IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

FIRECLEAN LLC, **Plaintiff,** **v.** **ANDREW TUOHY** and **EVERETT BAKER,** **Defendants.**	**Case No. 1:16-cv-00294 (JCC/MSN)**

DEFENDANT ANDREW TUOHY'S REPLY MEMORANDUM OF LAW
IN FURTHER SUPPORT OF
HIS MOTION TO DISMISS THE COMPLAINT

Jay Ward Brown, Va. Bar No. 34355
LEVINE SULLIVAN KOCH & SCHULZ, LLP
1899 L Street, N.W., Suite 200
Washington, DC 20036
Telephone: (202) 508-1100
Facsimile: (202) 861-9888
jbrown@lskslaw.com

Counsel for Defendant Andrew Tuohy

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

PRELIMINARY STATEMENT

As Tuohy demonstrated in his opening brief, FireClean's defamation claims fail as a matter of law because each of the statements at issue either is not capable of defamatory meaning or is protected opinion or both, and in any event FireClean has failed to adequately plead actual malice. But the Court need not reach these issues because it lacks jurisdiction over Tuohy. In this regard, in its opposition brief, FireClean first valiantly tries to ignore, and ultimately grudgingly tries to distinguish, *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002), which controls the jurisdictional question. FireClean's contortions, however, are unavailing: When considering what Tuohy is actually alleged to have done, and how, it is plain that Virginia courts may not properly exercise jurisdiction over him. As the Magistrate Judge observed in his unequivocal decision denying FireClean's motion for jurisdictional discovery as a pure "fishing expedition," "the universe of information relevant to establishing specific personal jurisdiction over a defendant in a case such as this is relatively narrow." Memorandum Opinion and Order (Dkt. No. 34) ("Mag. Op.") at 18. Because "that information is already before the Court," and is lacking, this case must be dismissed in its entirety against Tuohy. *Id*.

ARGUMENT

I. THIS COURT LACKS SPECIFIC PERSONAL JURISDICTION OVER TUOHY[1]

The Complaint in this case is based exclusively on Tuohy posting to the Internet articles and commentary the content of which FireClean does not like. The Fourth Circuit is clear that,

[1] It (again) appears that FireClean has abandoned its contention that Tuohy is subject to general jurisdiction in Virginia. *See* Pl.'s Opp. (Dkt. No. 36) at 4 n.3 ("specific jurisdiction [i]s the thrust of [FireClean's] argument") and 5-13 (making no argument concerning general jurisdiction). *Compare with* Transcript of June 10, 2016 Hearing (Dkt. No. 38) at 6:20-23 ("In all likelihood, Your Honor, we believe we will be proceeding on specific jurisdiction theories, but we're simply not entirely ruling out general jurisdiction at this point."). Because FireClean does not argue general jurisdiction in its opposition, Tuohy does not address the subject here.

in evaluating personal jurisdiction "[w]hen the Internet activity is, as here, the posting of news articles on a website," the question a court must ask is "whether the [publisher] manifested an intent to direct their website content . . . to a Virginia audience." *Young*, 315 F.3d at 263. To undertake this evaluation, the Fourth Circuit explained, a court "therefore turn[s] to the pages from the [publisher's] websites . . . and we examine their general thrust and content." *Id.* (rejecting personal jurisdiction over publisher of articles regarding Virginia prison warden despite fact that articles explicitly referenced conditions in his Virginia prison and highlighted Confederate Civil War memorabilia in warden's office, because Virginia was not the "focal point" of articles or website); *see also Carefirst of Maryland, Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 400 (4th Cir. 2003) (instructing that determination whether defendant manifested intent to target forum state should be made mainly "from the character of the website at issue").

The articles and commentary at issue here are about the technical aspects of the composition of gun lubricants. They have no Virginia connection or focus, and nothing on the Vuurwapen Blog itself points towards the Commonwealth. In *KMLLC Media, LLC v. Telemetry, Inc.*, this Court considered similar facts, and likewise found them insufficient to sustain personal jurisdiction:

> [T]he Report at issue did not "have a Virginia focus." . . . Aside from identifying Plaintiff's location in Great Falls, Virginia, the Report focused on "a ghosting vehicle and its ability to convert one purchased low level in banner online video advertising impression into multiple salable pre-roll impressions with faked results" using highly technical, market-focused jargon. Stated differently, Plaintiff "would have experienced [the same harm] wherever else they might have [been headquartered] and found themselves [answering to clients]" who read the article. There is simply no focus on Virginia.

KMLLC Media, LLC v. Telemetry, Inc., No. 1:15cv432 (JCC/JFA), 2015 WL 6506308, *9 (E.D. Va. Oct. 27, 2015) (quoting *Walden v. Fiore*, 134 S.Ct. 1115, 1124, 1125 (2014) (internal citations and quotations omitted)). That is precisely the case here: The Tuohy publications at issue here are detailed, technical discussions of the results of several different tests of chemical composition and follow-on commentary. The publications at issue do not appear in geographically-labeled forums, do not address themselves to other Virginia-based entities or individuals, or even use the word "Virginia" at all. *Compare with Hare v. Richie*, No. CIV.ELH-11-3488, 2012 WL 3773116, *11 (D. Md. Aug. 29, 2012) (finding that website directed internet activity into Maryland through explicitly labeled "Baltimore" section).

The only case cited by FireClean in support of its notion that the publications at issue were Virginia-focused, Pl.'s Opp. at 7, is not to the contrary. *Calder v. Jones*, 465 U.S. 783 (1984), is a case decided in the era of print newspapers, long before such publications migrated to the Internet.[2] It is a case that this Court explicitly considered in *KMLLC Media* and found to be inapplicable on facts similar to those at issue here, *KMLLC Media*, 2015 WL 6506308 at *8, with good reason. In *Calder*, the Supreme Court held that an article published in a print newspaper headquartered in Florida could sustain personal jurisdiction in California precisely because California *was* the focal point of the story in question, and because of the publisher's deliberate distribution of a large number of physical copies of the newspaper into California. 465 U.S. at 788-89. Specifically, the article published in the National Enquirer "concerned the California activities of a California resident"—namely, that she drank too heavily to actually perform her professional duties in the state. *Id.* at 788. "It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from

[2] *See* David Tomlin, *Extra! Extra! Internet Delivers Newspapers to Foreign Jurisdictions*, 17 Comm. Law. 3, *21-22 (1999) ("In 1994, only a handful of U.S. daily newspapers published online editions through commercial electronic dial-up services.").

California sources, and the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered." *Id*. Moreover, the Supreme Court observed, the publisher distributed 600,000 physical copies of the edition in California, its largest distribution by far in any state. *Id*. at 785. Here, the challenged statements concern FireClean's product, which has nothing to do with Virginia specifically. As this Court aptly put it in *KMLLC Media*, "Plaintiff is correct that if its allegations are true, the injury to Plaintiff's reputation occurred in the Commonwealth of Virginia; most notably, in the eyes of its clients and the online-advertising industry in the forum State. But that connection alone is not enough to assert personal jurisdiction over Defendants." *KMLLC Media*, 2015 WL 6506308 at *9.

FireClean attempts to side-step this obstacle to jurisdiction by re-characterizing Tuohy's conduct so that it would fall into a different line of jurisdiction cases: The relevant fact, FireClean now argues, is not the publication of articles to the world via the Internet, but the purported sending of individualized emails and letters to Virginia residents. *See* Pl.'s Opp. at 9-10 ("Tuohy's blog and Facebook 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."). To be clear, neither in its Complaint nor in its brief does FireClean actually allege that Tuohy himself sent into Virginia even a *single* email or other correspondence containing the allegedly defamatory statements. Rather, FireClean indulges in speculation based on an automated feature common to Internet platforms like Facebook and the site that hosts Tuohy's blog. Compl. ¶ 11 ("Moreover, the Vuurwapen Blog allows readers to request and receive notifications of new posts to the blog, and new comments to a particular blog post, via

email. Upon information and belief, there are regular readers and subscribers of Vuurwapen Blog who reside in Virginia and who receive updates to Tuohy's blog via email in Virginia."). Set aside entirely the unanswered question of whether any such email notices would have actually contained the allegedly defamatory articles, as opposed to a hyperlink that would direct the recipient to the blog or Facebook website from which they could be accessed. The fact remains that not even FireClean claims that Tuohy himself actually sent any such emails.

At bottom, FireClean seems to be arguing that personal jurisdiction is proper over anyone whose statements (or notices of such statements) are *automatically* sent by text message or email, without any intervention or intention on the part of the publisher, *by third party internet companies* (such as Facebook or website hosting companies), so long as at least one recipient of such automated notices is in Virginia. This is an invitation to greatly expand the law of specific jurisdiction. First, even assuming FireClean's technological speculation to be true, there is *not* an allegation – nor could there be one – of any intent on the part of *Tuohy* to target *Virginia* by this mechanism. Second, FireClean's theory would allow anyone to create personal jurisdiction simply by, for example, setting a Google Alert to automatically generate e-mails containing stories with their names, or by virtue of the fact that an article was downloaded by RSS feed. If such a standard would not subvert the Due Process protections undergirding this Circuit's personal jurisdiction jurisprudence, it is hard to know what would.

The line of cases cited by FireClean, in contrast, all involve the *deliberate* sending to particular recipients of letters or email that actually contained the defamatory material in question. In *First America First v. Nat'l Ass'n of Bank Women*, for example, the court held, in a case pre-dating *Young* and having nothing at all to do with the Internet, that letters written specifically to members of an association, some of whom were in Virginia, could sustain a

finding of personal jurisdiction. 802 F.2d 1511, 1517 (4th Cir. 1986). *Alahverdian v. Nemelka*, the out-of-district case on which FireClean places its greatest reliance, involved an individual who purposefully sent emails purporting to be *from the plaintiff himself*, which highlighted the plaintiff's inclusion on a local sex offender registry and noted an Ohio court conviction, and which "portray[ed] Plaintiff as a delusional, sexually deviant, and an insane person. Anyone who sends such an email intends harm to the person described. " No. 3:15-cv-060, 2015 WL 5004886, *6 (S.D. Ohio Aug. 24, 2015).

Courts demand more in cases like this one. *See, e.g. Galustian v. Peter*, 750 F. Supp. 2d 670, 675 (E.D. Va. 2010) (sending of allegedly defamatory email afforded no basis for jurisdiction, even where court assumed email was opened and read in Virginia, because plaintiff "has alleged no facts to suggest that the email sent by Peter was intended for a Virginia audience, even if it was in fact opened in Virginia") (citing *Young*, 315 F.3d at 263-64); *Dring v. Sullivan*, 423 F. Supp. 2d 540, 548 (D. Md. 2006) (finding no basis for personal jurisdiction, after considering *First America First*, where allegedly defamatory emails were distributed by automated listserv, including to some Maryland residents).

Nor is the fact that Tuohy posted some items to his Facebook page, or that some Internet users purportedly based in Virginia "liked" that page, enough to sustain personal jurisdiction, even though, as Facebook's more than 1 billion active users well know, that site provides multiple avenues for sharing and interaction. *See, e.g., Intercarrier Commc'ns, LLC v. Kik Interactive, Inc.*, No. 3:12-CV-771-JAG, 2013 WL 4061259, *4 (E.D. Va. Aug. 9, 2013) (finding no basis for personal jurisdiction where company promoted itself via Facebook and Twitter because there was no evidence social media usage targeted Virginia specifically or was customized for Virginia customers); *Thomas v. Battett*, No. 1:12-CV-00074, 2012 WL 2952188,

*4 (W.D. Mich. July 19, 2012) ("The opportunity to comment on, 'like,' or 'share' Facebook posts does very little to move Defendants' page farther up the continuum from passive to interactive. Although these features make a page slightly more interactive, Defendants' site lacked a commercial nature, and additional interactivity was absent. This means that, as above, the Facebook page 'does little more than make information available,' and qualifies as a passive site.") (quoting *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1124 (W.D. Pa. 1997); *Sweetgreen, Inc. v. Sweet Leaf, Inc.*, 882 F. Supp. 2d 1, 5 (D.D.C. 2012) ("To repeat, defendants' passive websites alone do not provide a basis for jurisdiction. Their Facebook pages and Twitter accounts, while interactive, are more like a broad national advertising campaign than a website engaging in e-commerce."); *Bittman v. Fox*, No. 14 C 08191, 2016 WL 2851566, *7 (N.D. Ill. May 16, 2016) ("Particularly with respect to a publication like the Tribune website, with substantial national readership, posting a comment to an online article seems several steps removed from deliberately targeting tortious communications toward an audience in a particular state. . . . In the posts that Bittman identifies, moreover, Kleinman was responding to content posted by others, rather than reaching into the state to disseminate defamatory material.").

Nor are FireClean's other attempts to premise personal jurisdiction based on other alleged contacts with Virginia sufficient. The only alleged phone and email contacts between Tuohy and Virginia are those with FireClean's managers themselves. Compl. ¶ 7; Declaration of Edward Sugg ("Sugg Decl.") (Dkt. No. 36-1) at ¶¶ 12, 14 (acknowledging that majority of pre-publication contacts between Tuohy and Sugg were unrelated to publications at issue here and were in nature of friendly exchanges, and that those that are relevant to publications at issue are short and few in number). And this is not enough. "[O]ur 'minimum contacts' analysis looks to

the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Walden*, 134 S.Ct. at 1122.

Next, almost as an afterthought, FireClean argues that because Facebook and GoDaddy (the company that hosts Vuurwapen Blog) have servers located in Virginia, that alone can sustain a finding of personal jurisdiction. Pl.'s Opp. at 9. Not so. As the Magistrate Judge discussed in detail when he rejected FireClean's request for third-party discovery to establish the location of servers actually hosting Tuohy's publications, any incidental (and speculative) transit of Vuurwapen Blog or Facebook content through a server located in Virginia would be both unintentional on the part of Tuohy and simply impossible for Tuohy himself to control. Mag. Op. at 11 (addressing fully cases cited by FireClean and concluding they fail to support its theory of personal jurisdiction, and observing that "[t]he Fourth Circuit has 'described as 'de minimis' the level of contact created by the connection between an out-of-state defendant and a web server located within a forum.' . . . This comports with common sense; the physical location of a server where information published to the internet is stored will often be a matter of happenstance, known neither to the writer nor the reader. That is in fact the case here. . . . The connection between user and server is particularly attenuated where, as here, the internet services in question have servers distributed throughout the world.") (quoting *Carefirst*, 334 F.3d at 402)). Rather than belabor the point here, Tuohy respectfully refers the Court to and incorporates here the Magistrate Judge's cogent discussion of this issue. Mag. Op. at 10-14.

Finally, FireClean appears to assert that personal jurisdiction exists because the scientific tests that Tuohy reported on in his articles used samples of FIREClean. Pl.'s Opp. at 11. Notably, FireClean has now abandoned the false allegation in its Complaint that Tuohy and co-defendant Baker "transacted business in the Commonwealth by, purchasing, and/or requesting

orders of FIREClean directly from the company in Virginia, and they know that FireClean is located in Virginia. Defendants' orders were received in Virginia, and FIREClean was shipped to Defendants from Virginia." Compl. ¶ 14. As FireClean's principal now admits in his declaration, FireClean *voluntarily* sent samples of FIREClean *to Tuohy*, in the apparent hope that Tuohy would write a review of its product. Sugg Decl. ¶ 13. Leaving aside the fact that the sending of samples is completely irrelevant to the issue of jurisdiction based on the publication of allegedly defamatory statements, the fact that it was FireClean that actively shipped samples to Tuohy in hopes of a review runs completely counter to any notion that Tuohy himself manifested any intent to target Virginia.

For all of these reasons, the Complaint should be dismissed for lack of personal jurisdiction over Tuohy.

II. FIRECLEAN'S CLAIMS FAIL AS A MATTER OF LAW

Tuohy demonstrated in his opening brief the reasons that *none* of the challenged statements provide a basis for a defamation claim. *See* Tuohy's Memorandum of Law in Support of Motion to Dismiss ("Tuohy Mem.") (Dkt. No. 12-1) at 18-30. There is little in FireClean's opposition calling these arguments seriously into question. Tuohy here addresses briefly the various categories of statements challenged by FireClean.

A. The "Vegetable Oil" Statements

It is difficult to understand what, precisely, FireClean maintains is both false and defamatory about Tuohy's statements comparing FIREClean to vegetable oil. On the one hand, at the outset of its brief, FireClean argues that it is "false" to say "that FIREClean is 'effectively' or 'nearly' identical to Canola oil," but in the same breath says this "is not the basis of FireClean's lawsuit." Pl.'s Opp. at 1. Later, it complains that Tuohy's comparisons to vegetable

oil falsely suggest to a reader that FIREClean is "not a specialty product designed specifically for firearms, and therefore not fit for its intended *use*." *Id.* at 15 (emphasis altered).

First, Tuohy's comparison accords with FireClean's *own* statements on the matter. Indeed, according to FireClean, even if Tuohy asserted that FIREClean definitively was comprised of a single pure type of vegetable oil, that would not be defamatory. In FireClean's own patent application, it notes that, with regard to FIREClean, "it has been surprisingly found that pure vegetable oils and various vegetable oil blends are superior to commercially available products in removing or avoiding carbon fouling on mechanical components." Compl., Ex. A at 5. Among the "pure vegetable oils" to which FireClean expressly refers is none other than Canola oil. *Id*. at Ex. A at 9, 11, 13. "[P]ure vegetable oil compositions and blended vegetable oil compositions satisfactorily remove carbon fouling, without exhibiting the problems of the market lubricants. . . . Furthermore, it was found that a blend of vegetable oil (soybean and canola) was superior to a single oil." *Id*. at Ex. A at 12.

Second, this also accords with Tuohy's explanatory statements in the very same publication now at issue. As Tuohy pointed out in his opening brief, in his articles, Tuohy emphasized not only the fact that pure vegetable oils like canola oil have a "long history of use as an industrial lubricant for metal-to-metal contact," but also that "FireClean works very well as a lubricant for the AR-15" and is a "good lubricant" in general. Tuohy Mem. at 24. The only case cited in support of FireClean's argument as to these statements, *Gen. Mills, Inc. v. Chobani, LLC*, No. 3:16-CV-58, 2016 WL 356039, *6 (N.D.N.Y. Jan. 29, 2016) is inapposite. That case involved a Lanham Act false advertising claim decided under a statutory standard applicable to commercial speech presenting a much lower bar than the principles relevant here. *Id*. at *8. More importantly, that case involved the implication that a perfectly safe additive would actually

cause consumer harm.[3] The statements at issue here conclude that FIREClean bears chemical similarities to common vegetable oils, which, in addition to being true, says nothing at all about gun oil performance. That FireClean may have wished its product to be characterized as "a proprietary blend of carefully selected vegetable oils," does not make Tuohy's statements that it is similar to common vegetable oils capable of defamatory meaning.

B. The Oil Usage Recommendations

FireClean persists in its argument that it is actionable for Tuohy to have advised members of the military to choose an oil other than FIREClean because the oil does not contain evidence of an anti-corrosive additive, and that it also is actionable for Tuohy to have quoted an expert's observation that vegetable oils with compositions similar to that of FIREClean can degrade in the presence of heat and oxygen. Pl.'s Mem. at 17-18.

FireClean, notably, makes no claim that its product actually contains anti-corrosive properties. As such, Tuohy's statement that he would not recommend the product to members of the military because they will likely need such protection not only contains no trace of defamatory meaning, it is also the essence of a protected opinion. By contrast, in *Gen. Products Co., Inc. v. Meredith Corp.*, the primary case cited by FireClean, the publisher *admitted* that an article inaccurately claimed that a particular type of chimney was unsafe for certain uses, having completely omitted the fact that the chimney actually came in two versions, one of which presented no safety risks. 526 F. Supp. 546, 549 (E.D. Va. 1981).

[3] That FireClean would invoke *Chobani* is particularly ironic, since it engages in precisely the same conduct that was challenged in that case. In its patent application, FireClean says of one competitor, "Break Free contains petroleum distillates. Petroleum distillates contain harmful, carcinogenic components and are treated as hazardous materials both in shipment and disposal." Compl. Ex. A at 2-3. Whether Break Free is actually hazardous, or contains the harmful substances in sufficient quantity to present a health risk, goes conspicuously unmentioned by FireClean, much like the defendant in *Chobani*.

Similarly a classic expression of non-actionable opinion is Tuohy's quotation of a chemistry expert's observation, "Vegetable oil is certainly nontoxic/biodegradable, and somewhat odor free. 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." Compl. Ex. J at 5. Moreover, this opinion is based upon the clearly disclosed facts of the results of the Nuclear Magnetic Resonance test—the results of which FireClean does not dispute, although it claims other tests would be more appropriate. In other words, this is a classic difference of scientific opinion. The only case cited by FireClean in support of this contention, *Fuste v. Riverside Healthcare Association Inc.*, is plainly inapposite. There, the court held actionable statements (1) that concerns existed relating to the competence of two doctors, and (2) that those doctors had "abandoned" their patients, a term that "has a particular connotation in the context of a doctor's professional responsibility to a patient." 265 Va. 127, 133 (Va. 2003). The challenged statements here do not claim that FIREClean failed at doing anything, merely that other oils would be *better* suited for particular purposes, and that the chemical composition of vegetable oils makes it susceptible to degradation in certain circumstances.

C. Criticisms of FireClean's Marketing

FireClean also continues to take issue with statements in which Tuohy questions the marketing and pricing of FIREClean. Pl.'s Mem. at 18-19. As an initial matter, stating that a product is overpriced is not defamatory, and is not equivalent to claiming that a company engaged in fraud. Next, it is plain that the highlighted statements are both protected opinions and clearly hyperbolic in nature: "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." *Id*. at 18. To assert that Tuohy is somehow quoting FireClean as claiming to possess "the most advanced gun lube on the

planet," for example, evinces a degree of hypersensitivity and disregard for context that is routinely rejected by Virginia courts. *See Schaecher v. Bouffault*, 290 Va. 83, 92 (Va. 2015) ("'language that is insulting, offensive, or otherwise inappropriate, but constitutes no more than 'rhetorical hyperbole' is not defamatory'") (quoting *Yeagle v. Collegiate Times*, 255 Va. 293, 296 (1998)). Finally, FireClean also challenges Tuohy's statement related to the January 2016 Facebook post. Pl.'s Mem. at 19-20. As fully discussed in Tuohy's opening brief, FireClean misreads this statement, which is simply not addressed to it at all. Tuohy Mem. at 26 n. 7.

D. FireClean Has Not Adequately Pled Actual Malice

FireClean cannot overcome its failure to adequately plead actual malice. FireClean first argues that the Court cannot determine its status as a public or private figure at this stage, and that in any event it is not a limited purpose public figure. But it is clear that, in appropriate cases, this determination can be made on a motion to dismiss. *Freedlander v. Edens Broad., Inc.*, 734 F. Supp. 221, 230 (E.D. Va. 1990) (granting motion to dismiss because plaintiffs were limited purpose public figures and had failed to adequately plead actual malice); *AdvanFort Co. v. Int'l Registries, Inc.*, No. 1:15-cv-220, 2015 WL 2238076 *10 (E.D. Va. May 12, 2015) ("Accordingly, based on the allegations in the Complaint as well as the numerous news articles of which the Court may take judicial notice, Plaintiffs are at the very least limited purpose public figures and thus subject to the actual malice standard with respect to their defamation claims."), *amended on reconsideration on alternate grounds*, 2015 WL 4254988 (E.D. Va. July 13, 2015). Furthermore, as evidenced through its widespread advertising efforts, appearances at industry events, media commentary, and public statements, FireClean has staked its position in the marketplace on the unique nature of its product and on its specific anti-fouling and unique high-performance properties. The performance and proper use of oil in weapons can be a matter of

life and death and thus undoubtedly is a matter of significant interest to the gun community in particular, and to the wider public in general. The Court may properly find FireClean to be a limited purpose public figure for purposes of its claims against Tuohy. *See Reuber v. Food Chemical News, Inc.*, 925 F.2d 703, 709 (4th Cir. 1991) (finding scientist to be limited purpose public figure and noting that "[s]omeone who has not attracted general notoriety may nonetheless be a public figure in the context of a particular controversy covered by publications of specialized interest").

FireClean has failed to adequately allege actual malice. Indeed, its chief attempt at such an allegation – that Tuohy should have been aware, in FireClean's opinion, that Infrared Spectroscopy was "not scientifically suitable for comparing oils from the same class of compounds," is belied by the articles themselves, which show both that Tuohy relied on the scientific opinions of several experts and that Tuohy worked to ensure the accuracy of his conclusions by using several advanced chemical tests in addition to Infrared Spectroscopy, including two variants of Nuclear Resonance Imaging and High Performance Liquid Chromatography. *See* Compl. ¶ 101 & Ex. J; Tuohy Decl. ¶ 11. FireClean has not explained how those tests are in any way inadequate to the evaluation undertaken, much less how they could be evidence of actual malice (that is, a deliberate or knowing likely falsehood).

FireClean's sole remaining allegations as to actual malice are either not evidence of knowing or reckless falsity at all, or are simply conclusory assertions unsupported by facts. *See Mayfield v. NASCAR*, 674 F.3d 369, 377 (4th Cir. 2012) (rejecting argument that allegations of actual malice "need only be articulated in the most general terms"). For example, FireClean suggests that Tuohy's failure to recommend FireClean for military use is evidence of malice. Pl.'s Mem. at 29. The factual allegation allegedly supporting this claim is Tuohy's prior test of

FireClean's performance after leaving a gun in storage for two years. *Id*. How a test of a gun placed in storage could possibly evidence anything about a gun's performance in combat is not explained, and its connection to Tuohy's clearly explained reason for not recommending FireClean for military use (while still praising the oil as lubrication) is implausible.

E. FireClean Has Not Adequately Pled Its Conspiracy Claims

FireClean has failed to state claims for statutory and common law conspiracy because (1) those claims are premised exclusively on the allegations of defamation related to a single article, all of which must be dismissed, and (2) because FireClean has failed to allege, in more than conclusory terms, that Tuohy and Baker engaged in any concerted action that would demonstrate a preconceived plan to injure its business. Tuohy Mem. at 29-30. FireClean has pointed to no such adequate allegations, relying instead on its bald assertion that such a plan existed. Compl. ¶¶ 133-34, 218. This is insufficient.

CONCLUSION

For the foregoing reasons, Tuohy respectfully requests that the Court dismiss the Complaint as against him.

Dated: July 7, 2016

Respectfully submitted,

LEVINE SULLIVAN KOCH & SCHULZ, LLP

By: /s/ *Jay Ward Brown*

Jay Ward Brown, Va. Bar No. 34355
1899 L Street, N.W., Suite 200
Washington, DC 20036
Telephone: (202) 508-1100
jbrown@lskslaw.com

Counsel for Defendant Andrew Tuohy

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of July, 2016, a true and correct copy of the foregoing DEFENDANT ANDREW TUOHY'S REPLY IN SUPPORT OF HIS MOTION TO DISMISS THE COMPLAINT was served via this Court's ECF system on counsel as follows:

Bernard Joseph DiMuro, Va. Bar No. 18784
Stacey Rose Harris, Va. Bar No. 65887
DiMuro Ginsburg PC
1101 King Street, Suite 610
Alexandria, VA 22314-2956
Telephone: (703) 684-4333
Facsimile: (703) 548-3181
Email: bdimuro@dimuro.com

Counsel for Plaintiff FireClean LLC

Timothy J. McEvoy, Va. Bar No. 33277
Matthew H. Sorensen, Va. Bar no. 65970
Cameron/McEvoy, PLLC
4100 Monument Corner Drive, Suite 420
Fairfax, Virginia 22020
Telephone: (703) 273-8898
Facsimile: (703) 273-8897
Email: tmcevoy@cameronmcevoy.com

Bradley D. Holt, Esq.
Owen Graham, Esq.
Devine Millimet
111 Amherst Street
Manchester, NH 03101
Telephone: (603) 695-8638
Facsimile: (603) 669-8547
Email: bholt@devinemillimet.com

Counsel for Defendant Everett Baker

/s/ *Jay Ward Brown*
Jay Ward Brown, Va. Bar. No. 34355