NO. C050766
(Superior Court of Sacramento)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

GEORGETTE GILBERT,

Plaintiff, Cross-Defendant and Appellant,

vs.

JONATHAN SYKES,

Defendant, Cross-Complainant and Respondent.

Appeal From the Superior Court of the State of California
County of Sacramento, No. 04AS02094
The Honorable Thomas Cecil, Judge

APPELLANT'S REPLY BREIF

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STATUTES

I. INTRODUCTION

Georgette Gilbert ("Gilbert") created an Internet website describing her experiences and opinions regarding elective plastic surgery. The website mentions Dr. Jonathan Sykes ("Sykes") who treated Gilbert. For this reason, Sykes and the Regents of the University of California ("UC Regents") sued her for libel and related claims.

Gilbert moved to strike the cross-complaint pursuant to the anti-SLAPP statute. The trial court found that the anti-SLAPP statute applied to the cross-complaint, because Gilbert's statements on the website relate to a matter of public interest. The trial court granted Gilbert's motion to strike as to the UC Regents' claims.[1]

The trial court erred, however, in denying Gilbert's motion as to Sykes. First, Sykes' argument that the anti-SLAPP statute does not protect Gilbert's website because it does not relate to a matter of public interest is incorrect. Gilbert has offered undisputed evidence establishing that elective plastic surgery is a matter of widespread public interest, that Sykes is in the public eye, and that his conduct can affect a large number of people.

Second, Sykes' cross-complaint fails to identify the substance of the alleged defamatory falsehoods, and therefore cannot meet the heightened pleading standard that protects the exercise of First Amendment rights or

[1] The UC Regents did not appeal the dismissal of their claims, and so with respect to them the judgment is now final.

the requirements of California law. Nor did Sykes' cross-complaint allege that Gilbert acted with actual malice. His claims are therefore insufficient as a matter of law.

Third, Sykes voluntarily and continuously keeps himself at the forefront of the public debate over elective plastic surgery. He is therefore a limited purpose public figure and must plead and prove actual malice to prevail on his claims. Gilbert's website is dedicated to weighing the risks and benefits of elective plastic surgery. Sykes' argument that Gilbert's website is dedicated to the specific incidents between Sykes and Gilbert misconstrues the website's nature by taking statements out of context and stretching inferences beyond reason. Moreover, if successful, Sykes' argument that the website cannot implicate him in addressing the public debate regarding plastic surgery would expose to liability those who are the first to expose the conduct of limited purpose public figures, without any requirement that the public figure prove actual malice. Sykes' effort to establish a novel limitation on the protection afforded by the First Amendment does not support his claims.

Fourth, Sykes has not presented evidence that establishes a probability that he will prevail on the merits of his claims. He has offered no evidence, admissible or otherwise, establishing that Gilbert's website contains any statement that is both false and defamatory. The statements on Gilbert's website are either substantially true or are constitutionally

protected opinions.

Finally, Sykes' subsidiary claims do not have any independent basis to support them apart from his libel claims. Even if they did, he has failed to adequately plead or prove that Gilbert's website contains any actionable statements, so his economic and emotional damage claims must likewise fail.

II. STANDARD OF REVIEW

The parties agree that all of the issues raised on this appeal are reviewed de novo. (Respondent's Brief ("RB") at pp. 8-9.) However, Sykes repeatedly refers to the trial court's conclusions as if they were binding on this court. (See, e.g., RB pp. 19, 24, 44, 59, 60-61.) Because this Court's review is de novo, the trial court's ruling and analysis are not binding on this court.

III. THE ANTI-SLAPP STATUTE APPLIES TO SYKES' CLAIMS, ALL OF WHICH ARISE FROM ACTS IN FURTHERANCE OF GILBERT'S RIGHT TO FREE SPEECH

A. Gilbert's Website Concerns a Matter of Public Interest

Even while conceding the statements at issue were made in a public forum, Sykes asserts that the anti-SLAPP statute is not applicable to his claims. (RB pp. 11-12.) Sykes ignores the undisputed evidence that plastic surgery is a matter of public concern. (RB pp. 10-15.) His assertion also contradicts the mandate that the anti-SLAPP statute be construed broadly. (*Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 808

(*Seelig*); *Damon v. Ocean Hills Journalism Club* (2000) 102 Cal.App.4th 468, 476 *(Damon)*.) The anti-SLAPP statute applies to Sykes' claims, as the trial court correctly found.

Section 425.16 applies to protect Gilbert's website because it is a "written statement made in a public place in connection with an issue of public interest." (§ 425.16, subd. (e)(3).)[2] As Sykes concedes, Gilbert's website is posted in the ultimate public forum, the Internet. (1 AA pp. 122-131; RB p. 11; see also *Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 895-897 (*Wilbanks*).) Furthermore, the entire website is intimately connected with a matter of public interest: the topic of plastic surgery.

A matter of 'public interest' within the anti-SLAPP context has been broadly construed to include matters concerning (1) a person or entity in the public eye; (2) conduct that could affect large numbers of people beyond the direct participants; or (3) a topic of widespread interest. (*Wilbanks*, *supra*, 121 Cal. App. 4th at p. 898; *Fontani v. Wells Fargo Investments,*

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[2] Gilbert's website also falls under § 425.16, subd. (e)(4), and the examples set forth in the anti-SLAPP statute are not exclusive (§ 425.16, subd. (3)(e) [".. . . in connection with a public issue *includes*:"][emphasis added]; see also *Smyers v. Workers' Compensation Appeals Board* (1084) 157 Cal.App.3d 36, 41-42 ["the word 'includes' in a statute is usually a term of enlargement and not limitation"]; *Briggs, supra*, 19 Cal.4th at pp. 1116-1117 ["The statute does not limit its application to certain types of activity"] [emphasis in original].) Therefore, Sykes' claims, which are claims based on Gilbert's website, are subject to the anti-SLAPP statute because they arise from conduct *prima facie* protected by the First Amendment and California law.

LLC (2005) 129 Cal.App.4th 719, 732.) Gilbert's website meets all of these criteria.

First, Sykes is a prominent physician who has consistently exploited his position to offer his opinions on plastic surgery in numerous publications and broadcasts. (See 1 AA pp. 155-156, 162-164, 171-175, 177-178, 180-181, 183, 194.) His own advertising boasts of treating over 10,000 patients and promotes his free public seminars on the latest procedures in plastic surgery. (1 AA p. 194.) Sykes is in the public eye. Second, the website provides information that affects many people – members of the public investigating the risks and benefits of plastic surgery, and Sykes' past, present, or future patients. (See, e.g., *Damon*, *supra*, 85 Cal.App.4th at p. 479 [finding a public issue where approximately 3,000 people's interests were implicated].) Finally, the website provides relevant information for people considering plastic surgery. (See *Magnussen v. New York Times Co.* (Okla., 2004) 98 P.3d 1070, 1075 [finding information about local plastic surgeons a matter of public interest] (*Magnussen*).)

B. Sykes Urges the Court to Apply an Incorrect Legal Standard

Rather than attempt to prove that Gilbert's website does not contribute to the debate on plastic surgery, Sykes complains that Gilbert made "no showing in her discussion that *the specific items of conduct*

underlying Dr. Sykes' action are properly considered matters of public interest." (RB p. 12.) The law requires no such showing. "[W]hether . . . speech addresses a matter of public concern must be determined by [the expression's] content, form and context . . . as revealed by the whole record." (*Dun & Bradstreet v. Greenmoss Builders* (1985) 472 U.S. 749, 761; *Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 207.) The entire publication must be evaluated to determine whether it addresses a matter of public interest or concern. (See, e.g., *Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146, 1160-1162 (*Annette F.*); *Sipple v. Foundation for National Progress* (1999) 71 Cal.App.4th 226, 238-239 (*Sipple*).) The onus is not on Gilbert to prove a public interest in the particular statements that offend Sykes. Instead, the anti-SLAPP statute applies to Gilbert's website if, as a whole, it relates to a matter of public interest.

Even if the analysis focused on the few statements relating to Sykes' conduct in isolation from the rest of the website, Gilbert's statements would still address a matter of public concern. Gilbert offered unrefuted evidence that her website addresses a topic of public interest, including that approximately 9 million people underwent plastic surgery in 2004, and that plastic surgery is the focus of extensive media attention. (Appellant's Opening Brief ("AOB") at p. 13.) Courts have held that plastic surgery is a matter of public interest. (See, e.g., *Magnussen*, 98 P.3d 1070, 1075 ["[P]ublic health is clearly a matter of public consonance. Furthermore, the

availability and skills of [plastic] surgeons constitutes matters relating to a community's public health."]; cf. *Huntington Life Sciences, Inc. v. Stop Huntington Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1246-1247 [finding support for holding that animal testing is a topic of widespread public interest under the anti-SLAPP motion in a New York case that held the same].) Sykes offered no evidence negating the public interest nature of plastic surgery.

Furthermore, Sykes was and is constantly in the public eye, contributing to the public discussion and debate relating to plastic surgery. Sykes is a prominent physician, and the director of Facial Plastic and Reconstructive Surgery at UC Davis. Indeed, Sykes is a regular participant in the public debate, regularly making media appearances and publishing articles, offering advice, and explaining the risks and benefits of plastic surgery procedures. (1 AA pp. 155-156, 162-164, 177-185.) Sykes promotes himself through media advertising (1 AA pp. 187-203), including a full page advertisement in Sacramento Magazine's "Top Doctors" issue. (1 AA p. 194.) He conducts free, public seminars for prospective patients, discussing "the latest procedures in facial plastic surgery." (1 AA p. 194.)

As noted above, Sykes' conduct has the potential to affect large numbers of people other than himself and Gilbert. It is of concern to his 10,000-plus patients (as of 2003), to prospective patients, and to the public in weighing the risks and benefits of plastic surgery. If procedures

performed even by such prominent practitioners as Sykes can result in outcomes such as Gilbert's, there is even greater reason to exercise caution before electing to have plastic surgery.

C. Sykes Misstates Legal Authority

Sykes relies heavily on cases that he miscites. For example, Sykes asserts that "it is not enough that the statement refers to a subject of widespread interest." (RB pp. 11-12 [citing *Wilbanks*, *supra*, 121 Cal.App.4th at p. 900].) Sykes' contention is wrong. The anti-SLAPP statute requires only that statements be made "in connection with" an issue of public interest. (Civ. Pro. Code § 425.16, subd. (e)(3), (4).) Broadly construed, as it must be, the statute protects any statement that pertains to a topic of widespread public interest. Gilbert's website meets this standard. No more is required.

Wilbanks confirms that Gilbert's website is protected by the anti-SLAPP statute. Right after the language Sykes cites, *Wilbanks* states that statements are protected by the anti-SLAPP statute if they "in some manner . . . contribute to the public debate." (*Wilbanks*, *supra*, 121 Cal.App.4th at p. 897.) Gilbert's website contributes to the public debate surrounding plastic surgery in at least two fundamental ways.

First, Gilbert's website provides general information about selecting a plastic surgeon, identifies particular concerns that patients should have in mind, and offers insight into Gilbert's own decision-making process. (1

AA pp. 122-131.) Sykes' own media appearances confirm that these are issues of public concern. In them he addresses whether a person is ready for elective plastic surgery. (1 AA p. 155 ["[patients] may not be ready for surgery" so they turn to other alternatives], 1 AA p. 162 ["Thinking about having cosmetic surgery? You're not alone."].) Although Sykes treats only his contributions to the public debate on plastic surgery as worthwhile, the experiences and perspectives of patients — such as Gilbert — are equally important.

Second, Gilbert's website provides a warning regarding Sykes' services. In *Wilbanks*, the statements at issue provided consumer information, generally, and also a "warning not to use plaintiffs' services." (*Wilbanks*, *supra*, 121 Cal.App.4th at p. 900.) The court therefore found that the statements contributed to public debate on a topic of widespread public interest, and were, thus, "directly connected to an issue of public concern." (*Ibid.*) This kind of speech is a legitimate contribution to the public debate, even if it is only tangential to the public interest. (See *id.* at pp. 898-901.) The business practices of a particular business may not constitute a public issue. (*Id.* at pp. 898-99.) General information about the industry in which the particular entity operates constitutes a matter of public interest, and a warning about using a particular provider's services constitutes a contribution to the debate related to the public interest. (*Id.* at p. 900, fn.6.) Gilbert's website is an exercise of free speech, offering

balanced information about an industry. (1 AA p. 122.) The relevant industry is elective plastic surgery, an industry of significant public interest. (1 AA p. 204.) Insofar as Sykes is implicated, the website does so in connection with the industry of elective plastic surgery and provides a warning about his services. (*Wilbanks*, *supra*, at p. 900-901.)

Thus, Gilbert's website contributes to the debate surrounding a matter of public interest and, therefore, is a statement "in connection with a public issue." (§ 425.16, subd. (b)(1).) In addition, Sykes does not and cannot dispute that the statements on Gilbert's website regarding him concern a person in the public eye. Similarly, as explained above, they address conduct with ramifications for a significant number of people — literally thousands of past and prospective patients. The anti-SLAPP statute applies to Sykes' claims.

IV. SYKES' CROSS-COMPLAINT WAS NOT LEGALLY SUFFICIENT, SO HE CANNOT PREVAIL ON ANY OF HIS CLAIMS

A. Sykes' Claims Fail Under the First Amendment and California Law

Section 426.16 requires the court to evaluate whether an anti-SLAPP plaintiff has established a probability of prevailing. "In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) Here, Sykes' cross-complaint is legally

insufficient. It asserts claims based on speech that is *prima facie* protected by the First Amendment in a way that is impermissibly vague and conclusory.

Sykes argues that his cross-complaint need not specifically state his claim as long as his evidentiary submissions provide the missing information. (RB pp. 16-18.) This is not the law. To survive an anti-SLAPP motion, pleadings must be "***both*** legally sufficient and supported by a sufficient *prima facie* showing of facts" to demonstrate a probability of prevailing. (*Wilson v. Parker, Covert, & Chidester*, (2002) 28 Cal. 4th 811, 821 (*Wilson*); *College Hospital v. Superior Court of Orange County* (1994) 8 Cal.4th 704, 716-717 (*College Hospital*); see also *Vogel v. Felice* (2005), 127 Cal.App.4th 1006, 1017 (*Vogel*); *Tuchscher Development Enterprises v. San Diego Unified Port District* (2003) 106 Cal.App.4th 1219, 1235 (*Tuchscher*).)

Sykes cannot rely on his counsel's arguments or declarations to cure his defective cross-complaint – it must stand "as it is."[3] (*Premier Medical*

[3] The trial court's order refers to the Baxter and Hamilton declarations. Gilbert objected in writing and orally to both (the Baxter declaration in whole, the Hamilton declaration in part). Despite Gilbert's objections and her later, express request for a ruling on her objections, the trial court declined to rule. [2 AA pp. 324-326; Respondent's Appendix, p. 15.] The trial court erred in failing to rule on the objections. (*City of Long Beach v. Farmers and Merchants Bank of Long Beach* (2000) 81 Cal.App.4th 780, 784 ["Trial courts have a duty to rule on evidentiary objections."]; see also *Church of Scientology, supra*, at p. 656-657 [ruling on evidentiary objections].) This court can rule on the objections as a matter of law, it

Management System v. California Insurance Guarantee (2006) 136 Cal.App.4th 464, 476 (*Premier Medical*); *Berger v. California Insurance Guarantee Association* (2005) 128 Cal.App.4th 989, 1006 (*Berger*).) Sykes offers no authority supporting his argument that a post-filing clarification of his cross-complaint is sufficient to avoid Gilbert's anti-SLAPP motion. Sykes' attempt to distinguish *Berger* is unavailing. (RB n. 10). The pleading standard for an anti-SLAPP motion is more strenuous than the standard for a demurrer. (*Premium Medical*, *supra*, 136 Cal.App.4th at p. 476 ["If we were reviewing a ruling on a demurrer, the rules of liberal construction might suggest that plaintiffs be allowed to amend their complaint to allege the claims regarding the impact of defendants' conspiracy on third-party settlement payments. On review of an anti-SLAPP motion to strike however, the standard is akin to that for summary judgment or judgment on the pleadings. ***We must take the complaint as it is.***"] [emphasis added].) In addition, he failed to provide citations for his argument that *Wilson*, *College Hospital*, or *Tuchscher* in any way lower the standard for pleading a libel claim. (*Wilson supra*, 28 Cal. 4th at p. 821; *College Hospital*, *supra*, 8 Cal.4th at pp. 716-717; *Tuchscher*, *supra*, 106 Cal.App.4th at p. 1235. They do not.

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should do so, and disregard Plaintiff's any of Sykes' evidence the court finds improper. (*Id.* at 785 [holding that objections which are not ruled on may be preserved for appellate review].)

Even if it met the requirements of California law, which it does not, Sykes' cross-complaint is not sufficiently specific to meet the requirements of the First Amendment. *Kottle v. Northwest Kidney Centers* (9th Cir. 1998) 146 F.3d 1065, 1063 (*Kottle*) [employing "a heightened pleading standard" in order to avoid any chilling effect on "the exercise of First Amendment rights"]); *Barry v. Time, Inc.* (N.D.Cal. 1984) 584 F.Supp. 1110 (*Barry*) [holding that *Time Inc. v. Hill* (1967) 385 U.S. 374, 387-391; *New York Times Co. v. Sullivan* (1964); and *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers* (9th Cir. 1977) 542 F.2d 1076 required dismissal of complaint for failure to plead actual malice with sufficient particularity].)

Sykes incorrectly disregards the "'general rule that the words constituting an alleged libel must be specifically identified, in not pleaded verbatim, in the complaint.'" (*Vogel*, *supra*, 127 Cal.App.4th at p. 1017 n.3 [quoting *Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1612, fn. 5 (*Kahn*)]; *Dowling v. Zimmerman* (2001) 103 Cal.App.4th 1400, 1421-1422 (*Dowling*). *Vogel* and the continuous line of cases preceding it require the plaintiff to specifically identify the allegedly libelous statements in the complaint. *Vogel*, at p. 1017 n.3. Indeed, "[e]ven under liberal federal pleading standards, 'general allegations of the defamatory statement' which do not identify the substance of what was said are insufficient." (*Jacobsen v. Schwarzenegger* (C.D. Cal. 2004) 357 F.Supp.2d 1198, 1216 (*Jacobsen*)

[quoting *Silicon Knights, Inc. v. Crystal Dynamics, Inc.* (N.D.Cal. 1997) 983 F.Supp. 1303, 1313-1314 (*Silicon Knights*)].)

Sykes' failure to properly plead his claims is fatal in light of the requirement that a claim must be legally sufficient to survive an anti-SLAPP motion. (*Wilson*, 28 Cal.4th at p. 821; *Vogel*, *supra*, at p. 1017, n. 3.) His efforts to distinguish *Vogel* are unavailing. He ignores the *Vogel* court's explicit reference to the rule in its third footnote. He incorrectly implies that the court did not wish to "rely on" the complaint's inadequate pleading for its disposition, but rather that court dismissed the complaint on its merits because it wished to "carry out a review of plaintiff's ability to prove its case." (RB p. 17, n.7.) The court was explicit: "We are constrained to observe, however, that [the complaint's inadequacy] was never clearly raised by defendant as a distinct ground for dismissal." (*Vogel*, at p. 1019.) Here, Gilbert has raised the issue at every opportunity. Sykes' cross-complaint is inadequately plead and may be stricken on that ground alone. (*Ibid.*; see also *Premier Medical*, 136 Cal.App.4th at p. 476-477.) Finally, the deficiency of Sykes' cross-complaint is identical to that of the claims addressed in *Vogel* in at least one critical respect. In both circumstances, the plaintiff failed to plead actual malice. In *Vogel*, the court found the inadequacy fatal. *Vogel*, *supra*, Cal.App.4th at 1019.

Sykes attempts to distinguish his cross-complaint from the complaint at issue in *Dowling*. However, the fact that the allegations of Sykes' cross-

complaint may have been marginally less vague than those addressed in the *Dowling* case does not mean they were sufficient. Compared to the allegations addressed in *Vogel*, *Silicon Knights*, and *Jacobsen*, all of which were found to be inadequate, the claims in Sykes' complaint are substantially less complete. (*Vogel*, *supra*, Cal.App.4th at 1019; *Jacobsen*, *supra*, 357 F.Supp.2d at p. 1216; *Silicon Knights*, *supra*, 983 F.Supp. at p. 1313-1314.

Sykes' cross-complaint is comparable to the complaint in *Silicon Knights*. In *Silicon Knights* the court granted the defendant's motion to dismiss because "[t]he complaint contain[ed] only general allegations of the defamatory statements and does not identify the substance of what was stated by the Defendants." (*Silicon Knights*, *supra*, 983 F.Supp. at p. 1314.) The complaint at issue accused the defendant of making

> false and defamatory statements to several of Silicon Knights' customers, prospective customers, industry associates and the public regarding: (a) the quality and reliability of Silicon Knights products, (b) the competence and ability of Silicon Knights' employees, and (c) Silicon Knights' cooperation and ability to work with customers, suppliers, or other persons in the software industry.

(*Ibid.*) This statement of allegedly defamatory falsehood is very similar to paragraph seven in Sykes' cross-complaint insofar as both make general allegations of defamation based on summary conclusions. The court dismissed the defamation claim in *Silicon Knights* because of plaintiff's

failure to "identify the substance of what was stated by the Defendants." (*Ibid.*) Sykes' cross-complaint, like the complaint at issue in *Silicon Knights*, fails to "identify the substance of what was stated" by Gilbert.

Sykes' argument that *Kahn*, *Kottle*, and *Barry* are inapplicable misses the point. These cases involve pleading standards that are either comparable to or less stringent than the anti-SLAPP standard; namely, demurrers and motions to dismiss. (*Kahn*, *supra*, 232 Cal.App.3d 1599, 1612, fn. 5 [affirming grant of general demurrer where the plaintiff failed to specifically identify the words constituting an alleged libel]; *Kottle*, *supra*, 146 F.3d at p. 1063 [affirming grant of motion to dismiss where the plaintiff failed to meet the "heightened pleading standard" employed to protect First Amendment rights]; *Barry*, *supra*, 584 F.Supp. at p. 1121-1122, 1128 [applying the summary judgment standard in rejecting plaintiff's defamation claims for failure to plead actual malice with sufficient specificity]; see also *Tuchscher*, *supra*, 106 Cal.App.4th 1219, 1236 ["[T]he California Supreme Court held that under . . . section 425.16 the required motion operates like a demurrer or motion for summary judgment in reverse."] [quotations omitted].) As established, a pleading must be legally sufficient to survive an anti-SLAPP motion. (See, e.g., *Wilson*, *supra*, 28 Cal.4th at pp. 820-821.) Whether the cases specifically deal with an anti-SLAPP motion is thus irrelevant. Nothing in *Kahn*, *Kottle*, and *Barry* remotely suggests that the stringent pleading standard

imposed by the First Amendment and California law evaporates if the challenge to the pleading is raised in a context other than a motion to dismiss.

B. Sykes' Arguments Are Contrary to the Anti-SLAPP Statute's Purpose of Promptly Resolving Speech-Based Claims

Prompt disposition of SLAPP cases arising from the exercise of free speech is the core function of the anti-SLAPP statute. (See, e.g., *Simmons v. Allstate Insurance Co.* (2001) 92 Cal.App.4th 1068, 1073-1074 (*Simmons*); *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 817 (*Wilcox*); *Briggs v. Eden Council for Hope and Opportunity* (1999) 19 Cal.4th 1106, 1127 (*Briggs*).) Sykes' argument that the court should ignore the legal insufficiency of his cross-complaint frustrates the goal of prompt resolution. (See, e.g., *Simmons*, *supra*, at p. 1073-1074 [allowing amendment of cross-complaint subject to the anti-SLAPP statute "would completely undermine" the statute's quick dismissal remedy]; *Church of Scientology of California v. Wollersheim* (1996) 42 Cal.App.4th 628, 657 [finding that plaintiff failed to establish a probability of prevailing after "[a]n examination of the Church's complaint reveal[ed] an absence of any admissible evidence to demonstrate its claim."] (*Church of Scientology*).) Courts will not adopt a construction of a statute that frustrates its purpose. (See, e.g., *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 129.) This court should not permit Sykes—or anyone else—to

undermine the anti-SLAPP statute with vague and evasive pleadings.

V. SYKES IS A LIMITED PURPOSE PUBLIC FIGURE, AND FAILED TO PLEAD OR PROVE THAT ANY OF GILBERT'S STATEMENTS WERE MADE WITH ACTUAL MALICE

A. Introduction

Sykes is a textbook limited purpose public figure, and must plead and prove actual malice to prevail on his claims. Sykes is a prominent plastic surgeon who has used the media to weigh in on the risks and benefits of elective plastic surgery — surgery which millions of people undergo each year. Recognizing that he has neither pleaded nor offered any cognizable evidence of actual malice, Sykes attempts to redefine the relevant public controversy not as the merits and risks of elective plastic surgery, but as Gilbert's statements about her interactions with him. (See, e.g., RB p. 55.) However, Sykes' novel articulation of the public controversy is contrary to the law. He is a public figure for purposes of the public controversy regarding elective plastic surgery. As a limited purpose public figure, he must plead and prove that Gilbert posted her website with actual malice. He did neither.

B. Sykes Is a Limited Purpose Public Figure

The parties agree on the requirements for a person to be a limited purpose public figure: (1) there must be a public controversy; (2) the plaintiff must have taken some voluntary act through which he or she sought to influence resolution of the public issue; and (3) the alleged

defamation was germane to the plaintiff's participation in the controversy. (See, e.g., *Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1577 (*Ampex*); AB, p. 22; RB p. 46.)

1. Gilbert's Website Addresses the Public Controversy of Plastic Surgery

Sykes argues, in essence, that for him to be a limited-purpose public figure there must be a pre-existing public controversy about his conduct with regard to Gilbert. (RB p. 53.) However: (1) The First Amendment imposes no such requirement; (2) This interpretation would prevent anyone from making a potentially defamatory public statement that implicates a public figure's conduct, because the speaker could not have the context of a pre-existing public controversy until her statements are made public; (3) the conclusion is belied by innumerable cases; and (4) The undisputed evidence establishes the existence of a public controversy. Sykes' position contravenes the purpose for extending First Amendment protection to speech concerning public figures. It should be rejected.

a. The Relevant Public Controversy Exists Independent of Specific Interactions Between Sykes and Gilbert

Courts consistently recognize the basic test for what constitutes a public controversy under the First Amendment to the United States Constitution and California law: a topic or issue that "has received public attention because its ramifications will be felt by persons who are not direct

participants." (*Waldbaum v. Fairchild Publications, Inc.* (D.C. Cir. 1980) 627 F.2d 1287, 1296 (*Waldbaum*); *Annette F., supra*, 119 Cal.App.4th at p. 1164.) Nothing else is required. Nothing in this definition requires the statements that form the basis for a libel claim be, themselves, the focus of a public controversy.

Gilbert spoke up and gave a public warning about plastic surgery and her unsatisfactory experiences with Sykes: "I started this website so I can share my experience with plastic surgery. My hopes are to inform and educate because when I originally looked into cosmetic surgery on the Internet there was very little information from a patient's perspective, but a lot of information coming from the doctors' perspective." (1 AA p. 122.) Because of the fundamental importance of protecting public discussion and debate on issues and persons of public concern, Gilbert is entitled to publicly comment about plastic surgery and her experiences with Sykes as a plastic surgeon, so long as she does so without actual malice. Even if she is the first to speak out about Sykes' conduct as a plastic surgeon, the First Amendment protects her. It does not require her to prove a pre-existing public controversy about the specific conduct that prompted her statements in order to address conduct of a public figure. Sykes cites no authority that it does. Gilbert has not made any provably false statements about Sykes, much less any that were made with knowledge of their falsity, and Sykes failed to plead or prove that she has. Therefore, Sykes' claims are

insufficient.

b. Sykes' Argument Would Unduly Restrict First Amendment Rights

Sykes' argument that Gilbert must establish a pre-existing public controversy as to the specific conduct that is the subject of the statements about him on her website is fundamentally incompatible with the constitutional protection for free speech embodied in the public figure doctrine. Sykes asserts that a public figure can successfully sue for defamation without proving actual malice for statements that are prompted by his "private" conduct, unless the speaker shows that there was a pre-existing public controversy regarding that specific conduct. (RB, p. 53.) However, Sykes' premise would preclude the very activity that the First Amendment and the anti-SLAPP statute seek to protect. The logical result of this position is that the first person to expose a public figure's conduct will be afforded no constitutional protection, even if the statements are in the context of a greater public controversy; only those who join the debate later would be afforded any protection. However, "[t]he general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled....The constitutional safeguard, we have said, was furnished to assure unfettered interchange of ideas for the bringing about (?) of political and social changes desired by the people." (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 269 (*New*

York Times), quoting *Roth v. United States* (1957) 354 U.S. 476, 484.) Sykes' proposition is thus contrary to the basic purpose of the First Amendment.

c. Sykes' Argument is Contrary to Case Law

Neither the First Amendment nor California law requires the pre-existing public controversy to revolve around the statements giving rise to a defamation claim for the plaintiff to be a public figure. (See *Waldbaum*, *supra*, 627 F.2d at p. 1296; *Annette F.*, *supra*, 119 Cal.App.4th at p. 1164.) There are numerous examples of cases (many involving doctors) applying the actual malice standard to public figures whose claims arose from statements related to conduct that was not the subject of any pre-existing public discussion:

- In *Annette F.*, *supra*, 119 Cal.App.4th at pages 1163-1166, the court protected statements accusing the plaintiff of domestic violence because the plaintiff was deemed a public figure as a result of her involvement in a prior litigation even though the domestic violence charges had not been the subject of any prior public debate.
- In *Sipple, supra*, 71 Cal.App.4th 226, the court found the plaintiff to be a public figure for purposes of his libel claims for statements regarding domestic abuse allegations against him because he was a prominent campaign manager and

political consultant, although there had been no prior public discussion of the abuse charges.

- In *Waldbaum, supra*, 627 F.2d at pages 1298-1299, the court protected statements suggesting that the plaintiff had done a bad job as president of a cooperative, because a public controversy regarding the viability of cooperatives existed before statements related to the plaintiff were made public.
- In *Schwartz v. American College of Emergency Physicians* (2000) 215 F.3d 1140, 1144-45, the court found a doctor who sued for an allegedly libelous statement that he had been sued for stock fraud was a public figure because he has authored articles in his field, was the editor-in-chief of a textbook in his field, and a scholar and researcher his field.
- In *Hunter v. Hartman* (1996) 545 N.W.2d 699, 704-05, a college medical trainer was found to be a public figure involved in public controversy independent of the particular statements giving rise to his defamation claim.
- In *Park v. Capital Cities Communications, Inc.* (N.Y.Ct.App. 1992) 181 A.D.2d 192, 197, an ophthalmologist who voluntarily appeared on television and radio shows to discuss his field of practice was a later found to be a public figure for

purposes of his libel claims against another doctor for commenting that the ophthalmologist was a "rotten apple."

- In *Martinez v. Soignier* (La.Ct.App. 1991) 570 So.2d 23, 27-28 (*Martinez*), a plastic surgeon's Yellow Pages advertisements in which he claimed to perform breast surgery qualified him as a public figure for purposes of his libel claim against another doctor for comments that plaintiff was a "quack" and that he lacked the training and qualifications to be perform breast surgery.

Indeed, Sykes' argument has been expressly rejected: "[I]t would be inappropriate to shrink all controversies to the specific statements of which plaintiff complains." (*National Life Ins. Co. v. Phillips Pub., Inc.* (D.Md. 1992) 793 F. Supp. 627, 637.) Likewise, none of the cases on which Sykes attempts to rely support his argument that there must be a pre-existing public controversy regarding his specific interactions with Gilbert.

Although *Ampex Corp. v. Cargle*, *supra*, 128 Cal.App.4th 1569, is cited by both parties, it fails Sykes. Sykes' claim that "unlike . . . *Ampex*, there was no pertinent public 'controversy' ongoing regarding the procedures performed by Dr. Sykes on Ms. Gilbert," demonstrates his misapplication of *Ampex*. The pertinent public controversy at issue in *Ampex* was not limited to the specific interactions between the parties. (RB p. 49; *Ampex*, at pp. 1577-78 [finding that Ampex's decision to discontinue

a product amounted to a public controversy].) The *Ampex* court held that Ampex was a public figure and required it to prove that Cargle made his statements with actual malice. (*Ampex, supra*, 128 Cal.App.4th at p. 1577-1578.) The public controversy in which *Ampex* was a public figure was the controversy surrounding a decision by its management to discontinue a product. (*Id.* at p. 1578 ["Ampex's decision and action in discontinuing iNEXTV amounted to a public controversy that elicited concerns about the management of Ampex."].) However, Cargle's remarks that gave rise to the lawsuit were not considered by the court in its analysis of the relevant public controversy. (*Ampex, supra*, at pp. 1577-78.) Instead, the court identified the mismanagement of the company as the public controversy at issue. (*Ampex, supra*, at pp. 1577-78 [finding that Ampex's decision to discontinue a product amounted to a public controversy].) Cargle contributed to the public controversy with his postings on the Internet message board, but his contributions and interactions with Ampex were not the "pertinent public controversy" as suggested by Sykes.[4] (*Id.* at pp. 1577-78; RB 49.)

The public attention paid to and discussion of elective plastic

[4] In defining the public controversy, Sykes argues that "the 'issue' and 'controversy' in his cross-complaint is *not* the propriety or impropriety of plastic surgery in general." (RB pp. 46-47.) However, he cites no authority for this proposition, or for his assertion that the public controversy is determined by the cross-complaint. In fact, the opposite is true.

surgery, across the nation, constitutes a public controversy. Gilbert's website relates to the public controversy surrounding plastic surgery and, insofar as her statements include Sykes, they are limited to his role as a plastic surgeon. Just as Cargle's statements about Ampex's management referenced the management in the context of a greater public controversy, Gilbert's referenced Sykes in his role as a plastic surgeon and, thus, in the context of a greater public controversy of elective plastic surgery. (*Ampex*, *supra*, 128 Cal.App.4th at pp. 1577-1578.) Neither *Ampex* nor this case involves a prior discussion about the specific interactions between the parties. Like Ampex, Sykes is a public figure independent of the specific interactions he seeks to put at issue.

Sykes' reliance on *Copp v. Paxon* (1996) 45 Cal.App.4th 829, bolsters Gilbert's position. (RB p. 50 [citing *Copp*] ("*Copp*").) Just as Copp attained public figure status as an expert in earthquake safety by voluntarily "promoting his views at the center of public debate," Sykes has thrust himself into the public debate on plastic surgery. (*Copp*, *supra*, at p. 846.) Also like *Copp*, the references to Sykes on Gilbert's website are "germane to the public controversy." (*Ibid.*) That is, the website only refers to him in his capacity as a plastic surgeon and informs the public as to "whether there [is] a reason 'to listen to him.'" (*Ibid.*)

Sykes also mischaracterizes *Terry v. Davis Community Church* (2005) 131 Cal.App.4th 1534. (RB pp. 51-53.) In *Terry*, the plaintiff's

conduct in engaging in an inappropriate relationship with a minor precipitated a discussion among the members of their church about the protection of children, a matter of public interest.

> Here, *the broad topic of the report and the meetings was the protection of children in church youth programs*, which is an issue of public interest. This is not to say that George Terry in fact molested the girl. Rather, George Terry's actions in engaging in a secretive and inappropriate relationship with the girl gave the Church and parents of youth group members cause for concern and opened for discussion the topics of whether other children were affected and how to prevent such inappropriate relationships.
>
> . . . .
>
> Here we have seen that plaintiffs' actions gave rise to an ongoing discussion about protection of children, which warrants protection by a statute that embodies the public policy of encouraging participation in matters of public significance.

(*Id.* at p. 1548, 1550.)

Terry addressed whether the speech at issue was connected with an issue of public concern under the anti-SLAPP statute, not whether the plaintiff was a public figure. The analyses are comparable, and *Terry* supports the conclusion that Sykes is a public figure. Contrary to Sykes' assertion, the *Terry* court did not say "that there was a 'legitimate ongoing discussion' regarding not only the general public issue of protecting children (but also the plaintiffs' specific alleged misconduct)." (RB p. 51.)

The court expressly rejected the plaintiff's contention that the relevant debate was about their conduct. (*Terry, surpa*, at p. 1547.) The public controversy to which the Church discussion pertained was the "broad topic" of the protection of children, not the Terrys' actions. Here, Sykes' actions caused Gilbert to post her website, and thereby to contribute to the ongoing public discussion about plastic surgery. Just as in *Terry*, her statements relate to a matter of substantial and legitimate public interest beyond the conduct giving rise to them.

d. Sykes Never Refutes Gilbert's Evidence That Plastic Surgery is the Subject of a Public Controversy

Gilbert's website shares her experiences with plastic surgery, which is a matter of ongoing public concern. Sykes' only basis for asserting that plastic surgery is not a matter of public concern are the arguments of his counsel. (See, e.g., RB pp. 11-12, 15, 49.) Because he cannot dispute the evidence demonstrating that plastic surgery is a matter of ongoing public controversy and concern, Sykes has attempted to apply the law in a manner unsupported by precedent or logic. Sykes is a public figure for purposes of comment on his role as a prominent plastic surgeon and self-proclaimed expert in the field. Gilbert is entitled to comment on her experiences with plastic surgery and Sykes, so long as she does not do so with actual malice.

2. Sykes is a Voluntary and Public Participant in the Debate Regarding Elective Plastic Surgery

Sykes' argument that failing to construe narrowly the public controversy requirement would make a public figure out of anyone who "has in any way become publicized in relation to his or her profession" is a straw man. (RB 55.) Only those who, like Sykes, have voluntarily thrust themselves into a matter of public concern are public figures. (*Copp*, *supra*, 45 Cal.App.4th at p. 846.) As described above, the evidence that Sykes has voluntarily thrust himself to the forefront of the public controversy concerning plastic surgery is undisputed and overwhelming. Sykes' prominence is not a happenstance, as his brief suggests. He has demonstrated plastic surgery on television (1 AA pp. 155-56, 162-64), written numerous articles regarding plastic surgery (*id.* at pp. 171-175, 177-178, 180-181), served as a columnist in the popular media on issues relating to plastic surgery (1 AA p. 177-178, 180-181, 183), given public seminars about plastic surgery (*Id.* at p. 194), and advertised his services heavily (*Id.* at pp. 187-194). The consequence of actively seeking prominence in a field that is of public interest or concern is that of becoming a public figure. (See, e.g., *Martinez*, *supra*, 570 So.2d at pp. 27-28.)

Sykes does not dispute that he voluntarily participated in the public discussion and debate regarding the risks and benefits of plastic surgery. The evidence that Sykes has sought and obtained prominence in the field of

plastic surgery is undisputed. (RB pp. 54-56.) Sykes has thrust himself to the forefront of a matter of ongoing public concern, and is therefore a public figure.

3. Gilbert's Website is Germane to Sykes' Participation in the Public Controversy Because it Includes Her Personal Experiences with Sykes in His Professional Role

For the reasons discussed above, Sykes is a limited purpose public figure. He has achieved the prominence he has sought; therefore, his credentials, specialized knowledge, and competence are relevant to the public debate about plastic surgery. (*Copp, supra*, 45 Cal.App.4th at p. 846; *McBride v. Merrell Dow Pharmaceuticals, Inc.* (D.C.Cir. 1983) 717 F.2d 1460, 1466.) Specific instances of his misconduct that relate in some way to his role in a matter of public controversy or concern are indisputably germane. (See, e.g., *Copp, supra*, 45 Cal.App.4th at p. 846.)

Gilbert's statements on the relative risks and benefits of elective plastic surgery, based on her own experience and research, are obviously general to the ongoing public discussion on the same subject—a discussion into which Sykes has vigorously injected himself. (1 AA pp. 122-23.) Her description of and opinions regarding her own results are directly germane to Sykes' role as a prominent practitioner of and commentator on elective plastic surgery. (See 1 AA pp. 122-123.) The performance of local physicians, and, in particular, local plastic surgeons is a relevant public

issue. (See, e.g., *Magnussen, supra*, 98 P.3d at p. 1075.) Sykes does not dispute that Gilbert's statements bear directly on topics on which Sykes has made public statements. (See AOB at pp. 33-35.) Thus, Gilbert's statements are germane.

C. Sykes Cannot Meet His Burden of Establishing a Probability of Prevailing Because He Failed to Offer Any Evidence of Actual Malice

Sykes does not and cannot establish that Gilbert made the statements at issue with actual malice. Therefore, Sykes' cannot establish a probability of prevailing on his claims. Sykes cannot establish actual malice for at least three reasons.

1. Sykes Did Not Plead Actual Malice

The first reason Sykes cannot establish actual malice is that he did not plead it. (1 AA pp. 10-16.) Limited purpose public figures must plead actual malice to recover for alleged injurious falsehood. (*Vogel, supra*, 127 Cal.App.4th at p. 1017-1018.) Sykes' failure to plead actual malice precludes him from establishing a probability of prevailing on his claims, because he has ignored the requirement that his pleadings address the defendant's constitutional defenses. (*Vogel, supra*, 127 Cal.App.4th at p. 1017-18; *Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 357-360.)

2. Sykes Offered No Evidence of Actual Malice

Sykes also failed to offer any evidence that Gilbert acted with actual malice. The anti-SLAPP statute places the burden on the plaintiff to

support his claims with evidence that would be admissible at trial. (Code Civ. Pro. § 425.16; *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 906).) The determination whether or not a plaintiff has a probability of success is made in light of that evidence. (*Ibid.*) In the trial court, Sykes cited no admissible evidence of actual malice. (2 AA pp. 248-249.) On appeal, Sykes lifts his previous arguments nearly verbatim from his trial court papers and cites no new evidence. (Compare 1 AA pp. 248-249 with RB pp. 56-59.) Therefore, his claims against Gilbert are barred.

Sykes arguments that he does not need to plead and prove actual malice are of no moment. "Courts must take into consideration the applicable burden of proof in determining whether the plaintiff has established a probability of prevailing." (*Annette F., supra*, 119 Cal.App.4th at p. 1166.) Thus, Sykes is required to demonstrate actual malice by clear and convincing evidence. (*Id.* at pp. 1166-1167.) Although Sykes attempts to "call into question" the sincerity of Gilbert's beliefs in her statements, he points to no evidence — direct or circumstantial — establishing that Gilbert knew her statements were false, or made with reckless disregard of their truth or falsity.[5] (RB 58.) In fact, Sykes' only

[5] Sykes uses a footnote to impute actual malice to Gilbert's website because her website states that "11 medical malpractice lawsuits" have been filed against Dr. Sykes. (RB n3.) Sykes' suggestion is baseless. First, it discusses new statements that are not in the record and that the trial court never addressed. Second, the statement is true. Gilbert is in possession of the complaints, and will provide them at the court's request.

citation to the record (RB pp. 59-60) is to Judge Cecil's ruling. (AA 325.) On de novo review, this court gives trial court findings no weight.

3. Falsity Alone Is Not Evidence of Actual Malice

In violation of settled principles, Sykes argues that falsity alone is sufficient to demonstrate actual malice. As a matter of law, falsity alone is not evidence of actual malice, which requires not just falsity, but knowledge of falsity. (See, e.g., *New York Times*, 376 U.S. at pp. 279-280.) Falsity, alone or in combination with evidence of ill will, is not sufficient to support a claim of actual malice. (*Greenbelt Cooperative Publishing Association v. Bresler* (1970) 398 U.S. 6, 9. [holding that the jury was improperly instructed that it could find malice "merely on the basis of a combination of falsehood and general hostility"]; *Ampex*, *supra*, 128 Cal.App.4th at p. 1579 [refusing to "infer actual malice solely from evidence of ill will, personal spite or bad motive"]; *H.E. Crawford Co., Inc. v. Dun & Bradstreet* (1957) 241 F.2d 387, 396 ["proof that the words are false is not sufficient evidence of malice"].) Therefore, Sykes has failed to offer evidence, let alone clear and convincing evidence, that establishes a probability of prevailing Gilbert's constitutional defenses.

Hagen v. Hickenbottom (1995) 41 Cal.App.4th 168 (*Hagen*), and *Villa v. McFerren* (1995) 35 Cal.App.4th 733] (*Villa*), do not relieve Sykes of his burden to plead and prove actual malice. (RB pp. 57-58.) First, *Hagen* and *Villa* address evidentiary proof in different legal contexts —

wills and civil conspiracy, respectively. They do not and could not eliminate the constitutional requirement that a public figure plead and prove actual malice to recover injurious falsehood claims. They do not even address this issue. Second, "preserve[ing] the precious liberties established and ordained by the Constitution" imposes a far more exacting standard than establishing the truth of a statement for determining the existence of undue influence (as in *Hagen*) or establishing a positive fact from a factually devoid statement (as in *Villa*). (See *Robertson*, *supra*, 36 Cal.App.4th at p. 358.)

The anti-SLAPP statute ensures that plaintiffs have evidence before they file claims. (*Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 16 [the anti-SLAPP statute "is best served by an interpretation which would require a plaintiff to marshal facts sufficient to show the viability of an action before filing a SLAPP suit."] (*Ludwig*).) Sykes has not obtained or provided any evidence of actual malice. His failure to plead or prove actual malice bars his claims against Gilbert.

VI. SYKES CANNOT ESTABLISH A PROBABILITY OF PREVAILING, BECAUSE HE CANNOT ESTABLISH THAT ANY STATEMENT OR IMPLICATION ATTRIBUTED TO GILBERT IS ACTIONABLE

The statements and implications Sykes points to as allegedly libelous demonstrably are not. To the extent they were made at all, Gilbert's statements and implications are true, are protected opinion, or are not "of

and concerning" Sykes. Moreover, most simply are not defamatory.

A. The Photographs Are Not Actionable

1. The Website's Sting is Unrelated to the Anything Sykes Said About Gilbert' Photo Presentation

Sykes fundamentally misconstrues the content of Gilbert's website, and hence the issues presented by Gilbert's motion and the appeal. Sykes claims that the question is whether he told Gilbert that the photographs of her taken after his surgery, *qua* photographs, showed a "good result." (RB pp. 29-30.) He argues that because he never saw or commented on the actual pictures posted on Gilbert's website, the website is false insofar as it says, "I was told by my doctor this was a good result — that I looked better after his surgery — what do you think?" (RB p. 26 [citing 1 AA p. 124; 2 AA p. 282].)

Gilbert's website does not state or imply that Sykes said anything about the pictures themselves. The gist and sting of Gilbert's photo presentation has nothing to do with any statement by Sykes. (See *Ringler Associates Inc. v. Maryland Casualty Co.* (2000) 80 Cal.App.4th 1165, 1180-1181 ["Significantly, however, the defendant need not justify the literal truth of *every word* of the allegedly defamatory matter. It is sufficient if the substance of the charge is proven true, irrespective of slight inaccuracy in the details 'so long as the imputation is substantially true so as to justify the gist or sting of the remark.'"] [emphasis in original]

(*Ringler*).) Rather, the website poses a question about the results of Sykes' surgery. It asks the viewer to judge for himself or herself whether the results themselves were good. (1 AA p. 124.) Especially with regard to the pictures that are posted on the website, what Sykes said or did not say, is irrelevant.

Sykes' cross-complaint says nothing about the implications of his statements concerning the results of the surgery. (1 AA p. 12.) The cross-complaint claims only that the photographs were misleading because the "after" photographs "were taken after additional and significant cosmetic surgery procedures *not* preformed by Dr. Sykes." (1 AA p. 12 at ¶ 7 [emphasis in original].) Sykes' claim, however, is demonstrably and indisputably false. (1 AA pp. 119-120.) Sykes has never submitted evidence that supports any other inference from Gilbert's photo presentation.[6] (See, e.g., *Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 646 ["Where the language at issue is ambiguous, the plaintiff must also

[6] Sykes' remaining arguments about the significance of the photographs and accompanying text are simply a *post hac* effort to prop up Sykes' claims with allegations not contained in the Cross-Complaint. Such attempts are not permitted as a matter of law. (*Premier Medical Management*, *supra*,136 Cal.App.4th at p. 476.) Sykes claims that he is permitted to bring in extrinsic allegations regarding additional statements about the photos because the Complaint alleged that the website misstated the content of communications between Gilbert and Sykes. (RB 29) This argument merely emphasizes the impermissible vagueness of Sykes' Complaint. (See Section IV, *supra*.) Not only does the Complaint fail to identify any such misstatement, it does not allege that any such misstatement was defamatory. (AA p. 12 at ¶ 7.)

allege the extrinsic circumstances which show the third person reasonably understood it in its derogatory sense."] (*Smith*).)

2. Any Implication of the Photo Presentation is Non-Actionable Opinion

The only potentially actionable implication that could possibly be drawn from the before and after pictures on Gilbert's website is that Gilbert did not think that the results of Sykes' surgery were good. That implication is a protected opinion. (*Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 20 [holding that opinion is only actionable if a reasonable fact finder could conclude that the statement declares or implies a provably false fact]; *Franklin v. Dynamic Details, Inc.* (2004) 116 Cal.App.4th 375, 436 [recognizing *Milkovich* as controlling] (*Franklin*).) Gilbert's evaluation of the overall outcome is a subjective, personal assessment — in other words, a matter of non-verifiable opinion that does not support any of Sykes' claims. In any case, whether or not Gilbert in fact had a "good result" is an inherently subjective aesthetic judgment. (Cf. *Moyer v. Amador Valley Joint Union High School District* (1990) 225 Cal.App.3d 720, 725 [holding that the statement "he is the worst teacher at FHS" contains "no factual assertion capable of being proved true or false"].) Sykes' characterization of Gilbert's statement as an objective "sense perception" is contrary to the First Amendment and California law. (See, e.g., *Franklin, supra*, at p. 390 [citing *Chapin v. Knight-Ridder* (4th Cir. 1993) 993 F.2d 1087, 1093

["Hefty is just too subjective a word to be proved false."]; *Ollman v. Evans* (D.C. Cir. 1984) 750 F.2d 970, 978 [opinion is "evaluative statement reflecting the author's political, moral, or ***aesthetic*** views, not the author's sense perceptions"] [emphasis added].)

The website does not in suggest that Sykes looked at the photographs and told Gilbert that the "after" photograph showed a good result. The only reasonable reading is that Sykes looked at Gilbert, and told her that the results of the surgery were good. The evidence supporting this conclusion is undisputed. Indeed, Sykes testified that "I thought they were very good and improving. And I think I tried to express that to her." (1 AA p. 144.) He testified that after the surgery he told Gilbert that she should do nothing further and that she looked fine. (1 AA p. 141.) He testified that his "aesthetic" observation after the surgery was that Gilbert was "starting to look good." (1 AA p. 143.) It cannot be defamatory to attribute to Sykes an opinion that he actually held.

Sykes' assertion that the photographs themselves were somehow misleading does not support his claims. Substantial truth is all that is required. (See, e.g., *Masson v. New Yorker Magazine* (1991) 501 U.S. 496, 516-517 ["it is sufficient if the substance of the charge be proved true"] (*Masson*).) The alleged differences in the photographs (lighting, angle, amount of make-up) are not supported by any evidence and are immaterial, as it is undisputed that the photographs accurately depict Gilbert's facial

features before and after Sykes' surgery, and it is those features that are the material to the comparison, nothing else. No evidence supports Sykes' insinuation that the photograph was somehow manipulated. (1 AA p. 120.) The claim that the "after" photograph is "substantially elongated" is also unsupported. (*Ibid.*) The round, and not oblong, clock in the background demonstrates that the photograph is not distorted. (*Id.* at p. 125.)[7] These are amateur photographs, taken with different cameras at different times. As a matter of law, Gilbert is not held to a standard of scientific precision. (*Vogel, supra*, 127 Cal.App.4th at p. 1021 ["Minor inaccuracies do not amount to falsity so long and the substance, the gist, the sting or the libelous charge be justified."]) The photographs are substantially accurate depiction of Gilbert before and after surgery by Sykes. Thus, the photographs are "true," and cannot support Sykes' claims.

Finally, Sykes' suggestion that his claim is alternatively supported by the alleged falsity of the time at which the photographs were taken is also without merit, because it attempts to turn minor inaccuracies into defamatory statements. Courts regularly reject this position. (See, e.g., *Carver v. Bonds* (2005) 135 Cal.App.4th 328, 358; *Partington v. Bugliosi* (1995) 56 F.3d 1147, 1161.) Whether the photographs were taken five

[7] Although the photographs are poorly reproduced in the Appellate Appendix, the same photographs are still available at http://www.mysurgerynightmare.com/wst_page2.

months or five and a half months after the surgery is immaterial. Sykes offers no explanation of why any mistake with respect to the time they were taken would be defamatory. It is undisputed that the "before" photographs was taken before Sykes' surgery, and the "after" photograph was taken after Sykes' surgery and before any subsequent procedures. (1 AA 16, p. 120.) Thus, the gist of the comparison presented is true. In addition, the precise timing of the "after" photograph neither states nor implies anything potentially injurious to Sykes' reputation. (See *Franklin, supra,* 116 Cal.App.4th at p. 384.)

B. Gilbert's Statement That She Did Not Need Five Procedures Is Not Actionable

Gilbert's statements that she did not need five procedures neither states nor implies a false assertion of fact.

As a threshold issue, Sykes' cross-complaint did not identify any specific statements in support of his claim that the website "falsely indicates that [he] recommended and performed procedures that [Gilbert] did not need/want." (1 AA p. 12.) That statement does not exist in any version of the website. Even Sykes' best attempt to conjure the inference from the website's language reveals that such words were never stated. (RB pp. 33-34.) Thus, Sykes never articulated an actionable claim. (*Smith, supra*, 72 Cal.App.4th at pp. 645-646.)

Sykes attempts to draw the implication from Gilbert's website that

Sykes suggested surgical procedures that Gilbert did not need. (2 AA pp. 241-242, 307.) To the extent such an inference exists, it cannot support the inference of a provably false assertion of fact and is thus protected opinion. (*Franklin*, *supra*, 116 Cal.App.4th at p. 385.) Elective plastic surgery is inherently not "necessary." Any "need" for it is a matter of aesthetic judgment. Therefore, Gilbert's wistful, retrospective understanding that she did not "need" plastic surgery is entirely a matter of opinion.

Sykes' new claim that Gilbert's website implies that Sykes "recommended and performed gratuitous surgeries on Gilbert" does not make the statements at issue defamatory. First, for the reasons just described, whether surgery is "needed" or "gratuitous" surgery is non-actionable opinion. Second, if any arguable implication exists and could be deemed factual, the gist of the website is indisputably true. (RB p. 36.) Sykes does not and cannot dispute that he suggested surgical procedures to Gilbert. (1 AA p. 140; RB p. 34.) Sykes himself testified that "a lot of my patients what you call complaints are not needs, they're wants. And my consultation always — always starts with asking them what they want." (1 AA p. 140.) Sykes also testified that Gilbert did not need any procedures — doing nothing was a possibility. (1 AA pp. 140, 141-42.) Thus, Sykes admits that Gilbert did not "need" any surgery and therefore that the elective surgery was, *ipso facto*, "gratuitous." (*Ibid.*; RB p. 36.) Nothing on the website states or implies that Gilbert did not "want" surgery. To the

contrary, the website plainly states that Gilbert "wanted to maintain what [she] had longer" and chose surgery to do that. (1 AA p. 122.) She sought out Sykes for that purpose. (1 AA p. 122.) She acknowledges that the surgery was not something that she needed. (1 AA pp. 122, 130.) Thus, the gist of the website is true—Sykes performed procedures that Gilbert did not need.

C. The Unalleged Misstatements Relied Upon by Sykes Do Not Support His Claims

Sykes attempts to support his claims by referring to statements not identified in the cross-complaint.[8] As discussed above, Sykes failed to properly allege these statements so they cannot support his claims. However, even if these newly identified statements, taken individually or as a whole, could be considered, they are either statements of protected opinion or are true. (*Ferlauto v. Hamsher* (1999) 74 Cal.App.4th 1394, 1405 [holding that evaluations of opinion must be made in the context of the whole publication] (*Ferlauto*).) The newly-alleged statements are as follows:

(1) "I really wasn't really sure what to expect when I met with

[8] Sykes' claim that Gilbert ignored these statements in her moving papers is false. (RB p. 34.) The cross-complaint did not identify them, so Gilbert could not respond. Gilbert did directly respond to the new alleged statements in her reply brief below. (2 AA pp. 307-309.) Sykes' alleging additional statements in his opposition brief is a stark reminder of the inadequacies of his pleading.

him." This statement is not defamatory and is true, and Sykes offered no evidence of its falsity.

(2) "He quickly suggested I would benefit from having five procedures to my face." This is true. Sykes' and Gilbert's testimony independently establish that he suggested five surgical procedures in the course of a 35-40 minute consultation. (1 AA p. 140.) Gilbert's undisputed testimony further establishes that Sykes told Gilbert she would benefit from the procedures by aging better. (1 AA p. 119.) Moreover, Gilbert makes it clear she went to Sykes seeking advice regarding elective plastic surgery and Sykes provided it. (1 AA pp. 119, 140.) Saying that a doctor has provided requested advice is not defamatory.

(3) "I was told that if I did the suggested procedures I would maintain my looks longer and age better into my late thirties and forties." Sykes does not dispute the truth of this statement. (1 AA p. 119.) Attributing this opinion to Sykes could not injure his reputation. (Cf. *Masson, supra*, 501 U.S. at pp. 511-512 [finding that California law requires, at minimum, that a defamatory attribution injure the plaintiff's reputation in order to be actionable] (*Masson*); see also I AA p. 164.)

(4) "He said I could be back to work in two weeks and that it would be subtle." As discussed in greater detail below, Sykes has not shown this statement to be substantially false. He does not dispute telling Gilbert that she could be back to work in two weeks. Sykes also admits he

said "that his 'goal was to make it so that at the end of her healing process, which could take several months, that she look natural after the surgery'" and that he told Gilbert he "didn't want to make her lips look unnatural." (RB p. 37; 1 AA 141.) It is not defamatory to attribute to a plastic surgeon the opinion that a patient will have a quick recovery and that the results of the surgery will be subtle. In any case, attributing the word "subtle" to Sykes does not materially alter the meaning of his version of their conversation, in which he admits to telling Gilbert that she would "look natural" after his surgery. (See *Masson*, *supra*, 501 U.S. at p. 518 ["[A] deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity . . . unless the alteration results in a material change in the meaning conveyed by a statement."].) Therefore, attributing the word "subtle" to Sykes cannot support his claims.

(5) "Wow, he made it sound simple and easy — sign me up!" This is a statement of Gilbert's understanding and does not "imply an assertion of objective fact." (*Milkovich, supra,* 497 U.S. at p. 18.) Describing an act as "simple" or "easy" is inherently subjective, and further demonstrates that the statement is an opinion. To the extent any objective fact could be implied, the statement is true. Sykes never disputes that he gave the impression that the surgery would be simple. In fact, he told Gilbert that she could be back to work in two weeks. (2 AA p. 280.) The statement is not actionable.

Taken as a whole, these statements are not actionable. They are true, non-defamatory, or statements of non-actionable opinion. (*Ringler, supra*, 80 Cal.App.4th at pp. 1180-1181; *Franklin, supra*, 116 Cal.App.4th at pp. 385-386.) Nor do they support Sykes' claims, even if they could properly be considered.

Indeed, Sykes' new claims on appeal are based not on statements Gilbert actually made, but instead on his contentions as to what the website implies. (See RB pp. 33-36 [Sykes fails to plead statements]; *Smith, supra*, 72 Cal.App.4th at pp. 645-646.) Sykes now claims that Gilbert's statements imply that he was "'pushing' plastic surgery procedures on an unsuspecting patient." (RB pp. 35-36.) This alleged implication is not supported by the website. Gilbert never implies that she received any procedure she did not ask for, and she makes it clear that she approached Sykes because she was interested in having surgery. (1 AA p. 122-131.) In any event, there is no evidence to support the claim that such an implication was intended, or that anyone actually understood the website as implying such a thing. (*Smith, supra*, 72 Cal.App.4th at pp. 645-46.) Finally, Sykes identified nothing in his cross-complaint that supports this new interpretation of his initial claims.

D. Gilbert's Warning About Doctors Taking Under the Table Payment is Not Actionable

Despite Sykes' contrary claims, the website does not imply he took

money under the table, and even if it did this claim is not supportable. (RB pp. 39-42.) As pointed out before the trial court and in Gilbert's opening brief, Sykes provided no evidence that this statement was false. (AOB, 48-50.) There is thus no basis for Sykes' contention or the trial court's conclusion that any implication that he took money under the table is false. This statement, therefore, cannot support Sykes' claims, even if it implies that Sykes took payments under the table.

Sykes argues that merely alleging that statements are "of and concerning" him is sufficient to support his claims. However, the First Amendment requires a statement to be provably "of and concerning" the plaintiff to be actionable. (*New York Times*, *supra*, 376 U.S. at p. 291; *Blatty v. New York Times Co.* (1987) 43 Cal.3d 1033, 1044.) First Amendment requirements may not be eliminated by statute. (See *Kraus, supra*, 23 Cal.4th at p. 129 [holding that courts must construe statutes to preserve their constitutional validity]; *Igartua-De La Rosa v. United* States (1st Cir. 2005) 417 F.3d 145, 148-149 ["[T]he Constitution is the Supreme law of the land, and neither a statute nor a treaty can override the Constitution"].)

Sykes does not and cannot establish that the "under the table" comment refers to him. (RB pp. 40-42.) His claim that it does is belied by the fact that he does not assert that any of the other statements on the "red flags" page refer to him. His citation to *Smith v. Maldanodo*, *supra*, 72

Cal.App.4th at pp. 645-646, actually contradicts his position. *Smith* explicitly requires that "the plaintiff must plead and prove that as used, the words had a particular meaning, or 'innuendo.'" (*Ibid.*) Here, Sykes' argument fails for at least two reasons. He is unable to link the statements on the "red-Flags" page of Gilbert's website to him—he is not mentioned on the "Red Flags" page, and the "Red Flags" page states that its suggestions are derived from Gilbert's consultations "with revision doctors all over the United States." (1 AA p. 128.) There is no basis for any inference that any of the statements directly referred to Sykes, so the "Red Flags" statements cannot be "of and concerning" Sykes. Second, the cross-complaint merely recites the conclusion that the website is "'of and concerning' [Sykes]."[9] (1 AA p. 13.) However, the cross-complaint does not allege any facts to support the conclusion Gilbert's website "suggests that Dr. Sykes was compensated for the procedures 'under the table.'" (1 AA p. 12.) Failure to establish the innuendo that gives rise to Sykes' conclusion that the webpage "suggests" that he received compensation

[9] Sykes' footnote tries to connect the under-the-table statement to himself by referencing Gilbert's second amended complaint. Gilbert's second amended complaint is not a part of the website, and has no effect on readers' understanding of any website statements (See *Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 261 [holding that courts must look to the knowledge and understanding of the audience to whom the publication was directed to ascertain whether a factual assertion may be implied].) Finally, there is no suggestion any reader was aware of the allegation in Gilbert's medical malpractice complaint, so as to connect this particular statement to Sykes. (*Ibid.*)

under the table is fatal to his cross-complaint. (*Smith*, *supra*, at pp. 645-646.)

Furthermore, the First Amendment requires not only that an implication be reasonable, but also that the plaintiff must show that it was intended. (*Dodds v. American Broadcasting Co.* (9th Cir. 1998) 145 F.3d 1053, 1063-1064; *Chapin v. Knight Ridder, Inc.* (4th Cir. 1993) 993 F.2d 1087, 1092-1093.) Sykes provides no evidence that Gilbert intentionally implied that prospective patients should be concerned that Sykes would request payment under the table. As with the other statements on which he bases his claims, Sykes ignores the fact that he must do more than allege the statement is "of and concerning" him, he must provide evidence to support that claim.

E. References to Results Being "Subtle" Are Not Actionable

Sykes argues that Gilbert's statements regarding subtle results are actionable. He asserts that "an indication that the goal was for Ms. Gilbert to look natural at the end of the healing process is not the equivalent of a representation that the procedure would be 'subtle.'" (RB p. 38.) Yet Sykes ignores the evidence, including his own statements. That evidence demonstrates not only that Sykes assured Gilbert that he "didn't want to make too much change," but that he routinely advised patients that a good result is one that is not noticeable. (1 AA p. 141, 164.) Moreover, Gilbert was not attributing the word "subtle" to Sykes. This was instead her

understanding. Gilbert's actual statements using the term "subtle" are:

- "I was told [by Sykes] 'I would look natural after surgery and that we didn't want to make too much change.' I was under the impression the result would be very subtle." (1 AA p. 122.) (In an earlier version of the website it stated: "He said I could be back to work in two weeks and that it would be subtle.") (2 AA p. 280.)
- "I went forward with the surgery. What I thought was going to be subtle actually turned out to be something very different. Look here to see my before and after photo." (1 AA p. 122.)
- "What I thought was going to be subtle turned into a nightmare." (1 AA p. 130.)

Thus, when Sykes brought his claims, it was clear from the website as a whole that Gilbert was not asserting that Sykes used the word "subtle." On the contrary, the website uses the same language Sykes used in his deposition testimony, in which he admitted telling Gilbert that "we didn't want to make too much change." (1 AA p. 141.) The website makes it clear that it was Gilbert's understanding that the results would be "subtle."

Sykes also selectively quotes from his deposition, but ignores his own testimony, in which he admitted telling Gilbert not just that she would look natural, but also that "we didn't want to make too much change." (1

AA p. 141.) The plain import of that statement is that the results would be subtle. In a media appearance regarding a plastic surgery much like Gilbert's, Sykes says that he regularly advises patients that his goal is "to get a good change, but not make people notice them as being changed." (1 AA p. 164.) Sykes' assurances to Gilbert that her appearance after the surgery would be "natural" also strongly support her understanding that the results of the surgery would be subtle. To assert on this basis that Sykes led Gilbert to believe, or even told her, that the results would be "subtle" is therefore substantially and indisputably true. Gilbert is not required to restate Sykes' statements verbatim, as long as "the substance of the change be proved true, irrespective of slight inaccuracy in the details." (See, e.g., *Masson, supra,* 501 U.S. at 516-17; *Carver v. Bonds* (2005) 135 Cal.App.4th 328, 358; *Partington v. Bugliosi* (1995) 56 F.3d 1147, 1161.) Gilbert has done so.

VII. BECAUSE ALL OF SYKES' CLAIMS ARISE FROM THE WEBSITE'S ALLEGED FALSITY, ALL OF HIS CLAIMS ARE BARRED

Sykes' libel claim is barred as a matter of law. Sykes does not assert that his trade libel claim survives independent of the libel claim. Sykes' remaining claims are barred for the same reasons as his libel and trade libel claims. "Regardless of the label placed on a cause of action, claims 'hav[ing] as their gravamen the alleged injurious falsehood of a statement . . . must satisfy the requirements of the First Amendment.'"

(*Kahn, supra*, 232 Cal.App.3d at p. 1615 [quoting *Blatty, supra*, 42 Cal.3d at p. 1045].) As described above, Sykes' claims are barred because he has neither alleged nor proven that Gilbert made any actionable statements about him with actual malice. He therefore cannot prevail on his claims for loss of prospective economic advantage and emotional distress. (*Blatty*, at p. 145.)

Sykes maintains that his subsidiary claims for loss of economic advantage and emotional distress must continue because they are supported by Gilbert's "discrete item of misconduct" in maintaining Google Sponsored Links that direct certain searches through www.google.com to Gilbert's website. (RB p. 63.) Sykes provides no authority for the claim that there is anything actionable about the Google Sponsored Links.[10] Nor has Sykes met his burden of establishing that the sponsored links, by themselves, constitute defamatory falsehoods and were made with actual malice. Sykes cannot possibly make such a showing, as the sponsored links contain no information independent of the website itself. Thus, there is no

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[10] Sykes cites *Copp, supra*, 45 Cal.App.4th at p. 848, for the proposition that intentional conduct designed to interfere with contractual and economic relationships does not necessarily have to be linked with the same facts underlying a defamation claim. Sykes' citation, however, is inapposite because he provides no basis for characterizing the Google Sponsored Links independently actionable. Moreover, he ignores the express holding of *Copp* that such claims "may not be based on speech that is entitled to constitutional protection." (*Copp*, 45 Cal.App.4th at p. 848.) Gilbert's speech is constitutionally protected.

actionable "discrete item of misconduct" associated with the sponsored links. (RB p. 63.)

Because his claims for loss of economic advantage and emotional distress fail to satisfy the requirements of the First Amendment and the anti-SLAPP statute, they are insufficient as a matter of law. They along with the remainder of his claims, should have been stricken.

VIII. CONCLUSION

The court should reverse the trial court's order denying Gilbert's anti-SLAPP motion, order dismissal of all of Sykes' claims against her, determine Gilbert's entitlement to attorneys' fees, and remand to the trial court to set the amount.

Dated: May 19, 2006

DLA PIPER RUDNICK GRAY CARY US LLP

By: _____
GREGORY LUNDELL
Attorneys for Plaintiff, Cross-Defendant and Appellant Georgette Gilbert

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rule 14, I hereby certify that the attached Appellant's Reply Brief contains 11,504 words (including footnotes, but excluding the tables of contents and authorities, and certificate of service), as determined by the word counting function of the software used to prepare this motion.

Dated: May 19, 2006

DLA PIPER RUDNICK GRAY CARY US LLP

By: _____
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Attorneys for Plaintiff, Cross-Defendant and Appellant Georgette Gilbert

DECLARATION OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is DLA Piper Rudnick Gray Cary US LLP, 2000 University Avenue, East Palo Alto, California 94303-2248. On May 19, 2006, I caused the within document to be served:

APPELLANT'S REPLY BRIEF

☒ By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at East Palo Alto, California addressed as set forth below.

Clerk of the Court Sacramento County Superior Court 720 Ninth Street, Room 611 Sacramento, CA 95814	One Copy of Appellant's Reply Brief
California Supreme Court Office of the Clerk State Building, Room 1295 350 McAllister Street San Francisco, CA 94102	Five Copies of Appellant's Reply Brief
Philip R. Birney, Esq. Danielle M. Guard, Esq. Daniel L. Baxter, Esq. Wilke, Fleury, Hoffelt, Gould & Birney, LLP 400 Capitol Mall, 22nd Floor Sacramento, CA 95814	**Attorneys for Respondent** One Copy of Appellant's Reply Brief
William L. Brelsford, Esq. Poswall, White & Cutler 1001 G Street, Suite 301 Sacramento, CA 95814	**Co-Counsel for Appellant** One Copy of Appellant's Reply Brief

Rudy Nolen, Esq. Nolen & Associates 1501 28th Street Sacramento, CA 95816	One Copy of Appellant's Reply Brief
Georgette Gilbert	**Client**

I declare that I am employed in the office of a member of the Bar permitted to practice before this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the State of California and United States of America that the above is true and correct. Executed on May 19, 2006, at East Palo Alto, California.

Zoya Khodosh

ZOYA KHODOSH