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Attorneys for Defendant,
OLGA MARCELA ESCOBAR-ECK

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

JOSHUA BILLAUER,

Plaintiff,

vs.

OLGA MARCELA ESCOBAR-ECK; and DOES 1 through 1,000,

Defendants.

CASE NO. 37-2021-00006367-CU-DF-CTL

[Assigned to Hon. Kenneth J. Medel, Dept. C-66]

DECLARATION OF SCOTT MCCASKILL IN SUPPORT OF DEFENDANT'S MOTION TO STRIKE PORTIONS OF PLAINTIFF'S COMPLAINT

[Filed Concurrently with Notice; Memorandum of Points and Authorities; [Proposed] Order]

Date: October 1, 2021
Time: 9:30 a.m.
Dept.: C-66

Complaint Filed: February 16, 2021
Trial Date: None Set

I, Scott McCaskill declare as follows:

1. I am an attorney at law licensed to practice in the State of California. I am a partner with the law firm of Gordon Rees Scully Mansukhani, LLP, attorneys of record for defendant Olga Marcel Escobar-Eck ("**Defendant**") in the above-captioned matter. I am one of the attorneys responsible for the handling of this file and have personal knowledge of the facts set forth below. I make this declaration in support of Defendant's motion to strike portions of

the Complaint

2. Pursuant to Code of Civ. Proc. Section 430.41, subdivision (a), I have met and conferred with Janna Ferraro, Esq., counsel for plaintiff Joshua Billauer ("**Plaintiff**"), concerning Plaintiff's Complaint and the grounds for the motion to strike. In particular, on March 25, 2021, I sent Cory Briggs, Esq., counsel for Plaintiff, a meet and confer letter setting forth the deficiencies in the Complaint. A true and correct copy of my March 25, 2021 letter is attached hereto as **Exhibit 1.**

3. Further, on Friday, April 23, 2021, I had telephone call Ms. Ferraro, regarding the contents of my March 25, 2021 letter. However, despite good faith efforts, we were unable to resolve the issues raised as to the Complaint, which are reflected in the motion to strike portions of the Complaint.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated this 28th day of April, 2021.

Scott McCaskill

Gordon Rees Scully Mansukhani, LLP
101 W. Broadway, Suite 2000
San Diego, CA 92101

EXHIBIT 1

EXHIBIT 1

SCOTT W. MCCASKILL
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March 25, 2021

BY U.S. MAIL ONLY

Cory J. Briggs, Esq.
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Re: **Joshua Billauer v. Marcela Escobar-Eck**
San Diego Superior Court Case No.: 37-2021-00006367-CU-DF-CTL

MEET AND CONFER CORRESPONDENCE

Dear Counsel,

Please allow this correspondence to serve as part of the meet and confer process as required by Code of Civil Procedure §§ 430.41 and 435.5 in relation to filing a demurrer and motion to strike the Complaint. As set forth herein, the Complaint is subject to demurrer, as it fails to state causes of action for libel *per se* and Intentional Infliction of Emotional Distress. Additionally, the Complaint is subject to a motion to strike vis-à-vis the claim for punitive damages, as the Complaint does not allege malice, fraud, or oppression.

I. FACTUAL BACKGROUND

A. Complaint

Plaintiff Joshua Billauer ("P**laintiff**") filed suit against defendant Marcela Escobar-Eck ("**Defendant**") for claims arising out of a tweet Defendant allegedly published on the Twitter social media platform. In his Complaint, Plaintiff asserts two causes of action: (1) Libel *Per Se* and (2) Intentional Infliction of Emotional Distress ("**IIED**").

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II. LIBEL *PER SE*

The first cause of action[1] for libel *per se* fails to state facts sufficient to constitute a cause of action as required by Code of Civil Procedure § 430.10(e). In particular, Plaintiff fails to plead all the elements of a cause of action for libel *per se* and fails to plead special damages to support a libel claim.

A. Elements of Cause of Action for Libel *Per Se*

A statement is libelous *per se* if it defames the plaintiff on its face, that is, without the need of extrinsic evidence to explain the statement's defamatory nature. (Cal. Civ. Code § 45a.) Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves he has suffered special damage as a proximate result thereof. (*Bartholomew v. YouTube*, LLC. (2017) 17 Cal.App.5th 1217, 1226.)

The critical determination of whether the allegedly defamatory statement constitutes fact or opinion is a question of law. (*Gregory v. McDonnell Douglas Corp*. (1976) 17 Cal.3d 596, 601.) Where potentially defamatory statements "are published in a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole," language which generally might be considered as statements of fact "may well assume the character of statements of opinion." (*Id*.)

Thus, in *Greenbelt Co-op. Pub. Ass'n v. Bresler* (1970) 398 U.S. 6, 13-14, for example, the United States Supreme Court acknowledged use of the word 'blackmail' as descriptive of the plaintiff's negotiating position in the context of the particular circumstances involved in that case was not libelous. Similarly, in *Old Dominion Branch No. 496, Nat. Ass'n of Letter Carriers, AFL-CIO v. Austin* (1974) 418 U.S. 264, 268, the Supreme Court held that the publication of Jack London's definition of 'scab,' containing the phrase "traitor to his God, his country, his family and his class" and other words suggesting that plaintiffs had 'rotten principles' and 'lacked character,' did not constitute libel. Instead, the Court held "[s]uch words were obviously used . . . in a loose, figurative sense to demonstrate the union's strong disagreement with the views of those workers who oppose unionization. Expression of such an opinion, even in the most pejorative terms, is protected under federal labor law." (*Id*. at 284.) The high tribunal, reversing a state court injunction of union picketing, stated in *Cafeteria Union v. Angelos* (1943) 320 U.S. 293, 295 that ". . . to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like 'unfair' or 'fascist'—is not to falsify facts."

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[1] Although the Complaint simply alleges a single cause of action for "Recovery of Damages", this cause of action does not appear to exist. As such, Defendant has attempted to glean the actual claims raised in the Complaint from the nature of the allegations.

B. Allegations

Plaintiff makes five primary allegations in support of the cause of action for libel *per se* in paragraph 10(A) of the Complaint:

i. Cyberbullying is a crime throughout the United States of America and its various territories.

ii. Defendants' assertion in the Criminal Tweet that PLAINTIFF "is engaging in cyberbullying' was false at the time it was published on Twitter, has always been false, and remains false. The Criminal Tweet was therefore libelous on its face.

iii. PLAINTIFF's employer and others who read the Criminal Tweet knew immediately that ECK was referring to PLAINTIFF and understood that ECK was charging him with engaging in the crime of cyberbullying.

iv. The publication of the Criminal Tweet was not privileged.

v. As a result of the publication and/or re-publication of the Criminal Tweet, PLAINTIFF has been exposed to hatred, contempt, ridicule, and/or obloquy; has been shunned or avoided; and/or has tended to be injured in his occupation.

C. Pleading Does Not State a Cause of Action for Libel *Per Se*

1. Allegations Do Not Refer to a Recognized "Crime"

While it is true that allegations that a plaintiff committed a crime is libelous on its face, there does not appear to be a recognized crime of "cyberbullying" within the state of California or, indeed, throughout the country. Instead, the term "cyberbullying" is a vague, amorphous concept that does not refer to a specific crime the way "assault" or "theft" does. Indeed, the Complaint fails to identify any criminal statute that prohibits, or even uses the word, "cyberbullying". As such, the Complaint fails to allege Defendant accused plaintiff of a crime, and thus the tweet at issue is not libelous *per se*.

Instead, it is clear from the context that the tweet was issued within the context of a heated zoning dispute Defendant and Plaintiff are both involved in. Just as the allegation of "blackmail" in *Bresler* was not libelous, neither is the statement here that Plaintiff was engaged in "cyberbullying". Rather, the charge of cyberbullying was clearly related to the back-and-forth online exchanges between the parties in a heated public debate, not to allegation of criminal conduct. Thus, beyond not being libelous on its face, the tweet is not libelous at all and the claim fails.

///

2. Complaint Fails to Plead Special Damages

As the tweet is not libelous *per se*, Plaintiff must plead special damages in order to state a claim for libel. Allegations that a plaintiff "has suffered in an amount, which, as yet, cannot be ascertained and which will be proven at trial" are insufficient to allege special damages in a libel claim. (*Forsher v. Bugliosi* (1980) 26 Cal.3d 792, 807.) Instead, a plaintiff must be "able to plead injury to property, business, trade, profession or occupation, if these interests have been injured even though the monetary extent might not have been ascertainable." (*Id*.)

For example, in *Washer v. Bank of America* (1943) 21 Cal.2d 822, 825, overruled on other grounds, 52 Cal.2d 551, 343 P.2d 36, the plaintiff bank manager met the requirement by alleging he had been refused employment at various banks and would be unable to secure employment at any other bank. In *Pridonoff v. Balokovich* (1951) 36 Cal.2d 788, 792, the court held a general allegation of loss of prospective employment was not sufficient, but the loss of specific employment with a specific employer was. (*See also Peabody v. Barham* (1942) 52 Cal.App.2d 581, 585 disapproved of on other grounds by *MacLeod v. Tribune Pub. Co*. (1959) 52 Cal.2d 536 [holding allegations that by reason of the publication of the "defamatory article plaintiff has been by it injured in her good name, fame and reputation and has suffered damage thereby in the sum of $50,000 [] utterly fail to meet the requirements for alleging special damages."].)

In *Gomes v. Fried* (1982) 136 Cal.App.3d 924, 940, the plaintiff that he suffered no financial out-of-pocket losses as a result of the allegedly defamatory article; he lost no time from work, incurred no medical or other bills, and no economic loss in his employment. The appellate court ruled plaintiff failed to allege, much less prove, he incurred any special damages stemming from the article at issue. (*Id*.)

Here, Plaintiff simply alleges "[a]s a result of the publication and/or re-publication of the Criminal Tweet, PLAINTIFF has been exposed to hatred, contempt, ridicule, and/or obloquy; has been shunned or avoided; and/or has tended to be injured in his occupation." (Complaint, ¶ 10(A)(v).) These general allegations fail to identify any item of specific damages, and thus fail to state a claim for libel.

III. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The second cause of action for IIED fails to state facts sufficient to constitute a cause of action as required by Code of Civil Procedure § 430.10(e). In particular, Plaintiff fails to plead all the elements of a cause of action for IIED.

A. Elements of Cause of Action for IIED

A cause of action for intentional infliction of emotional distress exists when there is:

> (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress;
>
> (2) the plaintiff's suffering severe or extreme emotional distress; and
>
> (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.

(*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050–51) (*Hughes*.) A defendant's conduct is "outrageous" when it is so "extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Id*.) The defendant's conduct must be "intended to inflict injury or engaged in with the realization that injury will result." (*Id*.) Importantly, "[l]iability for intentional infliction of emotional distress 'does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.'" (*Id*. at 1051.)

B. Allegations

Plaintiff makes three primary allegations in support of the cause of action for IIED in paragraph 10 of the Complaint:

¶ 10(B)(i) Defendants' publication and/or re-publication of the Criminal Tweet was outrageous.

¶ 10(B)(ii) When publishing and/or re-publishing the Criminal Tweet, Defendants intended to cause harm to PLAINTIFF and/or acted with reckless disregard for the likelihood that PLAINTIFF would suffer emotional distress as a result of the publication and/or re-publication.

¶ 10(B)(iii) As a result of the publication and/or re-publication of the Criminal Tweet, PLAINTIFF has suffered severe emotional distress. The publication and/or re-publication constituted a substantial factor in causing such distress.

C. Pleading Does Not State a Cause of Action for IIED

1. Complaint Fails to Allege Outrageous Conduct

The allegations in the Complaint do not support a claim that Defendant engaged in extreme and outrageous behavior, which is defined as "conduct so extreme it goes beyond all possible bounds of decency." (CACI No. 1602.)

a. Mere Insults Insufficiently Outrageous

In evaluating whether a defendant's conduct was outrageous, it is "not enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to

inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort." (Rest.2d Torts, § 46, com. d.) Liability has been found "only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." (*Id*.)

"[M]ajor outrage is still essential to the tort; and the mere fact that the actor knows that the other will regard the conduct as insulting, or will have his feelings hurts, is not enough." (*Newby v. Alto Riviera Apartments* (1976) 60 Cal.App.3d 288, 297, fn. 2, disapproved on other grounds by *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 740, fn. 9, quoting Rest.2d Torts, § 46, com. f.)

Courts have long held that "plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's feelings are hurt. (Cochran v. Cochran (1998) 65 Cal.App.4th 488, 496.) There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.... " (*Id*.)

b. Case Law Clarifies Conduct that is Sufficiently "Outrageous"

Examples of decisions where a defendant's conduct was deemed sufficiently outrageous include: *Sanchez–Corea v. Bank of America* (1985) 38 Cal.3d 892, 909 (bank failed to advise plaintiffs, who were small business operators, that the bank would give no further loans, bank misrepresented that further loans would be made if plaintiffs assigned all past, present and future accounts receivable to the bank, then refused further loans after plaintiffs did so, bank forced plaintiffs to execute excessive guarantees and security agreements, and bank employees publicly ridiculed plaintiffs, including the use of profanities); *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496–497 (plaintiff employee, who was black, alleged he was fired in a despicable manner when his supervisor did so while shouting various racial epithets); *Newby v. Alto Riviera Apartments* (1976) 60 Cal.App.3d 288, 293 (When tenant got involved in rent protest, landlord shouted at her, ordered her out of her apartment within three days, threatened to throw her out personally, and said "We are going to handle this the way we do down South.").

In contrast, cases where a defendant's conduct was not deemed outrageous include: *Schneider v. TRW, Inc*. (9th Cir.1991) 938 F.2d 986, 992–993 (applying California law, summary judgment held proper where plaintiff's evidence showed her supervisor screamed, yelled, and made threatening gestures while criticizing her job performance); *Ankeny v. Lockheed Missiles and Space Co*. (1979) 88 Cal.App.3d 531, 536-537 (demurrer proper where plaintiff alleged his employer prevented him from becoming a union steward, transferred him from job to job, wrongly denied him promotions, assigned him inappropriate job tasks, and personally insulted him).

Pertinent to the present case, in *Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 498, the parties to an intimate relationship gone bad were feuding. Those feuds are often accompanied by

an exchange of hostile unpleasantries "intended to sting whoever sits at the delivery end." The court held that "[w]hile the pain inflicted might be real, the tort of intentional infliction of emotional distress was never intended to remove all such barbs. To hold otherwise would needlessly congest our courts with trials for hurts both real and imagined which are best resolved elsewhere." (*Id*.)

c. Complaint Does Not Allege Outrageous Conduct

Name-calling via Twitter does not provide a basis to claim outrageous conduct. Further, there are not sufficient allegations to support a claim that Defendant intended to cause, or was reckless as to causing, Plaintiff any emotional distress. As such, the cause of action fails to state a claim.

2. Complaint Fails to Allege Severe Emotional Distress

In order to state a cause of action for IIED, a complaint must plead specific facts that establish severe emotional distress resulting from defendant's conduct. (*Michaelian v. State Comp. Ins. Fund* (1996) 50 Cal.App.4th 1093, 1114.) Severe emotional distress means "emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it." (*Hughes, supra*, 46 Cal.4th at 1051.)

Conclusory allegations of distress are insufficient. Instead, a plaintiff must "set forth any facts which indicate the nature or extent of any mental suffering incurred as a result of the allegedly outrageous conduct. (*Bogard v. Employers Casualty Co*. (1985) 164 Cal.App.3d 602, 617–618.) For example, in *Wong v. Tai Jing* (2010) 189 Cal.App.4th 1354, 1376, evidence of losing sleep, upset stomach and anxiety did not constitute severe emotional distress of such lasting and enduring quality that no reasonable person should be expected to endure. In *Hughes*, the plaintiff's assertions that "she has suffered discomfort, worry, anxiety, upset stomach, concern, and agitation as the result of defendant's comments to her on the telephone" were held to "not comprise emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it." (*Hughes, supra*, 46 Cal.4th at 1051.)

Here, the Complaint simply alleges "[a]s a result of the publication and/or re-publication of the Criminal Tweet, PLAINTIFF has suffered severe emotional distress. The publication and/or re-publication constituted a substantial factor in causing such distress." (Complaint, ¶ 10(B)(iii).) The Complaint fails to state any particular emotional distress plaintiff allegedly suffered, much less severe emotional distress. As a result, the Complaint fails to sufficiently state a claim for IIED and the claim fails.

IV. PUNITIVE DAMAGES

The prayer for punitive damages is unsupported by the allegations of the Complaint and is therefore subject to a motion to strike. Under Code of Civil Procedure § 435(b)(1), "[a]ny party, within the time allowed to respond to a pleading may serve and file a notice of motion to strike the whole or any part thereof" of the pleading. Code of Civil Procedure § 436(a) further

allows the Court to "[s]trike out any irrelevant, false, or improper matter inserted in any pleading."

Code of Civil Procedure § 431.10 defines "irrelevant matter" as that term is used in Section 436 to mean an "immaterial allegation." Section 431.10(3) defines an "immaterial allegation" in any pleading as: "A demand for judgment requesting relief not supported by the allegations of the complaint or cross-complaint."

The Complaint includes an immaterial allegation, as defined by Section 431.10(b)(3), in the form of a prayer for judgment requesting relief not supported by the allegations of the Complaint. Plaintiff prays for "punitive damages according to proof" (Complaint, Prayer, ¶ C) and alleges "Defendants published and/or re-published the Criminal Tweet maliciously, oppressively, and fraudulently in retaliation for PLAINTIFF's lawful expression of opinions about economic growth and development in his community and the impact thereof on the quality of life in his community." (Complaint, ¶ 11(A).)

These conclusory allegations are insufficient within the meaning of section 3294. (*Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864, 872.) Moreover, the prayer is premised on the inadequate allegations that support the causes of action for libel *per se* and IIED, and therefore the prayer for punitive damages concomitantly fails.

V. CONCLUSION

We note that Defendant's deadline to respond to Plaintiff's Complaint is March 29, 2021. As the parties will not have sufficient time to meet and confer on the issues raised in this letter at least five days prior to March 29, 2021, we will file a declaration for an automatic 30-day extension of time for Defendant to respond to the Complaint. Based on the deficiencies identified above, we request Plaintiff withdraw the Complaint on or before **April 7, 2021**. In the interim, we will reach out to your office via telephone to discuss further.

Best regards,

GORDON REES SCULLY MANSUKHANI, LLP

Scott McCaskill

cc: Craig J. Mariam