PETER C. LAGARIAS (SBN 77091)
LAGARIAS LAW OFFICES
1629 Fifth Avenue
San Rafael, California 94901-1828
Telephone: (415) 460-0100
Facsimile: (415) 460-1099

Attorneys for Defendant Sean Kelly

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MENDOCINO

MARK GOLOB,

Plaintiffs,

v.

SEAN KELLY,

Defendants.

CASE NO. SUUK CV PO-1463543

REPLY 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 SEAN KELLY IN SUPPORT OF SPECIAL MOTION TO STRIKE

Plaintiff Mark Golob does not address, much less defeat, the basis for defendant Sean Kelly's special motion to strike. Plaintiff Golob has filed a thirty five million dollar defamation claim in a blatant effort to chill Sean Kelly's free speech on public issues. Plaintiff Golob does not contest that Sean Kelly is a national franchise blogger journalist. Plaintiff Golob also does not even submit the asserted written defamation article into evidence, the first step of a defamation claim. Nor does plaintiff Golob establish defamation, falsity, and malice, or defeat the statute of limitations defense. Because Mark Golob has failed to establish a probability of prevailing at trial, the special motion to strike should be granted.

I. REPLY REGARDING CASE FACTUAL BACKGROUND

The opposition of plaintiff Mark Golob contains only a single declaration by Mark Golob with three exhibits. The Golob declaration is noteworthy as failing to set forth evidence on required elements of claims and defenses, and for not replying to specific evidence.

A. The Alleged Written Defamatory Representations Were Not Established in Evidence

Although Mr. Golob has asserted a thirty five million dollar damages claim for asserted defamation by a written blog statement, his declaration fails to attach a copy of the alleged written defamatory statement from the website. (Golob Decl. Para 8). Instead Mr. Golob claims to be quoting from and interpreting the website blog of Sean Kelly and states only: "In about January, 2014, Mr. Kelly posted that I had a "checkered past and history of litigation in the healthcare industry" on his website. This time he took the statements that I had a checkered past and a history of litigation out of the body of the article and made it a headline. I was in my home in Mendocino County California when I discovered this new posting." (Golob Decl. Para. 2). Defendant Sean Kelly hereby objects to this hearsay evidence and as also in violation of the best evidence rule, and the failure of Mr. Golob to establish the alleged written defamatory statements.

B. The Timing of the Alleged Defamatory Representations

Defendant Sean Kelly unequivocally declared that the two alleged defamatory statements, "checkered past" and "history of litigation" were continuously posted on his website since August of 2008. (Kelly Decl., 3/13/14, Paras. 16-24, Exs. F and G) ("The alleged defamatory sentence has remained posted on my website since August of 2008." Sean Kelly Decl., 3/19/14, Para. 16,

p. 4:21-23). In response to the unequivocal proof of continuous publication, plaintiff Mark Golob claims only that "After that letter [replying to his attorney demand letter in 2011] Sean Kelly did in fact take down the content related to me from his websites including the statements that I had a 'checkered past.'" (Golob Decl. Para. 8).

But the letters between Golob's attorney and Sean Kelly do not establish that the "checkered past" and "history of litigation" statements were taken down. (Sean Kelly Decl. 3/13/14, Paras. 16-24, Exs. F-H; Sean Kelly Reply Decl., 4/1/14, Paras. 8-22, Exs. M-O). Those letters instead addressed a different asserted statement about an affiliation between Mark Golob and a different company, Top Doc America. (*Ibid).*

Unlike plaintiff Mark Golob, defendant Sean Kelly has personal knowledge as the owner operator that his blog continuously posted the "checkered past" and "history of litigation" statements. (Sean Kelly Decl., 3/13/14, Paras. 2, 16). Mark Golob does not state he operated the blog, nor even state what he did, and when he did it, to "monitor" the internet and particularly the Kelly blog. Due to this new contention, Sean Kelly reiterated his continuous posting of the two alleged defamatory statements on his blog, and obtained snapshots from the Wayback Machine archive, establishing that the two alleged defamatory statements were posted on the internet on December 27, 2011, September 3, 2012, and February 27, 2013, all times when Golob somehow claims they were not. (Kelly Reply Decl., 04/01/14, Paras. 18-22, Ex. O).

The final response of plaintiff Mark Golob regarding timing is his new claim that a re-publication occurred "in or about January of 2014" with "the statements that I had a checkered past and a history of litigation out of the body of the article and made it a headline." (Golob Decl. Para. 8). But Golob does not attach the alleged new blog posting to his declaration. In contrast, defendant Sean Kelly has expressly denied there was any such new posting, but rather there were original postings in August of 2008. (Sean Kelly Reply Decl., Paras. 23-26, Ex. P).

C. Additional Factual Background

In his declaration, Mr. Golob does not address, much less deny, the myriad of accusations by former franchisees, customers and business associates against him or his companies with one exception. Mr. Golob admits the existence of numerous health care industry lawsuits, including by reciting dismissals and settlements of many such lawsuits. (Golob Decl. Para. 14).

II. LEGAL ARGUMENT

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

Plaintiff Mark Golob does not dispute the overview of the Anti-SLAPP statute, but instead incorrectly contends that the statute does not apply and that plaintiff has shown a probability of success on the merits of its two claims for relief. Plaintiff Golob is wrong on both arguments.

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

Plaintiff Golob fails to address each of the multiple subparts of the anti-SLAPP statute detailed in defendant Kelly's opening memo. Instead, plaintiff Golob argues that the matters discussed in the blog are not of public concern, now involve a retired private person, and involve commercial speech. These arguments are incorrect, both legally and factually, and do not apply to all three subparts of the anti-SLAPP statute either equally or at all.

Plaintiff Mark Golob fails to address the first basis asserted by defendant Sean Kelly for application of the anti-SLAPP statute. Namely, the blog articles involve 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. In our system of governance, comments about court cases and individuals involved therein are *per se* public issues. Even the inaccurate Golob opposition declaration admits to being involved in multiple litigations while placing his spin that these lawsuits were dismissed or settled. (Golob Decl., Para. 14). Finally when conduct falls within 425.16(e)(2), it is not necessary to establish that the conduct related to a public issue. *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1118.

Here the blog article contains discourse in a "public forum" including newspapers, newsletters, and blogs, about matters of "public concern," a second independent anti-SLAPP basis under Code of Civil Procedure Section 425.16(e)(3). Plaintiff Mark Golob does not contest that the Unhappy Franchisee forum and blog is a public forum. *See, 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). Instead plaintiff Golob labels the reporting about him and his companies as not a public concern especially, he argues, because he claims to no longer be selling franchises.

In his opposition, plaintiff Golob cites two cases seeking to determine public interest. The

first case involved efforts to enjoin tenants engaging in a free speech protest of bad business behavior by a landlord, *Thomas v. Quintero* (2005) 126 Cal.App.4th 635. The Court of Appeal found, as here, that the landlord businessman misconduct was in the "public interest." The second case, *Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, sought to list factors showing the public interest. But those factors, as well as the anti-SLAPP statutory mandate to be broadly construed, all support finding the public interest and anti-SLAPP application herein.

The Sean Kelly blog article was not mere curiosity but part of a national blog site on franchising problems involving hundreds of thousands of franchisees with dozens in the Butterfly Fitness franchise system. Kelly Decl., 03/31/14, Paras. 1-15). And the Sean Kelly blog article directly related to problems in franchising, an area of repeated legislative and judicial scrutiny. In *Postal Instant Press, Inc. v .Sealy* (1996) 43 Cal.App.4th 1704, the Court of Appeal spelled out this area of public interest:

> The relationship between franchisor and franchisee is a significant issue, and growing more important each year. As recently explained, "Franchising is rapidly becoming the dominant mode of distributing goods and services in the United States. According to the International Franchise Association, one out of every twelve businesses in the United States is a franchise. In addition, franchise systems now employ over eight million people and account for approximately forty-one percent of retail sales in the United States. Even conservative estimates predict that franchised businesses will be responsible for over fifty percent of retail sales by the year 2000."
>
> *Id.,* 43 Cal.App.4th at 1715.

Contrary to plaintiff Golob's arguments, and not even mentioned in his opposition, the California legislature, courts and newspapers have all found fraudulent and abusive franchisors to be of public concern. California has enacted laws to protect franchisees in the offer and sale of franchises and other aspects of the franchise relationship. Corporations Code Section 31000, *et. seq.,* Business & Professions Code Section 20000, *et. seq., see also*, 16 CFR Part 436.1 (FTC Franchise Rule); *see, Keating v. Superior Court* (182) 31 Cal.3d 584, 593-600, *rev. on other grounds, Southland Corp. v. Keating* (1984) 465 U.S. 1, 104 S.Ct. 852 ("The California Legislature has determined that franchisees are in need of special protection in dealing with franchisors." *Id.,* 31 Cal.3d at 5943-594). Stories about unfair and abusive behavior by franchisors, much like securities abuses that the franchise laws were modeled after, abound in public print press such as Business Week, and the Wall Street Journal. Defendant Golob also incorrectly suggests that the blog is commercial speech citing *Kasky v. Nike, Inc.* (2002) 27

Cal.4th 939. Although the distinction is not relevant to the conclusions herein, the blog articles of Sean Kelly about franchising are reporting and not commercial speech, i.e. not "speech proposing a commercial transaction." *Ibid*, 27 Cal.4th at 253 (citations omitted).

Here the publication by Sean Kelly was as a journalist blogger, not as an individual seeking to advance his own interest or litigation. (Sean Kelly Decl., 03/13/14, Paras. 2-4, 9, 16). The publication here about Mr. Golob and his businesses including Linda Evans Fitness outlets and Butterfly Fitness franchises involved myriads of customers and franchisees. (Kelly Decl., 3/13/14, Paras. 12-20, Exs. C-G). Multiple area franchisees filed a single complaint while six were interviewed and described their problems and losses with Butterfly Fitness franchises. (Kelly Decl., 03/13/14, Para. 14, Ex. E). The number of ongoing blog responses further reflect the public concern over these issues. Golob himself was quoted in a national health club magazine, and currently has a website lauding himself as founder of Linda Evans Fitness and Butterfly Life Fitness. (Kelly Decl., 3/13/14, Para. 28, Ex. L; Kelly Reply Decl., Paras. 33-36, Ex. Q).

A final opposition argument, made without real direct legal authority, is that Mr. Golob is no longer registered to sell franchises and is somehow retired. No court should award a party that delays filing suit for years then claims he is no longer in the public eye, especially when he claims the statute of limitations has not run during that long ago publication. Indeed, when the alleged defamatory material was published in 2008, Mr. Golob and Butterfly Fitness were clearly still an operating franchisor. (Kelly Decl., 03/13/14, Para. 16, Ex. F). Moreover Butterfly Life continued until at least September of 2011, when it filed for bankruptcy. (Kelly Decl., 03/13/14, Para. 27, Ex. K). Ultimately, Mr. Golob does not declare that he will not be involved in franchising in the future, nor even that he is not in some other type of business. His very public website indicates otherwise and injects his prior behavior back into the public arena. (Kelly Reply Decl., 4/01/14, Para. 36, Ex. Q).

The third independent reason that the anti-SLAPP statute is triggered is the statutory application 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 10951104. The anti-SLAPP statute, including the scope of "public interest" and "public issue," is to be broadly construed. *See, Briggs v. Eden Council for Hope & Opportunity,* (1999) 19 Cal.4th 1106, 1120-21. As detailed above ripping off health club

customers by closing and not refunding deposits, making phony earnings claims and not supporting franchisees are both a public issue and an issue of public interest. The press and free speech provide the public with information about bad business and bad government, the need for legislative changes, and the need to reign in bad business behavior from Wall Street derivatives to Bernie Madoffs and failed franchisors. Indeed, the press, including the Los Angeles Times, has written about these health club and franchise businesses including with comments injected Mark Golob. (Decl. of Sean Kelly, 03/13/14, Paras. 13, 28, Exs. D, L). Finally, to this day, Mark Golob has a promotional website promoting his status as founder of Butterfly Fitness and Linda Evans Fitness. (Sean Kelly Reply Decl., 04/01/14, Para. 36, Ex. Q).

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

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). 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; *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 Has Not Established Any Representations and Further Cannot Establish that the Asserted Representations Are Actionable Defamation or Negligent Misrepresentation

Plaintiff Golob in his complaint has claimed two asserted defamatory statements in a written blog, but he has failed to offer the writing as evidence. Instead, Mr. Golob purports to recite what he thinks the blog said in January of 2014. Golob Decl. Para. 8. Not only is this a violation of the best evidence rule (which objections defendant Sean Kelly hereby asserts), but also is hearsay, and not competent proof of a written statement. Evidence Code Sections 1500, 1501; *Von Brimer v. Whirlpool Corp.* (N.D. Cal. 1973) 362 F.Supp. 1182 ("The best evidence rule mandates that in order to present secondary evidence of the contents of the original written instrument, evidence of its loss, destruction, or unavailability must be presented." *Id.,* 362 F.Supp. at 1187). For this reason alone, Mr. Golob has not shown a probability of prevailing on a defamation claim as he has no proof of the alleged defamatory statements.

While plaintiff Golob has presented a claimed definition of the word "checkered past," he has failed to establish that the statement by Sean Kelly was not an opinion. Even if Golob's unattributed definition of "checkered past" from an unestablished source were used, the definition

calls for an opinion about character and quality. Here, the setting of this wording in the blog article was classic lead in opinion followed by detailed statements. In particular, following the "checkered past" statement the blog contained detailed verbatim statements first by Butterfly Life franchisee Jeff Marks and later by six other Butterfly Life franchisees. Those interviews tell a tale of franchisor unfair trade practices specifically, from which an experienced franchise professional is entitled to provide his opinion under the first amendment. *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.

Moreover, plaintiff Mark Golob fails to address this issue in his opposition because another court has already addressed a checkered record statement. In *Schuler v. McGraw-Hill Companies, Inc., supra*, 989 F.Supp. 1377, a federal district court dismissed the defamation claim finding that the checkered record phrase "unambiguously states an opinion, and, as such, is not defamatory as a matter of law." *Ibid.*, 989 F.Supp. at 1385. For this additional reason, plaintiff Golob has failed to establish a probability of prevailing on the merits.

2. Plaintiff Golob Has Failed to Establish that Either Representation Was False and Therefore Cannot Establish that He will Probably Prevail on Defamation or Negligent Misrepresentation

Plaintiff Golob's claims also are not probable to succeed, even if the statement "checkered past" was not an opinion, because truth is an absolute defense. *Francis v. Dun & Bradstreet, Inc.* (1992) 3 Cal.App.4th 535, 540; *Carver v. Bonds* (2005) 135 Cal.App.4th 328, 351.

Plaintiff Golob seeks, by sleight of hand, to argue that the alleged representation (which was not put in evidence) that he had a "history of litigation" was something bigger. In his brief, Golob in effect argues that what was stated was that he had history of *losing* litigation. But that was not the alleged statement in his complaint (and competent proof of the writing was not presented). The complaint alleges the statement was a "history of litigation." This statement was proven true by attachments of numerous lawsuits and references thereto involving Golob and his Butterfly Fitness franchisor being sued by numerous franchisees, as well as earlier litigation and the Butterfly Fitness bankruptcy. (Decl. of Sean Kelly, 03/13/14, Paras.11-14, 25-27, Exs. B-E, I, J-1, J-2, K,). Judicial knowledge was requested of these court pleadings and not opposed. Moreover, Golob's own declaration admits to these lawsuits, but argues they were settled or that he otherwise did not lose. (Golob Decl. Para. 14., *see also*, Golob MPA, p. 6, l. 11 admitting "a handful of lawsuits"). There is a history of litigation, and Golob has zero chance of prevailing on this claim.

Plaintiff Golob cannot establish that the assertion of a "checkered past" is false even if it is not an inactionable opinion. Golob was the subject of fraud claims by prior franchisees, including a verified complaint (Decl. of Sean Kelly, 03/13/14, Paras. 9-15, 26, Ex. A-G, J-1, J-2). Golob received innumerable comments in the blog which he did not answer. Also, having the ability to settle cases or outlast plaintiffs, does not rebut the multiple franchisees stating they lost their savings and investments in Golob's franchise. Indeed, missing from Golob's declaration is any defense of his conduct in not refunding fitness center memberships on closing, reimbursing franchisees like Jeff Marks who had six figure losses from purchasing Golob's Butterfly Life franchises, or even what happened to the Butterfly Fitness business that had to file for bankruptcy. Golob's own submission regarding his corporate bankruptcy indicates the court dismissed his company bankruptcy filing for failing to comply with court order. (Golob Decl., Ex. 3). Golob has no probability of establishing that the "checkered past" and "history of litigation" representations were false, and 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 has not established 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

Plaintiff Golob makes one desperate argument seeking to avoid the statute of limitations, namely claiming re-publication of the "checkered past" and "history of litigation" statements sometime in January of 2014. To manufacture this argument he cites a single case as providing that re-publication of a defamatory book recommences the statute of limitations. *See, Shively v. Bozanich* (2003) 31 Cal.4th 1230.

Nowhere in his opposition does Golob deny the fact that the exact defamatory statements which he challenges were published by Sean Kelly in 2008 and 2009. Moreover, Golob suggests these two offensive statements were taken down, but does not prove this happened. To the contrary, Sean Kelly unequivocally stated in his initial declaration that the publication has remained unchanged from 2008 and 2009, subject to additional bloggers adding entries down below. (Kelly Decl., 03/13/14, Para. 16, Ex. F; Kelly Reply Decl., Paras. 8-26, Ex. O). What follows from Sean Kelly's complete and supported declaration is that the statute of limitations ran years ago for these alleged defamatory remarks under the single publication rule. Civil Code Section 3425.3 (one year defamation) Civil Procedure Section 339 (two years negligent

misrepresentation); *Strick v. Superior Court* (1983) 143 Cal. App. 3d 916, 922-23; *Shively v. Bozanich* (2003) 31 Cal.4th 1230 (California follows single publication rule); *Traditional Cat Association, Inc. v. Gilbreath* (2004) 118 Cal.App.4th 392.

Desperate to avoid the statute of limitations bar, Golob claims in his declaration that Sean Kelly republished the "checkered past" and "history of litigation" remarks " in about" January of 2014, and adds that these remarks were elevated to the title rather than in blog text. (Golob Decl. Para. 8). But Golob fails to attach – or provide any proof – of this asserted new and most recent re-publication. Sean Kelly has denied such re-publication in his original and reply declarations and established that the original publications were not republished in January of 2014. Moreover, the failure of Golob to attach the asserted re-publication with altered text, is telling. Such text is the best evidence and could be examined forensically to establish its authenticity, if in fact it did not establish that it was indeed what had been published years earlier in 2008 and 2009. In sum, Golob's deliberate lack of proof establishes that he is not probable of overcoming the statute of limitations defense.

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's 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: April 2, 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. Reply Memorandum of Points and Authorities of Defendant Sean Kelly in Support of Special Motion to Strike

2. Reply Declaration of Defendant Sean Kelly in Support of Defendant's Special Motion to Strike

3. Reply of Defendant Sean Kelly to Plaintiffs' Evidentiary Objections

4. Defendant Sean Kelly's Objections to Declaration Evidence of Plaintiff Mark Golob

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 April 2, 2014, at San Rafael, California.

Michelle M. Hughes
Legal Assistant

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