No. 31837-1-III

COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION III

YVONNE A.K. JOHNSON, a single person,

Appellant,

v.

JAMES P. RYAN, a married individual,

Respondent.

APPEALED FROM SPOKANE COUNTY SUPERIOR COURT
CAUSE NO. 13-2-01362-7

APPELLANT JOHNSON'S REPLY BRIEF

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I. INTRODUCTION

> "*Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.*"[1]

James Ryan is a cyber-bully who abused his right to freely write and publish on all subjects when he created and thereafter utilized a series of web blogs to engage in libelous and vitriolic personal attacks against his ex-supervisor, Yvonne Johnson. Ms. Johnson commenced suit against Ryan to hold him responsible for his abusive conduct.

In response, Ryan asserted Washington's anti-SLAPP law as a shield against liability which the Trial Court erroneously allowed. Under Washington law statements not made in connection with an executive, legislative, or judicial proceeding must be made in connection with a matter of public concern in order to be protected. Since adoption of the 2010 Amendments to Washington's anti-SLAPP statute (RCW 4.24.525), no Washington court has fully analyzed the issue at hand – what constitutes speech on a matter of "public concern." Without the assistance of this Court cyber-bullies such as Ryan are free to invoke the anti-SLAPP statute with impunity to victimize private citizens and employers over wholly private disputes such as termination from employment.

Despite Ryan's failing to meet his burden of showing his speech qualifies as a matter of public concern, the Trial Court committed

[1] Washington State Constitution, Article 1, § 5 Freedom of Speech.

reversible error in granting Ryan's anti-SLAPP motion. Johnson now respectfully requests this Court reverse the Trial Court's grant of Ryan's anti-SLAPP motion, reinstate her claims, and remand the matter for full adjudication on the merits.

II. STATEMENT OF THE CASE

Certain of Ryan's purported statements of fact are simply incorrect. First, Ryan misstates Johnson's resume when he relies upon it to assert Johnson was a "*self-admitted public face and voice of Spokane Civic Theatre, responsible for both business and artistic decisions....*" Resp. Brief, p. 8. Johnson's resume at CP 37 makes clear what Johnson's responsibilities were.

Second, Ryan omits that Johnson acted under the guidance and at the direction of the Theatre Board of Directors ("Board") when performing her duties, including but not limited to: recruiting, hiring, supervising, evaluating employees, and administering procedures. Thus Ryan's assertions on p. 11, ll. 3-6 are inaccurate. CP 37. Third, Ryan states Johnson posted an ad on craigslist.com. Resp. Brief, p. 11. It was Ryan who posted the ad. CP 81, 123.

Lastly, Ryan's distortion on page 11 that "*Johnson's position that Ryan's speech is not on a matter of public concern is a 180 degree deviation from her pre-litigation statements that Ryan's position and*

termination were not only on matters of public concern, but were also so consequential to the public that his sexual interests could destroy Spokane Civic Theatre" is false, self-serving argument utterly unsupported by citation to the record. RAP 10.3(a)(5).

Ryan's termination letter was written, authored, and executed under the guidance and at the direction of the Board "*the Board does not view its termination actions as unfair...*" and speaks for itself. CP 83-86. Indeed, the termination letter refers to Ryan having "*failed to uphold yourself to the high public standards charged to representatives of the Theatre*," pursuant to the employee handbook and that his actions warranted termination due to a lack of "*professional judgment and leadership competence.*" CP 83.

III. ARGUMENT

A. Motion To Strike Ryan's Unsupported, Self-Serving Statements Of Fact.

RAP 10.3(a) requires the statement of the case to be "*a fair statement of the facts... without argument. Reference to the record must be included for each factual statement.*" RAP 10.3(a)(5). Arguments must be supported by "*citations to legal authority and references to relevant parts of the record.*" RAP 10.3(a)(5)-(6). A brief that fails to comply may be stricken, and the Court will "*ordinarily impose sanctions*

on a party or counsel for a party who files a brief that fails to comply with these rules." RAP 10.7.

Here, Ryan's statement of facts contains numerous improper, self-serving statements and argument without reference to the record. See Resp. Brief, p. 7, ll. 1-3; p. 8, ll. 10-12; p. 9, ll. 1-2, 4-5, 12-13, and 17-19; and p. 11, ll. 14-18. Johnson moves that his self-serving statements and argument not be considered pursuant to RAP 10.7. See Housing Authority of Grant County v. Newbigging, 105 Wn. App. 178, 185 (Div. III 2001).

B. The Anti-SLAPP Statute Dos Not Shield Ryan From His Defamatory Statements Made In Connection With A Private Employment Dispute.

1. Ryan's Speech Is Not A Matter Of Public Concern.

Prior to the 2010 Amendments to Washington's anti-SLAPP statute, the statute operated to grant "*immunity from civil liability for those who complain to their government regarding issues of public interest or social significance.*" Skimming v. Boxer, 119 Wn. App. 748, 758 (2004).

The 2010 Amendments resulted in the addition of a new section wherein actions involving public participation and petition were defined, in relevant part, as:

> "*...(d) Any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; or (e) Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in*

> *connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.*"

RCW 4.24.525(2)(d)-(e). In enacting the 2010 Amendment, our legislature chose the term "*public concern*" when defining actions involving public participation and petition, rather than "*public interest.*" RCW 4.24.525. For the past 28 years, Washington courts have decided whether speech is '*of public concern*' by adopting the U.S. Supreme Court's test from Connick v. Meyers, 461 U.S. 138 (1983). See Benjamin v. WSBA, 138 Wn.2d 506, 529 (1999) and Meyer v. Univ. of Wash., 105 Wn.2d 847, 851 (1986).

In choosing the term "***public concern***" over "public interest," our legislature was clear about intending the term "*public concern*" conveying its ordinary meaning. See Ellingson v. Spokane Mortg. Co., 19 Wn. App. 48, 56-58 (1978), wherein this Court determined the words "actual damage" were to convey their ordinary common law meaning since the legislature expressed no intent for them to convey a different statutory meaning.

Moreover, while Washington modeled the 2010 Amendment after California law, our legislature specifically chose the term "***public concern***" over the term "public interest" as used in California. This distinct difference is presumed intentional "*when the model act in an area*

of law contains a certain provision, but the legislature fails to adopt such a provision, our courts conclude that the legislature intended to reject the provision." See Dillon v. Seattle Deposition Reporters, LLC, 316 P.3d 1119, 1136 (Div. I 2014). Thus, Ryan's argument that this Court should rely upon California law instead of Washington jurisprudence when defining the term "*public concern*," is sorely misplaced.

On the matter of how to analyze what constitutes a matter of "public concern," Colorado law is quite instructive. Colorado, like Washington, requires speech to be on a matter of 'public concern' before it can be shielded by an anti-SLAPP statute. Additionally, Colorado, like Washington, determines what constitutes 'public concern' pursuant to the Connick test. "*In determining whether statements involve a matter of public concern, a court must analyze the content, form, and context of the statements, in conjunction with the motivation or 'point' of the statements as revealed by the whole record.*" Spaceon Specialty Contractors, LLC v. Bensinger, 713 F.3d 1028, 1035 (10th Cir. 2013).

Ultimately, in Spaceon the court concluded the speech at issue touched upon a matter of public concern, because:

> "*messages conveyed by the film have the potential to impact many members of the public or the public as a whole... who have an abiding interest in matters discussed in the film, such as human trafficking, tax evasion, insurance fraud, and the mistreatment of foreign workers.*

> *Moreover, ...the film alleges racial and ethnic discrimination and abuse by... a labor broker used by Spaceon....*"

Id. at 1037. Such is not even remotely the case here. Ryan's monologues do not have the potential to impact many members of the public or the public as a whole, because there is little to no abiding interest in Ryan's termination from a private community theatre, his campaign for reinstatement or a severance package, or his attempts to compel hatred and contempt of his ex-supervisor, Johnson. In short, Ryan's speech only served to convey his ranting campaign of personal gain and vengeance.

> "*I would love for her to remain as preternaturally fixated on my doings as I am on obtaining justice....*" (CP 7). "*It has never once – not once – occurred to me that I will not get the justice I seek.*" (CP 7). "*I'm going to offer Civic the opportunity to end this for $0.00 simply by demonstrating that Ms. Johnson and her 'board of directors' have the support of the community.*" (CP 8). "*[W]e specifically discussed a goal in the neighborhood of one year's salary... and moving expense out of here... when the case was dismissed, my first reaction was 'oh well... eff Civic. Now it's going to cost serious money if they ever want this to end.*'" (CP 10). "*Public ridicule is the only remedy for actions that fall into this category.*" (CP 104). "*[R]est assured that it will not be the end of this campaign to hold Civic and Yvonne A.K. Johnson accountable.*" (CP 105). "*This was their best chance to make this go away without spending money. This case was handled by their insurance company and had the potential to end this all with a reasonable settlement and a non-disclosure.*" (CP 105).

Unlike in Spaceon, Ryan was clearly not addressing issues of public import such as discrimination, human trafficking, tax evasion, and/or widespread insurance fraud.

Finally, in Snyder v. Phelps, 131 S. Ct. 1207 (2011), the Supreme Court noted that evidence of a pre-existing conflict between the parties and a resulting motivation to harm may demonstrate that speech on public matters was intended to mask an attack over a private matter. Id. at 1217. Here, evidence proves that there was a pre-existing conflict between the parties which ultimately resulted in Ryan's self-serving motivation to harm Johnson.

Ryan's attempt to now argue his speech concerned public matters is a weakly veiled attempt to mask a vicious campaign involving a private matter – Ryan's termination from the Civic Theater. The "*content-form-context*" of Ryan's vituperative cyber-monologue makes clear the focus of his blogging was to coerce a severance package and/or his reinstatement by means of false and libelous claims, neither of which constituted matters of "public concern." Ryan's conduct was nothing more than a rant of actionable accusations and insinuations wielded as a sword intending to cause hatred, contempt, and ridicule toward his former supervisor.

Further, Ryan's reliance upon case law analyzing permissible restraint on political speech in order to support his assertion that a speaker's motivation is irrelevant to the question of constitutional protection is also misplaced. See Resp. Brief pp. 34-35, citing Fed. Elec. Comm'n v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007).

2. Even Analyzed Under California Law, Ryan's Speech Is Still Not A Matter Of Public Concern.

For guidance in determining whether the speech at issue is of public rather than merely private interest, California Courts commonly rely upon Weinberg v. Feisel, 110 Cal. App. 4th 1122 (2003).

> "*First, 'public interest' does not equate with mere curiosity. Second, a matter of public interest should be something of concern to a substantial number of people. Thus, a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest. Third, there should be some degree of closeness between the challenged statements and the asserted public interest; the assertion of a broad and amorphous public interest is not sufficient. Fourth, the focus of the speaker's conduct should be the public interest rather than a mere effort 'to gather ammunition for another round of [private] controversy....' Finally, 'those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.' A person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people.*"

Id. at 1132–1133 (internal citations omitted).

The dispute at issue here is clearly one between private parties (Ryan, a private community theatre (Civic Theatre), and Ryan's ex-

supervisor, Johnson) regarding private matters (Ryan's termination for affiliating the Theatre in his extra-marital deviance and his subsequent efforts to compel reinstatement or a severance package) in contempt of Johnson. To the extent Ryan's defamatory statements regarding Johnson, made during his efforts to secure personal gain (monetary and vengeance), tangentially or collaterally involved arts and entertainment, those statements did not in any substantial manner contribute to any ongoing public debate regarding the "*creative process underlying the production of arts and entertainment.*" See Resp. Brief, p. 29, fn. 13.

Ryan's assertion of a broad and amorphous public interest in the '*creative process underlying the production of arts and entertainment*' is insufficient to establish a public interest much less a matter of public concern under RCW 4.24.525(2)(e) or (d). Indeed, California courts have specifically rejected the argument that "*any statement about a person in the public eye is sufficient to meet the public interest requirement.*" Albanese v. Menounos, 218 Cal. App. 4th 923, 934 (2013).

California has established, "*[a] public issue is implicated if the subject of the statement or activity underlying the claim (1) was a person or entity in the public eye; (2) could affect large numbers of people beyond the direct participants; or (3) involved a topic of widespread, public interest.*" Id. Moreover, "*where the issue is of interest to only a*

private group, organization, or community, the protected activity must occur in the context of an ongoing controversy, dispute, or discussion, such that its protection would encourage participation in matters of public significance." Id.

As in Albanese, none of those factors apply here. "*It is not enough... 'that a broad and amorphous public interest' can be connected to a specific dispute.*" Id. Ultimately, the Albanese court determined that while

> "*the evidence... shows there is some public interest in Albanese based on her profession as a celebrity stylist and style expert. ...there is no evidence of a public controversy concerning Albanese, Menounos, or Dolce and Gabbana. ...there is no evidence that the public is interested in this private dispute concerning... alleged theft of unknown items from Menounos or Dolce and Gabbana. In short, there is no evidence that any of the disputed remarks were topics of public interest.*"

Id. at 936. Here, despite Johnson purportedly being a "public" figure based on her profession, there is no evidence of a public controversy concerning Ryan's termination from a private employer and subsequent actions in seeking reinstatement, a severance package, and his contempt of Johnson. Moreover, Ryan's speech has no ability to affect large numbers of people nor did it involve a topic of widespread public interest.

As a result, even if California case law were found to be persuasive in determining whether Ryan's speech touches on a matter of

public concern, Ryan cannot and has not met the burden of proving his speech contributed to public debate. Ryan has failed to even identify what ongoing controversy, dispute, or discussion his speech purportedly touched upon or contributed to that could even remotely warrant protection. Indeed, it is clear that the true focus of Ryan's poisonous pen was the furtherance of his own private interests and compelling contempt and hatred toward Johnson – e.g., vengeance.

Finally, Ryan's reliance upon the following cases does not assist him. In Briggs v. Eden Council for Hope and Opportunity, 19 Cal. 4th 1106 (1999), the Court concluded the anti-SLAPP statute protected a nonprofit corporation's statements advising tenants how to initiate litigation against their landlord pursuant to subdivisions (e)(1) and (2), neither of which require a specific public interest showing. Id. at 1111-1123. In Snyder v. Phelps, 131 S.CT. 1207 (2011), it was determined the speech at issue touched upon matters of public concern ("*homosexuality in the military*" and "*the fate of the Nation*"). Id. at 1211. In Hilton v. Hallmark Cards, 599 F.3d 894 (9th Cir. 2009), the Court determined the speech at issue, a greeting card with Paris Hilton's image, constituted an issue of public interest as "*there is no dispute that Paris Hilton's career is something of concern to a substantial number of people*" primarily because the card at issue concerned her "*trademark phrase and her public*

persona – the very thing that interest people about her." Id. at 908. Likewise, Aronson v. Dog Eat Dog Films, Inc., 738 F.Supp.2d 1104 (W.D. Wash. 2010) dealt with an actual matter of public concern, U.S. health care crisis, not an amorphous concept such as here – management of a volunteer theatre. Similarly, Davis v. Avvo, Inc., 2012 WL 1067640 (W.D. Wash. 2012)[2] dealt with an actual matter of global concern – information provided to the public to assist in choice of doctors, dentists, and lawyers, including reviews by the general public.

In Traditional Cat Ass'n, Inc. v. Gilbreath, 118 Cal. App. 4th 392 (2004), the Court found the website at issue which reported on the status of litigation was made in furtherance of free speech "*[g]iven the controversy surrounding the parties' dispute and its evident notoriety in the cat breeding community*" as well as the fact that California courts "*have repeatedly held that reports of judicial proceedings... are an exercise of free speech.*" Id. at 397. Yet, Ryan's website, unlike Gilbreath's, was not created to report on the status of litigation. It was created to voice his contempt of the Civic Theatre and Johnson and his demands for reinstatement and/or a severance package.

Likewise, Nygard, Inc. v. Timo Uusi-Kerttula, 159 Cal. App. 4th 1027 (Cal. Ct. App. 2008) is also distinguishable. In Nygard, the Court

[2] Davis contained no analysis much less discussion of what constitutes a matter of public concern.

held the statements at issue provided "*individual employment experiences of... four employees and their opinions about Nygard's working conditions.*" Id. at 1034. The statements involved a Finnish celebrity – the chairman and founder of an international company with over 12,000 employees worldwide. Id. The Court found the statements were made in connection with an issue of interest to the Finnish public, thus the statements involved "*highly visible public figures and issues of public interest.*" Id. The Court specifically found evidence of 'extensive interest' in Nygard among the Finnish public satisfied the public interest requirement. Id. at 1042.

Further, in Sedgwick Claims Management Serv., Inc. v. Delsman, 2009 WL 2157573 (N.D. Cal., 2009) aff'd, 422 F. App'x 651 (9th Cir. 2011), the speaker enlightened consumers regarding the target corporation's questionable claims practices and advised them to avoid the company's services. Here, Ryan spoke about his employment termination, his demands for reinstatement and/or a severance package, and his personal animus towards the Civic Theatre and Johnson. Ryan offered nothing to enlighten consumers about the Theatre's services or practices as affecting them.

Finally, Ryan's reliance on Damon v. Ocean Hills Journalism Club, 85 Cal. App. 4th 468 (Div. I 2000) is also misplaced. In Damon, the

Court found the speech at issue to be of "*critical importance to a large segment*" because "*[f]or many Californians, the homeowners association functions as a second municipal government....*" Id. at 479. Notably, the Court specifically held:

> "*[g]iven the size of the Ocean Hills community, the nature of the challenged statements as involving fundamental choices regarding future management and leadership of the Association, and our Legislature's mandate that homeowner association boards be treated similar to governmental entities, the alleged defamatory comments involved "public issues" within the meaning of the anti-SLAPP statute.*"

Id. at 479-480. Here, the Civic Theatre is not akin to municipal government. Additionally, no legislative mandate exists requiring the Theatre be treated similar to a governmental entity.

Ryan's reliance upon California case law is not supportive of his position. None of these cases dealt with a private individual who, upon being terminated from a private community theatre, took it upon himself to publicly harass, intimidate, bully, and coerce his ex-employer into reinstating him, paying a severance while seeking to compel contempt of his ex-supervisor. Moreover, Ryan's speech did not occur in the midst of an ongoing controversy, it did not have the ability to affect a large group, nor is there any evidence that Johnson's purported fame unlike that of

Nygard and Paris Hilton is so great that her involvement in a private employment dispute is a matter of public interest.

Ryan, as a matter of fact and law, did not engage in speech warranting protection under Washington's anti-SLAPP statute, and it was reversible error to rule otherwise.

C. Johnson Met Her Burden Of Illustrating A Probability Of Prevailing On Her Defamation Per Se Claim.

The anti-SLAPP "*statute does not bar a plaintiff from litigating an action that arises out of the defendant's free speech or petitioning; it subjects to potential dismissal only those actions in which the plaintiff cannot state and substantiate a legally sufficient claim.*" Hilton v. Hallmark Cards, 599 F.3d 894, 908 (9th Cir. 2010). Here, even if the Court determined Ryan passed his threshold requirement of proving his speech touched upon matters of public concern, Johnson stated and substantiated a legally sufficient claim requiring reversal of the Trial Court's dismissal.

To state and substantiate a claim of defamation per se, Johnson must show that her defamation claim is "*legally sufficient*" and "*supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by* [Johnson] *is credited.*" Wilson v. Parker, Covert & Childester, 28 Cal. 4th 811, 821 (2002). Indeed "*[t]he*

role of the trial court... is akin to the trial court's role in deciding a motion for summary judgment. The trial court may not find facts or make determinations of credibility." Dillon, supra, at 1142. "*Thus, when considering a motion to strike under the anti-SLAPP statute, the court should apply a summary judgment-like analysis to determine whether the plaintiff has shown, by clear and convincing evidence, a probability of prevailing on the merits.*" Id. Moreover, the court "*must view the facts and all reasonable inferences therefrom in the light most favorable to the plaintiff.*" Id. at 1143.

Here, Ryan clearly accused Johnson of dishonesty in a governmental hearing – submitting false statements to a government agency with criminal implications. "*In the course of fighting my claim, Ms. Johnson submitted false statements to the Unemployment Security Department, in the form of my official separation letter. ...She has now opened the theater to... charges of making demonstrably false statements to a government agency, should Washington State wish to pursue that.*" CP 106-107. "*...you should know that in addition to the outright lies submitted to the State of Washington by Civic in my official separation letter....*" CP 108.

Further, Ryan intentionally exposed Johnson to hatred, contempt, and ridicule with the goal of intentionally depriving her of the benefit of

public confidence while seeking to injure her in her profession. Caruso v. Local Union No. 690 of Int'l Bhd. Of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., 100 Wn.2d 343, 354 (1983). "*My official separation letter should be expunged from the record now that Ms. Johnson's lies and distortions have been revealed as such.*" CP 106. "*...Yvonne A.K. Johnson could have avoided granting us this victory if her extraordinary intelligence had not been overwhelmed by her extreme maliciousness.*" Id. "*[A] few minutes spent reading this... is likely to induce a sense that Ms. Johnson would bring more drama and divisiveness than any respectable institution would care to have.*" CP 108. As a matter of fact and law, Ryan's blogged cyberbullying constitutes defamation per se.

"*A defamatory publication is libelous per se (actionable without proof of special damages) if it (1) exposes a living person to hatred, contempt, ridicule or obloquy, to deprive him of the benefit of public confidence or social intercourse, or (2) injures him in his business, trade, profession or office.*" Maison de France, Ltd. v. Mais Oui!, Inc., 126 Wn. App. 34, 44-45 (Div. I 2005). "*A publication is also libelous per se if it imputes to the plaintiff criminal conduct involving moral turpitude.*" Id.

Libel is examined under one of two standards. "*The necessary degree of fault depends on whether the plaintiff is a private individual or a*

public figure or public official." Id. at 44. "*When the defamed party is a public figure or public official, he or she must establish actual malice.*" Id. "*Actual malice is a heightened standard, and is 'knowledge of the falsity or reckless disregard of the truth or falsity of the statement.*" Id.

> "*Actual malice ordinarily may be inferred from objective facts, and evidence of negligence, motive and intent, by cumulation and appropriate inferences, may establish the defendant's recklessness or knowledge of falsity. Further, the defendant's mere statement of his belief in the publication's truth must be weighed against evidence adduced that supports a finding of knowing falsity or recklessness.*"

Id. Finally, "*Actual malice can... be inferred from circumstantial evidence, including a defendant's hostility or spite, knowledge that a source of information about a plaintiff is hostile, and failure to properly investigate an allegation.*" Duc Tan v. Le, 177 Wn.2d 649, 669 (2013).

The Trial Court committed error in holding Johnson failed to provide clear and convincing evidence of actual malice. Ryan was hostile and spiteful toward Johnson, and the objective evidence of James Humes' signature on the unemployment form submitted in the official proceeding illustrates Ryan misrepresented the involvement of others when he stated Johnson submitted false statements to the Unemployment Security Department. CP 107, 126. Indeed, it was Humes who handled the

unemployment dispute with the assistance of an attorney hired by the Board, not Johnson.

In Maison de France, supra, Division I found the Trial Court erred when concluding the speech at issue was substantially true in its stinging points because the evidence did not support "*the accusations of fraud*" as the author was only aware of a single occasion wherein "*the Seattle Police and the FDA contacted his store regarding a sale to one customer of one expired food item.*" Id. at 47. Accordingly, "*the accusations of fraud contained in the September 8th letter were defamatory per se because they falsely imputed criminal conduct to the appellants.*" Id. Just as the Court in Maison de France, Id., inferred actual malice from the objective facts (the defendant's letter setting forth allegations of fraud and the testimony regarding what the author knew) and inferences, so too can this Court. Moreover, Ryan's mere statement of his belief in the truth of his publication must be weighed against evidence adduced that supports a finding of knowing falsity or recklessness. Maison de France at 44. Here, there is no evidence supporting the accusation Ms. Johnson submitted false statements to the government. Id.

"*[I]mputation of a criminal offense involving moral turpitude has been held to be clearly libelous per se.*" Caruso, supra. Here, Ryan's

blogged accusations were defamatory per se because they falsely imputed criminal conduct involving moral turpitude to Johnson.

Finally, Ryan's reliance upon Mark v. Seattle Times, 96 Wn.2d 473 (1981), is misplaced. In Mark, the court held there is no liability when defendant's true factual statements create the "sting" of the damaging publication and their additional false statements do not cause any separate or additional harm. Mark, at 496. In Mark, the plaintiff was arrested after being charged with larceny based on fraudulent Medicaid billing. Id. A news report stated that Mark had "*bilked the state out of at least $300,000.*" Id. Ultimately, the State was only able to prove fraudulent claims totaling about $2,500. Id. at 477. Concluding the gist of the report was the arrest of Mark for Medicaid fraud involving substantial funds, the court found any inaccuracy in the amount involved did not alter the sting of the publication. Id. at 496. Mark is inapplicable here, as Ryan's accusation that Johnson lied in an official proceeding was the statement that created the "sting." Yet, unlike in Mark, there is no proof that Johnson lied in an official proceeding.

The Trial Court erred in ruling that Johnson failed to provide clear and convincing evidence of "actual malice." On the contrary, Johnson met her burden of showing the statement at issue was false, not privileged,

and was made with actual malice. As the statement constituted defamation per se, Johnson was not required to show damage.

IV. RAP 18.1 MOTION FOR ATTORNEY FEES AND COSTS

Appellant Johnson respectfully requests an award of reasonable attorney fees and costs incurred on appeal. RAP 18.1; RCW 4.24.525(6)(a). Moreover, Appellant Johnson in turn respectfully requests that the award of statutory damages against her in the amount of $10,000 be reversed and a like amount be awarded to her in order to deter Ryan from further abusive, frivolous use of Washington's anti-SLAPP statute. RCW 4.24.525(6)(b)(i)-(iii).

V. CONCLUSION

Based upon the foregoing, Appellant Johnson respectfully requests that the Trial Court's grant of Ryan's anti-SLAPP motion be reversed; that the Trial Court's dismissal of Appellant Johnson's defamation and tortious interference claims be reversed; that Respondent's statutory damages award, as well as the fees and costs awarded by the Trial Court be vacated

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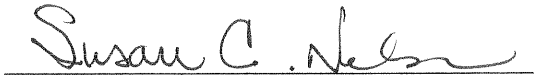
and dismissed; and that Appellant Johnson be awarded her reasonable costs and attorney fees on appeal.

DATED this 5 day of March, 2014.

DUNN BLACK & ROBERTS, P.S.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5 day of March, 2014, I caused to be served a true and correct copy of the foregoing document to the following:

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Susan C. Nelson

SUSAN C. NELSON

Sedgwick Claims Management Services, Inc. v. Delsman

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Opinion

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

SAUNDRA BROWN ARMSTRONG, District Judge.

***1** Plaintiff Sedgwick Claims Management Services, Inc. ("Sedgwick") is an out-of-state corporation that provides insurance claims services to various companies and their employees, including Defendant Robert A. Delsman, Jr. ("Defendant"). Defendant runs a "blog" in which he has strongly criticized the business practices of Sedgwick and its management. In addition, Defendant has mailed postcards styled as "WANTED" posters bearing the photographs of two of Sedgwick's executives, again with critical commentary. Sedgwick's First Amended Complaint ("Amended Complaint") alleges that Defendant engaged in copyright infringement by using the two photos. In addition, Sedgwick alleges various state law causes of action, including defamation, based on the content expressed in the blogs. The Court has original and diversity jurisdiction pursuant to 28 U.S.C. § 1331 and 1332, respectively.

The parties are presently before the Court on Defendant's Pro Se Motion for Summary Judgment, Improper Venue, Failure to Join Indispensible Third Party Under Rule 19. In view of Defendant's pro se status, the Court liberally construes his motion as one to dismiss the copyright infringement claim under Federal Rule of Civil Procedure 12(b)(6) and an anti-SLAPP motion to strike under California Code of Civil Procedure section 425.16 as to the remaining state law claims. Having read and considered the papers filed in connection with this matter and being fully informed, the Court hereby GRANTS the motion for the reasons set forth below. The Court, in its discretion, finds this matter suitable for resolution without oral argument. See Fed.R.Civ.P. 78(b).

I. BACKGROUND

A. FACTUAL OVERVIEW

Sedgwick provides insurance claim management services to its customers and their employees. (FAC ¶ 8.) The Company is an Illinois corporation and has its principal place of business in Memphis, Tennessee. (*Id.*) David North is the Company's Chief Executive Officer ("CEO") and Paul Posey is its Chief Operating Officer ("COO"). (*Id.* ¶ 12.) Sedgwick's clientele includes a number of recognizable companies, including General Electric. (*Id.* ¶ 8.) GE hired Sedgwick to manage and administer claims for its Long–Term Disability Income Plan, which is offered through Met–Life, Inc. ("Met–Life/GE Plan"). (*Id.* ¶ 10.)

Defendant was previously employed by GE and purchased insurance under the Met Life/GE Plan. (*Id.* ¶ 11.) In or about February 2006, he submitted a claim for disability benefits. (*Id.*) The status of his claim is not specified in the pleadings. However, Defendant, who claims he is disabled and has been unable to work for the last three years, apparently is highly dissatisfied with Sedgwick's handling of his claim. (Def.'s Mot. at 2.) As a means of expressing his opinions regarding Sedgwick and its management, Defendant began (on an unspecified date) to publicly express his views through a web blog and a postcard mailing campaign called "Operation Going Postcard." (FAC ¶ 12–13.)

***2** Defendant's blog is maintained at various URLs, i.e., www.Sedgwickcms.blogspot.com,www.gesupplydiscrimination.com and http:// gesupplyrexeldiscrimination.com. (*Id.* ¶¶ 33–35.) In these blogs, Defendant allegedly posted a number of "defamatory" statements in which he accuses Sedgwick of, *inter alia,* wrongfully denying benefits to claimants, violating various laws, and accusing Sedgwick and its "minions" (whom he calls "Sedgthugs") of having committed "Sedgcrimes." (*Id.* ¶ 23.) In addition, Sedgwick complains that Defendant used two copyrighted photographs, headshots of CEO North and COO Posey, and superimposed them

on fugitive-style "WANTED" postcards. (*Id.* ¶ 24.)[1] He also is alleged to have "morphed" the same two photos into pictures of Adolph Hitler and Heinrich Himler, respectively, and to have sent them to unspecified Sedgwick employees. (*Id.* ¶ 24.) Defendant allegedly obtained North's photo from a worker's compensation conference website, and Posey's photo from a Company press release announcing his elevation to COO. (*Id.* ¶ 25.)

In February 2009, Defendant launched Operating Going Postcard, which he described in his blogs as a campaign to "educate the consuming public" regarding the business practices of Sedgwick. (*Id.* ¶ 29.) According to Defendant, such negative publicity was a "good way to fight back against these despicable characters...." (*Id.*) On February 9, 2009, Defendant sent one such postcard to CEO North. (*Id.* ¶ 30.) One side of the postcard incorporates North's picture into a "WANTED" poster which is captioned: "WANTED FOR HUMAN RIGHTS VIOLATIONS." (*Id.*) To the right of the photo, the text reads: "Have you been threatened by this man or his minions? The time for change is at hand!" (*Id.*) On the other side of the postcard, the following copy appears:

> Have you been terrorized, threatened and lied to by Sedgwick Claims Management Services?
>
> The time to act is now!
>
> Report these despicable activities to the U.S. Department of Justice and the Attorney General in your state.
>
> Sedgwick CMS can be stopped peacefully and purposefully if enough people act now!
>
> Get informed!

(*Id.*)

In another postcard sent to MetLife on February 19, 2009, a picture of COO Posey is superimposed on the same type of "WANTED" poster, using the same format. (*Id.* ¶ 34.) To the right of the photo the text reads:

> Tired of a pocket full of Poseys
>
> More Liar Lawyers ready to take your rights away for their bottom line
>
> Just Say No to Sedgwick's latest Ponzi Scheme

(*Id.*) The copy on the opposite side of the postcard reads identically to the North postcard, as set forth above. (*Id.*)

On February 9, 2009, Defendant allegedly sent a postcard to Sedgwick's Operations Manager which showed the image of a skull, accompanied by the text: "Are you a victim of Sedgwick CMS? Have you or your family been terrorized by David North and his minions? Take a stand NOW! Just say NO!" (*Id.* ¶ 31.) The flipside of the postcard contained the same copy as the other postcards. (*Id.*) Defendant sent a similar postcard to Sears on February 17, 2009. (*Id.* ¶ 33.)

B. PROCEDURAL SUMMARY

***3** Plaintiff filed its Complaint in this Court on April 3, 2009, and an Amended Complaint on April 10, 2009, naming Delsman as the only defendant. The pleadings allege six claims for: (1) trespass to chattels; (2) copyright infringement; (3) interference with prospective economic advantage; (4) trade libel; (5) defamation and libel; and (6) unfair competition. Plaintiff's second claim for copyright infringement is the only federal claim. All other causes of action are predicated on state law.

In response to the Amended Complaint, Defendant filed a pro se motion styled as "Defendants (sic) Motion for Summary Judgment; Improper Venue; Failure to Join an Indispensible Third Party under Rule 19." (Docket 21.) Defendant's motion contains a scattershot of arguments, all of which seek the dismissal of the action. Among other things, Defendant contends that Sedgwick's complaint is a Strategic Lawsuit Against Public Participation (also known as a "SLAPP suit") intended to harass and intimidate him in response to his criticism of the Company. (Pl.'s Mot. at 3.) In addition, Defendant contends that his use of Sedgwick's photographs constitutes "fair use" under the Copyright Act, 17 U.S.C. § 107. (*Id.*)[2]

A court must liberally construe a pro se litigant's "inartful pleading" and motions. *See Bernhardt v. Los Angeles County,* 339 F.3d 920, 925 (9th Cir.2003); *Zichko v. Idaho,* 247 F.3d 1015, 1020 (9th Cir.2001). Although Defendant has styled his motion as one for summary judgment, he has not accompanied his motion with any evidence or declarations. Therefore, the Court construes his motion, as it pertains to Sedgwick's second claim for copyright infringement, as a motion to dismiss under Rule 12(b)(6). With regard to Sedgwick's remaining five state law causes of action, the Court construes the motion as an anti-SLAPP special motion to strike under California Code of Civil Procedure section 425.16.[3]

II. MOTION TO DISMISS COPYRIGHT INFRINGMENT CLAIM

A. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. To survive a motion to dismiss for failure to state a claim, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "In general, the inquiry is limited to the allegations in the complaint, which are accepted as true and construed in the light most favorable to the plaintiff." *Lazy Y Ranch Ltd. v. Behrens,* 546 F.3d 580, 588 (9th Cir.2008). However, a court need not accept as true unreasonable inferences or conclusory legal allegations cast in the form of factual allegations. *Sprewell v. Golden State Warriors,* 266 F.3d 979, 988 (9th Cir.2001).

B. COPYRIGHT INFRINGEMENT

The Copyright Act confers a copyright owner with the exclusive right to reproduce a copyrighted work and to distribute copies of the work. *See* 17 U.S.C. § 106(1)-(3). "[T]o establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.,* 499 U.S. 340, 361, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991). A claim of copyright infringement is subject to certain statutory exceptions, including the "fair use" exception, which provides that "the fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching ..., scholarship, or research, is not an infringement of copyright." 17 U.S.C. § 107. The fair use exception "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.,* 109 F.3d 1394, 1399 (9th Cir.1997) (internal quotation marks and citation omitted).

***4** The fair use statute sets out four factors to consider in determining whether the use in a particular case is a fair use. 17 U.S.C. § 107; *Leadsinger, Inc. v. BMG Music Publishing,* 512 F.3d 522, 529 (9th Cir.2008). These factors consist of the following: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107.

"When conducting a fair use analysis, [the Court is] not restricted to these factors; rather, the analysis is a flexible one that [the Court] perform[s] on a case-by-case basis." *Leadsinger,* 512 F.3d at 529. These factors should be weighed together, "in light of the copyright law's purpose 'to promote the progress of science and art by protecting artistic and scientific works while encouraging the development and evolution of new works.' " *Id.* (citation omitted); *accord Perfect 10, Inc. v. Amazon.com, Inc.,* 508 F.3d 1146, 1163 (9th Cir.2007). Not all factors must be met in order for the Court to make a determination of fair use. *Kelly v. Arriba Soft Corp.,* 336 F.3d 811, 822 (9th Cir.2003) (holding that fair use was established where two of the four factors weighed in favor of the alleged infringer).

Sedgwick argues that the issue of fair use cannot be decided on a motion to dismiss, and that it should be allowed to conduct "further discovery." (Pl.'s Opp'n at 7.) However, the Ninth Circuit has held that a defendant's "assertion of fair use may be considered on a motion to dismiss, which requires the court to consider all allegations to be true, in a manner substantially similar to consideration of the same issue on a motion for summary judgment, when no material facts are in dispute." *Leadsinger, Inc. .,* 512 F.3d at 530; *accord Savage v. Council on American–Islamic Relations, Inc.,* 2008 WL 2951281 at *4–9 (N.D.Cal.2008) (granting Rule 12(c) motion for judgment on the pleadings based on fair use defense) (Illston, J.); *Burnett v. Twentieth Century Fox Film Corp.,* 491 F.Supp.2d 962, 971–72 (C.D.Cal.2007) (granting Rule 12(b)(6) motion to dismiss based on fair use defense and dismissing copyright infringement claim).

C. FAIR USE FACTORS

1. First Factor—Purpose and Character of the Use

The first fair use factor addresses "whether the new work merely 'supercedes the objects' of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning or message, in other words, whether and to what extent the new work is 'transformative.' " *Campbell v. Acuff–Rose Music,* 510 U.S. 569, 579–80, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994) (internal citations omitted); 17 U.S.C. § 107(1). Among the various forms of "transformative use" is

parody, which is a " 'literary or artistic work that imitates the characteristic style of an author or a work for comic effort or ridicule, ...' " *Id.* at 580. Parody is "a form of social and literary criticism," it has "socially significant value as free speech under the First Amendment." *Dr. Seuss,* 109 F.3d at 1400.[4] "[T]he more 'transformative the new work, the less will be the significance of the other factors.' " *Wall Data Inc. v. Los Angeles County Sheriff's Dept.,* 447 F.3d 769, 779 (9th Cir.2006) (quoting *Campbell,* 510 U.S. at 578–79).

***5** Sedgwick argues that there can be no fair use where, as here, Defendant did not alter the photographs of North and Posey. (Pl.'s Opp'n at 7–8.)[5] This argument is misplaced. The question of fair use does not turn simply on whether the photographs themselves were unaltered. Rather, as the relevant jurisprudence makes clear, the salient inquiry is whether the use of the photos, *in the specific context used,* was transformative. *See Perfect 10, Inc.,* 508 F.3d at 1164 ("a search engine puts images *'in a diferent context'* so that they are 'transformed into a new creation.' ") (emphasis added). In that regard, the Ninth Circuit has consistently held that "making an exact copy of a work may be transformative so long as the copy serves a different function than the original work[.]" *Id.* (image originally used for entertainment or aesthetic purposes was transformed where defendant used the same image to facilitate use of an internet browser to locate information on the web); *Kelly v. Arriba Soft Corp.,* 336 F.3d 811, 816 (9th Cir.2003) ("exact replication" of protected images was fair use where used in a different context from the original); *Mattel,* 353 F.3d at 802 (photographs of Barbie dolls "in various absurd and often sexualized positions" parodied "Barbie's influence on gender roles and the position of women in society" and hence was transformative); *see also Nunez v. Caribbean Intern. News Corp.,* 235 F.3d 18, 22 (1st Cir.2000) (holding that use of unaltered pictures in conjunction with editorial commentary gave them "new meaning" sufficient to transform the works into a "newsworthy" use); *Leibovitz v. Paramount Pictures Corp.,* 137 F.3d 109, 115 n. 3 (2d Cir.1998) (application of the fair use doctrine is particularly apropos where the use of the work disparages the original).

Here, there can be no legitimate dispute that Defendant's use of North and Posey's photographs was transformative. Both images originally were used by Defendant for promotional reasons. (FAC ¶ 25.) Defendant, however, used the photographs as a vehicle for criticizing the Company. Specifically, both photographs are superimposed on postcards that mimic "WANTED" posters. Above each picture is the heading, in a large font, which states: "WANTED FOR HUMAN RIGHTS VIOLATIONS." (¶ 30, 32, 34.) The copy accompanying the photographs criticizes Sedgwick and its management's alleged mistreatment of claimants and questionable practices, and urges the public to report any misdeeds to the U.S. Department of Justice and state Attorney Generals. (*Id.*) When viewed in context, it is clear that Defendant used North and Posey's photographs for a fundamentally different purpose than they were originally intended by transforming them into a vehicle for publicizing and criticizing Sedgwick's alleged business practices. In view of the above, the Court finds that the first fair use factor weighs strongly in favor of fair use.[6]

2. Second Factor—Nature of Plaintiff's Work

***6** The second fair use factor looks to the nature of the plaintiff's work. 17 U.S.C. § 107(2). Where transformative uses are involved, this factor has been described as "not ... terribly significant in the overall fair use balancing...." *See Mattel,* 353 F.3d at 803; *Campbell,* 510 U.S. at 586 (noting that the second factor was "not much help" in the parody context). Neither party makes any argument regarding this factor. The Court therefore considers the second factor to be neutral.

3. Third Factor—Amount of the Work Used

"The third factor asks whether the amount and substantiality of the portion used in relation to the copyrighted work as a whole ... are reasonable in relation to the purpose of the copying." *Campbell,* 510 U.S. at 586; 17 U.S.C. § 107(3). Sedgwick briefly argues that this factor weighs against a finding of fair use because Defendant used the entire photograph of North and Posey. (Pl.'s Opp'n at 8.) This contention lacks merit.

The Ninth Circuit has held that the reuse of an entire image may be reasonable if it serves the *defendant's* intended purpose. *See Perfect 10, Inc. v. Amazon.com, Inc.,* 508 F.3d 1146, 1166 (9th Cir.2007) (use of entire image necessary to facilitate use of search engine); *Kelly,* 336 F.3d at 821 (same); *accord Calkins v. Playboy Enters. Int'l, Inc.,* 561 F.Supp.2d 1136, 1142–43 (E.D.Cal.2008) (magazine's use of model's high school photograph for the purpose of personalizing her was reasonable since "[t]o use a lesser portion of the Photograph would have defeated [the magazine]'s] purpose for using it."). Here, Defendant used the photographs to mimic a "WANTED" posted. As such, displaying only a portion of the North or Posey photographs would have

to punish them for doing so." *Thomas v. Quintero,* 126 Cal.App.4th 635, 657, 24 Cal.Rptr.3d 619 (2005) (internal quotations and citations omitted). "California enacted section 425.16 to provide a procedural remedy to resolve such a suit expeditiously." *Dowling v. Zimmerman,* 85 Cal.App.4th 1400, 1414, 103 Cal.Rptr.2d 174 (2001) (internal quotation marks and citation omitted).

***8** When a plaintiff brings a SLAPP complaint, the defendant may move to strike the complaint under section 425.16. Cal.Code of Civ. Proc. § 425.16(f). In assessing a special motion to strike an alleged SLAPP, the trial court engages in a two-step process. "First, the court determines whether the challenged cause of action arises from a protected activity described in the statute." *Maranatha Corrections, LLC v. Department of Corrections & Rehabilitation,* 158 Cal.App.4th 1075, 1084, 70 Cal.Rptr.3d 614 (2008). In that regard, "the critical consideration is whether the cause of action is based on the defendant's protected free speech or petitioning activity." *Navellier v. Sletten,* 29 Cal.4th 82, 89, 124 Cal.Rptr.2d 530, 52 P.3d 703 (2002). "Second, if the court so finds, it then decides whether the plaintiff has established a probability of prevailing on the merits of the claim." *Maranatha Corrections, LLC,* 158 Cal.App.4th at 1084, 70 Cal.Rptr.3d 614. If the plaintiff is unable to provide the factual and legal support for the challenged cause of action, the complaint should be stricken. Cal.Code Civ. P. § 425.16(b); *Dowling,* 85 Cal.App.4th at 1417, 103 Cal.Rptr.2d 174.

B. ACT IN FURTHERANCE OF PETITIONING OR FREE SPEECH RIGHTS

The anti-SLAPP statute applies to claims "arising from" speech or conduct "in furtherance of the exercise of the constitutional right of ... free speech in connection with a public issue or an issue of public interest." Cal.Code Civ.Proc. § 425.16(e)(4). The term "public interest" has been "broadly construed." *Integrated Healthcare Holdings, Inc. v. Fitzgibbons,* 140 Cal.App.4th 515, 523, 44 Cal.Rptr.3d 517 (2006). There are three general categories of cases falling within subdivision (e)(4) of section 425.16:(1) the subject of the statement or activity precipitating the claim was a person or entity in the public eye; (2) the statement or activity precipitating the claim involved conduct that could affect large numbers of people beyond the direct participants; and (3) the statement or activity precipitating the claim involved a topic of widespread public interest. *Id.* at 525, 44 Cal.Rptr.3d 517. The challenged statements must have been made in a public forum and involved a matter of public interest in order for section 425.16 to apply. *Wilbanks v. Wolk,* 121 Cal.App.4th 883, 895–899, 17 Cal.Rptr.3d 497 (2004).

Sedgwick does not dispute that Defendant's statements were made in public forum, i.e., through his web blog and mailings. *Id.* Instead, it asserts that Defendant's actions were "not those of any individual furthering public interest; they are actions of an individual engaging in harassment, intimidation, defamation and trespass for the sake of pursuing a personal vendetta." (Pl.'s Opp'n at 3.)[7] Sedgwick's conclusory assertions are belied by the pleadings. The statements in the Amended Complaint attributed to Defendant show that their purpose is to enlighten potential consumers of Sedgwick's allegedly questionable claims practices and to avoid using the company's services. (Compl.¶ 23.) Defendant urges persons who feel they have been treated improperly by Sedgwick to express their concerns to the company and to submit reports of misconduct to state and federal law enforcement agencies. (*Id.* ¶ 23, 29, 30–35, 17 Cal.Rptr.3d 497.) These statements are precisely the type of speech that presents a matter of public interest. *See Wilbanks,* 121 Cal.App.4th at 894–95, 17 Cal.Rptr.3d 497 (statements made on website accusing plaintiff brokerage firm of engaging in unethical or questionable business practices and warning public against patronizing the firm presented a matter of public concern within the purview of section 425.16); *Damon,* 85 Cal.App.4th at 480, 102 Cal.Rptr.2d 205 (statements in a newsletter critical of a homeowner association's manager's performance presented a matter of public concern).

***9** As an ancillary matter, Sedgwick argues that even if Defendant engaged in protected activity, it is not seeking to restrain his behavior. (Pl.'s Opp'n at 4.) This contention is contradicted by the pleadings. In its Amended Complaint, Sedgwick expressly seeks extensive injunctive relief including, *inter alia,* an injunction "prohibiting Defendant from further defaming and libeling Sedgwick" and an injunction barring Defendant from further "offensive" mailings. (FAC at 21–22.) Moreover, Sedgwick has alleged multiple claims against Defendant in which it seeks compensatory damages in excess of $75,000, in addition to the imposition of punitive damages. (*Id.*) As such, its strains credulity for Sedgwick to assert that it "does not seek to restrain" Defendant's protected expression. (Pl.'s Opp'n at 4.) The Court thus concludes a prima facie showing has been made by Defendant that Sedgwick's lawsuit arises from an act in furtherance of his right of petition or free speech.

The sole case cited by Sedgwick, *Duncan v. Cohen,* 2008 WL 2891065 (N.D.Cal.2008) is inapposite. In *Duncan,* the district court ruled that section 425.16 was inapplicable because the defendant was not predicating its use of material from plaintiff's book on its right to free speech. Rather, defendant claimed that it had a right to use the content based on *contractual rights* it had previously acquired. *Id.* at *3. Consequently, the court found that there was no restraint on any protected activity since none had been asserted. *Id.* While Defendant's papers in this case are not a model of clarity, it is readily apparent that he is asserting his constitutional rights to criticize Sedgwick.

C. PROBABILITY OF PREVAILING ON THE MERITS

In light of the Court's conclusion above, the burden shifts to Sedgwick to demonstrate a probability that it will prevail on its claims. *Hall v. Time Warner, Inc.,* 153 Cal.App.4th 1337, 1345, 63 Cal.Rptr.3d 798 (2007). "In opposing an anti-SLAPP motion, the plaintiff cannot rely on allegations in the complaint, but must bring forth evidence that would be admissible at trial." *Ampex Corp. v. Cargle,* 128 Cal.App.4th 1569, 1576, 27 Cal.Rptr.3d 863 (2005). Thus, Sedgwick's burden in this regard is to make a prima facie showing of facts through the presentation of evidence that would, if proved at trial, support a judgment in its favor. *Balzaga v. Fox News Network, LLC,* 173 Cal.App.4th 1325, 1337, 93 Cal.Rptr.3d 782 (2009); *Roberts v. Los Angeles County Bar Assn.,* 105 Cal.App.4th 604, 613–614, 129 Cal.Rptr.2d 546 (2003) ("In assessing the probability of prevailing, a court looks to the evidence that would be presented at trial, similar to reviewing a motion for summary judgment; a plaintiff cannot simply rely on its pleadings, even if verified, but must adduce competent, admissible evidence."); *Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles,* 117 Cal.App.4th 1138, 1147, 12 Cal.Rptr.3d 493 (2004) ("It is well settled that in opposing a SLAPP motion the plaintiff's showing of a probability of prevailing on its claim must be based on admissible evidence.").

***10** Sedgwick fails to adduce any evidence to meet its burden of showing a probability of prevailing on any of its claims. Rather, Sedgwick simply recites the elements of each of its state law causes of action and cites to various allegations of the Amended Complaint. (Pl.'s Opp'n at 5–6.) The conclusory allegations in Sedgwick's unverified pleading, standing alone, are insufficient to satisfy it burden of demonstrating a probability of prevailing on their claims. *See DuPont Merck Pharmaceutical Co. v. Superior Court,* 78 Cal.App.4th 562, 568, 92 Cal.Rptr.2d 755 (2000) ("It would defeat the obvious purposes of the anti-SLAPP statute if mere allegations in an unverified complaint would be sufficient to avoid an order to strike the complaint."); *e.g., Neville v. Chudacoff,* 160 Cal.App.4th 1255, 1270, 73 Cal.Rptr.3d 383 (2008) (affirming order granting motion to strike where the defendant failed to present any evidence to show a probability of success); *Kronemyer v. Internet Movie Data Base, Inc.,* 150 Cal.App.4th 941, 951, 59 Cal.Rptr.3d 48 (2007) (motion to strike properly granted where plaintiff failed to submit sufficient evidence to support his claims). For these reasons, the Court GRANTS Defendant's motion to strike Sedgwick's state law claims, pursuant to section 425.16.

IV. CONCLUSION

For the reasons stated above,

IT IS HEREBY ORDERED THAT Defendant's motion for summary judgment (docket 21), which the Court has liberally construed as a motion to dismiss Plaintiff's copyright infringement claim and special motion to strike the remaining state law causes of action, is GRANTED. The Clerk shall close the file and terminate all deadlines and open matters.

IT IS SO ORDERED.

Footnotes

1 Curiously, these photographs allegedly were registered with the Copyright Office on March 19, 2009 (FAC ¶ 9), only 15 days before Sedgwick commenced this lawsuit on April 3, 2009.

2 Defendant also accuses Sedgwick of discriminating against disabled persons and persons of color. (Pl.'s Mot. at 4.)

3 California's anti-SLAPP statute applies to state law causes of action filed in a federal court but is inapplicable to federal claims. *Bulletin Displays, LLC v. Regency Outdoor Adver., Inc.,* 448 F.Supp.2d 1172, 1180 (C.D.Cal.2006).

4 "[E]very court to address the issue whether a defendant's work qualifies as a parody has treated this question as one of law to be decided by the court." *Mattel, Inc. v. Walking Mountain Prods.,* 353 F.3d 792, 801 (9th Cir.2003).

5 Sedgwick's argument is limited to the use of the unaltered photos on the postcards on the website. (FAC ¶¶ 30, 32, 34.) It does not dispute that Defendant's morphing of the photos into Nazi leaders was transformative. (*Id.* ¶ 24.)

6 Given the transformative nature of Defendant's use of the photographs, the matter of whether the use was commercial is less significant. *See Elvis Presley Enters., Inc. v. Passport Video,* 349 F.3d 622, 628 (9th Cir.2003). Nevertheless, the Court notes that there is no claim that Defendant used the photographs for commercial gain. Rather, all of the facts presented indicate that the photographs were used as part of Defendant's overall endeavor to educate, publicize and warn the public about Sedgwick. The lack of commercialism also weighs in favor of fair use.

7 Sedgwick makes the unsupported supposition that Defendant has not made a prima facie showing supported by evidence that the claims alleged arise from an act in furtherance of Defendant's protected activity. (Pl.'s Opp'n at 3.) However, Sedgwick overlooks that the comparative burdens applicable to defendant and plaintiff on an anti-SLAPP motion are not the same. *See Fox Searchlight Pictures, Inc. v. Paladino* 89 Cal.App.4th 294, 305, 106 Cal.Rptr.2d 906 (2001). Unlike the plaintiff, the burden on the defendant is not an evidentiary one. All the defendant must do is show that "the act underlying the plaintiff's cause fits one of the categories spelled out in [section 425.16(e)]." *Braun v. Chronicle Publishing Co.,* 52 Cal.App.4th 1036, 1043, 61 Cal.Rptr.2d 58 (1997); *Navellier,* 29 Cal.4th at 94–95, 124 Cal.Rptr.2d 530, 52 P.3d 703. Indeed, California courts have consistently held that the defendant need not *prove* that its actions are constitutionally protected. *Id.; Fox Searchlight Pictures,* 89 Cal.App.4th at 305, 106 Cal.Rptr.2d 906. The defendant's burden is simply to show that the anti-SLAPP statute applies, which can be accomplished by examining the specific causes of action alleged. *See City of Cotati v. Cashman,* 29 Cal.4th 69, 78, 124 Cal.Rptr.2d 519, 52 P.3d 695 (2002). Here, Defendant posits that the claims alleged are based on his public criticism of Sedgwick. In view of his pro se status, the Court liberally construes Defendant's argument as one under the "public interest" prong of section 425.16(e).

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