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PRELIMINARY STATEMENT

The Foundation is a California-based, 501(c)(3) charitable organization that promotes Internet safety and assists local law enforcement organizations in their efforts to apprehend and prosecute Internet-based sexual predators and pedophiles. Mr. Von Erck is the President of the Foundation. He is an Oregon resident. As set forth below, neither Mr. Von Erck nor the Foundation have sufficient "minimum contacts" with Arizona necessary for this Court to exercise personal jurisdiction.

Plaintiff has admitted in court filings in this case that she is an "activist" and a "blogger" on "certain political issues" related to convicted pedophiles and registered sex offenders, and that she was convicted in 1992, in her words, "for sexual conduct with a minor." (See Docket #26, Plaintiff's Response to Motion to Dismiss ¶¶ 11, 16, 19, 24, 28.) Plaintiff is suing the Foundation and Mr. Von Erck based entirely on the content of the Foundation's Wikisposure webpage describing Plaintiff and her "activist" work. Essentially, Plaintiff is inappropriately seeking to use the federal courts to take down the Foundation's webpage and obtain a financial windfall. As set forth below, Plaintiff's claims fail to state a claim upon which relief may be granted.

For the reasons stated in this motion, this Court should dismiss the Complaint with prejudice.

THE COMPLAINT

In an attempt to establish jurisdiction, the Complaint alleges baldly that the Foundation "is doing business within the State of Arizona." (Compl. ¶ 2.) It does not support that allegation with any facts. Concerning Mr. Von Erck, the Complaint simply alleges that he is the "founder and President" of the Foundation and "is believed to reside in Portland, Oregon." (*Id.* ¶ 3.) These allegations are insufficient to establish jurisdiction.

The Complaint alleges that "[u]nder their 'Wikisposure Project' sub site [the Foundation and its volunteers] target individuals who they claim are pedophilia and

1 child rape advocates." (*Id.* ¶ 2.) "[T]he site posts names, home addresses, telephone
2 numbers, addresses, screen names, e-mail addresses, personal identifying
3 information, employers, hobbies, businesses and/or websites owned, and
4 photographs if available." (*Id.*) Substantively, the Complaint states that the
5 Foundation's Wikisposure webpage displays "four copyrighted images of Plaintiff as
6 well as numerous copyrighted written materials," "Plaintiff's personal identifying
7 information ... such as home address, telephone and cell phone numbers, maiden and
8 married names, jobs plaintiff has held, online magazines and bands she has written
9 for, date of birth, e-mail addresses, known affiliates (some of which she does not
10 know), Plaintiff's hobbies, that Plaintiff is a convicted child molester, that she was
11 convicted of molesting a child in Massachusetts and that she is a pedophile." (*Id.*
12 ¶ 27.) Plaintiff claims that she "contacted" the Foundation "demanding that they
13 cease and desist," and that the Foundation responded "simply stat[ing] 'Please shut
14 up, your typing is boring.'" (*Id.* ¶ 30.)

15 Whether or not these allegations are true, this matter is not a federal case.

16 ARGUMENT

17 18 **I. PLAINTIFF HAS FAILED TO MAKE A PRIMA FACIE SHOWING 19 THAT THIS COURT HAS PERSONAL JURISDICTION OVER THE 20 FOUNDATION AND MR. VON ERCK.**

21 Plaintiff bears the burden of making a *prima facie* showing of personal
22 jurisdiction to avoid dismissal. *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154
23 (9th Cir. 2006). A *prima facie* showing requires that the pleading or production of
24 admissible evidence is sufficient to establish the existence of personal jurisdiction.
25 *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004); *Doe v.*
26 *Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001) (per curium); *accord Wenz v.*
27 *Memery Crystal*, 55 F.3d 1503, 1505 (10th Cir. 1995). Conclusory allegations in a
28 complaint, however, are not accepted as true. *GTE New Media Servs., Inc. v.*
BellSouth Corp., 199 F.3d 1343, 1349 (D.C. Cir. 2000) ("Conclusory statements ...

1 [do] not constitute the *prima facie* showing necessary to carry the burden of
2 establishing personal jurisdiction.") (citations omitted).

3 Here, Plaintiff alleges absolutely no facts to support this Court's exercise of
4 personal jurisdiction over Mr. Von Erck. The Complaint acknowledges, in fact, that
5 Mr. Von Erck is a resident of Oregon. (Compl. ¶ 3.) Plaintiff's allegations
6 attempting to establish this Court's jurisdiction over the Foundation are likewise
7 deficient. Plaintiff alleges, without any factual support, that the Foundation "is doing
8 business within the State of Arizona." (Compl. ¶ 2). This conclusory statement does
9 not constitute a *prima facie* showing necessary to carry the burden of establishing
10 personal jurisdiction. *GTE New Media Servs.*, 199 F.3d at 1349. The Complaint
11 should be dismissed as to the Foundation and Mr. Von Erck on that basis alone.
12

13 **II. THERE IS NO FACTUAL BASIS FOR SUBJECTING THE**
14 **FOUNDATION AND MR. VON ERCK TO GENERAL OR SPECIFIC**
15 **JURISDICTION.**

16 **Nor is there any reason to think Plaintiff can establish personal**
17 **jurisdiction with respect to the Foundation or Mr. Von Erck.** The Foundation
18 does no business in Arizona and has not availed itself of this forum or committed any
19 act in Arizona that gives rise to Plaintiff's claims. Similarly, Mr. Von Erck does not
20 reside in Arizona, own any property in Arizona, pay any Arizona taxes, and he has
21 not otherwise done anything to avail himself of this forum or done any act in Arizona
22 that gives rise to Plaintiff's claims.

23 **A. Legal Standards For Personal Jurisdiction**

24 The Court must apply the law of the forum state – in this case Arizona – to
25 determine whether it may obtain personal jurisdiction over the Foundation and Mr.
26 Von Erck. *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d
1114, 1123 (9th Cir. 2002).¹ The exercise of personal jurisdiction is valid only if it

27 ¹ Plaintiff asserts that this Court has jurisdiction based on federal law (Compl.
28 ¶ 14), but the statute governing federal question jurisdiction does not provide an
independent basis for asserting personal jurisdiction. *See* 28 U.S.C. § 1331.

1 meets both the state long arm statute and constitutional due process requirements.
2 *Pac. Atl. Trading Co. v. M/V Main Exp.*, 758 F.2d 1325, 1327 (9th Cir. 1985).
3 Arizona's long arm statute is coextensive with the limits of constitutional due process,
4 and, thus, the Court need only conduct a single analysis. *See* Ariz. R. Civ. P. 4.2(a).

5 Due process protects an individual's liberty interest in not being haled into
6 court in a forum "with which he has established no meaningful 'contacts, ties, or
7 relations,'" by mandating that a defendant have certain "minimum contacts" with the
8 forum state such that maintenance of the suit does not offend "traditional notions of
9 fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316
10 (1945) (citation omitted). In other words, "the defendant's conduct and connection
11 with the forum State [must be] such that he [or she] should reasonably anticipate
12 being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S.
13 286, 297 (1980). The Supreme Court has emphasized that it is the "relationship
14 among the defendant, the forum, and the litigation" that is "the essential foundation
15 of *in personam* jurisdiction." *Helicopteros Nacionales de Columbia, S.A. v. Hall*,
16 466 U.S. 408, 414 (1984) (citation omitted).

17 Within this framework, personal jurisdiction may exist as a matter of general
18 or specific jurisdiction. General jurisdiction only exists where a non-domiciled
19 defendant's activities in the forum state are "substantial, continuous and systematic."
20 *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952). Where a
21 defendant's activities in a forum state are not enough to establish general jurisdiction,
22 specific jurisdiction exists only where the claims at issue arise from that defendant's
23 activities within the forum state. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462,
24 472 (1985). Under either test, "[t]he 'substantial connection' between [the] defendant
25 and the forum State necessary for a finding of minimum contacts must come about
26 by any action of the defendant purposefully directed toward the forum State." *Asahi*
27 *Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 112 (1987) (citation omitted); *see also*
28

1 *Burger King*, 471 U.S. at 474-75. Here, Plaintiff does not, and indeed cannot,
2 establish that this Court has general or specific jurisdiction over the Foundation and
3 Mr. Von Erck.

4 **B. General Jurisdiction**

5 **1. The Foundation Is Not Subject To General Jurisdiction.**

6 Plaintiff cannot establish general jurisdiction over the Foundation. For a court
7 to exercise general jurisdiction, a defendant's contacts must be substantial,
8 "continuous and systematic." *Helicopteros Nacionales*, 466 U.S. at 414-15. In
9 determining whether general jurisdiction exists, courts consider factors such as "
10 'whether the defendant makes sales, solicits or engages in business in the state, serves
11 the state's markets, designates an agent for service of process, holds a license, or is
12 incorporated in the state.'" *See Toler v. Acorn/WRN Intern.*, No. CV-F-07-1585
13 OWW/GSA, 2008 WL 449657, * (E.D. Cal. Feb. 15, 2008) (quoting *Bancroft &*
14 *Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000)).

15 Here, the Foundation has had no "substantial, continuous and systematic"
16 business activities within the forum state, and thus, general jurisdiction is not
17 established. Plaintiff makes the conclusory allegation that the Foundation is "doing
18 business within the State of Arizona," (Compl. ¶ 2), but does not have any facts to
19 indicate the type or duration of the alleged business contacts. In fact, the Foundation
20 is a California non-profit corporation, based in California and Oregon, and registered
21 as a 501(c)(3) charitable organization with the Internal Revenue Service.

22 (Declaration of Xavier Von Erck in Support of Specially Appearing Defendants'
23 Motion To Dismiss ("Von Erck Decl."), attached, ¶ 2.)² The Foundation does not do
24 any business within the Arizona, has not designated an agent for service of process,
25

26 ² In the context of a Rule 12(b)(2) motion to dismiss, the Court cannot assume
27 the truth of allegations in a pleading that is contradicted by a sworn declaration.
28 *Data Disc, Inc. v. Systems Technology Assocs., Inc.*, 557 F.2d 1280, 1289 & n. 5 (9th
Cir. 1977); *Jobe v. ATR Marketing, Inc.*, 87 F.3d 751, 753 (5th Cir. 1996) (court may
consider "affidavits, interrogatories, depositions, oral testimony, or any combination
of the recognized methods of discovery").

1 holds no license in Arizona, and is not incorporated within the state. (*Id.* ¶ 3.) Thus,
2 this Court has no basis to exercise general jurisdiction over the Foundation.

3 **2. Mr. Von Erck Is Not Subject To General Jurisdiction.**

4 The standard for establishing general jurisdiction over an individual defendant
5 is "exacting" and requires that a defendant's contacts be the sort that "approximate
6 physical presence." *Schwarzenegger*, 374 F.3d at 801 (internal quotations citation
7 omitted); *see also Glencore Grain Rotterdam*, 284 F.3d 1114, 1124-25 (9th Cir.
8 2002) (finding no general jurisdiction where defendant was at most a "visitor" to the
9 forum); *Brand v. Menlove Dodge*, 796 F.2d 1070, 1073 (9th Cir. 1986) (same). To
10 determine whether the requisite "approximate physical presence" exists, courts in
11 this Circuit consider several factors, such as whether the defendant owns property,
12 keeps bank accounts, solicits business, has established phone and mail service, and
13 has designated an agent for service of process in Arizona. *See, e.g., Glencore Grain*
14 *Rotterdam*, 284 F.3d at 1124. Where these factors are lacking, courts have
15 consistently refused to exercise general jurisdiction. *See, e.g., id.* at 1125;
16 *Schwarzenegger*, 374 F.3d at 801.

17 Here, the Court has no general jurisdiction over Mr. Von Erck because he has
18 absolutely no contacts with Arizona. As the Complaint states, Mr. Von Erck resides
19 outside Arizona. (Compl. ¶ 3.) He has never lived in or been a resident of Arizona,
20 does not own any real property in Arizona, does not own a business in Arizona, has
21 no bank account in Arizona, does not pay taxes in Arizona, and has no designated
22 agent for service of process in this state. (Von Erck Decl. ¶¶ 5-6.) In sum, Mr. Von
23 Erck has absolutely *no* substantial, continuous or systematic contacts with Arizona.
24 This Court has no basis to assert general jurisdiction over him.
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C. Specific Jurisdiction

1. The Foundation Is Not Subject To Specific Jurisdiction.

To assert specific jurisdiction over a nonresident defendant, the Ninth Circuit has established a three-part test: (1) the defendant must "perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;" (2) the claim must arise out of or result from the defendant's forum related activities; and (3) the exercise of jurisdiction must be reasonable. *Unocal*, 248 F.3d at 923; *see also Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 416 (9th Cir. 1997); *Omeluk v. Langsten Slip*, 52 F.3d 267, 270 (9th Cir. 1995). If any one of these three requirements is missing, the Ninth Circuit has held that the "'constitutional touchstone' of 'minimum contacts' necessary for due process" is not satisfied and the exercise of jurisdiction would be improper as it would deprive the defendant of due process of law. *Id.* (citing *Burger King Corp.*, 471 U.S. at 474).

a. There Is No Purposeful Availment.

To satisfy the first prong of the test, Plaintiff must show that the Foundation either (i) purposefully availed himself of the benefits and protections of the laws of Arizona, or (ii) purposefully directed his activities at Arizona. *Schwarzenegger*, 374 F.3d at 802. Plaintiff has not shown either because she cannot.

First, Plaintiff cannot establish that the Foundation purposefully availed itself of the benefits and protections of Arizona. Posting information, "including advertisements and/or defamatory statements, on a website does not establish purposeful availment." *Katzenbach v. Grant*, No. 1:04CV6501OWWLJO, 2005 WL 1378976, at * 7 (E.D. Cal. June 7, 2005). The Ninth Circuit has stated in *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997), "no court has ever held that an Internet advertisement alone is sufficient" to subject a defendant to personal jurisdiction in the plaintiff's home state, but there has to be "something more" that

1 indicates the defendant purposefully directed his activity to the forum state.
2 *Cybersell*, 130 F.3d at 417 (affirming dismissal where plaintiff did not prove
3 defendant took "deliberate action within the forum state" or "created "continuing
4 obligations to forum residents"). The fact that the Foundation operates a website that
5 can be viewed in Arizona is not sufficient to establish the purposeful avilment
6 element. *See Katzenbach*, 2005 WL 1378976, at * 7.

7 *Second*, Plaintiff fails to allege that the Foundation "purposefully directed" its
8 activities at Arizona to satisfy the "effects test" articulated in *Calder v. Jones*, 465
9 U.S. 783, 787 n.6, 104 S. Ct. 1482, 1486 n. 6, 79 L. Ed. 2d 804 (1984). The Ninth
10 Circuit has stated that a foreign act that has an effect in the forum state satisfies this
11 test only if the defendant "1) committed an intentional act, which was 2) expressly
12 aimed at the forum state, and 3) caused harm, the brunt of which is suffered and
13 which the defendant knows is likely to be suffered in the forum state." *Pebble Beach*,
14 453 F.3d at 1156 (citation omitted). In *Pebble Beach*, the Ninth Circuit held that to
15 satisfy the *Calder* test, an action must be "expressly aimed" particularly at the forum,
16 as opposed to being aimed at a worldwide market without regard to any effect in the
17 forum. *Id.* at 1156; *see also Olympia Steel Bldg. Systems Corp. v. General Steel*
18 *Domestic Sales, LLC*, No. 06-1597, 2007 WL 1217992 (W.D. Pa. Apr. 24, 2007)
19 (finding that specific jurisdiction was not warranted because defendants did not
20 *expressly aim* their allegedly "defamatory comments" of plaintiff at the forum state);
21 *Smith v. Holland*, No. Civ.A 04-2349, 2004 WL 1858041, at * 2 (E.D. Pa. Aug. 18,
22 2004) (noting that "[i]n defamation cases, defendant 'enters' the forum state by
23 broadcasting or publishing the defamatory statement there" and "[a]bsent evidence
24 that the defamatory statement was published to or targeted anyone in [forum state]
25 besides Plaintiff, the Court may not exercise personal jurisdiction over Defendants").
26 Applying this *Calder* test, courts have granted motions to dismiss where a plaintiff
27 has asserted a defamation claim. *See Wolk v. Teledyne Indus., Inc.*, 475 F.Supp.2d
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1 491, 504-505 (holding that court did not have personal jurisdiction over defendants
2 on plaintiff's defamation claim because plaintiff failed to establish that defendant
3 "expressly aimed his tortuous conduct at the forum" since plaintiff did not allege that
4 defendant published the defamatory statements in forum state); *Katzenbach*, 2005
5 WL 1378976, at ** 7-8 (noting that defendant did not know plaintiff was a resident
6 of the forum state and that posting of the defamatory statements was not "expressly
7 aimed" at forum state); *Smith*, 2004 WL 1858041 at *2 (finding that plaintiff offered
8 no evidence of any harm caused by the Defendant's alleged statement because
9 Complaint only contained "boilerplate allegations" that Plaintiff suffered
10 "humiliation, shame, disgrace, and harm to his reputation, as well as unspecified
11 'economic harm'"); *Directory Dividends, Inc. v. SBC Comms., Inc.*, No. Civ. 01-CV-
12 1974, 2003 WL 22533708, at *4 (E.D. Pa. Oct. 23, 2003) (granting motion to
13 dismiss where Plaintiff did not allege that any false statement was made in the forum
14 state). Here, there is no allegation, nor can there be, that the Foundation's statements
15 were made in or "expressly aimed" at Arizona. Thus, Plaintiff cannot establish that
16 The Foundation purposefully availed itself or directed any actions toward Arizona.
17

18 ***b. There Are No Claims That Arise Out Of Forum-Related***
19 ***Activities.***

20 To satisfy the second element of specific jurisdiction, Plaintiff must prove that
21 the lawsuit arises out of forum-related activities. *See Pebble Beach Co.*, 453 F.3d at
22 1156. Here, the Foundation has no forum-related activities. It has no office in
23 Arizona, does not solicit business in Arizona, and, contrary to Plaintiff's conclusory
24 allegation, the Foundation is not doing business in Arizona. Even if there were
25 forum-related activities on the part of the Foundation, however, the Ninth Circuit
26 applies a "but for" test, wherein it "considers whether plaintiffs' claims would have
27 arisen but for [defendant]'s contacts with [the forum state]." *Unocal*, 248 F.3d at 924.
28 This requirement derives from the Supreme Court's mandate that jurisdiction be

1 based on "relationship among the defendant, the forum, and the litigation."
2 *Helicopteros Nacionales*, 466 U.S. at 414 (citation omitted). Plaintiff does not allege,
3 and would be unable to prove in any event, that "but for" the Foundation's contacts
4 with Arizona, Plaintiff would not have been injured.

5
6 ***c. Exercising Jurisdiction Over The Foundation Would Be Unreasonable.***

7 Finally, personal jurisdiction must be "reasonable" and comport with
8 traditional notions of "fair play and substantial justice." *Unocal*, 248 F.3d at 925
9 (quoting *Int'l Shoe*, 326 U.S. at 326). In determining whether personal jurisdiction is
10 reasonable, courts must consider the following factors: (1) the extent of purposeful
11 interjection; (2) the burden on the defendant of defending in the forum; (3) the extent
12 of conflict with the sovereignty of the defendant's state; (4) the forum state's interest
13 in the dispute; (5) the most efficient forum for judicial resolution of the dispute; (6)
14 the importance of the forum to the plaintiff's interest in convenient and effective
15 relief; and (7) the existence of an alternative forum. *Core-Vent Corp. v. Nobel*
16 *Industries AB*, 11 F.3d 1482, 1488 (9th Cir. 1994) (holding that jurisdiction was
17 unreasonable). The weaker the plaintiff's showing of purposeful availment and
18 relatedness to forum-related acts, the less a defendant is required to show with
19 respects to "unreasonableness" in order to establish lack of jurisdiction. *See*
20 *Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 210 (1st. Cir. 1994) (noting "the
21 weaker the plaintiff's showing on the first two prongs (relatedness and purposeful
22 availment), the less a defendant need show in terms of unreasonableness to defeat
23 jurisdiction). Here, Plaintiff has made no showing of purposeful availment or
24 relatedness, and, as demonstrated above, the Court's exercise of personal jurisdiction
25 over the Foundation would be unreasonable. *See, e.g., Gray & Co. v. Firstenberg*
26 *Machinery Co., Inc.*, 913 F.2d 758, 761 (9th Cir. 1990) (finding exercise of
27
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1 jurisdiction unreasonable where defendants' purposeful interjection into the forum
2 was minimal); (Von Erck Decl. ¶¶ 2-3, 5-6).

3 **2. Mr. Von Erck Is Not Subject To Specific Jurisdiction.**

4 Here, specific jurisdiction over Mr. Von Erck does not exist. First, Plaintiff
5 has not and cannot establish that Mr. Von Erck purposefully availed himself of the
6 benefits and protections of Arizona law. Plaintiff has not established – has not even
7 alleged – that Mr. Von Erck took deliberate action within Arizona or created
8 continuing obligations to Arizona residents. *Cybersell*, 130 F.3d at 417 (affirming
9 dismissal where plaintiff did not prove defendant took "deliberate action within the
10 forum state" or created "continuing obligations to forum residents"). Secondly,
11 Plaintiff does not allege, and cannot prove, that "but for" Mr. Von Erck's contacts
12 with Arizona (which in this case are none), Plaintiff would not have been injured.
13 Lastly, because Plaintiff does not and cannot allege the necessary contacts between
14 Mr. Von Erck and California, personal jurisdiction over Mr. Von Erck would be
15 unreasonable.

16
17 **III. PLAINTIFF'S CLAIMS AGAINST THE FOUNDATION SHOULD**
18 **BE DISMISSED FOR FAILING TO STATE A CLAIM UPON WHICH**
19 **RELIEF CAN BE GRANTED.**

20 Pursuant to Rule 12(b)(6), a court must dismiss actions that fail to state a
21 claim upon which relief can be granted. Recently, the Supreme Court adopted a
22 "plausibility standard" to use in applying Rule 12(b)(6): requiring the dismissal of
23 any claim that does not allege "enough facts to state a claim for relief that is
24 plausible on its face" and does not "amplify a claim with some factual allegations in
25 those contexts where such amplification is needed to render the claim plausible."
Bell Atl. Corp. v. Twombly, __ U.S. __, 127 S.Ct. 1955, 1969, 1974 (2007).

1 **A. Plaintiff's Claim For Intentional Infliction of Emotional Distress**
2 **Must Be Dismissed.**

3 For a plaintiff to sustain a claim of intentional infliction of emotional distress
4 in Arizona, a plaintiff must show that: 1) the defendant's action or inaction was
5 extreme and outrageous; 2) the conduct was intentional or reckless; and 3) the
6 conduct caused severe distress. *See Watts v. Golden Age Nursing Home*, 127 Ariz.
7 255, 258 (1980). According to the Restatement (Second) of Torts, the conduct in
8 question must be "so outrageous in character, and so extreme in degree, as to go
9 beyond all possible bounds of decency, and to be regarded as atrocious, an utterly
10 intolerable in a civilized community." Restatement (Second) of Torts § 46 comment
11 d (1965); *see also Mintz v. Bell Atlantic Sys. Leasing Int'l Inc.*, 183 Ariz. 550, 554
12 (1995). Ordinary pain and suffering, embarrassment and humiliation are not
13 sufficient to sustain a claim of intentional infliction of emotional distress. *See*
14 *Johnson v. McDonald*, 197 Ariz. 155, 160 (1999) (dismissing emotional distress
15 claim because conduct was not so "outrageous").

16 Far from outrageous, Plaintiff here only alleges that the Foundation's
17 Wikisposure webpage displays "four copyrighted images of Plaintiff as well as
18 numerous copyrighted written materials"; posts Plaintiff's "home address, telephone
19 and cell phone numbers, maiden and married names, jobs plaintiff has held, online
20 magazines and bands she has written for, date of birth, e-mail addresses, known
21 affiliates (some of which she does not know), [and] Plaintiff's hobbies"; and states
22 "that Plaintiff is a convicted child molester, that she was convicted of molesting a
23 child in Massachusetts and that she is a pedophile." (Compl. ¶ 27.)³ Plaintiff claims
24 further that she "contacted" the Foundation "demanding that they cease and desist,"
25 and that the Foundation responded "simply stat[ing] 'Please shut up, your typing is
26 boring.'" (*Id.* ¶ 30.) But these allegations do not constitute conduct so outrageous to

27 ³ Plaintiff did not include the Foundation's webpage in her Complaint. For the
28 Court's convenience, it is attached to the Declaration of Xavier Von Erck, submitted
in support of this motion, as Exhibit A.

1 be regarded "beyond all possible bounds of decency." *See Johnson*, 197 Ariz. at 160.

2 Moreover, the mere fact that Plaintiff has suffered embarrassment and humiliation is
3 insufficient to state a claim of intentional infliction of emotional distress. *Id.*; *Watts*,
4 127 Ariz. at 258. Any purported "outrageousness" of the Foundation's conduct is
5 belied by Plaintiff's own statements in pleadings before this Court where Plaintiff

- 6 • describes herself as an "activist" and a "blogger" on "certain political issues"
7 related to convicted pedophiles and registered sex offenders; and
- 8 • admits that she was convicted in 1992, in her words, "for sexual conduct with
9 a minor."

10 (*See* Docket #26, Plaintiff's Response to Motion to Dismiss, ¶¶ 11, 16, 19, 24, 28.)

11 In other words, the Complaint only accuses the Foundation of describing Plaintiff as
12 she describes herself. Such claims are patently implausible and must fail as a matter
13 of law.

14 **B. Plaintiff's RICO Claims Must Be Dismissed.**

15 A threshold requirement to suit under 18 U.S.C. § 1964(c), the plaintiff must
16 allege, pursuant to 18 U.S.C. § 1962, the existence of an "enterprise" as defined in 18
17 U.S.C. § 1962, that is separate from the alleged racketeering activity. Whether or not
18 the entity is held to constitute an "enterprise" for purposes of 18 U.S.C. § 1964(c),
19 the enterprise cannot be a defendant. A plaintiff's complaint must maintain a
20 distinction between the statutorily required enterprise and the defendant. Conclusory
21 statements that certain entities and individuals constituted an enterprise is
22 insufficient to plead an "enterprise" distinct from the "persons" and/or pattern of
23 racketeering activity as required by RICO. *See Schuster v. Anderson*, 378 F.Supp.2d
24 1070 (N.D. Iowa 2005) (complaint was deficient because it failed to plead a RICO
25 "enterprise"); *Richmond v. Nationwide Cassell L.P.*, 52 F.3d 640, 647 (7th Cir. 1995)
26 ("The amended complaint's failure to present an enterprise separate and distinct from
27 the persons sought to be held liable is a proper basis for dismissal."); *Cashco Oil Co.*
28

1 v. *Moses*, 605 F.Supp. 70 (N.D. Ill. 1985) (noting that an entity cannot be both a
2 "person" and an "enterprise" for purposes of the same RICO claim); *Weizman v.*
3 *Adornato*, 625 F.Supp. 1101, 1103 (E.D.N.Y. 1985) (denying leave to amend
4 complaint to add RICO claim because amended complaint did not state a cause of
5 action under 18 U.S.C. § 1962(c) against defendants because it alleged that
6 defendants are both a "person" and an "enterprise").

7 Plaintiff fails to meet this requirement. Plaintiff failed to adequately allege the
8 existence of an "enterprise" distinct from the alleged racketeering activity. In her
9 Complaint, Plaintiff alleges that the defendants are both the "persons" and
10 "enterprise." (Complaint ¶¶ 91-92). This renders the RICO claim insufficient and
11 mandates its dismissal here.

12
13 **C. Plaintiff's Claims For Defamation, Cyberstalking And Copyright
14 Infringement Must Be Dismissed.**

15 The Complaint purports to assert defamation claims pursuant to federal
16 statutes, e.g., 42 U.S.C. §§ 223 & 230, 18 U.S.C. § 2261A, and for which no private
17 cause of action exists. Title 42 U.S.C. § 223(b)(5)(B), for example, vests
18 enforcement authority solely with the Federal Communications Commission or
19 United States Attorney General. Title 42 U.S.C. § 230 does not create any right of
20 action. Title 18 U.S.C. § 2261A is an exclusively criminal statute. And Plaintiff's
21 claims of copyright infringement do not establish any violation in light of the fair use
22 doctrine set forth in 17 U.S.C. § 107. In short, Plaintiff's claims are general,
23 conclusory, unsupported by any facts, and must fail. *See Associated Gen.*
24 *Contractors v. Metro. Water Dist.*, 159 F.3d 1178, 1181 (9th Cir. 1998) (noting that
25 conclusory allegations are insufficient to defeat a motion to dismiss for failure to
26 state a claim upon which relief can be granted).

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D. Plaintiff's Tort Claim Must Be Dismissed.

Finally, Plaintiff's tort claim must be dismissed because it is baseless. Plaintiff makes general, conclusory allegation of a "prima facie tort" that is not supported by any facts, which renders this cause of action insufficient. *See Associated Gen. Contractors*, 159 F.3d at 1181 (noting that conclusory allegations are insufficient to defeat a motion to dismiss for failure to state a claim upon which relief can be granted).

IV. PLAINTIFF'S CLAIMS AGAINST MR. VON ERCK SHOULD BE DISMISSED FOR FAILING TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED.

The only specific reference Plaintiff makes as to Mr. Von Erck is the following:

3. Phillip Jon Eide AKA Xavier Von Erck is the founder and President of Perverted Justice, corporatesexoffenders.com. and it's "wikisposure project" sub site. He is believed to reside in Portland, Oregon.

(Compl. ¶ 3). There are absolutely no allegations in the Complaint that Mr. Von Erck personally participated in any of the alleged unlawful actions identified in the Complaint. There are no factual allegations that Mr. Von Erck committed any of the predicate acts necessary to bring a claim under RICO, or made any of the supposedly defamatory statements. Nowhere in the Complaint does Plaintiff allege that Mr. Von Erck had any involvement with the unlawful actions on which her claims are based. Here, there is no factual basis on which to support any cause of action against Mr. Von Erck. Thus, because the Complaint alleges nothing more than the fact that Mr. Von Erck is the founder and president of the Foundation, all the claims against him should be dismissed entirely.

V. PLAINTIFF'S CLAIMS MUST BE DISMISSED FOR FAILURE TO PROPERLY SERVE THE FOUNDATION AND MR. VON ERCK.

Pursuant to Federal Rules of Civil Procedure, individuals and corporations may be served only by (1) "following stated law for serving a summons ... in the

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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2008, I electronically transmitted this document to the Clerk's office using CM/ECF System for filing and served a copy of the foregoing document by U.S. First Class Mail on the following, who is not a registered participant of the CM/ECF System:

Jan E. Kruska
4102 W. Woodridge Drive
Glendale, Arizona 85308.

/s/
Marcus R. Mumford