IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
PITTSBURGH DIVISION

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| ALEXANDER RHODES | ) | Case No. |
| | ) | |
| *Plaintiff,* | ) | |
| v. | ) | Civil Action No. 2:19-cv-01366 |
| | ) | |
| NICOLE PRAUSE | ) | |
| | ) | *Electronically Filed* |
| and | ) | |
| | ) | |
| LIBEROS LLC | ) | |
| | ) | |
| *Defendants* | ) | |

**PLAINTIFF RHODES' BRIEF IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS PURSUANT TO FED.R.CIV. 12(b)(2), and/or MOTION TO STRIKE, and/or MOTION TO DISMISS PURSUANT TO FED.R.CIV. 12(b)(6)**

Now comes Plaintiff Alexander Rhodes, by and through undersigned counsel, and hereby opposes Defendants' Nicole Prause ("Prause") and Liberos, LLC ("Liberos") Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(2), Motion to Strike pursuant to the California Anti-SLAPP Statute, and Motion to Dismiss pursuant to Fed.R.Civ.P 12(b)(6).

## I. OVERVIEW

Defendants, in their alternative Motions, ignore many of the facts presented by Plaintiff Rhodes and do not overcome their burden to show that 1) this Court lacks jurisdiction of Defendants; 2) that the California Anti-SLAPP law should apply or result in a dismissal of Plaintiff's claims; and 3) that Plaintiff has failed to state a claim upon which relief can be granted.

Defendants attempt to frame the issue at hand as centering around the debate regarding pornography addiction. Even a cursory examination of Plaintiff's Complaint, however, shows that while Plaintiff Rhodes and Defendant Prause are both participants in said debate, the nature of

Plaintiff's Complaint relate to statements made by Defendant Prause which have nothing to do with pornography addiction, but rather are personal attacks against Plaintiff Rhodes.

Falsely calling an individual a promoter or collaborator of a hate group is not related to the debate about pornography addiction. See Exhibit 1 – Affidavit of Alexander Rhodes. Falsely calling an individual a misogynist, a stalker, a cyber-stalker, or a harasser, is not related to the debate about pornography addiction. Most of the other statements Defendant Prause has made against Plaintiff Rhodes also are not related to the debate. The attempt by Defendant Prause to distract from her intentional conduct towards Plaintiff Rhodes does not stand up to critical examination.

## II. FACTUAL SUMMARY

Plaintiff Rhodes is the founder and ***sole member and operator*** of NoFap.com, as well as the subreddit NoFap, and Twitter handle NoFap (collectively "NoFap"). NoFap is designed to provide a forum for those who struggle with the problems associated with excessive pornography consumption. Plaintiff Rhodes was and is a resident of Pennsylvania and operates NoFap from Pittsburgh, as it was explained in numerous press articles, including the first paragraph and throughout the New York Times article published on July 8th, 2016, that Defendant Prause commented about numerous times on Twitter. Ex. 1.

Defendant Prause, as a licensed psychologist, frequently argues against the existence of pornography addiction. Her studies have been widely publicized, and she has gained some notoriety for her publicly stated positions and studies on pornography. Defendant Liberos is a for-profit "sexual biotechnology" company founded by Defendant Prause.

As Plaintiff Rhodes and Defendant Prause are on different sides of the debate regarding pornography addiction, disagreements over research have arisen over time. Instead of debating

Plaintiff Rhodes or criticizing Plaintiff Rhodes' views about porn addiction on the merits, Defendant Prause has undertaken a campaign to attack and defame Plaintiff Rhodes on issues that are well outside the scope of the debate surrounding pornography addiction. In fact, Defendant Prause has made many critiques regarding the science behind pornography addiction, which are all absent from Plaintiff Rhodes' Complaint, as this lawsuit has nothing to do with Defendant Prause's research or views about porn addiction.

On October 27, 2018, Defendant Prause escalated her attacks on Plaintiff Rhodes. October 27, 2018 is an important date, as it is the date of the Tree of Life synagogue mass shooting in Pittsburgh, which was perpetrated by a white nationalist extremist with anti-Semitic views. Ex. 1. On the same day as the mass shooting, Defendant Prause accused Plaintiff Rhodes, a lifelong Pittsburgh area resident, of promoting the Proud Boys, a white nationalist hate group with anti-Semitic views. Ex. 1. This accusation was based on an interview of Plaintiff Rhodes conducted by Gavin McInnes, the founder of the Proud Boys, in 2016, ***six months prior to Mr. McInnes forming the Proud Boys.*** Ex. 1. At the time of the interview, Plaintiff Rhodes only knew of Mr. McInnes as a comedian and co-founder of Vice Media. Id.

Defendant Prause, with full knowledge that Plaintiff Rhodes was a resident of Pittsburgh, used her and Liberos' connections to Pittsburgh to falsely associate and conflate Plaintiff Rhodes with anti-Semitic hate groups in an effort to cause maximum damage to Plaintiff Rhodes' character and reputation in and around Pittsburgh immediately following the Tree of Life shooting.

Defendant Prause repeated and aggrandized these false allegations against Plaintiff Rhodes numerous times after that. For example, on November 30, 2018, Defendant Prause reached out to a New Statesman blogger to relay that "Rhodes work w ProudBoys extremists, so worth getting on FBI radar." See Pl.'s First Amd. Cpt. ("Pl.'s Cpt."), Ex. 3, DOC No. 20, Dated Jan. 22, 2020.

Further, Defendant Prause falsely accused Plaintiff Rhodes specifically of being a misogynist, a stalker, a cyber-stalker, and subject to restraining and no-contact orders. Id.

Despite her self-serving arguments in her Motion to Dismiss, and as demonstrated by the language of the publications themselves, these statements were directed at Plaintiff Rhodes individually. Plaintiff Rhodes, as specifically identified by Defendant Prause in her statements, is the **sole operator** of the NoFap Twitter account. Some of the Defendants' false statements were directed to the NoFap Twitter account, falsely accusing that account holder of physical actions, which were clearly intended and reasonably understood to label Plaintiff Rhodes as the perpetrator of those actions. Id. To suggest otherwise is dishonest. Further, Defendant Prause made numerous statements specifically accusing Plaintiff Rhodes, **by name**, of cyber-staking her, stalking her, being engaged in fraud, being a misogynist, being a serial harasser, and being subject to no-contact and restraining orders.

The statements Defendant Prause has made against Plaintiff Rhodes are false. Plaintiff Rhodes does not support, work with, or promote the Proud Boys. Plaintiff Rhodes has never stalked or cyber-stalked Defendant Prause. Plaintiff Rhodes is not a misogynist and holds no such beliefs. Plaintiff Rhodes does not engage in fraud. Plaintiff Rhodes is not and has never been the subject of any no-contact or restraining order. These statements by Defendant Prause regarding Plaintiff Rhodes have no basis in fact and were made for the sole purpose of destroying Plaintiff Rhodes' character and reputation.

## III. LAW AND ARGUMENT

Defendants have alleged that Plaintiff's Complaint should be dismissed for lack of jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2); that Plaintiff's Complaint should be dismissed pursuant to California's Anti-SLAPP statute; and that Plaintiff's Complaint should be dismissed

pursuant to Fed. R. Civ. P. 12(b)(6). As demonstrated below, none of these arguments are persuasive. Further, should the Court find that Plaintiff has not established jurisdiction over Defendants, the appropriate remedy would be to transfer this matter to the Southern District of California, not dismissal.

## IV. THIS COURT HAS JURISDICTION OVER DEFENDANTS

### A. Fed. R. Civ. P. 12 (b)(2) Standard for Review

When defending a Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(2) the burden falls upon the plaintiff to come forward with sufficient facts to establish a prima facie case in favor of personal jurisdiction. *Carteret Savings Bank, FA v. Shushan,* 954 F.2d 141, 146 (3d Cir. 1992). To the extent that a defendant files opposing affidavits or depositions[1], a plaintiff may not rest on mere allegations in the complaint but must support such jurisdictional allegations with appropriate affidavits or other evidence. See *Time Share Vacation Club v. Atlantic Resorts, Ltd*., 735 F.2d 61, 66-67 n.9 (3d Cir. 1984).

Any conflict of facts between the plaintiff and defendant are to be resolved in favor of the plaintiff. *TJS Brokerage & Co., Inc. v. Mahoney*, 940 F. Supp. 784, 787 (E.D. Pa. 1996); *Di Mark Mktg., Inc. v. Louisiana Health Serv.& Indemnity Co*., 913 F. Supp. 402, 405 (E.D. Pa. 1996).

### B. This Court has Personal Jurisdiction over Defendants

Defendants argue that this Court does not have personal jurisdiction over either Defendant, and as such, Plaintiff's Complaint should be dismissed pursuant to Fed.R.Civ.P. 12(b)(2). "[I]n determining whether there is personal jurisdiction, we ask whether, under the Due Process Clause, [defendant] has 'certain minimum contacts with [Pennsylvania] such that the maintenance of the

[1] It should be noted that Defendants have not attached any supporting affidavit or deposition to confirm the facts alleged in their Motion. The unsubstantiated claims made by Defendants should require, at minimum, an evidentiary hearing in order to confirm the information alleged by Defendants.

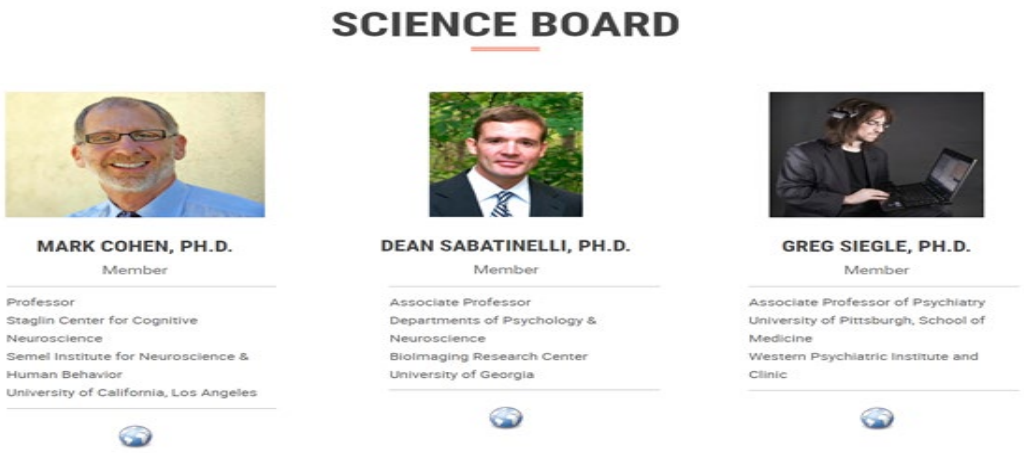
suit does not offend traditional notions of fair play and substantial justice.'" *D'Jamoos v. Pilatus Aircraft Ltd.,* 566 F.3d 94, 102 citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

Defendants' arguments fail as Defendants' conduct, both generally and as directed towards Plaintiff Rhodes, subject Defendants to jurisdiction in Pennsylvania. This Court has general jurisdiction over Defendants as Defendant Liberos maintains significant contacts with Pennsylvania, and more importantly, Pittsburgh. Further, this Court has specific jurisdiction over Defendants as Defendants' conduct again was specifically targeting Pittsburgh and Plaintiff Rhodes in his capacity as a citizen of Pittsburgh. Jurisdiction is clearly proper in this Court, and even if it were not, the proper remedy would be to transfer this matter, not dismissal.

**i. This Court has General Jurisdiction over Defendants**

General jurisdiction requires only that the plaintiff's claim arises out of the non-resident defendant's "continuous and systematic" contacts with the forum state, and does not require that the cause of action be related to the defendant's activities in the forum state. *Rocke v. Pebble Beach Co.*, No. 13-1149, 541 Fed. Appx. 208, (3rd Cir. 2013). These contacts must be more than "minimum" contacts, and include such factors as employing an agent in the forum or advertising in the forum. *Clark v. Matshushita Elec. Indus. Co*., 811 F. Supp. 1061, 1067 (M.D. Pa. 1993) and *Farina v. Nokia*, 578 F. Supp.2d 740, 750 (E.D. Pa. 2008). When examining the circumstances, it is clear that Defendants have maintained more than minimum contacts with Pennsylvania, and more specifically, Pittsburgh.

First, and in direct contradiction to claims made in Defendants' Motion, Defendant Liberos has openly advertised having a board member, Greg Siegle, who is employed by the University of Pittsburgh at their primary campus in Pittsburgh, Pennsylvania. Pl.'s Cpt. Ex. 2.




Defendant Liberos has recruited job applicants online while promoting having a "Pittsburgh base." Id.


Finally, Defendant Liberos' own website indicates that it has research operations overseen by the University of Pittsburgh's institutional review board and it is working exclusively with the University of Pittsburgh to fill multiple positions through the University. Id. at Ex. 2. This advertisement explicitly states that "hires are through the University of Pittsburgh." Id.

These contacts establish a significant connection between Liberos and Pennsylvania. Liberos employs an agent in Pennsylvania. Further, they clearly work with, and receive funding through, the University of Pittsburgh. As Defendant Prause was acting within the course and scope

of her employment for Defendant Liberos at all times, a charge she does not deny in her motion, and is presumably being indemnified by Liberos, she is also subject to jurisdiction in this forum.

Defendant Prause also maintains significant contacts with the University of Pittsburgh, listing herself as an affiliate of the university in her LinkedIn profile. Pl.'s Cpt., Ex. 1. Defendant Prause admits that she utilizes University of Pittsburgh resources and has an affiliation for research testing with the University of Pittsburgh. See Exhibit 2 – Affidavit of Nicole Prause ¶ 6. These contacts rise above and beyond the level of "minimum contacts" as provided in *Clark* and *Farina*.

Further, this matter is clearly distinguished from the cases cited by Defendants as the Defendants have done much more than passive internet postings. C.F. *Barrett v. Catacombs Press*, 44 F. Supp.2d 717 (E.D. Pa. 1999), *Gehling v. St. George's School of Medicine, Ltd.*, 773 F.2d 539 (1985) and *Reliance Steel Products Co. v. Watson, Ess, Marshall & Enggas*, 675 F.2d 587 (1982). Prior to, and during, the complained of conduct, Defendants advertised and recruited in the Pittsburgh area, growing their presence and the awareness of the citizens of Pittsburgh to Defendants' presence. Further, Defendant Liberos employed an agent in Pittsburgh. Defendants' contacts with the forums satisfy the contacts test and show that this Court has general jurisdiction over Defendants.

**ii. This Court has Specific Jurisdiction over Defendants**

Defendants next argue that there is no specific jurisdiction over the Defendants in this forum. To establish specific jurisdiction, "[f]irst the defendant must have 'purposefully directed [its] activities' at the forum. Second, the litigation must 'arise out of or relate to' at least one of those activities. And third, if the first two requirements have been met, a court may consider whether the exercise of jurisdiction otherwise 'comport[s] with 'fair play and substantial justice.'" *D'Jamoos v. Pilatus Aircraft Ltd.*, 566 F.3d 94, 102 (2009) citing *Burger King Corp. v. Rudzewicz*,

471 U.S. 462, 472, 105 S.Ct. 2174, 2182, 85 L. Ed. 2d 528 (1985) and *Helicopteros*, 466 U.S. at 414, 104 S.Ct. at 1872; *O'Connor*, 496 F.3d at 317

Defendants actions deliberately targeted Pennsylvania, and specifically Pittsburgh. As stated in Plaintiff's Complaint, the first day that Defendant Prause accused Plaintiff Rhodes of being affiliated with the Proud Boys was October 27, 2018, the day of the horrific shooting at the Tree of Life synagogue in Pittsburgh.


Pl.'s Cpt. at Ex. 3.

Despite being critical of Plaintiff Rhodes for years prior to October 27, 2018, and Plaintiff Rhodes being interviewed by Mr. McInnes more than two years prior, Defendant Prause chose the day of a tragic shooting in Pittsburgh to initiate her campaign of defamation falsely stating that Plaintiff Rhodes was a promoter of the Proud Boys. When Defendant Prause and her colleague David Ley were criticized for using the Tree of Life shooting to smear Plaintiff Rhodes with accusations of anti-Semitism, Defendant Prause described it as "the perfect time" and that "hate from NoFap will lead someone to attack us: and it will be on you. Stop this now." Ex. 1, ¶ 34.

Defendant Prause was well aware of Plaintiff Rhodes' status as a citizen of Pittsburgh prior to making these statements. Further, Defendant Prause was well aware of her and Liberos connections to Pittsburgh and the University of Pittsburgh. Defendant Prause attempted to tie Plaintiff Rhodes to a white nationalist hate group, the same day as a white nationalist conducted the worst anti-Semitic atrocity in our country's history. These statements were deliberately targeting Pennsylvania, and specifically Pittsburgh, in an effort to effect maximum harm upon

Plaintiff Rhodes' reputation. Plaintiff Rhodes is ethnically Jewish and spent years of his life in the same Squirrel Hill neighborhood where the mass shooting took place. Plaintiff Rhodes has traveled to Israel on three separate occasions. Ex. 1, ¶ 7. Defendant Prause's defamatory attacks specifically targeted Plaintiff Rhodes as a citizen of Pittsburgh on the day of and the days following the Tree of Life synagogue shooting, which caused him significant distress, especially as a member of the Pittsburgh Jewish community.

There can be no question that the present litigation arises out of Defendant Prause's targeting of Plaintiff Rhodes in connection to the Tree of Life shooting. The only remaining question to satisfy the test for specific jurisdiction is whether subjecting Defendants to jurisdiction in Pennsylvania fails to comport with "fair play and substantial justice".

"[W]here individuals 'purposefully derive benefit' from their interstate activities, …, it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities." *Burger King*, 471 U.S. at 474, citing *Kulko* v. *California Superior Court*, 436 U.S. 84, 96 (1978). It cannot be disputed that Defendants "derive benefit" from their connections to Pittsburgh. Defendant Liberos is a for-profit corporation. Defendant Prause was acting on behalf of Defendant Liberos at all times when directing her activities towards Plaintiff Rhodes. Defendant Liberos benefits commercially from the discrediting of critics to its research or people who believe that porn addiction is real. Defendants clearly derived benefit from their interstate activities in Pittsburgh. Defendants' due process is not violated by subjecting them to jurisdiction in Pennsylvania.

Defendants rely heavily on *Barrett v. Catacombs Press*, 44 F. Supp.2d 717 (E.D. Pa. 1999) to support their contention that there is no specific jurisdiction. The reliance on *Barrett* is misguided. In *Barrett*, the Defendant simply maintained a website, and on that website, published

two articles regarding the Plaintiff. Id. at 721-722. These postings were deemed "passive" by the Court. *Id*. at 728. The *Barrett* Court was deciding whether specific jurisdiction exists "where the defendant merely maintains a Web site without any contract to sell goods or any active solicitation." *Id.* at 727.[2] The court noted in *Barrett* that the Defendant had not participated in any non-Internet related contacts with Pennsylvania residents. *Id*. at 726.

This matter is easily distinguishable from *Barrett* as Defendants' conduct has been anything but passive. Defendant Prause has specifically targeted this forum in her attacks on Plaintiff Rhodes' character. Further, Defendants have maintained significant contacts with this forum and have derived substantial commercial benefit from these contacts. As such, this matter involves conduct that goes well beyond "passive" and subjects Defendants to specific jurisdiction.

Finally, on February 25, 2020, Plaintiff Rhodes was contacted by the Pennsylvania Department of State regarding a report made against Plaintiff Rhodes for the unlicensed practice of psychology. See Ex. 1. The report was received on October 01, 2019, the day after the following Twitter post from an account believed to be run by Defendant Prause:


See Ex. 1.

[2] In *Barrett,* the Plaintiff alleged that Defendant also posted the defamatory statements to several listservs and message boards. The court found that the plaintiff did not substantiate this claim. *Barrett*, 44 F.Supp.2d at 723. Defendant Prause posted the message on Twitter, effectively disseminating the post to all of her Twitter followers instantly, similar to a listserv.

The investigator informed Plaintiff Rhodes that the filed report stated that Plaintiff Rhodes is "charging residents of Pennsylvania for treatments for compulsive sexual behavior" and that Plaintiff Rhodes "[holds] no appropriate training and no licensure" to do so. Ex 1, ¶41. [3] The report contains the exact same phrasing used in the September 29 @BrainOnPorn Twitter posting. This report follows the pattern of conduct Defendant Prause has exhibited against many other people whom Defendant Prause has targeted in retaliation for them criticizing her or expressing views that are critical of pornography. See Pl.'s Cpt., Exs. 5-11.[4] Plaintiff Rhodes has a good faith basis to believe that Defendant Prause filed this fraudulent report against him.

The charges in the report are completely false and defamatory. At no times has Plaintiff Rhodes practiced psychology or offered any mental health treatments to anyone. Ex. 1. This report is a further attempt to harass and otherwise destroy Plaintiff Rhodes' reputation, specifically within Pennsylvania, as the report was made to the Pennsylvania State Board of Psychology. Indeed, due to Defendant Prause's fraudulent report, Plaintiff Rhodes is going through a mandatory investigative process with the Pennsylvania Department of State's Bureau of Enforcement and Investigation. For this process, Plaintiff Rhodes was forced to retain additional specialized counsel to defend himself at significant personal expense. Id. Defendant Prause specifically directed her conduct to Pennsylvania by continuing to harass and defame Plaintiff Rhodes, and that Plaintiff's Rhodes claims arise out of Defendant Prause's repeated actions towards him.

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[3] Plaintiff Rhodes was unable to include this allegation in his First Amended Complaint as he did not receive notice of the report against him until February 25, after the filing of the First Amended Complaint. Plaintiff Rhodes would prefer to move the case forward on its merits, as opposed to filing another amended complaint, and requests that this Court exercise judicial notice for the purpose of deciding this Motion.

[4] Further, since the filing of this lawsuit, Defendant Prause has filed such similar actions against two of Plaintiff's witnesses, Staci Sprout and Gary Wilson. Defendant Prause has also made similar SLAPP threats against other people who have shown support for Plaintiff Rhodes online or criticized her. Ex. 1.

**iii. The Appropriate Remedy to be Requested is Transfer, not Dismissal**

Even if Defendants establish that there is no jurisdiction, which they have not, the proper remedy would be to transfer this matter to a Court where the action could have been brought, not dismissal. Pursuant to 28 U.S. §1631, if a court determines that it lacks jurisdiction over a matter the court shall, if it is in the interest of justice, transfer said case to any other such court in which the action could have been brought.

"Once a district court determines that it lacks personal jurisdiction over the defendant, it has the option of dismissing the action or transferring it to any district in which it could have been brought." *Campbell v. Mars, Inc*., 2016 U.S. Dist. LEXIS 161996 at *8; citing *Matthews v. Am.'s Pizza Co.,* LLC, No. 13-6905, 2014 U.S. Dist. LEXIS 50263, 2014 WL 1407664, at * 1-2 (E.D. Pa. Apr. 10, 2014); see also 28 U.S.C. § 1631; *D'Jamoos*, 566 F.3d at 110 (directing the district court on remand to consider transfer pursuant to §1631 where personal jurisdiction was lacking); *Island Insteel Sys., Inc. v. Waters*, 296 F.3d 200, 218 n. 9, 44 V.I. 389 (3d Cir.2002) (stating that, where a court lacks personal jurisdiction, it can transfer the action pursuant to § 1631); *Gallant v. Tr. of Columbia Univ.*, 111 F. Supp. 2d 638, 648 (E.D. Pa. 2000) (Katz,J.) (transferring action under § 1631 where court lacked personal jurisdiction).

Because transfer is preferred over dismissal, there is a rebuttable presumption in favor of transfer. *Matthews v. America's Pizza Co., LLC*, 2014 U.S. Dist. LEXIS 50263, *Britell v. U.S.,* 318 F.3d 70, 73 (1st Cir. 2003); *Pac. Emplrs. Ins. Co. v. AXA Belgium S.A.,* 785 F. Supp. 2d 457, 475 (E.D. Pa. 2011) (Goldberg, J.). The presumption may be rebutted only if transfer would not be in the interest of justice. *Britell,* 318 F.3d at 74.

When determining whether transfer is in the "interest of justice", courts will look to 3 factors: 1) whether the transfer would unfairly benefit the Plaintiff; 2) whether the transfer would

impose an unwanted hardship on the Defendant; and 3) whether the transfer would unduly burden the judicial system. *Id*. In examining these three factors for the present case, it is clear that transfer should be preferred to dismissal.

First, Plaintiff Rhodes does not receive a benefit from having to litigate his case in California. Plaintiff Rhodes is a resident of Pittsburgh and will incur significant cost in litigating this case in California. Nor will Defendants be prejudiced in litigating this case in the jurisdiction in which they reside. *Matthews* at *7. Finally, transferring this matter to the Central District Court of California[5] will not unduly burden the Court in California. This matter is a simple defamation lawsuit which does not require extensive legal briefing or complicated legal concepts.

## V. CALIFORNIA'S ANTI-SLAPP STATUTE IS NOT APPLICABLE

### A. The California Anti-SLAPP does not apply because it is procedural in nature and conflicts with the Federal Rules of Civil Procedure

The California anti-SLAPP does not apply because it is procedural in nature. In analyzing the applicability of a state Anti-SLAPP statute in federal court, the threshold question is whether a state's Anti-SLAPP is procedural or substantive in nature. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487 (1938). If the Anti-SLAPP is found to be procedural in nature, then the Anti-SLAPP will not apply. If the Anti-SLAPP is substantive or has substantive portions, then the court must decide whether the portions directly conflict with federal procedural law. If there is a conflict with federal procedural law, then the court applies federal law, the Anti-SLAPP will not apply. *Block v. Tanenhaus*, 867 F.3d 585, 589 (5th Cir. 2017).

#### i. Anti-SLAPP laws are procedural in nature

[5] The Central District of California is the District Court for Los Angeles, where Defendant Liberos is located. Should Defendant Prause be located in another district and desire the case to be heard in said district, Plaintiff will oblige if necessary.

Many states have enacted Anti-SLAPP laws to protect individuals from meritless lawsuits, aimed at discouraging permissible, constitutionally protected expression. There is a split in authority as to whether these state Anti-SLAPP statutes should apply in federal court. The California law, as interpreted by California courts, has been interpreted as a way for a party to move to dismiss "certain unmeritorious claims that are brought to thwart constitutionally protected speech or petitioning activity." *Robinzine v. Vicory* (2006) 143 Cal.App.4th 1416, 1420-1421, 50 Cal. Rptr.3d 65), citing § 425.16. Other California courts have held that the statute serves as a "gatekeeping" function to screen out meritless claims. *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.

It stands to reason then, that the California law provides a defendant a mechanism to dismiss a complaint but does not provide any further substantial rights to a party. Further, there is a circuit split as to whether an Anti-SLAPP law is a substantive or procedural remedy.

The Second Circuit, D.C. Circuit, Tenth Circuit, and Eleventh Circuit have held that state Anti-SLAPP laws do not apply in federal court. *Abbas v. Foreign Policy Grp., LLC*, No. 13-7171, 783 F.3d 1328, 2015 WL 1873140 (D.C. Cir. 2015) (finding that the anti-SLAPP did not apply in federal court); *In re Gawker Media LLC*, 571 B.R. 612, 64 Bankr. Ct. Dec. (CRR) 167 (Bankr. S.D. N.Y. 2017) (holding that California anti-SLAPP did not apply in federal diversity case); *Los Lobos Renewable Power, LLC v. Americulture, Inc*, 885 F.3d 659 (10th Cir. 2018) (holding that New Mexico anti-SLAPP statute was inapplicable in federal Court); *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 102 Fed. R. Serv. 3d 468 (11th Cir. 2018); (holding that Georgia's anti-SLAPP statute did not apply in federal court).

The Seventh Circuit has not explicitly decided this issue; however, it is likely that it would also hold that state Anti-SLAPPs do not apply in federal court. In *Intercon Solutions, Inc. v. Basel*

*Auction Network*, the Seventh Circuit faced the issue of whether Washington's Anti-SLAPP was applicable in federal court, however, declined to do a full analysis when the case was decided on other grounds. *Intercon Solutions, Inc. v. Basel Action Network*, 791 F.3d 729 (2015). Notably, the lower court squarely faced the issue before appeal and determined that the Anti-SLAPP directly interferes with the Federal Rules' mode of operation, making it void in federal court.

The Fifth Circuit is split on the issue of whether an anti-SLAPP applies in federal court. In *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 168 (5th Cir. 2009) the Fifth Circuit held that the Louisiana anti-SLAPP applied to a diversity case in federal court. However, when faced with the issue again in *Klocke v. Watson*, 936 F.3d 240, 2019 U.S. App. LEXIS 25343, 2019 WL 3977545, the Fifth Circuit ruled that the Texas Anti-SLAPP did not apply, as it was a procedural remedy for defendants.

The First and Ninth Circuits have held that state Anti-SLAPPs apply in federal court. *Godin v. Schencks*, 629 F.3d 79 (1st Cir. 2010) (holding that Maine Anti-SLAPP applies in federal court); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999) (applying California Anti-SLAPP, explaining that the Anti-SLAPP advances substantive state interests even if it is plainly procedural).

The Third Circuit has not yet decided whether California's Anti-SLAPP applies in a federal diversity case, or whether that law is substantive or procedural. However, it is likely that the Third Circuit would follow the majority precedent described above in this case and determine that California's Anti-SLAPP is a procedural mechanism allowing for dismissal and creates no substantive rights.

**ii. The California Anti-SLAPP conflicts with the Federal Rules of Civil Procedure.**

Even if this court finds that California's Anti-SLAPP is substantive, the Anti-SLAPP will not apply because it interferes with the Federal Rules of Civil Procedure. A state rule conflicts with a federal procedural rule when it imposes additional procedural requirements not required by the Federal Rules of Civil Procedure. *Klocke*, 936 F.3d at 245, citing *Shady Grove*, 559 U.S. at 396 n.1, 130 S. Ct. at 1436 n.1 and *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1333, 414 U.S. App. D.C. 465 (D.C. Cir. 2015). When the state rule and the federal rules both specify requirements for a case to proceed at the next stage of litigation, the rules answer the same question. Id.

In *Abbas v. Foreign Policy Group*, Abbas sued Foreign Policy magazine after they published an article about Abbas. Foreign Policy magazine filed a motion to dismiss under the D.C. Anti-SLAPP and Rule 12(b)(6). The district court granted the motion pursuant to the Anti-SLAPP and denied the 12(b)(6) motion as moot. On appeal, the court found that a conflict existed between the Anti-SLAPP and federal rules 12(b)(6) and 56(a), explaining that both "answer the same question" as to whether the circumstances permit dismissal of a case before trial. The court held that the federal rules were broad enough to displace the Anti-SLAPP. See also *In re Gawker Media LLC*, 571 B.R. 612, 64 Bankr. Ct. Dec. (CRR) 167 (Bankr. S.D. N.Y. 2017) (holding that California Anti-SLAPP did not apply because it interfered with Federal Rules 12 and 56).

In this case, Defendant has moved for dismissal of all of Plaintiff's claims under the California Anti-SLAPP statute. The California Anti-SLAPP provides:

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech … in connection with a public issue shall be subject to a ***special motion to strike***, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. Cal Code Civ Proc § 425.16(b)(1).

Federal Rules 12(b)(6) and 56(a) also govern conditions for dismissal of a case. Under Rule 12(b)(6), a federal court may dismiss a case for failure to state a claim upon which relief may be granted if, accepting all factual allegations as true, the complaint does not state a plausible claim for relief. Fed. R. Civ. P 12(b)(6). Rule 56 states that a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

Like in *Abbas*, a conflict exists between the California Anti-SLAPP and Federal Rules 12(b)(6) and 56(a), because the Anti-SLAPP and the Federal Rules answer the same question as to whether the circumstances permit dismissal of a case before trial. The California Anti-SLAPP directly conflicts with Federal Rules 12 and 56 and should be displaced by the Federal Rules.

**B. Pennsylvania has a greater interest in applying its own law.**

If this Court holds that the California Anti-SLAPP law is substantive, which Plaintiff respectfully submits that it is not, California law should still not apply in this case because Pennsylvania has a greater interest in the application of its own law. In a diversity case, Pennsylvania choice of law rules are to be applied by the federal court. *Travelers Indem. Co. v. MTS Transp.*, LLC, 2012 WL 3929810, *19. Under the first step of this analysis, the Court must determine whether a conflict exists between the laws of the states in question. A real conflict exists only where the application of each state's substantive law produces a contrary result. *Hammersmith v. TIG Ins. Co.*, 480 F.3d 220, 230 (3d Cir. 2007). If there is no conflict, the court may apply the law of either state. If there is a conflict, the court must proceed to the second step of the conflict inquiry. This entails a determination of whether the conflict is “true,” “false,” or “unprovided-for.” A "true" conflict exists when both states’ interests would be impaired through application of the other state’s law. A "false" conflict exists when only one state’s interests would be impaired in

applying the other state's laws. A conflict is "unprovided for" when neither state would be impaired if the other state's law is applied. When a true conflict exists, it is necessary to proceed to a "deeper" choice of law analysis Id. at 230 (citing *Cipolla v. Shaposka*, 439 Pa. 563, 267 A.2d 854, 856 (Pa. 1970) (emphasis in original)). If the Court decides that a true conflict exists, the Court must then determine which state has the greater interest applying its law. Id. at 231.

In this case, a conflict does exist between the California Anti-SLAPP and the Pennsylvania Anti-SLAPP. Contrary to Defendant's assertion, Pennsylvania does in fact have a narrow Anti-SLAPP statute. *Penllyn Greene Assocs., L.P. v. Clouser*, 890 A.2d 424, 427, 2005 Pa. Commw. LEXIS 757. The Pennsylvania Anti-SLAPP statute, 27 Pa. Const. Stat. §§ 7707, 8301-05 is much narrower than the California Anti-SLAPP. The Pennsylvania Anti-SLAPP applies only to those petitioning the government over environmental issues. The California Anti-SLAPP, on the other hand, is extremely broad, and applies to all persons who are defending themselves against an action arising out of any speech. Thus, a defendant in California may pursue an Anti-SLAPP motion related to any matter of free speech, while a defendant in Pennsylvania may pursue an Anti-SLAPP only if the free speech issue is related to environmental issues.

Defendants' speculations into the thinking of the Pennsylvania legislature are totally unsupported. The Pennsylvania legislature did hold that "it is contrary to the public interest to allow [SLAPP] lawsuits to be brought primarily to chill the valid exercise by citizens of their constitutional right to freedom of speech and to petition the government for the redress of grievances." H.B. No. 393, 184th Reg. Sess. (2000). The Pennsylvania legislature determined that their version of the Anti-SLAPP will only apply to citizens participation in the establishment of environmental policies and the enforcement of said laws and regulations. *Penllyn* 890 A.2d at 427, Fn. 1.

The conflict in the current case is a false conflict because only one side would be impaired by the application of the other state's laws. Pennsylvania citizens would be harmed in the application of California's Anti-SLAPP because they would have an increased chance of having their defamation suit dismissed before they have an opportunity to be heard by a jury. Pennsylvania specifically enacted a narrow Anti-SLAPP statute, intended only to apply to environmental issues.

Thus, not only would Pennsylvania citizens be harmed, but Pennsylvania legislative intent as well. California citizens, on the other hand, would not be harmed because they could still seek to dismiss lawsuits through the equivalent dismissal mechanisms provided by the Federal Rules in Federal Rule 12 and 56. Because Pennsylvania has a greater interest in applying its own Anti-SLAPP and California's interest would not be harmed because its citizens can file for dismissal through a different rule, Pennsylvania law should apply.

**C. Plaintiff has Established a Prima Facie Case of Defamation.**

Even if the Court were to apply the California Anti-SLAPP statute to the present case, the Defendants have failed to state adequate grounds to dismiss the First Amended Complaint under that standard. The California Anti-SLAPP statute allows a court to strike any cause of action that arises from the *legitimate* exercise of a defendant's constitutionally protected rights of free speech or petition by establishing a "procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation" to screen out meritless claims. *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192. In performing this 'gate-keeping' function, the trial court must "**accept as true the evidence favorable to the plaintiff** and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." *HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th

204, 212. The trial court is not to weigh the credibility or comparative probative strength of competing evidence. *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1365.

To properly evaluate the merits of the motion, a **two-pronged test** is utilized. **First**, a court must decide whether the defendant "has made a threshold showing that the challenged cause of action arises from protected activity." *Taheri Law Group v. Evans* (2008), 160 Cal.App.4th 482, 488. **Secondly**, if (and only if) the defendant makes this threshold showing, the court must then decide whether the plaintiff "has demonstrated a probability of prevailing on the claim." *Taheri*, 160 Cal.App.4th at 488.

To sufficiently establish a probability of prevailing on a claim made subject to an Anti-SLAPP motion, the plaintiff must "state [ ] and substantiate[ ] a legally sufficient claim." *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123, quoting *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 412. Therefore, the plaintiff need only "demonstrate that the complaint is both **legally sufficient and supported by a sufficient *prima facie* showing of facts to sustain a favorable judgment** if the evidence submitted by the plaintiff is credited." *Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548, accord, *Rosenaur v. Scherer* (2001) 88 Cal.App.4th 260, 274 (emphasis added).

First, Plaintiff disputes that Defendants' conduct is protected under the California Anti-SLAPP law. As admitted by Defendants, California and Pennsylvania have similar requirements for a claim of defamation. A prima facie case for defamation requires the plaintiff to plead the following: (1) the defamatory character of the communication; (2) publication of the communication to a third party; (3) the communication refers to the plaintiff; (4) the third party's understanding of the communication's defamatory character; and (5) injury." *Brown v. Blaine*, 833 A.2d 1166, 1173 n. 14 (Pa. Commw. 2003)(citing 42 Pa. C.S.A. § 8343). In California, "[t]he

elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage. *Sanders v. Walsh*, 219 Cal. App. 4th 855, 2013 WL 5112143. "Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact which is false, unprivileged, and has a natural tendency to injure or which causes special damage." *Ringler Associates Inc. v. Maryland Casualty Co.* (2000) 80 Cal.App.4th 1165.

Upon a review of the facts in a light most favorable to Plaintiff Rhodes, it is clear that Plaintiff Rhodes established a prima facie case for his claims against Defendants. In this case, Defendant made numerous false statements across various mediums, which are clearly regarding Plaintiff Rhodes. Defendant has alleged, among other things, that Plaintiff Rhodes promotes an extremist hate group, works with multiple members of a hate group, is a misogynist, is subject to no-contact and restraining orders, has been reported to the FBI, engages in fraud, and specifically that Plaintiff Rhodes harasses, stalks, threatens, and cyber-stalks Defendant Prause.

Defendant Prause had no support for these statements at the time she made them, nor did she provide any evidence in Defendants' Motion to Dismiss. Defendant Prause based her statements linking Plaintiff Rhodes to the Proud Boys on one interview Plaintiff Rhodes did with Vice Media co-founder Gavin McInnes, months before the Proud Boys were founded. Defendant Prause also provided no evidence that Plaintiff Rhodes harasses her, stalks her, cyber-stalks her, threatens her, engages in fraud, has been reported to the FBI for criminal threats/stalking/cyber-stalking/computer intrusion, and is a misogynist, nor did Defendant Prause provide copies of the restraining and no-contact orders that she has claimed she has against Plaintiff Rhodes.

These statements are defamatory because they are false and tend to lower Plaintiff Rhodes in the estimation of the community or deter third persons from dealing with him. The statements

were made to third parties via the Internet and other mediums. Defendant Prause knew that the statements were untrue. Whether the statements are capable of defamatory meanings is a question of law for the court to decide. Because there is a probability that Plaintiff Rhodes will prevail on this claim, the Anti-SLAPP should not apply, and the motion should be denied.

## VI. PLAINTIFF HAS MET ITS BURDEN TO STATE A CLAIM

Defendants finally argue that Plaintiff Rhodes' claims fail as a matter of law. Defendants argue that Plaintiff cannot maintain his defamation claims as the statements by Defendants were directed at others, including Plaintiff's business, NoFap. This argument completely ignores the totality of the allegations included in Plaintiff's Complaint, and after viewing these allegations in Plaintiff's Complaint in a light most favorable to Plaintiff, is clearly nonsense.

"The court is required to conduct a two-part analysis when considering a Rule 12(b)(6) motion. First, the factual matters averred in the complaint, and any attached exhibits, should be separated from legal conclusions asserted therein. *Fowler*, 578 F.3d at 210. Any facts pled must be taken as true, and any legal conclusions asserted may be disregarded. Id. at 210-211. Second, the court must determine whether those factual matters averred are sufficient to show that the plaintiffs have a "plausible claim for relief." *Atiyeh v. Nat'l Fire Ins. Co*., 742 F. Supp. 2d 591, 596 (2010), citing F*owler v. UPMC Shadyside*, 578 F.3d 203, 210-211 (2009)

Defendants argued that none of Defendant Prause's false statements were concerning Plaintiff Rhodes personally, but only about his business and other people. While some of Defendant Prause's false statements are about Plaintiff Rhodes' business and relevant to calculate damages and to ascertain her motivations for targeting Plaintiff Rhodes with false statements, this argument is clearly false on its face when examining the evidence. First, there are numerous statements by Defendant Prause, including the most egregious statements discussing the Proud

Boys, that reference Plaintiff Rhodes directly by name, contextually refer to Plaintiff Rhodes, or refer to Plaintiff Rhodes by description, such as "NoFap founder":


To suggest that these statements could not be attributed to Plaintiff Rhodes strains credulity. Further, Defendants' motion completely fails to address Plaintiff Rhodes' allegations that Defendant Prause made claims of stalking and having a restraining order against Plaintiff Rhodes to producers of The Doctors television show. Even after this lawsuit was filed, Defendant Prause continued to defame Plaintiff Rhodes, by name, including alleging criminal conduct. Pl.s Cpt. ¶¶68-79, Ex 1. Clearly, Plaintiff has more than met his burden to plausibly prove that Defendant Prause was targeting Plaintiff Rhodes and intended to harm Plaintiff Rhodes.

Finally, there is no support to suggest that all of these false statements were "opinion regarding the characteristics of the membership of NoFap or the type of activities and viewpoints that NoFap supports and encourages." Defendants Motion to Dismiss, Dated Dec. 20, 2019, Doc No. 12 Page 35. This assertion completely ignores many of the exhibits attached to Plaintiff Rhodes' Complaint, the allegations contained in the Complaint, and the context of the statements made by Defendant Prause. Many of Defendant Prause's false statements online, targeting Plaintiff Rhodes with a malicious report to the Pennsylvania State Board of Psychology, and her

conduct towards the producers of The Doctors are all clearly outside of the opinion regarding NoFap and its membership.

Defendant Prause's statements, which were clearly made to smear Plaintiff Rhodes personally, falsely paint Plaintiff Rhodes as a racist stalker hate group leader who despises women and Jews, engages in fraud and other criminal behavior, and is such a danger to society that a Judge granted her a valid restraining order against him. These statements by Defendant Prause clearly satisfy the threshold for a claim of defamation against Defendants as they are defamatory per se. Defendants' Motion to Dismiss pursuant to 12(b)(6) must be denied.

## VII. CONCLUSION

Defendants have failed to meet their Rule 12 burden in their Motion to Dismiss. This Court has jurisdiction over both Defendants as both Defendants have maintained substantial contacts with Pennsylvania. Further, the California Anti-SLAPP law is a procedural law which does not apply to a federal diversity case. Finally, under both the California Anti-SLAPP law and Rule 12, Defendants have failed to show that Plaintiff will not be successful on the merits of his case, as Defendant Prause's statements were clearly false and of and concerning Plaintiff Rhodes.

For these reasons, Defendant's Motion to Dismiss should be DENIED.

Respectfully Submitted

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 23, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such to all counsel of record.

/s/ Andrew C. Stebbins
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