IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

RONALD S. FEDERICI, Plaintiff, vs. MONICA PIGNOTTI, *et al.*, Defendants.	CIVIL ACTION NO.: 1:10-cv-01418 **MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

COMES NOW Plaintiff Ronald S. Federici ("Federici"), by counsel, and hereby submits the following Memorandum of Law in Opposition to Defendants' Motion to Dismiss:

I. Introduction

Defendants JEAN MERCER ("Mercer") and MONICA PIGNOTTI ("Pignotti") have filed a Motion to Dismiss. Although Defendants attempt to portray the instant litigation as an "attempt to prevent freedom of speech," the instant case involves a campaign by Defendants to post deliberately false information about Plaintiff on the Internet, in the hopes of ruining his reputation and business.

Defendants allege that this Court lacks personal jurisdiction over them. However, this Court has personal jurisdiction over both Mercer and Pignotti under the effects test. Furthermore, Mercer has already waived the issue of personal jurisdiction in earlier proceedings, and thus this Court retains personal jurisdiction over her. The count of Conspiracy also provides an alternate basis for personal jurisdiction over both Defendants.

Perhaps in recognition of the frail status of their jurisdictional objections, Defendants also

argue that Plaintiff has failed to state any claim upon which relief may be granted. However, Plaintiff has sufficiently and properly pleaded each count asserted in his Complaint. Although some factual allegations may not rise to the level of detail that Defendants would like, Plaintiff has stated enough facts in his Complaint to support the reasonable expectation that discovery will uncover further evidence about Defendant's unlawful activities. Therefore, a dismissal at this early stage would be inappropriate.

II. Argument

A. Personal Jurisdiction

1. Defendant Mercer Waived Lack of Personal Jurisdiction

The present case was initiated in the Virginia General District Court for Fairfax County. Mercer and Defendant Advocates for Children in Therapy, Inc. ("ACT") were among the named defendants in the complaint and were served. True and correct copies of the Warrants in Debt and Affidavits for Service of Process on the Secretary of the Commonwealth are attached hereto and made a part hereof as Exhibits A and B. Court proceedings for this matter took place on June 18, 2010. A true and correct copy of the transcript of the court proceedings is attached hereto and made a part hereof as Exhibit C. Mercer appeared in court on behalf of herself and Defendant ACT. *See* Exhibit C, page 3. ACT also had an attorney present as a party representative, Ali Beydoun, Esq. *See* Exhibit C, page 3.

The General District Court ruled that since Mercer had litigated without raising jurisdiction, Mercer's objection to personal jurisdiction for both her and ACT had been waived. *See* Exhibit C, page 27. Although Mercer claims that she had only made a special appearance, her failure to contest personal jurisdiction and instead to argue her motion to dismiss on other grounds transformed any "special" appearance into a general appearance. "Virginia steadfastly

adheres to the traditional general and special appearance doctrine. A party wishing to challenge personal jurisdiction in Virginia must make a special appearance where it objects only on jurisdictional grounds." *Xyrous Communications, LLC v. Bulgarian Tele-communications Co. AD*, 2009 WL 2877084, *3, 74 Fed.R.Serv.3d 629 (E.D.Va. 2009) (citing *Brown v. Burch*, 519 S.E.2d 403, 406 (Va.Ct.App. 1999)). "Any action on the part of defendant, except to object to the jurisdiction, which recognizes the case as in court, will amount to a general appearance." *Id.* (citing *Maryland Casualty Co. v. Clintwood Bank, Inc.*, 154 S.E. 492, 494 (Va. 1930)). "An appearance for any other purpose than questioning the jurisdiction of the court ... is general and not special, although accompanied by the claim that the appearance is only special." *Gilpin v. Joyce*, 515 S.E.2d 124, 125 (Va. 1999). "A defendant who makes a general appearance in Virginia submits himself to the jurisdiction of the court." *Xyrous Comm.*, 2009 WL 2877084 at *3 (internal citations and quotation marks omitted). Thus, Mercer's general appearance constituted a waiver of her and ACT's defense to lack of personal jurisdiction, as properly decided by the General District Court. Furthermore, Defendants failed to appeal the General District Court's jurisdictional ruling in Virginia Circuit Court. As such, they are bound by the General District Court's ruling.

"In removal cases, a federal court obtains personal jurisdiction over a party if the state court from which that case was removed had personal jurisdiction over that party." *Xyrous Comm.*, 2009 WL 2877084 at *7. Due to Mercer's and ACT's waiver of personal jurisdiction and their failure to appeal the General District Court's jurisdictional ruling, the Virginia Circuit Court for Fairfax County obtained personal jurisdiction over them from the General District Court as related to Plaintiff's appeal, nonsuit, and refiling of his suit. Therefore, the present Court also obtained personal jurisdiction over Mercer and ACT when Defendants removed the instant case

to the Eastern District of Virginia.

2. This Court Has Specific Personal Jurisdiction Over Both Defendants

"[A] plaintiff need only make a prima facie showing of jurisdiction when the Court rules on a Rule 12(b)(2) motion without conducting an evidentiary hearing or without deferring ruling pending receipt at trial of evidence related to the jurisdictional issue." *JTH Tax, Inc. v. Liberty Services Title, Inc.,* 543 F.Supp.2d 504, 505 (E.D.Va. 2008) (citing *In re Celotex Corp.*, 124 F.3d 619, 628 (4th Cir. 1997)). "If the court rules on the basis of the motion papers alone, the plaintiff need only make a prima facie showing of a sufficient jurisdictional basis. The Court, in deciding whether a plaintiff has met this burden, must construe all relevant pleading allegations in the light most favorable to the plaintiff, assume credibility, and draw the most favorable inferences for the existence of jurisdiction." *Commercial Metals Co. v. Compania Espanola de Laminacion S.L.*, 2010 WL 4503124, *3 (E.D.Va. 2010) (citing *Combs v. Bakker*, 886 F.2d 673, 676 (4th Cir. 1989)) (internal citations omitted).

"In Virginia, a court has personal jurisdiction over a defendant if: (1) jurisdiction is authorized by Virginia's Long-Arm Statute, Va. Code § 8.01-328.1, and (2) jurisdiction comports with the Due Process Clause of the Fourteenth Amendment." *Id.* at 506 (citing *Hartford Cas. Ins. Co. v. JR Marketing*, LLC, 511 F.Supp.2d 644, 647 (E.D.Va. 2007)). Under Va. Code § 8.01-328.1(A), "[a] court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's: … 3. Causing tortious injury by an act or omission in this Commonwealth; 4. Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this Commonwealth." However, "because Virginia's long-arm statute

extends personal jurisdiction to the extent permitted by the Due Process Clause, the statutory inquiry necessarily merges with the constitutional inquiry, and the two inquiries essentially become one." *JTH Tax*, 543 F.Supp.2d at 506 (citing *Young v. New Haven Advocate*, 315 F.3d 256, 261 (4th Cir. 2002)). "Therefore, [a court] need only examine whether its exercise of personal jurisdiction over the [defendants] would offend due process." *Hartford Cas. Ins. Co. v. JR Marketing, LLC,* 511 F.Supp.2d 644, 647-648 (E.D.Va. 2007) (*see also Jones v. Boto Co., Ltd.,* 498 F.Supp.2d 822, 826 (E.D.Va. 2007): "Thus, in determining whether the exercise of personal jurisdiction over a defendant is proper, courts generally decline to address whether the requirements of Virginia's long-arm statute are met, focusing instead solely on whether the exercise of personal jurisdiction over the defendant comports with the requirements of the Due Process Clause").

"Personal jurisdiction may be general or specific under the Due Process Clause." *JTH Tax,* 543 F.Supp.2d at 507. "When a defendant's contacts with the forum state are continuous and systematic, irrespective of whether the transaction in question had sufficient contacts with the state, a court may exercise general personal jurisdiction over the defendant. In the absence of continuous and systematic contacts, a court may still exercise specific personal jurisdiction when the contacts relate to the cause of action and create a substantial connection with the forum state." *Id.* (citing *Diamond Healthcare of Ohio, Inc. v. Humility of Mary Health Partners*, 229 F.3d 448, 450 (4th Cir. 2000)) (internal quotation marks omitted).

"Courts must apply a three-pronged test to determine whether specific personal jurisdiction satisfies the Due Process Clause asking: '(1) whether the defendant purposefully availed itself of the privileges of conducting activities in the forum state, (2) whether the plaintiff's claim arises out of the defendant's forum-related activities, and (3) whether the

exercise of personal jurisdiction over the defendant would be constitutionally reasonable.'" *Id.* (citing *Young v. New Haven Advocate*, 315 F.3d 256, 261 (4th Cir. 2002)). For the first prong, "a defendant must have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *JTH Tax,* 543 F.Supp.2d at 506 (internal quotation marks omitted). "The minimum contacts analysis considers whether the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." *Id.* at 506-507 (internal quotation marks omitted). The second prong relates to causation. *Hartford Cas. Ins. Co.*, 511 F.Supp.2d at 649. The Fourth Circuit has not addressed which of three causation tests it prefers, but the Eastern District in *Hartford Cas. Ins.* "err[ed] on the side of inclusiveness and evaluate the [defendants'] contacts under the 'but for' analysis." *Id.* (citing *Cf. Prod. Group Int'l, Inc. v. Goldman*, 337 F.Supp.2d 788, 794-95 (E.D.Va. 2004)). "The third prong – that the exercise of personal jurisdiction be constitutionally reasonable – permits a court to consider additional factors to ensure the appropriateness of the forum once it has determined that a defendant has purposefully availed itself of the privilege of doing business there. Such factors include: (1) the burden on the defendant of litigating in the forum; (2) the interest of the forum state in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the shared interest of the states in obtaining efficient resolution of disputes; and (5) the interests of the states in furthering substantive social policies." *Consulting Engineers Corp. v. Geometric Ltd.*, 561 F.3d 273, 279 (4th Cir. 2009). "When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant." *Asahi Metal Indus. Co. v. Superior Court of Ca.*, 480 U.S. 102, 114, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987).

"In *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984), the Supreme Court held that a court may exercise specific personal jurisdiction over a nonresident defendant acting outside of the forum when the defendant has intentionally directed his tortious conduct toward the forum state, knowing that that conduct would cause harm to a forum resident." *Carefirst Of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.,* 334 F.3d 390, 397-398, 56 Fed.R.Serv.3d 361, 67 U.S.P.Q.2d 1243 (4th Cir. 2003). Under this "effects test," "the plaintiff must establish that specific jurisdiction is proper by showing that (1) the defendant committed an intentional tort; (2) the plaintiff felt the brunt of the harm in the forum, such that the forum can be said to be the focal point of the harm; and (3) the defendant expressly aimed his tortious conduct at the forum, such that the forum can be said to be the focal point of the tortious activity." *Consulting Engineers Corp. v. Geometric Ltd.,* 561 F.3d 273, 280 (4th Cir. 2009).

In the present case, the Court has personal jurisdiction over Mercer and Pignotti under both the Virginia long-arm statute and the constitutional analysis. Defendants have caused tortious injuries to Plaintiff, who lives in Virginia, is licensed in Virginia, practices in Virginia, and only serves Virginian clients (*see "*Plaintiff's Declaration," attached hereto and made a part hereof as Exhibit D), by engaging in a persistent course of conduct outside the Commonwealth, *i.e.*, they have engaged in a long-term campaign (having lasted at least two years) of defaming and tortiously interfering with Plaintiff's business expectancies via websites and Internet postings. Although Defendants assert in their motion that they are not responsible for any of the posts, because no evidentiary hearing has taken place, the Court must construe the facts as alleged by Plaintiff in his favor. Thus, even assuming *arguendo* that Defendants had not waived personal jurisdiction, Plaintiff has pleaded facts sufficient to meet the prima facie showing of personal jurisdiction under Virginia's long-arm statute.

This Court's specific personal jurisdiction over Defendants also comports with the requirements of the Due Process Clause. First, under the minimum requirements prong, this Court has personal jurisdiction under the effects test. As alleged in Plaintiff's Complaint, both Defendants have committed intentional torts, *i.e.*, defamation and tortious interference with Plaintiff's business relationships; Plaintiff has felt the brunt of the harm in Virginia; and Defendants expressly aimed their tortious conduct at Virginia. Again, Defendants have specifically targeted Plaintiff, a Virginia resident who provides his services in Virginia (*see* Exhibit D), which Defendants are well aware of, and Defendants directed Plaintiff's clients, who are Virginian by virtue of his doing business in Virginia, to file complaints against Plaintiff with various agencies in Virginia. Defendants Mercer and Linda Rosa have also repeatedly filed complaints with Plaintiff's licensing boards in Virginia, to no avail. *See* Exhibit D. This case is not an incident of Defendants casually mentioning Plaintiff in passing on their website, with no knowledge that their words would have any effect on Virginia. Rather, the websites that Defendants operate focus heavily on Plaintiff, featuring prominent, lengthy webpages about him; numerous posts (*see* Exhibits A through I of Plaintiff's Complaint); and some websites seemingly almost exclusively dedicated to him. For example, in Exhibit B of Plaintiff's Complaint, there are at least 89 mentions of Virginia: "Further useful information on how to file an official complaint against Federici: License number: 0810001534 Occupation: Clinical Psychologist Name: RONALD S FEDERICI Address of Record: Clifton, VA 20124 Initial License: 01/21/1988 Expire Date: 06/30/2009 License Status: Current Active Additional Public Information: No," "This is the information that child advocacy organizing PPL.org was shut down for, supposedly because it is 'a violation of the disclosure of personal information,' as Federici put it. Such an allegation is, of course, UTTER BULL. This information is taken from

the Virginia licensing board, which ANYONE is free and able to look up on the Public Information System of the Virginia Department of Health Professions", "Incidentally, if there is anyone here who has a complaint or concern about criminal activity on the part of any Virginia health professional, they can call or e-mail Shannon Roberson, Department of Health Professions, shannon.roberson@DHP.VIRGINIA.GOV, 804-367-4691. You can talk to him anonymously. He will not start an investigation unless you say so– but you have to identify yourself for that. Any know ledge of criminal activity, whether related to professional functions or not, is of interest to DHP..." Exhibit C of Plaintiff's Complaint is similar, referencing Virginia multiple times, citing to Virginia, and inviting Virginia residents to submit complaints about Plaintiff. Exhibit A of Plaintiff's Complaint shows that on the index page of www.childrenintherapy.org, Defendants prominently feature Plaintiff's name and link to a webpage that repeatedly mentions Plaintiff's ties to Virginia. As such, it is evident that Defendants are fully aware of Plaintiff's link to Virginia, and their repeated references to Virginia demonstrate they were completely aware that their tortious acts would affect Plaintiff in Virginia, such that they could reasonably anticipate being haled into court in Virginia.

Defendants cite to numerous cases that are irrelevant to or distinguishable from the instant litigation. First, the *Zippo Manufacturing Company v. Zippo Dot Com, Inc.* (952 F.Supp. 1119 (W.D.Pa. 1997)) test does not apply, as Plaintiff is not asserting personal jurisdiction based upon the degree of interactivity of a website; rather, Plaintiff asserts that the effects test, as first stated in *Calder v. Jones*, 465 U.S. 783 (1984) and as modified by the Fourth Circuit, applies in the instant case. Thus, *ALS Scan, Inc. v. Digital Serv. Consultants, Inc., et al.*, 293 F.3d 707, 714 (4th Cir. 2002), which used the *Zippo* test, is not relevant. Furthermore, *ALS Scan* is also distinguishable because the defendant was an Internet Service Provider operating solely in

Georgia; the plaintiff's only allegations were that the defendant provided bandwidth enabling other individuals to create a website that infringed the plaintiff's copyrights, and there were no allegations that the defendant was involved in the creation of the infringing website. Since the defendant had no contacts with Maryland, other than through its passive Internet website which anyone could access, the court ruled under the *Zippo* test that "[defendant] did not direct its electronic activity specifically at any target in Maryland; it did not manifest an intent to engage in a business or some other interaction in Maryland; and none of its conduct in enabling a website created a cause of action in Maryland." *Id.* at 715. Even if the court in that case had used the effects test, there would be no personal jurisdiction over defendant. In contrast, in the current case using the effects test, Plaintiff has alleged that Defendants specifically targeted their unlawful activity to Virginia, knowing that harm would occur in Virginia. Defendants in this case are not passive mediums through which unlawful activity occurred; rather, they took deliberate unlawful action on their own. Similarly, Defendants' cited case of *Galustian v. Peter, et al.*, 2010 U.S.Dist. LEXIS 121175 (E.D.Va. 2010) is distinguishable from the instant case: there is obviously a significant difference between merely "opening" a defamatory e-mail while in Virginia and actually posting defamatory messages online, with the intent to target Virginia and harm a Virginian resident. Furthermore, in contrast to *Young v. New Haven Advocate*, 315 F.3d 256, 263-64 (4th Cir. 2002), Plaintiff has attached exhibits to his Complaint that demonstrate Defendants actively encouraged individuals with complaints to report Plaintiff to Virginia authorities, and since Plaintiff's clients are from Virginia, Defendants were clearly targeting a Virginia audience. Again, Defendants were well aware that Plaintiff lived in Virginia, was licensed in Virginia, and had his business solely in Virginia, and Defendants' numerous posts attacking him were obviously directed at harming him in Virginia. Although Defendants argue

that there was no foreseeability because they had no knowledge that their actions would affect Plaintiff, the facts from Plaintiff's Complaint must be accepted as true and viewed in a light most favorable to Plaintiff. Therefore, Plaintiff has sufficiently alleged that Defendants targeted Virginia.

As for the second prong of the Due Process Clause analysis, as alleged in Plaintiff's Complaint, but for Defendants' actions, he would not have been damaged – *i.e.*, he would not have lost current and prospective clients as a result of their defamation and tortious interference. As stated in Plaintiff's Complaint, prospective patients and clients cited Defendants' websites as their reason for canceling their contracts. *See* Plaintiff's Complaint, ¶ 35. Thus, there is direct causation between Defendants' tortious acts and Plaintiff's harm.

Finally, for the third prong of the Due Process Clause, any burden to Defendants in litigating in Virginia – namely travel, which is arguably minimal and more of a bother than a burden in this day and age, when transportation between states is relatively simple – is outweighed by the interests of Virginia in adjudicating the present suit and by Plaintiff's interest in obtaining convenient and effective relief. Again, Plaintiff lives in Virginia, is licensed in Virginia, and has his business solely in Virginia, serving Virginia clients. *See* Exhibit D. Virginia therefore has a great interest in adjudicating this suit, as it is the target state of Defendants' harmful acts. Plaintiff's interest in obtaining convenient and effective relief in Virginia is strong, considering the immediate harm to him in this Commonwealth as a result of Defendants' acts, as well as the fact that the multiple Defendants to this action are all located in different states; since Plaintiff has alleged that Defendants are part of a conspiracy, it is more convenient and effective for Plaintiff to have his suit be litigated once in the same proceeding, joining the necessary parties, than it is to individually sue Defendants for the same cause of

actions based on the same underlying facts in their individual jurisdictions. When weighing the factors, it is clear that having personal jurisdiction over Defendants in this Court is constitutionally reasonable.

Thus, this Court has specific personal jurisdiction over both Mercer and Pignotti.

3. This Court Has Personal Jurisdiction Over Both Defendants Under Conspiracy Theory

This Court also has personal jurisdiction over both Defendants under the conspiracy theory. "While it is true that a defendant will not be subject to personal jurisdiction based on the unilateral activity of one who claims a relationship with that defendant, courts also recognize that personal jurisdiction may, in some circumstances, be based upon acts by a co-conspirator." *Noble Sec., Inc. v. MIZ Eng'g, Ltd.*, 611 F.Supp.2d 513, 539 (E.D.Va. 2009). "The courts acknowledging the conspiracy theory of jurisdiction seem to recognize that a defendant who joins a conspiracy knowing that acts in furtherance of the conspiracy have taken or will take place in the forum state is subject to personal jurisdiction in that forum state because the defendant has purposefully availed himself of the privileges of that state and should reasonably expect to be haled into court there." *Id.* Even assuming *arguendo* that Mercer and Pignotti were not personally responsible for any defamatory posts, since Plaintiff has properly alleged that they are co-conspirators with the other Defendants, both known and unknown to Plaintiff, the other Defendants' acts in defaming Plaintiff and tortiously interfering with his business relationships would constitute acts sufficient to confer personal jurisdiction in Virginia (as discussed *supra* in Section II(A)(2)), and personal jurisdiction would therefore extend in this suit over Mercer and Pignotti as well.

In a recent case, the Court ruled that registering a domain with Network Solutions, LLC ("Network Solutions"), a Virginia Internet Service Provider, was an act sufficient to support

jurisdiction over a defamation claim. "Here, defendant ... utilized Network Solutions, LLC ... and its Virginia servers to facilitate the publishing of defamatory remarks about plaintiff on the website www.BernardJCarl.com. Defendants could have chosen to register the domain name with another registrar that did not use servers located in Virginia." *Carl v. BernardjCarl.com*, 2009 WL 3245598, *1 (E.D.Va. 2009), *report and recommendation adopted by Carl v. bernardjcarl.com*, 662 F.Supp.2d 487, 93 U.S.P.Q.2d 1217 (E.D.Va. 2009), *vacated in part on other grounds by Carl v. BernardJcarl.com*, 2010 WL 4925840 (4th Cir. 2010). This is also supported by the Virginia long-arm statute, which states that "[u]sing a computer or computer network located in the Commonwealth shall constitute an act in the Commonwealth." Va. Code § 8.01-328.1(B).

All Defendants, including Pignotti and Mercer are associated with ACT. ACT's domain name, "childrenintherapy.org," is registered with Network Solutions. *See* Exhibit 1 of Plaintiff's Affidavit (Exhibit D). Network Solutions is a Delaware corporation with its primary place of business in Herndon, Virginia. *See* Exhibit 3 of Plaintiff's Affidavit (Exhibit D). Per Network Solutions' Service Agreement, all customers registering domain names with the company agree to jurisdiction in the Eastern District of Virginia and/or Fairfax County. *See* Exhibit 2 of Plaintiff's Affidavit (Exhibit D). Specifically, paragraph 21 states: "For the adjudication of any disputes brought by a third party against you concerning or arising from your use of a domain name registered with us you (but not Network Solutions) agree to submit to subject matter jurisdiction, personal jurisdiction and venue of the United States District Court for the Eastern District of Virginia, Alexandria Division and the courts of your domicile." *See* Exhibit 2, page 10 of Plaintiff's Affidavit. Additionally, Network Solutions' Service Agreement, paragraph 1 states that "the performance of our services will occur at our offices in Herndon, Virginia." *See*

Exhibit 2, page 2 of Plaintiff's Affidavit. The *Carl* magistrate judge noted that the Service Agreement was another indication that the defendants should have reasonably been expected to be haled into Virginia courts. *Carl*, 2009 WL 3245598 at *1. Similarly in this case, since ACT registered a domain name with Network Solutions, a Virginia company, and agreed to the Service Agreement with Network Solutions, personal jurisdiction should be found over ACT. Also, since ACT was "using" Network Solutions' computer network, that constituted an act "in" Virginia under the long-arm statute, particularly since ACT and other Defendants have used the "childrenintherapy.org" domain name to host a website that defames Plaintiff. As such, in addition to ACT's other actions (Section II(A)(2), *supra*, applies to ACT as well), ACT's registration with Network Solutions of the domain name "childrenintherapy.org" confers personal jurisdiction upon the co-conspirator Defendants as well, *i.e.*, Mercer and Pignotti.

Therefore, this Court has three separate bases for personal jurisdiction over Defendant Mercer and two separate bases for personal jurisdiction over Defendant Pignotti. Defendants' motion to dismiss for lack of personal jurisdiction should thus be denied.

B. Failure to State a Claim

1. Standard of Review

"A motion to dismiss should not be granted unless the plaintiff can prove **no** set of facts to support the claim and entitle the plaintiff to relief." *Randall v. U.S.*, 30 F.3d 518, 521 (4th Cir. 1994) (citing *Mylan Lab., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993)) (emphasis added). "In reviewing the legal sufficiency of [a] complaint, this court must accept as true all well-pleaded allegations and must construe the factual allegations in the light most favorable to the plaintiff." *Id.* "[T]he complaint is to be **liberally** construed in favor of plaintiff." *Jenkins v. McKeithen,* 395 U.S. 411, 89 S.Ct. 1843 (1969) (citing Fed. R. Civ. P. 8(f) and *Conley v. Gibson*,

355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)) (emphasis added).

Under the Federal Rules of Civil Procedure, "only a short and plain statement of the claim showing that the pleader is entitled to relief" is required in a plaintiff's complaint "in order to give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964 (2007) (internal quotations omitted). Although "a formulaic recitation of the elements of a cause of action will not suffice" (*Bell Atlantic Corp.*, 550 U.S. at 555), a well-pleaded claim "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of" the alleged illegal conduct. *Bell Atlantic Corp.*, 550 U.S. at 556. "[O]f course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Id.* at 556. Essentially, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 555.

2. Plaintiff Has Sufficiently Alleged Authorship of the Defamatory Statements

Contrary to Mercer's allegations, Plaintiff has alleged enough facts to establish that discovery will lead to evidence of Mercer's authorship of some of the defamatory posts. In General District Court, Mercer admitted to being a member of ACT (*see* Exhibit C, pages 9-10 ["... and a group of us got together and were very interested in educating the public about this particular topic and that has been the source of the website that we put together" and in response to the question "... and [ACT's] members are clinical practitioners?", Mercer replied: "No. As a matter of fact they are not … One person is a registered nurse. I am a developmental psychologist..."]); she appeared in General District Court on behalf of ACT (*see* Exhibit C)*;* she previously had her own blogs in which she posted about Plaintiff (*see* Exhibit E of Plaintiff's Complaint, pages 29-32, 40-41); a commenter with the user name "Jean Mercer" replied to

numerous posts about Plaintiff on www.stopchildtorture.org (*see* Exhibit C of Plaintiff's Complaint); Plaintiff has submitted multiple postings about Mercer and Plaintiff and that establish Mercer had direct communications with the authors of those posts (*see, for example*, Exhibits E ["I have the truth directly from Dr. Mercer"] and H of Plaintiff's Complaint); Plaintiff has submitted exhibits showing that most of the webpages and websites had similar content with similar, sometimes identical, accusations about Plaintiff; and Mercer and Pignotti have co-written several articles together (*see* Exhibit E, pages 46-48 of Plaintiff's Complaint). Furthermore, a number of posts and comments submitted by Plaintiff in the Complaint have no listed author. The nature of the Internet means that anyone can post anonymously. Given Mercer's relationship with Defendants and her activity on the aforementioned websites, particularly in regards to her involvement in posts relating to Plaintiff, it is not a stretch of the imagination to believe that Mercer is responsible for some of the defamatory posts, and discovery will bear that out. Therefore, Plaintiff has properly pleaded this claim.

. **3. Claims Based Upon Exhibit H of Plaintiff's Complaint Are Not Time-Barred**

Claims based upon Exhibit H of Plaintiff's Complaint are not time-barred. Plaintiff's original suit was filed in General District Court for Fairfax County on April 21, 2010, several months before the one-year limitations period for defamation. *See* Exhibits A and B. Plaintiff's appeal to the Circuit Court was non-suited on September 2, 2010. *See* Docket No. 3-4.

Under Va. Code § 8.01-229(E)(3), "If a plaintiff suffers a voluntary nonsuit as prescribed in § 8.01-380, the statute of limitations with respect to such action shall be tolled by the commencement of the nonsuited action, and the plaintiff may recommence his action within six months from the date of the order entered by the court, or within the original period of limitation, or within the limitation period as provided by subdivision B 1, whichever period is longer."

Therefore, Plaintiff had six months after September 2, 2010 in which to recommence his action, which Plaintiff did on November 24, 2010 in the Circuit Court of Fairfax County. Thus, Plaintiff's defamation cause of action with respect to Exhibit H is timely under Virginia law and is not barred.

4. Plaintiff is Not a Public Figure, and the Posts are Not Opinion

Contrary to Defendants' contention, Plaintiff is not a "public figure," even for "limited purposes," and herefore his defamation claim is not subject to the "actual malice" requirement. A court must consider several factors in determining whether an individual qualifies as a "limited-purpose public figure": "(1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in the public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statement; and (5) the plaintiff retained public-figure status at the time of the alleged defamation." *Hatfill v. The New York Times Co.*, et al., 532 F.3d 312, 319 (4th Cir. 2008). Although in their Memorandum of Law in Support of their Motion to Dismiss, Defendants portray the "controversy" in question as being a "debate surrounding treatment of behavioral and psychological disorders in, *inter alia,* adopted children" (*see* Docket No. 3, page 12), on their websites, Defendants specifically attack Plaintiff for being an "attachment therapist" ("attachment disorder therapist"), for denying his status as an "attachment therapist," and for promoting dangerous "attachment therapy" practices. *See, for example,* Exhibits A, B, and C of Plaintiff's Complaint. In their Motion to Dismiss, Defendants attempt to broaden the scope of the "public controversy" so that they can cast Plaintiff as being a "public figure for limited purposes." Had they properly asserted the "controversy" in question as being the debate surrounding "attachment therapy," Defendants would not be able to meet factor

numbers two, three, four, or five of the *Hatwill* test. As Defendants themselves acknowledge on their websites, Plaintiff has repeatedly rejected any association with "attachment therapy" and states that he does not promote any "attachment therapy" practices. *See* Exhibit A of Plaintiff's Complaint; *see also* Plaintiff's Affidavit, Exhibit D. Thus, it is evident that Plaintiff has not "voluntarily" assumed any role of special prominence in the "attachment therapy" realm; rather, Defendants themselves have dragged Plaintiff into their own controversy by claiming that he is an attachment therapist when, in fact, he has absolutely no relation to or ties with attachment therapy. Therefore, Plaintiff is not a "public figure" for "limited purposes."

However, assuming for the sake of argument that Plaintiff is a limited public figure who is subject to the "actual malice" standard for defamation, he has nevertheless sufficiently pleaded facts demonstrating actual malice on the part of Defendants. In his Complaint, Plaintiff alleges that "Defendants knew that said statements were false..." *See* Plaintiff's Complaint, ¶ 38. As such, this allegation meets the "actual malice" requirement, which is that Defendants "acted with knowledge that [the defamatory statement] was false or with reckless disregard of whether it was false or not." *Hatfill,* 532 F.3d at 317 (internal quotation marks omitted). To support this allegation, Plaintiff has identified statements that Defendants made in which Defendants claim certain events transpired that simply never happened. For example, Plaintiff alleges that Defendants' statement "In response to [Pignotti's] question about who is currently using the methods of restraints he recommended, he gave the name of a hospital with a psychiatric unit that has been defunct for years and a highly controversial residential facility that was sued due to injuries sustained by children who were there" is false. *See* Plaintiff's Complaint, ¶¶ 28-29. Accepting Plaintiff's allegations as true, clearly the only conclusion to be drawn is that Defendants fabricated this event. Thus, allegations such as this in Plaintiff's Complaint

demonstrate that Defendants possessed actual malice by knowingly posting false information. This is not a situation in which Defendants mentioned in passing Plaintiff's name and cited incorrect information taken from other sources. In fact, in many cases, no outside sources other than Defendants' own websites were referenced for Defendants' defamatory statements. Rather, Defendants have fixated on Plaintiff and have fabricated a barrage of false posts – on at least nine different websites and dozens of webpages, posts, and comments over the course of at least two years – about him. *See* Exhibits A through I of Plaintiff's Complaint.

Furthermore, the statements made by Defendants are not, contrary to Defendants' arguments, mere "opinion," criticisms, "rhetorical hyperbole," or "language of controversy" with Plaintiff over his methods. Defendants have in fact deliberately published their own fabricated stories about Plaintiff, many of which are completely and wholly unrelated to Plaintiff's alleged therapeutic practices. For example, Defendants claim that Plaintiff is not licensed by the Virginia Medical Board; that he attempted to gain legal guardianship over one of his adult adopted children; that he does not possess a doctorate degree; that he sends personal threats to child torture survivors; that he gave a child away online; and that he harasses, stalks, and spreads lies about Defendants on the Internet. Certainly, each of these statements contains "provably false factual connotations" or statements of "actual facts about a person." *Gibson v. Boy Scouts of Am.*, 360 F.Supp.2d 776, 781 (E.D.Va. 2005). Either Plaintiff is licensed by the Virginia Medical Board or he is not; either he has sent personal threats to child torture survivors or he has not. There is no way to conceivably construe these statements as "opinion" or "rhetorical hyperbole." These statements are all, again, completely untrue. *See* Plaintiff's Complaint; *see also* Exhibit D.

Additionally, Defendants' claims that actually do relate to Plaintiff's practices and therapeutic methods extend beyond mere opinion and "rhetorical hyperbole," such that a

reasonable person would take Defendants' statements seriously. The Fourth Circuit stated: "Typically, the types of speech that will enjoy the *Milkovich* protection are pure expressions of opinion and rhetorical hyperbole. Though the *Milkovich* Court explicitly declined to provide an 'exemption [from liability] for anything that might be *labeled* 'opinion,'' it emphasized that a statement must state or imply a defamatory fact to be actionable. This means that although someone cannot preface an otherwise defamatory statement with 'in my opinion' and claim immunity from liability, a pure expression of opinion is protected because it fails to assert an actual fact. Rhetorical hyperbole, in contrast, might appear to make an assertion, but a reasonable reader or listener would not construe that assertion seriously." *Schnare v. Ziessow*, 104 Fed.Appx. 847, 2004 WL 1557804, * 4 (4th Cir. 2004) (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990)). "In determining whether a statement can be reasonably interpreted as stating actual facts about an individual, we look to the circumstances in which the statement is made." *Id.* (citing *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 184 (4th Cir. 1998)). As part of looking to the circumstances, it is worth noting that "[f]actual statements made in support of an opinion ... can form the basis for a defamation action." *Hyland v. Raytheon Technical Services Co.*, 670 S.E.2d 746, 751 (Va. 2009). Additionally in Virginia, "[d]efamatory statements may include statements made by inference, implication, or insinuation." *Id.* at 750.

In the instant case, Defendants have stated, for example, that Plaintiff promotes practices that are lethal; that he tortures children; and that he denies children education, reading, food, sleep, and the opportunity to use the bathroom. These are all factual statements regarding Plaintiff's practices and the effects of those practices, not mere opinions or differing beliefs in an "academic debate," nor are they statements that a reasonable person would not believe.

Defendants are asserting as true the claims that Plaintiff's techniques will harm or kill children and that children are essentially tortured by these methods, despite their falsity. *See* Exhibit D; *see also* Plaintiff's Complaint. In *Arthur v. Offit*, the Court found that the simple statement "[s]he lies" "cannot reasonably be understood to suggest, as the Complaint alleges, that Plaintiff is 'a person lacking honesty and integrity ... [who should be] shunned or excluded by those who seek information and opinion upon which to rely,'" particularly since this language was surrounded by statements that the plaintiff possessed "'Kaflooey theories' that made [defendant] 'want to scream.'" *Arthur v. Offit,* 2010 WL 883745, *5 (E.D.Va. 2010). However, alleging that Plaintiff promotes lethal practices and tortures children through denying them education, food, sleep, and the bathroom are far cries from an impassioned, expression of outrage like the simple "[s]he lies." Nor are they the type of statements that were found to be rhetorical hyperbole or only "vaguely insinuating" as in *Schnare,* 2004 WL 1557804 at *5.

Defendant Pignotti is entitled to defend herself against personal accusations. What she is not permitted to do is to fabricate events that never occurred in an attempt to defame Plaintiff's character. For example, as discussed *supra*, Defendants claim that Plaintiff gave Pignotti "the name of a hospital with a psychiatric unit that has been defunct for years and a highly controversial residential facility that was sued due to injuries sustained by children who were there." *See* Plaintiff's Complaint, ¶¶ 28-29. Defendants also state that Plaintiff "sent an e-mail to [Pignotti's] Dean at FSU, cc'ing two of Federici's colleagues, Heather Forbes and Arthur Becker-Weidman, complaining about [Pignotti]. The e-mail was basically a repetition of the lies that had been spread about [Pignotti] on the internet." *See* Plaintiff's Complaint, ¶¶ 26-27. As alleged in Plaintiff's Complaint, Pignotti falsely represents these alleged incidents. At this stage, Plaintiff's allegations must be accepted as true for this motion to dismiss. Thus, Defendants can hardly

argue that their statements are merely "vigorous and angry expressions of disagreement" without any allegations of provable fact behind them, when they are in fact inventing the "ongoing interactions between the two camps." Plaintiff has also stated in his Complaint that he has not been involved in whatever Internet attacks Pignotti, Mercer, or other Defendants are experiencing; however, Defendants have posted that Plaintiff is responsible for these online attacks, that he has encouraged others to attack Defendants, and that he is cyberstalking Defendants. *See, for example,* Exhibits E, F, G, and H to Plaintiff's Complaint. These are all statements, made repeatedly by Defendants in multiple posts and websites. Thus, Defendants cannot claim they were merely engaged in "lawful right to protect [their] character" when they are fabricating Plaintiff's involvement in attacks on those characters.

Plaintiff has therefore properly alleged that Defendants possessed actual malice and that their statements are not mere "opinion" or "rhetorical hyperbole", and Defendants' motion to dismiss as to the defamation count should be denied. Assuming *arguendo* that Plaintiff has not sufficiently shown actual malice and that he must demonstrate Defendants possessed requisite intent necessary for the Court to find actual malice, the presence of requisite intent is a factual question. *See, for example,* J. Widener's dissent, *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1104 (4th Cir. 1993). As such, Plaintiff should be allowed to conduct discovery to determine whether Defendants possessed actual malice when they posted their statements about Plaintiff. Therefore, dismissing the defamation claim for lack of actual malice would be premature.

5. Counts II and III Do Not Fail For Lack of Specificity

In his Complaint, Plaintiff has identified two appointment cancellations – i.e., prospective business relationships or business expectancies – and a lost legal retainer – i.e., a contract – that Defendants were aware of and that they tortiously interfered with via their unlawful acts. *See*

Plaintiff's Complaint, ¶ 35. Plaintiff identified the value of those expectancies and contracts and the dates in which they were canceled. This case therefore differs significantly from *Government Employees Ins. Co. v. Google, Inc.*, where the court held that "Virginia law requires that a plaintiff plead a specific prospective economic advantage or business expectancy, and that a general expectancy that consumers will purchase insurance from the GEICO Website, which is all that plaintiff has alleged, does not suffice. The evidence of an expectancy must establish expectancy by and between two parties at least, based upon something that is a concrete move in that direction." *Government Employees Ins. Co. v. Google, Inc.,* 330 F.Supp.2d 700, 705 (E.D.Va. 2004) (internal quotations omitted). In this case, Plaintiff has identified specific contracts and business expectancies that were interfered with, not merely a "general expectancy" that he would have had some business with some third party had Defendants not interfered. Furthermore, Plaintiff has specifically alleged that the reason for the loss of those contracts and expectancies were Defendants' defamatory postings. In order to protect the confidences of his former prospective patients and clients, Plaintiff has not provided the names of the parties who canceled their appointments or contracts in his Complaint. Such information will be made available to Defendants during discovery, but if the Court deems that the names of these parties is necessary for the purposes of properly evaluating Defendants' motion to dismiss, then Plaintiff requests leave from the Court to amend his Complaint to include that information.

It is unclear why Defendants have an issue with Plaintiff only identifying $15,500.00 worth of lost business. In his Complaint, Plaintiff specifically prefaced those identifications with "for example" and then proceeded to list lost business from September 2010, the month in which the Complaint was filed. *See* Plaintiff's Complaint, ¶ 35. He then alleged that he had "lost over $200,000.00 in business over three years." *See* Plaintiff's Complaint, ¶ 35. Plaintiff's listed

business relationships are only a sample of his losses, not an exhaustive list. Again, full damages will be provided to Defendants during discovery.

Finally, as for Defendants' contention that a "competitive relationship" between Plaintiff and the interferer is required for tortious interference with business expectancies, they have cited to an unpublished case that contains no citations for the court's conclusion that a "competitive relationship" is necessary. However, even assuming *arguendo* that a "competitive relationship" is required, such a relationship is obviously present in the instant case. Defendants claim that Plaintiff's therapeutic methods are lethal and discourage the use of Plaintiff's practices. They also claim without basis that Plaintiff is an "attachment therapist" (*see* Complaint ¶¶ 16 and 18, for example), so as psychologists, social workers, and others involved in the debate over attachment therapy (*see* Docket No. 3, pages 5-6 and Exhibit A, page 1 to Plaintiff's Complaint ["We are an educational and public advocacy organization dedicated to halting the dangerous cruelty done to children by Attachment Therapy (AT), its associated Therapeutic Parenting practices (ATP), and other unvalidated, pseudoscientific interventions for Reactive Attachment Disorder (RAD) and other so-called attachment 'problems.'"]), they have a stake in ensuring that others will not hire Plaintiff or use his services. By portraying Plaintiff as an "attachment therapist" who promotes dangerous techniques, Defendants are able to discourage others from seeking business with Plaintiff while at the same able to secure an audience for their own theories, publications, organizations, and websites. Furthermore, Defendants repeatedly endorse Dr. Marolyn Morford and cite their approval of her services. *See* Exhibit E, pages 7-8, 11 to Plaintiff's Complaint ("I provide this information to answer the question about what therapeutic approaches I approve of. Recently I posted a link to a podcast where Dr. Marolyn Morford, who criticized various forms of so-called attachment therapies, discussed behavioral interventions that

have a high degree of research support"). Dr. Morford is a direct competitor of Plaintiff's (*see* Exhibit D).

Therefore, Counts II and III do not fail, and Defendants' motion to dismiss these counts should be denied.

6. Counts IV Has Adequately Pleaded Conspiracy

Plaintiff has adequately pleaded conspiracy under Va. Code § 18.2-499. It is true that "business conspiracy ... must be pleaded with particularity, and with more than mere conclusory language." *Harper Hardware Co. v. Powers Fasteners, Inc.*, 2006 WL 141672, *5 (E.D.Va. 2006) (quoting *Williams v. Dominion Tech. Partners, LLC*, 265 Va. 280, 290, 576 S.E.2d 752, 757 (Va. 2003)) (internal quotations omitted). In *Harper Hardware*, "Plaintiff allege[d] generally that Defendants conspired to damage the business and reputation of Harper Hardware," but the court found that "Plaintiff's broad allegations provide[d] no factual basis to discern the method of the alleged conspiracy or how it was carried out." *Id.* However, in the instant case, as discussed *supra*, Plaintiff has established that Mercer and Pignotti had relationships with each other and the other Defendants; that all Defendants engaged in posting false statements about Plaintiff on the Internet, including on each other's websites as identified in the Complaint, and that they did so with the intent to defame Plaintiff and tortiously interfere with his business relationships; that many of the websites had similar false statements on them (for example, most of the websites accused Plaintiff of being an "attachment therapist," of his therapeutic practices being dangerous and lethal, of his credentials being suspect, and of his involvement in 'smear campaigns' and lies about Defendants, including accusations that he harassed and cyberstalked individuals). Plaintiff has sufficiently alleged facts that make it plausible that Defendants did

indeed have a conspiracy and that discovery will lead to evidence supporting Plaintiff's allegations. Therefore, Count IV of Plaintiff's Complaint should not be dismissed.

III. Conclusion

WHEREFORE, in consideration of the foregoing, and for such reasons as may be advanced during oral argument, Plaintiff, by the undersigned counsel, respectfully requests that this Court deny Defendants' motion to dismiss. If this Court deems any part of Plaintiff's Complaint insufficient, then Plaintiff requests that this Court grant Plaintiff leave to amend his Complaint.

Dated: January 17, 2011 RONALD S. FEDERICI

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CERTIFICATE

I hereby certify that on the 17th day of January, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to the following:

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