Name and Address of Court:
Superior Court of California, County of Alameda
George E. McDonald Hall of Justice
2233 Shoreline Drive
Alameda, CA 94501
(510) 263-4305

5426146

SMALL CLAIMS CASE NO. AS07313430

NOTICE TO ALL PLAINTIFFS AND DEFENDANTS: Your Small Claims case has been decided. If you lost the case, and the court ordered you to pay money, your wages, money, and property may be taken without further warning from the court. Read the attached page for further important information about your rights.	***AVISO A TODOS LOS DEMANDANTES Y DEMANDADOS: Su caso ha sido resuelto por la corte para reclamos judiciales menores. Si la corte ha decidido en su contra y ha ordenado que usted pague dinero, le pueden quitar su salario, su dinero, y otras cosas de su propiedad, sin aviso adicional por parte de esta corte. Lea el reverso de este formulario para obtener información de importancia acerca de sus derechos.***

PLAINTIFF/DEMANDANTE *(Name, address, and telephone of each)*:
David Howard
928 Taylor Ave.
Alameda, CA 94501-____

Telephone No.: (510) 673-0998

Telephone No.:

DEFENDANT/DEMANDADO *(Name, address, and telephone number of each)*:
John Knox White
3239 Central Ave.
Alameda, CA 94501-____

Telephone No.: (510) 521-8096

-- Third Party --
Lauren Do
350 Hollister Avenue
Alameda, CA 94501-____

Telephone No.: (510) 209-2463

☐ See attached sheet for additional plaintiffs and defendants

NOTICE OF ENTRY OF JUDGMENT

Judgment was entered as checked below on *(date)*: **08/09/2007** Pro Tem Judge Andrew Dosa

1. ☐ Defendant *(name, if more than one)*:
   shall pay plaintiff *(name, if more than one)*:
   $ principal and $ costs on plaintiffs claim.
2. ☒ Defendant does not owe plaintiff any money on plaintiff's claim.
3. ☐ Plaintiff *(name, if more than one)*:
   shall pay defendant *(name, if more than one)*:
   $ principal and $ costs on defendant's claim.
4. ☐ Plaintiff does not owe defendant any money on defendant's claim.
5. ☐ Possession of the following property is awarded to plaintiff *(describe property)*:
6. ☐ Payments are to be made at the rate of $ per *(specify period):* , beginning on *(date)*:
   and on the *(specify day):* day of each thereafter until paid in full. If any payment is missed, the entire balance may become due immediately.
7. ☐ The court further orders ☐ plaintiff ☐ defendant to pay court fees and costs awarded in the sum $ directly to the court. A satisfaction of judgment shall be entered only upon full payment of the judgment, which includes the principal, accrued interest, court costs, and any other costs permitted by statute
8. ☐ Exhibits kept by the court shall be held for 90 days and if not claimed shall be destroyed.
9. ☐ Dismissed in Court ☐ with prejudice. ☐ without prejudice.
10. ☐ *Attorney-Client Fee Dispute (Attachment to Notice of Entry of Judgment) (form SC-132)* is attached.
11. ☒ Other *(specify)*: **Attached is the ruling summarized by Temporary Judge Andrew Dosa.**
12. ☐ This judgment results from a motor vehicle accident on a California highway and was caused by the judgment debtor's operation of a motor vehicle. If the judgment is not paid, the judgment creditor may apply to have the judgment debtor's driver's license suspended.
13. ☒ Enforcement of the judgment is automatically postponed for 30 days or, if an appeal is filed, until the appeal is decided.
14. ☐ This notice was personally delivered to *(insert name and date)*:

- The county provides small claims advisor services free of charge. Read the information sheet on the next page.-

INFORMATION AFTER JUDGMENT	*INFORMACION DESPUES DEL FALLO DE LA CORTE*

Your small claims case has been decided. The **judgment** or decision of the court appears on the front of this sheet. The Court may have ordered one party to pay money to the other party. The person (or business) who won the case and who can collect the money is called the **judgment creditor**. The person (or business) who lost the case and who owes the money is called the **judgment debtor.**

Enforcement of the judgment is postponed until the time for appeal ends or until the appeal is decided. This means that the judgment creditor cannot collect any money or take any action until this period is over. Generally, both parties may be represented by lawyers after judgment.

IF YOU LOST THE CASE . . .

1. If you lost the case on your own claim and the court did not award you any money, the court's decision on your claim is **FINAL**. You may not appeal your own claim.
2. If you lost the case and the court ordered you to pay money, your money and property may be taken to pay the claim unless you do one of the following things:
   a) **PAY THE JUDGMENT**
   The law requires you to pay the amount of the judgment. You may pay the judgment creditor directly, or pay the judgment to the court for an additional fee. You may also ask the court to order monthly payments you can afford.
   Ask the clerk for information about these procedures.
   b) **APPEAL**
   If you disagree with the court's decision, you may appeal the decision *on the other party's claim*. You may not appeal the decision on your own claim. However, if any party appeals, there will be a new trial on *all* the claims. If you appeared at the trial, you *must* begin your appeal by filing a form called a *Notice of Appeal* (form SC-140) and pay the required fees within *30 days* after the date this *Notice of Entry of Judgment* was mailed or handed to you. Your appeal will be in the superior court. You will have a **new trial** and you must present your evidence again. You may be represented by a lawyer.
   c) **VACATE OR CANCEL THE JUDGMENT**
   If you did not go to the trial, you may ask the court to vacate or cancel the judgment. To make this request, you must file a *Motion to Vacate the Judgment* (form SC-135) and pay the required fee *within 30 days* after the date this *Notice of Entry of Judgment* was mailed. If your request is denied, you then have *10 days* from the date the notice of denial was mailed to file an appeal.
   The period to file the *Motion to Vacate the Judgment is 180 days* if you were *not properly served* with the claim. The 180-day period begins on the date you found out or should have found out about the judgment against you.

IF YOU WON THE CASE . . .

1. If you were sued by the other party and you won the case, then the other party may not appeal the court's decision.
2. If you won the case and the court awarded you money, here are some steps you may take to collect your money or get possession of your property:
   a) **COLLECTING FEES AND INTEREST**
   Sometimes fees are charged for filing court papers or for serving the judgment debtor. These extra costs can become part of your original judgment. To claim these fees, ask the clerk for a *Memorandum of Costs.*
   b) **VOLUNTARY PAYMENT**
   Ask the judgment debtor to pay the money. If your claim was for possession of property, ask the judgment debtor to return the property to you. **THE COURT WILL NOT COLLECT THE MONEY OR ENFORCE THE JUDGMENT FOR YOU.**
   c) **STATEMENT OF ASSETS**
   If the judgment debtor does not pay the money, the law requires the debtor to fill out a form called the *Judgment Debtor's Statement of Assets* (form SC-133). This form will tell you what property the judgment debtor has that may be available to pay your claim. If the judgment debtor willfully fails to send you the completed form, you may file an *Application and Order to Produce Statement of Assets and to Appear for Examination* (form SC-134) and ask the court to give you your attorney's fees and expenses, and other appropriate relief, after proper notice, under Code of Civil Procedure section 708.170.
   d) **ORDER OF EXAMINATION**
   You may also make the debtor come to court to answer questions about income and property. To do this, ask the clerk for an *Application and Order for Appearance and Examination (Enforcement of Judgment)* (form EJ-125) and pay the required fee. There is a fee if a law officer serves the order on the judgment debtor. You may also obtain the judgment debtor's financial records. Ask the clerk for the *Small Claims Subpoena and Declaration (form SC-107) or Civil Subpoena Duces Tecum* (form 982(a)(15.1)).
   e) **WRIT OF EXECUTION**
   After you find out about the judgment debtor's property, you may ask the court for a *Writ of Execution* (form EJ-130) and pay the required fee. A writ of execution is a court paper that tells a law officer to take property of the judgment debtor to pay your claim. Here are some examples of the kinds of property the officer may be able to take: **wages, bank account, automobile, business property, or rental income.** For some kinds of property, you may need to file other forms. See the law officer for information.
   f) **ABSTRACT OF JUDGMENT**
   The judgment debtor may own land or a house or other buildings. You may want to put a lien on the property so that you will be paid if the property is sold. You can get a lien by filing an *Abstract of Judgment* (form EJ-001) with the county recorder in the county where the property is located. The recorder will charge a fee for the *Abstract of Judgment.*

NOTICE TO THE PARTY WHO WON: As soon as you have been paid in full, you *must* fill out the form below and mail it to the court *immediately* or you may be fined. If an *Abstract of Judgment* has been recorded. You must use another form; see the clerk for the proper form.

CASE TITLE AND SMALL CLAIMS CASE NO. MUST BE FILLED OUT.

CASE TITLE Howard **VS.** White **SMALL CLAIMS CASE NO.:** AS07313430

ACKNOWLEDGMENT OF SATISFACTION OF JUDGMENT
(Do not use this form if an Abstract of Judgment *has been recorded)*

To the Clerk of the Court
I am the ☐ judgment creditor ☐ assignee of record.
I agree that the judgment in this action has been paid in full or otherwise satisfied.
Date:

_________________________ ▶ _________________________
(TYPE OR PRINT NAME) (SIGNATURE)

Superior Court of California, County of Alameda
George E. McDonald Hall of Justice

Case Number: AS07313430
Judgment after Court Trial of 08/09/2007

DECLARATION OF SERVICE BY MAIL

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document was mailed first class, postage prepaid, in a sealed envelope, addressed as shown on the foregoing document or on the attached, and that the mailing of the foregoing and execution of this certificate occurred at 2233 Shoreline Drive, Alameda, California.

Executed on 08/09/2007.

Executive Officer / Clerk of the Superior Court

By [signature] digital

Deputy Clerk

JUDGMENT IN HOWARD V. WHITE

AS07313430

1. THE MOTION TO QUASH WAS DENIED DURING THE HEARING.

Plaintiff's subpoena of Loren Do did not comply with legal requirements. However, the issue was moot. Plaintiff intended to confirm if Defendant made two comments on October 27 and 29, 2006. Defendant testified he was the author/poster only of the November 4 comment, not of the earlier comments.

2. THE MOTION TO STRIKE/SLAPP– PROCEDURAL HANDLING IN THE SMALL CLAIM ACTIONS:

The statutory framework for the SLAPP Motion to Strike (Code of Civil Procedure Section 425.16) sets up a two part process, a pre-trial hearing on the Motion and a subsequent Trial, in a Limited or Unlimited Jurisdiction action. This procedure is not readily applicable to a Small Claims Action. One particular virtue of the Small Claim action is prompt adjudication of an entire controversy in one hearing. This Court exercised its discretion and conducted one evidentiary hearing, the trial, to address the Motion and the larger Action brought by Plaintiff.

In ruling on the Motion to Strike, the court considered only the evidence of Plaintiff. Plaintiff had to make a prima facie showing that the "stalker" statement was published, unprivileged, false, defamatory on its face, exposed him to hatred/contempt, and plaintiff sustained actual damages. If the prima facie showing was not met, then the Motion to Strike would be granted.

The court followed the ruling of the Honorable James Richman in **Barrett v. Clark, 2001 WL 881259, 2001 Extra LEXIS 46**, California Superior Court, Alameda County, No. 833021-5, July 25, 2001, the applicable portions of which were affirmed on appeal in Barrett et al. v. Rosenthal (1st District, 2004) 114 Cal.App.4th 1379, 9 Cal.Rptr.3d 142.

The issue in dispute at the appellate level was the potential liability of a "distributor" of defamatory or potentially defamatory material that was previously published by someone else. The distributor's publication was merely a re-publishing of the original material. The medium in Barrett was the internet. The distributor (someone serving as Ms. Loren Do did in this action) was determined to have potential liability by the Court of Appeal. The California Supreme Court granted review of the Court of Appeal ruling, and in Barrett v. Rosenthal (2006) 40 Cal.4th 33, – Cal.Prtr. 3d –, – P.3d –, reversed the Court of Appeal. The effect is that the original ruling by Judge Richman in its entirely was affirmed. The portion of his decision about distributor liability, which again is not applicable here, but would have concerned Ms. Do had she been named as a defendant herein, was affirmed by the California Supreme Court. (If Ms. Do had been a defendant, she would have defeated the Complaint by Plaintiff.)

The portions of the Barrett v. Clark decision by Judge Richman are quoted verbatim and provided at the end of this order.

3. DEFAMATION–CIVIL CODE SECTIONS 45 AND 45A

45. Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy,
or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.

45a. A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code.

4. FACTUAL FINDINGS BY THE COURT:

1. The word "stalker" was used in reference to Plaintiff at least five times

    October 14, 2006, by Joan G, entry 31 in Blogging Bayport Alameda thread of October 11 (Defendant's Exhibit M–7).
    October 29, 2006, by Anon, entry 12 in Blogging Bayport Alameda thread of October 26 (plaintiff's Exhibit 9c)
    October 29, and 2006, by Chris, entry 15 in Blogging Bayport Alameda thread of October 26 (plaintiff's Exhibit 9d)
    November 4, 2006, by defendant
    November 5, 2006, by John Piziali, entry 38 in Blogging Bayport Alameda November 3, 2006 thread (Defendant's Exhibit P–8)

2. Considering only the Plaintiff's evidence, the court concludes Plaintiff made a prima facie showing that the "stalker" statement was published, unprivileged, false, defamatory on its face, exposed him to hatred/contempt, and plaintiff sustained some actual damages. Therefore, the Motion to Strike is denied. Plaintiff had the "advantage" of making the initial argument and evidentiary presentation. However, once the defendant made his presentation, and further evidence was provided, the court had a full opportunity to determine if the Complaint was sufficient to warrant judgment against defendant.

3. The Court notes there was ultimately no persuasive evidence to support a finding that plaintiff acted with the intent to curb speech by defendant–that is, that Plaintiff posed the danger addressed by the Legislature when it enacted and amended the SLAPP statute.

4. Defendant presents evidence that the arguments between him and Plaintiff and others concerned public issues–Measure A, its meaning and application, and growth/development advocates v. "no change" Measure A proponents. After "investigating" defendant, plaintiff published information about defendant's sources of income, conduct and suitability for "public office" or service on city government committees, and his home address. In response, defendant called plaintiff a stalker for his conduct during the investigation. This "stalking" was not the public issue, however, the breadth of the First Amendment right to speech reaches to include it–it "became" part of the public issue and the disputes and various sides and

aspects of the debate.

5. Plaintiff, for the purposes of this litigation, was a limited public figure. To prevail, plaintiff must prove defendant acted with malice.

6. Defendant clearly published his comments. He used the word "stalker" as a statement of fact. Plaintiff's conduct of "investigating" defendant and his residence and history was called stalking. On its face, the word, referring to criminal conduct, is libelous per se. A reasonable person, when first and exclusively reading the speech, could have believed plaintiff did stalk defendant. Thus, plaintiff made a prima facie showing on that point. However, taken as a whole, and with a fuller reading of the thread, including defendant's apology, a reasonable person would have understood the word was not used in a defamatory manner. Thus, the Defendant's use of the word was "privileged" as acceptable speech.

Further, as defendant was the fourth person to call Plaintiff a stalker, it was clear to a reasonable person that the word was bandied about with an intent far removed from defamation and that the word was part of the type of protected speech common in public dialogue about political issues.

7. Defendant's use of the word may have been intemperate, unpleasant, "off-color, and disturbing to plaintiff. It was also an overstatement and inaccurate or erroneous. However the use of the word was not intended to accuse plaintiff of criminal activity or to suggest he was involved in criminal activity. The court finds that a reasonable person reading the statements by defendant, as well as all the other postings, and any other postings regarding plaintiff, when he was called a "stalker," would have understood them to be inflammatory, but not be defamatory. Defendant's "apology" confirmed defendant's intentions.

8. Plaintiff failed to prove Defendant spoke with malice. Thus, the statement was not defamatory.

9. Finally, the damages alleged by Plaintiff ultimately become a moot point. He has not shown defamation. While plaintiff experienced the unpleasantness or perhaps even the nastiness of public dialogue, and it caused him some emotional pain, this does not constitute compensable damage. (The court did read various comments made by Plaintiff on the various threads and there is no question Plaintiff availed himself of his right to speech, even provocative and "harsh" speech, such as generally used by Defendant.) Politics and the rough and tumble world of jagged, even irresponsible debate and careless attacks are protected (valued) by-products of the freedom of speech we embrace as a nation. It is better to allow this type of speech than the "censorship" involved in policing the irresponsible, untrue, careless speech which is often characteristic of passionate violent verbal exchanges. Censorship endangers protected speech.

The virtue of having the freedoms perhaps ought to, in a "moral" sense, be tempered by responsible speech and conduct we all understand and promote in a different way. Speech as employed by Defendant, while permitted and protected in the public square, would not improve relationships between spouses, parents and children, teachers and students, and so on. But it remains permissible, protected, and promoted by the Bill of Rights.

Both parties experienced the lash of protected speech. Both gave some measure of discomfort by their speech. By involving themselves in the public issue of Measure A, or any other public issue not connected to this litigation, both parties have embraced the opportunities freedom of speech presents, more so than if they had remained silent.

As for damages, there is another issue. Even if plaintiff could prove the statement was defamatory, he was not able to prove that the defendant's use of the word caused him damages. Defendant was the fourth person to use the word. Of all five individuals who said "stalker", defendant's comment was associated with some conduct by plaintiff, not as a slur or insult as it was used by the other four.

Thus, the damages of Plaintiff's prima facie showing could have been caused by one of the other four participants in the debate on the public issue. Plaintiff could not prove Defendant caused his damages.

As Plaintiff failed to meet his burden of proof, the court makes its Judgment for Defendant on the Complaint.

5. <u>Barrett v. Clark, 2001 WL 881259, 2001 Extra LEXIS 46</u>, California Superior Court, Alameda County, No. 833021-5, July 25, 2001

* * *

3. The Motion and the Anti-SLAPP Law

According to its preamble, section 425.16 was enacted by the Legislature in 1992 to address a stated concern over "the disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances." (Section 425.16, subd. (a).) (Wilcox v. Superior Court (1994) 27 Cal.App.4 th 809, 816-817, 823.)

[FN 1] SLAPP is an acronym for "Strategic Lawsuits Against Public Participation."

In 1997, the Legislature amended Section 425.16 to expressly mandate that it "shall be construed broadly." (Stats.1997, ch. 271, § 1; amending section 425.16, subd. (a).) [FN 2] . . . The Supreme Court has directed that the courts, "whenever possible, should interpret the First Amendment and section 425.16 in a manner 'favorable to the exercise of freedom of speech, not to its curtailment.'" (Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal.4 th 1106, 1119 ("Briggs"), quoting Bradbury v. Superior Court (1996) 49 Cal.App.4th 1170, 1176.)

[FN 2] Subdivision (a) of Section 425.16, as amended, provides as follows: "The Legislature funds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this

participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly."

* * *

[I]n M.G. v. Time Warner, Inc. (2001) 89 Cal.App.4th 623, 628-629 . . . the Court of Appeal explained how broadly the law has been applied. . .:

> At first, it was envisioned that the anti-SLAPP statute would be limited to situations involving "powerful and wealthy plaintiffs, such as developers, against impecunious protestors ...." [cite] The state Legislature, however, has directed that section 425.16 be interpreted broadly. [cite] Furthermore, a number of courts have approved the use of the anti-SLAPP statute by media defendants like [Time Warner, Inc.] [cite] Therefore, although in this situation, powerful corporate defendants are employing the anti-SLAPP statute against individuals of lesser strength and means, we are constrained by the authorities to permit its use against plaintiffs of this ilk.

[S]ection 425.16 creates an accelerated two-step procedure for disposing of SLAPP lawsuits. In the first step, the defendant bringing a Special Motion to Strike must establish that the lawsuit arises from "any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitutions in connection with a public issue." (Section 425.16, subd. (b); Wilcox v. Superior Court, supra, 27 Cal.App.4 th at 820.) The defendant may meet this burden by showing the act which forms the basis for the plaintiff's cause of action is "an act in furtherance of [the] person's right of petition or free speech," [such] . . . as:

* * *

3. any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest;

* * *

If the defendant meets this burden, in the second step, the burden shifts to the plaintiff to demonstrate a probability that the plaintiff will prevail on the claim. (Section 425.16, subd. (b).) To meet this burden, the plaintiff must demonstrate that his or her complaint is legally sufficient and is supported by a sufficient prima facie showing of admissible facts to sustain a favorable judgment. (Wilcox v. Superior Court, supra, 27 Cal.App.4 th at 823.) Once the appropriate evidence is submitted, the Special Motion to Strike must be granted "unless the court determines that the plaintiff has established that there is a probability that [he or she] will prevail on the claim." (Ibid.)

* * *

. . . Damon v. Ocean Hills Journalism Club, (1999) 85 Cal.App.4th 468, 479, held that "The definition of 'public interest' within the meaning of the anti-SLAPP statute has been broadly construed to include not only governmental matters, but also private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a

government entity." (Also see Sipple v. Foundation for National Progress (1999) 71 Cal.App.4th 226, 238-240 [statements that a nationally-known political consultant had physically and verbally abused his former wives determined to be a matter of public interest]; cf. Nicosia v. Rooy (N.D.Cal.1999) 72 F.Supp.2d 1093, 1110 [critical statements about biographer of Jack Kerouac deemed to involve a matter of public interest].)

* * *

B. Can Plaintiff Establish a Probability of Prevailing on His Claims

(i) The Applicable Law

As noted, once a defendant makes a prima facie showing under section 425.16 that the lawsuit arises from speech covered by the statute, the burden shifts to Plaintiffs to establish a probability of prevailing on their claims. Plaintiffs' showing must be made by competent and admissible evidence. (Wilcox v. Superior Court, supra, 27 Cal.App.4 th at 820, 830; Evans v. Unkow (1995) 38 Cal.App.4th 1490, 1497-98; Ludwig v. Superior Court (1995) 37 Cal.App.4 th 8, 15-16, 21, fn. 16, 25.) "The test is similar to the standard applied to evidentiary showings in summary judgment motions pursuant to Code of Civil Procedure § 437(c) and requires that the showing be made by competent admissible evidence within the personal knowledge of the declarant." (Church of Scientology v. Wollersheim, supra, 42 Cal.App.4 th at 654.)

To establish defamation, Plaintiff must come forward with admissible evidence on at least four scores.

First, Plaintiff must show that the matters complained of were "published," i.e., that the statements were communicated to some third person who understood their defamatory meaning and their application to the Plaintiffs. (See Witkin, Summary of California Law (9th ed.1988), Vol. 5, § 476, pp. 560-561.)

Second, Plaintiff must affirmatively show that the statements at issue are false. (Hejmadi v. AMFAC, Inc. (1988) 202 Cal.App.3d 525, 552-553 [truth is an absolute defense against civil liability for defamation].) Moreover, because the statements at issue pertain to a matter of public concern, the burden rests squarely on Plaintiffs to prove falsity. (Philadelphia News, Inc. v. Hepps (1986) 475 U.S. 767, 787-788; see Brown v. Kelly Broadcasting Co. (1989) 48 Cal.3d 711, 747; Nizam-Aldine v. City of Oakland (1996) 47 Cal.App.4 th 364, 373-375.) Plaintiffs must in addition show that statements contained or implied a "false factual assertion" about them. (Moyer v. Amador Valley Joint Union High School District (1990) 225 Cal.App.3d 720, 724-725 ("Moyer").) Statements that cannot "reasonably [be] interpreted as stating actual facts about an individual" because they are expressed in "loose, figurative or hyperbolic language," and/or the context and tenor of the statements "negate the impression that the author seriously is maintaining an assertion of actual fact" about the plaintiff are not provably false, and as such, will not provide a legal basis for defamation. (Milkovich v. Lorain Journal (1990) 497 U.S. 1, 21.)

Third, Plaintiff must show that the statements at issue are defamatory. In defamation actions, it is entirely appropriate for the Court to determine in the first instance "whether the publication could reasonably have been understood to have a libelous meaning." (Kapellas v.

Kofman (1969) 1 Cal.3d 20, 34, fn.14.) Thus, Plaintiff must show the statements involve "a false and unprivileged publication ... which exposes [him] to hatred, contempt, ridicule, or obloquy, or which causes [him] to be shunned or avoided, or which has a tendency to injure [him] in [his] occupation." (Civil Code section 45.)

Fourth, Plaintiffs must establish that as a result of the publications Plaintiffs suffered actual monetary damages. . . . [T]he United States Supreme Court has held that a plaintiff must produce "competent evidence of actual injury" in order to state a constitutional claim for defamation arising from matters of public concern. (Gertz v. Robert Welch (1974) 418 U.S. 323, 350.)

* * *

(iii) Plaintiffs Cannot Establish That Most Of The Statements At Issue Are Demonstrably False Statements Of Fact

[Defendant asserted] Plaintiffs Barrett and Polevoy are "quacks"; that Barrett is "arrogant" and a "bully"; and that Barrett has tried to "extort" her. Such statements are not actionable, because they do not contain provably false assertions of fact, but rather are expressions of subjective judgment. As Justice Swager observed in Copp v. Paxton (1996) 45 Cal.App.4th 829: "The issue whether a communication was a statement of fact or opinion is a question of law to be decided by the Court. In making the distinction, the courts have regarded as opinion any 'broad, unfocused and wholly subjective comment,' such as that the plaintiff was a 'shady practitioner,' 'crook,' or 'crooked politician.' Similarly, in Moyer, this court found no cause of action for statements in a high school newspaper that the plaintiff was 'the worst teacher at FHS' and 'a babbler.' The former was clearly 'an expression of subjective judgment.' And the epithet 'babbler' could be reasonably understood only 'as a form of exaggerated expression conveying the student-speaker's disapproval of plaintiff's teaching or speaking style.' (Cits. omitted; 45 Cal.App.4th at 837-838.) To the same effect, see Morningstar, Inc. v. Superior Court (1994) 23 Cal.App.4th 676, 691, n. 5, citing cases holding that (a) referring to township clerk as "playing hide and seek" with township funds, (b) referring to William Buckley as a "fellow traveler of fascism," and (c) referring to a change of membership on public board as "sleazy sleight of hand," are nonlibelous because the comments are phrased in vituperative terms or because the language was used in a "loose or figurative" sense.

* * *

. . . [O]ld defamation cases [were different.] . . .[T]he boundaries of permissible public discourse have evolved significantly in the last half century. . .: "Although it may have been actionable to call someone a 'hypocrite' in 1916, or an 'old witch' in 1955 (Opp.8:24-9:5), today calling someone a 'thief' and a 'liar' in a public debate has been held to be constitutionally-protected rhetorical hyperbole. (Rosenaur v. Scherer (2001) 88 Cal.App.4th 260, 280.)"

. . . The forum and context [of the] statements. . . [are significant, such as] in the "the general cacophony of an Internet" newsgroup, "part of an on-going free-wheeling and highly animated exchange" about health issues, where the "the postings are full of hyperbole, invective, shorthand phrases and language not generally found in fact-based documents." (Global

Telemedia International v. Doe 1 aka BUSTEDAGAIN40 (C.D.Cal.2001) 132 F.Supp.2d 1261, 1267, 1269-1270 [holding critical comments about plaintiff in Internet chat-room, including that it "screwed" investors out of their money and lied to them, to be non-actionable opinion and rhetoric]. Also see Gregory v. McDonnell Douglas Corp. (1976) 17 Cal.3d 596, 601: "[W]here potentially defamatory statements are published in a public debate, ... or in another setting in which ***the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion.")*** (Italics and emphasis added.)

* * *

(iv) Rosenthal's Statement About Polevoy Is Protected By Federal Law

The Complaint alleges in pertinent part that sometime after August 14, 2000 Rosenthal "repeatedly posted" to newsgroups "at least one" libelous message, (Paragraph 18), which message was that Polevoy stalked Christine McPhee. Because Plaintiffs specifically pleaded that such message was in fact originally posted by Tim Bolen and was reposted by Rosenthal, Rosenthal's moving papers contended that 47 U.S.C. 230 shielded her from liability. Plaintiffs' Opposition eschewed any reference to, much less discussion of, this argument and Rosenthal's Reply urged that the issue was conceded. At the hearing the Court confronted counsel for Plaintiffs about this, and Plaintiffs' Supplemental Memorandum does address the issue. (Supplemental Memorandum, hereinafter cited "Supp. Opp.," 5:21-10:14.) But not successfully.

47 U.S.C. 230 is part of the Communications Decency Act enacted by Congress in 1996 ("the Act"), and includes provisions creating immunity for certain communications on the Internet. . . . 47 U.S.C. 230(c)(1) provides that: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." [FN 3] And Section 230(e)(3) provides in relevant part: "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."

[FN 3] Section 230(f)(2) defines "interactive computer service" as any information service system, or access software provider that provides or enables computer access by multiple user to a computer server ..." Section 230(f)(3) defines "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer serve. Section 230(f)(4) defines "access software provider" as "a provider of software (including client or server software), or enabling tools that do any one or more of the following: (A) filter, screen, allow, or disallow content; (B) pick, choose, analyze, or digest content; or (C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content."

These protections for covered communications were enacted "to promote the continued development of the Internet and other interactive computer services and other interactive media," and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." (47 U.S.C. 230(b)(1),(2).) "[B]y its plain language, § 230[(c)(1)] creates a federal immunity to

any cause of action that would make service providers liable for information originating with a third-party user of the service." (Zeran v. American Online (4th Cir.1997) 129 F.3d 327, 330, cited with approval in Kathleen R. v. City of Livermore (2001) 87 Cal.App.4 th 684, 692.) Thus, § 230(c)(1) provides immunity to users, as well as providers, of interactive computer services.

* * *

(v) Plaintiffs Barrett and Polevoy Are Public Figures, Whose Claims Fail Because They Cannot Show Actual Malice

(a) Barrett and Polevoy are Public Figures

(b) Barrett and Polevoy Cannot Show Malice

It is well settled that where, as here, the publications at issue concern a public figure, actual malice may not be presumed. To the contrary, Plaintiffs bear the burden of proving actual malice, and it must be proved by clear and convincing evidence. (See Copp v. Paxton, supra, 45 Cal.App.4th at 846.) This means that Plaintiffs must show not only that the statements they attribute to Defendants were false and defamatory, but also that they were published with actual knowledge of their falsity or otherwise circulated with reckless disregard of whether they were false or not. (Id.) Moreover, "[t]he burden of proof by clear and convincing evidence requires a finding of high probability. The evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong so as to command the unhesitating assent of every reasonable mind." (Ibid.) Plaintiffs cannot meet the burden with which they are faced.

* * *

(vi) Plaintiffs' Claims Also Fail for Lack of Evidence of Actual Monetary Damages

Last, Plaintiffs' claims suffer the additional fatal defect in their damages allegations. While at common law compensatory damages for defamation-related injuries were available without evidence of loss, the United States Supreme Court has held that the First Amendment prohibits an award of presumed damages for false and defamatory statements involving matters of public concern. (See Gertz v. Robert Welch, supra, 418 U.S. at 350.) Thus, under Gertz, a public figure plaintiff must produce "competent evidence of actual injury" to state a constitutional claim for defamation. (Ibid.) In this instance, however, Plaintiffs have submitted no evidence that they suffered any actual monetary damage as a result of Defendants' publications. Having failed to establish that they suffered any monetary damage of any kind, Plaintiffs' claims are properly stricken for failure to show that they have prima facie merit. (See Averill v. Superior Court (1996) 42 Cal.App.4 th 1170, 1176.)

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Andrea Ortosa