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 RESPONSE
TO PLAINTIFF'S RULE 72 OBJECTION TO
THE MAGISTRATE JUDGE'S DENIAL
OF PLAINTIFF'S MOTION FOR JURISDICTIONAL DISCOVERY

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Defendant Andrew Tuohy respectfully submits this response to plaintiff FireClean, LLC's objection to the Magistrate Judge's order denying its motion for jurisdictional discovery (Dkt. 39) ("Objection" or Obj.").

BACKGROUND

This is a defamation action brought by FireClean, which manufactures the gun oil FIREClean, against two bloggers, Andrew Tuohy and Everett Baker, who posted articles analyzing the chemical composition of FIREClean on their blogs on the Internet. Magistrate Judge's Mem. Op. & Order (Dkt. 34) ("Mag. Op.") at 1-2. Upset that Tuohy's reporting and commentary, based on scientific testing and consultation with chemical experts, included the conclusion that FIREClean shared many properties with common vegetable oils, FireClean brought suit. Tuohy and Baker, neither of whom are based in the Commonwealth or wrote the articles in question here, moved to dismiss the Complaint for lack of personal jurisdiction and for failure to state a claim. That motion is now fully briefed before this Court and set for argument on July 14.

FireClean simultaneously "maintains that it has sufficiently alleged personal jurisdiction" and states that it "is willing to proceed on the Motions to Dismiss . . . by relying solely on the pleadings and the attached affidavits (and without discovery or an evidentiary hearing)," Obj. ¶¶ 1-2, while nevertheless seeking jurisdictional discovery "out of an abundance of caution" in the event this Court were otherwise inclined to rule against it on jurisdiction, *id.*

As originally filed, FireClean's Motion for Leave to Conduct Limited Jurisdictional Discovery (Dkt. Nos. 21 & 22) sought a wide array of information, including, inexplicably, names and contact information for the contributors to Tuohy's legal defense fund, names and

contact information for all subscribers to Tuohy's publications, FireClean's own correspondence with Tuohy, and the list of internet users who happened to "like" Tuohy's blog on Facebook and who coincidentally are also from Virginia. At oral argument before the Magistrate Judge, FireClean disowned the most blatantly improper of these requests, Transcript of June 10, 2016 Hearing (Dkt. No. 38) at 13:10-19 & 24:16-19 & (withdrawing requests for names of purchasers of T-shirts and for names and contact information of contributors to legal defense fund), but continued to press for broad discovery of purported "contacts" with Virginia. Mag. Op. at 2. After full briefing and oral argument on the issue, the Magistrate Judge unequivocally denied that motion in its entirety, declaring it a pure "fishing expedition." Mag. Op. at 18.

FireClean's objection to the ruling on its motion ignores the plain and thorough language of the Opinion itself, and there is no reason to disturb the Magistrate Judge's Order.

ARGUMENT

Courts are clear that, "[f]or non-dispositive matters, a District Court will only overturn a Magistrate Judge's Order if the Order is 'clearly erroneous or contrary to law.'" *Marro v. Citibank N.A.*, No. 1:12cv932 (JCC/TCB), 2012 WL 5286954, *2 (E.D. Va. Oct. 23, 2012) (quoting Fed. R. Civ. P. 72(a)). "A court's 'finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Id*. (quoting *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). As this Court noted, "The leading treatise on federal practice and procedure describes the alteration of a magistrate's non-dispositive order as 'extremely difficult to justify.'" *Id*. (quoting 12 Charles Alan Wright, et al., Federal Practice and Procedure § 3069 (2d ed. 1997)).

FireClean here objects to the denial of its motion to conduct jurisdictional discovery. As the Magistrate Judge correctly observed, '"[T]he decision of whether or not to permit jurisdictional discovery is a matter committed to the sound discretion of the district court.'" Mag. Op. at 2 (quoting *Base Metal Trading, Ltd. V. OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208, 216 n. 3 (4th Cir. 2002)). "The Fourth Circuit, however, has spoken approvingly of courts denying such discovery when 'the Plaintiff simply wants to conduct a fishing expedition in the hopes of discovering some basis of jurisdiction.'" *Id*. at 2-3 (quoting *Base Metal Trading*, 283 F.3d at 216 n. 3). "[W]here a plaintiff's claim of personal jurisdiction appears to be both attenuated and based on bare allegations in the face of specific denials by the defendant, a court may refuse jurisdictional discovery." *Intercarrier Commc'ns, LLC v. Kik Interactive, Inc.*, No. 3:12-cv-771 JAG, 2013 WL 4061259, at *6 (E.D. Va. Aug. 9, 2013).

As the Magistrate Judge also correctly noted, this is a case about the publishing of allegedly defamatory news reports and commentary to the Internet (on a blog and a related Facebook page, both available to the public throughout the world) and is, therefore, governed by the Court of Appeals' ruling in *Young v. New Haven Advocate*, 315 F.3d 256, 258 (4th Cir. 2002). In that case, which concerned a Connecticut newspaper's critical on-line news report regarding conditions at a Virginia prison, the Court of Appeals instructed that personal jurisdiction over an out-of-state defendant who has published an article to a generally-available website requires "proof that the out-of-state defendant's Internet activity is expressly targeted at or directed to the forum state." *Id.* at 262 "We thus ask whether the [publisher] manifested an intent to direct their website content . . . to a Virginia audience." *Id*. at 263. In order to make this determination, the Court of Appeals in *Young* considered "the pages from the newspapers' websites that [Plaintiff] placed in the record," and "examine[d] their general thrust and content"

as well as "the specific articles [plaintiff] complains about to determine whether they were posted on the Internet with the intent to target a Virginia audience." *Id*.; *see also Carefirst of Maryland, Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 400 (4th Cir. 2003) ("Whether CPC intended to target Marylanders can be determined only from the character of the website at issue."). Of course, the only relevant "internet activity" is that which bears on the allegedly defamatory articles themselves. *KMLLC Media, LLC v. Telemetry, Inc.*, No. 1:15cv432 (JCC/JFA), 2015 WL 6506308, *10 (E.D. Va. Oct. 27, 2015) ("Defendants' contact with Knowlera in the course of their investigation is electronic activity directed into Virginia with the manifested intent of engaging in (extremely limited) business with the State, but *these* activities have not created Plaintiff's cause of action in this case.") (emphasis in original). As all of this information is already available to FireClean, and reviewable by the Court, jurisdictional discovery is wholly unnecessary.

After correctly setting out governing law, the Magistrate Judge then analyzed each of the categories of discovery sought from Tuohy by FireClean and found them unnecessary because they were unlikely to lead to any discoverable material probative of the jurisdictional question. *See* Mag. Op. at 9 (rejecting request for t-shirt sales information because such sales are not connected to allegedly defamatory statements and have nothing to do with complained-of actions); *id.* at 15 (rejecting request for discovery on Tuohy's own contacts with plaintiff because plaintiff already has knowledge of such communications and because "the plaintiff cannot be the only link between the defendant and the forum." (quoting *Walden v. Fiore*, 134 S.Ct. 1115, 1122 (2014)); *id.* at 17 (rejecting request for discovery of Tuohy's "subscriber lists" because FireClean failed to provide a plausible basis for a claim that Virginia residents read Tuohy's blog or Facebook page in jurisdictionally significant numbers and because "[a] defendant 'does not

'consciously' or 'deliberately' target a forum if a[n] [internet] user [in that forum] unilaterally' views or interacts with something the defendant posted online.") (quoting *Intercarrier Commc'ns*, 2013 WL 4061259 at *4). And, with respect to FireClean's request for information about the location of third-party computer servers hosting Tuohy's blog and Facebook page, the Magistrate Judge similarly observed:

> Plaintiff has no basis for believing the servers hosting Defendants' blog posts are located in Virginia, as opposed to California, Amsterdam, or elsewhere. In contrast to the cases upon which Plaintiff relies, none of the internet services in question are headquartered in Virginia or principally locate their servers in the Commonwealth. Plaintiff simply hopes that the servers in question are located here.

Id. at 14.

FireClean bases its entire objection on the contention that the Magistrate Judge took too narrow a view of what is "relevant" to the analysis of specific jurisdiction. *See* Pl.'s Obj. at 4 ("[I]t is incorrect that the sole consideration in establishing specific jurisdiction is the 'thrust and content' of the defamatory piece."). But the most cursory examination of the Magistrate Judge's opinion belies the contention that he actually limited his analysis exclusively to the content of the websites in question. Indeed, in analyzing the applicable law, the Magistrate Judge expressly observed:

> These cases teach that whether a defendant is subject to specific personal jurisdiction in connection with an internet publication is determined largely by examining the publication itself. Nevertheless, this principle has not been treated as a bright line test, and courts have considered other evidence beyond the publication—albeit with a skeptical eye. With this in mind, the Court now turns to Plaintiff's proposed discovery to determine whether it is probative with respect to the matter at hand.

Mag. Op. at 8.

If anything, the Magistrate Judge was *overly* solicitous of each of FireClean's jurisdictional discovery requests, providing sound rationales for rejecting each even *after* concluding that most bore strikingly little connection to the complained-of activity—the posting of allegedly defamatory articles on the Internet.

CONCLUSION

For the foregoing reasons, Tuohy respectfully requests that the Court reject FireClean's objection and confirm the Magistrate Judge's Memorandum Opinion and Order denying its motion for leave to conduct jurisdictional discovery.

Dated: July 11, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of July, 2016, a true and correct copy of the foregoing DEFENDANT ANDREW TUOHY'S RESPONSE TO PLAINTIFF'S OBJECTION TO THE MAGISTRATE JUDGE'S MEMORANDUM OPINION AND ORDER was served via this Court's ECF system on counsel, as follows:

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