STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY, SS SUPERIOR COURT

Case No. 218-2022-CV-00803

Eric Spofford

*Plaintiff*

v.

New Hampshire Public Radio, Inc., et al.

*Defendants*

**NHPR Defendants' Opposition to Plaintiff's Motion for Limited Discovery Related to Curing Perceived Deficiencies with Complaint**

Defendants New Hampshire Public Radio, Inc. ("NHPR"), Lauren Chooljian, Jason Moon, and Dan Barrick ("NHPR Defendants") oppose Plaintiff's Motion for Limited Discovery Related to Curing Perceived Deficiencies with Complaint on the following grounds.

**ARGUMENT**

In response to the Court's order dismissing his complaint for failure to allege sufficient facts to support the actual malice element of his defamation claim, Eric Spofford now requests that the Court grant him unlimited access to NHPR's recordings of its interviews with six of its sources, Lauren Chooljian's "notes concerning and communications with" those six sources, her "notes concerning and communications with" former GRC human resources director Lynsie Metivier and any recordings of her call with Chooljian, and Chooljian's "notes concerning and communications with the mother of Eric's eldest son, Amy Cloutier (formerly Anagnost), and recordings (if any) of her interview(s)." (Mot. at 1.) In support of his extraordinary request for what would amount—his original complaint having been dismissed—to pre-complaint discovery, Spofford claims that he needs to listen to recordings of interviews Chooljian

conducted and to read her notes and communications with sources *before* he has alleged a viable cause of action, and that this extraordinary inversion of the usual order of operations is somehow necessary for him to have "a fair opportunity to sufficiently allege actual malice."[1] (Mot. at 2.)

Spofford had ample opportunity in his 90-page complaint to allege facts sufficient to establish actual malice, where (as characterized in the motion) he alleged generally that "each source [NHPR relied on] was biased, motivated to harm Eric's reputation, and inherently unreliable . . . ." (Mot. at 3.) The Court's order granting the motion to dismiss leaves no doubt that the Court understood that this was Spofford's position. *See* Order on Motions to Dismiss, April 17, 2023, at 19 ("[T]he primary issue relevant to actual malice in this case is the reliability of NHPR's sources. Spofford alleges that all of the identified sources were unreliable or biased against him, and that they shared motives to lie and cause harm to his reputation."). What the Court did not find in Spofford's complaint was a factual basis to support his claim that the NHPR Defendants "acted in bad faith in relying on these sources, or were subjectively aware that the information provided by these sources was probably false . . . ." *Id*. at 20. NHPR's story was based on nearly 50 sources—4 who are named, and 2 more whom Spofford acknowledges are real. Beyond his generalized insistence that everyone is out to get him, Spofford has failed to allege a factual basis for concluding that NHPR's sources lied, let alone—as would be required to establish actual malice—that NHPR either knew that its story was false or acted with reckless disregard for its truth or falsity. *Nash v. Keene Pub. Corp*., 127 N.H. 214, 222 (1985). Having

[1] Spofford first sought discovery while the NHPR Defendants' motion to dismiss was pending. The grounds for denying discovery are even stronger now that the Court has reviewed Spofford's allegations and found them insufficient to state a claim.

failed to allege what was required to get past NHPR's motion to dismiss, Spofford now asks the Court to dispense with that requirement and let him proceed to discovery anyway.[2]

It is true that actual malice is a "subjective standard," *Lemelson v. Bloomberg L.P.*, 903 F.3d 19, 24 (1st Cir. 2018) (quotation marks omitted)—but that does not mean Spofford needs pre-complaint discovery in order to have "a fair opportunity" to allege that element of his claim. (Mot. at 5.) Instead, before he is entitled to discovery, Spofford must first "la[y] out enough facts from which malice might reasonably be inferred[.]" *Lemelson*, 903 F.3d at 24 (quotation marks omitted); *see also Stone v. Bruce*, No. 2018-0230, 2018 WL 6301907, at *2 (N.H. Nov. 27, 2018) (non-precedential order) (affirming dismissal of defamation complaint where "the plaintiff failed to allege any facts that would . . . support a finding that the defendant doubted the veracity of her statements when she published them."); *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 58 (1st Cir. 2012) (affirming dismissal of defamation complaint where "none of [plaintiff's] allegations . . . plausibly suggest that, given the articles' reporting, the [defendant] either knew that its statements were false or had serious doubts about their truth . . . ."); *Resolute Forest Prod., Inc. v. Greenpeace Int'l*, 302 F. Supp. 3d 1005, 1027–28 (N.D. Cal. 2017) ("[T]he circuits that have considered the question have uniformly held that a claim may be dismissed for failing plausibly to allege actual malice without permitting discovery."). In granting NHPR's motion to dismiss, the Court correctly applied the rule that dismissal is warranted where "[t]he plaintiff [does] not plead any *facts* in her complaint to support" her legal theories. *Cluff-Landry v. Roman Cath. Bishop of Manchester,* 169 N.H. 670, 677 (2017) (emphasis added); *see also id.*

[2] Spofford claims that "[v]irtually every allegation" in his complaint "was tethered to objective evidence about the sources, their supposed stories, and third-party witnesses and records, including, for example, the New Hampshire Department of Justice, Office of the Attorney General." (Mot. at 6.) NHPR painstakingly addressed in its motion to dismiss the "objective evidence" Spofford cited in his complaint and demonstrated that none of it supported an inference of actual malice. NHPR does not repeat that analysis here.

("[W]e conclude that *the facts she alleged* do not, as a matter of law, establish that she 'engaged in an act protected by' the Act.") (emphasis added).

According to Spofford, *Nash v. Keene Publishing* "supports granting this Motion" because it "cautioned that the 'issue of malice does not readily lend itself to summary disposition.'" (Mot. at 5 (quoting 127 N.H. at 223).) But the fact that courts do not "readily" dismiss defamation complaints on the pleadings does not alter the rule that plaintiffs must allege sufficient facts to support their claim—including the element of actual malice. Instead, *Nash* makes clear that there must be "at least some affirmative circumstantial evidence" (or at the pleading stage, specific alleged facts) "from which malice could be inferred." 127 N.H. 214, 224 (1985).[3] Spofford identified no evidence from which malice could be inferred in his complaint, and his motion for discovery provides no reason to expect that the discovery he seeks would lead him to such evidence. The Court should decline to issue an order that would let Spofford go digging around in NHPR's files, based on nothing more than generalized conclusory accusations, in search of a factual basis for his claim.

Spofford proposes to solve the problem he has encountered in trying to allege actual malice with an affidavit where he would state that NHPR's reporting about him is false. (Mot. at 8 n. 5.) Everyone is well aware by now that this is Spofford's position, and NHPR reported his denial in its story. But if a defamation plaintiff could avoid dismissal for failure to allege actual malice simply by declaring that a story published about him is false, no defamation claim would ever be dismissed on the pleadings (every defamation plaintiff necessarily alleges that the story

[3] In *Nash* there was an obvious reason on the face of the allegedly defamatory publication to doubt its veracity: the author claimed that the police officer plaintiff had previously destroyed ("zeroed") *five* police cars without losing his job. *See* 127 N.H. at 225 ("[I]t is unlikely that the city would continue to employ a patrolman who had 'zeroed' five police cruisers before the incident in question."). As NHPR documented in its motion to dismiss, for all of his bluster, Spofford has identified no plausible reason why NHPR should have doubted the veracity of its story.

at issue is false). Moreover, denials of the sort Spofford proposes to present in an affidavit are "so commonplace . . . that, in themselves, they hardly alert the conscientious reporter to the likelihood of error." *Harte–Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 691 n. 37 (1989) (quotation marks omitted) ("Of course, the press need not accept denials, however vehement . . . .")

Spofford cites *New England Data Services, Inc. v. Becher*, 829 F.2d 286 (1st Cir. 1987) for the proposition that he "should have the meaningful opportunity," before amending his complaint, "to discover . . . fact[s] peculiarly within defendants' knowledge and which are difficult to expose." (Mot. at 7 (quotation marks omitted).) But the situation in *Becher* was very different than the situation here. The plaintiff had alleged a RICO mail and wire fraud claim. The complaint "clearly set out a general scheme, which very plausibly was meant to defraud the plaintiff, and also probably involved interstate commerce"—and given their respective locations it was "difficult to perceive how the defendants would have communicated without the use of the mail or interstate wires." *Id*. at 291. In that specific situation, the court held, "requiring plaintiff to plead the time, place and contents of communications between the defendants, without allowing some discovery . . . seems unreasonable." *Id*. In other words, the plaintiff had clearly and plausibly alleged a fraudulent scheme; all that was missing were a few details that were certain to exist. Here, however, Spofford has not clearly or plausibly alleged any basis for concluding that NHPR acted with actual malice, and he articulates no reason to think that the discovery he seeks would uncover evidence of actual malice. Unlike in *Becher*, what he is seeking is not a particular detail that is certain to exist, but instead facts the potential existence of which is based on nothing more than unsupported, indeed implausible, speculation by Spofford. The two situations are not at all "analogous." (Mot. at 6.)

Spofford insists that the discovery he seeks would let him "assess . . . the NHPR Defendants' subjective beliefs and the plausibility of the sources' accounts." (Mot. at 7.) But that is not how litigation works. A plaintiff cannot get around basic pleading requirements by pointing out that it would be helpful if, instead of having to alleged sufficient facts to support his claim before the door to discovery opens, he could just go straight to discovery in hopes of encountering material that could form the basis for a viable complaint. Nor does Spofford get anywhere with the suggestion that denial of this motion would amount to the announcement of a requirement that a plaintiff must allege "smoking gun evidence" (Mot. at 2) in order to state a claim for defamation. The problem with Spofford's complaint is not that he does not have "smoking gun evidence" in the form of direct access to Lauren Chooljian's state of mind; it is that nowhere in his 90-page complaint does he allege actual facts that suggest NHPR knew or had reason to think that its story was false.

Spofford suggests that NHPR should welcome discovery if it has nothing to hide. *See* Mot. at 7 ("If this story . . . was meticulously investigated and reported, then this discovery would only serve to enhance [NHPR's] defense."). One problem with this argument is that, by Spofford's logic, defendants who have been targeted with meritless lawsuits should always welcome discovery, a proposition that makes little sense.

A second problem, more specific to a defamation lawsuit against a news organization, is that discovery into how journalists work with their sources raises First Amendment concerns that enhance the importance of ensuring that threshold pleading requirements are met. NHPR briefed this issue in response to Spofford's first attempt to initiate discovery; the key point is that "trial courts are understandably wary of allowing unnecessary discovery where First Amendment values might be threatened . . . ." *Weyrich v. New Republic, Inc*., 235 F.3d 617, 628 (D.C. Cir.

2001). More specifically, in public figure defamation suits "there is a powerful interest in ensuring that free speech is not unduly burdened by the necessity of defending against expensive yet groundless litigation." *Michel v. NYP Holdings, Inc*., 816 F.3d 686, 702 (11th Cir. 2016). "[T]he actual malice standard was designed to allow publishers the 'breathing space' needed to ensure robust reporting on public figures and events." *Id*. "Forcing publishers to defend inappropriate suits through expensive discovery proceedings in all cases would constrict that breathing space in exactly the manner the actual malice standard was intended to prevent." *Id*.

Because "forcing defamation defendants to incur unnecessary costs can chill the exercise of constitutionally protected freedoms," there is "particular value in resolving defamation claims at the pleading stage." *Biro v. Condé Nast*, 963 F. Supp. 2d 255, 264, 279 (S.D.N.Y. 2013) (quotation marks omitted); *see also Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 592 (D.C. App. 2000) (recognizing the importance of dispositive motion practice in cases implicating the First Amendment because even "[t]he threat of prolonged and expensive litigation has a real potential for chilling journalistic criticism and comment on public figures and public affairs.") (quotation marks omitted); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) ("[W]ould-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court *or fear of the expense of having to do so.*") (emphasis added). A key reason we have the actual malice standard is to protect speakers from the expense and chilling effect of potential litigation; its First Amendment value would be reduced if public figures were permitted to proceed to discovery without first having made a *prima facie* showing of actual malice.

As the First Circuit has put the point, before discovery is permitted on a defamation claim against a news organization, "the court should be satisfied that a claim is not frivolous, a pretense

for using discovery powers in a fishing expedition." *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 597 (1st Cir. 1980). The fact that this is a defamation lawsuit by a public figure against a news organization thus argues for extra caution before discovery is permitted, not (as Spofford suggests) for ordering extraordinary pre-complaint discovery that would not otherwise be permitted.

Spofford suggests, misleadingly, that *Downing v. Monitor Pub. Co. Inc*., 120 N.H. 383 (1980) stands for the proposition that "[i]n New Hampshire, a defamation plaintiff who must demonstrate actual malice is entitled to source discovery," and that "[t]o secure that discovery, the plaintiff must merely proffer that there is a genuine issue as to the *falsity* of the NHPR Defendants' defamatory statements . . . ." (Mot. at 8.) Spofford's claim is misleading because the standard he points to in *Downing* is the standard for requiring a defendant to reveal the identities of confidential sources, not the threshold requirement for stating a cause of action for defamation. *See* 120 N.H. at 384 ("The issue in this libel case is whether the defendant should be required to disclose the source of its information."). The same goes for *de Laire v. Voris*, 2021 WL 6883274 at *3 (D.N.H. Nov. 29, 2021) (also about when journalists are required to disclose the identities of confidential sources). Neither case holds or suggests that discovery is available to any plaintiff who alleges simply that a story published about them is false, if their complaint does not also allege facts sufficient to establish all the other elements required to state a claim for defamation.

As for Part I, Article 14 of the New Hampshire Constitution, the point of that provision is "to guard against arbitrary and discriminatory infringements upon access to courts." *Huckins v. McSweeney*, 166 N.H. 176, 180 (2014). It is "basically an equal protection clause in that it implies that all litigants similarly situated may appeal to the courts both for relief and for defense

under like conditions and with like protection and without discrimination." *Id*. (quotation marks omitted). There is nothing discriminatory about requiring Spofford to allege facts to support his legal theory before he gets to set the mechanisms of discovery into motion—as would be required of any other litigant. *See id*. ("The right to a remedy is not a fundamental right, but is relative and does not prohibit all impairments of the right of access.") (quotation marks omitted). Spofford "has a right to his day in court" (Mot. at 8), but he does not have the right to have the usual rules of civil litigation suspended, or to be excused from the pleading requirements other plaintiffs are expected to meet.

WHEREFORE, the NHPR Defendants respectfully request that Plaintiff's motion for discovery be denied.

Dated this 8th day of May, 2023.

Respectfully Submitted,
New Hampshire Public Radio, Inc., Lauren Chooljian, Jason Moon, Dan Barrick

By their Attorneys,
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*/s/ Sigmund D. Schutz*

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I hereby certify that on this date this document was copied to all counsel via the electronic filing system.

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