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JOHN DOE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

JAMES WOODS,

Plaintiff,

v.

JOHN DOE, ET AL.,

Defendants.

Case No. BC589746

Assigned to: Hon. Mel Recana

DEFENDANT JOHN DOE'S REPLY IN SUPPORT OF SPECIAL MOTION TO STRIKE [CODE CIV. PROC. § 4251.6]

Date: February 2, 2016
Time: 8:30 a.m.
Dept.: 45

[Filed Concurrently Herewith: Objections to Plaintiff's Evidence in Support of Opposition and Reply To Plaintiff's Objections To Mr. Doe's Evidence]

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In his Special Motion to Strike ("the Motion"), Defendant John Doe ("Mr. Doe") established that Plaintiff James Woods' Complaint should be dismissed as a classic SLAPP suit: a petulant abuse of the judicial system to punish and suppress speech that upsets him. In his Opposition, Mr. Woods has doubled down. He demonstrated that he believes that his wealth and celebrity should protect him from the very insults he enjoys uttering, and that he is above civil liberty protections like the anti-SLAPP statute. Mr. Woods believes that he should be able to insult people by suggesting they're on drugs, but others shouldn't be able to do it to him. Mr. Woods is wrong.

Mr. Woods' first argument epitomizes his position: he's used his wealth to pay an "expert" to say that he's right, and that an insult on a social media platform is a "statement of fact." But the distinction between statements of fact, on the one hand, and insults, hyperbole, and statements of opinion, on the other, is a ***question of law for the court***, not a question of fact suitable for expert testimony. Money can't buy the law. Mr. Woods' expert testimony is as inadmissible as it is ridiculous.

Next, Mr. Woods struggles mightily against controlling California law: that courts distinguishing fact from opinion must look at the entire context of the communication and its audience, not just the challenged words themselves. Mr. Woods doesn't want that. Twitter is a place of sharp elbows, pranks and trolls (including, notably, Mr. Woods [Motion at p. 3 n.15]). But Mr. Woods is bound by the law just like Mr. Doe – and the law requires the Court to view Mr. Doe's insulting tweet in that context.

Finally, Mr. Doe clings to cases stating that online speech isn't *automatically* opinion. Nobody was arguing otherwise. California courts have set forth factors for Courts to consider in evaluating online speech, and all of those factors weigh in favor of Mr. Doe's insulting tweet being mere rhetoric.

It's one thing for a famous and wealthy celebrity to choose to be the most loathed and mocked resident of the schoolyard – the bully who can dish it out but can't take it. It's quite

another to expect the law to give special rights to such thin-skinned celebrity bullies. It doesn't. The Court should grant this Motion, dismiss Mr. Woods' vexatious complaint, and award fees.

II. ARGUMENT

A. Mr. Woods Concedes That Mr. Doe Has Met His Burden Under the Anti-SLAPP Statute

Mr. Doe's burden under the anti-SLAPP statute was to make a prima facie showing that the conduct cited in the Complaint concerns or arises from "any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." (§ 425.16, subd. (b)(1); *Governor Gray Davis Committee v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 458–59.) Mr. Woods apparently concedes that Mr. Doe has met this burden, because he launches directly into a discussion of his case. (Opposition at 6.) Therefore, the burden shifts to Mr. Woods to show that he has a probability of prevailing on his claim. (§ 425.16, subd. (b)(1); *Premier Med. Mgmt. Systems, Inc. v. California Ins. Guar. Ass'n* (2006) 136 Cal.App.4th 464, 476 ["plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment"].) Mr. Woods has utterly failed to do so.

B. Mr. Woods' Purported Expert Testimony On A Question Of Law Is Inadmissible

Mr. Woods has paid a professor of linguistics at USC $450 per hour to opine that the tweet at issue in this case – an insult delivered on Twitter, invoking the same sort of rhetoric Mr. Woods himself routinely uses -- is a statement of fact. That's is the power of money. The court need not reach the fact that the opinion is comically incredible: it's plainly inadmissible.

The determination of whether an allegedly defamatory statement constitutes fact or opinion is a **question of law** for the Court. *Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 600-60; *Okun v. Superior Court* (1981) 29 Cal. 3d 442, 450-51; *Chaker v. Mateo* (2012) 209 Cal. App. 4th 1138, 1147. Therefore, by definition it cannot be a subject of expert testimony. California courts have long held that experts may not opine on legal questions for

the court. *Summers v. A.L. Gilbert Co.,* (1999) 69 Cal. App. 4th 1155, 1178 ("There are limits to expert testimony, not the least of which is the prohibition against admission of an expert's opinion on a question of law.") *Nevarrez v. San Marino Skilled Nursing & Wellness Ctr.* (2013) 221 Cal. App. 4th 102, 122 ("an expert may not testify about issues of law or draw legal conclusions."); *People v. Jones* (2013) 57 Cal.4th 899, 950 ("[t]he cited rule does not ... authorize an 'expert' to testify to legal conclusions in the guise of expert opinion. Such legal conclusions do not constitute substantial evidence.") Notably Mr. Woods cites no case permitting such expert testimony.

The purported expert's report illustrates why this is the rule and why the Court must be the gatekeeper to determine the law. Professor Finnegan doggedly focuses only on Mr. Doe's single tweet and on Mr. Woods' tweet to which it responded. (Exhibit P to Opp. at 6.) ***But that's the wrong inquiry under California law.*** California courts evaluating statements look to the totality of the circumstances, including the context and the "knowledge and understanding of the audience to whom the publication was directed" and common expectations about the seriousness of the publication. (*Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 809-10; *Rudnick v. McMillan* (1994) 25 Cal.App.4th 1183, 1191; *Moyer v. Amador Valley J. Union High School Dist.* (1990) 225 Cal.App.3d 722, 724.) By contrast, Professor Finnegan actually ***fights*** against the relevant law, arguing that "there is no reason, however, to believe that all those who read this Tweet are familiar with any other Tweets." (Exhibit P to Opp. At 6.) In other words, he purports to *reject the test required by California law in favor of one he likes better.*

It is a good thing that Professor Finnegan's "expert" testimony is inadmissible: were it not, California's anti-SLAPP statute would be useless. As the Opposition shows, a litigant can pay an expert to say *anything.* If rich and powerful people could transform any insult or opinion into a statement of fact just by paying an expert to do so, they could harass their critics through vexatious litigation without restraint.

Mr. Woods also offers unsworn lay testimony from a reporter and a professor, who may or may not have any idea about the *legal* distinction between fact and opinion. That's patently

inadmissible. Notably, while citing unsworn lay opinion Mr. Woods did not cite Twitter itself, which rebuked him for this suit and noted that the tweet was "opinion and hyperbole rather than a statement of fact." (Exh. B to Opposition to Ex Parte Application to Conduct Early Discovery.)

C. **Mr. Doe's Challenged Tweet Is A Figurative Insult, Not A Statement Of Fact**

Mr. Woods concedes, as he must, that this motion turns on whether Mr. Doe's tweet was a provable statement of fact or not. (Opposition at 7.)[1] In his Opposition, he studiously ignores controlling precedent, clumsily attempts to reframe the legal test, and struggles unsuccessfully to hide the relevant context – a context that includes Mr. Woods repeatedly using the same insult Mr. Doe used on Twitter. His efforts are in vain: Mr. Doe's insulting tweet was not a provable statement of fact as a matter of law.

1. **"Hyperbole" Is Not The Only Alternative To "Provable Fact"**

Mr. Doe has sometimes used the term "hyperbole" to describe his insulting tweet. Mr. Woods focuses on this term to the exclusion of others, attaching dictionary definitions of hyperbole and arguing at length the term does not apply. (Opp. at 12.) This is a clumsy sleight of hand. "Hyperbole" is only one way to express the many categories of blunt expression that are absolutely protected by the First Amendment because they are not statements of fact. Those categories also include "vigorous epithet," "lusty and imaginative expression of [ ] contempt," and language used "in a loose, figurative sense." (Greenbelt Pub. Assn. v. Bresler (1970) 398 U.S. 6, 14.) Mr. Woods' parsing of the word "hyperbole" is a red herring.

2. **Mr. Woods Cannot Obscure The Context of Twitter – Including His Own Behavior**

As is noted above, in deciding whether a statement is fact or opinion, California courts look to the *entire context, including how the medium is viewed by its audience.* (*Seelig, supra,* 97 Cal.App.4th at 809-810.) Mr. Woods wishes mightily this were not the case, and argues that

[1] In typical form, Mr. Woods misrepresents Mr. Doe's position: he claims that Mr. Doe conceded that Mr. Woods will prevail on all other elements of a defamation claim. (Opposition at 7.) In fact, as the court saw, Mr. Doe conceded the other elements *only for purposes of Mr. Woods' prima facie burden on this motion.*

his own words and tone on Twitter are irrelevant. How could he do otherwise, when he is suing Mr. Doe for the same rhetorical indulges he enjoys? (Exhibit E-1 To Motion.)

Stephen Garramone @stevmg · 11 Oct 2015
@RealJamesWoods Have never heard logical argument against Obama just slogans and labels from you, Jon Voight, Giuliani, all RW shit-heads

James Woods @RealJamesWoods

Follow

@stevmg Well, put down your crack pipe, and retread my timelines. You'll find plenty there.

RETWEETS 8 FAVORITES 14

Mr. Woods wants this Court to *ignore* the larger context, and focus only on his single tweet sneeringly misgendering Caitlyn Jenner and Mr. Doe's angry, insulting response. But that's not the law. The full context is essential to the test, and required by the First Amendment. For instance, in *Chaker v. Mateo* (2012) 209 Cal.App.4th 1138, the court considered online claims that a plaintiff picked up prostitutes and was a deadbeat dad. On their face, ripped from context, those sound like factual assertions. But in the context of an internet gripe forum, they "would [not] be interpreted by the average Internet reader as anything more than the insulting name calling—in the vein of 'she hires worthless relatives,' 'he roughed up patients' or 'he's a crook'—which one would expect from someone who had an unpleasant personal or business experience with Chaker and was angry with him rather than as any provable statement of fact." *Id.* at 1149. Similarly, in *Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 811, the court considered not only the words used about the plaintiff and not even only the single broadcast, but the "irreverence of the Sarah and Vinnie

morning radio program, which may strike some as humorous and others as gratuitously disparaging," and placed it in a "genre."

In his Motion Mr. Doe submitted numerous sources establishing that Twitter is known for insult, misinformation, and "spouting off." (Motion at 3 n.13 – n.15; U.S. v. Bradbury (N.D. Ind., May 22, 2015) 2015 WL 2449641, at *3.) ("[a] lot of people spout off online via Twitter, Facebook and other social media."). Mr. Woods attempts to rehabilitate Twitter's seriousness -- its context -- by submitting articles about times that people played pranks on Twitter and readers fell for those pranks. (Exh. D – I to Opp.) Mr. Woods completely misses the point of the context inquiry. In determining between fact and opinion, the question isn't whether a hypothetical dupe *could* take an insult or a joke as a fact. That possibility is *built in* to the analysis mandated by the First Amendment. In *Farah v. Esquire Magazine* (D.C. Cir. 2013) 736 F.3d 528, the United States Court of Appeals for the D.C. Circuit confronted just such an argument when angry targets of satire sued a magazine. First the Court noted that it was essential to consider the magazine's satirical history in determining whether its article could be taken as asserting facts: "'Context' includes not only the immediate context of the disputed statements, but also the type of publication, the genre of writing, and the publication's history of similar works." *Id.* at 535. Next, the Court rejected the argument that the satire should be taken as fact because some dupe unfamiliar with the context or the history of the parties might take it as genuine: "[t]he test, however, is not whether some actual readers were misled, but whether the hypothetical reasonable reader could be (after time for reflection)." *Id.* at 537.

No, Mr. Woods is stuck with the Twitter context. His own articles show that it has been widely reported that Twitter is a place for misinformation swallowed by dupes. (Exh. E-I to Opp.) Mr. Doe's evidence shows that it's a place where Mr. Woods himself constantly and vigorously insults and engages in inflammatory figurative language, to the point that he's been widely branded a "troll." (Motion at 3-4, and at 3 n. 15; Exh. E1-E14 to Motion.) The evidence shows that it's a place where there's a *frequently used in-joke about Woods using cocaine* (Exh. C1-C10 to Motion) and where *Woods himself insults people by attributing drug*

use to them. (Ex. E-1, E-2 to Motion.) In that context, Mr. Doe's tweet is manifestly an insult, not a statement of fact.

3. The Question Isn't Whether ALL Tweets Are Opinion – The Question Is Whether THIS Tweet Is. All The Relevant Factors Show That It Is.

In his Opposition, Mr. Woods angrily attacks a strawman. Since this is a pleading and not Twitter, he doesn't attack it by telling it to drop its crack pipe, calling it a clown or scum, comparing it to Judas, mocking its sexuality, fantasizing about shooting it in the head, calling it a "disgusting, reprehensible liar," or suggesting that the strawman masturbates to pictures of domestic terrorists. (Exhibits E1, E2, E3, E4, E5, E7, E10, E11.)

The strawman is the argument that all statements made online are automatically opinion rather than fact. Mr. Woods rails against this argument (Opp. at 13-15) even though Mr. Doe never made it. In fact, Mr. Doe explicitly disclaimed the argument (Motion at 12), instead setting forth the factors that California courts have used to evaluate whether an online statement is one of provable fact. (Motion at 11-12.) Mr. Doe cited the factors from those cases that weigh in favor of a statement being one of opinion: that a forum is known for hyperbole and figurative insult, that the participants are known for the same, that a statement came as part of a pattern of insults, that an audience would be familiar with a particular in-joke, that the topic was political and heated, that the speaker was anonymous, that the statement was informal, that it was not labeled as fact, and that it didn't include any indicia of reliability. (Motion at 13-14.)

The cases Mr. Woods cites for the proposition that online speech can be factual actually prove Mr. Doe's point. In explaining when courts treat online speech as factual rather than rhetorical, the cases describe factors manifestly *not present in this case:*

> Thus, while *Krinsky, Summit Bank*, and *Chaker* allow courts to dispense quickly with defamation claims arising from true rants and raves, they do not preclude the courts from taking serious Internet speech seriously. Internet posts where the "tone and content is serious," where the poster represents himself as "unbiased" and "having specialized knowledge," or where the poster claims his posts are "Research Reports" or "bulletins" or "alerts," may indeed be reasonably

perceived as containing actionable assertions of fact. (*Overstock.com, supra*, 151 Cal.App.4th at pp. 705–706, 61 Cal.Rptr.3d 29.) And while "generalized" comments on the Internet that "lack any specificity as to the time or place of" alleged conduct may be a "further signal to the reader there is no factual basis for the accusations," specifics, if given, may signal the opposite and render an Internet posting actionable. (*Chaker, supra*, 209 Cal.App.4th at pp. 1149–1150, 147 Cal.Rptr.3d 496 [making this distinction but finding the comments at issue too generalized to support a defamation claim]; cf. *ComputerXpress, Inc. v. Jackson, supra*, 93 Cal.App.4th at p. 1013, 113 Cal.Rptr.2d 625 [though generally dismissing Internet postings as nonactionable, suggesting that in a "few instances in which the postings did contain apparent statements of facts—such as the statement that a company owned by the former president had filed for bankruptcy"—they could have been actionable had there been evidence of falsehood].) *Bently Reserve v. Papaliolios* (2013) 218 Cal.App.4th 418, 431

In response to this authority – which Mr. Woods barely acknowledges – he attacks yet another strawman. This time, he picks at each factor and argues that it, ***standing alone***, does not establish that a statement is one of opinion rather than fact. (*See, e.g.*, Opp. at 14 (arguing that anonymity alone doesn't make something opinion). Once again, that was not Mr. Doe's argument – he does not assert that any one factor standing alone determines the outcome. Rather, he established that *all of the factors point to the statement being mere rhetoric and insult, and taken together they show it was not a provable statement of fact.* (Motion at 14-15.)

Mr. Woods has no answer for this overwhelming combination of factors. He can't explain why anyone would think an anonymous tweeter -- responding to a homophobic[2] tweet

[2] Exh. A1 to Motion. Mr. Woods claims he's not a homophobe. So he says. (*See, e.g.*, Exh. E6.) But he deliberately called Caitlyn Jenner by the name Bruce Jenner, signaling his contempt and opposition to her transition. *See* GLAAD Media Reference Guide – Transgender issues, http://www.glaad.org/reference/transgender (retrieved September 19, 2015) ("[Transgendered persons] should be afforded the same respect for their chosen name as anyone else who lives by a name other than their birth name (e.g., celebrities)."). Meanwhile Mr. Woods claim's he's not a homophobe because, he dubiously claims, GLAAD endorsed him. (Opposition at 1 n.1.) This is more misdirection. The question isn't whether Mr. Woods is a homophobe (or, based on other tweets, a

attacking Caitlyn Jenner with a reference to an abortion controversy -- with a rude tweet using informal language and offering *no factual basis for the accusation whatsoever* -- should be taken as making a factual statement about his crack addiction. He has no answer for the evidence that "James Woods does cocaine" is an established in-joke on Twitter (Exh. C1 – C10 to Motion), part of the culture and context that the Court must consider in evaluating the nature of Mr. Doe's statement. He has no answer for the fact that ***he himself uses the same insult on Twitter.*** (Exh. E1, E2.) He has no answer for the fact that he himself uses Twitter to "regularly tweet [his] opinions on entertainment, social, and political issues." (Woods Decl. at para. 2.) He has no answer for the fact that Mr. Doe's insulting tweet came not as part of a series of factual statements, but as part of a ***stream of overt insults and abuse.*** (Exhibit B to Opp.) All he has is his money and his sense of entitlement.

4. Mr. Woods' Authorities Are Inapt and Unpersuasive

As in his unsuccessful motion for discovery, Mr. Woods piles irrelevant and out-of-state cases into his brief for the proposition that Mr. Doe's insulting tweet was a statement of fact. They are unpersuasive and inapt. In *Sanders v. Walsh* (2013) 219 Cal.App.4th 855, 864-65, the challenged accusations were specific and detailed allegations of perjury and fraud prefaced multiple times with the legend "Fact." In *Wilbanks v. Wolk* (2011) 121 Cal.App.4th 883, 902 the challenged statements suggested that the writer had inside knowledge, including the promise "stay tuned for details," and specifically accused plaintiff of unethical business practices. In *Yow v. National Enquirer* (E.D. CA 2008) 550 F.Supp. 1179, 1189, the issue was not whether the accusation of drug use was meant to be factual but whether it could be understood to be about the plaintiff herself. In *Burrill v. Nair* (2013) 217 Cal.App.4th 357, 385, the accusations of crime were expressly supported with details and references to bases for knowledge: the publication was a blog stated that an investigation by the Department of Consumer Affairs had met with witnesses and led to District Attorney involvement. In

racist) – people reading the tweets can make up their own minds about that. The point is that Mr. Woods is cynically and disingenuously trying to pretend that the tweet wasn't deliberately provocative, in order to obscure the context.

Ultimate Creations Inc. v. McMahon (D. Ariz. 2007) 515 F.Supp.2d 1060, 1067, the statements in question were made in a DVD documentary purporting to be an expose on the plaintiff, indicating that they were intended to be taken as fact. In *Liska v. United States* (2010 D. AZ) 2010 WL 1038652, a police officer falsely accused a nurse of being a drug-using felon in a communication to the Board of Nursing; the circumstances showed that he intended the Board of Nursing to take it as a true statement and act on it. In *Hadley v. Doe* (Ill. 2014) 12 N.E.3d 75, 91 the court found that the defendant's statement that plaintiff was "waiting to be exposed" implied possession of undisclosed facts. In *In re Indiana Newspapers Inc.* (Ind. 2012) 963 N.E.2d 534, 550, the court assumed without discussion that the statements in question were factual. In *Maxon v. Ottawa Publishing Company* (Ill. 2010) 402 Ill.App.3d 704, 716 the defendant's accusation that the plaintiffs bribed a council for a permit was specific and made in connection with a story about the permit, and accompanied by arguments that the permit vote was suspicious. In *Doe I v. Individuals* (D.Ct. 2008) 561 F.Supp. 249, 57, the statements in question suggested that the anonymous speaker had personal knowledge of the sexual acts being attributed to the plaintiff. In *Restis v. American Coalition against Nuclear Iran, Inc.* (S.D. NY 2014) 53 F.Supp.3d 705, 724 the court rejected defendants' arguments that the statements in question were automatically non-factual because they were on Facebook and Twitter, which is not Mr. Doe's argument.

Volume is not merit; Mr. Doe's flood of inapt cases does not support his arguments.

III. CONCLUSION

For the foregoing reasons, Defendant John Doe respectfully requests that the Court strike this vexatious Complaint and award his attorney fees, for which he will move separately.

Dated: January 26, 2016

Respectfully submitted,

BROWN WHITE & OSBORN LLP

By _____
KENNETH P. WHITE
Attorneys for Defendant
JOHN DOE

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 333 South Hope Street, 40th Floor, Los Angeles, California 90071.

On January 26, 2016, I served the following document(s) described as: **DEFENDANT JOHN DOE'S REPLY IN SUPPORT OF SPECIAL MOTION TO STRIKE [CODE CIV. PROC. § 4251.6]** in this action by placing true copies thereof enclosed in sealed envelopes and/or packages addressed as follows:

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☒ **BY MAIL:** I deposited such envelope in the mail at 333 South Hope Street, 40th Floor, Los Angeles, California 90071. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

☐ **BY FACSIMILE:** I served said document(s) to be transmitted by facsimile pursuant to Rule 2008 of the California Rules of Court. The telephone number of the sending facsimile machine was 213/613-0550. The name(s) and facsimile machine telephone number(s) of the person(s) served are set forth in the service list.

☐ **BY OVERNIGHT DELIVERY:** I served such 5ized by the overnight service carrier to receive documents, in an envelope or package designated by the overnight service carrier.

☐ **BY HAND DELIVERY:** I caused such envelope(s) to be delivered by hand to the above addressee(s).

☐ **BY ELECTRONIC MAIL:** On the above-mentioned date, from Los Angeles, California, I caused each such document to be transmitted electronically to the party(ies) at the e-mail address(es) indicated below. To the best of my knowledge, the transmission was reported as complete, and no error was reported that the electronic transmission was not completed.

☒ **STATE:** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 26, 2016, at Los Angeles, California.

Letty Perez