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

RONALD S. FEDERICI	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:10-cv-01418
	)	
MONICA PIGNOTTI, *ET AL.*	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

The Complaint against Jean Mercer and Monica Pignotti should be dismissed because the court lacks personal jurisdiction against them and the Complaint fails to state a claim upon which relief may be granted.

Preliminary Statement

This case arises from Plaintiff's attempt to prevent freedom of speech by those who might comment on Plaintiff's theories on treatment. In a massive attempt to squelch any criticism of his techniques, Plaintiff has named as defendants selected individuals in his field and attacked the use of internet blogs to post commentary evaluating Plaintiff's claimed therapeutic methods for pediatric developmental and psychological disorders. Dr. Federici is a neuropsychologist, with offices in McLean, Virginia, who is, allegedly, "internally [sic] renowned" and "provid[es] comprehensive evaluation and state-of-the-art treatment services for children having the 'full range' of developmental and psychiatric disorders," including, *inter alia*, "attachment-related disorders." Compl., ¶ 10. Dr. Federici is the author of "Help for the Hopeless Child," in which he details his methods for treating such children. Of particular concern to Mses. Mercer and Pignotti is Dr. Federici's advocacy of prone restraint, in which a child is restrained in a face-down position.

Defendant Mercer, a New Jersey resident, is Professor Emerita of Psychology at Richard Stockton College. She obtained her Ph.D. in psychology from Brandeis University in 1968 and has authored or co-authored a number of publications on child development, specifically attachment therapy. Dr. Mercer currently maintains a blog at childmyths.blogspot.com; she does not post anonymously and includes her name on all of her posts. None of the statements of which Plaintiff complains in the Complaint were authored by Dr. Mercer. Dr. Mercer does not reside, own property, work, or solicit business in Virginia. Exhibit A, Mercer Affidavit, ¶¶ 4, 5, 6.

In 2010, Dr. Mercer posted a blog entitled "The Hungry Boy" based upon her review of a published opinion from the North Carolina Court of Appeals in State v. Salvetti, which involved child abuse charges against the adoptive parents of a Russian boy who withheld food from the child in an effort to manage his behavioral issues. Attached as Exhibit B is a copy of the published opinion in State v. Salvetti. Plaintiff served as an expert witness for the parents, who ultimately pled guilty. On April 20, 2010, Plaintiff filed suit against Dr. Mercer for defamation and interference with business in the Fairfax County General District Court, Small Claims Division. Judgment was entered for Dr. Mercer.[1] After appealing this decision to the Fairfax County Circuit Court, the appeal was nonsuited on September 2, 2010; attached as Exhibit D is a copy of the non-suit order.

Defendant Pignotti, a Florida resident, obtained her Ph.D. in psychology from Florida State University in 2009. She is a Licensed Master Social Worker and has authored or co-authored a number of publications on psychotherapy issues, including, most recently, attachment disorder. She maintains the following blogs: monicapignotti.wordpress.com; phtherapies.wordpress.com; cyabuseaware.blogspot.com, and

[1] Dr. Mercer appeared by special appearance. See Letter, Mercer to Clerk, 6/6/2010, attached as Exhibit C.

psychjourney_blogs.typepad.com/monica_pignotti. As to those statements noted in the Complaint, Dr. Pignotti acknowledges her authorship of the substantive postings contained in Exhibits E, F, and H, and those comments posted by her in Exhibit G; she denies responsibility for any of the anonymous or alias comments of which Plaintiff complains. Dr. Pignotti does not reside, own property, work, or solicit business in Virginia. Attached as Exhibit E is a copy of Dr. Pignotti's Affidavit.

On November 24, 2010, Plaintiff filed the present suit, asserting that Mses. Mercer and Pignotti conspired with the other named Defendants "in a malicious campaign of unlawfully defaming and spreading lies about Dr. Federici and have utilized the aforementioned Internet websites to advance their campaign against him." Compl., ¶ 11. Plaintiff asserts four counts: (1) Defamation; (2) Tortious Interference with Contract Rights; (3) Tortious Interference with Business Expectancies; and (4) Conspiracy to Injure in Trade, Business and Reputation.

As set forth more fully below, Plaintiff's claims against Mses. Mercer and Pignotti fail for lack of personal jurisdiction. Further, the Complaint fails to state causes of action upon which relief may be granted.

Argument

I. No Personal Jurisdiction Exists over Mses. Mercer and Pignotti.

Plaintiff bears the burden of proving "the grounds of jurisdiction by a preponderance of the evidence." Galustian v. Peter, *et al.*, 2010 U.S.Dist. LEXIS 121175 at *6 (E.D.Va. Nov. 9, 2010) (internal citations omitted). Jurisdiction may be either general (where the subject of the suit does not arise from the defendant's activity in the forum) or specific (where the suit arises from activities in the forum). Consulting Eng'rs, Inc. v. Geometric Software Solutions, *et al.*, 2007 U.S.Dist. LEXIS 25150 at *7 (E.D.Va. April 3, 2007) (internal citations omitted). Plaintiff makes no allegations that Mses. Mercer and Pignotti's contacts were "continuous and

systematic" or supporting a finding of purposeful availment, necessary to general jurisdiction; as such, Defendants presume Plaintiff is proceeding under specific jurisdiction. See, Consulting Eng'rs, 2007 U.S.Dist. LEXIS 25150 at *8 (internal citations omitted).

Evaluating the existence of personal jurisdiction is a two-step process: (1) whether Virginia's long-arm statute authorizes such jurisdiction; and (2) whether jurisdiction would "be at odds with the Constitution." Wigand, *et al.* v. Costech Tech., Inc., *et al.*, 2008 U.S.Dist. LEXIS 743 at *12-13 (Jan. 4, 2008). As this Court explained, "a federal court may exercise jurisdiction over a defendant in the manner provided by state law. Because Virginia's long-arm statute aims to extend personal jurisdiction to the extent permissible under the federal Due Process Clause, the statutory inquiry merges with the constitutional inquiry." Id. at *8 (internal citations omitted). The key inquiry is whether Mses. Mercer and Pignotti have "'minimum contacts' with Virginia such that 'the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."'" Id. (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945)). Further, "[p]ersonal jurisdiction under the long-arm statute for tortious injury in the Commonwealth caused by acts or omissions outside of the Commonwealth is only permissible when a defendant 'regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this Commonwealth.'" Wigand, 2008 U.S.Dist. LEXIS at *15 (quoting Va. Code § 8.01-328.1).

The Complaint proffers three bases for jurisdiction: (1) that Defendants used Internet websites "widely accessible and utilized throughout the Commonwealth of Virginia"; (2) that "Defendants deliberately targeted" Dr. Federici and his business, both located in Virginia; and (3) that Defendants "caused injury on De. [sic] Federici by an act or omission in this

Commonwealth."[2] Compl., ¶ 9. Plaintiff's allegations are premised upon two alleged actions by Defendants: (1) a concerted effort by these Defendants to attack and damage Dr. Federici's reputation and business; and (2) use of the Internet to post blogs and articles relating to Dr. Federici and/or therapeutic methods associated with him. These premises are insufficient to confer jurisdiction on these Defendants under Virginia's long-arm statute.

A. Jurisdiction Premised on the "Conspiracy" Theory Fails.

As a preliminary matter, there is no allegation that these Defendants acted in Virginia or that the alleged conspiracy was formed in Virginia; indeed, as Plaintiff alleges, all known Defendants are physically located outside of Virginia. Compl., ¶¶ 2-7. Plaintiff offers no facts linking any alleged conspiracy to Virginia. As such, there was no "act or omission" in the Commonwealth and personal jurisdiction on this premise fails. See, Consulting Eng'rs, 2007 U.S.Dist. LEXIS 25150 at *13-14 (dismissing claims for lack of personal jurisdiction where alleged conspiracy and interference with contract occurred outside of Virginia, between nonresident entities where "no meetings or negotiations occurred in Virginia").

Rather, it appears that Plaintiff's sole basis for linking Mses. Mercer and Pignotti to the Commonwealth is through their use of Internet websites that, naturally, could be accessed in Virginia.

B. Defendants' Internet Postings are Insufficient to Confer Jurisdiction.

Plaintiff further bases jurisdiction upon Defendants' Internet postings, apparently claiming that these postings were "acts or omission" in Virginia causing injury. Compl., ¶ 9. In this circuit, whether internet contacts are sufficient to establish jurisdiction is analyzed under the sliding scale established in Zippo Manufacturing Company v. Zippo Dot Com, Inc., 952 F.Supp. 1119 (W.D.Pa. 1997). Under this standard, jurisdiction over a nonresident may exist only where

[2] Virginia law does not enumerate a jurisdictional basis for "deliberately target[ing]" a Virginia resident. Va. Code § 8.01-328.1.

the defendant "(1) directs electronic activity into the State, (2) with the manifested intent of 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 cognizable in the State's courts." ALS Scan, Inc. v. Digital Serv. Consultants, Inc., *et al.*, 293 F.3d 707, 714 (4th Cir. 2002). As the Fourth Circuit explained, "a person who simply places information on the Internet does not subject himself to jurisdiction in each State into which the electronic signal is transmitted and received." Id. (dismissing case for lack of personal jurisdiction where "Other than maintain its website on the Internet, Digital has engaged in no activity in Maryland, and its only contacts with the State occur when persons in Maryland access Digital's website.").

These facts are similar to those in Galustian v. Peter, *et al.*, where contact with Virginia was premised upon "the opening of the allegedly defamatory email in this forum." Id. at 10. The Galustian court applied the "effects test," whereby specific jurisdiction is proper upon showing that: "(1) the defendant committed an intentional tort; (2) the plaintiff felt the brunt of the harm in the forum, such that the forum can be said to be the focal point of the harm; and (3) the defendant expressly aimed his tortious conduct at the forum, such that the forum can be said to be the focal point of the tortious activity." Id. at 11 (citing Consulting Eng'rs Corp. v. Geometric Ltd., 561 F.3d 273, 280 (4th Cir. 2009)). Determining that it lacked jurisdiction, the court found that Virginia was not "the focal point of the allegedly tortious activity." Id. at 13.

Here, even assuming, *arguendo*, that the alleged postings were defamatory, and that Plaintiff has suffered demonstrable harm in Virginia, the Complaint contains no allegations that the alleged postings were expressly aimed at a Virginia audience. As such, this Court lacks personal jurisdiction. See, Galustian, *supra.* (finding no personal jurisdiction where no allegations that defamatory email, though opened in Virginia, was "intended for a Virginia audience"); see also, Young v. New Haven Advocate, *et al.*, 315 F.3d 256, 263-64 (4th Cir.

2002) (finding no specific jurisdiction in Virginia where newspaper's Internet postings, though about a Virginia warden, were aimed at a Connecticut audience).

Mealer v. GMAC Mortgage, LLC, *et al*, from the United States District Court for Arizona, is instructive. There, plaintiff filed suit against a GMAC engineer who allegedly made disparaging comments about plaintiff in response to plaintiff's internet posting. The court concluded that personal jurisdiction – based solely on this purported defamatory blog posting – did not exist. As the court explained, "the distinction between 'express aiming' and 'foreseeability' suggests that mere knowledge of an individual's residence, combined with intentional posting of defamatory statements on the internet (which, taken together, makes it foreseeable an individual will be harmed in a certain forum location) does not amount to 'express aiming.'" Mealer v. GMAC Mortgage, LLC, *et al.*, 2010 U.S.Dist. LEXIS 121789 at *11 (D.Ariz. Nov. 16, 2010) (internal citations omitted). Indeed, "[u]nless a website has unique ties to a particular forum, or the content of the offensive comment is somehow forum-specific, a blog posting of the type at issue here will seldom – if ever – constitute purposeful availment." Id at *12; see also, Irving v. Wagner Zone, Inc., *et al.*, 68 Va.Cir. 127, 130-31 (Fairfax 2005) (concluding that personal jurisdiction did not exist where defendant sold a used car to a Virginia resident through an Internet auction website, noting "Defendant did not 'manifest an intent to target and focus on Virginian' buyers").

Similarly, in Vogel v. Wolters Kluwer Health, Inc., d/b/a Lippincott Williams & Wilkins, *et al.*, the United States District Court for the Middle District of North Carolina declined to exercise jurisdiction over a defendant who allegedly infringed upon copyrighted material. The court commented:

> the fact that Dr. Trojanowski posts results of scientific research on various internet web sites and internet discussion forums does not justify asserting personal jurisdiction over him merely because residents of North Carolina may use the web sites or forums. Moreover, while Plaintiff maintains that these

> internet activities are directed at North Carolina, Plaintiff's only basis for this conclusory assertion is that there are several renowned medical centers within North Carolina. Plaintiff offers nothing more than conclusory allegations that Dr. Trojanowski purposefully directed any of the factual information he posted on the web sites toward North Carolina. In any event, the purely informative informational web site and forums in which Dr. Trojanowski posts information cannot alone serve as the basis for asserting personal jurisdiction over him.

Vogel v. Wolters Kluwer Health, Inc. d/b/a Lippincott Williams & Wilkins, *et al.*, 630 F.Supp.2d 585, 599-600 (M.D.N.C. March 18, 2008) (addressing general jurisdiction).

Accepting, for purposes of this argument alone, Plaintiff's allegation that Mses. Mercer and/or Pignotti were responsible for some, if not all, of the complained-of postings, the Complaint is wholly devoid of any indication that these postings were expressly directed at a Virginia audience.[3] Indeed, Plaintiff himself asserts that he is "internally [internationally] renowned" in his field. Compl., ¶ 10. Rather, an objective review of the postings demonstrates an online debate among individuals throughout the United States regarding the appropriate treatment for children suffering from neuropsychological and developmental disorders. As the postings were not expressly aimed at a Virginia audience, personal jurisdiction does not exist and the Complaint should be dismissed as to Mses. Mercer and Pignotti.

II. The Complaint Fails to State Viable Claims upon which Relief May be Granted.

Assuming, *arguendo*, that this Court exercises jurisdiction over Mses. Mercer and Pignotti, the Complaint should nevertheless be dismissed as to these Defendants, as it fails to state claims upon which relief may be granted. A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of the complaint. Randall v. United States, 30 F.3d 518, 522 (4th Cir. 1994). When considering a motion to dismiss, the court should accept as true all well-pleaded factual allegations and should view the complaint in a light most favorable to the plaintiff. De Sole v. United States, 947 F.2d 1169, 1171 (4th Cir. 1991). The court, however, need not accept as true

[3] Dr. Mercer affirmatively states that she did not author any of the postings cited in the Complaint and notes that she uses her name on all of her posts. Dr. Pignotti acknowledges authorship of those posts whose byline contains her name, disavowing ownership of any other postings.

the legal conclusions, unwarranted inferences, unreasonable conclusions or arguments asserted in the complaint. E. Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship, 213 F.3d 175, 180 (4th Cir. 2000); Edwards v. City of Goldsboro, 178 F.3d 231, 244 (4th Cir. 1999). Furthermore, a "pleading that offers 'legal conclusions' of 'a formulaic recitation of the elements of a cause of action will not do.'" Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atlantic v. Twombly, 550 U.S. 544, 555 (2007)); Stidham v. Jackson, 2007 U.S. Dist. LEXIS 54032 at *13 (W.D.Va. July 26, 2007) (legal conclusions "couched as factual allegations need not be accepted as true"); Assa'Ad-Faltas v. Virginia, 738 F. Supp. 982, 985 (E.D.Va. 1989) (citing Papasan v. Allain, 478 U.S. 265, 286 (1986)).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Iqbal, 129 S. Ct. at 1949 (citing Twombly, 550 U.S. at 570). A claim is "facially plausible" when the claimant pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. In Iqbal, the Supreme Court enunciated a "two-pronged approach" for determining whether a complaint survives dismissal:

> First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.

Id. at 1949-50. Therefore, "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." Id. at 1950. If any factual allegations remain, the Court should then review them to determine if the plaintiff has stated a plausible claim for relief. Id.

A. Dr. Mercer did not Author any of the Allegedly Defamatory Postings.

Plaintiff proffers absolutely no facts connecting Dr. Mercer with the alleged defamatory postings, other than his conclusory conspiracy allegations, insufficient to survive a Motion to Dismiss. Similarly, the exhibits Plaintiff incorporates show no contributions by Dr. Mercer:

- Exhibit A to the Complaint contains non-specific author postings from Advocates for Children in Therapy, noting that Larry Sarner is now Executive Director.
- Exhibit B to the Complaint contains posting from "Wayward Radish," whose identity is unknown (Plaintiff does not allege that Dr. Mercer is "Wayward Radish" and indeed notes that "some of the John Doe Defendants may be located within the Commonwealth of Virginia," certainly precluding Dr. Mercer, whom he identifies as a New Jersey resident, as one of these "individuals").
- Exhibit C to the Complaint contains name-specific comments, which do not include Dr. Mercer.
- Exhibit D to the Complaint specifically notes that it contains the opinions of Charly Miller.
- Exhibits E, F, and H to the Complaint contain articles authored by Dr. Pignotti.
- Exhibit G to the Complaint contains comments from Dr. Pignotti.
- Exhibit I to the Complaint contains an article authored by Daniel Ibn Zayd.

In short, the Complaint offers no facts even intimating that Dr. Mercer is responsible for the alleged misconduct, other than Plaintiff's self-serving and wholly-conclusory allegations. As such, the Complaint should be dismissed *in toto* as to this Defendant. See, Dobkin v. The Johns Hopkins Univ., *et al.*, 1994 U.S.Dist. LEXIS 5165 at *32 (D.Md. Jan. 25, 1994) (dismissing defamation claim, noting "Unlike his particularized accusations of Dr. German and Estelle Fishbein, Mr. Dobkin does not claim that the other individual Hopkins Defendants made specific defamatory comments about him. The broad-brushed contention that Professors Rowland, Roter

and Kasper 'participated in a smear campaign against him,' absent any specification of the time, place or content of such alleged comments, even under liberal pleading requirements, fails to state a claim for defamation."); Assaid v. Beaver, 53 Va.Cir. 445, 446 (Roanoke 2000) ("Plaintiff precisely states the language he claims to be defamatory and he identifies the speaker of that language. That is specific enough to satisfy the rule requiring that the exact defamatory language must be pled.").

B. Exhibit H and Any Attendant Allegations Must be Stricken.

Any claim based upon Exhibit H to the Complaint is time-barred. Virginia Code Section 8.01-247.1 provides a one-year statute of limitations in a defamation action. Va. Code § 8.01-247.1. A defamation action accrues when the defamatory material is published to a third party. Meyers v. Levinson, 2005 U.S.Dist. LEXIS 42799 at *42-43 (E.D.Va. July 26, 2005) (citing Jordan v. Shands, 255 Va. 492, 498, 500 S.E.2d 215 (1998)). Here, the offending post is dated July 29, 2009. This suit was not filed until November 24, 2010, over one year later. As such, any claim arising from Exhibit H must be dismissed.

C. The Complaint does not Meet the "Actual Malice" Standard for a Public Figure.

Under well-established law, a public figure claiming defamation must prove by clear and convincing evidence that the defamatory statement was made with "actual malice." Hatfill v. The New York Times Co., *et al.*, 532 F.3d 312, 317 (4th Cir. 2008). The court must consider the following factors in evaluating whether a plaintiff qualifies as a public figure:

> (1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in the public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statement; and (5) the plaintiff retained public-figure status at the time of the alleged defamation.

Id at 319 (internal citations omitted). In determining whether a public figure is subject to the "actual malice" standard, courts have distinguished between those public figures whose prominence is such that they are considered a public figure for all purposes, versus those who are public figures only for limited purposes as they "have thrust themselves to the forefront of *particular public controversies* in order to influence the resolution of the issues involved." Id at 318 (emphasis in original).

Here, Dr. Federici is clearly a limited public figure in connection with the debate surrounding treating of behavioral and psychological disorders in, *inter alia*, adopted children. Plaintiff touts himself as "internally [internationally] renowned" and indicates that he was to serve as an expert witness. Compl., ¶¶ 10, 35. He is the author of a published book ("Help for the Hopeless Child") and his website, www.drfederici.com, notes, "Dr. Federici is regarded as the country's expert in the neuropsychological evaluation and treatment of children having multi-sensory neurodevelopmental impairments, particularly children who have been adopted, both domestically and internationally." http://www.drfederici.com/staff.htm. His website further boasts that, "He has appeared on multiple television shows, and has been the focus of numerous publications regarding complex children with severe developmental and emotional disorders." Id. It is clear that Dr. Federici has "voluntarily assumed a role of special prominence" in the debate on treatment of these disorders, and advocated certain therapies, as set forth in his published and publically-available book. As such, he is a public figure within this context and subject to the "actual malice" standard.

"Actual malice" is a heightened standard, requiring the plaintiff to show that the allegedly defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." Hatfill, 532 F.3d at 317 (internal citations omitted). Indeed, "[t]he standard requires that the defendant have a 'subjective awareness of probable falsity' of the

publication." Id. A claim of actual malice fails where the defendant actually believed the truth of the statement made. Id. at 324 (affirming dismissal of defamation claim where reporter actually believed plaintiff was prime suspect in anthrax attacks). As the United States Court of Appeals for the Fourth Circuit explained, "Constitutional malice requires 'much more than a failure to exercise ordinary care' – it demands evidence of the 'publication of a *completely* fabricated story, or of one based entirely on an unverified anonymous telephone call; or publication where there are obvious reasons to doubt the veracity of the informant.'" Id at 325 (quoting Ryan v. Brooks, 634 F.2d 726, 732 (4th Cir. 1980)) (emphasis in original).

Absent Plaintiff's conclusory statements, the Complaint contains no allegations demonstrating that these Defendants acted with actual malice or with the subjective belief that the statements were false at publication. As such, the defamation claim should be dismissed. Hatfill, *supra.* Rather, as discussed more fully below, Dr. Pignotti's statements reflect her academic position regarding the merits of Plaintiff's therapeutic treatments and her beliefs and opinions about the debate raging between the various camps on this issue.

D. The "Defamatory" Postings are Opinion.

Under Virginia law, "a statement of pure opinion cannot" form the basis for a defamation claim. Gibson v. Boy Scouts of Am., *et al.*, 360 F.Supp.2d 776, 781 (E.D.Va. Jan. 10, 2005) (citing to Williams v. Garraghty, 249 Va. 224, 233, 455 S.E.2d 209 (Va. 1995)). As such, "speech which does not contain a provably false factual connotation, or statements which cannot reasonably be interpreted as stating actual facts about a person cannot form the basis of a common law defamation action." Id. As the Virginia Supreme Court explained:

> The First Amendment to the Federal Constitution and article 1, section 12 of the Constitution of Virginia protect the right of the people to teach, preach, write, or speak any such opinion, however ill-founded, without inhibition by actions for libel and slander. 'Error of opinion may be tolerated where reason is left free to combat it.' Thomas Jefferson's First Inaugural Address (1801). 'However pernicious an opinion may seem, we depend for its correction not on the

> conscience of judges and juries but on the competition of other ideas.' Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40, 41 L.Ed.2d 789, 94 S.Ct. 2997 (1974).

Am. Communications Network, Inc., *et al.* v. Williams, 264 Va. 336, 340, 568 S.E.2d 683, 685 (2002).

Similarly outside the defamatory realm is rhetorical hyperbole, which "might appear to make an assertion, but a reasonable reader or listener would not construe that assertion seriously." Schnare v. Ziessow, *et al.*, 104 Fed.Appx. 847, 851 (4th Cir. 2004). The United States Supreme Court explained that, "Protection for this type of speech . . . 'provides assurance that public debate will not suffer for lack of imaginative expression . . . which has traditionally added much to the discourse of our Nation.'" Id. (quoting Milkovich v. Lorain Journal Co., 497 U.S. 1, 20, 111 L.Ed.2d 1, 110 S.Ct. 2695 (1990)). Whether a statement is one of actionable fact, or unactionable opinion, is a question of law for the court's determination. Am. Communications Network, 264 Va. at 340, 568 S.E.2d at 685 (internal citations omitted). Crucially, "[i]n determining whether a statement is one of fact or opinion, a court may not isolate one portion of the statement at issue from another portion of the statement. Rather, a court must consider the statement as a whole." Hyland v. Raytheon Technical Serv. Co., *et al.*, 277 Va. 40, 47, 670 S.E.2d 746, 751 (2009) (internal citations omitted).

Particularly instructive is Arthur v. Offit, *et al.*, in which this Court considered a defamation claim arising from an article on the debate over mandatory vaccination of children. The article specifically profiled Defendant Offit, an advocate for mandatory vaccination. The plaintiff, dedicated to the prevention of vaccine-related injuries, took issue with Defendant Offit's statement "She lies." Arthur v. Offit, *et al.*, 2010 U.S.Dist. LEXIS 21946 at *7 (E.D.Va. March 10, 2010). In dismissing the claim, the Court concluded,

> including a remark by one of the key participants in a heated public-health debate stating that his adversary "lies" is not actionable defamation. Indeed, both the nature of the statement – including that it was quoting an advocate with a

> particular scientific viewpoint and policy position – and the statement's context – a very brief passage in a lengthy description of an ongoing, heated public health controversy – confirms that this is a protected expression of opinion.

Id. at *8. Noting that the "constitutional and common law protections . . . are at their zenith" because the publication involved a matter of "substantial public concern," the court further explained,

> Not only does Plaintiff's claim of the statement's falsity invite an open-ended inquiry into Plaintiff's veracity, but it also threatens to ensnare the Court in the thorny and extremely contentious debate over the perceived risks of certain vaccines, their theoretical association with particular diseases or syndromes, and, at bottom, which side of this debate has "truth" on their side.
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> ***
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> Plaintiff may wish to defend in Court the credibility of her conclusions about the dangers of vaccines, the validity of the evidence she offers in support of those theories, and the policy choices that flow from those views – as well as her own credibility for having advanced these positions. These, however, are academic questions that are not the sort of thing that courts or juries resolve in the context of a defamation action.

Id. at * 10, 17, 18.

Similarly, Schnare v. Ziessow, *et al.* involved a tripartite published article regarding proposed changes to the Labrador breed standard. Its author, defendant Ziessow, advocated the revised standard, and criticized his opposition throughout the article. Schnare, 104 Fed.Appx. at 848. In affirming dismissal of the case, the court concluded, "the challenged statements 'belong[] to the language of controversy rather than to the language of defamation.'" Id. at 853 (quoting Dilworth v. Dudley, 75 F.3d 307, 310 (7th Cir. 1996)).

Here, the comments attributable to Dr. Pignotti of which Plaintiff complains contain only opinion statements and "the language of controversy," and are therefore not actionable. The complained-of comments can be grouped into three general categories, which will discussed *in seriatim*.

First are those comments in which Dr. Pignotti responds to personal accusations. As is evident through the tone and words of Dr. Pignotti's postings, she has been subject to personal

attacks on the internet and otherwise regarding her competency and character. As Plaintiff admits, he prepared and sent "a letter of professional complaint" to the dean of Florida State University, where Dr. Pignotti was studying and teaching. Compl., ¶ 25. Dr. Pignotti's comments simply respond to the allegations leveled against her and are in no way defamatory, rather her lawful right to protect her character. See, Schnare, 104 Fed.Appx. at 851 (finding "vigorous and angry expressions of disagreement" where defendant's use of "vicious assassination of character and an outright lie" was "a response to [plaintiff's] accusation that [defendant] wanted to revise the breed standard in order to drive competitors from the market for his own financial gain").

Second are those comments in which Dr. Pignotti opines on Plaintiff's therapeutic methods. As in Schnare v. Ziessow, *et al.* and Arthur v. Offit, *et al.*, this is simply an academic debate in which parties on opposing sides offer differing opinions on a controversial topic, namely, *inter alia*, the use of prone restraint to treat psychological and behavioral issues in children. Such comments are not actionable defamation, but rather lawful opinion. Schnare, 104 Fed.Appx. at 853; see also, Gibson, *supra.* (concluding that the comment that the plaintiff was "unfit to be a Scoutmaster and in Scouts" was not actionable, as it was not provably false).

The final category is comprised of those comments in which Dr. Pignotti discusses the ongoing interactions between the two camps on this issue, namely the communications from Plaintiff to the deans of the universities at which Defendants Mercer and Pignotti worked, the negative internet postings regarding those individuals critical of prone restraint and other methods advocated by Plaintiff, and the lawsuit(s) filed against, *inter alia*, Dr. Mercer. These statements are nothing more than Dr. Pignotti's frustrated commentary on the methods employed by Dr. Federici and/or those embracing his therapeutic philosophies. Such comments are not actionable. See, Schnare, 104 Fed.Appx. at 851 (noting that comment "One would believe a

person of Dr. Schnare's education and background would be certain of the facts prior to signing an affidavit." is "only vaguely insinuating and not even arguably defamatory").

When Dr. Pignotti's postings are considered contextually and as a whole, it is apparent that her comments are opinion statements, challenging methods advocated by Plaintiff, responding to attacks on Dr. Pignotti's character, and commenting upon the course of interactions between the camps on both sides of these issues. These statements are simply not defamatory and this count should be dismissed against Dr. Pignotti. See, Arthur, *supra.*

E. **Counts II and III Fail for Lack of Specificity**.

Counts II (Tortious Interference with Contract Rights) and III (Tortious Interference with Business Expectancies) fail to state viable claims and should be dismissed. Tortious interference claims require proof of: "(1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted." Harper Hardware Co. v. Powers Fasteners, Inc., *et al.*, 2006 U.S.Dist. LEXIS 3821 at *11-12 (E.D.Va. Jan. 19, 2006) (citing Chaves v. Johnson, 230 Va. 112, 120, 335 S.E.2d 97, 102 (1985)). Such claims must be pled with specificity, identifying "a specific, existing contract or expectancy with a specific party"; a general claim will not suffice. Id. at *13 (citing Gov't Empls. Ins. Co. v. Google, Inc., 330 F.Supp.2d 700, 705 (E.D.Va. 2004).

Here, Plaintiff only alleges that, "Defendants knew of the existence of many valid contractual relationships between Dr. Federici and his clients/patients" and that "Defendants knew that Dr. Federici had a reasonable expectation of entering into valid business relationships with many additional clients/patients, with the probability of future economic benefit to Dr. Federici." Compl., ¶¶ 41, 45. While Plaintiff itemizes three alleged "cancellations," these

amount to $15,500, whereas he claims "over $200,000" in lost business.[4] Compl., ¶ 35. Additionally, it is unclear whether these incidents were the cancellation of existing contracts or the non-fruition of business expectancies. His claims are simply too general and non-specific to survive a Motion to Dismiss.

Further, "[t]o state a claim for tortious interference with business expectancy, there must also be a competitive relationship between the plaintiff and the interferer." Symbionics, Inc. v. Ortlieb, *et al.*, 2009 U.S.Dist. LEXIS 73144 at *33 (E.D.Va. Aug. 7, 2009). Plaintiff makes no allegations that Mses. Mercer and/or Pignotti compete with him in any business sense. Indeed, neither of these Defendants practices clinically, but rather both are in academe.

F. Count IV (Business Conspiracy) Fails.

Similarly, Plaintiff's conspiracy claim pursuant to Virginia Code Section 18.2-499 is equally deficient. Indeed, "[c]laims of statutory business conspiracy impose a heightened pleading standard" and "'business conspiracy, like fraud, must be pleaded with particularity, and with more than "mere conclusory language."'" Harper Hardware, 2006 U.S.Dist. LEXIS at *14-15 (citing Gov't Empls. Ins. Co., 330 F.Supp.2d at 706). Plaintiff, however, alleges in only a conclusory fashion that "Defendants have conspired together" and "Defendants have combined, associated, agreed, mutually undertook, or concerted together," offering absolutely no factual premise for these allegations, such as the date, place, and mode of the alleged agreement. Compl., ¶¶ 14, 49. These generalized statements do not meet the requisite pleading standard, and this claim should be dismissed. Harper Hardware. 2006 U.S.Dist. LEXIS at 15 ("Plaintiff's broad allegations provide no factual basis to discern the method of the alleged conspiracy or how it was carried out. Plaintiff has failed to state a claim for business conspiracy under Virginia Code §§ 18.2-499 and -500."); Wigand, 2008 U.S. Dist. LEXIS at *27-28 ("[Plaintiffs] have

[4] Dr. Federici's claim that he "has lost over $200,000 in business over three years and will soon be forced to close his business" is ironic, as he opened a second location in Clifton, Virginia in 2010. http://www.drfederici.com.

neither articulated when nor where these Defendants reached any form of tacit understanding, much less the means of carrying out the alleged objectives.").

Conclusion

For the reasons set forth fully above, Defendants Jean Mercer and Monica Pignotti respectfully request that the Complaint be dismissed as to them.

Respectfully submitted,

Dated: January 4, 2011

/s/ Kristin A. Zech

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Memorandum of Law in Support of Motion to Dismiss was electronically filed with the Clerk of Court using the CM/ECF system which will then send a notification of such filing (NEF) to the following on this 4th day of January, 2011, unless otherwise noted:

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