

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

OCT 18 2010

ALAN CARLSON, Clerk of the Court

N. Dorfman
BY N. DORFMAN

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE, CENTRAL DISTRICT

JAY PHOTOGLU, an individual,

Plaintiff,

v.

GRETCHEN ROSSI, an individual; and DOES 1
through 50, inclusive,

Defendants.

Case No.: 30-2010-00393514-CU-DF-CJC

Assigned For All Purposes To:
The Honorable Linda S. Marks
Department C7

NOTICE OF MOTION AND MOTION TO
STRIKE PORTIONS OF FIRST
AMENDED COMPLAINT

[CCP § 435, 436]

Date: November 19, 2010
Time: 10:30 a.m.
Dept.: C7

Complaint Filed: January 29, 2010
Trial Date: none set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on **November 19, 2010 at 10:30 a.m.**, or as soon thereafter as the matter may be heard in **Department C7** of the above-entitled Court, located at 700 Civic Center Drive, Santa Ana, California, Defendant Gretchen Rossi will and hereby does,

BB-2

BROWN & CHARBONNEAU, LLP

1 move pursuant to *Code of Civil Procedure* §§ 435 and 436 for an Order striking the following
2 portions of the Plaintiff Jay Photoglou’s First Amended Complaint (the “FAC”) on file herein:

- 3 (1) All references to statements, actions or conduct that are privileged pursuant to *Civil*
4 *Code* § 47(b), including:
- 5 a. “Rossi went as far as to file a police report and failed restraining order filled
6 with lies and accusations about Photoglou.” Page 2, lines 19-20.
 - 7 b. Paragraph 37 in its entirety.
 - 8 c. Paragraph 38 in its entirety.
 - 9 d. Paragraph 39 in its entirety.
 - 10 e. Paragraph 40 in its entirety.
 - 11 f. Paragraph 41 in its entirety.
 - 12 g. Paragraph 42 in its entirety.
 - 13 h. Paragraph 43 in its entirety.
 - 14 i. Paragraph 44 in its entirety.
 - 15 j. Paragraph 53 in its entirety and Exhibit 3.
 - 16 k. Paragraph 54 in its entirety and Exhibit 4.
 - 17 l. Paragraph 55 in its entirety.
 - 18 m. Paragraph 56 in its entirety.
 - 19 n. Paragraph 57 in its entirety.
 - 20 o. Paragraph 59 in its entirety and Exhibit 5.
 - 21 p. Paragraph 77 in its entirety and Exhibit 6.
 - 22 q. Paragraph 78 in its entirety and Exhibit 7.
 - 23 r. Paragraph 79 in its entirety.

24 (2) Plaintiff’s prayer for relief for punitive damages, including the reference “but also
25 punitive damages in order to deter Rossi from repeating these horrendous acts in
26 the future” (page 3, lines 11-12) and Paragraphs 70, 71, 89, 90, 97, and 104, in their
entirety.

27 (3) Plaintiff’s prayer for relief requesting attorneys’ fees.

28 The Motion will be made on the grounds that the FAC is not filed in accordance with the

1 requirements of the laws of the State of California and that the FAC contains irrelevant, false,
2 improper or immaterial matters subject to being stricken under *Code of Civil Procedure* §§ 435,
3 436 and 431.10. The references to statements, actions or conduct that are privileged pursuant to
4 *Civil Code* § 47(b) are immaterial and improper matters to plead. *Civ. Proc. Code* §§ 435, 436,
5 431.10. The request for punitive damages is immaterial and improper as Plaintiff is seeking relief
6 not supported by the allegations of the FAC. *Civ. Proc. Code* §§ 435, 436, 431.10. The request
7 for attorney's fees is immaterial and improper as it is not authorized by statute, law, and/or
8 contract. *Civ. Proc. Code* §§ 435, 436, 431.10.

9 This Motion will be based on this Notice, the following Memorandum of Points and
10 Authorities, all pleadings and records on file in this action, and any further oral or documentary
11 evidence that may be presented at the hearing of the Motion.

12 Dated: October 18, 2010

BROWN & CHARBONNEAU, LLP

13
14
15 By:


GREGORY G. BROWN

Attorneys for Plaintiff GRETCHEN ROSSI

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Defendant Gretchen Rossi moves pursuant to *Code of Civil Procedure* §§ 435 and 436 for
4 an Order striking the following portions of the Plaintiff Jay Photoglou’s First Amended Complaint
5 (the “FAC”) on file herein:

- 6 (1) All references to statements, actions or conduct that are privileged pursuant to *Civil*
7 *Code* § 47(b), including:
- 8 a. “Rossi went as far as to file a police report and failed restraining order filled
9 with lies and accusations about Photoglou.” Page 2, lines 19-20.
 - 10 b. Paragraph 37 in its entirety.
 - 11 c. Paragraph 38 in its entirety.
 - 12 d. Paragraph 39 in its entirety.
 - 13 e. Paragraph 40 in its entirety.
 - 14 f. Paragraph 41 in its entirety.
 - 15 g. Paragraph 42 in its entirety.
 - 16 h. Paragraph 43 in its entirety.
 - 17 i. Paragraph 44 in its entirety.
 - 18 j. Paragraph 53 in its entirety and Exhibit 3.
 - 19 k. Paragraph 54 in its entirety and Exhibit 4.
 - 20 l. Paragraph 55 in its entirety.
 - 21 m. Paragraph 56 in its entirety.
 - 22 n. Paragraph 57 in its entirety.
 - 23 o. Paragraph 59 in its entirety and Exhibit 5.
 - 24 p. Paragraph 77 in its entirety and Exhibit 6.
 - 25 q. Paragraph 78 in its entirety and Exhibit 7.
 - 26 r. Paragraph 79 in its entirety.
- 26 (2) Plaintiff’s prayer for relief for punitive damages, including the reference “but also
27 punitive damages in order to deter Rossi from repeating these horrendous acts in the
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future” (page 3, lines 11-12) and Paragraphs 70, 71, 89, 90, 97, and 104, in their entirety.

(3) Plaintiff’s prayer for relief requesting attorneys’ fees.

This motion to strike is made on the grounds that the FAC is not filed in accordance with the requirements of the laws of the State of California and that the FAC contains irrelevant, false, improper or immaterial matters subject to being stricken under *Code of Civil Procedure* §§ 435, 436 and 431.10. The references to statements, actions or conduct that are privileged pursuant to *Civil Code* § 47(b) are immaterial and improper matters to plead. *Civ. Proc. Code* §§ 435, 436, 431.10. The request for punitive damages is immaterial and improper as Plaintiff is seeking relief not supported by the allegations of the FAC. *Civ. Proc. Code* §§ 435, 436, 431.10. The request for attorney’s fees is immaterial and improper as it is not authorized by statute, law, and/or contract. *Civ. Proc. Code* §§ 435, 436, 431.10. Accordingly, the Court should grant this motion to strike.

II. ARGUMENT

A. The References To Statements, Actions Or Conduct That Are Privileged Pursuant To *Civil Code* § 47(B) Are Immaterial And Improper Matters To Plead.

If pleadings are insufficient, any defect may be raised by demurrer or motion to strike or by motion for judgment on pleadings. *Coyne v. Krempels* (1950) 36 Cal.2d 257. *Code of Civil Procedure* § 435(b)(1) permits any party, within the time allowed to respond to a pleading, to file a motion to strike the whole or part of a complaint. The court may strike out any irrelevant, false, immaterial or improper matter inserted in any pleading. *Civ. Proc. Code* § 436(a). Pursuant to *Code of Civil Procedure* § 431.10 immaterial or irrelevant matter includes allegations that are not essential or not supported by the allegations of the complaint.

Pursuant to *Civil Code* § 47(b), any speech made in a judicial proceeding is absolutely privileged and may not support tort claims for defamation. Section 47(b) is to be “construed broadly, to protect the right of litigants to ‘the utmost freedom of access to the courts without the fear of being harassed subsequently by derivative tort actions.’ Thus, it has been established for well over a century that a communication is absolutely immune from any tort liability if it has

1 ‘some relation’ to judicial proceedings.” Healy v. Tuscany Hills Landscape & Recreation
2 Corp. (2006) 137 Cal.App.4th 1, 5-6 (citations omitted). In fact, it is well “established that
3 demands to resolve disputes made in anticipation of litigation are privileged so long as litigation is
4 seriously anticipated in good faith.” Financial Corp. of America v. Wilburn (1987) 189
5 Cal.App.3d 764, 777 (citations omitted). Moreover, in analyzing which statements in a pleading
6 are privileged the Court should apply “looser standards of relevance” than in a typical motion to
7 strike irrelevant or immaterial matter. Financial Corp. of America v. Wilburn 189 Cal.App.3d at
8 776.

9 In Plaintiff’s FAC, the very basis for his tort claims for libel, slander and false light are his
10 allegations (which are peppered throughout the FAC) that Defendant made defamatory statements
11 about Plaintiff *in and in connection with* the civil harassment proceeding that Defendant
12 instituted against Plaintiff. These statements, actions or conduct are absolutely privileged. All the
13 statements are enumerated above in detail; however, specific examples of improper, privileged
14 matter that must be stricken include:

- 15 • “Rossi went as far as to file a police report and failed restraining order filled with lies and
16 accusations about Photoglou.” Page 2, lines 19-20.
- 17 • “In an attempt to undermine his credibility and make him seem like a stalker opposed to
18 her serious boyfriend and lover, Rossi filed a police report against Photoglou” and a TRO.
19 Page 7, lines 23-25.
- 20 • “The police report alleged numerous lies . . .” Page 7, line 26.
- 21 • “Rossi falsely accused Photoglou of stealing . . .” Page 8, line 7.
- 22 • “I [Rossi] have a restraining order against him now because he . . .” Page 8, line 10.
- 23 • “Rossi and Smiley tried to get the police to remove Photoglou based on Rossi’s temporary
24 restraining order.” Page 8, lines 19-20.
- 25 • “Rossi stated on a bravotv.com blog she dropped her TRO because Photoglou ‘had already
26 violated the Temporary Restraining Order once and it became apparent that a piece of
27 paper was not going to protect me from what he was consistently doing.’” Page 9, line 24.

28 Because each of the enumerated statements are privileged and as such cannot support
Plaintiff’s defamation causes of action, they should be stricken as they are not filed in accordance

1 with the law and constitute immaterial and improper matters to plead. *Civ. Proc. Code* §§ 435,
 2 436, 431.10.

3 **B. Plaintiff Has Failed To Allege Sufficient Facts Upon Which Punitive Damages**
 4 **May Be Founded.**

5 This Court may, upon a motion made pursuant to *Code of Civil Procedure* § 435 or at any
 6 time in its discretion, strike out any irrelevant, false or improper matter inserted in any pleading.
 7 *Civ. Proc. Code* § 436(a). An immaterial allegation includes any allegation not essential to the
 8 claim, not supported by the claim, and/or seeking relief not supported by the allegations and a
 9 demand for judgment requesting relief not supported by the allegations of the complaint. *Civ.*
 10 *Proc. Code* § 431.10. For purposes of *Code of Civil Procedure* § 436, “immaterial allegation”
 11 means “irrelevant matter.” *Civ. Proc. Code* § 431.10(c).

12 Plaintiff fails to plead sufficient facts to support its punitive damages claims. This is
 13 especially true once the improper, privileged allegations concerning the civil harassment
 14 proceedings are stricken. In California, the basis upon which punitive damages may be awarded
 15 is governed by *Civil Code* § 3294(a), which allows recovery only if Plaintiff proves, by clear and
 16 convincing evidence, “that the defendant has been guilty of oppression, fraud, or malice.”
 17 Additionally, it is a universally-recognized principle that “[t]he law does not favor punitive
 18 damages and they should be granted with the greatest caution.” *Dyna-Med, Inc. v. Fair*
 19 *Employment & Housing Commission* (1987) 43 Cal.3d 1379, 1392. In fact, relatively recent
 20 legislative amendments have made it more difficult for plaintiffs to **plead** and prove punitive
 21 damage claims. *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712.

22 California courts require that **specific facts** be pled in support of punitive damage
 23 allegations; mere conclusions are not enough. *Milliard v. A.H. Robbins* (1983) 148 Cal.App.3d
 24 374, 391; *Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6-7; *Grieves v. Superior Court*
 25 (1984) 157 Cal.App.3d 159, 166. Broad allegations that a defendant acted maliciously and
 26 willfully are not enough; specific facts must be alleged. *Austin v. Regents of University of*
 27 *California* (1979) 89 Cal.App.3d 354 disapproved on other grounds by *Ochoa v. Superior Court*
 28 (1985) 39 Cal.3d 159; *Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864. Any and all references to
 punitive damages against these moving defendants are no supported by any factual allegations

1 other than the mere conclusion.

2 Plaintiff's FAC in the prayer for relief for punitive damages, including the reference "but
3 also punitive damages in order to deter Rossi from repeating these horrendous acts in the future"
4 (page 3, lines 11-12) and Paragraphs 70, 71, 89, 90, 97, and 104, improperly request an award of
5 punitive damages wholly unsupported by any factual contentions warranting the imposition of
6 such damages. A mere allegation that an intentional tort was committed is not sufficient to
7 warrant an award of punitive damages; not only must there be circumstances of oppression, fraud,
8 or malice, but facts must be alleged in the pleading to support such a claim. Grieves v. Superior
9 Court (1984) 157 Cal.App.3d 159.

10 Plaintiff's FAC fails to set forth any allegations that would constitute deliberate, cold,
11 callous, malicious or intentional acts done to injure and damage Plaintiff by Defendant, which are
12 required to support a claim for punitive damages. Brousseau v. Jarrett (1977) 73 Cal.App.3d 864,
13 872. Instead, Plaintiff is entirely silent as to any such allegation.

14 As such, the punitive damages request in the above-referenced paragraphs and prayer for
15 relief of the FAC are unsupported by the allegations and should be stricken. *Civ. Proc. Code* §
16 430.10(e), (f). Again, this is especially true once the improper, privileged allegations concerning
17 the civil harassment proceedings are stricken.

18 **C. Plaintiff Is Not Entitled To Recover Attorney's Fees Against Defendant Under**
19 **The FAC As Plead.**

20 Plaintiff fails to show that he is entitled to attorneys' fees. *Code of Civil Procedure* § 1021
21 provides that unless attorneys' fees are specifically provided for by statute, "the measure and
22 mode of compensation of attorneys and counselors at law is left to the agreement .of the parties."
23 *Civ. Proc. Code* § 1021. There is no allegation that Defendant was a party to any contract. There
24 are no facts to support the application of any law or statute that would permit the recovery of
25 attorney's fees based on the facts alleged in the FAC.

26 None of the causes of action have any statutory basis for the award of attorney's fees that
27 the facts that have been alleged would support. Hence, the prayer for attorney's fees should be
28 stricken.

1 **III. CONCLUSION**

2 For all the foregoing reasons, the Court should grant the relief requested and strike out of
3 the FAC such irrelevant, false, improper or immaterial matters pursuant to *Code of Civil*
4 *Procedure* §§ 435, 436 and 431.10.

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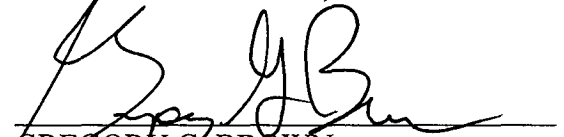
6 Dated: October 18, 2010

BROWN & CHARBONNEAU, LLP

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By:



GREGORY G. BROWN

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Attorneys for Plaintiff GRETCHEN ROSSI

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 BROWN & CHARBONNEAU, LLP

1 **PROOF OF SERVICE**
2 CCP §§ 1013A, 2015.5

3 STATE OF CALIFORNIA, COUNTY OF ORANGE

4 I, the undersigned, am employed in the County of Orange, State of California. I am over
5 the age of eighteen (18) years and not a party to the within action. My business address is 420
Exchange, Suite 270, Irvine, CA 92602.

6 On October 18, 2010, I served true copies of the foregoing document described as
7 **NOTICE OF MOTION AND MOTION TO STRIKE PORTIONS OF FIRST AMENDED
COMPLAINT** on the interested parties in this action, addressed as follows:

8 Bryan J. Freedman 9 Brian E. Turnauer 10 Freedman & Taitleman, LLP 11 1901 Avenue of the Stars, Suite 500 12 Los Angeles, CA 90067	<i>Attorneys for Defendant</i> Jay Photoglou 310 201-0005 – phone 310 201-0045 – fax bfreedman@ftllp.com burnauer@tflp.com
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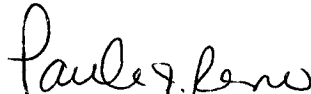
13 BY U.S. MAIL: The documents were placed in sealed, addressed envelopes on the above
14 date and placed for collection and mailing at my place of business. I am "readily familiar"
15 with the firm's practice of collecting and processing correspondence for mailing. Under
16 that practice, it would be deposited with the U.S. Postal Service on that same day with
postage thereon fully prepaid at Irvine, California in the ordinary course of business. I am
aware that on motion of the party served, service is presumed invalid if postal cancellation
date or postage meter date is more than one day after date of deposit for mailing in
affidavit.

17 BY OVERNIGHT DELIVERY: I enclosed the documents in an envelope or package
18 provided by an overnight delivery carrier and addressed on the above date. I placed the
19 envelope or package for collection and overnight delivery at an office or a regularly
utilized drop box of the overnight delivery carrier.

20 BY FACSIMILE TRANSMISSION: The documents were placed for transmission in a
21 facsimile transmission machine located in my employer's office, and were transmitted to a
22 facsimile machine maintained by the party or attorney to be served, on this same date in
the ordinary course of business. The transmission was reported as complete and without
error, and a record of the transmission was properly issued by the transmitting facsimile
machine.

23 (State) I certify (or declare) under penalty of perjury under the laws of the State of
24 California that the foregoing is true and correct and that this declaration was executed on
October 18, 2010, at Irvine, California.

25 (Federal) I declare that I am employed in the office of a member of the bar of this court at
26 whose direction the service was made.

27 
28 Paula J. Reno