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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL J. ZWEBNER, UNIVERSAL COMMUNICATIONS SYSTEMS, INC. and AIRWATER CORP.,

Plaintiffs,

v.

JAMES W. COUGHLIN a/k/a IRISHJIM 44, and DOES 1 - 25,

Defendants.

Case No. 05-CV-1263 JAH (AJB)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT JAMES W. COUGHLIN'S SPECIAL MOTION TO STRIKE (CAL. CODE CIV. PROC. § 425.16)

Date: September 22, 2005
Time: 3:00 p.m.
Ctrm.: 11
Judge: Hon. John A. Houston

Complaint Filed: June 21, 2005
Trial Date: None set.

ORIGINAL

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Michael Zwebner ("Zwebner"), Universal Communications Systems, Inc. ("UCSY") and Airwater Corp. ("Airwater") (collectively "Plaintiffs") filed this action to silence public discussion of Plaintiffs' companies and management on the Internet. Defendant James W. Coughlin is one of many anonymous posters on UCSY's and TVCE's Raging Bull Message Boards. These posters have taken advantage of a public forum, maintained by Lycos/Raging Bull on the World Wide Web, to discuss the merits and flaws in Plaintiffs' operations.

Plaintiffs seek in this lawsuit to suppress criticism. Plaintiffs also seek to impose massive damages on its critics.[1] Accordingly, in this motion, one of the posters, whose statements on the Raging Bull forum were entirely lawful and against whom this lawsuit is frivolous, moves to strike the Complaint on the ground that it is purely designed to suppress protected speech, and thus is Strategic Litigation Against Public Participation, *i.e.*, a SLAPP suit.

I.

INTRODUCTION

A. The Internet

The Internet is a democratic institution in the fullest sense. It serves as the modern equivalent of the Speakers' Corner in England's Hyde Park, where ordinary people may voice their opinions, however silly, profane, or brilliant they may be, to all who choose to listen. As the Supreme Court explained in *Reno v. ACLU,* 521 U.S. 844, 853, 870 (1997): "From the publishers' point of view, it constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers and buyers . . . . * * * Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, . . . the same individual can become a pamphleteer."

The Internet is a traditional public forum, and full First Amendment protection applies to free speech on the Internet. *Id. See also In re Verizon Internet Servs.*, 257 F. Supp. 2d 244, 259 (D.D.C. 2003), rev'd on other grounds, *Recording Indus. Ass'n of America, Inc. v. Verizon*

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[1] The prayer in Plaintiffs' complaint seeks consequential damages of at least $18 million. (Exhibit 1 to Notice of Lodgment of Exhibits ("NOL"), p. 6.)

Internet Servs., Inc., 351 F. 3d 1229 (D.C. Cir. 2003); *Columbia Ins. Co. v. Seescandy.com,* 185 F.R.D. 573, 578 (N.D. Cal. 1999); *ACLU v. Johnson*, 4 F. Supp. 2d 1029, 1033 (D.N.M. 1998), *aff'd*, 194 F.3d 1149 (10th Cir. 1999). Courts have recognized the Internet as a valuable forum for robust exchange and debate. *See Doe v. 2TheMart.com Inc.,* 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001); S*eescandy.com, supra,* 185 F.R.D. at 578.

The Internet is a particularly effective forum for the dissemination of anonymous speech. *See, e.g., 2TheMart.com, supra*, 140 F. Supp. 2d at 1092, 1097 ("Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas . . . . * * * [T]he constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded.") "The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 341-342 (1995).[2]

Knowing that people have personal and economic interests in the corporations that shape our world, and in the stocks they hope will provide for a secure future, and knowing, too, that people love to share their opinions with anyone who will listen, Raging Bull organized outlets for the

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[2] An individual's right to privacy includes the right to speak anonymously. *Rancho Publications v. Superior Court*, 68 Cal. App. 4th 1538 (1999). "The right to speak anonymously draws its strength from two separate constitutional wellsprings: the First Amendment's freedom of speech and the right of privacy in article I, section 1 of the California Constitution." *Id.*, at 1540-1541.

It is well established that the First Amendment protects the right to speak anonymously. The Supreme Court has repeatedly upheld this right. *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999); *McIntyre, supra*, 514 U.S. 334; *Talley v. California*, 362 U.S. 60 (1960). These cases have celebrated the important role played by anonymous or pseudonymous writings over the course of history, from the literary efforts of Shakespeare and Mark Twain through the authors of the Federalist Papers.

These rights are fully applicable to speech on the Internet. The Supreme Court has treated the Internet as a public forum of preeminent importance, which places in the hands of any individual who wants to express his views the opportunity, at least in theory, to reach other members of the public hundreds or even thousands of miles away, at virtually no cost, and has held that First Amendment rights are fully applicable to communications over the Internet. *Reno, supra*, 521 U.S. 844. As the Supreme Court has held, "[a]nonymity is a shield from the tyranny of the majority." *McIntyre, supra*, 514 U.S. at 357. Several cases have upheld the right to communicate anonymously over the Internet. *ACLU v. Johnson*, 4 F. Supp. 2d at 1033; *ACLU v. Miller*, 977 F. Supp. 1228, 1230 (N.D. Ga. 1997); *see also ApolloMedia Corp. v. Reno*, 526 U.S. 1061 (1999), *aff'g* 19 F. Supp. 2d 1081 (N.D. Cal. 1998) (protecting anonymous denizens of a web site at www.annoy.com, a site "created and designed to annoy" legislators through anonymous communications).

expression of opinions on these topics. These outlets, called the Message Boards, are an electronic bulletin board system where individuals freely discuss major companies by posting comments for others to read and respond to. The Message Boards can also be used as a resource for discussing ideas and providing directions to obtaining information about areas of interest. Often a thought or question is put to the board with the hope that some other poster may be of assistance. The Message Boards are there to allow posters to sing the praises of a company, as well as to critique the company's operations. Because the messages are posted anonymously, the overriding rule is that it is up to the reader to draw their own conclusions about the opinions of the poster.

Raging Bull maintains a Message Board for most publicly traded companies and permits anyone to post messages to it. The individuals who post messages there generally do so under a "handle" – similar to the old system of CB's used by truck drivers. Nothing prevents the individual from using his real name, but as inspection of the Message Boards at issue in this case will reveal, usually the person chooses an anonymous nickname. These typically colorful nicknames protect the writer's identity from those who disagree with him or her, and encourage the uninhibited exchange of ideas and opinions. Such exchanges are often very heated and, as seen from the various messages and responses on the Message Boards at issue in this case, they are sometimes filled with invective and insult. Most, if not everything, that is said on the Raging Bull Message Boards should be taken with a grain of salt. However, public disclosure of a poster's identity can be dangerous because other posters, who may not be emotionally stable, or who may be vengeful, may retaliate in a number of ways. There have been occasions when individuals have attempted to silence opposing opinions by disclosing the names or locations of posters. Harassment occasionally takes the form of virus infected e-mail assaults, offensive e-mails and registrations of the identified poster at offensive websites such as pornography sites.

B. <u>The Parties</u>

One of Raging Bull's Message Boards is devoted to Plaintiff UCSY, which trades under the stock symbol "UCSY" on the Over The Counter Bulletin Board. According to UCSY's Complaint, it is a publicly traded company organized under the laws of Nevada. It has an office in Miami, Florida, and does business in the United States, the Middle East, South America and

"other areas around the world." (NOL, Exhibit 1, ¶ 3.) UCSY maintains a public website at www.ucsy.com. (Declaration of James W. Coughlin in Support of Special Motion to Strike ("Coughlin Decl."), ¶ 6.) The website states: "UCSY is a Global Holding Organization with several diverse operational subsidiaries. Our range of activities include: BroadBand Wireless Internet Provision, currently operational in Lima Peru, state of the art Water from Air production, on a world wide basis, exciting energy saving "solar industry," providing power and energy solutions and now expecting great things from our security division. The company was formed to develop and commercialize novel therapeutic products for the treatment of chronic diseases." (NOL, Exhibit 2.) According to its most recent Annual Statement filed with the Securities and Exchange Commission (www.sec.gov) on January 13, 2005, UCSY had approximately 8,400 shareholders, including 600 holders of record and an estimated 7,800 holders in street name as of September 30, 2004. (NOL, Exhibit 3.) UCSY has over 255 million shares of its common stock outstanding. (NOL, Exhibit 4).

UCSY issues frequent press releases. Since August 27, 2003, UCSY has issued at least 112 press releases about its business operations and litigation regarding Internet posters. (NOL, Exhibit 19.).[3]

According to the Complaint, Airwater is a Florida corporation and is a wholly owned subsidiary of UCSY. (NOL, Exhibit 1, ¶ 4.) Airwater maintains a public website at www.airwatercorp.com. Its website also lists numerous press releases.

According to the Complaint, Zwebner is the Chairman of UCSY, and has been since November 2001. The Complaint also alleges that from September 1998 through 2002, Zwebner was also the Chairman of another publicly traded company, Talk Visual Corporation, now trading under the symbol "TVCE."[4] (NOL, Exhibit 1, ¶ 2). TVCE has its own Raging Bull Message

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[3] *See* www.ucsy.com/press.asp. These press releases include a June 22, 2005 press release announcing the filing of this action. (NOL, Exhibit 5). Plaintiffs issued another press release on January 21, 2005 announcing the filing of an earlier federal civil action against Mr. Coughlin. (NOL, Exhibit 6).

[4] The Company is now known as TVC Telecom, Inc. It is also a publicly traded company, and it is a reseller of long-distance telephone services for wireline and wireless customers. Its website at www.tvctelecom.com is no longer operational.

Board, and three of the claimed defamatory messages (messages 169782, 170,374 and 170739) were posted on the TVCE Message Board.

Posters on Raging Bull are warned:

> **DON'T BELIEVE EVERYTHING YOU READ**
> While reading the message boards you will find lots of opinions. Please be advised that some members may post information that is biased, misleading or false. When it comes right down to it, you are responsible for the decisions you make about your own money. Never trust a single information resource, whether a post on this Web site or a stock tip by the water cooler.

(NOL, Exhibit 13.).

The Raging Bull UCSY Message Board is very active. To date, over 55,000 messages have been posted to the Board. (NOL, Exhibit 14.). The Raging Bull TVCE Message Board is also very active. To date, over 173,000 messages have been posted to the Board. (NOL, Exhibit 15).

A casual review of those messages reveals an enormous variety of topics and posters. Investors and members of the public discuss the latest news about what products the company has sold and may sell, what new products it may develop, what the strengths and weaknesses of Plaintiffs' operations are, and what its managers and employees might do better. (Coughlin Decl., ¶ 13.) Questions are often posted as well as discussion topics. (*Id.*) Posters freely offer their opinions. (*Id.*) At times, the exchanges of opinion can be very contentious. (*Id.*) Many of the messages praise UCSY, some criticize it, and some are basically neutral. (*Id.*) Most of the posts give every appearance of being highly opinionated. Some of the posts have nothing to do with the company, often resembling adolescent rants. Politics, sports, religion and current events often weave their way into a portion of the posts.

One of the pseudonyms used on the Raging Bull Message Boards is "IrishJim44," the pseudonym used by Mr. Coughlin until he stopped posting in early 2004, over one year before the filing of the complaint in this case. (Coughlin Decl., ¶ 4.) A review of the Message Boards reveals that Mr. Coughlin posted numerous messages to the Boards, some of them supportive of UCSY in response to criticisms made by various other posters. On many occasions, Mr. Coughlin complained about certain aspects of UCSY, although it is hard to imagine any of the posts as

being defamatory or in violation of any of the other legal duties set forth in the complaint. Mr. Coughlin, a retired U.S. Navy veteran, is a UCSY and TVCE shareholder, and he has a keen interest in both companies' well being. (Coughlin Decl., ¶¶ 2-3.)

Mr. Coughlin believes Zwebner has also posted numerous messages to Internet Message Boards under various pseudonyms, including "bashersuit." (Coughlin Decl., ¶ 20.) On January 30, 2005, "bashersuit" posted a message identifying Mr. Coughlin and his address, and stating that Mr. Coughlin "is about to get a real BIG surprise. ¶ Too bad for him his address is now known !" (NOL, Exhibit 16).[5]

C. The Messages

The Complaint identifies 15 messages in paragraph 11 that Plaintiffs claim are "malicious, false and defamatory."[6] The Complaint paraphrases the messages and does not identify the dates they were posted. (Coughlin Decl., ¶ 18.) The full messages, which were posted between January 28, 2003 and January 4, 2004, are attached as Exhibit 10 to the NOL.[7] Each of the posted messages was in response to another message, and was part of a public discussion of public companies and their management. (*Id.*)

Mr. Coughlin now files this special motion to strike under the SLAPP statute.[8] Mr. Coughlin believes that none of the 15 messages violate the Plaintiffs' rights in any way. (*Id.*, ¶ 14.) Mr. Coughlin believes the real purpose of this action is to chill his First Amendment rights.[9]

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[5] On January 20, 2005, Plaintiffs filed a nearly identical complaint against Mr. Coughlin in the Southern District of Florida. *Zwebner, et al. v. Coughlin, et al.*, Civil Case No. 05-20168. (Coughlin Decl., ¶ 16; NOL, Exhibit 7). On March 22, 2005, Mr. Coughlin filed a motion to dismiss for, *inter alia*, lack of personal jurisdiction. On April 29, 2005, the Honorable Marcia G. Cooke granted the motion and dismissed the case against Mr. Coughlin. (NOL, Exhibit 8). On May 31, 2005, Plaintiffs' motion for reconsideration was denied. (NOL, Exhibit 9).

[6] Paragraph 11 identifies 16 messages, but UCSY message 26165 is repeated twice. In addition, Mr. Coughlin did not post TVCE Post No. 169782. (Coughlin Decl., ¶ 17.)

[7] For the Court's convenience, copies of the messages with the allegations in the Complaint are compiled in Exhibit 11 to the NOL.

[8] The Ninth Circuit has adopted and enforced California's anti-SLAPP statute. *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 970-973 (9th Cir. 1999).

[9] Zwebner and UCSY appear to be on a campaign to silence any criticism of its operations or management on the Internet. (Coughlin Decl., ¶ 19.) Attached as Exhibit 12 to the NOL is a list

II.

ARGUMENT

THIS LAWSUIT IS DESIGNED TO CHILL DEFENDANT'S FREE SPEECH, AND SHOULD BE DISMISSED UNDER THE CALIFORNIA ANTI-SLAPP STATUTE, CODE OF CIVIL PROCEDURE SECTION 425.16

A. This Case Falls Within the Scope of Section 425.16.

California law protects against the use of the courts to discourage free speech. Claims that have this intended effect are known as SLAPP, or Strategic Litigation Against Public Participation, suits. In 1992, the California Legislature recognized that there was a "disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition," and found a strong public interest encouraging "continued participation in matters of public significance." Cal. Code Civ. Proc. § 425.16(a). In order to ensure that "this participation should not be chilled through abuse of the judicial process," the Legislature established a presumption against the maintenance of litigation arising from any act "in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue." Cal. Code Civ. Proc. § 425.16(b). Once it is determined that such an issue is involved, the cause of action "shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." *Id.*

Examining Section 425.16, one court noted as follows:

> SLAPP lawsuits stifle free speech. They undermine the open expression of ideas, opinions and the disclosure of information. The marketplace of ideas, not the tort system, is the means by which our society evaluates and validates those opinions. The threat of a SLAPP action brings a disquieting stillness to the sound and fury of legitimate . . . debate.

Beilenson v. Superior Court, 44 Cal. App. 4th 944, 956 (1996) (internal citations omitted).

Wilcox v. Superior Court, 27 Cal. App. 4th 809 (1994) explained why the Legislature chose to create the anti-SLAPP remedy:

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of cases filed by Zwebner and/or UCSY regarding Internet messages.

> [W]hile SLAPP suits "masquerade as ordinary lawsuits" the conceptual features which reveal them as SLAPP's are that they are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so. Because winning is not a SLAPP plaintiff's primary motivation, defendants' traditional safeguards against meritless actions, (suits for malicious prosecution and abuse of process, requests for sanctions) are inadequate to counter SLAPP's. Instead, the SLAPPer considers any damage or sanction award which the SLAPPee might eventually recover as merely a cost of doing business. By the time a SLAPP victim can win a "SLAPP-back" suit years later the SLAPP plaintiff will probably already have accomplished its underlying objective. Furthermore, retaliation against the SLAPPer may be counter-productive because it ties up the SLAPPee's resources even longer than defending the SLAPP suit itself.

Id. at 816-817 (internal citations and footnote omitted).

Since enactment, Section 425.16(a) has been amended to provide that it "shall be construed broadly." The statute applies to "any other conduct in furtherance of the exercise of . . . the constitutional right of free speech in connection with a public issue or an issue of public interest." *Id.; Briggs v. Eden Council For Hope & Opportunity*, 19 Cal. 4th 1106, 1128 (1999). The courts have given special consideration to these SLAPP cases and have noted that "the early termination of [such a] lawsuit is highly desirable. * * * [T]he public has an interest in receiving information on issues of public importance even if the trustworthiness of the information is not absolutely certain." *Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d 254, 269 (1986) (internal citations omitted).

Although many SLAPP cases involve suits filed over statements made by citizens to zoning boards and in other kinds of official proceedings, in exercise of their right of petition for redress of grievances, the statute also extends to any exercise of free speech rights pertaining to public issues. Under subdivision (e) of the SLAPP statute, the communications that are protected against SLAPP suits include "(3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or 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 California Supreme Court has specifically ruled that a statement can be protected by sections (e)(3) and (e)(4) even if the issue is not pending before a public body. *Briggs, supra*, 19 Cal. 4th at 1117-1118, 1123.

The corporate performance and commercial activities of publicly held companies constitute "matters of public interest" for First Amendment purposes. *Paradise Hills Associates v. Procel*, 235

Cal. App. 3d 1528, 1544 (1991). As such, the public enjoys broad, but not unlimited, latitude to discuss and present opinions regarding these topics. *Morningstar, Inc. v. Superior Court*, 23 Cal. App. 4th 676, 695 (1994); *Macias v. Hartwell*, 55 Cal. App. 4th 669, 672-673 (1997) (SLAPP statute applies to leaflet in intra-union election); *Sipple v. Foundation For Nat. Progress*, 71 Cal. App. 4th 226, 238 (1999). *See also Wilcox, supra*, 27 Cal. App. 4th at 822 n.6 (defamation suit over advocacy of economic boycott by competing organization; Section 425.16 deemed applicable to "commercial speech"); *Church of Scientology v. Wollersheim,* 42 Cal. App. 4th 628, 650 (1996) (although case also involved right to petition, court specifically held that the statutory term "matters of public interest" "include[s] activities that involve private persons and entities, especially when a large, powerful organization may impact the lives of many individuals").

UCSY is a publicly traded corporation, a leader in its industry, with more than 8,400 shareholders and over 255 million issued shares of common stock. (Coughlin Decl., ¶ 7; NOL, Exhibit 3.) It operates worldwide, and has a presence throughout the country and the world. (*Id.*, ¶ 6; NOL, Exhibit 2.) It invites public comment by maintaining an extensive website and issuing dozens of press releases every year. Additionally, as a publicly traded company, UCSY files with the SEC financial and informational statements, as required by law. [10]

The general public has a strong interest in the company's doings, and discussion among employees, investors, and other members of the public about UCSY are surely a matter of public interest. Accordingly, the SLAPP statute is fully applicable when UCSY brings suit to suppress such discussion on the Internet. *ComputerXpress, Inc. v. Jackson*, 93 Cal. App. 4th 993, 1007 (2001) (Internet messages on stock message board were made in connection with an issue of public interest); *Global Telemedia Int'l, Inc. v. Doe 1,* 132 F. Supp. 2d 1261, 1264, 1266 (C.D. Cal. 2001) ("less-than-flattering" messages on stock message board were made "in connection with a public issue."). *See also Damon v. Ocean Hills Journalism Club,* 85 Cal. App. 4th 468, 478-480 (2000) (statements about a private homeowners' association were issues of public interest protected by the anti-SLAPP statute).

[10] TVCE is also a publicly traded company.

B. Plaintiffs Cannot Establish a "Probability of Success."

Under the anti-SLAPP statute, a defendant's only burden is to make a *prima facie* showing that the plaintiff's lawsuit arises from an act of the defendant in furtherance of First Amendment rights in connection with a public issue. *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 67 (2002); *Wilcox, supra*, 27 Cal. App. 4th at 820. Under the anti-SLAPP statute, a plaintiff must then establish a probability of prevailing on its claims. *See Equilon Enterprises, supra*, 29 Cal. 4th at 67. If the plaintiff does not meet this burden the complaint is stricken with prejudice. *Wilcox, supra*, 27 Cal. App. 4th at 830-831.

No probability of success can be shown on the current record.

1. Plaintiffs' Defamation Claim is Time Barred.

Under California law, defamation claims are subject to a one-year statute of limitation. *See* C.C.P. § 340(c); *Shively v. Bozanich*, 31 Cal. 4th 1230, 1246 (2003). Plaintiffs' Complaint alleges that fifteen (15) specific postings on the UCSY or TVCE Raging Bull Message Board allegedly made by Mr. Coughlin constitute defamation.[11] (Complaint, ¶ 11.) Although Plaintiffs aver that the postings were made "[f]rom approximately December 2002 through the present," a simple review of the actual postings themselves reveals that they were made between January 28, 2003 and January 4, 2004. A copy of each posting on the UCSY or TVCE Raging Bull Message Board identified in Plaintiffs' Complaint is attached to the Notice of Lodgment collectively as Exhibit 10. That exhibit reveals the following publication dates for each posting (in the order they appear in the Complaint):

UCSY Post No. 18291:	August 6, 2003
TVCE Post No. 169782:	May 22, 2003[12]
UCSY Post No. 26165:	January 4, 2004
TVCE Post No. 170374:	July 23, 2003
TVCE Post No. 170739	September 6, 2003
UCSY Post No. 7326:	January 28, 2003
UCSY Post No. 7580:	February 15, 2003
UCSY Post No. 7585:	February 15, 2003
UCSY Post No. 8064:	February 22, 2003

[11] Plaintiffs list sixteen postings in their Complaint but one is duplicative (UCSY Post No. 26165). (Complaint, ¶ 11.)

[12] Mr. Coughlin did not post TVCE Post No. 169782. (Coughlin Decl., ¶ 17.)

UCSY Post No. 9501:	March 5, 2003
UCSY Post No. 13984:	June 17, 2003
UCSY Post No. 14447:	June 19, 2003
UCSY Post No. 14909:	June 20, 2003
UCSY Post No. 20977:	October 22, 2003
UCSY Post No. 25984:	January 2, 2004
UCSY Post No. 26165:	January 4, 2004 [duplicate]

Plaintiffs did not file their Complaint until June 21, 2005, over seventeen (17) months after the most recent posting identified in the Complaint (UCSY Post No. 26165, posted on January 4, 2004). Plaintiffs' entire defamation claim is therefore time barred.

This case is closely analogous to the decision in *Traditional Cat Assn., Inc. v. Gilbreath*, 118 Cal. App. 4th 392 (2004). In *Traditional Cat*, the plaintiffs alleged a cause of action for defamation against defendants in connection with allegedly defamatory statements on an Internet website. *Id.* at 396. The defendants filed a motion to strike plaintiffs' complaint under C.C.P. § 425.16 alleging, among other grounds, that plaintiffs could not establish a probability of success on their defamation claim because it was untimely. The Court of Appeal held:

> We find the single-publication rule applies to statements published on Internet Web sites. Because the statements which give rise to plaintiffs' cause of action for defamation were posted on a Web site maintained by one of the defendants more than a year before plaintiffs' complaint was filed, plaintiffs' defamation cause of action is barred by the applicable statute of limitations, Code of Civil Procedure section 340.

Traditional Cat Assn., 118 Cal. App. 4th at 395 (footnote omitted).

So it is here. All of the postings identified in Plaintiffs' Complaint were posted well over a year prior to the filing of Plaintiffs' Complaint The oldest was posted on January 28, 2003 and the most recent was posted on January 4, 2004, with the remainder falling somewhere in between. Because Plaintiffs' defamation claim is time barred under C.C.P. § 340(c), under no circumstances will Plaintiffs be able to demonstrate any probability of success on this claim.

2. <u>The "Defamatory" Statements Identified in Plaintiffs' Complaint Constitute Non-Actionable Opinion.</u>

The untimeliness of Plaintiffs' defamation claim is sufficient grounds alone to strike this action under C.C.P. § 425.16. *See Traditional Cat Assn., supra,* 118 Cal. App. 4th at 399 ("[A] claim which is meritless because it is barred by the statute of limitations will cause just as much

intimidation as a claim which is barred because of a constitutional defense. Both forms of meritless lawsuits are the subject of section 425.16"). However, even if this Court could consider the merits of Plaintiffs' defamation claim (which it cannot), the entire claim should be stricken on the separate ground that it seeks to hold Mr. Coughlin liable for what amounts to pure opinion, which is non-actionable as a matter of law.[13]

Plaintiffs allege that the Raging Bull messages are defamatory. Defamation requires a false statement of fact made with malice that caused damage. *Ringler Associates Inc. v. Maryland Casualty Co.,* 80 Cal. App. 4th 1165, 1179 (2000). Because plaintiffs are at least limited public figures, plaintiffs must also prove by clear and convincing evidence that the allegedly false statements were made with actual malice, that is, with knowledge that the statement was false or with reckless disregard of whether it was false or not. *New York Times Co. v. Sullivan,* 376 U.S. 254, 280 (1964).

Plaintiffs cannot establish a probability of success. The messages posted by Mr. Coughlin are not defamatory or otherwise actionable. They are either not defamatory as to Plaintiffs, or they are statements of Mr. Coughlin's opinions and not a statement of fact. An essential element of a claim for defamation is that "the publication in question must contain a false statement of fact." *Gregory v. McDonnell Douglas Corp.,* 17 Cal. 3d 596, 600 (1976). Opinions are non-actionable, even if expressed with malice. *Id.* "The critical determination of whether the allegedly defamatory statement constitutes fact or opinion is a question of law." *Id.* at 601. *Accord, Yorty v. Chandler,* 13 Cal. App. 3d 467, 476 (1970).

California law is crystal clear that there is no cause of action for defamation against a statement of opinion. *Baker, supra,* 42 Cal. 3d at 259-260.

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[13] Additionally, because the postings at issue in this lawsuit are not libelous *per se*, Plaintiffs' defamation claim should be stricken on the additional ground that they have failed to plead and cannot prove special damages. *See* Cal. Civ. Code § 45a; *Fellows v. National Enquirer, Inc.*, 42 Cal. 3d 234, 235 (1986) ("Under Civil Code section 45a, language that is defamatory only by reference to extrinsic facts is not actionable unless the plaintiff can prove special damages. Special damages are defined in Civil Code section 48a as damages to property, business or occupation") (footnotes omitted). Here, Plaintiffs' Complaint is bereft of pleading or proof of special damages. (*See* Complaint, ¶ 14.)

> In making the distinction [between fact and opinion], the courts have regarded as opinion any "broad, unfocused and wholly subjective comment," such as that the plaintiff was a "shady practitioner," "crook," or "crooked politician." Similarly, in *Moyer v. Amador Valley J. Union High School Dist., supra,* 216 Cal. App. 3d at page 725, this court found no cause of action for statements in a high school newspaper that the plaintiff was "the worst teacher at FHS" and "a babbler." The former was clearly "an expression of subjective judgment." And the epithet "babbler" could be reasonably understood only "as a form of exaggerated expression conveying the student-speaker's disapproval of plaintiff's teaching or speaking style."

Copp v. Paxton, 45 Cal. App. 4th 829, 837-838 (1996) (internal citations omitted).

A review of the messages underlying Plaintiffs' Complaint are similar to those analyzed and found non-actionable by the court in *Global Telemedia Int'l, Inc. v. Doe 1*, 132 F. Supp. 2d 1261 (C.D. Cal 2001). In that case, the court stated:

> The statements were posted anonymously in the general cacophony of an Internet chat-room in which about 1,000 messages a week are posted about GTMI. The postings at issue were anonymous as are all the other postings in the chat-room. They were part of an on-going, free-wheeling and highly animated exchange about GTMI and its turbulent history. At least several participants in addition to Defendants were repeat posters, indicating that the posters were just random individual investors interested in exchanging their views with other investors.
>
> Importantly, the postings are full of hyperbole, invective, short-hand phrases and language not generally found in fact-based documents, such as corporate press releases or SEC filings.

Id. at 1267.

Under these standards, the messages cited by Plaintiffs are plainly not defamatory to Plaintiffs, or are statements of opinion. For example, calling Zwebner a "crook" or "thief" is not defamatory. *Seelig v. Infinity Broadcasting Corp.*, 97 Cal. App. 4th 798, 810 (2002) (the comments are just the type of "name-calling of the 'sticks and stones will break my bones' variety" that are not actionable defamation). "Thus, 'rhetorical hyperbole,' 'vigorous epithet[s],' 'lusty and imaginative expression[s] of . . . contempt,' and language used in a 'loose, figurative sense' have all been accorded constitutional protection." *Ferlauto v. Hamsher*, 74 Cal. App. 4th 1394, 1401 (1999) (calling lawyer "loser wannabe lawyer," "creepazoid attorney," "little fucker" and "meanest, greediest, low-blowing motherfuckers" not actionable).[14] Further, the statement

[14] *See also Lund v. Chicago & Northwestern Transp. Co.* 467 N.W.2d 366 (Minn. Ct. of App. 1991) (manager's memo calling employee "shitheads" protected opinion).

"part of the brilliant business strategy of Michael Zwebner, noted for his brilliance of looting companies and shareholders of all value" is clearly a statement of opinion. The other messages referenced in Paragraph 11 of the Complaint are similarly non-actionable.

Indeed, as a general matter, the presumption ought to be that casual statements about a company on a Raging Bull Message Board express opinions, rather than facts, just as courts have generally been reluctant to treat negative "stock tips" in financial publications, or commentary in financial newsletters, as defamatory statements of fact. *Biospherics, Inc. v. Forbes, Inc.* 151 F.3d 180, 184 (4th Cir. 1998); *Morningstar, supra*, 23 Cal. App. 4th at 693. The same casual language, breezy tone, and appearance of being opinions instead of reported facts that are found in an investment publication's "stock tips" are commonly found in message board postings as well. Indeed, the Raging Bull Message Boards contain express language that warns readers that "you will find lots of opinions. Please be advised that some members may post information that is biased, misleading or false. When it comes right down to it, you are responsible for the decisions you make about your own money. Never trust a single information resource, whether a post on this Web site or a stock tip by the water cooler." (NOL, Exhibit 13.) Such a disclaimer has been cited as a basis for denying a cause of action for defamation against an adverse financial rating. *Jefferson County Sch. Dist. No. R-1 v. Moody's Investor's Servs.*, 988 F. Supp. 1341, 1345 (D. Colo. 1997). The notion that most members of the public would treat the average message board posting as a reliable statement of fact on which to base major investment decisions is almost laughable; that is certainly true of the repartee in which Mr. Coughlin was engaged.

3. Zwebner Cannot Transmute a Defective Defamation Claim into an Actionable Intentional Infliction of Emotional Distress Claim.

Finally, to the extent that the Complaint alleges a claim by Zwebner for intentional infliction of emotional distress, the pleading requirements and defenses applicable to defamation actions cannot be evaded merely by placing a new label on what is, in essence, a defamation claim.[15] *Blatty v. New York Times Co.*, 42 Cal. 3d 1033 (1986). *Accord, Hustler Magazine v.*

[15] The elements of this cause of action require plaintiff to plead and prove: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the

Falwell, 485 U.S. 46, 52-53, 56 (1988). In *Blatty*, the California Supreme Court dismissed interference with economic advantage claims arising from an allegedly defamatory statement and enunciated the controlling rule:

> Not only does logic compel the conclusion that First Amendment limitations are applicable to all claims, of whatever label, whose gravamen is the alleged injurious falsehood of a statement, but so too does a very pragmatic concern. If these limitations applied only to actions denominated "defamation," they would furnish little if any protection to free-speech . . . : plaintiffs . . . might simply affix a label other than "defamation" to their injurious-falsehood claims . . . and thereby avoid the operation of the limitations and frustrate their underlying purpose.

Blatty, 42 Cal. 3d at 1044-1045 (citation omitted). And, in *Reader's Digest Assoc., Inc. v. Superior Court*, 37 Cal. 3d 244 (1984), the California Supreme Court specifically held that a claim for intentional infliction of emotional distress cannot stand where it is based upon speech that is constitutionally permissible. *Id.* at 265 ("[plaintiff's] cause of action for intentional infliction of emotional distress . . . fails for the same reason as his causes of action for defamation and privacy: liability cannot be imposed on any theory for what has been determined to be a constitutionally protected publication"). *See also Flynn v. Higham*, 149 Cal. App. 3d 677, 682 (1983) (no cause of action for intentional infliction of emotional distress exists where it is based on the same acts that do not support a defamation claim); *Lieberman v. Fieger*, 338 F.3d 1076, 1082 n.3 (9th Cir. 2003) ("Under California law, a plaintiff may not maintain an independent cause of action for the intentional infliction of emotional distress based on the same acts which were insufficient to support a cause of action for defamation").

Zwebner's emotional distress claim is predicated entirely upon the same conduct that is insufficient, for several reasons, to constitute a viable claim for defamation. Zwebner therefore

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probability of causing emotional distress; (2) plaintiff's suffering of severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. *Dove v. PNS Stores*, 982 F. Supp. 1420, 1424 (C.D. Cal. 1997); *Christensen v. Superior Court*, 54 Cal. 3d 868, 903 (1991). Inasmuch as a company cannot suffer severe or extreme emotional distress, UCSY and Airwater, the two corporate Plaintiffs, cannot maintain a cause of action for intentional infliction of emotional distress.

To be "outrageous," conduct must be "so extreme as to exceed all bounds of that usually tolerated in a civilized community." *Davidson v. City of Westminster*, 32 Cal. 3d 197, 209 (1982). Zwebner wholly fails to assert any facts that, even under the most liberal interpretation, could constitute a claim for intentional infliction of emotional distress.

cannot establish a probability of success with respect to any of his claims against Mr. Coughlin, and the Complaint should be stricken.

4. The Majority of Zwebner's Intentional Infliction of Emotional Distress Claim is Time Barred.

In addition to the reasons set forth in the preceding section as to why Zwebner cannot establish a probability of success on his intentional infliction of emotional distress claim, there exists a separate and distinct reason: the majority of the postings that purportedly constitute this claim are time barred.

A claim for intentional infliction of emotional distress is subject to the two-year statute of limitation set forth in C.C.P. § 335.1. In the Complaint, Zwebner alleges that the 15 UCSY and TVCE Raging Bull Website postings identified therein have caused him severe emotional distress. (Complaint, ¶¶ 19-21.) However, Zwebner's intentional infliction of emotional distress claim is time barred as to all but the following six postings:

UCSY Post No. 18291:	August 6, 2003
UCSY Post No. 26165:	January 4, 2004
TVCE Post No. 170374:	July 23, 2003
TVCE Post No. 170739	September 6, 2003
UCSY Post No. 20977:	October 22, 2003
UCSY Post No. 25984:	January 2, 2004

(*See* NOL Exhibit 11.) The remaining nine postings were posted during the period January 28, 2003 to June 20, 2003, more than two years prior to the filing of Plaintiffs' Complaint. (*Id.*) Any emotional distress claim based upon those nine postings is therefore time barred as a matter of law.

As to the remaining six postings, and for the reasons stated in the following section, Zwebner cannot demonstrate that any single posting can possibly give rise to a claim for intentional infliction of emotional distress.

5. Zwebner Cannot Satisfy the Required Elements for a Claim for Intentional Infliction of Emotional Distress.

The only six postings identified in the Complaint that could even theoretically support a claim for intentional infliction of emotional distress are the following:

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1. "To give this individual, ZWEBNER, the benefit of the doubt is like releasing a child molester from prison and allowing him to work in a child care center." (UCSY Post No. 18291, NOL Exhs. 10, 11.)

2. "Only ZWEBNER and his cronies make Death Threats." (UCSY Post No. 26165, NOL Exhs. 10, 11.)

3. "I beleave [sic] it is Charles Zwebner at the helm..hopefully, he has none of the instincts of 'thievery that Michael does." (TVCE Post No. 170374, NOL Exhs. 10, 11.)

4. "Ir [sic] is sad that he probably 'embezzled' more." (TVCE Post No. 170734 NOL Exhs. 10, 11.)

5. "Is that 'lapdancing' os [sic] 'wheelchair racing' for the mentally impaired." (UCSY Post No. 20977, NOL Exhs. 10, 11.)

6. "yakc2for1 = ZWEBNER!" (UCSY Post No. 25984, NOL Exhs. 10, 11.)

A plaintiff can prevail on a cause of action for emotional distress "only where [defendant's] conduct has been so outrageous in character and so extreme in degree as to go beyond all bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." Restatement (Second) of Torts §46, Comment (d); *see also Melorich Builders, Inc. v. Superior Court*, 160 Cal. App. 3d 931, 936 (1984); *Fisher v. San Pedro Peninsula Hosp.*, 214 Cal. App. 3d 590, 617 (1989).

None of the postings listed above meet this exacting standard. As to the first posting, it does not allege, as Zwebner suggests, that he is a child molester. (*See* Complaint, ¶ 11.) At most, it is an opinion and raises a doubt as to Zwebner's decision-making abilities. As for the second, third and fourth postings listed above, the law in California is clear that liability for intentional infliction of emotional distress claims does not extend to "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *See Fisher, supra*, 214 Cal. App. 3d at 617. That is all that exists here. And lastly, as to the fifth and sixth postings, it is impossible to discern what they even mean, much less is it possible to characterize the statements as so "outrageous" or "so extreme as to exceed all bounds of that usually tolerated in a civilized community." *Davidson,*

supra, 32 Cal. 3d at 209.[16]

Zwebner simply cannot establish that any of the postings identified in the Complaint that survive the two-year statute of limitation bar support a claim for intentional infliction of emotional distress.

III.

CONCLUSION

The special motion to strike should be granted. In addition, Mr. Coughlin should be awarded reasonable costs and attorneys' fees incurred in bringing this special motion to strike.

DATED: July 15, 2005

LUCE, FORWARD, HAMILTON & SCRIPPS LLP

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[16] Moreover, other than the conclusory allegations pled in the Complaint, Zwebner has not alleged that any of the viable postings identified in the Complaint have caused him severe emotional distress. Such an allegation would be contrary to previous statements Mr. Coughlin believes Zwebner has made postings under the pseudonym "MICHAELJ123." (Coughlin Decl., ¶ 21; NOL, Exhibit 20.) For example, in a message posted on the Raging Bull UCSY Board on March 17, 2003, "MICHAELJ123" stated "Well guess what.... your posts and those of your psycho friends dont interest or affect me in the least." (NOL, Exhibit 17.) In another post on the Raging Bull UCSY Board on April 6, 2003, "MICHAELJ123" stated, "For the record, let me tell you again, it has ZERO effect on me. I have been INTERNET HARDENED by you and your "fool" friends, and there is NOTHING you or anyone else can say that affects me anymore." "MICHAELJ123" further stated "**I will not deal with, respond to or even acknowledge any 'Annonymous Posters'.**" (NOL, Exhibit 18.).