UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BRIDGET BITTMAN, Plaintiff, v. MEGAN FOX, an individual; KEVIN DUJAN, an individual; DAN KLEINMAN, an individual; ADAM ANDRZEJEWSKI, an individual; and FOR THE GOOD OF ILLINOIS, an Illinois Not for Profit Organization, Defendants.	)	Civil Action No.: 1:14-cv-8191 Judge James F. Holderman

DEFENDANTS FOX AND DUJAN'S MEMORANDUM IN SUPPORT OF THEIR PARTIAL MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT AND MOTION FOR AN EXTENSION OF TIME TO ANSWER THE REMAINING COUNTS OF THE AMENDED COMPLAINT

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INTRODUCTION

This lawsuit is an attempt to intimidate and silence critics of the Orland Park Public Library's failure to address illegal activities occurring at the Library. Defendants Megan Fox and Kevin DuJan are writers and community activists who have openly criticized Library practices and policies that have allowed patrons to view child pornography on the Library's public-access computers and that have resulted in a series of indecent exposures occurring in the Library's public computer room. While Fox and DuJan's activism has forced the Library to make several changes (including redesign of the adult computer area to minimize opportunity for sexual activity and the enforcement of a previously-disregarded ID policy for computer usage), they have faced a remarkable series of retaliatory attacks by the Library—through its officers, employees, and "friends"—including a threat to sue Fox and DuJan for defamation if they continued their activism and even threats to their personal safety.

Plaintiff's thirteen-count complaint, the original version of which was served at a public Library Board meeting shortly after Defendants spoke critically about the Library's practices, is the Library's latest attempt to silence its opposition. Plaintiff claims that in the course of their campaign to change Library policies, Defendants have made various critical comments about her. These alleged statements include parodies of Plaintiff, critical opinions about Plaintiff's conduct as a public official, and a satirical Facebook Page called "Sassy Plants" that allegedly "impersonates" Plaintiff.

Even after a chance to amend her complaint, Plaintiff has been unable to remedy the inherent weakness of her claims. While evidence will show that all of Plaintiff's claims are meritless pursuant to Illinois' Anti-SLAPP law and common law, seven of these claims are suitable for immediate dismissal under Rule 12(b)(6) for failure to state a claim:

- **Counts 1 and 2 (Computer Fraud and Abuse Act & Stored Communications Act)**: Plaintiff attempts to apply the CFAA and the SCA—statutes designed to prevent computer hacking—to a satirical Facebook Page[1] allegedly created by Defendants. But creating a Facebook Page—even a fake or misleading Facebook Page (as alleged here)—does not involve accessing Facebook's computers "without authorization" or "exceed[ing] authorized access," as would be required to state a claim under both the CFAA and SCA. Further, Plaintiff fails to allege "damage" or "loss" within the meaning of the CFAA. *See infra*, p. 4–9.

- **Counts 10 and 11 (Defamation *Per Se* and False Light based on the Facebook Page)**: Plaintiff brings claims for defamation *per se* and false light based on the Facebook Page, but she fails to identify any actual false statements about her on the Page. Moreover, even if any of the disputed statements were about Plaintiff, they are opinions and subject to innocent construction, and thus are not actionable. *See infra*, p. 9–12.

- **Count 7 (Assault):** Plaintiff asserts a cause of action for civil assault based on allegations that Defendant DuJan "followed and approached" her, but this is insufficient to show that Plaintiff had a plausible fear of imminent injury based on a verbal threat or threatening physical gesture. Thus, Count 7 should be dismissed. *See infra*, p. 12–13.

- **Count 12 (Intentional Infliction of Emotional Distress):** To state a claim for intentional infliction of emotional distress, a complaint must allege extreme and outrageous conduct causing distress so severe that no reasonable person could be expected to endure it. Plaintiff's mild allegations of "Wrongful Conduct" are insufficient to state such a claim. *See infra*, p. 13–14.

- **Count 13 (Injunctive Relief):** Injunctive relief is a remedy, not a separate claim, and so Count 13 should be dismissed. *See infra*, p. 14.

As such, Counts 1, 2, 7, 10, 11, 12, and 13 should be dismissed with prejudice.

BACKGROUND

In late 2013, Defendants Fox and DuJan voiced complaints to the Orland Park Public Library about the Library's public Internet usage policies and related sexual misconduct by library patrons. Dkt. 34, Amended Complaint (hereinafter "Am. Compl.") ¶ 26. When the Library failed to address their concerns, Fox and DuJan began a campaign to change the Library's policy. *Id.* ¶ 28. They engaged in public debate with the Library by attending a

[1] "Facebook Page" will refer to the "Sassy Plants" Facebook Page. *See* Am. Compl. ¶ 99. The "Fans of Megan Fox" Facebook page mentioned in Plaintiff's complaint, *id.* ¶ 35, is not at issue in this motion.

number of Library Board meetings and voicing their concerns during public comment sessions at these meetings. *See id.* ¶¶ 279–81.

Fox and DuJan also criticized the Library through their social media accounts. *Id.* ¶¶ 37, 40, 53, 100. These criticisms included videos documenting unprofessional behavior by Library employees and statements of opinion about those Library employees. *Id.* ¶¶ 37, 53. Other posts were simply satirical accounts parodying Library policies or employees. *See id.* ¶¶ 40, 100.

Plaintiff Bittman is a Library employee responsible for public relations who participated in the policy debate in her capacity as a Library employee. *Id.* ¶ 27. Therefore, some of Fox and DuJan's posts about the Library controversy have included satirical critiques or opinions about Plaintiff. *See id.* ¶¶ 37, 40, 53. Plaintiff alleges that Defendants created a Facebook Page—called "Sassy Plants"—that parodies statements and actions by Plaintiff, among other things, and uses photographs of Plaintiff as part of the parody. *See id.* ¶¶ 100, 103-104, 112–15. Plaintiff claims that the Facebook Page "impersonate[s]" Plaintiff and a flower design business that she runs. *Id.* ¶¶ 102–03, 118–19. Plaintiff's 380-paragraph amended complaint does not identify a single statement on the Facebook Page that mentions Plaintiff or her business by name, but she nonetheless claims that she has been "prejudice[d]" by Sassy Plants and asserts civil claims pursuant to three federal criminal statutes and the Copyright Act, as well as claims for defamation *per se* and false light. *Id.* ¶¶ 126, 330; Counts 1–4, 10, 11. Plaintiff also brings claims for intentional infliction of emotional distress, assault, and "injunctive relief." *Id.* at Counts 7, 12, and 13.

ARGUMENT

To survive dismissal under Rule 12(b)(6), a complaint must allege enough facts to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl.*

Corp. v. Twombly, 550 U.S. 544, 570 (2007). In other words, a plaintiff's complaint "must actually suggest that the plaintiff has a right to relief, by providing allegations that raise a right to relief above the speculative level." *Indep. Trust Corp. v. Stewart Info. Servs. Corp.*, 665 F.3d 930, 935 (7th Cir. 2012). "[A] plaintiff has the obligation to provide the factual grounds of his entitlement to relief (more than mere labels and conclusions)." *Bissessur v. Ind. Univ. Bd. of Trs.*, 581 F.3d 599, 602 (7th Cir. 2009) (internal quotation marks omitted).

I. Plaintiff fails to plead a cause of action under either the Computer Fraud and Abuse Act (Count 1) or the Stored Communications Act (Count 2).

Plaintiff asserts claims under the Computer Fraud and Abuse Act ("CFAA") and the Stored Communications Act ("SCA")—statutes designed to prevent computer hacking and electronic information theft. *Matot v. CH*, 975 F. Supp. 2d 1191, 1195 (D. Or. 2013) ("CFAA's focus is on hacking rather than the creation of a sweeping internet-policing mandate."); *Cousineau v. Microsoft Corp.*, 6 F. Supp. 3d 1167, 1171 (W.D. Wash. 2014) (general purpose of SCA and CFAA "was to create a cause of action against computer hackers"). Plaintiff's CFAA and SCA claims rest on the premise that the Sassy Plants Facebook Page "impersonates" Plaintiff and her flower business. Am. Compl. ¶¶ 102–03; 118–19. But even taking Plaintiff's allegations as true, Plaintiff's theory stretches the CFAA and SCA beyond their limits. Neither the CFAA nor the SCA was intended to criminalize purported misrepresentations on Facebook, and interpreting the statutes as such would have far-reaching, undesirable implications.

(a) Plaintiff fails to allege Defendants acted "without authorization" or "exceed[ed] authorized access," as required by both the CFAA and SCA.

To state a claim under the CFAA or the SCA, Plaintiff must allege that in creating the Sassy Plants Facebook Page, Defendants acted "without authorization" or "exceed[ed]

authorized access," within the meaning of those statutes. *See* 18 U.S.C. §§ 1030(a)(4); 2701(a)(1)(2); *United States v. Nosal*, 676 F.3d 854, 858 n.4 (9th Cir. 2012) ("without authorization or exceeding authorized access" is a required element under 1030(a)(4)). Since Sassy Plants was created using Facebook's computers, not Bittman's (Am. Compl. ¶¶ 152, 175), Bittman must allege that Defendants violated the CFAA and SCA as those statutes apply to *Facebook's* computers. *See Matot*, 975 F. Supp. 2d at 1192. And so, without alleging any facts to support her claim, Bittman conclusively states that Defendants "obtained unauthorized access to or exceeded their authorized access" to Facebook's computers when they created Sassy Plants. *E.g.*, Am. Compl. ¶¶ 155–61. But parroting the words of the statute is not enough. *See Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009) (plaintiff must do more than "merely parrot the statutory language of the claims that they are pleading (something that anyone could do, regardless of what may be prompting the lawsuit)"). Counts 1 and 2 fail for that reason alone.

Plaintiff does not explain how Defendants acted without Facebook's "authorization" when they allegedly created the Facebook Page because they cannot do so. Facebook is indisputably open to the public, and Facebook invites members of the public to use the site to create Facebook pages. Thus, Bittman cannot credibly claim that Defendants accessed Facebook's computers "without authorization." *Pulte Homes, Inc. v. Laborers' Int'l Union of N. Am.*, 648 F.3d 295, 304 (6th Cir. 2011) (access is not "without authorization" where website, phone, or email systems do not require a password or code but are, instead, open to the public); *see* Am. Compl. ¶¶ 155, 176.

For this reason (and others), courts have rejected attempts to expand the reach of the CFAA and SCA to cover social media accounts that supposedly "impersonate" third parties, as Bittman alleges here. For example, in *Matot v. C.H.*, defendants used plaintiff's name and image

to create "forged" social media accounts on Facebook and Twitter that purported to belong to the plaintiff. 975 F. Supp. 2d at 1192. Plaintiff sued under the CFAA, claiming that the fake Facebook Page and Twitter account exceeded each company's terms of use, and therefore "exceed[ed] authorized access." *Id.* at 1192–96. The court rejected that theory and dismissed the case, finding that even if defendants' activities were violations of the social media sites' terms of use, such violations were not access "without authorization" or "exceed[ing] authorized access" within the meaning of CFAA. *Id.* So too here, where Plaintiff claims that Fox and DuJan improperly created a Facebook Page that "impersonated Ms. Bittman." *See e.g.* Am. Compl. ¶ 118. As the *Matot* court held, claims that merely allege "lying on social media websites" do not state a cause of action under the CFAA and should be dismissed. *See Matot*, 975 F. Supp. 2d at 1195 (noting Facebook estimated approximately 83 million of its active pages were "duplicates, false or undesirable;" refusing to recognize a cause of action for such a widespread activity); *see also Nosal*, 676 F.3d at 859–62 (misrepresentations on social media should not be actionable under CFAA).

The same reasoning applies to Bittman's SCA claim. Section 2701(a) of the SCA contains the same language as the CFAA—making it unlawful to "access[] without authorization" and "exceed[] an authorization"—and is "a 'close cousin' to [the] provision in the Computer Fraud and Abuse Act." *Cousineau*, 6 F. Supp. 3d at 1171. Thus, the *Matot* court's reasoning in dismissing the CFAA claim at issue there applies equally to Bittman's SCA claim. Mere allegations of lying on social media or violating Facebook's terms of use—a not uncommon occurrence for social media users, including law enforcement professionals—are not actionable under the CFAA or SCA. *See Matot*, 975 F. Supp. 2d at 1196 ("police departments have taken to creating false profiles for the purpose of law enforcement").

Reaching a different conclusion would have far-reaching implications because both the CFAA and the SCA have criminal applications. *See* 18 U.S.C. §§ 1030(c), 2701(b). Where a statute has both criminal and civil applications, the rule of lenity applies because the statute must be interpreted consistently—whether applied for civil or criminal purposes. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004). Thus, courts have read the CFAA and SCA narrowly in order to prevent turning millions of unsuspecting Facebook users into criminals. *See Matot*, 975 F. Supp. 2d at 1196 ("[T]he rule of lenity precludes application of the CFAA . . . to defendants' alleged creation of fake social media profiles in violation of social media websites terms of use."); *Int'l Ass'n of Machinists v. Werner-Masuda*, 390 F. Supp. 2d 479, 499 (D. Md. 2005) (SCA and CFAA "are primarily criminal statutes, and, thus, should be construed narrowly"). Here too, the Court should decline to bring a purported "fake" Facebook Page within the boundaries of of the CFAA and SCA, and should dismiss these claims.

(b) Plaintiff does not adequately allege damage or loss under Count 1.

Count 1 fails for another, independent reason: to state a claim under the CFAA, Plaintiff must allege some "damage" or "loss" resulting from Defendants' actions. *CustomGuide v. CareerBuilder, LLC*, 813 F. Supp. 2d 990, 997 (N.D. Ill. 2011). A civil plaintiff (like Plaintiff here) must also allege losses of at least $5,000 within a one-year period. 18 U.S.C. § 1030(c)(4)(A)(i)(I). Plaintiff has failed to sufficiently allege *any* "damage" or "loss."

"Damage" is defined in the CFAA as an "impairment to the integrity or availability of data, a program, a system, or information." 18 U.S.C. § 1030(e)(8). Courts in the Northern District "have consistently interpreted 'damage' under the CFAA to include 'the destruction, corruption, or deletion of electronic files, the physical destruction of a hard drive, or any diminution in the completeness or usability of the data on a computer system.'" *See SBS*

Worldwide, Inc. v. Potts, No. 13 C 6557, 2014 WL 499001, at *8 (N.D. Ill. Feb. 7, 2014); *see also Farmers Ins. Exch. v. Auto Club Grp.*, 823 F. Supp. 2d 847, 852 (N.D. Ill. 2011) ("The plain language of the statutory definition [of damage] refers to situations in which data is lost or impaired because it was erased or because (for example) a defendant smashed a hard drive with a hammer."). Plaintiff has alleged no such damage. *See* Am. Compl. ¶¶ 144–66. Allegations that the defendant has merely accessed, downloaded, or distributed Plaintiff's information are insufficient to satisfy this element. *SBS Worldwide*, 2014 WL 499001, at *8. Because Plaintiff has not alleged the destruction of any of her electronic information, she has not adequately pleaded "damage" within the meaning of the CFAA.

Plaintiff's allegations of "loss" are also statutorily insufficient. "Loss" is defined in the CFAA as "any reasonable cost to the victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition before the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service." 18 U.S.C. § 1030(e)(11). Only costs related to computer impairment after an interruption of service qualify as "losses" under the CFAA. *See SBS Worldwide*, 2014 WL 499001, at *9; *CustomGuide*, 813 F. Supp. 2d at 998. While lost business revenues "might fit the usual understanding of the term 'loss,' the CFAA provides a different definition that trumps the ordinary definition." *SFK USA, Inc. v. Bjerkness*, 636 F. Supp. 2d 696, 721 (N.D. Ill. 2009).

Plaintiff's claim for "losses . . . including, but not limited to, the costs of responding to the foregoing violations . . . in the form of attorney's fees," *see* Am. Compl. ¶ 165, is wholly unrelated to computer repair, and thus does not satisfy the CFAA's definition of "loss." Apart

from attorney's fees (which do not count as "losses" under the CFAA),[2] Plaintiff raises only a general claim of loss. *Id.* And a conclusory statement of loss is insufficient. *See Garelli Wong & Assoc., Inc. v. Nichols*, 551 F. Supp. 2d 704, 711 (N.D. Ill. 2008) (plaintiff did not adequately plead loss by claiming that "Defendant's conduct caused losses to [plaintiff] in excess of $5,000"). Because Plaintiff has not adequately pled any "damages" or "losses," let alone "losses" in excess of the $5,000 statutory threshold, her CFAA claim should be dismissed.

II. Plaintiff's claim for defamation *per se* based on the Sassy Plants Facebook Page (Count 10) fails because it does not identify actionable false statements.

In Count 10, Plaintiff alleges that the Sassy Plants Facebook Page constitutes "defamation *per se*," yet even after a chance to amend her complaint, she is unable to identify a single statement on the Page that even mentions Plaintiff, let alone makes a *false* statement about her. *See* Am. Compl. ¶¶ 99–126; 326–340. Failure to describe the content of alleged defamatory statements warrants dismissal. *Simons v. Ditto Trade, Inc.*, No. 14 C 309, 2014 WL 3889022, at *4 (N.D. Ill. Aug. 8, 2014) (dismissing claim where plaintiff failed to state the language of the alleged defamatory statement). The only specific statements that Plaintiff identifies in the amended complaint are not even about a person:

- "Sassiness is guaranteed." *Id.* ¶ 113.
- Have a "Sassy Plants Booth" at a "next big event." *Id.* ¶ 114.
- "Do you even have what it takes to arrange flowers this good? Probably not. You probably shouldn't even try because if you fail people will laugh at you. Sorry but it's true." *Id.* ¶ 115.

[2] *See Wilson v. Moreau*, 440 F. Supp. 2d 81, 110 (D.R.I. 2006), *aff'd* 492 F.3d 50 (1st Cir. 2007) ("[T]he Court holds that, as a matter of law, the costs of litigation cannot be counted towards the $5,000 statutory threshold."); *Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey*, 497 F. Supp. 2d 627, 647 (E.D. Pa. 2007) ("[L]itigation expenses, attorney's fees, and the costs of hiring experts . . . cannot be counted toward the statutory threshold.").

- Supposed references to "fruits" that allegedly imply a prejudice against gay individuals. *Id.* ¶ 124.

Statements that are not about the plaintiff are not actionable as defamation. *Huon v. Breaking Media, LLC*, No. 11 C 03054, 2014 WL 6845866, at *6, *8 (N.D. Ill. Dec. 4, 2014).

To the extent that these comments could plausibly be interpreted to constitute statements about Plaintiff or anyone else (they cannot), they are still not actionable as defamation because they are capable of innocent construction. *See Knafel v. Chi. Sun-Times*, 413 F.3d 637, 639–40 (7th Cir. 2005); *Green v. Rogers*, 917 N.E.2d 450, 463 (Ill. 2009). Any statement reasonably capable of a nondefamatory interpretation must be interpreted as such, and the claim for defamation *per se* should be dismissed. *Knafel v. Chi. Sun-Times, Inc.*, No. 03 C 6434, 2004 WL 628242, at *3 (N.D. Ill. Mar. 25, 2004), *aff'd* 413 F.3d 637 (7th Cir. 2005) (statements are not to be read in light most favorable to plaintiff); *see Knafel*, 413 F.3d at 642 ("[Defendant's] words are reasonably (and easily) subject to an innocent construction; i.e. one that stops short of saying she committed a crime."); *Green*, 917 N.E.2d at 464–65 (reinstating dismissal because statements that plaintiff committed "abuse" and "misconduct with children" were capable of innocent construction). The "Sassy Plants Statements" are easily capable of innocent construction, and therefore dismissal is appropriate.

Further, even if these statements could be read to apply to Plaintiff and could not be read to have an innocent construction, they are still opinions that enjoy First Amendment protection. *Rose v. Hollinger Int'l, Inc.*, 889 N.E.2d 644, 648 (Ill. App. Ct. 2008). Statements are only actionable as defamation where, in context, they have a precise and readily understood factual meaning and are objectively verifiable. *Id.*; *see Doherty v. Kahn*, 682 N.E.2d 163, 172 (Ill. App. Ct. 1997) (defendants' statements that plaintiff was "lazy," "incompetent,"

"dishonest," "cannot manage a business," and "lacks the ability to perform landscaping services" were non-actionable opinions). Far from factual statements with a "precise" and "verifiable" meaning, the "Sassy Plants Statements" are merely satirical opinions. *See Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 882 N.E.2d 1011 (Ill. 2008) (dismissing claim for defamation where language was "sophomoric" and "sometimes nonsensical"). Statements such as "Sassiness is guaranteed" are clearly not factual assertions; in Plaintiff's words, the statements are at worst "mocking." *See* Am. Compl. ¶ 328. Because none of the "Sassy Plants Statements" state facts capable of verification, they are not actionable as defamation.

III. Plaintiff's claim for false light based on the Sassy Plants Facebook Page (Count 11) fails for the same reasons.

Plaintiff's claim in Count 11 that the Sassy Plants Facebook Page casts her in a false light suffers the same flaws: statements of opinion and statements capable of innocent construction cannot form the basis of a false light claim. *See Schivarelli v. CBS, Inc.*, 776 N.E.2d 693, 701 (Ill. App. Ct. 2002), *appeal denied* 787 N.E.2d 170 (Ill. 2002) (dismissing because "[a]s in defamation actions, statements that are expressions of opinion devoid of any factual content are not actionable as false light claims"); *Mancari v. Infinity Broad. East, Inc.*, No. 04 C 3599, 2004 WL 2958765, at *5 (N.D. Ill. Nov. 25, 2004) (dismissing false light claim because statement was reasonably capable of an innocent construction). As detailed above, to the extent that the alleged "Sassy Plants Statements" can be construed to make comments about Plaintiff, these statements are non-actionable. *See Huon*, 2014 WL 6845866, at *13 ("[W]here a false light claim is premised on allegedly defamatory statements that a court finds are not actionable as defamation, the false light claim fails as a matter of law."). Although Plaintiff attempts to bolster her false light claim by referencing pictures of her on Sassy Plants, she is unable to articulate anything

about the pictures that could constitute a falsity "highly offensive to the reasonable person." *See Schivarelli*, 776 N.E.2d at 700–01; Am. Compl. at ¶ 343–51. Therefore, Plaintiff's false light claim based on Sassy Plants should be dismissed.

IV. Plaintiff's claim for civil assault (Count 7) is not plausible on its face.

Plaintiff claims in Count 7 that Defendant DuJan committed civil assault against Plaintiff, but the allegations do not support a plausible claim for civil assault. *See* Am. Compl. ¶¶ 276–291. The entire basis for Plaintiff's assault claim is that during a Library Board meeting, Plaintiff "proceeded to the back of the room to dial 9-1-1" and DuJan "followed and approached Ms. Bittman as she dialed 9-1-1." Am. Compl. ¶ 284–85. When DuJan approached Plaintiff, she "entered a private room adjacent to the meeting room using a security badge." *Id.* ¶ 289. Plaintiff entered the "private room to complete the 9-1-1 call in private," and after she entered the private room, DuJan allegedly "hung up the 9-1-1 call that Ms. Bittman had placed." *Id.* ¶¶ 290–91. Plaintiff does not allege a verbal threat from DuJan or that DuJan made any threatening physical gesture. *Id.* ¶¶ 276–291.

Thus, even under Plaintiff's version of the facts, there is no plausible apprehension of immediate offensive physical contact, as required to state a claim for civil assault. *Slaughter v. Waubonsee Cmty. Coll.*, No. 94 C 2525, 1995 WL 106420, at *2 (N.D. Ill. Mar. 9, 1995); *see Shea v. Winnebago Cnty. Sheriff's Office*, No. 12-CV-50201, 2014 WL 4449605, at *7 (N.D. Ill. Sept. 10, 2014) (dismissing claim for assault where plaintiff alleged that a defendant brandished his fists but did not allege any verbal threat or other facts showing defendant's intent to cause apprehension of immediate battery); *Harper v. Mega*, No. 96 C 1892, 1998 WL 473427, at *11 (N.D. Ill. Aug. 7, 1998) (dismissing claim for assault because plaintiff did not allege that defendants' threatening words were accompanied by a threatening movement). The fact that

DuJan walked toward Bittman as she locked herself in a private room cannot be reasonably construed as a menacing gesture indicating imminent physical harm.[3]

The *Slaughter* case is instructive. *Slaughter*, 1995 WL 106420. In *Slaughter*, the court dismissed a claim for civil assault, holding, "Plaintiff's complaint contains no facts that would indicate that [defendant] ever made an offer of injury by force. The complaint contains no allegations that he ever made any attempt to touch plaintiff, or ever threatened to touch plaintiff." *Id.* at *2. So too here—Plaintiff fails to allege that DuJan made any threatening statement or attempt to injuriously touch her. *See generally* Am. Compl. ¶¶ 276–291. As in *Slaughter*, "Plaintiff's conclusory allegation that [defendant's] conduct placed her in imminent apprehension of harmful and offensive bodily [contact] is belied by her factual allegations," *Slaughter*, 1995 WL 106420, at *2, and therefore Count 7 should be dismissed.

V. Plaintiff's allegations in Count 12 are not sufficiently "extreme and outrageous" to state a cause of action for intentional infliction of emotional distress.

Plaintiff's claim for intentional infliction of emotional distress (IIED) also falls short. To establish a claim for IIED, Plaintiff must allege "extreme and outrageous" conduct intended to cause distress that is "so severe that no reasonable man could be expected to endure it." *Milton v. Wal-Mart Stores, Inc.*, No. 11 C 7872, 2012 WL 1953197, at *3 (N.D. Ill. May 25, 2012). However, none of the purported "Wrongful Conduct" identified by Plaintiff satisfies the standard for "extreme and outrageous conduct." *See Duffy v. Orlan Brook Condo. Owners' Ass'n*, 981 N.E.2d 1069, 1079 (Ill. App. Ct. 2012) (objective standard determines whether conduct is

[3] Plaintiff seems to suggest that DuJan allegedly hanging up the phone was a threatening movement. Am. Compl. ¶ 258. However, Plaintiff acknowledges that at the point where DuJan reached the phone, she had already entered a separate room that required a security badge for entrance. *Id.* at ¶¶ 256–58. Thus, no imminent harm was possible because DuJan did not have physical access to her.

extreme and outrageous). Liability does not extend to "mere insults, indignities, threats, annoyances, petty oppressions, or trivialities." *Id.* at 1079–80 (upholding dismissal where defendants' actions were "inconvenient, aggravating, and annoying"). Even claims of harassment, intimidation, and embarrassment, without more, are insufficient. *See Milton*, 2012 WL 1953197, at *3 (dismissing claims where plaintiffs alleged intimidation and humiliation).

In contrast to Plaintiff's allegations that defendants posted photos of her house, the court in *Milton* dismissed an IIED claim where defendants actually *entered* plaintiffs' home and unjustly accused them of stealing. *Id.* Allegations that Sassy Plants Facebook Page caused emotional distress are similarly insufficient; statements that do not rise to the level of defamation cannot rise to the even higher level of "extreme and outrageous conduct." *Huon v. Breaking Media, LLC*, No. 11 C 03054, 2014 WL 6845866, at *15 (N.D. Ill. Dec. 4, 2014); *see also Collier v. Murphy*, No. 02 C 2121, 2003 WL 1606637, at *4–5 (N.D. Ill. Mar. 26, 2003) (dismissing IIED and defamation claims where defendants created unflattering fictional character that resembled plaintiff). Plaintiff's allegations of "Wrongful Conduct" amount to annoyances at best, and fall far short of the "extreme and outrageous" conduct necessary to state a claim.

VI. Injunctive relief is not a cause of action; Count 13 should be dismissed.

Plaintiff's cause of action for "injunctive relief" (Count 13) also fails. Injunctive relief is a remedy, not a separate claim. *CustomGuide v. CareerBuilder, LLC*, 813 F. Supp. 2d 990, 1002 (N.D. Ill. 2011) (dismissing with prejudice a claim for injunction, noting that an injunction "is an equitable remedy, not a separate cause of action"); *Town of Cicero v. Metro. Water Reclamation Dist. of Greater Chi.*, 976 N.E.2d 400, 414–15 (Ill. App. Ct. 2012) (upholding dismissal of injunctive relief claim because "injunction . . . is not a separate cause of action"). Count 13 is simply an improper request for an injunction and should be dismissed.

VII. The Court should extend the time to answer the remaining counts.

Filing a partial motion to dismiss under Rule 12(b) extends the time to file an answer to the entire complaint, including the claims not at issue in the Rule 12(b) motion. *See Intercom Ventures, LLC v. FasTV, Inc.*, No. 13 C 232, 2013 WL 2357621, at *6–7 (N.D. Ill. May 28, 2013); *Rawson v. Source Receivables Mgmt., LLC*, No. 11 C 8972, 2012 WL 3835096, at *1 n.1 (N.D. Ill. Sept. 4, 2012). Thus, this Court should grant Defendants' request for an Extension of Time to Answer the Remaining Counts of the Complaint until 14 days after the Court rules on the Partial Motion to Dismiss.

CONCLUSION

For the foregoing reasons, Defendants Fox and DuJan respectfully request that this Court grant their Partial Motion to Dismiss Counts 1, 2, 7, 10, 11, 12, and 13 with prejudice pursuant to Rule 12(b)(6), and Motion for an Extension of Time to Answer the Remaining Counts of the Complaint.

Dated: February 19, 2015

Respectfully submitted,

s/ Daniel R. Lombard

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CERTIFICATE OF SERVICE

I certify that on February 19, 2015, I caused the foregoing MEMORANDUM to be served via Electronic Court Filing ("ECF") and/or electronic mail in compliance with the Federal Rules of Civil Procedure on the following counsel:

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