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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

ANNA BABLER, a single woman,

Plaintiff,

vs.

DAVID GALLAGHER, a single man,

Defendant.

Cause No. CV2010-003278

**PLAINTIFF'S RESPONSE TO
DEFENDANT GALLAGHER'S
MOTION TO COMPEL
PRODUCTION OF FACEBOOK
RECORDS**

Plaintiff Anna Babler ("Plaintiff") respectively responds to Defendant's motion as follows:

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I. INTRODUCTION

Defendant has filed a motion to compel production of Ms. Babler's entire Facebook history from one year before she was sexually assaulted by Defendant until the present. The request for production thus encompasses almost seven years of every message, every status update, and every photograph of Ms. Babler regardless of whether it relates to the facts of this case or not. In an effort to justify this motion, Defendant asserts that a general perusing of Ms. Babler's complete Facebook records will help determine whether or not she has really been that affected by being raped and will help the defense reconstruct what really happened that night.

To date, Plaintiff has repeatedly attempted to satisfy Defendant's unreasonable and oppressive request and has provided extensive Facebook records above and beyond any potential relevance to this matter. Defendant's continued effort to collect the entire Facebook history from Plaintiff is unreasonable and oppressive as such record would constitute hundreds if not thousands of pages of otherwise personal information either shared with friends or in the case of photos, perhaps not shared with anyone at all. Plaintiff also notes that in response to Plaintiff's request for Facebook records from Defendant, the Special Master reviewed hundreds of pages from Defendant's account and found only a handful of pages spanning two days of data were relevant for production.

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II. THE PERSONA OF FACEBOOK AND LITIGATION

Litigants' internal sentiments do not necessarily manifest in observable form, and therefore emotionally damaged or remorseful litigants would likely not post pictorial evidence of their true feelings on Facebook. Because social norms encourage taking photographs of happy moments, individuals are unlikely to capture shameful, regrettable, or lonely moments with a camera. On Facebook, where the convention

1 is to portray a smiling and social persona, users' pictures arguably present biased
2 impressions of their complex emotional lives. *The Risks of Taking Facebook at Face*
3 *Value: Why the Psychology of Social Networking Should Influence the Evidentiary*
4 *Relevance of Facebook Photographs*, 14 Vand J Ent. & Tech L. 367, 381 (2012).

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6 A. Plaintiff's entire Facebook history from the past seven years is not
7 relevant to damages.

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9 Defendant makes a broad claim that scrutinizing every page from Ms.
10 Babler's Facebook account for the past seven years will give him some keen insight
11 into the extent of Ms. Babler's damages. Defendant goes so far to suggest that his
12 retained expert psychiatrist will use Ms. Babler's complete Facebook history to
13 analyze Ms. Babler's mental health based upon her Facebook data.

14 The issue of whether or not a litigant's social media content is fair for
15 discovery is not based upon a *privilege* analysis as the Defendant contends but is rather
16 steeped in basic principles of discovery. *Mailhoit v. Home Depot U.S.A., Inc.*, 285
17 F.R.D. 566, 570 (C.D. Cal. 2012). Plaintiff's assertion that the Defendant is not
18 entitled to pour over her entire Facebook record for the past seven years in hope of
19 finding a few instances of relevant information is based upon the prohibition against
20 discovery that causes unfair annoyance, embarrassment, or oppression. *See Ariz. R.*
21 *Civ. P. 26(c)(1)*. "The fact that a Defendant seeks an electronic file instead of a file
22 cabinet does not give it any greater right to rummage through its contents". *Howell v.*
23 *Buckeye Ranch, Inc.*, No. 11-CV-1014, 2012 WL 5265170 at *1 (S.D. Ohio Oct 1,
24 2012)

25 The restriction of a party's unfettered discovery request to access another
26 party's Facebook content based upon generic claims of relevance to emotional distress

1 damages has been upheld repeatedly by courts across the country. “The fact that an
2 individual may express some degree of joy, happiness, or sociability on certain
3 occasion sheds little light on the issue of whether he or she is actually suffering
4 emotional distress. If the Court were to allow broad discovery of Plaintiff’s social
5 networking postings as part of the emotional distress inquiry, then there would be no
6 principled reason to prevent discovery into every other personal communication the
7 plaintiff had or sent since the alleged incident¹. *Giachetto v. Patchogue-Medford*
8 *Union Free School Dist.*, 2013 WL 2897054 (E.D.N.Y. 2013) (Court denied
9 Defendant’s request for all records from social networking based upon the Plaintiff’s
10 claim of relevance to emotional distress damages.)

11 Here, the Defendant seeks production of the Plaintiff’s entire Facebook
12 record based on nothing but the thin assertion that some of the contents might be
13 relevant to damages. Even the cases relied upon by the Defendant in his motion
14 contradict such a broad request. In both *EEOC v. Simply Storage Mgmt., LLC*, 270
15 F.R.D. 430, 432 (S.D. Ind. 2010) and *Robinson v. Jones Lang LaSalle Americas, Inc.*,
16 2012 WL 3763545 (D. Or. Aug 29, 2012), the court found that Defendant was not
17 entitled to Plaintiff’s entire Facebook record. “The simple fact that a claimant has had
18 social communications is not necessarily probative of the particular mental and
19 emotional health matters at issue in the case. Rather, it must be the substance of the
20 communications that determines relevance”. *EEOC v. Simply Storage* at 435.
21 “Anything a person says may have some theoretical relevance to emotional distress
22 damages, but that does not justify the production of every communication that person

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¹ Under Defendant’s rationale, all photos digital or in photo albums, all messages, all physical letters, text messages, emails sent by Ms. Babler to anyone on any topic over the past seven years would be equally subject to discovery to determine her mental state and reflective of emotional distress.

1 has.” *EEOC* at 435, quoting *Rozell v. Ross-Holst*, 2006 WL 163143 (S.D.N.Y. Jan 20,
2 2006).

3 As such and consistent with the holding in *EEOC v. Simply Storage*, Ms.
4 Babler would agree to provide any post-assault Facebook data that makes specific
5 references to Ms. Babler’s emotional state or distress as well as any reference to any of
6 the matters alleged in her complaint as ordered in *Giachetto*. See *Giachetto*, at *4.
7 (*Court ordered production of 1) specific references by Plaintiff to emotional distress,*
8 *2) postings of photos or posts that reflect physical capabilities inconsistent with*
9 *Plaintiff’s claimed injury and 3) any account of the events contained in the complaint,*
10 *inconsistent or otherwise.*)

11 B. Plaintiff’s Entire Facebook record is not required for the Defendant to
12 “Reconstruct the Night in Question”

13 Defendant asserts that Plaintiff’s entire file be produced so they can peruse
14 any data from the night of the assault. Plaintiff has already produced these records but
15 if necessary, Plaintiff will reproduce all records from the day before the assault and the
16 day of the assault similar to what Defendant has provided so the Defendant can
17 “reconstruct the night.”

18 III. CONCLUSION

19 Defendant’s interest in rummaging through Ms. Babler’s entire Facebook
20 history for the past seven years should not be permitted. Traditional rules of
21 discovery apply to this request and as such, Defendant’s request must be tailored to
22 the potentially relevant information that may actually exist instead of the oppressive,
23 voyeuristic demand for volumes upon volumes of personal information. Consistent
24 with the case law cited herein and that cited by defense counsel, Ms. Babler will agree
25 to provide the following:

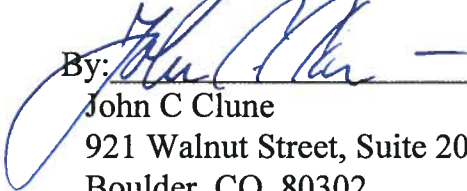
- 26 1. records from the day before and the day of the assault;

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- 2. records that specifically refer or relate to her emotional state or distress from the date of the assault to the present; and
- 3. records that reference any allegation made in the complaint.

No third party vendor will be needed for this production. Plaintiff asks that the remainder of Defendant's request be denied.

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By: 
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DATED this 19th day of November, 2013.

The foregoing was e-mailed this 19th day of November, 2013 to:

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