IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CONSUELO GALLARDO,	*	
Plaintiff	*	
v.	*	Civil Action No. 08-cv-00392 (JFM)
FEDEX KINKO'S OFFICE & PRINT SERVICES, INC.,	*	
Defendant	*	

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MEMORANDUM

Plaintiff Consuelo Gallardo ("Gallardo") has brought this action against defendant FedEx Kinko's Office and Print Services, Inc. ("FedEx Kinko's"), alleging gratuitous bailment (Count II), trespass to chattels or trover and conversion (Count III), and defamation or false light (Count IV) for destroying a personal document she left at a FedEx Kinko's facility.[1] Defendant has moved to dismiss plaintiff's complaint in its entirety. Defendant's motion will be granted.

I.

The facts alleged in plaintiff's complaint are as follows. At around 6:30 p.m. on January 15, 2007, Gallardo and her daughter, Adriana Gallardo ("Adriana"), went to a FedEx Kinko's store in Salisbury, Maryland to photocopy Gallardo's I-551 alien registration document ("Green Card"), which indicates her status as a lawful permanent resident of the United States. (Compl. ¶¶ 4, 15.) When Gallardo and Adriana left the store, plaintiff "inadvertently [left] the original on

[1] Count I of plaintiff's complaint, labeled "Respondeat Superior," is not listed here because it does not allege a freestanding tort, but rather provides facts to support the other alleged torts and an overarching theory of vicarious liability. (Compl. ¶¶ 4-17.)

the counter . . . ." (*Id.* at ¶ 6.)

The next day, Adriana returned to the FedEx Kinko's location to attempt to retrieve her mother's Green Card. (*Id.* at ¶ 7.) Initially, a FedEx Kinko's employee told her the document "was in the custody of the store in a safety box or locker." (*Id.*) When the employees looked in the locker, however, the card was not there. (*Id.* at ¶ 8.) The FedEx Kinko's staff then conferred with one another and determined that the Green Card had actually been torn into three pieces and discarded in the wastebasket. (*Id.*) A manager informed Adriana that a FedEx Kinko's employee had torn up her mother's Green Card, and then returned the shredded card to her. (*Id.* at ¶¶ 8-9.)

Adriana became very "emotionally upset" when she recovered the torn Green Card. (*Id.* at ¶ 10.) She called Gallardo, who also became very "emotionally upset," and immediately went to the FedEx Kinko's location with her husband and a friend. (*Id.*) Gallardo alleges that, in addition to upsetting her, the destruction of her Green Card affected her in a few ways. First, plaintiff states that her "legal status and constitutional protections and freedoms were placed in jeopardy as she had no verifiable proof of legal residency," which "can result in immediate loss of employment, affect employability, and subject the Plaintiff to immediate detention by the Department of Homeland Security . . . ." (*Id.* at ¶ 11.) In addition, plaintiff was forced to delay for several months her plans to travel to Mexico and "incurred additional costs of hiring an attorney and paying government fees to obtain a replacement Green Card." (*Id.* at ¶¶ 12-14.)

II.

Defendant moves to dismiss each of plaintiff's four counts for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). In *Bell Atlantic Corp. v. Twombly*, 127 S.

Ct. 1955, 1974 (2007), the Supreme Court held that, in order to survive a motion to dismiss, a plaintiff must plead plausible, not merely conceivable, facts in support of her claim.[2] The complaint must state "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1965. Under Rule 8(a) of the Federal Rules of Civil Procedure ("Rule 8(a)"), a plaintiff must provide "fair notice" and the "grounds" on which the claim rests. In considering a motion to dismiss, a court must "accept the factual allegations of the complaint as true and must view the complaint in the light most favorable to the plaintiff." *GE Inv. Private Placement Partners II v. Parker*, 247 F.3d 543, 548 (4th Cir. 2001). Defendant's arguments in favor of dismissing each claim are discussed in turn.

A.

In Count II, plaintiff claims that when a FedEx Kinko's employee destroyed the Green Card Gallardo left at the store, FedEx Kinko's committed the tort of gratuitous bailment (Compl. ¶¶ 18-24), defined as the breach of the duty of care, amounting to gross negligence, for property of another left on your premises. *Mickey v. Sears, Roebuck & Co.*, 196 Md. 326, 76 A.2d 350, 352 (1950). Defendant has moved to dismiss this claim on the ground that Gallardo is contributorily negligent for the destruction of her Green Card and thus precluded from recovering from defendant.[3] (Def.'s Mot. to Dismiss 4.) Contributory negligence, as Gallardo concedes, is a complete bar to recovery for a defendant's negligence. *Harrison v. Montgomery*

[2] Prior to *Twombly*, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), set the standard, granting Rule 12(b)(6) dismissals for failure to state a claim only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

[3] Defendant also argues that Gallardo fails to state a gratuitous bailment claim because a Green Card is not the type of property that can be the subject of such an action. Because defendant develops this argument with respect to the trespass and conversion claim (Count III), this issue will be discussed in the next section.

County Bd. of Educ., 295 Md. 442, 456 A.2d 894, 895 (1983). FedEx Kinko's premises Gallardo's contributory negligence on the fact that she "inadvertently" left her Green Card on the store's counter. (Def.'s Mot. to Dismiss 4.)

"A plaintiff is contributorily negligent when he fails to exercise ordinary and reasonable care for his own protection." *Shofer v. Stuart Hack Co.*, 124 Md. App. 516, 723 A.2d 481, 489 (Md. Ct. Spec. App. 1999) (citing *Menish v. Pollinger Co.*, 277 Md. 553, 356 A.2d 233 (1976)). Here, Gallardo's contributory negligence is clear. The inquiry "focuses on whether the plaintiff failed to exercise ordinary care, determined by what a reasonable person in the plaintiff's position would do under similar circumstances." *Shofer*, 723 A.2d at 489 n.3. By her own admission, she left her Green Card on the counter of a FedEx Kinko's store and failed to follow-up to retrieve it until the following day. Therefore, the only issue here is whether plaintiff alleges conduct by defendant that exceeds negligence and thus overcomes the ordinary bar to recovery where contributory negligence is present.

Gratuitous bailment is not an intentional tort, and the fact that a FedEx Kinko's employee is alleged to have intentionally torn the Green Card does not transform it into one. *See* Am. Jur. Torts § 15 (stating that intentional torts "generally require that the actor intended the consequences of the act, not simply the act itself").[4] At most, Gallardo alleges gross negligence

[4] Plaintiff argues that even if the tort of gratuitous bailment does not require an intentional act, she in fact has pled that defendant acted intentionally, therefore negating any contributory negligence defense, because she alleges her Green Card was cut into three pieces, rather than one. (Pl.'s Opp'n 2.) *State Farm Mutual Automobile Insurance Co. v. Hill*, 139 Md. App. 308, 775 A.2d 476, 479 (Md. Ct. Spec. App. 2001), upon which plaintiff relies in support of this argument, involved a situation where the wrongdoer was alleged to have "intentionally injured" the plaintiff. Here, an inference of "intention to injure" cannot be drawn from the mere fact that plaintiff's Green Card had been cut into several pieces. An equally plausible inference is that whoever cut the Green Card into pieces wanted to ensure that it could not be reassembled into a single document to plaintiff's detriment.

on the part of FedEx Kinko's, the degree of breach required for a gratuitous bailment claim, and "Maryland never has held that contributory negligence does not bar gross negligence," but "[t]o the contrary ha[s] suggested just the opposite in dicta." *Ramos v. S. Md. Elec. Co-op., Inc.*, 996 F.2d 52, 54-55 (4th Cir. 1993).

Furthermore, even if gross negligence is sufficient to overcome the contributory negligence bar, it is not clear that plaintiff's complaint pleads gross negligence on the part of FedEx Kinko's in destroying Gallardo's Green Card. "In Maryland, to establish gross negligence, a plaintiff must show 'a premeditated decision, deliberately arrived at, by an indifferent [actor] in possession of facts which should have indicated almost certain harm to others.'" *Id.* at 55 (quoting *Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 297 A.2d 721, 734 (1972). The complaint, which includes no specific facts regarding the identity or circumstances surrounding the employee tearing up the Green Card, does nothing to substantiate a conclusion that it was a premeditated or deliberate act by an indifferent actor. Accordingly, the degree of defendant's breach alleged is not sufficient to negate a contributory negligence defense.

Gallardo additionally argues that even if the complaint suggests contributory negligence, it is inappropriate to make that determination at the motion to dismiss stage because the existence of contributory negligence is "a decision for the jury." (Pl.'s Opp'n 3 (citing *Collins v. Gui-Fu Li*, 176 Md. App. 502 (Md. Ct. Spec. App. 2007)).) Plaintiff is correct that "[o]rdinarily, the question of whether the plaintiff has been contributorily negligent is for the jury, not the judge, to decide. . . ." *Campbell v. Baltimore Gas & Elec. Co.*, 95 Md. App. 86, 93-94, 619 A.2d 213, 216 (Md. Ct. Spec. App. 1993). Still, a court may "rule that there was contributory negligence as a matter of law when the undisputed facts of the case support such a finding as a

matter of law." *Id.* (finding contributory negligence as a matter of law on a motion for j.n.o.v.). There is a high standard, however, for deciding contributory negligence as a matter of law: "[t]he issue of contributory negligence cannot be taken from the jury unless no reasonable person could reach a contrary conclusion." *May v. Giant Food, Inc.*, 122 Md. App. 364, 712 A.2d 166, 175 (Md. Ct. Spec. App. 1998). That high standard has been met: the undisputed facts that Gallardo "inadvertently" left her Green Card on the counter and did not seek to recover it until the following day compel a finding that Gallardo was contributorily negligent.

B.

Count III of plaintiff's complaint alleges trespass to chattels or, alternatively, trover and conversion. (Compl. ¶¶ 25-29.) Trespass to chattels and conversion involve the same conduct – exercising control over another's property; the distinction is the degree of control exercised. Specifically, "[a] trespass is defined as an intentional or negligent intrusion upon or to the possessory interest in property of another," *Bittner v. Huth*, 162 Md. App. 745, 876 A.2d 157, 161 (Md. Ct. Spec. App. 2005), while conversion is established where a "defendant has 'wrongfully exercised ownership of, or a control or dominion over, personal property to which he has no right of possession at the time,'" *Bavarian Nordic A/S v. Acambis Inc.*, 486 F. Supp. 2d 354, 362-63 (D. Del. 2007) (applying Maryland law). *See also Staub v. Staub*, 37 Md. App. 141, 144, 376 A.2d 1129, 1132 (Md. Ct. Spec. App. 1977) ("[C]onversion [is] an exercise of the defendant's dominion or control over the chattel, as distinguished from [trespass, which is] a mere interference with the chattel itself, or with the possession of it. . . . [T]he difference between the two becomes almost entirely a matter of degree."). According to Gallardo's complaint, FedEx Kinko's committed either trespass to chattels or conversion when its employee

"intentionally and without authority interfered with the Plaintiff's Green Card by mutilating and destroying the same." (Compl. ¶ 26.)

Defendant argues that Count III should be dismissed because Gallardo fails to allege a property interest that is appropriately the subject of such a claim. According to FedEx Kinko's, plaintiff's Green Card is not the type of "personal property" that is actionable in a trespass to chattels or conversion claim.[5] In general, with respect to intangible property rights like those alleged here, Maryland only recognizes conversion claims that involve "the type of intangible property rights that are merged or incorporated into a transferable document." *Vaughn*, 806 A.2d at 794 (quoting *Allied Inv. Corp v. Jasen*, 354 Md. 547, 731 A.2d 957, 965 (1999)); *Bavarian Nordic A/S*, 486 F. Supp. 2d at 362 n.9; *see Alliance for Telecomms. Indus. Solutions, Inc. v. Hall*, 2007 WL 3224589, at *14 (D. Md. Sept. 27, 2007) ("Maryland has not been as expansive as some states in recognizing intangible rights for the purposes of conversion; it has refused 'to extend the tort . . . to cover completely intangible rights,' limiting recognition to those intangible rights where ownership is established, transferred, or maintained through documentation. . . .").[6]

Defendant contends that because a Green Card is not a document into which intangible property rights are merged, it is not a proper subject of a trespass or conversion action. A Green

[5] FedEx Kinko's also argues that the gratuitous bailment claim, if not properly dismissed on a contributory negligence theory, could be dismissed on this ground. (Def.'s Mot. to Dismiss 4.)

[6] Plaintiff claims that because all of the cases defendant cites apply to trover and conversion, not trespass, defendant lends no support to the position that a trespass action cannot lie where it alleges intangible property rights embodied in a Green Card. (Pl.'s Opp'n 4, 8.) Because the distinction between trespass and conversion relates to the degree of a defendant's interference with plaintiff's property, not the definition of "property," however, it is fair to assume that the same requirements for intangible property rights apply to both torts.

Card, according to defendant, "serves only to symbolize immigration status," "has no intrinsic value," and cannot be sold or transferred; in other words, "the fact that the Green Card was itself destroyed did not destroy Plaintiff's rights as a legal resident alien." (Def.'s Mot. to Dismiss 5-6.) In support of its argument that a Green Card does not incorporate the type of intangible property rights contemplated in a tort for conversion or trespass, defendant cites *Robinson v. St. Clair County*, 144 Ill. App. 3d 118, 493 N.E. 2d 1154 (App. Ct. of Ill. 1986). In *Robinson*, the plaintiff premised her bailment and conversion claims on the confiscation of "a medical card for aid to families with dependent children," without which her infant son was unable to obtain medical care and ultimately died of pneumonia. *Id.* at 1154-55. The court dismissed the plaintiff's action, holding that

> [t]he Medical Eligibility Card, or green card, is not property and does not entitle its holder or the persons named thereon to property. It is symbolic of a status; it reflects the entitlement to medical assistance . . . . The green card has no intrinsic value and it does not represent anything of intrinsic value. It cannot be sold, exchanged, assigned, or otherwise transferred, and it cannot be pledged or given as security.

Id. at 1156.

FedEx Kinko's argues that the "facts of this case are indistinguishable" from the facts in *Robinson*, and that, because Gallardo's "Green Card is not a transferable document, it cannot be the subject of a claim for bailment, trespass, trover or conversion." (Def.'s Mot. to Dismiss 6-7.)

Plaintiff, in turn, argues that whether a Green Card is properly the subject of a trespass or conversion suit is an issue of first impression in Maryland, and attempts to distinguish it from the underlying document and holding in *Robinson*. She cites *Liddle v. Salem Sch. Dist.*, 249 Ill. App. 3d 768, 619 N.E. 2d 530, 532 (App. Ct. Ill. 1993), where the court found a letter, withheld

from a high school student for seven months, that informed the student he was being recruited for a basketball scholarship, properly the subject of a conversion claim. In distinguishing the scholarship letter, the *Liddle* court stated that "[w]hile the [medical eligibility] card in *Robinson* contained information necessary to process an application for medical benefits, the wrongful retention, loss, or destruction of the card could not deprive the holder of access to those benefits." *Id.* The plaintiff in *Liddle*, on the other hand, "did not know of his status as a person being considered for a scholarship. Thus, it is this *information* that is claimed to constitute the property that was the subject of the bailment." *Id.* (emphasis in original).

Plaintiff makes a series of arguments for why her Green Card is more similar to the scholarship letter in *Liddle* than the Medical Eligibility Card in *Robinson*. First, she argues that the Green Card, which "is expected to be used by the holder in nearly all transactions of daily life where proof of lawful presence and identity are necessary," embodies a broader spectrum of rights than the medical eligibility card, which only connotes eligibility for medical services. (Pl.'s Opp'n 6.) Where a medical card is misplaced, a medical provider can make a telephone call to confirm an individual's entitlement; plaintiff points out that "[t]here is no phone number the employer can call to verify an alien's legal status in the United States." (*Id.*) Plaintiff also points to the Green Card's photo-identification feature as "inextricably [linking it] to its holder like a driver's license or passport." (*Id.*) Finally, plaintiff details the privileges and benefits that accompany permanent legal residency status, arguing that "the multitude of intangible property interests that flow from lawful permanent residency coalesce to make the green card . . . more than just a symbol of status . . . [because] it imbues the holder with, among other things, the right to work and lawfully receive compensation." (*Id.* at 7-8.)

Contrary to plaintiff's arguments, a Green Card is more akin to the medical eligibility card in *Robinson* than the scholarship letter in *Liddle*. The individual rights that are symbolized by a Green Card are not extinguished if the Green Card is destroyed any more than an individual's status as a licensed driver is destroyed with his driver's license.[7] In either case, the document's renewal may inconvenience the holder, but it does not destroy the status, and it can not be transferred to confer rights or status on another. In addition, unlike the scholarship letter in *Liddle*, the loss or destruction of Gallardo's Green Card did not deprive her of any information or knowledge. Gallardo was aware of her status as a permanent resident and could obtain a new Green Card confirming that status through administrative channels.[8] Accordingly, her claim for trespass or conversion cannot lie and will be dismissed.

C.

In her final count, plaintiff alleges defamation or, alternatively, false light, claiming that the employee's destruction of her Green Card "constitutes a non-verbal defamatory statement that exposed the Plaintiff to public scorn, hatred, contempt or ridicule." (Compl. ¶¶ 30-37.) Under Maryland law, to state a claim for defamation against a private person, a plaintiff must allege "(1) that the defendant made a defamatory communication to a third person; (2) that the statement was false; (3) that the defendant was at fault in communicating the statement; and (4)

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[7] Indeed, later in her opposition, plaintiff concedes this very point, stating, "The Defendant, through its employee's action[, did] not legally alter[] her status in the eyes of the government." (Pl.'s Opp'n 11.)

[8] Defendant points out that "[i]ndeed, the government posts a form on its website to obtain a new green card when one has been mutilated or destroyed," and cites Form I-90, Application to Replace Permanent Resident Card, which defendant states is available at http://www.uscis.gov. (Def.'s Mot. to Dismiss 6-7.) On that point, plaintiff's only response is that "there is no evidence that this was possible to do without an attorney." (Pl.'s Opp'n 8.)

that the plaintiff suffered harm." *Murray v. UFCW Int'l, Local 400*, 289 F.3d 297, 305 (4th Cir. 2002) (citing *Samuels v. Tschechtelin*, 135 Md. App. 483, 763 A..2d 209, 242 (2000)). Defendant claims that Gallardo's defamation action should be dismissed for failure to state a claim because the "statement" alleged was (1) not defamatory, (2) not "published," and (3) not a false statement of fact, but rather an unactionable opinion. (Def.'s Mot. to Dismiss 7.) Because I agree with defendant that all three of these essential elements are lacking in plaintiff's complaint, I find that plaintiff has failed to state a claim for defamation.

A statement is "defamatory" if it "tend[s] to expose one to public scorn, hatred, contempt, or ridicule." *Gooch v. Md. Mech. Sys., Inc.*, 81 Md. App. 376, 567 A.2d 954, 961 (Md. Ct. Spec. App. 1990). A plaintiff may allege that a statement that is defamatory *per se* or *per quod*, meaning by insinuation. *M & S Furniture Sales Co. v. Edward J. DeBartola Corp.*, 249 Md. 540, 241 A.2d 126, 127-28 (1968); *Gooch*, 567 A.2d 954, 962 ("Where the words themselves impute the defamatory character, no innuendo is necessary; but otherwise, it is."). An alleged "statement" that involves exclusively conduct and not words, may still be either *per se* or *per quod* defamatory. *M & S Furniture*, 241 A.2d at 128. A statement or conduct is *per quod* defamatory where "[e]xtrinsic facts . . . are necessary to determine the connotation that was understood by third parties to be attached to the alleged defamatory communication." *Gooch*, 567 A.2d at 963; *see M & S Furniture*, 241 A.2d at 127-28 (finding a landlord's conduct of chaining and padlocking both entrances to a tenant's shop to communicate "that the tenant had not paid its honest debts and therefore the landlord had repossessed the premises . . . was not defamatory on its face because the ordinary and natural meaning of the conduct did not necessarily import a defamatory meaning").

As defendant argues, the act of tearing a Green Card into three pieces and discarding it in a trash can "could be interpreted in a variety of different ways, including expressing frustration with the United States Government or with current immigration law and policies." (Def.'s Mot. to Dismiss 8; Def.'s Reply 4 n.2 (listing eight possible meanings of tearing the Green Card).)[9] Where, as here, the conduct is not *per se* defamatory, plaintiff must plead both that the "words or actions were defamatory" by virtue of the surrounding circumstances and that "such words or damage caused actual damage." *M & S Furniture*, 241 A.2d at 127-28; *Gooch*, 567 A.2d at 962. The *M & S Furniture* court found that plaintiff failed to allege defamation where he did not plead circumstances resolving the ambiguity of a locked store to communicate a defamatory statement and dismissed his complaint on that basis and for failure to plead special damages. *M & S Furniture*, 241 A.2d at 129. Gallardo's complaint similarly fails to allege facts to resolve the ambiguity of the Green Card's tearing as an expression intended to expose Gallardo to public scorn, hatred, contempt, or ridicule. Furthermore, Gallardo fails to plead, as required when alleging *per quod* defamation, that the conduct caused actual damages.[10]

Defendant's next argument is that Gallardo's defamation claim fails to allege the required "publication," whereby the statement is "communicat[ed] to a third person who reasonably recognizes the statement as being defamatory." *Gooch*, 567 A.2d at 961. Maryland "ha[s] long

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[9] Plaintiff's disjointed argument that the Green Card's destruction was *per se* defamatory fails. Essentially, plaintiff states that the Green Card is "inextricably linked to the Plaintiff and all of her actions in this country" and that "[t]here is no proximate nexus to reasonably conclude that the defendant's action was anything other than an attack on her legal presence in this country." (Pl.'s Opp'n 9.) This is simply an *ipse dixit* pronouncement that does not overcome that fact that defendant's actions may have been motivated by a host of other factors.

[10] Because plaintiff insists that she has pled *per se* defamation, she ignores the possibility that this could be *per quod* defamation and makes no argument that she has pled – or could plead if given leave to amend – special damages. (Pl.'s Opp'n 9.)

recognized that defamatory statements may be published through actions as well as through written or spoken word." *Caldor, Inc. v. Bowden*, 330 Md. 632, 625 A.2d 959, 970 (1993) (citing *M & S Furniture*, 241 A.2d at 128). Defendant points out that "[t]here is no allegation in the Complaint that the unidentified alleged witness to the act knew the act was specifically referencing the Plaintiff, knew the Green Card belonged to Plaintiff, or 'reasonably recognized' that the tearing of the Green Card had anything to do with the Plaintiff or her immigration status." (Def.'s Mot. to Dismiss 10.)

Gallardo responds that her complaint does satisfy the publication requirement by alleging in paragraphs 15 and 31 that the conduct "occurred on the premises of the Defendant . . . and while the employees were acting within the scope of their employment," which implies "that other people, both co-workers and invitees, were present at the property location." (Pl.'s Opp'n 9.) In addition, plaintiff claims publication also occurred when the Green Card was returned to plaintiff's daughter, plaintiff, her husband, and a friend, which constituted a continuing defamation. (*Id.* (citing *Caldor*, 625 A.2d at 970 (finding actionable defamation where police officers "paraded [plaintiff] in handcuffs through the store in full view of customers and other employees with whom he worked")).)

I agree with defendant that Gallardo's complaint fails to allege facts to support a plausible finding that the employee's action was "published" when he tore up the Green Card. In her complaint, Gallardo alleges that "[t]he Defendant employee knew that his statement was seen and observed by other of the Defendant employees and other invitees . . . and it was Defendant employee's intent to express his contempt of the Plaintiff and her immigration status through his actions." (Compl. ¶ 32.) The complaint fails, however, to include specific facts

concerning to the presence and identities of other employees and customers who witnessed the tearing, merely assuming that they must have been present because the conduct must have occurred during business hours (a fact that also seems in doubt). Furthermore, the complaint fails to allege that these anonymous witnesses had any idea what the employee was tearing, much less that he was making a defamatory statement about Gallardo. Contrary to plaintiff's argument, her complaint additionally fails to allege a continuing publication based on the plaintiff's and her family's subsequent discovery of the torn card. Nowhere does Gallardo allege that the employee's communication was directed at plaintiff and her family since she was not present for the Green Card's destruction, nor is the employee alleged to have any way of knowing that she would return and discover the Green Card torn up and discarded.

Finally, defendant alleges that plaintiff fails to plead a *prima facie* case for defamation because she does not allege a statement that was "false," but merely a non-actionable opinion. A false statement is "one that is not substantially correct," and a plaintiff bears the burden of proving its falsity. *Chesapeake Publ'g Corp. v. Williams*, 339 Md. 285, 661 A.2d 1169, 1174 (1995) (citations omitted). Here, where plaintiff alleges a defamatory opinion by defendant, that statement is only actionable in a defamation action if "the opinion can be reasonably interpreted to declare or imply untrue facts." *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 184 (4th Cir. 1998) (citing *Milkovich v. Lorain Journal Co.* 497 U.S. 1, 20 (1990)). On the other hand, "[w]hen a speaker plainly expresses 'a subjective view, an interpretation, a theory, conjecture or surmise, rather than [a] claim[ ] to be in possession of objectively verifiable [false] facts, the statement is not actionable.'" *Id.* at 186 (quoting *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993)).

Defendant argues that plaintiff's complaint nowhere alleges any falsity in defendant's communication; "[t]o the contrary, the fact underlying the employee's allegedly defamatory statement, that she is an immigrant with a Green Card, is true." (Def.'s Mot. to Dismiss 11-12.) Plaintiff concedes that defendant's alleged statement was an opinion, but argues that it was "[a]n unsupported opinion that implies defamatory facts" and is thus actionable under a defamation theory. (Def.'s Reply 10.) Gallardo relies on the *Biospherics* court's explanation that "[a]n unsupported opinion that implies defamatory facts, like '"[i]n my opinion Jones is a liar," can cause as much damage to reputation' and may be just as actionable 'as the statement, "Jones is a liar."'" *Biospherics, Inc.*, 151 F.3d at 183 (quoting *Milkovich*, 497 U.S. at 19). Plaintiff characterizes the actionable opinion she is alleging in at least three ways. First, she contends that the "false 'statement' that the Defendant finds so elusive is simply the act of cutting the Plaintiff's [Green Card] into three pieces" and that the "defamatory opinion imputed to that act is false as stated in paragraphs 31 through 33 of the complaint."[11] (Pl.'s Opp'n 10.) Plaintiff further argues that, by cutting her Green Card, defendant "has prevented her from realizing the rights and privileges that attach to that status by taking that document away . . . [a]nd that is an implication of facts that are not true." (*Id.* at 11.) Finally, Gallardo states that the defendant's non-verbal statement was "that the holder of this card is unwelcome in the United States if the Defendant actor has anything to say about it." (*Id.* at 10.)

Plaintiff's argument that her complaint pleads an actionable statement of opinion that

[11] This articulation of the "false statement" communicated by defendants' action is circular and hollow. It claims that the act is itself the false statement and then points to paragraphs 31 through 33 of the complaint, but those paragraphs do not allege a false statement. Instead, they state that the action exposed the plaintiff to public scorn, that the "employee's intent was to express his contempt for the Plaintiff and her immigration status," and that the action harmed plaintiff's reputation in the community. (Compl. ¶¶ 31-33.)

implies false facts is convoluted and unpersuasive. First, Gallardo does nothing to liken the opinion expressed here to the *Biospherics* example of opining that an individual is dishonest. Indeed, she struggles to even articulate any defamatory opinion on the part of the defendant, and those that she does assert do not imply false facts about Gallardo, but rather opinions explicitly protected by the First Amendment. *Biospherics, Inc.*, 151 F.3d at 183 ("Under the First Amendment there is no such thing as a false idea."). The statements plaintiff imputes to defendants' action – (1) preventing her from realizing rights associated with her Green Card, and (2) that she is unwelcome in this country – do not suggest any underlying false facts about plaintiff whatsoever. The first statement above is no statement at all, while the second is an opinion that conveys no facts, much less false facts.[12]

In tandem with her defamation claim, plaintiff alleges an alternative claim for false light. (Compl. ¶¶ 30-33.) To state a claim for false light, Gallardo must allege: "(1) that she was exposed to publicity in a false light before the public; (2) that a reasonable person would find the publicity highly offens[ive]; and (3) that the actor had knowledge of or acted in reckless disregard of the publicized matter placing plaintiff in a false light." *Holt v. Camus*, 128 F. Supp. 2d 812, 816 (D. Md. 1999). As defendant points out, however, because the same legal standards apply to defamation and false light claims, Maryland courts have rejected false light claims where a plaintiff has failed to meet the pleading requirements for a claim of defamation. *Id.* ("[T]he Fourth Circuit, interpreting Maryland law, has refused to allow a claim for false light/invasion of privacy to go forward where the claim fails to meet the standards for

[12] Furthermore, as discussed *supra*, plaintiff fails to allege any facts supporting an inference that the FedEx Kinko's employee intended to make a statement regarding whether or not plaintiff was welcome in the country or entitled to the rights embodied in a Green Card.

defamation.") (citations omitted). Because Gallardo fails to state a claim for defamation, she also fails to state a claim for false light. As such, the claim for defamation or false light is dismissed.

Date: May 12, 2008

/s/
J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CONSUELO GALLARDO, *

Plaintiff *

v.	*	Civil Action No. 08-cv-00392 (JFM)
	*	
FEDEX KINKO'S OFFICE & PRINT SERVICES, INC.,	*	
	*	
Defendant	*	
	*	
	*****	

ORDER

For the reasons stated in the accompanying memorandum, it is, this 12th day of May 2008

ORDERED

1. Defendant's motion to dismiss is granted; and

2. This action is dismissed in its entirety.

__/s/_____
J. Frederick Motz
United States District Judge