

SO ORDERED: May 20, 2016.



Basil H. Lorch III

**Basil H. Lorch III
United States Bankruptcy Judge**

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

In re:)	
Edward Ray Bay,)	Case No. 14-92409-BHL-7
Debtor.)	
_____)	
)	
Shoney's North America, LLC and)	
David Davoudpour,)	
Plaintiffs,)	
)	
v.)	
)	
Edward Ray Bay,)	Adv. Proc. No. 15-59014
Defendant.)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs Shoney's North America, LLC ("Shoney's") and David Davoudpour ("Davoudpour") commenced this adversary proceeding by filing a Complaint to Determine Dischargeability of a Debt (Doc. 1) against Debtor-Defendant Edward Ray Bay ("Bay") on March 13, 2015. This adversary proceeding stems from a series of disparaging internet publications by Bay regarding Shoney's and Davoudpour. Shoney's contends that these pre-petition publications amount to defamation, injurious falsehood or trade libel, and tortious interference, and that the resulting debt is excepted from discharge under § 523(a)(6). The matter was tried

before this Court on November 9, 2015. Per the Order Granting Plaintiff's Motion to Bifurcate Trial, the issue of damages or the value of any tort claims was not tried or considered at trial. Following trial, Shoney's CEO, Davoudpour, was dismissed as a plaintiff for lack of subject matter jurisdiction by the order entered November 18, 2015, leaving Shoney's as the sole Plaintiff. Shoney's filed a Plaintiff's Post-Trial Brief (Doc. 81) on November 24, 2015. Having reviewed the Pleadings, Exhibits, oral testimony, and arguments of counsel, the Court hereby finds that Judgment should be, accordingly, entered in favor of Plaintiff Shoney's.

FINDINGS OF FACT

Shoney's North America, LLC ("Shoney's")¹ and its predecessors and affiliates have operated and franchised family dining restaurants under the Shoney's™ name since at least the early 1950's. Raymond Danner ("Danner") was the Chairman and Chief Executive Officer of Shoney's predecessor during the 1970's and 1980's when the Shoney's™ restaurant chain experienced substantial growth. Danner was instrumental in growing the Shoney's™ chain into a large public company and national network of family dining restaurants. The peak of the expansion and popularity of the Shoney's™ restaurant chain came in the early 1990's. However, by the late 1990's, Shoney's came under financial stress following a class action racial discrimination lawsuit and in the face of substantial management turnover and a growing debt load. In 2000, Shoney's filed for chapter 11 bankruptcy, and in 2002, Shoney's was acquired by a private equity firm with a plan to hold the company for the short-term. Throughout this period, over 800 Shoney's™ restaurants closed, leaving 282 in operation by the end of 2006.

David Davoudpour ("Davoudpour"), an Atlanta-based restaurateur and entrepreneur, acquired Shoney's in December 2006. Davoudpour acquired Shoney's with the intent and plan to improve the quality of Shoney's™ food and service, modernize Shoney's™ restaurants to

¹ Shoney's North America, LLC was formed in 2007 after Davoudpour acquired the Shoney's restaurant chain. When the term "Shoney's" is used in reference to pre-2007 events, it is used generically to refer to the entity or entities controlling the Shoney's™ restaurant chain at the relevant times.

make them competitive with recent market trends, and revitalize the Shoney's™ brand. Under Davoudpour's management, Shoney's has worked to improve food quality by adding new menu items using fresh ingredients and has taken steps to improve service and operational performance. Shoney's has also developed a new and updated Shoney's™ restaurant design prototype, as well as a quick service, limited menu version of the restaurant which it has named Shoney's On the Go™. Davoudpour, who serves as the Chairman and CEO of Shoney's, is supported by a full executive management team.²

During the recession from 2008 through 2012, Shoney's focused on the foregoing revitalization efforts and did not actively seek to open or franchise new Shoney's™ restaurants. Meanwhile, around another 130 Shoney's™ restaurants closed during the period from 2007 through 2013 amidst the economic downturn. Beginning in 2013, Shoney's resumed efforts to actively sell new Shoney's™ and Shoney's On the Go™ franchises. According to the testimony of Steve Sanders, Senior Vice-President of Franchise Operations, today there are currently 150 company-owned and franchised Shoney's™ restaurants in operation. Since 2011, Shoney's has built and opened 6 new company-owned restaurants³ and has remodeled 13 company-owned restaurants to its new design standards. (P. Ex. 33).

Bay worked as an employee of Shoney's, for a Shoney's franchisee, or as a Shoney's franchisee himself for more than 35 years. From 1978 to 1991, Bay was employed by Shoney's as a General Manager of company-owned restaurants and as a franchise business consultant. From 1991 through 1996, Bay worked for a Shoney's franchisee in Southern Indiana. Bay

² The Shoney's executive team consists of the following: Kamran Habeeb, President; Catherine Hite, Executive Vice President and General Counsel; Steve Neuroth, Chief Financial Officer; Steve Sanders, Senior Vice President of Franchise Operations; Patti Nash, Vice President of Human Resources and Training; and Chef Eric Cleveland, Executive Chef. (P. Ex. 38).

³ Shoney's has opened new Shoney's™ restaurants in Newnan, GA; Panama City Beach, FL; Branson, MO; and Lawrenceville, GA. Shoney's has opened Shoney's On the Go™ restaurants in Buford, GA and Houston TX.

again worked as a Shoney's employee in the franchise department from 1997 through 2004.⁴ In 2004, Shoney's terminated Bay's employment in a downsizing effort, but offered Bay the opportunity to acquire two company-owned Shoney's™ restaurants as a franchisee. Through his company, SOMA Hospitality, Inc. ("SOMA"), Bay then entered into franchise and license agreements with Shoney's.⁵ Bay and SOMA thereafter operated Shoney's™ franchised restaurants in Henderson and Owensboro, Kentucky.

After Davoudpour acquired Shoney's, the relationship between Shoney's and Bay as franchisee began to sour. Bay took issue with some of the new operational and promotional programs⁶ that Davoudpour implemented as CEO. Significantly, Bay objected to a decision by Shoney's and its food distributor to implement a "contingency fund" to help pay for obsolete inventory of Shoney's™ food products. Each Shoney's franchisee was to contribute to building this fund by paying a premium on food purchases. Bay and SOMA contributed approximately \$1,600 to the contingency fund. Bay testified that he voiced his objection to the contingency fund at a Shoney's franchise meeting, accusing Davoudpour and Shoney's of going "outside its contracts" to force franchisees to pay fees. During 2010 and subsequent years, SOMA's restaurants also failed numerous Shoney's inspections due to alleged quality problems, putting it in default of its franchise agreements. At trial, Bay alleged that these inspection failures were predetermined and issued in retaliation for his objections expressed against Shoney's and Davoudpour. Steve Sanders testified that Shoney's gave Bay and SOMA several opportunities to improve restaurant quality, and that after additional training, SOMA's restaurants successfully passed inspection.

⁴ Bay's LinkedIn page biography falsely represents that he was Shoney's Director of Franchise Services for nearly five years (P. Ex. 1), but he admitted at trial that he only held that position for one year before moving back to a franchise business consultant position.

⁵ Bay personally guaranteed SOMA's obligations under the franchise and license agreements.

⁶ Bay declined to participate in some of Shoney's mandatory, advertised one-day promotional programs such as free hot fudge cake on Mother's Day and 65 cent hamburgers on Shoney's 65th birthday.

In November 2010, Bay and SOMA filed a lawsuit against Shoney's in the Chancery Court of Tennessee in Davidson County. Bay and SOMA alleged 19 claims against Shoney's, including unfair discrimination and that the contingency fund violated the parties' contracts and franchise law. (P. Ex. 2). The court granted summary judgment to Shoney's on several of the claims. Bay testified that his attorney withdrew from the case when Bay could no longer afford legal fees, after which the remaining claims were eventually dismissed without being fully adjudicated. According to Bay, the financial burden of litigation left Bay and SOMA short of money to operate SOMA's Shoney's™ restaurants. By early 2014, SOMA owed \$63,000 in rent to its landlord. In February 2014, the landlord terminated the leases for SOMA's restaurants which ended their operation. Due to the resulting breach of SOMA's franchise and license agreements, Shoney's terminated its franchise relationship with Bay and SOMA in March 2014.

According to his own testimony, Bay blames Shoney's and Davoudpour for the termination of his franchise relationship and believes that Shoney's conspired with his landlord to close his Shoney's™ restaurants. Furthermore, Bay admitted to being bitter and angry about the results of his 2010 lawsuit against Shoney's and the fact that he did not prevail on his claims. Bay's testimony, demeanor, and conduct at trial, on the whole, reflect feelings of animosity and ill will toward Shoney's and Davoudpour and resentment for the way that his franchise relationship with Shoney's came to end. In June 2014, Bay began manifesting these feelings in a series of negative internet postings about Shoney's which are the subject of this adversary proceeding.

Bay first began this posting activity under the pseudonym "Former Franchisee" in a Shoney's comment thread on the website www.unhappyfranchisee.com ("UF.com"). Bay posted several comments as Former Franchisee in such a manner as to misrepresent that there were multiple former franchisees voicing a similarly negative opinion of their experience with Shoney's and Davoudpour.

On June 4, 2014, Bay's first post under the Former Franchisee name stated, "I wouldn't deal with David Davoudpour again if franchises were free. Shoney's is a dead brand. He is a crook and a liar. Run from this guy as fast as you can!" (P. Ex. 3). Later that day, Bay posted the same statement on Shoney's Facebook page (P. Ex. 4) and sent an email to a number of current Shoney's franchisees containing a link to his comment on the UF.com webpage. (P. Ex. 5). On June 6, 2014, Bay made another post on UF.com as Former Franchisee which stated "Shoney's was a great franchise until it was bought out in 2007... then things went down hill really quickly. I to [sic] am a former franchisee, the experience after the buyout was horrible. The second post is right, RUN." (P. Ex. 43). On June 8, 2014, Bay posted another comment which agreed with the "other" posters and which referred to Davoudpour as a "snake oil salesman." (P. Ex. 6). At trial, Bay admitted that Davoudpour never personally lied to him and that he never interacted directly with Davoudpour aside from making a statement to him at a meeting among Davoudpour and other franchisees. In support of these posts at trial, Bay cited his experience with Davoudpour as a franchisee, his allegations from his prior lawsuit against Shoney's, and newspaper articles in which Davoudpour discussed Shoney's business plans. Steve Sanders and Shoney's franchisee Kaye Couch testified that Davoudpour is honest and truthful and that they have not known him to lie or be dishonest in his business dealings.

Bay's UF.com post on June 17, 2014 listed several purported "verifiable facts" in support of his previous comments and the contention that Shoney's is a "worst franchise." *Id.* These "verifiable facts" included the statement that when Bay left Shoney's in March 2014, there was "no [Shoney's] VP of Training, no VP of Human Resources, no VP or Director of Purchasing, all critical to franchise support." *Id.* However, Patti Nash has been Shoney's VP of Training and Human Resources since April 2013 and was identified as such on Shoney's website by late 2013. While Bay implies that Shoney's lacked executive purchasing management, Shoney's hired SpenDifference to provide an outsourced purchasing department and a full range of supply and purchasing services.

Later in June 2014, Bay began posting negative comments on Shoney's Facebook page under the impersonated identity of Shoney's former CEO and Chairman, Raymond Danner. Bay made one such post on Shoney's Facebook page on June 22 which linked to the UF.com webpage containing his Former Franchisee comments. In another post under Danner's name, Bay responded to a comment which implied that Shoney's may be misrepresenting the status of Orlando stores by stating that "this is SOP for David Davoudpor...he figures he will lie now and then you won't remember what he said in a few months. Shoney's is dying a slow agonizing death." (P. Ex. 10).

In August 2014, Bay took his use of Raymond Danner's identity further by creating a YouTube Channel in Danner's name on which he began to post videos discouraging others from franchising with Shoney's. (P. Ex. 11). Further, Bay created a Raymond Danner Facebook profile on which he posted links to his Raymond Danner YouTube videos and other negative content regarding Shoney's. (P. Ex. 18-19). Shoney's franchisee Kaye Couch testified that Bay also repeatedly sent emails containing his Raymond Danner videos to current Shoney's franchisees. On August 22, Bay posted his first Raymond Danner video, entitled "Franchise Shoney's," which displays a series of photographs allegedly showing poor conditions at various Shoney's and concludes with several statements about the company. (P. Ex. 12). Among the video's concluding remarks, Bay stated that "Shoney's Senior VP of Franchising [Steve Sanders] has no background in Franchising," and that "Shoney's has opened two new restaurants in 7 years."

On October 20, 2014, Bay posted his fifth video to the Raymond Danner YouTube Channel entitled "Shoney's Management Team" which characterizes Shoney's executive management team as incomplete, unqualified, and uncommitted. (P. Ex. 17). In this video, Bay states that "like his peers at Shoney's Mr. Sanders has no background in franchising nor does he have a business degree." Thus, Bay implies that not only is Steve Sanders unqualified, but that none of his "peers at Shoney's" have any background in franchising or a business degree.

Bay also states that President Kamren Habeeb is “MIA or AWOL” and “simply filling a post so it looks like Shoney’s has a complete management team;” states that that General Counsel Catherine Hite is still managing her own law firm and implies that she only works for Shoney’s part time; and states that Davoudpour “spends little time at the Shoney’s Corporate Offices and even less time in the restaurants” and only “runs Shoney’s part time.”

Through all of the foregoing posting activity and that which is not herein discussed, the overall message conveyed by Bay is that the once great brand of Shoney’s has rapidly declined under Davoudpour’s leadership and that Shoney’s is now a “dead brand” for a litany of purported reasons, including that Davoudpour is a “crook and a liar” and part-time CEO, that Shoney’s has key unfilled management positions critical to franchise support, that Shoney’s existing management is unqualified, incompetent, or only work part time, and that Shoney’s is not opening new restaurants and is only closing them. Bay admitted that in intentionally posting much of this information under the false identity of Raymond Danner, he was misrepresenting to the public the source of his YouTube channel and Facebook account and the identity of the author of their content. In the content of his posts and through his testimony, Bay further admitted that he wanted to discourage people from franchising with Shoney’s.

Steve Sanders and Kaye Couch testified as to the resulting harm from Bay’s posting activity, asserting that Bay has caused harm to the goodwill and reputation of the Shoney’s™ brand, harm to the business of Shoney’s and its franchisees, and harm to Shoney’s efforts to sell new franchises to current and prospective franchisees. While Mr. Sanders could not identify any actual lost franchise sales, he noted that prospective franchisees generally conduct internet research about a franchisor and thus are likely to see some of Bay’s posting activity. On April 23, 2015, the Court preliminarily enjoined enjoining Bay from posting information about Shoney’s or Davoudpour under the false identity of Danner or under anyone else’s identity other than his own. Bay moved his Raymond Danner videos to a new Ed R. Bay Youtube Channel

where they remain active. In his closing statement at trial, Bay told the Court that he was going to continue to post negative content about Shoney's on the internet.

CONCLUSIONS OF LAW

Shoney's alleges that through his posting activity Bay has committed defamation, injurious falsehood (or trade libel), and tortious interference with prospective business relationships against Shoney's. Moreover, Shoney's contends that Bay's actions amount to willful and malicious injury to Shoney's and that any debts arising therefrom are excepted from discharge pursuant to § 523(a)(6). Shoney's is also seeking a permanent injunction against Bay which would enjoin Bay from posting content about Shoney's attributed to Raymond Danner or anyone other than himself, require Bay to remove any defamatory statements and content from his Ed R. Bay YouTube channel and UF.com, and enjoin Bay from reposting or republishing those statements or their equivalent.

Section 523(a)(6) excepts from discharge any debt for willful and malicious injury by the debtor to another entity or the property of another entity. To render a debt dischargeable under § 523(a)(6), a party must establish by a preponderance of the evidence the elements of injury, willfulness, and maliciousness. See *First Weber Grp., Inc. v. Horsfall*, 738 F.3d 767, 774 (7th Cir. 2013). In the context of § 523(a)(6), the term "injury" means a "violation of another's legal right, for which the law provides a remedy." *Id.* (citing *In re Lymberopoulos*, 453 B.R. 340, 343 (Bankr. N.D. Ill. 2011)). Willfulness requires "a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury," *id.* (quoting *Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998)), and it "can be found either if the 'debtor's motive was to inflict the injury, or the debtor's act was substantially certain to result in injury.'" *Id.* (citing *Bukowski v. Patel*, 266 B.R. 838 (E.D.Wis.2001)). Finally, maliciousness requires that "that the debtor acted 'in conscious disregard of [his] duties or without just cause or excuse; it does not require ill-will or specific intent to do harm.'" *Id.* (quoting *Matter of Thirtyacre*, 36 F.3d 697, 700 (7th Cir.1994)).

I. Injury Under § 523(a)(6)

a. Defamation

Shoney's primarily contends that Bay's posting activity amounts to defamation. Bay maintains that his posting activity is free speech protected by the First Amendment. A communication is defamatory if it involves a false statement of fact, *Journal-Gazette Co. v. Bandido's, Inc.*, 712 N.E.2d 446, 457 (Ind. 1999), and it "tends so to harm a person's reputation by lowering the person in the community's estimation or deterring third persons from dealing or associating with the person." *Id.* at 451. To prove defamation, a plaintiff must demonstrate (1) a communication with defamatory imputation; (2) malice;⁷ (3) publication; and (4) damages. *Kelley v. Tanoos*, 865 N.E.2d 593, 596-97 (Ind. 2007). However, in an action for defamation *per se*, the plaintiff is entitled to presumed damages as a natural and probable consequence. *Id.* at 597. "A communication is defamatory *per se* if it imputes: (1) criminal conduct; (2) a loathsome disease; (3) misconduct in a person's trade, profession, office, or occupation; or (4) sexual misconduct." *Id.* at 596.

Turning to Bay's posting activity, virtually all of the statements at issue were aimed at discouraging people from franchising with Shoney's and either suggested misconduct in Shoney's business and trade or alleged criminal conduct.⁸ Any such communications of Bay's which are false are therefore defamatory *per se* and Shoney's is entitled to presumed damages as a natural and probable consequence. Furthermore, publication in the context of defamation

⁷ The First Amendment does not protect false and defamatory speech. *Love v. Rehfus*, 946 N.E.2d 1, 14 (Ind. 2011). However, the First Amendment does impose a higher burden for establishing defamation by requiring proof of actual malice in cases involving public figures and matters of public concern. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279, 84 S. Ct. 710, 726, 11 L. Ed. 2d 686 (1964). Here, it is not necessary to determine whether Shoney's qualifies as a public figure or whether Bay's posting activity covered a matter of public interest because malice is a required element for a finding of defamation under Indiana law in any case. *Journal-Gazette Co. v. Bandido's, Inc.*, 712 N.E.2d 446, 452 (Ind. 1999).

⁸ Davoudpour was previously dismissed as a plaintiff for lack of subject matter jurisdiction, leaving Shoney's as the sole Plaintiff. However, the statements which Bay directed at Davoudpour are still relevant in the context of Shoney's defamation claim. Because Davoudpour is CEO of Shoney's, any allegations of Davoudpour's misconduct in business dealings are imputed to Shoney's. Defamation of Davoudpour with respect to his management of Shoney's is defamatory against Shoney's itself.

simply requires communication of a defamatory statement to a third person. *Bandido's Inc.*, 712 N.E.2d at 456. All of the communications at issue were published to the public at large on the internet via the UF.com website, YouTube, and Facebook. Thus, the determination of defamation here turns on the falsity of the statements and whether Bay published them with malice.

i. Falsity

A communication is false when it either directly states a false fact or implies a false fact. *Cochran v. Indianapolis Newspapers, Inc.*, 372 N.E.2d 1211, 1217 (Ind. App. 1978). "An idea or opinion that conveys a defamatory imputation of fact . . . can be actionable." *Hamilton v. Prewett*, 860 N.E.2d 1234, 1245 (Ind. App. 2007). Several of Bay's "Former Franchisee" postings on UF.com contain objectively false statements. First, the Court finds Bay's statements referring to Davoudpour as a "crook and a liar" and "snake oil salesman" to be false. Shoney's presented evidence of Davoudpour's extensive background and success in the restaurant business and Shoney's witnesses testified that Davoudpour is honest, truthful, and is not known to lie or be dishonest in his business dealings. Aside from his own viewpoint and his allegations from the parties' previous lawsuit, Bay did not produce any evidence suggesting that Davoudpour engaged in criminal behavior or told untruths to Bay or the public. While Bay may contend that these comments are merely expressions of opinion and are protected by the First Amendment, his statements imply a former franchisee's personal knowledge of facts which would lead to the conclusion that Davoudpour is a crook and a liar. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695 (1990)(noting that couching a statement in terms of opinion does not dispel its factual implications, as the statement "[i]n my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar"). Thus, the Court concludes that these statements are false.

Further, Bay made at least one other false and defamatory statement on UF.com when he wrote that as of March 2014, there was “no [Shoney’s] VP of Training, no VP of Human Resources, no VP or Director of Purchasing, all critical to franchise support.” In fact, Patti Nash has been Shoney’s VP of Training and Human Resources since April 2013 and was identified as such on Shoney’s website by late 2013. While it is technically true that Shoney’s did not employ an individual as VP or Director of Purchasing, this communication is also false and misleading when taken in context. In determining whether a communication is defamatory, “the communication is to be viewed in context and given its plain and natural meaning.” *N. Indiana Pub. Serv. Co. v. Dabagia*, 721 N.E.2d 294, 301 (Ind. Ct. App. 1999); *Indianapolis Newspapers, Inc. v. Fields*, 259 N.E.2d 651 (Ind. 1970)(upholding a finding of defamation where accusations that former law enforcement officers had intimidated a witness “were clearly implied by what [the newspaper] did say and the way it said it, when read in full context . . . created by the statements explicitly published; the choice of loaded words; the choice of juxtaposition and sequence of ideas; . . . the cumulative weight of constant repetition” and “almost totally ignoring the conflicting evidence.”). Within the context of the comment about why Shoney’s is a “worst franchise” and in light of the overall message of Bay’s posting activity, Bay communicates that Shoney’s lacked proper management and oversight of several key business functions that are “critical to franchise support,” including purchasing. This ignores the fact that Shoney’s had contracted with Spendifference to manage and operate its supply and purchasing services. Accordingly, the Court finds this entire statement about Shoney’s management to be false.

Finally, all of the communications which Bay created and posted under the impersonated identity of Raymond Danner are false and misleading. Bay admitted that in posting under the impersonated identity of Raymond Danner, he was misrepresenting to the public the source of his YouTube channel and Facebook account and the author of their content. This misrepresentation is material to the meaning and effect of Bay’s communications, as Danner’s successful tenure as Shoney’s CEO lends more credibility to their content, increases their

potential impact, and makes them more likely to deter people from franchising with Shoney's. The Court finds that Bay's use of the impersonated identity of Raymond Danner is sufficient to render all communications posted thereunder false for the purposes of defamation. See *Rall v. Hellman*, 284 A.D.2d 113, 113, 726 N.Y.S.2d 629, 631 (2001) ("Where, as here, an act of literary impersonation imputes facts to the person impersonated that damage him in his trade or profession, a cause of action for libel per se is adequately pleaded."); see also *Laughland v. Beckett*, 2015 WI App 70, ¶ 28, 365 Wis. 2d 148, 168, 870 N.W.2d 466, 475 (finding defamation where the defendant created a fake Facebook profile in plaintiff's name and thereon posted that the plaintiff was a low life, preying swindler, and loser who had defrauded and manipulated banks); *Boston v. Athearn*, 764 S.E.2d 582 (Ga. App. 2014) (noting the defendants' child had committed libel by creating a Facebook profile under a classmate's name and posting defamatory material about that classmate).

ii. Malice

"Actual malice exists when the defendant publishes a defamatory statement 'with knowledge that it was false or with reckless disregard of whether it was false or not.'" *Bandido's, Inc.*, 712 N.E.2d at 456 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 279-80, 84 S.Ct. 710 (1964)). To demonstrate reckless disregard, the evidence must show that the defendant "entertained serious doubts as to the truth of his publication" or that "the false publication was made with a high degree of awareness of their probable falsity." *Id.* (citations omitted).

Bay's defamatory statements identifying Davoudpour as a crook, liar, and snake oil salesman were made with knowledge of their falsity or with reckless disregard of falsity. Bay admitted that he had had little to no contact with Davoudpour and that Davoudpour had never personally lied to him. Bay had no factual basis for making these statements and could only offer in support his own viewpoint and his allegations from his previous law suit. Bay's defamatory statements regarding Shoney's deficient management as of the time he left were

also made with knowledge of their falsity or with reckless disregard. Bay implied personal knowledge of this “verifiable fact” as a former franchisee, and one could assume that Bay would have in fact had knowledge of the management team as of the time that he parted with Shoney’s. Moreover, it is clear from Bay’s posting activity that he monitored and searched the internet for information about Shoney’s after leaving the company. Between his position as a franchisee and his internet activity, the Court finds that Bay either knew of or was reckless in his disregard of the falsity of the statement. In addition, all of the defamatory statements which Bay made under the impersonated identity of Raymond Danner were made with knowledge that they were false in that Bay intentionally misrepresented the author and source of the communications. Accordingly, the Court finds that Bay published each of the foregoing defamatory statements with malice. Bay’s malice is also supported by his evident ill will and animosity toward Shoney’s.

Having established that Bay published with malice false communications about Shoney’s which imputed misconduct or criminal conduct in its trade and business, the Court concludes that such communications amount to defamation per se. Shoney’s is entitled to presumed damages as a natural and probable consequence of the defamation per se. In accordance with the Order Granting Plaintiff’s Motion to Bifurcate Trial, the Court declines to determine the amount of damages at this time.

b. Injurious Falsehood and Tortious Interference

Shoney’s also contends that Bay’s posting activity amounts to injurious falsehood (or trade libel) and tortious interference with prospective business relationships. Injurious falsehood “seeks to protect economic interests rather than reputational interests.” *Sanderson v. Indiana Soft Water Servs., Inc.*, No. IP 00-0459-CHK, 2004 WL 1784755, at *7 (S.D. Ind. July 23, 2004). Consequently, a plaintiff must prove pecuniary loss in addition to the elements of (1) the publication of a false statement; (2) that the publisher intended to cause harm or should have

recognized the likelihood of doing so; and (3) that the publisher knew of the falsity or acted with reckless disregard to its truth. Restatement (Second) of Torts § 623A (1977). In order to prevail on a claim for tortious interference with business relationships, a plaintiff must prove (1) the existence of a valid relationship; (2) the defendant's knowledge of the existence of the relationship; (3) the defendant's intentional interference with that relationship; (4) the absence of justification; and (5) damages resulting from defendant's wrongful interference with the relationship. *Levee v. Beeching*, 729 N.E.2d 215, 222 (Ind. Ct. App. 2000). Based upon the evidence on the record, the Court finds that Shoney's failed to prove by a preponderance of the evidence that Bay's conduct amounted to injurious falsehood or tortious interference. Specifically, the evidence does not sufficiently establish the element of pecuniary loss from injurious falsehood or damages resulting from wrongful interference.

II. Willful and Malicious Under § 523(a)(6)

For the purposes of determining dischargeability under § 523(a)(6), an injury is willful if "deliberate or intentional," and malicious if "the debtor acted 'in conscious disregard of [his] duties or without just cause or excuse; [maliciousness] does not require ill-will or specific intent to do harm.'" *Horsfall*, 738 F.3d at 774. Given the evidence on record and considering Bay's own testimony, conduct, and demeanor at trial, the Court finds that Bays' defamation of Shoney's meets the standards for willful and malicious under § 523(a)(6).

A finding of willfulness here is supported by Bay's ill will and animosity toward Shoney's as revealed through his posting activity and its overwhelmingly negative and hostile message. Bay's animosity was also evident at trial, during which Bay told Kaye Couch that she was a "miserable person," referred to Shoney's counsel as a "dipstick," and assured the Court that he was going to continue to post negative content about Shoney's on the internet. The record leads to the conclusion that Bay not only intended to publish his defamatory communications about Shoney's, but did so with specific intent to harm Shoney's reputation and discourage

people from franchising with the company. The Court, having already found that Bay published defamatory communications with malice, also finds that Bay's defamation of Shoney's was malicious within the context of § 523(a)(6). *In re Cline*, 227 B.R. 828, 832 (Bankr. S.D. Ind. 1998)(noting that the state court could not have found the debtor liable for defamation under Indiana law without finding either that the debtor acted in conscious disregard of his duties or without just cause or excuse in holding the debt nondischargeable under § 523(a)(6)). Accordingly, the Court concludes that the debt from Bay's defamation of Shoney's is excepted from discharge pursuant to § 523(a)(6) as a debt for willful and malicious injury.

III. Injunctive Relief

Shoney's also seeks a permanent injunction against Bay which would enjoin Bay from further defaming Shoney's. The Court granted preliminary injunctive relief at the outset of this adversary proceeding, and, having made a final determination of defamation in this case, the Court now finds that Bay should be enjoined from publishing defamatory communications about Shoney's in the future. Thus, Bay shall be permanently enjoined from posting content about Shoney's attributed to Raymond Danner or anyone other than himself. Bay shall remove any defamatory statements and content from his Ed R. Bay YouTube channel and UF.com, and be permanently enjoined from reposting or republishing those statements or their equivalent.

CONCLUSION

The Court finds that Bay's posts on UF.com referring to Davoudpour as a crook, liar, and snake oil salesman and stating that Shoney's lacked proper management of its Training, Human Resources, and Purchasing operations, as well as all of the content Bay created and published under the impersonated identity of Raymond Danner, amount to defamation per se of Shoney's. The amount of damages from Bay's defamation may be determined at a later date. Further, the Court finds that the debt from Bay's defamation is a debt for willful and malicious injury and is therefore **NONDISCHARGEABLE** pursuant to § 523(a)(6). Finally, the Court finds that

injunctive relief shall be granted to Shoney's as follows: (1) Bay shall be permanently enjoined from posting content about Shoney's attributed to Raymond Danner or anyone other than himself; (2) Bay shall remove any defamatory statements and content from his Ed R. Bay YouTube channel, UF.com, or elsewhere; and (3) Bay shall be permanently enjoined from reposting or republishing those statements or their equivalent. Judgment shall be entered accordingly in favor of Plaintiff Shoney's.

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