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SAN FRANCISCO SCIENCE FICTION
CONVENTIONS, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

JONATHAN DEL ARROZ,

Plaintiff,

v.

SAN FRANCISCO SCIENCE FICTION CONVENTIONS, INC. ("SFSFC") aka "WORLDCON76" David W. Gallaher (2019), President; David W. Clark (2020), Vice President; Lisa Detusch Harrigan (2020), Treasurer; Kevin Standlee (2018), Secretary; Sandra Childress (2019); Bruce Farr (2018), Chair; 2018 SMOF Con Committee; Cheryl Morgan (2020); Kevin Roche (2018), Chair; 2018 Worldcon (Worldcon 76) Committee; Cindy Scott (2018); Randy Smith (2019), Chair; New Zealand 2020 Worldcon Agent Committee; Andy Trembley (2020); Jennifer "Radar" Wylie (2019), Chair; CostumeCon 2021 Organizing Committee; Lori Buschhaum; Susie Rodriguez and DOES 1 through 30, inclusive.,

Defendants.

Case No. 18-CV-334547

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT [C.C.P. § 437c]

[Filed Concurrently with Notice of Motion, Separate Statement of Undisputed Material Facts, Declaration of Kevin Roche, Declaration of Lindsey Pho, and Request for Judicial Notice, along with accompanying exhibits]

Date: May 11, 2021
Time: 9:00 a.m.
Dept.: 20
Judge: Honorable Socrates P. Manoukian

Action Filed: April 16, 2018
Trial Date: June 14, 2021

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I. INTRODUCTION

This case arises from Defendant San Francisco Science Fiction Conventions, Inc.'s ("Defendant" or "SFSFC") decision to revoke Plaintiff Jonathan Del Arroz's ("Plaintiff") attending membership to the 76th annual World Science Fiction Convention ("WorldCon 76" or "the Convention") held in San Jose in August 2018. Plaintiff's primary complaint was that SFSFC discriminated against him for his conservative, Christian, Trump supporting beliefs. However, most of Plaintiff's causes of action were dismissed as a result of Defendant's Demurrer. At this time, Plaintiff's only surviving claim is one for defamation.

Plaintiff's defamation claim is based upon a statement ("the Statement") Defendant posted on its WorldCon 76's website and Facebook account to inform its members that it had chosen to revoke Plaintiff's attending membership and ban him from attending the Convention. SFSFC took that action after Plaintiff expressed an intention to violate WorldCon 76's Code of Conduct. Plaintiff alleges that a portion of the Statement implies that he is a racist and a bully, and is thereby false and defamatory. Plaintiff is mistaken. It is well-established law that statements calling someone a racist or a bully are nonactionable opinions that cannot support a defamation cause of action.

Plaintiff is a science fiction author who has built his writing career on a marketing strategy that involves pitting himself against other professionals in the science fiction industry in order to increase his visibility in the media and on social media sites. This lawsuit is simply an extension of these tactics, this time with SFSFC as yet another victim of Plaintiff's abusive behavior – the same behavior which prompted SFSFC to prohibit Plaintiff's attendance at the Convention in the first place. Plaintiff has, throughout this litigation, used the lawsuit as a catalyst to self-promote and garner attention, which has increased his notoriety, and his book sales.

As set forth herein, Plaintiff will not be able to prove the essential elements and, thus, his defamation claim fails for any of the following reasons: (1) the statement is not defamatory; (2) calling someone a racist or a bully is a non-actionable expression of opinion, rhetoric or hyperbole; (3) the statement falls under the common interest privilege; (4) Plaintiff cannot prove actual malice; and (5) Plaintiff cannot prove special damages. Because no triable issue of material fact exists to salvage Plaintiff's claim, summary judgment is warranted.

II. STATEMENT OF FACTS

A. WorldCon 76

Defendant SFSFC is a California 501(c)(3) non-profit corporation that organizes science fiction conventions and other functions to promote and develop science fiction and fantasy art and literature. (Fact 1) Worldcon, i.e., the World Science Fiction Convention, is the annual conference of the World Science Fiction Society. It is the foremost gathering of the world's science fiction fans, is held at a different location each year, with the local fan community bidding on and then organizing the event. Worldcon is in some ways much like the World's Fair, a weekend-long international gathering of fans, artists, authors, and other creators who share an interest in science fiction and fantasy (in any medium) and meet to socialize, discuss, exhibit and share their works and interests. There are panels, lectures, demonstrations, dramatic productions, dances, an art show and vendors area, a media program and some unique events like the on-stage costume competition called the Masquerade. The first one was held in 1939 in New York City. The one held in San Jose in 2018 was the 76th convention, thereby named WorldCon 76. (Fact 2)

Worldcon is built on a participatory "membership" model rather than a passive audience "ticket" model. Supporting members are entitled to participate (remotely, via mail or online) in the selection of the Hugo Awards, and in the site selection processes for future Worldcon locations. Attending members are entitled to come to the conference and participate in-person. (Fact 3) The WorldCon 76 Committee within SFSFC was responsible for all aspects of WorldCon 76, including selecting the venue, maintaining a website, selling memberships, scheduling programming, recruiting volunteers, and drafting and enforcing WorldCon 76's Code of Conduct. (Fact 4)

SFSFC was aware of strife within the science fiction community, specifically relating to the issue of diversity among authors, artists, actors and creators as well as diversity among the characters in their works. (Fact 5) There has also been an increased demand by convention attendees that conventions protect them from harassment and that they create inclusive spaces free from hate. (Fact 6) These demands affected all aspects of hosting conventions, from the selection of guests to the drafting and enforcement of codes of conduct. (Fact 7) SFSFC wrote its Code of Conduct in 2016 with certain goals in mind, focusing on the safety of its members, with zero tolerance for the sort of

trolling, harassment, and bullying it had witnessed online and at past conventions. (Fact 8)

WorldCon's Code of Conduct can be found on its website and was posted publicly on WorldCon's website in April 2017. (Fact 9) The Code of Conduct states that "Harassment is any behavior that annoys other persons, aggravates them, or makes them feel unsafe. This includes but is not limited to: unwanted or threatening physical contact, unwanted or threatening verbal contact, following someone in a public area without a legitimate reason, and threatening physical harm in any way." (Fact 10) It also states, "WorldCon76 does not tolerate discrimination in any form – including through cosplay – based on but not limited to gender, race, ethnicity, religion, age, sexual orientation, gender identity, or physical/mental health conditions." (Fact 10) According to that Code of Conduct, WorldCon 76 reserved the right to revoke a membership at its discretion at any time. (Fact 10)

From August 16-20, 2018, WorldCon 76 took place at the San Jose Convention Center. At final count, WorldCon 76 had a total of 7,812 members, including both attending and supporting members. (Fact 11)

B. Plaintiff Jonathan Del Arroz

1. Background

Plaintiff contends that he is not a "nobody." (Fact 41) In 2010, he ran for US Congress. (Fact 42) In fact, Plaintiff believes he is quite famous and has frequently bragged about his many accomplishments, including:

a. That he is "a #1 Amazon Bestselling author"; (Fact 43)

b. That he has been recognized by PJMedia.com as "the "leading Hispanic voice in science fiction"; (Fact 44)

c. That he was a "winner of the 2018 CLFA Book Of The Year Award;" (Fact 45)

d. That he has been "employed by three major media outlets that have bigger readership bases than any science fiction book period because of how niche the market's gotten;" (Fact 46)

e. That he is "a popular journalist and cultural commentator." (Fact 47)

f. That he is an expert on the subject of "cancel culture," where people generate

social media outrage about someone in order to try and ruin their lives; (Fact 48)

g. That he has been interviewed by the Wall Street Journal on the subject of cancel culture; (Fact 49)

h. In April 2017, he published an article for The Federalist entitled "Forcing Political Correctness on Employees is Killing Marvel Comics," which made him somewhat of a cultural authority in the comic industry; (Fact 50)

i. He has since published over 10 articles for The Federalist; (Fact 51)

j. In September 2017, Plaintiff was interviewed by PJ Media, in relation to his April 2017 Federalist article. (Fact 52) The interview was about industry professionals attempting to harm a conservative comic reviewer, Richard C. Meyer's, career by banning him from conventions. (Fact 52) This incident, which became known as "Comicsgate," began when Plaintiff uncovered screenshots from a Facebook thread of individuals discussing goading Mr. Meyer into throwing a punch at New York Comic Con. (Fact 53) Plaintiff started #Comicsgate on Twitter, referring to this scandal in the comic book industry. (Fact 53) Plaintiff's theory is that there is or was a "concerted effort to… harass… conservative-libertarian-leaning authors" who are deemed too controversial. (Fact 54) He has been interviewed by PJ Media multiple times. (Fact 55)

Plaintiff published his first book in 2016 (Fact 56) and has since written 15 others (Fact 57). To market himself and his books, Plaintiff acquires followers and engages them by posting daily content on his own website www.delarroz.com, as well as other social media sites such as Twitter, Facebook, YouTube, Patreon, Gab, and Periscope. (See Facts 58-68.) From 2015-2017, Plaintiff also wrote comic book reviews for a company called Comic Related. (Fact 69) Since 2016, he has been publishing blog posts on his website daily. (Fact 66)

To increase visibility in the media and on social media sites, Plaintiff employs a marketing strategy that involves pitting himself against other professionals in the science fiction industry. Plaintiff's own tweets posted on Twitter are examples of "post[ing] exciting rhetoric that triggers their side or brings morale to our side." (Fact 19) That is his modus operandi. He also uses social media for "attacking," "defending" and "promotion" [sic]. (Fact 20) To him, "shitposting works as marketing." (Fact 21)

Plaintiff frequently and actively engages in inflammatory and offensive postings to provoke a response and create controversy to drive traffic to his various online accounts. Because of his conduct online, he has had his social media accounts suspended (Facts 22-24), and has what he calls a "hate following" where people follow him with the intention of getting "angry over free speech." (Fact 25) When he is called out for such postings, he attempts to turn the table and to make himself out to be the victim. (See Facts 26-28) Science fiction websites follow his activities and write articles about him, which generates discussions in the comments involving top professionals in the community. (See id.)

2. SFSFC Is Made Aware Of Plaintiff's Conduct Online

In 2017, Plaintiff came to SFSFC's attention when he responded poorly to a request by another Bay Area science fiction convention, Baycon, that he take the year off from participating as a panelist at that convention. (Fact 29) This was a standard request sent to many professionals and part of Baycon's policy of promoting new authors and professionals in the industry. (Fact 30) Plaintiff responded to the request by harassing the volunteer who sent him the email. (Fact 31) This was all made public on social media. (Id.) Because of this harassment, the 2018 Worldcon Committee began monitoring Plaintiff's online behavior and archiving his social media posts. (Fact 32)

SFSFC became aware of Plaintiff's numerous online activities regarding other science fiction industry professionals on social media, which came across as harassing or antagonizing. (Facts 34-37) SFSFC received many complaints from people in the science fiction community, including members who planned to attend WorldCon 76, who had observed Plaintiff's behavior and were afraid of confronting such harassing and disruptive conduct at the convention. (Fact 38)

On December 20, 2017, Plaintiff posted publicly on Twitter of his intention to wear a bodycam into the Convention and into a con suite. (Fact 12) SFSFC interpreted this as Plaintiff's expressed intention that he was going to attend the Convention, and go into a private suite where he would not be welcomed or allowed, all the while wearing a small hidden video recording device to record people without their knowledge or consent. (Fact 13) Four days later, on December 24, 2017, Plaintiff registered to attend WorldCon 76. (Fact 15) Upon registering, Plaintiff agreed to abide by

the rules and policies of the Convention. (Facts 14, 16)

After much deliberation, SFSFC made the decision to convert Plaintiff's membership from attending to supporting, so that he would not be allowed to attend the convention. (Fact 17) In light of Plaintiff's expressed intentions and his past behavior, SFSFC feared that he would come to the convention and would deliberately violate the Code of Conduct, which in turn would require WorldCon 76 organizers to ask him to leave, thereby giving him what he wanted--an opportunity and platform to create more controversy, disrupt the convention and generate more publicity for himself. (Fact 39)

C. <u>WorldCon's Statement Regarding Plaintiff</u>

On January 2, 2018, SFSFC posted the following statement on its social media websites explaining the decision to convert Plaintiff's membership:

> *Worldcon 76 has chosen to reduce Jonathan Del Arroz's membership from attending to supporting. He will not be allowed to attend the convention in person. Mr. Del Arroz's supporting membership preserves his rights to participate in the Hugo Awards nomination and voting process. He was informed of our decision via email. We have taken this step because he has made it clear that he fully intends to break our code of conduct. We take that seriously. Worldcon 76 strives to be an inclusive place in fandom, as difficult as that can be, and racist and bullying behavior is not acceptable at our Worldcon. This expulsion is one step toward eliminating such behavior and was not taken lightly. The senior staff and board are in agreement about the decision and it is final.*

("the Statement") (Fact 18). Due to the ongoing controversy surrounding harassment in the science fiction community and the significant concerns raised by Plaintiff's activities, the WorldCon 76 Committee deemed it necessary to make a statement regarding its decision. (Fact 40) Also on January 2, 2018, SFSFC informed Plaintiff of its decision to convert his membership. (Fact 71)

Despite being banned, Plaintiff came to the San Jose Convention Center on August 16, 2018 (the first day of the convention) and attempted to gain admittance. He was unable to do so and was asked to leave the Convention Center, which he did. In line with his behavior, Plaintiff recorded his entire encounter with WorldCon 76 volunteers and posted it on the Internet with commentary, all with the purpose to create more controversy and generate more publicity for himself. (Fact 72)

In the lead-up to WorldCon 76, Plaintiff used SFSFC's decision to ban him from attending the convention and organized a protest to take place outside the Convention Center. (Fact 73)

SFSFC learned of the protest on Plaintiff's social media and blog. (Fact 74) Concerned about violence from the protestors, the San Jose Police Department reached out to SFSFC and opted to have most convention center entrances locked and guards posted during the protest, with additional officers staged to respond quickly in the event of any such escalation. (Id.) On August 18, 2018, the protest organized by Plaintiff took place. Plaintiff did not attend the protest. (Fact 75)

D. Demurrer and Plaintiff's Sole Remaining Claim

On February 21, 2019, Defendant's Demurrer to Plaintiff's first, second, third, and fourth causes of action for various violations of the Civil Code related to discrimination was sustained without leave to amend. (Pho Decl., ¶3) The sole remaining claim in this action is Plaintiff's claim for defamation. (Id.)

III. SUMMARY JUDGMENT IS FAVORED REMEDY FOR DEFAMATION

Summary judgment is proper when there are no triable issues as to any material fact. (Code Civ. Proc. § 437c(c)). A defendant meets his burden if he establishes either (a) a complete defense to the plaintiff's cause(s) of action, or (b) that one or more elements of a cause of action cannot be established. (Code Civ. Proc. § 437c(o); *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 274.)

Once the defendant meets his burden, the burden shifts to the plaintiff, at which point the plaintiff cannot merely rely on allegations in the complaint, or on "mere conjecture or speculation," but instead must set forth specific and substantial facts showing that a triable issue of material fact exists. (Code Civ. Proc. § 437c(p)(2); *Lyle, supra,* 38 Cal.4th at 274.) Plaintiff's burden is not satisfied by declarations containing inadmissible evidence such as hearsay or legal conclusions. (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 761.) "There is a triable issue of material fact only if the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850).

Summary judgment promotes justice and judicial economy by allowing courts to cut through the pleadings to determine whether trial is necessary. (*Id.* at 843). Further, summary judgment is a

favored remedy in defamation cases due to the chilling effect of protracted litigation on First Amendment rights. (*Reader's Digest Ass'n, Inc. v. Superior Court ("Reader's Digest")* (1984) 37 Cal.3d 244, 251.) "[T]he courts impose more stringent burdens on one who opposes the motion and require a showing of high probability that the plaintiff will ultimately prevail in the case. In the absence of such showing, the courts are inclined to grant the motion and do not permit the case to proceed past the summary judgment stage." (*Couch v. San Juan Unified School District* (1995) 33 Cal.App.4th 1491, 1498-99.)

Upon such a motion, the trial court must determine if a sufficient showing of malice has been made to warrant submission of that issue to the jury. (*Reader's Digest, supra,* 37 Cal.3d at 251.) The mere assertion by the opposing party that defendants were motivated by ill will is of itself insufficient to deny a motion for summary judgment. (*See Dorn v. Mendelzon* (*"Mendelzon"*) (1987) 196 Cal.App.3d 933, 946.)

IV. PLAINTIFF'S DEFAMATION CAUSE OF ACTION FAILS

The elements of a defamation action are: (1) a false and unprivileged statement of fact; (2) published to someone other than the plaintiff; and (3) that injures the plaintiff's reputation or tends to injure the plaintiff in his or her occupation. (Civ. Code §§ 44-46; *See e.g., Jensen v. Hewlett-Packard Co.* (1993) 14 Cal.App.4th 958, 969.) As demonstrated herein, the following essential elements of Plaintiff's claim are defeated as a matter of law: (1) false statement of provable fact; (2) unprivileged; (3) Constitutional actual malice; and (4) special damages. Further, because truth is an absolute defense and Defendant can prove that the Statement is substantially true, Plaintiff's claim must fail.

A. Plaintiff Cannot Prove That The Statement Issued By WorldCon Was A False Statement Of Fact.

1. The Statement is not a provable statement of fact, but is only a non-actionable expression of opinion.

To state a defamation claim, a plaintiff must present evidence of a statement of fact that is provably false, not an opinion. (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 259-260.) Whether something constitutes racist or bullying behavior is a matter of opinion, thus defeating an essential element of Plaintiff's claim. Whether a statement is one of fact or opinion is

a question of law to be decided by the court. (*Id*. at 260.) In making the determination, the court must place itself in the position of the reader, and determine the natural and probable effect upon the average reader. (*Id*.) California courts have developed a "totality of circumstances" test to determine whether an alleged defamatory statement is one of fact or of opinion: "First, the language of the statement is examined. For words to be defamatory, they must be understood in a defamatory sense… Next, the context in which the statement was made must be considered… This contextual analysis demands that the courts look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed." (*Id*. at 260-261.) The dispositive question for the court is "whether a reasonable fact finder could conclude that the published statements imply a provably false factual assertion." (*Moyer v. Amador Valley J. Union High School Dist. ("Moyer")* (1990) 225 Cal.App.3d 720, 724.)

In *Moyer,* a teacher sued, inter alia, the school district, and student newspaper adviser, alleging defamation arising from a story in the student newspaper which stated he was the worst teacher, that he babbled, and that he was terrorized when a smoke bomb was set off in his class. (*Id.* at 722.) Defendant's demurrer was sustained and the defamation claim dismissed because the statements were not actionable. (*See id*.) "Worst teacher" was not a factual assertion capable of being proved true or false and was protected under the First Amendment. (*Id*.) The "babbler" statement could not have been understood to be stating actual facts about plaintiff, but was a form of exaggerated expression conveying the speaker's disapproval of plaintiff's teaching or speaking style. (*Id*.) The descriptive term "terrorize" falls within the protectible category of rhetorical hyperbole – a word used in a loose, figurative sense. (*Id*.; *see also Aisenson v. American Broadcasting Company* (1990) 220 Cal.App.3d 146, 157 (statement that judge was a "bad guy" was rhetorical hyperbole, and not actionable).)

Courts have held that "the term racist was not actionable" and "lacked a precise meaning, can imply many different kinds of fact, and is no more than meaningless name calling." (*Stevens v. Tillman* (7th Cir. 1988) 855 F.2d 394, 402-401; *see also Overhill Farms Inc. v. Lopez* (2010) 190 Cal.App.4th 1248, 1262; *Smith v. School Dist. of Pennsylvania* (2000) (USDC E.D. Penn.) 112 F.Supp.2d 417 (school officials' alleged public statements that student's parent was racist and anti-

Semitic were expressions of opinion, and could not support claim of defamation); *Covino v. Hagemann* (1995) 627 N.Y.S. 894 (allegation that behavior of employee in borough office had been racially insensitive was protected expression of opinion); *Ward v. Zelikovsky* (1994) 136 N.J. 516 (allegation of bigotry was nonactionable name calling and not slander per se); *Garrard v. Charleston County School District* (2019) 429 S.C. 170 (summary judgment granted after Court found article characterizing coach and players as racist in post-victory locker room ritual constituted expressions of writer's opinion and rhetorical hyperbole, and were protected under First Amendment; statement that they displayed racist behavior could not be objectively proved or disproved, and was susceptible to varying viewpoints and interpretations).) [1] Furthermore, "[t]he word has been watered down by overuse, becoming common coin in political discourse." (*Stevens v. Tillman,* 855 F.2d at 402].)

Although California courts have not yet ruled on the term "bully," it is even more undefined and open to interpretation than the term "racist." There is persuasive authority where courts have found the term "bully" is non-actionable opinion which is insufficient to support a claim of defamation. (*See Bartnicki v. Scranton School District* (M.D. Pa. 2019) 2019 WL 5864453 (Plaintiff failed to plead claim for defamation since he did not allege a specific statement was made about plaintiff, only an implication; defendant mentioned his name while speaking on adult bullying; even if defendant had actually stated plaintiff was a bully, such has been found to be a non-actionable opinion; *Hupp v. Sasser* (1997) 200 W.Va. 791 (statement by university dean that student "is a bully. He tried to bully me" was opinion devoid of provably false assertion of fact, and was protected under First Amendment; conclusion that student was a bully was totally subjective, and thus not provably false); *Dilworth v. Dudley* (7th Cir. 1996) 75 F.3d 307, 310 (summarizing holdings of various cases that concluded that many vacuous insults, such as phony, lazy, stupid, and chicken-stealing idiot, lacked defamatory meaning).

Plaintiff alleges that two portions of this statement are false and defamatory: (1) "he has

[1] *See also Kimura v. Superior Court* (1991) 281 Cal.Rptr. 691, 696 (granting summary judgment where letter accusing plaintiff of being racist and bigoted, and of impeding the University's affirmative action policy, could not be reasonably understood as implying facts). This case was originally published at 230 Cal.App.3d 1235, reviewed and ordered not to be officially published for unknown reasons. It involved the term "racist" and came out of the Sixth District Court of Appeal. Defendant is referencing this case here only because there is a dearth of California cases directly addressing the term "racist" in defamation actions.

made it clear that he fully intends to break our code of conduct"; and (2) "racist and bullying behavior is not acceptable at our Worldcon." The Statement, as read, states that Plaintiff's membership was revoked, and he would not be allowed to attend Worldcon 76. The reason given was that he made it clear he intended to break WorldCon's Code of Conduct. It goes on to state that WorldCon 76 is an inclusive place for its members, and that racist and bullying behavior is not acceptable at WorldCon. (Fact 18) On its face, the statement is not defamatory. Plaintiff mischaracterizes the Statement and contends that SFSFC stated he "is a racist bully." SFSFC did not, and contends that the Statement cannot give rise to a cause of action. The burden rests with Plaintiff to prove that the words of the Statement had a particular meaning (e.g., that he is a racist bully), which makes them defamatory.

Looking at the totality of the circumstances, including the knowledge of Worldcon 76's audience, the Statement does not imply a provable fact. SFSFC's statement pointing out that Plaintiff "has made it clear that he intends to violate our code of conduct" implies no defamatory facts, but instead points to Plaintiff's own "behavior" as the basis of its opinion. Plaintiff points to the phrase "racist and bullying behavior" and alleges that this phrase implies that he was in fact a racist and a bully and was, therefore, defamatory. But Plaintiff takes this phrase out of context. SFSFC's complete statement was that "Worldcon 76 strives to be an inclusive place in fandom, as difficult as that can be, and racist and bullying behavior is not acceptable at our Worldcon." This statement was forward-looking, speculative in nature, and constituted SFSFC's opinion both that (1) Plaintiff had behaved in a racist and bullying manner in the past, and (2) Plaintiff was likely to so behave if allowed to attend the Convention. Both of these opinions are protected speech and not subject to liability for defamation.

Even if the Statement could be understood to hold a particular meaning, Plaintiff cannot prove the Statement is false. Being a "racist bully" cannot be proven or disproven. Plaintiff claims that "he is not a racist or a bully" and "he has not bullied anyone." (See Pho Decl., Exh D, Response to SRog No. 1) But by what definition can the court measure whether a person is a racist or a bully? Such nebulous concepts are not susceptible to uniform definitions, but instead depend on individuals' particular experiences and opinions. This is why courts have held that such terms cannot

give rise to claims for defamation.

In short, individual opinions of what constitutes racism and bullying vary widely among the population, and cannot be construed as statements of fact. That Plaintiff "made it clear" he intended to break the rules is also an exaggerated expression conveying SFSFC's opinion. When viewed in the totality of the circumstances, these opinions do not imply any defamatory facts. Instead, SFSFC's statement points to Plaintiff's own writings, published on social media and blog sites, as the basis for its opinion. If Plaintiff fails to present evidence that Defendant's Statement was one of provable fact, and not opinion, his claim for defamation fails and summary judgment shall be granted.

B. Plaintiff Cannot Prove The Statement Was Unprivileged

Libel is defined under California law as a false and *unprivileged* publication by writing which exposes any person to hatred, contempt or ridicule. (See Civil Code § 45.) Thus, a writing which is privileged is, by definition, not libelous or defamatory. *(Brown v. Kelly Broadcasting Company* (1989) 48 Cal.3d 711, 723 n.7.) A privileged publication is one made, "without malice, to a person interested therein, (1) by one also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information." (Civil Code § 47(c); *see also Mendelzon, supra,* 196 Cal.App.3d 933, 944 (communications from hospital to another hospital about plaintiff doctor were privileged as it served an important interest in assessing the qualifications and fitness of a proposed staff member); *see also Cuenca v. Safeway San Francisco* (1986) 180 Cal.App.3d 985, 995 (charges made regarding allegations of kickbacks were matters of direct interest to employer's supervisory committee and board).) The purpose of the privilege is to allow interested parties to communicate on subjects of common interest without the specter of future lawsuits. (*See Beroiz v. Wahl* (2000) 84 Cal.App.4th 485, 493 (privilege protects good faith, well-intended communications serving significant interests). The privilege is applicable even if the statement between interested parties is false and defamatory per se. (*Gantry Construction Co. v. American Pipe and Construction* (1975) 49 Cal.App.3d 186, 197.) Thus, if the privilege is applicable to the Statement here, Plaintiff's claim must fail as a matter

of law, unless he can show SFSFC acted with malice.

Here, the Section 47(c) privilege applies. WorldCon's Statement was a privileged communication between "interested" parties with a mutual interest in the subject of the Convention. It served to address the important interests Defendant and its members shared in creating an inclusive environment, free from harassment and bullying; and to ensure the safety of its members and attendees at the Convention. Safety was a direct and immediate concern, and some members had concerns of being confronted by Plaintiff and his behavior at the Convention, based on his actions online. (Fact 38) Worldcon's publicly posted code of conduct clearly stated that harassment is any behavior that annoys other persons, aggravates them, or makes them feel unsafe. (Fact 10) This includes but is not limited to, unwanted or threatening physical contact, verbal contact, following someone in a public area without a legitimate reason, or threatening physical harm. (*Id*.) Statements related to members who violate or intend to violate the code of conduct, or who are banned for such behavior, are of considerable concern to the other members, and may influence those members' behaviors online towards other members and while in attendance at the Convention.

Plaintiff must show the Statement was an unprivileged communication. If he does not, and the Statement is privileged, he must prove Defendant's Statement was made with malice. (*See Mendelzon, supra,* 196 Cal.App.3d at 944.) Malice here is established by showing that the publication was motivated by hatred or ill will towards the plaintiff *or* by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights. (*Id*. at 945.) Plaintiff has no evidence to show the Statement was motivated by Defendant's hatred or ill towards him. Defendants were motivated by running a safe and drama-free event for its members, and made the difficult decision of acting preemptively to achieve this. Further, Defendant had reasonable grounds for belief in the truth of the publication. (See Facts 12-13, 19-40, 72) Defendant had been following Plaintiff's online conduct for some time and observed his harassment of others and stated intention to violate the code of conduct. (Facts 12-13, 19-40) Because the privilege applies and Defendant cannot prove malice, Plaintiff's claim fails as a matter of law, and summary judgment should be granted.

C. <u>Because Plaintiff Is a Public Figure, Or Limited Public, Figure,</u>

He Must Prove, By Clear And Convincing Evidence, That Defendant SFSFC Acted With Actual Malice.

Even if, *arguendo*, the qualified privilege does not apply, Plaintiff must prove actual malice in order to prevail on his defamation claim, since he is a public figure, or a limited public figure. (*Reader's Digest, supra,* 37 Cal.3d at 252-253.) In determining whether or not a statement was made with actual malice "[t]he question is not whether a reasonably prudent [person] would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." (*Id*. at 256-257 [internal quotation marks and citations omitted].) Furthermore, Plaintiff must prove actual malice *by clear and convincing evidence,* meaning that "'[t]he evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of every reasonable mind.'" (*Burrill v. Nair* (2013) 217 Cal.App.4th 357, 389.) The rationale for such differential treatment is, first, that the public figure has greater access to the media and, therefore, greater opportunity to rebut defamatory statements; and second, that those who have become public figures have done so voluntarily and, therefore, "invite attention and comment." (*Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 398.)

1. Plaintiff is a Public Figure, or a Limited Public Figure.

Speech related to public figures enjoys heightened protections under the First Amendment. (*See New York Times Co. v. Sullivan* (1964) 376 U.S. 254.) While there is some minor variation among courts' definitions of what constitutes a public figure, a public figure is generally thought to be one

> *whose name is immediately recognized by a large percentage of the* ***relevant population,*** *whose activities are* ***followed by that group with*** *interest, and whose opinions or conduct by virtue of these facts, can reasonably be expected to be known and considered by that group in the course of their own individual decision-making.*

(*Harris v. Tomczak* (E.D.Cal. 1982) 94 F.R.D. 687, 700-701 [compiling the definitions of many different courts] [emphasis added].) In *Reader's Digest,* plaintiffs had thrust themselves in the public eye: they were the subject of a full-length movie, four books, magazine and newspaper articles. (See *Reader's Digest,* 37 Cal.3d at 255.) Further, writers, artists and critics of all kind are

usually held to be public figures, at least with regard to critiques of their literary or artistic endeavors. (*Montandon v. Triangle Publications* (1975) 45 Cal.App.3d 938 (author had made promotional appearances on radio and television); *see also Dacey v. Florida Bar, Inc.* (1970 427 F.2d 1292 (author of best-selling book was a public figure, where author made at least 200 television appearances to promote his book, spoke on radio, made personal appearances and wrote magazine articles).) Public figures are those persons who, though not public officials, are "involved in issues in which the public has a justified and important interest." (*Montandon* 45 Cal.App.3d at 946.) Such figures are numerous and include "artists, athletes, business people, dilettantes, anyone who is famous or infamous because of who he is or what he has done." (*Id*.) The question of whether a plaintiff is a public figure is to be determined by the court, not the jury. (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203-04.)

Plaintiff is both a best-selling author and "the leading Hispanic voice in science fiction." (Facts 43-44) He has written 16 books. (Fact 57) He has published comic book reviews, news articles, countless blog posts and YouTube videos; has done media interviews; and has been the subject of articles, and cultural commentary in the science fiction community. (Facts 50-52, 65-69) He has many followers on social media (Facts 59-61), who he is able to incite to action (Fact 73); as well as a self-termed "hate following." (Facts 25) He posts multiple times a day on different social media channels in order to gain exposure; and if he's banned, "that's just a news story" and he "wins." (Fact 68) In 2010, he ran for Congress. (Fact 40) "[N]ationwide fame is not required." (*Harris, supra*, 94 F.R.D. at 702.) Plaintiff is well known enough as a professional author in the science fiction genre to be considered a general public figure. Plaintiff is not required to be a national household name. Rather, he is considered a public figure within the science fiction community because he has written and been the subject of multiple news articles and generates a great deal of discussion amongst members of the community. (See Facts 26, 46, 49-52, 55) (See *Stolz, supra,* 30 Cal.App.4th at 205; *Waldbaum v. Fairchild Publ'ns, Inc*. (D.C. Cir. 1980) 627 F.2d 1287, 1295 n.22 [Nationwide fame is not required; the question is whether the individual had achieved the necessary degree of notoriety where he was defamed, i.e., where the defamation was published]; *Chapman v. Journal Concepts, Inc*. (D.Haw. 2007) 528 F.Supp.2d 1081, 1092.)

Should the court find that Plaintiff is not a public figure in the general sense, he is at least a limited public figure. A limited public figure is an individual who "voluntarily injects himself or is drawn into a public controversy and thereby becomes a public figure for a limited range of issues." (*Reader's Digest*, 37 Cal.3d at 253, quoting *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 351; see also *Nadel v. Regents of University of California* (1994) 28 Cal.App.4th 1251, 1269-1270 (protesters who spoke publicly at city council meetings and demonstrations, wrote a letter to the local newspaper and spoke to reporters about their opposition to the development of People's Park were limited-purpose public figures).) An ongoing controversy exists in the science fiction community regarding the political character of various works of science fiction and the creators of those works. Plaintiff injected himself into this very public debate by writing articles and giving interviews on his theory that conservative authors were being targeted, canceled, or deemed too controversial after exercising their "free speech." (Facts 50, 52, 55) He claims he received death threats and has been harassed himself (Fact 70), which implies he has done something to garner such attention. He himself coined the hashtag Comicsgate, and was the one to uncover a supposed plot to "ruin" conservative comic reviewer, Richard C. Meyer. (Fact 53) All of this has led to numerous articles and interviews on the controversy (See Facts 48-55), including a Wikipedia page. (See RJN Exh 13) Plaintiff's words and behavior online regarding this topic of public interest therefore became fair game for comment by SFSFC. Plaintiff is a limited public figure who knowingly injected himself into an ongoing controversy for the purpose of self-promotion. Plaintiff must face the consequences of injecting himself into the fray—he has placed himself in a position where comment on his behavior related to these issues receives heightened First Amendment protections.

2. Plaintiff has no evidence of malice and has produced no such evidence.

In *Reader's Digest,* a church and its founder brought an action against a magazine and author for libel based upon an article charging plaintiffs of fraudulently soliciting cash donations to enrich themselves. (*Reader's Digest, supra,* 37 Cal.3d at 250.) The Court found that plaintiffs were public figures who had thrust themselves into the forefront of the public controversy

involving the church; and the article was not made with actual malice. (*Id*. at 254-257.) Although actual malice can be proven by circumstantial evidence (e.g.., evidence of negligence, motive and intent, a failure to investigate, anger and hostility towards plaintiff, reliance upon sources known to be unreliable), the failure to conduct a thorough and objective investigation, alone, does not prove actual malice, nor even necessarily raise a triable issue of fact. (*Id*. at 257-258.)

Plaintiff must show, by clear and convincing evidence, that SFSFC published the Statement knowing it was false, or subjectively entertaining serious doubt as to its truth. He can show neither. The indisputable evidence shows that SFSFC made a decision to convert Plaintiff's membership after being alerted that Plaintiff intended to violate WorldCon's Code of Conduct. It did so for the public safety of its membership. The test is a subjective one, where the defendant's actual belief concerning the truthfulness of the publications is the crucial one. (*Reader's Digest, supra,* 37 Cal.3d at 257.) The test directs attention to the "defendant's attitude toward the truth or falsity of the material published… [not] the defendant's attitude toward the plaintiff." (*Id.*)

Defendant is not aware of any falsity in the Statement. To its knowledge, Plaintiff had been using social media to harass other WorldCon members and industry professionals, and otherwise violate Worldcon's Code of Conduct. (Facts 28, 31, 33-37) Defendant had been on notice of Plaintiff's conduct since he publicly admonished Baycon and harassed the volunteer that sent him the email requesting he take the year off from participating as a panelist. (Facts 29-32) Due to his numerous online activities and postings (Facts 28, 31, 33-37) and tweets showing an intention to wear a bodycam to the Convention to record "hijinx," (Fact 12), SFSFC made the decision to convert Plaintiff's membership. (Fact 13, 15) Defendant had received complaints from members about Plaintiff's actions, who were afraid to confront him at the Convention. (Fact 38) For these reasons, Defendant published the Statement to its members.

Plaintiff claims SFSFC did not investigate his plans or contact him about his intentions, and because of this they acted with malice. (See Exh D to Pho Decl., SRog No. 16) However, failure to investigate alone is not enough to show malice. Plaintiff has no actual evidence to show Defendant entertained serious doubts as to the truth of the publication. Based on his expressed intentions and past behavior, Defendants feared Plaintiff would come to the convention and would deliberately

violate the code of conduct, which in turn would require the convention organizers to ask him to leave, thereby giving him what he wanted – an opportunity and platform to create more controversy, and to disrupt the convention. (Fact 39) In fact, Plaintiff did show up to the Convention, with a camera, filming the incident and posting it on the Internet with commentary, all with the purpose to create controversy and generate more publicity for himself. (Fact 72)

Because Plaintiff is a public figure, or at least a limited public figure, he is required to prove that SFSFC acted with actual malice. If Plaintiff cannot demonstrate, by clear and convincing evidence, that SFSFC made the Statement with actual malice, his claim fails and summary judgment should be granted.

D. Truth is a complete defense.

Truth is a complete defense to a claim of defamation. (See Cal. Civ. Code §§ 45, 46 [defining libel and slander as "false and unprivileged" publications].) The Statement, as read literally, is true. Plaintiff's membership was converted, and he was not allowed to attend the Convention. Racist and bullying behavior is not acceptable at Worldcon, and is against the code of conduct. Should the Court decide that the portion of the Statement stating Plaintiff "has made it clear that he fully intends to break our code of conduct" to be a defamatory statement of fact[2] (and therefore actionable), Plaintiff's claim for defamation still fails since the statement is true.

The Statement read, "We have taken this step because he has made it clear that he fully intends to break our code of conduct." (Fact 18) Plaintiff's behavior online—harassing other WorldCon 76 attendees and anticipating "hijinks" in Convention spaces—"made it clear" that he intended to violate WorldCon 76's code of conduct, which prohibited harassment (defined as "any behavior that annoys other persons, aggravates them, or makes them feel unsafe") and required affirmative consent before photographing or videoing other members. (Fact 10) Plaintiff had, in fact, harassed several members of WorldCon 76 online prior to SFSFC's statement. (*See* Facts 28, 31, 33-37) He also threatened to wear a body camera (widely understood to be a small device capable of being hidden and going undetected) into the SFWA suite (a Convention space, subject to

[2] As stated above, Defendant contends this portion of the Statement, that Plaintiff "made it clear" he intended to break the rules, is an opinion and therefore non-actionable.

the Code of Conduct) to film anticipated "hijinx" with other WorldCon 76 members. (Fact 12) SFSFC's statement that Plaintiff "made it clear that [Plaintiff] fully intends to break our code of conduct" is substantially true and, therefore, cannot be defamatory.

Because SFSFC's statement is substantially true, and SFSFC has offered proof of the truth of its claims, it cannot be liable to Plaintiff for defamation.

E. Plaintiff Cannot Prove Special Damages.

Where a statement is defamatory on its face, it is said to be libelous per se, and actionable without proof of special damage. But if it is defamation per quod, i.e., if the defamatory character is not apparent on its face and requires an explanation of the surrounding circumstances to make its meaning clear, it is not libelous per se, and is not actionable without pleading and proof of special damages. (See Civ. Code § 45(a); *see also Babcock v. McClatchy Newspapers* (1947) 82 Cal.App.2d 528, 539.)

In *Barnes-Hind v. Superior Court*, the Court said:

> If no reasonable reader would perceive in a false and unprivileged publication a meaning which tended to injure the subject's reputation in any of the enumerated respects, then there is no libel at all. If such a reader would perceive a defamatory meaning without extrinsic aid beyond his or her own intelligence and common sense, then… there is a libel per se. But if the reader would be able to recognize a defamatory meaning only by virtue of his or her knowledge of specific facts and circumstances, extrinsic to the publication, which are not matters of common knowledge rationally attributable to all reasonable persons, then… the libel cannot be libel per se but will be libel *per quod*, requiring pleading and proof of special damages.

(Barnes-Hind v. Superior Court (1986) 181 Cal.App.3d 377, 386.)

Examples of libel per se include cases where someone falsely accuses another person of having committed a crime (*see Boyich v. Howell* (1963) 221 Cal.App.2d 801, 802 (finding a publication which stated that plaintiff, a city councilman, was convicted, fined and barred from holding office for five years because he stuffed the ballot box in an election, was defamatory on its face) or being unfit to practice the person's trade, business or profession (*see Patton v. Royal Industries* (1968) 263 Cal.App.2d 760, 767 (finding that a letter defendant sent to potential customers that plaintiffs, skilled workmen, had been "terminated" and "replaced with personnel having more experience and knowledge," when they actually quit to start their own business, was a

serious reflection on their abilities, and libelous per se).) In California, if a defamation case is not categorized as "per se," it is defamation "per quod." Examples of special damages might include, but are not limited to, lost profits, decreased business traffic, and/or adverse employment consequences.

Here, Plaintiff admits he has not been accused of a crime. (Fact 76) Nothing in the Statement accuses Plaintiff of being unfit to practice his trade, business or profession. Therefore, this case is defamation per quod and Plaintiff must prove special damages. Plaintiff has claimed he lost profits from book sales because of the consequences of the incident, but has provided no evidence of such. (See Exh D to Pho Decl., Special Rogs 60-64) His claims for damages are merely speculative. He blames Defendant for lost sales and profit, when it is his own controversial actions which have caused publishers and those in the industry to distance themselves from him.

In fact, because of SFSFC's decision to ban him from attending WorldCon and this ensuing lawsuit, Plaintiff has generated more followers on social media and increased his sales profits. (Facts 77-81) Plaintiff has used this lawsuit to gain even more attention, creating content on his social media related to it, profiting off of public appearances, publications and his book sales. (Facts 82-84) The more controversial he is, the more publicity he acquires and the more traffic he generates for his various online sites and accounts, all of which translate into more money for his books and businesses. Because Plaintiff cannot prove special damages, summary judgment should be granted.

V. CONCLUSION

Plaintiff cannot show a triable issue of fact with regards to the Statement being a false and unprivileged statement of fact. Therefore, his claim for defamation fails. If the Court does find the Statement is actionable, Plaintiff should be considered a public figure and he must prove Constitutional actual malice. If he does not, his claim fails. Even if Plaintiff can meet his burden on all of the elements for defamation, he must still prove special damages, because this case is a defamation per quod case. Finally, Defendant has established truth of the Statement at issue, which is a complete defense barring Plaintiff's claim for defamation. For the reasons stated above,

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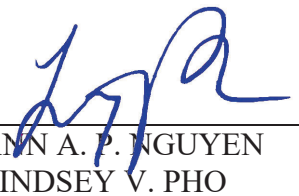
Defendant respectfully requests that this Court grant summary judgment in Defendant's favor.

Dated: February 19, 2021

MESSNER REEVES LLP

By: 

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