UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

RUGGERO SANTILLI,

Plaintiff,

vs. CASE NO. 8:17-cv-1797-T-33MAP

PEPIJN VAN ERP, et al.,
Defendants.
_____/

**DEFENDANT PEPIJN VAN ERP'S REPLY BRIEF**
**IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT**

Plaintiffs' response (DE 88) provides no valid arguments and no competent evidence for denying summary judgment. The response pretends that Defendant Pepijn van Erp's Motion for Summary Judgment (DE 77) rests on credibility issues, but in fact the grounds for summary judgment are legal issues and undisputed facts. Indeed, Plaintiffs have admitted the lack of any factual dispute, because Plaintiffs failed to provide a "Response to Statement of Material Facts" controverting the numbered paragraphs in van Erp's motion, as this Court requires. Instead, the response burdens the Court with irrelevance, such as the number of years required to obtain van Erp's graduate degree and Ruggero's recognitions in Estonia and Kathmandu. (DE 88 pages 3-4) Such irrelevant facts are the only arguments Plaintiffs have, because discovery has confirmed that, as recognized in the Report and Recommendation (DE 71) that this Court adopted (DE 74), Plaintiffs' case is without merit.

"The First Amendment protects debate on matters of public concern, including scientific matters." McMillan v. Togus Regional Office, Dep't of Veterans Affairs, 294 F.Supp.2d 305, 316 (E.D.N.Y. 2003), aff'd, 120 Fed. Appx. 849 (2d Cir. 2005). "As in political controversy,

science is, above all, an adversary process. It is an arena in which ideas do battle." Id. at 317 (citation omitted). For that reason, courts have "cautioned against the potential chilling effect that litigation can have on scientific inquiry." Id. The "hurly burly of a political and scientific debate" should be permitted to thrive; otherwise, "the free exchange of views would be diminished to the public detriment." Reuber, Inc. v. Food Chemical News, Inc., 925 F.2d 703, 717 (4th Cir. 1991). Ruggero should not be permitted to continue to use litigation[1] to attack speech he dislikes on scientific matters. By granting summary judgment, "this Court [will] in no way [be] invading the province of the jury," but rather "upholding its duty to prevent 'a forbidden intrusion on the field of free expression.' " Colodny v. Iverson, Yoakum, Papiano & Hatch, 936 F. Supp. 917, 927 (M.D. Fla. 1996) (quoting Bose Corp. v. Consumers Union, 466 U.S. 485, 499 (1984)). Van Erp's summary judgment motion should be granted.

I. Plaintiffs have admitted Section 770.01 applies to van Erp's blog.

Plaintiffs argue that Section 770.01's presuit notice requirement does not apply to van Erp's blog. (DE 88 pages 9-10) This is a surprising argument, because Plaintiffs and their attorney repeatedly have said otherwise. The original Complaint, Amended Complaint and Second Amended Complaint all allege: "Plaintiffs have complied with Florida Statute § 770.01 precedent to bringing this action." (DE 1-2 ¶ 7; DE 2 ¶ 8; DE 30 ¶ 10)[2] Likewise, in response to Israel's summary judgment motion, Plaintiffs stated that their attorney's presuit notice letter was sent "in compliance of 770.01." (DE 87 ¶ 4) Plaintiffs' counsel asked van Erp to "accept this letter as notice, as required by Florida Statute." (DE 77-2 page 24 (emphasis added)) In sum,

[1] See Santilli v. Cardone, 8:07-CV-308-T-23MSS, 2008 WL 4534138, at *4 (M.D. Fla. 2007) (case dismissed); Santilli v. Conte, 8:99-CV-1675-T-27MAP (M.D. Fla. Nov. 8, 2001) (case dismissed at DE 133).

[2] Because Plaintiffs alleged compliance with Section 770.01, this defect in their case could not be raised in a motion to dismiss, as Plaintiffs suggest (DE 88 page 7 n. 5), but instead was properly raised as an affirmative defense (DE 70 page 9).

Plaintiffs repeatedly alleged compliance with Section 770.01 because notice was, in their attorney's words, "required" by that statute.

Case law makes clear that Plaintiffs' pleadings and their attorney are correct: Section 770.01 applies in this case. In Alvi Armani Med., Inc. v. Hennessy, 629 F. Supp. 2d 1302, 1308 (S.D. Fla. 2008), Judge Lenard found Section 770.01 applicable to "the principal owner of [a] website, who is alleged to control the website's operations." Similarly, in this case, Plaintiffs say van Erp "has complete control of the website[]." (DE 64 ¶ 2) In Comins v. VanVoorhis, 135 So. 3d 545 (Fla. 5th DCA 2014), Section 770.01 was found applicable to a blogger, the court noting that "many blogs and bloggers will fall within the broad reach of 'media,' and, if accused of defamatory statements, will qualify as a 'media defendant' for purposes of Florida's defamation law." Id. at 559. Plaintiffs' response makes much of VanVoorhis' dictum, "We are not prepared to say that all blogs and all bloggers would qualify for the protection of section 770.01." Id. (quoted at DE 88 page 10) But this caveat does not exclude van Erp from the statute's protection. In fact, van Erp's website seems similar to VanVoorhis' blog. Like van Erp, VanVoorhis is described as having a master's degree and writing about academic matters. 135 So. 3d at 548. Section 770.01 applied to VanVoorhis' blog, the court explained, "as an alternative medium of news and public comment." Id. at 559. Van Erp's blog likewise is "an alternative medium of news and public comment," reporting such matters as Ruggero's "breaking news" about Invisible Terrestrial Entities (DE 77-2 page 2 ¶ 5(b) & page 33 line 4) and providing a forum where Carla Santilli and others have posted comments about such matters (DE 77-13 p 80 lines 6-8; DE 88-13 pages 6-30). Nothing in VanVoorhis says a blogger must possess personal expertise or provide unlimited public access, as Plaintiffs claim. In fact, the VanVoorhis opinion defines the word "blog" broadly as including "a site operated by a single individual or a small

group that has primarily an informational purpose, most commonly in an area of special interest, knowledge or expertise of the blogger, and which usually provides for public impact or feedback." 135 So. 3d at 559. Van Erp's blog clearly fits within that definition. Consequently, as Plaintiffs have repeatedly acknowledged, Section 770.01 applies in this case.

II. Statements not mentioned in a Section 770.01 notice are not actionable.

Implicitly acknowledging (again) that Section 770.01 applies in this case, Plaintiffs argue that their presuit notice letter was sufficient. (DE 88 pages 12-13) Plaintiffs do not dispute, however, that their pre-suit notice letter (DE 77-2 pages 23-24) listed only three of the seven statements that the Second Amended Complaint alleges are false and defamatory (DE 30 ¶ 19). Florida law requires a written notice "specifying the article or broadcast and the statements therein which [the plaintiff] alleges to be false and defamatory." § 770.01, Fla. Stat. (emphasis added). Because the statements at issue must be specified, a plaintiff cannot sue over statements that are not specifically listed in the notice. For example, in Nelson v. Associated Press, Inc., 667 F. Supp. 1468 (S.D. Fla. 1987), an article's statement that the plaintiff participated in séances could not be the basis of a defamation claim, the court found, because the plaintiff's notice letter mentioned other statements but did not mention séances. Id. at 1483-84. Likewise, in this case, because Plaintiffs' presuit notice letter did not mention "fake journals," Ruggero's claimed awards, his use of aliases, or his paying for publication services, those statements are not actionable in this case.[3] The same is true of other statements listed in the summary judgment response (DE 88 pages 20). "A plaintiff may not amend her complaint through argument in a

[3] Plaintiffs also point to Carla's April 2016 email message to van Erp (DE 78-1 page 5). That email message does not help Plaintiffs, because that message – like the presuit notice letter sent a month later – does not mention "fake journals," Ruggero's awards, his use of aliases, or his paying for publication services.

brief opposing summary judgment." Gilmour v. Gates, McDonald & Co., 382 F.3d 1312, 1315 (11th Cir. 2004).

As Plaintiffs note (DE 88 page 14), the statement expressing van Erp's opinion about one of Ruggero's claimed awards was published in August 2016 (DE 30-1 page 66), shortly after Ruggero filed his original state court Complaint (though long before van Erp and Israel were served with process (see DE 1-2 pages 28 & 103-104)). Plaintiffs claim they were not obliged to serve a presuit notice letter regarding that statement (or any others made after they filed the original Complaint), because they reason such a notice would not serve the purpose of avoiding litigation; litigation was already pending. (DE 88 pages 13-14) This policy argument ignores the fact that a separate notice concerning any additional statements might have avoided litigation concerning those additional statements. Moreover, the statement about Ruggero's claimed award was first challenged on April 5, 2017, in the Amended Complaint (DE 2 ¶ 17), some eight months after that statement's publication. Thus Plaintiffs had eight months in which to send a notice letter challenging that statement but instead chose to amend the pleadings to include that statement without providing the notice that Section 770.01 requires. Plaintiffs cite no case in which compliance with Section 770.01 was excused because litigation was already pending, and nothing in the statute creates such an exception to the notice rule. Because Plaintiffs' only Section 770.01 notice listed only three statements, no other statements are actionable.

III. Plaintiffs fail to create a fact issue concerning rhetorical hyperbole and opinion.

Plaintiffs' brief discussion of rhetorical hyperbole and opinion (DE 88 pages 15-17) provides no basis for denying summary judgment and in fact supports van Erp's motion. Plaintiffs quote Fortson v. Colangelo, 434 F. Supp. 2d 1369 (S.D. Fla. 2006), in which summary judgment was granted on rhetorical hyperbole grounds. This Court should reach the same result.

As Plaintiffs concede, determination that a statement is rhetorical hyperbole turns on context, cautionary terms and the medium used. (DE 88 page 16) Van Erp's motion explains why those elements all support the adopted Report's conclusion that the statements at issue are "subjective assessments" and "not readily capable of being proven true or false." (DE 77 page 10 (quoting DE 71 pages 10-11)) A blog is a popular medium for debate "and is the type of online forum where a reasonable person expects to find controversy and accompanying rhetoric." (DE 71 page 11) "Read in context, a reasonable reader would recognize Van Erp's posts as inviting intellectual rivals to engage in a scientific disagreement." (DE 71 page 9) The statements at issue, therefore, are rhetorical hyperbole.

Plaintiffs' response (DE 88 page 16) cites other language on van Erp's website, including the phrases "might be the easiest to debunk" (paraphrased in the response as "easy to debunk") and "scientific fraud." Plaintiffs did not list those statements in a Section 770.01 notice and elected not to sue on those statements; they are not entitled to challenge them now. But in any event those statements are just as loose as the challenged language. The phrase "might be the easiest to debunk" (DE 30-1 page 2) is highly subjective: How could any factfinder decide which of Ruggero's scientific claims "might be the easiest to debunk?" The phrase "scientific fraud" likewise is rhetorical hyperbole, an opinion or both. That phrase appears in van Erp's May 2013 article about Ruggero's use of aliases: "publishing in a scientific journal under a false name (defending an article of your own) is simply scientific fraud." (DE 30-1 page 23) Van Erp repeats the phrase at the end of the article. (DE 30-1 page 27) That context makes clear that van Erp is not alleging a literal crime, but rather conveying the subjective assessment that Ruggero's use of aliases to bolster his scientific claims is false and misleading. Notably, although van Erp's Statement of Material Facts (DE 77 ¶¶ 11-14) and the rest of his motion (DE 77 pages 4-5 & 21)

discuss Ruggero's use of aliases, Plaintiffs' response says nothing about that practice. Plaintiffs, therefore, have admitted Ruggero's use of a former employee's name in support of his scientific claims without her consent (DE 77-18).

A similar use of the term "fraud" was considered in Colodny v. Iverson, Yoakum, Papiano & Hatch, 936 F. Supp. 917 (M.D. Fla. 1996), in which summary judgment was granted to a defendant who described a nonfiction book as a "fraud." Id. at 921 & 927. In that case (and in this one), the word "fraud" was an expression of opinion. Id. at 925. As the adopted Report explains (DE 71 page 9), such opinions are not actionable.[4] Moreover, the phrase "scientific fraud" is not challenged in the original Complaint (DE 1-2 pages 4-13), Amended Complaint (DE 2) or Second Amended Complaint (DE 30). Plaintiffs' resort to statements outside the pleadings does not change the rhetorical hyperbole and opinion analysis. Moreover, Plaintiffs offer essentially no response to van Erp's opinion argument, including his declaration detailing the basis for his opinions (DE 77-2 pages 2-5). Summary judgment, therefore, is warranted, on both rhetorical hyperbole and opinion grounds.

IV. Plaintiffs completely fail to create a fact issue on actual malice.

Plaintiffs' brief discussion of actual malice (DE 88 pages 17-18) reveals the insufficiency of their evidence on that issue. Plaintiffs concede that Ruggero is a public figure,[5] so they "must produce evidence that the defendants 'actually entertained serious doubts as to the veracity of the

[4] See also Ayyadurai v. Floor64, Inc., 270 F. Supp. 3d 343, 362 (D. Mass. 2017) ("It is clear, particularly from the surrounding language describing plaintiff's claims as 'bogus' or 'easily debunked,' that the articles [using the terms "fraudulent," "fraud" and "charlatan"] are simply using colorful and figurative language and are not making any fact-based accusation that plaintiff has actually committed a fraud."), appeal pending (1st Cir. 2017).

[5] The Court need not consider whether Carla is a public figure, because, although the Second Amended Complaint's defamation counts demand relief for both "Plaintiffs" (DE 30 pages 6-9), Carla has abandoned her defamation claims (DE 88 page 19).

published account, or [were] highly aware that the account was probably false' " Klayman v. City Pages, 650 Fed. Appx. 744, 749 (11th Cir. 2016) (quoting Michel v. NYP Holdings, Inc., 816 F.3d 686, 703 (11th Cir. 2016)). Plaintiffs offer no evidence of such doubts. Instead, they assert that van Erp's research was deficient. (DE 88 pages 17-18) This argument ignores the many sources that van Erp's blog posts and testimony identify (DE 77-2 pages 2-5). As the adopted Report explains, "Van Erp includes links to Santilli-created content – websites and articles of Santilli's original research – and links to other primary sources…." (DE 71 page 10) The existence of those sources shows the absence of actual malice. See, e.g., Levan v. Capital Cities/ABC, Inc., 190 F.3d 1230, 1241-43 (11th Cir. 1999) (citing libel defendants' "numerous sources" and affirming summary judgment based upon insufficient evidence of actual malice).

Moreover, the U.S. Supreme Court and Eleventh Circuit have held that research deficiencies are insufficient to prove actual malice. In the foundational case of St. Amant v. Thompson, 390 U.S. 727 (1968), the defendant "had no personal knowledge of" plaintiff's activities at issue, "failed to verify the information" with those who might have known the facts, gave no consideration to whether his statements defamed plaintiff and "went ahead heedless of the consequences." Id.at 730. The U.S. Supreme Court found those facts insufficient to establish knowing or reckless falsity, explaining that "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." Id. at 731 (emphasis added). "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." Id. (emphasis added). Because the St. Amant plaintiff lacked evidence the defendant was aware of the probable falsity of the statements at issue, the plaintiff failed to prove actual malice. Id. at 732-33.

More recently, in Klayman, 650 Fed. Appx. at 744, the Eleventh Circuit found that "the defendants' failure to investigate and poor journalistic standards [were] insufficient to establish actual malice." Id. at 750-51. The Klayman plaintiff cited a "lack of editorial or verification processes and the authors' failure to contact [the plaintiff] for comment." Id. at 750. The plaintiff's "characterizations of the defendants," the Eleventh Circuit explained, "are immaterial as to whether they actually had doubts about the veracity of the statements or alleged implications." Id. The Eleventh Circuit, therefore, affirmed summary judgment for the defendants, explaining that "a reasonable jury could not find the existence of actual malice on the part of the defendants by clear and convincing evidence." Id. at 752.

Plaintiffs in this case offer the same arguments that failed in St. Amant and Klayman. "Not one person has done any research or provided qualified findings," Plaintiffs complain. (DE 88 pages 17-18) Van Erp has "not provided any credible source or evidence," Plaintiffs say, arguing that "even the most cursory of investigating would have revealed" facts supporting Ruggero. (Id. page 18) These claims are not only untrue – they also are identical to the findings found insufficient in St. Amant and Klayman. Whether an author adequately "investigated before publishing" is not the issue, as the St. Amant Court explained. 390 U.S. at 731. A "lack of editorial or verification processes and the authors' failure to contact [a possible source] for comment" does not establish knowing or reckless falsity, the Eleventh Circuit found in Klayman, 650 Fed. Appx. at 750. Because Plaintiffs offer no evidence (or even argument) that van Erp knew the statements at issue were false or seriously doubted their truth, they have failed to proffer the required clear and convincing evidence of actual malice.

V. Plaintiffs' tortious interference claims are barred and are not supported by evidence.

Plaintiffs offer only a cursory discussion of their tortious interference claims (DE 88 page 19) and provide no basis for denying summary judgment. Regarding standing, the response

admits that the alleged interference involved potential investors in "Plaintiffs' companies" and those companies' products (DE 88 page 19), not Plaintiffs directly. As this Court has found, stockholders are not entitled to bring direct actions for tortious injuries to their companies. In re Martino, 8:16-cv-2105-T-33, 2017 WL 1519797, at *5 (M.D. Fla. April 27, 2017). Plaintiffs offer no argument concerning the single cause of action rule, which bars the tortious interference claims. See Roca Labs, Inc., v. Consumer Opinion Corp., 8:14-cv-2096-T-33EAJ, 2014 WL 6389657 at *6 (M.D. Fla. Nov. 16, 2014) ("a single publication may give rise to only a single cause of action"). Finally, Plaintiffs fail to address the deficiencies that the adopted Report identified (DE 71 page 7), including the lack of existing business relationships. Claims that van Erp's blog posts have interfered with the ability to develop relationships with unnamed and unknown potential investors or customers are insufficient to prove tortious interference (DE 71 pages 7-8), because a "mere offer to sell cannot, by itself, support a tortious interference" claim. Ethan Allen, Inc. v. Georgetown Manor, Inc., 647 So.2d 812, 814 (Fla. 1994).

## Conclusion

Plaintiffs' response does not respond to van Erp's Statement of Material Facts and completely fails to rebut van Erp's grounds for summary judgment. Discovery has confirmed the adopted Report's assessment of Plaintiffs' case. Summary judgment should be granted.

## Response to Request for Oral Argument

Oral argument is not necessary. The issues in van Erp's motion are straightforward and involve basic principles of Florida law. However, if the Court is inclined to grant oral argument, van Erp requests that other upcoming deadlines in the case be postponed or the case stayed, so that the parties are not required to incur unnecessary trial preparation costs and expenses while the pending dispositive motions are decided.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on July 6, 2018, a true and correct copy of the foregoing is being filed with the Court's CMECF system, which will serve a copy electronically on Joseph E. Parrish, Esq., The Parrish Law Firm, P.A., PO Box 1307, Brandon, FL 33509-1307 (jparrish@theparrishfirm.com).

*/s/ James B. Lake*
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