Exhibit A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

BRIDGET BITTMAN,	)	
	)	
Plaintiff,	)	Civil Action No.: 2014-cv-08191
	)	
v.	)	
	)	Honorable James F. Holderman
MEGAN FOX, et. al.,	)	
	)	Magistrate Judge Susan E. Cox
Defendants.	)	
	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS MEGAN FOX'S AND KEVIN DUJAN'S PARTIAL MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT AND MOTION FOR EXTENSION OF TIME TO ANSWER THE REMAINING COUNTS OF THE AMENDED COMPLAINT

NOW COMES the PLAINTIFF BRIDGET BITTMAN ("Plaintiff"), by and through her counsel, Mudd Law Offices, and respectfully submits her Memorandum in Opposition to Defendants Megan Fox's ("Fox") and Kevin DuJan's ("DuJan") (collectively "Defendants") Partial Motion to Dismiss Plaintiff's Amended Complaint and Motion for Extension of Time to Answer the Remaining Counts of the Amended Complaint, and states as follows:

INTRODUCTION

This litigation arises from the Defendants' collective efforts to defame, discredit, disparage, and damage Plaintiff Bridget Bittman's ("Ms. Bittman") reputation. Ms. Bittman works as the marketing and public relations coordinator for the Orland Park Public Library ("OPPL"). Through that role, she is called upon to publicly comment on library procedures, including the OPPL's Internet filter policy. This policy allows for unfiltered access to adult computers at public libraries.

This policy has proven in the past to be divisive. Defendants Megan Fox and Kevin DuJan have complained, both to the Library and publicly, that the policy is inappropriate. Ms. Bittman defended the Internet policy. When Fox and DuJan were unable to change the long-standing policy Ms. Bittman defended through their campaign, they began to attack her work at the OPPL and then moved to her personal life. After enduring significant harassment, Ms. Bittman determined she had no alternative but to file suit to protect herself and her family. On January 21, 2015, Ms. Bittman ("Plaintiff") could endure no more as her distress and fear for the safety of her family increased significantly. To be sure, by pursuing her litigation, Ms. Bittman does not intend to stifle legitimate public comments and debate, but rather seeks to end the Defendants' unlawful harassing conduct directed to destroying her life and reputation.

Defendants Megan Fox and Kevin DuJan now move to dismiss six claims against them pursuant to Federal Rules of Civil Procedure 12(b)(6). For the reasons articulated below their Motion to Dismiss must be denied in its entirety.

FACTUAL BACKGROUND

Fox Facebook Page

The OPPL provides unfiltered access to the Internet for adults. Am. Compl. (January 21, 2015) (Dkt. No. 34) at ¶ 26 ("Am. Compl."). Beginning in the fall of 2013, Defendants Megan Fox and Kevin DuJan complained about the OPPL's unfiltered access Internet policy. Id. ¶ 26. Ms. Bittman is an employee of the OPPL providing it with marketing and public relations. Am. Compl. ¶¶ 16-17. In her capacity with the OPPL, Ms. Bittman publicly responded to these complaints and reiterated the OPPL's policy. Id. ¶ 27. Based on Ms. Bittman's responses to Fox and DuJan's public complaints, both Fox and DuJan began to complain of Ms. Bittman

professionally, before launching a public and relentless campaign to harass Ms. Bittman personally. Id. ¶¶ 28, 31.

As early as November 4, 2013, the Defendants began making false and defamatory statements about Ms. Bittman on the Internet, including on Fox's Facebook Page "Fans of Megan Fox[1]" ("Fox Facebook Page"). Am. Compl. ¶ 36. While Fox and DuJan continued to post false statements about Ms. Bittman on the Fox Facebook Page, the behavior escalated during the summer of 2014. Defendants Fox and DuJan traveled to Ms. Bittman's hometown, which is several miles away from Orland Park, Illinois, and took photographs of her home. Id. ¶ 46. Then, on June 18, 2014, Fox posted photographs of Ms. Bittman's house on the Fox Facebook Page. Id. ¶ 44. The only discernible reason for publishing these pictures on the Fox Facebook Page was to intimidate and harass Ms. Bittman. Id. ¶¶ 50-52.

Sassy Plants Facebook Page

Rather than be satisfied with threating Ms. Bittman's safety, the Defendants escalated their campaign by creating a Facebook Page entitled "Sassy Plants Illinois" ("Sassy Plants Facebook Page") in order to impersonate Ms. Bittman and her personal floral arrangement business. Am. Compl. ¶¶ 101-103. On the Sassy Plants Facebook Page, Fox and DuJan used Ms. Bittman's personal photographs as well as photographs of her floral arrangements without Ms. Bittman's authorization or permission. Id. ¶¶ 105-109. With these photographs, Fox and DuJan included derogatory and suggestive descriptions of the photographs portraying Ms. Bittman as an unprofessional individual, including references to "fruits" as a derogatory term for homosexuals. Fox and DuJan also posted the statement, "Do you even have what it takes to

[1] The statements made by Defendants on the "Fans of Megan Fox" Facebook Page are not subject to Defendants' Motion to Dismiss.

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, 124.

Additionally, while masquerading as Ms. Bittman, and in an effort to convince people Ms. Bittman actually ran the site, Fox and DuJan posted the advertisement for her floral business that stated, "[Y]ou should have a Sassy Plants Booth at your next big event including birthday part[ies], wedding[s], graduation[s], funeral[s], or whatever." Am. Compl. ¶ 114. By creating the Sassy Plants Facebook Page and soliciting electronic messages from the Facebook community, Fox and DuJan violated Facebook's Terms of Use. Id. ¶¶ 118-123. Clearly, the Defendants created the Sassy Plants Facebook Page with the intention of harassing Ms. Bittman and suggesting her personal floral arrangement business lacked professionalism and integrity.

Fox and DuJan[2] have engaged in a campaign to harass Ms. Bittman both personally and professionally, merely for doing her job.

STANDARD

In order to survive a 12(b)(6) Motion to Dismiss, "[a] plaintiff's complaint need only provide a 'short and plain statement of the claim showing that the pleader is entitled to relief,' sufficient to provide the defendant with 'fair notice' of the claim and its basis." Tamayo v. Blagojevich, 526 F.3d 1074, 1081 (7th Cir. 2008) (*citing* Fed. R. Civ. P. 8(a)(2). Thus, a complaint need not satisfy a "heightened fact pleading of specifics," but rather contain "enough facts to state a claim to relief that is plausible on its face." Killingsworth v. HSBC Bank Nev., N.A., 507 F.3d 614, 618 (7th Cir. 2007). Also, a complaint is to be construed "in the light most favorable to the plaintiff, accepting as true all well-pleaded facts alleged, and drawing all possible inferences in her favor." Tamayo, 526 F.3d at 1081; Savory v. Lyons, 469 F.3d 667, 670

[2] The conduct of Defendants Dan Kleinman, Adam Andrzejewski and For the Good of Illinois is not addressed in this Response as they have filed separate Motions to Dismiss. See Dkt. No. 38-39; 47-48.

(7th Cir. 2006). Consequently, a motion to dismiss should only be granted when it appears without a doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief. Chicago Bd. of Options Exchange v. Conn. General Life Ins. Co., 713 F.2d 254, 257 (7th Cir. 1983).

ARGUMENT

The Defendants raise several meritless arguments in an attempt to dismiss the Complaint. To begin with, the Defendants claim the Plaintiff fails to sufficiently plead facts to support her claim for a violation of the Computer Fraud and Abuse Act and the Stored Communications Act. Further, the Defendants similarly claim insufficient facts exist to establish common law claims for defamation *per se*, false light, assault, and intentional infliction of emotional distress. For the reasons discussed below, the Defendants arguments fail as a matter of law. Therefore, the Defendants' partial Motion to Dismiss should be denied in its entirety.

I. Plaintiff Properly Pleads a Violation of the Computer Fraud and Abuse Act

The Defendants argue that the Plaintiff has failed to properly allege a violation of the CFAA as the Plaintiff fails to allege the Defendants acted without authorization and is unable to establish damages. Mem. In Supp. of Mot. to Dismiss (February 19, 2015) (Dkt. No. 37) p. 5 ("Supp. Mem."). [3] However, the Plaintiff has properly alleged facts sufficient to establish a violation of the Computer Fraud and Abuse Act ("CFAA"). "To state a civil claim for a violation of the CFAA, the plaintiff must allege 1) damage or loss; 2) caused by; 3) a violation of one of the substantive provisions set forth in § 1030(a); and 4) conduct involving one of the factors in § 1030(c)(4)(A)(i)(I)-(V)." Cassetica Software, Inc. v. Computer Scis. Corp., No. 09 C 0003, 2009 U.S. Dist. LEXIS 51589, at *8 (N.D. Ill. June 18, 2009); 18 U.S.C. § 1030(a); 18

[3] The Defendants do not challenge the remaining elements required to plead a violation of the CFAA. See Mem. Supp. p. 5.

U.S.C. §§ 1030(c)(4)(A)(i)(I)-(V). The Plaintiff has properly pled facts sufficient to establish she has suffered damages caused by the Defendants' violation of Subsection 1030(a)(4), which requires a person to (1) knowingly and (2) with intent to defraud (3) access a protected computer (4) without authorization or exceeding authorized access (5) in order to further the intended fraud. 18 U.S.C. § 1030(a)(4).

(a) Plaintiff sufficiently alleges the Defendants exceeded their authorization.[4]

The Defendants specifically claim the Plaintiff cannot establish they acted "without authorization," or "exceeded their authorization" as defined under the CFAA because she "cannot do so." Mem. Supp., p. 5. To support this brave assertion, the Defendants cite Matot v. Ch. 975 F. Supp. 1191 (D. Or. 2013). Matot, emerged from the Ninth Circuit rather than the Seventh Circuit and, at best is non-binding, persuasive authority as the case is from the Ninth and not the Seventh Circuit. Moreover, the Ninth Circuit does not adopt the same interpretation of the CFAA as the Seventh Circuit. Specifically, the Seventh Circuit has held that a defendant may exceed his authorized access when doing so is for improper purposes in violation of a use restriction, or in violation of a duty of loyalty. See Motorola, Inc. v. Lemko Corp., 609 F. Supp. 2d 760, 767 (N.D. Ill. 2009); Int'l Airport Ctrs., LLC v. Citrin, 440 F.3d 418, 420-421 (7th Cir. 2006) In contrast, the Ninth Circuit, specifically declined to follow the holdings of its sister courts, including the Seventh, and held that the term "exceeds authorized access" does not extend to violations of use restrictions," or violations of duties of loyalties.[5] United States v. Nosal, 676

[4] For the purposes of this response, the Plaintiff will focus on "exceeding authorization" as the Defendants obtained authorized access to Facebook computers by virtue of their authorized personal use of the site, and thereafter exceeded such authorization by creating the Sassy Plants Facebook Page. 18 U.S.C. § 1030(e)(6).

[5] Indeed, even courts within the Ninth Circuit have recognized that, when using the broad CFAA analysis typified by the Seventh Circuit, "most courts that have considered the issue have held that a conscious violation of a website's terms of service/use will […] cause it to exceed authorization." United States v. Drew, No. CR 08-0582-GW, 2009 U.S. Dist. LEXIS 85780, *35 (C.D. Cal. August 28, 2009).

F.3d 854, 863 (9th Cir. 2012). As such, Matot is clearly not applicable to the case at hand. See Citrin, 440 F.3d at 421.

Here, the Plaintiff pleads that the Defendants consciously created a false Facebook Profile using the Plaintiff's personal information to carry out a fraudulent scheme in violation of Facebook's Terms of Use. Am. Compl. ¶¶ 152-159. Courts that have specifically addressed violations of terms of use have found actions similar to the Defendants constitute "exceeding authorized access." See, e.g., Southwest Airlines Co. v. Farechase, Inc., 318 F.Supp.2d 435, 439-40 (N.D. Tex. 2004); Nat'l Health Care Disc., Inc., 174 F.Supp.2d 890, 899 (N.D. Iowa 2001); Register.com, Inc. v. Verio, Inc., 126 F.Supp.2d 238, 247-51 (S.D.N.Y. 2000), aff'd, 356 F.3d 393 (2d Cir. 2004); Am. Online, Inc. v. LCGM, Inc., 46 F.Supp.2d 444, 450 (E.D. Va. 1998). Thus, the Defendants exceeded their authorized access to the Facebook computers. Therefore, the Plaintiff sufficiently pled this element.

In further effort to circumvent the law, the Defendants argue that a public website cannot form the basis of such a CFAA violation, however it makes no difference to the exceeding authorization analysis if the website in question was open to the public. Mem. Supp., p. 5. See EF Cultural Travel BV v. Zefer Corp., 318 F.3d 58, 62 (1st Cir. 2003)[6] (stating a "lack of authorization can be established by an explicit statement on the website restricting access," giving rise to a CFAA violation if a website user thereafter violated the terms of use, because […] we think that the public website provider can easily spell out explicitly what is forbidden"). Thus, the Defendants argument on this point has no merit. Given these constitute the only arguments raised by the Defendants on this issue and the Plaintiff has clearly sufficiently pled a CFAA claim, the Defendants' arguments on this issue have no basis.

[6] The First Circuit's broad interpretation of the CFAA is analogous to that of the Seventh Circuit. See EF Cultural Travel BV v. Zefer Corp., 318 F.3d 58, 62 (1st Cir. 2003); and Int'l Airport Ctrs., L.L.C. v. Citrin, 440 F.3d 418, 421 (7th Cir. 2006).

(b) Plaintiff sufficiently alleges loss under the CFAA

The Defendants next argue, without merit, that the Plaintiff has failed to sufficiently allege any damage or loss as required by the CFAA. Mem. Supp., p. 7. "[A] plaintiff alleging violations of section […] (a)(4) need only allege damage or loss, not both. Motorola, Inc. v. Lemko Corp., 609 F. Supp. 2d 760, 767 (N.D. Ill. 2009). The CFAA defines "loss" as "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to 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). Therefore, "a plaintiff can satisfy the CFAA's definition of loss by alleging costs reasonably incurred in responding to an alleged CFAA offense." Farmers Ins. Exch. v. Auto Club Group, 823 F. Supp. 2d 847, 854 (N.D. Ill. 2011). Here, the Plaintiff sufficiently alleges she has expended "reasonable costs" in responding to the Defendants' CFAA violation, which includes, costs expended investigating the Defendants' conduct, as well as attorney's fees. Am. Compl. ¶ 165.

(c) The Rule of Lenity Should Not Apply

The Defendants suggest that the "Rule of Lenity" compels this court to adopt the Ninth Circuit's narrow interpretation of the CFAA because any other interpretation would have far-reaching implications for the CFAA (and SCA for that matter). Mem. Supp., p. 7. The Rule of Lenity dictates that when a statute's language is "grievously" ambiguous, a court should construe the statute in favor of the accused. Chapman v. United States, 500 U.S. 453, 462-463 (1991). However, as this court has held, there is "no ambiguity in the language of the [CFAA], [and] the rule of lenity does not apply." Charles Schwab & Co. v. Carter, No. 04 C 7071, 2005 U.S. Dist.

LEXIS 5611, *10 (N.D. Ill. 2005). Therefore, the Defendants' appeal to the Rule of Lenity is misplaced.

(d) Conclusion

As demonstrated above, the Plaintiff has properly alleged Defendants Fox and DuJan exceeded their authorized access to Facebook's computers, violating its terms of use. Under Seventh Circuit precedent, this constitutes an unambiguous violation of the CFAA, which the Rule of Lenity cannot set aside. The Plaintiff has alleged loss to survive the Defendants' motion to dismiss. Therefore, the Defendants' Motion to Dismiss Count I should be denied.

II. Plaintiff Properly Pleads a Violation of the Stored Communications Act[7]

The Defendants claim the Plaintiff fails to properly plead a cause under the SCA for the exact reason she fails under the CFAA, that the Plaintiff is unable to establish the Defendants exceeded their authorization. However, the Plaintiff properly pleads a violation of the Stored Communications Act ("SCA"). The SCA provides a civil cause of action when an individual or entity "intentionally exceeds an authorization to access that facility; and thereby obtains […] a wire or electronic communication while it is in storage in such system." 18 U.S.C. § 2701(a).

(a) Plaintiff properly alleges the Defendants exceeded their authorization

Defendants again argue that the Plaintiff fails to establish that the Defendants exceeded their authorization to use the Facebook computers because "[m]ere allegations of lying on social media are not actionable under the CFAA or SCA." Mem. Supp., p. 6. To support this assertion, the Defendants suggest the court's analysis of a CFAA claim in Matot is equally applicable to any SCA claim. Id. However, that is not accurate. The SCA, meant to protect the privacy of

[7] Despite the Defendants' claim that the Stored Communications Act is a close cousin of the CFAA, and therefore the same reasoning should allow the court to dismiss both claims, the Plaintiff will respond to each federal statute separately. Mem. Supp., p. 6.

individuals from unauthorized access to electronic communications intended for them, allows a claim where a plaintiff can establish the defendant lacked permission or acted outside their scope of authority. See Sysco Corp. v. Katz, No. 13-cv-5477, 2013 U.S. Dist. LEXIS 143147 *11 (N.D. Ill October 3, 2013) (denying a motion to dismiss a SCA claim when the plaintiff alleged the defendant acted outside the scope of his authority by access and forwarding e-mails containing confidential information); see also Maremont v. Susan Fredman Design Group, Ltd., No. 10 C 7811, 2014 U.S. Dist. LEXIS 26557, *24 (N.D. Ill. March 3, 2014) (holding that allegations that defendants did not have permission to a Facebook and Twitter account may form the basis for a SCA claim). Therefore, Plaintiff properly alleges Defendants did not have authorization, or permission, to obtain access to the Facebook computers where electronic messages were stored that were intended for the Plaintiff. Am. Compl. ¶ 184. This is sufficient to establish the Defendants violated the SCA through their wrongful conduct.

(b) The rule of lenity should not apply

Once again, the Defendants appeal to the Rule of Lenity and scantly argue that "exceeds" and "authorization" should be construed narrowly within the SCA. Mem. Supp., p. 7. However, while the SCA does contain the terms "exceeds" and "authorization" the Defendants can point to no specific case where a court has stated those terms are, in fact, ambiguous, or so ambiguous as to require application of the Rule of Lenity. Mem. Supp., p. 7. Indeed, even accepting the terms as ambiguous, "[t]he simple existence of some statutory ambiguity, however, is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree." Muscarello v. United States, 524 U.S. 125, 138 (1998). Therefore, as the Defendants fail to establish the necessity for an appeal to the Rule of Lenity, it should not apply. Id.

Therefore, as the Plaintiff has properly pled facts sufficient to allege Defendants Fox and DuJan violated the SCA through their actions, and that the Defendants' appeal to the Rule of Lenity is woefully misplaced, the Defendants' Motion to Dismiss Count II should be denied.

III. Plaintiff Properly Pleads Defamation *Per Se* for the statements on Sassy Plants

The Defendants argue that the Plaintiff's claim for defamation *per se* relating to the Sassy Plants Facebook Page is insufficient because the statements alleged in the complaint are not about the Plaintiff and are further capable of innocent construction.[8] Specifically, the Defendants claim constant references to "fruits," as well as the statements "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," and "[Y]ou should have a Sassy Plants Booth at your next big event including birthday part[ies], wedding[s], graduation[s], funeral[s], or whatever," are not actionable as defamation. Mem. Supp., p. 10. However, the Plaintiff has pled sufficient facts to demonstrate the Sassy Plants Facebook Page and the Defendants' characterization of the Plaintiff are defamatory and not capable of innocent construction.

To state a claim for defamation, a plaintiff must present facts demonstrating that the defendant made a false statement about the plaintiff, that the defendant made an unprivileged publication of the statement in question to a third party, and that the publication caused damages to the plaintiff. Green v. Rogers, 234 Ill. 2d 478, 491 (2009). A statement is defamatory *per se* if the resulting harm is apparent and obvious on the face of the statement. Tuite v. Corbitt, 224 Ill.2d 490, 501 (2006). Of the five categories of statements classified as defamatory *per se* in Illinois, the Defendants' statements on the Sassy Plants Facebook Page offend at least two: (1) words that impute a want of integrity in the discharge of duties of office or employment; and (2)

[8]Interestingly, the Defendants, who took issue with the Plaintiff's stringent defense of the First Amendment, now try to hide behind the same defense.

words that prejudice a party, or impute a lack of ability, in his or her trade, profession or business. Id. Here, the statements on the Sassy Plants Facebook Page impute a lack of integrity in the Plaintiff's floral design business and prejudice the Plaintiff in her floral arrangement business.

(a) The statements attributed to the Plaintiff are defamatory

Statements wrongfully attributed to an individual that make the individual appear unprofessional or lacking in their employment are actionable as defamation *per se*. See Moriarty v. Greene, 732 N.E.2d 730, 738 (Ill. App. Ct. 1st Dist. 2000) (finding statements that falsely attributed statements to a child psychologist that questioned her professionalism actionable as defamation *per se*).

Here, the Defendants falsely attribute usage of the term "fruit" to the Plaintiff and her floral arrangement business that make the Plaintiff appear as unprofessional. Am. Compl. ¶ 327. Indeed, the Defendants themselves have asserted that the term "fruit" is derogatory and homophobic. Am. Compl. ¶¶ 69-71. Yet, on the Sassy Plants Facebook Page, the Defendants persistently use the term when masquerading as the Plaintiff. These statements not only impute a lack of integrity in the Plaintiff's business but also prejudice the Plaintiff in her floral arrangement business, as potential customers may believe her to be unprofessional and homophobic. These statements attributed to the Plaintiff are obviously defamatory on their face and the resulting harm to the Plaintiff's floral arrangement business is apparent.

The Defendants also falsely attribute additional statements to the Plaintiff that impute a lack of integrity and professionalism in the Plaintiff's floral arrangement business. By attributing the statements on the Sassy Plants Facebook Page to the Plaintiff, the Defendants call into question the Plaintiff's professionalism when dealing with prospective customers. Am.

Compl. ¶¶ 115, 328-330. Further, the statements falsely attributed to the Plaintiff, prejudice her in her floral arrangement business by asserting that she does not respect her customers or their potentially emotional events.

The statements attributed to the Plaintiff on the Sassy Plants Facebook Page are uncharacteristic of the Plaintiff, and taken as a whole, impute a lack of integrity and unprofessionalism.

(b) The Defendants' innocent construction argument fails

Defendants erroneously contend that their statements are entitled to an "innocent construction" that precludes a determination that the statements constitute defamation as a matter of law, without any explanation as to why or how they should be considered as such. Mem. Supp., p. 10. To determine whether a statement is protected under the innocent construction doctrine, a "statement is to be considered in context, with the words and the implications therefrom given their natural and obvious meaning . . ." Tuite, 224 Ill. 2d at 504 (citations omitted). The innocent construction rule does not apply simply because the allegedly defamatory words are "capable" of an innocent construction. Bryson v. News Am. Publs., 174 Ill. 2d 77, 93 (1996). Indeed, the court need not "strain to find an unnatural innocent meaning for a statement when a defamatory meaning is far more reasonable." Tuite, 224 Ill. 2d at 504-505. With this in mind, the Defendants' appeal to innocent construction fails, as the Defendants do no more than make a blanket assertion without explaining how or why the statements should be considered as such. Mem. Supp., p. 10. Indeed, the Defendants provide no specific arguments regarding the Sassy Plants Facebook Page' innocent construction, because none exists. Given the context of the Sassy Plants Facebook Page, the statements attributed to the Plaintiff are not capable of innocent construction. Tuite, 224 Ill. 2d at 504. As explained above,

the statements impute a lack of integrity and unprofessionalism in the Plaintiff's floral arrangement business.

The Defendants further assert that the statements still enjoy First Amendment protection because they are not "precise and readily understood as factual assertions," and cannot be verified as factual assertions. Mem. Supp., p. 10. However, "[o]nly statements that cannot reasonably be interpreted as stating actual facts are protected under the First Amendment." Kolegas v. Heftel Broad. Corp., 154 Ill.2d 1, 14 (1992). However, by making the statements on the Sassy Plants Facebook Page, the Defendants intended third parties to perceive the content at the Sassy Plants Facebook Page as statements made by the Plaintiff and content created by the Plaintiff. The Defendants also indirectly attribute these statements and content as having originated from the Plaintiff. These assertions are clearly meant as factual statements, and are readily ascertained as such by the third parties that visit the Sassy Plants Facebook Page.

(c) Conclusion

Therefore, because the statements made by the Defendants on the Sassy Plants Facebook Page impute a lack of integrity, as well as prejudice her in her floral arrangement business, and are further not capable of innocent construction, the Defendants' Motion to Dismiss Count X should be denied.

IV. Plaintiff properly pleads a claim for false light

The Defendants argue that because the statements on the Sassy Plants Facebook Page are not defamatory and capable of innocent construction, they cannot form the basis of a false light claim. As stated above, the statements on Sassy Plants Facebook Page have been sufficient pled as defamatory and further that innocent construction is inapplicable. Further, "a plaintiff need not be defamed to maintain a false light claim." Moriarty v. Green, 315 Ill.App.3d 225, 237 (Ill.

App. Ct. 1st Dist. 2000). To state a claim for false light, the allegations in the complaint must first show that the plaintiff was placed in a false light before the public as a result of the defendant's actions, that the false light would be highly offensive to a reasonable person, and that the defendant acted with actual malice. Kolegas v. Heftel Broadcasting Corp., 154 Ill. 2d 1, 17-18 (1992). The Defendants, once again, do not develop any argument as to why the statements on the Sassy Plants Facebook Page are capable of innocent construction. See, *supra* Sec. III(b). The Defendants are unable to develop an innocent construction argument, because one does not exist. Tuite, 224 Ill. 2d at 504. It is clear from the context of the Sassy Plants Facebook Page that the statements are meant to be defamatory and are incapable of being innocently construed.

When statements regarding an individual are published with the intent to harm that individual or their business, they will be actionable as false light. See Matteo v. Rubin, No. 07 C 2536, 2007 U.S. Dist. LEXIS 88394, *3, 11 (N.D. Ill. Dec. 3, 2007) (finding the defendant's actions of creating a false website with the intent to harm the plaintiff's business actionable as false light). The Defendants falsely attribute statements to the Plaintiff on the publicly accessible Sassy Plants Facebook Page that impute a lack of integrity, homophobia, discriminatory behavior to not only the Plaintiff, but also her floral arrangement business, with the sole intent to harm the Plaintiff. Am. Compl. ¶¶ 342-352.

The Plaintiff also properly alleges the content at the Sassy Plants Facebook Page, specifically the statements and accompanying photographs of the Plaintiff, would be highly offensive to a reasonable person. See Matteo, 2007 U.S. Dist. LEXIS 88394 at 3 (finding the posting of plaintiff's photographs with derogatory statements actionable as false light). This element is met, "when the defendant knows that the plaintiff, as a reasonable man, would be

justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity." Lovgren v. Citizens First Nat'l Bank, 126 Ill. 2d 411, 420 (Ill. 1989). Here, the Defendants' actions certainly constitute highly offensive behavior. The statements impute homophobia, and a trier of fact could conclude that the publication of these statements associated with the Plaintiff's photographs would be highly offensive to the Plaintiff. Id. Lastly, the Defendants acted with actual malice – or a reckless disregard to the truth – when attributing the statements on the Sassy Plants Facebook Page to the Plaintiff. Id.

Therefore, as the Plaintiff properly alleges the Defendants placed her in a false light, the Defendants' Motion to Dismiss Count XI should be denied.

V. Plaintiff properly pleads a claim for civil assault against Defendant DuJan

The Defendants incredulously argue that Plaintiff's claim for assault is not plausible on its face because there is no plausible apprehension of immediate offensive physical contact. Mem. Supp., p. 12. However, the Plaintiff properly alleges that Defendant DuJan placed her in imminent apprehension of physical harm. "[A]n assault can be defined as an intentional, unlawful offer of corporal injury by force, or force unlawfully directed, under such circumstances as to create a well-founded fear of imminent peril, coupled with the apparent present ability to effectuate the attempt if not prevented. Parrish v. Donahue, 110 Ill. App. 3d 1081, 1083 (Ill. App. Ct. 3d Dist. 1982).

Here, the Plaintiff has properly alleged that Defendant DuJan's actions constitute assault. During the public meeting at the OPPL, Defendant DuJan followed and approached Ms. Bittman as she made her way to the back of the meeting room to call the authorities, as she had been instructed by the Orland Park Police Department. Am. Compl. ¶ 285. It was at this moment that the Defendant created a well-founded fear of imminent peril. See Douglas v. Lofton, No. 12 C

8592, 2013 U.S. Dist. LEXIS 70051, *27-28 (N.D. Ill. May 17, 2013) (holding that allegations regarding the defendant's movements across the table toward the plaintiff that created an imminent fear of contact were sufficient to establish a claim for civil assault). To remove herself from the threat of danger, the Plaintiff entered a private room that required a security badge to enter. Id. at ¶ 289. While Defendant DuJan argues this negates any plausible threat of offensive physical contact, the tortious act of assault was complete when the Plaintiff was required to remove herself from the situation in self-defense. See Douglas, 2013 U.S. Dist. LEXIS 70051 at 27-28.

However, in further evidence of Defendant DuJan's tortious conduct, once the Plaintiff entered the private room that shielded her from Defendant DuJan, he hung up the Plaintiff's call, ending her communications with an 911 Emergency Operator. Id. at ¶ 291. Therefore, even as the Plaintiff attempted to defend herself from fear of immediate offensive physical contact, Defendant DuJan further placed the Plaintiff in fear by destroying the line of communication between the Plaintiff and an emergency operator. Id.

The Defendants contend Slaughter v. Waubonsee Community College is "instructive." Mem. Supp., p. 13. However, in Slaughter, the Defendant simply "asked plaintiff if she was willing to do something. She said no, and that was the end of it." Slaughter v. Waubonsee Community College, No. 94 C 2525, 1995 U.S. Dist. LEXIS 2872, *7 (N.D. Ill. Mar. 9, 1995). Conversely, here, Defendant DuJan followed the Plaintiff to the back of the room, knowing she was placing a call to an emergency operator. Am. Compl. ¶ 285. After forcing her to seek shelter in a private room that required a key-card to enter, Defendant DuJan ended a call with an emergency operator, from whom the Plaintiff was seeking assistance. Id. at ¶ 291. Defendant

DuJan did not merely "ask the Plaintiff a question." Slaughter, 1995 U.S. Dist. LEXIS 2872 at 7.

Defendant DuJan's actions created a well-founded fear of imminent peril that the Plaintiff believed he would act upon. Am. Compl. ¶ 286. Therefore, as the Plaintiff sufficiently establishes a claim for assault against Defendant DuJan, the Defendants' Motion to Dismiss Count XI, Assault should be denied.

VI. Plaintiff properly pleads a claim for intentional infliction of emotional distress

The Defendants contend that the actions directed toward the Plaintiff were no more than annoyances or aggravations and that the Plaintiff's claim "falls short," because the Defendants' actions were not sufficiently "extreme and outrageous." Mem. Supp., p. 13. The Plaintiff successfully pleads a claim for intentional infliction of emotional distress against Defendants Fox and DuJan. To properly allege a claim for intentional infliction of emotional distress, a plaintiff must plead that, "the defendant engaged in 'extreme and outrageous' conduct toward the plaintiff.[9] Ulm v. Mem'l Med. Ctr., 964 N.E.2d 632, 641 (4th Dist. 2012), quoting Hayes v. Illinois Power Co., 225 Ill. App. 3d 819, 826 (4th Dist. 1992). While the Defendants contend their actions were mere annoyances or aggravations, a concerted effort to ruin the Plaintiff's life is slightly more than a mere annoyance or aggravation.

Whether certain conduct is extreme and outrageous for purposes of the tort of intentional infliction of emotional distress "necessarily depends on the facts of each case." Ulm, 964 N.E.2d at 641. Under Illinois law, defamatory statements, if sufficiently extreme and outrageous, can support an IIED claim. See Goldstein v. Kinney Shoe Corp., 931 F. Supp. 595, 599 (N.D. Ill.

[9] The plaintiff must further prove the defendant intended or recklessly disregarded the probability that the conduct would cause the plaintiff to suffer emotional distress, the plaintiff endured "severe or extreme" emotional distress, and the defendant's conduct actually and proximately caused the plaintiff's distress." Ulm v. Mem'l Med. Ctr., 964 N.E.2d 632, 641 (4th Dist. 2012), quoting Hayes v. Illinois Power Co., 225 Ill. App. 3d 819, 826 (4th Dist. 1992). However, the Defendants do not challenge these elements. Mem. Supp. p. 13.

1996) (defamatory statements that plaintiff had engaged in "criminal sexual conduct" supported claim for IIED). Further, where those defamatory statements are part of an effort to harass and demean an individual, courts are for more likely to deem the conduct outrageous. See Flentye v. Kathrein, 485 F. Supp. 2d 903, 922 (N.D. Ill. 2007) (finding defendants' false and defamatory statements imputing criminal conduct, posting photographs of the plaintiff's family grave stone, as well as misusing the plaintiff's name in an effort to harm his business constituted a larger effort to harass and harm the plaintiff and therefore was actionable as IIED); see also Graves v. Man Group USA, Inc., 479 F. Supp. 2d 850, 857 (N.D. Ill. 2007) (finding defendants' false and defamatory statements imputing criminal activity, when coupled with contacting the police and requesting they attend the plaintiff's father's funeral actionable as IIED).

Here, the Defendants engaged in conduct designed to harass, demean, and embarrass the Plaintiff. Flentye, 485 F. Supp. 2d at 922. Like in Flentye, the Defendants have posted defamatory content alleging, among other things, that the Plaintiff engaged in repeated criminal conduct. Am. Compl. ¶¶ 36, 53, 73-75. Also similar to Flentye, the Defendants' conduct did not stop at defamatory statements. Flentye, 485 F. Supp. 2d at 922. Here, the Defendants' extreme and outrageous conduct is highlighted by the actions of traveling to the Plaintiff's residence in order to take pictures of her house and post those photographs online. Am. Compl. ¶¶ 44-49. The Defendants had no reason, other than harassment, when they took and later posted the photographs of the Plaintiff's home. Id. ¶¶ 50-52. Further, the persistent and thoroughly demeaning content of the Sassy Plants Facebook Page emphasizes the harassing nature of the Defendants' conduct. Am. Compl. ¶¶ 124-126. Again, the Defendants' actions had the specific and direct purpose of harassing and demeaning the Plaintiff. Throughout the foregoing conduct, the Defendant never commented on Library policy, nor did they question the Plaintiff's public

remarks regarding OPPL policy. The Defendants, rather, post personal photographs mined from Google archives, post photographs taken from the Plaintiff's personal Facebook Page, or when the Plaintiff's personal photographs proved too tame, the Defendants post photographs of the Plaintiff's house, taken from the front yard. Am. Compl. ¶¶ 39, 47-52, 104.

Based on the foregoing, the Plaintiff sufficiently alleged the Defendants' conduct was extreme and outrageous. Therefore, this Court should deny the Defendants' Motion to Dismiss Count XII Intentional Infliction of Emotional Distress.

CONCLUSION

Based on the foregoing, the Plaintiff has sufficiently alleged each of her claims. Therefore, this Court must deny Defendant Fox's and DuJan's Motion in its entirety.

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Chicago, Illinois

Respectfully submitted,
BRIDGET BITTMAN,

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