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**SUPERIOR COURT FOR THE STATE OF CALIFORNIA**

**COUNTY OF LOS ANGELES, CENTRAL DIVISION**

STEPHEN J. CLOOBECK, an individual; and XANADU 3, LLC, a Nevada limited liability company,

Plaintiffs,

v.

STEFANIE GURZANSKI, a/k/a STEFANIE GURZANSKI QUENVILLE, an individual; UNRULY AGENCY, LLC, a California limited liability company; ADRIANNA SUCHOR, an individual; XAXIER O. RUIZ, JR.,, an individual; PAULA ALEXANDRA FERNANDES, an individual; DOES 1–50, inclusive,

Defendants.

Case No. 21STCV00753

**DEFENDANT ADRIANNA SUCHOR'S NOTICE OF DEMURRER AND GENERAL DEMURRER TO PLAINITFF STEPHEN CLOOBECK'S FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES**

**PURSUANT TO CCP § 430.10**

| | |
|---|---|
| Action Filed: | January 8, 2021 |
| Judge Assigned: | Hon. Stephen J. Kleifield |
| Hearing Date: | August 2, 2021 |
| Time: | 8:30 A.M. |
| Dept: | 57 |
| RES ID: | 382269109478 |

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**TO PLAINTIFF STEPHEN CLOOBECK AND HIS ATTORNEYS:**

PLEASE TAKE NOTICE that on August 2, 2021 at 8:30 A.M. or as soon thereafter as the matter may be heard in Department 57 of the above-entitled court located at 111 North Hill Street, Los Angeles, CA 90012, Defendant Adrianna Suchor ("Adrianna" or "Ms. Suchor") will and hereby does move for an order sustaining a General Demurrer to the Complaint of Plaintiff Stephen Cloobeck ("Stephen" or "Mr. Cloobeck") on the following grounds.

This Demurrer is brought pursuant to Cal. Code of Civ. Proc. § 430.10 and is based on this Notice of Demurrer, the attached Memorandum of Points and Authorities, Plaintiff's Complaint and pleadings on file in this action, and such other papers, pleadings and argument as the Court may allow.

Ms. Suchor objects and demurrers to the Complaint on the following grounds:

1.) The Complaint does not state facts sufficient to constitute any cause of action against Ms. Suchor because, as to her, the Complaint contains nothing more than unsupported conclusory factual allegations, and conclusions of law unsupported by any well-pleaded facts, neither of which are sufficient to withstand demurrer; *see* CCP § 430.10(e);

2.) All claims in the Complaint are barred by California's "anti-heart-balm" statutes, Civ. Code §§ 43.4, 43.5, because notwithstanding melodramatic labels such as "fraud", the claims are substantively nothing more than an attempt at "seeking contract damages for the emotional pain of a broken engagement" which are barred by statute and by California policy; *Askew v. Askew* (1994) 22 Cal.App.4th 942;

3.) Plaintiff's second and seventh Causes of Action (for Trespass and Intrusion Into Private Affairs) is barred by federal law, specifically the Communications Decency Act, 47 U.S.C. § 230(c)(1), to the extent it seeks to treat Ms. Suchor as the "speaker or publisher" of information published on social media by another person.

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4.) Plaintiff's Second Cause of Action (for Trespass) fails to allege facts sufficient to state a claim under California law.

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## MEMORANUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

This case is about a wealthy older man who is upset about his failed relationship with a much younger woman. But in that sense, this dispute and judgment about this story and its participants belongs in a sonnet or a poem or a gossip column, not a courtroom. To quote the ever-wise William Shakespeare: "*Love is a smoke and is made with the fume of sighs*." Romeo and Juliet – Act 1, Scene 1.

Although perhaps lacking some of Shakespeare's passion and eloquence on the subject, California courts share the Bard's pragmatic view—disputes of the heart are a normal part of the human experience, and if they are to be resolved anywhere by anyone, that place is not in court and it is not by a judge or jury:

> Words of love, passion and sexual desire are simply unsuited to the cumbersome strictures of common law fraud and deceit. The idea that a judge, or jury of 12 solid citizens, can arbitrate whether an individual's romantic declarations at a certain time are true or false, or made with intent to deceive, seems almost ridiculously wooden … . The judiciary should not attempt to regulate all aspects of the human condition. Relationships may take varied forms and beget complications and entanglements which defy reason. Love has been known to last a lifetime, but it has also been known to be notoriously evanescent. These are matters better left to advice columnists than to judges and juries … . [W]e agree that courts should not be in the business of probing a suitor's state of mind.

*Askew v. Askew* (1994) 22 Cal.App.4th 942, 959 (emphasis added) (internal quotations omitted) (citing *A.B. v. C.D.* (E.D.Pa. 1940) 36 F.Supp. 85) (quoting *Douglas R. v. Suzanne M.* (1985) 127 Misc.2d 745 [487 N.Y.S.2d 244, 245-246]).

As explained below, a rich man's broken heart does not a lawsuit make, no matter how many pennies or lies may be involved. That is perhaps doubly true where, as here, the forlorn plaintiff seeks to mend his wounds and balm his heart not only with a suit against the woman who rejected him, but also against her best friend and other innocent bystanders simply for sport, spite and wrath. This demurrer should thus be sustained.

## II. SUMMARY OF FACTS

### a. The Initial Complaint

The background story of this matter reads like the worst sort of trashy romance novel. Plaintiff Stephen Cloobeck is a wealthy businessman who "earned" his vast fortune by allegedly defrauding thousands of victims into purchasing worthless timeshare properties via his company, Diamond Resorts International. *See*, *e.g.*, *Melaas v. Diamond Resorts U.S. Collection Dev., LLC* (N.D. 2021) ___ N.W.2d ____, 2021 WL 99388 ¶ 2 (discussing one alleged victim's claims against Diamond Resorts).

After "earning" his wealth, and nearing 60 years of age, Mr. Cloobeck did exactly what you'd expect—he divorced his wife and began looking for hot, young women to date. The hunt eventually led him into the arms of Defendant Stefanie Gurzanski, a 26-year old model and "Instagram Influencer" (Mr. Cloobeck is 59).

According to his original Complaint, and as explained in greater detail in the First Amended Complaint, Mr. Cloobeck and Ms. Gurzanski met in the summer of 2020 and dated until the end of December 2020; a period of about six months. During that time, Mr. Cloobeck lavished Ms. Gurzanski with expensive gifts, paid for a year-long lease on an apartment in Beverly Hills, and flew her (and her friends) on his private jet to stay at one of his fabulous homes in Cabo San Lucas, Mexico where the young ladies—*shockingly*—took some photos and posted them on social media.

Sadly, winter came, the fleeting summer romance faded, true love was not in the cards, and the relationship ended when Ms. Gurzanski rejected Mr. Cloobeck's marriage proposal on (or around) Christmas Day. This litigation followed a few days later.

In his original Complaint, Mr. Cloobeck asserted claims for fraud, trespass to chattels, conversion, unjust enrichment, "money had and received" and invasion of privacy by intrusion into private affairs. In short, Mr. Cloobeck claimed Ms. Gurzanski *tricked him into loving her* by claiming—falsely—to be a more successful model than she actually was. Mr. Cloobeck also claims Ms. Gurzanski used various affirmative lies and omissions to trick him into "(1) dating [her], (2) providing Gurzanski access to

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Cloobeck's property (under false pretenses); and (3) providing Gurzanski with substantial monies and/or personal properties [i.e., gifts]." Compl. ¶ 39. Worst of all, Mr. Cloobeck claims Ms. Gurzanski lied about her true feelings for him; "Although Gurzanski professed her love for Cloobeck, such statements were untrue—Gurzanski never intended to have a real relationship with Cloobeck." Compl. ¶ 49.

Against this tragic backdrop of love gone wrong, Mr. Cloobeck alleged Ms. Gurzanski committed fraud by failing to disclose the truth and/or by making certain omissions (i.e., failing to tell Mr. Cloobeck that she sometimes posed for nude photos). Mr. Cloobeck claims had he known the truth, he would not have dated Ms. Gurzanski and would not have been so generous with gifts he gave her. *See* Compl. ¶ 58.

The original Complaint also presented a handful of other discrete theories. First, Mr. Cloobeck claims he authorized Ms. Gurzanski to spend $5,000 on his credit card at Louis Vuitton, but she ended up spending $37,000 instead (ouch). *See* Compl. ¶ 21. Next, Mr. Cloobeck claims Ms. Gurzanski took nude photos/videos *of herself* (not him) at one or more of Mr. Cloobeck's homes which she subsequently posted on her social media pages without his "permission". *See* Compl. ¶¶ 90–92. Because Ms. Gurzanski posted these private images in the Internet showing the interior of Mr. Cloobeck's home, he claims she committed an actionable invasion of his privacy under California common law.

As it relates to Ms. Suchor (who is sued here solely because she is Ms. Gurzanski's best friend), the original Complaint was devoid any substance whatsoever. Specifically, although every claim in the Complaint was purportedly asserted against both Ms. Gurzanski and Ms. Suchor, the only specific allegations of wrongdoing against Ms. Suchor were identical conclusory allegations at the end of each individual cause of action; i.e.: "Upon information and belief, Suchor … *conspired with and/or aided and abetted* Gurzanski in the acts alleged herein such that Suchor … [is] vicariously liable for the harm done to Cloobeck." The same conclusory allegation was repeated in the original Complaint in ¶¶ 62, 69, 78, 87 & 96. That was the entire case as to Ms. Suchor.

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**b. The Amended Complaint**

Because the original Complaint was entirely devoid of any facts showing any wrongdoing on her part, on February 11, 2021 Ms. Suchor filed a general demurrer. The demurrer raised three main arguments: 1.) regardless of how his claims were styled, Mr. Cloobeck's claims were all barred by the California "anti-heart-balm" statutes, Civ. Code §§ 43.4, 43.5; 2.) as it related to Ms. Suchor, the original Complaint contained nothing by conclusory allegations which are insufficient to withstand demurrer, and 3.) to the extent Mr. Cloobeck's claims arose from photos published on social media by a third party (i.e., Ms. Gurzanski), those claims were barred as to Ms. Suchor due to the immunity provisions of the federal Communications Decency Act, 47 U.S.C. § 230(c)(1).

Rather than opposing the demurrer and explaining why his claims were properly pleadings, Mr. Cloobeck chose to amend. In his First Amended Complaint, Mr. Cloobeck angrily proclaims "this is not a 'heartbalm' action'", FAC ¶ 4, but that self-serving statement is inconsistent with the Complaint's obvious facts. As the facts plainly show, this case was, and still is, a textbook heartbalm action in every sense, and no much how much lipstick Mr. Cloobeck slathers on the pig, it oinks just the same as it always did.

Nothing in Mr. Cloobeck's Amended Complaint resolves any of the defects raised in Ms. Suchor's prior demurrer. Accordingly, as before, the demurrer should be sustained without leave to amend.

## III. DISCUSSION

**a. Conclusory Allegations Cannot Withstand Demurrer**

Taking the easiest and most obvious issue first, it is axiomatic "A demurrer tests the legal sufficiency of factual allegations in a complaint. In reviewing the sufficiency of a complaint against a general demurrer, this court treats the demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law." *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 42–43 [96 Cal.Rptr.2d 354, 356] (emphasis added) (citing *Title Ins. Co. v. Comerica Bank–California* (1994) 27 Cal.App.4th 800, 807, 32 Cal.Rptr.2d 735).

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Accordingly, to withstand demurrer, "the plaintiff must show the complaint alleges facts sufficient to establish every element of each cause of action … and, [a]llegations must be factual and specific, not vague or conclusory." *Rakestraw*, *supra*, 81 Cal.App.4th at 43 (emphasis added) (citing *Cantu v. Resolution Trust Corp*. (1992) 4 Cal.App.4th 857, 879–880, 6 Cal.Rptr.2d 151). Thus the governing rule is that "conclusory allegations will not withstand demurrer.' *Grisham v. Philip Morris U.S.A., Inc*. (2007) 40 Cal.4th 623, 638 (emphasis added).

Here, all of Mr. Cloobeck's claims against Ms. Suchor fail this simple test. As explained in her original demurrer, the claims in the original Complaint were supported by no facts beyond a single, wholly conclusory assertion that: "Upon information and belief, Suchor … conspired with and/or aided and abetted Gurzanski in the acts alleged herein such that Suchor … [is] vicariously liable for the harm done to Cloobeck."

Mr. Cloobeck apparently conceded this point, because the Amended Complaint makes some effort to add additional factual allegations specific to Ms. Suchor. However, these new facts remain wholly insufficient to plead any viable claims as to Ms. Suchor.

For example, in ¶ 30 of the FAC, Mr. Cloobeck added this new "factual" allegation:

> Suchor, Ruiz, and Fernandes actively supported Gurzanski's improper and fraudulent conduct. For example, upon information and belief, at different times, Suchor, Ruiz, and Fernandes operated the camera while Gurzanski created the Pornographic Social Media while on the grounds of the BH Property and Cloobeck's property in Cabo San Lucas. Suchor, Ruiz and Fernandes knew that they were helping Gurzanski create pornographic content for her OnlyFans account and knew that Cloobeck was unaware that they were doing so.

To paraphrase, Mr. Cloobeck alleges that his now ex-girlfriend Stefanie Gurazanki, committed "fraud", "trespass" and a bevy of other torts because she took nude photographs *of herself* while at, and around, Mr. Cloobeck's home in Mexico. Mr. Cloobeck claims he did not know that Stefanie was taking these photos or that she was posting them on social media, and thus he claims this conduct violated California law.

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Putting aside extensive other problems (not the least of which is the question of why *California* substantive law would apply to conduct occurring in Mexico), in an attempt to hold Ms. Suchor liable for the allegedly tortious conduct of Ms. Gurzanski, Mr. Cloobeck presents a conclusory allegation that Ms. Suchor "operated the camera" i.e., *she took some pictures of her friend*. Although this factual allegation is certainly (albeit barely) more specific that the purely conclusory allegations in the original Complaint, it is still patently insufficient to withstand demurrer.

This is so because the mere fact that Ms. Suchor took a photograph of her friend while on vacation in Mexico, or elsewhere, is not sufficient to establish a claim under any theory, much less the specific theories raised by Mr. Cloobeck. In other words, the point of a demurrer is to "examine the complaint … to determine whether it alleges facts sufficient to state a cause of action under any legal theory, such facts being assumed true for this purpose." *McCall v. PacifiCare of California, Inc*. (2001) 25 Cal.4th 412, 415.

Even assuming *arguendo* that Ms. Gurzanski's conduct of posting images of herself on social media somehow violated Mr. Cloobeck's rights simply because they show his home or property in the background (a seriously doubtful premise), the Amended Complaint does not contain any factual allegations sufficient to show that Ms. Suchor could be held jointly liable for those acts. This is so because as explained *infra*, federal law (specifically the Communications Decency Act, 47 U.S.C. § 230(c)(1)) expressly limits liability in any case arising from unlawful online content. In short, if Ms. Gurzanski posted unlawful content online, *she* could be liable for doing so, but Ms. Suchor (as nothing more than an innocent bystander) cannot.

Similarly, the FAC remains hopelessly conclusory as to the claims against Ms. Suchor in other respects. For example, in ¶ 42 of the FAC, Mr. Cloobeck alleges:

> Upon information and belief, Gurzanski, Suchor, Ruiz, Fernandes, and Unruly conspired and worked in concert to mislead Cloobeck about, inter alia: (1) Gurzanski's true profession; (2) her true intent in meeting and dating Cloobeck; (3) the activities that Gurzanski was engaging in while on the BH Property or on Cloobeck's property; (4) that the

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> monies/property provided to Gurzanski would be used to facilitate Pornographic Social Media; and (5) that the monies/property provided to Gurzanski would be shared with others, including Suchor, Ruiz and/or Fernandes.

None of these conclusory allegations are supported by *any* facts. In other words, the assertion that Ms. Suchor somehow "conspired and worked in concert to mislead Cloobeck about … Gurzanki's true profession" is nothing but a conclusion, not a well-pleaded statement of fact. Nowhere does Mr. Cloobeck explain *how/what/why* Ms. Suchor did to mislead or deceive him about his girlfriend's profession.

Presumably, Mr. Cloobeck may argue that Ms. Suchor misled him because *she never told him that Stefanie did any nude modeling*. But even assuming this is true, that is still not sufficient to support liability here because there is no requirement under California law (or any law) for an individual in Ms. Suchor's position to tell a man pursing a sexual relationship with her friend about any aspects of the friend's private life. If this was truly such an important issue to Mr. Cloobeck, he could and should have vetted Ms. Gurzanski more carefully. That he failed to do so is his fault, not Ms. Suchor's.

Along these same lines, the remaining allegations against Ms. Suchor are nothing more than hopelessly conclusory allegations unsupported by any facts and thus *per se* unable to withstand demurrer. For example, Mr. Cloobeck's first cause of action (asserted against all defendants, including Ms. Suchor) is styled as a claim for "fraud". The Court is familiar with the standards for fraud; "The elements of fraud are (a) a misrepresentation (false representation, concealment, or nondisclosure); (b) scienter or knowledge of its falsity; (c) intent to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Hinesley v. Oakshade Town Center* (2005) 135 Cal.App.4th 289, 294 [37 Cal.Rptr.3d 364, 367] (citing *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638, 49 Cal.Rptr.2d 377, 909 P.2d 981; 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 772, p. 1135.)

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Here, despite suing Ms. Suchor for fraud, Mr. Cloobeck's Amended Complaint contains no facts showing even a single element of the tort committed by Ms. Suchor, much less *all elements*. There is no allegation Ms. Suchor made any false statements to Mr. Cloobeck (or that she concealed or omitted any facts she had a duty to disclose). There is no factual allegation Ms. Suchor had any fraudulent intent or that she did anything whatsoever to induce Mr. Cloobeck to rely on anything. There is literally nothing showing any sort of fraudulent activity of any kind on the part of Ms. Suchor; just a wholly conclusory allegation that she *might* have done *something* to "conspire with and/or aid and abet" Ms. Gurzanski in some unidentified way. This is precisely the sort of barren, unsupported, conclusory allegation that is insufficient as a matter of law to withstand demurrer, and the same is true as to each any every claim individually asserted against Ms. Suchor.

As plaintiff, Mr. Cloobeck bears the burden of demonstrating he has properly alleged facts supporting each and every claim he raises against each Defendant. But as it relates to Ms. Suchor, the *only* allegations in the First Amended Complaint are either conclusory in nature (i.e., the unsupported allegation that Ms. Suchor somehow "conspired" with others) or are simply insufficient to state a claim (i.e., the allegation that Ms. Suchor took photos of her friend on vacation in Mexico). Such bare, conclusory allegations are not entitled to the presumption of truth in the absence of any well-pleaded facts, and are thus insufficient as a matter of law to withstand demurrer.

**b. California's "Anti-Heart-Balm" Statutes Bar ALL Claims**

Even if Mr. Cloobeck's claims against Ms. Suchor had sufficient factual support (which they do not), they would still fail for the reasons explained in the exceedingly helpful case *Askew v. Askew* (1994) 22 Cal.App.4th 942.

In short, and as explained in *Askew*, Mr. Cloobeck's claims are all barred by the California "anti-heart-balm" statutes, Civ. Code §§ 43.4, 43.5. Just like this case, *Askew* involved allegations of fraud and other misconduct arising from a failed relationship. As the Court of Appeal explained in *Askew*, when reviewing such claims, "tort labels of

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fraud and deceit are by themselves irrelevant. Courts must look to the *substance* of the lawsuit." *Askew*, *supra*, 22 Cal.App.4th at 954 (emphasis in original).

Here, the *substance* of Mr. Cloobeck's claims (as alleged in his original Complaint) could not be clearer:

> In order to seduce Cloobeck, Gurzanski claimed to be a prominent fashion model, having been selected to appear on the cover of numerous fashion magazines as well as modeling for famous clothing brands. She also pretended she was looking for a life partner. But these were lies. Gurzanski is not a fashion model at all, but a pornographic model, selling photographs and videos of herself online. Nor was she looking for a lifetime partner—instead she was looking for someone she could use, abuse, and then throw away.

Compl. ¶ 2 (emphasis added).

The First Amended Complaint attempts to plead-around the heart-balm rule expressed in *Askew* by retreating (slightly) from the purely emotional nature of this case, but that effort still falls far short. In short, legal formality and the almost-audible sad violin music aside, the *substance* of Mr. Cloobeck's position speaks for itself. Like countless men before him, Mr. Cloobeck wanted what all (or at least some) powerful men want: a long-term relationship with an attractive partner. That's fair enough. But to help achieve that goal, Mr. Cloobeck used his substantial wealth to pay a dower measured in luxury handbags, private jet flights, and diamond-covered watches. Sadly, in the end, Cupid's diamond-crusted arrow missed its mark.

To be clear—any person who has walked in Mr. Cloobeck's shoes can *surely* understand his genuine feelings of disappointment, heartbreak, and sadness. And giving him the benefit of the doubt, it is entirely possible Ms. Gurzanski was not completely honest with him about one or more details of her life (who ever is these days?). Still, this sort of heartbreak is a pain no law can fix, because as the Court recognized in *Askew*, "courts have simply drawn a line around certain 'intensely private' matters—even if they do implicate false representations." *Askew*, *supra*, 22 Cal.App.4th at 958 (emphasis added) (citing *Stephen K. v. Roni L.* (1980) 105 Cal.App.3d 640, 643 (no recovery for

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false representation of use of birth control pills against woman who subsequently bore plaintiff's child). In other words, "The judiciary should not attempt to regulate all aspects of the human condition. Relationships may take varied forms and beget complications and entanglements which defy reason." *Askew*, *supra* (quoting *Douglas R. v. Suzanne M.* (1985) 127 Misc.2d 745 [487 N.Y.S.2d 244, 245–46]).

No matter how his claims are couched, at the end of the day the substance of Mr. Cloobeck's case is very simple—while seeking (and, indeed, having) a romantic relationship with Ms. Gurzanski, he willingly gave her money, gifts, and other things of value in the hopes his generosity might sway her into marriage. That this did not occur is unfortunate for Mr. Cloobeck, but attempting to assign emotional blame or retrospectively measure the sincerity of Ms. Gurzanski's love are simply not tasks this Court can resolve. To quote *Askew* one last time, "'Gild the farthing if you will, But it is a farthing still.' So it is with lawsuits. This one is still a breach of promise action even if it is titled fraud." *Id*. (quoting H.M.S. Pinafore, Act II). The same is true here.

This Court should therefore hold, as the Court of Appeal did in *Askew*, that all of Mr. Cloobeck's claims (including those asserted direct against Ms. Gurzanski and those indirectly asserted against Ms. Suchor) are barred by Civ. Code §§ 43.4, 43.5.

**c. The Second and Seventh Causes Of Action Are Barred By 47 U.S.C. § 230(c)(1)**

Although it is not necessary for the Court to reach this issue, as-pleaded, Mr. Cloobeck's second and seventh causes of action are barred by federal law, specifically the Communications Decency Act, 47 U.S.C. § 230(c)(1). These two claims seek to impose liability for civil trespass and invasion of privacy (termed "Intrusion Into Private Affairs") based on the fact *Ms. Gurzanski* allegedly posted nude photos of herself on the Internet which were taken somewhere in or around Mr. Cloobeck's house/homes. Importantly, Mr. Cloobeck does *not* allege that he appears anywhere in these photos; he simply complains the images show Ms. Gurzanski *at his house* while nude, which Ms. Gurzanski published on the Internet, thus invading his privacy and constituting a trespass.

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All other problems aside, and even assuming these allegations are true, the second and seventh causes of action fail to state a claim *against Ms. Suchor* for a very simple and discrete reason—because under federal law, the only person who can face civil liability for information posted on the Internet is the original publisher of that content; i.e., the first person to post the information online. No others can be held liable—PERIOD.

This rule of law is found in Section 230 of the Communications Decency Act, 47 U.S.C. § 230(c)(1) (the "CDA"). As the California Supreme Court has explained, this law provides "broad" immunity for publication/republication of online content, and "The immunity provisions within section 230 'have been widely and consistently interpreted to confer broad immunity against … liability for those who use the Internet to publish information that originated *from another source*.'" *Hassell v. Bird* (2018) 5 Cal.5th 522, 535 (emphasis added) (quoting *Barrett v. Rosenthal* (2006) 40 Cal.4th 33).

Section 230 applies to virtually any state-law claim, including claims for invasion of privacy and any other tort which is based on "publishing" or "speaking" information. *See*, *e.g.*, *Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 806 [52 Cal.Rptr.3d 376, 390] (discussing scope of immunity); *Carafano v. Metrosplash.com, Inc.* (2003) 339 F.3d 1119 (finding CDA barred California state law invasion of privacy claim arising from allegedly unlawful internet posts which originated with an unknown third party). The CDA also bars claims for injunctive relief. *See Hassell*, *supra*, 5 Cal.5th at 541–42 (finding CDA barred injunctive relief against website operator Yelp.com arising from its publication of false third party speech, and explaining even when money damages are not sought, "an order that treats an Internet intermediary 'as the publisher or speaker of any information provided by another information content provider' nevertheless falls within the parameters of section 230(c)(1).") (emphasis added); *see also Barnes v. Yahoo!, Inc.* (9th Cir. 2009) 570 F.3d 1096, 1101–02 (explaining in context of Section 230 immunity, "what matters is not the name of the cause of action—defamation versus negligence versus intentional infliction of emotional distress—what matters is whether the cause of action inherently requires the court to treat the defendant

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as the 'publisher or speaker' of content provided by another. … If it does, section 230(c)(1) precludes liability.") (emphasis added).

A party seeking to invoke CDA immunity must establish three elements:

(1) The party is a provider or user of an interactive computer service;
(2) The cause of action treats the defendant as a publisher or speaker of information; and
(3) the information at issue is provided by another information content provider."

*Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 830 (emphasis added).

Here, all three elements are easily established. First, Mr. Cloobeck alleges Ms. Gurzanski used a website called OnlyFans.com to post nude images of herself taken on/at his property. *See* FAC ¶ 18. Mr. Cloobeck further alleges Ms. Gurzanski used his property as "sets and/or props for her Pornographic Social Media". FAC ¶ 36. This is sufficient to establish the first element of CDA immunity because social media websites qualify as "interactive computer services" within the meaning of the CDA. *See Federal Agency of News LLC v. Facebook, Inc.* (N.D. Cal. 2020) 432 F.Supp.3d 1107, 1117 (finding social media websites like Facebook and Instagram qualify as "interactive computer services" within the meaning of CDA).

Second, Mr. Cloobeck's claims seek to treat both Ms. Gurzanski and Ms. Suchor as the "speaker or publisher" of information (the "information" being nude images of Ms. Gurzanski published by her on OnlyFans.com). That much is plainly evident from the face of the Amended Complaint; "No reasonable person would condone the use of their residence(s) as a set for pornographic media *to be made available for public consumption* … ." FAC ¶ 107 (emphasis added). [1]

[1] Obviously, if Ms. Gurzanski took naked photos of herself at Mr. Cloobeck's house and *did not publish them on the Internet*, Mr. Cloobeck's invasion of privacy claim would fail on that basis. *See Caraccioli v. Facebook, Inc.* (2016) 167 F.Supp.3d 1056, 1063 (explaining, "Without the "republication" allegation, Plaintiff has not stated a claim for defamation, libel, false light, or public disclosure of private facts *because each of those claims presume a publication made by the defendant*.") (emphasis added).

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What Mr. Cloobeck is really saying is that his privacy was invaded by the act of Ms. Gurzanski *posting naked photos of herself on the Internet and making them available to the pubic*; i.e., "publishing" those images for the world to see. This demonstrates the second element of CDA immunity is met because Mr. Cloobeck's second and seventh causes of action necessarily treat both Ms. Gurzanski and Ms. Suchor as "publishers" of information. *See Barrett*, *supra*, 40 Cal.4th at 62 (explaining, "A user who actively selects and posts material based on its content fits well within the traditional role of 'publisher.' Congress has exempted that role from liability."); *see also Caraccioli*, *supra*, 167 F.Supp.3d at 1064–65 (holding California state law claim for "intrusion upon seclusion" barred by CDA).

Third, the Complaint is also clear the allegedly tortious photos of Ms. Gurzanski taken at Mr. Cloobeck's house were published online *by Ms. Gurzanski, not Ms. Suchor*. *See* FAC ¶ 18 (alleging, "Gurzanski had a pornographic social media presence, whereby she would create pornographic media content and make it generally available to the public for a fee, including on OnlyFans.com." (emphasis added). That allegation establishes the third element of CDA immunity because the law does not permit Mr. Cloobeck to impose liability on *Ms. Suchor* for unlawful material published online by someone else (Ms. Gurzanski).

As the California Supreme Court has explained, "Plaintiffs are free under section 230 to pursue the originator of [an unlawful] Internet publication. Any further expansion of liability must await Congressional action." *Barrett*, *supra*, 40 Cal.4th at 63 (emphasis added); *see also Phan v. Pham* (2010) 182 Cal.App.4th 323, 328 [105 Cal.Rptr.3d 791, 794] (explaining, "section 230(c)(1) immunity was intended to prevent liability that otherwise would obtain under traditional common law as regards the publication of someone else's material ….")

Here, according to Mr. Cloobeck's allegations, the "originator" of the allegedly unlawful Internet posts was Ms. Gurzanski, not Ms. Suchor. Assuming, *arguendo*, Mr. Cloobeck's privacy rights were violated by the fact that Ms. Gurzanski published nude

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images of herself on the Internet which were taken at or around Mr. Cloobeck's home, the only person who may face liability for that conduct is Ms. Gurzanski. Under the facts alleged in the Complaint, any attempt to impose liability on Ms. Suchor for information published online by Ms. Gurzanski falls squarely within the immunity provisions of the CDA. The sixth cause of action thus fails as a matter of law.

**d. Plaintiff Fails To State A Claim For Civil Trespass**

The FAC's second cause of action is entitled "trespass" and is asserted against Ms. Gurzanski and Ms. Suchor. In short, this claim alleges that Ms. Gurzanski and Ms. Suchor "entered" a home in Beverly Hills (referred to as the "BH Property") which is owned by Xanadu 3, LLC, a company Mr. Cloobeck apparently controls. After "entering" the property, Mr. Cloobeck claims that some photos of Ms. Gurzanski were taken and then published by Ms. Gurzanski on her social media websites.

In a fleeting moment of candor, Mr. Cloobeck admits he gave Ms. Gurzanski and Ms. Suchor permission to enter the BH Property. *See* FAC ¶ 71 ("Cloobeck gave limited[2] permission for Gurzanski, Suchor [and others] to enter the BH property *solely for social purposes*….") (emphasis added). That admission is fatal to his claim for civil trespass:

> The essence of the cause of action for trespass is an 'unauthorized entry' onto the land of another. Such invasions are characterized as intentional torts, regardless of the actor's motivation. Where there is a consensual entry, there is no tort, because lack of consent is an element of the [theory underlying the tort]. 'A peaceable entry on land by consent is not actionable.'

[2] The fact that Mr. Cloobeck claims he gave "limited" permission to enter the BH Property is irrelevant for two reasons. First, Mr. Cloobeck admits that HE is not the owner of the property; the owner is Xanadu 3, LLC. Thus, whatever after-the-fact limits Mr. Cloobeck attempted to impose on Ms. Suchor or Ms. Gurzanski's use of the property is simply meaningless because as a non-owner of the land, Mr. Cloobeck had no right to limit or control how the land was used by others. Second, although permission to access land may certainly be *revoked* after it has been given, there is no basis under California law to recognize Mr. Cloobeck's theory of *retroactive conditional permission* to access "solely for social purposes". If permission was given, that is the end of the inquiry.

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*Miller v. National Broadcasting Co.* (1986) 187 Cal.App.3d 1463, 1480 [232 Cal.Rptr. 668, 677] (emphasis added) (quoting/citing authorities)

Finally, even if Mr. Cloobeck had otherwise sufficiently pleaded a claim for civil trespass, the First Amended Complaint does not allege that Ms. Suchor or Ms. Gurzanski did anything to *damage the land itself*; the only alleged harm was to Mr. Cloobeck's delicate feelings. This is not sufficient to state a claim for trespass. *See San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 936 [55 Cal.Rptr.2d 724, 920 P.2d 669] ("the rule is that actionable trespass may not be predicated upon nondamaging noise, odor, or light intrusion.")

The fact that Ms. Gurzanski may have taken photos of herself on Mr. Cloobeck's property that he now finds objectionable or embarrassing is simply not actionable trespass under California law. This is so because such conduct, even if offensive to Mr. Cloobeck, did not and does not interfere with his *use* of the BH Property. *See Wilson v. Interlake Steel Co.* (1982) 32 Cal.3d 229, 233 [185 Cal.Rptr. 280, 649 P.2d 922] (explaining, "trespass is an invasion of the plaintiff's interest in the exclusive possession of his land" and holding intangible intrusion upon land without actual physical damage to property is not actionable).

## IV. CONCLUSION

For the reasons stated above, Ms. Suchor's general demurrer should be sustained without leave to amend.

DATED April 8, 2021.

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**PROOF OF SERVICE**

At the time of service I was over 18 years of age and not a party to this action. My business address is 4802 E. Ray Road, #23-271, Phoenix, AZ 85044.

On April 8, 2021, I served the following documents described as DEFENDANT ADRIANNA SUCHOR'S GENERAL DEMURRER; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF on the persons listed below:

**SEE ATTACHED LIST**

[X] **By United States mail:** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Phoenix, Arizona.

[ ] **By overnight delivery:** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

[ ] **By messenger service:** I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed above and providing them to a professional messenger service for service.

[ ] **By fax transmission:** Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed above. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.

[ ] **By e-mail or electronic transmission:** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury of the laws of the State of Arizona that the foregoing is true and correct. Executed on April 8, 2021, at Phoenix, Arizona.

**SERVICE LIST**

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Reservation Type:
Demurrer - without Motion to Strike

Case Number:
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Case Title:
STEPHEN J. CLOOBECK, AN INDIVIDUAL vs STEFANIE GURZANSKI,, et al.

Filing Party:
ADRIANNA SUCHOR, an individual (Defendant)

Location:
Stanley Mosk Courthouse - Department 57

Date/Time:
August 2nd 2021, 8:30AM

Status:
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Number of Motions:
1

## Motions

Demurrer - without Motion to Strike

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