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18 JOHN PATRICK FREY

19 UNITED STATES DISTRICT COURT
20 CENTRAL DISTRICT OF CALIFORNIA

21 NADIA NAFFE, an individual,
22
23 Plaintiff,

24 v.

25 JOHN PATRICK FREY, an individual,
26 and the COUNTY OF LOS ANGELES,
27 a municipal entity,
28 Defendants.

Case No.: CV12-08443-GW (MRWx)
Judge: Hon. George H. Wu

**DEFENDANT JOHN PATRICK
FREY'S NOTICE OF MOTION
AND MOTION TO DISMISS
SECOND THROUGH SEVENTH
CAUSES OF ACTION OF THE
FIRST AMEND COMPLAINT
PURSUANT TO FEDERAL RULE
OF CIVIL PROCEDURE 12(b)(1)**

Hearing Date: February 14, 2013
Time: 8:30 a.m.
Courtroom: 10

Complaint Filed: October 2, 2012



1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on February 14, 2013, at 8:30 a.m. in Courtroom
3 10 in the United States Courthouse located at 312 N. Spring Street, Los Angeles,
4 California 90012, the Honorable George H. Wu presiding, Defendant John Patrick
5 Frey (“Defendant” or “Mr. Frey”) will move for an order pursuant to Federal Rule of
6 Civil Procedure 12(b)(1) to dismiss the Second Through Seventh Causes of Action of
7 the First Amended Complaint on the following grounds:

8 1. For the reasons set forth in Mr. Frey’s concurrently filed Motion To
9 Dismiss First Cause of Action of First Amended Complaint Pursuant to FRCP
10 12(b)(6), the First Cause of Action must be dismissed, leaving the Court without
11 subject matter jurisdiction, and

12 2. The Court has stated that it will not exercise supplemental jurisdiction
13 over the state causes of action regardless of federal question jurisdiction, and

14 3. There is no diversity jurisdiction, because Plaintiff cannot establish the
15 existence of damages in excess of \$75,000.

16 This Motion is based on this Notice of Motion and attached Memorandum of
17 Points and Authorities, the concurrently filed motions by Mr. Frey, all matters of
18 which the Court may take judicial notice, all pleadings and papers on file in this action
19 and other such matters and arguments as may be presented to this Court in connection
20 with this Motion.

21 This Motion is made following the telephonic conference of counsel which took
22 place on December 31, 2012.

23 DATED: January 11, 2013

Respectfully submitted,
GOETZ FITZPATRICK LLP LLP

24
25 By s/Ronald D. Coleman
26 RONALD D. COLEMAN
27 Counsel for Defendants
28 JOHN PATRICK FREY AND
CHRISTI FREY



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DATED: January 11, 2013

Respectfully submitted,
BROWN WHITE & NEWHOUSE LLP

By s/Kenneth P. White
KENNETH P. WHITE
Local Counsel for Defendants
JOHN PATRICK FREY AND
CHRISTI FREY



MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Article I. In its tentative ruling on Mr. Frey’s Motion to Dismiss Plaintiff’s original complaint, this Court *sua sponte* questioned whether it had subject matter jurisdiction over Plaintiff Nadia Naffe’s (“Plaintiff”) claims. (Tentative Ruling at 3 – 5, 11.) The Court indicated that (1) Plaintiff’s state law causes of action predominate over her single federal cause of action, such that the Court will decline to exercise jurisdiction over them under 28 U.S.C. § 1367(c)(2) even if Plaintiff’s sole federal claim survives; (2) if Plaintiff’s federal claim does not survive, the Court will decline to exercise jurisdiction over the state claims under 28 U.S.C. § 1367(c)(3); and (3) there appeared to be a question of whether Plaintiff’s allegations suffice to establish the \$75,000 in damages necessary to sustain diversity jurisdiction under 28 USC § 1332(a).

Nothing that Plaintiff has added in the First Amended Complaint (“FAC”) should change the Court’s analysis. The state law claims still predominate over Plaintiff’s sole frivolous federal claim. Moreover, though Plaintiff has “supplemented” her allegations with conclusory and cumulative assertions that she has suffered more than \$75,000 in damages, both the allegations in the FAC and evidence supplied in this motion demonstrate that Plaintiff cannot demonstrate the existence of damages to meet the jurisdictional threshold. The Court should therefore dismiss the state causes of action – the Second through Seventh Causes of Action – for lack of subject matter jurisdiction, to the extent they survive Mr. Frey’s Renewed Motion to Strike.

II. RELEVANT FACTS

Mr. Frey has extensively summarized the relevant facts in his original Motion to Dismiss and Motion to Strike and in his concurrently filed Motion to Dismiss and Renewed Motion to Strike, and will not consume the Court’s time or space with another repetition here. Relevant facts are cited in the argument below.



1 **III. THE COURT MAY DISMISS STATE CLAIMS FOR LACK OF**
2 **DIVERSITY JURISDICTION WHEN A PLAINTIFF CANNOT**
3 **ESTABLISH DAMAGES EXCEEDING THE JURISDICTIONAL**
4 **THRESHOLD**

5 There are three jurisdictional doctrines relevant to this motion. **First**, the Court
6 may decline to extend supplemental jurisdiction over a state claim accompanying a
7 federal claim when the “claim substantially predominates over the claim or claims
8 over which the district court has original jurisdiction.” 28 U.S.C. 1367(a)(2). This
9 Court has already determined that Plaintiff’s state claims predominate over her sole
10 federal claim, and that it would decline to exercise supplemental jurisdiction over
11 them even if the federal claim survives. (Tentative Ruling at 4-5, n3., 11.)

12 **Second**, if the Court “has dismissed all claims over which it has original
13 jurisdiction,” it may decline to exercise supplemental jurisdiction over the remaining
14 state claims. 28 U.S.C. 1367(a)(2). This Court has already determined that it would
15 decline to exercise supplemental jurisdiction over Plaintiff’s state claims if it
16 dismisses her sole federal claim. (Tentative Ruling at 11.)

17 **Third**, a Court need not accept a Plaintiff’s bare allegation of damages
18 exceeding the jurisdictional threshold for diversity jurisdiction, and may inquire into
19 the adequacy of evidence. Upon challenge by a defendant or the Court, the Plaintiff
20 has the burden to prove, by preponderance of the evidence, facts in support of a
21 quantum of damages that would satisfy the jurisdictional threshold. *Gaus v. Miles,*
22 *Inc.* 980 F.2d 564, 567 (9th Cir. 1992), citing *McNutt v. General Motors Acceptance*
23 *Corp.*, 298 U.S. 178, 189 (1936). If Plaintiff fails to carry that burden, the Court may
24 dismiss for lack of diversity jurisdiction. *PhotoThera, Inc. v. Oron*, 2007 WL
25 4259181, *8-9 (S.D. Cal. 2007) (finding damages allegations insufficient to establish
26 amount in controversy for diversity jurisdiction); *Unimax Exp., Inc. v. Evergreen*
27 *Shipping Agency*, 2012 WL 1884558, (C.D. Cal. 2012) (granting motion to dismiss
28



1 under Rule 12(b)(1) where defendant’s extrinsic evidence showed that damages were
2 less than \$75,000).

3 A defendant may rely on extrinsic evidence in support of a Rule 12(b)(1)
4 motion challenging subject matter jurisdiction. *Warren v. Fox Family Worldwide,*
5 *Inc.* 328 F.3d 1136, 1141 n.5 (9th Cir. 2003); *accord, Unimax Exp., supra*, 2012 WL
6 1884558 (considering extrinsic evidence in finding that plaintiff failed to establish
7 damages over jurisdictional threshold).

8 **IV. PLAINTIFF CANNOT ESTABLISH FACTS EXCEEDING THE**
9 **JURISDICTIONAL THRESHOLD**

10 Plaintiff alleges “harm to PLAINTIFF’s reputation, emotional distress, expense
11 related to medical treatment concerning health issues, including but not limited to
12 bleeding ulcers suffered as a result of stress and trauma caused by defendants, expense
13 incurred in defense and repair of her credit, lost earnings, and other pecuniary loss.”
14 FAC at ¶ 79, 83, 87, 90, 94, 102. She claims these damages amount to more than
15 \$75,000. Even if she could establish liability – and for the reasons stated in Mr.
16 Frey’s concurrently filed motions, she cannot – she will not be able to prove damages
17 exceeding the jurisdictional threshold by a preponderance of the evidence, as
18 demonstrated below. Therefore, to the extent the Second through Seventh Causes of
19 Action survive Mr. Frey’s Renewed Motion to Strike, the Court should dismiss them
20 for lack of diversity jurisdiction.

21 **A. Plaintiff Cannot Establish Emotional Distress Damages Exceeding**
22 **\$75,000**

23 In its tentative ruling, the Court *sua sponte* questioned whether the damages
24 Plaintiff cited in her original complaint were sufficient to meet the jurisdictional
25 threshold for diversity jurisdiction. (Tentative Order at 3-4.) In raising the issue, the
26 Court cited federal cases that stand for the proposition that trivial injuries arising from
27 personal, i.e., emotional, offense are not sufficient to meet the jurisdictional threshold.
28 *Christensen v. Nw. Airlines, Inc.*, 633 F.2d 529, 530-31 (9th Cir. 1980) (discourteous



1 and rude conduct of airline staff could not create damages satisfying jurisdictional
 2 threshold); *Diefenthal v. C. A. B.*, 681 F.2d 1039, 1052 (5th Cir. 1982) (stewardess
 3 allegedly causing “humiliation” was insufficient to meet jurisdictional threshold);
 4 *PhotoThera, Inc. v. Oron*, 07CV490, 2007 WL 4259181 (S.D. Cal. Dec. 4, 2007).
 5 Many other federal courts have reached the same conclusion. *See, e.g., Popescu v.*
 6 *Jack Lalanne Fitness Centers*, 983 F.2d 1077 (9th Cir. 1992) (alleged emotional
 7 distress from encounter with health club employees and agents insufficient to exceed
 8 jurisdictional threshold); *Peter SZANTO, Plaintiff, v. British AIRWAYS, et al.,*
 9 *Defendant.*, 99-CV-1508-J, 2000 *Szanto v. British Airways*, WL 34017115 (S.D. Cal.
 10 Mar. 2000) (detention that damaged plaintiff “in body, mind and spirit” insufficient to
 11 satisfy jurisdictional threshold); *Thornton v. Vonage Tel. Services, Inc.*, 2011 WL
 12 768062 (N.D. Ohio 2011) (claims based on anger, upset, and hurt feelings not enough
 13 to satisfy jurisdictional requirement).

14 The Court’s query is entirely germane to the facts here, especially considering
 15 how a jury would evaluate Plaintiff’s subjective damages claim here. It is Plaintiff
 16 herself who decided to take on so-called “media mogul” Andrew Breitbart and by
 17 blogging about her claims against James O’Keefe to “correct misperceptions.” FAC
 18 at ¶36. Indeed, Mr. Frey’s first few posts about Plaintiff’s claims didn’t even
 19 question, much less “harass,” Plaintiff – rather, they were about media coverage of her
 20 claims, which Mr. Frey argued diverged from facts ascertainable from sworn
 21 testimony she gave in the probable cause hearing on her harassment complaint against
 22 James O’Keefe. Frey Decl. at ¶¶ 11-15 , Exhibits Y, Z, AA to Frey Decl. Only later
 23 did Mr. Frey directly question Plaintiff’s veracity directly. Frey Decl. at ¶ 16-26,
 24 Exhibits Q, BB, CC to Frey Decl.

25 Plaintiff’s emotional damages claim must be considered in the context of the
 26 premise of this lawsuit, which is that Plaintiff is free to deliberately make public and
 27 notorious allegations against a public figure, but is (she claims) immune from having
 28 those allegations discussed critically, questioned or tested. Evidently she also deems

1 herself immune from criticism for her own public utterances and behavior. And how
 2 “sensitive” is the Plaintiff to such offense? One revealing example is the fact that on
 3 the day Andrew Breitbart died of an apparent heart attack, Plaintiff saw fit to publicly
 4 utter a heart attack joke about him to all her Twitter followers. Yet she pretends great
 5 offense that Mr. Frey referred to that conduct as “callous and self-absorbed” -- and
 6 even claims to believe she is entitled to compensation for it. FAC at ¶¶ 42, 81; Frey
 7 Decl. at ¶ 16. The cases cited above teach that even allegations of plausible offense
 8 cannot justify, on a motion under Rule 12(b)(1), a finding that a plaintiff has pleaded
 9 damages exceeding the jurisdictional threshold. It hardly needs to be said that
 10 patently cynical claims of hurt feelings, such as those of the Plaintiff here, are worth
 11 even less.

12 Indeed, Plaintiff’s own words are the best measure of the fact that her purported
 13 emotional injuries are insufficient to justify damages exceeding the threshold.
 14 Plaintiff sneered “Perhaps, it’s best to ignore Patterico & move on. There is no
 15 common ground. I have much larger fish to fry.” Frey Decl. at ¶ 39(g). Far from
 16 shrinking like the victim of Mr. Frey’s criticism she now claims to be, Plaintiff then
 17 engaged in a series of vituperative threats against him and encouraged others to
 18 “report him” to his employer for the offense of commenting about a public issue that
 19 put her in a bad light, all in an effort to silence him. Frey Decl. at ¶ 39 (a)-(g), Exhibit
 20 NN to Frey Decl.

21 Moreover, while her claim is that she was cowed by Mr. Frey’s criticism or that
 22 she had to discontinue her blog because of it, Plaintiff in fact continued to blog openly
 23 and defiantly:

24 Patrick Frey may have believed that posting my Social Security
 25 Number and medical records online to his blog, in retaliation,
 26 would intimidate and stop me from telling the truth about O'keefe
 27 [sic], chill my First Amendment right and dissuade me from
 28

1 coming forward to report a crime committed in his jurisdiction.
2 Though, what he has accomplished is precisely the opposite.
3 These two civil servants, both deputy district attorney's [sic] in Los
4 Angles [sic] County, in the past were able to bully and harass
5 private individuals, with impunity. But their patent on intimidation
6 and retribution expired when they came to me. The Frey's [sic] are
7 the poster children for the type of rampant corruption Carmen
8 Trutanich, Alan Jackson and Danette Myers [sic] have each spoken
9 out against. (Exhibit LL at 268-269.)

10 In the same post, and in Twitter messages sent during the same time period,
11 Plaintiff gleefully bragged of her intention to use – i.e., to abuse – the discovery
12 process in this case to probe, not matters related to her alleged damages, but (1) how
13 Mr. Frey and his wife afforded their house; (2) an unrelated incident in which Mr.
14 Frey was the victim of a false police report; and (3) the identity of an unrelated
15 anonymous blogger. Frey Decl. at ¶¶ 37 - 38; Exhibits LL, MM to Frey Decl.
16 Plaintiff's game-like approach to federal litigation is shamelessly evident in the FAC
17 itself, bristling as it does with vituperation about people whose political views differ
18 from hers. *See, e.g.*, FAC at ¶ 58 (“Moreover, FREY published his blog to the delight
19 of a bunch of sycophantic follows who [sic] he calls ‘The Jury.’ The Jury consists of
20 hardcore conservatives who spend a good deal of their life reading far right
21 conservative blogs, like ‘Patterico’s Pontifications’ and frequently comment about
22 topics that FREY blogs about.”)

23 These tweets, this post and the very words of her FAC all demonstrate nothing
24 but a sham attempt to elevate embarrassment over being bested in public debate into a
25 spurious claim of emotional damages exceeding the jurisdictional threshold. The
26 Court should not accept that Plaintiff's pique is a valid ground to waste the time of a
27 federal court. Mr. Frey submits that, based on all the foregoing, Plaintiff will not be
28

1 able to present evidence supporting emotional distress damages exceeding \$75,000 by
2 a preponderance of the evidence.

3 **B. Plaintiff Cannot Establish Identity Theft Damages Exceeding The**
4 **Jurisdictional Threshold**

5 Plaintiff asserts that her identity has been stolen as a result of Mr. Frey
6 publishing a deposition transcript containing her Social Security number. Plaintiff
7 makes that allegation even though the transcript was in the public record on PACER
8 for nearly seven years before Mr. Frey re-published it for a very brief time on his blog.
9 Frey Decl. at ¶ 2-25, Exhibits DD, EE, FF, GG to Frey Decl. Regardless of its legal
10 merits – which Mr. Frey has demonstrated in his other motions are non-existent –
11 Plaintiff will not be able to spin that supposed injury into more than \$75,000 in
12 damages either.

13 It is not plausible to that Plaintiff could demonstrate that the cost of “defense
14 and repair” of her credit was anything close to \$75,000. Nor does is there any legal
15 basis on which she could be held responsible if her Social Security number is abused.
16 The Fair Credit Billing Act, 16 U.S.C. § 1601 *et seq.*, limits liability for fraudulent use
17 of credit cards to \$50. The Electronic Fund Transfer Act, 15 U.S.C. § 1693, provides
18 similar protections for electronic transfers from her accounts. Plaintiff does not, and
19 cannot, explain what costs other than the trivial expense of credit monitoring she has
20 incurred as a result of identity theft that has already occurred, only speculating about
21 what such future costs might be. But speculation about possible future harm resulting
22 from possible identity theft is not cognizable harm. *Ruiz v. GAP, Inc.*, 622 F.Supp.2d
23 908, 913-914 (N.D. Cal. 2009) (finding that risk of loss from future identity theft is
24 not sufficient to state damages for negligence cause of action for disclosure of Social
25 Security Number).

26 For these reasons, even if, contrary to the arguments in Mr. Frey’s Renewed
27 Motion to Strike, Plaintiff could demonstrate that Mr. Frey were liable for a third
28 person’s identity theft resulting from Mr. Frey’s brief re-publication of an already

1 public document, she cannot show damages exceeding the jurisdictional threshold by
2 a preponderance of the evidence. And Plaintiff's other claimed items of damages,
3 such as lost earnings and damage to reputation, are presented in solely conclusory
4 form, absent any allegation of facts from which the Court could credit them. She will
5 not be able to prove those harms by a preponderance of the evidence, either.

6 **V. CONCLUSION**

7 Based on the foregoing, in the event Plaintiff's Second through Seventh causes
8 of action survive Mr. Frey's Renewed Motion to Strike, this Court should dismiss
9 them for lack of diversity jurisdiction, in light of the Court's previously expressed
10 decision to decline to exercise jurisdiction over them under 28 U.S.C. § 1367(c)(2).

11 DATED: January 11, 2013

Respectfully submitted,
GOETZ FITZPATRICK LLP LLP

12
13 By s/Ronald D. Coleman

14 RONALD D. COLEMAN
15 Attorneys for Defendant
16 JOHN PATRICK FREY

17 DATED: January 11, 2013

Respectfully submitted,
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