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9 **SUPERIOR COURT OF CALIFORNIA**
10 **COUNTY OF SAN DIEGO**

11 JOSHUA BILLAUER,

12 Plaintiff,

13 vs.

14 OLGA MARCELA ESCOBAR-ECK; and
15 DOES 1-1,000,

16 Defendants.

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19 OLGA MARCELA ESCOBAR-ECK,

20 Cross-complainant,

21 vs.

22 JOSHUA BILLAUER; and ROES 1-10,
23 inclusive,

24 Cross-defendants

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

**CROSS-COMPLAINANT MARCELA
ESCOBAR-ECK'S OPPOSITION TO
CROSS-DEFENDANT JOSHUA
BILLAUER'S SPECIAL MOTION TO
STRIKE CROSS-COMPLAINT**

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

Complaint Filed: February 16, 2021
Trial: Not Set

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1 Cross-complainant Marcela Escobar-Eck (“Escobar-Eck” or “Cross-complainant”)
2 respectfully submits the following memorandum of points and authorities in opposition to cross-
3 defendant Joshua Billauer’s Special Motion to Strike the Cross-complaint as follows:

4 **I. STATEMENT OF FACTS**

5 Marcela Escobar-Eck is the President, CEO, and a Shareholder of Atlantis Group Land
6 Use Consultants, a land use and strategic planning consulting firm in San Diego. (Declaration of
7 Marcela Escobar-Eck (“MEE Decl.”) ¶2.) Ms. Escobar-Eck has been with Atlantis for
8 approximately 14 years and prior to that, was an employee of the City of San Diego (the “City”)
9 for approximately 20 years. (Id.) While at the City, Ms. Escobar-Eck worked in the planning,
10 economic development, and development services departments, the departments responsible for
11 the City’s land use policy building permits and entitlements. (Id.)

12 In or around 2019, Atlantis was hired as a permit consultant by the All Peoples Church
13 (the “APC”); the APC sought to build a church in the City’s Del Cerro neighborhood and is
14 required to get the City’s plan development approval. (MEE Decl. ¶3.) By November 2020, the
15 APC project was early in the development process and Ms. Escobar-Eck, on behalf of Atlantis,
16 made a virtual presentation (due to COVID-19) to the Navajo Community Planners, an advisory
17 group for the Del Cerro neighborhood. During that meeting, Joshua Billauer privately messaged
18 her saying “I’m going to make sure you get sent back to where you came from.” (MEE Decl. ¶4.)
19 Shortly thereafter, Ms. Escobar-Eck learned of Mr. Billauer’s “SaveDelCerro” Instagram account.
20 (MEE Decl. ¶5.) On December 30, 2020, Mr. Billauer published an Instagram post titled
21 “Conflicts of Interest and Influence” that included a photo titled “Lobbyists” with the following
22 statement: “Church land use lobbyist Marcela Escobar-Eck, former Director of Development
23 Services for the City of San Diego, has a history exerting of improper influence with City
24 officials.” (MEE Decl. ¶6.) Thereafter, additional social media posts were published about Ms.
25 Escobar-Eck directly related to her job as a land use consultant, falsely claiming that she has been
26 involved in controversial projects, that she is a hypocrite, and two-faced. (MEE Decl. ¶11.)
27
28

1 **II. LEGAL STANDARD APPLICABLE TO ANTI-SLAPP MOTIONS**

2 Anti-SLAPP motions are special motions to strike intended for complaints or causes of
3 action that stifle a defendant’s constitutional right to petition or of free speech. These special
4 motions are governed by Code of Civil Procedure section 425.16(b)(1). In determining the special
5 motion to strike, the court considers the pleadings and supporting and opposing affidavits stating
6 the facts upon which the liability or defense is based. (Code Civ. Proc. § 425.16(b)(2).) A
7 defendant who files an anti-SLAPP motion to strike bears the initial burden of demonstrating that
8 the complaint arises from a constitutionally protected activity. (*World Financial Group, Inc. v.*
9 *HBW Ins. & Financial Services, Inc.* (2009) 172 Cal.App.4th 1561.) Accordingly, the defendant
10 must show that the conduct alleged in the complaint meets the statutory criteria for being an act in
11 furtherance of the defendant’s constitutional rights of petition or free speech in connection with a
12 public issue. (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.*
13 (2008) 163 Cal.App.4th 550.) If the defendant fails to meet this burden, the motion must be
14 denied. (*Blackburn v. Brady* (2004) 116 Cal.App.4th 670.)

15 Under this legal framework, it is Billauer’s burden to prove the Cross-complaint arises
16 from an act in furtherance of his right of petition or free speech, or prong one. (Code Civ. Proc. §
17 425.16(b)(1); *Equilon Enterprises, LLC v. Consumer Cause Inc.* (2002) 29 Cal.4th 53, 59; *Park v.*
18 *Bd. Of Trustees of Cal. State University* (2017) 2 Cal.5th 1057, 1062-63.) If this Court determines
19 Billauer has made a prima facie showing on prong one, the burden shifts to Ms. Escobar-Eck to
20 show a probability of prevailing on her claims against Billauer. (*Equilon, supra*, 29 Cal.4th at 67;
21 *Navallier v. Sletten* (2002) 29 Cal.4th 82, 88; *Area 51 Productions, Inc. v. City of Alameda* (2018)
22 20 Cal.App.5th 581, 592-593.)

23 **III. AS TO THE FIRST PRONG, THE CROSS-COMPLAINT DOES NOT ARISE**
24 **OUT OF AN ACT IN FURTHERANCE OF BILLAUER’S RIGHT OF PETITION**
25 **OR FREE SPEECH IN CONNECTION WITH A PUBLIC ISSUE**

26 Code of Civil Procedure section 425.16(e)(2)-(4) implicate the first prong when (1) an act
27 in furtherance of a person’s right of petition or free speech includes a statement made in
28 connection with an issue under review by a legislative, executive, or judicial body, or any other

1 official proceeding authorized by law (Code Civ. Proc. § 425.16(e)(2)); (2) a statement is made in
2 a public forum in connection with an issue of public interest (Code Civ. Proc. § 425.16(e)(3)); or
3 (3) any other conduct in furtherance of speech in connection with a public issue. (Code Civ. Proc.
4 § 425.16(e)(4).) The statute is construed broadly however, the statute is not intended to apply to
5 purely private transactions. (*Garretson v. Post* (2007) 156 Cal.App.4th 1508; *see also Weinberg*
6 *v. Feisel* (2003) 110 Cal.App.4th 1122.) Thus, to demonstrate prong one, Billauer must show his
7 conduct falls within one of the above categories. As discussed below, he fails to do so and fails
8 the prong one analysis.

9 **A. Not Made In Connection With An Issue Under Consideration Or Review**

10 Billauer’s defamatory statements about Ms. Escobar-Eck were not made “in connection
11 with an issue under consideration or review by a legislature, executive, or judicial body, or any
12 other official proceeding authorized by law.” (Code Civ. Proc. §425.16(e)(2).) The purpose of
13 425.16 section (e)(2) is essentially to protect the activity of petitioning the government for redress
14 of grievances and petition-related statements and writings. (*Briggs v. Eden Council for Hope &*
15 *Opportunity* (1999) 19 Cal.4th 1106, 1120–1121.) Billauer does not cite this subsection; there is
16 no law cited in support of this subsection and there is no evidentiary support, whether documents
17 or declarations, that Billauer made statements that Ms. Escobar-Eck (the subject of the
18 statements) or APC was, and is, an issue under consideration or review by a legislature,
19 executive, or judicial body, or any other official proceeding authorized by law. Moreover,
20 Billauer fails to submit evidence in support of his motion identifying the type of land
21 development project APC is, the type of City review it might undergo, when that City review has
22 or will occur, and that the APC is a type of land development project that constitutes an issue
23 under consideration or review by a legislature, executive, or judicial body, or any other official
24 proceeding authorized by law.

25 Instead, Billauer argues that his defamatory statements are actionable because Ms.
26 Escobar-Eck said so by purportedly opining in her deposition that the APC project is “still under
27 consideration and review by the City of San Diego.” Ms. Escobar-Eck’s deposition statements do
28 not alleviate Billauer’s burden to cite to the law and the Motion takes a liberal interpretation of

1 Ms. Escobar-Eck responding “Correct” to Billauer’s attorney’s request to identify an exhibit.
2 There is no piece of law or evidence that demonstrates his defamatory statements were made as
3 required under this subsection and there Billuaer cannot rely on this subsection to meet his prong
4 one burden.

5 **B. Not Connected With An Issue of Public Interest**

6 Billauer’s defamatory statements were not made “in connection with an issue of public
7 interest” and Billauer makes no argument that they were. (Code Civ. Proc. §425.16(e)(3).)To
8 meet CCP 425.16(e)(3), Billauer must demonstrate that his defamatory posts about Ms. Escobar-
9 Eck generally as a land use consultant were made in connection with an issue of public interest.
10 He does not do so. As with the above, Billauer’s Motion contains no legal analysis or citation that
11 makes his statements about Ms. Escobar-Eck an issue of public interest or show when a statement
12 is connected to an issue of public interest under 425.16(e)(3). Absent such analysis, Billauer all
13 but concedes that his defamatory statements about Ms. Escobar-Eck were not made in connection
14 to an issue of public interest. In the event he attempts to argue this point in his reply, case law
15 shows the statements are not protect under 425.16(e)(3).

16 In order to satisfy the public issue/issue of public interest requirement, in cases where the
17 issue is not of interest to the public at large, but rather to a limited, but definable portion of the
18 public (a private group, organization, or community), the constitutionally protected activity must,
19 at a minimum, occur in the context of an ongoing controversy, dispute or discussion, such that it
20 warrants protection by a statute that embodies the public policy of encouraging participation in
21 matters of public significance.(*Du Charme v. IBEW, Local 45* (2003) 110 Cal.App.4th 107, 119.)

22 Ms. Escobar Eck is not a concern to a substantial number of people nor is the APC project
23 Billauer has submitted no evidence to show otherwise. Arguably, APC relates to the Del Cerro
24 community but there is no evidence to demonstrate concern over APC within the Del Cerro
25 community. The statements, specifically that Ms. Escobar-Eck has a history of exerting improper
26 influence over City officials have no proximity or closeness to the APC project and there is no
27 nexus to APC. Billauer allegedly attacked Ms. Escobar-Eck about the search warrant based a
28 2007 search warrant directed at another individual’s activities from the late 1990s. (Notice of

1 Lodging, Exh. 17.) Billauer’s inflammatory and false statements about Ms. Escobar-Eck have no
2 nexus to the APC project, and are not connected to an issue of public interest.

3 **C. Not In Furtherance Of His Exercise Of Speech or Petition In Connection**
4 **With a Public Issue or An Issue of Public Interest**

5 After failing to meet the standards for §425.16(e)(2) and (3), Billauer also fails to
6 demonstrate the defamatory statements were in “furtherance” of his exercising of his “right of
7 petition” or “right of free speech in connection with a public issue or an issue of public interest.”
8 (Code Civ. Proc. §425.16(e)(4).) Billauer cannot establish that this element is met because Ms.
9 Escobar-Eck is not a public issue or an issue of public interest; as discussed in subsection (B)
10 above, the APC project is not a public issue or an issue of public interest. (*Talega Maintenance*
11 *Corporation v. Standard Pacific Corporation* (2014) 225 Cal.App.4th 722, 734 [community was
12 comprised of more than 3500 homes and more than 9000 residents and the court deemed it but “a
13 narrow sliver of society and hence no public issue was found.”].) Billauer’s Motion offers zero
14 analysis that his defamatory statements were made in furtherance of his right of petition or
15 speech, in connection with a public issue or issue of public interest. Billauer has no evidence or
16 analysis that establishes that his defamatory statements about Ms. Escobar-Eck were made in
17 connection with a public issue, or an issue of public interest, as required.

18 Instead of analysis, Billauer cites three distinguishable cases and summarily concludes
19 that his statements fall squarely within the anti-SLAPP’s statute’s protective embrace. The first
20 case, *Averill v. Superior Court* (1996) 42 Cal.App.4th 1170 states private comments in connection
21 with a public issue can be protected (later codified by Code Civ. Proc. §425.16(e)(4).) However,
22 *Averill* is inapposite here because Billauer’s defamatory statements were directed at Ms. Escobar-
23 Eck, and have no connection with a public issue or an issue of public interest. In the second case,
24 *Midland Pac. Bldg. Corp. v. King* (2007) 157 Cal.App.4th 264, the “statements to planning
25 commission and city council” were actual statements made to the planning commission and city
26 council, which did not occur here; Billauer published his defamatory statements on social media.
27 In the third case, similar to *Midland*, *Tuchscher Dev’t Enterprises, Inc. v. San Diego Unified Port*
28 *Dist.* (2003) 106 Cal.App.4th 1219, the activity underlying each of the causes of action were

1 “communications to either the City or Lennar [developer] involving the proposed development.”

2 This is not the case here and Billauer fails to establish prong one under this subsection.

3 Since Billauer cannot establish the initial prong, the court need not address Ms. Escobar-
4 Eck’s probability of prevailing on the merits and this motion must be denied. (See, *Hylton v.*
5 *Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264.)

6 **IV. AS TO THE SECOND PRONG, MS. ESCOBAR-ECK DEMONSTRATES**
7 **PROBABILITY OF PREVAILING ON THE MERITS**

8 In analyzing the second prong, the Court “accept[s] as true the evidence favorable to the
9 plaintiff [citation] and evaluate[s] the defendant’s evidence only to determine if it has defeated
10 that submitted by the plaintiff as a matter of law.” (*Area 51 Production, supra*, 20 Cal.App.5th at
11 593 (citations omitted).) Under an anti-SLAPP motion, a plaintiff is required to demonstrate only
12 a minimal level of legal sufficiency and triability of the claims alleged. (*Lin v. City of Pleasanton*
13 (2009) 176 Cal.App. 4th 408 (“[t]he plaintiff need only establish that his or her claim has minimal
14 merit to avoid being stricken as a SLAPP”).) The court cannot weigh the credibility of the
15 evidence or compare the relative strengths of the competing evidence. (*Balzaga v. Fox News*
16 *Network, LLC* (2009) 173 Cal. App. 4th 1325.) The court merely determines if the plaintiff has
17 sufficient evidence to show that he or she can satisfy each element of the cause of action. (*Id.*)
18 Ms. Escobar-Eck’s claims have minimal merit, Billauer’s statements are not privileged, and
19 Billauer made the defamatory statements with malice.

20 **A. Ms. Escobar-Eck’s Libel Per Se Claims Has More Than Minimal Merit**

21 A defamation cause of action may be for libel or slander. (Civ. Code §44.) “Libel is a
22 false and unprivileged publication by writing, printing, picture, effigy, or other fixed
23 representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or
24 which causes him to be shunned or avoided, or which has a tendency to injure him in his
25 occupation.” (Civ. Code §45.) “A libel which is defamatory of the plaintiff without the necessity
26 of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel
27 on its face.” (Civ. Code §45a.) A special meaning has been given to the term ‘libel per se’ in
28 California and some other states. Where the statement is defamatory on its face, it is said to be

1 libelous per se, and actionable without proof of special damage. “The doctrine has been codified.
2 ‘A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as
3 an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory
4 language not libelous on its face is not actionable unless the plaintiff alleges and proves that he
5 has suffered special damage as a proximate result thereof.’ [citations omitted] (Civ. Code §45a;
6 *Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 351.)

7 Based on the undisputed facts and reasonable inferences related to the evidence, Ms.
8 Escobar-Eck has demonstrated that her claim for libel per se has “at least minimal merit” which is
9 sufficient to survive a special motion to strike. (*Briganti v. Chow* (2019) 42 Cal.App.5th 504,
10 510.) As a threshold issue, Ms. Escobar-Eck has alleged Billauer posted defamatory statements
11 on four (4) separate occasions and Billauer admits to posting at least three (3) statements, the
12 December 30, 2020, February 7, 2021, and April 8, 2021 defamatory posts (Exhibits 17, 20, and
13 21 to Ms. Escobar-Eck’s deposition transcript). (JB Decl. ¶14.) Ms. Escobar-Eck’s declaration in
14 support of this motion identifies three (3) separate defamatory social media posts were false.
15 (MEE Decl. ¶¶6, 9, 11.) With respect to the December 30, 2020 post Billauer admits he made,
16 Billauer claims it was based on a search warrant related to Ms. Escobar-Eck. (Notice of Lodging,
17 Exh. 22.) The is untrue as can be seen on the search warrant. As to the February 7 and April 8,
18 2021 defamatory posts claiming Ms. Escobar-Eck is a hypocrite and two-faced, this is untrue and
19 Billauer admits he has been motivated to influence the City’s decision on the APC project
20 although he has chosen to attack Ms. Escobar-Eck, not the APC project. (JB Decl. ¶14.)

21 Billauer acknowledges that statements that would injure a person in respect to their
22 profession by imputing dishonesty or questionable professional conduct arise to defamation per
23 se. (Motion, p. 17, lns. 16-17; *Balla v. Hall* (2021) 59 Cal.App.5th 652, 686.) Billauer’s
24 statements about Ms. Escobar- Eck are just that, untrue statements that would injure Ms. Escobar-
25 Eck in her profession as a land use consultant. Billauer has wrongfully published that Ms.
26 Escobar-Eck has a history of exerting improperly influence over City officials, that she is a
27 hypocrite, and implies she is a criminal by posting about the search warrant. Billauer intended his
28 statements to be incendiary and he has subjected her to contempt and ridicule from the public.

1 Ms. Escobar-Eck’s profession as a land use consultant requires her to be a trustworthy, honest,
2 law abiding and retain the utmost professional conduct. Billauer’s false claims to the contrary
3 have put her reputation and business at risk.

4 Although damages are presumed, Ms. Escobar-Eck submitted evidence that Billauer’s
5 statements caused her to lose revenue that she and Atlantis have suffered damage. (MEE Decl.
6 ¶17; Briggs Decl. ¶3.) The extent of lost business and personal revenue is still unknown. (MEE
7 Decl. ¶17.) At this stage, the evidence is sufficient to show that the libel per se claim has “at least
8 minimal merit” and should not be stricken. (*Briganti v. Chow, supra*, 42 Cal.App.5th at 510.)

9 **B. Billauer’s Comments Do Not Fall Under Any Privilege**

10 Billauer’s claim that his defamatory comments are privileged under Civil Code section 47
11 relies on inapplicable case law. Billauer cannot rely on the litigation privilege because his
12 defamatory statements do not involve communications that achieve the objects of litigation and
13 have some logical relation to litigation. (See, *Sylmar Air Conditioning v. Pueblo Contracting*
14 *Services, Inc.* (2004) 122 Cal.App.4th 1049, 1058.) In every case cited by Billauer in the Motion,
15 the statement was made TO the presiding body or agency. In *Tiedemann v. Superior Court* (1978)
16 83 Cal.App.3d 918, the privileged statement was a communication to a United States enforcement
17 agency regarding possible tax fraud. In *Lebbos v. State Bar* (1985) 165 Cal.App.3d 656, the were
18 informal complaints made to the State Bar. In *Briggs, supra*, the statements were made in
19 assisting the filing of a legal action. In *Pettit v. Levy* (1972) 28 Cal.App.3d 484, the defamatory
20 statements were made IN a city planning commission and/or city council proceeding.

21 Each of the three cases is distinguishable and Billauer has cited no case establishing
22 privilege where the defamatory post was made on social media. His claim that the statements
23 were made in relation to an active, official City proceeding and in anticipation of potential
24 litigation is belied by the devoid factual record in the Motion to include the fact that the APC was
25 not/is not before the City and he cannot identify what “potential litigation” for which he purports
26 to prepare his statement. While the APC project might be “pending” (although it is unknown what
27 this means), it is still 9 months from being *before* the City has a hearing. (MEE Decl. ¶18.) Thus
28 Billauer did not make his social media posts to the City, whether to the City Council, City

1 Planning Commission, the Hearing Officer, or any governmental or quasi-governmental agency
2 in anticipation of litigation and therefore the litigation privilege in Civil Code section 47 is
3 inapplicable.

4 **C. Mr. Billauer’s Statements Constitute Libel Per Se And He Made Them**
5 **Maliciously**

6 Billauer wrongfully contends Ms. Escobar-Eck is a limited purpose public figure. Even if
7 the Court were to find that she was a limited purpose public figure, the APC is not a matter of
8 “public concern,” and Ms. Escobar-Eck can show that Mr. Billauer maliciously posted the
9 defamatory statements.

10 1. Ms. Escobar-Eck is Not a Public Figure

11 A “‘limited purpose’ or ‘vortex’ public figure [is] an individual who ‘voluntarily injects
12 himself or is drawn into a particular public controversy and thereby becomes a public figure for a
13 limited range of issues.’” (*Grenier v. Taylor* (2015) 234 Cal.App.4th 471, 484.) For a person to be
14 considered a limited purpose public figure: (1) “there must be a public controversy about a topic
15 that concerns a substantial number of people. In other words, the issue was publicly debated.” (2)
16 “the plaintiff must have voluntarily acted to influence resolution of the issue of public interest. To
17 satisfy this element, the plaintiff need only attempt to thrust himself or herself into the public eye.
18 Once the plaintiff places himself or herself in the spotlight on a topic of public interest, his or her
19 private words and acts relating to that topic become fair game;” and (3) “the alleged defamation
20 must be germane to the plaintiff’s participation in the public controversy.” (*Id.*) When these
21 elements are not met, the plaintiff only has to make the regular prima facie showing that he/she
22 has a probability of prevailing. (*Id.* at 485.)

23 Billauer alleges Ms. Escobar-Eck is a public figure because she wrote a letter to the City’s
24 elected officials about herself. What he fails to state is that Ms. Escobar-Eck only wrote this letter
25 because of, and in response to, Mr. Billauer’s defamatory statements about her. (MEE Decl. ¶8.)
26 Thus Billauer, by publishing defamatory statements about Ms. Escobar-Eck, created the
27 circumstance that required her to write to the City and it is this communication Billauer caused
28 that he attempts to use to establish Ms. Escobar-Eck is limited public figure participating in a

1 public controversy.

2 With respect to the APC project, Ms. Escobar-Eck is not a limited public figure
3 participating in a public controversy. There is no evidence that APC is public controversy, there is
4 no evidence that Ms. Escobar-Eck has injected herself with respect to the APC and the City of
5 San Diego, the APC is not before the City of San Diego’s City Council, nor is it before the City’s
6 Planning Commission. (MEE Decl. ¶18.) At the time Mr. Billauer made the first of many
7 defamatory statements about Ms. Escobar-Eck, the APC project was being discussed amongst a
8 relatively small, specific audience. (MEE Decl. ¶4; 18.) This was not a hotly contested issue
9 before the City, it was at its infancy before the local planning group. Since, at the time the
10 defamatory statements began, there was no public controversy over a topic that concerns a
11 substantial number of people, Ms. Escobar-Eck was not, and is not, a limited purpose public
12 figure.

13 Further, if the Court were to determine that the APC project was a matter of public
14 controversy that concerns a substantial number of people, the defamatory statements were not
15 germane to Ms. Escobar-Eck’s participation in the public controversy. Mr. Billauer identifies this
16 third element but fails to address it, all but conceding that the defamatory statements are not
17 germane to the “public controversy.” The defamatory statements targeted Ms. Escobar-Eck
18 claiming she has a history of exerting improper influence with City officials. The defamatory
19 statements do not target the APC and the APC was not before the City at that time Billauer made
20 the statements, nor was there a controversy over whether or not there had been improper
21 influence of government officials. As of today, the APC project is still not before the City and
22 there are no allegations of improper influence with respect to Ms. Escobar-Eck and the APC
23 project. Thus, there is no limited purpose public figure status.

24 2. The All Peoples Church Is Not A Matter Of Public Concern

25 Billauer argues without support other than his own declaration that APC is a matter of
26 public concern because it involves governmental matters and has the potential to affect a large
27 segment of the community. There is no evidence, no law, nothing that support his position and it
28 therefore fails. Assuming arguendo Billauer can submit evidence other than his own testimony

1 demonstrating the APC is a matter of public concern, Billauer cannot show that in December
2 2020 when he defamed Ms. Escobar-Eck, APC was a matter of public concern.

3 A public issue includes “conduct that could directly affect a large number of people
4 beyond the direct participants” and a “topic of widespread, public interest.” (*Rivero v. American*
5 *Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913,
6 924 [where large number of people impacted included the members of the AFL-CIO].) There
7 must also be “some degree of closeness between the challenged statements and the asserted
8 public interest.” (*Weinberg v. Feisel, supra*, 110 Cal.App.4th at 1132; *FilmOn.com Inc. v.*
9 *DoubleVerify Inc.* (2019) 7 Cal.5th 133, 150 [statement cannot simply refer to issue, but must
10 “contribute to the public debate”].)

11 The APC is a relatively small project, in the quaint neighborhood of Del Cerro. (MEE
12 Decl. ¶3.) A small project in a small neighborhood is not a matter of public concern. (See, *Talega,*
13 *supra*, 225 Cal.App.4th 722, 734, where the community was comprised of more than 3500 homes
14 and more than 9000 residents and the court deemed it but “a narrow sliver of society and hence
15 no public issue was found.”) Even if APC was not a small project, Billauer’s defamatory
16 statements have no “closeness” to the asserted public interest as they are not about APC, they are
17 about Ms. Escobar-Eck. The statements are not about the APC project nor are there allegations
18 that Ms. Escobar-Eck acted improperly with respect to APC which means there is no closeness
19 between Billauer’s statements and the APC project and not a matter of public concern.

20 3. Billauer Made The Statements With Malice

21 “[A]ctual malice can be proved by circumstantial evidence.” (*Reader's Digest Assn. v.*
22 *Superior Court* (1984) 37 Cal.3d 244, 257.) Considerations such as “anger and hostility toward
23 the plaintiff,” “reliance upon sources known to be unreliable [citations] or known to be biased
24 against the plaintiff,” and “failure to investigate” may, “in an appropriate case, indicate that the
25 publisher himself had serious doubts regarding the truth of his publication.” (*Id.* at p. 258.) Such
26 evidence is relevant “to the extent that it reflects on the subjective attitude of the publisher,” and
27 failure to investigate, without more, generally is insufficient. (*Ibid.*)

28 Billauer stated under penalty of perjury that his intention with posting the defamatory

1 statements about Ms. Escobar-Eck was for purposes of “trying to influence the outcome of the
2 City’s review process.” (JB Decl. ¶14.) This admission highlights Mr. Billauer’s state of mind
3 when making his defamatory statements to harm Ms. Escobar-Eck. The undisputed facts are that
4 on November 5, 2020, Billauer admitted that he messaged Ms. Escobar-Eck privately, and Ms.
5 Escobar-Eck stated that he told her he was going to “make sure you get sent back to where you
6 came from.” (JB Decl. ¶4; MEE Decl. ¶4.) Billauer further wrongfully posted that Ms. Escobar-
7 Eck has a history of exerting improper influence over City officials despite having no evidence of
8 this and having submitted no evidence of this; Billauer was simply making it up to hurt Ms.
9 Escobar-Eck. There is no evidence that the “search warrant” Mr. Billauer allegedly “relied on”
10 was directed at Ms. Escobar-Eck and in fact, it is incontrovertible that the “search warrant” relates
11 to another individual yet he intentionally published this false information. Billauer either knew
12 the information he published was false or he failed to investigate it and yet he published it
13 regardless. He knowingly, willfully, and wrongfully published false information about Ms.
14 Escobar-Eck with the direct intent to harm her and harm her ability to work as a land use
15 consultant in the City. Billauer has also admitted hostility towards Ms. Escobar-Eck and that he
16 failed to investigate his defamatory statements prior to making them. In fact, Billauer had a high
17 degree of awareness of the probable falsity of the statements and made them anyway in hopes of
18 harming Ms. Escobar-Eck. He acted with malice.

19 4. The Statements Are False And Not Offered As Opinion

20 Lastly, Billauer argues that his defamatory statements were either his opinion or true.
21 Billauer does not identify which of his statements are either truth or opinion he simply lumps
22 them together and tells the Court that it is one or the other. When he claims something about a
23 defamatory statement is true, it is the non-actionable part of the statement he claims is true, not
24 the defamatory portion of the statement. The futility of Billauer’s claim as to truth is his absolute
25 failure to submit any reliable documentary support of the truth. Billauer cannot hide behind his
26 claim of opinion either; where an expression of opinion implies a false assertion of fact, the
27 opinion can constitute actionable defamation. (*GetFugu, Inc. v. Patton Boggs LLP* (2013) 220
28 Cal. App. 4th 141, 156, citing *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 18–19.) “To

1 ascertain whether the statements in question are provably false factual assertions, courts consider
2 the totality of the circumstances. Whether challenged statements convey the requisite factual
3 imputation is ordinarily a question of law for the court. [citations omitted.]” (*Id.*) A reasonable
4 reader would not view the above statement as a “nonactionable statement of opinion,” but instead
5 a “verifiable statement of fact.” (*Id.*) For example, Billauer’s statement that Ms. Escobar-Eck has
6 a history of exerting improperly influence with City officials contains provable facts and is not
7 hyperbolic; a reasonable reader would take that statement at its face value and believe it to be true
8 particularly in the context of her job as a land use consultant on land development projects. Since
9 it was Billauer’s intention to harm Ms. Escobar-Eck with his statements and influence City
10 officials, there was clear intent that the statement be asserted as fact, not opinion, and his
11 assertion that his statement or statements are opinion fails.

12 **V. MS. ESCOBAR-ECK SHOULD BE AWARDED ATTORNEYS FEES**

13 If this Court finds that a special motion to strike is frivolous or is solely intended to cause
14 unnecessary delay, this Court is permitted to order costs and reasonable attorney fees to a
15 successful plaintiff (here, Cross-complaint.) (Code Civ. Proc. § 425.16(c).) Here, the Court
16 should find that Billauer’s motion is frivolous and solely intended to cause unnecessary delay on
17 the basis that there is no justification for bringing an anti-SLAPP motion when no freedom of
18 speech or petition right is involved. Accordingly, Ms. Escobar-Eck should be awarded this
19 amount should she prevail on this motion and will do so by a noticed motion for fees.

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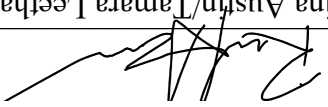
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VI. CONCLUSION

Billauer fails to meet the prong one analysis that the Cross-complaint arises out of his exercise of free speech or right to petition. As such, the Court need not consider prong two. However, if the Court considers prong two, the Cross-complaint has minimal merit. Finally, because this motion was brought frivolously and intended to cause unnecessary delay, Ms. Escobar-Eck is entitled to an award of attorney fees and costs. Thus, based on the foregoing, Ms. Escobar-Eck respectfully requests that the Court deny Billauer's Special Motion to Strike (anti-SLAPP) in its entirety.

DATED: September 20, 2021

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