IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(ALEXANDRIA DIVISION)

EDWARD J. WEGMAN, Plaintiff, v. JOHN R. MASHEY *et al.*, Defendants.	Civil Action No. 1:15-cv-00486-TSE/TCB Removed from the Circuit Court of Fairfax County, Virginia, Civil Action No. CL-2014-0003296

DEFENDANT JOHN MASHEY'S BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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I. INTRODUCTION

This case involves the filing of an untimely defamation claim in the wrong court. Plaintiff Edward J. Wegman, an editor of a scientific publication at the time that the facts underlying this lawsuit arose, is a climate change skeptic. In 2006, he submitted to Congress a report challenging global warming statistics. Many others, including Defendant John R. Mashey, believed that portions of the report were plagiarized. Plaintiff alleges that Defendant defamed him by alerting Plaintiff's publisher of this concern. After learning of, and looking into the concerns raised about the apparent plagiarism, the publisher allegedly terminated its contract with Plaintiff. The purported independent contractor agreement is attached to the Complaint as Exhibit 1.[1]

Plaintiff did not assert a defamation claim because the governing one-year statute of limitations has long expired. To circumvent this, Plaintiff styled his defamation claim as a tortious interference claim in an effort to obtain the benefit of the longer five-year statute. In addressing such litigation tactics, courts have routinely held that, where a plaintiff renames a claim to avoid it being time barred, the statute of limitations applicable to the "true" claim controls. Plaintiff's tortious interference claim, and his claim for conspiracy to commit the same, are thus subject to a one-year statute of limitations and are therefore time barred.

Not only are Plaintiff's claims untimely, but he filed them in an inappropriate forum. The Court lacks personal jurisdiction over Defendant, a California resident who has absolutely no ties to Virginia. Also, this District is an improper venue because Defendant does not reside here and almost no events underlying Plaintiff's claims occurred here. This action should be dismissed for the additional reason that Plaintiff failed to serve Defendant with the Complaint within one year of commencing this action in accordance with Virginia state law.

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[1] Because Defendant received the Complaint without Exhibit 1, his counsel requested and obtained the document from Plaintiff's counsel on April 9, 2015. The Complaint that was filed with the state court does not include the Exhibit.

For these and the reasons more fully set out below, the Court should dismiss this action with prejudice.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual background

Plaintiff was the lead author of a 2006 report submitted to Congress that sought to undermine global warming and climate change theories. (Complaint ("Compl."), ¶ 6, attached hereto as Exhibit A.) In March 2009, Defendant, a "nationally recognized science figure," allegedly posted on a blog (Deepclimate.org) that Plaintiff had plagiarized in the 2006 report. (*Id.*, ¶¶ 3, 7.) Defendant has allegedly since posted other unidentified "negative blogs" about Plaintiff. (*Id.*, ¶ 10.) Plaintiff alleges that he was the founder and an editor of a journal published by John Wiley & Sons, Inc. ("Wiley") known as *Wiley Interdisciplinary Review of Computational Statistics* ("WIRES"). (*Id.*, ¶ 11.) Plaintiff entered into a contract with Wiley to edit and write for the journal. (*Id.*, ¶ 12, Ex. 1.) The Complaint does not set out the respective duties and obligations of the parties to the contract.

According to the Complaint, in June 2012, Wiley notified Plaintiff that "Wiley wished to sever its ties" with Plaintiff based on communications Wiley had received complaining that Plaintiff had plagiarized. (*Id.*, ¶ 13.) Plaintiff states on information and belief that Defendant and other unidentified persons allegedly "conspired to orchestrate the letter writing campaign" against [Plaintiff] to Wiley."[2] (*Id.*, ¶ 18.) Plaintiff alleges that he was thereafter "forced to resign" his position from Wiley as editor of WIRES. (*Id.*, ¶ 14.) The Complaint notably fails to identify any specific communications between Plaintiff and Wiley concerning the termination of the contract. Plaintiff denies that he ever plagiarized, and contends that Defendant's contrary

[2] No letter of complaint from anyone to Wiley is either attached to the Complaint or identified or described in the text of the Complaint.

accusations are false and were made to "destroy" and "injure" his reputation and "discredit or ruin" him. (*Id.*, at 1, ¶¶ 21-22, 27, 39.)

Plaintiff is a resident of Virginia, and Defendant is a resident of California. (*Id.*, ¶¶ 4-5.) Defendant's ties to Virginia are virtually nonexistent. He has never resided in Virginia, and in the past 14 years his only "visits" there were, on two or three occasions, passing through Virginia airports to travel to or from Washington, D.C., with the last such visit occurring in 2007. (Declaration of John R. Mashey ("Mashey Decl.."), ¶¶ 6-7, attached hereto as Exhibit B.) He has never owned, rented, or controlled real or personal property in Virginia. (*Id.*, ¶ 7.) He has never been employed in Virginia or held any Virginia license or registration. (*Id.*, ¶¶ 8-9.) He has no office, telephone, or fax listing in Virginia. (*Id.*, ¶ 10.) He has never brought suit in any Virginia court or paid taxes in Virginia. (*Id.*, ¶¶ 11-12.)

Wiley's headquarters are in Hoboken, New Jersey. (Ex. A, Compl., Ex. 1, at 1.) Wiley does not have any offices in Virginia. (An excerpt from Wiley's website is attached hereto as Exhibit C.) Because Defendant is a California resident, and Wiley is headquartered in New Jersey, the inference from the skeletal Complaint is that, if Defendant allegedly sent letters to Wiley, he sent them from California to New Jersey.

B. Procedural background.

Plaintiff commenced this action in the Circuit Court of Fairfax County, Virginia by filing a Complaint on March 10, 2014. (Docket entries, at 2, attached as Exhibit D.) Plaintiff asserted claims for tortious interference, common law conspiracy, statutory conspiracy (violation of Virginia Code §§ 18.2-499 and -500), and punitive damages. (Ex. A, Compl., at 4-6.) He did not assert a defamation claim because it is time barred.

Plaintiff did not serve Defendant with the Complaint until over one year later on March 24, 2015, which is when Defendant first learned about the lawsuit. (Ex. B, Mashey Decl., ¶ 2.) Plaintiff was aware of Defendant's home address from the outset of the lawsuit, as it is identified

on the first page of the Complaint. (Ex. A.) Nonetheless, upon information and belief, Plaintiff did not attempt service until the time that he served Defendant on March 24, 2015. (Ex. B, Mashey Decl., ¶ 3.)

During the over one-year period during which Plaintiff declined to serve Defendant with the Complaint, he instead commenced discovery by serving document subpoenas on Wiley and George Mason University, Plaintiff's employer. (The subpoenas are collectively attached hereto as Exhibit E; Ex. A, Compl., ¶ 8.) Despite his obligation to do so, Plaintiff never served the subpoenas on Defendant; Defendant's counsel obtained them only upon request to the Court on April 9, 2015. (Ex. B, Mashey Decl., ¶ 4.)

This can be a serious problem

On April 13, 2015, Defendant timely removed this action to this Court on the basis of diversity jurisdiction. Defendant now files this Motion to Dismiss Plaintiff's Complaint.[3]

III. LEGAL ARGUMENT

The Court should dismiss this action for the following reasons: (i) the Court lacks jurisdiction over Defendant; (ii) Plaintiff filed this action in an improper venue; (iii) Plaintiff failed to timely serve Defendant in accordance with Virginia state law; and (iv) with respect to Plaintiff's claims for tortious interference, common law conspiracy, statutory conspiracy, and punitive damages, Plaintiff fails to state claims for which relief may be granted.

A. Pursuant to Federal Rule of Civil Procedure 12(b)(2), the Court should dismiss this action because the Court lacks personal jurisdiction over Defendant.

1. Standard of review under Rule 12(b)(2).

Rule 12(b)(2) permits dismissal of an action when the Court lacks jurisdiction over the defendant. *Hirsch v. Johnson*, No. 14-332, 2014 U.S. Dist. LEXIS 88051, at *4-5 (E.D. Va. June

[3] The aforementioned 2006 Congress report was co-authored by Yasmin Said. In June 2014, Said filed a Complaint against Defendant in Fairfax County Court that is virtually identical to the one filed by Plaintiff in this case. Defendant removed that action to this Court, which is captioned *Said v. Mashey*, Civil Action No. 1:15-cv-00487-JCC-IDD and is pending before the Honorable James C. Cacheris. Defendant has moved to dismiss that action as well.

26, 2014). The plaintiff bears the burden of demonstrating personal jurisdiction by a preponderance of the evidence once its existence is questioned by the defendant. *Id.* at *5.

The test for personal jurisdiction is well established:

> In Virginia, to establish jurisdiction over a nonresident, this Court must consider first whether jurisdiction is authorized by Virginia law, and then whether the exercise of jurisdiction comports with the due process requirements of the Fourteenth Amendment to the United States Constitution. As Virginia's general long-arm statute extends personal jurisdiction to the fullest extent permitted by due process, the statutory inquiry merges with the constitutional inquiry. As a result, the Court need only undertake one inquiry to determine whether the exercise of jurisdiction here comports with the Fourteenth Amendment's due process requirements.
>
> To satisfy the requirements of due process, a defendant must have sufficient "minimum contacts" with the forum state "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." To meet this minimum contacts test, a plaintiff must show that a defendant "'purposefully directed his activities at the residents of the forum' and the litigation results from alleged injuries that 'arise out of' those activities." This test is designed to ensure that the defendant is not "haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts."
>
> Two types of personal jurisdiction meet these constitutional requirements: specific jurisdiction and general jurisdiction. In analyzing the due process requirements for asserting specific jurisdiction, the Fourth Circuit has set out a three-part test in which the Court must consider, in order, (1) "the extent to which the defendant purposefully availed itself of the privilege of conducting activities in the State"; (2) "whether the plaintiffs' claims arise out of those activities directed at the State"; and (3) "whether the exercise of personal jurisdiction would be constitutionally reasonable." General jurisdiction exists for claims entirely distinct from the defendant's in-state activities where a defendant's activities in a state have been "continuous and systematic."

Id. at *7-9 (citations omitted).

2. The Court lacks personal jurisdiction over Defendant.

Defendant has absolutely no ties to Virginia other than that the Plaintiff who sued him happens to reside there. Plaintiff appears to acknowledge that there exists no good reason for suing Defendant in a forum nearly 2,900 miles from his home in Portola Valley, California: the only basis in the Complaint for asserting jurisdiction over Defendant is that he is a "blogger,

writing regularly for 'DeSmog Blog,' and has reached into Virginia and the nation, creating substantial contacts, thus subjecting him to the personal jurisdiction of this court." (Ex. A, Compl., ¶ 3.) Plaintiff's argument appears to be that, because Defendant writes for a blog that can be accessed online by Virginia residents, this Court has jurisdiction over him.

As explained below, Defendant's blog posts are not a basis for asserting specific jurisdiction over him because this alleged conduct did not give rise to Plaintiff's claims; rather, it is Defendant's alleged "letter-writing campaign" to Wiley that is the alleged tortious conduct. Nor are the blog posts a basis for asserting general jurisdiction over Defendant, as case law is abundantly clear that simply posting information on a blog is insufficient to create personal jurisdiction.

a. The Court lacks specific jurisdiction over Defendant.

Defendant's only conduct that allegedly gives rise to Plaintiff's claims is that he sent to Wiley correspondence expressing the belief that Plaintiff had plagiarized. (*Id.*, ¶¶ 13, 18.) Presumably, any such alleged correspondence would have been sent from Defendant's residence (California) to Wiley's corporate headquarters (New Jersey). Even if it is unclear from Plaintiff's Complaint whether Defendant sent the correspondence to New Jersey, he unquestionably did not send it to Virginia because Wiley does not have a Virginia office. (Ex. C, website excerpt.) Notably, although the alleged correspondence is the sole basis of Plaintiff's claims, he neither attached it to his Complaint nor alleged that it is not in his possession, thereby depriving the Court of its ability to review the correspondence to assess whether Plaintiff's characterization is accurate and whether it supports Defendant's defenses.

That Defendant allegedly also expressed the belief in the Deepclimate.org blog that Plaintiff had plagiarized (Ex. A, Compl., ¶ 3) is not a basis for asserting specific jurisdiction over Defendant because Plaintiff did not and cannot allege that this conduct gave rise to his claims for

tortious interference and conspiracy. Therefore, the Court lacks specific jurisdiction over Defendant.

b. The Court lacks general jurisdiction over Defendant.

"[F]or an individual, the paradigm forum for the existence of general jurisdiction is the individual's domicile." *Hirsch*, 2014 U.S. Dist. LEXIS 88051, at *16. Defendant is a citizen of and resides in California. (Ex. A, Compl., ¶ 5.) Defendant could not reasonably anticipate being haled into court in Virginia because of his nearly nonexistent contact with this forum. He has never resided in Virginia, and in the past 14 years his only "visits" there were, on two or three occasions, passing through Virginia airports to travel to or from Washington, D.C., with the last such visit occurring in 2007. (Ex. B, Mashey Decl., ¶¶ 6-7.) He has never owned, rented, or controlled real or personal property in Virginia. (*Id.*, ¶ 7.) He has never been employed in Virginia or held any Virginia license or registration. (*Id.*, ¶¶ 8-9.) He has no office, telephone, or fax listing in Virginia. (*Id.*, ¶ 10.) He has never brought suit in any Virginia court or paid taxes in Virginia. (*Id.*, ¶¶ 11-12.) In light of Defendant's complete lack of contact with Virginia, there exists no basis for asserting general jurisdiction over him.

Plaintiff's only stated reason for exercising general jurisdiction over Defendant is that he posted on a blog that could be viewed by Virginia residents if they sought out the blog posting. (Ex. A, Compl., ¶ 3.) But under Eastern District of Virginia precedent, "[t]he mere act of placing information on the Internet is insufficient to subject a person to personal jurisdiction in every State in which the information is accessed, or anyone who posted information on the Internet would be subject to personal jurisdiction in every State." *Knight v. John Doe #1*, No. 10-887, 2011 U.S. Dist. LEXIS 66238, at *9 (E.D. Va. June 21, 2011); *see also Headstrong Corp. v. Jha*, No. 05-813, 2007 U.S. Dist. LEXIS 31135, at *11-12 (E.D. Va. Apr. 27, 2007) ("The act of placing information on the Internet ... does not by itself subject the author to personal jurisdiction in any place where the information might be accessed").

Other federal district courts have reached the same result, with some having the opportunity to explicitly find that posting information on the Internet via a blog does not create personal jurisdiction in states where the blog may be read: "The few district courts to have considered blogs specifically have found them insufficient to establish general personal jurisdiction." *Shymatta v. Papillon*, No. 10-565, 2011 U.S. Dist. LEXIS 43619, at *8-9 (D. Idaho Apr. 21, 2011) (holding that "[defendant's] blog is insufficient to meet the exacting standard of general personal jurisdiction"); *see also League of United Latin Am. Citizens Inc. v. Nat'l League of Latin Am. Citizens*, No. 13-4725, 2014 U.S. Dist. LEXIS 127940, at *5 (N.D. Cal. Sept. 11, 2014) ("His alleged internet blog … is insufficient to confer general jurisdiction in California."); *Miller v. Kelly*, No. 10-2132, 2010 U.S. Dist. LEXIS 120332, at *14 (D. Colo. Nov. 12, 2010) ("[T]he Court finds that Defendant's authorship of a ... blog is an insufficient basis for the exercise of general personal jurisdiction over her.").

Absent either specific jurisdiction or general jurisdiction over Defendant, the Court should dismiss this action.

B. Pursuant to Federal Rule of Civil Procedure 12(b)(3), the Court should dismiss this action because Plaintiff filed it in an improper venue.

Rule 12(b)(3) permits dismissal of an action where venue is improper. *Hirsch*, 2014 U.S. Dist. LEXIS 88051, at *5. After a defendant raises an objection to venue, the plaintiff has the burden to establish that venue is appropriate in this District. *Id.* A civil action may be brought in:

> (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;
>
> (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated; or
>
> (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

28 U.S.C. § 1391(b)(1)-(3).

Here, this District is not an appropriate venue under any of the three subsections of § 1391(b). As to subsection (1), Defendant does not reside in Virginia; he resides in California. (Ex. A, Compl., ¶ 5.) Subsection (3) is inapplicable for two reasons. First, there is another district in which this action may be brought, which is the Northern District of California (the district encompassing San Mateo County, where Defendant resides). Second, as explained above, this Court lacks jurisdiction over Defendant.

As to subsection (2), a substantial part of the events giving rise to Plaintiff's claims did not occur in Virginia; in fact, almost none did. The two keys events are (i) Defendant's alleged interference with Plaintiff's contract and (ii) Wiley's termination of that contract. The alleged interference occurred when Defendant, a California resident, allegedly sent correspondence to Wiley, a corporation headquartered in New Jersey. (*Id.*, ¶¶ 5, 13, 18, Ex. 1, at 1.) To the extent it is unclear whether Defendant's alleged correspondence was sent to Wiley's New Jersey office, it is unequivocal that it was not sent to Wiley in Virginia because Wiley does not have a Virginia office. (Ex. C, website excerpt.) As to Plaintiff's allegation that Wiley notified him that it wished to terminate their contract and then "forced" him to resign[4] (Ex. A, Compl., ¶ 13-14), he did not plead any facts to suggest that such notification issued from anywhere but Wiley's New Jersey headquarters.

The lone event that potentially occurred in Virginia is that Plaintiff may have been in that state when he agreed to resign. (*Id.*, ¶ 14.) This event, however, was not a necessary element of Plaintiff's claims. Plaintiff's alleged harm occurred when Wiley notified him that it intended to terminate his contract and told him that he must resign. (*Id.*, ¶¶ 13-14.) At that juncture,

[4] Under Section 17 of the Wiley agreement attached to Plaintiff's Complaint, the Publisher was entitled to terminate an Editor where, *inter alia*, "(i) an Editor resigns or fails to fully and satisfactorily perform such Editor's duties hereunder, whether as a result of disability, death, or otherwise[.]" (Ex. A, Compl., Ex. 1, at 6-7.)

Plaintiff's claims arose because his contract was terminated; the only remaining question was the technicality of whether the termination would be a forced "resignation" or a firing. That Wiley offered Plaintiff the opportunity to resign, and Plaintiff, a Virginia resident, may have been in Virginia at the time he did so (although he has not alleged as such), does not change the fact that the termination occurred in New Jersey.

Because a substantial part of the events underlying Plaintiff's claims did not occur in Virginia, this District is not a proper venue under subsection (2). The Court should therefore dismiss this action because Plaintiff failed to file it in an appropriate venue.

C. Pursuant to Rule of Supreme Court of Virginia 3:5(e) and Virginia Code § 8.01-275.1, the Court should dismiss this action because Plaintiff failed to serve Defendant within one year of commencing this action.

Rule of Supreme Court of Virginia 3:5(e) provides:

> (e) *Service more than one year after commencement of the action.* — No order, judgment or decree shall be entered against a defendant who was served with process more than one year after the institution of the action against that defendant unless the court finds as a fact that the plaintiff exercised due diligence to have timely service on that defendant.

This rule derives from a Virginia statute that provides the same: "Service of process on a defendant more than twelve months after the suit or action was commenced shall be timely upon a finding by the court that the plaintiff exercised due diligence to have timely service made on the defendant." Va. Code § 8.01-275.1.

"Diligence" is defined as "devoted and painstaking application to accomplish an undertaking." *Shears v. Slade*, 73 Va. Cir. 20, 22 (2006). "Cases where untimely service could potentially be excused under this narrow standard include where there was some obstruction to service, such as the lack of an address or an evasive defendant." *Schmitt-Doss v. Am. Regent, Inc.*, No. 12-0040, 2012 U.S. Dist. LEXIS 176831, at *9 (W.D. Va. Dec. 13, 2012). A dismissal for failure to service process within one year is a dismissal with prejudice. *Id.* at *8.

Here, Plaintiff failed to serve Defendant within one year of commencing this action. Plaintiff filed his Complaint on March 10, 2014. (Ex. D, Docket entries, at 2.) He chose not to serve Defendant with the Complaint until over one year later, on March 24, 2015. (Ex. B, Mashey Decl., ¶ 2.) Therefore, absent a finding of due diligence, the Complaint should be dismissed.

There is no basis to support a finding that Defendant exercised due diligence in seeking to timely serve Defendant. Upon information and belief, Plaintiff did not attempt to serve Defendant until the March 24, 2015 service. (*Id.*, ¶ 3.) Plaintiff cannot assert that he spent time trying to locate Defendant's address, as the address is identified in his Complaint. (Ex. A, Compl., at 1.) Nor is there any evidence that Defendant sought to evade service; indeed, he did not learn about the lawsuit until the day that he was served with the Complaint (Ex. B, Mashey Decl., ¶ 2), thus not even giving him a conceivable opportunity to attempt to evade service.

Additional evidence shows that Plaintiff's failure to timely serve Defendant was actually *deliberate*. In the months following the commencement of this action, Plaintiff served attorney-issued, document subpoenas on Wiley and George Mason University. (Ex. E, Subpoenas; Ex. B, Docket entries dated April 15, 2014 and June 13, 2014.) Although Plaintiff was required to certify that he served copies of the subpoenas on Defendant (Va. Sup. Ct. R. 4:9A(a)(2)), he did not do so. The troubling conclusion from Plaintiff's conduct is that he delayed serving Defendant with the Complaint to gain a strategic advantage by obtaining through secret discovery subpoenaed documents before Defendant was made aware of the lawsuit, and thus before Defendant could exercise his procedural right to object to personal jurisdiction and the

impermissible scope of the subpoenas.[5] Such alarming litigation tactics counsel against a finding that Plaintiff acted diligently in seeking to serve Defendant with the Complaint.

Because Plaintiff failed to serve Defendant within one year of filing this action, and there exists no evidence that he acted diligently in seeking to do so, this action should be dismissed.

D. Pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court should dismiss all of Plaintiff's claims.

1. Plaintiff's claims are governed by New Jersey law.

A federal court exercising diversity jurisdiction applies the choice-of-law rules of the forum state. *Ford Motor Co. v. Nat'l Indem. Co.*, 972 F. Supp. 2d 850, 855-56 (E.D. Va. 2013). Plaintiff's claims for intentional interference with contract, common law conspiracy, and statutory conspiracy are intentional torts. *Id.* at 856. Virginia applies the law of the "place of the wrong" to tort actions. *Id.* Under Virginia law, the "place of the wrong" is the place "the last event necessary to make an [actor] liable for an alleged tort takes place." *Id.* "For claims of tortious interference with contract ... the occurrence of the plaintiff's injury marks the last event necessary to establish liability," which is the termination of the contract. *Id.* at 856, 857; *Gen. Assurance of Am., Inc. v. Overby-Seawell Co.*, 533 Fed. Appx. 200, 206 (4th Cir. 2013) (" ... we conclude that GAA's alleged injury occurred in North Carolina, the place where Yadkin Valley terminated its contract with GAA, which was the last event necessary to render OSC liable for the alleged torts.").

Here, the termination of Plaintiff's contract allegedly occurred when Wiley notified Plaintiff in June 2012 that it wished to terminate the contract and then informed Plaintiff that he must resign. (Ex. A, Compl., ¶¶ 13-14.) Plaintiff did not plead the means of that notification, *i.e.*, a telephone call, letter, or email. As to from where the notification originated, Wiley is

[5] Defendant must fully reserve his rights with respect to the appropriate remedy or sanction for the premature pursuit of third-party discovery before the Complaint was served and Defendant was on notice of the existence of this action.

headquartered in New Jersey (*id.*, Ex. 1, at 1), and Plaintiff did not plead any facts to rebut the inference that the notification thus came from there.

Therefore, because Wiley terminated the contract in New Jersey, the substantive law of New Jersey applies to Plaintiff's tortious interference claim. It necessarily follows that Plaintiff's common law conspiracy claim – which has the same "last event" as the tortious interference claim – and his punitive damages claim – which flows from the conduct underlying the tortious interference claim – are both likewise governed by New Jersey law. *See Ford Motor*, 972 F. Supp. 2d at 860-61.

2. The Court should dismiss Plaintiff's claim for defamation (which is disguised as a tortious interference claim) because it is time barred.

Plaintiff essentially alleged in his Complaint that Defendant defamed him by informing Wiley that Plaintiff had plagiarized in the 2006 report submitted to Congress. Plaintiff did not expressly assert a defamation claim, however, because the one-year statute of limitations governing that claim has long run. To circumvent the time bar, Plaintiff improperly recast the defamation claim as a tortious interference claim to gain the benefit of that claim's longer five-year statute of limitations.

Wary of such litigation maneuvers, courts have found that, where a claim for tortious interference is based on the commission of a tort, and that tort is thus the gravamen of the action, the statute of limitations applicable to that tort will control:

> [W]here the underlying wrong, which the complaint alleges is defamation by publication of a libelous report, and the claim of injury set out in each count springs from the act of publication, the [plaintiff] should not be able to circumvent the statute of limitations by merely terming the claim tortious interference when in essence it is one of defamation, subject to a one-year limitation of action. In such a situation, we will look to the gravamen of the action, not to the label applied to it by plaintiffs.
>
> . . .

> The basic difference between a cause of action for interference with a contractual relationship and a cause of action for defamation resulting in the loss of such a relationship is that the former action can be based on a variety of torts including defamation. Therefore, where the gravamen of an action for interference with a contractual relationship is based on the commission of a tort, the statute of limitations for that tort must govern.

Rolite, Inc. v. Wheelabrator Envtl. Sys., Inc., 958 F. Supp. 992, 1009 (E.D. Pa. 1997) (citations omitted); *see also, e.g., Taylor v. Casey*, 66 Fed. Appx. 749, 752 (4th Cir. 2003) ("The Kansas Court of Appeals held [plaintiff's] tortious interference claim was, essentially, just a defamation claim subject to a one-year, not a two-year, statute of limitations."); *Am. Civil Liberties Union of Minn. v. Tarek ibn Ziyad Acad.*, No. 09-138, 2009 U.S. Dist. LEXIS 114738, at *16 (D. Minn. Dec. 9, 2009) (finding that the statute of limitations applicable to a defamation claim also applies to an interference claim that is "essentially part of the defamation claim"). Although it appears that no reported Virginia opinion addresses this issue, this Court should predict that the Virginia Supreme Court would reach the same result as did the above courts.

Here, Plaintiff re-characterized his defamation claim as a tortious interference claim to avoid the shorter statute of limitations. In Virginia, the forum state's statutes of limitations control, not those of the place of the alleged wrong. *Torkie-Tork v. Wyeth*, 739 F Supp. 2d 887, 890 (E.D. Va. 2010). Under Virginia law, the statute of limitations for defamation is one year, and the statute of limitations for tortious interference is five years. *Wilson v. Miller Auto Sales, Inc.*, 47 Va. Cir. 153, 163 (1998); *Dunlap v. Cottman Transmission Sys., LLC*, 287 Va. 207, 222 (2014). Defendant made the alleged defamatory statements in June 2012 (Ex. A, Compl., ¶ 13), and then Plaintiff filed this action approximately 21 months later in March 2014 (Ex. D, Docket entry dated March 10, 2014), such that a defamation claim is time barred. For that reason, Plaintiff rebranded the defamation claim as a tortious interference claim.

The sole basis for Plaintiff's tortious interference claim is that Defendant advised Wiley that Plaintiff had plagiarized, which accusation Plaintiff contends is untrue and harmful and thus

amounts to defamation. (Ex. A, Compl., ¶¶ 13, 21.) Plaintiff's allegations make clear that Defendant's "interference" with the Wiley contract was his alleged defamatory statements. (*See id.*, ¶ 19 ("John Mashey, John Doe, and others used defamation ... to get Wegman removed from the editorial board at Wiley by the letter writing campaign."); ¶ 27 ("Defendant Mashey and Doe used improper methods to interfere with the contract and economic expectancies; namely, by committing defamation and conspiracy to injure the reputation of Plaintiff Wegman.").) Absent Defendant's alleged defamatory statements, Plaintiff's tortious interference claim collapses on itself. It is precisely these circumstances where a defamation claim is the gravamen of a lawsuit that the shorter statute applicable to the defamation claim must apply to the tortious interference claim. Applying Virginia's one-year statute to Plaintiff's tortious interference claim, the claim is time barred and should be dismissed.

3. The Court should dismiss Plaintiff's claim for common law conspiracy to commit tortious interference because it is time barred.

The Court should dismiss the common law conspiracy claim as untimely because it adopts the statute of limitations of the underlying tortious interference claim. *Espejo v. George Mason Mortgage, LLC*, No. 09-1295, 2010 U.S. Dist. LEXIS 8190, at *20 (E.D. Va. Feb. 1, 2010). Per the above analysis, Plaintiff's tortious interference claim is subject to a one-year statute of limitations. (Section III.D.2 *supra*.) His conspiracy claim is thus likewise subject to a one-year statute and is therefore time barred.

The conspiracy claim should be dismissed for an additional reason. Civil conspiracy is not an independent cause of action, but rather a "liability expanding mechanism" that exists only if a plaintiff can prove an underlying "independent wrong," such as tortious interference. *Farris v. County of Camden*, 61 F. Supp. 2d 307, 326 (D.N.J. 1999). If this Court dismisses Plaintiff's claim for tortious interference, there will no longer be an underlying independent wrong upon

which Plaintiff's common law conspiracy claim (Count II) is based, and it should therefore be dismissed.

4. The Court should dismiss Plaintiff's claim for violation of Virginia Code §§ 18.2-499 and -500 because New Jersey law does not encompass these statutes.

In *Ford Motor Co. v. National Indemnity Co.*, the plaintiff asserted claims for tortious interference and violation of Virginia Code §§ 18.2-499 and -500. 972 F. Supp. 2d 850, 854 (E.D. Va. 2013). After performing a choice-of-law analysis, the court found that Michigan law applied to the plaintiff's tortious interference claim. *Id.* at 860. It further found that the substantive law that applies to a claim for tortious interference also applies to a claim for violation of §§ 18.2-499 and -500. *Id.* at 860-61. The court concluded that, because Michigan law applied to the Virginia statutory claim – or, more specifically, because Virginia law did not apply to it – the statutory claim must necessarily be dismissed: "Therefore, the law of Michigan applies to Count II; and, because Michigan law does not encompass the Virginia Business Conspiracy Statute, the motion for summary judgment on Count II will be granted." *Id.* at 861.

Here, because New Jersey law applies to Plaintiff's tortious interference claim, it also applies to Plaintiff's statutory claim. *Id.* at 860-61. Because New Jersey law does not encompass §§ 18.2-499 and -500, Plaintiff's claim under these statutes should be dismissed. And this result makes sense because of the lack of notice to Defendant. Defendant, a California resident who allegedly sent correspondence to New Jersey, had no reason to believe that his conduct would be governed by Virginia statutes. To permit Defendant to be subject to liability under these statutes would impute to them an impermissible extraterritorial application.

5. The Court should dismiss Plaintiff's claim for punitive damages because Plaintiff failed to allege outrageous, evil conduct by Defendant.

Under New Jersey law, punitive damages are awarded in only those extreme circumstances where a defendant's conduct is truly evil and outrageous:

> Punitive damages are awarded as punishment or deterrence for particularly egregious conduct. As a result, "punitive damages serve to express the community's disapproval of outrageous conduct," and are awarded to punish the wrongdoer and deter others from similar conduct in the future.
>
> Punitive damages are determined from the perspective of the alleged wrongdoer. Under New Jersey law, "[t]o warrant a punitive award, the defendant's conduct must have been wantonly reckless or malicious. There must be an intentional wrongdoing in the sense of an 'evil-minded act' or an act accompanied by a wanton and willful disregard of the rights of another."
>
> An award of punitive damages requires "something more than the mere commission of a tort." "There must be circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that his conduct may be called willful or wanton."

Adkins v. Sogliuzzo, No. 09-1123, 2014 U.S. Dist. LEXIS 46575, at *33-35 (D.N.J. 2014) (citations omitted).

Here, Plaintiff seeks $700,000 in punitive damages on the sole basis that Defendant allegedly informed Wiley that one of its WIRES editors had plagiarized. (Ex. A, Compl., ¶¶ 13, 18, 31, 37.) No basis whatsoever is stated for the dollar figure. Although Plaintiff denied that he plagiarized (*id.*, ¶ 21), but without offering specific support for his claim, he does not (and could not) allege that Defendant did not sincerely believe that Plaintiff had plagiarized in the 2006 report submitted to Congress. Absent such an allegation, not only was it reasonable for Defendant to disclose the apparent plagiarism to the publisher that had placed Plaintiff on an editorial board, but he also arguably had an obligation to do so, particularly where Plaintiff's plagiarized material pertains to the extremely highly politicized issue of climate change and it had been submitted to Congress for purposes of influencing public policy and potential legislation in the field. It is a well-recognized tradition, akin to the peer review process, to call attention to perceived plagiarism, mathematical or other computational errors, and analytical

flaws in published works and manuscripts, just as it would be in graded work submitted by students.[6]

Punitive damages are certainly unwarranted where Defendant's alleged tortious conduct is not even actionable. There is no allegation that Defendant was intent on trying to take over the Wiley contract, as some competitor might, and which type of conduct forms the basis of many tortious interference claims. Indeed, the Complaint lacks any specific allegation that Defendant ever had specific knowledge of Plaintiff's agreement with Wiley dated January 15, 2006 or any term of that agreement. There is no allegation that Defendant would experience any financial benefit whatsoever by reason of the termination of Plaintiff's contract to serve as an editor for the Wiley publication. The gravamen of Plaintiff's Complaint is not wrongful interference with the agreement between Plaintiff and Wiley, but rather criticism of Plaintiff's submission to Congress of a report that contravened recognized professional standards because it was replete with well-documented plagiarized text, errors, bias, and other statistical and analytical flaws. The consequences of Plaintiff's apparent inability to conjure up a good-faith explanation for his plagiarism and pervasive mistakes cannot be laid at Defendant's feet or blamed on the many other well-regarded climate scientists and academics who drew similar conclusions and also brought such concerns to the attention of Wiley and the scientific community. Any other conclusion would expose every scientist who draws such concerns to the attention of scientific and academic publishers to tortious interference with contract claims whenever the editor or author is called accountable by the publisher for the shoddy work.

Indeed, that Defendant believed in good faith that Plaintiff had plagiarized is supported by Plaintiff's allegations that many others in the academic community expressed identical

[6] The Complaint also includes a conclusory allegation that "[n]one of the statements to Wiley were protected or privileged." (Ex. A, Compl., ¶ 20.) However, it is not possible for Defendant or the Court to assess or test the basis for this contention in the absence of even an excerpt of the supposedly actionable statement(s).

concerns. Raymond Bradley, a professor at the University of Massachusetts, filed a complaint with George Mason University, alleging that Plaintiff's 2006 report plagiarized from one of Bradley's textbooks. (*Id.*, ¶ 8.) Many persons other than Defendant sent letters to Wiley advising of Plaintiff's plagiarism and urging that it be promptly and properly addressed. (*Id.*, ¶ 18.) That so many people in the field believed that Plaintiff (and Said) had committed plagiarism and issued biased and fatally flawed conclusions undermines any contention that Defendant acted out of some specific malicious intent to cause Wiley to terminate its contract with Plaintiff. Indeed, as is even obvious from the cursory Complaint, Defendant's focus was on getting the flawed publication withdrawn or corrected in various respects, not on interfering with anyone's contractual relationship. No other inference can reasonably be drawn from the Complaint as presented, as there is no communication identified from Defendant to Wiley that either demanded or even requested that Plaintiff's contract be terminated, non-renewed, or that he be forced to resign as editor.

Punitive damages are meant to deter "outrageous" conduct. An award of punitive damages here would serve the contrary and detrimental purpose of deterring the *desirable conduct* of exposing plagiarism in published works, especially where the violator serves on the editorial board of a professional publication and is thus expected to demonstrate the utmost integrity in his work product and professional conduct. To permit a claim for punitive damages to proceed against Defendant for his having brought to light a perceived instance of significant plagiarism – even if Plaintiff were to ultimately succeed in his claim that he did not plagiarize, which is inconceivable under the circumstances – would have a serious chilling effect on academics and others from unmasking suspected plagiarism.

Tellingly, Plaintiff has pled no facts supporting his claim for punitive damages other than those supporting his claims for tortious interference and conspiracy. *See Adkins*, 2014 U.S. Dist.

LEXIS 46575, at *35 (holding that an award of punitive damages requires "something more than the mere commission of a tort"). Absent the pleading of any facts (as opposed to legal conclusions) supporting Plaintiff's contention that Defendant acted recklessly, maliciously, and with an evil mind, Plaintiff's punitive damages claim should be dismissed.

IV. CONCLUSION

For the foregoing reasons, Defendant respectfully requests that this Court grant his Motion to Dismiss and dismiss Plaintiff's Complaint with prejudice.

Respectfully submitted,

COZEN O'CONNOR

By: /s/ Emily M. Gurskis

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Dated: April 17, 2015

CERTIFICATE OF SERVICE

I, Emily M. Gurskis, hereby certify that on April 17, 2015 a copy of the foregoing Defendant John Mashey's Motion to Dismiss Plaintiff's Complaint, along with the accompanying Brief, proposed Order, Notice of Hearing, exhibits, and Certificate of Service, were served on the following via ECF and hand delivery, as follows:

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___/s/ Emily M. Gurskis_____
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