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John Knox White
3239 Central Ave
Alameda, CA 94501
Telephone: 510-521-8096

Defendant

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

Howard,) Case No. AS07313430
)
Plaintiff,) **DEFENDANT KNOX WHITE’S**
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT OF**
) **SPECIAL MOTION TO STRIKE**
v.) **COMPLAINT PURSUANT TO**
) **CALIFORNIA ANTI-SLAPP STATUTE,**
White) **CCP § 425.16**
)
) Date: April 18, 2007
Defendant.) Time: 8:45 a.m.
)
_____)
)

INTRODUCTION

Pursuant to the California Anti-SLAPP Law, CCP § 425.16, defendant John Knox White (“Knox White”) brings this special motion to strike the Complaint filed by plaintiff David Howard (“Howard”). The Anti-SLAPP Law clearly applies because the allegedly defamatory statement challenged in the Complaint constitutes constitutionally protected free speech used in a public forum, an Internet site open to public comment and devoted to political issues in Alameda, in connection with an issue of public interest, a section of the Alameda City Charter and the privacy rights of public officials. Howard cannot meet his burden under the Anti-SLAPP Law to demonstrate a probability of prevailing on his defamation claim. First, Howard is a limited public figure through his production of his KeepMeasureA.wordpress.com (“Keepmeasurea”) web log (“blog”) and engagement in discussions on the Laurendo.com blog. Thus, the actual malice standard applies, which Howard cannot establish. Second, and more fundamentally, the challenged statement – “I’ve called you a stalker” – is simply not actionable. Under the First Amendment, numerous California courts have confirmed that

speech which is understood by reasonable readers to be a colloquialism representing “hyperbolic rhetoric” or an “exaggerated expression of anger or disgust” is clearly protected. Moreover, the statement is protected opinion, and it is substantively true. For all of these reasons, Howard’s claim fails as a matter of law. Accordingly, the Anti-SLAPP Law mandates the pre-hearing dismissal of Howard’s complaint and the award to Knox White of his attorney’s fees and costs incurred in connection with defending this action and bringing this motion to strike. Howard’s complaint is a blatant attempt to use the state Small Claims courts to stifle vigorous public debate and retaliate against defendant for expressing his views. Howard’s threats of legal actions against other Alamedans, including the Alameda Journal [John Knox White’s Declaration ¶15 Ex. DD p.2] and Alameda Sun [Alameda Sun’s Declaration], further show a proclivity to litigation as a tool to control public debate and discussion. The Anti-SLAPP Law was specifically enacted to protect against this type of harassment. Pursuant to its terms, the Court should grant this motion, strike and dismiss the complaint, and award attorney’s fees.

STATEMENT OF FACTS

1. John Knox White (Defendant)

John Knox White, the defendant, is a resident of Alameda and the volunteer chair of the city’s Transportation Commission. Knox White is active in Alameda civic and political issues, including transportation policy issues as they pertain to city development projects. During the fall 2006 election, Knox White was a vocal critic of the “Action Alameda” slate of candidates running for city council and mayor of Alameda. Action Alameda was a Political Action Committee (PAC) formed to support three candidates who supported no-growth/slow-growth development and “Measure A,” a charter amendment passed in 1973 which limits the density of housing in the city of Alameda. The issue of Measure A was a recurring theme during the 2006 campaign. Declaration of John Knox White (“KW Dec.”) ¶ 2

2. David Howard (Plaintiff) is a limited purpose public figure

The plaintiff, David Howard, is an active member in the Alameda political arena, including political and development issues. During the fall of 2006, Howard was a proponent of the “Action Alameda” slate of candidates running in the fall 2006 election. Over same period of time, Howard started Keepmeasurea.wordpress.com (“Keepmeasurea”), a website dedicated to issues surrounding Alameda City Charter Article 26 (“Measure A”). KW Dec ¶ 3 & Ex. 3 This website was removed

1 from the Internet days before an attorney acting on behalf of the plaintiff sent letters to five Alamedans
2 (including the defendant) notifying them of his intent to sue them for perceived defamation. KW Dec ¶¶
3 14 & Exs. S,T,U,V,W,X,Y,Z,AA Until November 5, 2006, Howard was also a regular and frequent
4 poster on Laurendo.com, a blog that covers issues of public interest in Alameda, and was directly
5 involved in heated discussions with Laurendo.com participants on issues of development and
6 campaign finances in Alameda.

7 In the late summer and early fall 2006, Howard was involved in harassment campaigns against
8 civically involved Alamedans who held opposing views on Measure A.

9 On December 12, 2006, Howard announced that he had become one of two co-chairs of the
10 Action Alameda Political Action Committee (PAC), the same PAC that was the organizing mechanism
11 for the “Action Alameda” slate. KW Dec ¶¶4 & EX. B

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13 **3. Howard engaged in a campaign of harassment against critics of Measure A**

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15 **A. Howard collected and misrepresented information about Helen Sause, the** 16 **president of HOMES and a proponent of amending Measure A at Alameda Point**

17 Helen Sause is the president of Housing Opportunities Make Economic Sense (HOMES), a
18 group dedicated to fostering discussion about a ballot measure on housing and development issues
19 surrounding Measure A in Alameda. Before the middle of August 2006, Howard, under the pseudonym
20 “Mowster,” posted an article on www.wikipedia.org (“Wikipedia”) about Helen Sause. KW Dec ¶¶ 5,6
21 & Exs. C, D. In it, he intermixed facts from many different sources regarding the Yerba Buena
22 Gardens redevelopment project in San Francisco to inaccurately pin the project’s many problems on
23 Sause. In fact, Sause had been brought in to take over the project after the problems arose, eventually
24 winning the prestigious Justin Herman Memorial Award for her work in healing the wounds in the
25 community and guiding the project forward effectively with community support. After Sause requested
26 that the Wikipedia entry be removed, a Wikipedia editor wrote to her: “I have deleted the inappropriate

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and biased biography from our servers.” KW Dec ¶ 7 & Ex. E p.2.

2 On or around November 11, 2006, Howard hijacked an email list used by Sause, using the list
3 to taunt her in front of her friends and church congregation members. After Sause responded to those
4 who had received Howard’s email with an apology, explaining that she had not given him their email
5 addresses, Howard responded directly to her, taunting, “Oh, but you did make the list available to me
6 — however indirectly.” KW Dec ¶8 & Ex. F.

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8 **B. Howard sent badly compiled crime statistics to past and present funding agencies**
9 **of the Alameda Point Collaborative after discovering that the community resources**
10 **director, an Alameda citizen, is a member of HOMES, a group interested in amending**
11 **Measure A at Alameda Point**

12 In August and September 2006, Howard held many discussions on-line with Alameda Point
13 Collaborative (APC) community resources director Doug Biggs about Measure A. After discovering
14 that Biggs is a member of HOMES, Howard immediately dismissed Biggs’ opinions on Laurendo.com.
15 KW Dec ¶ 9 & Ex. G p.4. In mid-September 2006, Howard created a PowerPoint presentation about
16 crime and APC, using data from the Alameda Police Department. The analysis misconstrued crime
17 statistics for Alameda Point and was later called “completely erroneous” by Alameda Point Watch
18 Captain Mark Landes. KW Dec ¶17.

19 Even though Biggs informed Howard that his analysis was flawed, and Howard acknowledged
20 mistakes in emails sent to Biggs, Howard sent the presentation to past and current APC funding
21 agencies in September 2006, with an attached letter that cited an anonymous letter to
22 Alamedadailynews.com, an Alameda blog dedicated to preserving “Measure A” and other civic issues,
23 accusing APC of ignoring crime and residents’ needs. Howard’s letter to funders further asked the
24 agencies to “investigate further to find out what is going on at ACP (sic).” KW Dec ¶ 9 & Ex. H
25 Agencies that received the letter included the Soda Foundation, Alameda County Community
26 Development Agency, US Housing and Development Agency, and City of Alameda staff. KW Dec ¶18

On September 15, 2006, Howard taunted on Laurendo.com: “Doug — I can see you’ve seen my letters to local funders. How blue is your sky these days? Are you just cranky due to hand cramps from funding applications?” KW Dec ¶9 & Ex. I p.3

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5 **C. Howard made unfounded allegations about Doug Linney’s involvement in Mayor Beverly Johnson’s campaign and continued even after being corrected**

6 On October 5, 2006, Howard incorrectly asserted on Keepmeasurea and Alamedadailynews.com that Doug Linney, a one-time consultant for HOMES, was Mayor of Alameda Beverly Johnson’s campaign manager for the fall 2006 election. KW Dec ¶ 3 & Ex. A p.12. After hearing from Linney that his post was incorrect, Howard wrote on Keepmeasurea on October 6 that he had heard from someone who was “purportedly” Linney who told him that he was neither the mayor’s campaign manager nor a consultant on her campaign. Howard’s post ended with the rephrasing of the initial accusation: “Will Mr. Linney disclose his association with the Mayor Johnson Campaign?” KW Dec ¶ 3 & Ex. A p.13. The following day, December 7th, alamedadailynews.com posted a letter that again suggested Linney was the Mayors campaign mention. He wrote: “That would be Mayor Johnson who...now fervently pledges allegiance to Measure A...Doug Linney was working as a strategic advisor for HOMES....the group that wants to repeal Measure A.” KW Dec ¶ 3 & Ex. A p13.

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20 **D. Howard created and advertised Laurbendo.wordpress.com, a website devoted to the personal information of Lauren Do and Ben Kruger**

21 Laurbendo.wordpress.com (“Laurbendo”) is a website created by the plaintiff on October 7, 2006, to catalog personal information related to Laurendo.com web host Lauren Do and her husband, Ben Kruger. KW Dec ¶¶3,10 & Exs. A pp.8-11,K. Do and Kruger had both been open on Laurendo.com about their interest in public discussions about Measure A at Alameda Point. Laurbendo is a collection of links and information that Howard dug up while searching the Internet, including

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information on the type of car owned by Do and Kruger and photos of their daughter. The site also
attempts to “out” anonymous blogger and Laurendo.com user “Alameda” of the blog “Alameda
Musings.” Laurbendo ends with the accusation that Do, Kruger, and “Alameda” have been bought and
paid for by land developers in order to bring about changes to Measure A. Howard purchased
advertising on Google.com linked to the search term “Alameda” in order to drive Internet traffic to
Laurbendo. KW Dec ¶ 10 & Ex. L

**4. Howard targets the defendant for harassment. Knox White’s opinion on Measure A, that
an open community discussion is good public policy, is again the motivation.**

**A. Howard announces his intentions to target Knox White after Knox White
highlights Howard’s misuse of campaign finance information to attack Mayor of
Alameda Beverly Johnson**

On October 13, 2006, Howard posted incorrect campaign finance information for Beverly
Johnson’s fall 2006 election campaign on Keepmeasurea . When Knox White pointed out that the
information was incorrect, Howard made corrections. KW Dec ¶ 2 & Ex. M p.1. Three days later,
Howard began a campaign of insinuation and harassment of the defendant on Keepmeasurea, posting
“Has Bike Alameda (sic) accepted money from developers with interests in Alameda, and is this why
Mr. Wood and Mr. White (sic) are both so active against Measure A?” KW Dec ¶ 4 & Ex. A p16.
Three days later, he continued, announcing that he was “trying to shine light on John Knox White.”
KW Dec ¶ 4 & Ex. A p.17. Howard also posted on Craigslist.com and other locations in an attempt to
drive traffic to these postings. KW Dec ¶ 11 & Ex. N.

**B. The Don Roberts Show broadcast Knox White’s home address, a vigorous
discussion followed on Laurendo.com, and Howard posted not only Knox White’s home
address, but the address of his rental property and information regarding his income**

The Don Roberts Show is a weekly community access television show. During the fall 2006

1 election, the show featured and promoted only candidates from the “Action Alameda” slate, those who
2 ran on a “Keep Measure A” platform of slow growth. On November 1, 2006, the show published video
3 of the defendant’s house, including the house number, while the host announced the street on which
4 the house is located. The defendant had been critical of the “Action Alameda” candidates and was
5 singled out for ridicule because of this.

6 Laurendo.com covered the incident in a post called “Be very very quiet, I’m hunting non-Slate
7 supporters.” KW Dec ¶ 2 & Ex. o. Between November 3 and 4, 2006, discussion in the blog’s
8 comment section, which is available to anyone to use, ranged between this post and a second post
9 entitled “Ending on a positive note.” KW Dec ¶ 2 & Ex. P. A total of 109 comments from readers,
10 including the plaintiff and the defendant, were received on these two postings.

11 On the evening of November 4, 2006, Knox White began a spirited discussion with the plaintiff
12 on Laurendo.com, after the plaintiff posted Knox White’s personal information on the Keepmeasurea
13 site. This discussion was free flowing and involved the plaintiff further posting insinuations that the
14 defendant had purposefully misfiled his conflict of interest form 700, a form required for each city
15 commissioner in the state of California. KW Dec ¶¶ 3,12 & Exs. A pp.19,20 ,Q.

16 During this discussion, Howard accused the defendant of calling him “an elitist,” a comment
17 Knox White had never made. In response to Howard’s uncivil actions on the Keepmeasurea site, the
18 defendant corrected him and used the colloquialism “stalker” to describe Howard’s obsessive digging
19 through the defendant’s and others’ personal information and using it to harass them. KW Dec ¶¶ 2,12
20 & Exs. P p.3,Q p.4. After Howard objected, immediately threatening legal action, the defendant wrote:
21 “My apologies if you thought my use of the term was anything other than a hyperbolic reaction to what
22 I consider an inappropriate use of my public information.” KW Dec ¶¶ 2,12 & Exs. P p.6,Q p.4,5. If
23 the plaintiff’s aim is to exact an apology for a hyperbolic outburst, he received it on November 5, 2006,
24 less than 12 hours after the exchange.

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26 **5. Howard uses threats of legal action to continue his pattern of harassment**

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Howard has made numerous attempts to have defendant Knox White removed from the City of

2 Alameda Transportation Commission. On November 4, 2006, about an hour after the exchange on
3 Laurendo.com, Howard faxed a letter falsely accusing Knox White and his wife, Jennifer Knox White,
4 of defaulting on their home mortgage and falsely filing conflict of interest forms. KW Dec ¶ 13 & Ex.
5 R p.2. In the letter, Howard accused Knox White of “maniacal behavior” and of being “vulnerable to
6 bribes, kick-backs etc.” The letter presented as evidence of these assertions out-of-date news articles,
7 an anonymously filed FPPC complaint that was found to be non-meritorious, and documents from the
8 Alameda County Clerk’s website that Howard misrepresented. Finally Howard called for an
9 investigation in the defendant’s finances and for him to step down as Chair of the Transportation
10 Commission. KW Dec ¶ 13 & Ex. R.

11 On December 21, 2006, letters were sent from an attorney representing Howard to five
12 Alamedans, all of whom had been supportive of discussing the role of Measure A at Alameda Point.
13 The recipients were Knox White, Lauren Do, Michael Krueger, John Piziali, and Ben Kruger.
14 Complaint Exs. 2a,2b, KW Dec ¶ 14 & ExS. S,T,U,V,W,X,Y,Z,AA. The letters were scheduled for
15 arrival on the Saturday before Christmas and demanded action immediately after the New Year’s
16 holiday. The defendant responded within the requested timeline that the holiday timing of the letter
17 made it difficult to consult with his attorney and that he would respond shortly once such discussions
18 had occurred. On the following day, January 4, 2007, Howard announced on Alamedadailynews.com
19 that Knox White [and another letter recipient, Michael Krueger] “...have ignored to-date the January
20 3rd deadline set out for them in a letter from my attorney, they seem prepared to litigate...” KW Dec ¶
21 4 & Ex. BB. These are hardly the actions of an individual attempting to clear up a matter of
22 importance. Further in the posting, Howard posits “their intransigence leaves one to wonder what sort
23 of people Mayor Johnson appoints to the City's boards and commissions.” KW Dec ¶ 4 & Ex. BB. His
24 posting, in which he ties his threatened lawsuit into his ongoing campaign against the Mayor of
25 Alameda (whom he accuses of being hostile to Measure A), makes clear his attempt to use the issue for
26 political gain, rather than working toward a just resolution to a perceived slight. Furthermore, the
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1 December 21 letter from Howard’s attorney demanded that Knox White remove comments from
2 Laurendo.com, an action that was outside of Knox White’s control as comments on Laurendo.com are
3 not editable by the comment originator. Complaint Ex. 2b. As a frequent user of Laurendo.com,
4 Howard was well aware of this fact

5 On March 1, 2007, Howard announced his lawsuit filing on Alamedadailynews.com before the
6 defendant had even been served. In his posting, he requested that the City Council remove Knox White
7 from the Transportation Commission “until the matter is resolved.” KW Dec ¶ 4 & Ex. CC. On March
8 6, 2007, Howard faxed a letter to the City Council asking for Knox White to be removed because of
9 “conduct unbecoming a public official,” citing his lawsuit against the defendant. KW Dec ¶ 15 & Ex.
10 DD. Also on March 6, 2007, Howard addressed the City Council in person, accusing Knox White of
11 causing a “crisis in leadership” on the Transportation Commission and demanding that Knox White be
12 removed from the commission. KW Dec ¶ 16 & Ex. EE

13 Despite Howard’s claims that filing a lawsuit against the defendant was a last resort, Howard
14 announced his intentions to sue within minutes of the challenged comment being published. Although
15 legally required to do so, Howard has never asked the defendant, in writing or verbally, for the
16 restitutions he demands in his court filings. Complaint MC-031, EX 2a, 2b.

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ARGUMENT

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I. THE CALIFORNIA ANTI-SLAPP LAW PROTECTS FUNDAMENTAL CONSTITUTIONAL FREE SPEECH AND IS TO BE CONSTRUED BROADLY

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In 1992, in response to the "disturbing increase" in meritless lawsuits brought "to chill the valid
22 exercise of the constitutional rights of freedom of speech," the Legislature enacted California's
23 anti-SLAPP law, CCP § 425.16. A defendant's burden on an anti-SLAPP motion is minimal:

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2 Section 425.16 posits . . . a two-step process for determining whether an action is a
3 SLAPP. First, the court decides whether the defendant has made a threshold showing
4 that the challenged cause of action is one arising from protected activity. (§ 425.16,
5 subd. (b)(1).) "A defendant meets this burden by demonstrating that the act underlying
6 the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision
7 (e)". . . If the court finds that such a showing has been made, it must then determine
8 whether the plaintiff has demonstrated a probability of prevailing on the claim.

9 *Navellier v. Sletten* (2002), 29 Cal.4th 82, 88 [(Navellier)]. A defendant need merely make a *prima*
10 *facie* showing that a cause of action arises from an act in furtherance of the right of free speech in
11 connection with a public issue. CCP § 425.16(b)(1); *Braun v. Chronicle Publishing* (1997), 52
12 Cal.App.4th 1036, 1042-43. The anti-SLAPP statute "shall be construed broadly." CCP § 425.16(a);
13 *Briggs v. Eden Council for Hope and Opportunity* (1999), 19 Cal.4th 1106, 1119.

14 The Complaint arises from statements expressly addressed by the anti-SLAPP law: "(3) any
15 written...statement or writing made in a place open to the public or a public forum in connection with
16 an issue of public interest; or (4) any other conduct in furtherance of the exercise of...the constitutional
17 right of free speech in connection with a public issue or an issue of public interest." CCP §
18 425.16(e)(3),(4). Knox White's challenged comment clearly is "made in connection with an issue of
19 public interest." CCP § 425.16(e)(3),(4). Speech about issues of personal privacy and public officials
20 constitutes "matters of public interest" for First Amendment purposes. *Paradise Hills Associates v.*
21 *Procel* (1991), 235 Cal.App.3d 1528, 1544-1545; *Morningstar, Inc. v. Superior Court* (1994), 23
22 Cal.App.4th 676, 695; *ComputerXpress v. Jackson* (2001), 93 Cal.App.4th 993, 1005-08
23 [(ComputerXpress)]. Howard admits the issues are of public interest, because he created publicly
24 available blog posts specifically concerning them. KW Dec ¶ 2,4 & Ex. A,M,O,P.

25 The challenged comment was "made in a place open to the public or a public forum." CCP §
26 425.16(e)(3). *ComputerXpress*, 93 Cal.App.4th at 1006-08 (statements on Internet website open to
27 public are made in a public forum); *Global Telemedia Int'l v. Doe 1* (2001), 132 F.Supp.2d 1261,
28 1265-66; *Damon v. Ocean Hills Journalism Club* (2000), 85 Cal.App.4th 468, 475 [(Damon)]. As a
29 matter of law, Laurendo.com is a public forum.

30 Knox White's comments also arise from "the exercise of ... the constitutional right of free
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speech” CCP § 425.16(e)(4), as comments made in a heated exchange and understood by a reasonable reader to be hyperbolic statements of anger or frustration are protected speech. *Dowling v. Zimmerman* (2001), 85 Cal.App.4th 1400, 1420 [(*Dowling*)] (statements and letter regarding public issue); *Lafayette Morehouse v. Chronicle Publishing Co* (1995), 37 Cal. App. 4th 855, 864.

II. BECAUSE HOWARD CANNOT ESTABLISH A PROBABILITY OF PREVAILING ON HIS CLAIMS, THIS SLAPP SUIT MUST BE DISMISSED

Once a defendant has made a *prima facie* showing that the lawsuit arises from petition or speech activity covered by CCP § 425.16, the burden shifts to plaintiff to establish a probability of prevailing on his claims, by competent and admissible evidence. *Navellier*, 29 Cal. App. 4th at 88; *Ludwig v. Superior Court* (1995), 37 Cal. App. 4th 8, 15-16, 21 n. 16, 25. Howard cannot do so.

A. Howard is a limited purpose public figure for purposes of his defamation claims

“*Copp v. Paxton* (1996) 45 Cal.App.4th 829, 845-846 [(*Copp*)] sets forth the elements that must be present in order to characterize a plaintiff as a limited purpose public figure. (1) First, there must be a public controversy, which means the issue was debated publicly and had foreseeable and substantial ramifications for nonparticipants. (2) Second, the plaintiff must have undertaken some voluntary act through which he or she sought to influence resolution of the public issue. In this regard it is sufficient that the plaintiff attempts to thrust him or herself into the public eye. (3) And finally, the alleged defamation must be germane to the plaintiff’s participation in the controversy.” (*Ampex Corp. v. Cargle* (2005), 128 Cal.App.4th at p. 1577.) [(*Ampex*)]

1. The discussion of Don Roberts’ use of John Knox White’s home address is a public controversy.

The Internet is a vast public forum, *Reno v. American Civil Liberties Union* (1997), 521 U.S. 844, and the issue of open public records and reporting of the information of public officials is a matter of intense public interest. Don Roberts’ and Howard’s use of the defendant’s home address and public disclosure forms plainly relates to this broader issue. Even taken by itself, the extent of public interest in the Roberts controversy is shown by coverage by both the print media, such as the Alameda Times-Star KW Dec ¶ 19 & Ex. FF and multiple websites, including Keepmeasurea and Laurendo.com.

As one court has noted, “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...” *Damon*, 85 Cal.App.4th 468, 475. Among the matters that have been judicially accepted as within the “public interest” are statements and a letter regarding a landlord-tenant dispute, *Dowling* 1400, 1420 (2001); communication to city officials and employees about a proposed development, *Tuchscher Development Enterprises v. San Diego Unified Port District* (2003), 106 Cal. App.4th 1219, 1234 [(*Tuchscher*)]; views about the safety of dental amalgam, *Kids Against Pollution v. California Dental Association* (2003), 108 Cal. App.4th 1003, 1015; and communications about possible legislation concerning mail order contact lens sales. *1-800-Contacts v. Steinberg* (2003), 107 Cal. App.4th 568, 583.

2 Howard voluntarily thrust himself into the public eye when he posted the defendant’s personal information on the Internet in an attempt to influence the discussion of Roberts’ broadcast of the defendant’s home address.

Howard made multiple postings of Knox White’s personal information on Keepmeasurea. The first posting was identical information to that which Don Roberts had used and was being discussed on Laurendo.com. The second posting went further to include the address of Knox White’s rental apartment and reported income. After each posting, Howard wrote comments on Laurendo.com which linked directly to his own website’s posting. The comments were made as a part of a running discussion of the issues of the use of public information available for public officials.

These actions are compelling proof that Howard “undertook ‘voluntary act through which he seeks to influence the resolution of the public issues involved,’ “ and took “ ‘affirmative actions’ ” to thrust himself into the “ ‘forefront of [a] particular public controvers[y].’ ” (*Copp*, p. 845, quoting *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 254-255.) Howard does not have to have actually achieved prominence in the public debate. It is sufficient that he “ ‘attempt[ed] to thrust himself into the public eye’ or to influence a public decision.” (*Copp*, pp. 845-846.)

3 The defendant’s alleged defamation must be germane to the plaintiff’s participation in the controversy.

Knox White’s use of the term “stalker” to refer to Howard’s collection and posting of the defendant’s home and rental property addresses and personal income is directly connected to the plaintiff’s postings on Laurendo.com and Keepmeasurea. It also refers to Howard’s postings, email list

hijacking, and Wikipedia posting regarding Helen Sause, Howard's continuance of posting incorrect information about Doug Linney, and harassing and threatening the funding of the Alameda Point Collaborative. The alleged defamation is clearly "germane to the plaintiff's participation in the controversy." *Ampex*, 128 Cal.App.4th.

By this evidence, Howard is a limited purpose public figure and therefore, in order to prevail on a defamation claim, he is required to prove, by clear and convincing evidence, that not only was the defendant's comment a false statement of fact, but that it was uttered with actual malice.

Howard must " 'demonstrate the complaint is legally sufficient and supported by a sufficient *prima facie* showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' *Seelig v. Infinity Broadcasting Corp.* (2002) , 97 Cal.App.4th 798 [(*Seelig*)] 'The burden on the plaintiff is similar to the standard used in determining motions for nonsuit, directed verdict, or summary judgment.' " (*Seelig*, 97 Cal.App.4th p. 809.) The showing must be made through "competent and admissible evidence." *Tuchscher*, 106 Cal.App.4th 1219, 1236; see also *vans v. City of Berkeley* (2006), 38 Cal.App.4th at pp. 1497-1498.) Thus, declarations that lack foundation or personal knowledge, or that are argumentative, speculative, impermissible opinion, hearsay, or conclusory are to be disregarded. (*Tuchscher*, 106 Cal.App.4th 1238, 1240.)

4 Howard's defamation claim fails because he is a limited purpose public figure who cannot show that Knox White commented with constitutional malice

As a limited purpose public figure, the plaintiff must demonstrate "actual malice" by clear and convincing evidence. This requirement presents "a heavy burden, far in excess of the preponderance sufficient for most civil litigation." *Hoffman v. Capital Cities/ABC, Inc.* (2001) 9th Cir. 255 F.3d 1180, 1186-1187. The 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 to command the unhesitating assent of every reasonable mind." *Copp*, 45 Cal.App.4th 829, 846.

To demonstrate actual malice, Howard must demonstrate that Knox White either knew his statement was false or subjectively entertained serious doubt his statement was truthful. *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 511.

"The failure to conduct a thorough and objective investigation, standing alone, does

not prove actual malice, nor even necessarily raise a triable issue of fact on that controversy. *St. Amant v. Thompson* (1968) 390 U.S. 727, 732. Similarly, mere proof of ill will on the part of the publisher may likewise be insufficient. *Gomes v. Fried* (1982) 136 Cal.App.3d 924, 934-935" *Reader's Digest Assn. v. Superior Court* (1984), 37 Cal.3d p. 258. [(*Reader's Digest*)]

A court may consider a defendant's anger or hostility toward a plaintiff in determining the presence of malice only to the extent it impacts the defendant's *actual belief* concerning the truthfulness of the publication. (*Reader's Digest*, 37 Cal.3d at p. 258.)

The actual malice requirement has been imposed on public officials and public figures in part because such persons "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Gertz v. Welch*, (1974) 418 U.S. 323 p. 344 [(*Gertz*)]. "Plaintiffs' ability to correct the inadvertent errors of a critic...is manifest." *Christian Research Institute v. Alnor* (2007) , Cal.App.4th Case #G036587

Howard has direct access to the Laurendo.com website and continues to be a frequent commenter on Alamedadailynews.com. It is therefore clear that he has ample access and opportunity to correct any perceived errors in the comments of his critics.

As Howard has presented no evidence that Knox White acted with actual malice, a finding of Anti-SLAPP must be found.

B. Howard's Defamation Claim Must Be Stricken Because the Statements Identified in the Complaint Are Not Actionable.

To state a defamation claim that survives a First Amendment challenge, plaintiff must present evidence of a statement of fact that is *provably false*. *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 20 [(*Milkovich*)]. "Statements do not imply a provably false factual assertion and thus cannot form the basis of a defamation action if they cannot " 'reasonably [be] interpreted as stating actual facts' about an individual." *Seelig*, 97 Cal.App.4th 798, 809. Thus, "satirical, hyperbolic, imaginative, or figurative statements are [constitutionally]

protected because 'the context and tenor of the statements negate the impression that the author seriously is maintaining an assertion of actual fact.' *Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal. App. 3d 991, 1000-1001" *Franklin v. Dynamic Details, Inc.* (2004) 116 Cal.App.4th 375, 385. By the same token, a statement of opinion is actionable only if it implies a false assertion of fact. (*Wilbanks et al v. Wolk* (2004,)121 Cal.App.4th 883 at p. 903; see also *Underwager v. Channel 9 Australia* (1995) 69 F.3d 361, 366.)

1 The Statement at Issue is not Defamatory

"Defamation is an invasion of the interest in reputation." *Smith v. Maldonado*, 72 Cal. App. 4th 637, 645 (1999). Mere "childish name-calling" is not defamatory, nor are "vigorous epithets." *Polydoros v. Twentieth Century Fox Film Corp.* (1997), 67 Cal. App. 4th 318, 326-327. A defamatory statement must expose the plaintiff "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." Civ. Code § 45. Howard cannot show that he is subject to hatred, being shunned, or injured merely because Knox White published a statement during a heated discussion over Howard's use of information collection and harassment on a blog. Knox White's use of the term "stalker" to describe Howard's actions meets accepted, colloquial and slang definitions of "cyberstalking," and is therefore understood to be hyperbolic rhetoric denoting anger and frustration by any reasonable reader.

Further, this truthful information is in no way harmful to his reputation. These terms are merely the name-calling that is typical during intense political campaigns and personal disagreements and do not rise to the level of causing plaintiff to be hated, subjected to public ridicule, or injured in his occupation.

2 The Statement is True or Substantially True

Defamatory remarks must be false to be actionable. *Gertz*, 418 U.S. 323, 340. Under the First Amendment, a statement need only be "substantially true" to be protected. *Masson v. New Yorker Magazine* (1991), 501 U.S. 496, 516-17 [*Masson*]. Even if the defendant cannot "justify every word of the alleged defamatory matter; it is sufficient if the substance of the charge be proved, irrespective of slight inaccuracy in the details." *Masson*, 501 U.S. 496. "Minor inaccuracies do not amount to falsity so long as the 'substance, the gist, the

1 sting, of the libelous charge be justified.” *Masson*, 501 U.S. 496. Howard’s defamation
2 claim fails because he cannot establish that the statement is false. Although Knox White does
3 not have the burden of proving the truth of the statements, it can be established that the
4 challenged statement is true or substantially true.

5 Researchers Bocij and McFarlane, in the peer-reviewed journal *First Monday* define
6 cyberstalking as:

7 "A group of behaviours in which an individual, group of individuals or
8 organisation uses information technology to harass one or more individuals. Such
9 behaviour may include, but are not limited to, the transmission of threats and false
10 accusations, identity theft, data theft, damage to data or equipment, computer
11 monitoring and the solicitation of minors for sexual purposes. Harassment is defined
12 as a course of action that a reasonable person, in possession of the same information,
13 would think causes another reasonable person to suffer emotional distress."

14 Further in their study Bocij and McFarlane identify 4 types of cyberstalkers, including
15 the “composed cyberstalker” defined as:

16 The composed cyberstalker is so named because it is theorized that their actions are aimed
17 at causing constant annoyance and irritation to their victims. These cyberstalkers were not
18 trying to establish a relationship with the victim but wished to cause distress. These types
19 of perpetrators generally issued threats.

20 On the whole, participants estimated that these cyberstalkers had a medium to high level of
21 computer literacy. Only one of the cyberstalkers in this group was known to have a criminal
22 record, and only one was known to have had a previous history of victimization. No
23 members of this group was known to have had a psychiatric history, however three of the
24 perpetrators went on to conventionally stalk their victims.

25 Microsoft’s Encarta Dictionary describes cyberstalking as “**stalker using Internet**: a
26 stalker who uses the Internet to harass a victim.” Wikipedia describes cyberstalking as “the
27 use of the Internet or other electronic means to stalk someone. This term is used
28 interchangeably with online harassment and online abuse.” The online dictionary of slang
29 and colloquialisms, www.urbanmyth.com, defines “cyberstalk” as “[u]se of the internet to
30 secretly gather information about a person.”

31 Howard’s actions towards the defendant — collecting his personal information,
32 including address, mortgage and house-sale information, newspaper clippings, and
33

biographical information for organizations Knox White is involved in and then reprinting them with unfounded innuendo and attaching them to letters to the City of Alameda City Attorney suggesting that Knox White is “vulnerable bribes, kick-backs, etc.” KW Dec ¶ 13 & Ex R p.2 — shows Howard clearly “using the internet to secretly gather information” about Knox White and “us[ing] the Internet to harass” him.

Moreover, Howard’s extracting of factual information from Helen Sause’s resume and combining it with information with no connection to Sause to create a libelous web page on Wikipedia KW Dec ¶ 6 & Ex. D, his hijacking of Sause’s personal email list and using it to send mocking emails to Ms. Sause’s friends and church congregation, as well as sending taunting emails directly to Ms. Sause KW Dec ¶ 8 & Ex. F, certainly describes “us[ing] information technology to harass an individual,” the definition of a cyberstalker according to Bocji and McFarlane.

The creation of LaurBenDo.com, including the collection of links to Do and Kruger’s baby daughter’s photo and information about the cost of their house and car, combined with his numerous taunting emails and posts regarding Do and her husband, KW Dec ¶ 3, 10 & Ex A pp.8-11, K, L is clearly “aimed at causing constant annoyance and irritation” to Do and her family: This is the very definition of a “composed cyberstalker.”

Howard’s letter to Alameda Point Collaborative funders and subsequent online taunts KW Dec ¶ 9 & Ex G, H, I and posts regarding Doug Linney KW Dec ¶ 3,4 & Ex A pp.12,13,J further support the claim that Howard fits the description of a cyberstalker.

As Howard cannot show this statement to be “provably false” as required (*Seelig*), a motion of Anti-SLAPP should be granted.

3 The Statement is Protected Opinion.

The Court has made clear that a statement is constitutionally protected as “opinion” under the following circumstances: (1) the speaker employs “loose, figurative, or hyperbolic language” in a “public debate” that “cannot reasonably be interpreted as stating actual facts”; (2) the statements are purely subjective and cannot be proved by a core of objective evidence; or (3) the opinions are buttressed by true facts. *Milkovich 497 U.S. 1, 19-21*. The appellate court writes, “The narrow issue before this court is whether these statements can reasonably

1 be understood to state actual facts about plaintiff. In determining that issue, we consider the
2 nature and meaning of the language used, including the verifiability of the statements, and
3 the context in which the statements appeared. Viewed through that analytical prism, we are
4 impelled to conclude that the statements are not actionable.” *Moyer v. Amador Valley J.*
Union High School Dist. (1990), 225 Cal.App.3d 72. [(Moyer)]

5 Further, exaggerated or hyperbolic statements must be understood in the context in
6 which they were used. In the Moyer case, the term “babblers,” which has a very specific
7 definition and was included in a newspaper article, was found to be opinion because,
8 “Obviously, the readers of the article would have understood that the word was not used
9 literally but as a form of exaggerated expression conveying the student-speaker's disapproval
10 of plaintiff's teaching or speaking style. The statement could not reasonably have been
11 understood to be stating actual facts about plaintiff. (E.g., *Letter Carriers v. Austin* (1974),
12 418 U.S. at pp. 284-286 [(Letter Carriers)] [“traitor” understood to mean that plaintiffs'
13 actions were reprehensible, not that plaintiffs had committed treason]; *Greenbelt Pub. Assn.*
14 *v. Bresler*(1970), 398 U.S. at pp. 13-14 [(Greenbelt)] [“blackmail” merely a vigorous epithet
15 used to describe unreasonable negotiating position]; *Buckley v. Littell* (1976) 539 F.2d 882,
16 893, cert. den. (1977) 429 U.S. 1062 [(Buckley)] [the term “fascist” subject to a variety of
17 interpretations and cannot be regarded as a statement of fact]” *Moyer*, 225 Cal.App.3d 720

18 In determining whether disparaging remarks are actionable defamation, “the question
19 is not strictly whether the published statement is fact or opinion . . . [r]ather, the dispositive
20 question is whether a reasonable fact finder could conclude the published statement declares
21 or implies a provably false assertion of fact.’ *Franklin*, 116 Cal.App.4th 375.” *Ruiz v. Harbor*
22 *View Community Assn.* (2005)134 Cal.App.4th 1456, p. 1471. *Integrated Healthcare*
23 *Holdings, Inc v. Fitzgibbons* (2006), 140 Cal.App.4th 515, 531, [(Integrated Healthcare)] The
24 court quoted Franklin in stating, “[s]atirical, hyperbolic, imaginative, or figurative statements
25 are not actionable because “ ‘the context and tenor of the statements negate the impression
26 that the author seriously is maintaining an assertion of actual fact.’ ” (*Franklin*, 116
27 Cal.App.4th 375).

28 A reasonable reader would easily conclude, that Knox White’s comment, made in the

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midst of a vigorous and heated exchange, was clearly a “form of exaggerated expression conveying the student-speaker's disapproval of plaintiff's teaching” (*Moyer*) and therefore not actionable. For this reason a finding of Anti-SLAPP must be made.

a. The Disputed Statements Are Non-Actionable Hyperbole

“The narrow issue before this court is whether these statements can reasonably be understood to state actual facts about plaintiff. In determining that issue, we consider the nature and meaning of the language used, including the verifiability of the statements, and the context in which the statements appeared. Viewed through that analytical prism, we are impelled to conclude that the statements are not actionable.” *Moyer v. Amador Valley J. Union High School Dist.* (1990). 225 Cal.App.3d 720. (*Moyer*)

In *Rosenauro v. Scherer*, the court found the terms “thief” and “liar” not to be actionable because they were found to be rhetorical hyperbole, uttered in the heat of an intense political debate. “Nonetheless, the Supreme Court has reaffirmed a line of cases that provide ‘protection for statements that cannot ‘reasonably [be] interpreted as stating actual facts’ about an individual.’ *Milkovich*, 497 U.S. This provides assurance that public debate will not suffer for lack of ‘imaginative expression’ or the ‘rhetorical hyperbole’ which has traditionally added much to the discourse of our Nation.” *Milkovich*, 497 U.S. at p. 20.

A reasonable reader would easily conclude, that Knox White’s comment, made in the midst of a vigorous and heated exchange of issues coming directly out of the 2006 Alameda local election, was clearly “form of exaggerated expression conveying the student-speaker's disapproval of plaintiff's teaching” (*Moyer*, 225 Cal.App.3d 720) and “rhetorical hyperbole” therefore not actionable. For this reason a finding of Anti-SLAPP must be made.

b. The Disputed Statements Are Non-Verifiable Opinions

In determining whether disparaging remarks are actionable defamation, “the question is not strictly whether the published statement is fact or opinion . . . [r]ather, the dispositive question is whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact.’ [Citation.]” (*Ruiz, supra*, 134 Cal.App.4th at p. 1471.)” *Integrated Healthcare*, 140 Cal.App.4th 515, 531. The court quoted Franklin in stating, “[s]atirical, hyperbolic, imaginative, or figurative statements are not actionable

2 because “ ‘the context and tenor of the statements negate the impression that the author
3 seriously is maintaining an assertion of actual fact.’” *Franklin v. Dynamic Details, Inc.*
4 (2004) 116 Cal.App.4th 375.

5 Further, statements must be understood in the context in which they were used. In the
6 Moyer case, the term “babblers” which has a very specific definition was found to be opinion
7 because, “Obviously, the readers of the article would have understood that the word was not
8 used literally but as a form of exaggerated expression conveying the student-speaker’s
9 disapproval of plaintiff’s teaching or speaking style. The statement could not reasonably have
10 been understood to be stating actual facts about plaintiff. (E.g., *Letter Carriers*, 418 U.S;
11 *Greenbelt*, 398 U.S. *Buckley*, 429 U.S. 1062” *Moyer*, 225 Cal.App.3d 720.

12 As in *Moyer*, a reasonable reader would not have understood the use of “stalker” to
13 have implied that Howard was a stalker. Because of “‘the context and tenor of the statements
14 negate the impression that the author seriously is maintaining an assertion of actual fact,’”
15 “[t]he statement could not have been understood to be stating actual facts about plaintiff,” a
16 finding of Anti-SLAPP must be made.

17 III. THE ANTI-SLAPP LAW MANDATES THE AWARD OF ATTORNEY’S FEES 18 AND COSTS TO DEFENDANT

19 The Code of Civil Procedure section 425.16, subdivision (c) reads: “(c) In any action
20 subject to subdivision (b), a prevailing defendant on a special motion to strike shall be
21 entitled to recover his or her attorney’s fees and costs. If the court finds that a special motion
22 to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award
23 costs and reasonable attorney’s fees to a plaintiff prevailing on the motion, pursuant to
24 Section 128.5.”

25 The courts have routinely upheld that the legislature mandated the awarding of costs
26 and attorney fees to the defendant if he prevails on his claim of anti-SLAPP. “Thus, under
27 Code of Civil Procedure section 425.16, subdivision (c), any SLAPP defendant who brings a
28 successful motion to strike is entitled to mandatory attorney fees. The fee-shifting provision
29 was apparently intended to discourage such strategic lawsuits against public participation by
30 imposing the litigation costs on the party seeking to “chill the valid exercise of the

constitutional rights of freedom of speech and petition for the redress of grievances." CCP §
425.16 (a)." *Ketchum v. Moses* (2001) 24 Cal.4th 1122.

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CONCLUSION

For the reasons stated above, defendant respectfully requests that this Court enter an order
dismissing plaintiff's complaint with prejudice and awarding defendant its costs and attorney's fees
pursuant to the California Anti-SLAPP Law, CCP § 425.16(c).

Respectfully submitted,

JOHN KNOX WHITE
Defendant

March 30, 2007