IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
CIVIL ACTION NO. 7:14-cv-00214-FL

ANTHONY NOBLES,

Plaintiff,

v.

RODERICK BOYD, an Individual; KEITH LARSEN, an Individual; and SOUTHERN INVESTIGATIVE REPORTING FOUNDATION, a North Carolina Corporation,

Defendants.

CONSOLIDATED MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND MOTION TO STRIKE

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Plaintiff Anthony Nobles seeks to silence Defendants Roderick Boyd, Keith Larsen, and the Southern Investigative Reporting Foundation ("SIRF"), investigative business journalists who have published a well-reported and meticulously sourced article about Plaintiff, an inventor and businessman who has been in the public eye for more than 20 years. However, as demonstrated below, the Complaint fails as a matter of law. It is replete with conclusory allegations, and it suffers from substantial legal deficiencies. Given these deficiencies, dismissal is warranted not only for failure to state a claim, but also under California's anti-SLAPP statute, which is designed to safeguard the right to engage in free speech on matters of public concern by weeding out at the initial pleadings stage just the sort of action Plaintiff has brought here.

Plaintiff further ignores Defendants' First Amendment rights by requesting an injunction that would not only censor protected speech that has already been published but would also act as a prior restraint on future speech. In support of his motion, Plaintiff relies on allegations of harms that have already occurred or on speculative musings about purported harms that might occur. Plaintiff has failed to meet his burden of proof in establishing his entitlement to the "extraordinary" relief of a preliminary injunction in a case implicating constitutional rights.

STATEMENT OF THE NATURE OF THE CASE

Plaintiff, who resides in California, filed this action on October 1, 2014. He asserts four claims against Defendants: (1) defamation; (2) libel *per se*; (3) libel *per quod*; and (4) "unfair business practices." More than a month later, Plaintiff filed what he styled as an "emergency" motion for a temporary restraining order and preliminary injunction (DE 23) seeking to remove the article at issue from SIRF's website, remove Defendants' Twitter postings relating to the article, and enjoin Defendants from making any future statements "in any form or format . . . that are or reference" the statements Plaintiff takes issue with from the article. (DE 23 at 2.)

In lieu of an answer, Defendants timely filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) and a special Motion to Strike under the California anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16.

ALLEGATIONS OF THE COMPLAINT

Plaintiff is a high-profile "medical device inventor, developer and entrepreneur" with deep ties to California, where he lives, and an international "reputation in the medical device industry." (Compl. ¶ 1.) Indeed, Plaintiff "has been a renowned contributor to the advancement of the practice of medicine for more than 25 years." (Compl. ¶ 1.) As set forth in the Complaint, Plaintiff "has founded more than 28 companies," is currently "the CEO of seven companies," and "has developed more than 155 medical devices," which "have improved the quality of lives of thousands of people all over the world for more than 20 years." (Compl. ¶¶ 9-10, 12.)

The Complaint also details a lengthy list of Plaintiff's "opportunities to lecture" at various universities around the world (four of which are located in Southern California) and his other scholarly publications. (Compl. ¶¶ 14-16.) In addition to his high-profile work in the medical device industry, Plaintiff touts his close ties to his California community and his "contributions to the youth of his community" in Southern California. (Compl. ¶¶ 17, 21-22.)

SIRF is a North Carolina entity engaged in the business of publishing investigative journalism. (Compl. ¶ 4.) SIRF was founded by Mr. Boyd, who is its primary reporter and a resident of Wilmington. (Compl. ¶ 3.) Mr. Larsen was a SIRF intern who shared a byline with Mr. Boyd on the story at issue in this lawsuit. (Compl. ¶ 3.)

On or about September 16, 2014, SIRF published on its website a story (the "Article") entitled "The Invention of Professor Dr. Anthony Nobles." (Compl. ¶ 24.) The Article is attached as Exhibit A to the Complaint, and it shows hyperlinks to more than 50 documents

Defendants relied upon in their reporting (the "Source Documents").[1] The Source Documents consist of declarations and court filings from other litigation involving Plaintiff, news stories, documents from Plaintiff's own website, Securities and Exchange Commission documents, and even copies of e-mail exchanges between Plaintiff and Mr. Boyd prior to publication.

The Article begins with an examination of Plaintiff's academic credentials. Plaintiff calls himself "Professor Dr. Nobles," but, according to Defendants' reporting, his diplomas were received from two schools that were wrapped up in a fraud investigation for selling fake diplomas. (Compl. Ex. A at 4.[2]) The Article linked to copies of Plaintiff's purported diplomas, as well as a signed declaration from an expert that called into question the validity of the diplomas. (Compl. Ex. A at 4.) The Article then pointed out the undisputed fact that in the early 1990s, Plaintiff admitted to falsifying his academic credentials. (Compl. Ex. A at 5.)

The most remarkable portion of the Article—which Plaintiff does not allege is false—is the quote from someone who knew Plaintiff in the early 1990s claiming that Plaintiff tried to explain the discrepancies in his academic records by asserting that the CIA had "purged all of his academic records . . . during his tenure as a physician 'working on aliens' at a secret facility in Roswell, New Mexico." (Compl. Ex. A at 5-6.) Plaintiff does not take issue with this portion of the Article.

The Article concludes with an examination of how investors in Plaintiff's companies have fared over the years. The Article links to a series of SEC filings, news stories, and court filings in litigation filed by unhappy investors. (Compl. Ex. A at 8-10.)

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[1] Relevant Source Documents were attached as Exhibits 1-22 to Defendants' Notice of Filing. (DE 59.)

[2] Cited page numbers from the Article refer to the page numbers contained on the face of the Article itself, not the CM/ECF page numbers.

Plaintiff identifies 12 statements from the Article that he alleges are false and defamatory.[3] (Compl. ¶ 26(1)-(12), the "Contested Statements".) Plaintiff complains that, despite a long series of e-mail communications between Mr. Boyd and Plaintiff prior to publication, Defendants "went forward with publishing the article without verifying any of its facts with Prof. Nobles." (Compl. ¶¶ 27-35.) Plaintiff admits that Mr. Boyd detailed for him the substance of the Article, including some of its most powerful allegations. (Compl. ¶¶ 30-32.) Notably, despite more than a week of communication prior to publication, Plaintiff *never alleges* that he told Defendants that any fact or any claim in the story was false. While Plaintiff complains that he was denied an opportunity "to address these allegations before publishing the article," he never took issue with a specific fact or allegation, despite having ample opportunity to do so. (Compl. ¶ 35.)

ARGUMENT

I. THE COMPLAINT SHOULD BE DISMISSED UNDER FED. R. CIV. P. 12(b)(6)

A. Legal standard under Rule 12(b)(6)

As the Supreme Court has made clear, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 678-79 (citation omitted); *see Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 377 (4th Cir. 2012) ("A 'formulaic recitation of the elements of a cause of action will not do.'" (quoting *Twombly*, 550 U.S. at 555)).

[3] In the Motion, however, Plaintiff focuses on just nine statements (DE 24 at 7-8), one of which is not cited in the Complaint. (DE 24 at 20.)

"Nor does a complaint suffice it if tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). To satisfy the "facial plausibility" standard and survive a Rule 12(b)(6) motion, a plaintiff must do more than simply plead facts that hint at the "sheer possibility that a defendant has acted unlawfully." *Id.*

B. California law applies to the substance of Plaintiff's claims

While federal law applies to the procedural aspects of Defendants' Rule 12(b)(6) motion, California law governs the substance of plaintiff's claims. A federal court hearing state-law claims pursuant to its diversity jurisdiction "must apply the choice of law rules of the state in which it sits." *Res. Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631, 635 (4th Cir. 2005) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941)). Plaintiff here asserts jurisdiction under 28 U.S.C. § 1332. (Compl. ¶ 6.) Accordingly, this Court must apply North Carolina choice-of-law rules to determine which state's law governs.

North Carolina courts apply the *lex loci delicti* (or "the place of the wrong") choice of law test to tort claims. *See Eagle Nation, Inc. v. Market Force, Inc.*, 180 F. Supp. 2d 752, 755 (E.D.N.C. 2001) ("North Carolina courts adhere to the rule of *lex loci* and apply the substantive laws of the state in which the injuries were sustained.") (citing *Charnock v. Taylor*, 223 N.C. 360, 361, 26 S.E.2d 911, 913 (1943)). Under the *lex loci* rule in defamation cases, the place of injury is the state of the plaintiff's residence because that is where any injury to reputation or standing in the community will be felt. *See, e.g., Kamelgard v. Macura*, 585 F.3d 334, 341-42 (7th Cir. 2009) ("When the defamatory statement is communicated in many different states, it makes sense to apply the law of the plaintiff's domicile, and that is the usual result . . . . That is where the principal injury from a defamation will occur because it is where the victim works and lives and where . . . most of the people . . . are found with whom he has personal or commercial

transactions, which might be impaired by defamation.") (citations omitted); *Fuqua Homes, Inc. v. Beattie*, 388 F.3d 618, 622 (8th Cir. 2004) (holding that when there is multistate publication, "the state where the defamed party has its principal place of business will usually be the state in which its reputation is most grievously affected").

Defendants are not aware of any case in which a North Carolina appellate court has applied the *lex loci* rule to a defamation claim, let alone one, as here, involving multistate publication. However, in a multistate defamation case similar to this one—in which plaintiffs were affiliated with a private psychiatric hospital in Texas and defendant was a resident of North Carolina who published purportedly defamatory statements on two Internet blogs—another court in this district "adher[ed] to the *lex loci delicti* rule" and applied Texas law. *Ascend Health Corp. v. Wells*, No. 4:12-CV-00083-BR, 2013 U.S. Dist. LEXIS 35237, at *6-7 (E.D.N.C. Mar. 14, 2013). The court applied Texas law because the "alleged injury to plaintiffs, in the form of reputational and financial harm, [was] centered in Texas," as that was the state where [two of the four] plaintiffs [the hospital and its medical director] were located, and the allegedly defamatory remarks concern[ed]" the hospital and its medical director, as well as the hospital's parent company and that company's CEO. *Id.* at *7. "Simply put, Texas is the location where plaintiffs sustained their harm, and its law will apply to plaintiffs' tort claims." *Id.*

Under "*lex loci*," California substantive law controls in this action. That is where Plaintiff lives and where he claims to have an "excellent reputation . . . in his community." (Compl. ¶ 1.) It is also where he works and leads the seven companies of which he is CEO. (Compl. ¶ 12.) Plaintiff contends that Defendants' purportedly defamatory statements "have caused, and are continuing to cause irreparable damage to Plaintiff's reputation and are

impinging on his ability to conduct business as a medical device developer and inventor." (Compl. at p. 1.)

C. Plaintiff has failed to state a claim under California law

Plaintiff has failed to state any defamation claim under California law that is plausible on its face. As a threshold matter, all three defamation claims fail as a matter of law because Plaintiff, a public figure, has not sufficiently pleaded actual malice—the level of fault required by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny.

In addition, Plaintiff's defamation claims fail as a matter of law because the Contested Statements all suffer from one or more of the following flaws: (1) the statements are not defamatory; (2) the statements are non-actionable opinion; (3) the statements are not of and concerning Plaintiff; and/or (4) the statements are privileged as "a fair and true report in . . . a public journal, of a judicial . . . proceeding" pursuant to California Civil Code § 47(d)(1). For these reasons, Plaintiff's defamation, libel *per se* and libel *per quod* claims must be dismissed.

To prevail on a defamation claim, a plaintiff must allege and prove (1) the intentional publication of (2) a statement of fact that (3) is false, (4) defamatory, and (5) unprivileged, and that (6) has a natural tendency to injure or which causes special damage. *See, e.g., Harkonen v. Fleming*, 880 F. Supp. 2d 1071, 1078-79 (N.D. Cal. 2012) (citation omitted). "Further, the First Amendment requires that a defamation claim be based on a statement 'of and concerning' the plaintiff." *Harkonen*, 880 F. Supp. 2d at 1079 (citing *Blatty v. New York Times*, 728 P.2d 1177 (Cal. 1986)).

"[I]f plaintiff is found to be a limited purpose public figure, plaintiff 'must establish a probability that he or she can produce clear and convincing evidence that allegedly defamatory statements were made with knowledge of their falsity or with reckless disregard of their truth or

falsity.'" *Id.* at 1078-79 (quoting *Overstock.com, Inc. v. Gradient Analytics, Inc.*, 151 Cal. App. 4th 688, 700 (Cal. Ct. App. 2007) (citing *New York Times*, 376 U.S. at 279-80)).[4]

Libel *per se* is defined under California law as a "libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo, or other extrinsic fact . . . ." Cal. Civ. Code § 45a.

Libel *per quod* (i.e., where the publication is "not libelous on its face," Cal. Civ. Code § 45a) requires that the plaintiff specifically "allege[] and prove[] that he has suffered special damage as a proximate result" of the purportedly defamatory statements. Cal. Civ. Code § 45a. And, under California law, special damages arising from libel *per quod* (as defined in Cal. Civ. Code § 48a(4)(b)) must be pled with specificity. *See, e.g., Smith v. Los Angeles Bookbinders Union*, 284 P.2d 194 (Cal. Ct. App. 1955), *overruled on other grounds, MacLeod v. Tribune Publ'g Co*. (1959) 343 P.2d 36 (Cal. 1959).[5] Plaintiff has wholly failed to allege any special damages, and this claim should be dismissed on that basis alone.

1. Plaintiff is a public figure

Even setting aside the fact that Plaintiff (a) concedes he is a public figure (DE 24 at 15 n.3), and (b) attaches to his motion a court order from a California state court holding that Plaintiff was a public figure (DE 25-1, van Loben Sels Decl. Ex. E at 11-12), the allegations of the Complaint alone, including the Article, make it clear that Plaintiff is, at the very least, a

[4] Under North Carolina law, if a plaintiff is a public figure or a limited purpose public figure, he must prove by clear and convincing evidence that the defendant acted with actual malice—knowledge of falsity of the contested statements or reckless disregard for the statements' truth or falsity. *See, e.g., Gaunt v. Pittaway*, 139 N.C. App. 778, 785-86, 534 S.E.2d 660, 664-65 (2000).

[5] Under North Carolina law, a claim of libel *per quod* fails if plaintiff does not allege that he suffered special damages as a result of the contested statements. *See, e.g., Renwick v. News & Observer Publ'g Co.*, 310 N.C. 312, 317, 312 S.E.2d 405, 408 (1984).

limited-purpose public figure, and he may be an all-purpose public figure. "[W]hether a plaintiff in a defamation action is a public figure is a question of law for the trial court." *Harkonen*, 880 F. Supp. 2d at 1080 (quoting *Khawar v. Globe Int'l, Inc.*, 965 P.2d 696 (Cal. 1998)).

A limited-purpose public figure is someone who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 351 (1974); *see also Harkonen*, 880 F. Supp. 2d at 1080 (quoting *Ampex Corp. v. Cargle*, 128 Cal. App. 4th 1569, 1577 (Cal. Ct. App. 2005)).

Under California law, to establish that the plaintiff is a limited-purpose public figure, a defendant must establish the following:

> First, there must be a public controversy, which means the issue was debated publicly and had foreseeable and substantial ramifications for nonparticipants. Second, the plaintiff must have undertaken some voluntary act through which he or she sought to influence resolution of the public issue. In this regard it is sufficient that the plaintiff attempts to thrust him or herself into the public eye. And finally, the alleged defamation must be germane to the plaintiff's participation in the controversy.

Harkonen, 880 F. Supp. 2d at 1080 (quoting *Ampex Corp.*, 128 Cal. App. at 1577).[6]

A "public controversy" is any issue in which "the subject of the statement or activity underlying the claim (1) was a person or entity in the public eye; (2) could affect large numbers of people beyond the direct participants; or (3) involved a topic of widespread, public interest." *Id.* (quoting *D.C. v. R.R.*, 182 Cal. App. 4th 1190, 1226 (Cal. Ct. App. 2010)).

In this case, the Article discusses (a) substantial questions about the academic credentials and medical training of a well-known, high-profile CEO and medical device inventor; and (b) concerns raised in litigation by investors in Plaintiff's companies. The fact that questions were

[6] The test is similar in the Fourth Circuit. *See Wells v. Liddy*, 186 F.3d 505, 534 (4th Cir. 1999).

raised about Plaintiff's academic credentials and medical training—and his truthfulness about those issues—dating back to the early 1990s and continuing to the present is, of course, a matter of great concern for the people who have invested in Plaintiff's companies and for the "thousands of people" (i.e., patients) who have used Plaintiff's medical inventions.

As to the second element, Plaintiff has clearly attempted to "thrust himself into the public eye," as his own Complaint makes clear. Plaintiff describes himself as a "renowned contributor to the advancement of the practice of medicine for more than 25 years," who has "founded more than 28 companies and has developed more than 155 medical devices." (Compl. ¶¶ 1, 9.) According to the Complaint, Plaintiff's work has "saved and/or improved the quality of lives of thousands of people all over the world for more than 20 years." (Compl. ¶ 10.) Plaintiff goes on to tout the prominent role he plays in his community, a role which has garnered Plaintiff substantial media attention, (Compl. ¶¶ 17, 21, 22), the many universities and hospitals at which he has lectured, and the many journals in which he has published his work, (Compl. ¶¶ 13-16).

The Article further establishes that Plaintiff is a public figure. The Article notes, for example, that Plaintiff serves on the Sunset Beach town council (Compl. Ex. A at 2), which on its own supports holding Plaintiff is a public figure. *See Planned Protective Servs. v. Gorton*, 200 Cal. App. 3d 1, 8-9 (Cal. Ct. App. 1988) (holding that city council candidate was public figure), *disapproved on other grounds*, *Martin v. Szeto*, 84 P.3d 374, 377 (Cal. 2004). The Article also describes Plaintiff's high-profile life, including his Halloween display that attracted some 30,000 visitors, his Ferrari collection, and his donation to help rebuild the local community center. Most importantly, the Article details more than twenty years of questions from the media and other third parties about Plaintiff's academic credentials and his business practices.

By voluntarily taking on the public role of founding and running his companies and developing "more than 155 medical devices," Plaintiff has brought his academic credentials, medical training, and business practices into the public eye. Indeed, those very issues have been in the public eye since the early 1990s, when Plaintiff was first confronted with questions about his academic credentials. (Compl. Ex. A at 4-6.)

Finally, the Contested Statements (and the Article as a whole) are clearly "germane" to Plaintiff's voluntary participation in the highly public world of running companies, inventing medical devices, and lecturing and publishing around the world.

In a case with similar facts as to the status of the plaintiff, the court in *Harkonen* held that the plaintiff—a doctor and CEO of a biotechnology company—was a limited-purpose public figure because, among other things, his company had conducted the clinical trials and issued the press release that was at issue in the underlying statements. 880 F. Supp. 2d at 1075, 1080-81. *See also Gilbert v. Sykes*, 147 Cal. App. 4th 13, 23-25 (Cal. Ct. App. 2007) (holding that plaintiff, who was "a widely known plastic surgeon, practicing at a prestigious medical institution, who has written numerous articles on plastic surgery, appeared on local television shows on the subject and advertised in the Sacramento media market," was "an archetypical example of a 'limited purpose' or 'vortex' public figure"). The same is true here.

2. Plaintiff fails to sufficiently plead actual malice under *Iqbal*/*Twombly*

Federal courts across the country, including the Fourth Circuit, have interpreted the heightened *Iqbal*/*Twombly* pleading standard to require a public figure defamation plaintiff to allege sufficient facts to establish a "plausible" claim of "actual malice." *See, e.g.*, *Mayfield*, 674 F.3d at 377 (dismissing complaint, rejecting the argument "that allegations of malice need only be articulated in the most general terms," and holding that "malice must . . . be alleged in

accordance with Rule 8—a 'plausible' claim for relief must be articulated"); *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 57-58 (1st Cir. 2012) (explaining that under *Twombly* and *Iqbal*, "to make out a plausible malice claim, a plaintiff must still lay out enough facts from which malice might reasonably be inferred" and finding no actual malice); *Khon Som v. JP Morgan Chase Bank, N.A.*, No. 2:09-CV-02405-JAM-DAD, 2010 U.S. Dist. LEXIS 31097, at *19 (E.D. Cal. Mar. 30, 2010) ("Noticeably absent are any facts identifying . . . whether Defendants acted with actual malice.").

As one district court held:

> Not only is proving actual malice a heavy burden, but, in the era of *Iqbal* and *Twombly*, pleading actual malice is a more onerous task as well. . . .
>
> *Iqbal* itself squarely holds that, where a particular state of mind is a necessary element of a claim, defendant's pleading of that state of mind must be plausible and supported by factual allegations. . . . Moreover, given the difficulty of proving actual malice, as well as the fact that actual malice must be proven by clear and convincing evidence in order for a plaintiff to succeed, it stands to reason that Rule 12(b)(6) should play a particularly important role in testing the plausibility of a plaintiff's defamation claim. Indeed, *Iqbal* has a "particular value" in this context, as forcing defamation defendants to incur unnecessary costs can chill the exercise of constitutionally protected freedoms. In other words, in defamation cases, Rule 12(b)(6) not only protects against the costs of meritless litigation, but provides assurance to those exercising their First Amendment rights that doing so will not needlessly become prohibitively expensive.

Biro v. Condé Nast, 963 F. Supp. 2d 255, 278-79 (S.D.N.Y. 2013) (internal quotations and punctuation omitted).

In this case, Plaintiff relies entirely on boilerplate allegations of actual malice, failing to plead a single fact that would plausibly establish "clear and convincing evidence" that Defendants knew any fact in the Article was false, or recklessly disregarded whether any fact

was true or false. (*See* Compl. ¶¶ 25, 64, 65, 84, 85, 102, 103.)[7] Indeed, the Complaint contains numerous allegations about communications between Mr. Boyd and Plaintiff prior to publication of the Article, (Compl. ¶¶ 27-35), and copies of those communications were hyperlinked in the Article itself. Plaintiff admits that he had substantial detail on the substance of the Article, and admits he had at least eight days to communicate with Mr. Boyd about the Article prior to publication, and yet, there is not a single allegation in the Complaint that Plaintiff ever told Mr. Boyd that anything Defendants were planning to publish was false.

At most, Plaintiff alleges that Defendants "rushed to publish the Article" (Compl. at p. 8), or were "driven by a desire to disparage Plaintiff, (Compl. ¶ 69), neither of which supports a claim of actual malice. "Media defendants are liable for calculated falsehoods, not for their failure to achieve some undefined level of objectivity. Slanted reporting . . . does not by itself constitute malice." *See Paterno v. Superior Court of Orange Cnty.*, 163 Cal. App. 4th 1342, 1351 (Cal. Ct. App. 2008) (quotation and citation omitted).

> [T]he actual malice standard is not measured by what an objectively reasonable reporter would have written. "Fair and objective reporting may be a worthy ideal, but there is also room, within the protection of the First Amendment, for writing which seeks to expose wrongdoing and arouse righteous anger; clearly such writing is typically less than objective in its presentation."

Id. at 1353 (quoting *Reader's Digest Ass'n v. Superior Court*, 690 P.2d 610, 620 (Cal. 1984)). *See also Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 657, 688 (1989) ("[F]ailure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard."); *Masson v. New Yorker Magazine, Inc.*, 960 F.2d 896, 901 (9th Cir. 1992) ("[A] publisher who does not already have 'obvious reasons to doubt' the

[7] It should be noted that the Complaint is particularly devoid of any allegation that Mr. Larsen had any knowledge of falsity.

accuracy of a story is not required to initiate an investigation that might plant such doubt."); *Newton v. Nat'l Broad. Co., Inc.*, 930 F.2d 662, 686 (9th Cir. 1990) (finding no actual malice where reporter "tried at least twice to interview [plaintiff]"); *Dworkin v. Hustler Magazine, Inc*., 867 F.2d 1188, 1195 (9th Cir. 1989) ("The Supreme Court has explicitly held that when a plaintiff must prove *New York Times* malice, 'impos[ing] liability on the basis of the defendant's hatred, spite, ill will, or desire to injure [is] clearly impermissible. Ill will toward the plaintiff, or bad motives, are not elements of the *New York Times* standard.'") (quoting *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 281 (1974)); *Davis v. Costa-Gravas*, 654 F. Supp. 653, 657 (S.D.N.Y. 1987) (explaining that "plaintiff cannot prove actual malice merely by asserting that a publisher failed to contact the subject of his work").

Thus, Plaintiff's Complaint is no different than the complaint in *Mayfield*, in which the Fourth Circuit affirmed Rule 12(b)(6) dismissal of a complaint, holding that

> Appellants' assertion that Appellees' statements "were known by [them] to be false at the time they were made, were malicious or were made with reckless disregard as to their veracity" is entirely insufficient. This kind of conclusory allegation—a mere recitation of the legal standard—is precisely the sort of allegations that *Twombly* and *Iqbal* rejected. The Appellants go on to point to their allegations that the Appellees intended to harm Mayfield by publishing his drug test results and that Aegis failed to follow SAMHSA testing procedures. But these allegations simply do not suggest that Appellees knew their statements were false or that they were reckless with respect to their veracity.

Mayfield, 674 F.3d at 378.

The Fourth Circuit's holding in *Mayfield* applies with equal force to this case.

3. Contested Statements 1-12 are not defamatory

By statute, California defines "libel" as a "false and unprivileged publication by writing . . . which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to

be shunned or avoided, or which has a tendency to injure him in his occupation." Cal. Civ. Code § 45. Under California law, "[t]he question whether a statement is reasonably susceptible to a defamatory interpretation is a question of law for the trial court." *Smith v. Maldonado*, 72 Cal. App. 4th 637, 647 (Cal. Ct. App. 1999).

> In determining whether a publication has a defamatory meaning, the courts apply a totality of the circumstances test to review the meaning of the language in context and whether it is susceptible of a meaning alleged by the plaintiff. A defamatory meaning must be found, if at all, in a reading of the publication as a whole. . . . Defamation actions cannot be based on snippets taken out of context. . . . The defamatory character of language is measured according to the sense and meaning which such language may fairly be presumed to have conveyed to those to whom it was published. In determining whether statements are of a defamatory nature, and therefore actionable, a court is to place itself in the situation of the hearer or reader, and determine the sense or meaning of the language of the complaint for libelous publication according to its natural and popular construction.

Balzaga v. Fox News Network, LLC, 173 Cal. App. 4th 1325, 1337-38 (Cal. Ct. App. 2009) (citations, quotations, and internal punctuation omitted).[8]

"[T]he fact that some person might, with extra sensitive perception, understand [a defamatory] meaning cannot compel [the] court to establish liability at so low a threshold. Rather, the test . . . is whether by reasonable implication a defamatory meaning may be found in the communication." *Forsher v. Bugliosi*, 608 P.2d 716, 723 (Cal. 1980).

None of the Contested Statements can reasonably be read as being defamatory. For example, and without limitation:

[8] Under North Carolina law, a statement is libelous *per se* if it (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person's trade or profession; or (4) otherwise tends to subject one to ridicule, contempt, or disgrace. *See, e.g.*, *Renwick*, 310 N.C. at 317, 312 S.E.2d at 408-09. Courts should read contested statements in their full context in order to determine whether they are defamatory. *Id.* at 318, 312 S.E.2d at 409.

- "Note also the 16-year hiatus in conference attendance and research presentations." (Compl. ¶26(4).) Notwithstanding the fact that Plaintiff's own resume showed a 16-year hiatus in presentations (Compl. Ex. A at 7), it is not defamatory to state that someone has not given an academic presentation in a number of years.

- "In December of 2008 Sutura effectively wound down operations with Nobles buying (back) all Sutura's non-cash assets and $3 million in cash for $6.75 million." (Compl. ¶ 26(6).) Even if false, this statement does not accuse Plaintiff of a crime, nor does it injure him in his occupation. *See also* Compl. ¶¶ 26(7)-(10).

- "SIRF reached out to Anthony Nobles four times via phone . . . but no calls were returned. . . . SIRF did not ultimately secure an interview." (Compl. ¶ 26(12).) No reasonable person could interpret this statement as exposing Plaintiff to "hatred, contempt, ridicule, or obloquy," nor does such a statement tend to injure Plaintiff in his occupation.

While certain of the Contested Statements might present a closer question than others, all of the Contested Statements (Compl. ¶¶ 26(1)-(12)) nonetheless ultimately suffer from the same legal flaw—when viewed in context and as part of the entire Article, they are not reasonably susceptible of being considered defamatory. *See e.g.*, *Troy Group, Inc. v. Tilson*, 364 F. Supp. 2d 1149, 1156-57 (C.D. Cal. 2005) (holding that it was not defamatory for an investor to call investment fund managers "crooks"). *See generally Chapin v. Knight-Ridder*, *Inc.*, 992 F.2d 1087 (4th Cir. 1992) (affirming dismissal of defamation claim and examining each statement to assess whether it was actionable).

4. Contested Statements 1-3 and 11 are non-actionable opinions and not capable of being proven true or false

"Whether a statement is an assertion of fact or opinion is a question of law for the court." *Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1101 (N.D. Cal. 1999) (citations omitted). "Pure opinions—'those that do not imply facts capable of being proved true or false'—are protected by the First Amendment. *Id.* (quoting *Partington v. Bugliosi*, 56 F.3d 1147, 1153 n.10 (9th Cir. 1995)). "[I]f it is plain that the speaker is expressing a subjective view, an interpretation, a

theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." *Partington*, 56 F.3d at 1156 (quoting *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993)).

California courts employ a three-part test in determining whether alleged defamatory statements imply a false assertion of fact:

> We examine the totality of the circumstances in which [the statement] was made. First, we look at the statement in its broad context, which includes the general tenor of the entire work, the subject of the statement, and the format of the work. Next we turn to the specific context and content of the statement, analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation. Finally, we inquire whether the statement itself is sufficiently factual to be susceptible of being proved true or false."

Id. (quoting *Underwager v. Channel 9 Australia*, 69 F.3d 361, 366 (9th Cir. 1995)). *See also Overstock.com, Inc.*, 151 Cal. App. 4th at 701 (citations omitted).

With respect to the second prong of the test, "[o]f particular importance is the princip[le] that when an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment." *Nicosia*, 72 F. Supp. 2d at 1102 (quoting *Partington*, 56 F.3d at 1156-57); *see also Franklin v. Dynamic Details, Inc.*, 116 Cal. App. 4th 375, 387 (Cal. Ct. App. 2004) ("Because the bases for the . . . conclusion are fully disclosed, no reasonable reader would consider the term anything but the opinion of the author drawn from the circumstances related" (quoting *Chapin, Inc.*, 992 F.2d at 1093).[9]

[9] Under North Carolina law, a statement cannot be the subject of a defamation suit if it "cannot reasonably be interpreted as stating actual facts about an individual." *Daniels v. Metro Magazine*

California courts have consistently given speakers a wide berth for hyperbolic or figurative speech, even if the words at issue appear—on first blush—to be statements of fact. As the Ninth Circuit held:

> Authors should have "breathing space" in order to criticize and interpret the actions and decisions of those involved in a public controversy. If they are not granted leeway in interpreting ambiguous events and actions, the public dialogue that is so important to the survival of our democracy will be stifled. We must not force writers to confine themselves to dry, factual recitations or to abstract expressions of opinion wholly divorced from real events. Within the limits imposed by the law, we must allow, even encourage, them to express their opinions concerning public controversies and those who become involved in them.

Partington, 56 F.3d at 1159. *See also Underwager*, 69 F.3d at 367 (holding that accusing someone of "lying" is "no more than nonactionable 'rhetorical hyperbole, a vigorous epithet'" (quoting *Milkovich*, 497 U.S. at 17); *Crowe v. Cnty. of San Diego*, 593 F.3d 841, 879 (9th Cir. 2010) (holding that describing person as "exhibiting sociopathic tendencies" is not actionable under slander statute); *Rosenaur v. Scherer*, 88 Cal. App. 4th 260, 279 (Cal. Ct. App. 2001) (holding that calling someone a "thief and a liar" was nonactionable opinion and compiling similar cases); *Beilenson v. Superior Court*, 44 Cal. App. 4th 944, 951-52 (Cal. Ct. App. 1996) (holding that accusation of a "rip-off" is a "colorful epithet, when taken in context with the other information contained in the mailer, [and] was rhetorical hyperbole that is common in political debate").

Holding Co., 179 N.C. App. 533, 539, 634 S.E.2d 586, 590 (2006) (quoting *Milkovich, v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990)). "Rhetorical hyperbole and expressions of opinion not asserting provable facts are protected speech." *Id.* (citation omitted). Courts look to the circumstances in which a statement was made, including whether loose, figurative, and hyperbolic language was used, as well as the general tenor of the article, in determining whether a statement can reasonably be interpreted as stating actual facts about an individual. *Id.* at 539-40, 634 S.E.2d at 590 (citation omitted).

The Article includes several of Mr. Boyd's subjective opinions and interpretations and also hyperbolic language, none of which is actionable. For example, Contested Statement 1 simply presents Defendants' subjective opinion and interpretation regarding the public controversies related to both Plaintiff's credentials and to Plaintiff as a business person—"the legend of himself as a medical technology renaissance man," (Compl. ¶ 26(1))—after carefully outlining and providing for readers the bases upon which such opinions were drawn. In fact, this opinion is drawn in part from Plaintiff's own words, including his claim that he hopes to win a Nobel Prize. (Compl. Ex. A at 2.)

Similarly, Contested Statements 2 and 3, suggesting that Plaintiff used a "cheat"/"shortcut" around the problem of not having certain academic credentials (Compl. ¶ 26(2)), and commenting that Plaintiff had an "ersatz educational experience, (Compl. ¶ 26(3)), are not only Defendants' interpretations based on reporting disclosed to the reader, but are also hyperbolic statements incapable of being proven true or false. Likewise, Contested Statement 11, with hyperbolic reference to Plaintiff's "storybook life" and the subjective opinion that "it appears most" of the capital Plaintiff has raised has not earned a return, (Compl. ¶ 26(11)), is protected opinion.

Mr. Boyd offered his subjective interpretations of Plaintiff's credentials and business dealings—that is, Plaintiff's involvement in public controversies—in Contested Statements 1-3 and 11. He is allowed "breathing space" and leeway; that the language is hyperbolic only serves to underscore that such Contested Statements are opinion and therefore not actionable.

5. Contested Statements 7 and 9 are not of and concerning Plaintiff

"In California, whether statements can be reasonably interpreted as referring to plaintiffs is a question of law for the court." *SDV/ACCI, Inc. v. AT&T Corp.*, 522 F.3d 955, 959 (9th Cir.

2008) (citation omitted). "If the words used really contain no reflection upon any particular individual, no averment can make them defamatory." *Golden N. Airways v. Tanana Publ'g Co.*, 218 F.2d 612, 622 (9th Cir. 1954).

Contested Statements 7 and 9 do not even refer to Plaintiff, and therefore cannot support a defamation claim. Contested Statement 7, (Compl. ¶ 26(7)), expressly notes that it is unclear "[w]ho got custody of these assets." Thus, it makes no statement at all about Plaintiff. *See Chapin*, 993 F.2d at 1095-96 ("Plaintiffs complain about the sentence 'it is not clear where the rest of the money goes.' We do not know how this statement could be false."). Contested Statement 9 is even clearer—the "he" in that statement obviously refers to another individual (Mlinar), not Plaintiff. These statements are simply not actionable.

6. Contested Statements 1-3 and 5-11 are absolutely privileged under California's Fair Report Statute

a. Defining the fair report privilege

California law provides an absolute privilege—known as the "fair report" privilege—to any "fair and true report in . . . a public journal, of (A) a judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything said in the course thereof, or (E) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant has been issued." Cal. Civ. Code § 47(d)(1).[10] The term "public journal" covers both a newspaper and a news website. *See Carver v. Bonds*, 135 Cal. App. 4th 328, 351 (Cal. Ct. App. 2005).

[10] Under North Carolina law, defendants in a defamation action enjoy an "absolute privilege which attaches to statements made in the course of judicial proceedings." *LaComb v. Jacksonville Daily News Co.*, 142 N.C. App. 511, 513, 543 S.E.2d 219, 221 (2001) (quotations omitted). This privilege extends to "statements made in arrest warrants . . . . [and] [s]tatements in pleadings and other papers filed in judicial proceedings which are relevant or pertinent to the subject matter in controversy." *Id.*

"Whether or not a privileged occasion exists within the meaning of [§ 47(d)] is a question of law." *Howard v. Oakland Tribune*, 199 Cal. App. 3d 1124, 1128 (Cal Ct. App. 1988). *See also Dorsey v. Nat'l Enquirer, Inc.*, 973 F.2d 1431, 1434-35 (9th Cir. 1992) (finding the "fair and true" issue should be decided by court where the "district court had both the Reply Affidavit and the article before it; there are no disputed facts; the reasonable inferences therefrom all lead to the same conclusion").

Courts have construed Section 47(d) broadly to cover "fair and true" descriptions of court pleadings, *Mortensen v. Los Angeles Examiner*, 296 P. 927 (Cal. 1931), *overruled on other grounds, Lipman v. Brisbane Elementary Sch. Dist.*, 55 Cal. 2d 224, 233 (Cal. 1961) (explaining that if a defamatory statement is made "in any of the papers, whether denominated a complaint, an answer, a cross-complaint, an affidavit or a deposition," and a newspaper "in its report thereof states that such a charge had been made, then and in that case the publication was privileged"); affidavits, *Dorsey*, 973 F.2d at 1434-35 (holding fair report privilege applies to report of statements in affidavit filed in family court proceedings); Securities and Exchange Commission complaints, *Colt v. Freedom Commc'ns, Inc*., 109 Cal. App. 4th 1551, 1558 (Cal. Ct. App. 2003); and administrative agency investigation documents, *Howard*, 199 Cal. App. 3d at 1128.

Under the fair report privilege, if a news website provides a substantially accurate description of the proceeding—even if the material in the proceeding is itself false and defamatory—the publication is absolutely privileged. *See Colt*, 109 Cal. App. 4th at 1558 (holding that publication is privileged as long as it "captures the substance, the gist, the sting of the libelous charge") (citations omitted).

> The "fair and true" requirement of [§ 47(d)] does not require a media defendant to justify every word of the alleged defamatory material that is published. The media's responsibility lies in

> ensuring that the 'gist or sting' of the report—its very substance—is accurately conveyed. Moreover, courts must accord media defendants a certain amount of literary license and exercise a degree of flexibility in determining what is a fair report.

Dorsey, 973 F.2d at 1436 (internal citations and quotations omitted). *See also Paterno*, 163 Cal. App. 4th at 1354 ("[C]ourts will not engage in a 'hermeneutical exercise' dissecting the reporter's efforts in a legalistic postmortem. Otherwise, litigation-averse journalists would be reduced to reporting 'word-for-word quotations from legal documents.'"). Moreover, "Section 47[d] . . . does not require the reporter to resolve the merits of the charges, nor does it require that he present the plaintiff's version of the facts." *Dorsey*, 973 F.2d at 1436 (quotation omitted).

b. The Court may consider the Source Documents in analyzing Defendants' Rule 12(b)(6) motion

In ruling on a Rule 12(b)(6) motion, "[c]ourts may consider documents referenced in the complaint and documents 'integral to and explicitly relied on in the complaint if the plaintiffs do not challenge the document's authenticity.'" *Crispin v. BAC Home Loans Servicing, LP*, No: 5:11-CV-375-FL, 2011 U.S. Dist. LEXIS 144739, at *9-10 (E.D.N.C. Dec. 15, 2011) (quoting *Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 234 (4th Cir. 2004)).

Pursuant to that rule, courts in recent years have recognized that hyperlinks to sources contained in an article subject to a defamation lawsuit may be considered for purposes of ruling on a Rule 12(b)(6) motion. One federal court explained that "[t]he hyperlink is the twenty-first century equivalent of the footnote for purposes of attribution in defamation law, because it has become a well-recognized means for an author on the Internet to attribute a source." *Adelson v. Harris*, 973 F. Supp. 2d 467, 484 (S.D.N.Y. 2013) (citation omitted). The *Adelson* court, in granting a Rule 12(b)(6) motion to dismiss a libel suit, found that providing a hyperlink satisfied the attribution requirement of Nevada's fair report privilege. *Id.* at 482-85. The Court held:

"Indeed, as a form of attribution, a hyperlink provides benefits that a footnote does not. Unlike a footnote on a piece of paper—which merely provides one with directions to the source—the hyperlink instantaneously permits the reader to verify an electronic article's claims." *Id.* at 484.

Critically, the *Adelson* court reasoned

> protecting defendants who hyperlink to their sources is good public policy, as it fosters the facile dissemination of knowledge on the Internet. It is true, of course, that shielding defendants who hyperlink to their sources makes it more difficult to redress defamation in cyberspace. But this is only so because Internet readers have far easier access to a commentator's sources. It is to be expected, and celebrated, that the increasing access to information should decrease the need for defamation suits.

Id. at 485. *See also, e.g.*, *Nicosia*, 72 F. Supp. 2d at 1103 ("[The allegedly defamatory statement] directed readers to specific articles on De Rooy's web-site and provided a hyperlink for immediate access to such articles. These articles were at least as connected to the news group posting as the back page of a newspaper is connected to the front. Thus, the Court considers the articles part of the context of the [allegedly defamatory statement].").[11]

Here, Plaintiff attaches the Article to his Complaint, and, in the attached Article, the reader can see the web addresses associated with each hyperlink Defendants provided in their

[11] In an unpublished, per curiam decision, the Fourth Circuit has, in dicta, disapproved of the reliance on hyperlinked documents in the context of a Rule 12(b)(6) motion. *See Agora, Inc. v. Axxess, Inc.*, 11 Fed. Appx. 99 (4th Cir. 2001) (unpublished). That decision pre-dated the widespread prevalence of online media noted by the *Adelson* court, and, in fact, the propriety of citing hyperlinked documents was not raised or briefed by either party. Most importantly, in the instant case, the Article contains more than just hyperlinks—it also contains the actual web addresses for the Source Documents.

To the extent the court determines that it cannot rely on the Source Documents in deciding the Rule 12(b)(6) motion, Defendants' fair report privilege argument would not apply to that motion. Nonetheless, the court could consider the fair report privilege and the Source Documents in analyzing Plaintiff's preliminary injunction motion.

online story. Thus, the Article—including all the Source Documents—was submitted as part of the Complaint and may be considered by the Court.

c. The fair report privilege applies in this case

In reporting the Article, Defendants provided "fair and true" reports of a number of pleadings, affidavits, and other documents subject to the fair report privilege (which are part of the Complaint as Source Documents), and, accordingly, those statements are absolutely privileged. For example, Contested Statements 1-3, which describe questions about Plaintiff's academic credentials, relied, among other things, on filings in other court proceedings, including another defamation action brought by Plaintiff against different defendants in California (*Nobles v. Ryll*, L.A. County Case No. LC100903).[12]

[12] *See, e.g.*, Lyter Decl. (Notice of Filing Ex. 10) (explaining that Plaintiff's degrees from Glendale and Redding Universities were awarded from unauthorized diploma mills, all awarded on the same date, and purchased online in a single credit card transaction of $1,325 for one Masters and two Doctorates); Litner Decl., at ¶¶ 7-17 (Notice of Filing Ex. 14) (explaining his belief that Plaintiff overstated his academic credentials, lacked basic understanding of human anatomy and physiology, and that his "lab" was rudimentary and resembled nothing more than a garage); Moll Decl., at ¶¶ 4-5, 8-13 (Notice of Filing Ex. 15) (explaining his belief that Plaintiff claimed he was a doctor and surgeon, had fake diplomas, and overstated his academic credentials); Chiu Decl., at ¶¶ 4-5 (Notice of Filing Ex. 16) (explaining that an investigative firm discovered Plaintiff had inflated his academic credentials and that Plaintiff admitted he did not possess degrees he claimed to have). *See also, e.g.*, *U.S. v. Enowitch*, Criminal Compl., at ¶¶ 1-10 (Notice of Filing Ex. 8) (alleging in federal criminal complaint against co-owner of Redding and Glendale Universities that such universities were diploma mills and that the universities advertised doctoral degrees for $550, with a second at half-price); *Rogitz v. Visioneering, Inc.*, San Diego County Case No. 666353, Reply Mem., at 1-2 (Notice of Filing Ex. 13) (explaining in 1994 litigation brought against Plaintiff and related companies that Plaintiff displayed in his office degrees that he did not earn and that in response to interrogatories Plaintiff admitted the highest degree he had earned was a high school diploma); *see also, e.g.*, David Baines, *Northfork Whiz Kid's Credentials Questioned*, Vancouver Sun, June 19, 1992, at D1 (Notice of Filing Exs. 12-1 and 12-2).

Similarly, Contested Statements 5-11 relied, among other things, on documents filed by Sutura, Inc. with the Securities and Exchange Commission,[13] on pleadings in litigation brought by investors against Plaintiff and his companies,[14] and, again, on declarations filed in litigation brought by Plaintiff against different defendants in California.[15]

Because these Contested Statements are fair and accurate descriptions of the underlying documents, they are privileged and, therefore, non-actionable.

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[13] *See, e.g.*, Sutura, Inc., SEC Form 10-KSB, at 5, 20, F-6 (Notice of Filing Ex. 7) (discussing $23 million settlement and showing $11.96 million purchase of marketable securities).

[14] *See, e.g.*, *Pham v. Nobles*, Orange County Case No. 07CC07644, Compl., at ¶¶ 9-19 (Notice of Filing Ex. 19) (explaining that Plaintiff represented to Pham that he was a medical doctor and had performed life-saving heart surgery, that she invested $250,000 in his company, that he guaranteed she would double her investment in six months, and that he agreed to repurchase her stock for the amount of her investment but never did); *Mlinar v. Nobles*, Orange County Case No. 30-2012-00612044, Fourth Am. Compl., at ¶¶ 14-32, 40-41, 69 (Notice of Filing Ex. 20) (explaining that Plaintiff told Mlinar that Nobles Medical Technology (NMT) would be worth $150 million after FDA approval of its products and its subsequent acquisition by another company; that Mlinar invested $1.25 million in NMT; that Plaintiff told Mlinar that Gyntlecare would be worth $200 million after FDA approval of its products and its subsequent acquisition by another company; that Mlinar invested $1.25 million in Gyntlecare; that Mlinar never received stock in NMT and did not receive stock in Gyntlecare commensurate with his investment; that Mlinar received a one-time check in the amount of $435,842.39 from a representative of Gyntlecare, and no additional monies regarding his investments; that Plaintiff told Mlinar that Plaintiff could use Mlinar's Ferrari as collateral to raise $750,000 in additional financing, but that Mlinar would retain the ownership documents, and that Mlinar shipped his Ferrari to Plaintiff); *Mlinar v. Nobles*, Orange County Case No. 30-2012-00612044, First Am. Answer (Notice of Filing Ex. 21) (providing Plaintiff's responses to Mlinar's complaint).

[15] *See, e.g.*, Moll Decl., at ¶¶ 4-5, 8-13, 16 (Notice of Filing Ex. 15) (explaining that Plaintiff claimed he was a doctor and surgeon, had fake diplomas, and that Moll lost a large investment in a deal with Plaintiff); Litner Decl., at ¶¶ 7-19 (Notice of Filing Ex. 14) (explaining that upon learning that Plaintiff had misrepresented his credentials, Litner requested return of monies invested, which request was rejected); Chiu Decl., at ¶¶ 4-7, 14 (Notice of Filing Ex. 16) (explaining that two funds lost $11 million in investments in Plaintiff's company, Sutura, Inc., and that individual investors lost their full investments in same as well).

D. Plaintiff has failed to state a claim for unfair and deceptive trade practices

Because California law applies, Plaintiff's claim for violation of North Carolina's Unfair and Deceptive Trade Practices Act fails. *See, e.g.*, *Ascend Health*, 2013 U.S. Dist. LEXIS 35237, at *7-8 (holding that, because Texas law applied, claim for violation of North Carolina's Unfair and Deceptive Trade Practices Act failed). Additionally, Plaintiff's UDTPA claim fails because he "failed to plausibly allege that he was injured in North Carolina." *Martinez v. Nat'l Union Fire Ins. Co.*, 911 F. Supp. 2d 331, 338 (E.D.N.C. 2012) (applying law of situs test and finding the North Carolina law could not apply to UDTPA claim where plaintiff failed to allege injury in North Carolina). Thus, even if North Carolina law did apply, the UDTPA claim should be dismissed because the Plaintiff does not have business operations in North Carolina. *See The 'In' Porters, S.A. v. Hanes Printables, Inc*., 663 F. Supp. 494, 501-02 (M.D.N.C. 1987) (holding that UDTPA claim "applies only if the plaintiff alleges an in-state, injurious effect on his business operations in North Carolina").

Finally, as Plaintiff's UDTPA claim is merely derivative of his defamation claims, Plaintiff's failure to plead the latter prevents him from prevailing on the former.

II. THE COMPLAINT SHOULD BE DISMISSED UNDER THE CALIFORNIA ANTI-SLAPP STATUTE

A. The California anti-SLAPP statute applies to this case

Section 425.16 of the California Code of Civil Procedure ("Section 425.16") is an example of what is known as an "anti-SLAPP" statute, a form of statutory protection against lawsuits intended to chill or curtail the exercise of constitutional rights (a "strategic lawsuit against public participation"). In enacting Section 425.16 in 1993, the California legislature noted "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the

constitutional rights of freedom of speech and petition for the redress of grievances." Section 425.16(a). Accordingly, the legislature declared "that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly." *Id.*[16]

The Ninth Circuit has definitively held that Section 425.16 must be applied by federal courts applying California's substantive law. *See, e.g.*, *Hilton v. Hallmark Cards*, 599 F.3d 894, 900 n.2 (9th Cir. 2010) ("[W]e have long held that the anti-SLAPP statute applies to state law claims that federal courts hear pursuant to their diversity jurisdiction."); *Batzel v. Smith*, 333 F.3d 1018, 1025-1026 (9th Cir. 2003) ("Because California law recognizes the protection of the anti-SLAPP statute as a substantive immunity from suit, this Court, sitting in diversity, will do so as well."); *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 973 (9th Cir. 1999) ("We also conclude that the twin purposes of the *Erie* rule—'discouragement of forum-shopping and avoidance of inequitable administration of the law'—favor application of California's Anti-SLAPP statute in federal cases."); *see also Godin v. Schencks*, 629 F.3d 79, 87 (1st Cir. 2010) (anti-SLAPP statute applies in federal court); *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 168-69 (5th Cir. 2009) (same).

The only North Carolina court to consider the applicability of a state anti-SLAPP statute in federal court "assume[d], without deciding, that the [Texas anti-SLAPP statute] applied" in a federal diversity case. *See Ascend Health*, 2013 U.S. Dist. LEXIS 35237, at *12.[17]

[16] Notwithstanding this prefatory language, California courts have made clear that the defendant need not prove that the action was brought "with the intent to chill the defendant's exercise of constitutional speech." *Equilon Enter. v. Consumer Cause, Inc.*, 52 P.3d 685, 687 (Cal. 2002).

[17] It does not appear that the Fourth Circuit has yet addressed this issue.

B. What the anti-SLAPP statute requires

Section 425.16 establishes a two-step burden-shifting scheme. *First*, the defendant must "make a prima facie showing that the SLAPP suit arises from any act by the citizen party 'in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue.'" *Newsham*, 190 F.3d at 971 (quoting Section 425.16(b)(1). In relevant part, Section 425.16 defines an "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" as including:

> (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

Section 425.16(e). "In determining whether a cause of action falls within the scope of subdivision (e), courts must broadly construe the anti-SLAPP statute." *Annette F. v. Sharon S.*, 119 Cal. App. 4th 1146, 1160 (Cal. Ct. App. 2004).

Second, once the defendant meets that burden, the plaintiff must establish "that there is a probability that the plaintiff will prevail on the claim." Section 425.16(b)(1). When a federal court analyzes an anti-SLAPP motion "based on alleged deficiencies in the plaintiff's complaint"—as is the case here—"the motion must be treated in the same manner as a motion under Rule 12(b)(6), except that the attorney's fee provision of § 425.16(c) applies." *Rogers v. Home Shopping Network, Inc.*, 57 F. Supp. 2d 973, 983 (C.D. Cal. 1999).[18]

[18] Accordingly, discovery on Defendants' anti-SLAPP motion would not be appropriate or required.

If the plaintiff fails to establish a "probability" of success on the merits, the complaint must be dismissed (or, as described in Section 425.16(b), "shall be subject to a special motion to strike"). Moreover, "a prevailing defendant on a special motion to strike *shall* be entitled to recover his or her attorney's fees and costs." Section 425.16(c) (emphasis added).

C. The Article was "in furtherance of" Defendants' rights of free speech "in connection with a public issue"

Defendants are entitled to anti-SLAPP protection under Section 425.16(e)(3) and (4).

1. Section 425.16(e)(3)

It is well-settled that a news publication on the Internet qualifies as a "written or oral statement or writing made in a place open to the public or a public forum." Section 425.16(e)(3). *See Nygard, Inc. v. Uusi-Kertulla*, 159 Cal. App. 4th 1027, 1039 (Cal. Ct. App. 2008) ("Web sites accessible to the public . . . are 'public forums' for purposes of the anti-SLAPP statute.") (quoting *Barrett v. Rosenthal*, 146 P.3d 510 (Cal. 2006)); *Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 895-97 (Cal. Ct. App. 2004) (holding that personal website was a public forum); *Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468, 478 (Cal. Ct. App. 2000) (noting statutory abrogation of prior conflicting cases and holding that a neighborhood newsletter was a public forum). Plaintiff admits that the Article was published on a publicly available website, and therefore this portion of the test is satisfied. (Compl. ¶ 58.)

The Article also meets the "issue of public interest" prong of Section 425.16(e)(3). Under California law

> "an issue of public interest" within the meaning of section 425.16, subdivision (e)(3) is *any issue in which the public is interested.* In other words, the issue need not be "significant" to be protected by the anti-SLAPP statute—it is enough that it is one in which the public takes an interest.

Nygard, 159 Cal. App. 4th at 1042 (emphasis in original).

As one California court framed it, "[a] public issue is implicated if the subject of the statement or activity underlying the claim (1) was a person or entity in the public eye; (2) could affect large numbers of people beyond the direct participants; or (3) involved a topic of widespread, public interest." *D.C. v. R.R.*,182 Cal. App. 4th 1190, 1215 (Cal. Ct. App. 2010) (citation and quotations omitted).

In *Nygard*, for example, the California court held that a news story about a "prominent businessman" concerning his company's business practices was "an issue of public interest." 159 Cal App. 4th at 1042 (citing *Seelig v. Infinity Broad. Corp.*, 97 Cal. App. 4th 798, 807-08 (Cal. Ct. App. 2002) (discussion of reality show participants was "issue of public interest")); *Sipple v. Found. for Nat'l Progress*, 71 Cal. App. 4th 226 (Cal. Ct. App. 1999) (story about a political consultant's custody dispute was "issue of public concern")). *See also Wilbanks*, 121 Cal. App. 4th at 898 ("Consumer information, however, at least when it affects a large number of persons, also generally is viewed as information concerning a matter of public interest.").

The Article certainly meets this standard. Not only is Plaintiff by his own admission a public figure, but the subject matter of the Article dealt with a topic that "could affect" a large number of people, including investors in Plaintiff's companies and doctors and patients using products developed by his companies. Defendants' motion is, therefore, within the scope of Section 425.16(e)(3).

2. Section 425.16(e)(4)

Section 425.16(e)(4) was added to the anti-SLAPP statute after subsection (e)(3) "in order to broaden the statute." *Carver*, 135 Cal. App. 4th at 343. It covers any First Amendment activity "in connection with a public issue or an issue of public interest." Section 425.16(e)(4).

In *Wilbanks*, for example, the California court held that Section 425.16(e)(4) applied to the defendant's website publication concerning the plaintiff's products. 121 Cal. App. 4th at 897.

Here, Defendants were exercising their rights under the First Amendment to report and publish news about a self-described public figure—a high-profile businessman and member of the Southern California community. Accordingly, Section 425.16 applies.

D. Plaintiff has failed to establish a "probability" of success on the merits

For the reasons detailed in Section I, Plaintiff fails to state a claim for relief under Rule 12(b)(6). Accordingly, he has also failed to establish a probability of success, and his Complaint should be dismissed under Section 425.16.

III. PLAINTIFF IS NOT ENTITLED TO A PRELIMINARY INJUNCTION

A. Facts relevant to preliminary injunction motion

In addition to the allegations of the Complaint, the Article and Source Documents, and Plaintiff's evidentiary submission, the following record facts are relevant solely to Defendants' opposition to Plaintiff's preliminary injunction motion.

1. Background on the Article

Following a stint as a securities trader, Mr. Boyd became a reporter in 1999. Mr. Boyd has worked as an investigative business reporter at high-profile publications such as the New York Post and Fortune magazine. In 2012, he moved back to Wilmington and started SIRF. In 2013, he became an adjunct professor at UNC-Chapel Hill's School of Journalism and Mass Communication. (Boyd Decl. ¶¶ 2-4.) Mr. Larsen graduated from UNC-Wilmington in 2014, and he was a SIRF intern during the summer of 2014. (Larsen Decl. ¶¶ 2-3.)

Mr. Boyd's reporting on the Article began in May 2014, when he first learned about Plaintiff. In the ensuing weeks, Mr. Boyd reviewed numerous court documents filed in litigation

involving Plaintiff, documents filed with the Securities and Exchange Commission, and documents that turned up in Internet searches. (Boyd Decl. ¶¶ 9-10.) In early June 2014, Mr. Boyd asked Mr. Larsen to help him with the background research on Plaintiff. Over the next month, Mr. Larsen continued the research that Mr. Boyd had begun by continuing to review court documents, SEC documents, and documents relating to Plaintiff on the Internet. Mr. Larsen also made numerous calls to universities and other organizations to confirm his research about Plaintiff. (Larsen Decl. ¶¶ 4-8.)

While Mr. Larsen did substantial research for the Article, it was written by Mr. Boyd. (Boyd Decl. ¶ 12; Larsen Decl. ¶ 10.)

2. Communications with Plaintiff

Mr. Boyd confirms that he first attempted to call Plaintiff on September 8, 2014, more than a week prior to publication. Mr. Boyd tried to reach Plaintiff at various numbers four times on September 8. On September 9, 2014, Mr. Boyd called Plaintiff's lawyer, Mr. van Loben Sels, in an attempt to reach Plaintiff. (Boyd Decl. ¶ 15.)

Beginning on September 8, Mr. Boyd sent a series of e-mails to Plaintiff detailing the substance of the Article and requesting his comment. Those e-mails were linked in the Article as Source Documents. (Boyd Decl. ¶ 16.) Those communications show that a week before the Article was published, Mr. Boyd specifically told Plaintiff that he was working on a story "that looks at your multi-year use of diploma mill credentials from fake universities, and your obviously remarkable economic good fortune vs. The experience of your investors." (Boyd Decl. ¶ 17; Notice of Filing Ex. 22.) That same day, Mr. Boyd asked several specific factual questions relating to these same issues, including queries about (1) Plaintiff's submission in ongoing litigation of his diplomas from universities that had been discredited as diploma mills

"as evidence of your having been awarded two doctorates"; (2) a $23 million settlement payment made to one of Plaintiff's companies, Sutura, in a patent dispute, and the purchase of $12 million in Sutura's marketable securities; (3) Plaintiff's "inflating and/or misrepresenting academic credentials . . . going back into the 1990s"; and (4) various then-current and prior lawsuits involving Plaintiff. (Boyd Decl. ¶ 18.)

Defendants confirm what those e-mails show—that neither Plaintiff nor anyone on Plaintiff's behalf ever pointed to a fact that they said was false, even though Plaintiff had notice of what the substance of the Article was going to be. (Boyd Decl. ¶¶ 13, 22; Larsen Decl. ¶ 11.)

3. Defendants' state of mind

Defendants confirm that they never had any reason to think a factual statement in the Article was untrue, nor did they ever have any serious doubts about the truth or falsity of any factual statement in the Article. To the contrary, because of their careful reporting, Defendants were confident that the factual assertions in the Article were true. This confidence was bolstered by the fact that—despite multiple opportunities—Plaintiff never told Defendants that any fact they were planning to publish was false. (Boyd Decl. ¶¶ 13, 22; Larsen Decl. ¶ 11.)

As noted above, Plaintiff concedes he is a public figure. (DE 24 at 15 n.3.)

B. Legal standard

A party seeking a temporary restraining order or a preliminary injunction must establish *each* of the following:

> [1] that it is likely to succeed on the merits; [2] that it is likely to suffer irreparable harm in the absence of preliminary relief; [3] that the balance of equities tips in its favor; and [4] that an injunction is in the public interest.

Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); *Pashby v. Delia*, 709 F.3d 307, 320-21 (4th Cir. 2013). "Because a preliminary injunction affords, on a temporary basis, the relief that can be granted permanently after trial, the party seeking the preliminary injunction must demonstrate by 'a clear showing' that, among other things, it is likely to succeed on the merits at trial." *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 345 (4th Cir. 2009), *vacated on other grounds, Citizens United v. FEC*, 558 U.S. 310 (2010), *aff'd, The Real Truth About Obama, Inc. v. FEC*, 607 F.3d 355 (4th Cir. 2010) (per curiam).[19]

Where, as here, the moving party seeks a "mandatory preliminary injunction," which does more than simply preserve the status quo, "such an injunction is only granted in very specific circumstances, usually only when extreme or serious damage will result." *Price v. City of Fayetteville*, No. 5:13-CV-150, 2013 U.S. Dist. LEXIS 58587, *10 (E.D.N.C. Apr. 23, 2013) (citing *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 828 (4th Cir. 2004)).

As detailed below, Plaintiff fails to establish any of the four *Winter* factors, and he has failed to show that "extreme or serious damage will result" in the absence of an injunction.

C. Plaintiff's proposed injunction would constitute an unconstitutional prior restraint

Weighing in Defendants' favor on all four *Winter* factors is the fact that Plaintiff's proposed injunction would constitute a clear violation of Defendants' constitutional rights under the First Amendment. This alone warrants denial of Plaintiff's Motion.

[19] Plaintiff cites to *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977), and other cases for the proposition that the plaintiffs may make a lesser showing on certain of the four factors if other factors are satisfied. (DE 24 at 14-15, 18.) *Winter*, however, abrogated *Blackwelder* and its progeny: "In light of *Winter*, this Court recalibrated that ["balance-of-hardship"] test, requiring that each preliminary injunction factor be satisfied as articulated. Accordingly, courts considering whether to impose a preliminary injunction must separately consider each *Winter* factor." *Pashby*, 709 F.3d at 320-21 (citation omitted).

For more than 80 years, it has been a bedrock principle of constitutional law that "the chief purpose of the guaranty [of the First Amendment is] to prevent previous restraints upon publication." *Near v. Minnesota*, 283 U.S. 697, 713 (1931). Broadly speaking, "liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraint or censorship." *Id.* at 716.

The Supreme Court has made clear that the broad prohibition of prior restraints articulated in *Near* applies to preliminary injunctions precisely of the sort Plaintiff requests in this matter. In *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), for example, the Court struck down a temporary injunction banning a community civil rights organization from distributing leaflets concerning the business practices of a local real estate agent. In invalidating the injunction, the Court held that "the injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights." *Id.* at 418 (citing *Near*). This is so, the Court held, because "[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Id.* at 419 (quoting *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 181 (1968)). *See also Vance v. Universal Amusement Co.*, 445 U.S. 308, 317 (1980) (invalidating Texas statute providing for preliminary injunction against showing of a movie even before it had been adjudged obscene); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70-71 (1963) (invalidating state statute that gave morality commission power to enjoin publication of certain books); *Joyner v. Whiting*, 477 F.2d 456, 462 (4th Cir. 1973) ("Twice in the history of the nation the Supreme Court has reviewed injunctions that imposed prior restraints on the publication of newspapers, and twice the Court has held the restraints to be unconstitutional.") (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971), and *Near*).

The fact that the Article has already been published in no way renders the injunction Plaintiff seeks any less of a prior restraint, since he requests that Defendants be enjoined from future publication about Plaintiff. In *Keefe*, for example, the state court had enjoined the *further* distribution of leaflets. The Supreme Court held this to be a prior restraint even though many leaflets had already been handed out. *Keefe*, 402 U.S. at 418-19.

In light of the near-absolute prohibition on preliminary injunctions in cases involving a prior restraint, Plaintiff must overcome a "heavy presumption," a burden he fails to meet.

D. Plaintiff has failed to establish a likelihood of success on the merits

Plaintiff has failed to establish a likelihood of success on the merits because he has failed to state a claim upon which relief can be granted. As detailed above, the Contested Statements are non-actionable for one or more of the following reasons: (1) they are not defamatory; (2) they are opinion and not capable of being proven true or false; (3) they are not "of and concerning" Plaintiff; and (4) they are absolutely privileged under California's fair report statute.

Even with the benefit of six declarations and numerous exhibits, however, Plaintiff fails to establish a likelihood of success on the merits. As an initial matter, Plaintiff has submitted no evidence—much less "clear and convincing evidence"—to indicate that Defendants knew anything in the Article was false, or recklessly disregarded whether it was true or false. In fact, Plaintiff's own declaration confirms that he never told Mr. Boyd that any aspect of what Defendants were planning to publish was false. (DE 26, Nobles Decl. ¶¶ 2-10.) This is supported by the Declarations of Mr. Boyd and Mr. Larsen, who confirm they were never informed that any aspect of their reporting was false and never thought any aspect of it was false. To the contrary, they had reviewed SEC filings, court documents, and news stories in an effort to report the truth. (Boyd Decl. ¶¶ 13, 22; Larsen Decl. ¶ 11.)

Plaintiff's claim that the "falsity of these statements can demonstrated by publicly available documents" is both untrue and irrelevant. Plaintiff has failed to meet his burden of adducing admissible evidence that the Contested Statements are false. Indeed, the Source Documents demonstrate that the Contested Statements are true or substantially true.

Where the publication concerns an issue of public concern, "[the plaintiff] bears the burden of proving that the statements are false." *Carver*, 135 Cal. App. 4th at 344. While the plaintiff bears the burden of proving falsity, a "defendant can defeat a libel action by proving that the allegedly libelous publication, although not literally true in every detail, is substantially true in its implication, that is, that the 'gist' or 'sting' of the article, read as a whole, is true."[20] *Alioto v. Cowles Commc'ns, Inc.*, 623 F.2d 616, 619 (9th Cir. 1980). Similarly, California courts have explained that "[t]he concept that it is the gist or sting of the alleged defamatory statements that must be false rather than the specific details of the charge is deeply rooted in our common law." *Weller v. Am. Broad. Cos.*, 232 Cal. App. 3d 991, 1009 n.17 (Cal. Ct. App. 1991).

Contested Statements 1-3 are substantially true; in fact, Plaintiff offers no evidence that his "degrees" are not the product of a diploma mill. The Source Documents provide substantial evidence not only that Plaintiff's academic degrees are bogus, but also that he admitted to lying about his academic credentials in the early 1990s. The Source Documents also reveal Plaintiff's inflated claims about his teaching experience, including his claim that he was a visiting professor at UC-Irvine, and his overstated representations as to his entrepreneurial achievements. (Notice of Filing Exs. 4-5, 8-10, 12-16.)

[20] Under North Carolina law, a "published statement will only be considered false if it is so misleading that it produces a different effect on a reader's mind than would the truth." *Bowser v. Durham Herald Co.*, 181 N.C. App. 339, 341, 638 S.E.2d 614, 615-16 (2007).

Contested Statement 4 is based on Plaintiff's own resume. (Notice of Filing Ex. 18.) Defendants cannot be liable for relying on Plaintiff's own resume.

Contested Statements 5-11 are substantially true. While Plaintiff nitpicks at certain details in the statements, the Source Documents conclusively establish that a number of investors have raised substantial questions about how Plaintiff and his companies handled their investments. For example, Plaintiff's own evidence shows that one of his companies, Sutura, Inc., defaulted on more than $12 million in loans. (Babcock Decl. ¶ 5.) Similarly, Plaintiff admits that Sutura was paid a $23 million settlement for an alleged patent violation, and he submits an entire declaration devoted to refuting a claim that the Article *did not make*. (Bjorkman Decl. ¶¶ 3-6.) The Article never claimed that the settlement proceeds went to Plaintiff, and Defendants cannot be liable for a statement they did not make.

For all these reasons, Plaintiff has failed to establish a likelihood of success on the merits.

E. Plaintiff has failed to establish that he will suffer irreparable harm

In *Winter*, the Supreme Court set a high bar for the required showing of irreparable harm.

> Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction. Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.

Winter, 555 U.S. at 22 (emphasis in original) (citations omitted).

Where the harm suffered by the moving party may be compensated by an award of money damages at judgment, courts generally have refused to find that harm irreparable." *Hughes Network Sys. v. Interdigital Commc'ns Corp.*, 17 F.3d 691, 694 (4th Cir. 1994).

Plaintiff cannot meet his burden because (1) his Motion relies either on harm that has already allegedly occurred or on speculative, unsupported allegations of possible harm in the future, and (2) whatever harm Plaintiff has allegedly suffered may be compensated by an award of money damages after trial.

First, an injunction will not prevent any harm because the purported harms that Plaintiff points to arising from the Article have already allegedly occurred. Plaintiff complains that he "lost" a nomination for the Horatio Alger Award, and he asserts that shareholders in Nobles' companies have "been shaken" by the Article, which they have already seen. (DE 24 at 11-13.) Even assuming these are real harms, an injunction would do nothing to prevent them or ameliorate them. Plaintiff cannot point to any competent evidence of a single harm he is *likely* to suffer if the Article and related tweets are left online and Defendants are not saddled with a prior restraint on future speech about Nobles.[21]

Moreover, any harm he has suffered, if proven at trial, may be compensated by money damages. In fact, Plaintiff does not argue that his damages are not subject to calculation; rather, he alleges—based solely on the testimony of counsel for Plaintiff (DE 25)—that he will be unable to collect a money judgment. Counsel's testimony is rank speculation, not evidence.

Plaintiff's alleged harms are either a *fait accompli* or are so speculative as to be non-existent. Such a showing does not meet the burden set forth in *Winter*.

F. The balance of equities and the public interest weigh in favor of Defendants

For the reasons detailed above in Section III.C, the third and fourth elements of *Winter* favor denial of the Motion. The Supreme Court has held that "[t]he loss of First Amendment

[21] Plaintiff's only submission in support of his claim that he "lost" the Horatio Alger Award is the Declaration of Terry Giles, which relies entirely on inadmissible hearsay statements, and is therefore not competent evidence. (Giles Decl. ¶¶ 6-7; *see also* Nobles Decl. ¶¶ 20, 27, 31.)

freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Thus, imposition of a preliminary injunction that would act as a prior restraint and censor protected speech about a public figure and concerning an issue of public concern would intolerably impinge Defendants' First Amendment rights.

By contrast, Plaintiff has demonstrated no harm he would suffer in the absence of an injunction. In balancing the equities, there is nothing to weigh against Defendants' clear harm. When the powerful public interest in protecting the rights of journalists to write about public figures concerning issues of public concern is added to the analysis, the conclusion is inescapable. Plaintiff has failed to meet his burden on the final two elements of the *Winter* test.

CONCLUSION

For the reasons detailed above, Plaintiff's Motion should be denied, and Defendants' motion to dismiss and motion to strike should be granted.

Respectfully submitted, this the 9th day of December, 2014.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
CIVIL ACTION NO. 7:14-cv-00214-FL

ANTHONY NOBLES,

Plaintiff,

v.

RODERICK BOYD, an Individual; KEITH LARSEN, an Individual; and SOUTHERN INVESTIGATIVE REPORTING FOUNDATION, a North Carolina Corporation,

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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This the 9th day of December, 2014.

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