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DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL J. ZWEBNER, UNIVERSAL
COMMUNICATIONS SYSTEMS,
INC. and AIRWATER CORP.,

Plaintiffs,

v.

JAMES W. COUGHLIN a/k/a
IRISHJIM44 and DOES 1-25,

Defendants.

Civil No. 05CV1263 JAH(AJB)

ORDER GRANTING
DEFENDANT'S MOTION TO
STRIKE PLAINTIFFS'
COMPLAINT PURSUANT TO
CALIFORNIA CODE OF CIVIL
PROCEDURE § 425.16

[DOC. # 5]

INTRODUCTION

Defendant James W. Coughlin a/k/a IRISHJIM 44 ("defendant") has filed a motion to strike the complaint filed by plaintiffs Michael Zwebner ("Zwebner"), Universal Communications Systems, Inc. ("Universal"), and Airwater Corp. ("Airwater") (collectively "plaintiffs"). A hearing was held on the motion, during which the parties presented extensive oral argument. After a thorough review of the pleadings, relevant exhibits submitted by both parties, the oral argument presented at the hearing, and for the reasons set forth below, this Court GRANTS defendant's motion to strike plaintiffs' complaint.

BACKGROUND

Plaintiffs, on June 21, 2005, filed the instant complaint seeking damages for defamation and intentional infliction of emotional distress. *See* Compl. at 8. Jurisdiction is founded on diversity of citizenship. *Id.* ¶ 1. Zwebner previously acted as Chairman of Talk Visual

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1 Corporation, a publicly traded company with the trading symbol "TVCP", now "TVCE." Id.
2 ¶ 2. Zwebner acts as Chairman of Universal, a publicly traded company with the trading
3 symbol "UCSY." Id.

4 Plaintiffs, in their complaint, allege that defendant posted messages on internet sites
5 which "contained falsehoods, lies, [and] innuendoes." Compl. ¶ 10. Plaintiffs' claims arise out
6 of the posting of certain comments by defendant on internet message boards¹ devoted to
7 Universal, TVCP and TVCE, where various individuals with internet access may post and read
8 messages concerning "stock talk." Id. ¶ 9, 10, 11. The internet contains many "stock talk"
9 bulletin boards that permit the public to post messages anonymously. Id. at 9. Plaintiffs
10 allege that defendant posted "false and libelous" messages about plaintiffs on message boards
11 devoted to Universal, TVCP and TVCE. Id. ¶ 12. These message boards are very active; over
12 55,000 messages have been posted on the message board devoted to Universal and over
13 173,000 messages were posted on the message board devoted to TVCE. *See* Deft's Notice of
14 Lodgment, Exhs. 14, 15. Posters to these message boards are advised:

15 **DON'T BELIEVE EVERYTHING YOU READ**

16 While reading the message boards you will find lots of opinions. Please be
17 advised that some members may post information that is biased, misleading or
18 false. When it comes right down to it, you are responsible for the decisions you
19 make about your own money. Never trust a single information resource, whether
20 a post on this Web site or a stock tip by the water cooler.

19 Id., Exh. 13.

20 Plaintiffs' complaint points to the following messages allegedly posted by defendant:

- 21 ZWEBNER is like a Child Molester - UCSY post # 18291
- 22 ZWEBNER is the 'devil' - TVCE post # 169782
- 23 ZWEBNER and his cronies make 'death threats' UCSY post # 26165
- 24 ZWEBNER is a 'thief' - TVCE post # 170374
- 25 ZWEBNER has 'embezzled funds' - TVCE post # 170739
- 26 ZWEBNER has looted 'companies and shareholders - UCSY post # 7326
- ZWEBNER is an 'unethical person & common criminal' - UCSY post # 7580
- ZWEBNER is a 'thief' - UCSY post # 7585
- ZWEBNER is a 'crook' - UCSY post # 8064
- ZWEBNER, theft and fraud - UCSY post # 9501
- ZWEBNER 'has his offshore accounts, offshore companies and BATLINER to help him

27
28 ¹ The postings at issue in this case were posted on a website entitled, "Raging Bull," which is a financial website organized by individual bulletin boards dedicated to a single publicly traded company. *See* Mot. at 3; Deft's Notice of Lodgment, Exh. 10.

1 in his shorting' - UCSY post # 13984
 2 ZWEBNER - 'No self respecting Jew would want a gift from ZWEBNER, knowing his
 background - UCSY post # 14447
 3 ZWEBNER - 'Maybe it is because of his 'suspected' award that he received from the US
 Government that no one seems to be able to find out about' - UCSY post # 14909
 4 ZWEBNER - 'is that 'lapdancing' os (sic) 'wheelchair racing' for the mentally impaired' -
 UCSY post # 20977
 5 ZWEBNER - 'YAKC2for1 = ZWEBNER' - UCSY post # 25984
 6 ZWEBNER - 'Only ZWEBNER and his cronies make Death Threats' - UCSY post #
 26165

7 Compl. ¶ 11.

8 Defendant, on July 15, 2005, filed the instant motion to strike plaintiff's complaint,
 9 pursuant to Cal. Code Civ. P. § 425.16, which the Court set for hearing on September 22,
 10 2005. On July 21, 2005, defendant filed an *ex parte* application seeking to advance the hearing
 11 date. This Court denied defendant's *ex parte* application on July 22, 2005. *See* Doc. # 11.
 12 Plaintiffs filed an opposition on September 7, 2005 and defendant filed a reply brief on
 13 September 15, 2005. This Court heard oral argument from the parties on September 22, 2005.

14 **DISCUSSION**

15 Defendant moves to strike plaintiff's complaint pursuant to California Code of Civil
 16 Procedure 425.16 "on the ground that [the complaint] is purely designed to suppress protected
 17 speech." Mot. at 1.

18 **I. Legal Standard**

19 California law disfavors certain lawsuits designed to chill free speech activities. Such
 20 suits are known as Strategic Litigation Against Public Participation, or "SLAPP," lawsuits. In
 21 1992, the California State Legislature found that:

22 there has been a disturbing increase in lawsuits brought primarily to chill the valid
 23 exercise of the constitutional rights of freedom of speech and petition for the
 24 redress of grievances. The Legislature finds and declares that it is in the public
 25 interest to encourage continued participation in matters of public significance,
 and that this participation should not be chilled through abuse of the judicial
 process. To this end, this section shall be construed broadly.

26 Cal. Code Civ. Proc. § 425.16(a). California Code of Civil Procedure section 425.16 ("section
 27 425.16") permits a defendant to dismiss a lawsuit if the alleged bad acts arose from his or her
 28 exercise of free speech "in connection with a public issue" and if the plaintiff cannot show a

1 probability of success on his or her claims. Cal. Code Civ. Proc. § 425.16(b)(1).

2 In a special motion to strike under section 425.16, California's Anti-SLAPP statute, the
3 defendant has the initial burden of making a *prima facie* showing that the plaintiff's claims are
4 subject to section 425.16. Equilon Enterprises, LLC v. Consumer Cause, Inc., 29 Cal. 4th 53,
5 67 (2002); ComputerXpress, Inc. v. Jackson, 93 Cal. App. 4th 993, 999 (2001). If the
6 defendant makes that showing, the burden shifts to the plaintiff to establish a probability of
7 prevailing, by making a *prima facie* showing of facts which would, if proved, support a judgment
8 in the plaintiff's favor. ComputerXpress, 93 Cal. App. 4th at 999.

9 2. Analysis

10 a. Defendant's *Prima Facie* Showing

11 Under Section 425.16 an act in furtherance of a person's right of petition or free speech
12 includes: "(1) any written or oral statement or writing made before a legislative, executive, or
13 judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral
14 statement or writing made in connection with an issue under consideration or review by a
15 legislative, executive, or judicial body, or any other official proceeding authorized by law; (3)
16 any written or oral statement or writing made in a place open to the public or a public forum
17 in connection with an issue of public interest; (4) or any other conduct in furtherance of the
18 exercise of the constitutional right of petition or the constitutional right of free speech in
19 connection with a public issue or an issue of public interest. Cal. Code Civ. Proc. § 425.16(e).
20 In this case, the third and fourth definitions of an "act in furtherance" of a person's right to
21 petition are at issue.

22 Defendant bears the initial burden of making a *prima facie* showing that the plaintiff's
23 claims are subject to section 425.16. ComputerXpress, 93 Cal. App. 4th at 999. Here, the
24 conduct complained of in the complaint is defendant's postings relating to plaintiffs on an
25 internet message board. The internet and internet message boards have become a popular
26 method for members of the public to exchange opinions and ideas on a wide range of subjects.
27 As the Supreme Court explained:

28 //

1 From the publisher's point of view, it constitutes a vast platform from which to
2 address and hear from a world-wide audience of millions of readers, viewers,
3 researchers and buyers . . . Through the use of chat rooms, any person with a
4 phone line can become a town crier with a voice that resonates farther than it
could from any soapbox. Through the use of Web pages, . . . the same individual
can become a pamphleteer.

5 Reno v. ACLU, 521 U.S. 844, 870 (1997). Courts addressing motions pursuant to section
6 425.16 have found messages posted on internet message boards that offer discussion regarding
7 publicly traded companies fall within California's anti-SLAPP statute. *See, e.g., Global*
8 *Telemedia International, Inc. v. Doe 1*, 132 F. Supp. 2d 1261, 1264-66 (N.D. Cal. 2001). In
9 Global Telemedia, the Northern District of California found that messages posted on the
10 "Raging Bull Message Boards," by two individual investors that were critical of the plaintiff fell
11 within California's anti-SLAPP provision. *Id.* at 1264-66. In concluding that plaintiff (and
12 plaintiff's stock) was a matter of public interest, the Global Telemedia court pointed to the
13 plaintiff's use of press releases, it's large number of investors ("as many as 18,000"), and the
14 fact plaintiff had been the subject of thousands of internet postings. *Id.* at 1265.

15 Here, defendant has come forward with evidence demonstrating that plaintiffs are
16 publicly traded companies. Deft's Notice of Lodgment, Exhs. 2, 3, 4. According to its most
17 recent Annual Statement filed with the Securities and Exchange Commission, Universal had
18 over 8,000 shareholders and over 255 million shares of common stock outstanding. *Id.*, Exhs.
19 3, 4. Universal injected itself into the public arena by issuing press releases regarding it's
20 business operations and litigation concerning internet posters. *See id.*, Exh. 19. Universal also
21 maintains a public website which encourages public comment and discourse between internet
22 posters regarding its products. Coughlin Decl. ¶ 6; Deft's Notice of Lodgment, Exh. 2.
23 Therefore, this Court finds plaintiffs, including Universal, Airwater (a wholly owned subsidiary
24 of Universal), and Zwebner (Universal's Chairman), are matters of public interest.

25 Because defendant's postings were made in connection with his participation in public
26 discourse regarding a public issue, defendant has met his initial burden of demonstrating that
27 plaintiffs' claims are subject to section 425.16. Accordingly, the burden shifts to plaintiffs who
28 must establish a probability of success on the merits of their claims.

1 **b. Probability of Success on the Merits**

2 To show a probability of prevailing for purposes of section 425.16, a plaintiff must
 3 “make a prima facie showing of facts which would, if proved at trial, support a judgment in
 4 plaintiff’s favor.” ComputerXpress, 93 Cal. App. 4th at 1010 (quoting Kyle v. Carmon, 71
 5 Cal. App. 4th 901, 907 (1999)). “However, the plaintiff ‘cannot simply rely on the allegations
 6 in the complaint,’ but ‘must provide the court with sufficient *evidence* to permit the court to
 7 determine whether there is a probability that the plaintiff will prevail on the claim.”
 8 ComputerXpress, 93 Cal. App. 4th at 1010 (internal citations omitted). Plaintiffs assert claims
 9 for defamation and intentional infliction of emotional distress.

10 **I. Defamation**

11 Defendant contends² that plaintiffs cannot show a likelihood of success on the merits
 12 of plaintiffs’ defamation claim because the claim is barred by California’s one year statute of
 13 limitations for defamation claims. Mot. at 10. Defendant points out that the statements
 14 alleged in plaintiffs’ complaint were posted between January 28, 2003 and January 4, 2004 but
 15 the complaint was not filed until June 21, 2005, seventeen months later. Thus, defendant
 16 argues plaintiffs’ defamation claim was filed five months too late. Id. at 11.

17 Plaintiffs, in opposition, contend that the applicable statute of limitations in this case
 18 is Florida’s two year limitations period and, thus, their defamation claim is not barred. *See*
 19 *Opp.* at 5-6 (citing Fla. Stat. § 95.11). Plaintiffs urge the Court to apply Florida law in this
 20 diversity case in determining whether the complaint was timely filed. *See id.* (citing Rosenthal
 21 v. Jane Fonda, 862 F.2d 1398 (9th Cir. 1988)).³ Plaintiffs claim that, based on a
 22 “‘governmental interest’ analysis,” conflict of law rules require application of Florida’s statute
 23 of limitations in this case, in that Florida’s interest in the case is greater than California’s
 24 because “[t]he defamatory statements were directed through the internet at two corporations
 25

26 ² Because plaintiffs’ claims ultimately fail as untimely, this Court does not address defendant’s
 27 arguments concerning whether the statements at issue are actionable. *See* Mot. at 11-14.

28 ³ As defendant points out, the Rosenthal case involved a substantive choice of law analysis regarding
 which state’s statute of frauds law should apply. *See* Reply at 3; Rosenthal, 862 F.2d at 1400. Thus, the
Rosenthal case is unpersuasive here.

1 with the principal place of business in Florida and one individual whose only U.S. residence is
2 in Florida.” Id. at 6. In addition, plaintiffs contend the damages in this case primarily
3 incurred in Florida. Id.

4 In reply, defendant notes, even though plaintiff seeks redress under California
5 substantive law, plaintiffs claim Florida’s procedural rules should apply. Reply at 2 (citing Opp.
6 at 2, 5). According to defendants, in diversity actions, the applicability of a statute of
7 limitations is a procedural issue, not substantive, and, thus, California’s statute of limitations
8 apply here. Id. at 2, 3 (citing Zellmer v. Acme Brewing Co., 184 F.2d 940, 942 (9th Cir.
9 1950)). Defendant also argues that, even if the “governmental interest” analysis is applied to
10 the instant case, the outcome would not change. Id. at 4. Defendant explains that, under the
11 facts here, the case would be considered as establishing a “false conflict” of law. Id. (citing
12 Ashland Chemical Co. v. Provence, 129 Cal.App.3d 790 (1982). In Ashland, the California
13 Supreme Court applied California’s statute of limitations instead of Kentucky’s where the
14 plaintiff, a Kentucky corporation, sued a California corporation and two California residents
15 over a promissory note executed in Kentucky. Ashland, 129 Cal.App.3d at 793-94. The
16 Ashland court, characterizing the case as “the very paradigm of the false conflict,” found
17 California’s interest paramount because there were no Kentucky defendants and Kentucky was
18 not the forum. Id. at 794.⁴ Defendant points out that, similarly here, plaintiffs, who are
19 Florida corporations and residents, are suing a California resident⁵ based on California
20 substantive law in California. Reply at 5. According to defendant, the instant case is analogous
21 to the Ashland case and, thus, California’s interest in this case is paramount for the same

22
23 ⁴ The Ashland court explained that “[s]tatutes of limitations are designed to protect the enacting
24 state’s residents and courts from the burdens associated with the prosecution of stale cases in which memories
25 have faded and evidence has been lost.” 129 Cal.App.3d at 794 (citing McGee v. Weinberg, 97 Cal.App.3d
26 798, 804 (1979)).

27 ⁵ Plaintiffs assert defendant was employed by a Florida based company. *See* Opp. at 6. Plaintiffs note
28 that, although defendant successfully moved to dismiss a complaint filed by plaintiffs in Florida for lack of
personal jurisdiction, *see* Deft’s Lodgment, Exhs. 7-10, it was later discovered, after the motion had been fully
briefed, that defendant worked for a “related Florida company named “TalkVisual.” Opp. at 6 & n.1.
Defendant note that his affiliation with that entity was as an independent contractor, earning a minimal
amount of money, and, thus, “has had *de minimus* contacts with [Florida].” Reply at 5, n.2. Defendant,
however, correctly notes, in reply, that defendant’s limited employment with a Florida company does not
overtake California’s interest in protecting its citizens. *See* Reply at 5, n.2.

1 reason presented there: because states have an interest in protecting their citizens. *Id.*
2 Therefore, defendant contends that California's law must be applied.

3 This Court agrees with defendant. The United States Supreme Court has clearly rejected
4 the notion that a statute of limitations be applied as a substantive rule where there is a choice
5 of law issue in a diversity action. See Sun Oil v. Wortman, 486 U.S. 717, 726-729 (1988); see
6 also Alberding v. Brunzell, 601 F.2d 474, 476 (9th Cir. 1979)(observing that "statutes of
7 limitations are a procedural matter governed by the law of the forum."). This Court notes that
8 the California state court agrees. See Cossman v. Daimler-Chrysler Corp., 108 Cal.App.4th
9 370, 376 (2003).

10 In addition, even when the "government interest" analysis is applied, this Court finds
11 California's interest in protecting its citizens outweighs Florida's interest. This Court finds this
12 case similar to the Ashland case, cited by defendant, in that this case involves Florida plaintiffs
13 suing a California resident, thus, creating a "false conflict." See Ashland, 129 Cal.App.3d
14 at 793-94. As in Ashland, because Florida is not the forum and there are no Florida
15 defendants, Florida's interest is *de minimus* in comparison to California's interest in protecting
16 its citizens. Accordingly, this Court finds California's statute of limitations on defamation
17 claims apply in this case.

18 In California, defamation actions are subject to a one-year statute of limitations. C.C.P.
19 § 340(c); Shively v. Bozanich, 31 Cal.4th 1230, 1246 (2003). The statements at issue were
20 posted over seventeen months prior to the filing of the instant case. Therefore, plaintiffs'
21 defamation claims are time-barred.

22 2. Intentional Infliction of Emotional Distress

23 Defendant also contends that plaintiffs' intentional infliction of emotional distress claim
24 fails because their defamation claim fails. See Mot. at 14-16. Defendant points out that, an
25 intentional infliction of emotional distress claim based on defamatory speech cannot stand
26 when the speech is found to be constitutionally permissible or where the defamation claim has
27 been found insufficient. *Id.* at 15 (citing Reader's Digest Assoc., Inc. v. Superior Court, 37
28 Cal.3d 244, 265 (1984); Flynn v. Higham, 149 Cal.App.3d 677, 682 (1983); Lieberman v.

1 Fieger, 338 F.3d 1076, 1082, n.3 (9th Cir. 2003)(“Under California law, a plaintiff may not
2 maintain an independent cause of action for the intentional infliction of emotional distress
3 based on the same acts which were insufficient to support a cause of action for defamation.”).
4 Because plaintiffs’ defamation claim is time-barred, plaintiffs’ intentional infliction of emotional
5 distress claim, based upon the same factual basis as the defamation claim, also fails as time-
6 barred.

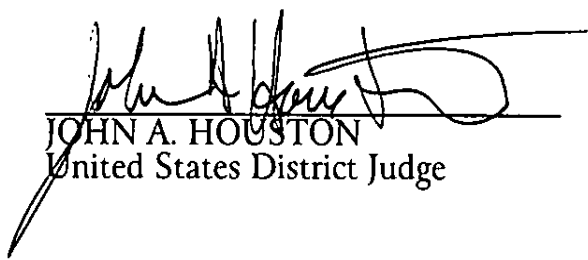
7 Accordingly, because all of plaintiffs’ claims are time-barred, plaintiffs have failed to
8 demonstrate a likelihood of success on the merits by making a *prima facie* showing of facts which
9 would, if proved, support a judgment in plaintiffs’ favor. ComputerXpress, 93 Cal. App. 4th
10 at 1010.

11 **CONCLUSION AND ORDER**

12 Based on the foregoing, this Court finds that defendant has met his initial burden of
13 making a *prima facie* showing that plaintiff’s claims are subject to section 425.16 and that
14 plaintiffs have failed to establish a probability of prevailing on the merits of their claims.
15 Accordingly, defendant’s motion to strike plaintiffs’ complaint is **GRANTED** and plaintiffs’
16 complaint is hereby **STRICKEN** pursuant to California Code of Civil Procedure § 425.16.

17 Defendant also seeks an award of reasonable costs and attorneys fees incurred in bringing
18 the instant motion and suggests the Court set a hearing date and briefing schedule for his
19 motion. *See* Mot. at 18; Reply at 9. However, this Court sees no need to address defendant’s
20 costs and fees request any differently than any other motion. Therefore, defendant is directed
21 to file his motion, if desired, in accordance with the Federal Rules of Civil Procedure and the
22 Local Rules of this District.

23
24 Dated: October 5, 2005

25
26 
27 JOHN A. HOUSTON
United States District Judge

28 cc: Magistrate Judge Battaglia
All Counsel of Record