



1 plaintiff because he is reviled by the members of the crowd. Someone in the crowd allegedly  
2 punches plaintiff, and plaintiff has no idea who it is. Plaintiff posts a picture on Twitter of a  
3 person in which no identifiable characteristics can be seen because the person is dressed in black  
4 bloc, like most others at the protest. An anonymous source on Twitter says it looks like the  
5 person in plaintiff's picture is Ben Bolen, so plaintiff brings suit against Ben Bolen. Bolen denies  
6 he punched plaintiff. Does the law permit plaintiff to maintain this suit, and to invade Mr.  
7 Bolen's personal effects, computer and cell phone? No way.

8 In response to Mr. Bolen's motion, plaintiff confirms what Mr. Bolen suspected: he relies  
9 entirely on inadmissible hearsay evidence to place the blame on Mr. Bolen. Plaintiff has no  
10 admissible evidence that Mr. Bolen punched him. The only admissible evidence in the record on  
11 this point is Mr. Bolen's testimony that it was not him. The other thing that is as clear on this  
12 record as plaintiff's inability to establish that it was Mr. Bolen who punched him is that Mr.  
13 Bolen would not have been named as a defendant in this lawsuit if he did not attend leftist  
14 political protests dressed in black clothing. The first step of the anti-SLAPP analysis is satisfied,  
15 and plaintiff has utterly failed to meet his burden of establishing a prima facie case against Mr.  
16 Bolen because all of his claims require that he prove that it was Mr. Bolen that punched him and  
17 plaintiff had failed to submit admissible evidence on this point.

18 **II. PLAINTIFF WAS REQUIRED TO SUBMIT ADMISSIBLE EVIDENCE TO**  
19 **MAKE A *PRIMA FACIE* SHOWING, BUT MUCH OF PLAINTIFF'S**  
20 **EVIDENCE IS INADMISSIBLE AND CANNOT BE CONSIDERED OR SHOULD**  
21 **BE STRICKEN**

21 The evidence submitted in response to an anti-SLAPP motion must be admissible. *Or.*  
22 *Educ. Ass'n v. Parks*, 253 Or App 558, 567 (2012), *rev den*, 353 Or 867 (2013) (“[A]ffidavits[,]  
23 for purpose of ORS 31.150(4)[,] shall be made on personal knowledge, shall set forth such facts  
24 as would be admissible in evidence, and shall show affirmatively that the affiant or declarant is  
25 competent to testify as to the matter stated therein.”). *See also Evans v. Unkow*, 38 Cal. App. 4th

1 1490, 1496 (1995) (evidence must be admissible); *Metabolife Int'l v. Wornick*, 264 F.3d 832,  
2 840 (9th Cir. 2001) (same).

3 It appears as if plaintiff treats his Complaint as evidence, but complaints are not evidence.  
4 While a pleading like a complaint may frame the issues, it is not itself evidence. *Jones v.*  
5 *Lindsey*, 193 Or App 674, 677 (2004) (“Pleadings are ‘the written statements by the parties of the  
6 facts constituting their respective claims and defenses.’ ORCP 13 A. Thus, pleadings frame the  
7 issues to be tried in a civil action. ORCP 51 A. However, unless admitted, the factual allegations  
8 in pleadings have no evidentiary effect.”).<sup>1</sup> And simply reciting what is alleged in a complaint  
9 also does not convert the allegation into evidence. *See, e.g., Smith v. Urich*, 151 Or App 40, 46  
10 (1997) (“The mere recitation in the affidavit that Smith *alleged in his complaint* that there was a  
11 defect in the sidewalk and that *he claimed* that the defect caused his injuries is not evidence that  
12 the defect existed or that it caused Smith's injuries.”) (Emphasis in original).

13 In opposing an anti-SLAPP motion, a plaintiff may not simply rely on allegations in his  
14 complaint. “An anti-SLAPP motion is an evidentiary motion. Once the court reaches the second  
15 prong of the analysis, it must rely on admissible evidence, not merely allegations in the  
16 complaint or conclusory statements by counsel.” *Finton Constr., Inc. v. Bidna & Keys, APLC*,  
17 238 Cal. App. 4th 200, 213, 190 Cal. Rptr. 3d 1, 12 (2015); *Paiva v. Nichols*, 168 Cal. App. 4th  
18 1007, 1017, 85 Cal. Rptr. 3d 838, 847 (2008) (same); *Monster Energy Co. v. Schechter*, 7 Cal.  
19 5th 781, 788, 444 P.3d 97, 102, 249 Cal. Rptr. 3d 295, 301 (2019) (same). Here, the Complaint  
20 may serve to frame issues, but is it not evidence, and the allegations in the Complaint are not  
21 evidence.

22 The only evidence that plaintiff has submitted is his own declaration. And in that  
23 declaration, plaintiff relies on hearsay in his attempt to establish that it was Mr. Bolen that

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24 <sup>1</sup> Indeed, it is not even proper for a plaintiff to allege evidence in Oregon. *See, e.g., Cole v. Multnomah Cty.*, 39 Or  
25 App 211, 220 (1979) (“[P]arties are not required to plead their evidence; indeed, it is improper to do so.”).

1 allegedly punched him. At paragraph 7 of his declaration, he states that “numerous other  
2 individuals familiar with Defendant and his frequent presence at Antifa rallies positively  
3 identified Defendant independently.” In paragraph 10 of his declaration, plaintiff states:

4 7 | 10. On May 2, 2019, I posted my footage on my Twitter and numerous members of the  
5 8 | public confirmed that Mr. Bolen was in fact the man who assaulted me. The members of the public  
6 9 | were familiar with Mr. Bolen as he has attended violent Antifa protests and riots in Portland since  
7 10 | 2016. On numerous occasions, Mr. Bolen has been photographed fighting, both with and without a  
8 11 | mask. Mr. Bolen always brings his skateboard with him to Antifa protests, which he uses as a  
9 12 | weapon and to get away quickly from the scene. The skateboard has unique markings, coloration,  
13 13 | and identifying characteristics.

10 Not only are these purported statements by anonymous Twitter users, “members of the  
11 public,” and “numerous other individuals” clearly hearsay and inadmissible, they show that Mr.  
12 Bolen was in fact named in this lawsuit because of his “frequent presence at leftist political  
13 protests.”<sup>2</sup> And there is no support for the statements that Mr. Bolen has been photographed  
14 fighting. Similarly, there is no basis for plaintiff’s statement that Mr. Bolen is a member of Rose  
15 City Antifa. He is not. He said as much in his declaration. Plaintiff simply states that he is a  
16 member, without furnishing evidence or a basis for why plaintiff is qualified to say that. Plaintiff  
17 does not set forth any facts establishing that he has personal knowledge regarding these  
18 statements. Nor does he offer any such photographs.

19 **III. PLAINTIFF MISUNDERSTANDS OR MISREPRESENTS THE APPROPRIATE**  
20 **STANDARD ON THE MOTION**

21 Relying on what he argues is binding California case law, plaintiff argues that the Court  
22 is limited to the four corners of his Complaint when determining whether the conduct at issue  
23 meets the first step of the analysis. Response memo, page 6. Plaintiff is wrong. Not only is this  
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25 <sup>2</sup> Plaintiff does not even identify who these people are, let alone offer declarations or affidavits from any.

1 not the rule, but the cases plaintiff cites in support of his argument clearly do not support  
2 plaintiff. They support Mr. Bolen. The holdings of those cases are the exact *opposite* of what  
3 plaintiff represents they are. The cases hold that a plaintiff like Mr. Ngo cannot avoid an anti-  
4 SLAPP motion through artful pleading.

5       The California Court of Appeals addressed this specific argument recently and held that  
6 when engaging in the first step of the analysis, the court is not limited to the allegations in the  
7 complaint, and is to consider the affidavits or declarations as well. *Boswell v. Retreat Cmty.*  
8 *Ass’n*, E064171, 2016 WL 3773403, at \*8 (Cal. Ct. App. July 11, 2016). In support of this  
9 conclusion, the Court relied on California Supreme Court decisions in which the Supreme Court  
10 considered declarations in deciding whether the “arising from” requirement had been met. *See*  
11 *Navellier v. Sletten*, 29 Cal. 4th 82, 89, 52 P.3d 703, 709, 124 Cal. Rptr. 2d 530, 536 (2002) (“In  
12 deciding whether the initial ‘arising from’ requirement is met, a court considers ‘the pleadings,  
13 and supporting and opposing affidavits stating the facts upon which the liability or defense is  
14 based.’”). *See also City of Cotati v. Cashman*, 29 Cal. 4th 69, 79, 52 P.3d 695, 702, 124 Cal.  
15 Rptr. 2d 519, 528 (2002) (“In deciding whether the ‘arising from’ requirement is met, a court  
16 considers ‘the pleadings, and supporting and opposing affidavits stating the facts upon which the  
17 liability or defense is based.’”); *Johnson v. Humphrey*, E072186, 2020 WL 4199710, at \*6 (Cal.  
18 Ct. App. July 22, 2020) (stating that “the trial court is not limited to the four corners of the  
19 complaint and is required to consider extrinsic evidence” when determining whether movant met  
20 his burden under the first step of the analysis, and stating as rationale for this requirement that  
21 “the anti-SLAPP Act cannot be defeated by ‘artful pleading.’”); *Precise Aerospace Mfg., Inc. v.*  
22 *Cantu*, E073696, 2020 WL 3603680, at \*5 (Cal. Ct. App. July 2, 2020) (same); *All. Fin. Capital,*  
23 *Inc. v. Moore*, A111823, 2006 WL 2641704, at \*4 (Cal. Ct. App. Sept. 15, 2006) (same;  
24 “Defendants are also mistaken in suggesting that a court is limited to the four corners of the  
25 complaint in identifying the substance of the lawsuit.”).

1           The plaintiff cites in support of his argument in this regard do not support plaintiff. They  
2 support Mr. Bolen. For instance, in *Abir Cohen Treyzon Salo, LLP v. Lahiji*, 40 Cal. App. 5th  
3 882, 888, 254 Cal. Rptr. 3d 1, 5 (Cal. Ct. App. 2019), and *Bel Air Internet, LLC v. Morales*, 20  
4 Cal. App. 5th 924, 929, 230 Cal. Rptr. 3d 71, 74 (Cal. Ct. App. 2018), the two cases plaintiff  
5 relies on in support of his argument, the issue was not whether it is impermissible for the court to  
6 look outside the four corners of the complaint under the first step of the analysis. The issue was  
7 stated by the *Bel Air* Court: “When a plaintiff’s complaint shows that a claim arises from  
8 communications that are protected under the statute, must the defendant support a motion to  
9 strike with declarations confirming that his or her actions fall within one of the categories of  
10 protected conduct?” *Bel Air Internet, LLC v. Morales*, 20 Cal. App. 5th 924, 929, 230 Cal. Rptr.  
11 3d 71, 75 (Cal. Ct. App. 2018). The Court concluded that a defendant/movant need not offer  
12 additional evidence if the allegations in the Complaint satisfy the first step of the analysis:

13           We conclude that, when the complaint itself alleges protected  
14 activity, a moving party may rely on the plaintiff’s allegations  
15 alone in arguing that the plaintiff’s claims arise from an act “in  
16 furtherance of the person’s right of petition or free speech.” (§  
17 425.16, subd. (b)(1).) While section 425.16 requires a court to  
18 consider both the “pleadings” and the “supporting and opposing  
19 affidavits stating the facts upon which the liability or defense is  
20 based” (§ 425.16, subd. (b)(2)), it does not require a moving party  
21 to submit declarations confirming the factual basis for the  
22 plaintiff’s claims.

19 *Id.*

20           Plaintiff is flat-out wrong when he argues that the Court is limited to the four corners of  
21 his Complaint when deciding whether the first step of the analysis is satisfied. The cases hold the  
22 exact opposite. If the rule were as plaintiff represents it to be, then a plaintiff could avoid an anti-  
23 SLAPP motion through artful pleading, as plaintiff attempts to do here.

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1 **IV. MR. BOLEN WOULD NOT HAVE BEEN NAMED IN THIS LAWSUIT IF HE**  
2 **DID NOT ATTENT LEFTIST POLITICAL PROTESTS, INCLUDING THE ONE**  
3 **ON MAY 1, 2019 OUTSIDE THE ICE DETENTION CENTER IN PORTLAND**

4 Mr. Bolen did not punch plaintiff, and just as Mr. Bolen argued in his motion, plaintiff  
5 has no admissible evidence to show that Mr. Bolen punched plaintiff, so this begs the question:  
6 why did plaintiff name Mr. Bolen as a defendant in this lawsuit? Plaintiff himself confirms that  
7 Mr. Bolen was named based on two things: (1) inadmissible hearsay evidence; and (2) Mr.  
8 Bolen’s regular appearance at leftist political protests, dressed in black bloc. In his opposition to  
9 Mr. Bolen’s motion, plaintiff confirms this by arguing that Mr. Bolen’s attendance at these  
10 protests since 2007, his arrest during the brief incursion of Portland by federal troops in July, and  
11 his attendance at the Mayday protest dressed in black clothing are the reason he was named as a  
12 defendant. Response Memo, page 9.<sup>3</sup> In his declaration, he confirms that he identified Mr. Bolen  
13 as the person who allegedly punched him because of Mr. Bolen’s regular attendance at leftist  
14 protests. *See, e.g.*, Paragraph 7 of plaintiff’s declaration (stating that he relied on numerous  
15 unidentified members of the public to identify Mr. Bolen as the person who allegedly punched  
16 him, and stating that these unidentified people were able to make the identification because of  
17 Mr. Bolen’s “frequent presence” at rallies). Plaintiff says the same thing in Paragraph 10 of his  
18 declaration. There, he says that it was members of the public who identified Mr. Bolen for him,  
19 and that their identification was based on Mr. Bolen’s attendance at protests and rallies since  
20 2016.

21 This confirms that the reason Mr. Bolen was named as a defendant in this lawsuit,  
22 through a misidentification allegedly made by anonymous people online, was because of his  
23 attendance at leftist political protests. Attendance at a leftist political protest and dressed in black  
24 bloc is political speech. Aside from voting, political protest is perhaps the most quintessential

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25 <sup>3</sup> Mr. Bolen was arrested by federal agents while they were in Portland at the president’s request. He considers his involvement in protests against police brutality, systemic racism and fascist behavior by federal authorities to be civil disobedience of the type that has always been not only acceptable in this country, but commendable.

1 form of American political speech. And there can be no question whatsoever that Mr. Bolen  
2 would not have been named as a defendant in this lawsuit if he did not attend leftist political  
3 protests in Portland, and was not present at the May 1, 2019 protest in downtown Portland,  
4 protesting the administration’s family separation policy.<sup>4</sup> This satisfies the first step in the anti-  
5 SLAPP analysis.

6 **V. JUST AS MR. BOLEN ARGUED IN HIS MOTION, PLAINTIFF HAS NO**  
7 **RELIABLE, ADMISSIBLE EVIDENCE TO SUPPORT HIS ALLEGATION**  
8 **THAT MR. BOLEN PUNCHED HIM**

9 “An anti-SLAPP motion is an evidentiary motion. Consequently, the *prima facie*  
10 showing of merit must be made with evidence that is admissible at trial. Unverified allegations in  
11 the pleadings or averments made on information and belief cannot make the showing.”  
12 *Contreras v. Dowling*, 5 Cal. App. 5th 394, 405, 208 Cal. Rptr. 3d 707, 715 (Cal. Ct. App. 2016),  
13 *as modified on denial of reh’g* (Nov. 18, 2016) (internal citations and quotations omitted). *See*  
14 *also Finton Constr., Inc. v. Bidna & Keys, APLC*, 238 Cal. App. 4th 200, 213, 190 Cal. Rptr. 3d  
15 1, 12 (2015) (“An anti-SLAPP motion is an evidentiary motion.”).

16 Regarding the record, what is more remarkable here is not what evidence plaintiff has  
17 submitted in opposition to Mr. Bolen’s anti-SLAPP motion; it is what he has failed to submit.  
18 While plaintiff’s Complaint may serve to help frame the issues, it is not itself evidence. *See*  
19 Section II above. As such, the only evidence plaintiff has submitted in response to Mr. Bolen’s  
20 motion is his own declaration. Plaintiff has not submitted any declarations from purported  
21 witnesses or people who identify Mr. Bolen as the person who allegedly punched plaintiff.  
22 Incredibly, despite claiming to be a photojournalist and despite referring to pictures in his  
23 declaration, plaintiff has not submitted a single photograph. Not one.

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<sup>4</sup> Indeed, if Mr. Bolen was not at that protest his defense to this lawsuit would be much simpler.

1           Instead, plaintiff confirms that Mr. Bolen was correct when he surmised that plaintiff  
2 either knew it was not Mr. Bolen who punched him and does not care, or that plaintiff has relied  
3 on an anonymous and incorrect online hearsay statement to blame Mr. Bolen, and still does not  
4 care if it is true or accurate so long as it is a person plaintiff believes to be Antifa.

5           Mr. Bolen suspected that plaintiff had relied on inaccurate and inadmissible hearsay to  
6 falsely accuse him of punching plaintiff, as laid out in his motion and supporting declaration.  
7 When Mr. Bolen challenged plaintiff on this issue through his motion, plaintiff simply doubled  
8 down on the hearsay and stated in his declaration that “numerous members of the public,” whom  
9 plaintiff does not even identify, confirmed to plaintiff that it was Mr. Bolen who allegedly  
10 punched him. Plaintiff does not offer a single declaration from any single one of these  
11 “numerous members of the public.” Instead, plaintiff simply states that “[t]he members of the  
12 public were familiar with Mr. Bolen as he attended violent Antifa protests and riots in Portland  
13 since 2016.” This evidence is inadmissible for a number of reasons. It is hearsay for which there  
14 is no exception. It lacks foundation. Plaintiff has not stated how it is that either he or the  
15 unidentified people who support him have personal knowledge sufficient to testify on that  
16 subject. Under no circumstance is that testimony admissible.

17           In his response and in his declaration, plaintiff speaks as if he has already shown that it  
18 was Mr. Bolen that allegedly punched him, but he has not shown that at all. Plaintiff has simply  
19 confirmed that he relied on inadmissible and inaccurate hearsay as his basis to name Mr. Bolen  
20 in this lawsuit. In his declaration, plaintiff just restates what is in his Complaint without offering  
21 the evidence needed to show that the allegations in his Complaint are correct. For instance, at  
22 paragraph 6 of his declaration, plaintiff says it was Mr. Bolen that he recorded at approximately  
23 2:45 on May 1, 2019. Mr. Bolen has denied that the person plaintiff photographed is him.  
24 Plaintiff has utterly failed to come forward with *prima facie* evidence that it was Mr. Bolen.

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1 At paragraph 7 of his declaration, plaintiff says he spoke with this same person he  
2 recorded at 2:45 again around 6:00 p.m., but that also does not show that this person was Mr.  
3 Bolen.

4 On May 1, 2019, plaintiff did not know who it was that allegedly punched him. He said  
5 as much on Twitter:



12 The following day, on May 2, 2019, plaintiff did not know who it was that allegedly  
13 punched him, also saying as much on Twitter.



24 So in his declaration when he says it was Mr. Bolen who first punched him and then  
25 spoke with him later in the evening on May 1, 2019, he is inferring from inaccurate hearsay

1 evidence that it was Mr. Bolen because on those dates plaintiff had no idea who the person was  
2 that allegedly punched him, as is evidenced by his posts on Twitter. Plaintiff does not dispute  
3 this in his declaration. He simply acts as if he has known the whole time it was Mr. Bolen who  
4 allegedly punched him. But it was not Mr. Bolen, because Mr. Bolen did not punch plaintiff.

5 Plaintiff next argues that the side by side comparison of photos in Mr. Bolen's  
6 declaration proves that it was Mr. Bolen that punched him. Not so. First, those photographs do  
7 not depict the same person. Second, plaintiff has not established that the person in the photo  
8 found in paragraph 28 of Mr. Bolen's declaration is Mr. Bolen. To the contrary, the only  
9 admissible evidence in the record on this point is from Mr. Bolen, who says that person is not  
10 him. Declaration of Ben Bolen, ¶ 27. Even if Mr. Bolen looks like the person in those photos,  
11 which he does not, plaintiff has not shown that the person in those photos is Mr. Bolen.

12 Plaintiff next argues that he can identify the person in the photograph in his Complaint as  
13 Mr. Bolen by comparing the small amount of hair visible in the photo embedded in plaintiff's  
14 Complaint with a 2016 booking photo of Mr. Bolen. At paragraph 7 of his declaration, plaintiff  
15 says: I was able to capture a photograph of Mr. Bolen during this encounter as his mid-length  
16 wavy, light brown hair was exposed. Mr. Bolen sported the same hair style in his 2016 booking  
17 photograph, as well as his recent photograph published on Portland State University's website.”

18 This does not even pass a straight face test. Notably, while he talks about all the photos  
19 he has taken or reviewed to allegedly confirm his identification of Mr. Bolen as the person who  
20 punched him, *he does not offer a single photograph with his response*. Here is a comparison of  
21 the photo in plaintiff's Complaint, which, again, has not been submitted and is not in evidence,  
22 next to Mr. Bolen's 2016 booking photo<sup>5</sup>:

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<sup>5</sup> The Court may take judicial notice of the booking photo and the characteristics it depicts. *Dolan v. State*, 187 So. 3d 262, 266 (Fla. Dist. Ct. App. 2016) (taking judicial notice of booking photograph); *State v. Newsome*, 265 So. 3d 1223, 1227 (La. Ct. App. 2019) (same).



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12 It is patently absurd to even suggest that a person unfamiliar with Mr. Bolen or the person  
13 in the photograph in plaintiff’s Complaint could look at these two photos and conclude they are  
14 the same person. Even plaintiff’s description of the 2016 booking photo is wrong. He says the  
15 photo shows that Mr. Bolen has “wavy” hair. The photo above speaks for itself in this regard.

16 Plaintiff’s last-ditch argument is that Mr. Bolen’s appearance changes drastically, so  
17 photo comparisons do not work and the Court should ignore the fact that Mr. Bolen does not  
18 look like the person in the photo in plaintiff’s Complaint or the anonymous tweet plaintiff relied  
19 on to misidentify Mr. Bolen as the person who allegedly punched him. In essence, plaintiff  
20 argues that the Court should just take plaintiff’s word that he has accurately identified Mr. Bolen  
21 as the person who punched him, even though he has no admissible evidence to support this  
22 argument. With respect, this is not how identification works. Under plaintiff’s argument, he can  
23 point to any photograph of any person and argue that it is Mr. Bolen, and that he has simply

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1 changed his appearance. If plaintiff was so sure about his identification of Mr. Bolen, one would  
2 expect him to submit evidence on this point and not simply offer self-serving unsubstantiated  
3 hearsay evidence.

4 Not only does this argument not carry the day, it is factually incorrect. Aside from losing  
5 some weight and getting in shape *between 2016 and 2018*, Mr. Bolen's appearance has not  
6 changed. This is a comparison of Mr. Bolen in 2016 (left) and 2018 (right):



18 Plaintiff describes the person who allegedly punched him as a heavy set man. Mr. Bolen  
19 may have been described as heavy set in 2016, but certainly not in 2019, when plaintiff alleges  
20 he was punched.

21 Plaintiff is simply wrong when he identifies Mr. Bolen as the person who allegedly  
22 punched him. And just as Mr. Bolen suspected, plaintiff has no admissible evidence to establish  
23 that it was Mr. Bolen because *it was not Mr. Bolen*. Plaintiff's evidence in this regard boils down  
24 to anonymous inadmissible online hearsay that cannot even be considered on this motion.

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1 Plaintiff was required to establish a “probability that the [he] will prevail on the claim by  
2 presenting substantial evidence to support a prima facie case. ORS 31.150(3). “In this context,  
3 presenting a prima facie case means that the plaintiff has presented enough evidence to avoid a  
4 directed verdict—namely, enough evidence to meet the plaintiff’s burden of production.” *Handy*  
5 *v. Lane Cty.*, 360 Or. 605, 618 (2016). Plaintiff would absolutely not survive directed verdict on  
6 the evidence that he has submitted in response to Mr. Bolen’s motion. At trial, plaintiff would  
7 not be permitted to prevail by taking the stand and testifying that “numerous” unidentified people  
8 have told him that the person who allegedly punched him was Mr. Bolen.

9 **VI. PLAINTIFF FAILED TO ADDRESS MR. BOLEN’S ARGUMENTS**  
10 **REGARDING GUILT BY ASSOCIATION AND THEREFORE CONCEDES THIS**  
11 **PART OF THE MOTION**

12 In his motion, Mr. Bolen argued that he could not be held liable for the actions of others,  
13 and that this would violate his rights under the Constitution, including the First Amendment. *See*  
14 *Motion*, section VI(b). Plaintiff does not address this at all in his response. As such, plaintiff has  
15 conceded the motion in this regard. To the extent that plaintiff seeks to hold Mr. Bolen somehow  
16 jointly liable for the actions of others, which it appears from the Complaint that he does, that  
17 claim or claims should be stricken pursuant to ORS 31.150. There can be no question that an  
18 attempt to hold Mr. Bolen liable for the actions of other people that plaintiff alleges are all  
19 leftists or Antifa satisfies the first step of the anti-SLAPP analysis, and plaintiff has failed to  
20 meet his burden under the second step.

21 **VII. PLAINTIFF DID NOT ADDRESS MR. BOLEN’S ARGUMENTS REGARDING**  
22 **THE EQUITABLE CLAIMS**

23 Plaintiff also did not address Mr. Bolen’s arguments regarding the equitable claims. Mr.  
24 Bolen argued that they are subject to the anti-SLAPP motion as well. Plaintiff did not respond,  
25 and so apparently concedes this point.

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1 **VIII. RESPONSE TO PLAINTIFF’S MOTION TO STRIKE**

2 Plaintiff included with his response to Mr. Bolen’s anti-SLAPP motion a separate motion  
3 to strike some of the evidence that Mr. Bolen submitted with his motion. Mr. Bolen responds to  
4 that motion to strike in a separate memorandum, filed with this reply, and incorporate that  
5 response to plaintiff’s motion to strike into this reply as if fully stated herein.

6 **IX. CONCLUSION**

7 Mr. Bolen did not punch plaintiff, and plaintiff has utterly failed to meet his burden of  
8 establishing a “probability that the [he] will prevail on the claim by presenting substantial  
9 evidence to support a prima facie case.” ORS 31.150(3). He has not submitted any declarations  
10 from any alleged witnesses, though he says they are numerous and they support him. He has  
11 submitted not a single photograph despite calling himself a photojournalist and referring to  
12 photos in his declaration. An anti-SLAPP motion is an evidentiary motion, and plaintiff has  
13 failed to meet his evidentiary burden on the motion.

14 Plaintiff is flat-out wrong when he argues that the Court is limited to the four corners of  
15 his Complaint when determining whether the first step of the analysis is met. The Court can and  
16 must consider the evidence in the record when determining whether the first step in the analysis  
17 is met.

18 If Mr. Bolen did not punch plaintiff, which he did not, then why was he named in this  
19 lawsuit? The reason he was named is because he is a leftist who regularly attends leftist rallies  
20 and protests dressed in the same manner as other participants. Plaintiff confirms this in  
21 paragraphs 7 and 10 of his declaration. Here, if the Court looks the evidence in the record,  
22 including plaintiff’s own declaration, it should conclude that Mr. Bolen would absolutely not  
23 have been named in this lawsuit were it not for his regular attendance at leftist rallies.

24 Attendance and participation in political protests and rallies is protected speech or conduct, and it  
25 satisfies the first step of the analysis under ORS 31.150(2)(d).

1 The Court should grant Mr. Bolen's motion and permit him to submit a prevailing party  
2 attorney fee petition under ORS 31.152(3).

3 DATED this 15th day of October, 2020.

4 DAVIS ROTHWELL  
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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing DEFENDANT BOLEN’S REPLY IN SUPPORT OF HIS ANTI-SLAPP MOTION on the following attorney(s) of record:

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1 by mailing to the foregoing a true copy thereof, placed in a sealed envelope, with postage  
2 prepaid, addressed as listed above, and depositing the same in the United States mail through a  
3 post office at Portland, Oregon, on this day.

4 DATED this 15<sup>th</sup> day of October, 2020.

5 DAVIS ROTHWELL  
6 EARLE & XÓCHIHUA, P.C.

7 /s/ Jonathan Henderson  
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