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

FIRECLEAN, LLC, Plaintiff, v. ANDREW TUOHY and EVERETT BAKER Defendants.	)	Civil Action No. 1:16-cv-00294-JCC-MSN

PLAINTIFF FIRECLEAN, LLC'S AMENDED OPPOSITION TO DEFENDANT ANDREW TUOHY'S MOTION TO DISMISS

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Introduction

The Plaintiff, FireClean, LLC, manufactures a lubricant, FIREClean® ("FIREClean"), that reduces carbon build-up on firearms. Until recently, the company was enjoying a steady increase in profits since its product debuted in 2012. That changed in September 2015, when Defendant Andrew Tuohy ("Tuohy"), a blogger without a degree in chemistry[1], but with a large readership in the online gun community, undertook a purportedly scientific comparison, using spectroscopy analysis, of FIREClean to Crisco Canola oil and Crisco soybean oil. Ignoring that spectroscopy analysis was not, in this case, sufficient to distinguish the oils, he used the results to declare, on his blog and Facebook page, which are widely read in the community of gun aficionados, that FIREClean is "effectively" or "nearly" identical to Canola oil. This is false, as FireClean conclusively demonstrates in its Complaint that its product possesses different properties than the Crisco oils used by Tuohy. **But, Tuohy's sloppy science is not the basis of FireClean's lawsuit**. Rather, the actionable defamation lies in the context of Tuohy's statements surrounding his conclusion. Tuohy has made numerous statements to the effect that FireClean has deceived and misled its consumers by repackaging common supermarket cooking oil. Tuohy's statements have conveyed that FIREClean is not fit for its intended purpose. Tuohy has declared FIREClean to be dangerous. Tuohy has accused FireClean of "looking people in the eye" and selling Canola oil "at a 100x markup." *These* are the statements that give rise to the defamation in this case.

Tuohy's readers have taken his statements to heart. His writings have been shared throughout the online gun community and have provoked hundreds of comments on his blog and Facebook page, as well as on Amazon reviews of FIREClean in which Tuohy's apparent readers accuse the company of being "con artists," "charlatans," and selling "snake oil." FireClean's

[1] Compl. Ex. D at 8 ("I don't have a degree in chemistry.")

revenues have fallen by over $25,000 a month since Tuohy's first reckless article. Tuohy's attacks continued through January of this year.

By his Motion to Dismiss, Tuohy now seeks shelter from the consequences of his own ongoing tortious conduct. Although Tuohy admits that his statements charging FireClean with manipulating shooting test results are disparaging, he argues that somehow, his other false and very similar statements do not constitute actionable defamation. He also claims that it is unconstitutional for FireClean to hale him into court in Virginia, despite (1) having published his false statements to, among others, a Virginia audience while "singling out" a Virginia company for harm; (2) using computer networks in Virginia to publish his tortious statements, (3) calling, texting and emailing FireClean's managers in Virginia regarding its product, and even (4) obtaining the product on which he conducted his testing from FireClean in Virginia.

Glaringly absent from the argument section of Tuohy's brief is a single reference to even one of the 24 defamatory statements that he now defends, which he prefers to put into categories and refer to only in generalities in relation to the legal principles at issue. Defendant Tuohy's specific statements, however, should be the focus of the analysis. Among Tuohy's false and disparaging references to FireClean and its product are statements such as:

- "Deliberately misleading the consumer in an effort to sell a product. Is there a word for that?"

- "What I do take issue with are attempts to mislead consumers and distort the facts. There is a line between being an aggressive salesman and not being entirely truthful about your product, the way it works, or what it contains. It is my belief that FireClean crossed that line long ago-and that many of their recent statements are simply egregious."

- "But knowing that FireClean has been willing to manipulate testing to make themselves look good, why would you trust anything they say?"

- "People lie for the strangest reasons, but one of the more common reasons is to separate you from your money. Don't be a fool. Be an educated consumer."

Despite proclaiming his purpose to report the "truth," to "educate consumers" and referring to his articles as having been "honestly researched," Tuohy now contends that, except for his statements charging FireClean with faking test results, which he admits are factual and disparaging[2], his other statements "should be taken with a grain of salt," are "hyberbolic," or mere "opinion," and in any event, are not defamatory. This argument is flatly contradicted by a reading of the statements in their full context.

Tuohy further asserts that FireClean is a limited purpose public figure, and has failed to sufficiently plead the requisite "actual malice." Tuohy ignores the governing precedent supporting the proposition that FireClean, by mere advertising and defense of itself in the wake of Tuohy's damaging statements, is not transformed into a public figure, and even if it were, FireClean has sufficiently pleaded "actual malice." Finally, contrary to Tuohy's assertion, the Complaint more than adequately alleges an actionable conspiracy.

ARGUMENT

I. This Court has Personal Jurisdiction over Tuohy.

A. Standard of Review and Application of Virginia's Long-Arm Statute

To survive threshold dismissal under Rule 12(b)(2), the plaintiff "need only make a prima facie showing that defendants are subject to personal jurisdiction" and a "district court must accept the uncontroverted allegations in the plaintiff's complaint as true and resolve any factual conflicts in the affidavits in the plaintiff's favor." *Tom Tom, Inc., v. AOT Systems GMBH*, 1:12-cv-528-TSE-IDD (E.D. Va. Sept. 14, 2012); *accord Mylan Labs., Inc. v. Akzo, N.V.*, 2 F.3d 56, 60 (4th Cir. 1993) (on a pretrial personal jurisdiction dismissal motion without an evidentiary

[2]Tuohy Mem. at 23, n. 6.

hearing, the plaintiff need only make a prima facie case of personal jurisdiction, as opposed to proof by a preponderance of the evidence, and may proffer supporting facts with affidavits).

The personal jurisdiction question is resolved by a two-step inquiry: (1) whether Virginia's long-arm statute reaches the defendant's behavior and (2) whether the exercise of personal jurisdiction comports with due process under the Fourteenth Amendment. *Carefirst of Md, Inc. v. Carefirst Pregnancy Ctrs*, 334 F. 3d 390, 397 (4th Cir. 2003). Because Virginia's long arm statute is intended to reach the outer limits of due process, the statutory and constitutional inquiries merge. *Peninsula Cruises, Inc. v. New River Yacht Sales, Inc.*, 257 Va. 315, 512 S.E. 2d 560, 562 (1999). Notably, Virginia's long arm-statute is a "single-act" statute that can confer specific jurisdiction for a single act by a non-resident which amounts to transacting business in Virginia and gives rise to the cause of action. *D'Addario v. Geller*, 264 F. Supp. 2d 367, 379 (E.D. Va. 2003) (finding that Defendants' tortious acts satisfy the long arm statute and therefore give rise to specific jurisdiction).[3]

The specific jurisdiction inquiry turns upon: "(1) the extent to which the defendant has purposefully availed itself of the privilege of conducting activities in the state; (2) whether the plaintiff['s] claims arise out of those activities directed at the state; and (3) whether the exercise of personal jurisdiction would be constitutionally 'reasonable.'" *Carefirst of Md, Inc. v. Carefirst Pregnancy Centers, Inc.*, 334 F.3d 390, 397 (4th Cir. 2003) (citing *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F. 3d 707, 711-12 (4th Cir. 2002), cert denied).[4]

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[3] The Magistrate Judge recently denied Plaintiff's motion for jurisdictional discovery. (Dkt. No. 34) (the "Order") Plaintiff intends to file a Rule 72 objection as the Order commits manifest errors of law and wrongly assumes that the discovery sought by Plaintiff went to only to general jurisdiction. Plaintiff was clear that specific jurisdiction was the thrust of its argument. It was an error to deny discovery that is clearly related to specific jurisdiction case law and precepts.

[4] Specific personal jurisdiction over a person or entity engaged in internet activity is proper where a person "(1) directs electronic activity into the State, (2) with the manifested intent of

In this case, Virginia's long-arm statute is triggered because Tuohy:

- Published the defamatory statements in Virginia. Va. Code § 8.01-328.1(A)(3) (causing tortious injury by an act or omission in the Commonwealth) and § 8.01-328.1(B) (using a computer network in the Commonwealth constitutes an act in the Commonwealth).
- Published the defamatory statements outside of Virginia while regularly interacting with Virginia readers of his blog and Facebook page and engaging in ongoing communications with FireClean's Virginia managers regarding its product. Va. Code § 8.01-328.1(A)(4) (causing tortious injury by an act or omission outside the Commonwealth if he regularly engages in a persistent course of conduct in the Commonwealth).

In committing the above-described acts, Tuohy became subject to the jurisdiction of this Court because he directed his tortious acts to a Virginia company and an audience of, among others, Virginians, and inflicted severe damage in Virginia.

B. This Court Should Find Jurisdiction Exists Over Tuohy.

1. Defendant Mistakenly Relies upon the *KMLLC* Decision

In seeking to avoid this Court's exercise of personal jurisdiction over him, Tuohy relies primarily upon *KMLLC Media, LLC v. Telemetry, Inc.*, No. 1:15cv432, 2015 WL 6506308 (Oct. 27, 2015 E.D. Va.) (Cacheris, J.), where personal jurisdiction was held lacking over a defendant who wrote a defamatory report about the plaintiff and distributed it to various entities, including one company that later published the report on the internet.[5] In *KMLLC*, the defendant did not

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engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action." *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002).

[5] Because Plaintiff was denied jurisdictional discovery (unlike in *KMLLC*), it proceeds solely on its proffers of proof and must only make a prima facie case for jurisdiction. *Mylan Labs.*, 2 F.3d at 60. In *KMLLC*, by contrast, the plaintiff was held to a preponderance of the evidence standard. *Id.* at *11

disseminate the report online, and it was "undisputed" that the defendant "did not directly distribute the Report to any individual in the Commonwealth." *Id.* at *8.[6] Rather, it was a non-party, AdAge, that published the report on its website.[7] Defendant argues that this case is no different than *KMLLC* with respect to personal jurisdiction. (Tuohy Mem. at 14-18.) Defendant ignores, however, that this Court, in its *KMLLC* opinion, emphasized that it would be a different case if it were the "defendant [who] emailed the damaging communication itself directly to the plaintiff as well as a number of other people within the forum state." *Id.* at *10 n. 5.

This case *is* that different case. Unlike in *KMLLC* where there was "no evidence that Defendants circulated the Report in Virginia," Tuohy has done so here, and has "deliberately exploi[ted] the market in Virginia and Plaintiff's business in Virginia." *Id.* at *9. Tuohy targeted the reputation of a Virginia company, targeted its product that was developed and sold from Virginia, targeted its managers personally, and disseminated his statements directly to Virginia residents, among others. Indeed, a search of publicly available information on Facebook indicates that Tuohy has 90 followers who self-identify as Virginia residents. (Declaration of Edward Sugg (Exhibit A) at ¶ 25.) The number of users, including Virginia residents, who actually saw Tuohy's defamatory postings is likely much greater than that. (*Id.* ¶ 24.) Moreover, FireClean, which supplies at least 20 Virginia retailers and contractors in bulk, heard from at least 15 of its customers that they had read Tuohy's articles. (*Id.* ¶¶ 8-9.) FireClean, in Virginia, was the target in Tuohy's sights for damage. Tuohy's publication of his

[6] The only connection of defendants to Virginia that the *KMLLC* plaintiff established was one investigatory email and phone call by the defendants to plaintiff, *id.* at * 10, the mailing of the report to two non-Virginia executives of companies with Virginia headquarters , *id.* at *11, and one sales pitch meeting to a Virginia company after the conduct in question, *id.* at * 12.

[7] "The fact that AdAge, a non-party, posted an article on its website regarding the Report does not somehow draw the named Defendant within the personal jurisdiction of this Court." *Id.*

defamatory statements in Virginia and his targeting of a Virginia company distinguish this case from *KMLLC* and serve to confer personal jurisdiction over him.

2. The Supreme Court's Analyses in *Calder* and *Walden* Confirm that Tuohy's Actions Subject Him to Personal Jurisdiction.

The Supreme Court's specific jurisdiction opinions of *Calder v. Jones*, 465 U.S. 783 (1984) and *Walden v. Fiore,* 134 S.Ct. 1115 (2014) are particularly instructive here. *Calder* involved a California actress who filed a defamation suit against Florida-based employees of the National Enquirer. The Court found there were ample contacts with the forum state of California for the exercise of personal jurisdiction because (1) the defendants relied on phone calls to "California sources" for information in their article; (2) they wrote the story about the plaintiff's activities in California; (3) they caused reputational injury in California by writing an allegedly libelous article that was widely circulated in the State; and (4) the "brunt" of that injury was suffered by the plaintiff in that State. *Id.*, 465 U.S. at 788-89. *See Walden v. Fiore*, 134 S.Ct. at 1123-1124 (noting that "[t]he crux of *Calder* was that the reputation-based "effects" of the alleged libel connected the defendants to California, not just to the plaintiff.")

Similarly, in this case, Tuohy: 1) Tuohy reached into Virginia, by phone and email, to obtain the FIREClean product used for his defamatory articles; and then directed his defamatory articles over the internet, including to Virginia readers and subscribers of his blog and Facebook page;[8] 2) Tuohy wrote postings containing defamatory statements about the Plaintiff's activities in Virginia;[9] 3) Tuohy's posting caused reputational injury in Virginia because his blog and

[8] (Complaint ¶¶ 6, 7, 8, 9, 13, 14, 34, 35, 38 and Tuohy Decl. at ¶ 8; Sugg Decl. at ¶¶ 12 – 14, 17 – 19.)

[9] For example, making defamatory statements directed at Plaintiff's Virginia based business such as "[d]eliberately misleading the consumer in an effort to sell a product. Is there a word for that?" (Complaint ¶ 72.)

FaceBook page were widely circulated in the Commonwealth;[10] and 4) the "brunt" of the injury was suffered by Plaintiff in Virginia.[11] Complaint at ¶ 8. As in *Calder*, and unlike in *KMLLC*, Virginia was the focal point of both the story and the harm suffered.

Nor does *Walden v. Fiore*, cited by Defendant Tuohy, cut against the present case. Significantly, *Walden* did not involve the dissemination of tortious statements over the internet, as Tuohy engaged in here.[12] There, Nevada plaintiffs brought a Bivens claim against a DEA agent arising out of the seizure of the plaintiffs' cash gambling earnings at the Atlanta airport. 134 S.Ct. at 1120. The Court ruled that the plaintiffs had shown no nexus between the defendant and the forum state of Nevada, because *all* tortious activity occurred in Georgia. The only colorable argument the plaintiff made—that the defendant "knew his allegedly tortious conduct would delay the return of funds to plaintiffs with connections to Nevada"—was not enough to establish jurisdiction. *Id.* at 1119.

In contrast to *Walden* (and *KMLLC*), by publishing his statements to, among others, Virginians, Defendant Tuohy actually committed tortious acts within the Commonwealth. Virginia's conflicts of law principles are instructive. For purposes of a defamation claim, the place of the wrong is the place of publication. *Lapkoff v. Wilks,* 969 F.2d 78, 81 (4th Cir.1992). For defamation claims involving the internet and email, the place of publication is deemed to be the place where the email was opened and read. *Galustian v. Peter*, 561 F. Supp. 2d 559, 565-

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[10] (Complaint ¶¶ 9, 17, 18; Sugg Decl. at ¶¶ 8, 9, 25.)

[11] In *First American First. v. National Ass'n of Bank Women*, 802 F.2d 1511, 1516-1517 (4th Cir. 1986), specific jurisdiction in Virginia was proper where letters about Virginia residents were mailed from Illinois around the country, but the brunt of injury was felt in Virginia.

[12] "In any event, this case does not present the very different questions whether and how a defendant's virtual 'presence' and conduct translate into "contacts" with a particular State. To the contrary, there is no question where the conduct giving rise to this litigation took place: Petitioner seized physical cash from respondents in the Atlanta airport, and he later drafted and forwarded an affidavit in Georgia. **We leave questions about virtual contacts for another day**." *Walden*, 134 S. Ct. at 1125, n. 9 (Emphasis added.)

66 (E.D. Va.)[13] (citing *Hydro Eng'g, Inc. v. Landa, Inc.*, 231 F.Supp.2d 1130, 1135–36 (D. Utah 2002)). Tuohy directly deposited his defamatory statements into Virginia by sending them to his Virginia subscribers, and by posting them on his website and Facebook page, which are available in Virginia, and worldwide. (Compl. ¶¶ 5, 8, 9-12) (Sugg Decl. ¶¶ 8, 9, 25.) Moreover, use of a computer network in Virginia is deemed to be an "act or omission in this Commonwealth." Va. Code S. 8.01-328.1(A)(3) & (B). *Bochan v. La Fontaine,* 68 F. Supp. 2d 692, 702 (E.D. Va. 1999). FireClean alleges that Tuohy satisfies this section of the long arm statute, as the Court may take judicial notice that Facebook and GoDaddy—which hosts Tuohy's website—have servers in Virginia. (Compl. ¶¶ 6, 7, 8, 11, 12; Exhibits B at 1 and C at 3)(Tuohy Declaration ¶ 7, Dkt. No.12-2).

3. The Court's Analysis in *Alahverdian* Applies Where Defendant Was the Online Disseminator

In *Alahverdian v. Nemelka*, 2015 WL 5004886 (Aug. 24, 2015 S.D. Ohio) the court addressed a situation strikingly similar to the one at hand, involving a defamatory campaign by a Utah defendant who sent disparaging emails "to a large number of internet users," portraying the Ohio plaintiff as a sexual and religious deviant and sex offender. There was no showing that any Ohioans received the emails. *Id.* at * 3. Nonetheless, the Court held that the three requirements for establishing specific jurisdiction were satisfied, because "the emails contained information that targeted Plaintiff and were intentionally sent to a large number of internet users multiple times a day for several consecutive days."[14] *Id.* at *5. Similarly, Tuohy's blog and Facebook

[13] *Order clarified on reconsideration*, 570 F. Supp. 2d 836 (E.D. Va. 2008), *vacated*, 591 F.3d 724 (4th Cir. 2010), and *rev'd in part on other grounds, vacated in part*, 591 F.3d 724 (4th Cir. 2010).

[14] *See also Hawbecker v. Hall*, 88 F. Supp. 3d 723, 729 (Feb. 19, 2015 W.D. Tex.) (in Facebook defamation action, holding Texas court had personal jurisdiction over Colorado resident Defendant knew she was targeting a Texas individual and "intended the focal point and brunt of her posts to be felt by [Plaintiff] in Texas.")

postings were available for worldwide consumption, including consumption in Virginia, and on information and belief, in light of his broad readership, his blog has Virginia subscribers who also actively received emails containing the same defamatory material. (Compl. ¶ 10.) We know that he has at least 90 Facebook followers. (Sugg. Decl. ¶ 25.) As with the Utah defendant's persistent conduct, Tuohy's tortious statements remain on his website and Facebook page for the world to see every day, and have been repeatedly shared and commented upon in the online gun community. (Compl. ¶¶ 8, 10, 90-97.)

Moreover, although the *Alahverdian* defendant had never set foot in Ohio, the court distinguished *Walden* because the *Walden* defendant "was not going out of his way to single the plaintiffs out, intentionally harm them, or form a contact with Nevada, rather, he was simply doing his job." *Alahverdian*, 2015 WL 5004886 at *9. In *Alahverdian*, the nature of the tortious acts made a difference. The defendant's "alleged deliberate actions sufficiently connected him to Ohio. Defendant was supposedly going out of his way to single Plaintiff out, intentionally harm him, and form a contact with Ohio through his directed actions." *Id.* at *6. Therefore:

> Although Defendant may have never traveled to Ohio, nor has he previously conducted activities within Ohio, it is alleged that Defendant sent electronic communications to various internet users world-wide causing harm to Plaintiff whom Defendant knew to reside in Ohio. Additionally, as mentioned above, although mere injury is not a sufficient connection with the forum state, this injury suffices since the Defendant in this case, unlike in *Walden*, formed and initiated the contact with the forum state himself.

Id. at *7. Those same words are an apt description of this case, except that more so here, Tuohy's statements *did* reach Virginians who subscribed to his blog and Facebook page, and even made their way to FireClean's Virginia customers. (Sugg Decl. ¶¶ 8, 9, 25.) As in *Alahaverdian*, Tuohy singled out FireClean, both as a company and by personally attacking its managers by name: "I made a discovery which calls into question any claim or statement made by FireClean as a Company and by Ed and Dave Sugg as individuals" (Compl. ¶ 73, Ex. E); and

"I spoke at length with one of the makers of FireClean, Ed Sugg, and he assured me that not a single drop of Crisco has even been part of their Formulation;" and "they asked to review a draft of this article for a few days before it was published. That is not how this blog works." *Id.* at 4. (Compl. Ex. C at 1 & 4.)

Moreover, Tuohy "does not dispute, for purposes of his jurisdictional motion, that he had multiple electronic communications with FireClean's principals in the course of gathering information for his articles." Tuohy Opposition to Motion for Jurisdictional Discovery at 9. (Dkt. No. 25.) Defendant Tuohy communicated with FireClean's Virginia managers regarding FIRECLean, and received product shipped from Virginia. (Compl. ¶ 6); (Sugg Decl. ¶12-13.) He knew that FireClean was located in Virginia, and knew that he was communicating with Dave and Ed Sugg who he knew lived in Virginia. (Compl. ¶¶ 8-15) (Sugg Dec. ¶11.) The very product that Tuohy received from the company in Virginia was the subject of his testing, commentary, and defamatory statements.[15] (*Id.*) When taken together with Defendants' internet conduct, Plaintiff has met its burden of establishing a prima facie case for personal jurisdiction.

C. Defendant's Reliance on *Young v. New Haven* Advocate Is Misplaced.

The case of *Young v. New Haven Advocate,* 315 F.3d 256 (4th Cir. 2002) is distinguishable in several respects. First, the plaintiff did not rely upon any non-internet contacts, as FireClean does here. *Id.* at 261. Second, in *Young*, the websites at issue, which contained Connecticut traffic and weather, were "decidedly local." *Id.* at 263. Indeed, the *Young* court specifically held the defendants– a local Connecticut newspaper and its employees – did not manifest an intent to target Virginia.

[15] In *KMLLC Media,* the Court found that the remaining contacts between the defendants and Virginia were to be given little weight. *KMLLC Media*, 2015 WL 6506308 at *10. However, the contacts between Tuohy and Virginia are much more extensive and systematic than "registration of a dummy website, one e-mail, one phone call, and a cursory sampling of Plaintiff's services for investigative purpose." *Id.*

Moreover, in *Bright Imperial Ltd. v. RT MediaSolutions,* the Court found that a court should not look only to a website's degree of interactivity, but also the degree to which it interacted with the Virginia contacts. 2012 WL 1831536, at *5 (May 18, 2012, E.D. Va.). An ongoing relationship with registered users of a website would put a defendant on notice that he would be subject to forum jurisdiction, and courts must consider the number of forum contacts in absolute, not relative, terms. Even a passive website could support jurisdiction if the defendant intentionally uses it to harm plaintiff in the forum state. *Id.*

Here, unlike in *Young*, Defendant Tuohy's blog and FaceBook pages are far-reaching on their face and interact with Virginians. The Vuurwapen Blog Facebook page is "liked" by at least 9,181 people from around the world, and at least 90 in Virginia, and is likely read by many more than that.[16] (Sugg Decl. ¶¶ 21-28.) Defendants' statements are directed towards FireClean, its integrity as a company, its product, and FireClean's relationship with its customers. Also in contrast to the websites in *Young*, Defendant's websites and Facebook postings were not passive webpages presenting information. Rather, they are interactive websites that intentionally engage in direct contact with Virginia residents and actively solicit interactions within Virginia. Such interactivity can trigger personal jurisdiction.[17] Facebook, one of the largest social networking websites in the country, is arguably the most interactive type of website possible under the *Zippo* analysis. Tuohy's blog and Facebook pages: (1) permit any viewer to leave a comment, (2) permit any viewer to reply to those comments, (3) have subscribers who are Virginia residents, (4) allow readers to receive direct email notifications of new posts and new comments to a blog

[16] Demonstrating that Tuohy is widely followed, one of the videos posted to the Vuurwapen Blog YouTube channels shows that it has been viewed more than 1.2 million times. https://www.youtube.com/watch?v=S6cwh4IxXSc

[17] "When a website is neither merely passive nor highly interactive, the exercise of jurisdiction is determined 'by examining the level of interactivity and commercial nature of the exchange of information that occurs.'" *Carefirst of Maryland,* 334 F.3d at 400 (quoting *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1126 (W.D. Pa. 1997)).

post, and (5) have regular readers and subscribers who receive updates via email who and are Virginia residents. (Compl. ¶¶ 4-21.) And, as already discussed, Tuohy's Facebook page has numerous Virginia readers with whom he interacts by replying to reader comments. (Sugg Decl. ¶¶ 25, 26) Tuohy frequently discussed FireClean on his Vuurwapen Blog Facebook page, and re-posted many of his defamatory statements there.[18] His statements remained on his blog and Facebook page and were cumulative, building upon one another, and were not one-off discrete statements. His posts routinely received hundreds of "Likes," "Shares," and Comments, to which Tuohy has simultaneously engaged in multiple conversations with multiple participants, with each comment publicly visible to all visitors and each post available for additional comment by any viewer.[19] Defendant's postings, which garnered enormous interactive comments between readers and Tuohy, were aimed at a Virginia company, its Virginia members and managers, and its product, which is manufactured and sold from Virginia. (Compl. ¶8.) These certainly constitute more than sufficient interactions with Virginia to warrant imposition of personal jurisdiction over Tuohy.

II. FireClean Has Pled Cognizable Defamation Claims Against Tuohy.

A. Tuohy's Statements Are Capable of Conveying a Defamatory Meaning.

In defending a motion to dismiss, FireClean need only show that the Defendant's statements are reasonably capable of conveying the disparaging meaning that FireClean ascribes to them. This is the Court's "gatekeeping function" at this stage of the legal proceedings. It is then for the jury to decide whether the statements *actually* possess that defamatory meaning, as well as whether they are false and made with the requisite intent. *Webb v. Virginian-Pilot*, 287

[18] (Complaint ¶¶ 9, 33, 72, 86, 95, 100, 122, 135, 138-141 and 154.)
[19] (*See, e.g.*, Compl. Exs. D, G, M, N, O, Q.)

Va. 84, 89 (2014).[20] FireClean's defamation allegations may be supported not only by the actual words used, but also by every "inference[] fairly attributed to them." *Wells v. Liddy,* 186 F.3d 505, 523 (4th Cir. 1999).

Tuohy recognizes that under Virginia law, which applies in this diversity action, "a statement is defamatory if it 'tends to injure the reputation of the party, to throw contumely, or to reflect shame and disgrace upon [the party], or to hold [the party] up as an object of scorn, ridicule or contempt." (Tuohy Mem. at 19, quoting *Chapin v. Knight-Ridder, Inc.,* 993 F.2d 1087, 1104-05 (4th Cir. 1993).) Moreover, a defamatory charge need not be direct:

> [B]ut it may be made indirectly, and it matters not how artful or disguised the modes in which the meaning is concealed if it is in fact defamatory. Accordingly, a defamatory charge may be made by inference, implication or insinuation. . .

Carwile v. Richmond Newspapers, Inc., 196 Va. 1, 82 S.E.2d 588, 591 (1954) (citations omitted). Every fair inference from allegations of defamation *must* be resolved in the plaintiff's favor. *Id.* Also at this stage, the plaintiff's construction of the statements' defamatory meaning may be supported not only by the actual words used, but also by every "inference[] fairly attributed to them," *Id; Wells v. Liddy,* 186 F.3d 505, 523 (4th Cir. 1999), and every such inference *must* be resolved in the plaintiff's favor. *Id.*

Without a rule that permitted defamation by implication or innuendo, the law "would immunize one who intentionally defames another by a careful choice of words to ensure that they state no falsehoods if read out of context but convey a defamatory innuendo in the circumstances in which they are uttered." *Pendleton v. Newsome*, 290 Va. 162, 173-74 (2015). ("A defamatory innuendo is no more protected by the First Amendment than is defamatory

[20] In ruling on a motion to dismiss, a court must accept the plaintiff's allegations of falsity. Also, because Tuohy's defamatory statements injured FireClean in its trade, business or profession, the statements are actionable *per se. Carwile,* 82 S.E.2d at 591; *Swengler v. ITT Corp.,* 993 F.2d 1063 (4th Cir. 1993)

speech expressed by any other means.") In *Pendleton*, the Supreme Court of Virginia emphasized the importance of the context in which the statement was made, and that a defamation claim shall survive demurrer if the statement is "reasonably capable" of conveying the disparaging meaning alleged within that context. In that case, a school board issued a statement after a little girl died at school from an allergic reaction to a peanut. The Court held that the statements, "**parents need to provide all necessary medication their child needs to the school**," and "**execution of the [school's allergy] plan is dependent upon the parents' ability to inform the school of needs and to provide the appropriate resources**," in the context of the alleged publicity of the statements surrounding the child's death, *were* reasonably capable of conveying by implication or innuendo that the parents had not provided the necessary medications (which was false), and therefore were responsible for their child's death. As a consequence, the Court reversed the trial court, which had sustained the demurrer. *Id.* at 175.

In this case, each one of Tuohy's alleged defamatory statements are either explicitly or implicitly injurious to FireClean's reputation, as follows:

1. <u>References Equating FIREClean to Canola or Cooking Oil</u>

Many of Tuohy's statements refer to FIREClean as, *inter alia*, "canola oil," "a common vegetable oil," "some sort of cooking oil," and Crisco. Ex. D, Statement Nos.[21] 2, 13, 15, 16, 17, 19, 20 & 24. In the context of Tuohy's articles, these references are reasonably capable of conveying the disparaging notions that:

- Because FIREClean is merely a cooking oil, it is therefore *not* a specialty product designed specifically for firearms, and therefore not fit for its intended use;

[21] While the various actionable statements should be read in context, for ease of reference, Plaintiff has listed in them in the attached Exhibit D.

- FireClean has deceived its consumers by re-packaging a product not truly fit for its intended use, i.e. a "common" supermarket or household product.

Tuohy would have the court believe that his statements are not disparaging because FireClean "admits that it is composed of at least three oils, each one of which is a natural, non-petroleum, non-synthetic oil derived from a plant, vegetable, or fruit or shrub or flower or tree nut," as stated in its patent application, and therefore IS like "vegetable oil." (Tuohy Mem. at 24.) As alleged in the Complaint, Crisco "Vegetable Oil" is soybean oil, and FIREClean is not soybean oil. (Compl. ¶ 31.) Crisco "Canola Oil" is common canola oil, and FIREClean is not canola oil. (*Id.* ¶ 29.) So, Tuohy's above-enumerated statements, in the context of the facts alleged, are literally false. Moreover, the true message of Tuohy's statements, such as "[I]f you think that putting canola oil - an oil with a long history of use as an industrial lubricant for metal-to-metal contact -on your rifle is dangerous, but that putting FireClean on your rifle is safe, then you're stupid," Ex. D, Statement No. 19, conveys that FIREClean *is* canola oil (and is dangerous).

On this issue, *Gen. Mills, Inc. v. Chobani, LLC*, No. 3:16-CV-58, 2016 WL 356039, at *6 (N.D.N.Y. Jan. 29, 2016), is analogous and instructive. There, plaintiff General Mills, which manufactures Yoplait yogurt, successfully sought an injunction pursuant to its Lanham Act claim regarding Chobani's misleading advertisements. Chobani's ads claimed that Yoplait contains the preservative potassium sorbate, and that "that stuff is used to kill bugs." 2016 WL 356039 at *3. While both statements were literally true, in the context of the commercial, they court held the statements conveyed the "literally false" message that Yoplait was unsafe to consume, when in fact, scientific evidence showed that potassium sorbate is safe for human consumption in the amounts present in Yoplait. *Id.* at *4, 9. Tuohy cannot disingenuously proclaim that he was simply making true statements. Similar to *Chobani*, even if the court believes that FIREClean

can accurately be described as "vegetable oil," Tuohy' choice of words and the context of his statements nevertheless convey the "literally false" and disparaging message that the product is something lesser than what it is advertised to be, unfit for its intended use, a deception to its customers, and unsafe.

2. Disparagement of the Safety and Efficacy of FIREClean

Tuohy also denigrates the safety, efficacy or propriety of FIREClean as a gun lubricant. Ex. D, Statement Nos. 3, 14, 15, 19. In addition to *Chobani*, the case of *General Products, Inc. v. Meredith Corp.*, 526 F. Supp. 546, 549-50 (E.D.Va. 1981), provides guidance. There, a manufacturer of triple-walled chimneys sued a magazine for an article stating that triple-wall chimneys are safe for use only for prefabricated fireplaces, and not for stoves, because they allow the accumulation of a substance that presents a fire hazard when used with stoves. The author did not distinguish between two types of triple-walled chimneys; the type the plaintiff manufactured was, in fact, safe for use with prefabricated fireplaces. *Id.* at 549. The court held that the statement was capable of casting aspersion on the "honesty, credit, efficiency, prestige or standing" in the plaintiff's field of business, and therefore defamatory. *Id.* at 549-550.

This principle fits squarely with the defamation arising from Tuohy's statements such as, "[g]iven that people in the military are often exposed to both UV and oxygen, and also need corrosion protection for their firearms, I would not recommend FireClean be used by members of the military."[22] and "it would be difficult to argue that vegetable oil possesses 'extreme heat resistance' when it is known to degrade in the presence of heat and oxygen…if you are comfortable with this on your firearm's internal components, then this would be a good product

[22] The fact that Tuohy couched his statement as a "recommendation" is of no moment, because his statement still conveys that FIREClean is unfit or unsafe. *See Moldea,* 15 F.3d at 1144.

to use, otherwise a more thermally stable product would be in order."[23] Tuohy's statements are also akin to the statements in *Fuste v. Riverside Healthcare Ass'n,* 265 Va. 127 (2003) that were held to be actionable. There, the Supreme Court of Virginia held that statements that there were "concerns" about the "competence" of doctors, and that the doctors had "abandoned their patients," contained provably false connotations. *Id.* at 133 (quoting *WJLA-TV v. Levin,* 264 Va. 140, 156, (2002)) (Tuohy Mem. at 20)). In this case, the provably false factual connotation is that FIREClean is not only different from what it is advertised to be, but also dangerous to use.

3. <u>References to Deceit and Fraud by FireClean</u>

Statement Nos. 1, 5-11[24], 12, 17, 18, 20, 21, 23, are reasonably capable of being construed as impugning the company's honesty and reputation. Ex. D. Statements such as, "I don't think I could look someone in the eye and tell them that a bottle of vegetable oil was the most advanced gun lube on the planet," and "[P]art of me wonders if I could look people in the eye and tell them they need to spend $7.50 an ounce on some sort of cooking oil for their gun," and "What I do take issue with are attempts to mislead consumers and distort facts," and "More Power to [FireClean] for having been able to sell something at a 100x markup for three years. . . ." in this context, explicitly convey that FireClean is fraudulently attempting to pass off an inferior product from what it advertises its oil to be.

Moreover, as discussed in Section C (2) below, these statements cannot be deemed "opinion based on disclosed facts," because FireClean further disputes the predicate facts of those statements, including that FireClean has ever *made* any representations about its formula to

[23] It is not just the conclusion in this statement with which FireClean takes issue; FireClean also disputes the facts underlying the conclusion, i.e., that FIREClean is "vegetable oil," because "vegetable oil" in most supermarkets is soybean oil (Compl. ¶ 31).

[24] Tuohy concedes the defamatory nature of the statements in Count II of the Complaint, to the effect that FireClean "manipulated" or faked the test portrayed in the Vickers Tactical Video are defamatory. (Tuohy Mem. at 23, n. 6.)

its customers (such that it could have deceived them); that spectroscopy is a sufficient method to distinguish FIREClean from canola or soybean oils; and that FIREClean is sold at 100 times its cost. These statements indisputably convey the false and disparaging notion that FireClean has defrauded its consumers.

4. False References to Claims of FireClean

Tuohy falsely asserts that FireClean calls its product "the most advanced gun lube on the planet." Ex. D., Statement No. 17. Words of this ilk have been examined by the Supreme Court. In *Masson v. New Yorker Magazine*, 501 U.S. 496, 511 (1991), the Court held that where a public-figure psychoanalyst was falsely quoted as stating that he was the "greatest analyst who ever lived," that "one need not determine whether [he] is or is not the greatest analyst who ever lived in order to determine that it might have injured his reputation to be reported as having so proclaimed." *Id.* at 511-512. Tuohy's statement is reasonably capable of conveying a defamatory meaning.

5. References that FireClean Is "Separating" the Consumer from His Money

Several of Tuohy's statements also convey that FireClean is just trying to "take people's money." Ex. D., Statement Nos. 17, 18, 20, & 23 ("People [referring to FireClean] lie for the strangest reasons but one of the more common reasons is to separate you from your money"). These statements are similar to ones deemed defamatory by the Supreme Court of Virginia. In *Tronfeld v. Nationwide Mut. Ins. Co.*, 272 Va. 709 (2006), the Court held that an insurance adjuster's statements that a personal injury attorney "just takes people's money" and that clients of the attorney "would receive more money [for their claims] if they had not hired [him] . . ." constituted actionable defamation. That the adjuster's statements may have been his personal opinion did not render them immune from legal challenge because, as the court found, the

adjuster's "statements 'are capable of being proven true or false' and are thus actionable in defamation." 272 Va. at 715 (quoting *Chaves v. Johnson*, 230 Va. 112, 118 (1985)).

In conclusion, in this context of the Complaint, Tuohy's statements, among others, that FIREClean is "virtually the same as many oils used for cooking," that use of FIREClean will lead to corrosion and weapon malfunction, that FIREClean is dangerous, that FireClean is deliberately misleading consumers about the nature of its product in an attempt to take their money, all are actionable. The statements made by Tuohy challenged in this action are capable of being proven true or false, and as demonstrated in the Complaint, they indisputably are false and defamatory.

B. Tuohy's Articles and Facebook Posts Are Defamatory As a Whole.

Not only is each statement identified in the Complaint defamatory, Tuohy's articles and Facebook postings, as identified in Counts I-IV, each read as a whole, also clearly constitute actionable defamation. The subtitle of each of Tuohy's articles is "Lies, Errors, and Omissions." Ex. D, Statements Nos. 1, 6, 11. This sets the stage for the disparaging inferences that follow. Tuohy conveys that FireClean has deceived consumers by marking up common cooking oil; that the product is a grocery store product and therefore not fit to be used as a specialty firearms lubricant; that it is likely to cause corrosion of a firearm; that it is inappropriate (or unsafe) in particular for military use; and that in promoting its product, FireClean has engaged in misrepresentations (Compl. ¶¶ 61, 62, 79, 112, 140, 148(d), 150(d), 160(f), 177(k).) Taken as a whole, each article and posting is also defamatory.

C. Tuohy's Arguments That His Defamatory Statements Are Not Actionable Do Not Withstand Scrutiny.

1. Tuohy's Statements Are Not Rhetorical Hyperbole.

Tuohy argues that language that is merely insulting or offensive constitutes "rhetorical hyperbole" and is not defamatory. (Tuohy Mem. at 18, citing *Schaecher v. Bouffault*, 290 Va.

83, 98 (2015)). While *Schaecher* articulates a valid legal proposition, it is totally irrelevant to FireClean's claims. Nothing in Tuohy's blog postings signal to his readers that his statements are "rhetorical hyperbole," or that they "should not always be taken literally, and in [any] event should be taken with a grain of salt" (Tuohy Mem. at 22), as Tuohy now contends. In fact, the opposite is the case.

Tuohy's articles reflected his attempt "to undertake my own testing to determine whether or not [the claims that FIREClean is Crisco] are true about FireClean. Trust, but verify" (Compl. Ex. C at 1.) In fact, Tuohy has recently professed *the non-rhetorical nature* of his statements in a recent Facebook post soliciting donations for his legal defense, where he refers to the "the results I honestly researched, because an unspoken truth is a lie." (April 1, 2016 Vuurwapen Blog Facebook Post, Ex. E.)[25] He has also stated, "I'm here to educate consumers. Nothing more nothing less." (June 7, 2016 Vuurwapen Blog Facebook Post, Ex. F.)

Indeed, what is noticeable about Tuohy's postings is the ***absence*** of offensive or hyperbolic language. An average reader of Tuohy's statements would reasonably be led to believe that Tuohy was reporting the results of his factual (and purportedly scientific) investigations, and was not merely venting emotions or untutored hyperbole. His statements are not the type of hyperbolic language that courts have held to preclude a defamation claim, and are a far cry from those of the spurned lovers in *Couloute v. Ryncarz*, 2012 WL 541089 (S.D.N.Y. Feb. 17, 2012) (Tuohy Mem. at 22), who posted emotional rantings on the Internet website www.liarscheatersrus.com; a website, the court noted, "specifically intended to provide a forum for people to air their grievances about dishonest romantic partners." *Id.* at 6.

[25] For the reasons stated in Tuohy's own brief, this Court can take judicial notice of his Facebook page. (Tuohy Mem. at 2, n. 2) (*citing Katyle v. Penn Nat. Gaming, Inc.*, 637 F.3d 462, 466 (4th Cir. 2011).

2. Tuohy's Statements Are Not Mere Opinion, But Imply False or Incomplete Facts.

Tuohy's "opinion" defense does not provide him refuge here. Virginia courts have long recognized that defamation occurs where the plain and natural meaning of the words contained in the statement are false and defamatory, even where the defendant attempts to conveniently characterize the statements as opinion. *See Carwile,* 82 S.E.2d 591-92. Merely "couching. . . statements in terms of opinion does not dispel [factual] implications.'" *Raytheon Technological Services Co. v. Highland,* 273 Va. 292, 303, (2007) (quoting *Milkovich,* 497 U.S. at 19). In other words, opinion is not immune from a defamation claim where it can be interpreted to imply false facts or false factual connotations.[26] *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 19 (1990). As the Supreme Court elaborated in *Milkovich*:

> If a speaker says, "in my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. **Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact**.

Id. (Emphasis added.) *See also Schaecher,* 290 Va. at 103. (Quoting *Milkovich.*)

This principle is key when considering Tuohy's supposed spectroscopy analysis. While the spectroscopy itself, although ill-premised, was not defamatory, Tuohy's accusations against FireClean are based upon both incomplete and false facts, as well as erroneous assessment of those facts. FireClean alleges that spectroscopy is not scientifically suitable for comparing oils from the same class of compounds, including triacylglycerides or hydrocarbons (Compl. ¶ 43) and that Tuohy failed to analyze any other aspects of the substances, including flash point, fire point, specific gravity, pour point, iodine value, and kinematic viscosity—*each* of which show differences between FIREClean and Crisco. (Compl. ¶ 142.)

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[26] Even Defendant Tuohy is forced to concede this proposition. Tuohy Mem. at 20, *citing PBM Products, LLC v. Mead Johnson Nutrition Co.*, 678 F. Supp. 2d 390, 401 (E.D. Va. 2009).

Yet, from these erroneous assessments, as the *Milkovich* court warns, Tuohy irresponsibly, erroneously, and with legal malice concluded that FIREClean: "and Canola oil appear to be 'effectively' or 'nearly' identical." (Compl. ¶¶ 100, 102); "is probably a modern unsaturated vegetable oil virtually the same as many oils used for cooking" (Compl. ¶ 47); "is, as previously stated on this blog, a common vegetable oil, with no evidence of additives for corrosion resistance or other features. The science is solid in this regard" (Compl. ¶ 111); "More power to [FireClean] for having been able to sell something at a 100x markup for three years. . . ." (Compl. ¶ 122); and "Canola oil. Go for the green cap," (Compl. ¶ 139) (in response to a reader who posted a picture of Crisco on the shelf at grocery store and wrote, "Speaking of FireClean, is this a good deal?")) These are precisely the type of "incorrect or incomplete facts" or "erroneous assessments" of those facts" that the Court in *Milkovich* declares to be actionable defamation. Here, Tuohy was engaged in "investigative journalism,"[27] not color commentary.

Tuohy's statements sharply contrast with those that were the subject of *Seaton v. TripAdvisor LLC,* 728 F.3d 592 (6th Cir. 2013) (Tuohy Mem. at 22), where the court held that a website listing the plaintiff's hotel on its "dirtiest hotels" list could not give rise to a defamation claim because the list could not "reasonably be interpreted as stating, as an assertion of fact, that [the plaintiff's] is the dirtiest hotel in America," because a reasonable reader would understand that placement in a ranking constitutes opinion, "not provable fact." *Id.* at 601.

Tuohy's "opinion" argument also improperly requires the Court to: (1) consider facts outside the pleadings and (2) give Tuohy the benefit of many inferences. Both are prohibited at this stage. To accept Tuohy's argument, he asks the court (1) to find that: "the controversy regarding the composition and value of FIREClean had been raging for several months"; (2) to

[27] Compl. Ex. G at 6 ("I think the gun community needs more investigative journalism....It's really sad what this has all come to. People paying a mark up on vegetable oil and gumming up their guns with it.")

review not only all of "Tuohy's blog," but also "the other examples of publications in the community" on the internet; and (3) to determine that "this is a community and a forum in which hyperbole, charge and countercharge" are routine. (Tuohy Mem. at 21.) Tuohy explicitly asks the Court to view his statement in "these contexts." (*Id.* at 22.) In doing so, the Court would subvert both the evidentiary standard and the benefit of fair inferences to which the Plaintiff is entitled. This Court need only find that a statement is **reasonably capable of conveying the meaning that Plaintiff ascribes** to it in order to survive this stage of the legal proceedings. *Webb v. Virginian-Pilot*, 287 Va. 84, 89 (2014). Whether Defendant offers a "better" interpretation of his statements is for the jury to decide at trial.

3. Tuohy's Disclosure of Certain Facts Does Not Immunize Him From Liability.

Contrary to Tuohy's view of the law, a statement is not spontaneously transformed into non-actionable opinion merely because the speaker discloses the facts upon which his statement is based. (Tuohy Mem. at 21.) In *Schaecher v. Bouffault*, upon which Tuohy relies, the Court specifically noted that the two people, Russell and Stidham, to whom the allegedly defamatory statements were published "possessed a **high degree of familiarity** with the subject," including the stated facts from which the speaker drew her conclusion (the statement at issue). 290 Va. at 105-106. (Emphasis added.) The Court held that "the positions of Russell and Stidham would allow them to reasonably conclude that Bouffault's [ultimate] statement was purely her own subjective analysis," and hence was non-actionable opinion.[28] 290 Va. at 106.

By contrast, the readers of Tuohy's blog are not alleged to have any prior knowledge of the issues in Tuohy's articles, nor the ability to discern whether Tuohy's predicate facts "are either incorrect or incomplete, or if [the defendant's] assessment of them is erroneous."

[28] The Court's decision was also based in part on the fact that the plaintiff did not allege that the stated facts underlying the conclusion were false or defamatory—contrary to the Complaint here.

Milkovich, 497 U.S. 18-19.[29] And FireClean has alleged precisely that: Tuohy's facts were incorrect, incomplete, and his assessment of them was erroneous, and recklessly so, particularly with respect to his inappropriate reliance on spectroscopy to distinguish the oils, his failure to use controls, his failure to employ other tests, his disregard for the fact that two different Crisco oils themselves had similar spectra (which would imply that different oils may present similarly on spectroscopy), and his use of differently-scaled axes to make the spectra appear more similar. (Compl. ¶¶ 39-49, 52, 142-144.) Thus, even if Tuohy's statements are considered "opinion," they are actionable opinion.

4. That Tuohy Made His Statements On His Blog and Facebook Page Does Not Make Them Non-Actionable.

The fact that Tuohy's statements may have been made on his blog and Facebook postings (Tuohy Mem. at 21-22) does not transform what would otherwise be statements actionable in defamation into non-actionable opinion. Merely because defamatory statements are made in the context of a review or opinion article does not mean that the statements may not be the subject of a defamation action. *Moldea v. New York Times Co.,* 15 F.3d 1137, 1146 (1994) ("we do hold. . . that assertions that would otherwise be actionable in defamation are not transmogrified into non-actionable statements when they appear in the context of a book review."). As addressed in Section C (1) above, the tenor of Tuohy's blog postings refutes any assertion of rhetoric or hyperbole.

[29] The comments to Tuohy's various articles indeed shows that many of his readers did not have prior familiarity with the subject, and were convinced by his presentation. (Compl. Exs. D & O) (one reader stating: "I can't say I'm really surprised that a company came along and started repackaging cooking oil to sell to the gun community." And another: "I guess I got taken. I've used fireclean [sic] and it worked, but now with all this evidence....I no longer have any faith in this company...") (Compl. Ex. O at 4)

5. FireClean Is Not a Limited Purpose Public Figure and, In Any Event, FireClean Has Plausibly Pled Actual Malice.

Tuohy argues that FireClean's Complaint is deficient because the company did not plead the "requisite intent" that Tuohy published his defamatory statements with "actual malice," that is, knowing them to be false or with reckless disregard of whether they were false. Tuohy Mem. at 19. Tuohy's argument is predicated upon his unsupported assertion that FireClean is a limited purpose public figure.[30] Although this determination is a matter of law, it raises issues of proof that are not proper on a motion to dismiss and, indeed, Tuohy injects facts outside the pleadings. Even if he could raise that argument now, Tuohy is wrong because FireClean did not thrust itself into a matter of public controversy as is required of a public figure, and in any event, FireClean has plead that Tuohy acted with "actual malice."

D. **A "Public Figure" Determination Is Not Proper at This Stage.**

In support of his limited purpose public figure argument, Tuohy baldly proclaims that FireClean is a "prominent gun oil manufacturer that has availed itself of advertising, industry press, and social media. . . ." (Tuohy Mem. at 27.) He refers to the patent application for FIREClean, FireClean's website and Facebook page, and a press release. (*Id.* at 28.) He relies on no allegations in the Complaint to establish the "prominence" necessary of a public figure. If every business that had a patent application, Facebook page, website, and press releases, the public figure exception would apply nearly anytime the plaintiff is a business. But that is not the law as the courts have recognized: "Activity likely to engender publicity… does not equate to

[30] The Fourth Circuit has recognized five requirements for a limited purpose public figure: (1) the plaintiff voluntarily assumed a role of special prominence in a public controversy; (2) the controversy existed prior to the publication of the defamatory statement; (3) the plaintiff had access to channels of effective communication; (4) the plaintiff sought to influence the resolution or outcome of the controversy; and (5) the plaintiff retained public figure status at the time of the alleged defamation. *Fitzgerald v. Penthouse International Ltd.,* 691 F.2d 666, 668 (4th Cir. 1982).

taking on a role of special prominence in a public controversy, so as to become a limited purpose public figure within meaning of defamation law." *Wells*, 186 F.3d at 536. Moreover and notably, the cases on which Tuohy relies for his "public figure" argument were decided either at trial, on summary judgment. (Tuohy Mem. at 27.)

1. FireClean Did Not Voluntarily Thrust Itself Into a Matter of Public Concern and Controversy.

Where an individual casts him or herself into the forefront of a public issue that person may be said to be a limited public figure for purposes of defamation law. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). A public controversy exists where the matter is a "topic of public concern" and has been "openly discussed by members of the general public." *Fitzgerald,* 691 F.2d at 669. *See also Reuber v. Food Chemical News, Inc.*, 925 F.2d 703 (4th Cir. 1991).

In this case, it cannot be said that any debate on FIRECLean meets that standard. To be sure, discreet segment of individuals who are gun aficionados commented on Tuohy's website. A controversy in a limited segment of the blogosphere, however, does not turn the issue into one that is "openly discussed by members of the general public." If it did, then virtually every issue that prompts debate online would be a matter of "public controversy" for purposes of defamation law. The standard set forth by the Fourth Circuit in *Fitzgerald* and *Reuber* is not so elastic.

Moreover, FireClean did not voluntarily thrust itself into any debate about FIRECLean's composition. Tuohy fails to point to any allegations in the Complaint to support such a conclusion. The only support Tuohy cites for his assertion is his reference to matters outside the pleadings: two press releases FireClean itself issued in September and October, 2015 in direct response to Tuohy's defamatory postings. (Tuohy Mem. at 28, n. 8.) That's it. Moreover, those press releases specifically state that they were being issued in response to "rumors and YouTube videos that have been circulating on the Internet" and the "false and misleading claims on [the]

web regarding [FIREClean's] performance" and composition. In the face of Tuohy's defamatory postings, FireClean had no choice but to respond. In essence, Tuohy's argument turns the standards for a limited purpose public figure on its head by seeking to transform a party that is forced to respond to defamatory statements into the party that thrusts itself into a role of special prominence.[31]

Indeed, the Fourth Circuit has recognized that where a party makes public comments in reasonable and proportionate response to another's attack involving a public controversy, the party does not become a limited public figure for doing so. *See Foretich v. Capital Cities/ABC, Inc.,* 37 F.3d 1541, 1560 (4th Cir. 1994) ("[w]e see no good reason 'why someone dragged into a controversy should be able to speak publicly only at the expense of foregoing a private person's protections from defamation.'"); *See also Blue Ridge Bank v. Veribanc, Inc.,* 866 F.2d 681 (1989) (bank, which had brought defamation action against reporting company for publishing erroneous figures as to bank's financial stability, was not a limited purpose public figure).

2. FireClean Has Plausibly Pleaded Actual Malice.

Even if FireClean were a limited purpose public figure, FireClean has plausibly pleaded that Tuohy's statements were made with knowledge of falsity or reckless disregard for the truth. Despite declaring that FIREClean is "virtually the same as many oils used for cooking," and improperly using the similar spectra of FIREClean and Crisco to imply they are the same,[32]

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[31] FireClean recognizes that in certain circumstances, not present here, involuntary participants in a public controversy may be public figures. However, as the Fourth Circuit has made clear, that occurs only where the individual "choose[s] a course of conduct which invites public attention." *Reuber,* 925 F.2d at 708. FireClean did not engage in any course of conduct inviting public attention by, for example, engaging in a widespread public advertising campaign attacking Tuohy's credibility. FireClean issued two press releases, which is a far cry from engaging in conduct inviting public attention, as is the standard in the Fourth Circuit.

[32] In addition, FireClean alleges a knowing or reckless disregard for the truth with respect to each of Tuohy's articles, as he knew or should have known that infrared spectroscopy is not

Tuohy responded to a critic of his methods that he was "**not terribly interested in determining the exact composition of the oil**" (Compl. Ex. D at 8), thus buttressing Plaintiff's claim that Tuohy's statements were made less out of genuine intellectual curiosity or consideration for the truth, and more for the purpose driving reader traffic to his blog.[33] (Compl. ¶¶ 69, 154.) Moreover, Tuohy undertook no testing that would differentiate FIREClean from Canola oil, despite that his own testing showed that two *different* types of Crisco had very similar spectra. (Compl. ¶ 45). Also demonstrative of malice is Tuohy's statement that he "would not recommend FireClean be used by members of the military" even though he knew FIREClean performed well in extreme conditions, and had posted to Facebook just days before writing the Spectroscopy Article, that he has used FIREClean over "several years" and "tens of thousands of rounds," and had "zero complaints." (Compl. ¶¶ 51, 55-61.)

Finally, Tuohy's January 18, 2016 Facebook Post simply continued his smear campaign by falsely conveying that FireClean had deceived consumers and simply was repackaging cooking oil found in the supermarket. (Compl. ¶¶ 189-91.) Tuohy knew his statements were false "or that he had serious doubts as to their truth and accuracy." (Compl. ¶¶ 193-94.) Nonetheless, "Tuohy purposefully avoided the truth in order to attract attention to his publication and his Facebook page." (*Id.* ¶ 195.)[34]

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scientifically suitable for comparing oils from the same class of compounds. (Compl. ¶¶ 40-49, 68-69, 152-153, 1891-184.)

[33] Nor should the Court permit Tuohy's improper injection of facts on a 12(b)(6) motion. Tuohy's statement that he "shared the results of the professor's test" with FireClean is disingenuous at best. (Tuohy Mem. Ex. 1 ¶ 10.) Tuohy did not share any actual results of his testing. (*See* Exhibit A, Declaration of Edward Sugg, attaching email from Tuohy.)

[34] The press releases cited by Tuohy (Tuohy Mem. at 28, n. 8), where FireClean states that its product is not Crisco oil, canola oil, or vegetable oil, and that it contains additives, further supports actual malice, since he continued with his tortious statements even after the press releases. *Tiversa Holding Corp. v. LabMD, Inc.*, 2014 WL 1584211, *7 (W.D. Pa. Apr. 21, 2014).

III. FireClean Has Properly Pleaded Its Conspiracy Claims.

FireClean also alleges statutory and common law conspiracy by Defendants Tuohy and Baker to defame FireClean through the statements contained in the Closer Look Article. (Compl. Counts VI & VII.) Tuohy, however, asserts that these claims fail, as an initial matter, because the Closer Look article is not defamatory.[35] Alternatively, Tuohy argues that FireClean's conspiracy claims must be dismissed because it has not pleaded the element of "concerted action" between the Defendants. (Tuohy Mem. at 30.) Tuohy's argument simply ignores the detailed allegations in the Complaint that: Baker contacted Tuohy and offered to perform additional testing on FIREClean and vegetable oils, which Baker admits on his blog; (Compl. Ex. K at 2-3.) Baker and Tuohy knew that the testing Baker would perform would be insufficient to determine that FireClean and canola oil are identical; (*Id.* ¶¶ 131-134) Baker was even warned by a professor at his university that his testing was insufficient to draw his conclusion with certainty; (*Id.* ¶ 109.) Yet, Baker and Tuohy had predetermined that the conclusions of the testing would be that "FIREClean® is Canola Oil," in order to drive traffic to their blogs and injure FireClean as part of their prearranged plan; (*Id.* ¶ 135 .) The plan succeeded since Tuohy used Baker's supposed findings from his purported testing to injure FireClean by the publication of false and disparaging statements in Tuohy's Closer Look article on October 23, 2015. These detailed factual allegations more than sufficiently allege concerted action between Tuohy and Baker under Counts VI and VII.

For all the reasons set forth above, FireClean, LLC respectfully submits that the motion to dismiss of Defendant Tuohy should be denied.

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[35] As set forth in Section II above, FireClean has stated a viable claim.

Dated: June 23, 2016

Respectfully submitted,

FIRECLEAN LLC

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CERTIFICATE OF SERVICE

I certify that on June 23, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send a notification of such filing to all counsel of record.

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

FIRECLEAN, LLC, Plaintiff, v. ANDREW TUOHY and EVERETT BAKER Defendants.	Civil Action No. 1:16-cv-00294-JCC-MSN

DECLARATION OF EDWARD SUGG
PURSUANT TO VIRIGNIA CODE § 8.01-4.3

1. My name is Edward Sugg and I am over 18 years of age.

FACTS RELATED TO FIRECLEAN

2. My brother, David Sugg, and I are the sole managers and members of the plaintiff in this case, FireClean, LLC ("FireClean"). We both reside in Virginia.

3. FireClean's product, FIREClean® ("FIREClean") was and still is developed in Virginia, and until March 2015, was manufactured exclusively in Virginia.

4. All sales, marketing, developmental, and executive decisions of the company are made in Virginia.

5. Much of FIREClean's sales, both direct and indirect (such as through Amazon or Dealer Orders) ship from Virginia.

6. FireClean has approximately 20 Virginia retailers, contractors, and governmental entities who purchase our product.

7. Since 2013, our reports show that FireClean has made at least 258 online sales that were shipped to Virginia addresses.

EXHIBIT
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A

8. After Tuohy's Spectroscopy Article, Smoke/Liar Article, and Closer Look Article, FireClean according to our records received communications from no fewer than 15 Virginia customers, stating that they had received or read his publication, and asking whether Tuohy's claims were true.

9. One customer, an employee of a Virginia contractor that does significant business with our company, sent FireClean a link to the Spectroscopy Article and stated in an email that, "It's been passed all around here" and that "I'm sure its made way overseas!"

FACTS RELATED TO ANDREW TUOHY

10. I first met Andrew Tuohy in person in April 2012 in St Louis, Missouri, for the 2012 NRA Annual Meeting.

11. I next saw him again when he attended a meeting in Washington, DC, although I believe he stayed in Springfield, Virginia. We met up for at least one meal. He knew that I lived in Virginia, and he had my phone number that has a 703 area code.

12. In the 2012 through 2015 timeframe, we exchanged numerous emails, text messages, Facebook messages, and occasionally phone calls. We would discuss, among other things the firearms industry, certain studies he had performed on the AR-15 platform, and FIREClean. I considered Tuohy to be a friendly acquaintance in the firearm community until he published the Spectroscopy Article.

13. FireClean occasionally sent Tuohy samples of FIREClean, including at least in August 2012 and September 2015. In August 2012, the samples were sent free of charge, with the understanding that Tuohy would do a review of the product in exchange for some merchandise we would send him. He never wrote the review. It is my belief that he used the September 2015 sample to perform the testing that became the subject of his disparaging articles.

14. On several occasions in August and September, Tuohy communicated with me by phone, text, and email, and prodded me about whether FIREClean is Crisco. FIREClean is not Crisco of any form, but the formulation is proprietary and I never discuss formulation with anyone but Dave.

TUOHY'S SEPTEMBER 11, 2015 EMAIL

15. In Defendant Andrew Tuohy's Declaration, attached to his Memorandum in Support of the Motion to Dismiss, he claims that he "shared the results of the professor's test with FireClean via an email message dated September 11, 2015. . . ."

16. Defendant Tuohy did not "share the results" in that email. In fact, he never even informed FireClean as to what test had been performed, and certainly never mentioned spectroscopy.

17. As evidenced by that September 11, 2015 email, attached here as Exhibit No. 1, Defendant Tuohy only told me that "it was their [the professor's] conclusion that FireClean was probably a modern unsaturated vegetable oil virtually the same as many oils used for cooking."

18. Based on that assertion, Defendant Tuohy asked if I had a response I would like included in the article. (Ex. No. 1.)

19. In my reply, I asked to see his draft article, since he had provided no basis whatsoever for the "professor's" conclusions. (Ex. No. 2.) Defendant Tuohy refused, and instead simply published his first defamatory article.

VIRGINIA FACEBOOK FOLLOWERS OF VUURWAPEN BLOG

20. I have been a personal user of Facebook for over three years. I am also an administer for the FireClean Facebook page.

21. Vuurwapen Blog appears to have a total of 9,181 followers, although only some of those users publicly identify their location. Of a sampling of the first 100 users listed as a follower, only 49 of those users identify their location.

22. Based on my understanding and use of Facebook, a user's individual privacy setting may prevent that user from appearing on this publicly-available list of Vuurwapen Blog followers.

23. Also based on my understanding and use of Facebook, when a user "likes" a page, depending on that user's own settings, the user may receive email notifications when the page has a new post, and/or new posts from the page may automatically appear in the user's news feed.

24. Based on my experience as an administrator of the FireClean Facebook page, the number of people who "like" an individual post is usually a small portion of the number of users who actually see or "view" the post itself. In my experience with FireClean's posts, the number of "likes" a post receives usually represents anywhere from .5 % to 6.0% of the people who "view" the post. Facebook provides information on "likes", "shares", and "views" of posts.

25. I searched for "People who like Vuurwapen Blog and live in Virginia" in the Facebook search bar, and it generated a list of 90 Facebook users who identify themselves as living in Virginia and "liking" the Vuurwapen Blog Facebook page.

26. I have compiled these 90 names into a list. Out of respect for those individual's privacy, that list will be provided to opposing counsel separately and made available for the court's inspection.

27. This list of 90 users may not be comprehensive, since not every person identifies their location, and some people have privacy or other settings that may prevent the pages they follow from being publicly visible.

28. Finally, based on my experience in maintaining FireClean's own Facebook page, the number of "followers" that a page has represents only a portion of the number of people who view the page, either regularly or irregularly.

I declare, under penalty of perjury, that the foregoing is true and correct, to the best of my knowledge and belief.

Edward Sugg

June 23, 2016

Edward Sugg Date

On Fri, Sep 11, 2015 at 7:47 PM, Andrew Tuohy <andrew.tuohy@gmail.com> wrote:
Ed

After our phone conversations, I went to the chemistry department at the University of Arizona and talked with one of the professors about FireClean. I felt that a full report on the topic wouldn't be complete without science, but the science here was a little above my level.

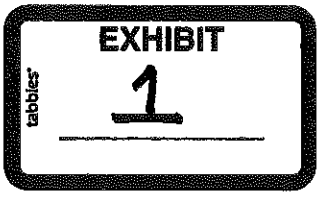
The professor was very interested in the topic and agreed to help me determine the differences between Crisco and FireClean. I took two types of Crisco, the vegetable and canola oils, as well as a sample of FireClean.

The tests took about a week and showed that all three were triglyceride oils exhibiting unsaturation with a small amount of trans fat. FireClean appeared to be most like the canola oil. It was their conclusion that FireClean was probably a modern unsaturated vegetable oil virtually the same as many oils used for cooking.

Do you have a response you would like attached to the article discussing the results?

Regards,

Andrew Tuohy



On Fri, Sep 11, 2015, 18:00 Ed Sugg <easugg@gmail.com> wrote:
Hi Andrew-

Thanks for your note.

The net is that we don't normally comment in any way on formulation.

I will say off the record that there is a huge range of experiences that folks will probably find if they start to experiment with different substances, the vast majority of which will probably end very, very badly. As in far worse than anything they can imagine.

I would very much discourage anyone from experimenting with anything from any origin on any guns they may need to work.

That said, our main concern is not what FireClean is made of but rather how it performs. And it performs exceptionally well when used as directed. We have it made from the highest performing, safest substances we can.

It's been used and abused in circumstances that defy the imagination- your 40K test as an example. Has any AR ever gone 10,000 legit rounds without a single stoppage? Ever?

We will do our best to provide a suitable answer in the next couple of days. I'd like to see a preview of the article beforehand in order to properly tailor our response.

I would strongly urge you to keep in mind is that there will most likely be legal action based on libelous statements made by a competitor. We are allocating a very significant sum towards that effort- they get expensive very quickly. I'd encourage everyone I know not to get caught up in that.

One thing we would like to do is pay for any competitive company's ammo to repeat a 10,000 round firing test. We will pay up to $4000 for ammo and give them $6,000 they can use for publicity (ads, etc.) announcing that they too have gone 10,000 rounds with the same equipment and conditions to your original test.

The caveat is that it needs to be a known, established brand. Defined here as one currently sold by Brownells- who carries >100 different vendors in just the lubricant category.

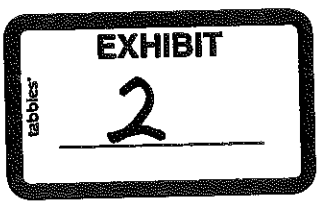
If they get zero stoppages= $6,000 + ammo reimbursement

1 stoppage= $5,000- ammo on them for all others below as well.

2 stoppages= $4,000.

3 stoppages= $3,000

4 stoppages= $2,000



5 stoppages= $1,000

Plus we can defray any reasonable expenses with the test that you or your team might incur.

Thanks and all the best-

Ed

Ed Sugg
FireClean LLC
703-795-4167

EXHIBIT B tabbies

The Facebook Data Center FAQ (Page 3)

How much Does Facebook Spend on Its Data Centers?

A map of the global audience for Facebook, created by Paul Butler, visualizes the geographic spread of its user base. (Source: Facebook)

Facebook has invested more than $1 billion in the infrastructure that powers its social network, which now serves more than 845 million users a month around the globe. The company spent $606 million on servers, storage, network gear and data centers in 2011, and expects to spend another $500 million in 2012, Facebook revealed in its February 2012 filing for an initial public stock offering.

Facebook reported in its SEC filing that it owns "network equipment" valued at $1.016 billion at the close of 2011. The number reflects the expense of rapidly building a massive Internet infrastructure, including Facebook's shift from buying vendor gear and leasing data centers to building its own servers, racks and custom data centers.

Thus far, Facebook's spending compares well with its Internet-scale peers. Google spent $951 million on its data center operations in just the fourth quarter of 2011, with infrastructure capital expenses of $3.4 billion for all of 2011.

Facebook spent about $210 million to build 28 megawatts of data center space in Prineville, which works out to about $7.5 million per megawatt. The most efficient providers are building scale-out data center space at between $5 million and $9 million per megawatt. Enterprise data centers, which require additional investment in on-site redundancy and security, can cost $15 million per megawatt.

Facebook said it expects to spend $180 million on real estate leases in 2012, but did not break out how much of that was dedicated to leasing of wholesale data center space, a market in which Facebook is one of the largest tenants. We have previously estimated Facebook's spending on data center leases to be at least $50 million a year.

Here's what we know about Facebook's spending on its major data center commitments:

- Facebook is paying $18.1 million a year for 135,000 square feet of space in data center space it leases from Digital Realty Trust (DLR) in Silicon Valley and Virginia, according to data from the landlord's June 30 quarterly report to investors.
- The social network is also leasing data center space in Ashburn, Virginia from DuPont Fabros Technology(DFT). Although the landlord has not published the details of Facebook's leases, data on the company's largest tenants reveals that Facebook represents about 15 percent of DFT's annualized base rent, which works out to about $21.8 million per year.
- Facebook has reportedly leased 5 megawatts of critical load – about 25,000 square feet of raised-floor space – at a Fortune Data Centers facility in San Jose.
- In March, Facebook agreed to lease an entire 50,000 square foot data center that was recently completed by CoreSite Realty in Santa Clara.
- Facebook also hosts equipment in a Santa Clara, Calif. data center operated by Terremark Worldwide (TMRK), a Palo Alto, Calif. facilityoperated by Equinix (EQIX) and at least one European data center operated by Telecity Group. These are believed to be substantially smaller footprints than the company's leases with Digital Realty and DuPont Fabros.

That adds up to an estimated $40 million for the leases with the Digital Realty and DuPont Fabros. When you add in the cost of space for housing equipment at Fortune, CoreSite, Terremark, Switch and Data, Telecity and other peering arrangements to distribute content, we arrive at an estimate of at least $50 million in annual data center costs for Facebook.

What Does it Look Like Inside A Facebook Data Center?

In April 2011, Data Center Knowledge was on hand as Facebook opened its first data center in Prineville, Oregon. Facebook Director of Datacenter Engineering Jay Park provided a tour of the data center, which we'll be presenting in two installments. The first video provides a look inside the data halls housing thousands of servers that power Facebook, including a closer look at the custom servers, racks and UPS units the company created for the facility. This video runs about 8 minutes.

In our seconds video, Facebook Director of Datacenter Engineering Jay Park provides a detailed overview of the facility's "penthouse" cooling system, which uses the upper floor of the building as a large cooling plenum with multiple chambers for cooling, filtering and directing the fresh air used to cool the data center. This video runs about 12 minutes.

NEXT: How Efficient Are Facebook's Data Centers?

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Staff
Contact Us
Submit News
Submit Guest Column
Site Map

HPC / Supercomputing
Facebook
Apple
Microsoft
Google
Northern Virginia
New York
Silicon Valley
North Carolina

Virtualization
Consolidation
Open Compute
Internet of Things
Storage
Convergence
Disaster Recovery
Managed Hosting
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Ashburn, VA 2 open positions

Find your job Ashburn

Facebook's mission to make the world more open and connected is only 1% done. We're looking for talented people who are hungry to build new things and bold enough to tackle complex issues that make the world better for everyone. We move fast at Facebook, so you'll have the opportunity to make an impact on your very first day and every day after.

Open positions

Infrastructure Data Centers

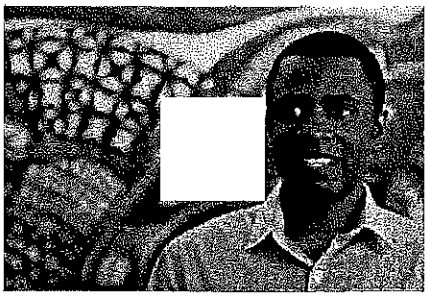
Network Engineer, Deployment & Support

Regional Construction Manager (North America - East)

Only show

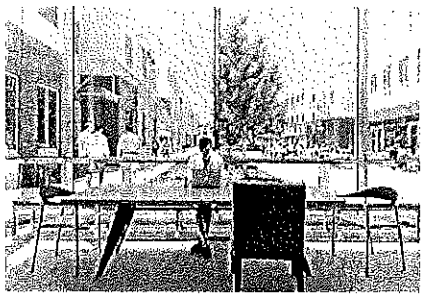
Infrastructure Data Centers (2)

EXHIBIT 3 tabbies



Life Inside Facebook

Hear about our unique culture and why we're passionate about connecting the world. Watch a quick video to meet the teams at Facebook



Facebook Careers Page

Get updates about our people, culture, events and more. Stay connected with us through the Facebook Careers Page.

Diversity at Facebook

We value the impact of every individual. We're creating a workplace where everyone can celebrate and share their different perspectives. Visit the Facebook Diversity page.

Interested in contract roles at Facebook? Visit the Facebook Contractor Opportunities site.

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Company Info
Our Facebook Page
Newsroom
Careers

How To
Help Center
Privacy Basics
Create a Page
Create an Ad

Our Policies
Data Policy
Terms and Policies
Cookies

More Resources
Family Safety Center
Facebook for Business
Facebook for Developers

Virginia Data Center Lease Agreement Signed Between Facebook and DuPont Fabros

Data center operator DuPont Fabros announced in late May that it had signed a deal to lease a large portion of its new Ashburn data center to Facebook.

The new facility, known as ACC7, is currently under a second phase of construction. The expansion will add 9 MW of critical load and 50,000 square feet of space to the site, making it DuPont Fabros' largest facility. Despite not opening until the end of 2015, ACC7 is already 84 percent leased on a critical load basis.

One of the Virginia data center's biggest customers is Facebook. The new lease provides the tech giant with an additional 7.5 MW and nearly 45,000 square feet in ACC7. Facebook now leases a total of more than 40 MW across DuPont's Ashburn campus. The lease provides Facebook with 4.5 MW in phase I which will be immediately available and an additional 3 MW when phase II comes online.

Eldredge, president and chief executive officer of DuPont Fabros. "The expanded relationship with Facebook gives us the opportunity to customize leases with terms that suit the long-term goals of both companies."

Facebook leasing on its own terms

As part of the new lease deal, DuPont Fabros agreed to amend each of Facebook's current leases. The terms of the new leases stipulate that Facebook has the ability to individually decrease the term of the lease of each of nine computer rooms, all of which offer 2.3 MW of available load. These changes will be allowed providing the aggregate reduction in lease terms does not exceed 67 months. The changes also allow for the extension of the lease of one 2.3 MW computer room by six months and two 4.3 MW computer rooms by 12 months each.

DuPont Fabros recently reported positive leasing trends for the first quarter of 2015. However, Facebook's new lease is more than all of the previous first quarter leasing activity. WIth the new lease agreement, occupancy in DuPont's entire portfolio is now at 96 percent, up from 94 percent prior to Facebook's lease.

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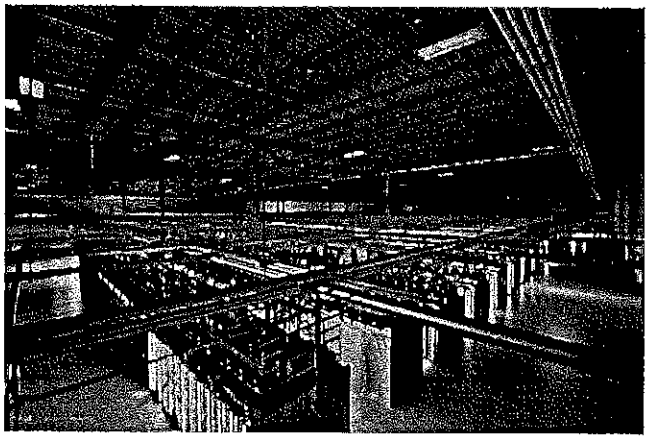
FAQ, GOOGLE

Google Data Center FAQ



An overhead view of the server infrastructure in Google's data center in Council Bluffs, Iowa. (Photo: Connie Zhou for Google)

Like this story? Get the latest data center news by e-mail or RSS, or follow us on Twitter or Facebook.

Google's data centers are the object of great fascination, and the intrigue about these facilities is only deepened by Google's secrecy about its operations. We've written a lot about Google's facilities, and thought it would be useful to summarize key information in a series of Frequently Asked Questions: **The Google Data Center FAQ**.

Why is Google so secretive about its data centers?
Google believes its data center operations give it a competitive advantage, and says as little as possible about these facilities. The company believes that details such as the size and power usage of its data centers could be valuable to competitors. To help maintain secrecy, Google typically seeks permits for its data center projects using Limited Liability Corporations (LLCs) that don't mention Google, such as Lapis LLC (North Carolina) or Tetra LLC (Iowa).

How many data centers does Google have?
Nobody knows for sure, and the company isn't saying. The conventional wisdom is that Google has dozens of data centers. We're aware of at least 12 significant Google data center installations in the United States, with another three under construction. In Europe, Google is known to have equipment in at least five locations, with new data centers being built in two other venues.

Google data centers locations?
Google has disclosed the sites of four new facilities announced in 2007, but many of its older data center locations remain under wraps. Much of Google data center equipment is housed in the company's own facilities, but it also continues to lease space in a number of third-party facilities. Much of its third-party data center space is focused around peering centers in major connectivity hubs. Here's our best information about where Google is operating data centers, building new ones, or maintaining equipment for network peering. Facilities we believe to be major data centers are bold-faced.

- UNITED STATES
- Mountain View, Calif.

- Pleasanton, Calif.
- San Jose, Calif.
- Los Angeles, Calif.
- Palo Alto, Calif.
- Seattle
- Portland, Oregon
- **The Dalles, Oregon**
- Chicago
- **Atlanta, Ga. (two sites)**
- **Reston, Virginia**
- Ashburn, Va.
- Virginia Beach, Virginia
- Houston, Texas
- Miami, Fla.
- **Lenoir, North Carolina**
- **Goose Creek, South Carolina**
- **Pryor, Oklahoma** (Under construction, delayed)
- **Council Bluffs, Iowa** (Under construction)

INTERNATIONAL

Toronto, Canada

- Berlin, Germany
- Frankfurt, Germany
- Munich, Germany
- Zurich, Switzerland
- **Groningen, Netherlands**
- **Mons, Belgium**
- **Eemshaven, Netherlands**
- Paris
- London
- Dublin, Ireland
- Milan, Italy
- Moscow, Russia
- Sao Paolo, Brazil
- Tokyo
- Hong Kong

- Beijing

Most of the international locations likely are for network peering or to house servers supporting the more than 30 country-specific versions of the Google search engine.

Where is Google likely to build new data centers?
Google's current expansion efforts are focused overseas. The company has been scouting multiple locations in Asia, including site visits in Taiwan and Malaysia. There have also been reports that it may locate a data center in Lithuania. Google takes great care to be secretive in its data center site location efforts in the United States. It has bought 466 acres of land in Blythewood, South Carolina for evaluation as a data center location.

What about these lists of Google IP addresses?
Many in the Search Engine Optimization (SEO) community track progress in Google's search results by checking some of the more than 500 IP addresses used by the Google search engine. Comparing Google search results from these different IP addresses can identify updates in Google's index, especially changes in PageRank. However, these lists don't necessarily represent separate physical data centers. Although Google's data center network is distributed throughout the world, nearly all of its IP addresses resolve to Mountain View, California, where Google has its headquarters.

1 | 2 | 3

About the Author

Rich Miller (7930 Posts)

Rich Miller is the founder and editor at large of Data Center Knowledge, and has been reporting on the data center sector since 2000. He has tracked the growing impact of high-density computing on the power and cooling of data centers, and the resulting push for improved energy efficiency in these facilities.

RESOURCE LINKS:

- Must Read White Paper: Data Sovereignty & Data Custody - Issues and Solutions
- Today's utility-scale solar solutions for data centers

One Comment

JOHN
MARCH 28, 2008 AT 5:23 AM

Some pictures of the constuction work in Eemshaven http://www.bouweemshaven.nl/20070530datahotel/index.html

EXHIBIT C tabbies

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As filed with the Securities and Exchange Commission on June 9, 2014

Registration No. 333-

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM S-1
REGISTRATION STATEMENT
Under
The Securities Act of 1933

GoDaddy Inc.
(Exact name of Registrant as specified in its charter)

Delaware	7370	46-5769934
(State or other jurisdiction of incorporation or organization)	(Primary Standard Industrial Classification Code Number)	(I.R.S. Employer Identification Number)

14455 N. Hayden Road
Scottsdale, Arizona 85260
(480) 505-8800
(Address, including zip code, and telephone number, including area code, of Registrant's principal executive offices)

Blake J. Irving
Chief Executive Officer
GoDaddy Inc.
14455 N. Hayden Road
Scottsdale, Arizona 85260
(480) 505-8800
(Name, address, including zip code, and telephone number, including area code, of agent for service)

Copies to:

Jeffrey D. Saper, Esq. Allison B. Spinner, Esq. Jordan S. Coleman, Esq. Wilson Sonsini Goodrich & Rosati, P.C. 650 Page Mill Road Palo Alto, California 94304 (650) 493-9300	Nima Kelly, Esq. Executive Vice President & General Counsel GoDaddy Inc. 14455 N. Hayden Road Scottsdale, Arizona 85260 (480) 505-8800	Alan F. Denenberg, Esq. Sarah K. Solum, Esq. Davis Polk & Wardwell LLP 1600 El Camino Real Menlo Park, California 94025 (650) 752-2000

Approximate date of commencement of proposed sale to the public: As soon as practicable after this registration statement becomes effective.

If any of the securities being registered on this Form are to be offered on a delayed or continuous basis pursuant to Rule 415 under the Securities Act, check the following box: ☐

If this Form is filed to register additional securities for an offering pursuant to Rule 462(b) under the Securities Act, please check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. ☐

If this Form is a post-effective amendment filed pursuant to Rule 462(c) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. ☐

If this Form is a post-effective amendment filed pursuant to Rule 462(d) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. ☐

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act. (Check one):

Large accelerated filer	☐	Accelerated filer	☐
Non-accelerated filer	☒ (Do not check if a smaller reporting company)	Smaller reporting company	☐

CALCULATION OF REGISTRATION FEE

Title of Each Class of Securities to be Registered	Proposed Maximum Aggregate Offering Price(1)(2)	Amount of Registration Fee
Class A Common Stock, $0.001 par value per share	$100,000,000	$12,880

(1) Estimated solely for the purpose of computing the amount of the registration fee pursuant to Rule 457(o) under the Securities Act of 1933, as amended.
(2) Includes aggregate offering price of additional shares of Class A common stock that the underwriters have the option to purchase to cover over-allotments, if any.

The registrant hereby amends this registration statement on such date or dates as may be necessary to delay its effective date until the registrant shall file a further amendment which specifically states that this registration statement shall thereafter become effective in accordance with Section 8(a) of the Securities Act of 1933 or until the registration statement shall become effective on such date as the Commission, acting pursuant to said Section 8(a), may determine.

In addition, we may not be able to adjust spending in a timely manner to compensate for any unexpected bookings shortfall, and any significant shortfall in bookings relative to planned expenditures could negatively impact our business and results of operations.

Our failure to properly register or maintain our customers' domain names could subject us to additional expenses, claims of loss or negative publicity that could have a material adverse effect on our business.

System and process failures related to our domain name registration product may result in inaccurate and incomplete information in our domain name database. Despite testing, system and process failures may remain undetected or unknown, which could result in compromised customer data, loss of or delay in revenues, failure to achieve market acceptance, injury to our reputation or increased product costs, any of which could harm our business. Furthermore, the requirements for securing and renewing domain names vary from registry to registry and are subject to change. We cannot guarantee that we will be able to readily adopt and comply with the various registry requirements. Our failure or inability to properly register or maintain our customers' domain names, even if we are not at fault, might result in significant expenses and subject us to claims of loss or to negative publicity, which could harm our business, brand and operating results.

We rely heavily on the reliability, security and performance of our internally developed systems and operations. Any difficulties in maintaining these systems may result in damage to our brand, service interruptions, decreased customer service or increased expenditures.

The reliability and continuous availability of the software, hardware and workflow processes that underlie our internal systems, networks and infrastructure and the ability to deliver our products are critical to our business, and any interruptions that result in our inability to timely deliver our products or Customer Care, or that materially impact the efficiency or cost with which we provide our products and Customer Care, would harm our brand, profitability and ability to conduct business. In addition, many of the software and other systems we currently use will need to be enhanced over time or replaced with equivalent commercial products or services, which may not be available on commercially reasonable terms or at all. Enhancing or replacing our systems, networks or infrastructure could entail considerable effort and expense. If we fail to develop and execute reliable policies, procedures and tools to operate our systems, networks or infrastructure, we could face a substantial decrease in workflow efficiency and increased costs, as well as a decline in our revenue.

We rely on a limited number of data centers to deliver most of our products. If we are unable to renew our data center agreements on favorable terms, or at all, our operating margins and profitability could be adversely affected and our business could be harmed.

We own one of our data centers and lease our remaining data center capacity from wholesale providers. We occupy our leased data center capacity pursuant to co-location service agreements with third-party data center facilities, which have built and maintain the co-located data centers for us and other parties. We currently serve all our customers from our GoDaddy-owned, Arizona-based data center as well as four domestic and four international co-located data center facilities located in Arizona, California, Illinois, Virginia, the Netherlands and Singapore. Although we own the servers in these co-located data centers and engineer and architect the systems upon which our platforms run, we do not control the operation of these facilities, and we depend on the operators of these facilities to ensure their proper security and maintenance.

Despite precautions taken at our data centers, these facilities may be vulnerable to damage or interruption from break-ins, computer viruses, denial-of-service attacks, acts of terrorism, vandalism or sabotage, power loss, telecommunications failures, fires, floods, earthquakes, hurricanes, tornadoes and similar events. The occurrence of any of these events or other unanticipated problems at these facilities could result in loss of data, lengthy interruptions in the availability of our services and harm to our reputation and brand. While we have disaster recovery arrangements in place, they have only been tested in very limited circumstances and not during any large-scale or prolonged disasters or similar events.

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The terms of our existing co-located data center agreements vary in length and expire over a period ranging from 2014 to 2020. Only some of our agreements with our co-located data centers provide us with options to renew under negotiated terms. We also have agreements with other critical infrastructure vendors who provide all of our facilities, including our data centers, with bandwidth, fiber optics and electrical power. None of these infrastructure vendors are under any obligation to continue to provide these services after the expiration of their respective agreements with us, nor are they obligated to renew the terms of those agreements.

Our existing co-located data center agreements may not provide us with adequate time to transfer operations to a new facility in the event of early termination. If we were required to move our equipment to a new facility without adequate time to plan and prepare for such migration, we would face significant challenges due to the technical complexity, risk and high costs of the relocation. Any such migration could result in significant costs for us and may result in data loss and significant downtime for a significant number of our customers which could damage our reputation, cause us to lose current and potential customers and adversely affect our operating results and financial condition.

Undetected or unknown defects in our products could harm our business and future operating results.

The products we offer or develop, including our proprietary technology and technology provided by third parties, could contain undetected defects or errors. The performance of our products could have unforeseen or unknown adverse effects on the networks over which they are delivered as well as, more broadly, on Internet users and consumers and third-party applications and services that utilize our solutions. These adverse effects, defects and errors, and other performance problems relating to our products could result in legal claims against us that harm our business and damage our reputation. The occurrence of any of the foregoing could result in compromised customer data, loss of or delay in revenues, an increase in our annual refund rate, which has ranged from 6.2% to 6.9% of total bookings from 2011 to 2013, loss of market share, failure to achieve market acceptance, diversion of development resources, injury to our reputation or brand and increased costs. In addition, while our terms of service specifically disclaim certain warranties, and contain limitations on our liability, courts may still hold us liable for such claims if asserted against us.

Privacy concerns relating to our technology could damage our reputation and deter existing and new customers from using our products.

From time to time, concerns have been expressed about whether our products or processes compromise the privacy of customers and others. Concerns about our practices with regard to the collection, use, disclosure or security of personally identifiable information or other privacy related matters, even if unfounded, could damage our reputation and adversely affect our operating results. In addition, as nearly all of our products are cloud-based, the amount of data we store for our customers on our servers (including personally identifiable information) has been increasing. Any systems failure or compromise of our security that results in the release of our users' or customers' data could seriously limit the adoption of our product offerings, as well as harm our reputation and brand and, therefore, our business. We expect to continue to expend significant resources to protect against security breaches. The risk that these types of events could seriously harm our business is likely to increase as we expand the number of cloud-based products we offer and operate in more countries.

We are subject to privacy and data protection laws and regulations as well as contractual privacy and data protection obligations. Our failure to comply with these or any future laws, regulations or obligations could subject us to sanctions and damages and could harm our reputation and business.

We are subject to a variety of laws and regulations, including regulation by various federal government agencies, including the U.S. Federal Trade Commission, or FTC, and state and local agencies. We collect personally identifiable information and other data from our current and prospective customers and others. The U.S. federal and various state and foreign governments have adopted or proposed limitations on, or requirements regarding, the collection, distribution, use, security and storage of personally identifiable information of

FireClean v. Tuohy (Tuohy Defamation Statements)		
Statement No.	**Count I**	**Complaint ¶¶**
1.	"Lies, Errors and Omissions; Infrared Spectroscopy of FireClean and Crisco Oils."	36, 37, 62, 71, 99, 123, 148(a), 160(a), 160(b), 177(a)
2.	"FireClean is probably a modern unsaturated vegetable oil virtually the same as many oils used for cooking."	40, 47, 97(l), 148(b)
3.	"[g]iven that people in the military are often exposed to both UV and oxygen (such as when they go outdoors) and also need corrosion protection for their firearms, I would not recommend FireClean be used by members of the military."	51, 148(c)
4.	Finally, the Spectroscopy Article, read as a whole, conveys the false and disparaging notion that FIREClean® is nothing more than a common household product; that FireClean has simply re-packaged a cheap and common household product and deceived the public into thinking that the product is somehow different or special; and that FIREClean® may not be suitable for its intended use, including for military use, because it is nothing more than simple and re-packaged cooking oil. This is false.	41, 148(d), 150(d), 177(k)
	Count II	
5.	"http://www.vuurwapenblog.com/general-opinion/lies-errors-and-omissions/where-theres-smoke-theres-liar/."	36, 37, 62, 71, 99, 123, 148(a), 160(a), 160(b), 177(a)
6.	"Lies, Errors and Omissions, Severe Problems with Vickers Tactical Video"	36, 37, 62, 71, 99, 123, 148(a), 160(a), 160(b), 177(a)
7.	"I made a discovery which calls into question any claim or statement made by FireClean as a company and Ed and Dave Sugg as individuals."	73, 160(c)

8.	"No honest person with a basic understanding of the scientific method would use handloaded or +P ammunition in a comparison with standard pressure bargain priced ammunition if the comparison was meant to show differences between lubricants and their effect on how much smoke comes out of the chamber during firing."	78, 160(d)
9.	"Different ammunition was selected for the FireClean portion of the demonstration to give the appearance of more smoke and thus a cleaner gun. . . . All the information required to judge the integrity of statements made by FireClean is contained in that Vickers Tactical video."	78, 160(e)
10.	"Deliberately misleading the consumer in an effort to sell a product. Is there a word for that?"	72, 86, 163
11.	Read as a whole, the Smoke/Liar article conveys that FireClean and its representatives have rigged a demonstration test to falsely demonstrate that FIREClean® is a superior product to CLP, and superior to not using gun lubricant.	61, 148(d), 160(f)
	Count III	
12.	"Lies, Errors and Omissions; A Closer Look at FireClean and Canola Oil"	36, 37, 62, 71, 99, 123, 148(a), 160(a), 160(b), 177(a)
13.	"According to every PhD who looked at the NMR results, FireClean and Canola oil appear to be 'effectively' or 'nearly' identical."	100, 177(b)
14.	"However, it would be difficult to argue that vegetable oil possesses 'extreme heat resistance' when it is known to degrade in the presence of heat and oxygen....If you are comfortable with this on your firearms' internal components, then this would be a good product to use, otherwise a more thermally stable product might be in order."	177(c)
15.	"FireClean is, as stated previously on this blog, a common vegetable oil, with no evidence of additives for corrosion resistance or other features. The science is solid in this regard."	111, 177(d)
16.	"I have absolutely no issue with the concept of making money (I applaud those who make money hand over fist) or taking a product from one sphere and introducing it to another. I think a certain amount of "finder's fee" is absolutely reasonable	111, 177(e)

17.	"That said, I don't think I could look someone in the eye and tell them that a bottle of vegetable oil was the most advanced gun lube on the planet, but those who can? Well, they're good salesman, I guess."	177(f)
18.	"What I do take issue with are attempts to mislead consumers and distort the facts. There is a line between being an aggressive and effective salesman and not being entirely truthful about your product, the way it works, or what it contains. It is my belief that FireClean crossed that line long ago-and that many of their recent statements are simply egregious."	111, 177(g)
19.	"A few weeks ago, FireClean said that putting canola oil on your firearm could have catastrophic results. Some people believed that, probably because they are stupid. I don't like it when people in political arguments call the other side stupid and I don't throw around the word stupid lightly. However, if you think that putting canola oil - an oil with a long history of use as an industrial lubricant for metal-to-metal contact - on your rifle is dangerous, but that putting FireClean on your rifle is safe, then you're stupid. There is no other way to define your level of intelligence and critical thinking."	100, 177(h)
20.	"More power to [FireClean] for having been able to sell something at a 100x markup for three years, but they had to know the gravy train would come off the rails at some point. I admire their gusto for having done it and part of me wonders if I could look people in the eye and tell them they needed to spend $7.50 an ounce on some sort of cooking oil for their gun. I don't think I could."	122, 177(i)
21.	"But knowing that FireClean has been willing to manipulate testing to make themselves look good, why would you trust anything they say?"	124, 177(j)
22.	The Closer Look Article, read as a whole, conveys the false and disparaging notion that FIREClean® is nothing more than a common household product; that FireClean has simply re-packaged a cheap and common household product and deceived the public into thinking that the product is somehow different or special; and that FIREClean® may not be suitable for its intended use because it is nothing more than simple and re-packaged cooking oil.	148(d), 177(k)

	Count IV	
23.	"People lie for the strangest reasons but one of the more common reasons is to separate you from your money. Question people when they make statements you find hard to believe. Don't be a fool. Be an educated consumer."	138, 189(a)
24.	In response to a picture of Crisco and the question, "Speaking of FireClean, is this a good deal?" Tuohy responds: "Canola oil."	139, 189(b)

Vuurwapen Blog
April 1 at 8:42am

It strikes me as peculiar that some people think I should not have published the results of the first test simply because I had an inkling FireClean would retaliate.

The only proper course of action was to publish the results I had honestly researched, because a truth unspoken is a lie. After all, didn't you stop reading gun magazines because they rarely if ever contained a bad review?

You can help here:

https://www.gofundme.com/spwt9qss

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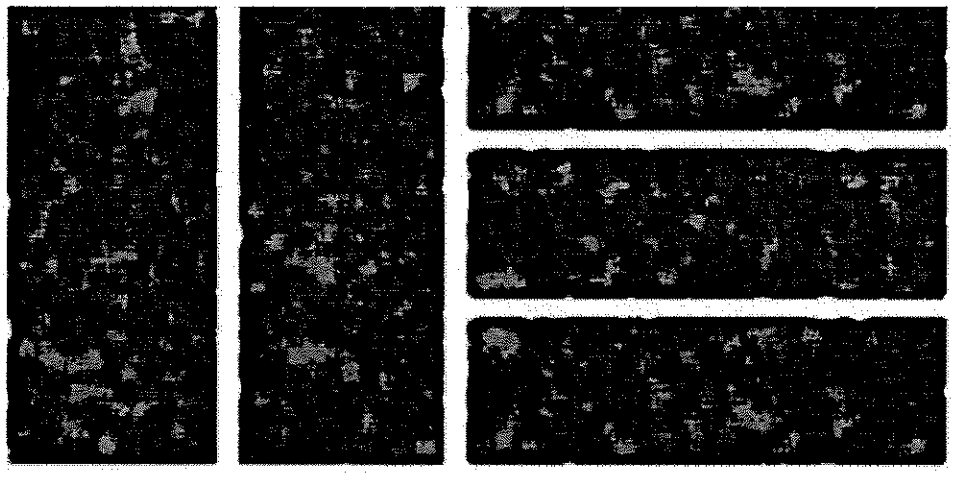
Vuurwapen Blog
March 31 at 10:23am

FireClean is suing me and Everett Baker in retaliation for our testing and series of articles on their product. We need your help to defend against this frivolous lawsuit. More to come.



VUURWAPEN

Click here to support VuurwapenBlog Legal Defense by Andrew Tuohy

EXHIBIT
tabbies
E

Like · Reply · 1 · September 25, 2015 at 7:04pm

Vuurwapen Blog No. I generally have enough sample packs or bottles of various lubes I've bought or been given to keep everything running.

Like · Reply · 1 · September 25, 2015 at 8:17pm

Write a reply...

Trevor Robinson So don't buy it! Vote with your wallets! Simple as that.

I personally use the shit out of this stuff, whatever it is.

Like · Reply · September 25, 2015 at 11:23pm

Vuurwapen Blog I'm here to educate consumers. Nothing more nothing less.

Like · Reply · 3 · September 26, 2015 at 7:56am

Trevor Robinson I'm happy about it too, it's a good thing. Whether I use the shit or not.

My comment was mostly directed at the idiots just shitting on a company for no other reason than someone said to.

Unless something more conclusive comes out, or they admit it's overpriced, the only way to do something is to, again, vote with your wallet.

Like · Reply · September 27, 2015 at 10:31am

Write a reply...

Jackson Lebeef Am I a total cretin because I use CLP for everything?

Like · Reply · September 25, 2015 at 8:18pm

Vuurwapen Blog no

Like · Reply · September 25, 2015 at 8:19pm

Danny Ramirez You got to love it when they call you a faker and conspiracy theorist. The kind of people that think you faked all that data but FC didn't posting is astounding. Really hope those are paid commenters because I don't want to believe there are people that stupid in this world.

Like · Reply · September 25, 2015 at 8:14pm

Vuurwapen Blog And of course that I'm being paid to do this when in fact they're supporting a guy who is compensated to say nice things about FireClean.

Like · Reply · 1 · October 1, 2015 at 12:11pm

Daryn Rodriguez I stopped at "unsubstantiated".

Ehh, you can clearly see the stamp on the brass.

EXHIBIT
tabbies
F