STATE OF IDAHO)
County of KOOTENAI)ss

FILED 12-14-2020

AT 1636 O'Clock M
CLERK OF DISTRICT COURT

Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

SNAP! MOBILE, INC., a Delaware corporation,
Plaintiff,
vs.
VERTICAL RAISE, LLC,an Idaho limited liability company, and PAUL LANDERS, individually,
Defendants.

Case No. **CV28-19-8796**

MEMORANDUM DECISION AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO DISMISS (COUNTERCLAIMS OF DEFENDANTS)

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

This matter is before the Court on a Motion to Dismiss filed on November 11, 2020, by plaintiff SNAP! Mobile (Snap) against defendants Vertical Raise and Paul Landers. Snap and Vertical Raise are both in the business of online fundraising. First Am. Compl. 2. This dispute is over Snap's claims that "Vertical Raise and Landers intentionally interfered with Snap's contractual relationship with Clay, Sanford, Hack and other Snap sales representatives by encouraging them to breach their Sales Representative Agreement with Snap". First Am. Compl. 18. Snap claims that "Vertical Raise and Landers intentionally targeted Clay, Sanford, Hack, and other Snap Sales Representatives for the express purpose of inducing Snap's clients to cancel campaigns with Snap and start campaigns with Vertical Raise, in violation of non-solicitation, non-competition, and confidentiality agreements to which Snap's former employees were subject as part of their Sales Representative Agreements". *Id.* at 19.

Snap Filed a Complaint and Demand for Jury and Request for Injunctive Relief on December 10, 2019. Vertical Raise filed an Answer on January 13, 2020. Snap Filed a First Amended Complaint and Demand for Jury Trial and request for Injunctive Relief on September 23, 2020. Vertical Raise and Paul Landers filed an Answer to First Amended Complaint and Counterclaim and Demand for Jury Trial on October 21, 2020, and again on October 22, 2020. On November 11, 2020, Snap filed a Plaintiff's Motion to Dismiss and, Memorandum in Support of Motion to Dismiss. The motion to dismiss seeks an order from this Court dismissing Vertical Raise's and Landers' counterclaims against Snap for 1) violation of the Idaho Consumer Protection Act, 2) tortious (or intentional) interference with a prospective business advantage, and 3) defamation. Mot. to Dismiss 2; Mem. in Supp of Pl.'s Mot. to Dismiss 2. On December 1, 2020, Vertical Raise and Landers filed a Memorandum in Response to Snap Mobile, Inc.'s Motion to Dismiss Vertical Raise, LLC's Counterclaims. Vertical Raise and Landers also filed a Motion to Strike and Motion to Shorten Time, in which they request this Court to strike Snap's motion to dismiss in its entirety as it was filed 13 days in advance of hearing instead of the 14 days required by I.R.C.P. 7(b)(3)(A). Mot. to Strike and Mot to Shorten Time 1-3. On December 4, 2020, Snap filed a Reply Memorandum in Support of Plaintiff's Motion to Dismiss.

Oral argument was held on December 8, 2020. At that hearing, the Court denied Vertical Raise's and Landers' motion to strike filed December 1, 2020, finding that Snap had shown good cause for filing 13 days in advance of hearing and that Vertical Raise and Landers had not shown prejudice in the filing one less day than required by the rule.

II. STANDARD OF REVIEW.

"A motion to dismiss under Rule 12(b)(6) for failure to state a claim must be read in conjunction with Rule 8(a), which sets forth the requirements for pleading a claim and

calls for 'a short and plain statement of the claim showing that the pleader is entitled to relief' and a demand for relief." *Harper v. Harper*, 122 Idaho 535, 536, 835 P.2d 1346, 1347 (Ct. App. 1992) (citing I.R.C.P. 8(a)(1), (2)). In considering a motion to dismiss under I.R.C.P. 12(b), the court may examine only those facts that appear in the complaint and any facts that are appropriate for the court to take judicial notice of. *Hellickson v. Jenkins*, 118 Idaho 273, 276, 796 P.2d 150, 153 (Ct. App. 1990).

The standard for reviewing a dismissal for failure to state a cause of action pursuant to I.R.C.P. 12(b)(6) is the same as the standard for reviewing a grant of summary judgment. *See Idaho Schs. For Equal Educ. v. Evans*, 123 Idaho 573, 578, 850 P.2d 724, 728 (1993); *Rim View Trout Co. v. Dep't. of Water Resources.*, 119 Idaho 676, 677, 809 P.2d 1155, 1156 (1991). Complaints should not be dismissed under I.R.C.P. 12(b) unless the non-moving party can prove no set of facts which would entitle him to relief. *Dumas v. Ropp*, 98 Idaho 61, 62, 558 P.2d 632, 633 (1977). The non-moving party is entitled to have all inferences from the record and pleadings viewed in its favor, and only then may the question be asked whether a claim for relief has been stated. *See Idaho Schs. for Equal Educ.*, 123 Idaho at 578, 850 P.2d at 729; *Miles v. Idaho Power Co.*, 116 Idaho 635, 637, 778 P.2d 757, 759 (1989). And any doubts must be resolved in favor of the survival of the complaint. *Gardner v. Hollifield*, 96 Idaho 609, 610-11, 533 P.2d 730, 731-32 (1975).

The grant of a Rule12(b)(6) motion will be affirmed where there are no genuine issues of material fact and the case can be decided as a matter of law. *See Moss v. Mid-American Fire and Marine Ins. Co.*, 103 Idaho 298, 302, 647 P.2d 754, 758 (1982); *Eliopulos v. Idaho State Bank*, 129 Idaho 104, 107-08, 922 P.2d 401, 404-05 (Ct. App.1996). When reviewing an order of the district court dismissing a case pursuant to

Idaho Rule of Civil Procedure 12(b)(6), "The issue is not whether the plaintiff will ultimately prevail, but whether the party 'is entitled to offer evidence to support the claims.'" *Orthman v. Idaho Power Co.*, 126 Idaho 960, 962, 895 P.2d 561, 563 (1995) (*quoting Greenfield v. Suzuki Motor Co. Ltd.*, 776 F.Supp. 698, 701 (E.D.N.Y.1991)).

III. ANALYSIS.

A. Idaho Consumer Protection Act.

First, Snap argues that the Idaho Consumer Protection Act does not give rise to the claims asserted by Vertical Raise and Landers. Mem. in Supp. of Pl.s' Mot. to Dismiss 3. Snap argues that, "[t]he claims asserted by Vertical Raise do not arise out of the purchase or lease of goods or services. Accordingly, the claim should be dismissed without leave to amend." Mem. in Supp. of Pl.s' Mot. to Dismiss 4.

Vertical Raise argues that:

> Vertical Raise offers its services for sale to the clients with whom it does business and whose relationships to Vertical Raise Snap has disrupted. (Counterclaim, ¶¶ 6,9, 24-28). Snap's disruption was caused by its disparaging of Vertical Raise's services by making false or misleading representations of fact. Snap's contention that Vertical Raise did not plead the sale of services fails. (Counterclaim, ¶¶ 24-28).

Mem. in Response to Mot. to Dismiss. 4.

Snap argues in their reply brief that:

> While Vertical Raise correctly asserts that it provides "services" to those programs who use Vertical Raise at [sic] its fundraiser provider, because Vertical Raise has not provided services to Snap! , its counterclaim against Snap! should be dismissed. The Idaho Consumer Protection Act deters unfair practices between parties in contract; no such contract existed between Vertical Raise and Snap! , and as such, no such cause of action can be brought against Snap!.

Reply 3.

Based on the pleadings, this Court grants Snap's Motion to Dismiss Vertical Raise's Counterclaim that "Snap and its agents and employees made numerous

unlawful statements that violated Idaho Code 48-601, et seq.", because no genuine issue of material fact exists regarding the contention that the counterclaim asserted by Vertical Raise arises out of the purchase or lease of goods or services from Snap. Idaho Code 48-608(1) of the "Idaho Consumer Protection Act" reads:

> Any person who purchases or leases goods or services and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by this chapter, may treat any agreement incident thereto as voidable or, in the alternative, may bring an action to recover actual damages or one thousand dollars ($1,000), whichever is the greater…

This Court agrees with Snap's argument that, "[w]hile Vertical Raise correctly asserts that it provides 'services' to those programs who use Vertical Raise a[s] its fundraiser provider, because Vertical Raise has not provided services to Snap!, its counterclaim against Snap! should be dismissed." Reply 3. Vertical Raise an Landers appear to be arguing that they have provided services to clients, and even though these clients do not include Snap, the fact that they have provided services to someone, this somehow satisfies the requirement of the Consumer Protection Act that a moving party "purchases or leases goods or services" I.C. 48-608(1). This Court finds that the plain language of the Idaho Consumer Protection act requires that such purchases or leases of goods and services must be in regards to the party the claim is being brought against. Furthermore, this Court finds that this conclusion by Vertical Raise and Landers that an action can be brought under the Consumer Protect Act against a party that is not in privity to a contract between the parties, is illogical, based on a plain reading of the Idaho Consumer Protection Act and *Taylor v. McNichols*. This last point is argued further by both parties below.

Snap argues that:

> Further, to have standing under the Idaho Consumer Protection

Act, "the aggrieved party must have been in a contractual relationship with the party alleged to have acted unfairly or deceptively. " Taylor v. McNichols, 149 Idaho 826, 846, 43 P.3d 642, 662. Vertical Raise's counterclaim does not allege any contractual relationship with Snap as a basis for its ICPA claim and is therefore facially deficient. See *Id.* ("It is clear from [Appellant's] complaints that he is not alleging that he entered into a contractual relationship with Respondents. Therefore, [Appellant's] complaints have failed to state claims for relief under the ICPA."). Although the failure to plead a contractual relationship with Snap is by itself a sufficient basis to dismiss the IPCA claim, it is clear from Vertical Raise's counterclaim that Vertical Raise had not even entered a contractual relationship with any program that chose to use Snap or any other fundraising program. (See, Answer and Counterclaim, pp. 14, 15, 16.) Accordingly, the claim should be dismissed without leave to amend.

Id. at 4-5.

Vertical Raise argues that:

If this Court holds that the Consumer Protection Act claim requires privity of contract between the parties to this litigation, Res Judicata will apply to any future motion to dismiss and shall entitle Vertical Raise to dismissal of Snap's same cause of action on the same grounds.

Mem. in Response to Mot. to Dismiss 5.

Snap argues in their Reply brief that:

Vertical Raise had no such contractual relationship with the programs for which it alleges Snap! violated of the Idaho Consumer Protection Act; Snap! did, in fact, have such contractual relationships. Accordingly, Vertical Raise's counterclaim fails as it failed to plead a contractual relationship with any program that chose to use Snap! or any other fundraising program instead of Vertical Raise. Taylor v. McNichols, 149 Idaho 826, 846, 43 P.3d 642, 662 (2010) (emphasis added). Accordingly, the counterclaim should be dismissed and is not subject to res judicata as Vertical Raise incorrectly alleges.

Reply 4.

In *Taylor v. McNichols,* 149 Idaho 826, 243 P.3d 642 (2010), the Idaho Supreme

Court held:

In order to have standing under the Idaho Consumer Protection Act (ICPA), I.C. § 48–601, *et seq.,* the aggrieved party must have been in a contractual relationship with the party alleged to have acted unfairly or deceptively. *See* I.C. 48–608(1) ("Any person who purchases or leases

> goods or services and thereby suffers ..."); *Haskin v. Glass,* 102 Idaho 785, 788, 640 P.2d 1186, 1189 (Ct.App.1982) (holding "that a claim under the ICPA must be based upon a contract").

149 Idaho at 846, 243 P.3d at 662.

Additionally, based on the pleadings, this Court finds that Snap and Vertical Raise have not entered into a contract. Vertical Raise does not argue that a contract existed in their Answer to First Amended Complaint and Counterclaim, or any other pleadings. As held in *Taylor v. McNichols*, "In order to have standing under the Idaho Consumer Protection Act (ICPA), I.C. § 48–601, *et seq.*, the aggrieved party must have been in a contractual relationship with the party alleged to have acted unfairly or deceptively." 149 Idaho at 846, 243 P.3d at 662. For the reasons described above, Vertical Raise's Counterclaim for Violation of the Idaho Consumer Protection Act (Idaho Code § 48-601, et seq.) is dismissed.

B. Intentional Interference with an Economic Advantage.

Next, Snap argues that Vertical Raise and Landers' claim of intentional interference with economic advantage fails to plead the necessary elements and should be dismissed without leave to amend. Mem. in Supp. of Pl.s' Mot. to Dismiss 5-7. Snap argues that:

> However, Vertical Raise does not plead that it had ongoing contracts with Monarch High School, Piedmont Hills High School, or any other customer. Instead, the nature of Vertical Raise's business is that once a team creates a fundraising page with Vertical Raise, the "fundraising director" (i.e., the sales representative) then goes onsite to help launch the campaign. Until the program is launched, no money exchanges hands. As Vertical Raise knows—by its own actions against Snap in violation of Snap's sales representatives' non-compete agreements—Vertical Raise's goal is to attack campaigns set to launch by competing organizations in an effort to get the organization to change fundraising provider. With respect to Monarch High School, Piedmont High School, and any other "client" as alleged by Vertical Raise, Vertical Raise did not have the required "existence of an economic expectancy" at the time the organization chose to not use Vertical Raise as its fundraising provider. Accordingly, Vertical Raise's claim of intentional interference with

economic advantage fails to meet the prima facia elements and should be dismissed without leave to amend.

Id. at 6-7.

Vertical Raise argues that, "Vertical Raise has pled that it had a valid economic expectancy arising from the relationships it had with its clients before Snap Interfered." Mem. in Response to Mot. to Dismiss 5-6.

Snap argues in their Reply brief that:

> While an "enforceable contract need not be shown to exist, just a valid economic expectancy," the claimant must demonstrate that it had a truly prospective or potential contract with a third party; that the agreement was a close certainty; and that the contract was not speculative. 44B Am. Jur. 2d Interference 3. Here, Vertical Raise has failed to plead the existence of a valid economic expectancy. Instead, Vertical Raise's counterclaim provides plain evidence that Vertical Raise systematically has attempted to interfere with and is continuing to attempt to interfere in Snap! 's existing valid expectancies, while trying to unjustifiably deflect Vertical Raise's improper conduct onto Snap!. A great example of this is Vertical Raise's claims that Snap! interfered in its relationship with Piedmont Hills High School even though the Vertical Raise contractor soliciting the program was a former Snap! employee who serviced the program while at Snap!. Accordingly, Vertical Raise had no valid economic expectancy in the relationship with Piedmont Hills, as any interaction between the former Snap! employee and Piedmont Hills would have been in violation of the former Snap! employee's contractual obligations. Accordingly, the claim fails to meet the prima facie elements and should be dismissed.

Reply 4-5. Snap initially argued that:

> even if Vertical Raise had the requisite economic expectancy in the named organizations, the alleged interference by individual sales representatives employed by Snap was not wrongful beyond the fact of the alleged interference of itself. As discussed below, the alleged statements made by Snap's sales representatives to the organizations about Vertical Raise's legal embroilment were true. The organizations had a right to not only know about Vertical Raise's legal issues, but also had the right to independently choose Snap as its fundraising provider based on this knowledge, no matter where ascertained. Snap's engagement of these programs was not for the sole design of injuring Vertical Raise or destroying its business, but rather, as an increase in its own business development. Downey Chiropractic Clinic v. Nampa Restaurant Corp., 127 Idaho 283, 284, 900 P.2d 191, 194 (1995). "The mere pursuit of one's own business purposes is not sufficient to support

> an inference of an improper motive to harm the plaintiff." Syringa Networks, LLC v. Idaho Dep't. of Admin., 155 Idaho 55, 65, 305 P.3d 499, 509 (2013)' See also Trumble v. Farm Bureau Mut. Ins. co. of Idaho, 166 Idaho 132, 456 P.3d 201, 221 (2019), reh'g denied (Jan. 30, 2020) ("Pursuing one's own business interest cannot support an inference of an improper motive to harm.").
>
> Further, Snap's engagement of the businesses was not done through violence, threats or intimidation, deceit or misrepresentation, bribery, unfounded litigation, defamation (as discussed further below), or disparaging falsehood. Downey, 127 Idaho at 284, 900 P.2d at 194. As such, Vertical Raise and Paul Landers' intentional interference claim does not meet the prima facie elements and should be dismissed without leave to amend.

Mem. in Supp. of Pl.s' Mot. to Dismiss 7-8.

Vertical Raise argues that Snap's Motion to dismiss Vertical Raise's Counterclaim for Tortious Interference with Prospective Business Advantage, must be properly considered under a summary judgment standard. Mem. in Response to Mot. to Dismiss 8. Vertical Raise goes on to argue that:

> In order for Snap to prevail in such a motion, the court would have to draw all reasonable inferences from the evidence in favor of Vertical Raise, decide that no genuine issue of material fact exists, and that Snap is entitled to judgment as a matter of law. Further, Snap would have been required to comply with Rule 56 by filing and noticing its pending motion 28 days before the hearing, which it failed to do...
>
> Vertical Raise is entitled to time to take the depositions of Snap sales agents, Brittney Bowden, Tyler Palmer, Brandon Moreno, Jason Brissette, and others to more fully determine the substance and scope of the statements made by Snap to Vertical Raise's clients that support its counterclaims.

Id.

Both parties, at varying times in their pleadings, have referred to this cause of action as "Intentional Interference with Prospective Economic Advantage" (Mem. in Supp. of Pl's. Mot. to Dismiss 5; Mem. in Response to Mot. to Dismiss 5), as well as "Tortious Interference with Prospective Business Advantage". Mem. in Supp. of Pl's. Mot. to Dismiss 2; Answer to First Amended Compl. and Counterclaim 17. This confusion may also have arisen through the fact that this type of cause of action is

referred to in case law, such as *Cantwell v. City of Boise,* as "intentional interference with a prospective economic advantage". 146 Idaho 127, 137–38, 191 P.3d 205, 215–16 (2008). This Court finds that these phrases are being used interchangeably to refer to the same cause of action that is titled in Vertical Raise's Answer to First Amended Complaint and Counterclaim as "Tortious Interference with Prospective Business Advantage". Answer to First Amended Compl. and Counterclaim 17.

This Court finds that a genuine issue of material fact exists as to Vertical Raise's counterclaim for tortious (or intentional) interference with prospective business (or economic) advantage. In *Cantwell v. City of Boise*, the Idaho Supreme Court found that "[t]o establish a claim for intentional interference with a prospective economic advantage" a claimant must show:

> (l) The existence of a valid economic expectancy; (2) knowledge of the expectancy on the part of the interferer; (3) intentional interference including termination of the expectancy; (4) the interference was wrongful by some measure beyond the act of the interference itself; and (5) resulting in damage to the plaintiff whose expectancy has been disputed.

146 Idaho 127, 137–38, 191 P.3d 205, 215–16 (2008).

Vertical Raise alleges in their Counterclaim that:

> 30. Vertical Raise had relationships with Monarch High School, Piedmont Hills High School and other customers that were known to Snap.
> 31. Several of those customers were expected to run fundraisers with Vertical Raise and Vertical Raise had a valid economic expectancy to the same.
> 32. Snap was aware of such economic expectancy.
> 33. Snap and its agents and employees intentionally interfered with that economic expectancy and induced termination thereof.
> 34. Snap and its agents and employees' interference with such economic expectancy was unlawful and Snap is vicariously liable for the acts of its agents and employees.
> 35. As a result of Snap and its agents and employees' interference, Vertical Raise has been damaged in an amount to be proven at trial.

Answer to First Am. Compl. and Countercl.18. Additionally, "Vertical Raise argues that

"Vertical Raise has pled that it had a valid economic expectancy arising from the relationships it had with its clients before Snap Interfered." Mem. in Response to Mot. to Dismiss 5-6.

This Court finds that Vertical Raise has plead a prima facie case for tortious interference with prospective business advantage. Vertical Raise's Counterclaim asserts all the elements for a prima facie case, and Vertical Raise argues as such in their response. Mem. in Response to Mot. to Dismiss 5-6. The Court understands Snap's argument that "Until the [Vertical Rise] program is launched, no money exchanges hands" (Mem. in Supp. of Pl.s' Mot. to Dismiss 6), but this Court is not persuaded that such fact would necessarily result in a dismissal of Vertical Rise's counterclaim for tortious interference with prospective business advantage. This Court also understands Snap's argument that any statements its employees made about Vertical Rise's legal or financial difficulties may be true, but to get to that point, this Court must look outside the pleadings. This may be an appropriate issue for summary judgment, but this Court cannot grant a dismissal of this counterclaim at this juncture.

Snap argues that "[t]he mere pursuit of one's own business purposes is not sufficient to support an interference of an improper motive to harm the plaintiff." Mem. in Supp. of Pl's. Mot to Dismiss. 5 (citing *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 179, 923 P.2d 416, 424 (1996). This Court finds that in order for this Court to consider Snap's argument against an improper motive, evidence by means of affidavits or declarations would have to be presented to this Court. Such an inquiry would bring this motion firmly in in the grounds of a rule 56 motion for summary judgment. Snap has plead this motion as a motion to dismiss, and continually asserted that this is not a motion for summary judgment. This Court finds that, based on the pleadings, Vertical Raise has presented a prima facia case for tortious interference with prospective

business advantage. For these reasons, the motion to dismiss Vertical Raise's and Landers' tortious interference with prospective business advantage claim is denied.

C. Defamation.

Finally, Snap argues that Vertical Raise's and Landers' counterclaim of defamation should be dismissed as the alleged statements against them were not defamatory. *Id.* at 8. Snap argues that the alleged statements made by Snap's sales representatives were true and protected by the first amendment. *Id.* at 9-10. Furthermore, Snap argues that:

> At the time of the Snap sales representatives' alleged statements, Vertical Raise was not only engaged in the current litigation, but its employees had been ordered by the Washington Superior Court to stop violating the terms of their prior employment contracts with Snap. As such, these statements, if made, were true and not defamatory, and the counterclaim should be dismissed.

Id. at 11. Additionally, Snap argues that, the alleged defamatory statement that Vertical Raise will be going bankrupt is a statement of opinion, and not defamatory. *Id.* at 11. Snap argues that:

> Here, the statement that "Vertical Raise will be going bankrupt" could not be proven false at the time the statement was made, nor could it be proven false currently. Additionally, there is no indication that the Snap sales representative who allegedly made the statement was privy to, or asserted he/she had "private, first-hand knowledge which substantiates the opinion he expresses." Weimer, at 352. Further, subsequent to that statement, a former Snap employee then and now engaged as an agent of Vertical Raise did file for bankruptcy, rendering the alleged statement true.

Id.

Vertical Raise argues that Snap's statements are defamation *per se* and defamation by implication, which are not constitutionally protected speech." Mem. in Response to Mot. to Dismiss. 9. Additionally, Vertical Raise argues that Snap's claim that, "the statements are not defamatory because they are true, and in so doing asks

the court to consider evidence beyond the Counterclaim… By supporting their motion with these alleged 'facts,' which Vertical Raise disputes, Snap departs from I.R.C.P. 12(b)(6) and asks the court to consider evidence and make factual finding." *Id.* at 12. Vertical Raise goes on to argue:

> This requests [sic] strays into the realm of I.R.C.P. 56. *See Gardner*, 96 Idaho at 611, 533 P.2d at 732; *see also Ritchie*, 342 F.3d at 908; I.R.C.P. 12(d). In considering these statements, the court must review this motion from a summary judgment standard and consider them all in the light most favorable to the non-moving party, Vertical Raise. *See Gibson*, 142 Idaho at 752, 133 P.3d at 1217; I.R.C.P. 56(c). Snap has not complied with Rule 56 and, therefore, its motion must be dismissed.

Id.

Snap argues that "[t]he statements as alleged do not raise a right to relief above the speculative level, as required." Mem. in Supp. of Pl.'s Mot. to Dismiss 12. Snap argues that:

> Here, Vertical Raise's conclusory allegation that Snap or its employees engaged in "other defamatory, false, misleading or deceptive representations" does not appraise Snap of the substance of those statements or permit Snap to meaningfully respond. Accordingly, the statements fail to meet the pleading requirements of Rule 8 and fail to state a claim upon which relief can be granted. Vertical Raise and Paul Landers' defamation claim should therefore be dismissed without leave to amend.

Mem. in Supp. of Pl.'s Mot. to Dismiss 12-13.

Vertical Raise argues that:

> Vertical Raise's statements "upon information and belief" were based reasonably in facts known to Vertical Raise at the time and recited in the Counterclaim. (Counterclaim, ¶¶ 12, 13, 16-20). It is Vertical Raise's intent to investigate these allegations further, and Vertical Raise believes that evidence proving the same will be revealed through the discovery process.
>
> If the court makes a ruling on this motion under the I.R.C.P. 12(b)(6) or under I.R.C.P. 56, the court will consider all of Vertical Raise's allegations in the counterclaim as true and then determine Vertical Raise has stated an underlying cause of action and the facts from which that cause of action arises. *Navo v. Bingham Mem 'l Hosp.*, 160 Idaho at 375,

> 373 P.3d at 693; Gardner, 96 Idaho at 611, 533 P.2d at 732. Vertical Raise's allegations go far beyond mere speculation, hearsay, and conclusions, and they meet the standard under Idaho Law. Vertical Raise has adequately pled a prima facie defamation cause of action for which relief can be granted and dismissal or judgment dismissing the same is inappropriate.

Mem. in Response to Mot. to Dismiss 14.

This Court finds that Vertical Raise has asserted a prima facia case for defamation in their Answer to First Amended Complaint and Counterclaim. Based on the pleadings in this case, this Court finds that an issue of material fact exists regarding Vertical Raise's counterclaim of defamation.

The Idaho Supreme Court has found that, "In a defamation action, a plaintiff must prove that the defendant: (1) communicated information concerning the plaintiff to others; (2) that the information was defamatory; and (3) that the plaintiff was damaged because of the communication." *Clark v. The Spokesman-Review*, 144 Idaho 427, 430, 163 P.3d 216, 219 (2007).

Vertical Raise stated in their Answer to First Amended Complaint and Counterclaim that:

> 43. Vertical Raise seeks entry of declaratory relief, pursuant to the Uniform Declaratory Judgments Act, Idaho Code 10-1201, et seq., declaring and decreeing that the restrictive covenants contained with the Sale Representation Agreements alleged in the FAC are void and unenforceable.
> 44. Vertical Raise seeks such other declaratory relief consistent with that sought in the preceding paragraph.
> Claim 5: Reservation of Right to Seek Punitive Damages
> 45. Vertical Raise reserves the right to seek leave of this Court to amend its
> Counterclaim to assert a claim for punitive damages pursuant to Idaho Code 6-1604.
> Costs and Attorney Fees
> 46. Because of the averments contained herein, Vertical Raise has been required to obtain legal counsel and is entitled to recover its costs and reasonable attorney fees pursuant to Idaho law, including but not limited to under Idaho Code 12-121 and 48-608(5).

Answer to First Amended Compl. and Counterclaim 18-19.

Snap has argued that the alleged "statements that Vertical Raise was going bankrupt" were in fact true and "[t]he statements as alleged do not raise a right to relief above the speculative level, as required." Mem. in Supp. of Pl.'s Mot. to Dismiss 12. These arguments are not going to be enough to succeed on a motion to dismiss. To ascertain whether statements were true or false, or were opinion, this Court would have to go beyond the pleadings. These arguments may be well taken at a summary judgment motion. But at this point, for purposes of the motion to dismiss, Vertical Raise has presented a prima facie case of defamation. When reviewing an order of the district court dismissing a case pursuant to Idaho Rule of Civil Procedure 12(b)(6), "The issue is not whether the plaintiff will ultimately prevail, but whether the party 'is entitled to offer evidence to support the claims.'" *Orthman v. Idaho Power Co.*, 126 Idaho 960, 962, 895 P.2d 561, 563 (1995) (*quoting Greenfield v. Suzuki Motor Co. Ltd.*, 776 F.Supp. 698, 701 (E.D.N.Y.1991)). This Court finds that Vertical Raise is entitled to offer evidence to support its prima facie claim of defamation. For the reasons described above, Snap's motion to dismiss Vertical Raise's Counterclaim of defamation is denied.

IV. CONCLUSION AND ORDER.

For the reasons discussed above, Snap's motion to dismiss Vertical Raise's counterclaim of Snap's violation of the Idaho Consumer Protection Act (Idaho Code § 48-601, et seq.) is granted. Snap's motion to dismiss Vertical Raise's counterclaims of tortious or intentional interference with prospective business advantage and defamation are denied.

IT IS HEREBY ORDERED Snap's Motion to Dismiss Vertical Raise's counterclaim of Snap's violation of the Idaho Consumer Protection Act (Idaho Code

§ 48-601, et seq.) is **GRANTED.**

IT IS FURTHER ORDERED Snap's Motion to Dismiss Vertical Raise's counterclaims of tortious interference with prospective business advantage and defamation are **DENIED.**

Entered this 14th day of December, 2020.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 14 day of December, 2020, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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