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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
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Dept.: 20
Judge: Honorable Socrates P. Manoukian

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1 **I. INTRODUCTION**

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

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

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

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

1 **II. STATEMENT OF FACTS**

2 **A. WorldCon 76**

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

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

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

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

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

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

15 **B. Plaintiff Jonathan Del Arroz**

16 **1. Background**

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

- 20 a. That he is "a #1 Amazon Bestselling author"; (Fact 43)
- 21 b. That he has been recognized by PJMedia.com as "the "leading Hispanic voice in
22 science fiction"; (Fact 44)
- 23 c. That he was a "winner of the 2018 CLFA Book Of The Year Award;" (Fact 45)
- 24 d. That he has been "employed by three major media outlets that have bigger
25 readership bases than any science fiction book period because of how niche the market's gotten;"
26 (Fact 46)
- 27 e. That he is "a popular journalist and cultural commentator." (Fact 47)
- 28 f. That he is an expert on the subject of "cancel culture," where people generate

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

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

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

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

8 j. In September 2017, Plaintiff was interviewed by PJ Media, in relation to his April
9 2017 Federalist article. (Fact 52) The interview was about industry professionals attempting to harm
10 a conservative comic reviewer, Richard C. Meyer’s, career by banning him from conventions. (Fact
11 52) This incident, which became known as “Comicsgate,” began when Plaintiff uncovered
12 screenshots from a Facebook thread of individuals discussing goading Mr. Meyer into throwing a
13 punch at New York Comic Con. (Fact 53) Plaintiff started #Comicsgate on Twitter, referring to this
14 scandal in the comic book industry. (Fact 53) Plaintiff’s theory is that there is or was a “concerted
15 effort to... harass... conservative-libertarian-leaning authors” who are deemed too controversial.
16 (Fact 54) He has been interviewed by PJ Media multiple times. (Fact 55)

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

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

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

9 2. SFSFC Is Made Aware Of Plaintiff’s Conduct Online

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

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

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

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

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

9 **C. WorldCon's Statement Regarding Plaintiff**

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

12 *Worldcon 76 has chosen to reduce Jonathan Del Arroz's membership from*
13 *attending to supporting. He will not be allowed to attend the convention in person.*
14 *Mr. Del Arroz's supporting membership preserves his rights to participate in the*
15 *Hugo Awards nomination and voting process. He was informed of our decision via*
16 *email. We have taken this step because he has made it clear that he fully intends to*
17 *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.

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

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

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

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

6 **D. Demurrer and Plaintiff's Sole Remaining Claim**

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

11 **III. SUMMARY JUDGMENT IS FAVORED REMEDY FOR**
12 **DEFAMATION**

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

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

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

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

8 Upon such a motion, the trial court must determine if a sufficient showing of malice has
9 been made to warrant submission of that issue to the jury. (*Reader's Digest, supra*, 37 Cal.3d at
10 251.) The mere assertion by the opposing party that defendants were motivated by ill will is of itself
11 insufficient to deny a motion for summary judgment. (*See Dorn v. Mendelzon* ("Mendelzon")
12 (1987) 196 Cal.App.3d 933, 946.)

13 **IV. PLAINTIFF'S DEFAMATION CAUSE OF ACTION FAILS**

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

22 **A. Plaintiff Cannot Prove That The Statement Issued By** 23 **WorldCon Was A False Statement Of Fact.**

24 **1. The Statement is not a provable statement of fact, but is** 25 **only a non-actionable expression of opinion.**

26 To state a defamation claim, a plaintiff must present evidence of a statement of fact that is
27 provably false, not an opinion. (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 259-
28 260.) 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

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

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

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

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

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

24 Plaintiff alleges that two portions of this statement are false and defamatory: (1) “he has
25

26 ¹ See also *Kimura v. Superior Court* (1991) 281 Cal.Rptr. 691, 696 (granting summary judgment where letter accusing
27 plaintiff of being racist and bigoted, and of impeding the University’s affirmative action policy, could not be reasonably
28 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.

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

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

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

1 give rise to claims for defamation.

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

10 **B. Plaintiff Cannot Prove The Statement Was Unprivileged**

11 Libel is defined under California law as a false and *unprivileged* publication by writing
12 which exposes any person to hatred, contempt or ridicule. (See Civil Code § 45.) Thus, a writing
13 which is privileged is, by definition, not libelous or defamatory. (*Brown v. Kelly Broadcasting*
14 *Company* (1989) 48 Cal.3d 711, 723 n.7.) A privileged publication is one made, “without malice,
15 to a person interested therein, (1) by one also interested, or (2) by one who stands in such a relation
16 to the person interested as to afford a reasonable ground for supposing the motive for the
17 communication to be innocent, or (3) who is requested by the person interested to give the
18 information.” (Civil Code § 47(c); *see also Mendelzon, supra*, 196 Cal.App.3d 933, 944
19 (communications from hospital to another hospital about plaintiff doctor were privileged as it served
20 an important interest in assessing the qualifications and fitness of a proposed staff member); *see*
21 *also Cuenca v. Safeway San Francisco* (1986) 180 Cal.App.3d 985, 995 (charges made regarding
22 allegations of kickbacks were matters of direct interest to employer’s supervisory committee and
23 board).) The purpose of the privilege is to allow interested parties to communicate on subjects of
24 common interest without the specter of future lawsuits. (*See Beroiz v. Wahl* (2000) 84 Cal.App.4th
25 485, 493 (privilege protects good faith, well-intended communications serving significant interests).
26 The privilege is applicable even if the statement between interested parties is false and defamatory
27 per se. (*Gantry Construction Co. v. American Pipe and Construction* (1975) 49 Cal.App.3d 186,
28 197.) Thus, if the privilege is applicable to the Statement here, Plaintiff’s claim must fail as a matter

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

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

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

28 **C. Because Plaintiff Is a Public Figure, Or Limited Public, Figure,**

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

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

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

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

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

27 (*Harris v. Tomczak* (E.D.Cal. 1982) 94 F.R.D. 687, 700-701 [compiling the definitions of many
28 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

1 usually held to be public figures, at least with regard to critiques of their literary or artistic endeavors.
2 (*Montandon v. Triangle Publications* (1975) 45 Cal.App.3d 938 (author had made promotional
3 appearances on radio and television); *see also Dacey v. Florida Bar, Inc.* (1970 427 F.2d 1292
4 (author of best-selling book was a public figure, where author made at least 200 television
5 appearances to promote his book, spoke on radio, made personal appearances and wrote magazine
6 articles).) Public figures are those persons who, though not public officials, are “involved in issues
7 in which the public has a justified and important interest.” (*Montandon* 45 Cal.App.3d at 946.) Such
8 figures are numerous and include “artists, athletes, business people, dilettantes, anyone who is
9 famous or infamous because of who he is or what he has done.” (*Id.*) The question of whether a
10 plaintiff is a public figure is to be determined by the court, not the jury. (*Stolz v. KSFM 102 FM*
11 (1994) 30 Cal.App.4th 195, 203-04.)

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

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

23 **2. Plaintiff has no evidence of malice and has produced no**
24 **such evidence.**

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

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

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

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

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

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

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

10 **D. Truth is a complete defense.**

11 Truth is a complete defense to a claim of defamation. (See Cal. Civ. Code §§ 45, 46 [defining
12 libel and slander as “false and unprivileged” publications].) The Statement, as read literally, is true.
13 Plaintiff’s membership was converted, and he was not allowed to attend the Convention. Racist and
14 bullying behavior is not acceptable at Worldcon, and is against the code of conduct. Should the
15 Court decide that the portion of the Statement stating Plaintiff “has made it clear that he fully intends
16 to break our code of conduct” to be a defamatory statement of fact² (and therefore actionable),
17 Plaintiff’s claim for defamation still fails since the statement is true.

18 The Statement read, “We have taken this step because he has made it clear that he fully
19 intends to break our code of conduct.” (Fact 18) Plaintiff’s behavior online—harassing other
20 WorldCon 76 attendees and anticipating “hijinks” in Convention spaces—“made it clear” that he
21 intended to violate WorldCon 76’s code of conduct, which prohibited harassment (defined as “any
22 behavior that annoys other persons, aggravates them, or makes them feel unsafe”) and required
23 affirmative consent before photographing or videoing other members. (Fact 10) Plaintiff had, in
24 fact, harassed several members of WorldCon 76 online prior to SFSFC’s statement. (See Facts 28,
25 31, 33-37) He also threatened to wear a body camera (widely understood to be a small device
26 capable of being hidden and going undetected) into the SFWA suite (a Convention space, subject to

27 _____
28 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.

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

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

6 **E. Plaintiff Cannot Prove Special Damages.**

7 Where a statement is defamatory on its face, it is said to be libelous per se, and actionable
8 without proof of special damage. But if it is defamation per quod, i.e., if the defamatory character
9 is not apparent on its face and requires an explanation of the surrounding circumstances to make its
10 meaning clear, it is not libelous per se, and is not actionable without pleading and proof of special
11 damages. (See Civ. Code § 45(a); *see also Babcock v. McClatchy Newspapers* (1947) 82 Cal.App.2d
12 528, 539.)

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

14 If no reasonable reader would perceive in a false and unprivileged publication a
15 meaning which tended to injure the subject’s reputation in any of the enumerated
16 respects, then there is no libel at all. If such a reader would perceive a defamatory
17 meaning without extrinsic aid beyond his or her own intelligence and common sense,
18 then... there is a libel per se. But if the reader would be able to recognize a defamatory
19 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.

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

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

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

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

12 In fact, because of SFSFC’s decision to ban him from attending WorldCon and this ensuing
13 lawsuit, Plaintiff has generated more followers on social media and increased his sales profits. (Facts
14 77-81) Plaintiff has used this lawsuit to gain even more attention, creating content on his social
15 media related to it, profiting off of public appearances, publications and his book sales. (Facts 82-
16 84) The more controversial he is, the more publicity he acquires and the more traffic he generates
17 for his various online sites and accounts, all of which translate into more money for his books and
18 businesses. Because Plaintiff cannot prove special damages, summary judgment should be granted.

19 **V. CONCLUSION**

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

27 ///

28 ///

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

2 Dated: February 19, 2021

MESSNER REEVES LLP

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By: 

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ANN A. P. NGUYEN

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LINDSEY V. PHO

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SAN FRANCISCO SCIENCE FICTION
CONVENTIONS, INC.

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