

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

SUSAN POLGAR

§

VS.

§

C.A. NO. 5-08CV0169-C

§

UNITED STATES OF AMERICA

§

CHESS FEDERATION, INC., ET AL.

§

§

**DEFENDANT UNITED STATES OF AMERICA CHESS FEDERATION, INC.'S
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR PLAINTIFF'S
FAILURE TO STATE A CLAIM UNDER FED. R. CIV. P. 12(b)(6),
OR IN THE ALTERNATIVE, MOTION FOR A MORE DEFINITE STATEMENT
PURSUANT TO FED. R. CIV. P. 12(e)**

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TABLE OF CONTENTS

INTRODUCTION..... 2

ARGUMENT..... 4

I. SLANDER, LIBEL, DEFAMATION AND SLANDER PER SE5

 A. *Defamation*5

II. BUSINESS DISPARAGEMENT7

III. TORTIOUS INTERFERENCE WITH CONTRACTS AND BUSINESS RELATIONSHIPS.....8

 A. *Tortious Interference With Contracts*8

 B. *Tortious Interference With Business Relationships*9

IV. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS11

V. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS12

VI. NEGLIGENCE.....14

VII. NEGLIGENCE PER SE15

VIII. CIVIL CONSPIRACY16

IX. ATTORNEY’S FEES17

X. EXEMPLARY DAMAGES18

 A. *Gross Negligence*.....18

 B. *Malice*19

CONCLUSION 19

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Bell Atlantic Corp. v. Twombly</i> , 127 S. Ct. 1955, 1965, 1974 (2007)	4, 5
<i>Philadelphia Newspapers, Inc. v. Hepps</i> , 475 U.S. 767, 776-77 (1986)	6
<i>Sisk v. Tex. Parks & Wildlife Dept.</i> , 644 F.2d 1056, 1059 (5 th Cir. 1981)	4, 5

STATE CASES

<i>ACS Investors, Inc. v. McLaughlin</i> , 943 S.W.2d 426, 430 (Tex. 1997)	9
<i>Agrium U.S., Inc. v. Clark</i> , 179 S.W.3d 765, 767 (Tex. App. – Amarillo 2005, pet. denied)	17
<i>Allied Capital Corp. v. Cravens</i> , 67 S.W.3d 486, 490-91 (Tex. App. – Corpus Christi 2002, no pet.)	10
<i>Ambrosio v. Carter’s Shooting Ctr., Inc.</i> , 20 S.W.3d 262, 265 (Tex. App. – Houston [14 th Dist.] 2000, pet. denied)	14
<i>Ash v. Hack Branch Distrib. Co.</i> , 54 S.W.3d 401, 413-14 (Tex. App. – Waco 2001, pet denied)	10
<i>Astoria Indus. v. SNF, Inc.</i> , 223 S.W.3d 616, 628 (Tex. App. – Fort Worth 2007, pet. denied)....	8
<i>Astoria Indus. v. SNF, Inc.</i> , 223 S.W.3d 616, 632-33 (Tex. App. – Fort Worth 2007, pet. denied)	10
<i>Basic Capital Mgmt. v. Dow Jones & Co.</i> , 96 S.W.3d 475, 480 (Tex. App. – Austin 2002, no pet.)	8
<i>Baty v. ProTech Ins. Agency</i> , 63 S.W.3d 841, 859-60 (Tex. App. – Houston [14 th Dist.] 2001, pet. denied)	10
<i>Boyles v. Kerr</i> , 855 S.W.2d 593, 594 (Tex. 1993)	12
<i>Bradford v. Vento</i> , 48 S.W.3d 749, 758 (Tex. 2001)	11
<i>Bradford v. Vento</i> , 48 S.W.3d 749, 757 (Tex. 2001)	10
<i>Butnaru v. Ford Motor Co.</i> , 84 S.W.3d 198, 207 (Tex. 2002)	9
<i>Chon Tri v. J.T.T.</i> , 162 S.W.3d 552, 556 (Tex. 2005)	15
<i>Clements v. Withers</i> , 437 S.W.2d 818, 822 (Tex. 1969)	18
<i>Coastal Transp. Co. v. Crown Cent. Pet. Corp.</i> , 136 S.W.3d 227, 231 (Tex. 2004)	17
<i>Coastal Transp.</i> , 136 S.W.3d at 231	17
<i>COC Servs. v. CompUSA, Inc.</i> , 150 S.W.3d 654, 679 (Tex. App. – Dallas 2004, pet. denied) ...	10
<i>Continental Coffee Prods. v. Cazarez</i> , 937 S.W.2d 444, 452 (Tex. 1996)	18
<i>Cotton v. Weatherford Bancshares, Inc.</i> , 187 S.W.3d 687, 701 (Tex. App. – Fort Worth 2006, pet. denied)	15
<i>D. Houston, Inc. v. Love</i> , 92 S.W.3d 450, 454 (Tex. 2002)	13
<i>Diamond Shamrock Ref. Co. v. Hall</i> , 168 S.W.3d 164, 169 (Tex. 2005)	17
<i>Doe v. Boys Clubs</i> , 907 S.W.2d 472, 477 (Tex. 1995)	13
<i>Eberle v. Adams</i> , 73 S.W.3d 322, 336 (Tex. App. – Houston [1 st Dist.] 2001, pet. denied)	16
<i>El Chico Corp. v. Poole</i> , 732 S.W.2d 306, 311 (Tex. 1987)	13
<i>Ernst & Young, L.L.P. v. Pacific Mut. Life Ins. Co.</i> , 51 S.W.3d 573, 583 (Tex. 2001)	15

<i>Excel Corp. v. Apodaca</i> , 81 S.W.3d 817, 820 (Tex. 2002).....	13
<i>Firestone Steel Prods. v. Barajas</i> , 927 S.W.2d 608, 613 (Tex. 1996)	13
<i>Firestone Steel Prods. v. Barajas</i> , 927 S.W.2d 608, 614 (Tex. 1996)	15
<i>Forbes, Inc. v. Granada Biosciences, Inc.</i> , 124 S.W.3d 167, 170 (Tex. 2003).....	8
<i>Gonzalez v. Gutierrez</i> , 694 S.W.2d 384, 390 (Tex. App. – San Antonio 1985, no writ)	10
<i>Granada Biosciences, Inc. v. Barrett</i> , 958 S.W.2d 215, 221 (Tex. App. – Amarillo 1997, pet. denied).....	8
<i>Great Nat’l Life Ins. Co. v. Chapa</i> , 377 S.W.2d 632, 635 (Tex. 1964).....	15
<i>Greater Houston Transp. v. Phillips</i> , 801 S.W.2d 523, 525 (Tex. 1990).....	13
<i>GTE Sw., Inc. v. Bruce</i> , 998 S.W.2d 605, 611 (Tex. 1999).....	12
<i>Haygood v. Chandler</i> , No. 12-02-00239-CV (Tex. App. – Tyler 2003, pet. denied) (memo op.; 10-31-03).....	12
<i>Hoffmann-La Roche, Inc. v. Zeltwanger</i> , 144 S.W.3d 438, 447 (Tex. 2004).....	11
<i>Holloway v. Skinner</i> , 898 S.W.2d 793, 795-96 (Tex. 1995).....	9
<i>Hong Kong Dev., Inc. v. Nguyen</i> , 229 S.W.3d 415, 448 (Tex. App. – Houston [1 st Dist.] 2007, n.p.h.).....	15
<i>Hurlbut v. Gulf Atl. Life Ins. Co.</i> , 749 S.W.2d 762, 766 (Tex. 1987).....	8
<i>Insurance Co. of N. Am. v. Morris</i> , 981 S.W.2d 667, 675 (Tex. 1998).....	15
<i>Juliette Fowler Homes, Inc. v. Welch Assoc.</i> , 793 S.W.2d 660, 664 (Tex. 1990).....	9
<i>Kroger Tex. L.P. v. Suberu</i> , 216 S.W.3d 788, 796 (Tex. 2006).....	11
<i>Lee Lewis Constr., Inc. v. Harrison</i> , 70 S.W.3d 778, 782 (Tex. 2001)	13
<i>Leyendecker & Assocs. v. Wechter</i> , 683 S.W.2d 369, 374 (Tex. 1984)	5
<i>Marshall v. Mehaffey</i> , 974 S.W.2d 942, 949 (Tex. App. – Beaumont 1998, pet. denied))	6
<i>Massey v. Armco Steel Co.</i> , 652 S.W.2d 932, 934 (Tex. 1983).....	15
<i>MKC Energy Invs. v. Sheldon</i> , 182 S.W.3d 372, 376 (Tex. App. – Beaumont 2006, no pet.).....	8
<i>Morrill v. Cisek</i> , 226 S.W.3d 545, 549 (Tex. App. – Houston [1 st Dist.] 2006, no pet.).....	5
<i>Moughon v. Wolf</i> , 576 S.W.2d 603, 604 (Tex. 1978).....	14
<i>Newsom v. Brod</i> , 89 S.W.3d 732, 735 (Tex. App. – Houston [1 st Dist.] 2002, no pet.).....	8
<i>Nixon v. Mr. Prop. Mgmt.</i> , 690 S.W.2d 546, 549 (Tex. 1985)	14
<i>Operation Rescue-Nat’l v. Planned Parenthood</i> , 975 S.W.2d 546, 553 (Tex. 1998)	15
<i>Paschal v. Great W. Drilling, Ltd.</i> , 215 S.W.3d 437, 450 (Tex. Ap. – Eastland 2006, pet. denied)	15
<i>Perry v. S.N.</i> , 973 S.W.2d 301, 305 (Tex.1998)	14
<i>Powell Indus. v. Allen</i> , 985 S.W.2d 455, 456 (Tex. 1998)	9
<i>Praesel v. Johnson</i> , 967 S.W.2d 391, 394 (Tex. 1998)	13
<i>Prudential Ins. Co. v. Financial Rev. Servs.</i> , 29 S.W.3d 74, 77 (Tex. 2000).....	9
<i>RAJ Partners v. Darco Constr. Corp.</i> , 217 S.W.3d 638, 649 n. 10 (Tex. App. – Amarillo 2006, no pet.)	10
<i>Randall’s Food Mkts., Inc. v. Johnson</i> , 891 S.W.2d 640, 646 (Tex. 1995).....	5
<i>Richardson-Eagle, Inc. v. William M. Mercer, Inc.</i> , 213 S.W.3d 469, 475 (Tex. App. – Houston [1 st Dist.] 2006, pet. denied)	10
<i>RTL AG Prods. v. Treatment Equip. Co.</i> , 195 S.W.3d 824, 833 (Tex. App. – Dallas 2006, no pet.).....	15
<i>Rudes v. Gottschalk</i> , 324 S.W.2d 201, 204 (Tex. 1959).....	14
<i>San Antonio Credit Un. v. O’Connor</i> , 115 S.W.3d 82, 90 (Tex. App. – San Antonio 2003, pet. denied).....	15

Southern Pac. Co. v. Castro, 493 S.W.2d 491, 497 (Tex. 1973)..... 14
Southwest Key Program, Inc. v. Gil-Perez, 81 S.W.3d 269, 273-74 (Tex. 2002)..... 13
Standard Fruit & Veg. Co. v. Johnson, 985 S.W.2d 62, 65 (Tex. 1998)..... 12
Stevens v. National Educ. Ctrs., 990 S.W.2d 374, 377
(Tex. App. – Houston [14th Dist.] 1999), *pet. denied*, 11 S.W.3d 185 (Tex. 2000) 18
Texas Beef Cattle Co. v. Green, 921 S.W.2d 203, 210 (Tex. 1996)..... 9
Texas Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc., 219 S.W.3d 563, 590
(Tex. App. – Austin 2007, *pet. filed* 7-10-07) 10
Texas Farm Bur. Mut. Ins. Cos. v. Sears, 84 S.W.3d 604, 610 (Tex. 2002) 11
Tiller v. McLure, 121 S.W.3d 709, 713 (Tex. 2003) 11
Trostle v. Trostle, 77 S.W.3d 908, 915 (Tex. App. – Amarillo 2002, *no pet.*)..... 16
Twyman v. Twyman, 855 S.W.2d 619, 621 (Tex. 1993)..... 12
Van Horn v. Chambers, 970 S.W.2d 542, 544 (Tex. 1998)..... 13
Victoria Bank & Trust Co. v. Brady, 811 S.W.2d 931, 939 (Tex. 1991) 9
Villa Senor v. Villa Senor, 911 S.W.2d 411, 418 (Tex. App. – San Antonio 1995, *no writ*) 6
Wal-Mart Stores v. Sturges, 52 S.W.3d 711, 726 (Tex. 2001)..... 10
Werner v. Colwell, 909 S.W.2d 866, 869 (Tex. 1995) 13
Western Invs. v. Urena, 162 S.W.3d 547, 550 (Tex. 2005)..... 13

STATE STATUTES

Tex. Civ. Prac. & Rem. Code § 41.001(11)(A) 17
Tex. Civ. Prac. & Rem. Code § 41.001(11)(B) 17
Tex. Civ. Prac. & Rem. Code § 41.001(7)(A) (2001) 18
Tex. Civ. Prac. & Rem. Code § 73.001 5, 6

FEDERAL RULES

Fed. R. Civl P. 12(b)(6) 1
Fed. R. Civ. P. 12(e) 4

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

SUSAN POLGAR	§
	§
VS.	§
	§
UNITED STATES OF AMERICA	§
CHESS FEDERATION, INC.,	§
and	§
BILL GOICHBERG, JIM BERRY,	§
RANDY BAUER, and	§
RANDALL HOUGH, all Individually and	§
in their Representative Capacities as	§
Members of the Executive Board of the	§
United States of America Chess Federation;	§
BILL HALL, Individually and in his	§
Representative Capacity as Executive	§
Director of the United States of America	§
Chess Federation; BRIAN MOTTERSHEAD;	§
HAL BOGNER; CHESS MAGNET, L.L.C.;	§
CONTINENTAL CHESS INCORPORATED;	§
JEROME HANKEN; BRIAN LAFERTY;	§
SAM SLOAN; KARL S. KRONENBERGER;	§
and KRONENBERGER BURGOYNE, LLP	§

C.A. NO. 5-08CV0169-C

DEFENDANT UNITED STATES OF AMERICA CHESS FEDERATION, INC.’S
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR PLAINTIFF’S
FAILURE TO STATE A CLAIM UNDER FED. R. CIV. P. 12(b)(6),
OR IN THE ALTERNATIVE, MOTION FOR A MORE DEFINITE STATEMENT
PURSUANT TO FED. R. CIV. P. 12(e)

Defendant United States of America Chess Federation, Inc. (“USCF” and/or “Defendant”) has filed its Motion to Dismiss for Plaintiff’s Failure to State a Claim Under Fed. R. Civ. P. 12(b)(6), or in the Alternative, Motion for a More Definite Statement Pursuant to Fed. R. Civ. P. 12(e).

INTRODUCTION

1. Plaintiff is Susan Polgar; Defendants are USCF, and Bill Goichberg, Jim Berry, Randy Bauer, and Randall Hough, all Individually and in their Representative Capacities as Members of the Executive Board of the USCF; Bill Hall, individually and in his Representative Capacity as Executive Director of the USCF; Brian Mottershead; Hal Bogner; Chess Magnet, L.L.C.; Continental Chess Incorporated; Jerome Hanken; Brian Lafferty; Sam Sloan; Karl S. Kronenberger; and Kronenberger Burgoyne, LLP.

2. On August 7, 2008, Plaintiff sued Defendants for slander, libel, defamation and slander per se; business disparagement; tortious interference with contracts and business relationships; intentional infliction of emotional distress; negligent infliction of emotional distress; negligence and negligence per se; civil conspiracy; gross negligence; and breach of fiduciary duty/legal malpractice.

3. As this Court may or may not be aware, one of the Defendants, Sam Sloan, filed a lawsuit styled *Sam Sloan v. Hoainhan "Paul" Truong, et al.*, Cause No. 1:07-cv-08537-DC, in the United States District Court, Southern District of New York. Sam Sloan sued many of the same parties that had been sued by Plaintiff in this lawsuit. Sam Sloan also sued Plaintiff in the New York lawsuit.

4. In the Sam Sloan lawsuit, Sam Sloan alleged that Plaintiff, along with her husband, were engaging in vicious personal attacks against Sam Sloan. Mr. Sloan alleged that Plaintiff and her husband began making thousands of internet postings that were defaming Sam Sloan. Sam Sloan claimed that Plaintiff and/or her husband were impersonating people and were making it appear that Sam Sloan had done all sorts of bad acts.¹ Sam Sloan also alleged that as a

¹ Sam Sloan repeated many of these claims in his recently filed pleading in this case.

result of the personal attacks, he was not re-elected as an executive board member for the USCF. Meanwhile, Plaintiff and her husband were elected as board members. When Sam Sloan sued the USCF and many of its board members and alleged that at least two of its board members (Plaintiff and her husband) had done such alleged bad acts, it put the USCF in a delicate situation as it was faced with the situation where a former board member was suing the USCF and its current board members.

5. Ultimately, the USCF obtained counsel to represent it and several of the Defendants. Moreover, the USCF engaged a separate counsel to represent Plaintiff and her husband. Although the New York lawsuit was recently dismissed, Sam Sloan has stated his intention to appeal the decision and/or pursue other litigation. Consequently, the USCF and many other Defendants appear to be caught between a much larger conflict between Plaintiff and her husband and Sam Sloan.

6. In defending the Sam Sloan litigation, the USCF also formed a separate litigation subcommittee as it was unsure whether or not Susan Polgar and/or Paul Truong did the alleged acts. In investigating the allegations in Sam Sloan's lawsuit, Plaintiff's husband was specifically asked to deny having any involvement with the fake Sam Sloan postings, and Paul Truong refused to so specifically deny the accusations in writing. The USCF also experienced other new issues in having a former board member sue the USCF and its current board members, and the USCF is still having to defend many specific allegations against two current board members, Plaintiff and her husband while now being faced with claims now being made by Plaintiff.

7. After the litigation subcommittee was formed to address such issues, attorney-client and confidential emails sent to some of the litigation subcommittee members appeared in Plaintiff's possession. Plaintiff refused to state how she specifically obtained the emails. Susan

Polgar was not a recipient of the emails and she refused to cooperate in an investigation trying to uncover how and why she received stolen emails. If they were truly innocent, one would have thought that Susan Polgar and Paul Truong would have cooperated and/or better cooperated in the investigation of the claims and in defense of the claims being made by Sam Sloan. One would have also thought that Susan Polgar and Paul Truong would have cooperated with regard to investigation pertaining to the stolen emails. However, instead of cooperating with the continuing investigations, Susan Polgar eventually filed this new lawsuit against the various defendants. Again, the filing of this lawsuit has put many of the Defendants in a delicate situation of being faced with conflicting claims.

8. Notwithstanding all of the above, Plaintiff has not specifically informed this particular Defendant as to why this particular Defendant is being sued by Plaintiff. Because Plaintiff's complaint does not state a claim upon which relief can be granted, the Court should dismiss Plaintiff's suit in its entirety, or in the alternative, order Plaintiff to amend her complaint with a more definite statement of the suit.

ARGUMENT

9. The Court has authority to dismiss a suit for failure to state a claim upon which relief can be granted if the complaint does not state factual allegations showing that the right to relief is plausible and above mere speculation. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1555, 1565, 174 (2007).

10. In the alternative, a motion for a more definite statement is proper when a complaint is so vague or ambiguous that the defendant cannot reasonably prepare a response. Fed. R. Civ. P. 12(e); *Sisk v. Tex. Parks & Wildlife Dept.*, 644 F.2d 1056, 1059 (5th Cir. 1981).

Subject to the Court's ruling on Defendant's motion to dismiss, the Court should, in the alternative, order that Plaintiff amend her complaint with a more definite statement of the suit.

11. In the complaint, Plaintiff alleged slander, libel, defamation and slander per se; business disparagement; tortious interference with contracts and business relationships; intentional infliction of emotional distress; negligent infliction of emotional distress; negligence and negligence per se; civil conspiracy; gross negligence; and breach of fiduciary duty/legal malpractice. However, none of the causes of action asserted in Plaintiff's complaint are supported by facts which would demonstrate that Plaintiff is entitled to relief, on any of her claims against this particular Defendant, that is plausible and above mere speculation. *See Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965, 1974 (2007). Alternatively, Plaintiff's complaint is so vague or ambiguous that this Defendant cannot reasonably prepare a response. Fed. R. Civ. P. 12(e); *Sisk v. Tex. Parks & Wildlife Dept.*, 644 F.2d 1056, 1059 (5th Cir. 1981).

I. SLANDER, LIBEL, DEFAMATION AND SLANDER PER SE

A. Defamation

12. Under Texas law, a plaintiff asserting a cause of action in defamation must prove:
- a. The defendant published a statement of fact (the action is in libel if published in writing or other graphic form, *see* Tex. Civ. Prac. & Rem. Code § 73.001; the action is in slander if the statement is published orally, *see Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995); the action is slander per se if the statement injures occupation, *see Morrill v. Cisek*, 226 S.W.3d 545, 549 (Tex. App. – Houston [1st Dist.] 2006, no pet.); the action imputes crime, *see Leyendecker & Assocs. v. Wechter*, 683 S.W.2d 369, 374 (Tex. 1984); imputes a loathsome disease, *see Villa Senior v. Villa Senior*, 911

S.W.2d 411, 418 (Tex. App. – San Antonio 1995, no writ); imputes sexual misconduct, *see Marshall v. Mehaffey*, 974 S.W.2d 942, 949 (Tex. App. – Beaumont 1998, pet. denied));

- b. The statement referred to the plaintiff;
- c. The statement was defamatory;
- d. The statement was false;
- e. With regard to the truth of the statement, the defendant was
 - i. acting with actual malice,
 - ii. negligent, or
 - iii. libel without regard to fault; and
- f. The plaintiff suffered pecuniary injury.

See Tex. Civ. Prac. & Rem. Code § 73.001; Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776-77 (1986).

13. In support of the six required elements to maintain an action in defamation, and therefore slander, libel and slander per se, Plaintiff’s factual allegations consist of the conclusory statements that “Defendants” have “conspired to unlawfully use the internet and international media outlets to slander, defame and disparage Polgar personally,” and “Defendants” have “published or caused to be published on the internet and in national and international media outlets, including the Lubbock Avalanche Journal and the New York Times, slanderous, defamatory and untrue statements about Polgar.” Neither of these conclusory statements offer any specifics as to how this particular Defendant published any alleged statements, how this Defendant referred to the Plaintiff, how such alleged statements were defamatory, how they were

false, or how the Plaintiff has suffered any pecuniary injury as a result.² Furthermore, Plaintiff's allegations failed to specify which defamatory statements, if any, were made by this Defendant. Additionally, even if Plaintiff's conclusory statements were accepted as true, her complaint fails to recite any facts demonstrating that this Defendant was acting with malice, which would certainly be required of a Plaintiff who describes herself as "one of the most successful and *widely known* chess players in the world," having been featured in a worldwide documentary and currently in negotiations to be featured in other films and make various endorsements. Finally, Plaintiff has also wholly failed to plead whether this Defendant was media or non-media and whether the alleged statements were concerning a public or private matter. Plaintiff has failed to state a claim for slander, libel, defamation and slander per se against this Defendant, and therefore the claim against this Defendant should be dismissed, or in the alternative, Plaintiff should be ordered to plead with a more definite statement of her claim for slander, libel, defamation and slander per se against this Defendant.

II. BUSINESS DISPARAGEMENT

14. Under Texas law, a plaintiff asserting a cause of action for business disparagement must prove the following:

- a. The defendant published disparaging words about the plaintiff's economic interests;
- b. The words were false;
- c. The defendant published the words with malice;
- d. The defendant published the words without privilege; and

² For example, Plaintiff has provided no specific allegations that any Defendant said or wrote any thing at any time. In other words, who said what when? Because Plaintiff has chosen to sue so many Defendants, Plaintiff needed to specifically state whatever Defendant did or said, when such alleged acts were done and how Plaintiff

e. The publication caused special damages.

See Forbes, Inc. v. Granada Biosciences, Inc., 124 S.W.3d 167, 170 (Tex. 2003); *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex. 1987); *Astoria Indus. v. SNF, Inc.*, 223 S.W.3d 616, 628 (Tex. App. – Fort Worth 2007, pet. denied); *MKC Energy Invs. v. Sheldon*, 182 S.W.3d 372, 376 (Tex. App. – Beaumont 2006, no pet.); *Basic Capital Mgmt. v. Dow Jones & Co.*, 96 S.W.3d 475, 480 (Tex. App. – Austin 2002, no pet.); *Newsom v. Brod*, 89 S.W.3d 732, 735 (Tex. App. – Houston [1st Dist.] 2002, no pet.); *Granada Biosciences, Inc. v. Barrett*, 958 S.W.2d 215, 221 (Tex. App. – Amarillo 1997, pet. denied).

15. Plaintiff's complaint fails to identify with specificity what disparaging words were allegedly published by any Defendants, much less identify which disparaging statements were actually published by this Defendant. Plaintiff's complaint further fails to identify with specificity the economic interests about which any alleged disparaging statements were made, nor does Plaintiff's complaint allege that any disparaging statements were made without privilege. As previously mentioned, Plaintiff fails to factually demonstrate how this Defendant was acting with malice. Finally, Plaintiff's complaint totally fails to factually demonstrate how any alleged disparaging statements have caused Plaintiff special damages. Plaintiff has failed to state a claim for business disparagement against this Defendant, and therefore the claim against this Defendant should be dismissed, or in the alternative, Plaintiff should be ordered to plead with a more definite statement of her claim for business disparagement against this Defendant.

III. TORTIOUS INTERFERENCE WITH CONTRACTS AND BUSINESS RELATIONSHIPS

A. Tortious Interference With Contracts

was damaged by said alleged acts.

16. Under Texas law, a plaintiff asserting a cause of action for business disparagement must prove the following:

- a. The plaintiff had a valid contract;
- b. The defendant willfully and intentionally interfered with the contract;
- c. The interference proximately caused the plaintiff's injury; and
- d. The plaintiff incurred actual damage or loss.

See Butnaru v. Ford Motor Co., 84 S.W.3d 198, 207 (Tex. 2002); *Prudential Ins. Co. v. Financial Rev. Servs.*, 29 S.W.3d 74, 77 (Tex. 2000); *Powell Indus. v. Allen*, 985 S.W.2d 455, 456 (Tex. 1998); *ACS Investors, Inc. v. McLaughlin*, 943 S.W.2d 426, 430 (Tex. 1997); *Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 210 (Tex. 1996); *Holloway v. Skinner*, 898 S.W.2d 793, 795-96 (Tex. 1995); *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 939 (Tex. 1991); *Juliette Fowler Homes, Inc. v. Welch Assoc.*, 793 S.W.2d 660, 664 (Tex. 1990).

17. Plaintiff's complaint fails to identify what contract with which this Defendant allegedly tortiously interfered, nor has her complaint factually demonstrated that any alleged interference was willful and intentional. Even assuming factual support for the first two elements, Plaintiff's complaint has failed to illustrate how any alleged tortious interference with contracts has proximately caused injury to her. Plaintiff has failed to state a claim for tortious interference with contracts against this Defendant, and therefore the claim against this Defendant should be dismissed, or in the alternative, Plaintiff should be ordered to plead with a more definite statement of her claim for tortious interference with contracts against this Defendant.

B. Tortious Interference With Business Relationships

18. There is no cause of action under Texas law for "tortious interference with business relationships." Out of an abundance of caution, this Defendant will assume that

Plaintiff intended to plead tortious interference with prospective relations, in which case, she must prove:

- a. There was a reasonable probability that the plaintiff would have entered into a business relationship with a third person;
- b. The defendant intentionally interfered with the relationship;
- c. The defendant's conduct was independently tortious or unlawful;
- d. The interference proximately caused the plaintiff's injury; and
- e. The plaintiff suffered actual damage or loss.

See Wal-Mart Stores v. Sturges, 52 S.W.3d 711, 726 (Tex. 2001); *Bradford v. Vento*, 48 S.W.3d 749, 757 (Tex. 2001); *Astoria Indus. v. SNF, Inc.*, 223 S.W.3d 616, 632-33 (Tex. App. – Fort Worth 2007, pet. denied); *Texas Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563, 590 (Tex. App. – Austin 2007, pet. filed 7-10-07); *RAJ Partners v. Darco Constr. Corp.*, 217 S.W.3d 638, 649 n. 10 (Tex. App. – Amarillo 2006, no pet.); *Richardson-Eagle, Inc. v. William M. Mercer, Inc.*, 213 S.W.3d 469, 475 (Tex. App. – Houston [1st Dist.] 2006, pet. denied); *COC Servs. v. CompUSA, Inc.*, 150 S.W.3d 654, 679 (Tex. App. – Dallas 2004, pet. denied); *Allied Capital Corp. v. Cravens*, 67 S.W.3d 486, 490-91 (Tex. App. – Corpus Christi 2002, no pet.); *Baty v. ProTech Ins. Agency*, 63 S.W.3d 841, 859-60 (Tex. App. – Houston [14th Dist.] 2001, pet. denied); *Ash v. Hack Branch Distrib. Co.*, 54 S.W.3d 401, 413-14 (Tex. App. – Waco 2001, pet. denied); *Gonzalez v. Gutierrez*, 694 S.W.2d 384, 390 (Tex. App. – San Antonio 1985, no writ).

19. Plaintiff's complaint fails to identify any entity or individual with which Plaintiff was prepared to enter a contract, nor does Plaintiff's complaint identify any entity or individual with which Plaintiff had an ongoing business relationship. Plaintiff's complaint further fails to

allege that this Defendant knew of Plaintiff's prospective contractual relationship(s) nor Plaintiff's ongoing business relationship(s). Plaintiff's complaint additionally fails to allege that this Defendant's conduct was independently tortious regardless of the effect any alleged actions had on Plaintiff's prospective contracts or business relationships with unidentified entities and/or individuals. Finally, Plaintiff's complaint fails to demonstrate how this Defendant's alleged interference proximately caused injury to Plaintiff. Plaintiff has failed to state a claim for tortious interference with business relationships against this Defendant, and therefore the claim against this Defendant should be dismissed, or in the alternative, Plaintiff should be ordered to plead with a more definite statement of her claim for tortious interference with business relationships against this Defendant.

IV. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

20. Under Texas law, a plaintiff asserting a cause of action for intentional infliction of emotional distress must prove the following:

- a. The plaintiff is a person;
 - b. The defendant acted intentionally or recklessly;
 - c. The emotional distress suffered by the plaintiff was severe;
 - d. The defendant's conduct was extreme and outrageous;
 - e. The defendant's conduct proximately caused the plaintiff's emotional distress;
- and
- f. No alternative cause of action would provide a remedy for the severe emotional distress caused by the defendant's conduct.

See Kroger Tex. L.P. v. Suberu, 216 S.W.3d 788, 796 (Tex. 2006); *Hoffmann-La Roche, Inc. v. Zeltwanger*, 144 S.W.3d 438, 447 (Tex. 2004); *Tiller v. McLure*, 121 S.W.3d 709, 713 (Tex.

2003); *Texas Farm Bur. Mut. Ins. Cos. v. Sears*, 84 S.W.3d 604, 610 (Tex. 2002); *Bradford v. Vento*, 48 S.W.3d 749, 758 (Tex. 2001); *GTE Sw., Inc. v. Bruce*, 998 S.W.2d 605, 611 (Tex. 1999); *Standard Fruit & Veg. Co. v. Johnson*, 985 S.W.2d 62, 65 (Tex. 1998); *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993); *Haygood v. Chandler*, No. 12-02-00239-CV (Tex. App. – Tyler 2003, pet. denied) (memo op.; 10-31-03).

21. Plaintiff's complaint fails to state that she is asserting this cause of action against this Defendant in Plaintiff's individual capacity. Plaintiff's complaint further fails to factually demonstrate that this Defendant's alleged conduct was intentional or reckless and/or that the distress suffered by Plaintiff was severe. Plaintiff's complaint additionally fails to demonstrate or even allege that this Defendant's conduct was extreme and outrageous. Plaintiff's complaint also fails to demonstrate how any alleged conduct by this Defendant proximately caused severe emotional distress to Plaintiff. Finally, Plaintiff's complaint fails to demonstrate or even state that Plaintiff's alleged severe emotional distress cannot be remedied by any other cause of action. Finally, Plaintiff is necessarily precluded from asserting the final element of a cause of action in intentional infliction of emotional distress being that she has also asserted seven other causes of action. Plaintiff has failed to state a claim for intentional infliction of emotional distress against this Defendant, and therefore the claim against this Defendant should be dismissed, or in the alternative, Plaintiff should be ordered to plead with a more definite statement of her claim for intentional infliction of emotional distress against this Defendant.

V. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

22. There is no cause of action under Texas law as expressly stated by the Texas Supreme Court in *Boyles v. Kerr* for negligent infliction of emotion distress. *See Boyles v. Kerr*,

855 S.W.2d 593, 594 (Tex. 1993). Plaintiff's non-cognizable claim against this Defendant for negligent infliction of emotional distress should be dismissed.

VI. NEGLIGENCE

23. Under Texas law, a plaintiff asserting a cause of action for negligence must prove the following:

- a. The defendant owed a legal duty to the plaintiff;
- b. The defendant breached the duty; and
- c. The breach proximately caused the plaintiff's injury.

See Western Invs. v. Urena, 162 S.W.3d 547, 550 (Tex. 2005); *D. Houston, Inc. v. Love*, 92 S.W.3d 450, 454 (Tex. 2002); *Excel Corp. v. Apodaca*, 81 S.W.3d 817, 820 (Tex. 2002); *Southwest Key Program, Inc. v. Gil-Perez*, 81 S.W.3d 269, 273-74 (Tex. 2002); *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 782 (Tex. 2001); *Van Horn v. Chambers*, 970 S.W.2d 542, 544 (Tex. 1998); *Praesel v. Johnson*, 967 S.W.2d 391, 394 (Tex. 1998); *Firestone Steel Prods. v. Barajas*, 927 S.W.2d 608, 613 (Tex. 1996); *Werner v. Colwell*, 909 S.W.2d 866, 869 (Tex. 1995); *Doe v. Boys Clubs*, 907 S.W.2d 472, 477 (Tex. 1995); *Greater Houston Transp. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990); *El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987).

24. Plaintiff's complaint is wholly void of any facts tending to establish that this Defendant owed her a duty of any kind. In fact, as a member of the Executive Board, Plaintiff Susan Polgar owed USCF various fiduciary duties, including a duty of loyalty which she breached by participating in a campaign of defamation and disparagement of various other members of the Board via the worldwide web. Even assuming this Defendant owed Plaintiff a legal duty, Plaintiff's complaint fails to offer any facts demonstrating that this Defendant breached such a duty. Finally, Plaintiff's complaint fails to factually explain how any such alleged breach proximately caused injury to Plaintiff. Plaintiff has failed to state a claim for

negligence against this Defendant, and therefore the claim against this Defendant should be dismissed, or in the alternative, Plaintiff should be ordered to plead with a more definite statement of her claim for negligence against this Defendant.

VII. NEGLIGENCE PER SE

25. Under Texas law, a plaintiff asserting a cause of action for negligence per se must prove the following:

- a. The statute is one for which tort liability may be imposed when violated;
- b. The defendant violated the statute without excuse; and
- c. The defendant's act or omission proximately caused the plaintiff's injury.

See Perry v. S.N., 973 S.W.2d 301, 305 (Tex.1998); *Nixon v. Mr. Prop. Mgmt.*, 690 S.W.2d 546, 549 (Tex. 1985); *Moughon v. Wolf*, 576 S.W.2d 603, 604 (Tex. 1978); *Southern Pac. Co. v. Castro*, 493 S.W.2d 491, 497 (Tex. 1973); *Rudes v. Gottschalk*, 324 S.W.2d 201, 204 (Tex. 1959); *Ambrosio v. Carter's Shooting Ctr., Inc.*, 20 S.W.3d 262, 265 (Tex. App. – Houston [14th Dist.] 2000, pet. denied).

26. Plaintiff's complaint fails to identify any statute, ordinance or administrative regulation which this Defendant has allegedly violated. Plaintiff's complaint further fails to factually allege that any such violation, if it occurred, was without legal excuse, nor how any such violation has proximately caused injury to her. Plaintiff has failed to state a claim for negligence per se against this Defendant, and therefore the claim against this Defendant should be dismissed, or in the alternative, Plaintiff should be ordered to plead with a more definite statement of her claim for negligence per se against this Defendant.

VIII. CIVIL CONSPIRACY

27. Under Texas law, a plaintiff asserting a cause of action for civil conspiracy must prove the following:

- a. The defendant was a member of a combination of two or more persons;
- b. The object of the combination was to accomplish
 - i. an unlawful purpose, or
 - ii. a lawful purpose by unlawful means;
- c. The members had a meeting of the minds on the object or course of action;
- d. One of the members committed an unlawful, overt act to further the object or course of action; and
- e. The Plaintiff suffered injury as a proximate result of the wrongful act.

See Chon Tri v. J.T.T., 162 S.W.3d 552, 556 (Tex. 2005); *Ernst & Young, L.L.P. v. Pacific Mut. Life Ins. Co.*, 51 S.W.3d 573, 583 (Tex. 2001); *Insurance Co. of N. Am. v. Morris*, 981 S.W.2d 667, 675 (Tex. 1998); *Operation Rescue-Nat'l v. Planned Parenthood*, 975 S.W.2d 546, 553 (Tex. 1998); *Firestone Steel Prods. v. Barajas*, 927 S.W.2d 608, 614 (Tex. 1996); *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983); *Great Nat'l Life Ins. Co. v. Chapa*, 377 S.W.2d 632, 635 (Tex. 1964); *Hong Kong Dev., Inc. v. Nguyen*, 229 S.W.3d 415, 448 (Tex. App. – Houston [1st Dist.] 2007, n.p.h.); *Paschal v. Great W. Drilling, Ltd.*, 215 S.W.3d 437, 450 (Tex. Ap. – Eastland 2006, pet. denied); *RTLAC AG Prods. v. Treatment Equip. Co.*, 195 S.W.3d 824, 833 (Tex. App. – Dallas 2006, no pet.); *Cotton v. Weatherford Bancshares, Inc.*, 187 S.W.3d 687, 701 (Tex. App. – Fort Worth 2006, pet. denied); *San Antonio Credit Un. v. O'Connor*, 115 S.W.3d 82, 90 (Tex. App. – San Antonio 2003, pet. denied); *Trostle v. Trostle*,

77 S.W.3d 908, 915 (Tex. App. – Amarillo 2002, no pet.); *Eberle v. Adams*, 73 S.W.3d 322, 336 (Tex. App. – Houston [1st Dist.] 2001, pet. denied).

28. Plaintiff's complaint fails to present any facts demonstrating how this Defendant was in combination with any other Defendant, entity or individual. Plaintiff's complaint further fails to allege any facts describing the nature of this Defendant's alleged agreement.³ Plaintiff's complaint also fails to describe or identify the unlawful purpose of any alleged conspiracy or the unlawful means employed by the alleged conspirators in pursuit of a lawful purpose. Plaintiff's complaint additionally fails to allege that this Defendant knew that any alleged agreed acts would result in harm to the Plaintiff. Plaintiff's complaint wholly fails to describe how this Defendant accomplished the object of an alleged overall agreement. Finally, Plaintiff's complaint fails to describe how the object of this Defendant's alleged agreement proximately caused injury to Plaintiff. Plaintiff has failed to state a claim for conspiracy against this Defendant, and therefore the claim against this Defendant should be dismissed, or in the alternative, Plaintiff should be ordered to plead with a more definite statement of her claim for conspiracy against this Defendant.

IX. ATTORNEY'S FEES

29. Plaintiff's complaint wholly fails to cite any statutory or contractual basis upon which she would be entitled to recover attorney's fees, and therefore Plaintiff's claim for the same should be dismissed, or in the alternative, Plaintiff should be ordered to plead with a more definite statement of her claim for attorney's fees against this Defendant.

³ Plus, Defendant Sam Sloan had sued many of the other Defendants in the New York proceeding. Surely Plaintiff is not asserting that the other Defendants were in some sort of conspiracy with Sam Sloan? Regardless, because Plaintiff has not been specific, dismissal is proper.

X. EXEMPLARY DAMAGES

A. *Gross Negligence*

30. To prove gross negligence under Texas law, the Plaintiff must show:

- a. The act or omission, when viewed objectively from the defendant's standpoint at the time it occurred, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others. Tex. Civ. Prac. & Rem. Code § 41.001(11)(A); *Coastal Transp. Co. v. Crown Cent. Pet. Corp.*, 136 S.W.3d 227, 231 (Tex. 2004).
- b. The defendant had actual, subjective awareness of the risk but proceeded anyway with a conscious indifference to the rights, safety, or welfare of others. Tex. Civ. Prac. & Rem. Code § 41.001(11)(B); *Coastal Transp.*, 136 S.W.3d at 231; *Agrium U.S., Inc. v. Clark*, 179 S.W.3d 765, 767 (Tex. App. – Amarillo 2005, pet. denied); *Diamond Shamrock Ref. Co. v. Hall*, 168 S.W.3d 164, 169 (Tex. 2005).

31. Section XII of Plaintiff's complaint alleges that the "Defendants" were grossly negligent for which Plaintiff is entitled to exemplary damages. However, Plaintiff's complaint fails to specify how this Defendant, specifically, was grossly negligent. Aside from another self-serving, conclusory statement, Plaintiff's complaint offers no specifics as to what act or omission, when viewed objectively from this Defendant's standpoint at the time it occurred, involved an extreme degree of risk considering the probability and magnitude of the potential harm to others. Plaintiff's complaint further fails to allege that this Defendant had a subjective awareness of the risk, but proceeded anyway with a conscious indifference to the rights, safety or welfare of others. Finally, even assuming there was a risk of which this Defendant was

B. Malice

32. To establish specific-intent malice, the Plaintiff must prove the Defendants acted with a specific intent to cause substantial injury to the Plaintiff. Tex. Civ. Prac. & Rem. Code § 41.001(7)(A) (2001). Specific-intent malice is characterized by ill will, spite, evil motive, or a purpose to injure. See *Continental Coffee Prods. v. Cazarez*, 937 S.W.2d 444, 452 (Tex. 1996); *Clements v. Withers*, 437 S.W.2d 818, 822 (Tex. 1969); *Stevens v. National Educ. Ctrs.*, 990 S.W.2d 374, 377 (Tex. App. – Houston [14th Dist.] 1999), *pet. denied*, 11 S.W.3d 185 (Tex. 2000).

33. Section XV of Plaintiff’s complaint alleges that the “Defendants” have acted with malice. However, Plaintiff’s complaint fails to specify how this Defendant, specifically, has acted with malice. Aside from yet another self-serving, conclusory statement, Plaintiff’s complaint is wholly devoid of any specific allegations demonstrating that this Defendant committed any acts with the *specific intent* to cause *substantial injury* to Plaintiff. Plaintiff has failed to state a claim for exemplary damages against this Defendant, and therefore the claim against this Defendant should be dismissed, or in the alternative, Plaintiff should be ordered to plead with a more definite statement of her claim for exemplary damages against this Defendant.

CONCLUSION

34. Plaintiff failed to provide factual allegations showing that the right to relief against this particular Defendant is plausible and not mere speculation. Thus, because Plaintiff’s complaint fails to state a claim upon which relief can be granted, the Court should dismiss the

suit in its entirety, or in the alternative, the Court should order Plaintiff to amend her complaint with a more definite statement of the suit.

Respectfully submitted,

By: _____ /S/
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served by first class mail, postage prepaid, facsimile or electronic mail by the Clerk of the Court via the ECM system, as listed below on the 26th day of September, 2008.

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