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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MENDOCINO

MARK GOLOB,

Plaintiffs,

v.

SEAN KELLY,

Defendants.

CASE NO. SUUK CV PO-1463543

MEMORANDUM OF POINTS AND AUTHORITIES OF DEFENDANT SEAN KELLY IN SUPPORT OF SPECIAL MOTION TO STRIKE

Date: April 11, 2014
Time: 9:30 a.m.
Dept.: E (Hon. Richard Henderson)
Complaint Filed: Feb. 5, 2014

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MEMORANDUM OF POINTS AND AUTHORITIES OF DEFENDANT SEAK KELLY IN SUPPORT OF SPECIAL MOTION TO STRIKE

Defendant Sean Kelly is a national franchise blogger journalist wrongly being sued by Plaintiff Mark Golob, a former franchisor executive. The purported defamation claim seeks thirty five million dollars in a blatant effort to chill free speech. Plaintiff Golob's defamation lawsuit should be dismissed under the California Anti-SLAPP statute as without merit and wrongfully infringing on Kelly's freedom of speech and press. Plaintiff Golob cannot establish he is likely to prevail as the alleged statements are not defamatory, are true, constitutionally protected, and the claims were not timely filed. The special motion to strike should be granted.

I. FACTUAL BACKGROUND

A. The Parties

Plaintiff Mark Golob is an individual residing in Mendocino County. Plaintiff Golob was previously the President of the franchisor Butterfly Fitness, Inc. (also known as Butterfly Life) which filed for bankruptcy in 2011.

Defendant Sean Kelly is an individual residing in Lancaster, Pennsylvania. Kelly is a national website blogger of franchise issues under websites called Unhappy Franchisee and the former Franchise Pick. (Decl. of Sean Kelly, Paras. 2-3, 7-8).

B. The Alleged Defamatory Representations

The form complaint of Plaintiff Mark Golob contains two allegations of asserted defamatory or negligent misrepresentation statements. First, Sean Kelly is alleged to have referred to Mark Golob as having a "checkered past." Second, Sean Kelly is alleged to have represented that Mark Golob had a "history of litigation in the health club industry." (Complaint, First and Second Causes of Action).

C. The Timing of the Alleged Defamatory Representations

The form complaint alleges that Plaintiff Mark Golob read the two alleged defamation statements "in January 2014 while in his home in Mendocino County, CA. and at many other times as a result of the statements." (Complaint, First and Second Causes of Action). The

complaint fails to allege when the statements were first published on the website, nor when first read by Plaintiff Mark Golob.

Both of the challenged statements were published on the Unhappy Franchisee website in August of 2008. (Decl. of Sean Kelly, Para. 16, 20, Exs. F, G). Plaintiff Mark Golob was aware of the publication of both statements by at least 2009, because his then lawyer, Scott Hammel, Esq., communicated with Sean Kelly about these and other statements in 2009. (Decl. of Sean Kelly, Paras. 21-22, Ex. G). Attorney Hammel not only posted on the Unhappy Franchisee blog website in 2009 on behalf of his client Mark Golob, but also sent a cease and desist letter to Sean Kelly in February of 2011, asking that comments about Mark Golob be taken down as defamatory. (Decl. of Sean Kelly, Para. 23-24, Ex. H).

D. Additional Factual Background

Plaintiff Mark Golob was the President of Butterfly Fitness, Inc., a women's health club franchisor also called Butterfly Life. Butterfly Fitness, Inc. and Plaintiff Golob were the subject of a number of lawsuits and arbitration claims by the health care franchisees of Butterfly Fitness, Inc. and Plaintiff Golob was party to other lawsuits as well. (Decl. of Sean Kelly, Paras. 10-14, 26, Ex. B, C-1, C-2, D, E, J-1, J-2, M). Some of these claims included allegations of fraud in the offer and sale of these health club franchises. (Decl. of Sean Kelly, Paras. 10-14, 26, Ex. B, C-1, C-2, D, E, J-1, J-2, M).

Butterfly Fitness, Inc. and Mr. Golob were issued a cease and desist order by the State of California in 2009. (Decl. of Sean Kelly, Para. 25, Ex. I). Butterfly Fitness, Inc. also filed a bankruptcy petition in 2010 after being sued by many of its franchisees. Decl. of Sean Kelly, Para. 27, Ex. K.

The alleged defamatory statements were made in a national blog website which discusses franchising and the significant financial impact to individuals purchasing franchises and the economy generally. (Decl. of Sean Kelly, Paras. 7-9, 15, 16, 20, Exs. A, F, G. Newspaper articles were also written about these health clubs, franchises and Plaintiff Mark Golob. (Decl. of Sean Kelly, Paras. 13, 28, Exs. D, L).

II. LEGAL ARGUMENT

A. Overview of the California Anti-SLAPP Special Motion to Strike

The California Anti-SLAPP statute provides defendants with a special motion to strike any cause of action which arises from "any act of that person in furtherance of the person's right of petition or free speech … in connection with a public issue." Code of Civil Procedure Section 425.16 (b)(1). "The purpose [of the Anti-SLAPP statute] is to curb the chilling effect that certain litigation may have on the valid exercise of free speech and petition rights, and the statute is to be interpreted broadly to accomplish that goal." *Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1181. "While SLAPP suits masquerade as ordinary lawsuits such as defamation and interference with prospective economic advantage, they are generally meritless suits brought primarily to chill the exercise of free speech or petition rights by the threat of severe economic sanctions against the defendant, and not to vindicate a legally cognizable right." *Simpson-Strong-Tie Company, Inc. v. Gore* (2010) 49 Cal.4th 12, 21 (citations omitted). Thus, the Anti-SLAPP statue "expedite(s) the early dismissal of these unmeritorious claims." *Ibid.*

Courts address Anti-SLAPP motions in a two-step statutory process. First, courts determine whether the defendant has made a threshold showing that the challenged cause or causes of action arise from protected activity. *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056. If the court finds that defendant has established this threshold of protected activity, then the burden shifts to the plaintiff to establish a probability of prevailing on the cause of action(s) challenged. *Ibid.* (citations omitted). Under the second step of the analysis, the plaintiff "must demonstrate that the complaint is both legally sufficient *and* supported by prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. *Ibid.* (emphasis added, citations omitted). If the plaintiff is unable to meet this burden, then the motion to strike is granted and the prevailing defendant is entitled to recover its attorney's fees and costs. Code of Civil Procedure Section 425.16 (c).

B. The Challenged Conduct of Defendant Sean Kelly Involves the Exercise of Free Speech and First Amendment Rights Within the Anti-SLAPP Statute

The Anti-SLAPP statute provides for a motion to strike any cause of action that arises from any act "*in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue* .... unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." Code of Civil Procedure Section 425.16 (b)(1) (emphasis added).

Here, Sean Kelly's articles meet three categories of conduct protected by the Anti-SLAPP statute. First, the articles fall within Section 425.16(e)(2), which protects written statements made "in connection with" [issues] under consideration or review [by an] executive or judicial body or any other official proceeding authorized by law." Code of Civil Procedure Section 425.16(e)(2); *see*, *Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1048-49. Here the article referenced numerous litigation matters. Second, the article is protected as discourse in a "public forum" including newspapers, newsletters, and blogs, about matters of "public concern." Code of Civil Procedure Section 425.16(e)(3); s*ee also, Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 808 (radio show is public forum); *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 469, 474-76 (newsletter is public forum); *Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, 693 (internet message board is public forum). Third, the articles also fall within the protection of Section 425.16(e)(4) which applies to "any other conduct in furtherance of the exercise of ... the constitutional right of free speech in connection with a public issue or an issue of public interest." Code of Civil Procedure Section 425.16(e)(4). News reporting is free speech within the protections of Code of Civil Procedure Section 425.16. *American Humane Association v. Los Angeles Times Commission* (2001) 92 Cal.App. 4th 1095, 1099-1100, 1104.

The Anti-SLAPP statute, including the scope of "public interest" and "public issue," is to be broadly construed. Code of Civil Procedure Section 425.16 (a); *see also, Briggs v. Eden Council for Hope & Opportunity*, (1999) 19 Cal.4th 1106, 1120-21. The California Legislature has already codified the public interest of information about franchisors and their principals including by enacting the California Franchise Investment Law, Corporations Code Section 31000, *et. seq.* ("CFIL"). The Legislative purpose codified in 1971 in the CFIL statute provides: "The Legislature hereby finds and declares that the widespread sale of franchises is a relatively new

form of business which has created numerous problems both from an investment and business point of view in the State of California. … California franchisees have suffered substantial losses where the franchisor or his or her representative has not provided full and complete information regarding the franchisor-franchisee relationship, the details of the contract between franchisor and franchisee, and the prior business experience of the franchisor. It is the intent of this law to provide such prospective franchisee with the information necessary to make an intelligent decision regarding franchises being offered. …" California Corporations Code Section 31001.

The Federal Trade Commission also held extensive public hearings on problems in franchising during the 1970s and thereon enacted its own federal trade regulation rule regarding the offer and sale of franchises nationwide. *See*, 16 CFR Part 436.1. Both California and federal law require disclosure of twenty three categories of information in the offer and sale of franchises including information regarding officers and directors of the franchisor, and litigation and bankruptcy information. *See, e.g.*, 16 CFR Part 436.5 required disclosure of litigation history to prospective franchisees includes franchisor officer and directors litigation).

The press, including the Los Angeles Times, has written about these health club and franchise businesses including Plaintiff Mark Golob. (Decl. of Sean Kelly, Paras. 13, 28, Exs. D, L).

C. Plaintiff Golob Cannot Show a Probability of Prevailing on Either of His Two Causes of Action for Defamation and Negligent Misrepresentation

As Defendant Sean Kelly meets the threshold showing that the lawsuit falls within the Anti-SLAPP statute, Plaintiff Mark Golob's claims must be stricken unless he presents evidence establishing a probability that he will prevail on the merits. Code of Civil Procedure Section 425.16 (b)(1). Mark Golob's burden is substantial. "[I]n order to satisfy [the] burden under the second prong of the Anti-SLAPP statute, it is not sufficient that Plaintiff's complaint survive a demurrer." *Dupont Merck Pharmacy v. Superior Court* (2000) 78 Cal.App.4th 562, 568. Thus a Plaintiff cannot simply rely on the allegations set forth in the complaint, nor can a court merely accept those allegations. *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 654-56. Instead, the plaintiff must meet the defendant's defenses established in declarations, including

constitutional rights defenses, and must present competent evidence showing that he or she will "probably prevail at trial." *Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, 1117; *see also, Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 359.

1. Plaintiff Golob Cannot Establish that the Asserted Representations Are Actionable Defamation or Negligent Misrepresentation

Here the initial alleged defamatory and negligent misrepresentation claims assert that Mark Golob had a "checkered past." But such an opinion representation is constitutionally protected and not actionable defamation or negligent misrepresentation. *See, Milkovich v. Lorain Journal Co.*, (1990) 497 U.S. 1 (the First Amendment protects opinions and non-verifiable assertions of fact); *Schuler v. McGraw-Hill Business Week Online* (D.N.M. 1997) 989 F.Supp. 1377. Constitutional protections of free speech "are not peculiar to [defamation] actions but apply to all claims whose gravamen is the alleged injurious falsehood of a statement." *Blatty v. New York Times* (1986) 42 Cal.3d 1033, 1042-43.

In *Schuler v. McGraw-Hill Companies, Inc., supra*, 989 F.Supp. 1377, a federal district court granted a motion to dismiss Plaintiff Schuler's tort claims including for defamation. The allegations concerned an article entitled "Did the Amex Turn a Blind Eye to a 'Showcase" Stock?" about an American Stock Exchange decision regarding Princtron, Inc. In its decision the district court reviews numerous asserted defamatory statements, including one that the plaintiff had a "checkered record." The "checkered record" defamation claim was rejected as opinion by the district court: "Defendants argue that the Constitution protects them from incurring liability for expressing the opinion that Plaintiff's record is 'checkered'. Plaintiff argues that it is for the jury to decide whether the phrase constitutes an opinion. I find that this phrase unambiguously states an opinion, and, as such, is not defamatory as a matter of law." *Ibid.*, 989 F.Supp. at 1385.

References to a "checkered past" about Plaintiff Mark Golob is likewise opinion and not actionable defamation as a matter of law.

The second alleged defamatory representation is that Mark Golob had been involved in litigation. This accusation fails as this representation is simply not defamatory. Moreover, as

noted below, the litigation representation is also truthful.

2. Plaintiff Golob Cannot Establish that the Claims Are False and Therefore Cannot Establish Defamation or Negligent Misrepresentation

Because proof of a false factual statement is a core requirement for a defamation or negligent misrepresentation claim, truth is an absolute defense. *Francis v. Dun & Bradstreet, Inc.* (1992) 3 Cal.App.4th 535, 540. Moreover, to allow robust public discourse and debate, courts do not solely focus on literal truth, and do not require an absence of errors. Substantial truth is all that is required to defeat a defamation claim to insure freedom of speech and expression in our democracy. *Carver v. Bonds* (2005) 135 Cal.App.4th 328, 351.

Plaintiff Golob cannot establish that the assertion of a "checkered past" is false even if it is not an inactionable opinion. Mark Golob was the subject of fraud claims by prior franchisees and involved in numerous litigation matters. (Decl. of Sean Kelly, Paras. 9-15, 26, Ex. A-G, J-1, J-2). In addition, Mark Golob was found to have made a misrepresentation in a franchise registration document and violated a registration requirement and was issued a cease and desist order by the California Department of Corporations. Moreover, Plaintiff Golob was sued by multiple franchisees for asserted fraud and thereafter his franchise company, Butterfly Fitness, Inc., filed for bankruptcy. (Decl. of Sean Kelly, Ex. 27, Para. K). The representations were not false, and Plaintiff cannot establish actionable defamation. *See, Fountain v. First Reliance Bank* (Sup. Ct. S.C. 2012) 730 S.E.2d 305, 310 ("checkered past" representation held not actionable).

Plaintiff Golob will also not be able to establish that the representation of health club litigation is false either. Both Golob and his Butterfly Fitness franchisor were sued by numerous franchisees, and earlier litigation exists as well as the above bankruptcy. (Decl. of Sean Kelly, Paras.11-14, 25-27), Ex. B-E, I, J-1, J-2, K).

Nor can Plaintiff Golob establish actual malice required for his defamation claims. *See, New York Times Co. v. Sullivan*, (1964) 376 U.S. 254, 269.

3. The Statute of Limitations Has Run

The statute of limitation for defamation claims is one year. Code of Civil Procedure

Section 340(c). A cause of action for libel accrues upon the first general distribution of the publication to the public, and is not delayed until a plaintiff discovers the libel. Civil Code Section 3425.3; *Strick v. Superior Court* (1983) 143 Cal. App. 3d 916, 922-23; *see also*, *Shively v. Bozanich* (2003) 31 Cal.4th 1230 (California follows a single publication rule, namely the statute of limitations commences once the asserted misrepresentation is first published to the general public). This is true for statements published on the Internet as well. *Traditional Cat Association, Inc. v. Gilbreath* (2004) 118 Cal. App. 4th 392, 394. In the event a cause of action for negligence exists separate from defamation, it would have at best have a two year statute of limitations under Code of Civil Procedure Section 339.

In *Traditional Cat Association, Inc. v. Gilbreath* (2004) 118 Cal.App.4th 392, a defendant successfully brought an Anti-SLAPP motion to strike a defamation claim as time barred. The trial court denied the motion, but the Court of Appeal reversed finding that the defamation claims were meritless due to statute of limitations defenses.

> In determining whether a plaintiff has demonstrated the requisite probability of prevailing, section 425.16, subdivision (b)(2), requires that the court "consider the pleadings, and supporting and opposing affidavits stating the facts upon which the *liability or defense* is based." (Italics added.) Thus on its face the statute contemplates consideration of the substantive merits of the plaintiff's complaint, as well as all available defenses to it, including, but not limited to constitutional defenses. This broad approach is required not only by the language of the statute, but by the policy reasons which gave rise to our Anti-SLAPP statute. As the court in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 60, 124 Cal.Rptr.2d 507, 52 P.3d 685, stated: "'Intimidation will naturally exist anytime a community member is sued by an organization for millions of dollars even if it is probably that the suit will be dismissed.' [Citation.] 'Considering the purpose of the [Anti-SLAPP] provision, expressly stated, the nature or form of the action is not what is critical but rather that it is against a person who has exercised certain rights.' [Citation.]' The Legislature recognized that "all kinds of claims could achieve the objective of a SLAPP suit – to interfere with and burden the defendant's exercise of his or her rights.'" "Similarly, a claim which is meritless because it is barred by the statute of limitations will cause just as much intimidation as a claim which is barred because of a constitutional defense. Both forms of meritless

lawsuits are the subject of section 425.16.

Id., 118 Cal.App.4th at 398-399.

The Court of Appeal in *Traditional Cat Association, supra*, then applied the single publication rule for the alleged defamation to internet website, rejecting plaintiffs' contentions that internet publication was continuous and never time barred. *Id.,* 118 Cal.App.4th at 399-405. Because the Plaintiff's lawsuit was filed more than a year after the alleged defamatory statements were first published on the website, the alleged defamation claims were time barred. As a result, a Court of Appeal directed that the defamation claim be stricken. *Id.,* 118 Cal.App.4th at 405.

Here the asserted misrepresentations regarding the checkered past and litigation of Mark Golob were first published on the internet in August of 2008 and have remained there. Decl of Sean Kelly, Para. 16. This lawsuit was not filed until February 5, 2014, some five plus years later. Moreover, counsel for Mark Golob and his companies, Scott Hammel, Esq., was aware of the alleged misrepresentation and commented in the blog section containing these statements in 2009, and sent a cease and desist letters in 2011. Decl of Sean Kelly, Paras. 20-24, Exs. G, p.7, H. Plaintiff Golob will accordingly not be able to establish he is likely to prevail on defamation and negligent misrepresentation claims due to the statute of limitations. His claims are time barred.

III. CONCLUSION

For the foregoing reasons, Defendant Sean Kelly requests that the Court grant his Anti-SLAPP special motion and strike the first and second causes of action, comprising the entire complaint of Plaintiff Mark Golob. The prayer seeking $35 million dollars exemplifies the in terroreum purpose of the lawsuit seeking to chill defendant Kelly first amendment rights and his reporting of franchisor actions to the public. Defendant Kelly further requests that the Court award his attorney's fees and costs in an amount to be determined in a separate motion.

DATED: March 13, 2014

LAGARIAS LAW OFFICES

By: _____
Peter C. Lagarias, Esq.
Attorney for Defendant Kelly

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I, Michelle M. Hughes, declare as follows:

I am over the age of 18 years, and not a party to the within action; my business address is 1629 Fifth Avenue, San Rafael, California 94901-1828; I am employed in Marin County. On the date set forth below, I served copies of the following documents(s):

1. Notice Of Motion Of Defendant Sean Kelly And Special Motion Of Sean Kelly To Strike Plaintiff Mark Golob's Causes Of Action For Intentional Tort Of Defamation And For General Negligence (CCP 425.16

2. Memorandum Of Points And Authorities Of Defendant Sean Kelly In Support Of Special Motion To Strike

3. Declaration Of Defendant Sean Kelly In Support Of Special Motion To Strike Of Defendant Sean Kelly

4. Request For Judicial Notice In Support Of Special Motion Of Defendant Sean Kelly To Strike Plaintiff Mark Golob's Causes Of Action For Intentional Tort Of Defamation And For General Negligence (CCP 425.16

Said document(s) were addressed as follows:

Nikolaus W. Reed, Esq.
Law Offices of Nikolaus W. Reed
135 10th Street
San Francisco, CA 94103

The described document(s) were served by the method(s) indicated as following:

[] (BY MAIL) The above-described document(s) will be deposited with the United States Postal Service on this same date in the ordinary course of business, in a sealed envelope(s) with postage thereon fully prepaid and placed for collection in the United States mail at San Rafael, California.

[X] (BY FEDERAL EXPRESS) I caused such envelope(s) with postage thereon fully prepaid to be placed in the Federal Express office at San Rafael, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on March 13, 2014, at San Rafael, California.

Michelle M. Hughes
Legal Assistant

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