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IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MULTNOMAH

ANDY NGO,

Plaintiff,

v.

ROSE CITY ANTIFA, an unincorporated  
association; BENJAMIN BOLEN, an  
individual; JOHN HACKER, an individual;  
CORBYN (KATHERINE) BELYEA, an  
individual; JOSEPH CHRISTIAN EVANS,  
an individual; MADISON LEE ALLEN, an  
individual; DOES 1-50,

Defendants.

Case No.: 20CV19618

**PLAINTIFF NGO’S MEMORANDUM  
OF LAW IN SUPPORT OF PLAINTIFF’S  
CROSS-MOTION TO STRIKE**

**Preliminary Statement**

In an attempt to avoid liability for battery, assault, and intentional infliction of emotional distress, Defendant Benjamin Bolen (“Bolen”) hides behind Oregon’s Anti-SLAPP statute, which in pertinent part allows a defendant to strike claims arising out of “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.” ORS 31.150(d), Def.’s Mot. p. 15, 1.8-10.

Aware that Plaintiff Andy Ngo’s allegations are sufficiently pled and do not give rise to an anti-SLAPP defense, Bolen has submitted declarations in support of his anti-SLAPP motion that invent facts and allege Ngo included Bolen in this action because of “his political views and his attendance at an antifascist political rally.” Def.’s Mot. ¶ 16. Bolen improperly asks this Court to consider testimony offered in his own Declaration and the Declaration of left-wing author and Antifa sympathizer, Shane Burley; both of which raise novel theories entirely unrelated and

1 irrelevant to this action, and are saturated with unfounded accusations and subjective opinions  
2 speculating as to Ngo’s motive for filing suit against Bolen – which is also irrelevant to whether his  
3 claims should be struck.

4 Accordingly, Ngo moves this Court to strike improper testimony from the Declarations for  
5 three reasons: **First**, the Declarations offer testimony that is insufficient evidence from which a  
6 reasonable trier of fact could find that the Defendant has met its initial burden to establish a *prima*  
7 *facie* case; **Second**, the Declarations include testimony based on personal opinion, not personal  
8 knowledge; and **third**, the Declarations included purported “facts” that would be inadmissible in  
9 evidence. *See* ORCP 47; *see also* ORE 403.

### 10 Legal Standard

11 In order to prevail on a Motion to Strike, Bolen bears the burden to first, make a *prima facie*  
12 showing that plaintiff’s claims forming the basis of defendant’s Motion to Strike arise out of  
13 conduct described in 31.150(2). To present “substantial evidence to support a *prima facie* case [a  
14 defendant] must submit sufficient evidence from which a reasonable trier of fact could find that the  
15 party met its burden of production.” *Handy v. Lane County*, 360 Or 605, 622-23, (2016). In ruling  
16 on a defendant’s Motion to Strike, the court must “consider pleadings and supporting and opposing  
17 affidavits stating the facts upon which the liability or defense is based.” ORS 31.150(4). Whereas a  
18 defendant relies upon affidavits as his evidence to make his *prima facie* showing for a Motion to  
19 Strike, the affidavits’ evidentiary requirements mirror those of affidavits submitted pursuant to  
20 ORCP 47. *Oregon Educ. Ass’n v. Parks*, 253 Or. App., 558, 567 (2012). As is the circumstance  
21 under ORCP 47, affidavits for the purpose of ORS 31.150(4), as is the case here, “shall be made on  
22 personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show  
23 affirmatively that the affiant or declarant is competent to testify as to the matter stated therein.” *Id.*;  
24 *see also* ORCP 47. In other words, the court is not required to identify in its ruling “admissible  
25 evidence”, but rather, the court must evaluate affidavits setting forth such facts as would be

1 admissible in evidence. *Id.*

2 **Argument**

3 **I. LAY WITNESS TESTIMONY BASED ON SPECULATION OR CONJECTURE**  
4 **MUST BE STRUCK FROM CONSIDERATION.**

5 **A. Bolen’s Declarations Offer Testimony in Violation of ORS 40.405 (Rule 701)**  
6 **and ORS 40.315 (Rule 602).**

7 Rule 701 provides that lay witness testimony “is limited to those opinions or inferences  
8 which are (1) rationally based on the perception of the witness; and (2) helpful to a clear  
9 understanding of testimony of the witness or the determination of a fact in issue. ORS 40.405.  
10 Likewise, Rule 602 provides in pertinent part, that “a witness may not testify to a matter unless  
11 evidence is introduced sufficient to support a finding that the witness has personal knowledge of the  
12 matter.” ORS 40.315. “A witness’s opinion must be based on personal knowledge and not  
13 guesswork.” *State v. Davis*, 351 Or. 35, 58 (2011) (citing Laird C. Kirkpatrick, Oregon Evidence  
14 § 701.03(3), Art VII–572 (5th ed. 2007) (so stating)). “Oregon’s lay opinion rule precludes  
15 opinions based on conjecture or speculation, because opinions based on speculation or conjecture  
16 generally are not based on the perception of the witness or on the witness’s personal knowledge.”  
*State v. Davis*, 351 Or. 35, 58 (2011).

17 **B. Bolen’s Declarations are Conjecture, not Personal Observation.**

18 The testimony described below is not based on personal observation; rather, the Declarations  
19 submitted in support of Bolen’s Motion to Strike are based upon unfounded, subjective opinions as  
20 to Ngo’s motive in bringing this action. The testimony differs in stark contrast to the allegations in  
21 Ngo’s Complaint and further supported by the Declaration of Andy Ngo filed herewith. In his  
22 Motion, Bolen alleges “Plaintiff included [Bolen] in this action because of his political views and  
23 his attendance at an antifascist political rally”, Def.’s Mot. ¶ 16. Yet Mr. Burley testifies that he  
24 does not know why Ngo filed this lawsuit, Burley Decl. ¶ 17 (stating “Plaintiff may be doing it for  
25 the fame, he may be doing it for the money, or he may be doing it for ideological reasons.” *Id.*

1 Indeed, such testimony is not helpful as to the determination of a fact in issue which is an element  
2 required pursuant to ORS 40.405 – Rule 701 (Testimony of Lay Witnesses) (“lay witness testimony  
3 “is limited to those opinions or inferences which are (1) rationally based on the perception of the  
4 witness; and (2) helpful to a clear understanding of testimony of the witness or the determination of  
5 a fact in issue.”).

6 The testimony described below must be struck because: (1) the testimony is not rationally  
7 based on the perception of the witness, (2) the testimony is not helpful as to the determination of a  
8 fact in issue, (3) the testimony is not based on personal knowledge, and (4) the testimony would not  
9 be admissible as evidence at trial. ORS 40.405, ORS 40.315; *see also Parks*, 253 Or. App. at 567.

10 **i. Declaration of Benjamin Bolen.**

11 Ngo moves to strike the following testimony included in Benjamin Bolen’s Declaration:

- 12 • “He appears at these rallies in an effort to dox leftists, which means to uncover their identity  
13 and then publicly post personal identifying information online so white nationalist or other  
14 right wing groups can access the information and use it to target leftists and their families  
15 with harassment, threats, and sometimes even violence.” Bolen Decl. ¶ 9;
- 16 • “It is well known to people who attend rallies in Portland, Oregon that [the conduct in  
17 paragraph 9] is what Andy Ngo does.” *Id.* ¶ 10;
- 18 • “Mr. Ngo feeds on [the] attention [of boos, jeers and contempt from the crowd].” *Id.* ¶ 11;
- 19 • “[Ngo] attempts to unmask or identify members in the crowd, and he then posts this personal  
20 identifying information online for white nationalist groups to consume.” *Id.*;
- 21 • “[Ngo] raises money online by getting as much attention as he can, so he attends the rallies  
22 and provokes confrontations with people in the crowd to provide him material to post online  
23 to get more views and more donations.” *Id.*;
- 24 • “[Ngo] believes that racially motivated crimes are hoaxes.” *Id.* ¶ 12;

- 1 • “[Ngo] posts dozens of tweets on Twitter nearly every day, and nearly every one of those
- 2 tweets relates to Antifa or Black Lives Matter, and in particular, his posts reveal identifying
- 3 information about people with whom Mr. Ngo disagrees.” *Id.*;
- 4 • “The information in [Ngo’s] tweets is presented in a manner designed to build hatred or
- 5 resentment of leftists, Black Lives Matter supporters and Antifa.” *Id.*;
- 6 • “Mr. Ngo engages in stochastic terrorism by both demonizing leftists and posting their
- 7 personal identifying information online.” *Id.*;
- 8 • “He knows that this information is used to target his opponents.” *Id.*;
- 9 • “Mr. Ngo has a working relationship with right wing or white nationalist groups like the
- 10 Proud Boys, Patriot Prayer, The Three Percenters and potentially Atomwaffen.” *Id.* ¶ 14;
- 11 • “He has a practice of embedding with a group of people from one of these groups, and
- 12 reaches agreements with them whereby they provide him protection while they instigate a
- 13 skirmish or physical confrontation that Mr. Ngo films and deceptively edits in a manner to
- 14 further his agenda.” *Id.*;
- 15 • “Mr. Ngo facilitates harassment and threats from white nationalist groups targeting
- 16 leftists....” *Id.* ¶ 15;
- 17 • “A video widely circulated online [ ] shows Mr. Ngo with the group of Proud Boys while
- 18 they planned their attack.” (to the extent Bolen implies Mr. Ngo was a member, associated
- 19 with, or part of the group of Proud Boys for any reason other than engaging in journalism).
- 20 *Id.* ¶ 16;
- 21 • “[Ngo] films in a manner designed to make it look like leftists are violent or provoked the
- 22 fight, and that the white nationalist group he has embedded with are hapless victims.” *Id.*
- 23 ¶ 17;
- 24 • “Mr. Ngo does not care about the truth or about being accurate.” *Id.*;
- 25 • “[Ngo] is using this lawsuit as a means to raise money.” *Id.*;

- 1 • “So long as it fits Mr. Ngo’s narrative, he publishes information without regard to whether it
- 2 is true.” *Id.* ¶ 18;
- 3 • “Deception and misinformation are Mr. Ngo’s specialty.” *Id.*;
- 4 • Mr. Ngo was discharged from his position at the student newspaper at Portland State
- 5 University while I attended the college because he disseminated false or misleading
- 6 information regarding speakers who had presented at the college.” *Id.* ¶ 19;
- 7 • “[Portland State University] found that Mr. Ngo had breached his ethical obligations in
- 8 several respects.” *Id.*;
- 9 • “[Ngo] repeatedly uses his online platform to publish misinformation in his attempt to
- 10 malign Antifa.” *Id.* ¶ 20;
- 11 • “Twitter [ ] is [Ngo’s] primary method of doxing people he disagrees with.” *Id.* ¶ 23;
- 12 • “Mr. Ngo has rushed to judgment with faulty information in an effort to demonize someone
- 13 with political views that differ from his own.” *Id.* ¶ 30;
- 14 • “Mr. Ngo has named me as a defendant in this lawsuit because I am a leftist.” *Id.* ¶ 32.
- 15 • “Mr. Ngo does not care about being accurate with his allegations, so long as it is a leftist, or
- 16 someone he thinks holds antifascist views that he names as a defendant.” *Id.*;
- 17 • “Mr. Ngo has a record of being reckless with information, and even intentionally spreading
- 18 misinformation designed to malign or harm people with political views that differ from his
- 19 own.” *Id.*;
- 20 • “Naming me as a defendant in this lawsuit is simply one more instance of this conduct.” *Id.*

21 The above-articulated testimony is speculative and based on nothing more than Bolen’s own  
22 subjective beliefs. Such testimony is not based on personal knowledge or observation; is not helpful to  
23 this case; and is improper because “Oregon’s lay opinion rule precludes opinions based on conjecture  
24 or speculation.” *Davis*, 351 Or. at 58; *see also* ORE 602 (excluding material not based on “personal  
25 knowledge of the matter”). It also constitutes material intended to “unfairly prejudice, [cause]

1 confusion of the issues, and mislead . . ." within the meaning of ORE 403. Accordingly, the  
2 aforementioned testimony offered in Bolen's Declaration provided in support of Bolen's Motion to  
3 Strike must be stricken.

4 **ii. The Declaration of Shane Burley.**

5 Ngo also moves to strike the following testimony included in Shane Burley's Declaration:

- 6 • "[Ngo] has used innuendo, bigoted characterizations, and outright mischaracterizations" to  
7 buil[d] a career on stoking the fears of a largely conservative base with hyperbolic  
8 accusations of the malfeasance of left-wing activists...." Burley Decl. ¶ 6.
- 9 • "Andy Ngo uses his clout and funding to identify people leads to a sequence of threats,  
10 slanders, and attacks." *Id.*;
- 11 • "[Ngo] takes an incident, usually something fairly innocuous like a fiery speech at a  
12 political rally or a disagreement on social media, and then traces far reaching allegations  
13 often mixed with his opponent's personal information." *Id.* ¶ 7;
- 14 • "Mr. Ngo was fired from the Portland State University's Vanguard for an mischaracterizing  
15 a Muslim student's statements, he has been widely denounced for articles that use bigoted  
16 depictions, and he has singled out journalists and activists with wild accusations of  
17 malfeasance." *Id.* ¶ 9.
- 18 • "Ngo continues to use a pattern that makes these people appear as threats to basic decency  
19 simply for speaking a position he disagrees with, and the ensuing mob of acolytes does the  
20 dirty work." *Id.* ¶ 10;
- 21 • "Activists [ ] fear for their lives because Andy Ngo wants to make a name for himself."  
22 *Id.*;
- 23 • "I know when I suddenly start seeing threatening words online directed at me, my ethnic  
24 background, my sexual orientation, or my lifestyle, there is often one source for it:  
25 Andy Ngo decided to Tweet about me again." *Id.* ¶ 12.

- “Mr. Ngo regularly tries to discredit my work...”. *Id.* ¶ 17.

Just as Bolen’s testimony is based on speculation, Mr. Burley’s testimony, too, is speculative and not based on personal knowledge or observation. Mr. Burley’s testimony is not helpful to this Court in ruling on a factual issue. Mr. Burley’s testimony is guesswork and pursuant to *Davis*, this Court must strike the aforementioned testimony from consideration in ruling on Bolen’s Motion to Strike.

There is no basis for concluding that Mr. Burley is qualified as an expert in any cognizable field of "scientific, technical or other specialized knowledge [that would] assist the trier of fact in this matter". ORE 702. He merely offers attacks upon the plaintiff which are also inadmissible under ORE 403.

### Conclusion

Bolen’s own evidence is in conflict with Bolen’s own basis for lodging his anti-SLAPP motion. The Declarations provided are speculative and the testimony is not based on personal knowledge of the matter. Rather, Bolen and his affiant Mr. Burley engage in guesswork that is not helpful to a clear understanding of testimony of the witness or the determination of a fact in issue. Accordingly, and because “Oregon’s lay opinion rule precludes opinions based on conjecture or speculation, because opinions based on speculation or conjecture generally are not based on the perception of the witness or on the witness's personal knowledge”, *Davis*, 351 Or. at 58, Bolen’s Declarations in Support of Bolen’s Motion to Strike must themselves be stricken.

Dated: October 5, 2020.

Respectfully submitted,

/s/ James L. Buchal

JAMES L BUCHAL (OSB #921618)  
jbuchal@mllp.com  
3425 S.E. Yamhill, Suite 100  
Portland OR 97214  
Telephone: 503-227-1011



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HARMEET K. DHILLON\*  
(CA Bar No.: 207873)  
harmeet@dhillonlaw.com  
DHILLON LAW GROUP INC.  
177 Post Street, Suite 700  
San Francisco, California 94108  
Telephone: (415) 433-1700  
*Pro Hac Vice\**

*Attorneys for Plaintiff Andy Ngo*

**CERTIFICATE OF SERVICE**

I, Carole Caldwell, hereby declare under penalty of perjury under the laws of the State of Oregon that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within entitled cause. I am an employee of Murphy & Buchal LLP and my business address is 3425 SE Yamhill Street, Suite 100, Portland, OR 97214.

On October 5, 2020, I caused the following document to be served:

PLAINTIFF NGO’S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF’S CROSS-MOTION TO STRIKE DEFENDANT BOLEN’S TESTIMONY

in the following manner on the parties listed below:

Hilary Boyd, Esq.	( ) (BY FEDERAL EXPRESS)
Jonathan Hendersion, Esq.	(X) (BY FIRST CLASS US MAIL)
DAVIS ROTHWELL EARLE & XÓCHIHUA, P.C.	(X) (BY E-MAIL)
200 SW Market Street, Suite 1800	( ) (BY FAX)
Portland, OR 97201	( ) (BY HAND)
Tel: 503-222-4422	
Fax: 503-222-4428	
<a href="mailto:hboyd@davisrothwell.com">hboyd@davisrothwell.com</a>	
<a href="mailto:jhenderson@davisrothwell.com">jhenderson@davisrothwell.com</a>	

David D. Park, Esq.	( ) (BY FEDERAL EXPRESS)
ELLIOTT & PARK, P.C.	(X) (BY FIRST CLASS US MAIL)
324 S Abernethy Street	(X) (BY E-MAIL)
Portland, OR 97239-8529	( ) (BY FAX)
Tel: 503- 227-1690	( ) (BY HAND)
<a href="mailto:dave@elliott-park.com">dave@elliott-park.com</a>	

Michelle R. Burrows, Esq.	( ) (BY FEDERAL EXPRESS)
MICHELLE R. BURROWS, P.C.	(X) (BY FIRST CLASS US MAIL)
1333 Orenco Station Parkway# 525	(X) (BY E-MAIL)
Hillsboro, OR 97124	( ) (BY FAX)
Tel: 503-241-1955	( ) (BY HAND)
<a href="mailto:michelle.r.burrows@gmail.com">michelle.r.burrows@gmail.com</a>	

1 David F. Sugerman, Esq.  
2 SUGARMAN LAW OFFICE  
3 707 SW Washington St., Ste. 600  
4 Portland, OR 97205  
5 Tel: 503-228-6474  
6 [david@sugermanlawoffice.com](mailto:david@sugermanlawoffice.com)

( ) (BY FEDERAL EXPRESS)  
(X) (BY FIRST CLASS US MAIL)  
(X) (BY E-MAIL)  
( ) (BY FAX)  
( ) (BY HAND)

5 Christopher A. Larsen, Esq.  
6 PICKETT DUMMIGAN MCCALL LLP  
7 210 SW Morrison St., 4th Fl.  
8 Portland, Oregon 97204  
9 Tel: 503-223-7770  
10 [chris@pdmlegal.com](mailto:chris@pdmlegal.com)

( ) (BY FEDERAL EXPRESS)  
(X) (BY FIRST CLASS US MAIL)  
(X) (BY E-MAIL)  
( ) (BY FAX)  
( ) (BY HAND)

10 Gabriel Chase, OSB # 142948  
11 CHASE LAW, P.C.  
12 621 S.W. Alder St., Ste. 600  
13 Portland, OR 97205  
14 Tel: 503-294-1414  
15 [gabriel@chaselawc.net](mailto:gabriel@chaselawc.net)

( ) (BY FEDERAL EXPRESS)  
(X) (BY FIRST CLASS US MAIL)  
(X) (BY E-MAIL)  
( ) (BY FAX)  
( ) (BY HAND)

16 /s/ Carole A. Caldwell