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Clerk of the Superior Court
By Kristin Sorianosos, Deputy Clerk

8 **SUPERIOR COURT OF CALIFORNIA**

9 **COUNTY OF SAN DIEGO**

10 JOSHUA BILLAUER,) CASE NO. 37-2021-00006367-CU-DF-CTL
11)
Plaintiff,) [Assigned to Hon. Kenneth J. Medel,
12) Dept. C-66]
vs.)
13 OLGA MARCELA ESCOBAR-ECK; and) **MEMORANDUM OF POINTS AND**
DOES 1 through 1,000,) **AUTHORITIES IN SUPPORT OF**
14) **DEFENDANT’S MOTION TO STRIKE**
Defendants.) **PORTIONS OF PLAINTIFF’S**
15) **COMPLAINT**
16) [Filed Concurrently with Notice of Motion
and Motion to Strike; Declaration of Scott
17) McCaskill; [Proposed] Order]
18) Date: October 1, 2021
19) Time: 9:30 a.m.
20) Dept.: C-66
21) Complaint Filed: February 16, 2021
22) Trial Date: None Set
23)

22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 **I. INTRODUCTION**

24 Olga Marcela Escobar-Eck (“**Defendant**”) respectfully moves to strike plaintiff’s prayer
25 for punitive damages in the Complaint pursuant to Code of Civil Procedure sections 431, 435
26 and 436.

27 To wit, plaintiff sues for Libel *Per Se* and Intentional Infliction of Emotional Distress,
28

1 and based upon same prays for punitive damages. However, both of plaintiff's claims fail.
2 Moreover, the Complaint does not allege fraud, malice or oppression. As such, the prayer for
3 punitive damages is improper and should be stricken.

4 **II. LEGAL STANDARD FOR MOTION TO STRIKE**

5 Under Code of Civil Procedure section 435, subdivision (b)(1), "[a]ny party, within the
6 time allowed to respond to a pleading may serve and file a notice of motion to strike the whole or
7 any part thereof" of the pleading. Code of Civil Procedure section 436 further allows the Court
8 to:

- 9 (a) Strike out any irrelevant, false, or improper matter inserted in any
10 pleading.
11 (b) Strike out all or any part of any pleading not drawn or filed in
12 conformity with the laws of this state, a court rule, or an order of
13 the court.

14 Code of Civil Procedure section 431.10 defines "irrelevant matter" as that term is used in
15 Section 436 to mean an "immaterial allegation." Section 431.10 defines an "immaterial
16 allegation" in any pleading as:

- 17 (1) An allegation that is not essential to the statement of a claim or
18 defense.
19 (2) An allegation that is neither pertinent to nor supported by an
20 otherwise sufficient claim or defense.
21 (3) A demand for judgment requesting relief not supported by the
22 allegations of the complaint or cross-complaint.

23 As set forth below, the Complaint includes a prayer for damages not supported by the
24 allegations or relevant statutes which should be stricken.

25 **III. REFERENCE TO IRRELEVANT, FALSE OR IMPROPER MATTERS
26 SHOULD BE STRICKEN**

27 All reference to irrelevant, false or improper matter should be stricken pursuant to
28 Code of Civil Procedure sections 431.10, 435 and 436.

A. Prayer for Punitive Damages Does Not Lie and Should Be Stricken

The Complaint includes immaterial allegations, as defined by Section 431.10, subdivision

1 (b)(3), in the form of a prayer for judgment requesting relief not supported by statute or the
2 allegations of the Complaint. Here, plaintiff prays for:

- 3 1. Paragraph 11(A): “Defendants published and/or re-published the
4 Criminal Tweet maliciously, oppressively, and fraudulently in retaliation
5 for PLAINTIFF’s lawful expression of opinions about economic growth
6 and development in his community and the impact thereof on the quality
7 of life in his community.”
2. Prayer for Relief, ¶ C, at page 4, line 15: “Punitive damages according to
proof.”

8 **B. Plaintiff Fails to Allege Acts Sufficient to Support Prayer for Punitive**
9 **Damages**

10 1. Requirements of Civil Code § 3294 for Claim for Punitive Damages

11 Plaintiff’s prayer for punitive damages fails to meet the requirements of Civil Code §
12 3294, which only allows for recovery of punitive damages when a “defendant has been guilty of
13 oppression, fraud or malice.” Civil Code § 3294(b) defines malice, oppression, and fraud as
14 follows:

15 (1) “Malice” means conduct which is intended by the defendant to cause
16 injury to the plaintiff or despicable conduct which is carried on by the
17 defendant with a willful and conscious disregard of the rights or safety of
others.

18 (2) “Oppression” means despicable conduct that subjects a person to cruel
and unjust hardship in conscious disregard of that person’s rights.

19 (3) “Fraud” means an intentional misrepresentation, deceit, or
20 concealment of a material fact known to the defendant with the intention
21 on the part of the defendant of thereby depriving a person of property or
legal rights or otherwise causing injury.

22 2. Allegations of Malice, Oppression, & Fraud Must Be Set Forth

23 In order to state a prima facie claim for punitive damages, a complaint must set forth the
24 elements as stated in the general punitive damage statute, Civil Code § 3294. (*College Hospital*
25 *Inc. v. Superior Court* (1994) 8 Cal.4th 704, 721.) These “statutory elements include allegations
26 that the defendant has been guilty of oppression, fraud or malice.” (*Turman v. Turning Point of*
27 *Central California, Inc.* (2010) 191 Cal.App.4th 53, 63.)

1 3. Allegations in Support of Punitive Damages Must Be Pled

2 Specifically

3 California courts refuse to accept “[v]ague, conclusory allegations” to support punitive
4 damages claims and a “conclusory characterization of defendant’s conduct as intentional, willful
5 and fraudulent is a patently insufficient statement of ‘oppression, fraud, or malice’ . . . within the
6 meaning of section 3294.” (See *G. D. Searle & Co. v. Sup. Ct.* (1975) 49 Cal.App.3d 22, 29; see
7 also *Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864, 872.) Rather, specific, objective, factual
8 allegations are required to support a prayer for punitive damages. (*Grieves, supra*, 157
9 Cal.App.3d at 166.) In *Brousseau*, the court determined that a “conclusory characterization of
10 defendant’s conduct as intentional, willful and fraudulent is a patently insufficient statement of
11 ‘oppression, fraud, or malice’ . . . within the meaning of section 3294.” (*Brousseau, supra*, 73
12 Cal.App.3d at 872.) Further, the mere allegation an intentional tort was committed is not
13 sufficient to warrant an award of punitive damages. (*Grieves, supra*, 157 Cal.App.3d at p.166;
14 *Taylor v. Sup. Ct.* (1979) 24 Cal.3d 890, 894.)

15 4. Plaintiff Fails to Specifically Allege Acts of Oppression or Malice, or
16 Fraud Sufficient to Support a Claim for Punitive Damages

17 The Complaint does not adequately allege fraud. In addition, the Complaint is devoid of
18 any specific allegation that Defendant acted with oppression or malice. As such, there is no basis
19 for plaintiff’s claim for punitive damages.

20 ***a. Complaint fails to allege fraud***

21 The Complaint does not allege any of the elements of fraud. To prove fraud, a party must
22 show the following: (1) a misrepresentation, consisting of a false representation, concealment or
23 nondisclosure, (2) knowledge of falsity, (3) intent to defraud, (4) justifiable reliance, and (5)
24 resulting damage. (*Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 184.) Pleading in
25 generalities, “without identifying the specific persons who made the misrepresentations, the
26 precise statements made, or the dates on which they were made” are insufficient to state a claim
27

1 for fraud in the inducement. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743,
2 766.)

3 The Complaint fails to plead facts regarding any of the elements of a fraud claim.
4 Indeed, the only reference to any alleged fraud is the conclusory statement that Defendant
5 “published and/or re-published the Criminal Tweet maliciously, oppressively, and fraudulently in
6 retaliation for PLAINTIFF’s lawful expression of opinions about economic growth and
7 development in his community and the impact thereof on the quality of life in his community.”
8 (Complaint, ¶ 11(A).) This general allegations is insufficient to establish a claim for punitive
9 damages based on fraud.

10 ***b. Complaint does not allege malice or oppression***

11 As discussed in Section III(B)(4)(a), *supra*, the Complaint merely alleges that Defendant
12 “published and/or re-published the Criminal Tweet maliciously, oppressively, and fraudulently in
13 retaliation for PLAINTIFF’s lawful expression of opinions about economic growth and
14 development in his community and the impact thereof on the quality of life in his community.”
15 (Complaint, ¶ 11(A).) These conclusory allegations are insufficient within the meaning of
16 section 3294. (*Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864, 872.)

17 Moreover, as discussed more fully in Defendant’s Demurrer, plaintiff’s claims for libel
18 *per se* and IIED fail. As the prayer for punitive damages is premised on the inadequate
19 allegations that support the causes of action for IIED, the prayer concomitantly fails.
20 Consequently, plaintiff’s claim for punitive damages should be stricken.

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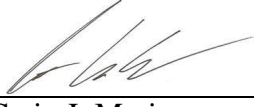
IV. CONCLUSION

Plaintiff fails to sufficiently allege oppression, fraud, or malice by Defendant that would justify punitive damages. Further, as both of plaintiff's underlying claims fail, the claim for punitive damages concomitantly fails. As such, the prayer for punitive damages should be stricken.

Respectfully submitted,

Dated: April 28, 2021

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By: 

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