IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

EUCLID DISCOVERIES LLC, J. ROBERT WERNER and RICHARD Y. WINGARD,	Case No. 1:11-cv-11393-DJC
Plaintiffs, v. MARK NELSON, SACHIN GARG and JOHN DOES 1-150, all of whose true names are unknown,	**DEFENDANTS MARK NELSON'S AND SACHIN GARG'S RESPONSE TO PLAINTIFFS' SUR-REPLY IN OPPOSITION TO DEFENDANTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS**
Defendants.	(Leave to file granted April 13, 2012)

Respectfully submitted,

MARK NELSON,
SACHIN GARG

By their attorney,

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I. <u>The Court Lacks Personal Jurisdiction Over Nelson and Garg</u>[1]

A. Plaintiffs Fail to Satisfy the *Prima Facie* Standard

Plaintiffs misconstrue the *prima facie* standard. Defendants do not have the burden to "rebut" anything: "plaintiff[s] ultimately bear[] the burden of persuading the court that jurisdiction exists." *Platten v. HG Bermuda Exempted Limited*, 473 F.3d 118, 134 (1st Cir. 2006). The Court must take *specific facts affirmatively alleged* in the complaint and construe them in the plaintiff's favor, but Plaintiffs "may not rely on unsupported allegations in their pleadings, but are obliged to adduce **evidence of specific facts**." *Id.* (emphasis added). The Court also considers the defendants' uncontroverted facts. *Id.*

Plaintiffs rely not on "specific facts affirmatively alleged," but on a mix of paraphrases, speculation, and misleading assertions. (Pl. Sur-Reply at 5-6.) There are no specific facts alleged in the Complaint that could support the assertion of personal jurisdiction over Nelson or Garg. The email from Mr. Corley to which Plaintiffs refer is not alleged in the Complaint, is not alleged to be defamatory, dates from 2006, and was not written by Nelson. At most, it shows that Nelson knew that Euclid was in Massachusetts, which as the cases cited previously, is absolutely not a basis for personal jurisdiction. The various Blog comments to which Plaintiffs refer are simply comments and demonstrate no connection to Massachusetts.[2]

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[1] On subject-matter jurisdiction, Defendants incorporate their memorandum in opposition to Plaintiffs' motion to amend the complaint to dismiss the John Doe defendants (Dkt. No. ___), which addressed the subject matter arguments contained in Plaintiffs' sur-reply. With respect to venue, Defendants incorporate by reference Section I.B. of their motion to strike the sur-reply (Dkt. No. 42), arguing that Plaintiffs waived venue by failing to argue it before their sur-reply.

[2] Comments 13-17 and 22, D.I. 1-1 at 11-13, contains comments from 2006, only two of which were Nelson's (15 and 22). Nelson states in comment 22 that Euclid's research operations must be located around the country rather than housed in a small building. He also explicitly states that he has never tried to defame Euclid but has made clear that he is offering only opinions and "sheer speculation," and that he has no interest in damaging Euclid but rather encourages people

As for Nelson's supposed "emphasis" on "his contacts with" Tiny Angel and supposed "assert[ion] that the basis for his defamatory comments is a Massachusetts resident" (Pl. Sur-Reply at 5-6), this is a particularly egregious misrepresentation. Nelson's single reference to Tiny Angel is hardly an "emphasis," and he never asserts that he based his statements on Tiny Angel. Nor does he allege that he had any contact with Tiny Angel—only that he thinks he stumbled on his identity. Finally, there is no evidence that Tiny Angel is a Massachusetts resident. "New England" is much larger than just Massachusetts, and Plaintiffs have asked the Court to "infer" that he is from Massachusetts. The Court may not draw an inference from a "fact" that is not alleged in the Complaint and that is explicitly speculative.

Even if it were Defendants' burden to rebut the jurisdiction, they have done so here. Although Plaintiffs never suggested otherwise in its opposition briefs, in Plaintiffs' Sur-Reply, Plaintiffs assert that it is "conspicuous" that Nelson and Garg have not declared that they own property, etc., in Massachusetts, and that Nelson has offered only "attorney argument" that he posted the statements from Texas. In direct response to this new argument made for the first time in the Sur-Reply, Defendants have filed two Declarations.[3] Though it is Plaintiffs' burden, Defendants' Declarations address these speculative negative inferences.

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to invest because it is a valuable opportunity if Euclid's technology exists. Comment 85, D.I. 1-1 at 28-29 contains nothing defamatory and is not referenced in the More Definite Statement.

[3] At oral argument, Plaintiffs' counsel objected to these Declarations as untimely. Even if that were a basis for refusing to consider them (and putting aside the irony of Plaintiffs' objection), the premise is incorrect. As noted, Plaintiffs never offered their speculation until their Sur-Reply. Defendants moved to strike that brief because it was not a sur-reply at all. The Court did not rule on that motion until oral argument, and since the Declarations rebut Plaintiffs' insinuations in the Sur-Reply, they could not have been filed. Moreover, although they were ready at the time of oral argument and submitted for that reason, they are in reality part of Defendants' present response to the Sur-Reply, which Defendants obtained leave to file only at oral argument. As for the April 11 date on the Declarations, as undersigned counsel explained at oral argument, that was simply a vestige of the date they were first drafted and they were not

B. The Massachusetts Long-Arm Statute Does Not Authorize Jurisdiction

Plaintiffs misstate the First Circuit's holding in *Murphy v. Erwin-Wasey, Inc.*, 460 F.2d 661, 664 (1st Cir. 1972). The Court ***did not hold*** that Section 3(c) of the Massachusetts long-arm authorizes jurisdiction over a defendant who "publishes a libelous comment in Massachusetts." (Pl. Sur-Reply at 6.) The issue was fraud, not libel. *Id.* at 664. The court found jurisdiction because the defendant had mailed a false statement directly to a Massachusetts resident with the intent that the resident would rely on it in executing a contract. *Id.* Moreover, the First Circuit has since questioned its holding in *Murphy* and refused to apply it to defamation. *See Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 205 (1st Cir. 1994) (noting *Murphy* did not address defamation, and expressing the Court's "profound reservations about extending the *Murphy* rationale"); *Platten*, 437 F.2d at 138, n. 13 (noting *Murphy* was decided before Supreme Court's modern jurisdictional cases, and recognized that Section 3(c) would not apply where the plaintiff "was not deceived by" the allegedly tortious acts). As the First Circuit stated:

> Intuitively, it would seem hard to characterize the act of publishing an allegedly defamatory act outside the forum state as an act within the forum state. In fact, no fewer than five courts applying long-arm statutes pattered after the Uniform Act [as is Massachusetts'] have eschewed *Murphy*'s reasoning in the defamation context and declined to assert jurisdiction on this basis.

Ticketmaster, 26 F.3d at 205, at n.5 (collecting cases). Moreover, *Murphy* recognized that Section 3(c) applies only when the "act causing the injury" occurs in Massachusetts and that construing it any more broadly "would render § 3(d) a nullity." *Murphy*, 460 F.2d at 664. As this Court held in *Kolikof v. Samuelson*, 488 F. Supp. 881, 883 (D. Mass. 1980), the *Murphy* logic applies only when "the nature of the information transmitted across state lines is a crucial

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completed and executed until the evening of April 12. Plaintiffs have not been prejudiced by the Declarations, where they respond to arguments that Plaintiffs made only in their sur-reply.

element of the alleged tort." Where, as here, the only act necessary to establish the tort (publication of the statement) occurred elsewhere, Section 3(c) does not apply. *Id.*

Courts applying long-arms analogous to Section 3(c) in online defamation cases agree, focusing on the location of the Internet servers upon which the statements are posted, because that is where the material was published. *See, e.g.*, *Bochan v. La Fontaine*, 68 F. Supp. 2d 692, 698-99 (E.D. Va. 1999).[4] Although Massachusetts law on this specific point is sparse, the only apparent decision to address the issue is in accord. *See Zwebner v. Villasenor*, 2000 WL 35486421 (Mass. Super. Ct. Dec. 26, 2000) (Section 3(c) authorized jurisdiction where defamatory statements were published on Massachusetts corporation's website hosted on Massachusetts servers, and citing with approval *Bochan*, *Telco*, and *Krantz.*) It is undisputed that the Blog is hosted on Go Daddy's servers in Scottsdale, AZ.[5]

With respect to Garg, Plaintiffs argue only that Section 3(c) of the long-arm applies because Nelson's statements should be attributed to Garg under a novel "joint venture" theory. As noted at oral argument, any such construction of the long-arm statute would directly violate Section 230 of the CDA, which prohibits treating Garg as the speaker of Nelson's comments for any reason and provides immunity from liability and suit. Attribution of Nelson's comments to Garg to gain jurisdiction would violate his immunity. *See* 47 U.S.C. § 230(c)(1) and (c)(3).

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[4] *See also Telco Comm. v. An Apple a Day*, 977 F. Supp. 404, 407 (E.D. Va. 1997); *Krantz v. Airline Pilots Ass'n Int'l*, 427 S.E.2d 326, 327 (Va. 1993).

[5] Nor is it sufficient that Plaintiffs viewed the statements here (assuming *arguendo* that they did so through servers in Massachusetts, of which there is no evidence). In *Scheel v. Harris*, 2011 WL 2559880 (W.D. Va. June 28, 2011), the Court held that transmission of statements to the plaintiffs was not defamatory because it was not publication to a third-party. The Court also held that the delivery of plaintiff's email by means of AOL's computer servers in Virginia did not provide jurisdiction because the servers simply aided the plaintiff in receiving the statements and were "not integral to the tort." 2011 WL 2559880 at *4-5.

C. Due Process Does Not Permit the Exercise of Personal Jurisdiction

Plaintiffs have offered no evidence of contacts with Massachusetts, other than their contention that they (two of them) have been injured here. (Pl. Sur-Reply at 7.) This is insufficient to show "relatedness." As for purposeful availment, Plaintiffs' tactic appears to be to argue that Nelson's supposed "obsession" with Euclid and his comments on the Blog about Euclid (the vast majority of which are not even alleged to be defamatory) satisfies the requirement that an Internet statement "target the forum." This is wrong:

> There is a difference between tortious conduct targeted at a forum resident and tortious conduct expressly aimed at the forum. Were the former sufficient, a [forum] resident could hale into court in [the forum] anyone who injured him by an intentional tort committed anywhere.

Atiyeh v. Tostigan, 2002 WL 461592 (E.D. Penn. March 15, 2002). Similarly, in *Bailey v. Turbine Design, Inc.*, 86 F. Supp. 2d 790, 796–97 (W.D. Tenn. 2000), there was no targeting:

> Plaintiff was not attacked as a Tennessee businessman. Indeed, the alleged defamatory comments had nothing to do with plaintiff's state of residence. Thus, it cannot be said that the defamatory statements constitute actions 'expressly aimed' at Tennessee. … **Unless [the forum state] is deliberately or knowingly targeted by the tortfeasor, the fact that harm is felt in [the forum state] from conduct occurring outside [it] is never sufficient to satisfy due process**.

86 F. Supp. 2d at 796-97 (internal quotation and citation omitted, emphasis added).

D. The Texas Statute of Limitations Applies

Plaintiffs' choice-of-law argument falls wide of the mark. First, it is well-established that "[g]ranting a motion to dismiss based on a limitations defense is entirely appropriate when the pleader's allegations leave no doubt that an asserted claim is time-barred." *LaChapelle v.*

Berkshire Life Ins. Co., 142 F.3d 507, 509 (1st Cir.1998).[6] That is the case here. There is no dispute as to the publication date of the statements in question, and the single publication rule establishes that the statute of limitations began running upon publication—and that would be true even if Plaintiffs had not conceded that they were fully aware of the alleged defamation "[b]eginning on or about June 11, 2008 and continuing to the present." (Complaint § 2, ¶ 7.) Accordingly, there are no unknown facts that preclude dismissal on the basis of the statute of limitations. Tellingly, Plaintiffs do not even suggest any.

Second, the personal jurisdiction and choice of law analyses are not the same:

> As the parties should know, the questions surrounding statutes of limitations (and, here, the choice-of-law issue), on the one hand, and personal jurisdiction, on the other, are separate and distinct. Indeed, choice-of-law issues 'arise only after it is assumed or established that ... contacts with the forum state are sufficient to support personal jurisdiction.'

Travelers Supply, Inc. v. Hilton Head Labs., Inc., 2008 WL 5533434, at *5 (D. Mass. Dec. 23, 2008) (citation omitted)(quoting *Allstate Ins. Co. v. Hague,* 449 U.S. 302, 320 n. 3 (1981) (Stevens, J., concurring). The choice of law question is simply, *with respect to the statute of limitations*, which state has the most significant relationship to the occurrence and the parties. Unlike personal jurisdiction, the focus is "**on the statute of limitations issue, and not on the underlying tort**." *Nierman v. Hyatt Corp.*, 441 Mass. 693, 696 (2004)(emphasis added).[7]

[6] Plaintiffs assert without authority, that it is "more appropriate" to defer choice of law decisions until the factual record has been developed and that "for this reason, courts regularly defer the choice of law analysis until later in the case," citing *Institute of Innovative Med., Inc. v. Laboratorio Unidos de Biquimica Funcional, Inc.*, 613 F. Supp. 2d 181 (D.P.R. 2009). (Pl. Sur-Reply at 13.) That case provides no support because there was no choice of law issue at all: the court had to decide which of two Puerto Rican statutes of limitations would apply. *Id.* at 187-88. In any event, Plaintiffs fail to identify a single fact that could possibly affect the legal determination of the choice of law with respect to the statute of limitations. There is none.

[7] Plaintiffs assert that Nelson "publicized his contacts with a Massachusetts investor (Tiny Angel)" (Pl. Sur-Reply at 14), as if this were a fact, glossing over their plea a few pages earlier

Third, Plaintiffs' suggestion that Texas has no "legitimate" interest in shielding its citizens from (assumedly) "legitimate" claims is nonsensical. Every state shields alleged tortfeasors from even legitimate claims after a period of time—that is inherent in statutes of limitations. The only question is whether that period should be one or three years.

Fourth, Plaintiffs' assertion that applying the Texas statute would "render the Commonwealth powerless" to protect its citizens is a straw man. Plaintiffs have known about the alleged defamation from the outset and were free to sue at any time. Applying the Texas statute would not change that; it would simply acknowledge that Plaintiffs should not have slept on their rights. Rather than render the Commonwealth powerless, application of the Texas fully implements the Commonwealth's interest in proper application of its own choice of law rules.

Finally, Defendants reference to Massachusetts defamation cases does not "concede" anything. It is implicit in the *Nierman* decision that the choice of state tort law may differ from the choice of state statute of limitations; hence, the focus on the statute of limitations rather than on the underlying tort. Defendants' citation of Massachusetts cases reflects the rule that courts need not engage in choice of law analyses where there is no actual conflict. *Okmyansky v. Herbalife Int'l of Am., Inc.*, 415 F.3d 154, 158 (1st Cir. 2005). Although Defendants reserve the right to argue for the application of Texas defamation law should the case proceed on the merits, Defendants have not argued that there is an actual conflict between Massachusetts and Texas law that bears on Defendants' motions. *Compare Ravnikar v. Bogojavlensky*, 438 Mass. 627, 629-30

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that the Court "should *infer* that Tiny Angel is a Massachusetts resident" because the court should draw all inferences in Plaintiffs' favor. (Pl. Sur-Reply at 6.) The Complaint contains no allegation that Tiny Angel—or, for that matter, *any* person who posted a comment on the Blog or even read the Blog—was a Massachusetts resident, and there is no evidence that he—or anyone else—was. Mr. Nelson said simply that he believed him to be a chiropractor "in New England." The court should draw inferences only from the well-pleaded factual allegations in the Complaint, not from Plaintiffs' speculative wishful thinking in response to a Rule 12 motion.

(Mass. 2003), *with Marshall v. Fulton*, 2011 WL 1630661, at *9 (N.D. Tex. Apr. 29, 2011).[8] It is beyond serious dispute that "Texas has the dominant interest in having its own limitations statute enforced." *Nierman v. Hyatt Corp.*, 441 Mass. 694, 697, n. 9 (2004).

II. The Texas Anti-Slapp Statute Requires Dismissal, Attorneys Fees and Sanctions

As Defendants pointed out at oral argument, Plaintiffs do not seriously challenge the application of the Texas anti-SLAPP statute as a choice of law matter. They provide no legal argument, simply pointing out that Massachusetts has a narrower anti-SLAPP law and asserting that the Texas law should not apply "for all the reasons previously advanced with respect to the applicable statute of limitations." (Pl. Sur-Reply at 15-16.) Instead, Plaintiffs argue that the statute does not apply on its own terms. This too is incorrect.

As discussed at oral argument, good cause certainly exists here to extend the time to file the motion. Plaintiffs' Complaint failed to provide Nelson with reasonable notice of the nature of the claims against him. That the Court took the extraordinary step of ordering Plaintiffs to provide a more definite statement certainly establishes good cause to extend the period. Indeed, failure to do so would encourage precisely the type of deficient pleading that compelled the Court to act. Plaintiffs could avoid the Texas anti-SLAPP statute entirely simply by filing a vague complaint, knowing that it would be impossible to file an anti-SLAPP motion until the court had ruled on a motion for a more definite statement. This would eviscerate the statute.[9]

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[8] Plaintiffs' assertion that Defendants cannot "credibly" argue that Massachusetts has "absolutely no" interest in Plaintiffs' claims misstates both aspects of the choice of law analysis. The issue is not whether Massachusetts has "any" interest, but whether it has a "substantial" interest, and the relevant interest is not in the tort, but in the statute of limitations.

[9] As for whether Nelson's Blog comments were about a "matter of public concern," Plaintiffs tread a very narrow line, arguing that the "tenor" of Nelson's comments were that Euclid does not have a product and therefore his comments were not about "a good, product, or service in the marketplace." (Pl. Sur-Reply at 16) (underlining in original). But they do not affirmatively allege that Euclid has no such product or service, and they offer no affidavit or other evidence to

As previously discussed, Plaintiffs have made no effort to satisfy the statutory burden of establishing "by clear and specific evidence a prima facie case for each essential element of the claim." § 27.005(c). Their claims are barred as a matter of law for the myriad reasons set forth in Defendants' motions, and Plaintiffs have not offered even a shred of admissible evidence, let alone clear and specific evidence, to establish their *prima facie* case on each element: no affidavits, no documents, nothing other than lawyer arguments, unsupported theories, and pure speculation. Accordingly, the Complaint must be dismissed under the Texas anti-SLAPP statute and the Court must award Nelson his attorney fees, costs, and deterrent sanctions.

III. The Six Remaining Statements Are Non-Defamatory as a Matter of Law

Despite Plaintiffs' unsupported statement to the contrary (Pl. Sur-Reply at 17), "the threshold question of whether the statements as a whole and taken in context are reasonably susceptible of a defamatory meaning is a question of law for the Court, and Massachusetts law favors the use of dispositive motions to resolve defamation cases." *Augat, Inc. v. Collier*, 1996 WL 110076, *42 (D. Mass. Feb. 8, 1996) (citing cases). The only "factual issues" that Plaintiffs point to as precluding judgment on the pleadings are "the context of the surrounding messages and any implied meaning." (Pl. Sur-Reply at 17.) Yet, thanks to Plaintiffs' initial decision to frame their Complaint as a fishing expedition for possibly defamatory statements, the Court has

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support their defense, just a lawyer's characterization of the "tenor" of Nelson's statements. This is no doubt intentional: if Plaintiffs were to state that Euclid has no product or services, they would not only validate the thrust of the Blog comments but they would also defeat their own claim for Commercial Disparagement and Defamation (Count II), which is premised on Defendants' alleged disparagement of "Euclid's products and services." (Complaint ¶ 23.) Indeed, Plaintiffs allege that Defendants have disparaged Euclid's "products and services," which Euclid has branded "EuclidVision" (Complaint § 2, ¶ 1), and that Euclid has suffered "the monetary loss of important and valuable business" (separate from the alleged loss of funding and reputational injury). (Complaint § 2, ¶ 28.) These factual allegations constitute an admission that Euclid has products and services and Plaintiffs' are estopped from pretending otherwise simply to avoid liability under the Texas anti-SLAPP statute.

before it *all* of the context for every one of the allegedly defamatory statements, in the nearly 500 pages and more than 1,500 articles and comments attached as exhibits to the Complaint. The Court can view each message in the precise context in which it appeared, and can follow the entire extended online conversation in its entirety. Taken in context, in a spirited online discussion that includes both supporters of Euclid and those who question it, many if not all of whom are clearly Euclid investors who have a deep knowledge of the situation, not one of Nelson's comments is reasonably susceptible of defamatory meaning.[10] [11]

CONCLUSION

For the foregoing reasons, as well as those set out in their respective opening and reply briefs, Defendants Nelson and Garg respectfully request that the Court enter judgment on the pleadings and dismiss the Complaint as to each of them, with prejudice. Defendants further request that the Court award them their attorney fees and costs incurred in connection with this litigation, plus a deterrent sanction pursuant to the Texas anti-SLAPP statute.

Respectfully submitted,

MARK NELSON,

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[10] *See, e.g.*, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990) (statement is opinion when the "general tenor of the article" negates the impression that actual facts are being asserted); *Riley v. Harr*, 292 F.3d 282, 293 (1st Cir. 2002) (statement that plaintiff was a "liar" was protected opinion because the author reported the underlying facts); *Gray v. St. Martin's Press, Inc.*, 221 F.3d 243, 248-49 (1st Cir. 2000) (calling plaintiff's closeness with the president "faked" was protected opinion).

[11] *Coughlin v. Town of Arlington*, 2011 WL 6370932, at *2 n.17 (D. Mass. Dec. 19, 2011), is of no assistance. The court did *not* hold that it must "draw factual inferences regarding the explicit and implied meaning of defendants' messages, as well as defendants' malicious intent in posting the messages, in plaintiffs [*sic*] favor." (Pl. Sur-Reply at 18.) There, the plaintiff did not identify any false statement, but instead described the defendant's participation in the publication of plaintiff's emails, the truth of which was not challenged. The question before the court was whether plaintiff had adequately pled actual malice to overcome the defense of truthfulness. Judge Wolf disagreed and denied the motion to dismiss for failure to adequately plead malice. 2011 WL 6370932, at *14-15. *Coughlin* stands for nothing more than that.

SACHIN GARG

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Dated: January 31, 2012

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/s/ Mitchell J. Matorin