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Art of Living Foundation

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ART OF LIVING FOUNDATION, a California corporation,

Plaintiff,

vs.

DOES 1-10, inclusive**,**

Defendants.

Case No. 10-cv-5022-LHK-HRL

PLAINTIFF'S OPPOSITION TO DEFENDANTS DOE/KLIM AND DOE/SKYWALKER'S MOTION TO DISMISS & EVIDENTIARY OBJECTIONS

Date: May 12, 2011
Time: 1:30 PM
Judge: The Honorable Lucy H. Koh
Ctrm: Courtroom 4, 5th Floor

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Plaintiff Art of Living Foundation ("Plaintiff"), by and through its counsel of record, respectfully submits the following memorandum of points and authorities in opposition to the Motion to Dismiss of Defendants Doe/Klim and Doe/Skywalker (collectively, "Defendants").

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Defendants disregard two seminal rules governing motions to dismiss: a) the Court must accept the complaint's allegations as true, and b) the Court may not consider extrinsic evidence, except when established by judicial notice. Defendants' disregard is not based on their lack of knowledge. To the contrary, Defendants have sought to sneak before the Court numerous factual assertions through an improper request for judicial notice.

With their improper evidence, Defendants seek to recast the complaint as a story about a large, oppressive religious cult seeking to silence dissidents through threats of retaliation. However, Plaintiff is the master of its complaint, and the complaint does not allege these facts. Rather, the complaint alleges that Plaintiff is a non-denominational educational and humanitarian organization that offers classes in breathing, meditation, and yoga. Defendants are disgruntled former students and student-teachers of Plaintiff. Defendants, out of spite and malice, have started Internet blogs on which they have published false statements accusing Plaintiff of criminal activity and financial misconduct. Defendants have also published Plaintiff's trade secrets and copyrighted materials on their blogs. The complaint contains all of these allegations, and the Court must accept them as true for purposes of resolving Defendants' motion to dismiss.

With these allegations, Plaintiff has stated valid claims for defamation, trade libel, misappropriation of trade secrets, and copyright infringement. Additionally, Plaintiff has submitted sufficient evidence to establish the Court's personal jurisdiction over Defendants. More specifically:

- Plaintiff has submitted evidence that Defendants expressly aimed their misconduct

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toward California where Plaintiff is based in California, Defendants' blogs refer to Plaintiff, Plaintiff's website, Plaintiff's employees, and California, and Plaintiff has received inquiries about Defendants' blogs;

- The complaint alleges that Defendants made false and defamatory statements of and concerning Plaintiff, and that these statements were made with actual malice;
- The complaint alleges that Defendants disparaged the quality of Plaintiff's services and induced others not to deal with Plaintiff;
- Because Defendants have not moved to dismiss Plaintiff's misappropriation of trade secrets claim or its copyright claim, those claims must remain.

Because Plaintiff has established this Court's personal jurisdiction and the viability of all of its claims, the Court should deny Defendants' motion to dismiss.

BACKGROUND

Plaintiff, the Art of Living Foundation, is a California non-profit corporation based in Goleta, California. (Complaint ("Compl.") ¶13.) Plaintiff is a non-denominational educational and humanitarian organization dedicated to the teachings of His Holiness Sri Sri Ravi Shankar ("Shankar"). (Compl. ¶¶22-23.) Plaintiff offers courses on breathing, meditation, and yoga. (Compl. ¶24.) At the core of Plaintiff's teachings is Sudarshan Kriya, which is a rhythmic breathing exercise. (Compl. ¶25.)

Plaintiff—in consultation with Shankar—has developed detailed processes by which Plaintiff's courses are to be taught. (Compl. ¶37.) These processes are contained in several written manuals, including a) the Training Guide Phase One, b) the Phase One Supplement Manual (the Continuation Manual), and c) the Yes! Teacher Notes (collectively, the "Manuals"). (Compl. ¶39.) Plaintiff has intentionally not memorialized the teaching processes for Sudarshan Kriya in a formal manual to prevent the unlawful distribution of its Sudarshan Kriya teaching principles (the "Principles"). (Compl. ¶40.) Instead, Plaintiff trains instructors of Sudarshan Kriya through oral presentations, during which the student-teachers may take written notes. (*Id*.) Plaintiff considers the Manuals and the Principles highly confidential and uses vigorous efforts

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to preserve their confidentiality. (Compl. ¶¶41-44.)

In or around November 2009, Defendants started the blog entitled "Leaving the Art of Living" and located at <artoflivingfree.blogspot.com> (the "Blogspot Blog"). (Compl. ¶53.) In or before May 2010, Defendants started the blog entitled Beyond the Art of Living and located at <aolfree.wordpress.com> (the "Wordpress Blog"; the Blogspot Blog and the Wordpress Blog are referred to collectively as the "Blogs"). (Compl. ¶54.) With few exceptions the Blogs have remained active and accessible since their creation. (Compl. ¶55.) The ostensible purpose of the Blogs is to provide former students of Plaintiff and those doubting Plaintiff's teachings a space to heal, find answers, and understand the experiences they went through as students of Plaintiff. (Compl. ¶56.) In fact, the Blogs contain numerous false and defamatory statements about Plaintiff. (Compl. ¶57.)

Each anonymous Defendant has posted false and defamatory statements on the Blogs (hereinafter the 18 defamatory statements identified in the complaint are referred to as the "Statements"). (Compl. ¶62.) Moreover, each Defendant has conspired and worked with the other Defendants to publish the Statements on the Blogs. (Compl. ¶72.) The Statements are false, defamatory, and completely fabricated. (Compl. ¶61.) Defendants Klim and Skywalker are identified as the authors of several of the defamatory Statements. (Compl. ¶60.) In addition, the Blogs contain numerous defamatory statements published anonymously under the fictitious names Aolwhistleblower, Whistleblower, Peaceful Warrior, Klim & Co., AoL-Free, and Prosecutor. (Compl. ¶59.)

In addition to publishing false and defamatory statements on the Blogs, Defendants posted Plaintiff's confidential trade-secret information on the Wordpress Blog. (Compl. ¶67.) Specifically, during June and July of 2010, Defendants posted the Manuals on the Wordpress Blog. (Compl. ¶68.) Additionally, Defendants posted a link to a written description of Plaintiff's teaching Principles for Sudarshan Kriya, which as discussed above, Plaintiff holds in the strictest confidence. (Compl. ¶69.) Additionally,

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during this time Defendants published the full text of Plaintiff's copyrighted text: the Breath Water Sound Manual on the Blogs. (Compl. ¶68.)

The Blogs have had their intended effect, *i.e.* to discourage people from taking Plaintiff's courses. (Compl. ¶65.) Plaintiff has received numerous inquiries about the truthfulness of the Statements on the Blogs. (Compl. ¶66.) Many of these people have expressed anger, frustration, or outrage to Plaintiff based on the Blogs' false statements—particularly the Blogs' accusations of physical abuse, sexual abuse, financial misconduct, and fraud. (Compl. ¶66.)

ARGUMENT

In resolving a motion to dismiss under Rule 12(b)(6), the Court must accept the complaint's allegations as true and construe the allegations in the light most favorable to the plaintiff. *Saldate v. Wilshire Credit Corp.*, 686 F. Supp. 2d 1051, 1057 (E.D. Cal. 2010). In their motion to dismiss, Defendants seek to introduce extrinsic facts through unauthorized requests for judicial notice and otherwise. Defendants' tactics are improper. But even if the Court were to accept Defendants' extrinsic evidence, Defendants' motion would still fail.

As an initial matter, Defendants' motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2) fails where Defendants aimed their misconduct at California. Plaintiff's motion to dismiss under Rule 12(b)(6) fares no better. First, Plaintiff has stated a claim for defamation where the complaint alleges that the Statements are "of and concerning" Plaintiff, provably false, not protected religious conduct, and were made with malice. Second, Plaintiff has stated a valid claim for trade libel where it has alleged that Defendants intentionally disparaged the quality of Plaintiff's services, and thereby induced others not to purchase Plaintiff's services. Finally, because Defendants do not seek to dismiss Plaintiff's claims for misappropriation of trade secrets or copyright infringement, those claims necessarily survive. Thus, the Court should deny Defendants' motion to dismiss in its entirety.

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A. This Court has personal jurisdiction over Defendants where they aimed their misconduct at California.

In opposition to a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the plaintiff must produce sufficient documentary evidence to support a finding of personal jurisdiction. *See Von Grabe v. Sprint PCS*, 312 F. Supp. 2d 1285, 1297 (S.D. Cal. 2003). Plaintiff has done so here.[1]

A court may exercise personal jurisdiction over a defendant consistent with due process if the defendant has certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1205 (9th Cir. 2006) (quoting *International Shoe Co. v. Washington,* 326 U.S. 310 (1945)). The Ninth Circuit analyzes specific jurisdiction according to a three-prong test: 1) the non-resident defendant must purposefully direct his or her activities or consummate some transaction with the forum or resident thereof, or perform some act by which the defendant purposefully avails him/herself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; 2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and 3) the exercise of jurisdiction must comport with fair play and substantial justice, *i.e.* it must be reasonable. *Id.* at 1205-06. In tort cases, the first prong of this test—the purposeful availment/purposeful direction prong—asks whether the defendant purposefully directed his or her activities at the forum state, regardless of whether those actions occurred within the forum. *See id.* at 1206. Known as the effects test, the Ninth Circuit construes the test as imposing three requirements: 1) that the defendant allegedly committed an intentional act, 2) expressly aimed at the forum state, 3) which caused harm that the defendant knew was likely to be suffered in the forum state. *Id.* at 1206.

[1] Defendants offer the declarations of Klim and Skywalker in support of their motion to quash, special motion to strike, and motion to dismiss. Plaintiff has objected to the admissibility of Defendants' declarations in support of all three motions in its opposition to the motion to quash, and incorporates those objections in this opposition.

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Courts have frequently applied the effects test in defamation cases like the one at hand. Thus, in *Calder v. Jones*, 465 U.S. 783, 789 (1984), the Supreme Court found that it was proper for a California court to exercise jurisdiction over two Florida reporters who published an article impugning the professionalism of an entertainer living in California. The Court found that the exercise of personal jurisdiction was reasonable where the defendants knew that the brunt of the harm from the article would be felt in California. *Id.* at 789. The Ninth Circuit has incorporated *Calder's* holding in its decisions:

- *Gordy v. Daily News, L.P.*, 95 F.3d 829, 835 (9th Cir. 1996) – A New York newspaper's contacts with California were sufficient for the exercise of personal jurisdiction in a defamation action brought by a California resident even though the newspaper only had 13-18 subscribers in California. By publishing the defamatory article, the effects of which were felt in California, and by regularly mailing the few subscribers the newspaper had in California, the newspaper had purposefully directed its conduct toward California.
- *Brainer v. Governors of the Univ. of Alberta*, 873 F.2d 1257, 1259 (9th Cir. 1989) – A vice-president of Canadian university was subject to personal jurisdiction in Arizona based on claims that he defamed a faculty member of the University of Arizona. The alleged defamation occurred during a telephone call that the defendant received from an associate dean at the University of Arizona. The court found that the defendant had purposefully directed his conduct toward Arizona where he knew that the possible harm stemming from his statements made during the phone call would occur in Arizona, even though the defendant had not initiated the phone call and had no other contacts with Arizona.
- *Miracle v. N.Y.P. Holdings, Inc.*, 87 F. Supp. 2d 1060, 1064 (D. Haw. 2000) – a New York newspaper had sufficient contacts with Hawaii to satisfy the purposeful direction test even though the newspaper only had two subscribers in Hawaii. By publishing the defamatory articles, the effects of which would clearly be felt in

Hawaii, and by circulating the very small number of newspapers to Hawaii residents, the defendants purposefully directed their conduct toward Hawaii.

Here, the evidence of Defendants' purposeful direction is more significant than in *Calder, Gordy, Brainer,* and their progeny. Plaintiff is based in California. (Compl. ¶13.) The purpose of the Blogs is to describe Defendants' experiences with Plaintiff. (Compl. ¶56.) The Blogs contain numerous references to Plaintiff, Plaintiff's website, Plaintiff's employees, and California. (Declaration of Jeffrey M. Rosenfeld in Opposition to Defendants Motions to Dismiss, Strike and Quash ("Rosenfeld Decl") ¶¶9-13 & Exs. G-K.) The Blogs are both hosted in California using California-based companies (*i.e.* Google, Inc. and Automattic, Inc.). (*Id.* ¶¶24-25 & Exs. V-W.) In creating and using the Blogs, Defendants agreed to terms of service that state that any dispute regarding the use of the Blogs will governed by California law and be resolved in California courts. (*Id.* ¶¶19-20 & Exs. Q-R.) Skywalker himself uses a Google email account to contribute to the Blogs—an account for which he submitted to jurisdiction in California when he activated the account. (*id.* ¶¶21, 23 & Exs. S, U.) Finally, Plaintiff—based in California—has received multiple inquiries regarding the Blogs and the Statements on the Blogs. (Compl. ¶66.) In light of these facts, it is beyond dispute that Defendants purposefully directed their misconduct toward California.

The second prong of the Ninth Circuit's specific jurisdiction test is also satisfied (*i.e.* the claim must be one which arises out of or relates to the defendant's forum-related activities). This action arises out of Defendants' use of the Blogs to defame Plaintiff and to infringe on Plaintiff's intellectual properties. These are precisely the activities that Defendants directed at California.

Finally, the exercise of personal jurisdiction is reasonable where there is no alternative forum that has more connections to Defendants' misconduct. In assessing reasonableness, the Court must remember that Defendants have operated the Blogs anonymously, and that Plaintiff does not know the location of Defendants. Plaintiff selected this Court as having the greatest number of known contacts to Defendants'

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misconduct. If the Court finds that it does not have personal jurisdiction, Plaintiff will be unable to bring this action in any court because Plaintiff cannot yet determine where Defendants are located. Based on the foregoing facts, the exercise of personal jurisdiction is reasonable.

Defendants' authority, *Church of Scientology v. Adams*, 584 F.2d 893, 899 (9th Cir. 1978) is of questionable relevance. As an initial matter, because *Adams* pre-dates *Calder*, to the extent it is inconsistent with *Calder*, it is no longer good law. Moreover, *Adams* is readily distinguishable from the case at hand. In *Adams*, the articles at issue did not concern California events, nor were California readers a principal or even secondary target of the articles. The only mention of a California resident in the *Adams* articles was by way of an isolated reference to a person who spoke to representative of a national organization based in California. By comparison, the Blogs here concern Plaintiff, a California organization. (Compl. ¶13.) The Blogs have repeated references to Plaintiff, Plaintiff's website, Plaintiff's employees in California, and California generally. (¶¶9-13 & Exs. G-K..) Finally, the Blogs are read by California residents, and Plaintiff has received inquiries from California residents regarding the Blogs. (Cohen Decl. *passim* & Exs. A-B; Dhall Decl. ¶¶49-53.)

Because Defendants purposefully directed their conduct toward California and because California is the most reasonable forum to litigate this action, the Court has personal jurisdiction over Defendants. However, if there is any question regarding personal jurisdiction, the Court should allow Plaintiff to conduct jurisdictional discovery to identify Defendants' contacts with California. *See Am. W. Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 801 (9th Cir. 1989) (where pertinent facts bearing on the question of jurisdiction are in dispute, discovery should be allowed).

B. Plaintiff has stated a claim for defamation against all Defendants.

To state a claim for defamation, a plaintiff must allege 1) a publication that is 2) false, 3) defamatory, 4) unprivileged, and 5) has a natural tendency to injure or cause special damage. *Wong v. Tai Jing*, 189 Cal. App. 4th 1354, 1369 (2010). Moreover,

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where the plaintiff is a public figure or official, the plaintiff must allege the defendant's actual malice. *See Reader's Digest Assn. v. Superior Court*, 37 Cal. 3d 244, 256 (1984). Plaintiff has alleged sufficient facts to support each of these elements.

1. The complaint alleges that Defendants published the Statements on the Blogs.

In order to state a cause of action for defamation, a plaintiff must allege that the defendant published the defamatory statement at issue. Here, the complaint alleges that Defendants published all 18 defamatory Statements on the Blogs. Moreover, the complaint alleges that Defendants conspired and worked together to publish each of the Statements. Thus, Plaintiff has alleged the required publication by Defendants.

Skywalker argues that none of the defamatory Statements were authored by him—not even those associated with his name. (Mot. at 6:18-19; Skywalker Decl. ¶3.) As an initial matter, this extrinsic evidence—in the form of an anonymous declaration—cannot be considered on a motion to dismiss. Moreover, and contrary to Skywalker's declaration, the complaint specifically alleges that Skywalker—working with the other Defendants—published the defamatory Statements on the Blogs. Thus, the complaint alleges that Defendants published the defamatory Statements.

2. The complaint alleges that the Statements are "of and concerning" Plaintiff.

To state a claim for defamation, a Plaintiff must allege that the statement at issue is "of and concerning" the plaintiff. *See Yow v. Nat'l Enquirer, Inc.*, 550 F. Supp. 2d 1179, 1183 (E.D. Cal. 2008). The "of and concerning" standard does not require that a defendant refer to the plaintiff by name, so long as the plaintiff could be identified by clear implication. *Id.* A statement is "of and concerning" the plaintiff if from the evidence a juror could infer that the statement refers to the plaintiff, or that the publication points to the plaintiff by description or circumstances tending to identify the plaintiff. *Id.* To determine whether a statement applies to a plaintiff, the statement must be examined in context, considering the totality of the circumstances. *D.A.R.E. America v. Rolling Stone Magazine*, 101 F. Supp. 2d 1270, 1290 (C.D. Cal. 2000). Thus, on a motion to dismiss,

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the Court must determine whether the plaintiff has pled that the statement at issue either expressly mentions the plaintiff or refers to the plaintiff by reasonable implication. *See Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1046 (1986). Whether a statement is "of and concerning" a plaintiff is a question of fact to be resolved by a jury. *See Dworkin v. Hustler Magazine, Inc.*, 668 F. Supp. 1408, 1417 n.11 (C.D. Cal. 1987). Thus, any question regarding the "of and concerning" requirement should be resolved by a jury and not on a motion to dismiss.

Here, the complaint specifically alleges that the Blogs are about Plaintiff and that the Blogs refer to Plaintiff both expressly and by implication. (Compl. ¶¶4, 57, 58, 60, 110, 111.) Moreover, many of the Statements specifically refer to Plaintiff by name. (Compl. ¶62.) Nonetheless, Defendants argue that those Statements that refer expressly to Shankar but not to Plaintiff are not "of and concerning" Plaintiff. (Mot. 9:14-16.) Defendants' argument fails. First, Defendants' argument conflicts with the allegations in the complaint, which allege that the Statements are about Plaintiff. (Compl. ¶¶4, 57, 58, 60, 110, 111.) Second, even those Statements that do not expressly refer to Plaintiff by name refer to Plaintiff by reasonable implication, particularly where Plaintiff's teachings are inextricably intertwined with those of Shankar and a primary purpose of Plaintiff is to spread Shankar's teachings in the United States. (Compl. ¶16, 23, 30, 37, 39.) Similarly, statements that refer generally to Plaintiff's teachers also refer to Plaintiff by reasonable implication, where Plaintiff's teachers are part of Plaintiff's organization.

Thus, despite Defendants' particular construction of the Statements, the complaint has alleged that the Statements refer to Plaintiff either expressly or by reasonable implication. Thus, Defendants' motion must be denied as to Plaintiff's defamation claim.

3. The complaint alleges that the Statements are false and defamatory.

To state a claim for defamation, a complaint must allege a defamatory statement that would be understood as a factual assertion as opposed to purely opinion. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17-19 (1990). Contrary to Defendants' motions, the Supreme Court has held that statements of opinion are not constitutionally

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protected. *See id*. Rather, the dispositive question is whether a reasonable juror reading the statement at issue could conclude that it implies a provably false factual assertion. *Rodriguez v. Panayiotou*, 314 F.3d 979, 985 (9th Cir. 2002). In evaluating whether a statement implies a provably false assertion, courts examine: a) the statement's broad context, b) the statement's specific context, and c) whether the statement is susceptible of being proved true or false. *Underwager v. Channel 9 Australia*, 69 F.3d 361, 366 (9th Cir. 1995). Here, the complaint alleges that each Statement is provably false.

a. The Statements' broad context indicates that the Statements would be understood as assertions of fact.

In analyzing a statement's broad context, courts look at whether the tenor and format of the publication suggests that the statement is purely opinion. *See Underwager*, 69 F.3d at 366. For example, a reader is more likely to understand formats such as parodies, critical reviews, letters to the editor, and radio talk shows as containing statements of pure opinion. *See, e.g.*, *Gardner v. Martino*, 563 F.3d 981, 988 (9th Cir. 2009) (opinionated and hyperbolic talk show format reduced expectation of learning objective fact). Moreover, courts look at whether the tenor of the publication was adversarial in nature—such as a television debate or an article about a contentious public meeting—in determining whether a statement contains purely opinion. *See Ferlauto v. Hamsher*, 74 Cal. App. 4th 1394, 1401 (1999).

Here, the complaint alleges that Defendants use the Blogs to defame Plaintiff; that the Statements on the Blogs are false and defamatory; that thousands of viewers of the Blogs have been misled about Plaintiff, Plaintiff's services, and Plaintiff's teachings; and that Plaintiff has received numerous inquiries from its students about the truthfulness of the Statements. (Compl. ¶66.) In light of these allegations, the broad context of the Blogs indicates that the Statements were understood as assertions of fact.

Defendants argue that statements on Internet discussion groups are less likely to be construed as statements of fact. (Mot. p. 12:8-15.) However, the relevant case law and leading treatises disagree, finding that today, blogs are often viewed as conveying

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facts. *See* ROBERT D. SACK, SACK ON DEFAMATION, §4:2.4[C] (4th ed. 2010). In *Cohen v. Google, Inc.*, 887 N.Y.S.2d 424, 429 (N.Y. Sup. Ct. 2009), the court said:

> The court also rejects the Anonymous Blogger's argument that this court should find as a matter of law that Internet blogs serve as a modern day forum for conveying personal opinions, including invective and ranting, and that the statements in this action when considered in that context, cannot be reasonably understood as factual assertions. To the contrary, "In that the Internet provides a virtually unlimited, inexpensive, and almost immediate means of communications with tens, if not hundreds, of millions of people, the dangers of its misuse cannot be ignored.

Thus, the fact that the Statements were published on Internet blogs—as opposed to a traditional news medium—does not suggest that they are purely opinion.

Defendants also argue that because the Blogs offer heated debate, they should be construed as offering only opinions. (Mot. at 12:8-15.) However, the complaint does not allege that the Blogs offer heated debate. Rather, the complaint alleges that the Blogs offer a one-sided critique of Plaintiff, whereby Defendants defame Plaintiff, misappropriate Plaintiff's trade secrets, and infringe on Plaintiff's copyrighted materials. (Compl. ¶57.) Thus, Defendants' argument regarding a heated-debate finds no support in the complaint.

Because the complaint alleges that the Blogs are understood by readers as offering assertions of fact, the broad context of the Statements weighs against any finding that the Statements consist of opinions.

b. The Statements' specific context indicates that the Statements would be understood as assertions of fact.

To determine whether a defamatory statement implies a factual assertion, courts also look at the statement in its specific context, noting the content of the statement and the use of figurative or hyperbolic language. *See Rodriguez*, 314 F.3d at 986. However, the mere use of conditional language will not immunize an otherwise defamatory statement. *See id.* at 987; *Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 902 (2004).

Here, none of the Statements is couched as an opinion or contains conditional or hyperbolic language. (Compl. ¶62.) To the contrary, each of the Statements is set forth

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as a straightforward assertion of fact. Moreover, each of the Statements implies the author's knowledge of additional facts underlying the Statements and does not reference a third party source for the defamatory accusations. (Compl. ¶62.) In the absence of such conditional language and references, a reasonable juror would conclude that the Statements contain assertions of fact.

c. The Statements are susceptible of being proved true or false.

A straightforward reading of the Statements demonstrates that each is susceptible of being proved true or false. Moreover, the complaint specifically alleges that each Statement is in fact false.

- Contrary to Statements Nos. A, B, D, E, H, I, L, & M neither Plaintiff—nor its teachers or volunteers—has exploited, swindled, cheated, physically abused, threatened, or sexually abused or raped its students. (Request for Judicial Notice of Defendants Doe/Klim and Doe/Skywalker ("Defendants' RJN") at 6-8; Compl. ¶63);
- Contrary to Statements Nos. C, F, J, P & S, Plaintiff has used the proceeds from its charitable program and courses to support Plaintiff's charitable works. (Defendants' RJN at 6-8; Compl. ¶63);
- Contrary to Statement No. G & Q Plaintiff has never laundered money, engaged in fraud, or engaged in other illegal activites. (Defendants' RJN at 6-8; Compl. ¶63);
- Contrary to Statements Nos. K, N, P & R Shankar is in good health and has not obtained money from Plaintiff's members using illegitimate causes or for illegitimate purposes. (Defendants' RJN at 6-8; Compl. ¶63).

Instead of looking at the straightforward meaning of the Statements, Defendants fabricate rules of construction to show that the Statements are opinion. However, Defendants' rules are not supported by Defendants' own authority.

- Defendants' Proposed Rule: Defendants argue that statements alleging the commission of crimes are not inherently defamatory. (MTD at 18:1-20.)

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Flaws in Defendants' Analysis: Under California law, an allegation that the plaintiff is guilty of a crime is an assertion of fact that is defamatory on its face. *See Yow v. Nat'l Enquirer, Inc.*, 550 F. Supp. 2d 1179, 1183 (E.D. Cal. 2008). Defendants' case law does not support Defendants' contrary rule. *See In re Yagman*, 796 F.2d 1165 (9th Cir. 1986) (finding that forensic pathologist's statement that deceased had been killed was statement of opinion where it was expressly couched as an opinion); *Dunn v. Gannett New York Newspapers*, 833 F.2d 446, 454 (3d Cir. 1987) (finding that loose and figurative language asking mayor what happened to missing funds was statement of opinion). Here, the Statements accuse Plaintiff of specific criminal activity without any conditional language suggesting an opinion.

- Defendants' Proposed Rule: Defendants argue that accusations of financial fraud, money laundering, and deceit are opinions when they are set forth in statements about Plaintiff's financial transparency.

Flaws in Defendants' Analysis: Contrary to Defendants' argument, statements accusing a business of financial improprieties are assertions of fact that are defamatory per se. *See Kelly v. Gen. Tel. Co.*, 136 Cal. App. 3d 278, 284 (1982); *Gallagher v. Connell*, 123 Cal. App. 4th 1260, 1270 (2004). Defendants provide no authority to the contrary. Thus, Defendants' Statements that Plaintiff committed fraud, deceit, money laundering, etc. are defamatory assertions of fact.

- Defendants' Proposed Rule: Defendants argue that accusations of physical and mental abuse are protected evaluative opinions.

Flaws in Defendants' Analysis: Defendants' authority does not support this rule. First, in *Campanelli v. Regents of Univ. of California*, 44 Cal. App. 4th 572, 579 (1996), the court found that an accusation that a coach's pressure on a player was making him physically ill was a statement of opinion. However, the court did not adopt a rule regarding evaluative opinions to reach this decision. Rather, the court found that the statement was an opinion where it was based on the express opinion of the father of the player, where the statement was couched as an opinion, and where the statement was

made in a heated debate. Here, the Statements of physical and mental abuse are not couched as opinions, are not expressly based on the opinions of others, and were not made in a heated debate—but rather were published on one-sided Blogs created for the purpose of defaming Plaintiff.

Defendants' improper analogy continues with *People for the Ethical Treatment of Animals v. Bobby Berosini Ltd.*, 895 P.2d 1269, 1275 (Nev. 1995) where the court found that accusations of animal abuse were "evaluative opinions" when they were based on a disclosed video of a trainer punching and shaking animals. The court found that an evaluative opinion involves a value judgment based on undisputed and accurate information concurrently disclosed to the public—in that case in the form of a video that was shown while the allegedly defamatory comments were made. Here, the Statements of physical and mental abuse were not accompanied by any undisputed and accurate information (such as a video of the alleged abuse).

Finally, Defendants' cases regarding diagnoses by doctors do not set forth any rule regarding evaluative statements of physical or mental abuse. Rather, these cases address the good faith diagnoses by doctors. *See Nanavati v. Burdette Tomlin Mem'l Hosp.*, 857 F.2d 96 (3d Cir. 1988); *In re Yagman*, 796 F.2d 1165 (9th Cir. 1986). The courts in these cases certainly did not adopt a general rule regarding whether statements of physical and mental abuse are protected evaluative opinion. Thus, Defendants' purported rule regarding evaluative opinions is not supported by their case law and certainly does not apply to the Statements here.

In summary, because the Blogs were created to defame Plaintiff, because the Statements are not couched as opinions, and because the Statements are provably false, the Statements are not protected opinion. Thus, Defendants' motion to dismiss fails as to Plaintiff's defamation claim.

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4. Defendants' defamatory Statements are not protected religious conduct.

Defendants argue that even if the Statements are false and defamatory, they are absolutely privileged as speech urging people to avoid a religious organization. (Mot. p. 21:1-22.) Defendants' argument fails. As an initial matter, Defendants' factual predicate—that Plaintiff is a religious organization—is extrinsic evidence that cannot be considered by the Court on a motion to dismiss. Moreover, Defendants' assertion is contradicted by the complaint, which states that Plaintiff is not a religious organization, but rather a non-denominational educational and charitable organization that teaches courses in breathing, yoga, and meditation.

But even if Plaintiff were a religious organization, Defendants' argument would still fail. There is no First Amendment right to publish false and defamatory statements—regardless of whether the statements are about a religious organization. *See Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1089 (9th Cir. 2002). Thus, California courts have found statements about religious organizations to be defamatory and unprivileged. *See Flynn*, 744 F.2d 644, at *passim* (9th Cir. 1984) (finding that statements about religious organization implied defamatory meaning); *Conley v. Roman Catholic Archbishop of San Francisco*, 85 Cal. App. 4th 1126, 1130 (2000) (finding that church was amenable to rules governing torts, such as defamation; exception only related to church administration and employment based on theological reasons); *McNair v. Worldwide Church of God*, 197 Cal. App. 3d 363, 378 (1987) (same).

Defendants' authority carves out two limited exceptions that do not apply here. First, *Higgins v. Maher*, 210 Cal. App. 3d 1168, 1170 (1989) involves the ministerial exception to defamation. The ministerial exception precludes liability for otherwise actionable defamation claims when they are based on statements regarding a church's governance of ecclesiastical matters, such as theological controversy, church discipline, or church government. The ministerial exception simply does not apply to the Statements here where they were not made by a religious organization in the

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governance of ecclesiastical matters. Rather, as the complaint alleges, the Statements were made by former students of Plaintiff for the specific purpose of defaming Plaintiff.

Defendants' remaining authority deals with the limited exception of "shunning," where as part of a church's theology, the church instruct members to shun former members. Courts have found that a church's practice of shunning constitutes religious conduct protected by the First Amendment, and that any tort liability deriving from the shunning would constitute a direct burden on religion. *See Paul v. Watchtower Bible & Tract Soc. of New York, Inc.,* 819 F.2d 875, 880 (9th Cir. 1987); *Sands v. Living Word Fellowship*, 34 P.3d 955, 959 (Alaska 2001). Here, the Statements are not part of the Defendants' religious conduct—nor are Defendants an organized church or religion. Rather, as the complaint alleges, Defendants are disgruntled former students of Plaintiff who created the Blogs for the purpose of defaming Plaintiff. The Defendants did not urge others to shun Plaintiff as part of Defendants' religious ideology; rather Defendants published false statements about Defendants out of spite, malice, and profiteering. Under no construction of Defendants' Statements would they be covered by the ministerial exception or the religious conduct ("shunning") exception.

Finally, Defendants' supposed privilege makes no sense: it would immunize from liability any statement about religion or a religious organization, regardless of how false or defamatory. Such a privilege has been rejected by California courts. Thus, even if Plaintiff were a religious organization—and it is not—Plaintiff has alleged that Defendants made unprivileged defamatory Statements.

5. While Plaintiff need not prove malice, it has alleged that Defendants made the Statements with malice.

To state a claim for defamation, a public-figure plaintiff must allege actual malice, *i.e.* that the defendant acted intentionally or entertained serious doubts as to the truth of the statements. *See Christian Research Inst. v. Alnor*, 148 Cal. App. 4th 71, 81 (2007). However, a private-figure plaintiff need only allege that the defendant was negligent in making the defamatory statement. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342,

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345-46 (1974). Contrary to Defendants' unsupported argument, Plaintiff is not a public-figure. But even if Plaintiff were a public-figure, it has alleged Defendants' actual malice.

a. Plaintiff is not a public figure where it has a limited media presence and has not thrust itself into Defendants' controversy.

There are two types of public-figures who are required to plead and prove actual malice in a defamation action: an all-purpose public-figure and a limited-purpose public-figure. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974). An all-purpose public-figure is a person that has achieved such pervasive fame or notoriety that it reasonable to treat that person as a public-figure for all purposes. *See id.* By comparison, a limited-purpose public-figure is a person that voluntarily injects itself into a particular public controversy and thereby becomes a public-figure as to issues raised by the controversy. *See id*.

The same public-figure/private-figure analysis applies to corporations as to individuals. *See Vegod Corp. v. American Broadcasting Companies*, *Inc.*, 25 Cal. 3d 763, 769-71 (1975). Unless a corporation has enjoyed pervasive fame or has purposefully interjected itself into a public controversy, it should be treated as a private-figure. *Id.* Pervasive fame exists where a corporation has acquired substantial media access, particularly as to the controversy at issue. See *id.* at 767. However, the fact that a corporation has advertised in various media will not transform a corporation into a public-figure. *See Melaleuca, Inc. v. Clark*, 66 Cal. App. 4th 1344, 1362 (1998); *Rancho La Costa, Inc. v. Superior Court*, 106 Cal. App. 3d 646, 660 (1980).

As an initial matter, the complaint does not refer to Plaintiff as a public figure. *See Weingarten v. Block*, 102 Cal. App. 3d 129, 134 (1980) (noting that complaint referred to plaintiff as "public official"). And while Plaintiff's services have been praised in several articles in the national and international press, the complaint does not allege that Plaintiff enjoys significant media access. In fact, Plaintiff does not enjoy such media access. Nor does the compliant allege that Plaintiff has found an appropriate forum to respond to the Statements. Nor does the complaint allege that Plaintiff has interjected itself into the

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controversies raised by the Blogs in any way. Rather, the complaint alleges that the Blogs are a one-sided tool used by Defendants to defame Plaintiff. Because Plaintiff only has limited media access, and because Plaintiff has not used the media to respond to the Blog's Statements, Plaintiff cannot be considered an all-purpose public-figure or a limited-purpose public figure. Thus, Plaintiff need not allege Defendants' malice.

b. The complaint alleges that Defendants made the Statements with malice.

Even if the Court treats Plaintiff as a public-figure, the complaint alleges that Defendants acted with actual malice in publishing the Statements. To allege actual malice, a complaint must include allegations that the defendant knew its defamatory statement was false or entertained serious doubts as to its truth. *See Christian Research Inst. v. Alnor*, 148 Cal. App. 4th 71, 84 (2007).

Here the complaint contains several allegations describing Defendants' actual malice. The complaint alleges: a) that the Defendants are disgruntled students of Plaintiff, b) that Defendants have perpetrated an attack-campaign against Plaintiff by publishing false, defamatory, and completely fabricated Statements containing the most scurrilous allegations, c) that Defendants created Blogs for the purpose of publishing these false and defamatory Statements, d) that Defendants published the Statements for the overt purpose of destroying the reputation of Plaintiff, and e) through the operation of the Blogs, Defendants intentionally disparaged Plaintiff, Plaintiff's teachings, and Plaintiff's services. (Compl. ¶109.)

Notwithstanding these allegations, Defendants argue that the complaint does not allege actual malice—presumably because the term "malice" does not appear in the complaint. This argument fails. General allegations of malice satisfy federal pleading standards. *See Flowers v. Carville*, 310 F.3d 1118, 1131 (9th Cir. 2002). Moreover, allegations that a defamatory statement was motivated by hatred or ill will toward the plaintiff sufficiently allege actual malice. *See Kelly v. Gen. Tel. Co.*, 136 Cal. App. 3d 278, 285 (1982). The complaint contains precisely such allegations.

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Finally, if the complaint's allegations of actual malice are somehow deficient—and they are not—Plaintiff is prepared to amend its complaint to include additional allegations of malice. Even when an anti-SLAPP motion is pending, courts should allow a plaintiff to amend its complaint to add allegations of actual malice. *See Nguyen-Lam v. Cao*, 171 Cal. App. 4th 858, 873 (2009). Because Plaintiff has demonstrated that Defendants made false, defamatory, and unprivileged Statements about Plaintiff, Plaintiff is entitled to amend its complaint if the Court finds its allegations of malice are somehow deficient.

In summary, because Plaintiff has alleged a valid claim for defamation—including allegations of falsity and malice—Defendants' motion to dismiss must be denied.

C. Plaintiff has alleged a claim for trade libel.

To succeed on a claim for trade libel, a plaintiff must allege: 1) an intentional disparagement of the quality of the plaintiff's services, 2) which induces others not to deal with the plaintiff, and 3) which causes the plaintiff special damages. *See Aetna Cas. & Sur. Co., Inc. v. Centennial Ins. Co.*, 838 F.2d 346, 351 (9th Cir. 1988); *ComputerXpress, Inc. v. Jackson*, 93 Cal. App. 4th 993, 1010 (2001). Plaintiff has alleged these elements.

First, the complaint alleges that the Statements disparage Plaintiff's services—namely Plaintiff's classes and teachers—accusing Plaintiff of physical and sexual abuse and financial misconduct. (Compl. ¶62.) Moreover, the complaint alleges that these Statements are false. (Compl. ¶63.) Second, the complaint alleges that the Statements have induced others not to deal with Plaintiff. (Compl. ¶65.) To wit, the complaint alleges that Plaintiff has received multiple inquiries from existing and prospective students asking about the Statements on the Blogs. (Compl. ¶66.) These people have expressed concern that the Statements are true, and that Plaintiff is a corrupt organization that puts its students at risk. (Compl. ¶66.) Finally, the complaint alleges that Plaintiff has suffered special damages as a result of the Statements. (Compl. ¶¶73-74.)

Defendants argue that Plaintiff's trade libel claim is just a re-characterization of Plaintiff's defamation claim, and should be stricken for the same reason. (Mot. p. 21:6-

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10). However, as discussed above, Plaintiff has adequately pled its defamation claim and has not skirted the requirements of the First Amendment. Thus, Defendants' argument is moot, as Plaintiff has stated a valid claim for both trade libel and defamation.

D. Defendants have not moved to dismiss Plaintiff's misappropriation of trade secrets claim or copyright claim.

Defendants have not moved to dismiss Plaintiff's claims for misappropriation of trade secrets or copyright infringement. Thus, these claims survive Defendants' motion.

CONCLUSION

For all of the reasons set forth above, the Court should deny Defendants' motion to dismiss.

DATED: March 17, 2011

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