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3:01-CV-01752 BOSLEY MEDICAL V. KREMER

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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY: *[Signature]* DEPUTY

9 UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

11 BOSLEY MEDICAL INSTITUTE, *et al.*,) No. 01 CV 1752 JNK (AJB)
12 Plaintiffs,)
13 v.) District Judge Keep
14 MICHAEL STEVEN KREMER,,) Magistrate Judge Battaglia
15 Defendant.) NOTICE OF DEFENDANT'S MOTION FOR
16) PROTECTIVE ORDER BARRING
17) DEPOSITION QUESTIONS ABOUT
18) STATEMENTS WHOSE SPECIFIC
19) LANGUAGE HAS NOT BEEN IDENTIFIED
AS ALLEGEDLY DEFAMATORY
DATE: *Nov. 22, 2002*
TIME: *9:30 a.m.*
PLACE: *Crm. A*

20 Please take notice that at 9:30 a.m. on November 22, 2002, in Courtroom
21 A on the 1st Floor of the United States District Court for the Southern District of California,
22 Michael Steven Kremer will move the Court, pursuant to Rules 26 and 37 of the Federal Rules of
23 Civil Procedure, to require plaintiffs to identify the specific language of the statements on which their
24 complaint for defamation is based in advance of defendant's deposition, as provided by the Court's
25 discovery order of March 22, 2002. On November 11, 2002, undersigned counsel Mr. Levy conferred
26 about this proposed motion with Bosley's counsel Peter Albert, who refused to agree to identify the
27 statements on which his clients were suing.

1 In support of this motion, Kremer will rely on the accompanying Memorandum of Law, and
2 the following documents which are attached hereto:
3 Orders of February 5 and March 22, 2002, Docket Nos. 11 and 20;
4 Kremer's Memorandum Regarding Specific Discovery to Be Allowed, Docket No. 15;
5 Kremer's edited version of Deposition Topics, as approved by the Court in the March 22 order
6 (Exhibit C to Docket No. 15); and the correspondence attached to the Motion.

7 Dated: November 13, 2002

Respectfully submitted,

8
9 By: Paul Alan Levy (CAS)
10 Paul Alan Levy
11 Attorneys for Michael Kremer

12 LUCE, FORWARD, HAMILTON & SCRIPPS LLP

13 By: Charles A. Bird
14 Charles A. Bird
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FEB - 5 2002

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BOSLEY MEDICAL INSTITUTE, INC., a
Delaware corporation, BOSLEY MEDICAL
GROUP, S.C., an Illinois corporation,

Plaintiff,

v.

MICHAEL STEVEN KREMER, an
Individual, and TUCOWS, INC., a Canadian
corporation,

Defendants.

Civil No. 01-1752 K (AJB)

Order Granting Plaintiff's Motion to
Conduct Limited Discovery

Presently before the Court is Plaintiff's Motion to Conduct Limited Discovery. Defendant has filed an opposition and Plaintiff has filed a reply. This motion is appropriate for submission on the papers and without oral argument pursuant to Local Rule 7.1(d)(1) and the hearing set for February 5, 2002 is vacated. For the reasons set forth below, Plaintiff's motion is GRANTED.

Background

On June 12, 2001, Bosley Medical Institute, Inc. ("Plaintiff" or "Bosley"), filed a complaint in the U.S. District Court for the Northern District of Illinois alleging, among other things, that the registration and use of the domain names bosleymedical.com and bosleymedicalviolations.com constitute cyberpiracy, infringement of Bosley's trademarks BOSLEY and BOSLEY MEDICAL, dilution of those marks and unfair competition. The complaint also alleges that the web sites at these domain names contain libelous

1 information and statements. Bosley consented to a change of venue to the Southern District of California
2 and on August 30, 2001, the Illinois district court entered an order transferring the case.

3 On October 17, 2001, Michael Steven Kremer ("Defendant" or "Kremer") filed a motion to dismiss
4 the complaint without leave to amend based on Rule 12(b)(6); to dismiss counts III, VII and VIII
5 (cyberpiracy, libel and actual malice) for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1);
6 to dismiss all the claims of Bosley Medical Group for lack of standing; and to strike counts VII and VIII
7 pursuant to California's anti-SLAPP statute. On November 13, 2001, the parties stipulated to a continuance
8 of the hearing on the motion to dismiss and strike pending resolution of the discovery issue.

9 Plaintiff seeks limited discovery to respond to factual issues raised in the thirty page motion to
10 dismiss and the eleven page declaration of Defendant in support of the motion to dismiss and motion to
11 strike. Mot. at 2. Specifically, Plaintiff seeks (1) information about the creation and publication of the
12 "summaries of several different investigations" appearing on Defendant's web sites to determine whether
13 Defendant intended them to be taken as protectable opinions or non-protectable facts, (2) discovery germane
14 to both direct and circumstantial evidence of fault such as whether Kremer in fact relied on the "investigative
15 and media reports" on which much of the web sites content is allegedly based, and if so to what extent, and
16 (3) whether Defendant published these statements with knowledge or reckless disregard as to their truth or
17 falsity, regardless of whether Defendant relied on the alleged investigative and media reports as he claims.
18 Reply at 4-5. In the alternative, Plaintiff requests that the Court strike Defendant's affidavit and motion to
19 dismiss and strike. Mot. at 8.

20 Defendant opposes on the basis that (1) allowing the discovery would violate Defendant's rights
21 under the First Amendment and the California anti-SLAPP statute, (2) Plaintiff has not made the required
22 showing that such discovery is necessary to avoid dismissal, (3) discovery is not necessary before the Court
23 dismisses the trademark claims, and (4) the libel counts can also be dismissed without discovery. See Opp'n
24 generally.

25 //

26 //

1 Discussion

2 A. California Anti-SLAPP Statute

3 In 1992, the California Legislature enacted a provision commonly known as an "anti-SLAPP" suit
4 statute. Rogers v. Home Shopping Network, 57 F. Supp.2d 973 (C.D. Cal. 1999) (citing Briggs v. Eden
5 Council for Hope and Opportunity, 19 Cal. 4th 1106 (1999)). SLAPP suits, referring to "strategic lawsuit
6 against public participation," are commonly brought for "purely political purposes" in order "to obtain an
7 economic advantage over the Defendant, not to vindicate a legally cognizable right of the Plaintiff." Rogers
8 57 F. Supp at 974 (citing Briggs, 81 Cal. Rptr. 2d 471). Generally speaking, the "conceptual features [that
9 distinguish SLAPP suits] are that they are generally meritless suits brought by large private interests to deter
10 common citizens from exercising their political legal rights or to punish them from doing so." Id. (citing
11 Wilcox v. Superior Ct., 33 Cal. Rptr. 2d. 446, 450 (1994)). The legislature enacted Cal. Civ. Pro. § 425.16
12 to combat suits that "were being used to harass plaintiffs who spoke out on matters of public concern and
13 often could not afford to defend even a meritless suit. Rogers, 57 F. Supp. 2d at 975 (citing Briggs, 81 Cl.
14 Rptr. 2d at 479-80).¹ In fact, the statute begins by discussing the legislative intent behind its enactment as
15 follows:

16 (a) The Legislature finds and declares that there has been a disturbing increase in lawsuits
17 brought primarily to chill the valid exercise of the constitutional rights of freedom of speech
18 and petition for redress of grievances. The Legislature finds and declares that it is in the
19 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.

20 Cal Civ. Code § 425.16. To avoid such chilling, a special procedure was created for early testing of the
21 validity of the suits involving such rights:

22 (b)(1) A cause of action against a person arising from any act of that person in furtherance
23 of the person's right of petition of free speech under the United States or California
24 Constitution in connection with a public issue shall be subject to a special motion to strike,

25 _____
26 ¹ Neither party to this motion disputes the applicability of the California statute to the
27 above-entitled litigation. However, it has been established that "[i]f a provision [of the statute]
28 collides with a federal rule, it cannot apply in federal court. If a provision does not collide with
the federal rules, the court must make a balancing judgment to determine whether that provision
applies in federal court." Rogers, 57 F. Supp. 2d at 979 (citing Hanna v. Plummer, 380 U.S. 460,
471, 85 S. Ct. 1136 (1965)).

1 unless the court determines that the plaintiff has established that there is a probability that
2 the plaintiff will prevail on the claim.

3 (2) In making its determination, the court shall consider the pleadings, and supporting and
4 opposing affidavits stating the facts upon which the liability or defense is based.

5 (3) If the court determines that the plaintiff has established a probability that he or she will
6 prevail on the claim, neither that determination nor the fact of that determination shall be
7 admissible in evidence at any later stage of the case . . .

8 Id. To further the end of protecting defendants from incurring legal expenses, the Legislature provided that
9 the special motion to strike may be brought early in the lawsuit and that discovery ordinarily may not
10 proceed unless and until the court finds that the suit has a probability of success. Rogers, 57 F. Supp 2d at
11 976. However, "a plaintiff who desires to conduct further discovery after the Defendant files a special
12 motion must file a noticed motion for permission to conduct such discovery, which the court will grant only
13 for good cause shown and only for specified discovery." Id. at 977. The requirements of "good cause" and
14 "specified discovery" have been strictly applied by the California courts." Id.

15 Here, Defendant argues that in moving to strike Bosley's claims for libel, Plaintiff cannot support
16 at least three elements of libel: (1) the alleged defamation implies an assertion of objective fact; (2)
17 Defendant acted with actual malice; and (3) the publication of defamatory language damaged Plaintiff's
18 reputation. Mot. at 3. In response, Plaintiff maintains that said arguments go beyond pointing out supposed
19 insufficiencies with Bosley's pleadings relating to these elements and instead allege a lack of evidence
20 necessary to prove the elements. Id. Plaintiff contends that it therefore needs discovery on these allegations
21 in order to respond. Id. In so arguing, Plaintiff points to several specific instances that call for discovery.

22 For example, Plaintiff alleges that Defendant's allegations with regard to element (2) that Defendant
23 did not act with actual malice, is particularly difficult for Plaintiff to rebut without discovery. Mot. at 4.
24 Specifically, Plaintiff alleges that Defendant's motion relies on Defendant's alleged ignorance of Plaintiff's
25 challenges to the factual accuracy of statements made on the web site or the investigative and media reports
26 on which the statements are supposedly based. Id. In support thereof, Defendant asserts that Plaintiff has
27 never "seriously" challenged the accuracy of criticisms made against his business. Id. (citing Ex. 2, pp. 44,
28 45 ¶¶ 12, 13). To prove malice, Plaintiff alleges that Plaintiff should be allowed to discover if Defendant's
defamatory statements were made with knowledge or reckless disregard as to their falsity, regardless of
whether Defendant relied on the investigative and media reports as he claims. Id. Plaintiff therefore alleges
that Defendant's motion to dismiss, because it raises latent fact issues such as malice, intent or knowledge,

1 which are exclusively in Defendant's control, should be treated more as a motion for summary judgment
2 pursuant to Fed. R. Civ. P. 56.

3 In response, Defendant argues that despite Plaintiff's claim that the motion should be treated as a
4 motion for summary judgment, Defendant moved to dismiss because necessary allegations were omitted
5 from the complaint. Opp'n at 5. Defendant further contends that "while part of the motion to dismiss is
6 based on evidence," even treating that part as analogous to a summary judgment motion, Rule 56(f)
7 prescribes the procedural steps Plaintiff must follow to show that summary judgment can be granted unless
8 they have this discovery. Id.

9 In Rogers, supra in analyzing § 425.16, the district court noted that this section is not limited to
10 testing legal theories. Rogers, 57 F. Supp. 2d at 980. Instead, the Rogers court indicated that "a court
11 presented with a special motion to strike must consider 'supporting and opposing affidavits stating the facts
12 upon which the liability or defense is based.'" Id. (citing Cal. Civ. Proc. Code § 425.16(b)(2)). The court
13 further noted that "most of the California state court opinions addressing § 425.16 concern issues of fact
14 rather than legal arguments. Id.

15 While the Rogers court devoted an extensive amount of analysis to distinguishing between a motion
16 for summary judgment and a motion to dismiss, and found that § 425.16 cannot be used in a manner that
17 conflicts with the Federal Rules, the Rogers court supplied the outcome of that analysis as follows:

18 If a Defendant makes a special motion to strike based on alleged deficiencies in the
19 plaintiff's complaint, the motion must be treated in the same manner as a motion under Rule
20 12(b)(6) . . . If the Defendant makes a special motion to strike based on the plaintiff's alleged
failure of proof, the motion must be treated in the same manner as a motion under Rule 56.

21 Rogers, 57 F. Supp. 2d at 983. In discussing a nonmoving parties ability to conduct discovery in an effort
22 to oppose a motion for summary judgment, the Ninth Circuit Court of Appeals found that "although Rule
23 56(f) facially gives judges the discretion to disallow discovery when the nonmoving party cannot yet submit
24 evidence supporting its opposition, the Supreme Court has restated the rule as requiring rather than merely
25 permitting, discovery 'where the nonmoving party has not has the opportunity to discover information that
26 is essential to its opposition.'" Merabolife v. Wornick, 264 F. 3d 832 (9th Cir. 2001) (citing Anderson v.
27 Liberty Lobby, Inc, 477 U.S. 242, 250 n.5, 106 S. Ct. 505 (1986)). Moreover, if the information needed to
28 defend "is in the moving party's control, as is generally the case when a plaintiff must prove malice, "most

1 courts . . . are lenient in granting further time for discovery." Rogers, 57 F. Supp. 2d at 981. This tendency
2 toward leniency is strengthened when the summary judgment motion raises latent fact issues such as motive,
3 intent, knowledge, or credibility and the moving party has exclusive control over those facts. Id.

4 Here, because Defendant has made his motion to strike based at least somewhat on Plaintiff's alleged
5 failure of proof and factual inadequacies, Plaintiff is allowed limited discovery in an effort to rebut
6 Defendant's allegations of Plaintiff's alleged failure of proof and factual inadequacies. Defendant argues
7 that if the court does find the motion to strike to be more similar to a Rule 56 motion for summary judgment,
8 Plaintiff is nonetheless not entitled to discovery at this point as it has failed to follow the proper procedure
9 as set out in Rule 56(f). The Court disagrees.

10 In Rogers, the district court noted that a special motion to strike premised on an alleged lack of
11 evidence, similar to a summary judgment motion, must comport with federal standards. In so finding,
12 however, the district court noted that plaintiff in that case had identified specific discovery which she needed
13 to obtain before opposing the motion. Id. at 981, 984. The Rogers court therefore continued the hearing on
14 the motion to strike to allow plaintiff time to attempt to conduct discovery. Id. at 984. Here, as in Rogers,
15 it is illogical to argue that Plaintiff should be required to bring a Rule 56(f) motion before the Court because
16 as discussed earlier, the standards in allowing discovery to oppose a motion for summary judgment are
17 lenient.


18 Based on the aforementioned reasons, Plaintiff's motion is granted. As mentioned before, Plaintiff
19 seeks (1) information about the creation and publication of the "summaries of several different investiga-
20 tions" appearing on Defendant's web sites to determine whether Defendant intended them to be taken as
21 protectable opinions or non-protectable facts, (2) discovery germane to both direct and circumstantial
22 evidence of fault such as whether Kremer in fact relied on the "investigative and media reports" on which
23 much of the web sites content is allegedly based, and if so to what extent, and (3) whether Defendant
24 published these statements with knowledge or reckless disregard as to their truth or falsity, regardless of
25 whether Defendant relied on the alleged investigative and media reports as he claims.

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1 Because the Court finds Plaintiff's requested areas of discovery are overly-broad and open-ended,
2 the parties are required to submit further briefing with regard to the limited discovery. Specifically, Plaintiff
3 shall submit a brief *on or before February 13, 2002*, of no more than *ten (10)* pages indicating the requested
4 source of information and the specific subject matter to be obtained from that source. Defendant shall
5 thereafter submit any opposition *on or before February 20, 2002*, of no more than *ten (10)* pages. The
6 Court orders the parties to meet and confer prior to the submissions in an effort to narrow the potential
7 issues.

8 IT IS SO ORDERED.

9 Dated: 2/5/02

10 
11 ANTHONY J. BATTAGLIA
12 United States Magistrate Judge

13 cc: Judge Keep
14 All Counsel of Record

FILED

MAR 22 2002

CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
DEPUTY

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BOSLEY MEDICAL INSTITUTE, INC., a
Delaware corporation, BOSLEY MEDICAL
GROUP, S.C., an Illinois corporation,

Plaintiff,

v.

MICHAEL STEVEN KREMER, an
Individual, and TUCOWS, INC., a Canadian
corporation,

Defendants.

Civil No. 01-1752 K (AJB)

Order Defining the Scope of Plaintiff's
Limited Discovery

Pursuant to the Court's order granting Plaintiff's motion to conduct limited discovery, the parties have submitted further briefing outlining their respective positions. Having thoroughly reviewed the briefs, the scope of discovery is set out more fully below.

Discussion

Procedurally, Plaintiff seeks discovery in the form of (1) responses to interrogatories, (2) production of documents, and (3) a deposition of Defendant Kremer. Substantively, Plaintiff maintains that it is entitled to discovery regarding (1) the creation and publication of the summaries of several different investigations appearing on Defendant's web sites to determine whether Kremer intended them to be taken as predictable opinions or non-predictable facts, (2) whether Kremer relied on allegedly factual sources of information and if so to what extent, (3) whether Kremer published content on the web sites with knowledge or reckless disregard of their truth or falsity, (4) whether Kremer's web site includes less protected commercial speech,

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1 and (5) whether Kremer registered the domain names and maintains the web sites with motivation and intent
2 to confuse or divert Plaintiff's consumers. See Pl.'s Brief generally.

3 Defendant objects on the basis that (1) the Court's order does not support discovery on the trademark
4 issues in the case, (2) all of the requests are overbroad insofar as they seek information about parts of the
5 web site that are alleged to be defamatory, (3) assuming discovery of Kremer's intent about the fact/opinion
6 distinction is proper, the requests addressed to that issue are overbroad, and (4) the discovery pertaining to
7 actual malice is overbroad. Defendant also requests discovery of Plaintiff, a stay pending appeal of the
8 Court's order allowing Plaintiff limited discovery and an order prohibiting Plaintiff's verbatim recording
9 of meet and confers.

10 Plaintiff devotes its entire brief to outlining the specific areas of discovery it seeks. In fact, a review
11 of Plaintiff's moving papers indicates that Plaintiff is operating under a misinterpretation of the Court's
12 order. Specifically, in its opposition, Plaintiff indicates that "the [Court] order identified three discovery
13 areas related to the defamation claims that the Court believed to be 'overly-broad and open-ended.'" Pl.'s
14 Opp'n at 1. Plaintiff further states however, that "[t]he Court granted Bosley's motion seeking discovery
15 relating to other defamation and trademark-related issues without requiring further briefing from the parties."

16 Id. The Court disagrees.

17 In evaluating Plaintiff's original motion to conduct limited discovery, the Court addressed Plaintiff's
18 request with regard to Defendant's motion to strike claims VII and VIII (libel and actual malice) pursuant
19 to the California anti-SLAPP statute only. In granting Plaintiff's request, the Court granted Plaintiff
20 discovery with regard to those claims which are the subject of the motion to strike. Indeed, the Court found
21 Plaintiff's requested areas of discovery overly broad and open-ended and ordered further briefing with regard
22 to the limited discovery. The Court did not however grant Plaintiff's motion relating to other defamation
23 and trade-mark related issues without requiring further briefing. Indeed, the entire context of the order was
24 contemplated with respect to Defendant's motion to strike. To interpret the Court's order otherwise would
25 be to interpret the Court's order in error.

26 Here, in submitting further briefing to the Court, Defendant has delineated Plaintiff's discovery
27 requests. (See Def.'s Exs. A-C). The Court finds Defendant's modifications appropriately define and
28 narrow the scope of discovery as contemplated in the Court's prior order. Therefore, Defendant shall

1 respond to proposed Interrogatory Nos. 3 and 4 as reworded by Defendant and Document Request Nos. 3,
2 5 through 9, and 11 as reworded by Defendant as directed below. In addition, Plaintiff may depose
3 Defendant Kremer on proposed topics 4, 6 through 12, and 14 as reworded by Defendant and as directed
4 below.

5 Stay on Discovery

6 Defendant has already objected to the previous findings of this Court so the issue of reversal is before
7 Judge Keep. Pursuant to this order defining the proper scope of discovery the issue matures. In the form
8 of this dispute, the motion to dismiss will not be decided until the resolution of the appeal, and likewise, no
9 prejudice will occur if Defendant's responses as ordered are delayed pending resolution of the appeal.
10 Therefore, Defendant is ordered to respond to the written discovery within *fifteen (15)* days of a ruling from
11 Judge Keep on Defendant's appeal. Consistent therewith, the deposition should proceed forthwith after said
12 disposition of Defendant's objections to the order allowing limited discovery.

13 Recording of Meet and Confers

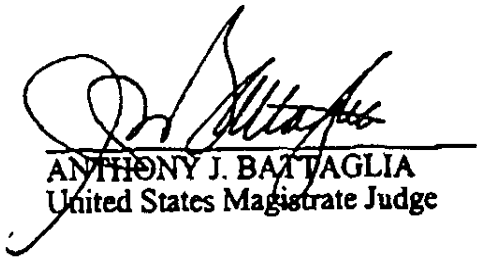
14 Defendant also objects to Plaintiff's verbatim recording of meet and confer sessions and therefore
15 requests an order that no party may impose the keeping of a verbatim transcript of a meet and confer.
16 Defendant's request is GRANTED. Unless both parties are in agreement, one party shall not unilaterally
17 record a meet and confer session.

18 Discovery of Plaintiff

19 Lastly, in light of this Court's order allowing for limited discovery, Defendant requests discovery
20 of Plaintiff. Defendant's request is DENIED.

21 IT IS SO ORDERED.

22 Dated: 3/22/02


ANTHONY J. BATTAGLIA
United States Magistrate Judge

23
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25 cc: Judge Keep
26 All Counsel of Record
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9 UNITED STATES DISTRICT COURT
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11 BOSLEY MEDICAL INSTITUTE, *et al.*,) No. 01 CV 1752 JNK (AJB)
12 Plaintiffs,) District Judge Keep
13 v.) Magistrate Judge Battaglia
14 MICHAEL STEVEN KREMER,) DEFENDANT'S SUPPLEMENTAL BRIEFING
15 Defendant.) ABOUT SPECIFIC DISCOVERY PROPOSALS
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1 On February 5, 2002, the Court granted Bosley's request for "limited discovery." It outlined
2 three areas pertaining to defendant's SLAPP motion on which Bosley would be allowed discovery,
3 but ruled that these areas were "overly-broad and open-ended." It directed the parties to attempt to
4 negotiate and failing that, to brief the precise discovery that should be allowed pursuant to that order.

5 Bosley's brief and discovery requests belie its contention that the discovery it seeks is
6 "limited." Bosley goes well beyond the areas outlined in the February 5 order, seeking all the
7 discovery that it is likely to need on every issue that is likely to be disputed in the case. And, within
8 each area, its proposed discovery requests are extremely broad and open-ended, seeking extensive
9 discovery "initially" from defendant Kremer, with the promise that further discovery will be sought
10 from other persons who are identified through the initial round of discovery. Perhaps this extremely
11 broad discovery is sought on the assumption that the Court will "compromise" by allowing about half
12 of what is sought; in any event, the great bulk of the discovery should be denied.

13 Kremer's response to the requested discovery proceeds in two parts. This memorandum
14 responds to Bosley's February 13 brief and explains what portions of the requested discovery are
15 fairly within the Court's order of February 5.^{1/} The attached exhibits A, B, and C go line by line
16 through each of Bosley's proposed requests, and suggest reworded discovery requests and areas of
17 inquiry which, we believe, conform to the limits set by the February 5 order.^{2/}

18 **A. The February 5 Order Does Not Support Discovery on the Trademark Issues in the**
19 **Case.**

20 The first way in which the requested discovery goes beyond what the Court has ordered is that
21 much of it pertains to trademark issues. The Court's order specified three areas in which the Court
22 was prepared to permit limited discovery. Each area pertained to the libel claims, which defendant

23 _____
24 ^{1/} In this regard, Bosley has evaded the Court's ten page limit on briefs by violating the Local
25 Rules concerning the format of papers. The text of its memorandum appears to be in 11-point
26 type, and the footnotes are in an even smaller font. Had plaintiff moved for leave to file an
27 over-length brief, defendant would surely have supported that motion.

28 ^{2/} Bosley refused defendant's request for the opportunity to review the specific discovery
requests and deposition topics that Bosley planned to request the Court's permission to pursue,
thus making it impossible for the parties to meet and confer about specific language and
requiring the specifics to be litigated entirely before the Court.

1 has moved to dismiss and moved to strike under the SLAPP statute. One area pertained to the
2 fact/opinion distinction and two pertained to whether the allegedly defamatory statements on the web
3 site were published with "actual malice." Yet more than half of the proposed discovery topics
4 (deposition items 15 to 30, interrogatories 5 to 8, and document items 12 to 25), are aimed at the
5 motion to dismiss the trademark claims, which is based solely on Rule 12(b)(6). All of this discovery
6 should be denied.

7 To be sure, in Bosley's prior papers on whether discovery should be allowed at all, it pointed
8 to statements in the Kremer affidavit that Bosley argued were relevant to the trademark claim, but
9 most of those statements were intended to walk the Court through certain documents which, because
10 of their public nature (and because some of them are referenced in the complaint), defendant contends
11 can properly be considered on a motion to dismiss under Rule 12(b)(6). Moreover, the affidavit's
12 statements about Kremer's lack of commercial involvement was directed to the issue of personal
13 jurisdiction, which was no longer an issue once the case was transferred to this Court. The motion
14 to dismiss the trademark claims will stand or fall under Rule 12(b)(6). Presumably, these facts explain
15 why the Court confined discovery permitted at this stage of the case to select issues pertaining to the
16 defamation claims.

17 For example, a number of the discovery requests are directed to the issue of whether Kremer's
18 use of Bosley's trademarks presents a "likelihood of confusion." The motion to dismiss, insofar as
19 it pertains to that issue, is based solely on the face of the complaint and on the two web sites that are
20 referenced in the complaint, defendant's argument being that the sites are so plainly non-confusing
21 that Bosley's allegation must fail as a matter of law. Either that argument is correct or it isn't; but no
22 discovery is need to address it. *Cf. Abercrombie & Fitch v. American Eagle Outfitters*, 2002 WL
23 226195, at 19-21 (6th Cir. Feb. 15, 2002) (publications so dissimilar on face that judgment is granted
24 as a matter of law, finding no likelihood of confusion, despite absence of discovery on that issue).

25 Bosley also argues that various forms of discovery are needed to probe the issues of
26 "commercial speech" or "use in commerce." But Bosley errs in arguing that these aspects of the
27 motion to dismiss are based on Bosley's "alleged failure of proof and factual inadequacies." Mem.
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1 7. To the contrary, the motion is based on Bosley's failure to **plead** commercial speech or use in
2 commerce. In this regard, it is important to recall that the argument portion of the motion to dismiss
3 does not even mention any aspect of the affidavit save one—the disclaimer of any financial connection
4 to the hair industry. ¶ 23, cited in D. Mem. 19. That point was made primarily to explain why it is
5 significant that Bosley has not **alleged** a commercial nexus in its complaint. To be sure, if Bosley
6 chooses to amend its complaint to include such allegations (and Bosley is on notice that such pleading
7 would be questioned under Rule 11), then Kremer will have to decide whether to move for summary
8 judgment on that point, and at that juncture Bosley would be free to argue that it needs discovery
9 before summary judgment can be granted. As it is, the requested discovery represents a fishing
10 expedition, to enable Bosley “to find out if it has any basis for a claim [about Kremer’s nexus to
11 commerce],” which is not a proper reason for discovery. *E.g., Micro Motion v. Kane Steel Co.*, 894
12 F.2d 1318, 1327 (Fed. Cir. 1990); *see also MacKnight v. Leonard Morse Hosp.*, 828 F.2d 48, 52 (1st
13 Cir. 1987) (“it was not asking too much to require plaintiff to disclose some relevant facts and basis
14 for them before the requested discovery would be allowed”).

15 Some requested discovery based on the supposed need to oppose dismissal of the trademark
16 counts under Rule 12(b)(6) does not even bear on the issues in that motion. For example, Document
17 ¶ 23 and related Deposition Topic ¶ 28 seek information about persons who might have told Kremer
18 that, based on the content of the web site, they would not patronize Bosley. This data has no possible
19 bearing on commercial use or likelihood of confusion; at most, it goes to the damages that Bosley
20 might claim if it succeeds in establishing a trademark violation. Yet the motion to dismiss the federal
21 claims is not based on a failure to plead damages. As this example shows, the “limited discovery” that
22 Bosley seeks is really discovery to prepare its case for trial. This bad faith response to the February
23 5 order would warrant the Court in deciding not to allow **any** discovery at this juncture.

24 Finally, recognizing that the February 5 order authorized discovery only on issues relating to
25 defamation, Bosley now argues that the issue of “commercial speech” is pertinent to defamation as
26 well. Mem. 6. By contrast, Bosley’s original Rule 12(d) motion raised the issue of commercial
27 speech **solely** in discussing the trademark issues. Moreover, making this argument does not evade the
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1 problem that the libel counts of the complaint do not even allege that commercial speech is at issue
2 here.

3 In any event, Bosley offers no citation for the proposition that whether speech is commercial
4 or non-commercial depends on the motivation of the speaker, rather than the content of the speech,
5 and the speech itself is available for the Court's review on the face of the web site; Bosley admits as
6 much because its proposed deposition topic, ¶ 15, is "[w]hether Kremer's web site includes
7 commercial speech." No discovery is needed to determine whether the contents of the site are
8 "commercial." Bosley also errs in arguing that discovery into whether Kremer's speech is
9 "commercial" has some relevance to determining whether Kremer's publication was with actual
10 malice (that is, whether he knew or acted with reckless disregard of any statement's probably falsity).
11 Finally, the request that Bosley be permitted to ask any deposition questions deemed relevant to
12 commercial speech, Deposition ¶ 15, is extremely vague and open-ended. This request should be
13 denied.^{3/}

14 **B. All of the Requests Are Overbroad Insofar as They Seek Information About Parts of the**
15 **Website That Are Not Alleged to Be Defamatory.**

16 The first problem with the remaining discovery requests is that they seek information about
17 Kremer's basis for every statement on the web site, regardless of whether those statements are alleged
18 to be defamatory. The two challenged web sites contain more than 15,000 words and nearly 800
19 sentences, but Bosley does not allege that everything on the web sites is actionable defamation. The
20 complaint, ¶ 48 (A) through (D), mentions four topics on which Bosley believe it has been defamed,
21 but even then Bosley has not specified the particular language that it deems actionable. The categories
22 are so broad and general that it is impossible for defendant to know which specific statements in his
23 site are at issue in this case. And yet the discovery inquires into Kremer's mental processes about
24 every word on the sites, whether or not they are the subject of the suit.

25 Bosley's request for such wide-ranging discovery simply confirms the statement of the

26 ^{3/} If the Court decides that discovery should be permitted about the statements in paragraph 23
27 of the Kremer Affidavit, then it should allow only the versions of Document Requests 12 and
28 14 to 19, Interrogatories 5 and part of 7, and Deposition Subjects 16 and 18 to 23, as reworded
in the attached Exhibits.

1 arbitrator who, rejecting Bosley's demand that Kremer give up the domain name
2 "bosleymedical.com," found Bosley guilty of "cyberbullying" in order to squelch dissent by a
3 consumer critic. http://arbiter.wipo.int/domains/decisions/html/2000/d2000_1647.html, at 5.
4 Bosley should not be allowed to begin this case by conducting a fishing expedition concerning all
5 parts of the web site, and only then decide, after extensive discovery, what statements it wants to
6 challenge under the defamation laws.

7 Moreover, Kremer's SLAPP motion seeks to have every part of the complaint stricken on the
8 ground that the web sites are entirely "opinion" or stated without actual malice. The SLAPP motion
9 makes clear that it is only certain fragments of the web site whose contents are opinion rather than
10 fact; the motion makes clear that it is only after Bosley has identified the specific language that it
11 contends is actionable that Judge Keep will be able to scrutinize those words under the established
12 tests for distinguishing between fact and opinion and thus decide which defamation claims may go
13 forward. (For example, the motion points out that words such as "fraud," "unethical," and
14 "misrepresentation" are not generally susceptible of factual definition; yet these are among the topic
15 areas on which Bosley alleges defamation. Mem. 28). Similarly, the standard of actual malice cannot
16 be applied until Bosley reveals the precise statements on which it is suing. The Court can observe that
17 the discussion of "actual malice" consumes one short paragraph in the memorandum in support of the
18 motion to strike, Mem. 29; the reason for such abbreviated treatment is that Kremer cannot reasonably
19 be expected to make specific arguments about the basis for particular statements until Bosley
20 identifies the specific statements that are at issue in the case, and presents evidence that such
21 statements are false. Bosley does not need discovery to put such claims forward.

22 Because a SLAPP motion must ordinarily be filed within sixty days of the commencement of
23 the action, Kremer's motion raised a number of issues, such as the opinion and actual malice defenses,
24 recognizing that it was not yet possible to apply those defenses to the particular language on which
25 Bosley is suing; rather, it was anticipated that once, in response to the motion, Bosley provided the
26 specific language, the parties would be able to litigate whether some of the allegedly defamatory
27 statements should be stricken based on those two defenses.

28

1 Accordingly, Bosley should be allowed to take discovery about the application of the
2 fact/opinion distinction (if at all), and about the application of the actual malice standard, only with
3 respect to the particular statements that Bosley identifies as being the basis for this lawsuit. Bosley
4 should **first** be required to identify, verbatim, the specific statements in the web site that it alleges are
5 false statements of fact uttered with actual malice and causing damages. These allegations must, of
6 course, be made subject to Rule 11. Kremer should be required to respond to discovery only
7 pertaining to those statements. The Court either should require such identification by separate order,
8 or should adopt the revised wording in the attached discovery requests that would accomplish that
9 objective.

10 **C. Assuming That Discovery of Kremer's Intent About the Fact/Opinion Distinction**
11 **Is Proper, the Requests Addressed to That Issue Are Overbroad.**

12 The first area of potential discovery listed in the February 5 Order was as follows:

13 (1) information about the creation and publication of the "summaries of several
14 different investigations" appearing on Defendant's web site to determine whether
15 Defendant intended them to be taken as protectable opinions or non-protectable facts.

16 Kremer does not agree that this area is proper for discovery because the distinction between actionable
17 factual statements and non-actionable opinion does not depend in any respect on the "intent" of the
18 person making the statement. Bosley cites no law to support its contention that this issue depends on
19 the speaker's intent, Mem. 2-4, and in fact courts routinely decide the issue of fact versus opinion as
20 a pure question of law on a motion to dismiss under Rule 12(b)(6). *E.g., Cochran v. NYP Holdings*,
21 210 F.3d 1036, 1038 (9th Cir. 2000); *Dodds v. ABC*, 145 F.3d 1053, 1065-1068 (9th Cir. 1998);
22 *Gregory v. McDonnell-Douglas Corp.*, 17 Cal. 3d 596, 601, 552 P.2d 425, 428 (1976)(decided on
23 demurrer). Indeed, as Judge Shadur has explained, one reason why defamatory words must be pleaded
24 in haec verba is that the Court can then decide, on a motion to dismiss under Rule 12(b)(6), whether
25 the words in question represent fact or opinion. *Vantassell-Matin v. Nelson*, 741 F. Supp. 698, 707
26 (N.D. Ill.1990). Thus, although Kremer does not wish to reargue the issues that the Court may have
27 already decided, he respectfully submits that this is not a proper area for discovery at all.

28 But, if there is to be any discovery about this issue, the requests sought solely for this reason,
Document ¶¶ 1, 2 and 4, Interrogatories 1-2, and Deposition ¶¶ 1-5, are substantially overbroad. They

1 are phrased in the disjunctive, to require Kremer to testify and provide evidence at length about
2 everything pertaining to the creation and maintenance of the web sites, regardless of whether the
3 questions relate directly to Kremer's intent about whether particular statements were intended to be
4 taken as fact or opinion. Some of the interrogatories seek to identify every person who has contacted
5 Kremer about the web sites, supposedly to ascertain the "impressions" those individuals had about the
6 web sites, presumably to show whether they were reading facts or opinions. Such discovery has no
7 bearing on Kremer's intent; nor does Bosley cite any law showing that actual impressions of readers
8 are needed to decide the fact/law distinction. Moreover, discovery of communications from other
9 consumers who have seen Kremer's web site threatens First Amendment interests by requiring the
10 identification of persons who may have contacted Kremer in confidence about Bosley. In this regard,
11 courts commonly refuse to allow discovery into confidential informants unless all other means for
12 dismissing the lawsuit have been exhausted. The accompanying exhibits revise the wording of the
13 various discovery requests to limit the questions to the specific issue that justifies them. And, as
14 argued above, the questions are limited to the specific statements on the web site alleged to be
15 actionable.

16 **D. The Discovery Pertaining to Actual Malice Is Overbroad.**

17 The other two potential discovery areas identified in the February 5 order relate to whether the
18 allegedly defamatory statements were published with the requisite degree of fault, *i.e.*, actual malice:

19 (2) discovery germane to both direct and circumstantial evidence of fault such as
20 whether Kremer in fact relied on the "investigative and media reports" on which much
21 of the web sites' content is allegedly based, and if so to what extent, and (3) whether
22 Defendant published these statements with knowledge or reckless disregard of their
23 truth or falsity, regardless of whether Defendant relied on the alleged investigative and
24 media reports as he claims.

23 Both areas are legally relevant to the motion in that they relate to the issue of actual malice. To the
24 extent that discovery is appropriate on that issue with respect to certain statements on the web sites,
25 defendant agrees that some of the proposed discovery requests are fairly directed to these areas. In
26 other respects, however, they are substantially overbroad.

27 The most important aspect of overbreadth is that Bosley seeks to take discovery about
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1 Kremer's investigation concerning each and every statement on the web site, regardless of whether
2 the statements are allegedly defamatory, false, and factual. Bosley apparently acknowledges that not
3 every word on the web site is actionable; but without exception, its discovery requests seek
4 information about the basis for "the web sites" or "the content of the web sites" and similar phrases.
5 This discovery will place an enormous burden on Kremer. Moreover, insofar as the discovery seeks
6 information that Kremer may have obtained from confidential sources, the discovery will burden not
7 just Kremer but also the First Amendment rights of the sources. The courts in libel cases have been
8 scrupulous to avoid discovery of such sources unless truly essential to the disposition of case. *Shoen*
9 *v. Shoen*, 5 F.3d 1289, 1292-1298 (9th Cir. 1993); *Bruno v. Stillman*, 633 F.2d 583, 597 (1st Cir. 1980);
10 *Cervantes v. Time*, 464 F.2d 986, 993-994 (8th Cir. 1972); *Southwell v. Southern Poverty Law Center*,
11 949 F. Supp. 1303, 1311 (W.D. Mich. 1996). The discovery requests should be pared down so that
12 it is only the factual basis of specific statements alleged to be actionable, which Bosley should be
13 required to identify at the outset, that are subject to discovery.

14 One set of discovery requests is of questionable relevance to the issue of actual malice. Bosley
15 asks for information about "communications . . . between Kremer and Bosley" about the nature or
16 content of the web sites. Deposition ¶ 13, Document ¶ 10. There is no explanation of how this
17 material relates to the issue of malice.

18 **E. Discovery to Be Taken by Kremer.**

19 Defendant believes that his motions to dismiss and to strike can be decided without any
20 discovery. If, however, these motions are to be treated as motions for summary judgment, as Bosley
21 argues, Mem. 2, then it would be unfair for Bosley to be able to take wide-ranging discovery of
22 Kremer, and of other persons identified through that "initial" discovery, without Kremer also being
23 allowed to pursue discovery from Bosley. If this Court's order allowing discovery is upheld by Judge
24 Keep, then defendant should also be allowed to pursue discovery on issues relating to the pending
25 motions. With respect to the libel claims, those issues include whether the statements on the web site
26 are true or substantially true, what similar accusations have been made by other persons and what
27 efforts Bosley has made to counteract those accusations and the outcome of those efforts, whether
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1 Bosley has been so heavily criticized in other, unchallenged publicized reports that the web sites
2 cannot damage its reputation further, and whether the defamatory statements have caused Bosley any
3 damage as required for a libel claim in California. If the Court will permit discovery on the trademark
4 issues as well, defendant should be permitted to pursue discovery on the issues of likelihood of
5 confusion, whether Bosley's trademarks have the good reputation that it claims, such that a dilution
6 claim is tenable, whether the trademarks are famous as Bosley alleges, whether others have used
7 Bosley's marks and any efforts Bosley has made to counter any such use of their trademarks.

8 Defendant intends

9 to begin with interrogatories and requests to produce directed to Bosley followed by depositions of
10 Bosley and its executives and possibly subpoenas duces tecum and depositions of individuals
11 identified in the initial round of discovery to Bosley.

12 **REQUEST FOR STAY PENDING APPEAL**

13 Defendant has filed objections to the order permitting discovery to begin before the Court
14 issues a decision on his motion to dismiss the complaint under Rules 12(b)(1) and 12(b)(6) and to
15 strike the complaint under the California anti-SLAPP statute. The Court is requested to include in its
16 order allowing specified discovery a stay pending the outcome of those objections.

17 **BOSLEY'S VERBATIM RECORDING OF MEET AND CONFERS**

18 When the parties met to confer about the specific discovery to be allowed, Bosley's counsel
19 insisted, over objections of defense counsel, on recording a verbatim transcript of the discussion.
20 Defendant objected on the ground that, unlike an attorney's own notes of the discussion, such a
21 recording would have the tendency to chill negotiations, and had no valid purpose because statements
22 during a meet and confer are inadmissible under Rule 408. See attached correspondence.

23 In other contexts, the courts have ruled that one party to a negotiating session may not insist
24 on recording the session over the adversary's objections. *E.g., NLRB v. Pennsylvania Tel. Guild*, 799
25 F.2d 84, 87-89 (3d Cir. 1986). In twenty-five years of litigating in federal and state courts across the
26 country, undersigned counsel have never been confronted with an opposing counsel who tried to
27 transcribe or otherwise keep a verbatim record of a meet and confer; although we have found no cases
28

1 precisely on point, one decision rejected a party's demand that it be permitted to videotape a meet and
2 confer as "preposterous." *THK America v. NSK Co.*, 160 F.R.D. 100, 107 (N.D. Ill. 1994).

3 Given the short time allowed for the meet and confer before plaintiffs's brief was due,
4 defendant did not impose on the Court for an immediate ruling, but promised to seek relief in these
5 papers. Anticipating that the parties will continue to disagree about the propriety of this practice, the
6 Court is requested to rule that no party may impose the keeping of a verbatim transcript on any other
7 party.


8 CONCLUSION

9 The discovery permitted to Bosley should be limited as argued above and in the attached
10 modified discovery requests. Moreover, if Bosley is allowed to begin discovery, Kremer should also
11 be allowed to begin discovery as well. The discovery should be stayed pending objections, and
12 verbatim transcription of meet and confers should be barred without unanimous consent.

13 Respectfully submitted,

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Dated: February 20, 2002

EXHIBIT C

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BOSLEY MEDICAL INSTITUTE, *et al.*,

Plaintiffs,

v.

MICHAEL STEVEN KREMER,

Defendant.

) No. 01 CV 1752 JNK (AJB)

) District Judge Keep

) Magistrate Judge Battaglia

) **DEPOSITION CATEGORIES PROPOSED
BY PLAINTIFFS**

) **(with comments by defendant)**

DEPOSITION CATEGORIES
Definitions

1. "Defendant" or "Kremer" means Michael Steven Kremer, any corporation owned or controlled in whole or in part by Michael Steven Kremer, and his agents, representatives, employees and all other persons acting or purporting to act on behalf of Michael Steven Kremer.

2. "Bosley" means Bosley Medical Institute, Inc. and Bosley Medical Group, S.C., and their agents, representatives, employees and all other persons acting or purporting to act on their behalf, including Dr. Larry Lee Bosley.

15

1 3. "Web sites" mean the sites identified by and located at the Internet Protocol addresses
2 corresponding to the domain names "bosleymedical.com" and "bosleymedicalviolations.com".

3 4. "Person" includes any natural persons, firms, partnerships, corporations,
4 proprietorships, joint ventures, associations or any other organizations or entities.

5 5. "Document" means all documents and tangible things within the scope of Fed. R. Civ.
6 Pro. 34, including every original (and any copy of any original which differs in any way from the
7 original) of every writing or recording, whether handwritten, typed, drawn, sketched, printed or
8 recorded by any physical, mechanical, electronic or electrical means whatsoever to which Defendant
9 now has or has had access to in the past.

10 6. "Sources" mean "the numerous law enforcement investigations, media reports, web
11 site materials and newsgroup and discussion group materials" as described on page 28, lines 17 and
12 18 of Kremer's Motion to Dismiss and Strike Bosley's Complaint, and any other third party sources
13 of information, findings, materials or data on which Kremer allegedly relied in creating the web sites.

14 7. "Summaries" mean the "brief summary on the home page" of bosleymedical.com as
15 described in ¶27 of Defendant's Affidavit in support of its Motion to Dismiss and Strike the
16 Complaint, the "summary of the several different investigations of Bosley" on the
17 bosleymedicalviolations.com site as also described in ¶27 of Defendant's Affidavit in support of its
18 Motion to Dismiss and Strike the Complaint, and any other portions of the web sites that are anything
19 other than verbatim reproductions of content created and/or published by third party sources.

20 8. As used herein, the word "identify" when used in reference to a:

21 a) natural person means to state his or her full name and present or last known
22 address and his or her present or last known position or business affiliation;

23 b) business, partnership, association or other legal entity means to state its full
24 name and the address of its principal office or place of business;

25 c) affiliation, sponsorship or endorsement means, if a natural person is involved,
26 to state his or her full name, present or last known address and his or her present or last known
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1 position or business affiliation, or, if a business, partnership, association or other legal entity is
2 involved, to state its full name and the address of its principal office or place of business.

3 9. "Content of the web sites" refers to all written and graphical means of communication
4 published on the web sites, including text, reproductions of materials prepared by a third party source,
5 advertisements, images and hyperlinks.

6 10. With respect to any information which Defendant deems privileged, provide a
7 statement setting forth the specific ground(s) on which the claim of privilege rests.

8 11. "Defamatory statements" means those statements on the web sites whose specific
9 language has been alleged to be among the defamatory statements over which plaintiffs are suing
10 the defendant.

11 NOTE: the foregoing definition will be used throughout this response to limit
12 the scope of the discovery sought to the specific language that plaintiffs are
13 alleging to constitute actionable defamation

14

15

Categories

16 **TOPIC 1.** ~~The creation and publication of the summaries appearing on the web sites to~~
17 ~~determine~~ Whether Kremer intended each of the defamatory statements to be taken as protectible
18 opinions or non-protectible facts.

19 The deleted language would expand the discovery to matters irrelevant to the
20 one issue that is said to justify this document request, the fact-opinion
21 distinction. Moreover, deposition questions in this area are likely to ask
22 Kremer to testify to legal conclusions. Assuming that Kremer's "intent" has
23 any relevance to this legal issue, the added language is needed to limit the
24 scope of the discovery to the particular parts of the web site alleged by
25 plaintiffs as the basis for the defamation counts in the complaint.

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1 **TOPIC 2.** ~~The reason and purpose that Kremer created the web sites, including~~ Whether
2 Kremer intended ~~the content of the web sites~~ each defamatory statement to be taken literally by the
3 expected viewers of the web sites.

4 The deleted language would expand the discovery to matters irrelevant to the
5 one issue that is said to justify this document request, the fact-opinion
6 distinction. Assuming that Kremer's "intent" has any relevance to this legal
7 issue, the added language is needed to limit the scope of the discovery to the
8 particular parts of the web site alleged by plaintiffs as the basis for the
9 defamation counts in the complaint.

10 **TOPIC 3.** ~~The portions of the web sites that~~ defamatory statements that Kremer intended
11 to be "figurative" opinion language, if any, and those which ~~portions that~~ Kremer intended to
12 comprise statements relating to matters of fact.

13 Assuming that Kremer's "intent" has any relevance to this legal issue, the
14 substituted language is needed to limit the scope of the discovery to the
15 particular parts of the web site alleged by plaintiffs as the basis for the
16 defamation counts in the complaint. Moreover, deposition questions in this
17 area are likely to ask Kremer to testify to legal conclusions.

18 **TOPIC 4.** The preparation of and revisions to the ~~web sites~~ defamatory statements,
19 including Kremer's efforts to have them ~~summaries and "statements relating to matters of fact"~~
20 ~~that appear on the web sites~~ conform to the sources on which they are allegedly based.

21 The added language is needed to limit the scope of the discovery to the
22 particular parts of the web site alleged by plaintiffs as the basis for the
23 defamation counts in the complaint.

24 **TOPIC 5.** Feedback or comments Kremer has received from visitors to the web sites
25 regarding the content of the ~~web sites~~ defamatory statements including those that reflect the
26 impression the web sites created on them.

27

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1 This topic is not relevant to the issue that allegedly supports it, and threatens
2 to impinge on the First Amendment rights of persons who have contacted
3 Kremer about Bosley on the assumption that they could provide him with
4 information in confidence. Replacing the deleted words with the suggested
5 addition would confine the discovery to the statements that are the subject of
6 this litigation.

7 **TOPIC 6.** Whether Kremer relied on allegedly factual public sources of information in
8 preparing the content of the ~~web sites~~ defamatory statements, the public sources that were relied
9 upon, and the extent to which they were relied upon.

10 This topic threatens to impinge on the First Amendment rights of persons who
11 have contacted Kremer about Bosley on the assumption that they could
12 provide him with information in confidence. (Even if Bosley were entitled to
13 such information in preparation for trial, there is no need for it to respond to
14 Kremer's SLAPP motion, which will be based only on public sources).
15 Inserting the word "public" would avoid that problem. Replacing the deleted
16 words with the suggested addition would confine the discovery to the
17 statements that are the subject of this litigation.

18 **TOPIC 7.** Whether and the means by which Kremer investigated the truth or falsity, or was
19 otherwise made aware of the truth or falsity, of the public sources relied upon in preparing ~~the~~
20 ~~content of the web sites~~ defamatory statements.

21 This topic threatens to impinge on the First Amendment rights of persons who
22 have contacted Kremer about Bosley on the assumption that they could
23 provide him with information in confidence. (Even if Bosley were entitled to
24 such information in preparation for trial, there is no need for it to respond to
25 Kremer's SLAPP motion, which will be based only on public sources).
26 Inserting the word "public" would avoid that problem. Replacing the deleted
27
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1 words with the suggested addition would confine the discovery to the
2 statements that are the subject of this litigation.

3 **TOPIC 8.** Kremer's belief or knowledge regarding the truth or falsity of the public sources on
4 which Kremer relied in preparing the ~~content of the web sites~~ defamatory statements.

5 This topic threatens to impinge on the First Amendment rights of persons who
6 have contacted Kremer about Bosley on the assumption that they could
7 provide him with information in confidence. (Even if Bosley were entitled to
8 such information in preparation for trial, there is no need for it to respond to
9 Kremer's SLAPP motion, which will be based only on public sources).

10 Inserting the word "public" would avoid that problem. Replacing the deleted
11 words with the suggested addition would confine the discovery to the
12 statements that are the subject of this litigation.

13 **TOPIC 9.** Research or other efforts made by Kremer to investigate the accuracy and the
14 factual bases of the public sources on which he relied in preparing the ~~content of the web sites~~
15 defamatory statements.

16 This topic threatens to impinge on the First Amendment rights of persons who
17 have contacted Kremer about Bosley on the assumption that they could
18 provide him with information in confidence. (Even if Bosley were entitled to
19 such information in preparation for trial, there is no need for it to respond to
20 Kremer's SLAPP motion, which will be based only on public sources).

21 Inserting the word "public" would avoid that problem. Replacing the deleted
22 words with the suggested addition would confine the discovery to the
23 statements that are the subject of this litigation.

24 **TOPIC 10.** Whether Kremer published ~~content on the web sites~~ defamatory statements with
25 knowledge or reckless disregard of their truth or falsity.

26 Replacing the deleted words with the suggested addition would confine the
27 discovery to the statements that are the subject of this litigation.

28

1 **TOPIC 16.** Any business, partnership or association relating to any aspect of the hair business
 2 with which Kremer is involved, and/or any affiliation, sponsorship or endorsement acquired by
 3 Kremer with any person associated with any aspect of the hair business.

4 This topic is not relevant to the libel issues at which the anti-SLAPP motion is
 5 directed. Plaintiffs justify this request only based on their desire to take
 6 discovery to decide whether to allege that their trademarks are "used in
 7 commerce."

8 **TOPIC 17.** Kremer's relationship with any person ~~involved with~~ who owns the third party
 9 web sites to which the web sites presently link and have linked, from the date of the web sites'
 10 creation to the present, including the links entitled "alt.baldspot", "hair loss help", "the bald truth"
 11 and "problems with hair transplantation."

12 This document request is not relevant to the libel issues at which the anti-
 13 SLAPP motion is directed. Plaintiffs justify this request only based on their
 14 desire to take discovery to decide whether to allege that their trademarks are
 15 "used in commerce." This request is supposedly relevant to the trademark
 16 issues on the theory that it will help establish whether Kremer has any
 17 commercial interests in the hair business. However, there is no explanation
 18 for the proposition that any connection to persons who, in turn, are involved
 19 with other web sites that discuss issues in the hair industry and complaints
 20 about Bosley and other "hair restoration" service providers is relevant to the
 21 issue of whether Kremer has made a commercial use of the Bosley
 22 trademarks. Moreover, discovery into "relationships" with any person who is
 23 "involved with" another web site, which might include persons who have
 24 simply posted comments on a message board, threatens to invade the right of
 25 association protected by the First Amendment without any compelling
 26 justification. Even with the suggested change in language, however, the

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1 document request's relevance has not been explained and it threatens First
2 Amendment rights.

3 **TOPIC 18.** The persons that have assisted, contributed or provided any input in creating,
4 hosting, maintaining and updating the web sites, and the nature of their assistance, contribution
5 and/or input.

6 This document request is not relevant to the libel issues at which the anti-
7 SLAPP motion is directed. Plaintiffs justify this request only based on their
8 desire to take discovery to decide whether to allege that their trademarks are
9 "used in commerce." To the extent that "providing input" might be
10 interpreted as requiring the identification of persons who have provided
11 information to Kremer on the assumption that they were communicating in
12 confidence, there is no basis for allowing that discovery at this juncture of the
13 case.

14 **TOPIC 19.** ~~The costs and other expenses associated with creating, hosting, maintaining and~~
15 ~~updating the web sites, from the date of their creation to the present, and the means by which~~
16 Kremer has financed and continues to finance the web sites.

17 This topic is not relevant to the libel issues at which the anti-SLAPP motion is
18 directed. Plaintiffs justify this topic only based on their desire to take
19 discovery to decide whether to allege that their trademarks are "used in
20 commerce." Even if the Court decided to allow discovery for this reason,
21 however, there remains no basis for discovery into how much the web sites
22 have cost; the claimed relevance is to identify outside sources of funding
23 (which do not exist), and the discovery should be limited to that subject.
24 Indeed, that subject is adequately covered by the next proposed topic.

25 **TOPIC 20.** The persons that have assisted or contributed to, or are otherwise involved in,
26 Kremer's efforts to finance the costs and expenses associated with the web sites.

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1 This topic is not relevant to the libel issues at which the anti-SLAPP motion is
2 directed. Plaintiffs justify this request only based on their desire to take
3 discovery to decide whether to allege that their trademarks are "used in
4 commerce."

5 **TOPIC 21.** Any business, partnership or association with which Kremer is involved, and/or
6 any affiliation, sponsorship or endorsement that has developed, in connection with creating,
7 hosting, maintaining and/or updating the web sites.

8 This document request is not relevant to the libel issues at which the anti-
9 SLAPP motion is directed. Plaintiffs justify this request only based on their
10 desire to take discovery to decide whether to allege that their trademarks are
11 "used in commerce."

12 **TOPIC 22.** Any advertising that appears on or in connection with the web sites.

13 This topic is not relevant to the libel issues at which the anti-SLAPP motion is
14 directed. Plaintiffs justify this request only based on their desire to take
15 discovery to decide whether to allege that their trademarks are "used in
16 commerce."

17 **TOPIC 23.** Any income or other benefit received in connection with the creation and/or
18 maintenance of the web sites.

19 This topic is not relevant to the libel issues at which the anti-SLAPP motion is
20 directed. Plaintiffs justify this only based on their desire to take discovery to
21 decide whether to allege that their trademarks are "used in commerce."

22 **TOPIC 24.** Whether Kremer registered the domain names and maintains the web sites with
23 motivation or intent to confuse or divert Bosley's customers.

24 This topic is not relevant to the libel issues at which the anti-SLAPP motion is
25 directed. Plaintiffs justify this topic only based on their desire to take
26 discovery pertaining to the "likelihood of confusion" issue. However, the
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1 motion to dismiss is based on the proposition that the web sites are so non-
2 confusing that there is no likelihood of confusion as a matter of law.

3 **TOPIC 25.** The process that Kremer engaged in to select the domain names to identify the
4 web sites.

5 This topic is not relevant to the libel issues at which the anti-SLAPP motion is
6 directed. Plaintiffs justify this topic only based on their desire to take
7 discovery pertaining to the "likelihood of confusion" issue. However, the
8 motion to dismiss is based on the proposition that the web sites are so non-
9 confusing that there is no likelihood of confusion as a matter of law.

10 **TOPIC 26.** The steps Kremer has taken in designing the web sites to minimize confusion
11 among accidental visitors to the sites as to the source of the sites or the affiliation with or
12 sponsorship of the sites by Bosley.

13 This topic is not relevant to the libel issues at which the anti-SLAPP motion is
14 directed. Plaintiffs justify this topic only based on their desire to take
15 discovery pertaining to the "likelihood of confusion" issue. However, the
16 motion to dismiss is based on the proposition that the web sites themselves
17 are so non-confusing that there is no likelihood of confusion as a matter of
18 law. The HTML code found on the web sites, which is described in the
19 affidavit, speaks for itself.

20 **TOPIC 27.** Feedback or comments from visitors to the web sites that reflect confusion on the
21 part of these persons as to the source of the web sites and/or their affiliation with or sponsorship
22 by Bosley.

23 This document request is not relevant to the libel issues at which the anti-
24 SLAPP motion is directed. Plaintiffs justify this request only based on their
25 desire to take discovery pertaining to the "likelihood of confusion" issue.
26 However, the motion to dismiss is based on the proposition that the web sites
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1 and the only purpose of Kremer's affidavit was to show the Court how to
2 review that code on the documents themselves.

3 **TOPIC 30.** Kremer' assertion that the metatags and initial text of the pages of the web sites
4 are what most search engines show when a search for Bosley or Bosley Medical is conducted.
5 This topic is not relevant to the libel issues at which the anti-SLAPP motion is
6 directed. Plaintiffs justify this topic only based on their desire to take
7 discovery pertaining to the "likelihood of confusion" issue. However, the
8 motion to dismiss is based on the proposition that the web sites are so non-
9 confusing that there is no likelihood of confusion as a matter of law.
10 Moreover, the meta tags can be viewed in the HTML code for the web site,
11 and the only purpose of Kremer's affidavit was to show the Court how to
12 review that code on the documents themselves. The relationship between
13 meta tags and search engines is well established in the public record.

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8 Attorneys for Michael Kremer

9 UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

11 BOSLEY MEDICAL INSTITUTE, *et al.*,) No. 01 CV 1752 JNK (AJB)
12 Plaintiffs,) District Judge Keep
13 v.) Magistrate Judge Battaglia
14 MICHAEL STEVEN KREMER,) PROOF OF SERVICE BY MAIL
15 Defendant.)
16

17 I, Linda F. Anderson, declare as follows:

18 I am employed with the law firm of LUCE, FORWARD, HAMILTON & SCRIPPS LLP, whose
19 address is 600 West Broadway, Suite 2600, San Diego, California 92101-3372. I am over the age of
eighteen years, and am not a party to this action.

20 On November 13, 2002, I caused to be served the following:

- 21 1. NOTICE OF DEFENDANT'S MOTION FOR PROTECTIVE ORDER BARRING
22 DEPOSITION QUESTIONS ABOUT STATEMENTS WHOSE SPECIFIC
23 LANGUAGE HAS NOT BEEN IDENTIFIED AS ALLEGEDLY DEFAMATORY;
24 2. DEFENDANT'S EXPARTE MOTION TO EXPEDITE BRIEFING OF MOTION FOR
25 PROTECTIVE ORDER BARRING DEPOSITION QUESTIONS ABOUT
26 STATEMENTS WHOSE SPECIFIC LANGUAGE HAS NOT BEEN IDENTIFIED AS
27 ALLEGEDLY DEFAMATORY; AND
28 3. MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER
BARRING DEPOSITION QUESTIONS ABOUT STATEMENTS WHOSE SPECIFIC
LANGUAGE HAS NOT BEEN IDENTIFIED AS ALLEGEDLY DEFAMATORY

on the interested parties in this action by:

U. S. MAIL: I placed a copy in a separate envelope, with postage fully prepaid, for each
address named on the attached service list for collection and mailing on the below

1 PAUL ALAN LEVY, pro hac vice
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2 Public Citizen Litigation Group
1600 20th Street, NW
3 Washington, DC 20009
(202) 588-1000

4 CHARLES A. BIRD, State Bar No. 056566
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6 San Diego, California 92101-3391
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7 Fax No. (619) 232-8311

8 Attorneys for Michael Kremer

9 UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

10 BOSLEY MEDICAL INSTITUTE, *et al.*,) No. 01 CV 1752 JNK (AJB)
11)
12 Plaintiffs,) District Judge Keep
13) Magistrate Judge Battaglia
14 v.)
15) DECLARATION OF PERSONAL SERVICE
MICHAEL STEVEN KREMER,)
16)
17 Defendant.)

17 I declare as follows: I am employed in the City and County of San Diego by CalExpress
18 Messenger Service; I am over the age of eighteen years and not a party to this action. My business
19 address is 1302 Kettner Blvd., San Diego, California 92101. On November 13, 2002, I hand
20 delivered/personally served the following:

- 21 1. NOTICE OF DEFENDANT'S MOTION FOR PROTECTIVE ORDER BARRING
22 DEPOSITION QUESTIONS ABOUT STATEMENTS WHOSE SPECIFIC
23 LANGUAGE HAS NOT BEEN IDENTIFIED AS ALLEGEDLY DEFAMATORY;
- 24 2. DEFENDANT'S EXPARTE MOTION TO EXPEDITE BRIEFING OF MOTION
25 FOR PROTECTIVE ORDER BARRING DEPOSITION QUESTIONS ABOUT
26 STATEMENTS WHOSE SPECIFIC LANGUAGE HAS NOT BEEN IDENTIFIED
27 AS ALLEGEDLY DEFAMATORY; AND
- 28 3. MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER
BARRING DEPOSITION QUESTIONS ABOUT STATEMENTS WHOSE
SPECIFIC LANGUAGE HAS NOT BEEN IDENTIFIED AS ALLEGEDLY
DEFAMATORY

by hand delivering a true copy thereof on the interested parties, in this action as follows:

