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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DANE WIGINGTON dba GEOENGINEERING WATCH,

Plaintiff,

v.

DOUGLAS MacMARTIN fka DOUGLAS MacMYNOWSKI et al.,

Defendants.

No. 2:21-cv-02355-KJM-DMC

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS AND MOTION TO STRIKE

ORAL ARGUMENT REQUESTED

Date: April 15, 2022
Time: 10:00 a.m.
Courtroom: 3, 15th floor
Judge: Hon. Kimberly J. Mueller

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I. INTRODUCTION

This case is not about whether solar radiation management ("SRM") is being implemented. The defendant's attempt to frame this lawsuit in that manner is an attempt to make the plaintiff appear unsympathetic. Likewise, this lawsuit was not filed to limit the defendant's free exercise of First Amendment rights. This case is about malice and deliberate acts to cause emotional and financial distress to the plaintiff.

Plaintiff Dane Wigington dba GeoEngineering Watch investigates and publishes information regarding solar radiation management aka solar radiation modification ("SRM"). Wigington maintains a Facebook page and a YouTube channel with a donation button to aid in further research and dissemination of information about the threats and risks of SRM. In 2021, he completed a documentary including evidence that he and his team gathered that SRM could be, and already is being, implemented with deleterious effects. On March 10, 2021, he published the documentary on YouTube and Facebook. Thereafter, Defendant Douglas MacMartin defamed Wigington and disrupted Wigington's economic relationship with Facebook by reaching out to Facebook's third-party "fact-checker" in a successful effort to stifle Wigington's speech by getting Wigington's documentary labeled "Incorrect" and "False."

"Incorrect" and "False" labels prevent Wigington's film and other content from being shared on Facebook. Those who try to share his content are prevented from sharing content on Facebook for 30 days. In response, Wigington filed a complaint against MacMartin for defamation and interference with prospective economic relations. Wigington claims that this is not just a difference of opinion about facts as MacMartin claims, but a personal attack resulting from longstanding animosity. Wigington chose not to sue Facebook or the fact-checking organization because he understands that these entities merely believed MacMartin without knowledge of the years of hatred that MacMartin has expressed for Wigington.

MacMartin now moves to dismiss and strike Wigington's claims. His motion should be denied. The Court has "specific jurisdiction" over him; the complaint states claims upon which relief can be granted; and the claims do not fall within the protection of the anti-SLAPP statute, but, even if they did, Wigington has met his burden of demonstrating a probability of prevailing.

II. STATEMENT OF FACTS

Wigington alleges as follows. MacMartin intentionally defamed Wigington to disrupt Wigington's economic relationship with Facebook. By getting Wigington and his followers censored on Facebook, MacMartin stopped Wigington from obtaining financial contributions to continue his research and greatly limited public exposure to Wigington's research. MacMartin achieved this by providing his academic credentials in an application to be a third-party "fact-checker" and authoring a review ("Review") of Wigington's documentary, *The Dimming*. MacMartin succeeded in causing the documentary to be labeled "Incorrect" by the fact-checker and "False" by Facebook. (Compl. ¶¶ 55-70; *see also id.* at ¶¶ 72-94.)

Wigington further alleges that MacMartin did not do the Review out of any sincere desire to evaluate the documentary or to educate the public (*see* Compl. ¶¶ 55-60) but instead to retaliate against Wigington after years of online and on-air debates in which MacMartin repeatedly and publicly accusing Wigington of having nothing to offer but "BS," of being "a fake" and a "fraud," and of "making stuff up" (*see id.* at ¶¶ 15-48, 60).

MacMartin claims that he did not write the "Review," just the "Feedback." (Am. Mem., ECF No. 10-1, 4, fn.1.) However, Wigington alleges MacMartin initiated the fact-checking. Both Science Feedback and its subsidiary, Climate Feedback, require fact-checkers to undergo an application process where they are vetted and must certify that they do not have a conflict of interest that would degrade the integrity of their fact-checking mission. The only reasonable inference is that MacMartin withheld his long history of animosity toward Wigington to slip through the crucible of Climate Feedback's application process and get Wigington's content banned.

III. ARGUMENT

A. The Court has personal jurisdiction over MacMartin.

California's "long arm" statute permits local courts to exercise jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States." *See* Cal. Code Civ. Proc. § 410.10; *Mavrix Photo, Inc. v. Brand Technologies, Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011). This statute allows both state and local federal courts to exercise personal jurisdiction on any basis (consistent with state law) allowable under the U.S. Constitution – i.e., to the outer limits of

constitutional due process. Thus, the two inquiries merge; that is, the court need only determine whether the assertion of personal jurisdiction violates the Due Process Clause. *Harris Rutsky & Co. Ins. Services, Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1129 (9th Cir. 2003).

A defendant who is not "at home" in the forum state and thus not subject to general jurisdiction may still be subject to jurisdiction on claims related to the defendant's activities or contacts there – so-called "specific" jurisdiction. *Walden v. Fiore*, 571 U.S. 277, 283 & n.6 (2014). The inquiry whether a forum state may assert specific jurisdiction focuses on the relationship among the defendant, the forum, and the litigation. *Id.* at 283-84. Relevant here, the Ninth Circuit applies the following three-part test ("Minimum Contacts Test") to determine whether a district court constitutionally may exercise specific jurisdiction over a nonresident defendant:

> (1) The non-resident defendant must purposefully direct his activities … [to a] resident [of the forum state] … ;
> (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
> (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must be reasonable.

Freestream Aircraft (Bermuda) Limited v. Aero Law Group, 905 F.3d 597, 603 (9th Cir. 2018); *see, e.g., Benaron v. Simic*, 434 F.Supp.3d 907, 914 (D. Or. 2020) (quoting the test as excerpted above).

1. *Calder*: *National Enquirer*'s story "does not wash."

For example, in *Calder v. Jones*, 465 U.S. 783, 791 (1984), the Supreme Court held that it was proper for a court in California to exercise jurisdiction over a Florida reporter and a Florida editor in a libel action arising out of their intentional conduct in Florida which was allegedly calculated to cause injuries to a plaintiff in California. Significantly, the allegedly libelous story concerned a California resident, and "[i]t impugned the professionalism of an entertainer whose television career was centered in California." *Id.* at 788.

The newspapermen argued that they were not responsible for the circulation of the article in California. A reporter and an editor, they claimed, have no direct economic state in their employer's sales in a distant State. Nor are ordinary employees able to control their employer's marketing activity. They likened themselves to a welder employed in Florida who works on a boiler

which subsequently explodes in California. The Supreme Court found that their analogy "does not wash." *Calder*, 465 U.S. at 789.

> Whatever the status of their hypothetical welder, petitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and Petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the *National Enquirer* has its largest circulation. Under the circumstances, petitioners must "reasonably anticipate being haled into court there" to answer for the truth of the statements made in their article. [Citations.] An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California.

Id. at 789-90. MacMartin's fact-check of Wigington's film was purposefully directed at Wigington. In addition to MacMartin's former residence in California and long-standing hostilities with Wigington, the timeline of events indicates MacMartin was monitoring Wigington's site and acted immediately upon release of *The Dimming*.

2. *Benaron*: WY defendant sued by OR plaintiff re WA daughter.

As another example, in *Benaron*, 434 F.Supp.3d 907, plaintiff sued defendant, a Wyoming resident who had never been to Oregon, in Oregon for false light and intentional interference with business relations based on defendant's false statements to a university, attended by plaintiff's daughter in yet a third state, Washington, asserting that plaintiff's daughter was not entitled to in-state resident tuition in Washington. The Oregon district court (pursuant to Oregon's long-arm statute, which, like California's, confers personal jurisdiction to the outer limits of due process under the United States Constitution) concluded that, "as in *Calder*," defendant's contacts with the university "were not 'untargeted negligence' but rather were 'performed for the very purpose of having their consequences felt in the forum state'; *i.e.*, for the purpose of causing Plaintiff financial injury by increasing [her daughter's] tuition or for the purpose of depriving Plaintiff of the value of the relationship with the University by having [her daughter] expelled or sanctioned." *Id.* at 916.

Here, the following is alleged. MacMartin knew that Wigington resided in California. (Compl. ¶¶ 1, 28-29, 31.) MacMartin's Review specifically targets Wigington – indeed, with a photograph of his face and a picture of his dba logo. (*Id.* at ¶¶ 55-56.) It is further alleged that the

only "reviewer" was MacMartin; that the Review is the only "fact-check" review that MacMartin has ever done for Climate Feedback or any other so-called "independent fact-checker"; that Climate Feedback did not contact MacMartin to do the Review, and, instead, MacMartin contacted Climate Feedback to do it; that MacMartin did not do the Review out of any sincere desire to evaluate the documentary's claims or to educate the public but instead to retaliate against Wigington; and that people to whom the statements were published reasonably understood the statements to mean that Wigington was either delusional or a con artist. (Compl. ¶¶ 58, 60, , 75, 80.) The Review had the intended effect of harming Wigington and depriving him of the value of his relationship with Facebook. (Compl. ¶¶ 61-70.) Such conduct more than satisfies the first prong of the "minimum contacts" test.

The case upon which MacMartin relies, *Burdick v. Superior Court*, 233 Cal.App.4th 8 (2015), is distinguishable. Thus, although the Review was published to Climate Feedback's website, that publication was *secondary* to its purpose. Its *primary* purpose was as a purported "fact-check" of Wigington's documentary, to be communicated to viewers of Wigington's Facebook page. MacMartin intended *a direct communication with Wigington and his audience* – an audience that necessarily included a great number of California residents. *See, e.g., Dongxiao Yue v. Wenbin Yang*, 62 Cal.App.5th 539, 548-549 (2021). The publication here was even more targeted than in *Calder*. MacMartin's actions satisfy the second prong of the Minimum Contacts Test because he purposefully directed his communications at an audience that Wigington built over decades with its primary base in California.

3. *Burger King Corp.*: "fair play and substantial justice."

Once the requisite minimum contacts with the forum state have been established, "these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.' " *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). However, "where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, **he must present** a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Id.* (emphasis added).

Courts consider seven factors in this regard: (1) the extent of the defendant's purposeful interjection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum. *Menken v. Emm*, 503 F.3d 1050, 1058 (9th Cir. 2007). In view of these factors, MacMartin cannot possibly "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King Corp.*, 471 U.S. at 476.

As to the first factor, MacMartin purposefully had contact with Wigington and Wigington's audience in California when he wrote the Review that he intended would appear on Wigington's Facebook page. MacMartin also lived in California for many years during which he demonstrated fits of temper aimed at Wigington. Despite his move to New York, MacMartin intended to get at his old California nemesis by becoming a fact-check reviewer. Therefore, purposeful contact is a factor that favors Wigington.

As to the second, the burden is minimal. MacMartin is well-acquainted with California from the many years he spent here as an active professor at CalTech. MacMartin still travels to California to visit his in-laws and attend scientific conferences. (MacMartin Decl. ¶ 9, ECF No. 10-1.) As recently as "Christmas 2021" he traveled to California "to visit extended family." (*Id.*) Although traveling from New York to California to litigate the matter will create some burden due to travel and other expenses, "with the advances in transportation and telecommunications and the increasing interstate practice of law, any burden is substantially less than in days past." *Menken*, 503 F.3d at 1060. In addition, unless the inconvenience in litigating in the forum " 'is so great as to constitute a deprivation of due process, it will not overcome clear justifications for the exercise of jurisdiction.' " *Caruth v. International Psychoanalytical Ass'n*, 59 F.3d 126, 128-129 (9th Cir. 1995). This factor also favors Wigington.

As to the third, there is no conflict with the sovereignty of New York. Litigating state law claims for defamation and interference with prospective economic relations would essentially be the same in both jurisdictions. This factor also favors Wigington.

As to the fourth, "California maintains a strong interest in providing an effective means of redress for its residents [who are] tortiously injured." *Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1200 (9th Cir. 1988). California possesses a clear interest in protecting Wigington as a California resident. *Id.* "California's interest in providing effective redress for its residents supports the reasonableness of an exercise of jurisdiction in this case." *Id*. This factor also favors Wigington.

As to the fifth, California is the most efficient forum to hear the case. Wigington and his environmental organization are based in California. Much of Wigington's evidence is therefore also located in California. MacMartin and some other potential witnesses are located outside of California (e.g., some of the individuals featured in *The Dimming*), but with electronic filing and messaging and the regularity with which remote depositions are conducted (especially since the advent of COVID-19), requiring MacMartin to defend himself in California would not violate MacMartin's due process. This factor also favors Wigington.

As to the sixth, it will be far easier for Wigington, an individual, to litigate this matter in California, the forum state in which he resides. Conversely a greater burden would be placed on him if he was forced to litigate his claim in another state. This factor weighs in Wigington's favor. *CE Distribution, LLC v. New Sensor Corp.*, 380 F.3d 1107, 1112 (9th Cir. 2004); *see Menken*, 503 F.3d at 1061.

As to the final factor, New York is an alternate forum. However, MacMartin has substantial ties to California. He visits relatives in California, the state he once called home. He continues to work for his California employer. Therefore, the final factor does not present a "compelling case" that a California court exercising jurisdiction over him would be unreasonable.

Accordingly, MacMartin's motion to dismiss under Federal Rules of Civil Procedure Rule 12(b)(2) must be denied.

B. Wigington has sufficiently pleaded the defamation claims.

To survive a motion to dismiss, a complaint need only contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct

alleged." *Id.* "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* All that is necessary is that the "[f]actual allegations must be enough to raise a right to relief above the speculative level, [citation],[footnote] on the assumption that all the allegations in the complaint are true (even if doubtful in fact)," *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), i.e., that the factual contents "nudg[e]" the claim "across the line from conceivable to plausible," *id.* at 570. When evaluating a Federal Rule of Civil Procedure 12(b)(6) motion, the court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). "Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

In California, "[t]he elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damages," *John Doe 2 v. Superior Court*, 1 Cal.App.5th 1300, 1312 (2016), and libel "is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation," Cal. Civ. Code § 45.

"In determining the meaning of a communication, words, whether written or spoken, are to be construed together with their context. Words which standing alone may reasonably be understood as defamatory may be so explained or qualified by their context as to make such an interpretation unreasonable. So too, words which alone are innocent may in their context clearly be capable of a defamatory meaning and may be so understood. The context of a defamatory imputation includes all parts of the communication that are ordinarily heard or read with it." *John Doe 2*, 1 Cal.App.5th at 1313.

MacMartin misconstrues the law when he asserts that his statements that are the subject of this action are "mere expressions of opinion." (*Id.* at 10:4-17.) MacMartin made "an assertion of fact that is provably false." *John Doe 2*, 1 Cal.App.5th at 1313. He has asserted that the following claims are "pure fantasy":

> Global climate engineering operations are a reality. Atmospheric particle testing conducted by GeoengineeringWatch.org has now proven that the lingering, spreading jet aircraft trails, so commonly visible in our skies, are not just condensation as we have officially been told. ... The intentional dimming of direct sunlight by aircraft dispersed particles, a form of global warming mitigation known as "Solar Radiation Management", has and is causing catastrophic damage to the planet's life support systems. The highly toxic fallout from the ongoing geoengineering operations is also inflicting unquantifiable damage to human health.

(Compl. ¶ 56.)

MacMartin does not identify this as his opinion. The context in which his statements are made belies the assertion that they are just opinions. Mr. MacMartin was vetted as a fact-checker. He had to prove that he had a Ph.D. and was published in recent peer-reviewed journals regarding the subject matter. Climate Feedback's "credibility criteria" guide MacMartin to pay attention to whether a review depicts a complete or imbalanced view of the relevant science. Here, there is a debate about the status of SRM. Some peer-reviewed scientists take the position that SRM is being implemented. Others do not. MacMartin's conclusion that the claim is pure fantasy is an attempt to quash the debate and prevent input from the opposing side, marginalizing any opposition. MacMartin does not even concede that the other viewpoint exists. Thus, rather than an expression of opinion, MacMartin's statement is a tactical and rhetorical attempt to harm Wigington and anyone else that does not agree with MacMartin.

MacMartin's second statement is equally infirm:

> We also know with 100% certainty that (a) the aircraft contrails they see aren't geoengineering, and (b) no-one is doing geoengineering.

(Compl. ¶ 56.)

These are not mere statements of ideas protected under the First Amendment. *See John Doe 2*, 1 Cal.App.5th at 1313. They were *offered as facts* by a purported "*fact-checker*" and *used as facts* by Facebook to de-platform and silence Wigington. Wigington provided evidence both in his documentary and in the instant complaint that there are peer-reviewed scientists that believe that SRM is being implemented. It is axiomatic that science is never 100 percent certain of anything. The history of science is one of continual correction of false assumptions previously believed to be true. Any assertion of scientific fact to 100 percent certainty is provably false on its face.

Wigington is not asking the Court to serve as a "supreme peer-review journal," but rather only to decide whether MacMartin's publication of the two purported facts were false. Wigington intends to show that they were. Simply put, "[a]ll of these claims are [not] pure fantasy." (Compl. ¶ 78.) Wigington's documentary lays out the evidence that "global client engineering operations are a reality." (*Id.*) It summarizes and shows that the atmospheric particle testing that Wigington's team of trained and certified scientists performed are strong evidence that "the lingering, spreading jet aircraft trails, so commonly visible in our skies, are not just condensation as we have officially been told." (*Id.*) It also summarizes the evidence that "[t]he intentional dimming of direct sunlight by aircraft dispersed particles" "has and is causing catastrophic damage to the planet's life support systems," and that "[t]he highly toxic fallout from the ongoing geoengineering operations is also inflicting unquantifiable damage to human health." (*Id.*)

In contrast, the Review does not address any of this. Instead, it offers only *ipse dixit* and citations to materials that *predate* and *do not consider* the information in the documentary. The two false allegations of "fact" contained in MacMartin's defamatory statements having nothing to do with Wigington's film or its findings.

Unlike *John Doe 2*, 1 Cal.App.5th at 1314, MacMartin's communication does not identify nondefamatory facts underlying his opinion. Those exposed to these statements are not aware of other, non-defamatory facts. The recipient is only left with the intended impression that Wigington is not trustworthy, and his information should be wholly discounted.

For all these same reasons, Wigington intends to show that it likewise is not true that "[w]e also know with 100% certainty that (a) the aircraft contrails they see aren't geoengineering, and (b) no-one is doing geoengineering." (Wigington Decl. ¶ 78.)

Wigington also intends to show that the publication of these false "facts" exposed him to "hatred, contempt, ridicule, or obloquy, or … cause[d] him to be shunned or avoided, or which ha[d] a tendency to injure him in his occupation." Wigington alleges that MacMartin directly defamed the quality, accuracy, and integrity of his work. This is quintessential defamation under California Civil Code section 46. However, Wigington alleged special damages in the loss of donations obtained from those exposed to his content on Facebook.

Wigington also alleges that MacMartin acted with actual malice – i.e., with knowledge or reckless disregard as to the falsity of the alleged defamatory statements. *Makaeff v. Trump University, LLC*, 715 F.3d 254, 265 (9th Cir. 2013).

As the California Supreme Court explained, this is a "subjective test, under which the defendant's actual belief concerning the truthfulness of the publication is the crucial issue." *Reader's Digest Assn. v. Superior Court*, 37 Cal.3d 244, 257 (1984).

As a result, "actual malice can be proved by circumstantial evidence. '[E]vidence of negligence, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity." *Reader's Digest Assn.*, 37 Cal.3d at 257. "A failure to investigate[Footnote] [citation], anger and hostility toward the plaintiff [citation], reliance upon sources known to be unreliable [citations] or known to be biased against the plaintiff [citations] – such factors may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication." *Id.* at 258.

Such is the case here. The evidence shows a long history of malice. MacMartin hates Wigington and calls him names in group emails and on nationwide radio. After years of animosity, Wigington produced a film making his case. MacMartin not only had a personal conflict of interest due to his hatred of Wigington, but also because of his financial grants to study theoretical ramifications of SRM. MacMartin sought out Facebook's fact-checker Science Feedback, or its climate-focused subsidiary, Climate Feedback, with the intent of preventing distribution of Wigington's film. MacMartin went through the fact-checker's application process, where he certified that he was a neutral, impartial fact-checker. MacMartin concealed his history of animosity with Wigington. MacMartin only acted as a fact-checker for Wigington's film. MacMartin never directly addressed any of the evidence presented by Wigington. MacMartin cited studies that either did not address his conclusion at all or that were based upon a consensus of his close colleagues and not any scientific experimentation or study. All the cited sources predated Wigington's film. By proceeding in this manner, MacMartin, at the very least, acted with reckless disregard as to the falsity of the defamatory statements.

Wigington therefore submits that he has sufficiently pleaded the defamation claims. However, if the Court determines that the claims in any way fall short (e.g., in conveying the allegation of actual malice), then Wigington requests leave to amend.

C. Wigington has sufficiently pleaded the interference claims.

MacMartin argues that Wigington's interference claims "should be dismissed as they are duplicative and based on the same conduct as [Wigington's] defamation claim," referencing *Palm Springs Villas II Homeowners Ass'n v. Parth*, 248 Cal.App.4th 268, 290 (2016) (*Palm Springs Villas II*). (*See* Am. Mem. 15:25-27.) This argument fails for at least three reasons.

First, *Palm Springs Villas II* was decided in California state court under the California Code of Civil Procedure, not the Federal Rules of Civil Procedure.

Second, as *Palm Springs Villas II*, 248 Cal.App.4th at 290 n.12, acknowledged, there is a split of authority regarding whether a demurrer may be properly sustained on the ground that a cause of action is duplicative, with *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC*, 162 Cal.App.4th 858, 890 (2008) (*Blickman Turkus*), holding that duplication "is not a ground on which a demurrer may be sustained" and citing California Code of Civil Procedure section 430.10. Wigington submits that *Blickman Turkus* is the better reasoned case. Significantly, whereas the court in *Blickman Turkus* cites the Code of Civil Procedure, the court in *Palm Springs Villas II* only cites two other cases, *Rodrigues v. Campbell Industries*, 87 Cal.App.3d 494, 501 (1978), and *Award Metals, Inc. v. Superior Court*, 228 Cal.App.3d 1128, 1135 (1991); and the court in *Award Metals, Inc.*, itself, only cited *Rodrigues*, in which the court considered a made-up cause of action that contained, "by necessary implication, all of the allegations of each of the preceding four alleged causes of action and thus add[ed] nothing to the complaint by way of fact or theory of recovery." *Rodrigues*, 87 Cal.App.3d at 501. The court therefore reached the unremarkable conclusion that, "[t]here is no authority for a pleading of this type and the demurrer was properly sustained without leave to amend as to that cause." *Id.*

Third, although Wigington's interference claims depend on the defamatory statements that are the subject of his defamation claims, the interference claims also depend on additional facts and are based on well-established theories of recovery, *compare, e.g.*, Judicial Council of Cal. Civ. Jury

Instns. (2022) CACI Nos. 1700, 1701 (the essential elements of defamation per se and per quod), with *id.* at CACI Nos. 2202, 2204 (the essential elements of intentional and negligent interference with prospective economic relations); and, they have separate statutes of limitations, *see, e.g., Perfect 10, Inc. v. Visa Intern. Service Ass'n*, 494 F.3d 788, 810 (9th Cir. 2007) ("Under California law, a libel claim must be filed within one year of publication of the allegedly libelous statement, Cal. Code Civ. Proc. § 340(c), and an intentional interference claim must be filed within two years of the underlying act, Cal. Code Civ. Proc. § 339.").

The California state law claim of intentional interference with prospective economic advantage has five elements: "(1) the existence, between the plaintiff and some third party, of an economic relationship that contains the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentionally wrongful acts designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm proximately caused by the defendant's action." *Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.*, 2 Cal.5th 505, 512 (2017).

A plaintiff may satisfy the intent requirement "by pleading specific intent, i.e., that the defendant desired to interfere with the plaintiff's prospective economic advantage," or "a plaintiff may alternately plead that the defendant knew that the interference was certain or substantially certain to occur as a result of its action." *Korea Supply Co. v. Lockheed Martin Corp.* 29 Cal.4th 1134, 1154 (2003). Here it is obvious from the speed with which MacMartin sought to review the film that he was actively monitoring Wigington's online activity because within just 15 days of Wigington publishing *The Dimming* on YouTube and Facebook on March 10, 2021, Climate Feedback published MacMartin's review. (Compl. ¶¶ 55-56).

Similarly, the elements of negligent interference with prospective economic advantage are (1) that the plaintiff and a third party were in an economic relationship that probably would have resulted in a future economic benefit to the plaintiff; (2) that the defendant knew or should have known of this relationship; (3) that the defendant knew or should have known that this relationship would be disrupted if the defendant failed to act with reasonable care; (4) that the defendant failed to act with reasonable care; (5) that the defendant engaged in wrongful conduct; (6) that the

relationship was disrupted; (7) that the plaintiff was harmed; and (8) that the defendant's wrongful conduct was a substantial factor in causing the plaintiff's harm. *Venhaus v. Schultz*, 155 Cal.App.4th 1072, 1077-78 (2007).

With respect to the third element of the intentional interference claim and the fifth element of the negligent interference claim, "[c]ommonly included among improper means are actions which are independently actionable, … e.g., … defamation." *PMC, Inc. v. Saban Entertainment, Inc.*, 45 Cal.App.4th 579, 603 (1996) (*disapproved of on other grounds by Korea Supply Co.*, 29 Cal.4th at 1158-59 & n.11).

The foregoing is exactly what Wigington has pleaded. Besides the base allegations (Compl. ¶¶ 84-90, 92-94), Wigington's complaint also alleges that as a result of MacMartin's defamatory statements, Wigington's economic relationship with Facebook has been disrupted to the extent that Facebook relied on those statements and tagged Wigington's documentary with the disparaging "FALSE" label, which now means that when someone goes to Wigington's Facebook page and tries to view his post from March 10, 2021, the link to *The Dimming* on YouTube is grayed-out and unavailable, and in its place glowers a warning that his documentary contains "False Information" that was "Checked by independent fact-checkers" (*id.* at ¶¶ 61-62). The complaint then goes on to describe the other disruptions to Wigington's relationship with Facebook due to the defamatory statements, which, in turn, (1) reduced the viewership for his documentary and consequent donation revenue and (2) reduced the number of views of his documentary and consequent monetization revenue from those views. (*Id.* at ¶¶ 63-70.)

Wigington therefore also submits that he has sufficiently pleaded the interference claims; nevertheless, as with the defamation claims, Wigington requests leave to amend if the Court determines that the interference claims are in any way lacking – e.g., for want of additional details as to how Facebook monetization works, including paying Facebook to "boost" posts – options that have been denied Wigington because of MacMartin's defamatory Review.

D. The Court should deny MacMartin's Anti-SLAPP motion.

California Code of Civil Procedure section 425.16 ("Anti-SLAPP Law") declares that it is "in the public interest to encourage continued participation in matters of public significance, and

that this participation should not be chilled through abuse of the judicial process." The Anti-SLAPP Law "requires that a court engage in a simple, two-step process in ruling on a special motion to strike. First, the court must decide whether the defendant has made a sufficient threshold showing that the challenged cause of action is subject to a special motion to strike. Second, if the threshold showing has been made, the court must determine whether the plaintiff has demonstrated sufficient minimal merit to be allowed to proceed." *Weinberg v. Feisel*, 110 Cal.App.4th 1122, 1130 (2003) (citing *Navellier v. Sletten*, 29 Cal.4th 82, 89 (2002), and *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal.4th 53, 66 (2002)).

"Section 425.16, subdivision (e), sets forth four categories of conduct to which the anti-SLAPP statute applies. The only way a defendant can make a sufficient threshold showing is to demonstrate that the conduct by which the plaintiff claims to have been injured falls within one of those four categories." *Weinberg*, 110 Cal.App.4th at 1130.

The first two categories regard statements related to an official proceeding and do not apply here. "The third category embraces statements made 'in a place open to the public or a public forum in connection with an issue of public interest.' " *Weinberg*, 110 Cal.App.4th at 1130 (quoting Cal. Code Civ. Proc. § 425.16(e)(3)). "A public forum is a place open to the use of the general public ' "for purposes of assembly, communicating thoughts between citizens, and discussing public questions." ' " *Weinberg*, 110 Cal.App.4th at 1130 (quoting *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992), in turn quoting *Hague v. Committee for Indus. Organization*, 307 U.S. 496, 515 (1939)). On the other hand, "Means of communication where access is selective, such as most newspapers, newsletters, and other media outlets, are not public forums." *Weinberg*, 110 Cal.App.4th at 1130 (citing *Arkansas Educ. Television Com'n v. Forbes*, 523 U.S. 666, 678-80 (1998)).

In the instant case, there is nothing that suggests Facebook is sufficiently open to general public access to be considered a public forum. The record shows just the opposite. Through so-called "fact-checking," Facebook heavily regulates what its users can post, see, and forward. Access through Facebook is therefore undeniably selective within the meaning of *Weinberg*; as a result, Facebook is not a public forum.

To try to get around this reality, MacMartin clings to *Nygard, Inc. v. Uusui-Kerttula*, 159 Cal.App.4th 1027, 1038 (2008). However, he ignores what *Nygard* acknowledged: a split of authority as to the very meaning of "public forum." *See id.* at 1037 and the fact that *Weinberg* criticized the very case upon which *Nygard* rests for its definition of "public forum," *Damon v. Ocean Hills Journalism Club*, 85 Cal.App.4th 468, 476-77 (2000). As *Weinberg* noted:

> [*Damon*] held that a small, private, selective-access newsletter is a public forum within the meaning of subdivision (e)(3) of section 425.16. [Citation.] That conclusion overlooks a fundamental rule of statutory construction, i.e., when, in a statute, the Legislature employs a word or phrase that has a well-defined and judicially established meaning, then absent a clear indication of legislative intent to the contrary, that is the meaning which must be given to the word or phrase. [Citations.] The concept of a public forum was developed in, and has sole reference to, First Amendment cases. Those cases establish beyond doubt that a private selective-access newsletter is the very antithesis of a public forum. While it might be shown in a particular case that a newsletter is sufficiently open to general public access as to come within section 425.16, a private selective-access newsletter cannot be found to be a public forum without such a showing. To the extent the decision in *Damon v. Ocean Hills Journalism Club* suggests otherwise, it is contrary to the plain language of the statute, and we decline to follow it.

Weinberg, 110 Cal.App.4th at 1131 n.4.

As for Climate Feedback's website, that certainly is not a forum where the opposing side has an opportunity to respond.

It is therefore richly ironic that MacMartin is citing the First Amendment in aid of a "Review" that he intended a commercial social media platform would use to block someone else's expression. MacMartin is not using the First Amendment as a shield to protect "comments made in the arena of public debate and controversy," *see Campanelli v. Regents of University of California*, 44 Cal.App.4th 572, 578 (1996), but rather as a sword to cut off the speech of another.

The fourth category of conduct within section 425.16 is "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." "The right of petition refers to the right to petition the government for the redress of grievances," *Weinberg*, 110 Cal.App.4th at 1131, and is not implicated here. As a result, the remaining question here is, Does MacMartin's conduct constitute "any other conduct in furtherance of the exercise of … the constitutional right of free speech in connection with a public issue or an issue of public interest"? The answer is, No.

Thus, although Wigington agrees that the issue treated in his documentary is "a public issue or an issue of public interest," MacMartin's conduct was not in furtherance of the exercise of MacMartin's constitutional right of free speech in connection with this issue, it was to stifle the free speech of Wigington (and others) in connection with this issue. *See Jordan-Benel v. Universal City Studios, Inc.*, 859 F.3d 1184, 1190-91 (9th Cir. 2017); *see also City of Cotati v. Cashman*, 29 Cal.4th 69, 78 (2002) ("In short, the statutory phrase 'cause of action ... arising from' [in Cal. Code Civ. Proc. § 425.16] means simply that the defendant's act underlying the plaintiff's cause of action must itself have been an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was based on an act in furtherance of the defendant's right of petition or free speech.").

In any event, even if MacMartin could get past the first step in the anti-SLAPP analysis, he cannot get past the second because Wigington "has demonstrated sufficient minimal merit to be allowed to proceed." *Weinberg*, 110 Cal.App.4th at 1130. Thus, "when," as here, "an anti-SLAPP motion to strike challenges only the legal sufficiency of a claim [*see* Am. Mem. 19:1-14], a district court should apply the Federal Rule of Civil Procedure 12(b)(6) standard and consider whether a claim is properly stated," *Planned Parenthood Federation of America, Inc. v. Center for Medical Progress*, 890 F.3d 828, 834 (9th Cir. 2018) (*Planned Parenthood*), *amended* 897 F.3d 1224 (9th Cir. 2018)[1]; and, here, Wiginton has properly stated his defamation and interference claims.

IV. CONCLUSION

MacMartin's motion should be denied. He has done more than enough to trigger the Court's specific jurisdiction; Wigington's complaint adequately pleads the defamation and interference claims; and Wigington's claims do not fall within the protection of the anti-SLAPP statute (indeed, it would turn the point of the statute on its head to apply it to this case), but, even if they did, Wigington has met his burden of demonstrating "sufficient minimal merit to be allowed to proceed." *Weinberg*, 110 Cal.App.4th at 1130.

[1] "[O]n the other hand, when an anti-SLAPP motion to strike challenges the factual sufficiency of a claim [not the case here], then the Federal Rule of Civil Procedure 56 standard will apply. But in such a case, discovery must be allowed, with opportunities to supplement evidence based on the factual challenges, before any decision is made by the court." *Planned Parenthood*, 890 F.3d at 834.

California law prohibits an amendment to a complaint after an Anti-SLAPP motion is filed to protect the defendant from harassment caused by abuse of the legal process. This contrasts the federal rule that allows amendments as a matter of course in response to a 12(b) motion. *See* Fed. R. Civ. P. 15(a)(1)(B). Given this conflict, Wigington was prevented from amendment for fear that the Court would deem it improper under California substantive law. Plaintiff requests that the Court expressly allow amendment of the complaint to cure any defects perceived by the Court without creating such an inference of harassment. Wigington therefore requests leave to amend, pursuant to Federal Rule of Civil Procedure 15, which provides that courts "should freely give leave when justice so requires."

Dated: March 18, 2022

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