

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

MARY CUMMINS,	Plaintiff,	} Case No. CV 11-8081-DMG (MANx)
v.		
AMANDA LOLLAR aka BAT WORLD	Defendants.	} MOTION FOR SUMMARY JUDGMENT
SANCTUARY an individual person, et al.		

On July 10, 2012, Defendants Amanda Lollar and Bat World Sanctuary filed a motion for summary judgment/partial summary judgment (“the Motion”) noticed for hearing on August 10, 2012. [Docs. ## 41, 42, 43, 44, 45, 46, 47.] On July 25, 2012, Plaintiff filed her response. [Doc. # 59.] On July 27, 2012, Defendants replied. [Docs. 60, 61, 62.] On July 30, 2012, Plaintiff filed a reply to Defendants’ response. [Doc. # 64.] At the August 10, 2012 hearing, the Court orally granted Plaintiff’s request for leave to file a supplemental brief and, thereafter, allowed Defendants to file a supplemental reply. On September 12, 2012, Plaintiff filed her supplemental brief. [Docs. ## 86, 87, 88.] On September 21, 2012, Defendants filed their supplemental reply. [Docs. ## 90, 91, 92, 93.] The Motion was then submitted for decision. Having duly considered the parties’ submissions in favor of and in opposition to the Motion, the Court now renders its decision. For the reasons set forth below, the Motion is GRANTED.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I.

PROCEDURAL BACKGROUND

On September 29, 2011, Plaintiff Cummins filed a complaint against Defendants Amanda Lollar and Bat World Sanctuary. On December 22, 2011, Plaintiff filed a first amended complaint (“FAC”) against the same Defendants and alleging the same causes of action, providing more specificity than the original complaint. [Doc. # 21.] In the FAC, Cummins alleges five causes of action (defamation, defamation per se, intentional interference with business relations, intentional interference with prospective economic advantage and intentional infliction of emotional distress) all based on allegedly defamatory statements about Cummins posted on the Internet by Defendants. The allegedly defamatory statements that Cummins challenges include statements that Cummins “has a criminal record,” was “convicted” of “theft of property, forged name on a credit card,” is a “cyberstalker,” “cybersquatter,” “hacked into our website” and “email list,” “was picked up by the LAPD Anti-Terrorism Task Force,” “posts pornography in children’s chat rooms,” “commits animal cruelty,” “tortures animals,” has made “false complaints to govt agencies about deft,” has a “history of stalking and harassment,” was “charged with criminal contempt,” and Plaintiff’s deposition was “court ordered.”

Defendants seek summary judgment contending that Cummins is a limited public figure and, therefore, summary judgment is warranted because the allegedly defamatory statements were either true, constituted opinions, or were made without malice.

II.

FACTUAL BACKGROUND

Cummins is the founder of a non-profit organization, Animal Advocates, located in California and is licensed by the United States Department of Agriculture and the California Department of Fish & Game (“CADFG”) to possess, rescue and rehabilitate ill, injured and orphaned native wildlife for release back to the wild. (FAC ¶ 9 [Doc. # 21].) According to Cummins’ declaration filed in opposition to the summary judgment

1 motion, Cummins also serves as the president of Animal Advocates. (Plaintiff's Opp'n,
2 Exh 1.) [Doc. # 59.]

3 Cummins alleges she is trained to care for coyotes, bobcats, foxes, raccoons,
4 opossums, skunks and all other small mammals including bats; has published CADFG
5 approved manuals on wildlife rehabilitation and instructs CADFG accredited classes to
6 wildlife rehabilitators, veterinarians and animal care professionals. (FAC ¶¶ 9-10.)
7 Plaintiff further alleges that she has been trained at the Rio Hondo Police Academy and
8 the California State Humane Association Animal Law Enforcement Academy to
9 investigate animal cruelty and neglect. (*Id.* at ¶ 11.)

10 It is undisputed that Defendant Amanda Lollar operates a bat sanctuary in Texas,
11 Defendant Bat World Sanctuary. In June 2010, Cummins attended an internship at Bat
12 World Sanctuary, but left early after injuring her head. According to Cummins, during
13 her internship, she "witnessed Defendant Lollar commit animal cruelty, animal neglect,
14 [and] violations of the health code," and after returning to California "reported
15 Defendants for the violations she witnessed." (Plaintiff's Opp'n at 7.) Cummins also
16 posted comments about Lollar's activities on the Internet. (*Id.* at 8.) Numerous postings
17 about Plaintiff and Defendants have appeared on the Internet. Plaintiff and Defendants
18 each blame the other for the postings. In September 2012, Lollar sued Cummins in Texas
19 for defamation. (Plaintiff's Opp'n at 5.) In September 2011, while Lollar's action was
20 pending, Cummins filed the instant defamation action in the Central District of California
21 against Lollar and Bat World Sanctuary. After a court trial in the Texas action, Lollar
22 was awarded a \$6.1 million judgment against Cummins.

23 According to Cummins' opposition to the summary judgment motion,
24 Plaintiff with written and oral permission from defendant
25 posted videos and photos online. Plaintiff made honest
26 comments on the photos such as "she (Defendant) debarked her
27 dogs," "she has rabies vaccinations," "I found a dead bat with
28 one wing under her desk" In retaliation for reporting

1 Defendant to authorities and posting the truth about her
2 activities online, Defendant started defaming Plaintiff

3 Plaintiff's Opp'n at 8.

4 At her deposition, Plaintiff stated the following:

5 She [Amanda Lollar] states that I have harassed and
6 defamed her and that she states that I posted on the Internet
7 false statements of fact.

8 Everything I have posted about the woman and her
9 organization is the absolute truth.

10 And she states I've made wild accusations containing
11 false and defamatory statements about her and Bat World to
12 numerous government agencies.

13 Again that's completely false. Everything that I have
14 complained about her was the absolute truth.

15 (MacPhail Decl., Exh. A (Plaintiff's Depo., 64:25-65:9).) [Doc. # 42.]

16 Cummins has maintained a YouTube website with various downloadable videos
17 concerning rescue and rehabilitation of squirrels, raccoons, skunks, bats and other
18 wildlife (<http://www.youtube.com/user/marycummins>). (MacPhail Decl., Exh. B.) She
19 also maintains a website for her non-profit organization, Animal Advocates, which
20 provides links to her biography and four-page curriculum vitae, as well as several online
21 articles about her (<http://www.animaladvocates.us>). (*Id.*, Exh. D.)

22 **III.**

23 **LEGAL STANDARD**

24 Summary judgment should be granted "if the pleadings, the discovery and
25 disclosure materials on file, and any affidavits show that there is no genuine issue as to
26 any material fact and that the movant is entitled to a judgment as a matter of law." Fed.
27 R. Civ. P. 56(c)(2); *accord Mattos v. Agarano*, 590 F.3d 1082, 1085 (9th Cir. 2010).
28 Material facts are those that may affect the outcome of the case. *Anderson v. Liberty*

1 *Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). An issue is
2 genuine “if the evidence is such that a reasonable jury could return a verdict for the
3 nonmoving party.” *Id.*

4 The moving party bears the initial burden of establishing the absence of a genuine
5 issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L.
6 Ed. 2d 265 (1986). Where the moving party does not have the ultimate burden of
7 persuasion at trial, the moving party meets its burden of production and persuasion by
8 either producing evidence negating an essential element of the nonmoving party’s claim
9 or defense or showing that the nonmoving party does not have enough evidence of an
10 essential element to carry its ultimate burden of persuasion at trial. *Id.* at 325; *see also*
11 *Nissan Fire & Marine Ins. Co.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Once the moving
12 party has met its initial burden, Rule 56(e) requires the nonmoving party to “go beyond
13 the pleadings and by her own affidavits, or by the ‘depositions, answers to
14 interrogatories, and admissions on file,’ designate ‘specific facts showing that there is a
15 genuine issue for trial.’” *Id.* at 324; *see also Bias v. Moynihan*, 508 F.3d 1212, 1218 (9th
16 Cir. 2007). “[T]he inferences to be drawn from the underlying facts . . . must be viewed
17 in the light most favorable to the party opposing the motion.” *Matsushita Elec. Indus.*
18 *Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).
19 However, “an opposing party may not rely merely on allegations or denials in its own
20 pleading.” Fed. R. Civ. P. 56(e).

21 IV.

22 DISCUSSION

23 A. DEFENSE OF TRUTH AS TO CUMMINS’ DEPOSITION

24 It is not entirely clear why the statement that Cummins’ “deposition was court
25 ordered” would be defamatory. Nonetheless, Cummins complains that contrary to
26 Lollar’s post on the Internet that Cummins’ “deposition was court ordered,” it was,
27 instead, pursuant to notice. Cummins concedes in her deposition, however, that the
28 Texas court granted a motion to compel her deposition and ordered the deposition to

1 occur. (MacPhail Decl., Exh. A.) Thereafter, the parties mutually agreed on a different
2 date for the deposition. *Id.* That subsequent mutual agreement regarding the date does
3 not change the fact that the deposition was court ordered. Because this statement was
4 true, Plaintiff cannot prevail on this claim of defamation.

5 **B. CERTAIN OF THE INTERNET POSTINGS ARE OPINION**

6 Cummins contends that she has been defamed by Lollar’s Internet postings that
7 accuse her of being a “cyberstalker,” a “crackpot,” “psycho” and a “crackpot stalker.”
8 These claims fail for two reasons: (1) because these are statements of opinion, they are
9 not actionable and (2) Cummins cannot prove that these allegedly defamatory statements
10 were authored by Lollar.

11 As the California Court of Appeal has explained:

12 “An essential element of libel . . . is that the publication in
13 question must contain a false statement of fact. . . . This
14 requirement . . . is constitutionally based.” (*Gregory v.*
15 *McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 600-601 [131
16 Cal.Rptr. 641, 552 F.2d 425].) “However pernicious an opinion
17 may seem, we depend for its correction not on the conscience of
18 judges and juries but on the competition of other ideas. But
19 there is no constitutional value in false statements of fact.”
20 (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 339-340 [41
21 L.Ed.2d 789, 805, 94 S.Ct. 2997], fn. omitted.)

22 * * *

23 [T]he courts have regarded as opinion any “broad, unfocused
24 and wholly subjective comment,” (*Fletcher v. San Jose*
25 *Mercury News* (1989) 216 Cal.App.3d 172, 191 [264 Cal.Rptr.
26 699]) such as that the Plaintiff was a “shady practitioner”
27 (*Lewis v. Time Inc.* (9th Cir. 1983) 710 F.2d 549, 554), “crook”
28 (*Lauderback v. American Broadcasting Companies* (8th Cir.

1 1984) 741 F.2d 193, 195-198), or “crooked politician”
2 (*Fletcher v. San Jose Mercury News, supra*, 216 Cal.App.3d at
3 pp. 190-191). Similarly, in *Moyer v. Amador Valley J. Union*
4 *High School Dist., supra*, 225 Cal.App.3d at page 725, this
5 court found no cause of action for statements in a high school
6 newspaper that the Plaintiff was “the worst teacher at FHS” and
7 “a babbler.” The former was clearly “an expression of
8 subjective judgment.” (*Ibid.*) And the epithet “babbling” could
9 be reasonably understood only “as a form of exaggerated
10 expression conveying the student-speaker’s disapproval of
11 Plaintiff’s teaching or speaking style.” (*Id.* at p. 726.)

12 *Copp v. Paxton*, 45 Cal. App. 4th 829, 837-38, 52 Cal. Rptr. 2d 831 (1996). One of the
13 statements on which the *Copp* court focused was a statement in a letter that referred to the
14 plaintiff as a “booby.” Finding such expression to be opinion, the court stated, “[t]he
15 epithet ‘booby,’ like the expression ‘babbling,’ can be understood only as a vague
16 expression of low esteem.” *Id.* at 838.

17 Like “booby” and “babbling,” labels such as “cyberstalker,” “crackpot,” “psycho,”
18 and “crackpot stalker” are expressions of subjective judgment conveying an opinion of
19 low esteem. As such, they are not actionable.

20 Moreover, at her deposition, when confronted with the exhibits containing these
21 allegedly defamatory statements, Cummins admitted that she did not have evidence that
22 Lollar was the author. When asked about a document, marked as Exhibit 9 during her
23 deposition, Cummins claimed that the exhibit falsely stated that she was a cyberstalker
24 and . . . they call me a crackpot. I’m psycho.” (MacPhail Decl., Exh. A (Plaintiff’s
25 Depo., 84:16-20).) Cummins admitted, however, that she did not know who posted
26 Exhibit 9 to the Internet. (*Id.* (Plaintiff’s Depo., 84:2-4).) Similarly, Cummins claimed
27 that a document marked as Exhibit 20 was defamatory because it said, “I’m a
28 quote/unquote morbid cyberstalker who should be in jail for her crimes.” (*Id.* (Plaintiff’s

1 Depo., 131:23-132:4.) Again, Plaintiff admitted that she had no evidence to prove that
2 Lollar authored Exhibit 20. (*Id.* (Plaintiff’s Depo., 131:3-7).) As to another document,
3 marked as Exhibit 21, which allegedly contained the defamatory statement that Cummins
4 was a “cyberstalker” (*id.* (Plaintiff’s Depo. 132:23-25)), Cummins again admitted she did
5 not know who the author was. (*Id.* (Plaintiff’s Depo., 132:15-18).) Plaintiff claimed that
6 a document marked as Exhibit 23 defamed her by calling her “a quote/unquote notorious
7 crackpot stalker. . . . And they post that I am stalking people I’ve never even heard of
8” (*Id.* (Plaintiff’s Depo., 137:6-14).) When asked whether this document was drafted
9 by Lollar, Cummins admitted she had no evidence as to who posted this statement on the
10 Internet. (*Id.* (Plaintiff’s Depo., 137:2-5).)

11 Thus, even if these expressions were not constitutionally protected opinion,
12 Cummins has failed to present any evidence that Lollar is the author of the Internet
13 postings that accuse her of being a “cyberstalker,” “crackpot,” “psycho,” and a “crackpot
14 stalker.” Consequently, Plaintiff cannot prevail against Lollar on these claims.

15 **C. CUMMINS IS A LIMITED PUBLIC FIGURE**

16 A public official is prohibited “from recovering damages for a defamatory
17 falsehood relating to his official conduct unless he proves that the statement was made
18 with ‘actual malice’ – that is, with knowledge that it was false or with reckless disregard
19 of whether it was false or not.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80,
20 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). This “actual malice” requirement has been
21 extended to “public figures.” *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S. Ct.
22 1975, 18 L. Ed. 2d 1094 (1967).

23 In the *Gertz* decision, the Court observed that the
24 characterization of a Plaintiff as a public figure “may rest on
25 either of two alternative bases. In some instances an individual
26 may achieve such pervasive fame or notoriety that he becomes
27 a public figure for all purposes and in all contexts. More
28 commonly, an individual voluntarily injects himself or is drawn

1 into a particular public controversy and thereby becomes a
2 public figure for a limited range of issues.”

3 *Copp*, 45 Cal. App. 4th at 843-44 (quoting *Gertz*, 418 U.S. at 315).

4 “*Copp* . . . sets forth the elements that must be present in
5 order to characterize a Plaintiff as a limited purpose public
6 figure. First, there must be a public controversy, which means
7 the issue was debated publicly and had foreseeable and
8 substantial ramifications for nonparticipants. Second, the
9 Plaintiff must have undertaken some voluntary act through
10 which he or she sought to influence resolution of the public
11 issue. In this regard it is sufficient that the Plaintiff attempts to
12 thrust him or herself into the public eye. And finally, the
13 alleged defamation must be germane to the Plaintiff’s
14 participation in the controversy.”

15 *Gilbert v. Sykes*, 147 Cal. App. 4th 13, 24, 53 Cal. Rptr. 3d 752 (2007) (quoting *Ampex*
16 *Corp. v. Cargle*, 128 Cal. App. 4th 1569, 1577, 27 Cal. Rptr. 3d 863 (2005)).

17 “A person *becomes* a limited public figure by injecting himself into the public
18 debate about a topic that concerns a substantial number of people. Once he places
19 himself in the spotlight on a topic of public interest, his private words and conduct
20 relating to that topic become fair game.” *Gilbert*, 147 Cal. App. 4th at 25 (emphasis in
21 original).

22 In this case, Cummins has made herself a limited public figure in the field of
23 animal welfare – rescue, rehabilitation, and care. There is public interest in the protection
24 of wildlife and Cummins has voluntarily and publicly involved herself in that issue. Her
25 postings on the Internet evidence her voluntary acts seeking to involve herself in
26 promoting animal welfare to the public and to influence the public debate concerning
27 animal rescue and rehabilitation. Moreover, Cummins has voluntarily thrust herself into
28 the public eye concerning the personal attacks between herself and Lollar by posting on

1 the Internet comments regarding her own experience as an intern at Batworld and
2 Lollar's conduct and activities. Because Cummins has publicly aired on the Internet her
3 personal dispute with Lollar, the alleged defamatory comments by Lollar are germane to
4 Cummins' participation in the public controversy.

5 As a result, Cummins is a limited public figure with respect to the field of animal
6 welfare as well as the personal attacks between herself and Lollar. Therefore, Cummins
7 is required to show actual malice to prevail on her defamation claims.

8 Cummins contends that when Lollar posted on the Internet that Cummins was
9 convicted of crimes, she acted with reckless disregard for the statement's truth or falsity.
10 Cummins argues that "[t]he original post made by another stated Mary Cummins 'was
11 charged with credit card forery (sic) and theft!' . . . That was posted by an anonymous
12 person on an anonymous blog . . . It was not a credible source and it said 'charged with,'
13 not 'convicted.'" (Plaintiff's Supp. Brief at 4 [Doc. # 86].) Plaintiff provides no
14 evidence to support her assertion that the source was not credible or that Lollar was more
15 than negligent.

16 Cummins' burden of proving "reckless disregard" is not an easy one:

17 The reckless disregard standard requires a high degree of
18 awareness of . . . probable falsity . . . There must be sufficient
19 evidence to permit the conclusion that the defendant in fact
20 entertained serious doubts as to the truth of his publication. . . .

21 Gross or even extreme negligence will not suffice to establish
22 actual malice; the defendant must have made the statement with
23 knowledge that the statement was false or with actual doubt
24 concerning the truth of the publication.

25 *Annette F. v. Sharon S.*, 119 Cal. App. 4th 1146, 1167, 15 Cal. Rptr. 3d 100 (2004)
26 (quotation marks and citations omitted). Given this high standard for finding reckless
27 disregard, Cummins' personal belief that Lollar's source was not credible is not sufficient
28 to meet it.

1 As further argument for finding malice, Cummins contends that Lollar continued
2 to post the defamatory statements that Cummins was convicted of crimes even after
3 having been notified of their falsity. Cummins asserts that she sent two cease and desist
4 email messages to Lollar, which Lollar admits receiving. (Plaintiff's Opp., Exh. 3 [Doc.
5 # 59].) Cummins contends that Lollar's receipt of these email messages is evidence that
6 she was on notice of the falsity of her Internet posting. In her deposition, however, Lollar
7 explains that "I deleted the post because we received a cease and desist. I deleted every
8 post on World Bat Line where you [Plaintiff] were a part of the comment thread." (*Id.*)
9 Because Cummins neither disputes this deposition testimony nor provides any evidence
10 to controvert the testimony, her evidence of Lollar's receipt of her cease and desist
11 emails, without evidence that Lollar continued to post the statements thereafter, is not
12 sufficient to foreclose summary judgment on the issue of malice.¹

13 Cummins does not address the issue of malice with respect to the false statement
14 that she was charged with criminal contempt. In fact, apparently, even Defendants'
15 counsel herein believed that Cummins was found in criminal contempt as he was arguing
16 such as recently as May 11, 2012, in Defendants' opposition to Plaintiff's preliminary
17 injunction motion. In said opposition, Defendants' counsel asserted that the statement of
18 criminal contempt was true but nevertheless, Defendants would delete the word,
19 "criminal." [Doc. # 31.] In the Order denying Plaintiff's preliminary injunction motion,
20 this Court explained that Plaintiff was found in civil contempt, not criminal contempt.
21 (Order Denying Mot. for Prelim. Inj., filed July 17, 2012 [Doc. # 49].) Cummins,
22 however, provides no evidence that Lollar knew of the falsity of the statement before this
23 Court's order denying preliminary injunction, and provides no evidence that Lollar
24 continued to post that statement after this Court's July 17, 2012 Order. Having failed to
25

26 ¹ Even if Cummins could prove malice for Defendants' Internet posting of statements that she
27 was convicted of crimes, to the extent such posting was the republication of information posted by
28 another person, Defendants would be immune from liability. 47 U.S.C. § 230(c)(1); *Barrett v. Rosenthal*, 40 Cal. 4th 33, 63, 51 Cal. Rptr. 3d 55 (2006).

1 produce any evidence of malice (i.e., that Defendants acted with knowledge of falsity or
2 reckless disregard of truth or falsity of a statement when posting such statement on the
3 Internet), Cummins fails to show that a genuine issue of material fact remains.

4 **V.**

5 **CONCLUSION**

6 Based on the foregoing, Defendants are entitled to summary judgment on
7 Cummins' defamation claims. Furthermore, because Cummins' other claims (intentional
8 interference with business relations, intentional interference with prospective economic
9 advantage, and intentional infliction of emotional distress) are all premised on the alleged
10 defamation, summary judgment is warranted as to all of Cummins' claims.

11 Accordingly, Defendants Lollar and Bat World Sanctuary's motion for summary
12 judgment is GRANTED. By no later than November 30, 2012, Plaintiff Cummins shall
13 file a status report regarding her efforts to serve her Second Amended Complaint on all
14 remaining defendants.

15
16 DATED: November 16, 2012

17 
18 DOLLY M. GEE
19 UNITED STATES DISTRICT JUDGE
20
21
22
23
24
25
26
27
28