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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JANE DOE,

Plaintiff,

v.

UBER TECHNOLOGIES, INC., TRAVIS KALANICK, ERIC ALEXANDER, and EMIL MICHAEL,

Defendants.

CASE NO. 3:17-cv-03470-SI

DEFENDANT EMIL MICHAEL'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: December 1, 2017
Time: 9:00 a.m.
Place: Courtroom 1, 17th Floor

The Honorable Susan Illston

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on December 1, 2017, at 9:00 a.m., or as soon thereafter as the matter may be heard, in the United States District Court, Northern District of California, Courtroom 1, 17th Floor, at 450 Golden Gate Avenue, San Francisco, CA 94102, before the Honorable Susan Illston, defendant Emil Michael will and hereby does move the Court for an order dismissing plaintiff's complaint for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. This motion is based on the Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Complaint, and such further argument and briefing as the Court may request.

RELIEF SOUGHT

Defendant Michael seeks an order dismissing plaintiff's complaint for failure to state a claim because plaintiff has not met the burden of pleading sufficient facts on the three causes of action alleged against him, for: intrusion into private affairs, public disclosure of private facts, and defamation *per se*.

STATEMENT OF THE ISSUES (CIVIL L.R. 7-4(a)(3))

Whether plaintiff Jane Doe's complaint should be dismissed as to defendant Michael pursuant to Rule 12(b)(6) for failing to meet the pleading burden on the three causes of action alleged against him: (1) intrusion into private affairs, (2) public disclosure of private facts, and (3) defamation *per se*.

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I. INTRODUCTION

The plaintiff has sued the defendants for allegedly participating in confidential, internal company discussions about medical records that were potential evidence in legal proceedings involving their employer. The complaint is based on anonymous allegations reported by a technology news site, several years after the alleged discussions. These allegations cannot support any of the plaintiff's legal claims, and they all should be dismissed.

First, for intrusion into private affairs, the complaint does not allege that the medical records were improperly obtained or that Mr. Michael had anything to do with Uber's obtaining them. The complaint alleges only that the records were "intentionally obtained" from Delhi police by a different employee and nothing about the propriety of that act. Compl. ¶ 54. This does not state a claim against Mr. Michael, who had nothing to do with obtaining any records.

Second, for public disclosure of private facts, the complaint does not allege that Mr. Michael ever disclosed anything publicly about the plaintiff. The sole "public" disclosure was by anonymous "sources" to a technology news site, years later. The only allegations against Mr. Michael are that he was shown records relevant to legal action against his employer, and that he joined internal discussions with other employees about this evidence. *Id*. ¶¶ 10, 11.

Third, for defamation *per se*, the complaint alleges that "Uber executives . . . privately speculat[ed] . . . that [plaintiff] had colluded with a rival company to harm Uber's business." *Id*. ¶ 3. Even accepting the allegation, private speculation about possible legal action cannot amount to a defamation claim.[1] Otherwise, people could never discuss among themselves cases or the motives of parties in prospective litigation without the risk of committing a tort. California has long recognized that these kinds of internal discussions are privileged. Cal. Civ. Code §47. Further, private "speculation," by definition, is not a statement susceptible to being true or false; it is just that, speculation. And, finally, the complaint never alleges that Jane Doe was identified

[1] Mr. Michael disputes the complaint's allegations factually; however, for purposes of a motion to dismiss, the allegations are taken as true and construed in the light most favorable to the non-moving party. *See Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987).

by name. There is no cause of action for private, anonymous defamation. Ultimately, any public disclosure was made by those anonymous sources years later. If plaintiff suffered any harm, it is due to the acts of those secret sources.

In opposing this motion, plaintiff perhaps will argue that it does not matter that there are missing allegations against missing defendants, because the unnamed persons are likely part of the Uber organization. This would not rescue a complaint against Mr. Michael, however. If access to medical evidence was arranged and authorized by Uber's legal department, for example, there would be no basis to charge Mr. Michael with intentional, malicious, or highly offensive conduct. If other Uber employees (or former employees) spread defamatory rumors, there would be no basis to charge Mr. Michael with making those statements. In all of those situations, there would be no viable lawsuit against Mr. Michael.

None of this is to trivialize plaintiff's situation—she was the victim of a terrible crime—and Mr. Michael is grateful that the perpetrator was caught and brought to justice. But this case against Mr. Michael should be dismissed.

II. FACTUAL BACKGROUND

A. The Crime in India

In December 2014, the plaintiff was sexually assaulted by an Uber driver in Delhi, India. Compl. ¶ 2. Plaintiff "reported it to the police and underwent a medical examination in connection the [*sic*] report." *Id.* ¶ 49. Uber's then-CEO released a statement in which he decried the "despicable crime" and offered to support the victim. *Id.* ¶¶ 4, 53. The complaint alleges that another employee got a copy of plaintiff's medical records during a meeting "with Delhi police." *Id.* ¶¶ 9, 54. The complaint does not allege any more detail about that meeting, the records or any other evidence, other than to allege that this was "highly offensive." *Id.* ¶ 55. The complaint does acknowledge that "criminal proceedings were already under way," *id.* ¶ 62, but omits the fact that the plaintiff brought a lawsuit against Uber within a month, which was later dismissed.[2]

[2] *See Jane Doe v. Uber Technologies, Inc.* Case No. 3:15-cv-00424-LB (N.D. Cal.), filed January 29, 2015, dismissed September 2, 2015.

B. The Allegations Against Mr. Michael

The complaint names Mr. Michael personally, but alleges virtually nothing against him. It only alleges that: (1) he was "show[n] the records" at an unspecified time and place and (2) that he and the two other individual defendants "discussed the records among themselves and with other staff at Uber" and were "privately speculating" about a "hypothesis among themselves." Compl. ¶¶ 3, 10-11, 60. Those are the only (uncorroborated) factual allegations against Mr. Michael. *Id.*[3]

The complaint does not allege that Mr. Michael had anything to do with Uber's obtaining the records. It does not allege that the other employee did anything duplicitous or improper with the Delhi police. It does not allege that Mr. Michael directed any employee to obtain them. And it does not allege that anyone ever discussed the records with anyone outside the company. To the contrary, the complaint alleges that Uber employees "*privately* speculat[ed] . . . that [plaintiff] had colluded with a rival company to harm Uber's business." *Id.* ¶ 3 (emphasis added).

III. LEGAL STANDARDS

A complaint should be dismissed under Rule 12(b)(6) when it fails to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted and alteration in original). Legally, Rule 8 requires that "a complaint . . . contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory." *Id.* at 562 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F. 2d 1101, 1106 (7th Cir. 1984)). "[T]he court will not accept conclusory allegations concerning the legal effect of the events the plaintiff has set out if these allegations do not reasonably follow from the pleader's description of what happened, or if these allegations are contradicted by the description itself." Wright & Miller *et al.*, 5B Fed. Prac. & Proc. Civ. § 1357 (3d ed.).

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[3] The complaint includes several paragraphs regarding unrelated instances of alleged misconduct at Uber that have no relevance to the instant claims and serve no purpose other than to impugn the defendants and to promote news coverage. *See* Compl. ¶¶ 1, 15-16, 36, 41-46; *https://www.wigdorlaw.com/uber-privacy-violations-ceo-lawsuit/* (last visited Oct. 14, 2017).

Furthermore, factually, the complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly, 550 U.S.* at 570. The "mere possibility of misconduct" is not enough. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). A complaint that alleges facts merely consistent with liability "stops short of the line between possibility and plausibility," and should be dismissed. *Twombly*, 550 U.S. at 557. Plausibility, as used in *Twombly* and *Iqbal*, refers to whether the non-conclusory factual allegations, when assumed to be true, "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. The plaintiff must provide more than labels and conclusions; a formulaic recitation of a cause of action's elements will not do. *Twombly*, 550 U.S. at 555.

IV. DISCUSSION

A. The Complaint Fails to Plead Intrusion into Private Affairs Against Mr. Michael

The first cause of action is for intrusion into private affairs based on the alleged acquisition of plaintiff's medical records. "[T]he common law tort of intrusion has two elements. First, the defendant must intentionally intrude into a place, conversation, or matter as to which the plaintiff has a reasonable expectation of privacy. Second, the intrusion must occur in a manner highly offensive to a reasonable person." *Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272, 286 (2009).

The complaint does not allege any legally cognizable intentional "intrusion," and certainly none against Mr. Michael. Under California law, the plaintiff must allege that the defendant intended to "penetrate[] some zone of physical or sensory privacy . . . or obtain[ed] unwanted access to data by electronic or other covert means, in violation of the law or social norms." *Id.* Common examples of intrusion are "unconsented-to physical intrusion into the home, hospital room or other place the privacy of which is legally recognized, as well as unwarranted sensory intrusions such as eavesdropping, wiretapping, and visual or photographic spying." *Shulman v. Group W Productions, Inc.*, 18 Cal. 4th 200, 230-31 (1998).

Here, the complaint alleges that the intrusion occurred when another employee "met with Delhi police and intentionally obtained plaintiff's confidential medical records." Compl. ¶ 54.

This allegation, however, says nothing about Mr. Michael. The only allegations about Mr. Michael are that he and another defendant were later shown the medical records, and that they discussed them. *Id.* ¶¶ 56, 60. But intrusion into private affairs is a distinct act that can only occur when the intrusion happens; it is not a continuing tort. *Flowers v. Carville*, 310 F.3d 1118, 1126 (9th Cir. 2002); *Rodriguez v. Cty. of Los Angeles*, 2007 WL 7708555, at *5 (C.D. Cal. Dec. 11, 2007) (explaining that the unauthorized intrusion was a discrete wrong that occurred the moment defendant entered plaintiff's home, and could not be considered a continuing tort). Thus, any potential intrusion was complete at the time of any alleged meeting with Delhi police, which did not involve Mr. Michael. There is no cause of action for the conduct alleged here: passively seeing and discussing records that had been previously procured elsewhere.[4]

Furthermore, because this is an *intentional* tort, the intrusion must be purposeful. There are no allegations to suggest that Mr. Michael intentionally obtained the records, or that he had anything to do with obtaining them. Compl. ¶ 56 (alleging that Mr. Michael was "show[n]" the records"); *see also* Judicial Council of California Civil Jury Instructions (2016 edition) No. 1800, element 2 (a plaintiff must prove that the "defendant intentionally intruded into [*specify place or other circumstance*]").

The first cause of action should be dismissed.

B. The Complaint Fails to Plead Public Disclosure of Private Facts Against Mr. Michael

Plaintiff's second cause of action is for public disclosure of private facts. To plead this claim, plaintiff must allege: "(1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern." *Moreno v. Hanford Sentinel, Inc.*, 172 Cal. App. 4th 1125, 1129-30 (2009). This

[4] The Restatement confirms that there must be some intentional intrusive act: "physical intrusion into a place in which the plaintiff has secluded himself, as when the defendant forces his way into the plaintiff's room in a hotel or insists over the plaintiff's objection in entering his home. . . . use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs windows with binoculars or tapping his telephone wires. . . . [or] some other form of investigation or examination into his private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account." Restatement (Second) of Torts § 652B, cmt. b.

claim fails against Mr. Michael for the simple reason that the complaint does not allege that he publicly disclosed any information.

First, there is no allegation that Mr. Michael was the source of any information about the plaintiff that was disclosed to the public. Indeed, there is no allegation that any of the defendants publicly disclosed anything about plaintiff, except to express disgust for the crime and support for her recovery. Compl. ¶ 4.

Second, to be a public disclosure, the "disclosure [must] be widely published and not confined to a few persons or limited circumstances." *Hill v. Nat'l Coll. Athletic Ass'n*, 7 Cal. 4th 1, 27 (1994). In other words, it must be "communicat[ed] . . . to the public at large, or to so many persons that the matter must be regarded as *substantially certain* to become one of public knowledge." Restatement (Second) of Torts § 652D cmt. a. (emphasis added); *see also Kinsey v. Macur*, 107 Cal. App. 3d 265, 272 (1980) (finding liability for public disclosure only where defendant sent letters to a "diverse group of people living in several states and totally unconnected [from each other] either socially or professionally").

Here, the complaint vaguely alleges that the defendants "discussed Plaintiff's records with numerous staff throughout Uber, including non-executives." *Id.* ¶ 60. There is no allegation that Mr. Michael or anyone else ever "published" the records, let alone "widely published" them, or disclosed her records "to the public in general." *Hill*, 7 Cal. 4th at 27; *Kinsey*, 107 Cal. App. 3d at 270-71 (noting that Justices Warren and Brandeis "expressed the belief that it was mass exposure to the public gaze and not just backyard gossip which provided the raison d'etre for the tort."). Similarly, there is no allegation that the records ever did become public or that any defendant intended that to happen.

To the contrary, the complaint alleges that the fact that Uber had the records was not disclosed until years later—and only by anonymous "sources." Compl. ¶¶ 72, 99. All the complaint can muster is that employees privately discussed the records, internally at Uber. This clearly falls short of a general, public disclosure. The cause of action for public disclosure of private facts should be dismissed.

C. The Complaint Fails to Plead Defamation *Per Se* Against Mr. Michael

Plaintiff's third cause of action is for defamation *per se*. Defamation requires "the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage." *Smith v. Maldonado*, 72 Cal. App. 4th 637, 645 (1999). In this case, the complaint alleges that the defamatory statements were made by the three individual defendants "to each other and other employees at Uber." Compl. ¶ 95. This claim fails for three separate reasons.

1. The Common Interest Doctrine Protects Against a Defamation Claim

A defamation claim cannot be based on a privileged statement. The allegations here, however, concern statements protected by California's common interest privilege. These alleged statements were made solely within Uber, concerning the company's response to, and evaluation of, the legal ramifications of the crime in India. These are classic examples of privileged, common-interest statements. *See* Cal. Civ. Code § 47(c) ("A privileged publication or broadcast is one made . . . . In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent…").

Here, all the individual defendants had an interest in discussing the response to serious charges against the company—which the complaint characterizes as "ongoing legal issues in Delhi." Compl. ¶65. *See Hui v. Sturbaum*, 222 Cal. App. 4th 1109, 1118-19 (2014) (holding that the interest applies "where the parties to the communication share a contractual, business or similar relationship or the defendant is protecting his own pecuniary interest"); *Hawran v. Hixson*, 209 Cal. App. 4th 256, 287 (2012) (same); *Kashian v. Harriman*, 98 Cal. App. 4th 892, 914-15 (2002) (same); *Rancho La Costa, Inc. v. Superior Court*, 106 Cal. App. 3d 646, 664-65 (1980) (same). In discussing pending and threatened legal action against their employer,[5] the defendants shared common interests in considering the effects on the business.

[5] As noted above, plaintiff also filed a complaint against Uber in this same timeframe, which was later dismissed. *Supra* at 2-3.

Further, there is no allegation that any alleged private conversation was had with malice. In fact, other than in boilerplate requests for punitive damages, Compl. ¶¶ 83, 92, the word "malice" does not appear in the complaint. "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to [t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal*, 556 U.S. at 678. Here, plaintiff has alleged nothing but a threadbare recitation of the element—there are no factual allegations that could sustain a plausible inference that Mr. Michael bore any malice, hatred, or ill will toward the plaintiff. Nor does he. Accordingly, the statements at issue here fall within the statutory common interest privilege and cannot form the basis of a defamation claim.

2. The Alleged Defamatory Statement is "Private Speculation"

A second reason the defamation cause of action fails is that the complaint alleges no facts supporting an inference that Mr. Michael knew any alleged statement was false. To the contrary, the complaint itself refers to the discussions as "private[] specula[tion]." Compl. ¶¶ 3, 11. By its nature, "speculation" is not a "statement of fact" but rather a suggestion or conjecture as to what *could* or *might* be true. It is well-established that an action for defamation cannot be based on a statement of opinion, or, in other words "statements that cannot reasonably be interpreted as stating actual facts." *Weiner v. San Diego Cty.*, 210 F.3d 1025, 1031 (9th Cir. 2000) (citations omitted). At most, the "statement" alleged in the complaint is a statement of opinion among co-workers—or in the words of the complaint, it was nothing more than a "theory." Compl. ¶¶ 14, 60. But where a "speaker is expressing a subjective view, an interpretation, a *theory*, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." *Gardner v. Martino*, 563 F.3d 981, 988-89 (9th Cir. 2009) (quoting *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1226-27 (7th Cir. 1993) (Posner, C.J.)) (emphasis added). That the complaint acknowledges that the "statement" was pure speculation is sufficient to dismiss the claim independent of any other considerations. *Id.* ("[W]hen it is clear that the allegedly defamatory statement is speculation on the basis of the limited facts available, it represents a non-actionable personal interpretation of the facts." (citation and quotation marks omitted)).

3. Plaintiff is Not Identified or Identifiable as the Subject of the Alleged Defamatory Statement

Defamation is "an invasion of the interest in reputation," *Maldonado*, 72 Cal. App. 4th at 645, but here, the plaintiff's name was never publicly disclosed (or even known to Mr. Michael). This is entirely consistent with a "Doe" complaint, which seeks to protect an anonymous plaintiff.

Logically, plaintiff's reputation could not have been harmed when no one has ever affirmatively associated any of the alleged statements with her actual identity. *Golden N. Airways v. Tanana Publ'g Co.*, 218 F.2d 612, 622 (9th Cir. 1954) (citing *Noral v. Hearst Publ'ns*, 40 Cal. App. 2d 348, 352 (1940)) ("Defamatory words to be actionable must refer to some ascertained or ascertainable person, and that person must be plaintiff."). The complaint does not allege that Mr. Michael or any defendant intentionally communicated any statement "to some third person who understands the defamatory meaning of the statement and its application to the person to whom reference is made." *Maldonado*, 72 Cal. App. 4th at 645. A statement is only actionable if the "recipient of the communication reasonably understands that the statement was intended to refer to the plaintiff." *Taus v. Loftus*, 40 Cal. 4th 683, 718 n.15 (2007) (citing *Washer v. Bank of Am.*, 21 Cal. 2d 822, 829 (1943)); *see also* Restatement (Second) of Torts § 564 cmt. a. For example, "[s]tatements disparaging 'LeBron James's father' [without mentioning his name] do not defame" LeBron James's estranged biological father, "unless the people who heard them could have understood them as referencing [LeBron's biological father]." *Stovell v. James*, 810 F. Supp. 2d 237, 248-49 (D.D.C. 2011). Here, there are no allegations that either the recipient or the speaker of the communication knew and communicated the plaintiff's identity.[6] Because plaintiff was never identified, there is no cause of action for defamation.

[6] The *Guardian* article cited in the complaint (at footnote 3), notes that the "victim . . . cannot be named for legal reasons"; likewise, the principal article cited in the complaint to support the allegations here (Compl. at 13, FN 9), does not identify the plaintiff by name.

In sum, the third cause of action also fails for three independent reasons: (1) the alleged statement is protected by the common interest privilege, (2) the alleged statement was not a statement of fact and (3) the identity of the plaintiff was not known or revealed.

V. CONCLUSION

For the reasons stated herein, the complaint against Mr. Michael should be dismissed in its entirety. Because plaintiff cannot cure the legal failings of the complaint, Mr. Michael respectfully requests that the complaint be dismissed with prejudice.

Dated: October 16, 2017

Respectfully submitted,

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