California Superior Court
Mendocino County

MARK GOLOB,
Plaintiff,

vs **Case SCUK CVPO 14-63543**

SEAN KELLY,
Defendant.
_____/

Minute Order Granting Special Motion to Strike

Plaintiff Mark Golob filed a complaint seeking unspecified damages against defendant Sean Kelly alleging that Kelly posted defamatory statements on Kelly's website contending that plaintiff Golob had a "checkered past" and a "history of litigation in the health club industry." Defendant Golob timely filed a special motion to strike (SLAPP) pursuant to CCP 425.16. The motion was argued before the court on April 11 and submitted for decision. Peter Lagarias appeared on behalf of moving party Sean Kelly ("Kelly"); Nikolaus W. Reed appeared on behalf of plaintiff Mark Golob("Golob").

Discussion

Evidentiary Rulings

Kelly Request for Judicial Notice: Kelly's request for judicial notice of documents from four identified cases in the US District Courts and the Bankruptcy Court, from the Contra Costa Superior Court and from the Calif. Dept. of Corporations are granted.

Golob Objections to Kelly March 14 Declaration: Golob raises a number of objections to the six page declaration of Kelly filed March 14, 2014.

A. Paragraph 9: Consideration of the source, nature, number and contents of the blog comments are relevant in determining whether Kelly's charged comments were made in the exercise of his constitutional right of free speech in connection with a public issue or an issue of public interest. Golub's objection to the content of "blog" comments as hearsay is overruled. The blog comments will not be received as evidence of the truth of the matters stated therein.

B. Paragraph 10: The objection is sustained. Kelly fails to demonstrate sufficient personal knowledge of the facts stated

C. Paragraphs 11, 14 and 26: The court has taken judicial notice of the referenced legal documents. The remainder of the allegations is these paragraphs amount to Kelly's characterization of the contents of the documents and are essentially hearsay and not relevant. The objections are sustained.

D . Paragraphs 12-13: Consideration of the news articles is relevant in determining whether Kelly's charged comments were made in the exercise of his constitutional right of free speech in connection with a public issue or an issue of public interest. The articles will not be received as evidence of the truth of the matters stated therein. The objections are overruled.

E. Paragraph 17: Consideration of the blog comments is relevant in determining whether Kelly's charged comments were made in the exercise of his constitutional right of free speech in connection with a public issue or an issue of public interest. The blog comments will not be received as evidence of the truth of the matters stated therein. The objections are overruled.

F Paragraph 20: Consideration of the comments received on the blog are relevant in determining whether Kelly's charged comments were made in the exercise of his constitutional right of free speech in connection with a public issue or an issue of public interest. The blog comments will not be received as evidence of the truth of the matters stated therein. The objections are overruled.

G. Paragraph 22: The challenged allegations are observations made by Kelly in response to comments made by Scott Hammel. The observations may not be relevant; they are not hearsay. The objection is overruled.

H. Exhibits A, F and G: Consideration of the blog entries is relevant in determining whether Kelly's challenged comments were made in the exercise of his constitutional right of free speech in connection with a public issue or an issue of public interest. The blog comments will not be received as evidence of the truth of the matters stated therein. The objections are overruled.

I. Exhibit B, C-2, J and K: The court has taken judicial notice of these documents and records. Consideration of the court documents and records is relevant in determining whether Kelly's charged comments were made in the exercise of his constitutional right of free speech in connection with a public issue or an issue of public interest. The records and documents will not be received as evidence of the truth of the matters stated therein. The objections are overruled.

J. Exhibit C-1, D and L: Consideration of the media articles is relevant in determining whether Kelly's charged comments were made in the exercise of his constitutional right of free speech in connection with a public issue or an issue of public interest. The court will receive the articles as evidence of the subject matter of the articles and their publication but not for the truth of the specific matters stated in the articles. The objections are overruled.

K. Exhibit E: The objection is overruled. (EC 1220 and 1280)

L. Exhibit H: The objection is overruled. (EC 1220)

M. Exhibit I: The objection is overruled. (EC 1280)

N. Exhibit M: The hearsay objection is sustained.

Kelly Objections to March 27 Declaration of Golob:

A. Paragraphs 1 and 6: The objections to paragraphs 1and 6 are sustained. The paragraphs do not contain sufficient information to indicate personal knowledge of the facts stated.

B. Paragraph 5: The paragraph does not contain sufficient information to indicate personal knowledge of the facts stated. The first sentence constitutes hearsay. The court will consider the attached exhibit as a party statement.

C. Paragraphs 7, 11, 12 and 13: The objections are overruled.

D. Paragraph 8: The second sentence of paragraph 8 recites the contents of a writing. The declaration contains no admissible evidence from which the court could conclude that any of the exceptions in EC 1523 apply. The objection to that sentence is sustained. (EC 1523(a))

E. Paragraph 9: To the extent that paragraph 9 recites what third parties have "indicated" to Golob, it constitutes hearsay. The objection will be sustained.

F. Paragraph 10: Golob made no request for judicial notice and has provided no authentication for his alleged recital from a dictionary. The objection is sustained.

Motion to Strike

In reviewing a motion under CCP 425.16, the court undertakes a two-step process in determining whether to grant a SLAPP motion. "First, the court decides whether the defendant has made a threshold prima facie showing that the defendant's acts, of which the plaintiff complains, were ones taken in furtherance of the defendant's constitutional rights of petition or free speech in connection with a public issue." (*Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1364) If the court finds the defendant has made the requisite showing, the burden then shifts to the plaintiff to establish a "probability" of prevailing on the claim by making a prima facie showing of facts that would, if proved, support a judgment in the plaintiff's favor. (*Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 907.)

Defendant's Threshold Burden: In a motion to strike a cause of action under CCP 425.16[1], the defendant has the initial burden of showing that the plaintiff's cause of action arises from an act performed by the defendant in furtherance of his constitutional right of free speech.

[1] All subsequent numerical references shall be to CCP Sec. 425.16 unless otherwise noted.

(CCP 425.16 (b)(1) and (e); Equilon Enters. V Consumer Cause, Inc. (2002) 29 CA4th 53, 67) CCP 425.16 (e) specifies *four* categories of conduct protected by the statute. Defendant Kelly contends that his conduct falls within the protective scope of CCP 425.16 because the challenged writing (1) was made in connection with as issue under consideration or review by a administrative or judicial body and/or was made in a public forum in connection with an issue of public interest. (425.16(e)(2) and (3); *(Kashian v Harriman (2002) 98 CA4th 892, 906)*

A. Judicial/Administrative Proceeding: The protection of 425.16 is extended to any writing "made in connection with an issue *under consideration* or review by . . . an executive or judicial body." Kelly argues his statements were made in connection with pending litigation and/or an inquiry by the California Commissioner of Corporations. Kelly fails to specifically identify what judicial and/or administrative proceedings were pending at the time of his 2008 posting statement. Exhibits appended to his declaration relate to four legal actions, one bankruptcy petition and a proceeding before the Commissioner of Corporations. Of the six identified proceedings, only two had been initiated prior to the 2008 statement. *Wulf v Womans Workout World et al., (including Golob)* was initiated in February 1991 and terminated in April 1991. (See: Exhibit B to Kelly Declaration.) *Linda Evans Fitness v Womans Workout World, et al., (including Golob)* was filed in August 1999 and remanded to state court in November 1999. (See: Exhibit C-2 to Kelly declaration) The Department of Corporation proceedings were initiated in March 2003. (See: Exhibit I to Kelly Declaration.) All of the matters identified by Kelly as being under review by a judicial or executive body (425.16 (e)(2)) had either been resolved and were terminated prior to the 2008 posting or were commenced after that posting.

Kelly has failed to make a prima facie showing that when the challenged statements were made in 2008 the statements were made in connection with a judicial or administrative proceeding *then under consideration.* Kelly has failed to establish that his statements fall within the protection of 425.16 (e)(2).

B. *Public Forum / Public Interest:* Constitutional protection is also afforded to writings made in a *public forum* regarding an issue of *public interest.* (425.16(e)(3)) There can be little remaining doubt that internet web sites constitute a "public forum" within the meaning of 425.16 (e)(3). (See: *Chaker v Mateo (209 CA4th 1138, 1143-1144 ("Chaker")* and *Wilbanks v Wolk (2004) 121 CA4th 883, 896-897 (Wilbanks))*

Kelly presented uncontradicted evidence that he has been operating interactive websites since at least 2006 in areas relating to the marketing and sales of franchises with the intent to "help prospective franchise investors learn from the experience of current and former franchisee owners."[2] Kelly states that "both existing and potential franchisees seek information about franchise business, including both performance and problems with franchisors" [3] The media articles submitted by Kelly (Kelly 3/14 Dec., Exhibits C-1, and D) and the website blog entries (Kelly 3/14 Dec., Exhibits A, F, G and L) indicate the public interest in the marketing, purchasing and operation of marketed-franchises is both widespread and significant.

An issue of public interest within the meaning of 425.16(e)(3) is any interest in which the public is interested. The issue need not be significant to be protected by the anti SLAPP statute – it is suffucient that it is an issue in which the public takes an interest. (*Summit Bank v Rogers*

[2] 3/14/14 Dec. 2:18.
[3] 3/14/14 Dec. 2: 10.

(2012) 206 4TH669, 693-695) The question of whether something is of public interest must broadly construed. (*Hecimovich v Encinal Sch. PTO (2012) 203 4TH 450*)

The principal thrust of Kelly's unhappyfranchise.com website is very similar to those examined by the *Wilbanks* and *Chaker* courts. In *Wilbanks* the website operator acted as a "consumer watchdog," providing public information about "viaticals, a specialized insurance product, and the brokers who sold them. Wolk, defendant therein, posted a statement highly critical of plaintiff broker's business practices, reporting that he was under investigation by the Department of Corporations. The court likened the posted information to "consumer protection" information. Because the information posted was ostensibly provided to aid consumers in choosing among brokers, the *Wilbanks* court found the statements were directly connected to an issue of public concern.

In *Chaker* the defendant posted a series of quite derogatory statements on websites of more general interests than a website devoted to consumer issues. Because the posted comments included remarks about plaintiff's business activities, the court determined the comments "plainly fall within the rubric of consumer information about Chaker's 'Counterforensics' business and were intended to serve as a warning to consumers about his trustworthiness."

The court finds that the principal thrust or gravamen of Kelly's website was to provide a forum for those interested in acquiring more information about specific franchises, primarily for the purpose of investment and operation. The site performed generally as a "consumer watchdog" where interested individuals could exchange ideas and experiences about particular franchises. The fact that the particular website page containing the challenged remarks was addressed primarily to a single franchisee (plaintiff's Butterfly Life) is not itself significant. The *Wilbanks* court observed that the challenged comments in that case were directed towards a single broker's practices; however, because the comments constituted a warning not to use the broker's services, the court determined the comments were connected to a public issue because they were ostensibly provided to aid consumers in choosing among brokers. Kelly's challenged comments that Golob had a "checkered" past and "history of litigation in the health club industry" are sufficiently related to "consumer watchdog" purpose of the website. *(Rivera v First DataBank, Inc. (2010) 187 CA4th 709, 716)*

The court finds that defendant Kelly has made a prima facie showing that the challenged written remarks were made in a public forum in connection with an issue of public interest. (CCP 425.16 (e)(3))

Plaintiff's Burden:

The burden now shifts to plaintiff Golob to establish there is a reasonable probability that he will prevail on his claim. (CCP 425.16 (b)(1)) Golob must show that the complaint is legally sufficient and supported by a prima facie showing, by admissible and competent evidence, of facts that would be sufficient to sustain a favorable judgment on his claims. *(Taus v Loftus (2007) 40 CA4th 683, 714)* In assessing the probability that plaintiff will prevail, the court may consider only evidence that would be admissible at trial. The court will consider Kelly's opposing evidence only to determine whether it defeats Golob's showing as a matter of law.

(*Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 867; *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 654; *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 827-828) Finally, in assessing the probability the plaintiff will prevail, the court considers only the evidence that would be admissible at trial. (*Kashian v Harriman (2002) 98 CA4th 892, 906; Church of Scientology v. Wollersheim, supra, 42 CA4th, at 654-655*; *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1497)

Golob's claim for defamation is based on the allegation that in or about January 2014 Kelly made a posting on his website *unhappyfranchisee.com* stating that Golob had a "checkered history" and a "history of litigation in the health club industry" ("2014 posting.") Golob acknowledges and Kelly agrees that at some time in 2008 Kelly had posted on the same website a similar or identical statement that Mark Golob had a "checkered history" and a "history of litigation in the health club industry." ("2008 posting") (A copy of the 2008 posting with the subject comments is attached as Exhibit H to the March 14, 2014 declaration of Kelly.) Golob further contends that the 2014 posting was in a sufficiently different format or context from the 2008 posting so as to constitute a different and separate publication not barred by the single publication rule. (CC 3425.3)

The exact words and the form in which the words appeared are of critical importance in this matter. If the 2014 posting was identical in form to the 2008 posting, then the 2014 posting would constitute a continuing but single publication. In that case, the one year statute of limitations would have expired no later than 2009, a year from the date of first publication. If the 2014 *differed from* the 2008 posting in form or context, the posting may constitute a separate, new publication with a new one year limitation period. Golob's claim would be time-barred in the first instance, but not in the second.

1. *Proof of Publication:* Golob's claim is based on the contents of writing, in this case a website statement allegedly made in January 2013. It is Golob's burden to establish by evidence, admissible in court, the exact words allegedly written by Kelly. Golob seeks to prove the contents of the writing through declaration testimony rather than through the production of the original writing or a copy in accordance with EC 1521. Oral testimony (or its written equivalent: declaration testimony) may be used to establish the contents of writing only if (1) the proponent does not have possession or control of the writing and establishes to the satisfaction of the court that the original has been lost or destroyed without fraudulent intent on the part of the proponent; or (2) if the proponent does not have possession of the original or a copy and either of the following: (a) neither the original nor a copy was reasonably procurable or (b) the writing is not closely related to the controlling issues. (EC 1523 (b) and (c))

The proponent of the oral/declaration evidence, plaintiff Golob, has presented no evidence to the court from which the court could find or reasonably infer that the proffered oral/declaration evidence is admissible under EC 1523 (b) or (c)(1). The court also finds that the exact contents of the writing are critical to the controlling issues in the case. (EC 1523 (c)(2))

Plaintiff Golob has failed to make a *prima facie* showing by admissible evidence what exact words were written by Kelly in the allegedly defamatory publication.

2. *Defamatory Nature of Publication:* Golob must establish that at least one of the alleged statements was false and unprivileged and exposed him to "hatred, contempt, ridicule, or obloquy," or caused him "to be shunned or avoided or . . . has a tendency to injure him in his work." (CC 45) There is no contention in this matter that the statements made were privileged. Plaintiff does not contend and presented no evidence that either of the alleged statements caused him to be "shunned or avoided or had "a tendency to injure him in his work."

(a) "checkered history:" The term "checkered" is defined in relevant part[4] as "marked by alternation, contrast, vicissitude, or diversity esp. of fortune <a man with a ~ business career, but who survived all storms – George Santayana.>" (*Webster's Third International Dictionary,(unabridged), pg. 382)* The characterization of Golob's history as "checkered" does not expose Golob to "hatred , contempt, ridicule, or obloquy" nor does it "cause him to be shunned or avoided' or "have a tendency to injure him in his occupation." (CC 45; *Schuler v McGraw-Hill-Business Week Online (D.N.M. 1997) 989 FS 1377, 1385*)

Because defamation consists of, among other things, a false and unprivileged publication, which has a tendency to injure a party in its occupation, the sine qua non of recovery for defamation is the existence of falsehood. Since the challenged statement must contain a provable falsehood, courts distinguish between statements of fact and statements of opinion for purposes of defamation liability. The characterization on Golob's past as "checkered" is clearly an opinion; statements of opinion are constitutionally protected. *(McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 112,

An expression of opinion may be actionable, however, if it *implies* a false assertion of fact. (*Wilbanks, supra,* 121 Cal.App.4th at pp. 902–903) To determine whether a statement is actionable fact or non-actionable opinion, the court must apply a totality of the circumstances test examining both the language of the statement itself and the context in which it is made. Courts

> "have recognized that online blogs and message boards are places where readers expect to see strongly worded opinions rather than objective facts. (See *Krinsky v. Doe 6* (2008) 159 Cal.App.4th 1154, 1162) '[t]he use of a pseudonymous screen name offers a safe outlet for the user to experiment with novel ideas, express unorthodox political views, or criticize corporate or individual behavior without fear of intimidation or reprisal" (*Global Telemedia Intern., Inc. v. John Doe 1* (C.D.Cal.2001) 132 F.Supp.2d 1261, 1267 [finding Internet postings "are full of hyperbole, invective, short-hand phrases and language not generally found in fact-based documents, such as corporate press releases or SEC filings"].)
>
> *Summit Bank v Rogers (2012) 206 CA4th 669, 694-697*

After an examination of the term "checkered history" and the context in which the term appears, the court finds that the characterization of Golob's history as "checkered" is an expression of an opinion and that the opinion does not imply a false assertion of fact.

[4] The first section of the definition describes a checkered pattern, such as a checkerboard.

(b) "history of litigation in the health club industry" It is undisputed, that at the time the 2008 publication was made, Golob had been involved in two civil actions and one administrative proceeding relating to the health club industry: *Wulf v Womans Workout World et al., (including Golob)* was initiated in 2/91 and terminated in 4/91. (See: Exhibit B to Kelly Declaration.) *Linda Evans Fitness v Womans Workout World, et al., (including Golob)* was filed in August 1999 and remanded to state court in November 1999. (See: Exhibit C-2 to Kelly declaration.) The Department of Corporation proceedings were initiated in March 2003. (See: Exhibit I to Kelly Declaration.) While Golob contends in his declaration that none of these proceedings resulted in any finding adverse to him, the fact remains that the allegation that Golob had a "history of litigation in the health club industry" is accurate. Truth of the statements made is a complete defense against liability for defamation, regardless of the bad faith or malicious purpose. (*Terry v Davis Community Church (2005) 131 CA4th 1534, 1553; Washer v Bank of America (1948) 87 CA2nd 501, 509)*

It is equally undisputed that by the time of the alleged 2013 publication, Golob had been involved in several subsequently filed actions: *Rosner v Gergley et al., Barntary v Gergley et al.* and Butterfly Fitness, Inc. bankruptcy petition proceeding (Kelly Declaration, Exhibits J-1, J-2 and K) and Golob March 27, 2014 Declaration at 3:12- 4:5.)

Plaintiff Golob has failed to carry his burden to make a prima facie showing that he would probably prevail on his claim that the challenged statements were defamatory in nature.

3. *Statute of Limitations:* Golob does not contest that any action based on the 2008 publication has been long-barred by the one year statute of limitations of CCP 340 (c). Golob contends that Kelly again published the challenged statements by posting them on Kelly's "unhappyfranchisee.com" website in or about January 2014. (Golob: February 5, 2014 Complaint). As discussed above, Golob has failed to establish by admissible evidence the content of the alleged 2014 publication.

Golob argues that the 2008 posting was interrupted at some time. (Golob March 27, 2014 Declaration, 2:8-19) Not only are the bulk of Golob's factual allegations not admissible (See, above), at least one of the key allegations is not supported by the cited evidence. Golob contends (Dec. 2:14-16) that the attached Exhibit 1 is evidence of Kelly's agreement to "take down" the challenged posting from Kelly's unhappyfranchisee.com website. The text of the communication clearly refers to a posting and a website that are totally different from that described in Golob's complaint. Golob's statement that he "monitored the content related to [him] on the internet subsequently" are of very little evidentiary value. Golob does not state when, how frequently, during what period of time or in what manner he "monitored" the internet. He does not even state that he viewed or monitored in any way the content of Kelly's unhappyfranchisee.com website on which the challenged statements occurred.

The court is cognizant of the rule that it is not to *weigh* the defendant's evidence against that of the plaintiff in determining whether plaintiff has made a prima facie showing of the probability that he will prevail at trial. (*HMS Capital Inc. v Lawyers' Title Company (2004) 118 CA4th 204, 212)* However, in assessing the probability that plaintiff will prevail, the court may consider only evidence that would be *admissible at trial.* (*Kashian v Harriman (2002) 98 CA4th 892, 906;* The court will consider Kelly's opposing evidence only to determine whether it defeats Golob's showing as a matter of law. (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co.*

(1995) 37 Cal.App.4th 855, 867; *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 654; *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 827-828)

As discussed above, Golob has failed to make a prima facie showing to establish the contents of the alleged 2014 publication by admissible evidence. Kelly has made a prima facie showing of the content of the 2008 posting (Kelly March 14, 2014, Declaration, Ex. F) and of the fact that the 2008 posting has remained on the website and unchanged in format or form. (Kelly April 2, 2014 Declaration: 17-19) California subscribes to the single publication rule. (*CC 3425.3; McGuiness v Motor Trend Magazine (1982) 129 CA3rd 59, 61)* The court finds the defendant's opposing evidence defeats plaintiff's evidence as a matter of law on the issue that plaintiff's claim is barred by the CCP 340(c) limitation period.

Disposition

As discussed above, the court has found that defendant Sean Kelly made a prima facie showing by admissible evidence that the challenged statements set forth in defendant Sean Kelly's unhappyfranchisee.com website were made in a "public forum in connection with an issue of public interest" (CCP 425.10 (e)) and that plaintiff Golob failed to establish a "probability" of prevailing on his claim by making a prima facie showing by admissible evidence that would, if proved, support a judgment in his favor. (*Kashian v Harriman* (2002) 98 CA4th 982, 906) The motion of defendant Sean Kelly to strike the complaint of plaintiff Mark Golob pursuant to CCP 425.16 is granted.

Defendant Kelly has prevailed on his motion and is entitled to the recovery of his attorney fees incurred in this motion. (*CCP 425.16(c); Ketchum v Moses (2001) 24 C4th 1122, 1131.)* Counsel for defendant Kelly is directed to serve and submit a formal order consistent with this ruing no later than June 16, 2014.

Dated: May 21, 2014

RICHARD J. HENDERSON

RICHARD J. HENDERSON
Judge of the Superior Court

Copies to Counsel/Parties:
Nikolaus W. Reed
Peter C. Lagarias

PROOF OF SERVICE

Case: **SC-UK-CV-PO-14-0063543-000 - GOLOB, MARK VS. KELLY, SEAN**

Document Served: **PROOF OF SERVICE FOR MINUTE ORDER GRANTING SPECIAL MOTION TO STRIKE**

Service date: **May 22, 2014**

I, Peggy Mello, am a citizen of the United States of America and employed by the Superior Court in the County of Mendocino, State of California. I am over the age of 18 years and not a party to the within entitled action. My business address is 100 North State Street, Ukiah, CA 95482-4416.

I served copies of the attached document(s) by placing a true copy thereof, enclosed in a sealed envelope(s) with postage thereon fully prepaid in the United States mail at Ukiah, California addressed to:

Peter Lagarias, Esq. 1629 Fifth Ave. San Rafael, CA 94901-1828
Nikolaus Reed, Esq. 135 10th Street San Francisco, CA 94103

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 22, 2014 at Ukiah, California.

JAMES B. PERRY, Interim Clerk of the Court

By: PEGGY MELLO
Peggy Mello, Deputy Clerk