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IN THE UNITED STATES DISTRICT COURT

THE NORTHERN DISTRICT OF CALIFORNIA

RESOLUTE FOREST PRODUCTS, INC., RESOLUTE FP US, INC., RESOLUTE FP AUGUSTA, LLC, FIBREK GENERAL PARTNERSHIP, FIBREK U.S., INC., FIBREK INTERNATIONAL INC., and RESOLUTE FP CANADA, INC.,

Plaintiffs,

v.

GREENPEACE INTERNATIONAL (aka "GREENPEACE STICHTING COUNCIL"). GREENPEACE, INC., GREENPEACE FUND, INC., FORESTETHICS, DANIEL BRINDIS, AMY MOAS, MATTHEW DAGGETT, ROLF SKAR, TODD PAGLIA, and JOHN AND JANE DOES 1 through 20, inclusive,

Defendant.

Case No. 17-cv-02824-JST

GREENPEACE DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT PURSUANT TO RULE 12(B)(6) AND MOTION TO STRIKE AMENDED COMPLAINT PURSUANT TO CAL. CIV. PROC. CODE § 425.16

Date: May 31, 2018
Time: 2:00 p.m.
Judge: The Honorable Jon S. Tigar
Location: Courtroom 9 19th Floor

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MEMORANDUM OF POINTS AND AUTHORITIES

Defendants Greenpeace International ("GPI"), Greenpeace, Inc. ("GP Inc."), Daniel Brindis, Amy Moas, Matthew Daggett, and Rolf Skar (collectively, the "Greenpeace Defendants") respectfully submit this reply in support of their Motion under Rule 12(b)(6) to dismiss in its entirety and with prejudice the Amended Complaint of Resolute Forest Products, Inc. ("Resolute FP"), Resolute FP US, Inc., Resolute FP Augusta, LLC ("Resolute Augusta"), Fibrek General Partnership, Fibrek U.S., Inc., Fibrek International Inc., and Resolute FP Canada, Inc. (collectively, "Resolute," "RFP"), and to strike the Amended Complaint pursuant to the California anti-SLAPP statute.[1]

INTRODUCTION

Resolute has now wasted the resources of two district courts for two years with claims that, as its Opposition makes starkly clear, are devoid of life. Indeed, a close look at the Opposition confirms that nothing about Resolute's claims has changed since it filed the original Complaint, other than Resolute's own emphasis. No matter how it tries to recast or reshuffle those claims, the effort is fruitless and should be rejected by this Court, for several reasons.

As an initial matter, based on the contents of its 80-page Opposition ("Opp."), Resolute has all but abandoned its RICO claims, devoting just 15 pages to defend the causes of action that have so dominated both its original and amended pleading, and which have served as the centerpiece of Resolute's extensive efforts to litigate this case in the media and wield a threat of a $300 million damage claim. Other than the sheer embarrassment it would have faced for not reasserting those claims after the Court's prior dismissal of Resolute's Complaint and application of the California anti-SLAPP statute to award Defendants their attorney's fees and costs on Resolute's state law claims, it is unclear why Resolute chose to include them again. Resolute's arguments in support of those claims are nothing more than warmed-over versions of the same arguments it made previously. They do not come close to demonstrating that Resolute has plausibly pled the existence of a racketeering enterprise with a common purpose; predicate acts

[1] The Greenpeace Defendants also join in the arguments of Greenpeace Fund, Inc., and Stand (formerly known as ForestEthics) and Todd Paglia, in support of their separate motions, as appropriate.

of mail or wire fraud; or proximate cause linking the alleged acts of the "enterprise" and Resolute's purported harm. The RICO statute, designed for pursuing mobsters, is an ill-fitting suit for environmental advocates. Resolute's RICO claims must thus be dismissed once again, this time with prejudice.

As for Resolute's defamation claims, Resolute's counsel has stated publicly that the amended pleading "allege[s] a mountain of new facts showing malice."[2] However, upon inspection, this "mountain" is scarcely more than a heap of recycled assertions. Almost all of the purported "new" facts date back to 2012 and 2013 – far outside the statute of limitations for defamation in California – and involve other parties besides the Greenpeace Defendants, and thus have no bearing on the 17 statements by the Greenpeace Defendants actually at issue here. Some of those purported new facts were also statements by non-defendant Greenpeace Canada that were later retracted, demonstrating good faith rather than actual malice. Finally, Greenpeace Canada's identification of the Montagnes Blanches forest region and the statement that Resolute's Forest Stewardship Council ("FSC") certificates were terminated, were clearly based on publicly-disclosed true facts, undercutting Resolute's assertion of falsity.

As all of the many pleadings and briefing in this case by now have made abundantly clear, every allegation made by Resolute against Greenpeace sounds in speech, and as this Court has said, a courtroom is not the appropriate forum for debating issues of public concern. What Resolute really wants is for Greenpeace to ***stop talking***, not because Greenpeace's statements are defamatory or fraudulent, but simply because Resolute does not like what Greenpeace is saying. And it has employed the classic corporate bully's method of trying to get its way: Spending massive sums of money to tie Greenpeace up for years in court, on no more than a pretense. This is precisely the kind of suit that the California anti-SLAPP law was designed to remedy and, Greenpeace again should be awarded its further attorney's fees and costs under the anti-SLAPP statute for dismissal of the state tort claims.

[2] Declaration of Lacy H. Koonce, III ("Koonce Decl."), Ex. 8.

ARGUMENT

A. RESOLUTE HAS FAILED TO STATE A CLAIM FOR RELIEF

1. Resolute Does Not State A Claim For Defamation

a. The Statements-In-Suit

In its original Complaint, Resolute asserted that some 267 allegedly defamatory statements were made by defendants or other parties. Greenpeace demonstrated that, in fact, only 49 were made by the named defendants, and of those statements only 26 were made during the applicable statute of limitations, and could be found in a grand total of ten publications. In the Amended Complaint, Resolute omits some of the allegedly defamatory statements identified in the original Complaint, but adds some others, now asserting that there were 135 defamatory statements. *See* ECF No. 200, Declaration of Lacy H. Koonce, III, ¶¶ 2-4. Again, the bulk were made by non-Greenpeace Defendants or are outside the statute of limitations, leaving only 17 statements in suit made by Greenpeace appearing in ten publications. Those are listed and provided in Greenpeace's Supplemental Appendix.

Resolute does not dispute that the bulk of the challenged statements were made by non-parties and outside the statute of limitations, and indeed implicitly concedes the latter point when it argues that some statements are nevertheless within the two-year statute of limitations for trade libel and tortious interference. Opp. 32 n.3. However, it utterly fails to allege ***which*** of the alleged statements support these other claims, as it must as a matter of pleading. *See, e.g.*, *Code Rebel, LLC v. Aqua Connect, Inc.*, No. CV 13-4539 RSWL (MANx), 2013 WL 5405706, at *4 (C.D. Cal. Sept. 24, 2013) (requiring plaintiff to "identify the specific time and location of each alleged statement" giving rise to a trade libel claim); *Eldorado Stone, LLC v. Renaissance Stone, Inc.*, No. 04-cv-2562 JM(LSP), 2005 WL 5517731, at *3 (S.D. Cal. Aug. 10, 2005) (dismissing trade libel claim for failure to identify speaker, time, and place of statement); *First Advantage Background Servs. Corp. v. Private Eyes, Inc.*, 569 F. Supp. 2d 929, 937 (N.D. Cal. 2008) (same).[3] Then, inexplicably, it argues that "[a]s set forth below, the Amended Complaint pleads

[3] The Greenpeace Defendants address why Resolute's trade libel claim fails as a matter of law in their opening motion, noting – among other deficiencies – that the injury Resolute complains of

hundreds of actionable statements." Opp. 32. As has become all too commonplace in Resolute's papers, this is an invitation that leads nowhere: The Court may exhaustively examine what Plaintiff "sets forth below" but will find no support for the notion that Plaintiff can bring defamation claims based on statements outside of the statute of limitations, or made by non-defendants.

b. Resolute's Claims Are Subject to First Amendment Scrutiny

Resolute's focus on Greenpeace's defamation defenses, rather than its RICO claims, tacitly demonstrates that notwithstanding its grandiose assertion that "the First Amendment does not protect" the Greenpeace Defendants' statements, Opp. 32, Plaintiff is beginning to acknowledge, as it must, that its claims, all based on Greenpeace's speech on matters of environmental advocacy – "however labeled and under whatever legal theory asserted," *Heller v. NBCUniversal, Inc.*, No. CV-15-09631-MWF-KS, 2016 WL 6573985, at *4 (C.D. Cal. Mar. 30, 2016) – must comport with the First Amendment. *See Unelko Corp. v. Rooney*, 912 F.2d 1049, 1058 (9th Cir. 1990) (claims sufficiently similar to defamation, such as tortious interference with business relationships and product disparagement, "are subject to the same first amendment requirements that govern actions for defamation"). Indeed, "[u]nder California law, 'First Amendment limitations are applicable to all claims, of whatever label, whose gravamen is the alleged injurious falsehood of a statement.'" *Films of Distinction, Inc. v. Allegro Film Prods., Inc.*, 12 F. Supp. 2d 1068, 1082 (C.D. Cal. 1998) ("If the defendants' statements about the plaintiff's product or service are protected opinions, the cause of action for trade libel must fail."). This is particularly necessary in the context of a motion to strike under California's anti-SLAPP statute. *See Baral v. Schnitt*, 1 Cal. 5th 376, 393 (2016) ("The anti-SLAPP procedures are designed to shield a defendant's constitutionally protected *conduct* from the undue burden of frivolous litigation," and "courts may rule on plaintiffs' specific claims of protected activity, rather than reward artful pleading"); *Sheley v. Harrop*, 9 Cal. App. 5th 1147, 1164 (2017) (*Baral*

is reputational and not that Greenpeace has disparaged any particular good or service. *See* GP Br. 36-37.

"reiterated that it is the defendant's activity allegedly giving rise to liability that is the focus of the anti-SLAPP scheme, not the manner in which the plaintiff pleads causes of action.").

Moreover, Greenpeace's statements are especially protected here "because 'speech concerning public affairs is more than self-expression; it is the essence of self-government.'" *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964)). Greenpeace's advocacy criticizing Resolute's forestry practices and the ecological impacts that have or could result therefrom lies within the core of First Amendment protection and, to succeed, Resolute must demonstrate more than substantial falsity; it must also show knowing falsity or high degree of awareness of falsity – a standard it simply cannot meet (especially as here it cannot show any falsity at all). *Garrison*, 379 U.S. at 73-74; *see also* GP Br. 7.

Notwithstanding the opportunity to amend its complaint, Resolute still does not plausibly plead that the 17 Greenpeace statements in suit are actionable. *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 702 (11th Cir. 2016); *Franchise Realty Interstate Corp. v. S.F. Local Joint Exec. Bd. of Culinary Workers*, 542 F.2d 1076, 1082-84 (9th Cir. 1976) (applying heightened pleading standard to dismiss complaint because it clearly implicated the First Amendment); *Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1109 (N.D. Cal. 1999) ("conclusory statements" do not satisfy heightened pleading standard for actual malice); *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1121-22 (N.D. Cal. 1984) (recognizing that actual malice should be tested at the pleading stage and concluding that complaint insufficiently alleged actual malice). *See* GP Br. 6-20. Instead, in its Response, Resolute reverts to the same core arguments that this Court rejected in granting Greenpeace's motion to dismiss the original complaint and it is abundantly clear that Resolute has merely retraced what it did before. The only new allegations Resolute puts forward do not convert its assault on Greenpeace's advocacy into a plausible defamation claim. In particular, Resolute focuses on (1) its contention that Greenpeace Canada's error, and public retraction, in 2012, are sufficient evidence of actual malice years later; (2) allegations that Greenpeace Canada's identification of the Montagnes Blanches forest region is false because the Canadian government challenged its accuracy; and (3) contesting whether Resolute's certificates were

"terminated" or not. Finally, Resolute continues to draw broad conclusions regarding Greenpeace's motives from a so-called "operational memo" that Resolute purports to extensively (and apparently selectively) quote, but has not provided the Court or defendants. As discussed *infra*, none of these points changes the grounds for dismissal identified in this Court's previous order dismissing Resolute's initial complaint.

c. Greenpeace Canada's 2012 Statements and Retraction Are Irrelevant to The Court's Actual Malice Inquiry

The purported linchpin of Resolute's actual malice argument continues to be statements made by non-party Greenpeace Canada in late 2012 that mistakenly asserted, based on incorrect mapping coordinates, that Resolute had been logging in an area in violation of the CBFA, and that were later publicly retracted by agreement between Resolute and Greenpeace Canada. However, there are numerous fatal flaws with this contention that refute Resolute's required showing of constitutional malice as a matter of law.

First, Resolute makes no plausible allegations that the named Greenpeace Defendants themselves published any statements during 2012 or 2013 with actual malice; Plaintiff's assertions concerning actual malice all center on Greenpeace Canada. However, Greenpeace Canada is not a defendant in this action, presumably because of the pending defamation lawsuit Resolute has brought in Canada against that entity. Even as to Greenpeace Canada, Plaintiff alleges here only that Greenpeace Canada ***should*** have known that its statements were in error, not that it ***did*** know they were in error. GP Br. 10-11; *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 512 (1984) (actual malice focuses solely on the defendant's actual state of mind "at the time of publication"); *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245, 253 (1974) (a plaintiff must prove actual malice with respect to each defendant, including the publisher); *Murray v. Bailey*, 613 F. Supp. 1276, 1281 (N.D. Cal. 1985) ("[p]laintiff cannot recover … without proving each defendant acted with actual malice as to each purported defamation")). Regardless, even if it could somehow show that Greenpeace Canada acted with actual malice – which it cannot – it cannot impute such a state of mind to the named Greenpeace Defendants here. *Revell v. Hoffman*, 309 F.3d 1228, 1234 (10th Cir. 2002) ("[A]ctual malice must be proved

separately as to each defendant"); *McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1303 (D.C. Cir. 1996) ("[Plaintiff] may show [publisher's] malice only through evidence of the information available to, and conduct of, its employees"); *Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1446 (8th Cir. 1989) ("If [author] is not an employee of Viking, independent evidence of Viking's culpability is required"); *Secord v. Cockburn*, 747 F. Supp. 779, 787 (D.D.C. 1990) ("Actual malice must be proved separately with respect to each defendant … and cannot be imputed from one defendant to another absent an employer-employee relationship giving rise to *respondeat superior*."); *Murray*, 613 F. Supp. at 1281.[4]

Second, the alleged statements fall far outside the applicable statute of limitations, and thus as noted cannot serve as the basis for a defamation claim under California law, whomever made them. For this reason, Resolute now attempts to argue that these statements made years earlier – long before any of the statements in suit were published – demonstrate that the 17 later statements were made with actual malice. Opp. Br. 45-47. Yet actual malice is measured at the time of publication and Resolute has not plausibly alleged – nor could it – that the statements made in 2012 by Greenpeace Canada were made with actual malice, much less demonstrated that the named Greenpeace Defendants made each of the 17 statements in suit (none of which repeat the error) three or more years later with a "high degree of awareness of their probable falsity," *Garrison*, 379 U.S. at 74, and that each defendant "in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

Third, although Resolute acknowledges that Greenpeace Canada issued a public retraction of its erroneous statements in early 2013, Resolute now attempts to turn that good-faith act on its head, arguing ***both*** that the fact that Greenpeace Canada ***did not*** retract the statements for several months demonstrates actual malice, and that when it ***did*** issue a retraction, this was an admission that the statements were made with actual malice. Opp. 47. Neither is supported by any plausible factual allegations, and each argument is irrelevant to an actual malice showing: whether or not Greenpeace Canada (or any other party) believed its statements to be true at the

[4] In the Canadian litigation, Greenpeace Canada has set forth at length an explanation for the mapping errors. *See* ECF No. 200, Koonce Decl., Ex. 2 (Statement of Defence) ¶¶ 42-48.

time of publication. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 286 (1964); *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1515 (D.C. Cir. 1996).[5] Finally, to implicate the named Greenpeace Defendants, Resolute goes even farther, lumping together all of their statements made after May 31, 2015 and claiming that such statements must have been made with actual malice because Greenpeace Canada admitted mistakes and retracted its publication. Opp. 48-50. Not only is this a *non sequitur*, the challenged statements made after May 31, 2015 by the named parties were wholly different, substantively, than the ones that were retracted in 2013 by Greenpeace Canada; while the earlier statements were about where Resolute was logging, the later statements do not make any such claims about the location of logging roads or the like. Resolute asserts a sort of free-floating malice spanning many years on the part of all Greenpeace entities,[6] but that is not the high degree of awareness of probable falsity or serious doubt as to truth that the law requires. Ill will, which is at most what Resolute attempts to allege, is not actual malice. *See, infra* at 20.

Fourth, Resolute's contention that it did not release all claims against Greenpeace Canada related to the 2012 mistaken publication is belied by those entities' contemporaneous correspondence. *See* Koonce Decl., Ex. 9. As the letters put at issue by Plaintiff reveal, and to which this Court may take judicial notice, Resolute demanded a retraction and offered a release of claims in return. Greenpeace Canada accepted Resolute's offer, *see id.*, and published a full retraction. *See* Koonce Decl., Ex. 10. The retraction is evidence that Greenpeace lacked actual malice when it initially published the challenged materials, ECF No. 173, MTD Order 12; GP

[5] Resolute's reliance on non-libel cases that address recklessness in the context of fraud are inapposite to the constitutional actual malice standard applicable here. *See, e.g., Shenwick v. Twitter, Inc.*, 282 F. Supp. 3d 1115 (N.D. Cal. 2017) (Private Securities Litigation Reform Act); *DeMarco v. Lehman Bros., Inc.*, 309 F. Supp. 2d 631 (S.D.N.Y. 2004) (same).

[6] Resolute's assertion that the Court may consider evidence outside the limitations period is a straw man (Opp. 46); the Greenpeace Defendants have never argued for any such strict cut-off, only that the statements by Greenpeace Canada from three years earlier are not ***relevant*** to an analysis of actual malice at the time of publication in 2015 and thereafter, especially different statements made by other parties. Further, the cases Resolute cites on point are inapposite; for example, although Resolute argues that in *Antonovich v. Superior Court*, 234 Cal. App. 3d 1041, 1052-53 (1991), the court considered events from 1980 to determine whether a statement made eight years later was made with actual malice; in that case the 1988 statement was ***about*** an event that had occurred in 1980 and what the speaker thought at that time.

Br. 11, and this U.S. suit is thus plainly an effort by Resolute to assert defamation claims based on retracted statements that Plaintiff previously released as to Greenpeace Canada.[7] For these reasons, the frivolousness of Plaintiff's suit is evident and has imposed a waste of the court's and the parties' resources.

d. Greenpeace's Critiques of Resolute's Forestry Practices Are Protected Opinions Based on Disclosed Facts

Resolute contends that Greenpeace's statements cannot be protected statements of opinion if they rely on "verifiably false facts," Opp. 36, or if they "are based on incorrect or incomplete facts or draw erroneous conclusions from those facts." *Id.* 38. Resolute focuses on what it alleges to be false Greenpeace statements on its activities in the Montagnes Blanches forest region, *id.* 36, as well as a bullet-point list of Greenpeace statements criticizing Resolute's logging practices. *See id.* 38-39. In so doing, Resolute misstates the applicable standard and misleads the Court as to the nature of Greenpeace's critiques of Plaintiff's operations in the Canadian Boreal Forest.

i. The Advocacy Context of Greenpeace's Statements

As the Greenpeace Defendants have consistently maintained, the challenged statements are all based on credible science, cited in the publications in suit, and all resound as advocacy on environmental public policy. Greenpeace has long called out Resolute publicly for its environmental record in the Canadian Boreal Forest, among other things focusing on its unsustainable logging and the impact of its practices on endangered wildlife habitat.

[7] Notably, Resolute brought suit against Greenpeace Canada notwithstanding the release. Indeed, Resolute now seeks to play the pending Canadian litigation against this suit, arguing that Greenpeace Canada is "withholding documents in contempt of a court order … out of concern that those documents could be used to bolster Resolute's claims in the RICO proceeding." Opp. 56. Resolute's claim is wholly inaccurate. The affidavit appended to Resolute's Opposition, ECF No. 208-1, Agre Decl., Ex. A, which purports to describe discussions during a case conference, is disputed by Greenpeace Canada's counsel. *See* Koonce Decl., Ex. 11. Rather, as counsel for Greenpeace Canada explains in his letter, and as borne out in Greenpeace Canada's related moving papers, Koonce Decl., Ex. 12, Greenpeace Canada is seeking a protective order to ***preclude Resolute*** from misusing Greenpeace Canada's discovery materials in contravention of Canadian civil procedure rules. As this Court has repeatedly affirmed, discovery is premature in this proceeding and Resolute's effort to misconstrue Greenpeace Canada's discovery positions in a separate litigation offers no basis for this Court to reconsider its rulings. *See* ECF No. 205.

Greenpeace's advocacy has taken a variety of forms, consisting of articles, online posts, letters and other forms of protected speech. This broad advocacy has been directed to the general public, Resolute itself, and Resolute's customers. In almost every instance, Greenpeace's statements criticizing Resolute either incorporated, or were accompanied by, substantive reports documented with references to (typically previously published) scientific analyses, audits and official terminations of Resolute's Forest Stewardship Council certifications as non-compliant with applicable standards. In other words, the statements clearly set forth the basis for the opinions expressed therein, and case law in this Circuit confirms that such statements are non-actionable. *See, e.g., Standing Comm. on Discipline of U.S. Dist. Court for Cent. Dist. of California v. Yagman*, 55 F.3d 1430, 1439 (9th Cir. 1995) ("[w]hen the facts underlying a statement of opinion are disclosed, readers will understand they are getting the author's interpretation of the facts presented; they are therefore unlikely to construe the statement as insinuating the existence of additional, undisclosed facts."); *Wynn v. Chanos*, 75 F. Supp. 3d 1228, 1233-34 (N.D. Cal. 2014).

Resolute's reliance on *Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.*, 946 F. Supp. 2d 957, 972 (N.D. Cal. 2013), *aff'd*, 609 F. App'x 497 (9th Cir. 2015), Opp. 33, holding that an opinion is not protected speech when it is based on implied or undisclosed facts, is thus entirely misplaced.[8] In contrast, Greenpeace's advocacy, consisting of judgments supported by facts disclosed in the publications, is classic protected opinion, and cannot serve as the basis for defamation liability. Resolute even acknowledges that it "does not dispute the accuracy of the general assertions or the sources that the Greenpeace Defendants rely on to support those assertions." Opp. 41. And Resolute's contentions that because Greenpeace's reports are authored by people with deep knowledge in their fields, those reports are excluded from opinion protections, Opp. 34-35, entirely miss the mark. Greenpeace's efforts to reinforce why its

[8] Plaintiff's reliance on *Restis v. Am. Coal. Against Nuclear Iran, Inc.*, 53 F. Supp. 3d 705 (S.D.N.Y. 2014), is similarly misplaced. That court found the statements in issue were not protected opinions because they implied the existence of supporting facts "unknown to persons reading or hearing it," *id*. at 719, whereas, as Resolute repeatedly acknowledges, the Greenpeace statements in suit here readily set forth and disclosed the facts upon which they relied. *See, e.g.*, Opp. 34-35, 41.

advocacy is meritorious does not render the opinions it expressed unprotected. The context of the statements – advocacy publications in a range of formats seeking to sway public opinion – indicates to readers that the conclusions drawn are opinions based on the facts disclosed.[9]

Gross v. New York Times Co., 82 N.Y.2d 146 (1993), a case upon which Resolute relies, Opp. 36, does not detract from Greenpeace's position, but rather reinforces why their statements are protected opinion. In *Gross*, the alleged defamatory statements were made in an investigative article in the news section of the newspaper, a context which the court held to suggest that the statement were factual in nature. *Id*. at 155-56. Two years later, in *Brian v. Richardson*, 87 N.Y.2d 46 (1995), the same court distinguished *Gross*, and held that accusations of misbehavior and criminal conduct made in an op-ed in the New York Times were pure opinion. Noting the differing contexts, the court held that, unlike the investigative reports in *Gross* and similar to the letter to the editor by an animal rights activist in *Immuno AG*, the op-ed format created the "common expectation" that the communications would "represent the viewpoints of [its] author[] and … contain considerable … diversified forms of expression and opinion." *Id*. at 53. In *Brian*, the court noted that the author disclosed that he had an interest in the issues discussed, thereby "signalling that he was not a disinterested observer," *id*., and the defendant had stated the bases for his allegations. *Id*. Greenpeace is well-known as a source for environmental advocacy. By disclosing the factual bases for their opinions, Greenpeace's conclusions on the impacts Resolute's logging is having on the Boreal ecosystem are protected speech and cannot be subject to defamation.

[9] Cases cited by Resolute are thus inapposite to Greenpeace's environmental advocacy. The scientific research at issue in *Melaleuca, Inc. v. Clark*, 66 Cal. App. 4th 1344, 1354-55 (1998), for example, was based on the results of the defendant's purported scientific testing, and "were not asserted in the context of a dispute or intellectual inquiry in which the audience might expect" emphatic speech or advocacy. The same was true in *Hi-Tech Pharm., Inc. v. Cohen*, 277 F. Supp. 3d 236 (D. Mass. 2016), wherein the defendant had published alleged defamatory statements in a peer-reviewed journal article, and *Enigma Software Grp. USA, LLC v. Bleeping Computer LLC*, 194 F. Supp. 3d 263, 270 (S.D.N.Y. 2016), where the alleged defamatory statements were made on a computer support website that promotes "unbiased and truthful advice" to its readers.

ii. Resolute Cannot Invent New Standards for Examining Protected Opinion

Problematically, Resolute argues for this Court to apply an incorrect and unfounded standard to determine whether Greenpeace's statements are protected opinion based on disclosed facts, arguing, without citation to cases in support, that Greenpeace's opinions may be actionable if Greenpeace did not draw the "correct" conclusion – *i.e.*, Resolute's conclusion – from the studies and data upon which it relied. Opp. 34 (statements not protected if Greenpeace "draws erroneous conclusions from those facts"). In the evolving field of environmental science, this proposed standard is untenable. As this Court noted in dismissing Resolute's first complaint, statements may be protected opinion where they touch on matters of scientific controversy. MTD Order 17-18. Because environmental science, like so many scientific pursuits, encompasses "numerous and widely varied approaches and philosophies" and can be the subject of "much debate and disagreement," *Spelson v. CBS, Inc.*, 581 F. Supp. 1195, 1202-03 (N.D. Ill. 1984), *aff'd*, 757 F.2d 1291 (7th Cir. 1985), speech espousing opinions on matters of environmental science is protected, without the need for the Court to wade into the merits of competing opinions. Indeed, as this Court noted, where, as here, experts retained by Greenpeace have demonstrated that the challenged statements present well-supported opinion in the complex debate regarding forest sustainability and climate changes, such statements are nonactionable and the fact that Resolute's experts disagreed only underscored the vigorous debate over these topics. MTD Order 15-16; *Underwager v. Salter*, 22 F.3d 730, 736 (7th Cir. 1994) (scientific controversies "must be settled by methods of science rather than matters of litigation."). Resolute's arguments that Greenpeace is liable in defamation because it reached a conclusion that RFP would not have desired it to reach must once again be rejected.

iii. The Montagnes Blanches Statements

The dispute regarding Resolute's impact on the Montagnes Blanches forest region underscores this point. Resolute contends that Greenpeace Canada statements that it has "acquired three harvest blocks through auction sales inside the Montagnes Blanches," and that "all three sites have been logged," are false and defamatory because the "three harvest blocks

purchased by Resolute were not within the Montagnes Blanches," based on "the Quebec Government's official maps of the region." Opp. 36. The Greenpeace publications at issue, the May 2017 Clearcutting report, *see* Suppl. App. Tab 8,[10] and the Endangered Forests in the Balance report, *see id.* Tab 5, each depict on a map the boundaries of the Montagnes Blanches region Greenpeace's statements pertain to. The Montagnes Blanches, or "white mountains," is a descriptive word used to refer to a vast forested region containing spectacular "white mountains" – somewhat akin to the "Rockies" in the United States as a nomenclature. While Greenpeace's mapped "Montagnes Blanches" region certainly overlaps substantially with the mapping issued by the Quebec government – after all, they are both addressing a vast region surrounding the same mountain range – they are not identical. There is nothing false or defamatory about Greenpeace's statements that Resolute's activities in the region Greenpeace has transparently mapped have impacted Caribou herds undeniably residing within those boundaries. Where Greenpeace is entirely forthcoming about the boundaries of the region it is describing, and thus not implying the existence of unstated facts, *see* Suppl. App. Tabs 5 & 8, its conclusions regarding the impact of Resolute's activities in that region, *e.g.*, "each time Resolute logs in intact forests and Woodland Caribou habitat, it is further jeopardizing the species' chances of survival," Am. Compl. App. B-3; *see* Suppl. App. Tab 8, are protected opinion based on disclosed factual support.[11]

[10] Elsewhere Resolute complains that some of the hyperlinked sources in the Clearcutting report are "inoperable," Opp. 38 n.6, but "'link rot,' … while reflecting a current limitation in the long-term usefulness of hyperlinking, does not undermine the status of hyperlinks as akin to footnotes in the vast and fast-paced world of the Internet," and "[t]his is particularly so in the context of defamation cases, which typically involve prompt challenges to publications, … as mandated by the typically brief limitations periods for defamation claims." *Adelson v. Harris*, 973 F. Supp. 2d 467, 484 n.13 (S.D.N.Y. 2013), *aff'd*, 876 F.3d 413 (2d Cir. 2017).

[11] Even if Greenpeace's map of the Montagnes Blanches region was "false" – and there are inadequate allegations such that could ever be true of a sprawling forest ecosystem – the Plaintiff must show that the sting of the allegedly false statements was beyond the sting that would have been caused had the Greenpeace Defendants truthfully reported the circumstances. *Okun v. Superior Court*, 29 Cal. 3d 442, 452 (1981). Put another way, a statement is not considered false unless it would have a different effect on the mind of the reader from that which the pleaded truth would have produced. *Hughes v. Hughes*, 122 Cal. App. 4th 931, 936 (2004). Here, Resolute has admitted that it purchased the three harvest blocks cited by Greenpeace, and has not pleaded how the statement that those blocks were within the "Montagnes Blanches" region caused additional damage. The impact of the statements is that Resolute's logging activities in

iv. Other Alleged Misstatements

In the same vein as its critique regarding Greenpeace's Montagnes Blanches mapping, at pages 38-39 of its brief, Resolute sets forth a series of six examples of statements it claims are based on "incorrect or incomplete facts or draw erroneous conclusions from those facts." As discussed *supra* at 9-11, no defamation liability lies where Resolute is merely challenging Greenpeace's opinions drawn from disclosed facts. Nevertheless, Greenpeace addresses Resolute's mischaracterizations of the statements at issue, and their disclosed sources, below. As will become clear, in its attempt to portray these statements as constituting allegedly incorrect or incomplete facts or erroneous conclusions, Resolute must significantly distort both the context and content of the statements, which just serves to demonstrate that Resolute's version of the "truth" here is nothing more than its opinion. That Greenpeace chooses not to be a mouthpiece for Resolute and include every fact that Resolute would like, does not make false what Greenpeace publishes. *See, infra* at 15 & n.22**.**

- Opp. 38-39: "GP-USA's April 2015 article "Rite Aid Making the Wrong Choice for Ancient Forests" authored by Brindis stated that "Resolute is logging in the last undisturbed ancient forests in Quebec and Ontario" (¶ 263), which implies the false fact that as a result of Resolute's harvesting there will be no remaining intact forest landscapes. GP-USA omits that 85% of intact forest landscape is off-limits to forestry by law and in no danger of being harvested by any company, let alone Resolute. And in the remaining areas where Resolute does harvest, Resolute is responsible for only a fraction of the harvesting, with the remaining areas being harvested by other forestry companies that are not mentioned, and thus Resolute cannot be singularly responsible for the loss of the last remaining intact forest landscapes. (¶¶ 155-59; 334, 337.)"

First, the article cited by Resolute is dated April 15, 2015, more than one year before it filed suit on May 31, 2015, and therefore outside the applicable statute of limitations for defamation. Perhaps for that reason, the Amended Complaint does not allege the article or any statements therein are defamatory. Instead, the article is referenced at Table B of the Amended Complaint in a list of alleged "fraudulent wire communications." *See* Am. Compl. ¶ 407. Thus, Resolute's citation to the article in its Opposition yet again demonstrates how fast and loose

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these three blocks has detrimentally affected caribou herd residing in the region. Whether the blocks are located within the "Montagnes Blanches" as delineated by Greenpeace or outside the area delineated by the Quebec government adds little to the gist or sting of the alleged defamatory statements, and Resolute has not alleged it caused additional damage.

Resolute plays with statements that otherwise would be part of its defamation claim but for the fact that claim is time-barred. In any event, the publication clearly has not and cannot be alleged to contain any actionable statements. Second, the statement in the web blog is selectively quoted by Resolute. In full, the sentence containing the contested language reads: "Resolute is logging in the last undisturbed ancient forests in Quebec and Ontario, some of which is threatened Woodland Caribou habitat." Although Plaintiff assumes "ancient forests" implies "intact forests," that is not what is asserted and those are two different concepts. The publication hardly implies that Resolute's actions will deplete all intact forests – there is no statement in the article that Resolute was engaging in clearcutting an entire forest, but rather that it was engaging in "logging," with the focus on how such logging was impacting Caribou habitat. Even by Resolute's own definition of what constitutes an "intact forest," Plaintiff appears to concede that it does engage in logging in such lands.[12] As to the impugned omission, it is not Resolute's role to dictate what other facts or information Greenpeace should include in its advocacy publications. *DARE America v. Rolling Stone Magazine*, 101 F. Supp. 2d 1270, 1284 n.3 (C.D. Cal. 2000) ("Plaintiffs' suggestion that Defendants failure to contact [plaintiff] before publishing [the] article evidences actual malice is … legally misguided."), *aff'd*, 270 F.3d 793 (9th Cir. 2001); *Maheu v. Hughes Tool Co.*, 569 F.2d 459, 465-66 (9th Cir. 1977) (if the gist or sting is the same, the omission is not actionable); *Reader's Digest Ass'n v. Superior Court of Marin Cty.*, 37 Cal. 3d 244, 259 (1984) ("Neither is there a duty to write an objective account. A publisher is 'not required to provide an objective picture' … So long as he has no serious doubts concerning its truth, he can present but one side of the story").

- Opp. 39: "GP USA's "Campaign Page: Boreal Forest" launched on June 29, 2015, states that "[Resolute]'s operations threaten iconic species such as woodland caribou" which implies the false fact that Resolute is threatening the last remaining woodland caribou. (ECF No. 185-2.) GP-USA omits that 77% and 76% of woodland caribou ranges in Quebec and Ontario, respectively, are located in areas off limits to forestry. (¶ 338.) And in the remaining areas where Resolute does harvest, Resolute is responsible for only a fraction of the harvesting, with the remaining areas being harvested by other forestry companies that are not mentioned, and thus Resolute

[12] And Resolute's further arguments that the Greenpeace Defendants have defamed the company by referring to it as a "forest destroyer," *see* Opp. 37, have already been rejected by this Court, as Resolute acknowledges. *Id*. 31.

cannot be singularly responsible for the destruction of woodland caribou. (¶¶ 160-73, 334, 337-38.)"

Once again Resolute references statements and publications not contained in Plaintiff's nearly 500-paragraph Amended Complaint. Moreover, Resolute twists the statement it purports to quote; but stating that a species is "threatened" by Resolute's "operations" is not the same thing as making claims about 'the last remaining caribou," and Plaintiff's attempt to equate the two is misleading. Nor does Greenpeace state that Resolute is "singularly responsible" for the totality of caribou habitat losses – as Plaintiff again misleadingly contends.

- Opp. 39: "GP USA's July 2015 article "Why Forests Are Critical For Public Health" authored by defendant Moas draws the erroneous conclusion from a source discussing the benefits of reforestation and harms of massive deforestation by fire, industrial development and *illegal* logging in Indonesia, Brazil and Costa Rico, that "The Canadian Boreal forest . . . one of the largest reservoirs of carbon in the world and the largest intact ancient forest in all of North America . . . is under threat from unsustainable logging. One company *in particular*, Resolute Forest Products, is threatening the future of the Boreal forest and the wildlife that rely on it to thrive." (¶¶ 142-54, 145 n.1; ECF No. 185-1) (emphasis added).)"

The context of this article is a web blog, *see* Suppl. App. Tab 3, which incorporates hyperlinks to some sources but does not include the same footnoting as Greenpeace's in-depth published reports. Resolute misleadingly alleges the article relies on a source pertaining to regions outside Canada to draw a conclusion about Resolute's impact in the Canadian Boreal – but the source at issue is provided in a hyperlink to a preceding section of the web blog that generally discusses, under a separate heading, "3 Ways Forests Protect Our Health." Greenpeace has forest campaigns working to protect forests around the world – in a general blog article such as this, it is not only appropriate but necessary to discuss in general terms from a global perspective.

- Opp. 39: "The February 2016 Endangered Forests in the Balance Report intentionally misrepresents that "Canada *leads* the world in loss of intact forests, with 21% of intact forest loss worldwide between 2000 and 2013 occurring in Canada . . .." The study GP-Canada cites reveals that rather than leading the world in intact forest loss, North America combined lost the *least amount of intact forests* on Earth. The same study also revealed that the majority of intact forest loss in North America was from fire and other natural disturbances, not harvesting. (¶ 156-57)."

Again, Resolute distorts Greenpeace's claims. The study Greenpeace Canada cites in its detailed report states that the northern forest belt, otherwise known as the global boreal forest, comprised of Canada, Russia and Alaska, suffered the most intact forest loss, and that overall

Canada lost the most. *See* Suppl. App. 5, Endangered Forests in the Balance 4 & n.17 (citing http://www.wri.org/news/2014/09/release-new-analysis-finds-over-100-million-hectares-intact-forest-area-degraded-2000). Resolute, however, disputes that ***North America*** lost the greatest area of intact forests by grouping the United States and Mexico with Canada, but their contention distorts the forest areas at issue in Greenpeace's statement. Moreover, Greenpeace's report notes that fires are a cause for intact forest losses, *see* Suppl. App. Tab 5, Endangered Forests in the Balance 4, so Resolute's contention that Greenpeace ignored that fact is not only inaccurate but intentionally misleading.

- Opp. 39: "In the December 2016 letter to book publishers, GP-USA (Moas) purports to rely on a 1998 study based on computer modeling of hypothetical forest landscapes with limited focus on the regions in question, but fails to disclose a more recent (2013) paper by the same scientist, which relied on observed data and concluded that managed Boreal forest is having a slight *cooling* effect on global climate. (¶ 342.)"

Resolute's arguments again revert to a "battle of the experts," which only underscores the fact that Greenpeace's statements are protected opinion. The letter at issue, see Suppl. App. Tab 7, refers to both to the 1999 Kurz study and a 2006 Tarnocai study that specifically address Canadian boreal forest landscapes. *See id.* n.1. Each study is cited as support for Greenpeace's statement in the letter that the Canadian boreal "contains more than 200 billion tons of carbon." Nowhere in the letter, and certainly not with these sources, does Greenpeace make any claims about Resolute's impact on carbon or the overall impact on climate. Instead, the 1999 study is relied upon only to show that this forest is carbon rich, which Resolute does not contend the 2013 paper refutes.

- Opp. 39: "Brindis and Moas misleadingly claimed that the suspension of Resolute's FSC certificates was the result of "serious non-conformances" or "shortcomings in the company's operations-on-the-ground," without disclosing that the Quebec government has repeatedly and publicly stated that the suspensions were due to narrow issues within the exclusive control of the Quebec government, not Resolute. Defendants likewise omitted that Resolute remains one of the largest holders of FSC certificates in North America. (¶ 336, 361.)"

The purported Greenpeace statements are not identified in the Amended Complaint and cannot form the basis of Resolute's libel claim. Nevertheless, it is worth noting that in general when referring to Resolute's FSC certificate losses Greenpeace cites and relies on the

independent FSC audits and their findings that Resolute's operations are not in conformance with FSC criteria. *See, e.g.*, Suppl. App. Tab 5, Endangered Forests in the Balance 3 & n.6. That Resolute would prefer Greenpeace include further detail regarding the nuances of the audits, or Resolute's overall FSC certificate holdings, is untenable as a matter of First Amendment law, and certainly is insufficient to plausibly plead that Greenpeace's statements that Resolute's certificates have been terminated for non-conformances are false or that such statements were made with actual malice.

e. Resolute's Certificates Were Indisputably Terminated, And Greenpeace Is Not Obligated To Promote Resolute's Remaining Certificate Holdings

Resolute contends that Greenpeace "disseminated the false allegation that two of Resolute's FSC certificates had been terminated and two certificates suspended," but the publicly available documents substantiating Greenpeace's statements do not lie. The Forest Stewardship Council is an independent nonprofit organization established to promote the responsible and sustainable management of the world's forests. *See* Koonce Decl., Ex. 13. The FSC is a voluntary scheme that independently inspects and evaluates forestry operations for sustainability practice, compliance with local laws, respect for Indigenous peoples' rights, the health safety, and rights of forest workers, and the provision of a wide range of other social benefits. *See id*. To acquire and maintain FSC certification, forestry companies operating in the Canadian Boreal Forest must ensure compliance with the FSC National Boreal Standard, and these practices are audited by independent firms. *See id.*, Exs. 14-15. Failing to meet FSC requirements can lead to auditors issuing non-conformances. When a certificate holder fails or is unwilling to adjust operations within the timeframe set by the FSC and auditors, certificate suspension and terminations will result.

Resolute had four of its FSC certificates in Lac St. Jean, Quebec and Northern Ontario totaling an area of over 8 million hectares of the Boreal Forest terminated (Mistssini-Peribonka,

Lac St-Jean and Caribou Forest),[13] or suspended (Dog River).[14] The independent auditors of Rainforest Alliance hired by Resolute identified thirteen major non-compliances with the FSC National Boreal standard in two Lac St-Jean certificates.[15] In its March 2014 official statement on the suspension of three certificates (Dog River, Mistassini-Peribonka, and Lac St-Jean), Resolute committed to do everything possible to recover these certificates before termination and meet its commitment to achieve FSC certification on 80% of its operations.[16] Despite its statement, the Mistassini-Peribonka certificate was terminated in December 2014.[17] Subsequently the certificate for Caribou Forest was terminated in January 2015.[18] And, Resolute quietly dropped its commitment to achieve FSC certification on 80% of its operations.

Rather than make a concrete effort to regain their FSC certificates, Resolute allowed them to be terminated and then sued its critics for pointing out its failings. However, Resolute's defamation challenge to any Greenpeace statements commenting on Resolute's lost FSC certificates must fail because Greenpeace's statements are supported by FSC's own records, available online to the public, and are thus, substantially true.

f. The Alleged "Operational Memo" Is A Red Herring

Finally, Resolute still has not revealed the alleged "operational memo."[19] Instead, Resolute purports to selectively – and by all appearances, misleadingly – quote from the document, which Plaintiff now says Defendant Todd Paglia authored in 2012.[20] Resolute fails to allege or prove, however, that any Greenpeace Defendant (or Greenpeace Fund) ever possessed

[13] Koonce Decl., Ex. 16 (PF Resolu Canada Inc. (Mistassini-Peribonka)); *id.*, Ex. 17 (Dolbeau-Mistassini); *id.*, Ex. 18 (Resolute FP Canada Inc. (Caribou Forest)).
[14] Koonce Decl., Ex. 19.
[15] Koonce Decl., Ex. 20; *id.*, Ex. 21.
[16] Koonce Decl., Ex. 22.
[17] *See supra* at n.13. The word "terminated" is the FSC's own term. Koonce Decl., Ex. 23.
[18] Koonce Decl., Ex. 23. Resolute later quietly dropped this commitment. *Id.*, Ex. 24.
[19] Notably, Resolute does not allege the document was entitled an "operational memo" – that appears to be a characterization chosen by Resolute to make the document appear sinister.
[20] Nowhere in the Amended Complaint does Plaintiff allege that this document was authored by Paglia – this is new information slipped into the Opposition. Indeed, despite discussing the memo at length at Paragraphs 76 to 85 and elsewhere in the pleading, Plaintiff only discloses at Paragraph 322 that it was purportedly authored by just one defendant (Paglia's employer ForestEthics), followed by an entirely bare allegation that it was "shared with, and approved, by the other members of the Enterprise."

the document or how they might have obtained a copy, or that each Defendant agreed to its purported ideas. Instead, Resolute claims the Court may infer that each Defendant knew of the document, Opp. 4, 51, without plausibly alleging that they ever did.

In resting so heavily on this absent memo, Resolute claims that insofar as it purportedly included a call of action to publicly critique Resolute's forestry practices, such an alleged plan is all that is needed to plausibly plead actual malice to survive Greenpeace's motion to dismiss. But this is hardly the case. All the purported memo shows is, at most, that the defendants shared an interest in publicly challenging Resolute's environmental record. *See* Opp. 51-52. But even if this could somehow constitute ill will – which it does not, given the defendants' various, publicly-held environmental views and their records of challenging many prominent companies – this does not equate with actual malice. *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 10-11 (1970) ("spite, hostility, or deliberate intention to harm" not equivalent to actual malice); *Ostrander v. Madsen*, No. 00-35506, 2003 WL 193565, at *1 (9th Cir. Jan. 28, 2003) ("Proof of hostility or ill will does not show actual malice."). Indeed, neither the allegation of "failure to conduct a thorough and objective investigation, standing alone," nor "mere proof of ill will," is sufficient to prove actual malice. *Reader's Digest Ass'n v. Superior Court*, 37 Cal. 3d 244, 258, (1984). And, moreover, purported demonstrations of ill will years before or after the time of publication are not sufficient to establish actual malice. *See Shoen v. Shoen*, 48 F.3d 412, 417 (9th Cir. 1995) ("A showing that [libel defendant] harbored ill will … at a time after the alleged libels—even only one month later—cannot, without more, establish actual malice.").[21]

Moreover, Resolute argues that by virtue of this one 2012 memorandum, any defendant can be liable for the publications of other defendants for many years to come. This is untenable. The alleged existence of the purported memorandum cannot substitute for knowledge of falsity as to each publication in suit. First, only one who takes a responsible part in a publication of

[21] Ill will can only be circumstantial evidence of actual malice. "Bias may *support* a showing of actual malice; if you bad-mouth someone, the fact that you also don't like him makes it marginally more likely you're lying. But bias evidence is not sufficient by itself to support a claim." *Suzuki Motor Corp. v. Consumers Union of U.S., Inc.*, 330 F.3d 1110, 1119 (9th Cir. 2003); *see also Harte–Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 666 n.7 (1989) ("[A]ctual malice may not be inferred alone from evidence of personal spite, ill will or intention to injure on the part of the writer.") (internal quotation marks omitted).

purportedly defamatory material may be held liable for the publication. *Universal Commc'n Sys., Inc. v. Turner Broad. Sys., Inc.*, 168 F. App'x 893 (11th Cir. 2006) (*per curiam*). Second, Plaintiff has not specifically alleged the existence of an agreement between the Greenpeace Defendants and any other entity to publish the specific statements in suit. *See Matson v. Dvorak*, 40 Cal. App. 4th 539, 549 (1995) ("The general rule for defamation is that only one 'who takes a *responsible* part in the publication is liable for the defamation.'") (quoting *Osmond v. EWAP, Inc.*, 153 Cal. App. 3d 842, 852, 200 Cal. Rptr. 674 (1984)). Instead, Resolute alleges only that the purported "operational memo" was drafted by Paglia – not that it was ever received by any of the Greenpeace Defendants, or that it was adopted by any of the Greenpeace Defendants, or that the alleged memo dictated specific statements that Greenpeace later published that are in suit. In alleging that the purported RICO "enterprise" collaborated on messaging, Resolute runs afoul of this Court's decision that there is no support in the statute or case law for using RICO as a substitute for showing that a party took a responsible part in a particular publication. *See* MTD Order 13-14 . Third, Plaintiff's "conspiracy" theory among organizations that share common messages fails in light of the constitutional right of association. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

Finally, Resolute complains that the operational memo specifically planned to depict Resolute as the "most regressive forest products company," Opp. 5, 7, 13, but it does not claim that the Greenpeace Defendants ever made such an allegation.[22] Of course even if Greenpeace had, such a statement would be a subjective ranking and protected speech. *Seaton v. TripAdvisor LLC*, 728 F.3d 592, 600-01 (6th Cir. 2013) (the "Dirtiest Hotel" was protected opinion).

2. Resolute Has Not Plausibly Pled a Civil RICO Violation

As noted, Resolute's defense of its RICO claims in its Opposition is almost an afterthought. Resolute does not even try to explain how it has addressed in its amended pleading

[22] Resolute further claims that the moniker was "false" because "[b]y July 2012, Resolute held the largest number of FSC certificates in the world." Opp. 23. To be clear, notwithstanding Plaintiff's desire to put words in Greenpeace's mouth regarding its supposed sterling environmental record, the Greenpeace Defendants have no legal obligation to include information that Resolute would prefer they include – choice of what to include in Greenpeace's advocacy is an editorial judgment which a defamation plaintiff cannot dictate and with which courts do not interfere. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

the flaws identified by the Court in dismissing the original Complaint, including the lack of specificity around its claims and the failure to plausibly plead proximate cause. Rather, it just rehashes the same arguments it made when opposing the prior motions, with some additional selective references to the supposed 2012 "operational memo." We briefly address only a few key points raised in the Opposition, below.

a. Failure to Plead Fraud with Specificity

This Court dismissed the RICO claims in Resolute's original Complaint for failure to comply with the heightened pleading requirements of Rule 9(b), holding that with respect to the alleged fraudulent statements, Resolute often failed to identify the author, and "never identifie[d] the 'misconduct' or 'specific content' that constitutes fraud in the reports."[23] MTD Order 18-19. While Resolute has included additional names of authors of the challenged statements in its Amended Complaint, its descriptions of the content of those statements remain for the most part unchanged. *Compare* Compl. Table B to Am. Compl. Table A. For example, in the Complaint, the first entry in Table B was an email from "Greenpeace" to Kimberly-Clark on August 21, 2012, and Resolute described the subject as "Challenging Resolute's compliance with FSC standards." By contrast, in the Amended Complaint, Resolute lists the author as "Greenpeace Canada," and describes the subject as "Accusing Resolute of non-compliance with FSC standards." Surely these minor tweaks do not provide sufficient additional detail around the "misconduct" or "specific content" to avoid dismissal again, on the same grounds as before.

As discussed in the Greenpeace Defendants' opening brief and below, Resolute again asks this Court to accept that simply by alleging a misstatement by a defendant, it has satisfied its burden to show mail or wire fraud, but more is required: Resolute must show an intent by the Greenpeace Defendants to defraud someone of property by means of a trick or deceit. GP Br. 24-26. As such, to meet its burden under Rule 9(b), Resolute is required to identify how the statements at issue defrauded someone (in the Court's words, it must identify the "misconduct"

[23] As previously noted (GP Br. 25), the Court also held that much of the pleading was "even less specific," singling out Resolute's claim that Greenpeace "processed millions of dollars in fraudulently induced donations" while failing to identify "a single donor, donation date or amount, nor how the donation was fraudulently induced" (MTD Order 19), yet in the Amended Complaint Resolute repeats precisely this same type of allegation about defrauding donors.

alleged). For each of the statements, merely alleging that a statement "accuses" Resolute of some act or omission, or is otherwise misleading, without specifically alleging how this worked a fraud on the particular recipients, does not satisfy the heightened pleading standard.

b. Failure to Plead Conduct of an Enterprise

Resolute makes little attempt in its Opposition to explain how its Amended Complaint plausibly alleges the necessary elements of an enterprise conducted by the purported "enterprise members." Moreover, although in the Amended Complaint Plaintiff identifies the "common purpose" of the alleged enterprise as "target[ing] Resolute with a disinformation campaign that could be used to fraudulently induce millions of dollars in donations from individual donors and foundations" (Am. Compl. ¶ 43), in its Opposition it appears to back away from this allegation of a common fraudulent purpose. Instead, it focuses on the supposed operational memo, and states that the common purpose was "to make Resolute and its products highly controversial," with "all ENGOs focusing their energy resources on positioning Resolute as the most regressive forest products company." Opp. 74. These shifting definitions suggest that Resolute is making up its allegations on the fly to suit its purposes, rather than grounding its allegations in any real-world facts.

In *Ellis v. JP Morgan Chase & Co.*, No. 12-cv-03897-YGR, 2015 WL 78190, at *4-5, (N.D. Cal. Jan. 6, 2015), plaintiff alleged that the named defendant participated in an enterprise with vendors and brokers to "defraud borrowers and obtain money from them by means of false pretenses," and that the alleged members "associated for the common purpose of routinely, and repeatedly, ordering, conducting, and assessing borrowers' accounts for unnecessary default-related services." However, this Court found that no cognizable common purpose was sufficiently alleged, because "Plaintiffs have offered no factual allegations to render plausible their claim that the enterprise members actually knew of the alleged fraudulent common purpose, or that they 'formed' the enterprise to participate in performing 'unnecessary property inspections'—much less that they "devised a scheme to defraud borrowers ... by means of false pretenses." *Id.*

So too here. Notwithstanding Resolute's attempt to recast the alleged common purpose, the fact remains that there are no plausible allegations of any agreement among the purported members to conduct the business of a RICO enterprise – every one of Resolute's allegations in this regard remain wholly speculative, especially as it has not even plausibly pled that the "enterprise members" saw and agreed to the supposed plan described in the "operational memo."[24] More importantly, the "common purpose" it describes is not a racketeering purpose at all, but rather a lawful purpose that could be (and here was) accomplished by parallel advocacy by like-minded groups: To call out Resolute for its poor environmental practices.

In addition to failing to plead a common purpose, Resolute continues to evade the question of how this supposed enterprise was organized and run. Although it cites well-trodden language in the case law that RICO enterprises are to be broadly interpreted and that a formal organizational structure is not required, that precedent does not countenance the wholesale absence of any allegations of organization or continuity. *Boyle v. United States*, 556 U.S. 938, 944-45 (2009) still requires a plaintiff to plausibly plead "an ongoing organization, formal or informal" and that "the various associates function as a continuing unit." Other than a generalized "long history of collaboration" between ENGOs (Opp. 74), Resolute's only allegations regarding the relationships between enterprise members and continuity of the alleged enterprise again rest entirely on the purported "Operational Memo," which even with Resolute's selective quotation does not describe a RICO enterprise, but rather appears at most the aspirational goals of a single party to use lawful means to call out a powerful company for its actions. Moreover, one document from 2012 hardly suffices to show continuity over the long period of time during which Resolute alleges the "enterprise" supposedly existed.

c. Failure to Plead Predicate Racketeering Acts

Resolute wastes several pages of its Opposition addressing mail and wire fraud by setting up straw men and then knocking them down. Opp. 70-71. When it does finally reach the key issue of whether Resolute actually has alleged a scheme attempting to deprive another of

[24] Resolute's selective citation to the purported "operational memo" is particularly egregious here, as it is impossible to determine the context for any of the alleged snippets Resolute cites, or how they were presented in the alleged document.

property, it poses but fails to answer the question. *Id*. 71-72. At most, it simply provides the same litany of alleged categories of fraudulent acts, without any basis, it has provided before: That defendants used the mails and wires "to harm Resolute through misleading Resolute's customers, certification agencies and other critical stakeholders" by (i) preparing misleading reports; (ii) broadly disseminating those reports; (iii) communicating and coordinating with one another to disseminate those reports; (iv) disseminating misleading information directly to Resolute's stakeholders, customers, and other "critical market constituents"; (v) harassing Resolute's customers with extortionate threats; (vi) soliciting fraudulent charitable donations by means of false pretenses; and (vii) wiring fraudulently obtained funds. Opp. 69-70. However, other than soliciting charitable donations, which this Court has already found fails to state a claim both because it was not pled with specificity and because Plaintiff could not show proximate cause in connection therewith, on their face none of these alleged acts constituted an attempt to deprive a third party of something of value. *See* GP Br. 27-28.

It is worth restating that much of what Plaintiff alleges in its Amended Complaint, as in its original Complaint, is simply made up out of thin air, and this is particularly true of its allegations of other RICO predicate acts. The Greenpeace Defendants' original Motion to Dismiss, for instance, showed that Plaintiff's allegations of theft of proprietary information, impersonation/false pretenses, fraudulent "inducement" of donors, defrauding tax authorities, fabrication of evidence, bribery, witness tampering and the like were simply bare allegations with no support. ECF No. 62, Greenpeace Defs.' Mot. Dismiss ("Orig. MTD") 30-31 ; ECF No. 98, Greenpeace Defs.' Reply Mem. in Supp. Mot. Dismiss & Mot. Strike ("Orig. MTD Reply") 28-31. While Resolute has dropped some of these alleged acts from its Amended Complaint, it still alleges computer fraud, money laundering, and theft of trade secrets through the use of impersonation/false pretenses. *E.g.*, Am. Compl. ¶¶ 400, 440, 447. The Greenpeace Defendants have addressed why each of these purported RICO predicates are wholly unsupported, and in response Resolute says nothing – it again makes no effort to defend its decision to recycle these baseless allegations. This type of cynical gamesmanship – making sensational allegations that it has no intent to defend and drops when pressed – has no place in this Court. In the end, the

alleged predicate criminal acts still boil down to a defamation claim which, as a matter of law, cannot constitute a RICO predicate act. *See* GP Br. 21.

d. Failure to Plead Proximate Cause

Proximate cause may be a "flexible concept," as Resolute asserts (Opp. 62), but here Plaintiff seeks to stretch that concept past its breaking point. As this Court noted in dismissing the original Complaint, in this Circuit, three non-exhaustive factors are considered in determining whether a plaintiff has shown proximate cause: "(1) whether there are more direct victims of the alleged wrongful conduct . . . .; (2) whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct; and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries. MTD Order 20 (*citing Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1168-69 (9th Cir. 2002)).

Significantly, Resolute ignores the third factor altogether, effectively conceding that the Court would have to adopt complicated rules to apportion damages here, as it held would be problematic when it dismissed the original Complaint. MTD Order 20; GP Br. 31-32. Resolute also gives short shrift to the second factor, arguing that it needs fact discovery in order to determine whether it was proximately harmed by the alleged fraud – a tacit admission that this would be no more than a fishing expedition. Opp. 67. In support of this argument, it cites cases holding that a court should not credit speculation about whether there might be other causes for the harm, but here when this Court dismissed Resolute's RICO claims previously, the Court pointed to "numerous reasons why a customer might cease or interrupt its relationship with Resolute" *that Resolute itself had identified* in the Complaint.[25] MTD Order 20. Nothing in the Amended Complaint suggests that any of those reasons have ceased to exist, and indeed the new

[25] Customers often gave reasons for their actions that flatly belied any reliance on supposed fraudulent statements; for example, Kimberly-Clark, which Resolute says received false statements from Greenpeace Canada starting in mid-2012, told Resolute three years later that it would not pursue a relationship "[d]ue to Resolute's continued dispute with Greenpeace and the recent upsets in the CBFA." Compl. ¶ 150; *see also* Am. Compl. ¶ 231. Nothing about this statement (made by a non-defendant) indicates that Kimberly-Clark's decision flowed directly from a fraudulent statement – indeed the existence of a dispute between Resolute and Greenpeace Canada and of turmoil in the CBFA were objective facts.

pleading inadvertently discloses even more intervening causes of purported harm. For instance, Resolute now alleges that in February 2015 a delegation from the Canadian government visited both 3M and Best Buy to "discuss Canada's leading sustainable forestry practices," but that despite this visit, those companies declined to continue working with Resolute "out of fear of further brand damaging publicity from Greenpeace." Am. Compl. ¶ 259. Notwithstanding the fact that the allegation as to the companies' rationale is pure speculation, "fear of publicity" is not the equivalent of being defrauded (nor is it extortion).[26] Decline in the demand for newsprint with the advent of the Internet and e-books is another cause for loss of business to Resolute, the largest purveyor of newsprint in the world. Am. Compl. ¶ 24; *see* Orig. MTD 36. Hachette, a book publisher, indicated yet another reason customers might consider changing their relationship with Resolute[27] – this very lawsuit and its chilling effect on the exercise of free speech. GP Br. 3, 31.

Resolute devotes the bulk of its attention to the first factor in the proximate cause analysis, no doubt because it is well aware that for every category of fraudulent activity alleged, there were *without question* more direct victims of the alleged fraud, whether those were Greenpeace's donors,[28] Resolute's customers, or even the general public,[29] all of whom could

[26] Resolute would have this Court believe that so long as it alleges (in bare fashion) that some statements by defendants were false (Opp. 68), any customer actions that in any way were influenced by the public debate around Resolute's practices over half a dozen years, must have flowed directly from the supposed fraud. Such a tortured construction would make a mockery of the doctrine of proximate cause.

[27] Resolute claims without support that Hachette terminated its relationship with Resolute. Opp. 68; Am. Compl. ¶ 409(c). Nothing in the letter from Hachette to Resolute indicates that Hachette actually terminated its relationship; indeed, the context of the letter clearly suggests that the relationship was to continue. ECF No. 200, Koonce Decl., Ex. 4. And, in any event, even if Hachette terminated its relationship with Resolute that would never constitute extortion.

[28] In its Opposition, Resolute claims that "this Court previously held that defendants' donors were the direct victim's [sic] of defendants' racketeering scheme." Opp. 63. Not so. The Court held only that "Resolute does not explain how it is the victim of [Greenpeace]'s fundraising scheme, given that the only persons who *could have been defrauded* were the donors who gave the money." MTD Order 20 (emphasis added). The Court did *not* find that Resolute had pled the existence a racketeering scheme by defendants, or that *anyone* was defrauded.

[29] Notably, Resolute makes no effort to explain how purported fraud on the general public could have led directly to economic loss by Resolute; to the contrary, any harm from such statements would be reputational only, and would therefore not be cognizable under RICO. *See Kimberlin v.*

readily vindicate their own rights if they believed they had been defrauded. To avoid this problem, Resolute says that there can be multiple victims and it is sufficient for Resolute to allege that it was the "primary and intended victim" of an alleged scheme to defraud, citing *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 650 (2008).

In *Bridge*, a municipality held a public auction to sell tax liens acquired on the property of delinquent taxpayers, but one of the bidders manipulated the system by having related companies attest that they were not related to the bidder, thus allowing the bidder to get a disproportionate share of liens as compared to its competitors. The Supreme Court found that the plaintiff competitor had pled proximate cause even though it was not plaintiff but rather the municipality that relied on the false attestations, because the direct harm was to the competitors who lost valuable liens to the perpetrator of the fraudulent scheme. *Id.* at 645.[30] Here, of course, Greenpeace and Resolute are not competitors. Moreover, even if it was true (and it is not) that the alleged "enterprise" misled Resolute's customers, it was those customers themselves who would have been directly "harmed" by the challenged statements, as they were the parties who acted in reliance, at their own expense, upon the statements. Of course, as discussed, that each of those customers also took a variety of actions – the vast majority of which did not include termination of Resolute – further demonstrates the complex decision-making in which those customers engaged, confirming that the simplistic causal chain that Resolute now proffers is unsustainable. That many customers responded with calls for further dialogue further highlights the fact that what was at issue here were speech activities.

To bolster its argument that it was the "primary and intended victim," Resolute predictably returns to the "operational memo," which it says shows that Resolute was the

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Nat'l Bloggers Club, No. GJH-13-3059, 2015 WL 1242763, at *9 (D. Md. Mar. 17, 2015); *Kimm v. Lee*, No. 04-Civ-5724, 2005 WL 89386, at *5 (S.D.N.Y. Jan.13, 2005).

[30] Resolute made these same arguments in opposition to the prior motions, citing many of the same cases, and the Greenpeace Defendants noted that those cases are clearly distinguishable because they involve direct competitors. *See* Orig. MTD Reply 38 n.25. The new cases that Resolute cites are distinguishable for the very same reason. *Mid Atl. Telecom, Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 263-64 (4th Cir. 1994) (direct competitors);*Transcription Commc'ns Corp. v. John Muir Health*, No. C-08-4418 TEH, 2009 WL 666943, at *13 (N.D. Cal. Mar. 13, 2009) (direct competitors); *C&M Café v. Kinetic Farm, Inc.*, No. 16-cv-04342-WHO, 2016 WL 6822071, at *7 (N.D. Cal. Nov. 18, 2016)(directly competing fake website).

"target" of the purported enterprise's activities. Opp. 63-64. The Greenpeace Defendants do not dispute that Resolute's business practices were a focus of their advocacy, but that alone does not make Resolute the target of a fraudulent scheme. Putting aside that this 2012 document (not plausibly alleged to have been shared among the enterprise members) cannot substitute for all of the missing causal links between the allegedly fraudulent statements over the course of six years and any supposed direct harm to Resolute,[31] more importantly, on its face the snippets of purported quotes from that alleged document point only to making Resolute a focus of lawful advocacy, not a scheme to defraud (or extort) anyone.

B. GPI SHOULD BE DISMISSED FOR LACK OF PERSONAL JURISDICTION

Resolute argues in its Response that GPI is subject to personal jurisdiction because it (a) directed its activities to California through connections between itself and GP Inc. and GP Fund; and (b) has sufficient contacts with the United States as a whole to satisfy Fed. R. Civ. P. 4(k)(2). Opp. 78-79. As to the former argument, Resolute has not pled, other than in a general manner, any direct connections between GPI on the one hand, and GP Inc. and GP Fund on the other, relating to the specific claims in this case – rather, all of the contacts between the Greenpeace entities are longstanding organizational ties that have nothing to do with the facts of this case. Unlike in *Dubose v. Bristol-Myers Squibb Co.*, No. 17-cv-00244-JST,2017 WL 2775034, at *2-4 (N.D. Cal. June 27, 2017), where plaintiff's injuries would not have occurred "but for" defendants' conduct in California, here the causal connection Resolute seeks to draw between GPI's relationship with GP Inc. and GP Fund. and the advocacy campaign, Opp. 78, is so attenuated and conclusory that the "but for" test cannot be satisfied. *Doe v. Am. Nat'l Red Cross*, 112 F.3d 1048, 1051-52 (9th Cir. 1997) (finding that defendant's peripheral involvement in the flow of products into a state is not sufficient to haul it before a court in that state); *Cloud v. Ness*, No. 2:14-cv-02308-TLN-AC, 2015 WL 7271760, at *4 (E.D. Cal. Nov. 18, 2015) (finding that

[31] Plaintiff again cites *Feld Entm't Inc. v. Am. Soc'y for the Prevention of Cruelty to Animals*, 873 F. Supp. 2d 288, 321-22 (D.D.C. 2012), in support of its arguments that indirect, attenuated harm suffices for proximate cause. The Greenpeace Defendants have addressed *Feld* at length in their briefing on the prior motion. Orig. MTD Reply 38.

defendant's deposit of checks in the state did not sufficiently connect it to the forum in a meaningful way).

As to Federal Rule of Civil Procedure 4(k)(2), as a threshold matter, this basis for jurisdiction only applies to claims sounding in federal law, so if the Court finds that GPI does not have minimum contacts with California, it must dismiss all of the state law claims against GPI. Yet even as to the RICO claims, Plaintiff has not plausibly pled sufficient contacts with the U.S. as a whole to trigger Rule 4(k)(2). First, its allegation that GPI solicits donations in the U.S. is a bare allegation lacking any substance. Am. Compl. ¶ 41. And as GPI has argued in connection with its motion to dismiss the original Complaint, a lone trip to Georgia by one employee is hardly sufficient contact with Georgia, much less the U.S. as a whole. Orig. MTD 8-9.

Lastly, although Resolute claims that four of the plaintiffs are based in the U.S., there is no dispute that Resolute Forest Products, Inc. – the parent company for all of the other named Resolute plaintiffs – is headquartered in Montreal. Indeed, nowhere in the Amended Complaint, other than mere identification in the jurisdictional paragraphs, are any of the other Resolute entities mentioned; their relevance to this dispute is never even described, and there are no allegations that those entities' reputations were injured. Thus, as the Greenpeace Defendants have stated, the locus of Resolute's reputation is in Canada, not the United States.

CONCLUSION

Resolute has spent two years now engaged in a protracted public relations offensive masquerading as a lawsuit, using these proceedings as a means to harass, intimidate, and exhaust the resources of the defendants. Greenpeace therefore requests that this Court grant its motions to dismiss and strike the Amended Complaint, dismiss Resolute's Amended Complaint with prejudice, and award Greenpeace its attorney's fees pursuant to Cal. Civ. Proc. Code § 415.16(c)(1).

This 11th day of May, 2018.

Respectfully submitted,

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