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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF MENDOCINO

MARK GOLOB, Plaintiff, vs. SEAN KELLY; DOES 1-10,	Case No.: SUUK CV PO-1463543 MARK GOLOB'S POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S SPECIAL MOTION TO STRIKE. Hon. Richard Henderson Dept: E Date: April 11, 2014 Time: 9:30 a.m.

I.

FACTS

Defendant and moving party Sean Kelly has been sued for defamation of Plaintiff Mark Golob arising out of a headline to an article posted to the internet on or about January 2014 stating that Plaintiff had a "checkered past" and a "history of litigation." (See Complaint). Defendant claims that the statements made in the posting had been there continuously since 2008. (Defendant's Motion To Strike). However, in February 2011 Sean Kelly agreed to and did in fact take down the statements from his website and they were contained at that time as part of the body of a blog. (See Dec. of Mark Golob at Paragraph 5 and Exhibit 1 thereto). References to Plaintiff stayed down, and Plaintiff monitored the internet to ensure such, until similar but different statements were posted in about January 2014 and discovered at that time by Plaintiff. (See Dec. of Mark Golob at Paragraphs 6-8).

Plaintiff has been semi-retired for over seven years and has in no way been involved in franchising for over seven years. (See Dec. of Mark Golob at Paragraphs 2, 15). He spends most of his time on his ranch in Medocino County and being involved in the lives of his children and grandchildren. He makes every effort to remain out of the public eye and enjoy his family in privacy. (*Id.* at Paragraph 15). A state license is required to sell franchises and Mark Golob's license expired at least seven years ago and has not been renewed. (*Id.* at Paragraph 2).

When Plaintiff discovered in January 2014 that Sean Kelly had posted on the internet that he had "a checkered past" and "a history of litigation" he was extremely distressed and upset given nothing could be further from the truth. (*Id.* at Paragraph 9). This time, not only were the statements made into a headline, but they were taken out of the body of a blog and made into the focus of a headline. *Id.* Dictionary.com provides as a definition of "checkered" as "marked by dubious episodes; suspect in character or quality: a checkered past." (*Id.* at Paragraph 10). Plaintiff's friends, associates and potential business partners who have discovered the posting have questioned Plaintiff about what suspect things he has done and what ethical breaches of character he is guilty of. (*Id.* at Paragraph 9). The answer is none and he further can prove he does not have a history of litigation. (*Id.* at Paragraphs 11-14). He has addressed these suggestions to the contrary in the Declaration of Mark Golob, attached hereto.

II.

ARGUMENT

A. The Special Motion to Strike Under Cal. Civ. Proc. Section 425.16 Does Not Apply To This Case As Mr. Golob Is A Private Individual And The Statements Are Not About A Matter Of Public Concern.

Cal. Civ. Proc. § 425.16(e) identifies what complaints may be subject to a special motion to strike as those which impermissibly attack an "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue..." (emphasis added).

In *Thomas v. Quintero*, (2005) 126 Cal. App. 4th 635, 646 the *Thomas* court, referring to *Weinberg v. Feisel*, (2003) 110 Cal. App. 4th 1122, set forth a "few guiding principles from decisional authorities" as to what constitutes "an issue of public interest."

"First, 'public interest' does not equate with mere curiosity. (Citations omitted).

Second, a matter of public interest should be something of concern to a substantial number of people. (Citations omitted).

Third, there should be some degree of closeness between the challenged statements and the asserted public interest. (Citation omitted).

Fourth, the focus of the speaker's conduct should be the public interest rather than a mere effort 'to gather information for another round of [private] controversy.'" *Id.* at 658, 659.

In the case at bar, Mr. Golob has not sold a franchise to anyone in over seven years nor has he even possessed a license to sell franchises for at least seven years. [Dec. of Golob at 2]. Mr. Golob's past, "checkered" or not with a "history of litigation" or not is nothing more than a curiosity. There is no public interest being addressed by Defendant's statement nor is there a relationship between Mr. Golob's character as misstated by Defendant and any legitimate public interest.

B. The Burden of Showing The SLAPP Statute Applies Falls To The Moving Party.

"Traditionally, a party seeking to benefit from a statute bears the burden of making a prima facie showing the statute applies to her. We see no reason why that rule should not apply to a party seeking a special motion to strike under section 425.16. It is not only logical to put this burden on the party seeking the benefit of section 425.16, it is fundamentally fair that before putting the plaintiff to the burden of establishing probability of success on the merits the defendant be required to show imposing that burden is justified by the nature of the plaintiff's complaint." *Willcox v. Superior Court*, (1994) 27 Cal. App. 4th 809, 819.

Defendant has not met this burden as the speech in question fails all of the required elements to be "an issue of public interest" and to therefore qualify for protection under Cal. Civ. Proc. Section 425.16.

C. Defendant's Publication Can Not Be The Basis For Turning An Issue Into A "Public" Issue And Said Limitation Was Designed To Have A Limiting Effect on the SLAPP Statute.

With respect to the first of the Commonwealth Energy factors, the court in *Weinberg* noted that a defendant's own conduct in disseminating the information challenged in the action does not, itself, create an issue of "public interest": "If the mere publication of information in a union newsletter distributed to its numerous members were sufficient to make that information a matter of public interest, the public-issue limitation would be substantially eroded, thus seriously undercutting the obvious goal of the Legislature that the public-issue requirement have a limiting effect." *Weinberg v. Feisel*, (2003) 110 Cal. App. 4th 1122, 1134.

D. Even If The Statements In Question Were Regarding a Public Issue, Which They Are Not, The Statements Would Further Need To Relate To An **Ongoing** Public Issue Which Is Clearly Not The Case In The Case At Bar.

To satisfy public issue or issue of public interest requirement of provisions of anti-SLAPP statute concerning statement made in public forum in connection with issue of public interest and concerning any other conduct in furtherance of the exercise of constitutional rights of petition or of free speech in connection with public issue or issue of public interest, in cases where the issue is not of interest to public at large, but rather to limited, but definable portion of public, such as private group, organization, or community, constitutionally protected activity must, at a minimum, occur in context of **ongoing** controversy, dispute, or discussion, such that it warrants protection by statute that embodies public policy of encouraging participation in matters

of public significance. Cal. Civ. Proc. § 425.16(e)(3,4). *See Du Charme v. International Broth. of Elec. Workers, Local 45* (2003) 110 Cal. App. 4th 107, 1 Cal. Rptr. 3d 501.

Again, Mr. Golob has not sold a franchise to anyone in over seven years nor has he even possessed a license to sell franchises since that time. [Dec. of Golob at 2].

E. Commercial Speech Is Not Afforded The Same Anti-SLAPP Protection As Traditional Political Speech And Defendant's Statements Are Defamatory False Commercial Speech And Not Political Speech.

Appellate cases where facts similar to the case at bar hinge on the application of the distinction between political and commercial speech are sparse likely because it is determined early in the analysis that for the reasons above, the SLAPP statute does not apply. However, the general principle that only a particular type of speech is unlimited and subject to special protections is relevant to this case. There is a significant constitutional distinction between the protections afforded to commercial speech and political speech. See *Kasky v. Nike, Inc.* (2002) 119 Cal. Rptr. 2d 296.

Defendant's have not met the burden of protection under SLAPP statute.

F. Should The Court Find That C.C.P Section 425 Applies To This Case, Which It Should Not, Defendant's Motion Must Be Denied As Plaintiff Demonstrates A Probability Of Prevailing On The Claim.

In fact, Plaintiff need only show he can prevail on any part of his claim to defeat a SLAPP motion. *Mann v. Quality Old Time Service*, (2004) 120 Cal. App. 4th 90, 106.

Plaintiff through his attached declaration has demonstrated that, if a jury finds him creditable, he has a probability of successfully prosecuting his lawsuit against Defendant for defamation and negligence. Plaintiff gets the benefit of the assumption that he will be credited

with the evidence he presents.

First, he has established that he is a private individual who has had nothing to do with selling franchises for at least seven years and has also not had a license to deal in franchises since that time. Further, he has established that he has never been convicted and any crime whatsoever, nor has he ever lost a civil lawsuit brought against him. He has a clean record with the State of California. The Cease and Desist Order was a mistake and withdrawn by the State soon thereafter, a fact conveniently left out in the moving papers. (See Decl. Mark Golob at 14(c)). No business he has run has ever been declared bankrupt and neither has he personally. He has no ethical breaches of any kind which would support Defendant's statement the he has a "checkered past." He has no history of litigation. There are a handful of lawsuits in which he was named with many other Defendants and which were dismissed in his favor. (See Decl. Mark Golob). Even a cursory investigation by Defendant would have revealed this truth which means that Defendant acted with reckless disregard for the veracity of his statements.

False statements ... tending directly to injure a plaintiff in respect to his or her profession by imputing dishonesty or questionable professional conduct are defamatory per se. *Burrill v. Nair* (2013) 217 Cal. App. 4th 357, 158 Cal.Rptr.3d 332,

If the court determines that the statements are reasonably susceptible to a defamatory interpretation, it is for the jury to determine if a defamatory meaning was in fact conveyed to a listener or reader. *Kahn v. Bower* (1991) 232 Cal. App. 3d 1599, 1608, 284 Cal. Rptr. 244.

G. Plaintiff Has Brought This Lawsuit Within The Statute Of Limitations.

As indicated in the Declaration of Mark Golob at paragraphs 5-7, all references to Plaintiff having a "checkered past" and a "history of litigation" were deleted by Defendant in February 2011. Said declaration attaches an email from Defendant confirming that those statements were removed from publication. Plaintiff monitored statements made about him after that time and discovered in about January 2014 that Defendant had decided to post in an article

headline stating that Plaintiff had a checkered past with a history of litigation. Plaintiff, after politely asking Defendant to remove the statements and providing notice that the statements were untrue, brought suit in February 2014. This suit was brought within the one year of publication.

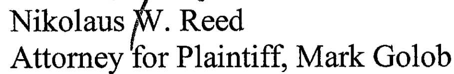
Defendant argues incorrectly that the statements were published years ago and fall outside the statute of limitations. This argument is tantamount to an argument that if he made a defamatory statement in a book years ago and then published a new book whose title was the defamatory statement, protection should be given to the new book based upon statute of limitations protection. Obviously, such a result is absurd and the new book with it's defamatory title is a new publication within the statute of limitations. The rule that each publication of a defamatory statement gives rise to a new cause of action for defamation applies when the original defamer repeats or recirculates his or her original remarks to a new audience. *Shively v. Bozanich* (2003) 7 Cal. Rptr. 3d 576, 31 Cal.4th 1230, 80 P.3d 676. Each publication of a defamatory statement ordinarily gives rise to a new cause of action for defamation. *Id.*

III.

CONCLUSION

For the aforementioned reasons, Plaintiff requests that Defendant's motion to strike Plaintiff's Complaint be denied.

Dated 3-26-14



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