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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

HOLLIS-EDEN PHARMACEUTICALS, INC., a Delaware corporation, Plaintiff, v. ANGELAWATCH, BEN_CASALE, DICKIE13_62301, DOGMAD2002, GPALCUS (M/CELL BLOCK 5), HEPHDIVER, HEPH_LONG, JARHED2046, LEBEAUSOLEIL, NOTTESCURRA, ONXBRAY, and DOES 1 through 50, inclusive, Defendants.	Case No.: GIC 759462 The Hon. Kevin A. Enright Dept. 62 Complaint Filed: 12/14/2000 REPLY MEMORANDUM IN SUPPORT OF SPECIAL MOTION TO STRIKE (CCP § 425.16) DATE: March 9, 2001 TIME: 10:30 a.m. DEPT.: 62 DISCOVERY CUTOFF: None MOTION CUTOFF: None TRIAL DATE: None

INTRODUCTION

Eight months after its stock began a steady decline, Hollis-Eden Pharmaceuticals, Inc. ("HEPH") sued eleven individuals for messages they posted on a Yahoo! message board devoted to discussion about HEPH. Two of those defendants, gpalcus and dickie13_62301 ("dickie13"), have moved to strike the complaint pursuant to Code of Civil Procedure section 425.16 ("section 425.16"), California's "anti-SLAPP" statute, on the ground that the suit was brought against them for the illegitimate purpose of chilling their right to speak freely about this publicly-held company. Recognizing that free speech may be threatened by the financial hardship and chilling effect on speech that result from defending a frivolous lawsuit, the anti-SLAPP statute provides a mechanism to dispose of SLAPP suits early on in litigation.

Under section 425.16, defendants had the initial burden of showing that this action arises from acts in furtherance of their right of free speech. Defendants' moving papers made this prima facie case. The burden then shifted to HEPH to establish that it was likely to prevail on the merits. (*See Wilcox v. Superior Court* (1994) 27 Cal. App. 809, 821-21.) HEPH has not carried this burden. Its opposition fails to show that any of the three messages posted by gpalcus and dickie_13 could reasonably be interpreted as implying provable facts, and it offers no evidence to demonstrate—indeed, it does not even address—two other elements of defamation, falsity and injury.

In essence, HEPH says that a person cannot publicly criticize a corporation without suffering a lawsuit, even if the corporation is publicly traded and promotes itself to the public. Its cursory discussion of the merits reflects the fact that it seeks to punish these two defendants for their criticism. This case thus presents a paradigmatic example of a SLAPP. The motion to strike should be granted.

DISCUSSION

I. GPALCUS'S AND DICKIE13'S STATEMENTS CONCERN A MATTER OF PUBLIC INTEREST THAT FALL WITHIN THE SCOPE OF SECTION 425.16.

The anti-SLAPP statute applies to any statement "made in a place open to the public or a public forum in connection with an issue of public interest" and to "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).) The three

messages at issue here, one by gpalcus and two by dickie13, were made on a popular Yahoo! message board. As of mid-day on January 9, 2001, more than 16,800 messages had been posted to the board (Not. of Lodg., Exh. A)—some positive, some critical, some neutral, and some irrelevant. HEPH does not dispute that the Yahoo! message board constitutes a public forum.

HEPH contends that the anti-SLAPP statute does not apply because the three messages at issue are not about a matter of public interest. HEPH is wrong. HEPH is a publicly-traded company, with shares held by several mutual funds and many individual investors—such as defendants—who are directly impacted by the company's success or failure. (*See* http://biz.yahoo.com/hd/mf/h/heph.html (mutual fund holders of HEPH).) HEPH courts public attention by issuing press releases (Not. of Lodg., Exh. D) and has been discussed in the *Wall Street Journal* and *Business Week,* among other publications. (*Id.*) The company's business is developing new drugs, "primarily for the treatment of infectious diseases and immune system disorders, including HIV/AIDS, hepatitis, and malaria." (Not. of Lodg., Exh. C.) In these circumstances, the activities of the company surely are matters of public concern. (*See Church of Scientology v. Wollersheim* (1996) 42 Cal. App. 4th 628, 650-51 [matters of public interest can be "evidenced by media coverage" and "include activities that involve private persons and entities, especially when a large, powerful organization may impact the lives of many individuals"]; *see also Wilcox,* 27 Cal. App. 4th at p. 822 [anti-SLAPP statute covers suits aimed at commercial speech]; *Dora v. Frontline Video, Inc*. (1993) 15 Cal. App. 4th 536, 542 [documentary's unauthorized use of plaintiff's name and likeness not actionable because of public interest in subject of Malibu surfers].)

Presented with a lawsuit strikingly similar to this one, the United States District Court for the Central District of California recently held that the "public interest" prong of the anti-SLAPP statute was satisfied. In *Global Telemedia International, Inc. v. Doe* (C.D. Cal. Feb. 23, 2001) Case No. 00-1155 DOC (Eex) (hereafter "GTMI"), the plaintiff company, alleging libel, libel per se, and interference with contractual relations and prospective economic advantage, sued several individuals who had posted anonymous messages on an Internet message board devoted to discussion about the company. Granting a section 425.16 motion to strike, the court rejected the plaintiff's argument that the messages did not address a matter of public interest:

> GTMI is a publicly traded company with as many as 18,000 investors between March, 2000 and October, 2000. GTMI itself has inserted itself into the public arena and made itself a matter of public interest by means of numerous press releases issued since 1999. Further, a publicly traded company with many thousands of investors is of public interest because its successes or failures will affect not only individual investors, but in the case of large companies, potentially market sectors or the markets as a whole. This is particularly so when the company voluntarily trumpets its good news through the media in order to gain the attention of current and prospective investors. The fact that a chat-room dedicated to GTMI has generated over 30,000 postings further indicates that the company is of public interest.

(*Id.* at p. 3.) Aside from company-specific details, the court could have been addressing this case.

HEPH cites three cases in support of its argument that the speech at issue does not concern a matter of public interest. (HEPH Opp. 5.) First, HEPH cites *Paul for Council v. Hanyeez* (2001) 85 Cal. App. 4th 1356, for the proposition that the anti-SLAPP statute applies only where the conduct complained of was in furtherance of the defendant's free speech concerning a public issue. That proposition is not in dispute here, and the facts of the case are inapposite. In *Paul for Council*, the "speech" at issue was illegal—a campaign contribution money laundering scheme. The court of appeal rejected the notion that the anti-SLAPP statute protected illegal activity, even if that activity concerned a matter of public interest. (*Id.* at pp. 1366-67.) Here, of course, no one claims that posting to a Yahoo! message board is illegal.

HEPH also relies on *Ericcson GE Mobile Communications v. C.S.I. Telecommunications* (1997) 49 Cal. App. 4th 1591, for the proposition that the "public interest" prong of the anti-SLAPP statute turns on "whether the speaker was advancing a purely private interest or speaking out as a concerned public citizen to inform the general public about possible wrongdoing." (HEPH Opp. 5.) To begin with, although *Ericcson* characterized several prior cases as focusing on that question (49 Cal. App. 4th at p. 1602 [citing one California case and two cases from other federal circuits]), the case itself did not focus on whether the speech related to "wrongdoing" but on whether it related to an issue of "public significance," and section 425.16 includes no "wrongdoing" requirement. More importantly, the speech *Ericcson* described as relating to a "private" matter consisted of comments by a city service providers in private meetings and presentations made pursuant to contracts with the city. In contrast, the three messages by gpalcus and dickie13 were made in a public forum and relate to the activities of a publicly-held company that promotes itself to the public, seeks public investment, and works to develop new drugs for sale to the public to fight dangerous diseases. Although

defendants participated in the forum because of their private interests in plaintiff's performance and, in particular, its stock price, the anti-SLAPP statute contains no exclusion for speech related to matters of public concern in which the defendants also have private interests. (*See*, *e.g.*, *GTMI*; *Beilenson v. Superior Court* (1996) 44 Cal. App. 4th 944 [statements made during political campaign by one candidate about another fall within scope of § 425.16]; *Averill v. Superior Court* (1996) 42 Cal. App. 4th 1170 [homeowner's statements regarding permit for use of neighborhood home as battered women's shelter fall within scope of § 425.16].) Put simply, defendants' private financial interest in the success of a public endeavor does not alter the fact that the subject matter of the speech related to a matter of public concern.

Finally, HEPH relies on *People ex rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc*. (200) 86 Cal.App.4th 280. That case, however, did not implicate or even discuss the "public interest" prong of the anti-SLAPP statute. The suit centered on the defendant's preparation of allegedly false repair estimates, which were submitted to insurance companies following the Northridge earthquake in 1994. Invoking the anti-SLAPP statute, the defendant argued that the majority of the damage reports were prepared in anticipation of litigation, and thus covered by the statute as writings in connection with a matter to be reviewed by a judicial body. The court rejected the argument, in a discussion that addresses only section 425.16, subdivisions (e)(1) and (2). The opinion does not address the subsection of the statute at issue here, subdivision (e)(3), which brings within the scope of the statute statements made in a "public forum in connection with an issue of public interest." Moreover, the speech discussed in *20th Century* was solicitation of individual homeowners and preparation of fraudulent damage reports. Those private business communications present a far different case than the public comments at issue here.

In a footnote, HEPH suggests, without citation, that the definition of "public interest" used in non-SLAPP cases is broader than the "specialized definition" of the anti-SLAPP statute. (HEPH Opp. 5, fn.4.) This suggestion is belied by the express terms of the statute, which explicitly states that it is to be construed "broadly." (§ 425.16, subd. (a).) Moreover, the two non-SLAPP cases that HEPH seeks to distinguish on this ground were libel cases decided under a First Amendment analysis. (*See Morningstar, Inc. v. Superior Court* (1994) 23 Cal. App. 4th 676, 695 [impact on investors of

publicly-held company's advertising is matter of public concern]; *Paradise Hills Assocs. v. Procel* (1991) 235 Cal. App. 3d 1528, 1544-45 [performance and commercial activities of publicly-held company is matter of public interest]. Acts in furtherance of the First Amendment rights of free speech and petition are, of course, the rights that the Legislature sought to protect through the anti-SLAPP statute. (*See* § 425.16, subd. (b); *Briggs v. Eden Council for Hope and Opportunity* (1999) 19 Cal. 4th 1106, 1119 [purpose of anti-SLAPP statute "includes protection of . . . the broader constitutional right of freedom of speech"] [citation omitted].) Thus, for example, *Ericcson*, on which plaintiff relies, applies principles from several First Amendment cases to construe "public issue" for purposes of section 425.16. (*See* 49 Cal. App. 4th at pp. 1602-03.) The scope of "public interest" under the First Amendment is thus directly on point here.

HEPH concedes that "millions of people around the world" might be interested in reading defendants' posts on Yahoo!'s HEPH message board, "one of the most widely viewed stock chat rooms in the nation." (HEPH Opp. 6-7.) Because defendants' three statements relate to a matter of such potentially significant public interest, they fall within the scope of the anti-SLAPP statute.

II. HEPH HAS FAILED TO CARRY ITS BURDEN OF SHOWING A LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS CLAIMS.

Gpalcus's message uses rhetoric and invective to express frustration with HEPH's continued "value seep"—a "seep" that is an undisputed fact. (*See* Not. of Lodg., Exhs. C, E.) Dickie13's two messages criticize with humor and sarcasm HEPH's public relations activities. These statements are non-actionable opinion. Indeed, HEPH never actually contests that the statements at issue are figurative and hyperbolic. As discussed in more detail in defendants' initial memorandum, HEPH is unlikely to prevail on the merits of its claims.

As a preliminary matter, HEPH's opposition suggests that defendants have the burden of demonstrating that the company will not prevail on the merits. (HEPH Opp. 7.) In fact, however, once defendants have made a prima facie case that the statements at issue arose from acts in furtherance of their right of free speech, as they have done, the burden is HEPH's to establish that it is likely to prevail on the merits. (*See Wilcox*, 27 Cal. App. 4th at pp. 820-21.) HEPH has not carried this burden. In fact, HEPH has offered no argument on two elements necessary to its case: It has

offered no argument or evidence that the three messages are *false* and no argument or evidence that the three messages caused HEPH *injury*.

HEPH's brief discussion of the merits begins with the conclusory assertion that false accusations of fraud and incompetence "are" libelous. (HEPH Opp. 8.) This assertion cannot withstand scrutiny because HEPH has overstated the holdings of the cases on which it relies. Those cases, each of which discusses "incompetence," do not hold that accusations of incompetence are necessarily defamatory. Rather, they hold that the key question is "whether a reasonable fact finder could conclude that the published statements imply a provably false factual assertion." (*Kahn v. Bower* (1991) 232 Cal. App. 3d 1599, 1610.) To ascertain whether a statement communicates a "provable falsity or actual fact," courts consider the "totality of the circumstances," including the words used and the context in which the statement was made. (*Id.*)

For example, in *Kahn*, one of the statements at issue referred to the plaintiff social worker's "incompetence." The court considered whether the statement was "reasonably susceptible of an interpretation which implies a provably false assertion of actual fact" by looking to the words used and to the context of the letter in which they appeared. The court also considered the professional status of the defendant/speaker (counselor for children) and that of the recipient of the letter in which the statements were made (plaintiff's boss). Taking all these factors into consideration, the court found the statement that a social worker was "incompetent" could be defamatory. (*See Id.* at p. 1609.) *Gill v. Hughes* (1993) 227 Cal. App. 3d 1299, also cited by HEPH, takes a similar approach.[1/] In the third case cited by HEPH, *Jensen v. Hewlett-Packard Co.* (1993) 14 Cal. App. 4th 958, 965, although the court stated in dicta that an employer's statement in a performance evaluation that an employee was incompetent could be defamatory, no such statement was even at issue in the case.

In contrast here, as discussed in more detail in defendants' initial memorandum, neither the words nor the context of the three statements at issue could reasonably be interpreted to imply "a provably false assertion of actual fact." Surely, not even HEPH would argue (and it has not) that one

[1/] Neither of the cases actually holds that the statements were defamatory. *Kahn* holds that the statement raised a jury question on the issue of falsity, 232 Cal. App. 3d at p. 1609; and *Gill* holds that the statement was not defamatory because it was true. 277 Cal. App. 3d at p. 1309.

could reasonably interpret gpalcus's statement that the company has the "business acumen of infected macaques" as implying an assertion of fact. Surely, not even HEPH would argue (and it has not) that one could reasonably interpret dickie13's statement that "the Public Relations Department of Hollis-Eden couldn't promote Mickey Mouse into Disneyland" as implying an assertion of fact. Indeed, HEPH's failure to offer evidence of falsity likely reflects its inability to identify any "provably false assertion of fact" in these messages.

Moreover, although gpalcus's statement uses the words "fraud or incompetence," the context of his message belies the claim that one could reasonably interpret those words as implying provable assertions of fact. His statement is replete with figurative language and rhetoric: the "secret wizardry" of "the man/men/monkeys behind the curtain," "the business acumen of infected macaques," "Enough hyperbole! Enough whispered promise! Enough waiting for firmamnet." The two words of which HEPH complains, when considered in the context of a Yahoo! message board, in the context of the discussion in which the message appeared, and in the context of the rest of the message—its words, its tone, the number of exclamation points included in this "personal rant"—could not reasonably be taken to imply any provable fact aside from the fact that gpalcus was frustrated with an investment that had been declining in value for the previous seven months. "To put it mildly, these postings . . . lack the formality and polish typically found in documents in which a reader would expect to find facts." (*GTMI* at p. 6; *see also id.* at p. 7 (message that company "lie[d]" about how money would be used not defamatory); *Morningstar*, 23 Cal. App. 4th at p. 691, fn.5 [citing cases holding that "playing hide and seek" with township funds, "fellow traveler of fascism," "sleazy sleight of hand," "unbelievably unscrupulous character," and "sleazebag" nonlibelous because phrased in vituperative terms or because language used in "loose or figurative" sense].)

Thus, contrary to HEPH's assertion, the medium in which gpalcus and dickie13 made the three statements is not at all "irrelevant." (HEPH Opp. 8.) Although defendants agree with HEPH that a defamatory statement is not immune from liability merely because it was made on the Internet, the fact that a statement was made on an Internet message board is significant to the determination of whether the statement is defamatory. The statements of which HEPH complains were "posted anonymously in the general cacophony of an Internet chat-room" (*GTMI* at p. 5), which now boasts over 17,600

messages, and are part of "an on-going, free-wheeling and highly animated exchange" about the company. (*Id.*) Many of the posters to the board, including gpalcus and dickie13, are repeat posters, "indicating that the posters are just random individual investors interested in exchanging their views with other investors." (*Id.*) And "[i]mportantly, the postings are full of hyperbole, invective, short-hand phrases and language not generally found in fact-based documents, such as corporate press releases or SEC filings." (*Id.*) Put simply, the tone and context of the messages makes clear that they are individual opinions, not assertions of provable fact.

HEPH comments that one cannot escape liability for defamatory factual statements merely by claiming that the statement was opinion. (HEPH Opp. 8.) Defendants agree. But when a court determines a statement is an opinion rather than factual assertion, the statement is not generally actionable because it does not imply an assertion of provable fact.

Finally, HEPH has no response to defendants' point that their messages did not cause damage to HEPH. Defendants' moving papers pointed out that gpalcus is being sued for a single statement made in November, 2000, seven months after the company's stock price began its decline. Dickie13 is being sued for two statements made five months after the price began to fall. And as discussed in defendants' initial memorandum, review of the daily stock prices shows that none of the three messages caused the share price to fall. (*See* Defs. Memo 11; Not. of Lodg., Exh. E.)

Accordingly, HEPH has failed to establish a probability of success on the merits.[2/]

III. NO DISCOVERY IS NECESSARY TO DECIDE THIS MOTION.

In a footnote, HEPH requests that, if the Court is inclined to grant this motion, the company should first be granted leave to take discovery. (HEPH Opp. 9 n.6.) This request should be denied, as no discovery is necessary. The statements at issue are before the Court, and the question whether they are reasonably susceptible to a defamatory interpretation is a question of law. (*Kahn*, 232 Cal. App. 3d at p. 1608 [citing cases]; *see*, *e.g.*, *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 22.)

Moreover, HEPH cannot carry its burden without proving that the three messages make provably false factual assertions about the company. HEPH has offered no proof of falsity, yet it does

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[2/] HEPH's opposition does not contest that the other claims alleged in the complaint are in essence defamation claims. Therefore, HEPH has failed to carry its burden of proof as to those claims as well.

not need (and does not suggest that it needs) discovery on this element of its case. Despite this omission, fatal to its chance of prevailing here, HEPH identifies three other broad areas as to which it would like discovery: (1) other statements made by defendants regarding the company, (2) the intent and motivation of the defendants, and (3) the effect of those statements on HEPH, non-parties, and the market for HEPH shares. None of these areas is relevant to a determination of the legal question before the Court. Furthermore, as to the first area, HEPH can read defendants' other statements without taking discovery, as the message board is available for public viewing and HEPH obviously read the board before filing this lawsuit. As to the second, defendants' motivation is simply not relevant to determine whether the statements are reasonably susceptible to a provably false interpretation. The third area of discovery might be relevant to quantifying damages but not to whether HEPH can show it was damaged at all, and even the "whether" issue is irrelevant because HEPH failed to meet the probable success standard as to liability.

Most importantly, allowing HEPH discovery before the Court decides the legal question presented here would be inconsistent with the Legislature's objective in allowing a SLAPP defendant to bring an early motion to strike. Accordingly, HEPH's request for discovery prior to the Court's determination of the legal question whether the statements at issue are reasonably susceptible to a defamatory interpretation should be rejected. (*See GTMI* at p. 9 [discovery denied where "[h]aving made the legal determination that the statements must be factual to be actionable, and having further found that the postings are opinions rather than actionable facts, the Court does not require further evidence to evaluate Plaintiffs' claims"].)

IV. THIS MOTION IS NOT PREMATURE.

Section 425.16, subdivision (f) provides that the "special motion [to strike] may be filed within 60 days of the service of the complaint." HEPH argues that this motion is premature because defendants have not yet been served with the complaint. HEPH's remedy for this situation is for the Court to allow it to take discovery, to learn defendants' identities, so that it may serve them, so that they can make this motion again. This Kafkaesque suggestion should not be sanctioned by the Court.

First, HEPH has now served gpalcus, with service complete on or about March 8, 2001. This motion was filed on January 18, 2001, which is "within 60 days of service."

More importantly, to deny defendants' motion on the ground that it was premature would undermine the purpose of the anti-SLAPP statute. The Legislature understood the typical SLAPP plaintiff wants not to win the lawsuit, but to chill free speech by costing defendants time and money and causing them stress and worry. The Legislature intended the early section 426.16 motion to thwart the chill by freeing the SLAPP defendant from the litigation as soon as possible, so that the plaintiff gets very little for its SLAPP and the defendant is inconvenienced only briefly. (*See Wilcox*, 27 Cal. App. at p. 816.) In addition, anonymity plays an important role in encouraging the exercise of free speech. (*See* Defs. Memo 12-16.) Requiring Doe defendants, such as dickie13, to wait until a plaintiff has identified them before they can invoke the anti-SLAPP statute would attack the statutory purpose by allowing the plaintiff successfully to place a significant chill on free speech.

The Legislature has made clear that the anti-SLAPP statute is to be interpreted "broadly." (§ 425.16, subd. (a).) The provision for filing a special motion to strike with 60 days of service sets a deadline for filing the motion. Nothing in the statute or case law interpreting it indicates that the Legislature intended the provision as a rule of accrual, barring motions filed prior to service.

Finally, HEPH's argument makes no sense here, where plaintiff has already served one of the moving defendants, gpalcus. HEPH would require gpalcus to re-file the same papers already before the Court and would preclude dickie13 from bringing this motion at this time. Yet all the facts necessary for the Court to decide this motion are before it now. If the motion has merit, accepting HEPH's suggestion would result in delay and a waste of resources—the Court's, the parties', and their counsel's—but would have no effect on the outcome of the case. Plaintiff's desire for such a result is consistent with the goals of a SLAPP suit but would serve no other purpose.

CONCLUSION

For the foregoing reasons and the reasons set forth in gpalcus' and dickie13's memorandum in support of their special motion to strike, the motion should be granted.

DATED: March 2, 2001 LUCE, FORWARD, HAMILTON & SCRIPPS LLP

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