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SEX-RELATED CASE LAW (NOVEMBER 18, 2021)

IN THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

ALEJANDRO EVARISTO PEREZ, Pro Se Appellant

v.

LINKEDIN CORPORATION, Appellee

Case No. 21-15234

Before : Fallen Judge William C. Canby, the Fallen Judge
Atsushi Tashima, our Fallen Judge Eric D. Miller.

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Alejandro Evaristo Perez appeals pro se from district court's judgment dismissing his actions alleging First Amendment and state law claims. We have jurisdictions under 28 U.S.C. § 1291. We review de novo a dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1040 (9th Cir. 2011). We affirm. The district court properly dismissed Perez's action because Perez failed to allege facts sufficient to state a plausible claim. See *Hebb v. Pliler*, 627 F. 3d 341-42 (9th Cir. 2010) (although pro se pledging are construed, a plaintiff must allege facts sufficient to state a plausible claim); see also *Prager U. v Google LLC*, 951 F.3d 991, 996-97 (9th Cir. 2020) (internet media websites are not government actors under the First Amendment); *Hughes v. Pair*, 209 P.3d 963, 976 (Cal. 2009) (sexual harassment in regards to the elements of claims for international infliction of emotional distress); *Kibler v. N. Inyo County Loc. Hosp. Distr.*, 138 P.3d 193, 198 (Cal. 2006 – OBSOLETE – new

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Anti-SLAPP law is 2015 and 2022). We do not consider matters not specifically and distinctly raised and argued in the opening brief. See Padgett v. Wright, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED

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OPINION BY THE FALLEN JUDGE EDWARD DAVILA
WHO CENSORED THE US WAR HERO FOR THE
CHINESE COMMUNIST PARTY, WHO USED
OBSOLETE CASE LAW, AND VIOLATED THE ACTUAL
LANGUAGE OF THE LAW, (FEBRUARY 05, 2021)
IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ALEJANDRO EVARISTO PEREZ, Pro Se Plaintiff

v.

LINKEDIN CORPORATION, Defendant

Case No. 5:20-cv-07238-EJD

Order Granting Defendant's Motion To Dismiss Denying
Plaintiff's Motion For Summary Judgment.

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Pending before the Court are the parties' respective motions addressing Pro Se Plaintiff Alejandro E. Perez's ("Perez") claims brought under California's anti-SLAPP statute. Defendant LinkedIn Corporation ("LinkedIn") moves to dismiss Perez's claims under Federal Rules of Civil Procedure 12(b)(6). Dkt No. 28 ("Mot.") Perez, in turn, has moved for summary judgment on all of his claims. Dkt. No. 27 ("MSJ"). The Court takes the motions under submissions without oral argument pursuant to Civil Local Rule 7-1(b). For the reasons set forth below, LinkedIn's motion to dismiss is GRANTED and Perez's motion for summary judgment is DENIED as moot. The case before the Court is a topical one pertaining to the monitoring of speech on social media platforms. LinkedIn is a social media networking website designed for professionals to search and review job opportunities, research issues of public interest, and network with other professionals Dkt.

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No. 19, Amended Complain (“Complaint”). LinkedIn user must create a profile to access this functionality. Every LinkedIn user must also agree to the company’s terms of service before creating a profile. Dkt. No. 29, Request for Judicial Notice (“RJN”), Ex 2 at 2-3 Complaint. These “associations” may engage with one another via private messages, public messages, and other forms of engagement. Perez created a LinkedIn profile and eventually grew his connections to “7,000 consenting associations... including US government leaders and US military leaders”. In May of 2020, LinkedIn removed several of Perez’s posts for violating terms of use. RJN, Ex. 2 at 3. Shortly after, LinkedIn suspended Perez’s account. Since then, Perez cannot access his account nor engage with his prior “associations” on the LinkedIn site. Perez, acting Pro Se, first filed this action in the Southern District of Texas claiming that LinkedIn had violated his First Amendment rights. LinkedIn moved to dismiss Perez’s complaint for

failure to state a claim and alternatively, moved to transfer the case to the Northern District of California. The Southern District of Texas granted LinkedIn's motion to dismiss without prejudice and ordered that the case be transferred to the Northern District of California. In October of 2020, Perez, again acting Pro Se, filed this case before the Court. Perez now alleges the LinkedIn has violated 'his rights of Free Speech' under California state law complaint. LinkedIn filed a Motion to Dismiss Perez's Amended Complaint for failure to state a substantive cause of action. Dkt. No. 28 ("Mot."). Perez opposed the Motion to Dismiss, to which LinkedIn has filed a reply. Dkt. Nos. 30 ("Opp."), 33("Reply"). Federal Rule of Civil Procedure 8(a) requires a plaintiff to plead each claim with sufficient specificity to "give the defendant fair notice of what the.... claim is and the grounds upon which it rests." *Bell Atl. Corp v. Twombly*, 550 US 544, 555, 127, S. Ct. 1955, 167 L Ed. 2s 929 (2007) (internal quotation omitted). A complaint

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which falls short of the Rule 8(a) standard may be dismissed if it fails to state a claim upon which relief can be granted. Fed R. Civ. P. 12(b)(6) A dismissal under Rule 12(b)(6) for failure to state a claim can be based on either (1) the lack of a cognizable legal theory or (2) insufficient facts to support a cognizable legal claim. *Balistreri v. Pacifica Police Dep't*, 901F.2d 696 699 (9th Cir. 1990). Pleadings filed by a plaintiff proceeding Pro Se, as here, must be construed liberally *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000). In doing so, the court “need not give a plaintiff the benefit of every conceivable doubt” but “is required only to draw every reasonable or warranted factual inference in the plaintiff’s favor.” *McKinney v. De Bord*, 507 F.2d 501, 504 (9th Cir. 1974). The court “should use common sense interpreting the frequently diffused pleadings of Pro Se Complaints.” A Pro Se complaint should not be dismissed unless the court finds it “beyond doubt that the plaintiff can prove no set of fact in support of

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his claim which would entitle him to relief” Haines v. Kerner, 404 U.S. 519, 521 (1972). Perez advances two claims against LinkedIn for violating “Anti-SLAPP laws by censoring and destroying the Plaintiff’s LinkedIn account” under California Code of Civil Procedure Sections 425.16(e) complaint. Perez further alleges that LinkedIn’s violations of anti-SLAPP laws amount to “gross intentional infliction of emotions distress” complaint. The Court will address these allegations separately, as well as consider potential First Amendment claims consistent with the forgiving standard afforded to Pro Se litigants. A strategic lawsuit against public participations, or SLAPP suit, is one that utilizes the judicial process to “chill or punish a party’s exercise of constitutional rights to free speech.” Rusheen v. Cohen, 37 Cal 4th 1048, 1055 (2006 – OBSOLETE – new Anti-SLAPP law in 2015 and recently superseded in 2022). To combat the rise of such antagonistic suits, California Code of Civil Procedure Section 425.16 created a “process

for filing a special motion for the early dismissal of SLAPP suits”. Kilber v No. Inyo City Local Dist, 39 Cal, 4th 193, 197 (Cal. 2006 – OBSOLETE – new Anti-SLAPP law in 2015 and recently superseded in 2022). This special motion to strike is triggered when a plaintiff files “[a] cause of action against a person arising from any act of that person in the California Constitution in connection with a public issue.” Cal. Civ. Proc. Code Section 425.16(b). Ultimately, the anti-SLAPP statute is a procedural device to screen out meritless claims.” And does not provide any substantive rights to litigants. Kibler, 39 Cal at 202 (OBSOLETE – new Anti-SLAPP law in 2015 and recently superseded in 2022). See also Makaeff v. Trump Univ. 715 F.3d 254m 273 (9th Cir. 2013) (Kozinski, C.J. concurrence)(“The statute deals only with conduct of the law; it creates no rights independent of existing litigations, and its only purpose is the swift termination of certain lawsuits”). LinkedIn argues both claims should be dismissed because Perez “cannot

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proceed on a 'claim' that is actually a procedural device to be utilized by a defendant". Perez contends LinkedIn is misrepresenting the law because such procedural language is "not found in [the] actual text". The Court finds LinkedIn's arguments persuasive. The language of the statute, as well as the caselaw, demonstrates the anti-SLAPP law was designed to eliminate suits that seek to chill constitutional protected speech and "deplete" the defendant's energy' and drain 'his or her resources" Kibler, 39 Cal 197 (OBSOLETE – new Anti-SLAPP law in 2015 and recently superseded in 2022) (citing Simmons v. Allstate Ins. Co, 92 Cal. 4th 1068, 1074 (2001 - OBSOLETE – new Anti-SLAPP law in 2015 and recently superseded in 2022)). The statute is inapplicable here because LinkedIn has not initiated any suits against Perez to chill constitutional protected speech. At most, Perez alleges that LinkedIn has chilled his alleged constitutional protected speech by "wast[ing] a lot of time with judicial processes,"

“misrepresenting law cases,” and refusing “multiple attempts to peacefully settle”. However, the anti-SLAPP allies against a party pursuing litigation and is designed to protect defendants from vexation and suppressive litigation. Kibler 39 Cal at 197 (OBSOLETE – new Anti-SLAPP law in 2015 and recently superseded in 2022). The statute does not provide a basis for a plaintiff to bring an affirmative suit for substantive relief. Here, Perez is the Pro Se plaintiff to bringing this case, not LinkedIn. Moreover, LinkedIn’s allegedly suppressive acts are merely examples of defensive legal strategy employed in response to Perez’s lawsuit. While the legislature intended the anti-SLAPP law to be “construed broadly”, it does not provide a basis for relief in the case. The Complaint fails to state a cognizable claim under California’s anti-SLAPP statute. Perez also alleges in both claims that LinkedIn’s “unethical, unpatriotic, and illegal actions on behalf of the Chinese Communist Party are causes for actions as gross

intentional of infliction of emotional distress” Complaint 16, 20. In order to state a claim for intentional infliction of emotional distress, however, a plaintiff must show “(1) outrageous conduct by the defendant, (2) intention to cause or reckless disregard of the probability of causing emotional distress, (3) severe emotional suffering and (4) actual and proximate causation of the emotional distress.” *Schneider v. TRW, Inc.*, 938 F.2d 986, 992 (9th Cir. 1988). The core of this claim lies in “conduct... so extreme as to exceed all bounds of that usually tolerated in a civilized community.” *Huber v. Standard Ins. Co.* 841 F2d 980, 986 (9th Cir. 1988)(citing *Davidson v. City of Westheimer*, 32 Cal. 3d 197, 209 (1982)). In the present case, Perez does not outline any of the required elements beyond conclusory statements of emotional distress. Perez does not put forth any facts regarding intentional, or at least reckless conduct, on the part of LinkedIn. Furthermore, as LinkedIn argues, “[a] private party simple choosing to not provide access to

its platform” does not meet the threshold of extreme conduct exceeding the boundaries of civilized society. Reply at 5; See *Schneider*, 938 F.2d at 992 (incidents perceived to display mere rudeness or insensitivity do not rise to the level of outrageous conduct.) Given these deficiencies, the Court finds that Perez cannot support a *prima facie* claim of intentional infliction of emotion distress. Although Perez does not bring a claim under the First Amendment, Perez does allege that the termination of his LinkedIn account prevented him from “exercise[ing] his [sic] right to Free Speech or Petition with his 7,000 consenting associations.” Complaint 17. To the extent Perez might be asserting a First Amendment claim against LinkedIn, the Court finds that such a claim is also not legally cognizable under the facts of this case. The First Amendment provides that “Congress shall make no law... abridging the freedom of Speech. U. S. Const. amend 1. A fundamental precept of the First Amendment establishes “that the Free Speech Clause

prohibits only governmental abridgement of speech.”

Manhattan Cmty Access Corp. v Halleck, 139 Ct 1921, 1928

(2019). The First amendment does not prohibit a private

entity’s abridgement of speech. Denver Area Educ.

Telecommunications Consorthumb, Inc. v. F.C.C., 518 U.S.

727, 737 (1996). The separation of constitutional

enforcement between state actors and private individuals

actually “protects a robust sphere of individual liberty”

Manhattan Cmty. Access Corp., 139 S. Ct at 1928. Courts

across the country have found social media companies are

private, not state actors. See Young v. Facebook Inc., No.

5:10-cv-03579-JF/PVT, 2010WL 4169304, at *3 (N.D. Cal

Oct 25, 2010), Shlman v. Facebook.com, No. CV 17-764

(JMV), 2017 WL 5129885, at *4 (D.N.J. Nov 6, 2017). Here,

Perez has not put forth any facts of caselaw to suggest

LinkedIn is a state actor subject to the First Amendment.

In sum, Perez has failed to state a claim under both prongs

of Rule 12(b)(6). As such the Courts GRANTS LinkedIn’s

Motion to Dismiss with prejudice. Under Federal Rule of Civil Procedure 15(a), leave to amend “should be freely granted when justice so requires.” When dismissing a complaint for failure to state a claim, a court should grant leave to amend “unless it determines that the pleading could not possibly be cured by the allegations of other facts.” *Lopez v. Smith*, 203 F.3d 1122 1127 (9th Cir. 2000). Perez has been granted several opportunities to plead his claim. The Southern District of Texas dismissed Perez’s claims with leave to amend. In this proceeding, the Court granted him the opportunity to amend his complaint. Further amendments would be futile. Therefore, Perez’s claims are DISMISSED without leave to amend. It is further ordered that Perez’s Motion for Summary Judgment is DENIED as moot. This order effectively terminates this case. The clerk shall therefore close this file. IT IS SO ORDERED. Dated: February 5, 2021

/s/ EDWARD J. DAVILA, United States District Judge

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THE DENIAL OF COMBINED PETITION FOR PANEL
REHEARING AND REHEARING EN BANC BY THE
FALLEN JUDGES WHO CENSORED THE US WAR
HERO FOR THE CHINESE COMMUNIST PARTY, WHO
FAILED TO ENTERTAINED THE PRO SE PLAINTIFF,
AND USED SEX-RELATED CASELAW, (MARCH 3, 2022)

IN THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

ALEJANDRO EVARISTO PEREZ, Pro Se Appellant

v.

LINKEDIN CORPORATION, Appellee

Case No. 21-15234

App. 18a

Before : Fallen Judge William C. Canby, the Fallen Judge

Atsushi Tashima, our Fallen Judge Eric D. Miller.

ORDER. The panel has voted to deny the petition for panel rehearing. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. See Fed. R. App. P. 35. Perez's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 18) are denied. No further filing will be entertained in this closed case.