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

DAVID KOENIG,

Plaintiff,

v.

EVANS CLINCHY, JENNIFER  
CLINCHY, and BRIANNA (LOLA)  
McKISSEN,

Defendants.

Case No.: 23CV15424

**DEFENDANT BRIANNA MCKISSEN'S  
SPECIAL MOTION TO STRIKE  
PURSANT TO ORS 31.150 AND  
MEMORANDUM IN SUPPORT**

*Oral argument requested.*

**UTCR 5.050 INFORMATION**

- a) ORS 31.152(1): A hearing on this motion is required within 30 days of filing.
- b) Estimated time for oral argument: 60 minutes
- c) Official court recording services requested: Yes
- d) Telephonic/remote appearance requested: Yes

**UTCR 5.010 CERTIFICATION**

Even though conferral is not required by UTCR 5.010, Ms. McKissen's counsel made multiple attempts to confer with Mr. Koenig's counsel, including by phone, on the issues presented in this motion, but the parties were unable to resolve the issues presented.

///

1 **MOTION**

2 Defendant McKissen moves to strike Plaintiff’s claims against her for defamation, civil  
3 conspiracy, intentional interference in economic relations, and intentional infliction of emotional  
4 distress, as alleged in the Second Amended Complaint. All of Plaintiff’s claims arise out of Ms.  
5 McKissen’s protected conduct in furtherance of the constitutional right of free speech in  
6 connection with a public issue or an issue of public interest, as specified under ORS  
7 31.150(2)(d). Mr. Koenig also cannot meet his burden to establish a probability that he will  
8 prevail on every element of every claim. See ORS 31.150(3) (describing burden shifting).

9 This Motion is supported by the following Memorandum of Points and Authorities, the  
10 Declaration of Brianna McKissen with supporting exhibits, the Declaration of Ashley L. Vaughn  
11 with supporting exhibits, and the Court’s file in this matter.

12 Should the Court grant this Motion, Ms. McKissen moves the Court for an award of her  
13 reasonable attorney’s fees and costs in bringing this Motion, as mandated by ORS 31.152(3).

14 **TIMELINESS OF MOTION**

15 A defendant must file a special motion to strike under ORS 31.150 *et seq.* within 60 days  
16 of service of the moved-against complaint. ORS 31.152(1). Defendant McKissen, as argued  
17 more below, contests that Plaintiff properly served her with any complaint in this case, including  
18 the applicable Second Amended Complaint. However, assuming *arguendo*, that service was  
19 effective on the date it was attempted—June 5, 2023—this motion is timely because it is filed  
20 within 60 days of “service.”  
21

22 **MEMORANDUM IN SUPPORT**

23 **I. INTRODUCTION**

24 Plaintiff David Koenig has long held a reputation as “the most despised person in  
25 [competitive] Scrabble.” Exhibit (“Ex.”) 1 to Declaration of Ashley L. Vaughn (“Vaughn  
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1 Decl.”), “Scrabble Whiz,” *New Jersey Monthly* (Apr. 3, 2008),  
2 <https://njmonthly.com/articles/jersey-living/scrabble-rouser/>.

3 As detailed in the “Scrabble Whiz” article, “Koenig’s arrogance, a character flaw *to*  
4 *which he freely admits*, has alienated some of his peers. He’s even been described as ‘the most  
5 despised person in Scrabble.’” *Id.* (emphasis added). Now, fifteen years later, he claims that  
6 comments from three people in the competitive Scrabble community have irreparably damaged  
7 his already-tanked reputation. Koenig’s arrogance, along with his inability to accept a reputation  
8 that he himself cultivated and even embraced in the past, is the impetus for this frivolous lawsuit.

9 Defendants are fellow competitive Scrabble players, who are heavily involved in that  
10 community within the Pacific Northwest. This lawsuit arises from them expressing legitimate  
11 concerns for the safety of themselves and their friends and colleagues in the community, after  
12 Plaintiff Koenig expressed violent and threatening behavior. After being suspended from  
13 playing in major Scrabble tournaments, Koenig filed suit alleging Defendants have engaged in a  
14 “smear campaign” of lies to destroy his reputation.  
15

16 Additionally, even while this case has been pending—as recently as July 24, 2023—  
17 Koenig continues to publish lengthy blog posts about this dispute, complete with attachments  
18 and evidence directly from this case, arguing his case in the court of public opinion. *See, e.g.*,  
19 Ex. 2 to Vaughn Decl., “The Conspiracy,” (July 24, 2023), <https://splenetic.net/> (part of a series  
20 of blog posts authored by Plaintiff, including “Part I: The Crucible,” “Part II: The Fallout,” “The  
21 Scapegoat,” and “The Conspiracy.”). He alone continues to publicize this matter and continues  
22 to re-publish the allegedly defamatory content, to try to “set the record straight.” *See id.* (*again*,  
23 republicizing the documents, advertising his lawsuit, and attempting to keep the matter at the  
24 forefront of public attention). While Mr. Koenig continues to robustly exercise his First  
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1 Amendment right to free speech repeatedly, he asks this Court to punish Defendant McKissen  
2 for her exercise of the same. Such hypocrisy should not be sanctioned.

3 This Court should grant Defendant McKissen’s Motion to Strike because all of her  
4 challenged conduct is protected conduct in furtherance of the constitutional right of free speech  
5 in connection with a public issue or an issue of public interest, as specified under ORS  
6 31.150(2)(d). Further, Mr. Koenig cannot come close to meeting his burden to produce  
7 substantial evidence establishing a probability that he will prevail on every element of every  
8 claim. *See* ORS 31.150(3). Anti-SLAPP laws were enacted to protect free speech from the  
9 chilling effect of lawsuits just like this one, that aim to bully individuals into silence. Defendant  
10 asks this Court to exercise its role as gatekeeper to prevent that from happening.

11  
12 **II. APPLICABLE FACTS**

13 Plaintiff alleges he is a “highly ranked competitive Scrabble player,” that Defendants are  
14 “fellow competitive Scrabble players and prominent members of the competitive Scrabble  
15 community[,]” and that he and Defendant McKissen engaged in a romantic relationship in early  
16 2020 for several months. 2nd Amend. Compl. ¶¶ 1, 2, 6. Plaintiff alleges that Defendants  
17 engaged in a “smear campaign” to ostracize him from the competitive Scrabble community,  
18 including getting him barred from playing in tournaments sponsored by the North American  
19 Scrabble Players Association (NASPA), the World Game Players Organization (WGPO), and the  
20 Collins Coalition (CoCo). *Id.* ¶¶ 3-5.

21  
22 Plaintiff alleges that on April 14, 2022, he received a “Notification of Potential  
23 Disciplinary Action” from WGPO’s President Steve Pellinen, indicating that Pellinen had filed  
24 complaints with the three aforementioned Scrabble organizations “alleging that Plaintiff had  
25 breached the organizations’ codes of conduct by threatening violence against individuals as well  
26 as the Scrabble community at large and engaging in ‘predatory behavior’ toward Defendants

1 Jennifer Clinchy and Brianna McKissen.” *Id.* ¶ 9 (referencing Ex. A to the 2nd Amend. Compl.,  
2 Notification). Attached to the Notification were statements by the Clinchy Defendants and  
3 Defendant McKissen, detailing highly concerning behavior by Koenig that they believed posed a  
4 danger to themselves and other participants in the competitive Scrabble community. *See* Exs. B-  
5 D to Compl. Defendant McKissen’s statement is dated March 3, 2022. Ex. D to Compl.<sup>1</sup>  
6 Defendant admits she authored that statement. McKissen Decl. ¶ 2. In the statement, she  
7 describes her brief romantic relationship with Koenig, and how her interactions with him caused  
8 her intense fear and distress. Ex. 1 to McKissen Decl. She describes Koenig’s frequent and  
9 violent rants—rants to which he has admitted. *See* Plaintiff’s Affidavit (May 26, 2023) at 21 (“I  
10 admitted many angry thoughts to her.”); 29 (“I continued to go on late night angry rants while we  
11 lived together[.]”). She describes what she perceived as predatory behavior that has continued  
12 for two years since their breakup. Ex. 1 to McKissen Decl. She describes how she is a survivor  
13 of child abuse, which he knew, and how that affected her perception of and reaction to his  
14 behavior. *Id.* She issues a warning to her fellow Scrabble players because she legitimately  
15 feared for their safety based on Koenig’s violent rants. *Id.*

17 Her March 3 statement attached to the Complaint is 7.5 pages long. Out of that  
18 statement, Koenig alleges that only two comments are defamatory:

- 19 1. “I wasn’t counting on . . . him being an actual psychopath[.]”
- 20 2. That he threatened “it was a whole random tournament of Scrabblers he wanted to  
21 shoot down[.]”

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24  
25 <sup>1</sup> Although Ms. McKissen’s statement is attached in full to Plaintiff’s complaint,  
26 she reattaches it for the Court’s convenience as Exhibit 1 to her own declaration, filed herewith.

1 *Id.* at 2-3; Compl. ¶ 10. On information and belief, Koenig has campaigned since April 14, 2022  
2 to appeal his suspension from various Scrabble tournaments, without success. *See, e.g.*, Ex. 2 to  
3 Vaughn Decl., “The Conspiracy.” He filed this action on April 14, 2023.

4 Ms. McKissen’s statements are statements of her *opinions* about Koenig based on her  
5 personal experiences with him and perceptions of him. McKissen Decl. ¶ 3. When she made the  
6 statements, she did not intend for them to be interpreted as absolute fact, nor did she present  
7 them as such. *Id.* ¶ 4. In fact, in the same statement, she writes “I tell him that I do *think* he’s an  
8 actual psychopath.” Ex. 1 to McKissen Decl., at 4 (emphasis added). By her own words, her  
9 statement is one of opinion, *i.e.* something she *thinks*. In the same letter she also states, “I am  
10 not asking you to believe that he is delusional and unhinged, that he’s a psychopath, or that he  
11 will actually harm me, Jennifer, Evans, or anyone else. I am not a psychologist; and I can’t see  
12 the future.” *Id.* at 7. Again, she is conditioning her statements as opinions and stating that she is  
13 not presenting them as facts. Plaintiff also referred to himself as a psychopath on more than one  
14 occasion, which he admitted under oath. *See, e.g.*, Pl.’s Aff. at 31 (“I jokingly ask her if her  
15 family knows I’m a psychopath[.]”); 70 (“Do they know I’m a psychopath?”). No reasonable  
16 person would understand them to be anything other than her opinions.

17  
18 Ms. McKissen understood, when she drafted the statement, that it would be submitted to  
19 the leadership of at least some of the various Scrabble organizations. McKissen Decl. ¶ 5. She  
20 understood and, indeed, intended for her statement to be made public, as is evidenced from its  
21 plain language. *Id.* *See also* Ex. 1 to McKissen Decl., at 1 (“When I realized this that I can’t feel  
22 safe here until *everyone knows* the whole story of what happened with Koenig . . . .”); (“I also  
23 realized that writing everything down was the only way I could tell you guys the whole  
24 story[.]”); (addressing her remarks to an audience of “You,” in the plural sense). It was her  
25 intent, based on her personal interactions with Koenig, to express her legitimate and considerable  
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1 fear of Koenig, both to ask for others’ assistance in protecting her and to warn others about what  
2 she perceives as a very real threat to others’ safety. McKissen Decl. ¶ 6.

3 And Ms. McKissen’s fear is reasonable. Plaintiff admits that he previously and very  
4 publicly threatened another Scrabble player with whom he disagreed about politics. He admitted  
5 he stated: he “wanted to beat the living shit out of another Scrabble player[;]” “after he bashed in  
6 the skull of another Scrabble player, he was going to diarrhea in the player’s mouth[;]” “going to  
7 chop off the balls of another Scrabble player, stuff the balls in the player’s mouth, and then take  
8 pictures and send them to the player’s kids[.]”. Pl.’s Resp. to Def. Clinchy’s Req. for Adm. (May  
9 16, 2023). *See also* Ex. 2 to McKissen Decl. (email string from Koenig, including forwarded  
10 communications from NASPA regarding incident). These were *public* statements, made on  
11 Facebook. Ex. 2 to McKissen Decl. He was already formally disciplined by the NASPA for  
12 these public statements. *Id.*

14 In the end, this case arises from Koenig’s admitted arrogance. It arises from his inability  
15 or unwillingness to accept responsibility for his own actions that bear their own consequences.

16 Defendant McKissen respectfully asks this Court to grant this anti-SLAPP motion,  
17 dismiss Plaintiff’s claims in full as against her, and award Defendant McKissen’s reasonable  
18 attorney’s fees and costs necessitating this motion.

19 **III. APPLICABLE LAW**

20 A Strategic Lawsuit Against Public Participation (“SLAPP”) is a lawsuit intended to  
21 censor, intimidate, and silence critics by burdening them with the cost of a legal defense until  
22 they abandon their criticism or opposition. *Handy v. Lane Cty.*, 274 Or App 644, 650 (2015),  
23 *aff’d in part, rev’d in part*, 360 Or 605 (2016). ORS 31.150, commonly referred to as Oregon’s  
24 “anti-SLAPP” statute, provides for a Special Motion to Strike against such lawsuits that involve  
25 claims that arise out of certain protected speech related conduct. Anti-SLAPP statutes are  
26

1 intended to shield one of our country’s most fundamental rights—freedom of expression,  
2 enshrined in the First Amendment to the United States Constitution. As the Court of Appeals  
3 aptly stated in *Staten v. Steel*, “[t]he purpose of the [anti-SLAPP law], as amplified in the  
4 pertinent legislative history, is to expeditiously terminate unfounded claims that threaten  
5 constitutional free speech rights[.]” 222 Or App 17, 32, (2008), *rev den by State v. Falbo*, 345 Or  
6 618 (2009). The statute, its legislative history, and the caselaw interpreting it, recognize the  
7 axiomatic principle that when an individual is forced to expend significant time, expense, and  
8 emotion in defending against a frivolous lawsuit, their speech rights have already been chilled,  
9 regardless of the ultimate outcome of the litigation months or years later. *See Young v. Davis*,  
10 259 Or App 497, 508 – 09 (2013) (“[T]he goal, similar to that of summary judgment, is to weed  
11 out *meritless* claims meant to harass or intimidate—not to require that a plaintiff prove its case  
12 before being allowed to proceed further.”) (emphasis added).

14 ORS 31.150 provides, in relevant part:

15 “(1) A defendant may make a special motion to strike against a claim in a civil  
16 action described in subsection (2) of this section. The court shall grant the motion unless  
17 the plaintiff establishes in the manner provided by subsection (3) of this section that there  
18 is a probability that the plaintiff will prevail on the claim. The special motion to strike  
19 shall be treated as a motion to dismiss under ORCP 21 A but shall not be subject to  
ORCP 21 F. Upon granting the special motion to strike, the court shall enter a judgment  
of dismissal without prejudice. If the court denies a special motion to strike, the court  
shall enter a limited judgment denying the motion.

20 “(2) A special motion to strike may be made under this section against any  
21 claim in a civil action that arises out of:

22 \* \* \*

23 “(d) Any other conduct in furtherance of the exercise of the  
24 constitutional right of petition or the constitutional right of free speech in connection with  
a public issue or an issue of public interest.

25 “(3) A defendant making a special motion to strike under the provisions of this  
26 section has the initial burden of making a prima facie showing that the claim against  
which the motion is made arises out of a statement, document or conduct described in



1 subsection (2) of this section. If the defendant meets this burden, the burden shifts to the  
2 plaintiff in the action to establish that there is a probability that the plaintiff will prevail  
3 on the claim by presenting substantial evidence to support a prima facie case. If the  
4 plaintiff meets this burden, the court shall deny the motion.

5 “(4) In making a determination under subsection (1) of this section, the court  
6 shall consider pleadings and supporting and opposing affidavits stating the facts upon  
7 which the liability or defense is based.”

8 Resolution of an anti-SLAPP motion involves a two-step burden-shifting framework.  
9 *Davoodian v. Rivera*, 327 Or App 197, at \*4 (2023). Step One requires the Court to determine  
10 whether the defendant, or moving party, has established that the moved-against claims arise from  
11 protected activity under ORS 31.150(2). *Id.*; ORS 31.150(3). Significantly, the statute directs  
12 courts to “liberally” construe the statute “in favor of the exercise of the rights of expression.”  
13 ORS 31.152(4). If the defendant meets its burden at Step One, Step Two involves the burden  
14 shifting to the plaintiff to “establish that there is a probability that the plaintiff will prevail on the  
15 claim by presenting substantial evidence to support a prima facie case” on every element of  
16 every challenged claim. *Id.* Each step of the process presents a question of law. *Young*, 259 Or  
17 App at 507-10 (holding that whether the plaintiff has established a probability of prevailing  
18 presents a legal question).

#### 18 IV. ARGUMENT

##### 19 A. ***Step One: Plaintiff’s claims against Defendant McKissen all arise out of Ms. 20 McKissen’s protected conduct under ORS 31.150(2)(d).***

21 Defendant McKissen can satisfy her burden to prove all of Plaintiff’s claims against her  
22 arise out of her protected conduct under ORS 31.150(2)(d). Claims arising out of “conduct in  
23 furtherance of the exercise of \* \* \* the constitutional right of free speech in connection with a  
24 public issue or an issue of public interest[,]” are subject to a special motion to strike. ORS  
25 31.150(2)(d). Plaintiff’s claims against Ms. McKissen are premised on two allegedly defamatory  
26 statements that she made in a statement submitted to various Scrabble organizations, summarized

1 in one sentence in his Complaint: “Defendant McKissen calls Plaintiff ‘an actual psychopath’  
2 and says that he was a threat to ‘shoot down’ a “whole random tournament of Scrabblers.” 2nd  
3 Amend. Compl. ¶ 10. Those two statements constitute the *entirety* of the alleged defamatory  
4 statements by Ms. McKissen. *See* Pl.’s Aff. at 38 (“I have already addressed *all* of the ways in  
5 which Lola’s statement is a lie.”) (emphasis added). The remainder of Plaintiff’s complaint is  
6 directed at the other Defendants.

7 Ms. McKissen’s statements constitute protected conduct in furtherance of her right of  
8 free speech in connection with an issue of public interest.

9 First, Ms. McKissen’s statements were opinion statements and, as such, are  
10 constitutionally protected. *Neumann v. Liles*, 358 Or 706, 722 (2016). Whether a statement is  
11 opinion versus fact is a question of law. *Slover v. Or. State Bd. of Clinical Soc. Workers*, 144 Or  
12 App 565, 568 (1996). Merriam-Webster defines “opinion” as “a view, judgment, or appraisal  
13 formed in the mind about a particular matter.” “Opinion,” Merriam-Webster.com Dictionary,  
14 *Merriam-Webster*, <https://www.merriam-webster.com/dictionary/opinion>. Ms. McKissen’s  
15 statements were just that—her views and judgments formed about Mr. Koenig.  
16

17 In fact, in the very same letter, she says “I told him that I do think he’s an actual  
18 psychopath.” By her own words, her statement is one of her opinion, *i.e.* something she thinks.  
19 Later in the same letter she says, “I am not asking you to believe that he is delusional and  
20 unhinged, that he’s a psychopath, or that he will actually harm me, Jennifer, Evans, or anyone  
21 else. I am not a psychologist; and I can’t see the future.” Again, she is conditioning her  
22 statements as opinions and stating that, because they are her opinions, she is not presenting them  
23 as absolute facts. Also, your client referred to himself as a psychopath on more than one  
24 occasion, which he admitted under oath. *See, e.g.*, Pl.’s Aff. at 31 (“I jokingly ask her if her  
25 family knows I’m a psychopath[.]”); 70 (“Do they know I’m a psychopath?”).

1 Her conduct, in committing her opinions to a written text, was in “furtherance of” her  
2 constitutional right to express her opinion. *Davoodian*, 327 Or App at \*15 (holding that in  
3 “furtherance of” in the statute means any conduct that advances or promotes the event).

4 Second, her statements were in connection with a public issue or an issue of public  
5 interest because they involved matters of public safety—the safety of their friends, competitors,  
6 and colleagues in the Scrabble community. This is especially so considering that Plaintiff was  
7 previously disciplined for making public and extremely violent threats against another fellow  
8 competitive Scrabble player in the community. *See, e.g., Mullen v. Meredith Corp.*, 271 Or App  
9 698, 707 (2015) (news coverage of gunfire was a matter of public interest); *Traditional Cat*  
10 *Ass’n, Inc. v. Gilbreath*, 13 Cal Rptr 3d 353, 356 (Cal App 2004) (infighting among different  
11 factions of cat breeders was “of public interest in the cat breeding community”); *Davoodian*, 327  
12 Or App at \*\*24-25 (holding that a private communication between two parties addressing  
13 allegations of sexual assault by a healthcare employee serving the public is a matter of “interest  
14 to the public”).

16 Because Defendant McKissen has met her burden to show that Plaintiff’s claims arise  
17 from her protected activity under ORS 31.150(2)(d), the burden shifts to Plaintiff to establish a  
18 probability that he can prevail on each of his claims by presenting substantial evidence *on every*  
19 *element* to support a prima facie case. He cannot do so; therefore, this Court should grant  
20 Defendant’s motion and strike Plaintiff’s complaint in its entirety.

21  
22 **B. Step Two: Plaintiff cannot establish a probability that he will prevail on every claim  
by presenting substantial evidence to support a prima facie case on every element.**

23 **1. Defamation**

24 The heart of Plaintiff’s case is the defamation claim. Without the allegedly defamatory  
25 comments, the remainder of Plaintiff’s claims fail on their faces. Plaintiff cannot present a *prima*  
26

1 *facie* case on this defamation claim for several reasons: 1) Defendant’s statements were those of  
2 opinion, not fact; 2) Plaintiff cannot prove by substantial evidence that his reputation has been  
3 further harmed by Defendant’s statements; and 3) Plaintiff’s claim is barred by the statute of  
4 limitations.

5 First, as argued above, Ms. McKissen’s two alleged defamatory statements are statements  
6 of opinion, not fact.<sup>2</sup>

7 Second, Plaintiff must prove that due to *Defendant’s* defamatory statements, his  
8 reputation has been harmed. Plaintiff cannot present substantial evidence to prove a causal link  
9 between (1) *Defendant’s*, as opposed to someone else’s, statements and (2) further damage to his  
10 reputation, beyond what he had already inflicted on it himself. For example, Plaintiff cannot  
11 present substantial evidence to prove that Ms. McKissen’s two allegedly defamatory statements  
12 harmed his reputation, as opposed to others’ allegedly defamatory comments. Additionally, it is  
13 undisputed that not only did Plaintiff know of his reputation as the “most despised person” in the  
14 competitive Scrabble community, but embraced that reputation. Additionally, prior to the  
15 statements at issue in this case, it is undisputed that Plaintiff made graphically violent and *public*  
16 threats against another competitive Scrabble player and was disciplined by NASPA for that  
17 conduct. Plaintiff cannot meet his burden to present substantial evidence that Ms. McKissen’s  
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22 <sup>2</sup> To the extent that Plaintiff argues that there are additional actionable statements  
23 made by Ms. McKissen beyond those two alleged in the complaint, Defendant will move to  
24 strike inclusion of those statements. A defendant cannot defend against a defamation claim  
25 without having sufficient notice of the specific allegedly defamatory comments. Plaintiff’s  
26 claims should be limited to those two specific statements alleged. To the extent Plaintiff claims  
there are additional statements, they are likely also barred by the statute of limitations. The  
statements are also either statements of opinion or are true because she was merely repeating  
what Plaintiff said.

1 comments damaged his reputation to a greater degree than it was already damaged. Finally, it is  
2 *Plaintiff*, not Defendants, that continues to publicize and re-publish the allegedly defamatory  
3 statements. How much harm have his own actions inflicted on his reputation?

4 Finally, Plaintiff’s defamation claim is barred by the applicable statute of limitations.  
5 The Oregon appellate courts have left undecided whether resolution of affirmative defenses is  
6 required when considering an anti-SLAPP motion. *Davoodian*, 327 Or App at \*29. However,  
7 the policy underlying anti-SLAPP law—the expeditious dismissal of frivolous lawsuits meant to  
8 chill speech—supports the consideration of dispositive affirmative defenses at this stage.

9 Even if we assume the discovery rule applies and work from an operative date of April  
10 14, 2022—when Plaintiff alleges he first learned of Ms. McKissen’s statements—the claim is  
11 barred by the one-year statute of limitations because Plaintiff did not serve Defendant properly  
12 within 60 days of filing the original complaint. Plaintiff filed the complaint on the last possible  
13 day of the statute of limitations—April 14, 2023. *See* Compl. (date-stamped April 14, 2023).  
14 For that date to be effective, Plaintiff needed to serve Defendant properly within 60 days of  
15 filing. ORS 12.020(2). Service of the first complaint was ineffective because Plaintiff mailed  
16 the summons and complaint to my client via first class and certified mail on May 2, 2023 but  
17 failed to secure a signed return receipt or complete a follow-up mailing. Exs. 3-4 to Vaughn  
18 Decl. Plaintiff did not complete personal, substitute, or mail service. *See* ORCP 7D & D(3)(a).  
19 Service of the First Amended Complaint was ineffective because Plaintiff did not get a signature  
20 on the return receipt nor did Plaintiff mail a new summons. Ex. 5-6 to Vaughn Decl.; ¶ 8.  
21 Service of the Second Amended Complaint was ineffective because, while an individual  
22 personally handed the complaint to Ms. McKissen, Plaintiff again did not include a summons.  
23 Vaughn Decl. ¶ 9. Service of both is required to effectuate personal service. ORCP 7D(2)(a)  
24 (“Personal service may be made by delivery of a true copy of the summons and a true copy of  
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1 the complaint to the person to be served.”). Plaintiff has never filed a Proof of Service for any  
2 version of the complaint. Because Plaintiff failed to properly serve Ms. McKissen with both the  
3 complaint and summons within 60 days of commencing the case, the case will be deemed to  
4 commence when Plaintiff does effectuate proper service, not the filing date—that will be outside  
5 the one-year statute of limitations.

6 **2. Conspiracy claims**

7 Plaintiff has alleged a variety of “civil conspiracy” claims—“conspiracy to defame;”  
8 “conspiracy to tortiously interfere with economic relations;” and “conspiracy to intentionally  
9 inflict emotional distress.” 2nd Amend Compl. Defendant McKissenn cannot find any support  
10 for such claims in Oregon law. During conferral, Defendant requested that Plaintiff’s counsel  
11 provide legal support for the claims, and Plaintiff’s counsel failed to do so. Vaughn Decl. ¶ 10.

12 **3. Intentional infliction of emotional distress**

13 Ms. McKissen’s statements do not amount to an “extraordinary transgression of the  
14 bounds of socially tolerable conduct.” This issue is a matter of law. *Harris v. Pameco Corp.*,  
15 170 Or App 164, 171 (2000). Insults or mean words do not result in liability, even when the  
16 defendant intended to cause the plaintiff distress. *See Brewer v. Erwin*, 287 Or 435, 457–58  
17 (1979); *Kraemer v. Harding*, 159 Or App 90, 110 (1999); *House v. Hicks*, 218 Or App 348, 357–  
18 366 (2008) (holding that liability only exists when the conduct is “so outrageous in character,  
19 and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as  
20 atrocious, and utterly intolerable in a civilized community.”). One incident is generally not  
21 actionable—there must be repeated conduct. *Brewer*, 287 Or at 456–60; *Turman v. Central*  
22 *Billing Bureau, Inc.*, 279 Or 443, 445–46 (1977).

23 Ms. McKissen wrote a letter to express her fear, based on her personal interactions with  
24 him, that Mr. Koenig—who has a history of making violent statements—is unsafe. By his own  
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1 admissions, Mr. Koenig expressed that he could see how her fear may have been reasonable.  
2 She wanted to warn her community of friends and colleagues. Her actions do not come close to  
3 surpassing “all possible bounds of decency,” being atrocious, or being “utterly intolerable.”  
4 Plaintiff cannot present substantial evidence proving he has a probability of proving this element  
5 as a matter of law.

6 Plaintiff can also not prove Defendant’s intentionality. Plaintiff admitted, under oath,  
7 that he does not believe Ms. McKissen acted intentionally or maliciously, and expressed that he  
8 understands that she perhaps misunderstood the situation and was genuinely in fear:

9 “I am far more sympathetic to Lola, and it is extremely sad that she has  
10 gotten caught up in this mess. . . . However, she has badly misunderstood  
11 the situation between her and me . . . I am charitably interpreting that . . .  
12 she really felt in danger, *rather than interpreting her actions as a  
malicious attempt to destroy my life.*”

13 Pl.’s Aff. at 11 (emphasis added). Plaintiff’s own admissions undermine his claim that Ms.  
14 McKissen intentionally harmed him.

15 **4. Intentional Interference with Economic Relations**

16 First Amendment-protected speech cannot form the basis of an intentional interference  
17 with economic relations (IIER) claim. *Gardner v. Martino*, 563 F3d 981, 992 (9th Cir 2009). As  
18 argued above, Defendant’s speech is opinion speech protected by the First Amendment. As  
19 argued above, Plaintiff also cannot introduce substantial evidence of intentionality or that  
20 Defendant’s comments were the cause of his emotional distress. Finally, Plaintiff cannot present  
21 substantial evidence that he earned any economic advantage from the Scrabble tournaments,  
22 especially considering entry fees, airfare, and other expenses, or that he had a contractual  
23 relationship with these organizations.

24 ///

25 ///

1       **V.     ATTORNEY’S FEES**

2             If the Court grants Defendant’s motion to strike, the Court “shall” award reasonable  
3 attorney fees and costs to Defendant incurred in making this motion. ORS 31.152(3).

4       **VI.    CONCLUSION**

5             For the reasons argued above, Defendant McKissen respectfully requests that this Court  
6 grant Defendant’s special motion to strike, dismiss Plaintiff’s claims against Defendant  
7 McKissen in their entirety, and award Defendant’s reasonable attorney’s fees and costs.

8  
9             DATED this 1st day of August, 2023.

10  
11                                     */s/ Ashley L. Vaughn*  
12                                     Ashley L. Vaughn, OSB No. 114691  
13                                     ashley@dumasandvaughn.com  
14                                     **DUMAS & VAUGHN, LLC**

15  
16                                     *Of Attorneys for Defendant*  
17                                     *BriAnna McKissen*



1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on August 1, 2023, I served the foregoing **DEFENDANT**  
3 **BRIANNA MCKISSEN'S SPECIAL MOTION TO STRIKE AND MEMORANDUM IN**  
4 **SUPPORT** on:

5  
6 Plaintiff David Koenig  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]

9 Michael Fuller  
10 111 SW 5<sup>th</sup> Avenue, Suite 3150  
11 Portland, OR 97204  
12 Telephone: (503) 222-2000  
13 [michael@underdoglawyer.com](mailto:michael@underdoglawyer.com)

14 *Of Attorneys for Defendants Evans Clinchy*  
15 *and Jennifer Clinchy*

- 16  by E-filing/ Electronic Mail  
17  by Facsimile  
18  by First Class Mail *on Plaintiff only*  
19  by Hand Delivery  
20  by Overnight Delivery

21 /s/ Ashley L. Vaughn  
22 Ashley L. Vaughn, OSB #114691  
23 *Of Attorneys for Defendant McKissen*