L. LIN WOOD, P.C.
TRIAL LAWYERS

L. LIN WOOD
Direct Dial: (404) 891-1406
lwood@linwoodlaw.com

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VIA ECF

Honorable Dora L. Irizarry
United States District Court
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *La Liberte vs. Reid*, Civil Action No. 18-5398
Response to Defendant's Request for Pre-Motion Conference

Your Honor,

Please allow this letter to serve as Plaintiff Roslyn La Liberte's response to Defendant Joy Reid's November 6, 2018, letter requesting a pre-motion conference prior to filing an anti-SLAPP motion pursuant to California law.

Ms. La Liberte has no objection to a pre-motion conference, in the Court's discretion, nor to Ms. Reid's filing of an anti-SLAPP motion. Ms. Reid's preliminary argument of her proposed motion does merit a response, however. With one exception, Ms. La Liberte will oppose the bases cited in Ms. Reid's letter in support of such a motion.

Ms. Reid is a nationally known political analyst. Ms. La Liberte is your average private citizen. She received notoriety when Ms. Reid took to social media to defame and humiliate Ms. La Liberte with false accusations of screaming racial slurs at a fourteen-year-old Latin American young man who, like Ms. La Liberte, appeared at a City Council meeting in California to address the state's sanctuary laws. What is missing from Ms. Reid's letter is any reference to her own defamatory publications and an acknowledgement that one issue will not be in dispute: falsity. Ms. La Liberte did not scream racial slurs at anyone at the City Council meeting. Your Honor may view the only currently available video of the interaction here: https://www.youtube.com/watch?v=oqLoTK2ZjKw. The balance of this letter will address what is contained in Ms. Reid's letter.

The factual allegations in this case are as follows. Ms. La Liberte appeared at the City Council meeting to exercise her right to participate in our democracy. She was wearing a "MAGA" hat. Early at the meeting – during a break in the proceedings – a young man accompanied by his mother approached Ms. La Liberte and engaged her in a discussion on the topic of the day.[1] An out of context photograph of that interaction was taken. On June 28, 2018, that picture was posted on Twitter by Alan Vargas alongside racial slurs allegedly yelled by an unidentified "they" at the young man in the photograph (the "initial tweet").

[1] It was hours later that Ms. La Liberte's turn to speak before the City Council came.

On June 29, 2018, Ms. Reid re-tweeted the initial tweet; just the tweet with no original commentary (the "retweet"). On the same day, Ms. Reid took to Instagram with a post of her own, including the initial photograph and authoring, in part, "She [Ms. La Liberte] showed up too, in her MAGA hat, and screamed, 'You are going to be the first deported' . . . 'dirty Mexican!'." On the same day, Ms. La Liberte began to receive threatening hate mail, some of which is addressed in the Complaint.

On the same day, the young man in the picture was interviewed by another news station, stating that Ms. La Liberte "was being civil." *See* http://www.foxla.com/news/local-news/people-online-twist-the-real-story-behind-photo-of-woman-yelling-at-boy (the "Fox story"). The next day, Ms. La Liberte's son e-mailed the link to the Fox story to Ms. Reid, explaining that she was wrong. He e-mailed her again on July 1st, and was among others who posted the Fox story to Ms. Reid's social media account.

Despite the Fox story, and being directly provided with it, Ms. Reid then posted a photograph comparing Ms. La Liberte's photo to racism during the civil rights movement in the 1950s. Again authoring her own post, Ms. Reid stated:

> It was inevitable that this image would be made. It's also easy to look at old black and white photos and think: I can't believe that person screaming at a child, with their face twisted in rage, is real. B[ut] every one of them were. History sometimes repeats. And it is full of rage. . . .

This July 1 post – to both Instagram and Facebook – is the one that Ms. Reid asserts is incapable of a defamatory meaning as a matter of law.

In addition to omitting that she was provided with knowledge of falsity prior to issuing her July 1 posts, Ms. Reid argues a number of points outside the four corners of the Complaint, to include that Mr. Vargas was an attendee at the City Council meeting and that others were also defaming Ms. La Liberte as though it is a license to defame. Contrary to Ms. Reid's representations, the record before the Court shows that Ms. Reid did not even know that it was a City Council meeting – calling it a political "rally" – much less that Mr. Vargas was an attendee.

In short, this case concerns false, defamatory *per se* publications to third persons with the requisite degree of fault. It is not the frivolous defamation case anti-SLAPP statutes are designed to "weed out."

As to the legal positions cited by Ms. Reid, Ms. La Liberte does not concede that California law applies to this matter. The State of California has no vested interest in providing special protection to a resident of another state for defamatory posts published outside California. To the extent California law does apply, Ms. La Liberte will oppose the application of a state anti-SLAPP

statute in federal court because such an application is inconsistent with the Federal Rules of Civil Procedure.[2]

Moreover, even if California's anti-SLAPP statute is applied, each of Ms. Reid's posts are defamatory. *See, e.g., Slaughter v. Friedman*, 32 Cal 3d 149, 154, 649 P2d 886, 889 (1982) (the "inquiry is not to determine if the communications may have an innocent meaning but rather to determine if the communication reasonably carries with it a defamatory meaning") (internal quotations and citations omitted). Each of Ms. Reid's posts is reasonably understood as an accusation that Ms. La Liberte engaged in racist conduct.

As to the degree of fault that must be shown, Ms. La Liberte is a private figure rather than a public figure. Ms. Reid asserts that "by participating in the Council Meeting with respect to a public issue, La Liberte is a limited pubic [sic] figure and thus must both adequately allege and then prove that Reid acted maliciously." But the false attacks made by Ms. Reid are not pertinent to, and have nothing to do with, Ms. La Liberte's comments on a public issue. To qualify as a limited purpose public figure, Ms. La Liberte "must have voluntarily acted to influence the resolution of the issue of public interest," and "the alleged defamation must be germane to the plaintiff's participation in the public controversy." *Grenier v. Taylor*, 234 Cal App 4th 471, 484, 183 Cal Rptr 3d 867, 877 (Cal Ct App 2015) (holding that plaintiff, who had sought public attention as a pastor, was not limited purpose figure for purposes of accusations regarding his morality because his work as a pastor was not germane to specific accusations of immorality) (emphasis added). Ms. La Liberte did not intervene in a controversy regarding racism, and Ms. Reid's false accusations of racism are not germane to Ms. La Liberte's public comments on the issue of California's sanctuary policy.

To the extent Ms. La Liberte is ultimately deemed a public figure who must prove actual malice, she has alleged it. Ms. Reid acted on the Internet-word of a teenager she does not know, and who is a social media activist with a demonstrable bias against Ms. La Liberte. She took it a step further than even he did, materially altering and adding to the sting of Mr. Vargas's initial tweet. The truth was at her fingertips figuratively and literally; the young man in the photograph denied her claims by video interview, and that video was provided directly to Ms. Reid. Stated simply, Ms. Reid saw an opportunity to advance her agenda, so she disregarded truth or falsity and the effect her posts would have on Ms. La Liberte in favor of inciting outrage at the Republican Party. "[A]ctual malice can be proven by circumstantial evidence. Evidence of negligence, of motive and of intent may be adduced for the purposes of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or his knowledge of falsity. A failure to investigate, anger and hostility toward the plaintiff, reliance upon sources known to be unreliable, or known to be biased against the plaintiff – such factors may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication." *Reader's Digest Assn. v. Superior Ct.*, 37 Cal 3d 244, 257-58, 690 P2d 610, 618-19 (1984) (internal quotations and citations omitted). Though Ms. Reid cites a number of cases for the proposition

[2] Based on Ms. Reid's representations of her intent to pursue California law, this letter likewise cites California law.

that any one of these factors, standing alone, may be insufficient to allege actual malice, she ignores the totality of her conduct that demonstrates actual malice: relying on an inherently biased source, acting out of personal animus and for personal gain, failing to investigate despite the source's bias, and ignoring facts establishing falsity.

This pre-motion procedure has served its purpose in one regard. Ms. Reid cites 1996 legislation entitled the Communications Decency Act, 47 U.S.C. § 230 (the "Act"), for the proposition that "retweeting" is granted the highest protection available in defamation: absolute immunity. Such a proposition turns centuries of defamation jurisprudence on its head and provides the highest form of immunity to arguably the lowest form of communication. Generally, "every repetition of the defamation is a separate publication and hence a new and separate cause of action though the repeater states the source." *Di Giorgio Corp. v. Val. Labor Citizen*, 260 Cal App 2d 268, 273, 67 Cal Rptr 82 (Cal Ct App 1968).

The Act was promulgated in response to a New York decision, *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), that held an internet service provider liable for defamatory content of its users. The section of the Act at issue is entitled "Protection for private blocking and screening of offensive material," and the subsection at issue is entitled "Protection for 'Good Samaritan' blocking and screening of offensive material." 47 U.S.C. § 230(c); *see also Fair Hous. Council of San Fernando Val. V. Roommates.Com, LLC*, 521 F3d 1157, 1163-64 (9th Cir. 2008) ("Congress sought to immunize the *removal* of user-generated content, not the *creation* of content . . . . [A]s the Seventh Circuit recently held, the substance of section 230(c) can and should be interpreted consistent with its caption.") (emphasis in original). Yet, the Act – enacted long before the existence of social media for the purpose of immunizing websites from liability for their users' defamatory content as the Internet boomed – is now being offered as an immunity for "users" who republish information from another user no matter their degree of fault. To the extent that is the case, it should be categorized as unintended consequences in derogation of fundamental First Amendment principles.

Should such a common law rule become the courts' majority view pending legislative review, it would be a very dangerous concept. News outlets are not even afforded true absolute immunity for reporting on allegations made in public, civil, or criminal proceedings. Yet, under Ms. Reid's interpretation, republishing allegations originally made on social media receive such absolute protection. Such a rule's application to the circumstances of this case would be a gross miscarriage of justice, and that feeling is consistent with those limited decisions on the issue. *See, e.g., Barrett v. Rosenthal*, 114 Cal App 4th 1379, 9 Cal Rptr 3d 142, 153 (2004) ("[A]t least one trial judge has gagged at the unfairness that resulted from application of such a broad immunity. The view of most scholars who have addressed the issue is that *Zeran's* analysis is flawed, in that the court ascribed to Congress an intent to create a far broader immunity than that body actually had in mind or is necessary to achieve its purposes. We share that view."). Other Courts have queried whether the Act's use of the term "publisher" is a term of art not intended to provide immunity to those who republish with knowledge of the post's defamatory character. *See, e.g., Doe v. Am. Online, Inc.*, 783 So 2d 1010, 1018-28 (Fla. 2001) (dissenting opinion stating, *inter alia*, that Congress's intent was "solely" to provide service providers immunity for implementing

good-faith monitoring programs but "the so-called 'Decency Act' has, contrary to well-established legal principles, been transformed from an appropriate shield into a sword of harm and extreme danger[.]").

Notwithstanding the injustice, and facing the prospect of a California anti-SLAPP motion containing mandatory fee shifting, Ms. La Liberte has elected to amend her Complaint to remove the retweet prior to the filing of such a motion. To the extent that Ms. Reid intends to assert that *all* of her subsequent posts are immunized by the Act, Ms. La Liberte will oppose on the undisputed basis that the remaining posts are new, original content authored by Ms. Reid, which materially added to and created their own defamatory stings. *See, e.g., Shiamili v Real Estate Group of New York, Inc.*, 17 NY3d 281, 292 (2011) (finding defendants to have been "content providers" with respect to new heading, subheading, and illustration accompanying repost of another user's content); *Roomates.com*, 521 F3d at 1164-72 (finding website operator liable for developing other users' information in such a way as to contribute to the libelousness of the message). Ms. Reid developed and created each post after the retweet.

Finally, to the extent Ms. Reid elects a factual, rather than facial, challenge to Ms. La Liberte's Complaint, Ms. La Liberte is entitled to discovery. *See Planned Parenthood Fedn. of Am., Inc. v Ctr. for Med. Progress*, 890 F3d 828, 834 (9th Cir. 2018), *amended,* 897 F3d 1224 (9th Cir. 2018) ("[W]hen an anti-SLAPP motion to strike challenges the factual sufficiency of a claim, then the Federal Rule of Civil Procedure 56 standard will apply. But in such a case, discovery must be allowed, with opportunities to supplement evidence based on the factual challenges, before any decision is made by the court.").

Ms. La Liberte will await the Court's decision regarding a pre-motion conference.

Respectfully,

Lin Wood

cc: John Reichman, Esq.