique cause of action might apply here.

Moreover, 20 years after *Yeitrakis*, New Mexico still has not recognized a claim for "self-defamation." To the extent that Plaintiffs have alleged self-defamation as a separate claim from defamation, it must be dismissed under Rule 12(b)(6).

B. Plaintiffs' Complaint Fails to State a Claim for 'Presentation in a False Light"

In New Mexico, a "false light" cause of action is said to be a close cousin of a defamation claim, but a false light claim addresses an alleged injury to a plaintiff's feelings rather than to the

plaintiff's reputation. *Smith v. Durden*, 2012-NMSC-010, ¶32, --N.M.--, 276 P.3d 943, 951.

The elements of a false light claim are set out in the Restatement (2d) of Torts, as follows:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Restatement (2d) of Torts Section 625E.

Similar to Plaintiffs' claim of defamation, there are no facts alleged in the Complaint that would shed any light whatsoever on which statements or communications by HSUS were false, if any, or whether or how such actions would be highly offensive to a reasonable person. There is no hint of any fact to suggest that Defendant HSUS acted in reckless disregard as to the falsity of the publicized matter. In fact, HSUS is unable to determine from the Complaint which of its alleged statements, communications or actions are at issue, when or where they occurred and by whom. Plaintiffs do not allege any grounds or facts to support any of these elements of this claim.

The false light claim should be dismissed.

C. Plaintiffs' Complaint Fails to State a Claim for Prima Facie Tort

New Mexico is one of a handful of jurisdictions to have recognized a cause of action for "prima facie tort." Plaintiffs list prima facie tort as one of their legal causes of action.

Prima facie tort is "aimed at unjustified intentional and malicious conduct causing injury." *Allison v. Boeing Laser Technical Services*, 689 F.3d 1234, 1244 (10th Cir. 2012). Prima facie tort is not a "catch-all;" it does not allow a plaintiff to pursue a claim that cannot

"stand on its own legs." *See*, *Beavers v. Johnson Controls World Services, Inc*., 120 N.M. 343, 348, 901 P.2d 761, 766 (Ct. App. 1995) *citing* Restatement (Second) Torts § 870 cmt. e and *Bandag of Springfield, Inc. v. Bandag, Inc.*, 662 S.W.2d 546, 553 (Mo.Ct.App. 1983). Prima facie tort does not duplicate established causes of action, nor is it "used to evade stringent requirements of other established doctrines of law." *Schmitz v. Smentowski,* 109 N.M. 386, 398, 785 P.2d 726, 738 (1990); *Andrews v. Stallings,* 119 N.M. 478, 493-94, 892 P.2d 611, 626-27 (Ct.App.1995); *Yeitrakis v. Schering-Plough Corp*., 804 F.Supp. 238, 249 (D.N.M. 1992).

New Mexico recognizes that not every intentionally caused harm will give rise to an actionable tort. *Hagebak v. Stone*, 2003-NMCA- 007, ¶ 25, 133 N.M. 75, 61 P.3d 201. New Mexico narrowly applies the claim of prima facie tort. *Saylor v*. Valles, 2003-NMCA-037, ¶ 24, 133 N.M. 432, 63 P.3d 1152, *citing Lexington Ins. Co. v. Rummel.,* 1997-NMSC-043, ¶¶ 11 and 12, 123 N.M. 774, 945 P.2d 992 (emphasizing importance of limiting prima facie tort); *Kitchell v. Pub. Serv. Co. of N.M.,* 1998–NMSC–051, ¶ 15, 126 N.M. 525, 972 P.2d 344 (same).

1. Plaintiffs Have Failed to Allege the Elements or Grounds for a Claim for Prima Facie Tort.

A prima facie tort cause of action requires:

(1) a lawful act which is intentional and wrongful,
(2) a malicious intent to injure the plaintiff,
(3) injury to the plaintiff as a result of the intentional act, and
(4) the act is without social or economic justification or lacks sufficient justification.

Schmitz v. Smentowski, 109 N.M. at 395, 785 P.2d at 734-735; *Kitchell v. Pub. Serv. Co. of N.M.,* 1998–NMSC–051 at ¶ 15; U.J.I.-Civ. 13-1631 NMRA ("Definition and Elements of Prima facie Tort"). A plaintiff must plead each of these four elements. *Hill v. Cray Research, Inc*., 864 F.Supp.1070, 1078 (D.N.M. 1991). Here, Plaintiffs' allegations that might pertain to their prima facie tort claim are:

> 5: Defendants acted through correspondence and communications to interfere with Plaintiffs' business. Defendants, pursuant to their organizational policies, openly opposed the business of Plaintiffs and acted to halt the business of Plaintiffs.
>
> 6: Defendants have publicly taken credit for the destruction of Plaintiffs' business and therefore they intended to harm Plaintiffs to meet their organizations' "policy beliefs."
>
> 7: Defendants' actions caused Plaintiffs' lost business, investment and reputation.
>
> 8: Defendants could have sought recourse through the legislative process to have "their belief system recognized," but instead chose to seek relief outside proper procedures.
>
> 10: Defendants' communications and actions were made in an effort to ensure Plaintiffs could not engage in "their chosen business venture, and to do so in a way that did the greatest possible damage to their livelihood."
>
> 11: Plaintiffs' business is a legally allowed and needed business one in which they had a right to expect that there would be no wrongful interference from people and entities such as the defendants" as there is strong support in New Mexico for the unidentified but "critically necessary service" Valley Meat would provide.
>
> 12: Defendants interfered with Plaintiffs' business "by threatening lawsuits against government officials, protest, false reports, defamatory statements and intimidation."
>
> 13 and 14: Plaintiffs' economic loss and injury was caused by Defendants who are liable for compensatory and punitive damages "for their intentional tortious interference with Plaintiffs [sic] right to engage in lawful business."

Plaintiffs' Complaint, Doc. 1-2. These allegations do not meet Plaintiffs' pleading burden. At most, Plaintiffs claim they were hoping to establish a business (of slaughtering horses for human consumption), which Defendants (as activists for the humane treatment of animals and horse rescuers) opposed by diverse tortious conduct, not following "proper procedures," as well as petitioning the government, corresponding and communicating with unknown persons, attempting to have their beliefs recognized, protesting and threatening to utilize the legal system. These allegations in no way allow the Court to draw the reasonable inference that Defendants are liable for prima facie tort. *Ashcroft v. Iqbal*, 129 S.Ct. at 1949.

Furthermore, Plaintiffs have failed to plead grounds or facts supporting the elements of their claim, as required. *Hill v. Cray Research, Inc.*, 864 F.Supp. at 1078. There are no

allegations that HSUS' acts lacked justification. Rather, the Complaint suggests that Defendants exercised their First Amendment rights to free speech, petitioned the government and provided the public access to information. There are no allegations that Plaintiffs had a legally protected interest which Defendants harmed. There are no allegations that Defendants had a malicious intent toward Plaintiffs. In short, Plaintiffs' prima facie tort claim is wholly deficient. It should be dismissed.

2. Plaintiffs Have Not Pled Facts Showing Defendants Acted Without Justification.

Only one paragraph of the Complaint even mentions the concept of justification, and that allegation is less than clear and totally without any factual support in the Complaint. Complaint, Para. 8, Doc. 1-2. The Complaint alleges:

> Defendants were of course free to harbor their own belief's [sic] on an issue but they were not justified in taking actions to injure Plaintiffs in order to prevent Plaintiffs from exerting their lawful rights in order to satisfy their own beliefs. Defendants chose unjustifiably to seek relief outside of the proper procedures.

This perplexing, confusing and incomprehensibly ambiguous allegation provides no notice of facts supporting a lack of justification for Defendants' conduct, which Plaintiffs are required to allege. Plaintiffs simply make the bald allegations that Defendants unjustifiably sought "relief outside the proper procedures" and were "not justified in taking actions to injure Plaintiffs in order to prevent Plaintiffs from exerting their lawful rights in order to satisfy their own beliefs." It is impossible to decipher from these allegations what Plaintiffs claim Defendants did or what the grounds are for the supposed lack of justification for this undisclosed conduct.

Clearly, lawful acts, even those that injure another, may be socially, economically or otherwise sufficiently justified and, therefore, not provide a basis for prima facie tort. *See e.g. Gioia v. Pinkerton's Inc.*, 194 F.Supp.2d 1207 (D.N.M. 2002) (defendants' decisions, even if

misguided, were based on valid employment-related justifications and therefore not actionable as prima facie tort); *Guest v. Berardinelli*, 2008-NMCA-144, ¶39, 145 N.M. 186, 195 P.3d 353 (noting defendants' actions were justified because they had had probable cause to file suit and did not overtly misuse the legal process); *Silverman v. Progressive Broadcasting, Inc.*, 1998–NMCA–107, ¶39, 125 N.M. 500, 964 P.2d 61 (legitimate business interest provides justification); *Mosley v. Titus*, 762 F.Supp.2d 1298, 1333-34 (D.N.M. 2010) (legitimate business interest provided justification for attorney's bringing suit against physician whom he hoped to "run out of town;" and court noted that "some doctors may need to be run out of town"); *Padwa v. Hadley*, 1999-NMCA-067, ¶¶ 26-29, 127 N.M. 416, 981 P.2d 1234 (no showing that defendant's sexual relations with plaintiff's wife, ex-wife, and ex-fiancée was without justification, so prima facie tort claim was dismissed).

Conduct which is not justified has been defined as conduct that is not excusable or not privileged. *Portales Nat. Bank v. Ribble*, 2003-NMCA-093, ¶4, 134 N.M. 238, 75 P.2d 838 *citing* Restatement (Second) of Torts § 870 cmt e, at 282 (1979). It is conduct that, in the absence of a privilege, is inexcusable in the eyes of society and the law, given the relationship of the parties or the circumstances surrounding the act. *Beavers v. Johnson Controls World Services, Inc*., 120 N.M. 343, 350, 901 P.2d 761 (Ct. App. 1995) *citing* Restatement (Second) Torts, *supra*. Plaintiffs have not pled lawful conduct by Defendants that is "inexcusable in the eyes of society and the law" or to conduct that is socially, economically or otherwise unjustified. Rather, reading between the lines and by engaging in speculation and assumptions, Plaintiffs seem to allege that two organizations dedicated to humane treatment of animals acted to further animal protection and welfare, which contravened Plaintiffs' hopes to slaughter horses for human consumption.

Furthermore, Plaintiffs allege conduct that implicates Defendants' exercise of their rights under the First Amendment to the United States Constitution, and rights to petition the government, engage in free speech and provide free access to information. Complaint, Paras. 5, 10 and 12, Doc. 1-2. Such conduct is privileged and it provides sufficient social justification for the conduct. *See* Holmes, Oliver Wendell, Jr., *Privilege, Malice and Intent*, Harv. L. Rev. *4 (April 25, 1894) (in discussing privileges for acts that may harm others, stated that a privilege rests "upon the proposition that the benefit of free access to information, in some cases and within some limits, outweighs the harm to an occasional unfortunate"). *See, Andrews v. Stallings*, 119 N.M. at 493-94, 892 P.2d at 626-27, where the New Mexico Court of Appeals stated:

> [I]t also does not make sense to allow recovery under [prima facie tort] for expressions that are protected against defamation claims. *See National Nutritional Foods Ass'n v. Whelan,* 492 F.Supp. 374, 384 (S.D.N.Y.1980); *see also* James P. Bieg, *Prima Facie Tort Comes to New Mexico: A Summary of Prima Facie Tort Law,* 21 N.M.L.Rev. 327, 369 (1991) ("[I]t would be incongruous to allow prima facie tort to eliminate a requirement or restrictive feature of a traditional tort, such as defamation, which expresses an important public policy-freedom of speech."). In the present case it is clear that prima facie tort is being asserted merely to circumvent the established defenses to defamation.

The *Andrews* court thereafter concluded that defendants' allegedly defamatory statements were either protected opinion under the common law or within the boundaries of First Amendment protection. *Id*. Defendants' reports to public authorities expressing concerns about plaintiffs' taxes and insurance coverage were insufficient to support a prima facie tort claim. *Andrews*, 119 N.M. at 494, 892 P.2d at 627. *Cf. Blackmon v. Iverson*, 324 F.Supp.2d 602, 609 (E.D. Pa. 2003) *citing United States Golf Ass'n v. St. Andrews Systems Data-Max, Inc.*, 749 F.2d 1028, 1036 (3rd Cir. 1984) (having free access to information is prized by society); *People v. Rewald*, 318 N.Y.S.2d 40, 45 (N.Y. 1971) (United States Constitution provides a right to free access to information, protects open communication of ideas, and allows petitioning the

government for redress of grievances); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 208 F.3d 885, 893 (10th Cir. 2000) (noting that "in the open political arena . . . partisanship is the hallmark of decision making") *citing Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 504, 108 S.Ct. 1931 (1988).

Plaintiffs have not alleged lack of justification. The allegations of their complaint instead demonstrate social justification and implicate First Amendment rights attendant to Defendants' conduct. Because of this, Plaintiffs have failed to state a claim for prima facie tort. That claim should be dismissed.

3. Plaintiffs Have Not Pled Facts Showing Defendant HSUS Acted with the Malicious Intent to Injure Plaintiffs.

Plaintiffs "bear a heavy burden to establish intent to injure." *Hagebak v. Stone*, 2003–NMCA–007, ¶ 27, 61 P.3d at 209. In the context of prima facie tort, New Mexico requires that defendant's intent to injure be "malicious." *Jaynes v. Strong-Thorne Mortuary, Inc.*, 1998-NMSC-004, ¶ 27, 124 N.M. 613, 954 P.2d 45. Not only must the act be intentional, but the defendant must know that the act was wrong when he or she did it. *Portales Nat. v. Ribble*, 2003-NMCA-093, ¶ 8 *citing Kitchell v. Pub. Serv. Co. of N.M.*, 1998-NMSC-051, ¶ 17. The burden is on the plaintiff to make such a showing, which must be of an actual intention to injure, not merely an intent to do the act which may result in the claimed injury. *Lexington Ins. Co. v. Rummel*, 1997-NMSC-043, ¶ 14, 123 N.M. 774, 945 P.2d 992.

In *Lexington Ins. Co. v. Rummel*, 1997–NMSC–043, at ¶ 15, 16, 123 N.M. at 778, 945 P.2d at 996, for example, a material question whether the defendant intended to injure plaintiff, when the plaintiff's factual allegations indicated that the defendant "was motivated by the legitimate business purpose of reducing its own liability and the liability of its insured in the face of an enormous judgment, rather than by an intent to injure [the plaintiff]." Similarly, in

Silverman v. Progressive Broadcasting, Inc., 1998–NMCA–107, ¶¶ 37 and 39, a plaintiff failed to show on summary judgment that defendants acted with the requisite malicious intent. Plaintiff claimed that defendants' objections to her work product and allegations that she had acted deliberately negatively affected her ability to obtain future work opportunities. *Id*. at ¶ 38. The evidence was that defendants' objections were motivated not by any malice toward plaintiff, but by legitimate business concerns. *Id.* at ¶ 39.

While Plaintiffs allege an intent to interfere with their business, they do not anywhere allege that Defendants' intent was malicious. Rather, the sparse allegations which could reflect on intent indicate Defendants' intent was not malicious, and certainly not with malice toward Plaintiffs. *See* Complaint, Paras. 3, 4, 5, 6 and 8, Doc. 1-2. Plaintiffs' allegations are that Defendants (whose identities they disguise in the caption of their lawsuit) are The Humane Society of the United States and Front Range Equine Rescue. Complaint, Paras. 3 and 4, Doc. 1-2. Plaintiffs allege that both organizations have "policy beliefs" which Defendants tried to foster through the conduct at issue in this case. *Id*. at Paras. 5, 6 and 8. Although Plaintiffs do not identify Defendants' "policy beliefs," it can be assumed that an equine rescuer tries to save horses and HSUS promotes animal protection issues and seeks to reduce animal suffering. Plaintiffs' allegations, when taken as a whole, are not that Defendants were motivated by malice toward Plaintiffs, but that they were motivated by a desire to prevent harm to animals, to rescue horses, to promote animal and equine welfare and to lobby the public and the government to do the same. Accordingly, Plaintiffs' Complaint lacks the necessary element of malicious motivation. As such, Plaintiffs' claim for prima facie tort should be dismissed.

4. Plaintiffs Have Not Pled Facts Showing Injury to Legally Protected Interests.

In the context of claims for prima facie tort, the term "injury" means harm to or "the

invasion of any legally protected interests of another." Restatement (Second) Torts § 870, cmt.e ("[I]njury denotes 'the invasion of any legally protected interests of another.' The use of the term, injury, in this Section means that the harm must be to a legally protected interest of the plaintiff."). *See also Yeitrakis v. Schering-Plough Corp*, 804 F.Supp. 238, 247 (D.N.M. 1992) (plaintiff could not prove intent to injure in employment termination case since employment at will doctrine provided him with no legally protected interest in continued employment or termination only for just cause); *Hill v. Cray Research, Inc.*, 864 F.Supp. at 1078-79 (same).

Plaintiffs here have alleged that Defendants interfered with their business. But, Plaintiffs never identify what their business is or was, other than through several vague labels such as "a critically necessary service," "a legally allowed and needed business," "their chosen business venture," "a lawful business" and "the legal business." *See* Complaint, Paras. 5-14, Doc. 1-2. These vague allegations do not suffice. To meet their pleading burden, Plaintiffs must plead facts sufficient to show they have a legally protected interest that Defendants harmed. Plaintiffs have not pled that they possessed a legally protected interest in the business they vaguely reference.

5. Plaintiffs Allege Defendants Engaged in Unlawful Conduct which Injured Them; Because a Prima Facie Tort Claim Can Only Be Based on Lawful Conduct, Plaintiffs' Prima Facie Tort Claim Must Be Dismissed.

A distinguishing factor of prima facie tort is that it is based in a lawful act. *See*, *Schmitz*, 109 N.M. at 396-97; *Mountain Highlands, LLC v. Hendricks*, (not reported in F.Supp.2d) 2009 WL 13000750 (Memorandum Opinion and Order by Judge James O. Browing issued February 13, 2009) (prima facie tort provides a possible remedy for certain lawful conduct). When a plaintiff alleges *unlawful* conduct, a prima facie claim is not appropriate and may properly be

dismissed. *E.g. Lopez v. Garcia*, 1 F.Supp.2d 1404, 1406 (D.N.M. 1997) (prima facie tort claim dismissed in part for failure to allege defendants acted lawfully); *Negrete v. Maloof Distributing L.L.C.*, 762 F.Supp.2d 1254, 1296, 1297-98 (D.N.M. 2007) (if defendant's actions were unlawful, prima facie tort claim fails; since plaintiff clarified that he contends defendant's statements to the police were false, such statements were unlawful, and cannot for the basis for prima facie tort); *Silverman v. Progressive Broadcasting, Inc.*, 1998–NMCA–107, ¶36 (unlawful sexual harassment and discrimination, as a matter of law, do not state prima facie tort claim); *Lee v. ABF Freight Sys., Inc.*, No. CIV 91–1254 JC/RWM, 1992 WL 611458, at *2 (D.N.M. Sept.23, 1992) (plaintiff's employer refused to accommodate her religious beliefs, which would constitute a Title VII violation and not be lawful acts necessary for a prima facie tort); *Hill v. Cray Research, Inc., supra.*, 864 F.Supp. at 1078 (if defendants' termination of plaintiff's employment was unlawful, the first element of a lawful act cannot be met) *citing, inter alia*, *Bandag of Springfield, Inc. v. Bandag, Inc.*, 662 S.W.2d 546 (Mo.App.1983); *Burns Jackson Miller Summit & Spitzer v. Lindner*, 88 A.D.2d 50, 452 N.Y.S.2d 80, 93 (1982) (intentional conduct that has been recognized as tortious cannot be "lawful" conduct).)

Here, Plaintiffs allege Defendants engaged in unlawful conduct such as making defamatory statements, tortious interference with Plaintiffs' right to engage in a lawful business, threats and intimidation, and making false reports. Complaint, Paras. 12 and 14, Doc. 1-2. While Plaintiffs also appear to allege lawful acts such as holding beliefs, Plaintiffs' damages allegation reveals that only Plaintiffs claim that Defendants' "intentional tortious interference" caused all of their damages. Thus, Plaintiffs have failed to allege the essential element of lawful conduct, and in fact have alleged that their claims are based upon allegedly unlawful conduct. For this additional reason, the prima facie tort claim should be dismissed with prejudice.

D. Plaintiffs' Complaint Fails to State a Claim for Civil Conspiracy

Because Plaintiffs have failed to state a valid claim under Rule 12(b)(6), their final allegation of civil conspiracy also must be dismissed. Civil conspiracy is not in itself a cause of action; it must be accompanied by a civil action against one of the conspirators. *Valles v. Silverman*, 2004-NMCA-019, 135 N.M. 91, 84 P.3d 1056. A civil conspiracy must involve an independent unlawful act that itself would give rise to a cause of action. *Ettenson v. Burke*, 2001-NMCA-003, ¶12, 130 N.M. 67, 72, 17 P.3d 440, 445.

If Plaintiffs' Complaint for defamation, false light invasion of privacy and prima facie tort fails to state a claim, the cause of action for civil conspiracy cannot simply stand on its own and must also be dismissed. *Healthsource, Inc. v. X-Ray Associates of New Mexico, Inc.*, 2005 NMCA-097, ¶37,138 N.M. 70, 81, 116 P.3d 861, 872 (district court held correct in dismissing civil conspiracy claim when the underlying causes of action were previously dismissed for failure to state a claim).

In addition, Plaintiffs have failed to allege the essential elements of a civil conspiracy claim. In order to state a claim for civil conspiracy, a plaintiff must allege: (1) that a conspiracy between two or more individuals existed; (2) that specific wrongful acts were carried out by the defendants pursuant to the conspiracy; and (3) that the plaintiff was damaged as a result of such acts. *Valles v. Silverman*, 2004-NMCA-019, 135 N.M. 91, 84 P.3d 1056. As noted above, Plaintiffs have utterly failed to allege any specific wrongful acts. The Complaint simply identifies the cause of action without any factual underpinning or grounds whatsoever. The mere recitation of a legal theory does not state a valid cause of action. Thus, Plaintiffs' Complaint fails to state a claim for civil conspiracy as well.

III. Conclusion

Plaintiffs' Complaint fails to meet the pleading standards required under Fed.R.Civ.P. 8 and should be dismissed pursuant to Rule 12(b)6), Fed.R.Civ.P. for failure to state a claim. The Complaint fails to set forth the elements of the recited causes of action or to provide any factual support or grounds for such allegations.

Under well-established law in the 10th Circuit, Plaintiffs' Complaint should be dismissed.

EATON LAW OFFICE, P.C.

By *-Electronically Signed by P. Scott Eaton-*

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CERTIFICATE OF SERVICE

I CERTIFY SERVICE of a true copy of the foregoing was mailed with sufficient postage to counsel of record, as follows:

A. Blair Dunn
6605 Uptown Blvd. NE #280
Albuquerque, NM 87110-4233

on this 7th day of December 2012.

-Electronically Signed by P. Scott Eaton-
P. Scott Eaton

NM Capitol Report | A view from the New Mexico state capitol

08/14/2012

Horse-slaughter plant is dead

Roswell family business suspends plan, cites lack of cooperation from USDA

UPDATED

Entrepreneurs who wanted to slaughter horses and sell the meat in Europe suspended their plan today, complaining that the federal government stalled them into submission.

Valley Meat Co., a family business near Roswell, gave up after four months of seeking approval from the U.S. Department of Agriculture for a horse-slaughter plant, said A. Blair Dunn, attorney for the business.

A spokesman for the USDA Food Safety and Inspection Service in Washington said tonight that the agency has not done horse inspections in six years and simply needs more time to make sure it handles the job correctly.

But Dunn said that his clients, the De Los Santos family that owns the meat-processing plant, no longer could subsist while awaiting for a decision from the USDA. The family instead is restarting its cattle business, probably as soon as Monday.

"They're suspending any plans for the horse-slaughter plant," Dunn said in an interview. "It doesn't look like anybody is going to get a grant of inspection for horse slaughter."

Neil Gaffney, the USDA spokesman, said no horse-slaughter plants exist in the United States, and approving one is not a simple process.

"Following a decision by Congress in November 2011 to lift the ban on horse slaughter, two establishments, one in New Mexico and one in Missouri, have applied for a grant of inspection exclusively for equine slaughter," he said. "The Food Safety and Inspection Service is currently reviewing those applications."

But, he said, the service had determined that that significant time was needed to update its testing and inspection processes. Only then will it be able to implement an inspection regimen, Gaffney said.

The collapse of the horse-slaughter plan disappointed one animal-protection group in New Mexico but heartened another.

Rusty Cook, president of the New Mexico Horse Council, had hoped the Roswell slaughter plant would go into operation.

Cook said horses now are abandoned, starved and hauled long distances for slaughter in foreign countries. The Roswell plant would have improved that situation, she said.

Cook said she had hoped Valley Meat Co. could keep its proposal alive until after the November election, in hopes that "the atmosphere" would be different then.

A different view came from Lisa Jennings, executive director of Animal Protection of New Mexico, and an opponent of the slaughter plant.

EXHIBIT "A"

"New Mexicans want a truly humane safety net for horses," she said. "Now we can put this chapter behind us."

Gov. Susana Martinez, a Republican, and State Land Commissioner Ray Powell, a Democrat, both opposed horse slaughter in New Mexico. Martinez recently said she planned to send a letter to the U.S. Department of Agriculture asking it to deny the company's application.

But today Martinez said through her spokesman that she had no comment on the project's demise.

The De Los Santos family had to retrofit its 7,000-square-foot plant to prepare for the slaughter and processing of horses. A meat-processing plant cannot slaughter cattle and horses simultaneously, Dunn said.

Even with the changes, the plant can accommodate cattle again, Dunn said.

He said the family had no expectation of selling horse meat in the United States, but it believed the food would be readily accepted in foreign markets, especially Europe.

"They thought they had a good opportunity for their business to expand," Dunn said.

He said his clients received other bad news today — a notice of an $86,000 fine from the state Environment Department. The state alleges that Valley Meat Co. failed to register a composting site for manure and cow intestines.

Dunn said the company met every regulatory requirement, but the state at one point lost the application. He said the De Los Santos family was in full compliance with environmental laws.

Posted by Milan Simonich on 08/14/2012 at 01:50 PM | Permalink

Posted by: Remy | 08/16/2012 at 10:39 AM

What is missing is the fact we need to return horse processing to the USA We can process healthy horse meat and anyone that does not believe that is basically stupid....as for the TB folks let them deal with their drugged up ponies! Those horse huggers that have no "skin in the game" are the worthless do gooders that are against proper and humane horse processing. I have an idea for you go find another cause to screw up people's lives and business. I bet most of these morons are Liberal Democrats living in Disneyland!

Posted by: cj | 08/16/2012 at 11:22 AM

The simple fact is the USDA is not providing a service that it currently, by law, is required to do. They are intentionally stalling because to allow the permits brings them under fire. I think the family needs to sue the USDA for failure to process their application in a timely manner interfering with their rights as business owners. Sad to see the during this current administration that they are NOT willing to support honest business owners.

Posted by: Fred South | 08/16/2012 at 02:19 PM

The slaughtering of socialized companion animals for their meat is NOT a profession to be proud of! Here's hoping the people involved in this revolting way of making a living can re-invent themselves & find a more suitable form of employment!

Posted by: ann fox | 08/16/2012 at 10:05 PM

Entrepreneurs? Excuse me while I catch my breath from laughing. Here is yet another article on Santos that leaves out two important details. Santos was shut down by the USDA this past February for inhumane treatment of slaughter animals and was recently fined over $80,000 for environmental issues. So much for compliance. Those are the two most common violations in horse slaughter plants so the USDA is doing exactly what they should be doing. He has already proven he can't follow laws for traditional livestock and one can only imagine what a chamber of horrors it would be for horses.

Horses were abandoned, starved and hauled long distances when the three US plants were open. Hundreds of thousands of horses were hauled to Mexico and Canada. What was the excuse then? It wasn't lack of slaughter then and it surely isn't lack of slaughter now.

As far as Missouri, Wallis was run out of town in Mountain Grove and the Rockville plant is mired in legal issues and shell companies.

Slaughter is for food production, not a disposal service. Only animals that were raised and regulated as food animals should enter the food chain.

Posted by: Ewafb | 08/19/2012 at 11:14 AM

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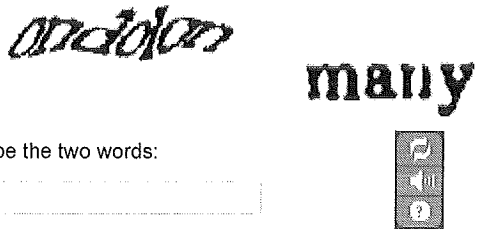

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