1 UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
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4 SHIVA AYYADURAI, an individual,)
Plaintiff)
5) Civil Action
)
6 vs.) No. 17-10011-FDS
)
7 FLOOR64, INC., a California)
corporation d/b/a TECHDIRT;)
8 MICHAEL DAVID MASNICK, an)
individual; LEIGH BEADON, an)
9 individual; and DOES 1-20,)
Defendant)
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BEFORE: THE HONORABLE F. DENNIS SAYLOR, IV
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MOTION HEARING
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John Joseph Moakley United States Courthouse
17 Courtroom No. 2
1 Courthouse Way
18 Boston, MA 02210
19
April 20, 2017
20 2:00 p.m.
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22
23 Valerie A. O'Hara, FCRR, RPR
Official Court Reporter
24 John Joseph Moakley United States Courthouse
1 Courthouse Way, Room 3204
25 Boston, MA 02210
E-mail: vaohara@gmail.com

1 APPEARANCES:

2 For The Plaintiff:

3 Harder, Mirell & Abrams, by DOUGLAS E. MIRELL, ESQ.,
132 S. Rodeo Drive, Beverly Hills, California 90212;

4

Cornell Dolan, P.C., by TIMOTHY CORNELL, ESQ.,
5 One International Place, Boston, Massachusetts 02110;

6 For the Defendants:

7 Prince Lobel, by JEFFREY J. PYLE, ESQ., ROBERT A.
BERTSCHE, ESQ., and THOMAS R. SUTCLIFFE, ESQ.,
8 One International Place, Boston, Massachusetts 02110.

9 ALSO PRESENT: Dr. Shiva Ayyadurai
Michael Masnick, Leigh Beadon

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1 PROCEEDINGS

2 THE CLERK: All rise. Thank you. Please be
3 seated. Court is now in session in the matter of
4 Dr. Shiva Ayyadurai vs. Floor64, Inc., Civil Action
5 Number 17-10011.

6 Would counsel please identify themselves for the
7 record.

8 MR. CORNELL: Good afternoon, your Honor,
9 Timothy Cornell for the plaintiff.

02:01PM 10 MR. MIRELL: Good afternoon, your Honor,
11 Douglas Mirell also for the plaintiff, and with us is
12 Dr. Ayyadurai.

13 THE COURT: Good afternoon.

14 MR. PYLE: Good afternoon, your Honor,
15 Jeffrey Pyle. Mr. Beadon and Mr. Masnick are in the
16 courtroom today. With me at counsel table is my partner,
17 Rob Bertsche, and my associate, Thomas Sutcliffe.

18 THE COURT: All right. This is the hearing on a
19 motion to dismiss. Mr. Pyle, it's your motion, I'll hear
02:03PM 20 from you first.

21 MR. PYLE: Thank you, your Honor. There are
22 three well-established First Amendment principles that
23 require the dismissal of this case.

24 The first is a statement has to be provably
25 false to be the subject of a libel claim. The defendants

1 here are being sued for their opinion that Shiva Ayyadurai
2 isn't the inventor of e-mail. The defendants say that
3 other people developed the fundamentals of e-mail long
4 before plaintiff wrote his 1978 computer program, and
5 their personal judgment that it's those earlier systems,
6 and not the plaintiff's system that deserves to be called
7 the first e-mail system, is a nonactionable opinion
8 protected by the First Amendment.
9 The second principle is that a public figure
02:04PM 10 libel plaintiff, as Mr. Ayyadurai admits he is, has to
11 show that the defendants published with knowing falsity or
12 reckless disregard for the truth. That being said, even
13 if there were some provably false statement in the
14 article, the plaintiff has to allege facts, and not mere
15 buzz words and labels and conclusions, showing actual
16 malice.
17 The third principle is that a court proceeding
18 cannot be used as a vehicle to punish or chill the
19 exercise of free speech. That principle derives from the
02:04PM 20 First Amendment, and it's expressed in the California
21 anti-SLAPP law, which applies here under Massachusetts
22 choice of law principles.
23 The articles here constitute the exercise of
24 free speech on a public issue, and the plaintiff hasn't
25 shown a probability of success on the merits of his

1 claims. For that reason, we've brought motions to strike
2 the complaint under the California anti-SLAPP law.
3 With the Court's permission, I'd first like to
4 address the issue of opinion. Most of the 84 allegedly
5 defamatory statements identified in the complaint amount
6 to various ways of saying that plaintiff is falsely
7 holding himself out to be the inventor of e-mail.
8 The articles don't say that the plaintiff
9 misrepresented anything he actually did. They acknowledge
02:05PM 10 he created an e-mail program in 1978, when he was 14 years
11 old, and they congratulate him for that.
12 The defendants just dispute the significance of
13 that accomplishment and say it doesn't make him the
14 inventor of e-mail, and that's because of these earlier
15 computer programs that allowed users of networked
16 computers to send textural messages to each other using
17 the familiar protocol of name, @ symbol and computer name.
18 The plaintiff, of course, disagrees with that.
19 He says those earlier programs are mere electronic
02:06PM 20 messaging and his is the first program that could properly
21 be called e-mail, but what's striking about this case is
22 that there's very little dispute, there's actually no
23 dispute over the underlying facts.
24 Plaintiff acknowledges what the ARPANET
25 researchers did in the 1960's and '70's, the defendants

1 acknowledge what the plaintiff did when he was 14 years
2 old. The debate really boils down to a disagreement about
3 what the significance of those facts are, and that is the
4 kind of personal judgment that the *Gray* case and the
5 *Phantom Touring* case and *Milkovich* says is not susceptible
6 to proof one way or the other. You can't prove a
7 subjective personal judgment true or false. That's what
8 this case is about.
9 Now, plaintiff points out that the articles use
02:06PM 10 words like "liar" and "fake e-mail inventor" and "bogus,"
11 and he argues that those kinds of words are always
12 provably false.
13 Well, first of all, we've cited numerous cases
14 where those exact same words have been held to be
15 nonactionable opinions. They're on pages 12 and 13 of our
16 main memorandum on the 12(b)(6) motion. You have to look
17 to what the article said the plaintiff supposedly lied
18 about to determine if the statement is provably false or
19 as opposed to being just the speaker's subjective
02:07PM 20 conclusion, and here the articles say without exception
21 that plaintiff lied about being the inventor of e-mail.
22 So that means that if he were to try to prove
23 his case, and the *Hepps* case says that if a plaintiff like
24 him, who's a public figure, has to prove the statement to
25 be false, the plaintiff would have to prove that he really

1 and truly is the inventor of e-mail, and that takes you
2 right back to the very subjective question about what are
3 the defining fundamental characteristics of e-mail, which
4 is a personal judgment call.
5 The statements are also protected under our
6 First Amendment case law because the defendants
7 articulated the exhaustive, non-defamatory factual bases
8 for their conclusions, and they cited and even repeatedly
9 and extensively hyperlinked to documents articulating the
02:08PM 10 plaintiff's side of the story, too, and under
11 *Phantom Touring* and other cases, that renders them First
12 Amendment protected opinions, and with the Court's
13 permission, I'd like to hand up just one example of this
14 extensive articulation of the non-defamatory facts.
15 This is Exhibit G to the complaint, which is the
16 first in the series of the allegedly defamatory articles.
17 I've handed up a highlighted copy, and as the Court can
18 see, it's quite a long article. It's five pages,
19 single-spaced, and in the second paragraph, it sets forth
02:09PM 20 precisely what I've just said, that there's no dispute
21 Mr. Ayyadurai was apparently a very bright 14 year-old who
22 wrote an e-mail software program for the University of
23 Medicine and Dentistry in New Jersey.
24 By all accounts, it was a perfectly decent
25 e-mail system. No one doubts that he received a copyright

1 registration, but the problems are, this article says,
2 that e-mail was created before 1978, and in the next
3 paragraph, it goes through and details exactly what
4 existed before 1978, including hyperlinks to
5 documentation, including the source code for these prior
6 e-mail systems.
7 You go onto the next page, and this article
8 acknowledges he has a copyright registration. We have a
9 screen shot of the copyright registration. He cites to
02:09PM 10 supporters of Mr. Ayyadurai's arguments that the copyright
11 makes him the inventor of e-mail and explains why
12 copyright is different than a patent and that a copyright
13 is really just a registration, it's not a declaration that
14 anybody invented anything.
15 On the next page, there is further statements
16 that the plaintiff alleges to be defamatory, which is that
17 Mr. Ayyadurai in the defendant's opinion misquoted and
18 misrepresented the content of a RAND report from the 1970s
19 to support his view that his program was the first e-mail
02:10PM 20 claim. He says that one of these earlier researchers
21 claimed that e-mail was impossible to create.
22 This article explains why that's a misreading of
23 the report and hyperlinks to the report so that readers
24 can actually read it for themselves. That is then
25 repeated again on the next page, and on the final page, 6

1 of 7 on this printout, the article says, "Ayyadurai has
2 built up his entire reputation around the entirely false
3 claim he invented e-mail. His bio Twitter feed and his
4 website position himself as having invented e-mail."
5 It takes you down to a website Mr. Ayyadurai
6 set up called, "inventorofemail.com" where he makes these
7 claims, and it hyperlinks to that website so that readers
8 can see for themselves what his side of the story is.
9 The article concludes by saying, "Mr. Ayyadurai
02:11PM 10 should be proud of what he wrote in 1978. He may have
11 made some incremental improvements on what else was
12 already out there, but that is not inventing e-mail."
13 None of the evidence he has put forward makes him the
14 inventor of e-mail in Mike Masnick's opinion.
15 So when you go back to the first page of this
16 exhibit, you see the stated undisputed, non-defamatory
17 bases for the personal judgment reflected in the headline,
18 "Why is the *Huffington Post* running a multi-part series to
19 promote the lies of a guy who pretended to invent e-mail?"
20 In context, reading the article as a whole,
21 which was required in this analysis, the epithet "lies" is
22 not used to imply undisclosed, defamatory facts suggesting
23 deceit or lying, it is intended to a reasonable reader
24 means only that this is the subjective characterization
25 and opinion of Mike Masnick.

1 And on this point, the *Phantom Touring* case is
2 particularly instructive. That case involved a newspaper
3 column questioning whether a comedy production called,
4 *"Phantom Of The Opera"* was in marketing itself trying to
5 intentionally deceive customers into thinking they were
6 buying tickets for the Andrew Webber musical, which was
7 very popular back then in 1986.
8 The Court said, "Of greatest important is the
9 breadth of the articles, which not only discussed the
02:13PM 10 facts underlying the writer's view but also gave readers
11 information from which they might draw contrary
12 conclusions."
13 The articles contained the sort of
14 self-contained give and take, a verbal debate, within the
15 article. That's exactly the case with Exhibit G. That's
16 exactly the case with the other articles. An insertion of
17 deceit, which was made in *Phantom Touring* in that case,
18 reasonably could be understood only as the writer's
19 personal conclusion about the information presented, not
02:13PM 20 as a statement of fact. That is this case also.
21 The First Amendment also protects rhetorical
22 hyperbole, the use of imaginative expression, rhetorical
23 hyperbole, even vituperative and unpleasant attacks on
24 public figures. Accusation of lying and equivalent
25 remarks have been held to be rhetoric in many cases, such

1 as in the *Underwager* case of the Ninth Circuit, where a
2 direct allegation of lying was held strictly to be
3 rhetorical hyperbole, a vigorous epithet used by those who
4 considered the plaintiff's position extremely
5 unreasonable.
6 Plaintiff takes exception to statements that he
7 stakes his entire reputation on being the inventor of
8 e-mail, but, again, no reasonable reader could have
9 understood that to actually convey a provable fact one way
10 or the other.
11 In any event, the articles talk about how his
12 Twitter bio describes himself in the first line as
13 "inventor of e-mail," how all of his Tweets are about
14 inventing e-mail, registering inventor of "e-mail.com" for
15 himself, and the overall tenor of all these articles and
16 the tone of these articles very clearly signal to a
17 reasonable reader that the writer is offering up opinion.
18 They include subheads, like from the "That's just wrong
19 department," and titles like, "The View from Bogustan."
02:14PM 20 This clearly signals to a reader that these are opinions
21 that are being offered of the reader.
22 The second principle I mentioned why this case
23 must be dismissed is on the question of actual malice.
24 Even if there were some factual, provably false statement
25 in this case, the complaint would still fail to state a

1 claim because under the *Schatz* case of the First Circuit,
2 a complaint has to contain facts plausibly suggesting
3 actual malice for a plaintiff to proceed to the discovery
4 phase.
5 These have to be facts that satisfy *Iqbal* and
6 *Twombly* on this question, not just conclusions and legal
7 buzz words, and the allegations in the complaint do not
8 come close to that standard.
9 The only fact set forth in the complaint that
02:15PM 10 purports to show knowing falsity or reckless disregard for
11 the truth is that the website, "Gawker," a different
12 website, having nothing to do with the defendants, settled
13 a case with the plaintiff after 10 of the 14 articles on
14 Techdirt had already been published, but, of course,
15 actual malice looks to the suggestive state of mind of the
16 defendant at the time of publication and learning facts
17 about something after you've published says nothing about
18 subjective state of mind, and even as to the four articles
19 that came after the Gawker settlement, the fact that there
02:16PM 20 was a compromise without admission of liability of a
21 different claim based on a different article written by a
22 different defendant on a different website in the context
23 of a bankruptcy says nothing about Mike Masnick's state of
24 mind at the time he wrote the articles at issue in this
25 case.

1 In responding to our motion to try to show
2 actual malice, plaintiff points to the fact that the
3 defendants didn't try to talk to him before publication.
4 First of all, he doesn't point to any fact that he could
5 have cleared up had the defendants spoken to him, but,
6 beyond that, it's settled law that mere failure to
7 investigate does not show actual malice. That's the
8 *Harte-Hanks vs. Connaughton* case.
9 Plaintiff points to the fact that Techdirt has
10 acknowledged he created some kind of an e-mail program, so
11 Mr. Masnick must have been speaking with knowledge of
12 falsity when he called plaintiff a liar, but the article
13 never accused him of not inventing an e-mail program, they
14 repeatedly acknowledged that he did so.
15 Finally, plaintiff points to his supporters and
16 said, "I have renowned supporters who support my claim and
17 agree with my opinion," but that, again, says nothing
18 about Mike Masnick's state of mind as to the truth of the
19 facts that he reported. All it shows is that there's a
02:17PM 20 disagreement between plaintiff's supporters and
21 Mr. Masnick.
22 The failure to plead facts showing actual malice
23 is, of course, fatal to the plaintiff's complaint under
24 the *Schatz* case and given the important First Amendment
25 interest in protecting speech about public figures. That

1 is perfectly appropriate.
2 Without that rule, public figures would be able
3 to subject their critics to the burdens of discovery when
4 there's no reasonable likelihood of demonstrating an
5 important constitutional element of their claim.
6 Finally, I'd like to address our motions to
7 strike under the California anti-SLAPP law. Under
8 Massachusetts choice of law principles, which
9 Massachusetts adheres to the restatement second of
02:18PM 10 conflict of laws, the question of which states anti-SLAPP
11 law to apply boils down to which state has the greater
12 interest in the particular question at issue.
13 The weight of authority applying those
14 restatement principles is that the anti-SLAPP law of the
15 state where the speaker is located should control, at
16 least where the speech emanated from that jurisdiction, as
17 it did here, as you can see in the affidavit of
18 Mike Masnick, submitted in support of the motion to
19 strike.
02:18PM 20 That is the holding of numerous cases we cite in
21 the brief, such as the *Chi* and *Palermo* cases from the
22 Northern District of Illinois, *Global Relief* out of the
23 Southern District of New York, the *Filer* case from Utah,
24 and the *Sarver* case of the Ninth Circuit. All of these
25 decisions apply the anti-SLAPP law of the speaker's

1 jurisdiction, not the plaintiff's jurisdiction.
2 That's because a state has a great interest in
3 protecting its citizens from strategic lawsuits against
4 public participation, an interest that outweighs any
5 interest of the plaintiff's jurisdiction in SLAPP law
6 application.
7 Now, plaintiff objects and points to cases and
8 principles that speak to the substantive law of defamation
9 that should apply, and Restatement Section 150 discusses
02:19PM 10 that in cases of widespread defamation via movies or other
11 means of mass communication, you look to the plaintiff's
12 jurisdiction.
13 The Courts have held that applies to conduct
14 regulating rules, such as the rules of substantive
15 defamation, not to a question of immunity.
16 Anti-SLAPP laws are statutes of immunity.
17 Immunity is of a different character. There are different
18 interests at play, and under the restatement principles,
19 you look to the speaker's jurisdiction as to what
02:20PM 20 anti-SLAPP law to apply. Here, that's California.
21 Assuming the Court does apply the anti-SLAPP law
22 of the State of California, it should grant the motions to
23 strike. Publication of these articles meets the statutory
24 standard in that statute of acts in furtherance of the
25 exercise of the constitutional right of free speech in

1 connection with an issue of public interest and who should
2 be credited with creation of a
3 fundamentally-transformative technology of human
4 communication is an interest of public interest, as
5 California courts have defined that material.
6 Plaintiff doesn't really dispute that. He tries
7 to make a distinction between that issue, which all the
8 articles are about, and attacks on his reputation, which
9 he says are not protected.
02:21PM 10 Well, there's no authority for that point of
11 view. As a matter of fact, there are many California
12 cases where the same kinds of epithet the plaintiff
13 objects to are held to be protected by the anti-SLAPP law.
14 That means that the burden shifts to the plaintiff to show
15 a probability that he'll succeed on the merits of his
16 claims.
17 That is a very high standard. That means he has
18 to establish evidentiary support for his claims at this
19 stage of the litigation. So, especially as to the actual
02:21PM 20 malice question, there has been no competent, admissible
21 evidence introduced to show that any defendant published
22 any fact with knowing falsity or reckless disregard.
23 They haven't even stated a claim of actual
24 malice, let alone established admissible evidence that
25 shows a probability they'll succeed in showing actual

1 malice by clear and convincing evidence, which is the
2 constitutional standard. That means that plaintiff has
3 failed to sustain his burden under the motions to strike,
4 and they should be allowed.
5 There are a few other issues in controversy in
6 the case, but unless the Court has particular questions
7 about them or about anything else, I have said I would
8 rest on the papers on the other issues except to say that
9 in conclusion, three principles require dismissal of this
02:22PM 10 case: No false statement, no provably false statement; no
11 allegation showing actual malice; and this is a SLAPP case
12 under California law.
13 THE COURT: All right. Thank you.
14 MR. PYLE: Thank you, your Honor.
15 THE COURT: All right. Who's going to take the
16 lead for the plaintiff? Mr. Mirell.
17 MR. MIRELL: Yes, if I may use the podium?
18 THE COURT: Yes.
19 MR. MIRELL: Your Honor, may it please the
02:23PM 20 Court, for 27 months through an integrated series of 14
21 defamatory articles, all of which are made available on a
22 single web page, Techdirt has undertaken a vendetta
23 against the personal and professional reputation of our
24 client, Dr. Shiva Ayyadurai.
25 Techdirt is a purveyor, your Honor, of mendacity

1 under the guise of its bogus claims that the 14 defamatory
2 articles it published contain only opinion or rhetorical
3 hyperbole. In truth, however, the articles published by
4 Techdirt contain enumerable materially false statements of
5 facts:
6 First, whether Dr. Ayyadurai invented e-mail is
7 a question of fact, not opinion or rhetorical hyperbole.
8 THE COURT: Let me stop you there.
9 MR. MIRELL: Yes.
02:24PM 10 THE COURT: You say he invented e-mail requires
11 that we define "e-mail," does it not?
12 MR. MIRELL: It does, your Honor.
13 THE COURT: And how do we do that? I mean, in
14 patent cases, we face this problem constantly, even where
15 you have a patent and it has an elaborate statement of the
16 claim of what you invented. We still have claim
17 construction. I mean, it's a very elaborate process to
18 define what is the invention, and if reasonable people
19 could disagree on what is e-mail, you know, even assuming
02:24PM 20 that they agree that he invented some piece of it, how is
21 that a provable fact?
22 I mean, let's take, for example, if he didn't
23 invent the "@" symbol, a lot of people would say, well,
24 that's a critical component of e-mail, and if he didn't
25 invent that, how can you say he invented e-mail, or if he

1 didn't invent sending text from one computer to another,
2 which apparently he did not?
3 MR. MIRELL: So, your Honor, what we have done
4 in our complaint is clearly identified what we believe are
5 the components of e-mail. We have identified those in
6 paragraphs 13 and 18 of the complaint, and we have said
7 that those are the critical components that identify what
8 e-mail is. There is no necessary reason to take the
9 Court's example why the use of an "@" symbol is necessary
02:25PM 10 in order to accomplish an e-mail transmission.
11 THE COURT: Isn't that an opinion? In other
12 words, you say that's what constitutes e-mail?
13 MR. MIRELL: Well, your Honor, the question
14 ultimately is a question for the jury, and the question
15 for the jury is whether or not the components that we have
16 identified in our complaint as constituting the requisite
17 components for establishing what is commonly understood by
18 those jurors, by reasonable people, to be e-mail, is in
19 fact what "e-mail" is and is in fact what Dr. Ayyadurai in
02:25PM 20 fact invented.
21 THE COURT: All right. Please continue.
22 MR. MIRELL: So if I can suggest to your Honor
23 that what the plaintiffs -- what the defendants in this
24 case have done is that they have essentially said that
25 Dr. Ayyadurai is not responsible for any aspect of e-mail,

1 and they do that instead of referring you to Exhibit G of
2 our complaint, I'd refer you to the November 3rd article
3 from 2016, which I believe to be Exhibit R.
4 And in that case -- yes, it is Exhibit R. In
5 that case, the claim is made, and I'm quoting directly,
6 and I apologize for the language I'm using, your Honor,
7 "Shiva Ayyadurai's claim that he invented e-mail is
8 complete bullshit. It's not true, not even remotely."
9 Your Honor, that is the theme of these articles.
02:27PM 10 That is the theme of the vendetta that has been waged by
11 Techdirt against my client. What they are saying is that
12 he played no meaningful role whatsoever, and the fact that
13 they acknowledge that he accomplished certain tasks when
14 he was working in New Jersey is not -- does not derogate
15 from the fact that the invention that he created is an
16 invention that is commonly known and understood by the
17 public as e-mail.
18 And we have, your Honor, presented to the Court
19 statements from 12 experts in this field who have provided
02:27PM 20 us with testimony, and their statements are included
21 within the complaint itself that indeed my client invented
22 e-mail.
23 Now, beyond that question is the question of
24 what else they have said about him. They have said that
25 Dr. Ayyadurai lied, committed fraud or made bogus claims

1 concerning the circumstances surrounding his e-mail
2 creation efforts, and those, your Honor, too, are all
3 questions of fact. They are not opinion or rhetorical
4 hyperbole.
5 In the November 6th article from 2016, Exhibit S
6 to our complaint, the statement is made, "Ayyadurai is a
7 liar, he is a fraud, he is a charlatan."
8 Now, it remains to be seen, your Honor, and we
9 acknowledge this, whether a reasonable jury would conclude
02:28PM 10 that defendant's claim that Dr. Ayyadurai is a fraud is
11 tantamount to a criminal accusation, which would be per se
12 defamatory or simply a shorthand form of false invective
13 that is ruinously damaging to his personal and
14 professional reputation and thus defamatory per quad, but
15 there are other claims that they have made.
16 They claim in their articles that my client has
17 deceived reporters into writing articles attributing the
18 creation of e-mail to him, and that, too, is a question of
19 fact, not opinion or rhetorical hyperbole.
02:29PM 20 They assert that he has built his entire
21 reputation upon his e-mail creation efforts. That, too,
22 is a question of fact, not opinion or rhetorical
23 hyperbole, and this is a man whose career spans 40 years,
24 and the fact that he mentions this aspect of his career in
25 his Twitter bio or that he did so in the context of a book

1 that he wrote where the subject of the book is e-mail in
2 no way means that his "entire -- " to use the defendant's
3 phrase, " -- reputation was built upon this."
4 In any event, your Honor, this is clearly grist
5 for the discovery mill. The defendants have never couched
6 their own statements about my client as mere opinions, and
7 that's a significant fact, although it certainly wouldn't
8 be dispositive as the *Milkovich* Court has identified.
9 The defendants do not state all facts upon which
02:30PM 10 they rely to make their factual statements, and let me
11 give one very clear example of that. In Defendant
12 Beadon's November 16th, 2016 article, he quotes an
13 anonymous commenter who writes without citing any support
14 whatsoever that, "Shiva Ayyadurai did not invent e-mail."
15 Beadon's article introduces this comment by
16 saying that it reiterates a quote, to use his words,
17 "simple fact," a fact, not an opinion, not rhetorical
18 hyperbole.
19 And, your Honor, your colleague on this court,
02:30PM 20 Judge Mastroianni, in February noted in his opinion in
21 *McKee vs. Cosby* that calling someone a "liar," as
22 defendants repeatedly do, indeed, they repeatedly called
23 him a "liar" on approximately a dozen occasions, calling
24 him a "faker" or a "falsifier" on 42 occasions, calling
25 him a "bogus purveyor of this concept" on 17 occasions and

1 claiming that he didn't invent e-mail on 23 occasions,
2 with respect to the accusation that one is a liar, that is
3 defamatory, Judge Mastroianni concluded, and while *McKee*,
4 while the *McKee* case that he decided acknowledges the
5 existence of contrary, non-First Circuit authority, as
6 defendants' counsel has pointed out, although he points
7 out no contrary Supreme Court authority on the subject,
8 the *McKee* case correctly describes the interpretation and
9 application of defamation law as complex and dizzying, but
02:31PM 10 given that characterization, assuming that were a true
11 characterization, it would be both inappropriate and
12 irresponsible to dismiss my client's claims at this very
13 earliest stage without providing him the opportunity
14 either to conduct discovery or to amend his complaint if
15 there is any aspect of it which the Court believes to be
16 inadequate.
17 I'd like to sort of begin in reverse order, if I
18 could, by addressing the anti-SLAPP motion issue because
19 defendant's motion to strike is a pure unadulterated
02:32PM 20 exercise in SLAPP law shopping.
21 To the best of our knowledge, your Honor, and
22 this is important, no state court in Massachusetts and no
23 federal court within the First Circuit has ever applied
24 California's anti-SLAPP statute, and certainly none of the
25 defendants here have cited such a case, whether in the

1 defamation or any other context. Doing so here, we
2 submit, would therefore be both unprecedented and
3 fundamentally wrong.
4 Indeed, your Honor, as you may be aware, among
5 the Judges within the Ninth Circuit itself, there is a
6 significant split concerning whether the extensive
7 procedural provisions of this statute, including its
8 explicit provision under Subdivision I, mandating an
9 interlocutory appeal of any ruling granting or denying an
02:33PM 10 anti-SLAPP motion, whether that interferes with the
11 extensive procedural provisions of the Federal Rules of
12 Civil Procedure in violation of the Supreme Court's
13 *Hanna vs. Plumer* decision of 1965.
14 Defendants really in this case have relied very
15 heavily upon the Ninth Circuit's *Sarver* decision, and that
16 was mentioned here by my colleague shortly before I spoke.
17 That decision, the *Sarver* case, is obviously not binding
18 authority in this jurisdiction and far from holding that
19 the speaker's jurisdiction should control.
02:34PM 20 *Sarver* actually acknowledged the following, and
21 I quote from page 898: "In cases of defamation, the
22 second restatement factors normally would call for the
23 application of the law of the plaintiff's domicile."
24 Now, the only reason the *Sarver* Court chose to
25 apply the anti-SLAPP law of California was because the

1 evidence presented by the plaintiff was in the Court's
2 words, "insufficient to establish the state of New Jersey
3 as his legal domicile," and the Court held that, "merely
4 being stationed in New Jersey for two years," as
5 Sergeant Sarver was, "was insufficient to create
6 domiciliary status, and, in any event, military personnel
7 during their enlistment period retain the domicile they
8 possessed prior to entering the service."
9 Now, defendants recognize that there is no basis
02:34PM 10 whatsoever for bringing an anti-SLAPP motion against my
11 client under Massachusetts law. They say that he likely
12 is not subject to that law, and that's so, of course,
13 because the Massachusetts anti-SLAPP statute,
14 Section 59(h) of Chapter 231 speaks only to the right to
15 petition governmental bodies, which obviously is wholly
16 irrelevant to my client's claims in this case.
17 Moreover, that statute was first enacted two
18 years after the passage of California's anti-SLAPP law,
19 thus the Massachusetts legislature, I think can
02:35PM 20 conclusively be presumed to have been well aware of the
21 broad contours of other states' anti-SLAPP statutes and
22 should be presumed to have deliberately decided to
23 constrict the breadth of its own anti-SLAPP law, so what
24 defendants are asking you to do is to reach across the
25 continent to glom onto a more far-reaching statute that

1 allows them a shot at delaying the prompt adjudication of
2 this litigation by imposing a stay upon discovery and by
3 creating an opportunity for a costly and time-consuming
4 interlocutory appeal.
5 And they do so, your Honor -- and this is
6 fascinating -- they do so without even mentioning that one
7 of the defendants sitting here in the courtroom today,
8 Leigh Beadon, is not only not a Californian, but he's not
9 even a resident of the United States. He lives in and
02:36PM 10 presumably wrote the November 6th article that I
11 previously referred to from his home in Toronto.
12 Section 150, Sub 2 of the Restatement Second of
13 Conflict of Laws contains the presumption that the law to
14 be applied hasn't and can't be overcome by these
15 defendants, and that's the restatement section that is
16 referred to explicitly and discussed in *Sarver* and the
17 conclusion reached that Sergeant Sarver could not prove
18 himself to a domiciliary of any state, much less
19 New Jersey.
02:36PM 20 Certainly -- and that provision of the
21 restatement says that, "When a natural person claims that
22 he has been defamed by an aggregate communication,"
23 there's no dispute that this is that, this is an aggregate
24 communication, "the state of most significant relationship
25 will usually be the state where the person was domiciled

1 at the time if the matter complained of was published in
2 the state," so there's nothing unusual about this case
3 that would take it outside the parameters of this
4 presumption and rule.
5 There's also no dispute that Techdirt's articles
6 were and remain available for reviewing in Massachusetts,
7 and there are also no particular issues implicated by this
8 litigation within the meaning of Comment B to Section 150,
9 and defendants have identified none.
02:37PM 10 Instead, your Honor, this is a classic garden
11 variety, multi-state defamation of an individual plaintiff
12 who unquestionably is a Massachusetts domiciliary and has
13 been such for well more than three decades, and since
14 defendants have not contested that, I'm not going to
15 explore all the ways in which we've demonstrated that my
16 client is indeed a Massachusetts domiciliary.
17 What defendants seek to do though is to ask this
18 Court to ignore the time-tested maxim of jurisprudence
19 that particular expressions qualify those which are
02:38PM 20 general, and instead of focusing upon the restatement
21 provision that is applicable to this case, that involving
22 the tort of multi-state defamation, defendants seek to
23 divert this Court's attention to a provision that speaks
24 to tortious conduct in general, that's Section 145, and
25 when that fails, to a provision which speaks to no

1 specific cause of action, which is Section 6 of the
2 restatement.
3 In any event though, defendants present nothing
4 to suggest that California has any more significant
5 relationship to either the occurrence or to the parties
6 implicated by this litigation than does Massachusetts,
7 and, indeed, the fact that two of the three defendants may
8 be domiciled in California is really only a matter of
9 happenstance since, as we all know, this article could
02:38PM 10 have easily been written, just as easily written on a
11 Wi-Fi-enabled desert island in the middle of the Pacific
12 Ocean.
13 Now, even if resort were had to Section 145 or 6
14 of the restatement, Massachusetts still clearly has the
15 more significant relationship to the defamatory statements
16 to the injuries that are suffered by Dr. Ayyadurai and to
17 the significant monetary damages resulting therefrom,
18 including to the ongoing business dealings of his five
19 operating Massachusetts companies, those that he currently
02:39PM 20 owns or operates.
21 Moreover, should there ever be a question about
22 the role that M.I.T. as an institution may have played
23 either in the life of Dr. Ayyadurai or in the creation of
24 e-mail, as these defamatory articles repeatedly suggest,
25 that's yet another reason why Massachusetts has the more

1 significant relationship to this litigation.
2 With respect to the statute itself, if it were
3 to be found applicable, your Honor, Dr. Ayyadurai's
4 complaint and the supporting declarations we submitted
5 clearly establish that his claims at least have the
6 requisite minimal merit, which is the standard, and
7 satisfy the requirement that he demonstrate a reasonable
8 probability of prevailing on the merits, and I don't
9 intend to go into that in any great detail because I think
02:40PM 10 it is quite clear that the California statute does not and
11 cannot apply in this case.
12 Defendants talked about the *Phantom Touring*
13 case. Let me spend a moment talking about that. With
14 respect to -- and they cite it with respect to trying to
15 demonstrate that the statements made by our client are
16 opinion.
17 Well, the fact is that the 14 defamatory
18 articles, unlike the story that was at issue in that case,
19 do not embody subjective aesthetic judgments found in a
02:41PM 20 newspaper's theater column, which according to the opinion
21 itself was, "known to contain more opinionated writing
22 than the typical news report."
23 And this was a case, too, about the production
24 of a musical comedy that was sought to be passed off as
25 the acclaimed Broadway drama, but unlike the *Phantom* case,

1 Techdirt's stories don't present, "all sides of the
2 issue." They are a one-sided and defamatory rant without
3 any "give and take."
4 What they have in fact done -- because they did
5 not speak to Dr. Ayyadurai and because they did not speak
6 to any of the individuals who wrote any of the articles
7 that predated any of the postings by Techdirt, including
8 the story in *TIME* magazine that's an exhibit to our
9 complaint, including, *The Wired Story*, that's likewise an
02:42PM 10 exhibit to our complaint, as well as other stories that
11 were published during the course of the defamatory string
12 of publications -- all of those, in all of those cases,
13 there are statements that are made that do not allow the
14 Court to conclude that this is opinion as opposed to
15 factual statements.
16 He is not -- our client is not given the
17 opportunity to refute the claims that are being made by
18 the defendants in the articles that they published. He is
19 not, for example, was never asked why M.I.T.'s 1965
02:42PM 20 mailbox system is not e-mail, never given an opportunity
21 to refute that assertion.
22 He was never given the opportunity to explain
23 why the advances by Mr. Tomlinson, including the use of an
24 @ symbol, are or are not e-mail, or why the folders that
25 were created by Larry Roberts in 1975 are or are not

1 e-mail, or why the MS personal messaging system is not
2 e-mail, or why the ARPANET is not e-mail, or why the use
3 of a BCC in the 1997 RFC -- RFC, by the way, stands for
4 "request for comment --" why that is not e-mail, or why
5 the 1977 RAND report by Mr. Crocker doesn't undermine my
6 client's claims.
7 None of those -- all of those are statements
8 that our client was never given an opportunity to respond
9 to, and the issue of whether or not Techdirt has failed to
02:43PM 10 investigate I think is spoken to profoundly by that
11 failure because what it demonstrates is the fact that our
12 client was not given that opportunity, and that as a
13 consequence, the failure to investigate can constitute
14 willful disregard for the truth of a matter, and that
15 speaks, too, to the actual malice question that was
16 addressed by my colleague.
17 THE COURT: Do you agree that he is a public
18 figure for these purposes?
19 MR. MIRELL: Your Honor, we have not contested
02:44PM 20 that at this time. We don't believe that that issue has
21 been resolved yet. We don't believe it necessarily needs
22 to be resolved because we believe he satisfies the
23 requirements of *New York Times*' constitutional malice.
24 We believe that the failure to investigate can
25 be and in this case is proof of the purposeful avoidance

1 of the truth, and we believe this is particularly true
2 where Techdirt not only did not speak with my client, but
3 he also did not speak -- they also, the authors of those
4 articles, did not speak with any of the authors of the
5 prior articles, including the *TIME Magazine* and *The Wired*
6 *Story*.
7 To the extent that these issues have not been
8 fully fleshed out in the complaint, leave to amend should
9 be freely granted, and in the case that was cited in the
02:45PM 10 reply papers, the *Schatz* case is readily distinguishable.
11 In our case, unlike that case, there is more than a
12 plausible claim of actual malice.
13 Here we have, at the very least, a failure to
14 investigate, which can be proof of purposeful avoidance
15 under the Supreme Court's *Harte-Hanks'* decision, and it's
16 ludicrous to assert that we've not passed that
17 plausibility test.
18 Turning to another issue, with respect to the
19 Rule 12 motion that was submitted, if the Court believes
02:46PM 20 that any cause of action was inadequately pled, my client
21 should be given leave to amend.
22 With respect to the defamation claim and
23 assuming arguendo that Dr. Ayyadurai is a public figure
24 who will have to prove constitutional malice, that can be
25 proven by inference, since the defendants do not -- since

1 defendants, according to the Supreme Court's decision in
2 *Bose Corp. vs. Consumers Union*, don't readily admit to
3 willful or reckless behavior, and I'm sure that the Court
4 will understand that that is in fact the way of the world.
5 Discovery has to be permitted and a motion to
6 dismiss denied. In the *National Association of Government*
7 *Employees'* case that we cited, the plaintiff had, in the
8 words of the Massachusetts Supreme Court, "Available to it
9 the instruments of pretrial discovery to seek out proof of
02:47PM 10 the crucial state of mind," because discovery was
11 permitted after the denial of a motion to dismiss and
12 before the entry of summary judgment in that case.
13 And that decision, the *National Association*
14 decision cites to *Herbert vs. Lando,* the Supreme Court's
15 seminal 1979 decision in which the Court held that the
16 plaintiff, and I'm quoting here, "The plaintiff must focus
17 on the editorial process and prove a false publication
18 attended by some degree of culpability on the part of the
19 publisher. If plaintiffs in consequence now resort to
02:47PM 20 more discovery, it would not be surprising." Indeed not,
21 your Honor.
22 Discovery is the sine qua non of what must occur
23 in the context of a case in which actual malice is an
24 element that needs to be proven. The *Behunin* case from
25 California is one that establishes that proposition as

1 well, and the inferential support for finding that actual
2 malice already exists in this case as a result of the
3 defendant's own acknowledgement in its own articles
4 concerning the numerous, prominent and reliable sources,
5 *TIME*, *Wired*, *CBS,* who support my client's claims that he
6 indeed and did invent e-mail, and those are bolstered by
7 the fact that we have in paragraphs 22 through 33 of our
8 complaint identified prominent individuals who likewise
9 support those claims.
02:48PM 10 Let me just speak to the question of when actual
11 malice is or ought to be analyzed. Not only does that
12 question apply when the article is first published, but it
13 also is applicable when the article remains available to
14 the public, as it does in this case on the Internet, and
15 when requests to take down have been refused by Techdirt,
16 we believe that it's appropriate for the Court to consider
17 all of the evidence that the defendants have available to
18 it and that plaintiffs have identified up until this very
19 hearing in order to determine whether or not they are
02:49PM 20 responsible for publishing with actual malice by refusing
21 to take down any of the 14 defamatory articles that we're
22 complaining about, all of which remain available for the
23 public to view today, and it certainly is the case that
24 the damage that occurs to our client's personal and
25 professional reputation and to his business interests is

1 continuing on a day-to-day basis.
2 At least, and I'm familiar with this case
3 because our firm represented the plaintiff, at least in
4 the *Hulk Hogan* case, *Gawker* had the decency, at long last,
5 to take down its postings after they were available for
6 viewing by 7 million individuals. Techdirt has not yet
7 shown the same degree of care or responsibility.
8 If I may briefly address the question of the
9 Section 230 argument that was raised by Mr. Beadon. In
02:50PM 10 the article that he authored, Mr. Beadon republished on
11 November the 6th certain statements that first appeared in
12 a comment to the November 3rd article:
13 "He is thus an information content provider as
14 to that article." He deserves no immunity under
15 Section 230; moreover, he editorialized in his November 6th
16 article.
17 As I said at the outset, he introduced the comment
18 that our client, "Did not invent e-mail," by saying that the
19 anonymous poster was reiterating, "The simple fact."
02:50PM 20 Again, not an opinion, not rhetorical hyperbole, but a
21 fact, and we should take Mr. Beadon at his word that he regards
22 the claim that our client did not invent e-mail as a pure
23 statement of fact.
24 Your Honor, to do anything less would open the
25 flood gates because defendant's argument taken to its

1 logical extension is that Section 230 immunizes the
2 authors of articles for every statement contained in those
3 articles that were first authored by someone else on a
4 website on social media or on another Internet platform,
5 and that assertion runs contrary to long-standing common
6 law principles and to Section 578 of the Restatement
7 Second of Torts regarding republication, a provision that
8 has been adopted in the State of Massachusetts, and that
9 provision provides that essentially at common law, "One
02:51PM 10 who republishes a defamatory statement is deemed thereby
11 to have adopted it and so may be held liable together with
12 the person who originated the statement for resulting
13 injury to the reputation of the defamation victim."
14 And as we pointed out, we still do not yet know
15 that Mr. Beadon himself is not the author of the
16 defamatory comments that he republished, and that, too, is
17 grist for the discovery mill.
18 The *Roommates'* case from the Ninth Circuit that
19 we have cited establishes that, "The unprotected
02:52PM 20 development includes materially contributing to its
21 alleged unlawfulness." *Roommates* holds that, "An
22 interactive computer service can simultaneously also be an
23 information content provider within the meaning of
24 Section 230 of the Communications Decency Act," and that
25 is indeed what we believe has occurred here.

1 We believe Mr. Beadon's usage in this case is
2 far more analogous to the unprotected use of content
3 originally provided by third-party users and later
4 published for a different purpose in a different context
5 at a different time in the *Perkins* and *Fraley* cases that
6 we discussed in our opposition papers and which defendants
7 interestingly don't even cite, much less distinguish in
8 their reply papers.
9 And the case that they do cite, *Doe vs.*
02:53PM 10 *Friendfinder* out of the District Court of New Hampshire,
11 that's a case that is not only not controlling, but we
12 believe it is wrongly decided.
13 Moreover, we believe that the reposting of
14 imposter profiles that are not a part of any article
15 written by a website author, such as Techdirt's Beadon,
16 are irrelevant to the Court's decision in this case.
17 And that decision, of course, is absolutely
18 irreconcilable with the recent Ninth Circuit case of
19 *Perkins* and *Fraley* that we discussed and that defendants
02:53PM 20 ignored.
21 To the extent that the Court has any additional
22 questions or concerns, I would be more than happy to
23 address those at this time.
24 THE COURT: Let me turn back to Mr. Pyle. Any
25 response?

1 MR. PYLE: Thank you, your Honor. Mr. Mirell
2 said that these articles have no give and take, they're
3 all one-sided and don't express Dr. Ayyadurai's point of
4 view, and his best example for that was Exhibit R to the
5 complaint where he read you a line that began, "For almost
6 five years now, we've been among those explaining why
7 Shiva Ayyadurai's claim that he invented e-mail is
8 complete bullshit. It's not true, not even remotely."
9 Mr. Mirell stopped there.
02:54PM 10 What it goes on to say is, "What does appear to
11 be true is that as a fairly bright kid, Ayyadurai was
12 working for a small college in New Jersey, and he wrote an
13 electronic messaging program for the school, which he
14 named Email. It was not the first, it was not the last,
15 it was nothing special."
16 That exemplifies what the plaintiff is trying to
17 do here, pull lines and quotes and words out of context
18 and argue that they are defamatory, that they allege
19 deceit, when they only express opinions.
02:55PM 20 The law is the Court must review the words in
21 context, in their whole context, and on that point, the
22 parties agree that all these articles are archived on
23 Techdirt.com in a list, and the plaintiff has said the
24 Court should read all the articles together.
25 They said that in footnote 1 to their main

1 opposition paper, so even to the extent that they were to
2 claim that this particular article didn't include all
3 facts that might be favorable to Mr. Ayyadurai, the other
4 articles do, and they agree they ought to be considered by
5 the Court altogether in the same context.
6 Another example he pointed to was Exhibit S
7 where he says that Mr. Beadon said Mr. Ayyadurai is a
8 fraud. Well, Exhibit S is the copied and pasted
9 third-party comment from an anonymous commenter. All
02:56PM 10 Mr. Beadon did was copy and paste that comment into
11 another post.
12 That is squarely protected by Section 230.
13 Section 230 says that, "A user of a website," such as
14 Mr. Beadon, cannot be held liable for information that
15 originates from another information content provider
16 defined to be another user of the website.
17 Another user of the website posted this comment.
18 Mr. Beadon copied and pasted it in there. Mr. Mirell
19 says, well, we don't know, Mr. Beadon could have written
02:56PM 20 this himself and done so under the guise of an anonymous
21 commenter, but there's a good reason why the *Kimzey vs.*
22 *Yelp* case out of the Ninth Circuit says, "That's not
23 enough. Implausible allegations of fabrication of
24 third-party comments would eviscerate the immunity that's
25 established by Section 230."

1 Talk about opening the flood gates, all the
2 plaintiff would have to do is allege that a third-party
3 content was actually written by the website, and they'd
4 get around what Congress intended to be and what the
5 First Circuit has called a "very broad immunity to suit,"
6 not just a defense to liability.
7 The position is taken that Mr. Beadon by copying
8 and pasting this user-generated post is liable as a
9 content developer himself under Section 230. I would
02:57PM 10 commend the Court's attention to the decision by
11 Judge Stearns in the *Doe vs. Backpage* case, which my
12 partner Rob Bertsche and I were involved in.
13 In that case, the Court held that there was a
14 classified ad website where people could upload classified
15 ads to the site, and the site automatically generated
16 sponsored ads. Judge Stearns said these sponsored ads
17 generated by the website, even though they put them in a
18 different format, in a different location on the website
19 simply reflects the legality or illegality of the
02:57PM 20 underlying ad and do not make backpage.com a developer of
21 content liable in and of itself within that exception to
22 Section 230. Mr. Mirell doesn't mention that case because
23 that case directly refutes the point.
24 The *Perkins* and *Fraley* cases I didn't mention in
25 the reply brief because they're completely unlike this

1 case. In the *Perkins* case, which involved LinkedIn, there
2 were e-mail messages sent out by LinkedIn without the user
3 of LinkedIn's consent where the e-mail message implied
4 that the plaintiffs, the users, were promoting LinkedIn to
5 their friends, and the plaintiffs found that to be
6 annoying. That's nothing like this case.
7 This is a straight up case of copying and
8 pasting third-party content into another part of the cite,
9 and the case law has been uniformed. Mr. Mirell can point
02:58PM 10 you to no case holding that the copying and pasting of
11 third-party content somewhere else in the cite verbatim is
12 content development under Section 230.
13 As far as the other 12(b)(6) implications of
14 that Exhibit S, the third-party content, Mr. Mirell points
15 to the *McKee* case and suggests that Judge Mastroianni held
16 that it's always defamatory to call somebody a liar. He
17 did not say that in the *McKee* case, as we explain in our
18 reply brief, he said that in relation to an allegation
19 that someone lied about being sexually assaulted. That's
02:59PM 20 entirely different from this case. To lie about being
21 sexually assaulted, there may be objective facts that is
22 susceptible to prove one way or the other.
23 Whether or not somebody invented e-mail, and as
24 the Court's question implies, "What is e-mail," is not the
25 sort of thing that is subject to being proven true or

1 false one way or the other.
2 On the issue of the motion under the California
3 anti-SLAPP law, there's been the suggestion that we're
4 shopping for law in the hopes of getting an interlocutory
5 appeal.
6 Well, for one thing, we haven't brought an
7 interlocutory appeal yet. It's not even before the Court,
8 but, regardless, the proposition we're advancing is that
9 the law of the speaker should control.
03:00PM 10 Far from advancing forum shopping, I would argue
11 that that reduces the prospect of forum shopping because
12 otherwise you could have people who live in California or
13 in other states who are subject to strong anti-SLAPP
14 protection being sued in far-off places based on Internet
15 speech and won't be able to be figure out what exactly
16 their level of protection is because they can't anticipate
17 where they might be sued if they publish on the Internet.
18 The policies of the Second Restatement, Second
19 Restatement, Section 50, which Mr. Mirell mentions
03:00PM 20 cross-references Section 145 and Section 6.
21 Section 6 looks to the issue of the protection
22 of justified expectations, and all the Court would be
23 doing in ruling that California law applies here is that a
24 California publisher has a justified expectation that the
25 California publisher is protected by the California

1 anti-SLAPP law. There's nothing so odd about that.
2 Discussion was made of the *Sarver case* of the
3 Ninth Circuit, and Mr. Mirell again repeated, he says the
4 only reason *Sarver* held California anti-SLAPP law to apply
5 is that the plaintiff couldn't establish his residence in
6 New Jersey. That's not true.
7 The Court after saying that goes on to say that,
8 "Even assuming that Sergeant Sarver lived in New Jersey,
9 we still would apply the California anti-SLAPP law because
03:01PM 10 the balancing of interests here points toward California
11 because that is the location of the majority of the
12 defendants."
13 Mr. Mirell mentioned Mr. Beadon's residence
14 outside of this country in Canada. The mere fact that the
15 alleged author of one of the 13 of the 14 blog posts
16 resides outside of either California or Massachusetts
17 doesn't change the dichotomous choice that the Court has,
18 do you apply California or Massachusetts anti-SLAPP law?
19 And, in any event, all that would do would
03:02PM 20 justify denying Mr. Beadon's anti-SLAPP motion, which is
21 separate from the anti-SLAPP motion of Floor64 and
22 Mike Masnick, which pertains to 13 of the 14 articles at
23 issue.
24 There is much made of the fact that Mr. Masnick
25 did not speak to the so-called experts that Mr. Ayyadurai

1 cites to support his claim to have invented e-mail, but he
2 addresses the views of those experts in the articles,
3 discusses them, cites to them, quotes them, and hyperlinks
4 to their primary articles.
5 We're talking here about commentary on published
6 articles. One is allowed to comment on a published
7 article without calling up the author of the article and
8 asking them what they meant.
9 There is no question of failure to investigate
03:02PM 10 being sufficient to establish actual malice here. First
11 of all, again, failure to investigate is not sufficient to
12 establish actual malice.
13 Under controlling case law, failure to
14 investigate only comes into question when substantial
15 doubts as to the truth of the facts being reported have
16 already been raised to the defendant, then a failure to
17 investigate may be relevant in determining actual malice,
18 and that is a quote that the plaintiff leaves out from his
19 quote of the *Murphy* case from the SJC.
03:03PM 20 There is no requirement that there be any such
21 investigation when you're talking about commentary on
22 published articles and commentary on statements made
23 publicly by the plaintiff himself.
24 Also, Mr. Mirell mentioned a lot about how
25 they'd like to take discovery. Well, discovery and the

1 discovery process has a major chilling effect on the
2 exercise of free speech in cases where the discovery and
3 the complaint fails to state a claim. The *Schatz* case and
4 the *Biro* case out of the Second Circuit make this point
5 very clear.
6 It is a significant First Amendment interest
7 that the plaintiff articulate showing actual malice before
8 activating the discovery machine. That is the whole
9 purpose for which the Court applies *Iqbal*/*Twombly* to this
03:04PM 10 question, and they even say searching examination of
11 actual malice on the 12(b)(6) question is critically
12 important to protect free speech.
13 Mr. Mirell also suggested, I was surprised to
14 hear that you need not look only to the defendant's state
15 of mind at the time of publication but could also consider
16 that they kept the articles up on the Internet. There's
17 no such tort as failure to remove defamatory content from
18 the Internet. Defamation is not a continuing tort.
19 The single publication rule says that the
03:04PM 20 defamatory speech happens the moment it's first published,
21 and there's no authority that I'm aware of that says that
22 you can establish actual malice from the fact that a
23 defendant failed to take down a post from the Internet.
24 That just isn't the law.
25 Finally, jumping back to Exhibit S, the article

1 that's protected by Section 230 where Mr. Beadon
2 introduced the article, they certainly didn't plead that
3 Mr. Beadon's minimal editorializing around the article
4 somehow made him liable for what the third-party commenter
5 said, and the law, particularly from the *Jones vs. Dirty*
6 *World* case says that, "Even statements that ratify
7 third-party comments or agree with third-party comments do
8 not constitute creation of content that gets you into the
9 Section 230 exception for that kind of activity."
03:05PM 10 That's all I have.
11 THE COURT: All right. Mr. Mirell, last word.
12 MR. MIRELL: All right. Your Honor, I will be
13 brief. What I think we need to focus on is the notion
14 that when you are asked in a context such as this to
15 determine whether or not a statement has been made that is
16 materially false, then when an individual who has made the
17 claim, such as our client has, that he invented e-mail,
18 that is a factual statement that needs to be explored and
19 needs to be made the subject of discovery, needs to be
03:06PM 20 made the subject of continuing proceedings and cannot be
21 simply dismissed on the pleadings.
22 That is a statement along with the claims that
23 essentially accuse him of criminality by calling him a
24 fraud, by calling him a fraudster. That is not simply the
25 kind of loose invective that this Court recognized in the

1 *Feld* case. This is not a crazy individual, this is not a
2 claim that someone is, in the words of that case, "a --"
3 and, again, I apologize for using the phrase "-- fucking
4 crazy."
5 This Court was correct when in that case it
6 concluded that that invective, that use of a term, was
7 clearly meant to be not taken in the literal sense of
8 calling someone "psychotic" or something of that
9 character, and the Court looked to the overall context of
03:07PM 10 the stories.
11 In this case, if the Court is going to look at
12 the overall context of the lengthy 14 defamatory articles
13 that were published, it will see 17 instances of bogus
14 being used to refer to our client's invention, it will see
15 23 times that the claim is made that he did not invent,
16 and that is what, by the way, just so we're clear with
17 respect to Exhibit S, the quote that I was referring to is
18 the quote that appears on page 3 of 4 in the docket on
19 that exhibit where the statement is made, "Another
03:08PM 20 anonymous commenter reiterated the simple fact:" Those
21 are Mr. Beadon's words, and then he proceeds to quote,
22 "Shiva Ayyadurai did not invent e-mail."
23 In addition in this case, there are 8 instances
24 where my client is alleged to be a fake, where his claims
25 are alleged to be false or falsehoods 34 times.

1 Your Honor, this is not a single instance where
2 there has been loose hyperbolic invective thrown at my
3 client. What has happened in this case is that Techdirt
4 has decided to create a factual issue about whether or not
5 my client did what he has said he has done, and it is up
6 to a jury to make that determination, and it is up to this
7 Court to conclude not only that the Rule 12 motion has to
8 be denied but also that there is absolutely no basis, and
9 the only case, the only other case that I would call the
03:09PM 10 Court's attention to is the *Godin* case.
11 There is absolutely no basis for believing that
12 this Court can reach out and adopt the California
13 anti-SLAPP statute and apply it to the circumstances in
14 this case when it is absolutely clear that when you are an
15 aggregate defamer, when you are engaged in the multi-state
16 defamation of individuals, you have to be expected to be
17 hailed into court anywhere where those statements appear
18 and remain.
19 That too, your Honor, is a principle I think
03:10PM 20 that is easily derivable from the Supreme Court's *Calder*
21 *vs. Jones* case. That, obviously, is a case that involved
22 jurisdiction, but clearly where Shirley Jones lived in
23 California when she was defamed by the Florida-based
24 *National Enquirer*, the U.S. Supreme Court clearly said
25 that Ms. Jones' reputation and her work were in

1 California, that's where she was entitled to bring her
2 action for defamation against the Florida publisher.
3 We didn't have to go -- she didn't have to go
4 where the speaker spoke because the speaker spoke to her
5 in her own state, and that's what's happened here in this
6 case.
7 Dr. Ayyadurai is a proud resident of the
8 Commonwealth of Massachusetts. He has been so for
9 decades. There's no question of his transient presence,
03:11PM 10 as there was in the *Sarver* case, and we believe this Court
11 is obligated to uphold the rights and the privileges of
12 citizenship of this state and allow him to continue to
13 pursue this action here.
14 THE COURT: All right. Thank you. All right.
15 I'm going to take it under advisement. Thank you. It was
16 very well argued on both sides, and, again, I'll take it
17 under advisement and safe travels to all.
18 MR. MIRELL: Thank you, your Honor.
19 MR. PYLE: Thank you, your Honor.
03:11PM 20 THE CLERK: All rise.
21 (Whereupon, the hearing was adjourned at
22 3:11 p.m.)
23
24
25

1 C E R T I F I C A T E

2

3 UNITED STATES DISTRICT COURT)

4 DISTRICT OF MASSACHUSETTS) ss.

5 CITY OF BOSTON)

6 I do hereby certify that the foregoing transcript,

7 Pages 1 through 50 inclusive, was recorded by me

8 stenographically at the time and place aforesaid in Civil

9 Action No. 17-10011-FDS, SHIVA AYYADURAI, an individual vs.

10 FLOOR64, INC., a California corporation

11 D/b/a TECHDIRT, MICHAEL DAVID MASNICK, an individual; LEIGH

12 BEAON, an individual; and DOES 1-20 and thereafter by me

13 reduced to typewriting and is a true and accurate record of the

14 proceedings.

15 Dated April 27, 2017.

16

17 s/s Valerie A. O'Hara

18 ____________________________

19 VALERIE A. O'HARA

20 OFFICIAL COURT REPORTER

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