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JUDICIAL OFFICER: Cynthia A. Freeland

CASE NO.: 37-2020-00031568-CU-HR-NC

CASE TITLE: SCHUMACHER VS BONA [IMAGED]

CASE CATEGORY: Civil - Unlimited CASE TYPE: Harassment

EVENT TYPE: Motion Hearing (Civil)

CAUSAL DOCUMENT/DATE FILED:

Respondents Anthony Bona's and Noel Breen's Anti-SLAPP Special Motions to Strike are granted:

The anti-SLAPP statute was enacted in response to a "disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (Code Civ. Proc., § 425.16 (a).) The statute is "construed broadly" consistent with the "public interest to encourage continued participation in matters of public significance." (*Ibid.*) It provides that a "cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (*Id.* at subd. (b)(1).)

The phrase "act in furtherance of a person's right of petition or free speech" is defined to include:

- Any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;
- Any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;
- Any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; or
- Any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(*Id.* at subds. (e)(1)–(4).)

The anti-SLAPP statute thus calls for a two-step process. "First, the court decides whether the defendant has made a threshold showing that the challenged conduct is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken in furtherance of the defendant's right of petition or free speech under the United States or California Constitution in connection with a public issue, as defined by statute. If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

A. Whether Bona's And Breen's Conduct Forming The Basis Of The CHRO Request Was Protected Activity

1. The *Baral* Issue

Initially, the parties dispute whether the holding in *Baral v. Schnitt* (2016) 1 Cal.5th 376 regarding so-called "mixed" causes of actions applies in this case, and whether the Court should only look at specific instances of allegedly protected activity or the principal thrust of the CHRO request as a whole. *Baral*, however, clearly directs that courts should only look at specific instances of allegedly protected

activity, not the principal thrust of the claim. Regardless, in this case, contrary to Schumacher's position that the allegedly protected activity merely provides context for the allegedly non-protected activity underlying her request for a restraining order, the specific instances of allegedly protected activity are the only bases for issuing a civil harassment restraining order, with the allegedly non-protected activity merely providing the context against which the allegedly protected activity should be analyzed.

2. The CHRO Request Is Based On Bona's And Breen's Speech In A Public Forum In Connection With A Public Issue

"The right to speak on political matters is the quintessential subject of our constitutional protections of the right of free speech. Public discussion about the qualifications of those who hold or who wish to hold positions of public trust presents the strongest possible case for applications of the safeguards afforded by the First Amendment." (*Conroy v. Spitzer* (1999) 70 Cal.App.4th 1446, 1451.) Thus, the "conduct" and/or "character and qualifications" of public officials constitute issues of "public interest" falling squarely within the purview of section 425.16. (*Ibid.*; *Vogel v. Felice* (2005) 127 Cal.App.4th 1006, 1015–1016.)

In *Vogel*, for example, two candidates for public office sued for libel and other torts based on statements posted to the defendant's public website. Among other things, the website included: (1) a list entitled "Top Ten Dumb Asses" identifying the candidates as numbers 1 and 2 and linking their names to www.satan.com and www.idiot.com, (2) a statement that one candidate was "Wanted as a Dead Beat Dad" that when clicked linked to another website dedicated to locating "deadbeat dads," and (3) a statement that the other candidate was "Bankrupt, Drunk & Chewin' tobaccy" that when clicked linked to a new page associating him with criminal and immoral conduct. (*Vogel*, *supra*, 127 Cal.App.4th at pp. 1010–1013.) The trial court denied the defendant's anti-SLAPP motion finding "the communications exceeded what would be reasonably considered relevant as between interested parties." (*Id.* at p. 1013.) The court of appeal reversed, holding there could be no "serious doubt that the challenged statements were made 'in connection with a public issue of an issue of public interest.'" (*Id.* at pp. 1015–1016.)

Thus, it cannot be disputed that Schumacher's conduct, character, and qualifications as a Carlsbad councilmember constitute issues of "public interest." Nor can it be disputed that Breen's blog and Facebook are each a "public forum" for purposes of section 425.16. (*Vogel*, *supra*, 127 Cal.App.4th at p. 1015; accord *Cross v. Facebook, Inc.* (2017) 14 Cal.App.5th 190, 199.) Consequently, the question becomes whether Bona's and Breen's allegedly harassing conduct forming the basis for the CHRO request-Bona's two Facebook posts, Breen's blog posts, and the other activity over the last year-was sufficiently "in connection with" Schumacher's conduct, character, and qualifications as a councilmember.

Schumacher relies on *FilmOn.com* for the proposition that Bona and Breen must prove their statements sufficiently "participate[d] in or further[ed]" the discussion of a public issue for protection. (*FilmOn.com*, *supra*, 7 Cal.5th at p. 151.) *FilmOn.com* is not entirely on point because it involved section 425.16, subdivision *(e)(4)*, which unlike subdivision (e)(3) contains no "public forum" requirement and thus necessitates a heavier burden. (See *Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 903.) Nonetheless, the "in connection with" language appears in both (e)(3) and (e)(4) and therefore *FilmOn.com*'s analysis may still assist in determining whether an adequate connection existed here. (See *Serova v. Sony Music Entertainment* (2020) 44 Cal.App.5th 103, 117 fn. 8, review granted Apr. 22, 2020, S260736.) In answering this question, "the context of the speech-the speaker, audience and purpose-are important." (*Id.* at p. 121.) "The ultimate question is whether the 'wedding of content and context' shows that the statement 'contributes to or furthers the public conversation on an issue of public interest.'" (*Ibid.*, citing *FilmOn*, *supra*, 7 Cal.5th at p. 154.) Of importance, the defendant's burden at this first stage of the analysis "is not an onerous one." (*Symmonds v. Mahoney* (2019) 31 Cal.App.5th 1096, 1103.)

Here, Schumacher concedes in the "Combined Opposition to Respondents' Special Motions to Strike" that the request for a civil harassment restraining order "only arises from specific threats that were made to (a) force Petitioner to move out of her home, (b) surveil and stalk Petitioner using 'high tech surveillance,' and (c) threatening to blow Petitioner up with a bomb by posting a video of an explosion superimposed over her speaking." (Combined Opposition to Respondents' Special Motions to Strike, p. 5, ll. 18-20.) Bona is one of Schumacher's current constituents who is active in Carlsbad politics. Bona

submits evidence regarding his purpose in making the Facebook posts as they relate to Schumacher's qualifications, purported underperformance, and request that she step down. The post about Schumacher moving out of Carlsbad was posted on Schumacher's councilmember Facebook page for the entire community to see, and the other "Where's Cori?" post was public and seemingly directed towards other neighbors who share his unfavorable views of her as a councilwoman. Schumacher claims this is merely Bona's baseless opinion of her, but such opinions are still protected if they relate to a matter of public interest. (See *FilmOn.com*, *supra*, 7 Cal.5th at p. 151 ["We are not concerned with the social utility of the speech at issue, or the degree to which it propelled the conversation in any particular direction"].) The other aspects of the CHRO request that Schumacher claims provide "context" and build up for these two Facebook posts actually support Bona's position. Political discourse on Nextdoor over issues like the Stay-at-Home order, a YouTube video with commentary over a council hearing about police reform, frustration about unanswered COVID questions on Facebook Live, and a PRA request related to official cellphone records would tend to suggest that the complained of Facebook posts around this same time were also in connection with Schumacher's political conduct, character, and qualifications. Considering both content and context on the whole, in light of the broad interpretation given to the anti-SLAPP statute and low burden on this first step, the Court concludes on balance that the conduct forming the basis for the CHRO request as to Bona was sufficiently "in connection with" an issue of public interest. (See *Vogel*, *supra*, 127 Cal.App.4th at p. 1015.)

The Court reaches a similar conclusion as to Breen's conduct, with Breen also having been a politically active constituent until moving to Palm Springs. The Carlsbad Uncensored blog that Breen runs is described as addressing "politics in North San Diego County." The two blog posts that Schumacher takes specific issue with indeed relate to local politics generally, and Schumacher specifically. The August 9, 2020 post discusses a "decomposition" of Carlsbad as a result of Schumacher's leadership on the city council and calls for "normal people, caring people to seek public office." The blog post cannot fairly be characterized as anything other than a critique of current state of the community and Schumacher's conduct as a councilmember. The September 19, 2020 blog post telling Schumacher to GTFO of Carlsbad is also a critique on her as a councilmember. The post asks whether readers are "sick and tired of seeing innocent people being called racist" and states it is going to "borrow a line from the Councilwoman" when telling her to "GTFO." This post appears to be in response to Schumacher's own August 21, 2020 Twitter post stating it is time for Tony Krvaric (chairman of the San Diego Republican Party) to take his "brand of white nationalist, regressive, traditionalist/authoritarian toxic & destructive politics" and "GTFO of North County." Thus, Breen's blog is also sufficiently "in connection with" an issue of public interest.

Schumacher attempts to focus on Breen's earlier conduct, primarily between 2016 and 2018 when she was cornered and accosted at events, which she claims was not protected. Schumacher's CHRO request, however, states that the alleged harassment occurred "July 2020 to beginning of September 2020." When asked if she has been harassed at any other times, she checked the box for "No." Although a party's evidentiary submissions can provide more clarity on existing allegations, (see *Wittenberg v. Bornstein* (2020) 50 Cal.App.5th 303, 315) a party cannot oppose an anti-SLAPP motion by submitting evidence in support of new, unpled allegations of unprotected conduct (see *Medical Marijuana, Inc. v. Project CBD.com* (2020) 46 Cal.App.5th 869, 900). The CHRO request cannot fairly be read as encompassing Breen's earlier conduct that Schumacher is now attempting to raise.

Schumacher also argues that Bona's and Breen's speech was threatening and exceeded constitutional protection. "The same argument could be made by the plaintiff in a defamation suit-the defendant has no First Amendment right to engage in libel or slander. Yet, defamation suits are a prime target of SLAPP motions. The problem with [plaintiff's] argument is that it confuses the threshold question of whether the SLAPP statute applies with the question whether [plaintiff] has established a probability of success on the merits. The Legislature did not intend that in order to invoke the special motion to strike the defendant must first establish [his or] her actions are constitutionally protected under the First Amendment as a matter of law. If this were the case, then the inquiry as to whether the plaintiff has established a probability of success would be superfluous." (*Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 305.) Thus, whether Bona or Breen made true threats should be addressed at the second stage of the analysis. (*See* ibid.)

B. Schumacher Has Not Met Her Burden Of Showing A Probability Of Success On The Merits

Given the above, the burden shifts to Schumacher to establish, with admissible evidence, a "probability"

of prevailing on her CHRO request. "Ordinarily, the process the court uses in determining the merits of the motion is similar to the process used in approaching summary judgment motions. The evidence presented must be admissible and the trial court does not weigh the evidence. Rather, a probability of prevailing is established if the plaintiff presents evidence establishing a prima facie case which, if believed by the trier of fact, will result in a judgment for the plaintiff." (*Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 662.) However, in the context of a CHRO request, the petitioner must establish a prima facie case with "clear and convincing evidence." (*Ibid.*; see Code Civ. Proc., § 527.6(i).)

In order to obtain a CHRO, Schumacher must prove through clear and convincing evidence that she suffered "harassment." (Code Civ. Proc., § 527.6 (a)(1).) Harassment is defined as "unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously annoys, or harasses the person, and that serves no legitimate purpose." (*Id.* at subd. (b)(3).) A "credible threat of violence" is a "knowing and willful statement or course of conduct that would place a reasonable person in fear for the person's safety or the safety of the person's immediate family, and that serves no legitimate purpose." (*Id.* at subd. (b)(2).) "Constitutionally protected activity is not included within the meaning of 'course of conduct.'" (*Id.* at subd. (b)(1).)

The issue here is essentially whether Bona and Breen were engaged in a course of protected political commentary (legitimate conduct) or made unprotected "true threats" constituting harassment under section 527.6. (See *City of Los Angeles v. Herman* (2020) 54 Cal.App.5th 97.) "'True threats' are not constitutionally protected speech. A constitutionally unprotected threat is one that a reasonable listener would understand, in light of the context and surrounding circumstances, to constitute a true threat, namely, a serious expression of an intent to commit an act of unlawful violence rather than an expression of jest or frustration." (*Id.* at p. 104.) "Context is everything in threat jurisprudence. Indeed, context is critical in a true threats case and history can give meaning to the medium." (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1250.) Although not cited by either party, *Herman* is instructive.

Herman involved a request for a workplace violence restraining order against a member of the public (Herman) based on comments made to a city attorney (Fauble) during city council meetings. Herman frequently attended council meetings and had been removed from meetings more than 100 times. (*Herman*, *supra*, 54 Cal.App.5th at p. 100.) During one meeting, Herman said "Fuck Mr. Fauble" in a threatening manner and stated that "everyone should know" Fauble lived at a specific address that he publicly revealed. (*Ibid.*) During the public comment period at another meeting two weeks later, Herman in an angry and threatening manner again disclosed Fauble's home address, including the floor of his apartment, and described the location of Fauble's home in relation to where the council meets. (*Ibid.*) At that meeting, Herman also submitted public speaker cards, one of which had a swastika drawn on it, another had a drawing of a KKK hood with figures that were either an "SS" or lightning bolts above Fauble's name, and yet another contained Fauble's home address and the statement "Los Angeles City Attorney Mr. Strefan Edward Fauble of Mayor Eric Garcetti & ATT Mike FEUER" with a swastika drawn next to Herman's comments. (*Ibid.*) Other cards contained another drawing of a KKK hood and the statement "Fuck you Edward Fauble." (*Ibid.*) Finally, at a third meeting a few days later, Herman was disruptive and was escorted out of the meeting, but before leaving yelled in a loud and threatening manner "fuck you Fauble. I'm going back to Pasadena and fuck with you." (*Ibid.*)

The trial court granted the request for a restraining order concluding that the evidence showed a credible threat of violence, and the court of appeal affirmed finding substantial evidence supported the order. (*Id.* at pp. 102–105.) The court noted that Herman's repeated disclosure of Fauble's home address served no legitimate purpose and served to show Fauble that Herman knew where to find him. (*Id.* at p. 102.) The court noted the threatening context of these disclosures was further shown by Herman's direct threat that he would "go back to Pasadena [where Fauble lived] and fuck with" him. (*Ibid.*) The court found that the circumstances of the threats, including Herman's angry demeanor, supported the trial court's conclusion that the threats could reasonably be viewed as serious. (*Id.* at p. 103.) The court also held a reasonable viewer could conclude that Herman's threats were personal, noting Herman drew hateful Nazi and KKK symbols on public speaker cards along with insults directed at Fauble, and Herman had previously indicated a belief that Fauble was Jewish. (*Ibid.*) The court rejected Herman's argument that he did not make "true threats" because he did not actually intend to harm Fauble, noting the "relevant issue is not what the speaker intended, but what a reasonable listener would understand." (*Id.* at pp. 104–105.)

Context distinguishes this case from *Herman*. Unlike Herman who repeatedly disclosed Fauble's home address and yelled in a threatening manner as he was escorted out of a meeting that he was going to go back to Pasadena and "fuck" with him, Bona commented on a Facebook post about a council meeting after previously asking Schumacher to step down that she should get ready to "move" out of the city. Unlike Herman who communicated his message to the Jewish city attorney alongside swastikas and a play on words for "Führer", Bona posted about neighbors surveilling her alongside a picture of Waldo and the words "Where's Cory?" And unlike drawing an SS or lightning bolts over Fauble's name, Bona added a brief animated explosion similar to a comic book (along with various other animations added to the video) over Schumacher's face in the middle of a council meeting that appears to reference Schumacher's head exploding from confusion. Neither Bona's "non-neighborly" comments on Nextdoor, his PRA request, nor his threat to sue over unanswered questions about COVID during a Facebook Live event provide context that would lead a reasonable person to believe that he intended to physically force Schumacher from her home, join forces with the neighborhood to unlawfully stalk her through high tech surveillance at the expense of her safety, or build a bomb. Simply calling these posts threats is not enough; some modicum of clear and convincing evidence is required to establish a prima facie case. Without considering Bona's subjective intent or weighing the evidence, the court finds that Schumacher has failed to demonstrate a probability of success on the merits of her request for a CHRO against Bona.
The result is the same as to Breen. Merely comparing Schumacher's leadership to that of East Germany is not a threat to her safety, but rather pure political criticism. Although many people may disagree, or find such a comparison to be crude and offensive method of stating his opposition, even unpopular opinions are entitled to protection. Nothing in the August 9, 2020 blog post Schumacher submitted can reasonably be construed as a threat to her safety or other unconstitutional activity. The same is true of the September 7, 2020 blog post Schumacher submits that repeatedly includes the term "GTFO." As noted above, the blog post itself notes it is "borrow[ing] a line from the Councilwoman" that she had put "squarely in the public domain"-an apparent reference to Schumacher's August 21, 2020 Twitter post telling Krvaric to take his "brand of white nationalist, regressive, traditionalist/authoritarian toxic & destructive politics" and "GTFO of North County." Breen's blog post thereafter uses GTFO not as a threat to Schumacher, but as a mantra with phrases like "Never again will 'guilt by association' carry the day GTFO" and "Never again will you be bullied into silence GTFO." Again, the Court does not consider whether Breen's unpled conduct cornering Schumacher and monopolizing her time at political events in years past would independently entitle her to a CHRO. (*Medical Marijuana*, *supra*, 46 Cal.App.5th at p. 889 [holding the pleading "provides the outer boundaries of the issues that are to be addressed in an anti-SLAPP motion"].) But even if the Court considers the evidence for the purpose of putting the pleaded allegations (Breen's blog) in context, this evidence simply does not color these posts from a year later as threats that Breen would physically force Schumacher from her home or otherwise put her in physical danger. The only reasonable interpretation of these posts is political commentary, not personal threats. Even without weighing the evidence, the court concludes that Schumacher also failed to meet her burden of presenting sufficient evidence to demonstrate a probability of success with her claim against Breen.
Accordingly, the Court finds that Schumacher has failed to establish a probability of success and grants both Bona's and Breen' anti-SLAPP motions. More specifically, the Court strikes the social media posts and emails attached as pages 2 through 15 of Attachment 7(a)(3). To the extent that page 1 of Attachment 7(a)(3) refers to and relies upon pages 2 through 15, those references also are stricken. As set forth above, any additional allegations contained in Schumacher's description of the alleged harassment are insufficient to constitute harassment within the meaning of California Code of Civil Procedure section 527.6. To the extent that both Bona and Breen have indicated in pleadings their intent to file motions seeking attorneys' fees, the Court schedules the hearing on said motions for April 9, 2021 at 1:30 p.m. All motions, oppositions, and replies shall be filed and served pursuant to Code.