NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEFFREY ISAACS, Dr., Plaintiff-Appellant, v. USC KECK SCHOOL OF MEDICINE; et al., Defendants-Appellees.	No. 20-55239 D.C. No. 2:19-cv-08000-DSF-RAO MEMORANDUM* (Filed Apr. 22, 2021)

Appeal from the United States District Court
for the Central District of California
Dale S. Fischer, District Judge, Presiding

Submitted April 14, 2021** Pasadena, California

Before: M. SMITH and IKUTA, Circuit Judges, and STEELE,*** District Judge.

Appellant Jeffrey Isaacs challenges the district court's grant of Appellees' motion to dismiss and special motion to strike pursuant to California Code of Civil Procedure § 425.16. Because the parties are familiar with the facts, we do not recount them here,

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable John E. Steele, United States District Judge for the Middle District of Florida, sitting by designation.

except as necessary to provide context to our ruling. Our review is de novo for both the granting of Appellees' motion to dismiss, *L.A. Lakers, Inc. v. Fed. Ins. Co.*, 869 F.3d 795, 800 (9th Cir. 2017), and Appellees' special motion to strike, *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102 (9th Cir. 2003). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

1. A district court may grant a motion to dismiss a complaint based on an affirmative defense, such as a statute of limitations, when the "defense is obvious on the face of a complaint." *Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 902 (9th Cir. 2013). Here, the district court did not err in granting Appellees' motion to dismiss Isaacs's civil Racketeer Influenced and Corrupt Organizations Act (RICO) and state law claims because it is obvious from the face of the complaint that these claims are time barred.

"The statute of limitations for civil RICO actions is four years." *Pincay v. Andrews*, 238 F.3d 1106, 1108 (9th Cir. 2001). This period "begins to run when a plaintiff knows or should know of the injury which is the basis for the action." *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 365 (9th Cir. 2005). "The plaintiff is deemed to have had constructive knowledge if [he] had enough information to warrant investigation which, if reasonably diligent, would have led to discovery of the fraud." *Pincay*, 238 F.3d at 1110 (quoting *Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271, 275 (9th Cir. 1988)).

Isaacs's complaint alleges that in June of 2015—when his appeal of the revocation of his medical license was dismissed—he "became reasonably suspicious, and informed, that [University of Southern California Keck School of Medicine (USC)] was not complying with the Settlement Agreements." Because the basis of his RICO claim is his inability to practice medicine and reputational harm caused by the revocation of his license, it is undeniable that Isaacs was aware of his injury by June of 2015. Isaacs filed his current lawsuit on September 16, 2019—over four years after his medical license was revoked and his injury was apparent.[1] Accordingly, it is obvious from the face of the complaint that Isaacs's RICO claim is time barred.

Pursuant to California law, contract and recission claims are subject to a four-year statute of limitations. Cal. Civ. Proc. Code §§ 337(a), (b). Again, Isaacs's complaint alleges that in June 2015, Isaacs suspected USC "was not complying with the Settlement Agreements." The limitations period, therefore, began running in June of 2015, rendering his current contract and recission claims time barred.

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[1] Throughout his complaint, Isaacs alleges that he learned of his injury—the negative impact on his medical career, education and reputation—in 2019 when he found a copy of his Association of American Medical Colleges (AAMC) profile, which reflected his dismissal from USC for "Non Academic Reasons." Because the limitations period is triggered when an individual becomes *aware of or suspects* an injury (not when he finds smoking-gun evidence of his injury), the year in which Isaacs discovered this document does not affect our statute of limitations analysis.

Intentional interference with contract is subject to a two-year statute of limitations. Cal. Civ. Proc. Code § 339(1). Isaacs's complaint alleges that John Doe—an unnamed defendant—notified Dartmouth's residency program of Isaacs's disciplinary records at USC, and thus, "deliberately defeated the purpose of the [settlement] agreements." Given that Dartmouth terminated Isaacs in 2012, Isaacs's claim against John Doe is time barred. Isaacs alleges that the New Hampshire Board of Medicine published "a fake order to the public, which is meant to defeat [Isaacs's] consideration vested by the settlement agreements." Again, the New Hampshire Board of Medicine published its initial order in 2014 and its finalized order in June 2015—thus, it is obvious from the face of the complaint that Isaacs's claim is time barred.

Finally, fraud and constructive fraud claims are subject to a three-year statute of limitations. Cal. Civ. Proc. Code § 338(d). The limitations period begins to run when the plaintiff "suspect[s] or should have suspected that an injury was caused by wrongdoing." *Kline v. Turner*, 105 Cal. Rptr. 2d 699, 702 (Ct. App. 2001). Isaacs's complaint alleges that "USC represented it would seal [his] disciplinary records" but that "representation was false." Again, Isaacs's complaint alleges that by June of 2015, he suspected USC "was not complying with the Settlement Agreements." Therefore, he was aware of his injury more than three years before he filed his claim, rendering both his fraud claims time barred.

2. The district court did not err in granting Appellees' motion to dismiss as to Isaacs's retaliation claim. Under both the Rehabilitation Act and the Americans with Disabilities Act (ADA), "[a] *prima facie* case of retaliation requires a plaintiff to show: '(1) involvement in a protected activity, (2) an adverse employment action[,] and (3) a causal link between the two.'" *Coons v. Sec'y of U.S. Dep't of Treasury*, 383 F.3d 879, 887 (9th Cir. 2004) (quoting *Brown v. City of Tucson*, 336 F.3d 1181, 1187 (9th Cir. 2003)). Isaacs failed to allege that he was an employee of USC.

3. The district court did not err in granting Appellees' motion to dismiss Isaacs's 42 U.S.C. § 1983 claim against the New Hampshire Board of Medicine for violating his Eighth Amendment rights. Pursuant to well-settled law, "[s]tate agencies . . . are not 'persons' within the meaning of [42 U.S.C.] § 1983, and are therefore not amenable to suit under that statute." *Maldonado v. Harris*, 370 F.3d 945, 951 (9th Cir. 2004) (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70 (1989)). It is undisputed that the New Hampshire Board of Medicine is a state agency. Therefore, Isaacs's Eighth Amendment claim, made via § 1983, is barred by the Eleventh Amendment.[2]

4. Isaacs's remaining constitutional claims were also properly dismissed. Isaacs alleges that Gibson Dunn and Crutcher LLP (Gibson Dunn) and USC

[2] In his brief, Isaacs argues that his claim is primarily against an investigator for New Hampshire Board of Medicine. Isaacs, however, did not name this person as a party to the suit. As such, the Eleventh Amendment precludes his claim.

violated his right to due process and his First Amendment right to "assemble and speak at USC events" when they "unilaterally restricted [his] freedom" to access the USC campus. The First and Fourteenth Amendments, however, do not apply to private actors unless those actors are exercising a function "traditionally exclusively reserved to the State." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974)). Both USC and Gibson Dunn are private actors, and neither party was exercising traditional, exclusively state functions. Accordingly, Isaacs's claims fail as a matter of law.

5. The district court did not err in granting Appellees' motion to strike Issacs's state law claims pursuant to California's anti-SLAPP statute, California Code of Civil Procedure § 425.16. "[A] party may file a motion to strike a cause of action against it if the complaint 'aris[es] from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue.'" *Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 595 (9th Cir. 2010) (quoting Cal. Civ. Proc. Code § 425.16(b)(1) (second alteration in original)). A court considering a party's motion to strike engages in a two-part inquiry: (1) "the defendant must make a prima facie showing that the plaintiff's suit arises from an act in furtherance of the defendant's rights of petition or free speech"; and (2) the plaintiff must "demonstrate a

probability of prevailing on the challenged claims." *Id.* (internal quotation marks omitted).

Isaacs's stricken claims relate to emails between him, a Gibson Dunn attorney, and USC's in-house counsel. Appellees' statements in these emails constitute protected speech, and most of them are reiterations of USC's legal position, "made in direct response to [Isaacs's] threats." Moreover, Isaacs did not establish a likelihood of success on the merits of these claims. Isaacs does not have a protected right to being on USC's campus—USC is a private school and may exclude Isaacs. The Gibson Dunn emails do not amount to "extreme and outrageous conduct," *Hughes v. Pair*, 209 P.3d 963, 976 (Cal. 2009) (listing the elements of a cause of action for intentional infliction of emotional distress), or "intentional acts designed to induce a breach or disruption of [a] contractual relationship," *Reeves v. Hanlon*, 95 P.3d 513, 517 (Cal. 2004) (listing the elements of intentional interference with contractual relations). The district court, therefore, did not err in granting the motion to strike.

AFFRIMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DR. JEFFREY ISAACS, Plaintiff, v. DARTMOUTH HITCHCOCK MEDICAL CENTER, et al., Defendants.	CV 19-8000 DSF (RAOx) Order GRANTING Motions to Dismiss (Dkt. Nos. 29, 45, 58, 61, 72); Order GRANTING Special Motions to Strike (Dkt. Nos. 64, 67) (Filed Feb. 3, 2020)

Plaintiff Jeffrey Isaacs has brought this suit challenging numerous actions by various Defendants relating to the aftermath of Plaintiff's tenure at the University of Southern California's (USC) Keck School of Medicine and Plaintiff's subsequent termination from a residency program at Dartmouth Hitchcock Medical Center. All Defendants have filed motions to dismiss and Defendants USC Keck School of Medicine and Gibson, Dunn & Crutcher LLP have filed special motions to strike under California Code of Civil Procedure § 425.16. The Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15.

A. Claims Against the Dartmouth Entities

Plaintiff does not oppose dismissal of Dartmouth Hitchcock Medical Center and Geisel School of Medicine at Dartmouth.

B. Claims Against the University of Southern California

The claims against USC based on any acts prior to 2008 are barred by a combination of waiver and res judicata. Plaintiff filed a lawsuit against USC in 2006. Plaintiff and USC entered into two settlement agreements resolving that case. As relevant here, in those agreements Plaintiff waived all claims against USC predating the settlements. Plaintiff then tried to avoid the settlements, but their validity was finally adjudicated against Plaintiff in 2008. Therefore, Plaintiff cannot challenge the enforceability of the settlements because of res judicata and his claims against USC for acts prior to 2008 are barred by the waivers within those settlement agreements.

Some claims include alleged disclosures by USC in violation of various agreements between the parties. These alleged disclosures are alleged to have led to Plaintiff's dismissal from his residency program at Dartmouth. However, they are alleged to have occurred in 2012, well outside any relevant statute of limitations period.[1] Even if Plaintiff did not have any reason to learn of the breach until June 2015 (when he admits knowing of it), all relevant limitations periods would have run prior to the filing of this suit in September 2019. Any acts that form the basis of the RICO claim

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[1] The relevant limitation periods are four years for breach of contract and rescission, Cal. Code Civ. Proc. § 337(a), (c), three years for the fraud claims, Cal. Code Civ. Proc. § 338(d), and two years for the emotional distress claims, Cal. Code Civ. Proc. § 335.1.

that are not barred by the settlement agreements are also barred by the statute of limitations. A RICO claim must be brought within four years of when the plaintiff knew, or should have known, of his injuries. Living Designs, Inc. v. E.I. Dupont de Nemours & Co., 431 F.3d 353, 365 (9th Cir. 2005). The very last possible harm suffered by Plaintiff occurred in March 2014 when the New Hampshire Board of Medicine posted its revocation order revoking Plaintiff's right to practice medicine.

C. Claims Against the New Hampshire Board of Medicine

The New Hampshire Board of Medicine's status as a state agency ultimately bars all of Plaintiff's claims against it.[2]

The state law claims and any federal claims for retrospective relief are barred by the Eleventh Amendment. The Ninth Circuit considers five factors to determine if a governmental entity is an "arm of the state":

> (1) whether a money judgment would be satisfied out of state funds; (2) whether the entity performs central governmental functions; (3) whether the entity may sue or be sued; (4) whether the entity has the power to take property in its own name or only the name of

[2] Plaintiff asserts that certain individuals are also defendants in this case. However, none of those individuals are named in the complaint.

> the state; and (5) the corporate status of the entity.

Ray v. Cty. of Los Angeles, 935 F.3d 703, 709 (9th Cir. 2019) (internal quotation marks omitted). The first factor – the source of any money judgment – is the most important. Id at 709-10.

By statute, New Hampshire provides sovereign immunity to the Board. N.H. Rev. Stat. § 329:17, IX. New Hampshire waives this immunity only for a limited class of claims not relevant here and provides that damages for any successful action will be paid from the state treasury. See N.H. Rev. Stat. §§ 541-B:1, I, II-a, 541-B:13. So, to the degree the Board can be sued at all, payment would be made from state funds.

The Board regulates the practice of medicine in New Hampshire. The New Hampshire legislature has explicitly determined this to be a public function for the purposes of protecting the public. N.H. Rev. Stat. § 329:1-aa ("The primary responsibility and obligation of the board of medicine is to protect the public."). The Court finds this regulatory function to be a "central government function."

As stated earlier, the Board generally cannot be sued. It also appears to have a limited ability to sue on its own behalf. The only mention of suit in its enabling statues is a right to sue for injunctive relief against unauthorized practice of medicine. See N.H. Rev. Stat. § 329:17-b. In such a suit, the Board is represented by the New Hampshire Attorney General. Id.

The Board's enabling statute does not appear to authorize it to take property in its own name. The Board also does not have independent corporate status. It is designated as an "administratively attached agency" within the New Hampshire Department of Health and Human Services. N.H. Rev. Stat. § 329:2. Such an agency is independent in substantive function, but not in administration. See N.H. Rev. Stat. § 21-G:10.

All of the Eleventh Amendment factors favor a finding that the Board is an arm of the state. Therefore, it is immune from suit under the Eleventh Amendment.

Plaintiff's federal claims for prospective relief could potentially survive under Ex parte Young, 209 U.S. 123 (1908), but those claims fail independent of the Eleventh Amendment bar. Under Ninth Circuit law, state agencies are not capable of forming the specific malicious intent required by RICO and, therefore, cannot be liable under that statute. Lancaster Cmtv. Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397, 404 (9th Cir. 1991). Further, Plaintiff has not plausibly alleged any racketeering acts committed by the Board or the Board's involvement in any enterprise. Plaintiff fails to allege any association between the Board and the other Defendants other than that the Board received information from them in accordance with its statutory duties, and Plaintiff's claims of obstruction of justice, retaliation, and fraud are not supported by any allegations that satisfy any of those statutes. Finally, "[s]tate agencies . . . are not 'persons' within the

meaning of § 1983, and are therefore not amenable to suit under that statute." Maldonado v. Harris, 370 F.3d 945, 951 (9th Cir. 2004) (citing Will v. Mich. Dep't of State Police, 491 U.S. 58, 70 (1989)).[3]

D. Anti-SLAPP Motion by USC and Gibson, Dunn & Crutcher

The only other claims in this case are those against USC and its counsel, Gibson, Dunn & Crutcher LLP, that concern statements by Gibson Dunn on behalf of USC. Plaintiff alleges that these statements amount to a "lifetime ban" on Plaintiff from entering the USC campus. The Court finds that the statements by Gibson Dunn were protected activity subject to the California anti-SLAPP statute and that they should be stricken.

Anti–SLAPP motions are subject to a two-step analysis with shifting burdens. First, USC and Gibson Dunn must make a prima facie showing that Plaintiff's claims "arise[] from an act in furtherance" of their rights of petition or free speech. Mindys Cosmetics, Inc. v. Dakar, 611 F.3d 590, 595 (9th Cir. 2010) (citations omitted). They can meet their burden by demonstrating that the act underlying the challenged claim fits into one of the four categories of section

[3] The Court notes that, while not raised by the Board, all claims against the Board would presumably be barred by the relevant statutes of limitations. All challenged actions by the Board took place in 2013 and 2014. See Compl. ¶¶ 150-51; 167-70.

425.16, subdivision (e). If USC and Gibson Dunn make this prima facie showing, the burden shifts to Plaintiff to demonstrate "a probability of prevailing on the challenged claims." Mindys Cosmetics, 611 F.3d at 595. "In deciding whether the 'arising from' requirement is met, a court considers the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." City of Cotati v. Cashman, 29 Cal. 4th 69, 79 (2002) (quoting Cal. Civ. Code § 425.16(b)).

An "act in furtherance of a person's right of petition or free speech" includes:

> (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

Cal. Civ. Proc. § 425.16(e). "The California Court of Appeal has interpreted the anti-SLAPP statute's 'arising from' language to mean that a claim is based on whatever conduct constitutes the 'specific act[] of

wrongdoing' that gives rise to the claim." Jordan-Benel v. Universal City Studios, Inc., 859 F.3d 1184, 1190 (9th Cir. 2017) (quoting Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP, 133 Cal. App. 4th 658, 671 (2005)). "Put another way, a court focuses its anti-SLAPP analysis on the specific conduct that the claim is challenging." Id. (citing Wang v. Wal-Mart Real Estate Bus. Trust, 153 Cal. App. 4th 790, 808 (2007)).

The statements by the Gibson Dunn lawyer were in response to e-mails from Plaintiff about Plaintiff's right to enter USC's campus and to contact "USC Police." At least one e-mail threatened "action against [Gibson Dunn]" and another noted that Plaintiff "expects a concrete answer or this will go straight to the judge." The statements that have been interpreted as a threat of a lifetime ban expressed USC's legal position that Plaintiff had no right and no reason to be present on USC property.

The statements by the Gibson Dunn lawyer that are at issue were statements of the legal position of USC in a long running legal dispute. They were made in direct response to threats by Plaintiff to seek legal relief against USC and Gibson Dunn itself. This qualifies the statements as acts in furtherance of USC and Gibson Dunn's right of petition or free speech.

Given that USC and Gibson Dunn satisfy the first prong of the anti-SLAPP analysis, Plaintiff now must show some likelihood of success on the merits. To meet this requirement, "the plaintiff must demonstrate that the complaint is both legally sufficient and supported

by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." Oasis W. Realty, LLC v. Goldman, 51 Cal. 4th 811, 820 (2011) (internal quotation marks omitted). Courts consider the pleadings and supporting and opposing affidavits, but do not make credibility determinations or compare the weight of the evidence. Id. Instead, courts "accept as true the evidence favorable to the plaintiff and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." Id. (internal quotation marks and brackets omitted). The anti-SLAPP motion must be granted "if the plaintiff fails to produce evidence to substantiate his claim or if the defendant has shown that the plaintiff cannot prevail as a matter of law." Siam v. Kizilbash, 130 Cal. App. 4th 1563, 1570 (2005); see also Oasis W. Realty, 51 Cal. 4th at 820.

In denying Plaintiff's motion for a preliminary injunction, the Court found that Plaintiff has virtually no chance of success on the merits of this case. As for the particular "lifetime ban" related claims, Plaintiff especially has no chance of success. The statements are protected by the California litigation privilege as they were made during litigation between the parties in direct response to threatened legal action by Plaintiff. Plaintiff has also not alleged or otherwise given any reason why USC is not within its rights to exclude him from the USC campus. USC is a private school, and Plaintiff has not articulated any right to be there if USC does not want him there.

E. Conclusion

The motions to dismiss and the motions to strike are GRANTED. The Court finds that there is no reason to grant leave to amend. Plaintiff has brought numerous lawsuits based on the same essential dispute in courts all around the country over a period of more than ten years. He recently filed another case in this Court that he dismissed in the face of motions to dismiss. Nothing Plaintiff could allege could avoid the settlement waiver, res judicata, statute of limitations, and Eleventh Amendment bars to his claims. Any further pleadings would only be a futile waste of time and resources for all concerned. The Court will enter judgment in favor of Defendants without further delay. USC and Gibson Dunn may file a motion for a determination of reasonable attorney's fees under § 425.16 no later than February 24, 2020.

IT IS SO ORDERED.

Date: 2-3-2020 /s/ Dale S. Fischer
Dale S. Fischer
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEFFREY ISAACS, Dr., Plaintiff-Appellant, v. USC KECK SCHOOL OF MEDICINE; et al., Defendants-Appellees.	No. 20-55239 D.C. No. 2:19-cv-08000-DSF-RAO Central District of California, Los Angeles ORDER (Filed May 28, 2021)

Before: M. SMITH and IKUTA, Circuit Judges, and STEELE,* District Judge.

Judges M. Smith and Ikuta vote to deny the petition for rehearing en banc, and Judge Steele so recommends. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote. Fed. R. App. P. 35. Accordingly, the petition for panel rehearing and rehearing en banc is DENIED.

* The Honorable John E. Steele, United States District Judge for the Middle District of Florida, sitting by designation.