



Northern
California

May 3, 2018

Via First-Class U.S. Mail & E-mail

Frances Teso, Chief Executive Officer & Executive Director
Voices College-Bound Language Academies
14271 Story Road
San Jose, CA 95127

Re: Your January 12, 2018 Letter to Claudia Rossi

Dear Ms. Teso:

We write on behalf of Claudia Rossi, a trustee and board member of the Santa Clara County Board of Education (“the Board”). Your January 12, 2018 letter to Trustee Rossi takes issue with comments she made regarding Voices College-Bound Language Academies (“Voices”) at the Board’s December 13, 2017 public meeting (“the Meeting”). Your letter also threatens to initiate litigation if Trustee Rossi does not immediately, publicly, and in writing retract her comments and apologize.

Trustee Rossi will not accede to your demand—a blatant and improper attempt to silence her from raising the very concerns she was duly elected to raise. Trustee Rossi’s comments are protected by privilege under California’s Civil Code; your letter fundamentally misunderstands the laws governing defamation; and your letter misrepresents Trustee Rossi’s actual comments at the Meeting. For these reasons, we ask that you immediately retract your demand and refrain from further leveling baseless legal claims against Trustee Rossi.

I. Trustee Rossi’s Statements at the Meeting Are Privileged Under California’s Civil Code.

Sections 47(a) and (b) of the California Civil Code provide that statements made “[i]n the proper discharge of an official duty” or “in any [] official proceeding authorized by law” are privileged. CAL. CIV. CODE § 47(a)-(b). “The privileges conferred by these sections are absolute and unaffected by the existence of malice.” *Royer v. Steinberg*, 153 Cal. Rptr. 499, 504 (Ct. App. 1979) (citing *Saroyan v.*

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Burkett, 371 P.2d 293, (Cal. 1962)). Trustee Rossi's statements at the Meeting are protected under both sections.

First, Trustee Rossi's statements were made in the proper discharge of her official duties. The California Supreme Court has explained "the purpose of the so-called absolute 'official duty' privilege is to insure efficiency in government by encouraging Policy-making officials to exercise their best judgement in the performance of their duties free from fear of general tort liability." *Sanborn v. Chronicle Pub. Co.*, 556 P.2d 764, 767 (Cal. 1976). Consequently, § 47(a) "protects any statement by a public official so long as it is made (a) while exercising policy-making functions, and (b) within the scope of [her] official duties." *Royer*, 153 Cal. Rptr. at 505 (emphasis added).

The California Court of Appeal has expressly held § 47(a) protects statements a local school-board trustee makes at an open meeting. *Id.* And Trustee Rossi's statements were clearly "related to a matter properly within the board's jurisdiction"—namely Voices' petition to renew its charter, which is within the Board's jurisdiction, *see id.*; CAL. ED. CODE § 47605. Thus, Trustee Rossi's statements are absolutely protected under § 47(a).

Second, Trustee Rossi's statements were made in an official proceeding authorized by law. Section 35145 of the California Education Code authorizes the governing board of any school district to convene. *See also* CAL. GOV. CODE § 54950 *et seq.* Courts have therefore held that "meetings of a school district board of trustees [qualify] as 'official proceedings' within the purview of section 47." *Royer*, 153 Cal. Rptr. at 506 (citing *Frisk v. Merrihew*, 116 Cal. Rptr. 781 (Ct. App. 1974)). So long as Trustee Rossi's statements "have some connection or logical relation to the proceeding," her statements are additionally protected by § 47(b). *Id.*

It is undisputed, and your letter confirms, the Meeting was an official Board meeting and open to the public. And Trustee Rossi's statements were undeniably related to a matter properly before the Board in the Meeting. Even accepting your letter's misrepresentations of her remarks as true, each of her purported statements relate to renewing Voices' charter: whether Voices artificially deflates scores, how and why Voices reallocates funds meant for education to its Charter Management Organization ("CMO"), and the rate of compensation for Voices' teachers are each connected and logically related to whether Voices' charter should be renewed. For these reasons, Trustee Rossi's statements are absolutely protected by § 47(b).

Should you choose to litigate, a court will dismiss your action because Trustee Rossi's statements are entitled to an absolute privilege under both §§ 47(a) and (b).

II. Trustee Rossi's Statements at the Meeting Are Not Defamatory.

Even a perfunctory glance at relevant case law reveals your defamation claims against Trustee Rossi are baseless. Under California law, a defamation claim includes the following elements: “(1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or cause special damage.” *KM Strategic Mgmt., LLC v. Am. Cas. Co. of Reading PA*, 156 F. Supp. 3d 1154, 1166-67 (C.D. Cal. 2015) (citation omitted). You cannot proceed with a defamation claim for statements Trustee Rossi made during the Meeting because those statements are privileged. See *supra* Part I. Even if those statements were not privileged, your defamation claims would still be meritless.

First, it is not clear who or what you are claiming has been defamed: are you claiming *you* were defamed, or are you claiming *Voices* was defamed? None of Trustee Rossi's statements—even your misrepresentations of them—refer to *you* in any way. Additionally, none of your claims allege reputational harm to either you or *Voices*; this is critical because “an action for defamation is designed to protect the *reputation* of the plaintiff.” *Leonardini v. Shell Oil Co.*, 264 Cal. Rptr. 883, 899 (Ct. App. 1989) (emphasis in original) (internal quotation marks and citation omitted).

Based on the second-to-last-paragraph of your letter, it appears you are attempting to allege trade libel, which (1) is not a form of defamation and (2) requires you to prove Trustee Rossi's statements were false and induced others not to deal with *Voices*, resulting in special damages in the form of pecuniary loss to *Voices*. *Aetna Cas. And Sur. Co., Inc. v. Centennial Ins. Co.*, 838 F.2d 346, 351 (9th Cir. 1988). To prevail on such a claim, you must “identify[] particular customers and transactions of which [*Voices*] was deprived as a result of the [alleged] libel.” *BioZone Laboratories, Inc. v. Next Step Laboratories Corp.*, No. 17-cv-02768-NC, 2017 WL 5665658, at *5 (N.D. Cal. Nov. 27, 2017) (internal quotations and citation omitted). Your letter fails to do this.

Second, some of the statements you take issue with are statements of opinion, not fact. Your claim “requires showing that [Trustee Rossi] made a factual assertion, as opposed to an opinion, that was false.” *Wynn v. Chanos*, 75 F. Supp. 3d 1228, 1233 (N.D. Cal. 2014). Courts regard “broad . . . and wholly subjective comment[s] . . . such as . . . [a person] was a ‘shady practitioner’ . . . or ‘crooked politician’” to be statements of opinion. *Copp v. Paxton*, 52 Cal. Rptr. 2d 831, 837 (Ct. App. 1996) (internal quotation marks and citations omitted).

Here, Trustee Rossi referring to *Voices*' CMO team members as “people in suits”—mild language compared to “shady” or “crooked”—is an opinion because of the “loose, figurative, or hyperbolic language.” *Wynn*, 75 F. Supp. 3d at 1233 (quoting *Mikovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990)). “[S]tatements of rhetorical hyperbole are not actionable and [t]he law provides no redress for harsh

name-calling.” *Ultimate Creations, Inc. v. McMahon*, 515 F. Supp. 2d 1060, 1065 (D. Ariz. 2007) (quoting *Flowers v. Carville*, 310 F.3d 1118, 1127 (9th Cir. 2002)).

Third, “opinions that are based on expressly stated or disclosed facts”—such as Trustee Rossi’s opinions about the problematic practice of grade deflation and Voices’ CMO team members’ compensation—“are actionable ‘only if the stated facts are themselves false and demeaning.’” *Wynn*, 75 F. Supp. 3d at 1233 (quoting *Standing Comm. On Discipline of U.S. Dist. Ct. for Cent. Dist. Of Ca. v. Yagman*, 55 F.3d 1430, 1439 (9th Cir. 1995)) (emphasis added). As explained below, *see infra* Part III, Trustee Rossi’s statements regarding grade deflation and CMO team members’ compensation were based on Voices’ test-score data and projected CMO fees, respectively. Even if you could establish the underlying facts are false, you would also need to establish that Trustee Rossi knew the underlying facts were false or had some reason to doubt their accuracy; otherwise, her “reliance [on the facts] is protected by the First Amendment.” *Flowers*, 310 F.3d at 1129. Despite having multiple opportunities (including the January 12 letter) to respond to each of Trustee Rossi’s comments and the information she based her comments on, you have not once established the facts underlying her opinions are false and demeaning, much less that Trustee Rossi had some reason to doubt their accuracy.

Fourth, you have not shown Trustee Rossi’s statements are false, which is fatal to your defamation claims. “In all cases of alleged defamation, . . . the truth of the offensive statements or communication is a complete defense against civil liability, regardless of bad faith or malicious purpose.” *Smith v. Maldonado*, 85 Cal. Rptr. 2d 397, 403 (Ct. App. 1999). Even if your misrepresentation of Trustee Rossi’s statement is true and she in fact stated that Voices artificially deflates scores at the beginning of the year, you have not established Voices does not artificially deflate scores.

Fifth, your defamation claims require clear and convincing evidence Trustee Rossi made the allegedly defamatory statements with actual malice. In analyzing defamation claims, courts distinguish between private and public figures because “those classed as public have voluntarily thrust themselves to the fore, inviting attention and comment and exposing themselves to increased risk of defamatory falsehood.” *Vegod Corp. v. Am. Broadcasting Cos., Inc.*, 603 P.2d 14, 16 (Cal. 1979). Public figures are therefore subject to a heightened burden of proof in defamation cases: they must establish the alleged defamatory statements were made with actual malice, that is, “with knowledge of [their] falsity or with reckless disregard for the truth.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

Voices qualifies as a “limited-purpose public figure” because it has “thrust [itself] to the forefront of [a] particular public controvers[y] in order to influence the resolution of the issues involved.” *Id.* at 345. While one can debate the relative merits of charter schools versus public schools, the mere existence of that debate—

and the importance of its outcome to our educational system—establishes that it is a public controversy. *See, e.g., Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1296 (D.C. Cir. 1980) (Defining a public controversy as “a real dispute, the outcome of which affects the general public or some segment of it”).

Voices has actively involved itself in this public controversy. For example, Voices’ website asserts that it “is among the highest-performing dual-language schools in California. [Its] record of success exceeds that of nearby district schools. . . . Voices 3rd grade Latino students are vastly out performing [*sic*] Latino students from nearby districts in both Math and ELA.” By posting statistics and claims on its website—“an intentional act seeking public attention”—Voices “willingly inserted [itself] into the public’s eye on this issue.” *Harkonen v. Fleming*, 880 F. Supp. 2d 1071, 1080-81 (N.D. Cal. 2012). Additionally, courts have found that when entities “enter[] into a continuing relationship with the government and could be expected to receive the scrutiny that eventually attends upon all major governmental efforts, [that entity] is a limited purpose public figure.” *Greschner v. Becker*, No. CV-14-02352-PHX-GMS, 2016 WL 3969941, at *3 (D. Ariz. July 25, 2016) (internal quotation marks and citation omitted). Voices “knowingly entered into [a] relationship with the [Board] and therefore should [] expect[] to receive some degree of . . . attention as a result.” *Id.* In fact, one federal court has held as a matter of law that a government-funded charter school like Voices is a public figure under the First Amendment. *Am. Civil Liberties Union of Minn. v. Tarek ibn Ziyad Acad.*, No. CIV.09-138(DWF/JJG), 2009 WL 4823378, at *5 (D. Minn. Dec. 9, 2009).

Because Voices is a limited-purpose public figure, Trustee Rossi’s statements are protected by the First Amendment—and not defamatory—unless you can prove that she knew her statements were false or that she recklessly disregarded the truth. To establish reckless disregard for the truth, you must show by clear and convincing evidence that Trustee Rossi “entertained serious doubts as to the truth” of her statements when she made them. *Gertz*, 418 U.S. at 334 n. 6. “Gross or even extreme negligence will not suffice to establish actual malice.” *Annette F. v. Sharon S.*, 15 Cal. Rptr. 3d 100, 114 (Ct. App. 2004).

Trustee Rossi did not believe the data and statistics she was relying on were false. That Trustee Rossi did not independently investigate the data and statistics does not establish reckless disregard for the truth. *Makaeff v. Trump University, LLC*, 715 F.3d 254, 270 (9th Cir. 2013). In *Copp*, for example, the court found the defendant did not act in bad faith, despite the fact he “relied on intuitive judgment with little actual investigation or evidence in characterizing [the plaintiff] as a self-styled expert in pursuit of personal gain.” 52 Cal. Rptr. 2d at 845. Your letter does not point to a single fact suggesting Trustee Rossi recklessly disregarded the truth; on the contrary, Trustee Rossi’s statements were based on data provided to her by Morgan Hill Unified School District (“MHUSD”) and she invited you to respond several times.

Your defamation claims are baseless, and we welcome the opportunity for a court to tell you the same.

III. Your Letter Misrepresents Trustee Rossi's Actual Statements at the Meeting.

It is not without irony you characterize Trustee Rossi's statements at the Meeting as inaccurate and then proceed to misrepresent what she said, particularly because the Board has posted video and audio of the Meeting on its website.

First, Trustee Rossi never stated Voices artificially deflates student test scores at the beginning of the school year to later show growth; she informed the public she was elected to serve that this problematic tactic is used by private academic centers. Regarding Voices, the recording of the Meeting shows that Trustee Rossi actually stated:

So what is unfortunate is that is *appears* that Voices—and I'd like the district *and I'll give Voices a chance to respond*—in the letter that was sent to us by the district, page 6 of 12, it mentions questionable or misrepresented data. And I'd like to give the district a chance to address that, and of course *Ms. Teso, uh, I will also give you an opportunity to respond. . . .* I want [the community] to be aware of that tactic because, uh, it is entirely possible that Voices is trying that with your children. *I'll give [Voices] a chance to respond.*

Nowhere in these statements does Trustee Rossi claim Voices actually deflates test scores at the beginning of the school year to later show growth; she states this *appears* to be the case—an opinion based on data and information provided to her by MHUSD. For example, the email Trustee Rossi is referring to found Voices' test scores to be questionable and misrepresented, *and* the Superintendent of MHUSD, Steven Betando, stated at the Meeting:

We looked at the scores, those scores seemed unlikely and so, yeah, we have a suspicion because if [the students] come in having no knowledge at all is-is very suspect.

During the Meeting, Trustee Rossi thrice invited you to respond to these concerns. Instead of setting the record straight, you deferred to another trustee, who also failed to respond to these concerns. Even in your letter, sent a month after the Meeting, you state only that Voices “operates at the highest ethical standards in all operations” without providing any data or addressing MHUSD found Voices' scores to be questionable and misrepresented. That “[i]n [your] 30 years in education, it has never even been hinted that the results [you] and [your] organization achieve

are anything but laudable” similarly does not address the data MHUSD found to be questionable.

Second, your letter incorrectly asserts that Trustee Rossi referred to the CMO team members as a “bunch of people in suits’ who no one ever sees and who take money from students to line their own pockets.” Again, the recording of the Meeting shows that Trustee Rossi never made this statement. She instead said:

I want to advocate for the [Voices] teachers because what happens, these charter school organizations have layers and layers that they pay out charter management fees, they have on the payroll marketing, lawyers, law firms, all kinds of people—you see all these people in suits that come here to advocate? All of them are getting paid. And that means your students and your teachers are suffering cause that money could go to them. . . . There are parent concerns about the [Voices] facility itself that you are currently in, and the one you were in before. And why are we concerned about that? Because the money is there for you to have a better facility, so where is all the money going?

Later in the Meeting, while reacting to projected CMO fees for 2021-22, Trustee Rossi said:

Half a million dollars from your school to that CMO, that management organization, . . . people in suits that you never get to see.

Trustee Rossi never uttered the words “bunch of people” or “take money from students to line their own pockets.”

IV. Your Threatened Litigation is an Attempt To Chill Trustee Rossi’s Valid Exercise of her Constitutional Rights; Trustee Rossi Can Therefore Seek Recovery of Attorney’s Fees and Costs.

Should you choose to initiate litigation against Trustee Rossi for exercising her constitutional rights, she will seek recovery of attorney’s fees and costs pursuant to California’s anti-SLAPP (strategic lawsuit against public participation) statute. *See* CAL. CIV. PROC. § 425.16(c)(1). In enacting the anti-SLAPP statute, the California Legislature found:

[T]here has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech. . . . [I]t is in the public interest to encourage continued participation in matters of public significance, and [] *this participation should not be chilled through abuse of the judicial process.*

Id. at § 425.16(a) (emphasis added).

Your threatened litigation is exactly the type of lawsuit the anti-SLAPP statute was designed to deter. Because Trustee Rossi's statements were oral statements made at an official and public proceeding authorized by law about an issue of public interest under consideration by the Board, she can avail the protection of the anti-SLAPP statute. *Id.* at § 425.16(e); *see also Gilbert v. Sykes*, 53 Cal. Rptr. 3d 752, 761 (Ct. App. 2007) ("The public interest requirement . . . must be 'construed broadly' so as to encourage participation by all segments of our society in vigorous public debate related to issues of public interest") (citation omitted).

Trustee Rossi will succeed in her anti-SLAPP action because there is no probability you will succeed on your defamation claims. *See supra* Parts I-III; *see also McGarry v. University of San Diego*, 64 Cal. Rptr. 3d 467, 475 (Ct. App. 2007) (outlining two-step process for an anti-SLAPP motion: (1) defendant's actions were in furtherance of her constitutional right to free speech or petition about a public issue; (2) plaintiff must show reasonable probability she will succeed on merits at trial).

Please let us know by May 10, 2018 if you disagree with any of this, if you intend to proceed with the threatened litigation, or if you would like to discuss this matter. You can reach us at (415) 621-2493, or at bmalik@aclunc.org.

Sincerely,

A handwritten signature in blue ink, appearing to read "Bilal Malik".

Bilal Malik
Attorney/Litigation Fellow

Christine P. Sun
Legal and Policy Director

ACLU Foundation of Northern
California