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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DIONNE CHOYCE,
Plaintiff,
v.
SF BAY AREA INDEPENDENT MEDIA
CENTER, et al.,
Defendants.

Case No. 13-cv-01842-JST

**ORDER GRANTING IN PART AND
DENYING PART MOTIONS TO
DISMISS, DENYING ANTI-SLAPP
MOTIONS WITHOUT PREJUDICE**

Re: ECF Nos. 29, 30

I. INTRODUCTION

Plaintiff Dionne Choyce (“Plaintiff”) has brought a cause of action for copyright infringement under the federal Copyright Act, 17 U.S.C. § 101, et seq., and state-law causes of action for defamation and libel. First Amended Complaint (“FAC”), ECF No. 26. Before the Court are two separate motions by two Defendants: SF Bay Area Independent Media Center (“Indybay”) and Layer42.net, Inc. (“Layer42”) (collectively, the “Moving Defendants”). In both motions, the Moving Defendants move the Court to dismiss all claims with prejudice pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and separately move the Court to specially strike the state-law claims pursuant to California’s Anti-SLAPP (“Strategic Lawsuit Against Political Participation”) statute, Cal. Code Civ. Proc. § 425.16. The matter came for hearing on March 27, 2014.

United States District Court
Northern District of California

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II. BACKGROUND

A. Factual Background¹

Plaintiff Dionne Choyce is a lawyer at The Choyce Law Firm. FAC ¶ 6. Defendant SF Bay Area Independent Media Center (“Indybay”) operates an independent media website, indybay.org (“Indybay”), in the County of San Francisco. FAC ¶ 7. Defendant Layer42, a California corporation, provides internet connectivity, hosting, and infrastructure to Indybay “in furtherance of” the Indybay website. FAC ¶ 8. Defendant Cernio Technology Cooperation (“Cernio”), an unincorporated association operating in Santa Rosa, California, provides similar services as co-defendant Layer42 “in furtherance of” the Indybay website. FAC ¶ 9.

Plaintiff alleges that, on or around April 25, 2012, unknown Doe Defendants posted a webpage on Indybay with the title “Attorney Dionne choyce who embezzled from homeless may serve prison time.” FAC ¶ 16. Within this webpage, Defendants or persons associated with Defendants included a graphic image of Plaintiff entitled “dionne_choyce.jpg,” which was taken from his firm’s website. FAC ¶ 17. The postings contained additional content indicting that Plaintiff was being prosecuted by the U.S. Department of Justice. FAC ¶ 18.

On or around May 24, 2012, other Doe Defendants posted another webpage on Indybay with the title “The Choyce Law Firm evicted from building.” FAC ¶ 19. This webpage used the same graphic image as used in the prior webpage. FAC ¶ 20. The May 24 content claimed that Plaintiff’s firm was being evicted from its office for failure to pay two months of rent, and also indicated that the firm’s landlord was acting in part in response to Plaintiff’s “embezzlement.”

¹ On a motion to dismiss, the Court generally considers only the allegations of the complaint, in the light most favorable to the plaintiff. Indybay requests that the Court also take judicial notice of a printout of content that purportedly appears on the indybay website, including the statement that “[o]pinions are those of the contributors and are not necessarily endorsed by the SF Bay Area IMC.” ECF No. 33. Plaintiff opposes this request. The printout is relevant only to the defamation claim, over which the Court will not exercise jurisdiction, and so the Court DENIES the request. The printout’s accuracy is also “subject to reasonable dispute.” Moreover, even if the Court did take notice of the statement on the website, it would have little effect on the disposition of the state-law claim, since it would demonstrate only what the website says about Indybay’s editorial policy rather than what that policy actually is. Indybay has also submitted a declaration from David Morse, which is relevant only to the Anti-SLAPP Motion. Plaintiff objects to that declaration also. The court need not, and will not, consider the Morse Declaration.

1 FAC ¶ 21. The content also claimed that the eviction was applauded by many in the “community”
2 whom Choyce had victimized. Id.

3 Plaintiff asserts that the content on both webpages is false. FAC ¶¶ 18, 21. Plaintiff
4 argues that the use of Plaintiff’s firm website photo constitutes copyright infringement, and the
5 content on both webpages constitutes defamation and libel. FAC ¶ 5.

6 **B. Procedural History**

7 Plaintiff filed the initial complaint in this action in April 2013. Complaint for Damages
8 and Injunctive Relief (“Initial Compl.”), ECF No. 1. In the complaint, he brought causes of action
9 for copyright infringement, defamation, and libel against Defendants Indybay, Layer42, Cernio,
10 and Does 1-10. Id.

11 Layer42, then the only answering Defendant, moved to dismiss all the claims against it,
12 and brought an anti-SLAPP Motion to strike Plaintiff’s defamation and libel claims. ECF No. 9.
13 The Court dismissed Plaintiff’s copyright claim without prejudice, since Plaintiff failed to allege
14 that he had registered his copyright in the image or even that he had submitted a completed
15 application that had been received by the Copyright Office. Order Denying Plaintiff’s Motion to
16 Strike, Granting in Part and Denying in Part Defendant’s Motion to Dismiss and Granting
17 Defendant’s Motion to Specially Strike (“Previous Order”) 5:1-11, , 2013 WL 6234628, 2013 U.S.
18 Dist. LEXIS 169813 (citing 17 U.S.C. § 411(a)) (“no civil action for infringement of the copyright
19 in any United States work shall be instituted until pre-registration or registration of the copyright
20 claim has been made in accordance with this title”). The Court granted “Plaintiff leave to file an
21 amended complaint re-asserting his copyright claim, if he alleges that he has now applied for a
22 copyright,” and further ordered that Plaintiff “must in any such complaint restrict his asserted
23 remedies to those which are available for infringement alleged to have occurred before the
24 copyright holder applied for a copyright.” Previous Order 18:6-9, 2013 WL 6234628, at *11,
25 2013 U.S. Dist. LEXIS 169813, 35. The Court warned that “[f]ailure to comply with this order
26 will result in dismissal with prejudice of the federal claim.” Id. 18:15, 2013 WL 6234628, at *12,
27 2013 U.S. Dist. LEXIS 169813, 36.

28 Since the only potential jurisdiction the Court might exercise over the state law claims was

1 supplemental jurisdiction, after dismissing the sole federal claim without prejudice, the Court
2 stated that it would “not address Plaintiff’s state law claims on a 12(b)(6) motion.” Previous
3 Order 7:13, 2013 WL 6234628, at *4, 2013 U.S. Dist. LEXIS 169813, 13. However, the Court
4 stated that it would “reach those claims insofar as Defendant is entitled to consideration of its anti-
5 SLAPP motion.” Id. 7:13-15, 2013 WL 6234628, at *11, 2013 U.S. Dist. LEXIS 169813, 13. The
6 Court went on to conclude that, under the Anti-SLAPP statute, Layer42 was entitled to strike the
7 state-law claims insofar as they related to the allegation that Plaintiff had embezzled from clients.

8 Plaintiff filed the FAC in December 2013. As his first cause of action, he re-asserted his
9 copyright complaint against all Defendants, but again failed to allege that he had applied for a
10 copyright. FAC ¶¶ 20-25. He brought a second cause of action for defamation against Layer42,
11 Cernio, Indybay and Does 1-10, restricting his allegations to relate only to the May 24 posting.
12 FAC ¶¶ 26-58. His third cause of action for defamation is brought against Does 1-10 for both the
13 May 24 and April 25 postings. FAC ¶¶ 59-88. The fourth of cause of action, also only against
14 Does 1-10, is for libel. FAC ¶¶ 89-102.

15 Indybay has subsequently appeared in this action, filing one of the two instant motions to
16 dismiss and to strike.

17 **C. Jurisdiction**

18 The Court has jurisdiction over the copyright infringement claim pursuant to 28 U.S.C. §§
19 1331 & 1338(a).

20 **D. Legal Standard**

21 A pleading must contain a “short and plain statement of the claim showing that the pleader
22 is entitled to relief.” Fed. R. Civ. P. 8(a)(2). “Dismissal under Rule 12(b)(6) is appropriate only
23 where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable
24 legal theory.” Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008).
25 Dismissal is also proper where the complaint alleges facts that demonstrate that the complaint is
26 barred as a matter of law. See Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th
27 Cir.1990); Jablon v. Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980).

28 For purposes of a motion to dismiss, “all allegations of material fact are taken as true and

1 construed in the light most favorable to the nonmoving party.” Cahill v. Liberty Mut. Ins. Co., 80
2 F.3d 336, 337-38 (9th Cir. 1996). However, “[w]hile a complaint attacked by a Rule 12(b)(6)
3 motion to dismiss does not need detailed factual allegations, a Plaintiff’s obligation to provide the
4 ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic
5 recitation of the elements of a cause of action will not do.” Bell Atl. Corp. v. Twombly, 550 U.S.
6 544, 555 (2007). To survive a motion to dismiss, a pleading must allege “enough fact to raise a
7 reasonable expectation that discovery will reveal evidence” to support the allegations. Id. at 556.

8 **III. ANALYSIS**

9 **A. Federal Copyright Claim**

10 The FAC, like its predecessor, fails to allege that Plaintiff applied for a copyright in the
11 allegedly copyrighted image. The FAC must be dismissed again for this reason. In his
12 opposition, Plaintiff has attached a Proposed Second Amended Complaint (“PSAC”), in which he
13 finally alleges that he has applied for a copyright, and limits his asserted remedies to those
14 available for post-infringement registration, as the Court previously ordered. Exh. A to Plaintiff’s
15 Opposition to Defendant Layer42.net, Inc.’s Motion to Dismiss (“Opp. to Layer42”), ECF Nos. 37
16 & 37-1. The question is whether the Court should provide a second opportunity to amend by
17 allowing Plaintiff to file the PSAC.

18 In deciding whether to grant leave to amend, a court must “consider ‘(1) bad faith, (2)
19 undue delay, (3) prejudice to the opposing party, (4) futility of amendment, and (5) whether
20 plaintiff has previously amended his complaint.’” Sisseton-Wahpeton Sioux Tribe of Lake
21 Traverse Indian Reservation, N. Dakota & S. Dakota v. United States, 90 F.3d 351, 355 (9th Cir.
22 1996) (quoting Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989)).
23 “[T]he district court’s discretion is particularly broad where a plaintiff has previously amended the
24 complaint.” Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990).

25 Plaintiff makes an unconvincing attempt to blame his adversary for his failure to amend,
26 arguing that Layer42 filed a request for attorney’s fees which required opposition over the holiday
27 season, and this task apparently distracted Plaintiff’s counsel from adding an allegation to the FAC
28 that Plaintiff had applied for a copyright. Opp. to Layer42 2:21-28. This argument is particularly

1 unpersuasive given the fact that Layer42’s counsel offered a stipulation to Plaintiff’s counsel to
2 alter the deadlines to avoid the holiday season, and received no response. Declaration of Daniel L.
3 Casas ¶ 6, and Exh. C thereto, ECF Nos. 41-1. Plaintiff acknowledges that the failure to amend
4 was due to “oversight” on his part. Opp. to Layer42 7:9-10.

5 Dismissal with prejudice might be justified as a sanction for failing to follow the Court’s
6 previous order, since the Court finds that the need to control the pace of its docket and the need for
7 timely resolution of litigation weigh in favor of dismissal, Plaintiff’s excuse for failure to follow
8 the Court’s order is insubstantial, and the Court put Plaintiff specifically on notice that his failure
9 to follow the Court’s order would result in dismissal with prejudice. Cf. Yourish v. California
10 Amplifier, 191 F.3d 983, 992 (9th Cir. 1999) (affirming dismissal with prejudice when plaintiff
11 provided only a “paltry excuse for his default on the judge’s order”). Denial of leave to amend
12 might also be justified given the undue delay and the fact that the Court previously granted leave
13 to amend. See Allen, 911 F.2d at 374 (indicating dismissal with prejudice would be justified even
14 in the absence of a ‘futility’ finding where “the movant presented no new facts . . . and provided
15 no satisfactory explanation for his failure to fully develop his contentions originally”).

16 Denial of leave to amend under Rule 15 is also appropriate here because further leave to
17 amend would be futile. Even if the Court were to consider the PSAC, it would not salvage
18 Plaintiff’s copyright claim. A copyright infringement plaintiff “bears the burden of proving
19 copyright ownership.” Fleischer Studios, Inc. v. A.V.E.L.A., Inc., 654 F.3d 958, 962 (9th Cir.
20 2011). The PSAC makes the conclusory legal conclusion that “[a]mong the exclusive rights
21 granted to Plaintiff under the Copyright Act are the exclusive rights to reproduce the Copyrighted
22 Work and to distribute the Copyrighted Work to the public.” ¶ 23. But this legal assertion is not a
23 well-pled factual allegation whose truth the Court must accept at the pleading stage. See Ashcroft
24 v. Iqbal, 556 U.S. 662, 678 (2009) (“the tenet that a court must accept as true all of the allegations
25 contained in a complaint is inapplicable to legal conclusions”).

26 “Under the copyright laws, the registration of a copyright certificate constitutes prima
27 facie evidence of the validity of a copyright in a judicial proceeding commenced within five years
28 of *the copyright’s* first publication.” Lamps Plus, Inc. v. Seattle Lighting Fixture Co., 345 F.3d

1 1140, 1144 (9th Cir. 2003) (emphasis added) (quoting Entm't Research Group, Inc. v. Genesis
2 Creative Group, Inc., 122 F.3d 1211, 1217 (9th Cir. 1997) (citing 17 U.S.C. § 410(c)). The PSAC
3 alleges that the Copyright Office issued Plaintiff a registered copyright in the image on October
4 23, 2013, after the first motion to dismiss in this action. PSAC ¶ 24. Since Plaintiff has used the
5 image in his marketing since 2005, Declaration of Dionne Choyce ("Choyce Decl.") ¶ 2, ECF No.
6 11, he cannot avail himself of this prima facie presumption.

7 The PSAC therefore must contain additional well-pled factual allegations from which it is
8 plausible to conclude that Plaintiff himself owns a valid copyright in the photographic image. But,
9 as Plaintiff's counsel acknowledged at oral argument, and as Plaintiff himself has testified in a
10 sworn declaration, the image was not created by Plaintiff; it is an image of Plaintiff. Choyce Decl.
11 ¶ 2. It was taken by a professional photographer. Id. Therefore, any copyright in the image
12 "vests initially in the author or authors of the work," 17 U.S.C. § 201(a), which would be the
13 photographer of the image, not Plaintiff. See generally Aalmuhammed v. Lee, 202 F.3d 1227,
14 1231-32 (9th Cir. 2000). Even if the Court gave Plaintiff leave to file the PSAC, it would still fail
15 to state a claim for copyright infringement, rendering leave to amend futile.

16 Nonetheless, out of an abundance of caution, the Court has further considered the
17 possibility that Plaintiff might be able to finally plead a viable copyright claim if given a fourth
18 opportunity to do so.

19 Faced with Indybay's arguments that he is not the author of the image, Plaintiff stated in
20 his opposition brief that, if the PSAC also fails to state a claim for copyright infringement, further
21 "leave to amend should be granted" to allege facts that state a claim. Plaintiff's Opposition to
22 Indybay's Motion 5:22-23, ECF No. 40. But in his brief, Plaintiff does not even hint at what facts
23 he would plead in a Second Proposed Second Amended Complaint that would salvage his claim.
24 He provides no explanation of how he owns the rights to the image. He does not state that he
25 acquired the rights from the original photographer, and neither does he explain that the work was
26 made for hire. And he does not explain how he could have a valid registration in an image he did
27 not author, since the certificate of registration he obtained in the copyright states that he, himself,
28 is the "author." Exh. A to Supplemental Declaration of Dow Patten, ECF No. 17.

1 In Salameh v. Tarsadia Hotel, “Plaintiffs’ counsel represented to the district court that he
2 knew additional facts that could solve the deficiencies in the complaint, but counsel never
3 proffered these facts to the court.” 726 F.3d 1124, 1133 (9th Cir. 2013) cert. denied, 13-763,
4 2014 WL 684134 (U.S. Feb. 24, 2014). “A plaintiff may not in substance say ‘trust me,’ and
5 thereby gain a license for further amendment when prior opportunity to amend had been given.”
6 Id.

7 But – again, out of an abundance of caution – at oral argument the Court gave Plaintiff’s
8 counsel a second opportunity to explain why the Court should give him a fourth opportunity to re-
9 plead. Plaintiff’s counsel explained that the image was, contrary to the certificate of registration
10 Plaintiff obtained, actually a “work made for hire,” and that Plaintiff will at some point apply to
11 the Copyright Office to correct his certificate. But a work made for hire is, with exceptions not
12 here relevant, “a work prepared by an employee within the scope of his or her employment.” 17
13 U.S.C. § 101. For this category to apply, the photographer must be a regular employee rather than
14 an independent contractor or a specially commissioned photographer. Marco v. Accent Pub. Co.,
15 Inc., 969 F.2d 1547, 1550-53 (3d Cir. 1992). It simply is not plausible to infer that when Plaintiff
16 “started [his] own practice as an attorney in or about 2005,” and “had a professional photograph
17 taken of [him],” he employed a professional photographer as a member of his regular staff.
18 Choyce Decl. ¶ 2.

19 This action has been pending for nearly a year, and Plaintiff has yet to plead a valid federal
20 cause of action in any of his proposed complaints, or explain how he might at any point in the
21 foreseeable future. Given the numerous opportunities Plaintiff has had to state a claim of
22 copyright infringement, and Plaintiff’s failure to explain to the Court how the copyright claim
23 might be rendered plausible on further amendment, the Court concludes that further leave to
24 amend would be futile. Since there has been unjustified and undue delay, because the Court
25 previously granted leave to amend, and because the Court needs to control the pace of its docket,
26 further leave to amend will not be provided. The copyright claim is dismissed with prejudice.

27 **B. Supplemental Jurisdiction Over Defamation Claim**

28 The only jurisdiction the Court might exercise over the state-law defamation claim is

1 supplemental jurisdiction, pendent from the sole federal claim that the Court has again dismissed,
2 this time with prejudice. The Court previously explicitly declined to exercise supplemental
3 jurisdiction over the state-law claims, but stated that it would “reach those claims insofar as
4 [Layer42] is entitled to consideration of its Anti-SLAPP Motion. Previous Order 7:6-15, 2013
5 WL 6234628, at *4, 2013 U.S. Dist. LEXIS 169813, 13 (citing Carnegie-Mellon Univ. v. Cohill,
6 484 U.S. 343, 350, n.7 (1988) (“Cohill”) (“in the usual case in which all federal-law claims are
7 eliminated before trial, the balance of factors to be considered under the pendent jurisdiction
8 doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to
9 exercise jurisdiction over the remaining state-law claims”).

10 In this motion, Layer42 continues to urge the Court to reach, and dismiss, the state-law
11 claims, but does not specifically argue that the factors governing supplemental jurisdiction weigh
12 in favor of the Court doing so. Indybay, on the other hand, argues that the Court should exercise
13 supplemental jurisdiction over the defamation claim, since both Moving Defendants are moving to
14 dismiss on the grounds that they are immune from liability under Section 230 of the federal
15 Communications Decency Act (“CDA”). Therefore, Indybay argues that since the parties have
16 already briefed, and the Court has already addressed, Section 230 in the context of the facts
17 alleged, and because the Court’s ruling would hinge on application of federal rather than state law,
18 all four Cohill factors weigh in favor of supplemental jurisdiction even in the absence of a federal
19 cause of action.

20 Indybay made persuasive arguments in its papers and at the hearing. However, the
21 arguments only apply to the extent the Court does, in fact, find that this action may not proceed
22 past the pleading stage for the reason of CDA immunity. If the Court does not reach that
23 conclusion, the Court will be left proceeding with litigation between California parties in which
24 the only causes of action are California defamation and libel law. For that reason, the Court again
25 will not exercise supplemental jurisdiction over the state-law claims in this action. The Motions to
26 Dismiss are denied without prejudice insofar as they are brought against the state-law claims.

27 **3. Anti-SLAPP Motion**

28 In its Previous Order, the Court declined to exercise supplemental jurisdiction over the

1 state-law claims, but then said it would “reach those claims insofar as Defendant is entitled to
2 consideration of its anti-SLAPP motion,” and then proceeded to address the merits of Layer42’s
3 Anti-SLAPP Motion. Previous Order 7:13-14, 2013 WL 6234628, at *4, 2013 U.S. Dist. LEXIS
4 169813, 13. The Court has reconsidered that determination. When a court has diversity
5 jurisdiction over a state-law claim, the Anti-SLAPP Motion is recognized as a substantive element
6 of the state law a federal court is bound to apply. U.S. ex rel. Newsham v. Lockheed Missiles &
7 Space Co., Inc., 190 F.3d 963, 973 (9th Cir. 1999); see also Batzel v. Smith, 333 F.3d 1018, 1025-
8 26 (9th Cir. 2003) (federal courts sitting in diversity “recognize[] the protection of the anti-SLAPP
9 statute as a substantive immunity from suit”). But where, as here, the Court has declined to
10 exercise jurisdiction over state-law claims, defendants have no presumptive right to have Anti-
11 SLAPP Motions heard by a federal court. Therefore, the Court will deny both Defendants’ Anti-
12 SLAPP Motions without prejudice towards Defendants raising them in any future state-court
13 proceeding.

14 The Court also VACATES the portion of its Previous Order addressing Defendants’ Anti-
15 SLAPP Motion. Previous Order 7:16-16:5, 2013 WL 6234628, at *4-10, 2013 U.S. Dist. LEXIS
16 169813, 13-33.

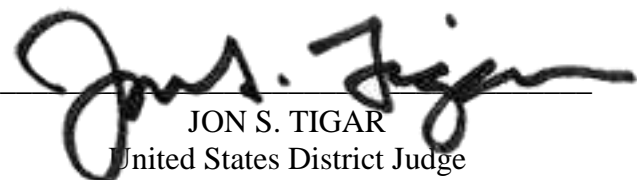
17 **IV. CONCLUSION**

18 Defendants’ motions are GRANTED IN PART and DENIED IN PART. Plaintiff’s
19 copyright cause of action is DISMISSED WITH PREJUDICE. The Court will not exercise
20 jurisdiction over the defamation and libel claims in this action, and so Defendant’s motion to
21 dismiss those claims, and to specially strike those claims pursuant to the anti-SLAPP statute, are
22 dismissed without prejudice towards Defendants re-making them in any state-court proceeding.

23 Defendants shall submit a proposed order of judgment consistent with this order. The
24 Clerk shall close the file.

25 **IT IS SO ORDERED.**

26 Dated: June 2, 2014

27 
28 JON S. TIGAR
United States District Judge