David Loy, Legal Director
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May 4, 2023

VIA FACSIMILE (858.573.1574)

Sergeant Jared Wilson
President
San Diego Police Officers Association Inc.
8388 Vickers St.
San Diego, CA 92111-2309

Re: Cease and Desist Letter

Dear Sergeant Wilson,

I am legal director of the First Amendment Coalition ("FAC"), a nonprofit, nonpartisan organization dedicated to defending freedom of speech, freedom of the press, and the public's right to know. On behalf of FAC and not representing any other person at this point, I write to explain why your "Cease and Desist Letter" of April 28, 2023, to Joe Orellana should be withdrawn. Threats of litigation can exert a significant chilling effect on speech protected by the First Amendment. Regardless of whether correction or retraction of a statement might be appropriate, the First Amendment prohibits claims arising from a statement about a public official unless the plaintiff can prove by clear and convincing evidence that the statement was made with actual knowledge it was false or with reckless disregard for the truth. The letter states no facts meeting that stringent standard.

I understand the letter states Mr. Orellana "published a tweet in which [he] falsely accused Lt. Sharki of being on the Brady List, a list of police officers who have been found to have committed misconduct that could affect their credibility as witnesses in court." Among other things, the letter states that failure to "remove the tweet" will "result in legal action."

On the facts stated in the letter, any claims arising from the tweet at issue would be subject to an anti-SLAPP motion. Under the anti-SLAPP statute, any "cause of action against a person arising from any act of that person in furtherance of the person's right of … free speech … in connection with a public issue shall be subject to a special motion to strike," with costs and fees to the prevailing defendant, "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." Code Civ. Proc. § 425.16(b)(1), (c)(1).

Any claims based on the facts stated in the letter would arise from acts in furtherance of Mr. Orellana's "right of … free speech … in connection with a public issue," because they concern statements "made in … a public forum in connection with an issue of public interest" or "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." Code Civ. Proc. § 425.16(e)(3)–(4).

As a website, Twitter is a public forum, and the statement alleged in the letter involves issues of public interest relating to the integrity of police officers and their credibility as witnesses. *See Jackson v. Mayweather*, 10 Cal. App. 5th 1240, 1252 (2017) (holding social media sites are public forums under anti-SLAPP statute); *Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468, 479 (2000) (noting "definition of 'public interest' within the meaning of the anti-SLAPP statute" is "broadly construed" and includes "governmental matters").

Faced with an anti-SLAPP motion, the plaintiff must show a probability of prevailing on alleged claims. The plaintiff cannot rest on mere allegations but must produce sufficient evidence to establish a prima facie case. *Baral v. Schnitt*, 1 Cal. 5th 376, 385 (2016); *Christian Research Inst. v. Alnor*, 148 Cal. App. 4th 71, 86 (2007). A plaintiff has no probability of prevailing if every element of the claim cannot be substantiated or the claim is barred by applicable defenses. *Annette F. v. Sharon S.*, 119 Cal. App. 4th 1146, 1166 (2004); *Traditional Cat Assn., Inc. v. Gilbreath*, 118 Cal. App. 4th 392, 398 (2004).

The traditional elements of defamation are intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or causes special damage. *See Taus v. Loftus*, 40 Cal. 4th 683, 720 (2007); *Smith v. Maldonado*, 72 Cal. App. 4th 637, 645 (1999). The First Amendment also places strict limits on defamation claims.

Assuming Mr. Orellana published a false statement of fact about Lieutenant Sharki, any claim arising from that statement would be subject to stringent review under the First Amendment, which reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). "Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

Therefore, a public official alleging defamation or related claims must prove by clear and convincing evidence that the speaker knew the statement was false or acted with reckless disregard for the truth. *New York Times*, 376 U.S. at 279–80. As a police officer, Lieutenant Sharki is a public official. *McCoy v. Hearst Corp.*, 42 Cal. 3d 835, 841 n.3 (1986); *Gomes v. Fried*, 136 Cal. App. 3d 924, 933 (1982). In any claim arising from the statement alleged in the "Cease and Desist Letter," Lieutenant Sharki would have to prove by clear and convincing evidence that Mr. Orellana knew his statement was false or published it with reckless disregard for the truth.[1]

[1] The *New York Times* standard cannot be avoided merely by pleading claims other than defamation, such as intentional infliction of emotional distress. *Hustler Magazine v. Falwell*, 485 U.S. 46, 57 (1988). Plaintiffs "may not avoid the strictures of defamation law by artfully pleading their defamation claims to sound in other areas of tort law." *Noel v. River Hills Wilsons, Inc.*, 113 Cal. App. 4th 1363, 1373 (2003).

This issue is independent of whether the statement is objectively false. *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 681 (1989). The test is "a subjective test, under which the defendant's actual belief concerning the truthfulness of the publication is the crucial issue. This test directs attention to the defendant's attitude toward the truth or falsity of the material published," not "the defendant's attitude toward the plaintiff." *McGarry v. Univ. of San Diego*, 154 Cal. App. 4th 97, 114 (2007).

Mere failure to investigate, lack of due care, or "gross or even extreme negligence" are insufficient to prove actual malice. *Christian Research Institute*, 148 Cal. App. 4th at 90; *see also, e.g., McCoy*, 42 Cal. 3d at 860. In response to an anti-SLAPP motion, Lieutenant Sharki would have to "establish a probability that [he] will be able to produce clear and convincing evidence of actual malice." *Annette F.*, 119 Cal. App. 4th at 1167. In deciding an anti-SLAPP motion, a court exercises independent review in determining whether the plaintiff can establish a probability of proving actual malice by clear and convincing evidence. *Christian Research Institute*, 148 Cal. App. 4th at 86.

The "Cease and Desist Letter" asserts no evidence, much less clear and convincing evidence, showing that Mr. Orellana subjectively believed his statement to be false or acted with reckless disregard for the truth under the stringent *New York Times* standard. At best, the letter implies Mr. Orellana may have been negligent in making a false statement, but mere negligence is insufficient to meet the *New York Times* standard.

For the foregoing reasons, the "Cease and Desist Letter" should be withdrawn immediately.

Sincerely,

FIRST AMENDMENT COALITION

David Loy
Legal Director