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DOUGLAS MacMARTIN

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DANE WIGINGTON dba GEOENGINEERING WATCH,

Plaintiff,

vs.

DOUGLAS MacMARTIN fka DOUGLAS MacMYNOWSKI; and DOES 1-10, inclusive.

Defendant.

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

Hon. Kimberly J. Mueller

DEFENDANT DOUGLAS MacMARTIN'S REPLY MEMORANDUM IN SUPPORT OF HIS MOTION TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(2) AND 12(b)(6) AND MOTION TO STRIKE PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 425.16

Date: April 15, 2022
Time: 10:00 a.m.
Courtroom: 3, 15th Floor

Complaint filed: November 5, 2021
Removal Date: December 17, 2021

I. Introduction

Plaintiff's Opposition lays bare the frivolity of this defamation suit. Plaintiff continues to argue that Dr. Douglas MacMartin's statements setting forth his views on SRM are defamatory because Plaintiff takes the opposing position on this same issue. That is no more defamatory than an Oakland A's fan suing a San Francisco Giants fan for writing positive articles about the A's while denigrating the Giants. If Plaintiff's expansive and absurd view of defamation law were to gain traction, scientific, religious, and even political debates would be fertile ground for litigation; and courts would be asked to determine whether, for example, we should rely on fossil fuels or renewable energy, whether a political party's views on an issue are correct—or even whether God exists. Courts that have been asked to wade into these types of disputes (and find one side "false") have correctly declined to do so, and this Court should do the same.

In any event, Plaintiff fails to state any claim for defamation or interference with his contractual relationship with Facebook. Even more fundamentally, Plaintiff cannot establish personal jurisdiction over Dr. MacMartin in this Court. Nor does Plaintiff meaningfully dispute that Dr. MacMartin's feedback statements were constitutionally-protected opinion given the nature of the statements and the specific language used. And Plaintiff cannot point to any allegations in the Complaint showing that Dr. MacMartin had reason to know that his statements were false; to the contrary, Plaintiff pleads that Dr. MacMartin held these beliefs long before the parties ever interacted. He therefore has not pled—and cannot plead—actual malice. Finally, the interference claims also fail because Plaintiff relies on the alleged wrongful act of defamation (but there was no defamation here) and Plaintiff cannot plausibly argue that he had an economic relationship with Facebook. At the end of the day, the conduct at the heart of Plaintiff's claims—the fact-checking notation on Plaintiff's Facebook post about his documentary—was an act taken by non-party Facebook, not Dr. MacMartin. For all these reasons, the Court should grant Dr. MacMartin's anti-SLAPP motion.

Throughout the Opposition, Plaintiff asks the Court for the right to amend his Complaint should the Court find the allegations insufficient to state a claim. The Court should deny this request. The parties held a meet-and-confer in advance of the filing of the motion to dismiss, so

Plaintiff was on notice of the grounds for dismissal. Plaintiff chose not to amend then, and should not be granted leave now having squandered that opportunity.

II. There is no Specific Personal Jurisdiction Over Dr. MacMartin

Plaintiff did not argue in favor of the exercise of *general* personal jurisdiction and has therefore conceded no such jurisdiction exists. *See Hall v. Mortgage Investors Group*, No. 2:11–CV–00925–JAM–GGH, 2011 WL 4374995, *5 (E.D. Cal. Sept. 16, 2011) (failure to oppose argument amounts to concession).

Plaintiff's attempt to argue that this Court has *specific* personal jurisdiction over Dr. MacMartin fails because Plaintiffs cannot point to any conduct that was purposefully directed toward ***California***—as opposed to a plaintiff who happens to live in California. Plaintiff tries instead (unsuccessfully) to analogize Dr. MacMartin's statements on a public website to the circumstances in a nearly 40-year old U.S. Supreme Court case, *Calder v. Jones*, 465 U.S. 783 (1984), in which the Court found specific personal jurisdiction where an alleged defamatory statement was made in a newspaper that was physically circulated *in California*, the state with that newspaper's largest circulation. Indeed, the Supreme Court recently clarified the specific facts that warranted the exercise of specific personal jurisdiction in that case:

> The crux of *Calder* was that the reputation-based "effects" of the alleged libel connected the defendants to California, not just to the plaintiff. … the reputational injury caused by the defendants' story would not have occurred but for the fact that the defendants wrote an article for publication in California that was read by a large number of California citizens.

Walden v. Fiore, 571 U.S. 277, 287-88 (2014). It is that connection to California—rather than just to Plaintiff himself—that is glaringly absent in this case, where the statements were not made in any California-specific circulation but rather on a public Internet website. As California courts have made clear, "merely posting on the Internet negative comments about the plaintiff and knowing the plaintiff is in the forum state are insufficient to create minimum contacts [under *Calder*]."[1] *Burdick*

[1] Plaintiff's bald statement that Wigington's Facebook page "necessarily included a great number of California residents" is neither legally relevant nor supported. Plaintiff's citation to *Dongxiao Yue v. Wenbin Yang*, 62 Cal. App. 5th 539 (2021) is inapt; in that case, the alleged defamatory statements "repeatedly referred to California; suggested California criminal liability, and threatened a California visit by [defendant]." *Id.* at 549. Nor is it plausible that Dr. MacMartin's feedback on the public ClimateFeedback website was a "direct communication" with Plaintiff.

v. Super. Ct., 233 Cal. App. 4th 8, 25 (2015); *see also Jacqueline B. v. Rawls L. Grp., P.C.*, 68 Cal. App. 5th 243, 254-55 (2021) (for purposeful direction, courts consider whether statements are "California focused" by targeting a Californian audience to have an effect therein).

Finally, Plaintiff's citation to *Benaron v. Simic*, 434 F. Supp. 3d 907 (D. Or. 2020), also misses the mark. *Benaron* was not decided under California law, *see Walden*, 571 U.S. at 286 (specific personal jurisdiction determined by the law of the forum state), and, in any event, *Benaron* is not an Internet defamation case. Instead, in *Benaron*, the plaintiff alleged that the defendant reached out to her daughter's *Washington* university and her *Oregon* employer with an intent to disturb those specific *Oregon* relationships.[2] Because Plaintiff cannot point to any purposeful direction to California here, there is no personal jurisdiction over Dr. MacMartin in this court.

III. Plaintiff Does Not Plead Actionable Defamation

A. Plaintiff Concedes That This Case Involves Two Sides of a Debate and Therefore the Statements are not Capable of Defamatory Meaning.

Plaintiff fails to support his contention that the alleged "feedback" is capable of defamatory meaning as required for a defamation claim. Plaintiff concedes that he is asking this Court "to decide whether [Dr.] MacMartin's [statements about geoengineering] were false" (ECF No. 16 [Opp'n] at 15:2)—yet, a page earlier, Plaintiff concedes that "there is a debate about the status of SRM." (*Id.* at 14:11-12.) Plaintiff goes even further:

> Some peer-reviewed scientists take the position that SRM is being implemented. ***Others do not***. [Dr.] 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***. [Dr.] MacMartin does not even concede that the ***other viewpoint*** exists.

(ECF No. 16 [Opp'n] at 14:12-15 (emphasis added).) Since Plaintiff concedes that there is disagreement on this issue, even among "peer-reviewed scientists," it is inappropriate for him to ask this Court of law to decide that the other side of the "debate" is "false." *See, e.g.*, *Resolute Forest Prods., Inc. v. Greenpeace Int'l*, 302 F. Supp. 3d 1005, 1021 (N.D. Cal. 2017) ("[t]he academy, and

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[2] Plaintiff's resort to the "due process" principles in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) is not helpful; the due process inquiry is relevant only *after*—and *if*—a plaintiff satisfies the purposeful availment requirement, a threshold Plaintiff did not meet here. *See Burger King Corp.*, 471 U.S. at 476-77.

not the courthouse, is the appropriate place to resolve scientific disagreements"); *Weiss v. Mayda*, No. B071255, 1993 WL 723475, at *2 (Cal. Ct. App. Dec. 29, 1993) ("Mere expressions of opinion or severe criticism are not libelous if they clearly go only to the merits or demerits of a condition, cause, or controversy which is under public scrutiny."); *Arthur v. Offit*, No. 01:09-cv-1398, 2010 WL 883745, at *6 (E.D. Va. Mar. 10, 2010) (debate about the dangers of vaccines involves "academic questions that are not the sort of thing that courts or juries resolve in the context of a defamation action."). Plaintiff fails to address—let alone distinguish—this case law.[3]

B. Dr. MacMartin's Statements Constitute Protected Opinion as a Matter of Law.

Plaintiff also fails to refute that the two statements at issue are protected statements of opinion under California law. Plaintiff posits that Dr. MacMartin did not "identify" these statements as opinion (ECF No. 16 [Opp'n] at 14:7)—but under California law, the court need only look at the context of the statements to determine whether they are readily understood as opinion. Plaintiff does not address ***any*** of the contextual indicia of opinion that Dr. MacMartin points out in his Motion to Dismiss: the statements are made in a section called "feedback," the phrase "pure fantasy" is hyperbolic rhetoric and fanciful, and the entire feedback section is replete with language of conjecture, including referencing his own "hypothesis" and labeling it a "mundane *belief*." (ECF No. 16 [Opp'n] at 13:25-15:22.) Instead of finding contextual clues within the "feedback" section itself, Plaintiff argues that the relevant "context" is that Dr. MacMartin was allegedly vetted as a fact-checker and had to prove that he had a Ph.D. and is published in peer-reviewed journals. (ECF

[3] Plaintiff repeatedly suggests in his Opposition that Dr. MacMartin specifically sought out the opportunity to be a Facebook fact-checker with the intent of stifling Plaintiff's speech by getting his documentary labeled "incorrect" or "false." (ECF No. 16 [Opp'n] at 1:16-17, 7:8-9, 19:11-13.) These accusations are mostly not even supported by allegations in the Complaint; the only allegation that addresses this alleged conduct is pled "on information and belief" (ECF No. 1-1 [Compl.] at ¶ 60) and is simply not plausible. *See Blantz v. Cal. Dep't of Corr. & Rehab., Div. of Corr. Health Care Servs.*, 727 F.3d 917, 927 (9th Cir. 2013) (allegations that are only based "on information and belief" are "conclusory" and "insufficient to state a claim."); *see also Lawrence v. Medtronic*, 791 F. App'x 679, 680 (9th Cir. 2020) ("[A]llegations [that] are facially implausible and are not enough for us to 'draw the reasonable inference that the defendant is liable for the misconduct alleged.'") (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)); *Mehta v. Wells Fargo Bank, NA*, 510 F. App'x 498 (9th Cir. 2013) (affirming the district court's dismissal because Plaintiff's allegations were implausible).

No. 16 [Opp'n] at 14:7-11.) Setting aside that these allegations are not in the Complaint, whether or not Dr. MacMartin has an advanced degree or is well published in the field has no bearing on whether this particular statement constituted fact or opinion. Indeed, there are contexts in which a Ph.D. might be making statements of fact (*e.g.*, in an academic textbook) and other contexts in which they might be making statements of opinion (*e.g.*, a "feedback" statement replete with language of conjecture).

Plaintiff also does not dispute that the facts on which Dr. MacMartin bases his "feedback" statements are known—both because Dr. MacMartin has long held these views (ECF No. 1-1 [Compl.] at ¶¶ 17-18; ECF No. 16 [Opp'n] at 14:9-14) and because some of them are set forth in the Review preceding the "feedback" section. Plaintiff argues only that he does not agree with these disclosed facts or the conclusions Dr. MacMartin draws from them (*i.e.*, because the sources pre-date Plaintiff's documentary); but such disagreement does not undermine the finding, under California law, that disclosure of the underlying facts constitutes protected opinion. *See, e.g.*, *Doe v. Super. Ct.*, 1 Cal.App.5th 1300, 1314 (2016).

Finally, the allegation that *Facebook*—a third party not under Dr. MacMartin's control—later used the "feedback" statement for purposes of fact checking is not relevant. What is relevant is that when the statements were published on the Climate Feedback website, they constituted constitutionally-protected opinion.

C. Plaintiff Did Not Plausibly Allege Actual Malice[4]

Plaintiff's Opposition also fails to point to specific allegations in the complaint that plausibly plead the strict criteria for "actual malice." Plaintiff instead relies on the alleged "long history of malice"—*i.e.*, *hostility*—between Plaintiff and Dr. MacMartin and the bald assertion that Dr. "MacMartin hates Wigington and calls him names." (ECF No. 16 [Opp'n] at 16:15-16.) In so arguing, Plaintiff appears to have confused "actual malice" as required for a defamation claim, for plain, colloquial "malice." Plaintiff relies on just one out-of-context quotation from a single California case to argue that "anger and hostility toward the plaintiff" are "factors" in the actual

[4] Plaintiff does not challenge Dr. MacMartin's assertion that he is a limited public figure and therefore concedes that he must allege actual malice to plead defamation.

malice analysis. (*Id.* [citing *Reader's Digest Ass'n v. Super. Ct.*, 37 Cal. 3d 244, 257 (1984)]). Plaintiff's manipulation of the case law is unavailing; in cherry-picking this language, Plaintiff neglects to mention that the *Reader's Digest* court granted summary judgment in defendant's favor because, among other reasons, "mere proof of ill will on the part of the publisher" may be "***insufficient***" to "prove actual malice." *Id*. at 258. And, indeed, the *Readers Digest* court found that alleged personal hostility towards the plaintiff ***was in fact*** insufficient to demonstrate that plaintiff published his statements with knowledge of their falsity. *Id*. at 260. Specifically, the court emphasized that defendant's personal hostility towards plaintiff post-dated the development of his allegedly defamatory beliefs and, therefore, the alleged personal hostility "does not indicate a state of mind that would suggest that he had serious doubts about the article's veracity." *Id*.

In the nearly forty years since *Readers Digest* was decided, California courts have uniformly held that they "will not infer actual malice solely from evidence of ill will, personal spite or bad motive." *Ampex Corp. v. Cargle*, 128 Cal. App. 4th 1569, 1579 (2005); *see also Sugarman v. Benett*, 73 Cal. App. 5th 165, 177 (2021) ("'evidence of ill will, personal spite or bad motive'" alone is insufficient to permit an inference of actual malice."); *Ostrander v. Madsen*, No. 00-35506, 2003 WL 193565, at *1–2 (9th Cir. Jan. 28, 2003) ("[p]roof of hostility or ill will does not show actual malice," especially where hostility arose after defendant formed his allegedly defamatory beliefs.). That principle is especially applicable here, where the public record demonstrates that Dr. MacMartin has been publishing his theories about SRM (including the theories that Plaintiff now calls defamatory) since at least 2013—long before the allegations of when his hostility towards Plaintiff began in 2017. (ECF No. 6-3 [Dr. MacMartin's Resume section regarding Recent Research Support] at 13-14.) Plaintiff concedes as much in his Complaint, alleging, in a section of the Complaint that pre-dates the development of any alleged antagonism between Plaintiff and Dr. MacMartin, that "[Dr.] MacMartin has also researched and published material on SRM, but he maintains that SRM has only been explored as a theoretical possibility." (ECF No. 1-1 [Compl.] at ¶ 16.) Indeed, the circumstances of Dr. MacMartin and Plaintiff meeting was an "anti-geoengineering activist email[ing] [Dr.] MacMartin expressing grave concerns about climate engineering *and MacMartin's role in it*." (*Id.* at ¶ 17.)

Plaintiff's only remaining contention regarding actual malice is that Dr. MacMartin failed to investigate his claims sufficiently because, allegedly, the sources relied upon by Dr. MacMartin were biased and one-sided. (ECF No. 16 [Opp'n] at 16:15-28.) Yet the *Reader's Digest* court disposed of this argument, holding that "[t]he failure to conduct a thorough and objective investigation, standing alone, does not prove actual malice, nor even necessarily raise a triable issue of fact on that controversy." *Reader's Digest*, 37 Cal. 3d at 258; *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 287-88 (no actual malice even where publisher would have discovered falsity of published material had they checked their own news files.); *Newton v. Nat'l Broadcasting Co.*, 930 F.2d 662, 669 (9th Cir. 1990) ("Even an extreme departure from accepted professional standards of journalism will not suffice to establish actual malice; nor will any other departure from reasonably prudent conduct, including the failure to investigate before publishing."). Plaintiff therefore fails to point to any plausible allegations sufficient to plead actual malice.

IV. Plaintiff Does Not State a Claim for Interference with Prospective Economic Relations.

Plaintiff devotes a substantial part of his Opposition to arguing that the interference claims should not be dismissed as duplicative of the defamation claims. (ECF No. 16 [Opp'n] at 17:4-19:25.) But this Court need not even delve into these arguments because the interference claims are themselves insufficiently pled.

First, Plaintiff concedes that he is arguing that the "wrongful conduct" underlying the interference claims is Dr. MacMartin's alleged defamation. (ECF No. 16 [Opp'n] at 18:15-22.) But (for the reasons stated above), Plaintiff has not plausibly plead defamation; and absent this "wrongful conduct"—a required element of intentional and negligent interference claims—Plaintiff cannot state an interference claim. *See, e.g.*, *Block v. eBay, Inc.*, 747 F.3d 1135, 1141 (9th Cir. 2014).

Second, Plaintiff continues to argue that Dr. MacMartin has allegedly interfered with an alleged economic relationship *with Facebook*—but Plaintiff still cannot point to any plausible allegations in the Complaint that would support the existence such an economic relationship. For example, Plaintiff does not allege any contract he had with Facebook, or any loss of any funds that would have been paid to him directly by Facebook. That is because Plaintiff makes plain in his

Opposition that the alleged loss of revenue was coming from Facebook subscribers, not Facebook itself. (ECF No. 16 [Opp'n] at 15:27-28.) Plaintiff also fails to sufficiently allege that Dr. MacMartin was even aware of Plaintiff's alleged economic relationship with Facebook. In any event, even Plaintiff's allegations make clear that it was not Dr. MacMartin who placed a "False Information" warning on Plaintiff's Facebook page; instead, Facebook did so. (ECF No. 16 [Opp'n] at 19:12-13 (noting that "Facebook relied on [Dr. MacMartin's] statements and tagged Wigington's documentary with the disparaging "FALSE" label").)

V. <u>This Case Qualifies as a SLAPP Suit Under California's Anti-SLAPP Statute.</u>

Plaintiff's arguments that the anti-SLAPP analysis does not apply to this case are simply wrong. Plaintiff argues that neither Facebook nor the Climate Feedback website qualify as public forums under Cal. Code Civ. Proc. § 425.16(e)(3). Those assertions are incorrect; under California law, both websites are public forums for anti-SLAPP purposes. As the California Court of Appeals held recently in *Cross v. Facebook, Inc*., 14 Cal. App. 5th 190, 199 (2017):

> As the trial court aptly observed, "It cannot be disputed that Facebook's website and the Facebook pages at issue are 'public forums,' as they are accessible to anyone who consents to Facebook's Terms." This, of course, is consistent with the law establishing that "[w]eb sites accessible to the public ... are 'public forums' for purposes of the anti-SLAPP statute." (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 41, fn. 4, 51 Cal.Rptr.3d 55, 146 P.3d 510.)

And to the extent Plaintiff argues that the Climate Feedback website is not a public forum because it "is not a forum where the opposing side has an opportunity to respond," Plaintiff does not cite to a single case in support of that statement.

Plaintiff's suggestion that Dr. MacMartin's "feedback" statements were not in furtherance of his exercise of free speech because it allegedly "stifle[d] the free speech of Wigington," (ECF No. 16 [Opp'n] at 22:1-4), is ludicrous. Plaintiff concedes throughout his Opposition that he and Dr. MacMartin have differing viewpoints on this issue. That Dr. MacMartin disagrees with Plaintiff does not mean that he is "stifling" Plaintiff's ability to speak freely simply by putting forth his own opinions and ideas. The scientific SRM community is not a zero-sum game. Indeed, "the question of subjective intent is not relevant… The anti-SLAPP statute … incorporates no intent-to-chill pleading or proof requirement [and] a defendant who meets its burden under the statute of

demonstrating that a targeted cause of action is one 'arising from' protected activity … faces no additional requirement of proving the Plaintiff's subjective intent." *City of Cotati v. Cashman*, 29 Cal. 4th 69, 74 (2002) (internal citation and quotation omitted); *see Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal. 4th 53 (2002) (held that a defendant does not need to demonstrate an intent to chill speech to successfully pursue an Anti-SLAPP motion).

Finally, with respect to the second prong, for the reasons discussed herein and in Dr. MacMartin's opening brief, Plaintiff has not come close to satisfactorily pleading his claims against Dr. MacMartin. *See Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 834 (9th Cir. 2018) (holding that federal courts must review a California Anti-SLAPP motion under a Fed. R. Civ. P. 12(b)(6) standard). As a result, the Court should strike Wigington's claims and award Dr. MacMartin his fees and costs associated with defending this suit. Cal. Code Civ. Proc. § 425.16(c).

VI. Conclusion

For the reasons set forth above and the Motion to Dismiss, Defendant, Dr. Douglas MacMartin respectfully requests that the Court dismiss the Complaint in its entirety, with prejudice.

Dated: April 8, 2022

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