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14 **SUPERIOR COURT OF CALIFORNIA**

15 **COUNTY OF SAN DIEGO**

16 JOSHUA BILLAUER,

17 Plaintiff,

18 vs.

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

21 Defendants.

22
23 AND ALL RELATED ACTIONS.

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

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

) **OPPOSITION TO PLAINTIFF AND**
) **CROSS-DEFENDANT JOSHUA**
) **BILLAUER'S EX PARTE**
) **APPLICATION TO SHORTEN TIME**
) **ON MOTION TO COMPEL**
) **DEPOSITION OF THIRD-PARTY**
) **WITNESS AND EXTEND DEADLINE**
) **FOR ANTI-SLAPP MOTION**

) Hearing Date: July 15, 2021
) Hearing Time: 8:30 a.m.

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

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Superior Court of California,
County of San Diego

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Clerk of the Superior Court
By Adriana Ive Anzalone, Deputy Clerk

1 pleading are properly denied where the proposed amendment would be futile. (*Royalty Carpet*
2 *Mills, Inc. v. City of Irvine* (2005) 125 Cal.App.4th 1110, 1125.)

3 Here, the Motion is futile because the Subpoena is void, as it failed to provide proper
4 notice to Ms. Escobar-Eck. To wit, along with the Subpoena Plaintiff also served a Notice to
5 Consumer or Employee (the “Notice”). However, the Notice was served on Ms. Escobar-Eck’s
6 counsel on July 2, 2021, the same date the Subpoena was served on Atlantis. (See Notice,
7 attached as **Exhibit 1** to Declaration of Scott McCaskill.) Thus, the Notice violates Code of
8 Civil Procedure section 1985.6, subd. (b)(3), which requires the Notice be served on the
9 employee “[a]t least five days prior to service upon the custodian of the employment records . . .
10 .” As such, the Notice is defective and Atlantis has exercised its rights under Code of Civil
11 Procedure section 1985.6, subd. (j) to not produce the requested documents. Thus, Plaintiff
12 seeks to waste this Court’s time by expediting a motion to compel a legally unenforceable
13 subpoena. The Court should deny the Motion on the grounds that the planned motion to compel
14 will be futile.

15 **B. Atlantis Cannot Comply With the Subpoena**

16 The Motion is further futile as it impermissibly seeks to force Atlantis, a non-party, to
17 define the claims brought by its employee and to determine what facts, witnesses, and documents
18 support its employees’ claims. As outlined in Atlantis’ objections, the Subpoena seeks to force
19 to produce:

20 Each and every **WRITING** that pertains in any way to the basis, nature,
21 and/or extent of Olga Marcela Escobar-Eck’s share of any and all financial
22 losses suffered by The Atlantis Group as a result of one or more of the
23 allegedly defamatory statements described in that certain cross-complaint
24 filed by Olga Marcela Escobar-Eck in San Diego County Superior Court
25 case no. 37-2021-00006367-CU-DF-CTL (a copy of which is attached
26 hereto as Exhibit “A”).

27 (Motion, Ex. B.)

1 This demand fails to identify the requested documents with reasonable particularity. To
2 wit, this demand would force Atlantis to speculate at what “financial losses” its employee, Ms.
3 Escobar-Eck, is claiming resulted from Plaintiff’s actions. Atlantis is not a party to the lawsuit
4 between plaintiff and Ms. Escobar-Eck and thus is not privy to what losses Ms. Escobar-Eck is
5 claiming as damages in her cross-complaint. As such, this demand calls for Atlantis to make
6 legal conclusions as to what its employee is claiming as damages.

7 Plaintiff’s categories of Examination contained in the Subpoena are similarly
8 objectionable as outlined below:

9 1. Category 1

10 Plaintiff demands Atlantis produce a designee to testify as to:

11 The basis, nature, and/or extent of Olga Marcela Escobar-Eck’s share of
12 any and all financial losses suffered by The Atlantis Group as a result of
13 one or more of the allegedly defamatory statements described in that
14 certain cross-complaint filed by Olga Marcela Escobar-Eck in San Diego
County Superior Court case no. 37-2021-00006367-CU-DF-CTL (a copy
of which is attached hereto as Exhibit “A”).

15 (Motion, Ex. B.)

16 This category is impermissibly vague as it does not describe the “financial losses suffered
17 by The Atlantis Group as a result of one or more of the allegedly defamatory statements”. The
18 category thus fails to describe the area of testimony with reasonable particularity in violation of
19 Code of Civil Procedure § 2025.230. Moreover, this category would force Atlantis to speculate
20 as to what financial losses Ms. Escobar-Eck is claiming resulted from plaintiff’s actions.

21 Atlantis is not a party to the lawsuit between plaintiff and Ms. Escobar-Eck and thus is not privy
22 to what losses Ms. Escobar-Eck is claiming as damages in her cross-complaint. As such, this
23 category calls for Atlantis to make legal conclusions as to what its employee is claiming as
24 damages.

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1 documents. The category thus fails to describe the area of testimony with reasonable
2 particularity in violation of Code of Civil Procedure § 2025.230.

3 As outlined above, the Subpoena is overly broad, vague, and calls for Atlantis to make
4 legal conclusions it cannot make. Plaintiff has failed to provide any authority that a non-party
5 can be forced to draw such legal conclusions regarding the claims made by a party, despite being
6 asked to provide such authority prior to bringing the Motion. (See Correspondence, attached as
7 **Exhibit 2** to McCaskill Dec.)¹

8 **C. Plaintiff Fails to Identify Any Basis to Extend Anti-SLAPP Deadline**

9 Plaintiff provides no basis for his requested extension of the deadline to file an Anti-
10 SLAPP motion. Indeed, plaintiff failed to raise this issue at all in the meet and confer
11 correspondence and thus failed to make a serious attempt to obtain “an informal resolution of
12 each issue” as required by the Discovery Act. (§ 2025, subd. (o); *DeBlase v. Superior Court*
13 (1996) 41 Cal.App.4th 1279, 1284, 49 Cal.Rptr.2d 229.) This alone is grounds to deny
14 Plaintiff’s requested extension.

15 Moreover, there is no nexus between the deposition Plaintiff is seeking and any Anti-
16 SLAPP motion he may wish to file. The purpose of the Anti-SLAPP law is to strike “cause[s] of
17 action against a person arising from any act of that person in furtherance of the person’s right of
18 petition or free speech under the United States Constitution or the California Constitution in
19 connection with a public issue. . . .” (C.C.P. § 425.16, subd. (b)(1).) In ruling on a motion under
20 Section 425.16, the trial court engages in a two-step process. First, “the defendant must establish
21 that the challenged claim arises from activity protected by section 425.16.” (*Baral v. Schnitt*
22 (2016) 1 Cal.5th 376, 384, (*Baral*).) Second, “[i]f the defendant makes the required showing, the
23 burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of
24 success.” (*Id.*)

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27 ¹ This email was not included as an Exhibit to the Motion.

1 Here, Plaintiff seeks to depose Atlantis as to the facts, witnesses and documents
2 underlying Cross-Complainant's as-yet-undefined damages claims. Nothing about that issue has
3 any nexus to whether the claim arises from protected activity. Moreover, the Cross-Complaint
4 alleges libel *per se*, for which damages are presumed. (*Barnes-Hind, Inc. v. Superior Court*
5 (1986) 181 Cal.App.3d 377, 382.) Thus, the Subpoena does not seek information relevant to
6 Cross-Complainant's probability of success. As such, there is no basis for Plaintiff's request to
7 extend the deadline to file an Anti-SLAPP motion.

8 **III. CONCLUSION**

9 As outlined above, Plaintiff's Motion is futile as it seeks to expedite the hearing to
10 enforce a defective subpoena. Further, the Subpoena cannot be enforced as it seeks to force a
11 non-party to define the claims of its party employee. Finally, there is no basis for Plaintiff's
12 request to extend the deadline to file an Anti-SLAPP motion. As such, the Motion should be
13 denied.

14 Respectfully submitted,

15 Dated: July 14, 2021

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21 MARCELA ESCOBAR-ECK

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23 By: /s/ Tamara Leetham

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