H034059

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

YVONNE WONG,

Plaintiff and Respondent,

vs.

TAI JING, JIA MA, AND
YELP! INC. (SUED HEREIN AS YELP.COM)

Defendants and Appellants.

AFTER AN ORDER BY THE SANTA CLARA COUNTY SUPERIOR COURT
HON. WILLIAM J. ELFVING
CASE NO. 108CV129971

APPELLANTS' OPENING BRIEF

CALIFORNIA ANTI-SLAPP PROJECT
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TAI JING, JIA MA, AND YELP! INC.

State of California
Court of Appeal
Sixth Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Caption: Wong v. Jing

Court of Appeal Case Number: H034059

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	
4.	

Please attach additional sheets with Entity or Person Information if necessary.

Please check here if applicable:

✓ There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 8.208.

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Signature of Attorney/Party Submitting Form

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INTRODUCTION.

Appellants Tai Jing (Jing) and Jia Ma (Ma) have a young son whom they took to respondent dentist Yvonne Wong (respondent) for treatment. After one such treatment, their son had an apparent adverse reaction to the nitrous oxide administered by respondent. Jing and Ma, although concerned, did not question the dentist's treatment methods and had her treat their son for about two more years. However, when he faced having several cavities filled, Jing and Ma took him to another dentist, whose office was closer and who used different methods than respondent, methods that Jing preferred.

Jing was happy to find a dentist with whom he and his son were more comfortable. He decided to share his discoveries regarding dentists and dental treatments with others who, like him, may not have considered that not all dentists practice in the same way. He posted a review of respondent on the consumer information website Yelp.com, comparing the methods of respondent and the new dentist. The review was critical, because it grew out of his son's negative experience with respondent and Jing's happiness at subsequently finding a dentist who was a better fit for his family's needs. However, the review did not defame respondent. It was non-actionable consumer commentary.

In response to Jing's review, respondent sued Jing, Ma, and Yelp for

libel, derivative causes of action for negligent and intentional infliction of emotional distress, and a claim for injunctive relief. Appellants filed a special motion to strike the Complaint as a meritless SLAPP pursuant to Code of Civil Procedure[1] section 425.16. Although the trial court found that the anti-SLAPP law applied to respondent's claims, it also found that she had shown a probability of prevailing thereon.

In fact, appellants' motion should have been granted. Jing's review of respondent's services and statements about alternative treatment methods, the sole basis for respondent's claims, constituted statements made in a public forum about issues of public interest, and is protected under the anti-SLAPP law. Respondent did not show a probability of prevailing on her claims, because the challenged statements were not defamatory, Ma did not publish them, and Yelp is immune from civil liability under federal law. This action should be dismissed as the SLAPP that it is.

STATEMENT OF APPEALABILITY.

An order denying a special motion to strike brought pursuant to section 425.16 is an appealable order pursuant to sections 904.1,

[1] Subsequent statutory section references herein are to this Code, unless otherwise indicated.

subdivision (a)(13), and 425.16, subdivision (j).

STATEMENT OF THE CASE.

A. Factual Background.

1. Respondent Yvonne Wong.

Respondent Yvonne Wong is a pediatric dentist practicing in Foster City. (I CT 250:23-25.) She maintains a website promoting her practice that states, inter alia, "our staff is dedicated to help make your children's dental experience pleasant and fun." (I CT 32:6-7, 38.)

2. Appellants Tai Jing and Jia Ma.

Appellants Tai Jing and Jia Ma took their children to respondent for dental care for a couple of years. (II CT 349:10-21; I CT 251:3-11, 252:6-10.) On one occasion, their four year-old son had an apparent adverse reaction to the nitrous oxide administered by respondent. (I CT 349:10-18.) From Jing's perspective, his son's "dental experience" with respondent was not "pleasant and fun." (II CT 349:10-25.) When their son faced procedures to fill several cavities, Jing and Ma visited another dentist, whose office was closer to their home and who had been recommended to them. (II CT 349:23-25.) The new dentist had a different approach to treatment than respondent, and his explanations of his methods were clearer and made Jing comfortable. (II CT 350:1-5, 352:11-13, 353:4-6.) In

particular, the second dentist did not use nitrous oxide to keep the boy calm during treatment, and used alternative materials to fill the cavities rather than the old-fashioned amalgam fillings containing mercury that respondent had previously used on the boy. (II CT 349:26 - 350:5.) After this positive experience with the second dentist, Jing posted a review on the Yelp.com website comparing the two dentists' methods. (I CT 8; II CT 349:23 - 350:5, 350:21 - 351:2, 351:20 - 352:15, 353:3-8.) Jing's intent in posting the message was to inform the public that not all dentists use the same treatment methods, and that modern alternatives to traditional methods are available. (II CT 350:21 - 351:2, 351:22-25, 351:27 - 352:2, 353:3-8.)

3. Appellant Yelp! Inc.

Appellant Yelp! Inc. owns and operates Yelp.com (collectively, Yelp), a website that describes itself as "the fun and easy way to find, review and talk about what's great – and not so great – in your world." (I CT 29:5-7, 32:8-9, 40.) "You already know that asking friends is the best way to find restaurants, dentists, [etc.]. . . . Yelp makes it fast and easy by collecting and organizing your friends' recommendations in one convenient place." (I CT 32:10-11, 46.) Users can find information by using Yelp's search function, browsing by topic, or soliciting information by posting inquiries to the website's message boards. (I CT 29:16-20.) Yelp users can post a review of any business. (I CT 29:7-15, 32:8-9, 42.) They can also

view other users' profiles and reviews (as well as detailed statistics about other users' reviews, such as the number of positive or negative reviews written) in order to gauge the credibility and similarity of the tastes of other users. (I CT 29:21-24.)

4. Yelp's Website as an Important Source for Consumer Information.

According to its co-founder and Chief Executive Officer, "Yelp was born out of a belief that the best source for information about a local community is from the community members themselves, and that, prior to Yelp, it was all but impossible to broadly tap into the knowledge of the local community." (I CT 29:25-27.) Fortune magazine has reported:

> Employing the same user-generated content model that powers YouTube or Craigslist, Yelp can reach into a city's every nook to reveal hidden car washes, dentists, plumbers – the sorts of unsexy but necessary services that make up our daily lives. When we discover something wonderful (or horrible), we love to tell our friends about it. We also turn to people we trust when we need a good recommendation. Yelp is enabling those conversations to happen on a massive scale.

(I CT 32:12-13, 48.)

Yelp's co-founder and Chief Executive Officer states:

> It is my belief that a consumer is better served by being exposed to the experiences of millions of other consumers rather than relying on more traditional sources of consumer information, such as a telephone directory. As such, Yelp.com serves as a consumer information website that helps consumers make more informed choices about the businesses they patronize.

(I CT 29:27 - 30:3.) The user-generated reviews on Yelp, as opposed to

reviews undertaken only periodically by paid professionals (such as those that appear in traditional print media), provide a wealth of consumer information that would not otherwise be readily available to the public because Yelp collects the varied opinions of many different people in one place.

Additionally, the fact that businesses have no way of knowing which of their customers will end up writing a Yelp review may motivate business owners to provide a superior level of service across the board. This plays a particularly important role for consumer protection where health and personal care services are concerned. Customer reviews are a significant means consumers have of informing themselves about the options available when selecting a new health professional. To this end, Yelp also features a forum where people can ask for recommendations for service providers, including dentists. (I CT 32:14-16, 52-56.)

The Yelp website indicates that it covers major metropolitan areas in the United States, including San Francisco. (I CT 32:8-11, 46.) According to the San Francisco Chronicle, "Founded in 2004 in San Francisco, Yelp . . . now reaches more than 11.5 million people a month. More than 3 million reviews appear on the site." (I CT 32:17-19, 58.) According to the New York Times, Yelp has become "one of the richest repositories of local reviews on the Web." (I CT 32:20-22, 63.) Since these San Francisco

Chronicle and New York Times articles were published, Yelp use has continued to grow. As of January 2009, more than 17 million people visited Yelp every month and 4.5 million reviews had been posted by its users. (I CT 30:4-5.)

One study found that 26 percent of adult Internet users in the United States, more than 33 million people, have rated a product, service, or person using an online rating system. (I CT 32:26-28, 71.) Indeed, respondent herself acknowledged below that "the internet is an important vehicle for dissemination of matters of public concern." (I CT 248:13-14.)

5. Jing's Post on Yelp.

On or about September 10, 2008, Jing, using the screen name "TJ," posted a review of respondent (the Post) on Yelp that is the basis for this lawsuit, which read as follows:

> 1 star rating 09/10/2008
>
> Let me first say I wish there is "0" star in Yelp rating. Avoid her like a disease!
>
> My son went there for two years. She treated two cavities plus the usual cleaning. She was fast, I mean really fast. I won't necessarily say that is a bad thing, but my son was light headed for several hours after the filling. So we decided to try another dentist after half a year.
>
> I wish I had gone there earlier. First, the new dentist discovered seven cavities. All right all of those appeared during the last half year. Second, he would never use the laughing gas on kids, which was the cause for my son's dizziness. To apply laughing gas is the

> easiest to the dentist. There is no waiting, no needles. But it is general anesthetic, not local. And general anesthetic harms a kid's nerve system. Heck, it harms mine too. Third, the filling Yvonne Wong used is metallic silver color. The new dentist would only use the newer, white color filling. Why does the color matter? Here is the part that made me really, really angry. The color tells the material being used. The metallic filling, called silver amalgams, has a small trace of mercury in it. The newer composite filling, while costing the dentist more, does not. In addition, it uses a newer technology to embed fluoride to clean the teeth for you.
>
> I regret ever going to her office.
>
> P.S. Just want to add one more thing. Dr Chui, who shares the same office with Yvonne Wong, is actually decent.

(I CT 3:12-14, 8; II CT 349:6-7.) The Post has since been modified by Jing, and now reads:

> 1 star rating 9/10/2008
>
> Dr Chui, who shares the same office with Dr Yvonne Wong, is very nice.

(II CT 351:3-9; I CT 32:23-25, 68.)

B. Procedural History.

1. Respondent's Complaint.

Respondent filed her Complaint on December 11, 2008, alleging four causes of action. The first cause of action, for "liable [sic] per se," is against all appellants; the second cause of action, for intentional infliction of emotional distress, is against appellants Jing and Ma; the third cause of action, for negligent infliction of emotional distress, is against appellants

Jing and Yelp; and the fourth cause of action, for specific performance/ injunctive relief, is against all of the appellants. (I CT 1-7.) All of respondent's causes of action are based solely on the Post. (See I CT 2:11-20, 3:10 - 4:21, 5:19-21, 6:17-19, 8.)

2. Appellants File a Special Motion to Strike the Complaint as a Meritless SLAPP.

On January 21, 2009, appellants filed a special motion to strike respondent's Complaint as a meritless SLAPP pursuant to section 425.16. (I CT 11-26.) Appellants showed that respondent's claims are subject to subdivision (e)(3) of the anti-SLAPP statute because the Post was published in a public forum and addressed issues of public interest. (I CT 21:15 - 25:13.) In this regard, appellants showed that the statements in the Post were made in connection with the issues of the quality of dental care, patients' informed access to it, and the use of amalgam fillings, all issues of public interest. (I CT 22:6 - 25:13.)

3. Respondent Dismisses Her Complaint as to Yelp.

On February 3, 2009, respondent dismissed her Complaint as to Yelp, without prejudice. (I CT 229.)

4. Respondent Opposes Appellants' Special Motion To Strike.

On February 17, 2009, respondent filed her opposition to appellants' motion. (I CT 232-48.) She argued, inter alia, that the Post was about a

private dispute over the scheduling and billing of appointments and the treatment of Jing and Ma's child, and that the use of amalgam fillings was not an issue of public interest. (I CT 235:2-5, 237:14-19, 238:4-25, 239:21-25, 241:23-25, 244:1-3, 244:15-20.) Respondent did not contest that the quality of dental care and patients' informed access to it *are* issues of public interest. Respondent did not submit any evidence to show who actually published the Post, nor did respondent attempt to demonstrate a probability of prevailing against Yelp. Respondent also submitted objections to some of appellants' evidence. (I CT 230-31.)

5. Appellants Reply to Respondent's Opposition.

On March 10, 2009, appellants filed their reply to respondent's opposition. (II CT 334-46.) Appellants showed that respondent's argument that the Post was about a private dispute was wrong and that it was, in fact, about issues of public interest. (II CT 337:16 - 340:5.) Appellants further showed that Jing was solely responsible for the Post, that Ma did not have anything to do with its writing or publication, and that she did not even learn of it until her husband Jing received an e-mail about it from Yelp, so there was no basis for any claim against Ma. (II CT 341:10-18, 349:6-9, 357:6-9.) Appellants also showed that respondent could not prevail on her claims against Jing because, inter alia, the challenged statements in the Post were not defamatory. (II CT 341:19 - 345:11.) Appellants further

established that Yelp was entitled to a ruling on its special motion to strike, despite its dismissal by respondent. (II CT 345:12-28.) Finally, appellants showed that respondent could not prevail against Yelp, which is immune under 47 U.S.C. section 230 of the Communications Decency Act (CDA). (II CT 346:1-9.) Appellants also filed objections to some of respondent's evidence. (II CT 387-393.)

6. The Trial Court Finds That the Anti-SLAPP Statute Applies, But Denies Appellants' Motion.

On March 17, 2009, a hearing was held on appellants' special motion to strike. (RT 1-14.) On March 18, 2009, the trial court issued an order denying appellants' motion. (II CT 403-405.) The court found that section 425.16 applied to respondent's claims (II CT 403:25 - 404:1), but went on to find that respondent showed a probability of prevailing on her claims against Jing and Ma (II CT 404:4-7). With regard to respondent's probability of prevailing, the trial court also held that the evidence submitted by appellants with their reply memorandum should be disregarded because appellants did not submit that evidence with their moving papers. (II CT 404:8-20.) The court overruled each of respondent's objections to appellants' evidence. (II CT 404:21.) The court also ruled on appellants' objections to respondent's evidence. (II CT 397 - 402.) The court did not address the special motion to strike as to Yelp, despite appellants' specific request for a ruling thereon. (See II CT 345:17-

19.)

STANDARD OF REVIEW.

"'Whether section 425.16 applies and whether the plaintiff has shown a probability of prevailing are legal questions which we review independently on appeal.'" (*Beach v. Harco National Insurance Company* (2003) 110 Cal.App.4th 82, 90, quoting *Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 807.)

Although a trial court's ruling on the admissibility of evidence is generally reviewed only for abuse of discretion, "to the extent the trial court's decision depends on the proper construction of [statutes], the issue is a question of law, which we review de novo." (*Zhou v. Unisource Worldwide, Inc.* (2007) 157 Cal.App.4th 1471, 1476.)

ARGUMENT:

I. THE TRIAL COURT IMPROPERLY DENIED APPELLANTS' SPECIAL MOTION TO STRIKE.

A. The California Anti-SLAPP Law Was Enacted to Protect the Fundamental Constitutional Rights of Petition and Speech and Is to Be Construed Broadly.

In 1992, in response to the "disturbing increase" in meritless lawsuits brought "to chill the valid exercise of the constitutional rights of freedom of

speech and petition for the redress of grievances," the Legislature overwhelmingly enacted section 425.16, California's anti-SLAPP law. (Stats. 1992, ch. 726, § 2.) In 1997, the Legislature unanimously amended the statute to expressly state that it "shall be construed broadly." (Stats. 1997, ch. 271, § 1; amending § 425.16(a).) Subdivision (a) of section 425.16 provides:

> The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and this participation should not be chilled through abuse of the judicial process. *To this end, this section shall be construed broadly*.

(Emphasis added.)

In 1999, the California Supreme Court underscored this requirement of broad construction, directing that courts, "whenever possible, should interpret the First Amendment and section 425.16 in a manner 'favorable to the exercise of freedom of speech, not to its curtailment.'" (*Briggs v. Eden Council for Hope and Opportunity* (1999) 19 Cal.4th 1106, 1119, quoting *Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1170, 1176.)

1. Section 425.16 Sets Forth a Two-Step Analysis.

Section 425.16 sets forth a two-step process for evaluating a special motion to strike. First, the defendant must make a prima facie showing that the plaintiff's cause of action arises from an act of the defendant in

furtherance of the right of petition and/or the right of free speech in connection with a public issue. (§ 425.16, subd. (b)(1); *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 ("*Navellier I*"); *Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 894.) Once the defendant makes this showing, the burden shifts to the plaintiff to establish a probability of prevailing on her claims, by establishing that "the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment." (*Wilson v. Parker, Covert & Chidester* (2003) 28 Cal.4th 811, 821 [citations and internal punctuation omitted].) If the plaintiff does not meet this burden, the anti-SLAPP motion must be granted. (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.)

2. The Scope of Acts Covered by Section 425.16.

Subdivision (e) of the anti-SLAPP statute provides four illustrations of the types of acts covered by the statute:

> (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

B. Respondent's Claims Are Subject to Subdivision (e)(3) of the Anti-SLAPP Law, Because They Arise from Statements Made in a Public Forum in Connection with Issues of Public Interest.

Appellants demonstrated that respondent's claims are subject to subdivision (e)(3), because they arise from statements made in a public forum (a consumer information website), regarding issues of public interest (the quality of dental care, patients' informed access to it, and the use of amalgam fillings). (I CT 20:1 - 25:13.) Additionally, consumer protection information generally has been held to involve an issue of public interest. (*Wilbanks v. Wolk, supra,* 121 Cal.App.4th at pp. 898-900; *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 23-24.) The Post, the subject of this lawsuit, is clearly a "writing made in a place open to the public or a public forum in connection with . . . an issue of public interest. . . ." (§ 425.16, subd. (e)(3).)

Respondent did not deny below that Yelp is a consumer information website or a public forum. Nor did she deny that the quality of dental care and patients' informed access to it are issues of public interest. Instead, respondent argued that the statements relate to "[a] mere dispute between private parties about the manner in which private services were rendered" (I CT 241:23-24), and that "no genuine controversy . . . exists regarding" the use of amalgam. (I CT 242:9-12.)

The trial court agreed with appellants on this point, finding that:

> Defendants have shown that Plaintiff's claims arise from protected speech because each cause of action is based on their negative online review of her dental services, which constitutes a "writing made in a place open to the public or a public forum in connection with an issue of public interest."

(II CT 403:25-28 [citing § 425.16, subd. (e)(3) and I CT 32-228].)

Respondent is wrong on this issue and the trial court correct, as discussed below. There are additional reasons, beyond that mentioned by the trial court, that the anti-SLAPP law applies to respondent's claims, also discussed below.

1. The Allegedly Defamatory Statements Were Made in a Public Forum.

Internet message boards and discussion groups are public fora. (*ComputerXpress v. Jackson* (2001) 93 Cal.App.4th 993, 1006-07; *Wilbanks v. Wolk*, *supra*, 121 Cal.App.4th at pp. 895-97.) Here, the Complaint alleges: "On Yelp.com, as well as other sites,[2] Defendants Jing and Ma registered slanderous complaints against the Plaintiff. . . ." (I CT 2:11-12), and "Defendants Jing and Ma had made several libelous statements on the web site Yelp.com." (I CT 3:16-17.) It also alleges that "Defendant Yelp.com [sic] re-published the libelous statements, and after Plaintiff notified said defendant of her objections, it refused to retract the

[2] The Complaint does not specify, and respondent never explained below or presented any evidence regarding, to what "other sites" this refers.

libelous entry" (I CT 3:21-23), and that "Defendant Yelp.com re-published the slander. . . ." (I CT 5:24). Additionally, attached as Exhibit A to the Complaint is the Post, printed from the Yelp website. Thus, the allegedly defamatory statements were made in a public forum. As noted above, respondent has not contended otherwise.

2. "Issue of Public Interest" Is to Be Construed Broadly, and the Post Involved Issues of Public Interest.

Subdivision (e)(3)'s requirement that the challenged activity be "'in connection with an issue of public interest' . . . is to be 'construed broadly' so as to encourage participation by all segments of our society in vigorous public debate related to issues of public interest." (*Seelig v. Infinity Broadcasting Corp.*, *supra*, 97 Cal.App.4th at p. 808.) An "issue of public interest" means "any issue in which the public is interested. In other words, the issue need not be 'significant' to be protected by the anti-SLAPP statute – it is enough that it is one in which the public takes an interest." (*Nygård v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1042.)

Here, the Post was published on a consumer information website. It was intended to, and did, provide information to consumers about respondent's dental services and alternatives to traditional dental practices such as the use of amalgam fillings. (I CT 8; II CT 350:6 - 351:2, 350:3-8.) "Courts have recognized the importance of the public's access to consumer

information" such as this, since "[m]embers of the public. . . . clearly have an interest in matters which affect their roles as consumers, and peaceful activities . . . which inform them about such matters are protected by the First Amendment." (*Wilbanks v. Wolk*, *supra*, 121 Cal.App.4th at p. 899 [internal punctuation and citation omitted].) The statements in the Post were made in connection with the issues of the quality of dental care, patients' informed access to it, and the use of amalgam fillings, which are issues of public interest.

Statements of no greater public significance than those at issue here have been held to be protected as an issue of public interest under section 425.16. (*Seelig v. Infinity Broadcasting Corporation*, *supra*, 97 Cal.App.4th at pp. 807-08 [radio "shock jock" commentary about plaintiff's decision to appear on *Who Wants to Marry a Multimillionaire?* television show was made in connection with an issue of public interest and is protected under (e)(3)]; *Ingels v. Westwood One Broadcasting Services, Inc*. (2005) 129 Cal.App.4th 1050, 1062-64 [interchange on radio call-in talk show regarding whether caller was too old to participate in the show involves a matter of public interest and is protected under (e)(3) and (e)(4)]; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1420 [statement that someone had entered the tenants' locked garage and turned the dial of their water heater off is protected under (e)(4) as conduct that "arguably involved

public issues of nuisance and safety," even though it directly affected only two tenants]; *Nygård v. Uusi-Kerttula, supra*, 159 Cal.App.4th at p. 1042 [defendant's statements about his work experience with a prominent Finnish businessman is protected under (e)(3)]; see also *Dora v. Frontline Video* (1993) 15 Cal.App.4th 536, 540-44 [documentary about Malibu surfers of the 1950s involved a matter of public interest (not a § 425.16 case)].)

The Post is thus clearly protected under subdivision (e)(3), as the trial court correctly found. Consumer reviews are matters of public interest because they provide important information to the public at large, especially, as here, when the review implicates health issues such as the quality of dental services and controversial health practices.

3. The Quality of Dental Care and Patients' Informed Access to It Are Issues of Public Interest.

According to the National Women's Health Information Center of the U.S. Department of Health and Human Services, "Lacking healthy teeth and gums has an effect on how we look, but it also affects the health of our bodies." (I CT 33:7-10, 91.) In its "Healthy People 2010" report, the Centers for Disease Control states that "[o]ral health is an essential and integral component of health throughout life." (I CT 33:11-12, 101.)

The Centers for Disease Control also states that there are approximately 500 million visits to dentists in the United States on an

annual basis. (I CT 33:13-15, 142.) According to the United States Census Bureau, there were over 118,000 dental establishments in the United States in 2002, bringing in revenues of $71.1 billion. (I CT 33:16-18, 154.) Also according to the Census Bureau, in 2007, the dental profession brought in revenues of $87 billion. (I CT 33:19-21, 158.) In 1995, there were 26,000 licensed dentists in the State of California, according to the State Employment Development Department. (I CT 33:22-24, 163.)

The California Legislature has expressed its intent that health professionals, including dentists, should be supervised and regulated by the State to protect the public. (See Bus. & Prof. Code, § 1601.2.) The State regulatory boards, including the Dental Board, have been established for this purpose. (Bus. & Prof. Code, § 101.6.) The Legislature has made clear that the quality of care provided by dentists is of serious concern to Californians.

The first recommendation of the American Dental Association (ADA) for finding a dentist is to "Ask family, friends or co-workers for recommendations." (I CT 33:25-27, 168.) Similar advice is given by the Academy of General Dentistry and WebMD. (I CT 33:28 - 34:4, 172, 174.) In this regard, Yelp was host to 1631 forum listings for dentists in the San Francisco area and 480 dentists in the Foster City area at the time of filing of appellants' special motion to strike. (I CT 34:5-7, 177, 180.)

The above shows that the quality of dental care and patients' informed access to it are issues of public interest. As noted, respondent did not challenge this.

4. The Use of Amalgam Fillings Is an Issue of Public Interest.

The use of amalgam fillings, which contain mercury, is also a topic of widespread public discussion and interest. (I CT 34:8-19, 34:24 - 35:5, 184-198, 208-228.)

The United States Food and Drug Administration (FDA) acknowledges that the use of amalgam fillings is a topic of concern. According to the FDA, "Dental amalgams contain mercury, which may have neurotoxic effects on the nervous systems of developing children and fetuses." (I CT 34:8-10, 184.) The FDA also provides information about alternatives to amalgam fillings, indicating that it is currently reviewing its rules regarding labeling of amalgam fillings and "evidence about safe use" thereof. (I CT 185.) The FDA states, "You may want to weigh these advantages against the possibility that dental amalgam could pose a health risk, until further information is conveyed through the rulemaking . . . or otherwise." (I CT 186.) The FDA has also requested public comment regarding the use of amalgam fillings and regulations related thereto. (I CT 186-87.)

According to ABC News, mercury is a major component of amalgam

fillings and is a known neurotoxin, and although some studies indicate that the use of such fillings is safe, others believe more studies should be done. (I CT 34:11-13, 190-91.) According to the Times of Trenton, the threat of amalgam fillings to the environment caused New Jersey to enact a regulation requiring dentists to install special equipment to prevent mercury from amalgam fillings from entering the state's water supply. (I CT 34:17-19, 197.)

In response to appellants' showing that amalgam fillings are an issue of public interest, respondent contended the contrary, asserting that there is no "genuine" controversy regarding their use. (I CT 242:11, 251:17-24.) First, for purposes of subdivision (e)(3), the anti-SLAPP law does not require that there be a controversy, only that the allegedly wrongful statements relate to an *issue* of public interest. (*Wilbanks v. Wolk, supra*, 121 Cal.App.4th at pp. 898-900; *Dowling v. Zimmerman, supra*, 85 Cal.App.4th at p. 1420; *Nygård v. Uusi-Kerttula, supra*, 159 Cal.App.4th at p. 1042.) Respondent's opinion that there is no "genuine" controversy about the use of amalgam (I CT 251:17-24), and the opinions of her "expert," dentist Bernard Eisenga, and the ADA that its use is safe and acceptable (II CT 316:1-7; I CT 264), are simply that, their opinions. These positions represent only one stance in the ongoing debate on the use of amalgam fillings.

In fact, respondent's own evidence indicates that there is indeed a "genuine" controversy over the use of amalgam. The Dental Material Safety Data Sheet respondent provided to Ma, under the heading "Toxicity of Dental Materials," states:

> Mercury in its elemental form is on the State of California's Proposition 65 list of chemicals known to the state to cause reproductive toxicity. *Mercury may harm the developing brain of a child or fetus*. [¶] . . . *This has caused discussion* about the risks of mercury in dental amalgam. . . . [¶] *A diversity of opinions exists* regarding the safety of dental amalgams. *Questions have been raised* about its safety in pregnant women, children, and diabetics. . . .

(I CT 251:3-11, 262 [emphasis added].) The report from the Journal of the ADA that respondent submitted also acknowledges and discusses the controversy:

> [*T*]*here have been periodic concerns* regarding the potential adverse health effects arising from exposure to mercury in amalgam. . . . [¶] . . . *Controversy still exists* as to whether mercury from amalgam is a significant contributor to the total body mercury burden. . . . [¶] . . . [R]ecent publications *continue to debate* not only the degree of mercury release, but also the clinical significance such release may have on the health of patients. Literature reviews by Pleva and Lorscheider and colleagues both *expressed concerns* relating to the safety of amalgam. . . . [¶] . . . [*C*]*ontroversy persists* concerning potential adverse health effects that patients may experience as a result of chronic exposure to mercury released from amalgam restorations. . . . [*D*]*ebate continues* regardin*g* not only the degree of mercury exposure, but also – and more importantly – whether this exposure results in any ill effects on health.

(I CT 251:17-24, 266-67, 271-72 [footnotes omitted, emphasis added].)

Indeed, the declaration of respondent's "expert" suggests that use of

amalgam is a matter of concern among *his own* patients, because he reports counseling and "respon[ding]" to them about it. (II CT 316:7-9.)

Thus, the evidence presented by respondent actually supports appellants' contention that the use of amalgam fillings is a matter of public debate, controversy, and interest.

5. The Allegedly Defamatory Statements Are Not About a Private Dispute.

As discussed above, the allegedly defamatory statements were made in a public forum about issues of public interest and are therefore protected under the anti-SLAPP law. Nonetheless, respondent argued below that the anti-SLAPP law does not apply to her claims because the Post was about a private dispute regarding her scheduling and billing procedures and her treatment of Jing and Ma's son. (I CT 235:2-5, 238:4-25, 241:23-25, 244:1-3, 244:15-20.)

In this regard, respondent argued that this case is distinguishable from *Wilbanks v. Wolk*, *supra*, 121 Cal.App.4th 883 (cited by appellants at I CT 22:6-13), because the statements at issue in *Wilbanks* involved the public interest since the activities of the parties "touched large numbers of people," whereas the statements here arise from a "dispute over a single dental procedure performed on one private citizen by another." (I CT 244:1-20.) However, as appellants noted below, *Wilbanks* expressly states that the plaintiff brokers' business practices in that case "do not affect a

large number of people," that what was critical was that the viatical *industry* writ large "touches a large number of persons," and that consumer information pertaining thereto was thus "information concerning a matter of public interest." (*Wilbanks v. Wolk, supra,* 121 Cal.App.4th at pp. 898-99.)

As in *Wilbanks*, the Post here was not simply an attack on respondent and her practices, but was consumer protection information comparing the techniques of two dentists and alerting patients to alternative treatment methods. (See *Wilbanks v. Wolk, supra*, at pp. 899-900.) Such consumer protection information is protected under subdivision (e)(3) of the anti-SLAPP law as a matter of public interest. (See *Wilbanks v. Wolk, supra*, 121 Cal.App.4th at pp. 898-900 ["[The] statements were a warning not to use plaintiffs' services. In the context of information ostensibly provided to aid consumers choosing among brokers, the statements, therefore, were directly connected to an issue of public concern"].)

Additionally, even assuming, *arguendo*, that the Post's statements about laughing gas and cavities do not relate to a matter of public interest, as respondent argued below (I CT 243:10-11), and which appellants dispute (because those statements relate to the broader issues of quality of dental care and patients' informed access to it), the statement about the use of amalgam fillings does involve a matter of public interest, as discussed above. Respondent's claims would thus be "mixed" causes of action

(containing protected and unprotected statements). Because the protected statement is not merely "incidental" to respondent's claims, respondent's causes of action are subject to section 425.16. (*Peregrine Funding Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672 ["'where a cause of action alleges both protected and unprotected activity, the cause of action will be subject to section 425.16 unless the protected activity conduct is "merely incidental" to the unprotected conduct'" (citations omitted)]; *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 244, 308 ["a plaintiff cannot frustrate the purposes of the SLAPP statute through a pleading tactic of combining allegations of protected and nonprotected activity under the label of one 'cause of action.'"].)

Finally, respondent's attempt to spin such clearly protected speech into a private dispute over a cancelled appointment fee (I CT 235:2, 238:4-8, 238:15-25) is groundless. There is no mention in the Post of respondent charging for cancelled appointments. (I CT 8.) The issue had been resolved before the Post was published, and Jing has testified that he was not concerned about it when he wrote the Post. (II CT 352:18 - 353:2.)

The allegedly wrongful statements alleged in the Complaint are not about a private dispute but clearly constitute consumer protection information, and relate to the public discussion of the quality of dental care,

patients' informed access to it, and the use of amalgam fillings, all issues of public interest.[3]

C. Respondent Did Not Show a Probability of Prevailing on Any of Her Claims.

As noted above, once appellants established that respondent's causes of action are subject to the anti-SLAPP law, as appellants did below, the burden shifted to respondent to establish by admissible evidence a probability of prevailing on her claims. Respondent did not meet her burden, and appellants' special motion to strike should have been granted.

1. Respondent's Claims and Her Burden of Proof.

This lawsuit is based entirely on the publication of a single Yelp consumer review, i.e., the Post. Respondent alleges four purported causes of action: libel per se (against all appellants), intentional infliction of emotional distress (against Jing and Ma), negligent infliction of emotional distress (against Jing and Yelp), and specific performance/injunctive relief (against all appellants). (I CT 1-7.) The purported fourth cause of action is for injunctive relief (I CT 6:13 - 7:13); however, "an injunction is a remedy,

[3] Respondent also asserted below that the anti-SLAPP law does not apply because she did not sue appellants to chill the exercise of their speech rights. (I CT 241:6-18, 242:2-4.) However, respondent's allegedly "pure" motive is irrelevant to a determination of whether the anti-SLAPP law applies. (*Equilon Enterprises v. Consumer Cause* (2002) 29 Cal.4th 53, 67 [whether plaintiff "had pure intentions when suing" defendant not relevant to applicability of § 425.16].)

not a cause of action." (*Roberts v. Los Angeles County Bar Assn.* (2003) 105 Cal.App.4th 604, 618; *Camp v. Board of Supervisors* (1981) 123 Cal.App.3d 334, 356 [a request for injunctive relief "is attendant to an underlying cause of action"].)

Of particular importance here, as discussed further below, is that in opposing an anti-SLAPP motion, a plaintiff must rely on the Complaint *as pled* and may not add allegations after the filing of a special motion to strike. (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 88 [plaintiff must state and substantiate "a legally sufficient claim"]; *Gallant v. City of Carson* (2005) 128 Cal.App.4th 705, 710 [in a special motion to strike, "the pleadings frame the issues to be decided"]; *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1293-94 [a party has no right to amend a pleading prior to adjudication of a pending anti-SLAPP motion].)

Respondent did not establish a probability of prevailing on any of her causes of action against any of the appellants. Since the fourth "cause" is a remedy entirely derivative of the first three, it also fails.

2. Appellant Jia Ma.

Respondent did not submit any evidence that appellant Ma had any involvement in the writing or publication of the allegedly defamatory statements, as appellants noted in their reply papers. (See II CT 341:10-18.) With their reply papers, appellants also submitted declarations from Jing

and Ma that made clear that Jing, alone, and without the consultation or knowledge of Ma, wrote and published the Post. (II CT 349:6-9, 357:6-9.) Appellants argued that the lack of any evidence that Ma was involved in the writing or publication of the Post, bolstered by the express testimony of Ma and Jing that she was not, meant that respondent had not established a probability of prevailing on her claims against Ma. (II CT 341:10-18.) However, the trial court ruled that appellants' evidence in this regard must be disregarded because appellants should have submitted said evidence with their moving papers, and found that respondent had shown a probability of prevailing on her claims against Ma. (II CT 404:8-20; see RT 3:25-6:25.) In fact, respondent did not establish publication by Ma, and the trial court's ruling excluding appellants' reply evidence was in error.

a. Respondent Did Not Show That Appellant Ma Published the Post.

Respondent sued Ma for allegedly defaming her in the Post. Publication is an essential element of a libel or defamation claim. (Civ. Code, § 45 ["libel is a false and unprivileged publication"]; *Dible v. Haight Ashbury Free Clinics* (2009) 170 Cal.App.4th 843, 854 ["publication is a necessary element for a defamation claim"].) Yet respondent did not submit any evidence that Ma had any involvement in the writing or publication of the Post. Therefore, respondent did not establish that she can prevail on her claim for libel against appellant Ma.

Further, each of respondent's other claims against Ma is dependent on her participation in the publication of the Post. (See I CT 1-7.) Therefore, because respondent did not show that Ma had any involvement in the Post, respondent did not establish a probability of prevailing against appellant Ma on *any* of her claims. Finally, even if it is assumed that Ma was somehow responsible for the Post, respondent still did not show a probability of prevailing on her claims, as discussed below.

b. The Trial Court Erred in Disregarding the Evidence Submitted in Appellants' Reply.

In their reply, Ma and Jing testified that Ma had no involvement with the Post – it was written and published by Jing alone, without Ma's knowledge. (II CT 357:6-9, 349:6-9.) Appellants had a right to respond to respondent's argument and evidence regarding *her* burden of showing that she could prevail on her claims. (See § 1005, subd. (b), giving the moving party the right to file "reply papers at least five court days before the hearing."].) The trial court's ruling that appellants should have submitted evidence rebutting respondent's arguments with their moving papers, *before* respondent made *her* showing on *her* burden, ignored the two-step process under the anti-SLAPP law and deprived appellants of their right to respond to respondent's opposition in their reply papers.

Here, the trial court improperly applied the statutory standard for summary judgment motions to reply evidence submitted on an anti-SLAPP

motion. (II CT 404:13-17.) The trial court did so even though the anti-SLAPP law does not follow the summary judgment procedure whereby the moving party must establish that there are no disputed facts and the moving party must prevail on the undisputed facts (§ 437c, subds. (a)-(c)), and even though the anti-SLAPP law embodies bifurcated burdens of proof.

As noted above, once defendants making a special motion to strike meet their burden of showing that the anti-SLAPP statute applies to the plaintiff's claims, *the burden then shifts to the plaintiff* to show that she has a probability of prevailing on her claims. It is perfectly appropriate for the moving party to respond to the plaintiff's arguments and evidence in reply papers. (*Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 775 ("*Navellier II*") [defendant properly pointed in his reply to plaintiff's failure to meet his burden under section 425.16]; see also *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 644 [mentions reply declarations without any hint that such are improper], disapproved on another point in *Equilon Enterprises v. Consumer Cause, supra*, 29 Cal.4th at p. 68, fn. 5.)

Here, the trial court expressed concern that respondent had not had the benefit of discovery in attempting to show a probability of prevailing, and that appellants revealed facts in their reply of which respondent was not aware. (RT 3:25-4:20; II CT 404:17-20.) This concern is baseless. Although the filing of a special motion to strike triggers a discovery stay,

the anti-SLAPP law provides that discovery can be allowed if good cause is shown, upon noticed motion. (§ 425.16, subd. (g).) Here, respondent did not seek any discovery below, nor did she attempt to show that Ma was in any way responsible for the allegedly defamatory Post. If respondent needed discovery, she should have made a motion seeking it. Her failure to request discovery, if indeed any was necessary, is not grounds to deny appellants' motion. (See, e.g., *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1499 [plaintiff's "failure to comply with the statute by making a timely and proper showing below makes his discovery request meritless."].)

Thus, as a matter of law, the trial court's failure to consider appellants' reply evidence was erroneous. The evidence filed by appellants was proper and should have been considered, and such evidence established that there was no publication by, and thus there can be no liability for, Ma.

3. Appellant Tai Jing.

Respondent did not show a probability of prevailing on her cause of action for libel against appellant Jing. Because her remaining causes of action and claim for relief are based entirely on that cause, she similarly has not shown that she can prevail on any of them.

a. The Trial Court's Ruling.

The trial court found that respondent showed a probability of prevailing on her claims. However, it did not provide any specific analysis

of the individual causes of action in this regard. Instead it simply cited portions of respondent's evidence. (II CT 404:4-7.) Those citations are of little assistance in determining what speech the court found to be libelous. Two and one-half of the five paragraphs in respondent's declaration referred to by the trial court discussed respondent's perception that Jing and Ma were upset about her scheduling and billing practices and preferences (I CT 252:19 - 253:5), which were simply not mentioned in the Post. Further, nothing about billing practices is alleged in the Complaint, and the billing issue is not germane to the any of allegations respondent *did* make in the Complaint, or to any of the supposed "defamatory implications" respondent later raised in her opposition to appellants' anti-SLAPP motion. The fourth paragraph cited by the trial court merely concluded that the Post was libelous, without providing any facts to support that claim. (I CT 253:6-7.) The fifth paragraph cited by the trial court asserted that respondent was upset by the Post and concerned about its impact on her practice. (I CT 254:3-7.) Another portion of respondent's declaration referenced by the trial court is a statement that in May 2008, respondent examined Jing and Ma's child, diagnosed "multiple" cavities, and recommended that additional x-rays be taken since respondent had not gotten a clear picture of half of the child's teeth. (I CT 252:16-19.) The court also referenced an Exhibit A to respondent's declaration (II CT 404:6-7), but there is no Exhibit A to

respondent's declaration. Presumably, the court was referring to Exhibit A to the Complaint, which is the allegedly libelous Post. (I CT 8.)

The trial court also referred to two paragraphs in the declaration of respondent's "expert" witness, dentist Bernard Eisenga (II CT 404:6), which stated that he believes amalgam fillings are not hazardous and are not an issue of public interest, that they are approved by the ADA (II CT 316:1-6), and that he advises his patients not to worry about amalgam fillings because he believes them to be safe (II CT 316:7-14).

This evidence cited by the trial court does not show that respondent has a probability of prevailing on her claims.

b. Respondent Did Not Establish a Probability of Prevailing on Her Claim for Libel.

To recover for libel, respondent had to show that appellants made a false and unprivileged publication by writing that exposed respondent to hatred, contempt, ridicule or obliquy, or that caused her to be shunned or avoided, or that had a tendency to injure respondent in her profession. (Civ. Code, § 45.) In addition, a claim for libel must specifically identify, if not plead verbatim, the words constituting the allegedly libelous statement. (*Gilbert v. Sykes*, *supra*, 147 Cal.App.4th at p. 31.) Where a plaintiff's claim that a particular statement is libelous is based on *implication* rather than express statement, "proper allegations and proofs of the facts necessary to make the meaning of the language apparent will be required." (*Forsher*

v. Bugliosi (1980) 26 Cal.3d 792, 803, quoting *Schomberg v. Walker* (1901) 132 Cal. 224, 227-228.)

As discussed below, respondent did not show that appellant Jing libeled her in any way, whether it be as alleged in the Complaint, or as respondent subsequently attempted to modify her claims in her opposition to appellants' anti-SLAPP motion.

Respondent alleges in her Complaint that there were three defamatory statements in the Post: (1) that respondent used fillings containing mercury without warning Ma (I CT 2:12-14, 3:17-19); (2) that respondent used a general anesthetic that is out of her scope of practice (I CT 2:15-16); and (3) that respondent misdiagnosed Jing and Ma's son's case (I CT 3:10-12, 3:19).

In her opposition to appellants' special motion to strike, respondent asserted essentially that the Post contained the three statements identified in the Complaint, but added allegations that the Post falsely stated or implied that respondent's use of a filling containing mercury was "unlawful," and that the use of such fillings harmed the health and safety of Jing and Ma's child (I CT 235:13-14); that respondent "improper[ly]" used a general anesthetic "that could, and did, impair the health and well being of" Jing and Ma's son (I CT 235:14-15); and that respondent was an "indecent disease." (I CT 235:11.) Respondent elaborated that "these assertions . . .

had the cumulative effect of creating the impression to the public at large that Plaintiff (1) broke the law; (2) deviated from the applicable standard of care by failing to fully disclose all matters germane to the minor child's treatment; (3) exposed the minor child to an unreasonable risk of harm that could result in severe physical and mental impairment; (4) was indecent and incompetent in the practice of dentistry." (I CT 235:16-21.)

Respondent subsequently restated these supposed defamatory implications, "clarifying" the claim about appellants' alleged failing to fully disclose by adding "in treat[ing] Defendants' son with a filler containing trace amounts of mercury without their knowledge," and added yet two *more* supposed implications – that she "had improperly used a general anesthesia in treating [Jing and Ma's] child and caused their child to *suffer serious harm*; [and] that the Plaintiff *missed several cavities*, and thus deviated from the applicable standard of care in the diagnosis and treatment of the . . . minor child's condition." (I CT 239:11-21 [emphasis added].)

As explained above, respondent must rely on her Complaint as pled, and she may not change her allegations in the face of appellants' anti-SLAPP motion. In any case, respondent failed to show that any of the statements alleged in the Complaint or that she later argued were implied by the Post were defamatory.

i. The Statement About Amalgam Fillings.

The Complaint alleges that the Post indicated "that the Plaintiff did not warn defendant Ma of the fact that her son's filler contained trace amounts of mercury." (I CT 2:12-14; see also 3:17-19.)

Yet the Post did not say this. The actual statement about amalgam fillings was:

> Third, the filling Yvonne Wong used is metallic silver color. The new dentist would only use the newer, white color filling. Why does the color matter? Here is the part that made me really, really angry. The color tells the material being used. The metallic filling, called silver amalgams, has a small trace of mercury in it. The newer composite filling, while costing the dentist more, does not. In addition, it uses a newer technology to embed fluoride to clean the teeth for you.

(I CT 8; see also II CT 349:6-7.)

Appellants do not dispute that Ma's signature appears on the form provided by respondent acknowledging that Ma was "provided with a copy of the Dental Material Safety Data Sheet" on February 11, 2006, or that the Data Sheet states that amalgam fillings contain mercury. (See I CT 260-261.) Presumably, if Jing had been concerned that respondent actually failed to get informed consent from his wife before performing his son's procedure, he would have so stated in the Post. Jing wrote in the Post that he was angry about "the [filling] material being used" *not* because of any lack of warning from respondent, but because he realized after the fact

(from his new dentist, Dr. Sun, and from his subsequent research on the Internet) that there are dentists who do not use amalgam fillings at all, but opt for more modern, arguably safer, alternative filling materials. (I CT 8, II CT 349:26 - 350:16, 353:3-6.) Apparently Dr. Sun was able to convey to Jing in a more understandable manner that potential problems with amalgam fillings could be avoided with available alternatives, because although Jing had "always known silver amalgam had heavy metal content," he did not know "that there were readily available alternatives" that did not contain mercury. (I CT 350:6-8.)

The only evidence relating to amalgam fillings referred to by the trial court in its decision are two paragraphs from the declaration of Bernard Eisenga. (II CT 405:4-7.) The essence of both paragraphs is that amalgam fillings are a safe and accepted treatment and are not an issue of public interest. (II CT 316:1-14.) Neither of these paragraphs establishes that appellants defamed respondent by falsely accusing her of using amalgam fillings on Jing and Ma's son without warning, as alleged in the Complaint. (I CT 2:11-14, 3:17-19.) Thus, the evidence cited by the trial court on this point does not support its apparent ruling that respondent has shown merit to this claim, as pled.

In her opposition to appellants' anti-SLAPP motion, however, respondent significantly expanded the basis of her libel claim, referring for

the first time to "defamation by implication." (I CT 245:1, citing *Thomas v. Los Angeles Times Communications, LLC* (2002) 189 F.Supp.2d 1005.) As noted above, however, to sufficiently allege a defamatory implication, respondent was required to submit "proper *allegations* and proofs *of the facts necessary to make the meaning of the language apparent.*" (*Forsher v. Bugliosi, supra*, 26 Cal.3d at p. 803 [emphasis added].) Respondent's Complaint did not do so.[4] Respondent's opposition claimed that Jing's statement in the Post that he was angry that respondent used amalgam for his child's filling "conveys the implied assertion that this was done without their knowledge or consent, and *was dangerous*,"[5] and that respondent therefore "*broke the law* and *breached the applicable standard of care*." (I CT 245:7-9, 247:13-18 [emphasis added].) Yet respondent's Complaint

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[4] *Thomas* itself clearly states that the plaintiff's complaint in that case alleged that an article written about him was defamatory and that it "[s]pecifically . . . contends that the article contains six false and defamatory implications," and that it further specified "that the alleged defamatory implications were achieved through the use of linguistic devices and slanted words and phrases and the exclusion of numerous facts and documents." (*Thomas v. Los Angeles Times Communications, LLC, supra*, 189 F.Supp.2d at p. 1009, citing paragraphs 10 and 12-14 of the complaint.)

[5] Respondent's opposition alternatively characterized the "dangerous" implication as an implication that respondent's use of amalgam fillings was "*to the detriment of the health and safety* of the[] minor child"; and "exposed the minor child to an *unreasonable risk of harm* that could result in severe physical and mental impairment"; that "the filler was dangerous *as applied by Plaintiff*"; and the "minor child *suffered actual harm to his nervous system* . . . by his exposure to the mercury in the filling." (See I CT 235:13-14, 235:16-21, 239:11-21, 242:16-22, 247:7-13 [emphasis added].)

alleges no facts whatsoever relating to the safety of amalgam fillings (either generally, or as used by respondent), or to the lawfulness or applicable standard of care relating to such filings (or their use). Subsequent argument in respondent's *opposition* regarding these entirely theoretical "implications" of the amalgam fillings statement cannot cure the insufficiency of her pleading in this case. Any claim of defamatory implications of the amalgam fillings statement raised for the first time in respondent's opposition must therefore fail.

In addition to the supposedly defamatory "implications" just discussed, respondent also raised for the first time in her opposition the issue of the Post's supposedly defamatory *omissions*. Regarding the amalgam fillings statement specifically, respondent suggested that the Post was defamatory because it did *not* say that Jing and Ma "were informed about the mercury filling [and] that it is ADA approved." (I CT 247:21-25.) Respondent relied on *Wilbanks v. Wolk, supra*, 121 Cal.App.4th 883, for the proposition that the Post is defamatory because of both the necessary implications from the statements therein and the omitted information that would theoretically dispel such implications. (I CT 247:1 - 248:3.)

Even putting aside the issue of the insufficiency of respondent's Complaint to state a cause of action for defamation by implication, the instant situation is not analogous to that in *Wilbanks* in this regard. The

defendant in *Wilbanks* made the following statements, among others: "Wilbanks and Associates provided incompetent advice. [¶] Wilbanks and Associates is unethical." (*Wilbanks v. Wolk*, *supra*, 121 Cal.App.4th at p. 901.) The court noted that these were:

> express assertions that plaintiffs provided incompetent advice and engaged in unethical business practices. A person reading Wolk's statements reasonably could conclude that Wolk was aware . . . of [undisclosed] facts . . . , and had concluded that they demonstrated incompetence and a lack of ethics.

(*Id.* at p. 902.) In contrast, the Post does not contain any such statements that reasonably imply undisclosed facts that respondent was incompetent or unethical or that she acted unlawfully.

In addition, *Wilbanks* found that in making statements about plaintiffs, the defendant omitted significant facts, which contributed to the defamatory implications of her statements: she reported that a judgment had been entered against plaintiffs, but omitted that it was in small claims court, which the court noted "does not carry the same suggestion of malfeasance"; and she reported a Department of Insurance investigation of plaintiffs, but failed to mention that the Department investigates every complaint, thus falsely implying that the Department had formed an opinion that the complaint about plaintiffs was worthy of investigation. (*Id.* at p. 903.) Here, the "omission" respondent pointed to is not material to the alleged defamatory implications regarding amalgam fillings, because the

Post did not state or imply that respondent did not inform Jing and Ma about the mercury in amalgam fillings, and even the ADA has acknowledged that there is controversy over the use of amalgam.

There are additional reasons that respondent could not prevail on the new allegations made in her opposition, even if respondent *could* amend her pleading at this stage. The Post did not state or imply that respondent's use of amalgam fillings was unlawful; rather, it simply conveyed Jing's lay opinion that he preferred that his children be treated by a dentist who uses a newer technology. (I CT 8.) Similarly, the Post did not state that respondent's use of the amalgam fillings harmed the health or safety of Jing and Ma's son, i.e., was "dangerous." (*Ibid.*) Jing is not, and did not in the Post hold himself out to be, a dentist or medical expert. (See I CT 8, II CT 352:16-17.) Any implication about the safety of amalgam fillings and respondent's use thereof was just Jing's lay opinion and as such is not actionable, and it was made in the context of the statement that some dentists do not use such fillings and Jing preferred that they not be used on his son. (See *Wilbanks v. Wolk*, *supra*, 121 Cal.App.4th at p. 904 ["An accusation that, if made by a layperson, might constitute opinion, may be understood as being based on fact if made by someone with specialized knowledge of the industry."].) Jing's opinion in this regard did not defame respondent. Indeed, Jing, apparently without knowing it, was following the

advice dispensed by the FDA (among others) that "You may want to weigh the[] advantages [of durability and relatively low cost] against the possibility that dental amalgam could pose a health risk. . . ." (I CT 34:8-10, 186; see also I CT 251:7-10, 262.)

ii. The Statement About Laughing Gas.

The Complaint alleges that the Post "indicated that [respondent] used a General Anesthetic that is out of her scope of practice." (I CT 2:15-16.)

The actual statement about laughing gas in the Post was:

> [M]y son was light headed for several hours after the filling. . . . [Dr. Sun, the second dentist Jing and Ma visited,] would never use the laughing gas on kids, which was the cause for my son's dizziness. To apply laughing gas is the easiest to the dentist. There is no waiting, no needles. But it is general anesthetic, not local. And general anesthetic harms a kid's nerve system. Heck, it harms mine too.

(I CT 8.)

The Post did not state, nor did it imply, that respondent's use of laughing gas was outside the scope of her practice. Rather, the Post asserted that laughing gas does not have to be used and there are dentists who do not use it. With regard to respondent's use of the drug, the Post simply discussed the effects of the laughing gas on Jing's son, stating that, after the treatment, the child was lightheaded for several hours. Additionally, as Jing subsequently testified, his son actually vomited afterwards and his face was pale. (II CT 349:10-21.) However, when that

happened, Jing "didn't think too much of it at that time" because although he "suspected that his son's reaction might be related to the anesthetic, . . . I didn't know if any other choices were available in pediatric dentistry" (II CT 349:17-19), and he "trust[ed] in Dr. Wong" (II CT 349:19).

Respondent acknowledged that she used nitrous oxide (also known as laughing gas) on Jing and Ma's son (I CT 251:11-17; see also 2:17-18), as the Post stated. The Post's statement that laughing gas is a "general anesthetic" is true. Jing's Internet research discovered that, according to MedicineNet.com, nitrous oxide is a "gas that can cause general anesthesia." (II CT 350:17-19, 355.) The World Health Organization classifies nitrous oxide as a general anesthetic. (II CT 361:12-16, 376.) The Journal of the ADA states that "[n]itrous oxide is a general anesthetic used at subanesthetic concentration to reduce anxiety during dental procedures." (II CT 361:8-11, 363.)

Indeed, neither respondent nor her "expert" unequivocally denied that nitrous oxide is or can be used as a general aesthetic. Instead, respondent conclusorily asserted that "[a]s applied by me and other dentists, N2O/O2 is not a general anesthetic because the patient does not lose consciousness." (I CT 251:15-17.) Her "expert" did not even say that, but instead said only that nitrous oxide "is not a general anesthetic that causes 'harm' to the system" (II CT 316:17-18), which would seem to indicate that

it *is* a "general anesthetic." Further, respondent's own professional organization, the ADA, expressly states that "[n]itrous oxide *is* a general anesthetic." (II CT 363 [emphasis added].)

Thus, respondent cannot prevail on any claim based on the Post's discussion of respondent's use of laughing gas, as pled.

The trial court apparently agreed that respondent did not establish that the statement about laughing gas was actionable, since it did not refer in its ruling to any evidence related to the Post's mention of laughing gas. (II CT 404:4-7.)

Respondent asserted in her opposition to appellants' anti-SLAPP motion, however, several expansions of her position as to why the Post's statement that respondent used a general anesthetic on Jing and Ma's son, which "harms a kid's nervous system," is libelous. Respondent asserted for the first time that "by necessary implication . . . a reasonable person viewing these statements could conclude that Defendant's minor child *suffered actual harm to his nervous system*[6]. . . . [and] that Plaintiff *had not obtained Defendants' informed consent* before using the . . . ADA-approved N2O/O2, and in so doing *broke the law* and *breached the applicable*

[6] Respondent's opposition alternatively characterized the "actual harm to his nervous system" implication as an implication that respondent's use of nitrous oxide "*could, and did, impair the health and well being* of Defendants' minor child"; "caused their child to suffer *serious harm*"; and "*harmed their kid's nervous system*." (See I CT 235:14-15, 239:17-18, 243:2-5 [emphasis added].)

standard of care." (I CT 247:9-11, 247:13-18 [emphasis added].) Respondent's Complaint, however, alleges no facts relating to the effect(s) of the nitrous oxide on Jing and Ma's son, or to the lawfulness or applicable standard of care relating to the drug (or its use), or that respondent specifically secured Jing and Ma's informed consent to using nitrous oxide on their child. The opposition's claimed defamatory implications of the laughing gas statement that theoretically arise from such unalleged facts are therefore without basis in the Complaint.

Additionally, respondent asserted for the first time in her opposition that the Post's laughing gas statement is libelous because it *failed to state* that Jing and Ma "had permitted their child to be given N2O/O2 without objection, that their child never lost consciousness . . . , [and] that they were present during the procedure." (I CT 247:21-25.) These subsequent assertions cannot cure the deficiency in respondent's pleading. Respondent cannot change the basis of her claims once an anti-SLAPP motion is filed.

Further, even if respondent *could* amend her pleading at this stage, she still could not prevail on the new allegations made in her opposition. If the Post implied that respondent's use of nitrous oxide harmed Jing and Ma's son, or that general anesthesia harms human nervous systems, that statement was merely Jing's lay opinion, his belief, informed by his research and by his observation of his son's reaction to the drug, that

laughing gas, as a general anesthetic, harms a young child's nervous system. (II CT 350:1-5, 350:17 - 351:2.) As previously noted, a lay opinion is not actionable. (See *Wilbanks v. Wolk*, *supra*, 121 Cal.App.4th at p. 904.) Jing's point was simply that he preferred that his child go to a dentist who did not use nitrous oxide, because of his personal feelings, based in large part on his son's apparent reaction to the drug.[7] Expressing such a lay opinion, the poster's subjective preference for another dentist who used different methods, did not state or imply provably false facts. (*Moyer v. Amador Valley J. Union High School Dist.* (1990) 225 Cal.App.3d 720, 724 and fn.2 [statement not actionable unless it contains or implies a provably false factual assertion].) Again, Jing's opinion about nitrous oxide does not defame respondent.

Finally, the "omissions" in the Post were not material. Jing's point was that his son had an adverse reaction to the nitrous oxide, and any parental consent or presence during the procedure does not change that fact. Further, whether the child lost consciousness does not change the fact that nitrous oxide is a general anesthetic.

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[7] Jing is not alone in believing that nitrous oxide is not appropriate for use on everyone. The clinical guidelines submitted by respondent herself state that there are potential disadvantages to the use of nitrous oxide (I CT 277-78) and that a dentist's assessment of whether to use nitrous oxide on a patient should include "allergies and previous allergic or adverse drug reactions." (*Id*. at 278.)

iii. The Statement About Cavities.

The Complaint alleges that the Post makes the libelous assertion "that [respondent] had mis-diagnosed the case" of Jing and Ma's son (I CT 3:17-19), presumably regarding the "cavities in the teeth on the left side of his mouth" diagnosed by the second dentist (I CT 3:10-12).

The actual statement in the Post was that "the new dentist discovered seven cavities. All right all of those appeared during the last half a year." (I CT 8.) In fact, the new dentist *did* discover seven cavities – this statement is true. (II CT 349:26, 352:3-4.) The Post did not state that respondent failed to discover any of these cavities, much less that, if she in fact was unaware of any of the seven, this was due to misdiagnosis. Respondent herself alleged that she was able to confirm just two of the cavities (I CT 2:25 - 3:1), presumably due to problems with the films she had taken, as discussed subsequently in her opposition to appellants' anti-SLAPP motion. (I CT 252:17-20.)

In any event, the second sentence of this statement about cavities acknowledged that young children can develop cavities quickly, such that some of the seven cavities may not have even existed at the time of respondent's last examination. Jing has testified that, as a non-dentist, he gave respondent the benefit of the doubt that this was the case. (II CT 352:3-7.) If Jing meant to convey that respondent missed any of the

cavities, and specifically missed them through any fault of her own, presumably he would have said so. Jing has testified that if he had thought that respondent had committed malpractice, he would have made a complaint to the government about her, but he did not. (II CT 352:13-15.) Jing's intent in making the statement about the number of cavities was to show why he was happy to find a dentist who did not use amalgam fillings or nitrous oxide, *especially because of the number of cavities his son gets*. (II CT 352:37-15.)

It is unclear whether the trial court found that respondent showed a probability of prevailing with regard to the Post's statement about cavities. The court referred to paragraph 10 of respondent's declaration (in which respondent stated that she examined Jing and Ma's son, diagnosed "multiple" cavities, and suggested additional x-rays for further diagnosis), but did not elaborate.[8] (II CT 404:4-7; I CT 252:16-19.) If the trial court did in fact find the Post's statement about cavities to be defamatory, such finding was in error.

[8] Most of the statements in respondent's declaration to which the trial court referred (II CT 405:4-7) relate to her scheduling and billing practices and her perception that Jing and Ma were upset about said practices (I CT 252:19-253:5). Respondent's opposition apparently posits that the testimony regarding scheduling is germane to the Post's statement about cavities in that Jing and Ma "request[ed] . . . a Saturday appointment to treat the cavities that the later dentist alleged [sic] discovered," but were rebuffed. (I CT 247:21-26.) Yet the Complaint does not make any allegations in this regard, and respondent cannot oppose appellant's motion based upon allegations not contained in the Complaint.

Respondent subsequently asserted in her opposition to appellants' anti-SLAPP motion that the Post contained a libelous

> implied assertion that Plaintiff failed to discover several cavities in their minor child's mouth prior to her discharge. . . . To suggest that Plaintiff failed to discover existing cavities is to accuse her of failing the most fundamental standards of professional competence. It is, in essence, to call Plaintiff utterly incompetent of basic dentistry.

(I CT 245:20-25; compare 231:16-21, 239:11-21, 243:6-9, 243:11, 246:14-17, 247:17-22.) First, respondent failed to allege in her Complaint any "defamatory implication" of her incompetence, or any facts relating thereto. In addition, as just discussed, the statement that a second dentist discovered cavities for himself is not the same as a statement that the first dentist did not discover, or would not have discovered, said cavities for *herself* under the same circumstances. Here, where respondent admits that she was prevented from rendering a complete diagnosis due to inadequate x-rays, and where the Post specifically acknowledged the possibility that some or all of the cavities had developed quite recently, respondent's claim that the Post accused her of being "utterly incompetent" is disingenuous.

Respondent's opposition further asserted that the Post's statement about cavities is defamatory because it neglected to say that respondent "declined [Jing and Ma's] request to make a Saturday appointment" to treat their son's cavities. (I CT 247:21-26.) This omission is not material to a determination of appellants' anti-SLAPP motion, even if it had been

properly alleged. How respondent chooses to schedule appointments was simply not addressed in the Post. Further, Jing has testified that respondent's scheduling practices were "not an issue for [him]," and that he and Ma still kept an appointment for their son *after* the "missed appointment" they were billed for and respondent suggests they were "[a]pparently angered by." (II CT 352:18 - 353:2; I CT 235:2.)

iv. Other Unalleged Statements.

As discussed above, respondent attempted in her opposition to expand or modify the allegations in her Complaint regarding the Post's statements about respondent's use of amalgam fillings and laughing gas, and such amendment to the pleadings is not permitted after the filing of an anti-SLAPP motion. In addition, respondent's opposition further suggested that there are entirely different allegedly defamatory statements that were not alleged in the Complaint, such as that the Post allegedly compared respondent to a disease or suggested "that she lacked decency." (I CT 235:10-11, 238:23-24, 239:19-21, 248:5-6.) These new, unalleged claims cannot be the basis for denial of appellants' anti-SLAPP motion, for the same reason.

However, even if respondent *could* amend her Complaint in this regard, any statement that she is not decent, or that compares her to a disease, is non-actionable opinion or hyperbole. (*Moyer v. Amador Valley*

J. Union High School Dist., supra, 225 Cal.App.3d at p. 724; *Ferlauto v. Hamsher* (1999) 74 Cal.App.4th 1394, 1401.) The following similar types of statements have been held to be not actionable: that plaintiff is not an "honorable company" (*Franklin v. Dynamic Details, Inc.* (2004) 116 Cal.App.4th 375, 388-89 [this was a "classic assertion[] of subjective judgment"]); that a judge is "dishonest" (*Standing Committee on Discipline v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1440); that a political foe is a "thief" and a "liar" (*Rosenaur v. Scherer* (2001) 88 Cal.App.4th 260, 280); that plaintiff is a "shady practitioner" (*Lewis v. Time, Inc*. (9th Cir. 1983) 710 F.2d 549, 554); that plaintiff is a "crooked politician" (*Fletcher v. San Jose Mercury News* (1989) 216 Cal.App.3d 172, 190-91); that plaintiff "must have trouble sleeping" (*Underwager v. Channel 9 Australia* (9th Cir. 1995) 69 F.3d 361, 367); and that the plaintiff is "immoral" or engaged in immoral behavior (*McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 116-17).

c. Respondent Did Not Show A Probability of Prevailing On Her Claims For Emotional Distress or Injunctive Relief.

Respondent's claims for negligent and intentional infliction of emotional distress are also based on the assertion that statements in the Post are actionable, which is not so. Further, the intentional infliction claim

requires that appellants' conduct be so outrageous in character and so extreme in degree as to go beyond all bounds of decency, intolerable in a civilized community. (*Trerice v. Blue Cross of California* (1989) 209 Cal.App.3d 878, 883.) Respondent did not establish that. In addition, respondent must show that she suffered "severe emotional distress" of such substantial quantity or enduring quality that no reasonable person in a civilized society should be expected to endure it. (*Fletcher v. Western National Life Insurance Company* (1970) 10 Cal.App.3d 376, 397.) To prevail on a claim for negligent infliction of emotional distress, respondent must show that she suffered severe emotional distress, that is, emotional injury which is substantial or enduring. (*Twaite v. Allstate Insurance Co.* (1989) 216 Cal.App.3d 239, 257-258.) Respondent merely stated that the Post "was very emotionally upsetting to me and has caused me to lose sleep, have stomach upset and generalized anxiety" (I CT 254:3-4), which did not establish that she suffered severe emotional distress under either standard.

Finally, respondent is not entitled to injunctive relief. An injunction is a form of relief that is dependent on a probability of prevailing on the underlying claims. (*Roberts v. Los Angeles County Bar Assn.*, *supra*, 105 Cal.App.4th at p. 618; *Camp v. Board of Supervisors*, *supra*, 123 Cal.App.3d at p. 356.) As respondent's three underlying claims all fail, she

cannot obtain injunctive relief.

4. Appellant Yelp.

Respondent also sued Yelp on the basis that it maintained the website on which the allegedly defamatory statements were published, did not investigate the accuracy of the review, did not delete it upon the request of respondent, and was therefore responsible for what was said in the Post. (I CT 5:24 - 6:2.) Appellants' counsel attempted to get respondent to dismiss Yelp because it clearly could not be liable for any third-party content, due to the immunity from civil liability provided by the federal CDA. In fact, even before this lawsuit was filed, Yelp made respondent aware of that federal statute in an email to her explaining that it was not responsible for determining the accuracy of the Post. (I CT 253:15-19, 287.) Incredibly, respondent stated that she took Yelp's e-mail to be "an invitation to litigate the matter." (I CT 253:19-21.) Despite respondent's awareness of Yelp's assertion of its immunity, she nonetheless proceeded against Yelp. (I CT 253:15-22, 287-88.)

Although respondent's counsel told appellants' counsel that he would dismiss Yelp,[9] he subsequently told the media only that he would

[9] Respondent's counsel's written correspondence with appellants' attorney in this regard was ambiguous, indicating an "intention" to dismiss Yelp, while stating that he was giving "an open, indefinite extension to answer the complaint on behalf of Yelp.com." (II CT 304.)

"probably" dismiss Yelp, and he also ignored a subsequent warning that Yelp would seek dismissal if respondent did not promptly dismiss it. (II CT 378:6 - 379:15, 381-386.) Only after appellants filed this anti-SLAPP motion did respondent finally dismiss Yelp, but even then it was *without prejudice*. (I CT 229.) Indeed, even in her opposition to appellants' anti-SLAPP motion below, respondent was still unwilling to concede that Yelp is immune from her claims, asserting that Yelp's claim of immunity "is untenable." (I CT 236:3-9.)

As a result, Yelp requested a determination below as to whether the trial court would have granted its anti-SLAPP motion had respondent not dismissed Yelp. (II CT 345:17-19.) Yelp's request is consistent with the statutory purpose of preventing SLAPP plaintiffs from reaping the benefits of bringing pressure on SLAPP defendants while avoiding the burden of substantiating their claims once challenged, and of providing vindication to SLAPP defendants:

> [A] defendant who is voluntarily dismissed, with or without prejudice, after filing a section 425.16 motion to strike, is nevertheless entitled to have the merits of such motion heard as a predicate to a determination of the defendant's motion for attorney's fees and costs under subdivision (c) of that section. . . .
>
> Persons who threaten the exercise of another's constitutional rights to speak freely and petition for redress of grievances should be adjudicated to have done so, not permitted to avoid the consequences of their actions by dismissal of the SLAPP when a defendant challenges it. An adjudication in favor of the defendant on the merits of the defendant's motion to strike provides both financial

> relief in the form of fees and costs, as well as a vindication of society's constitutional interests.

(*Liu v. Moore* (1999) 69 Cal.App.4th 745, 751, 752.) Despite appellants' request, the trial court did not make a determination as to whether Yelp would have prevailed on its anti-SLAPP motion but for respondent's dismissal. (See II CT 403-04.)

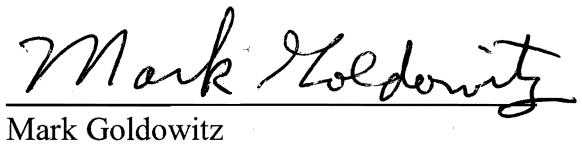
Clearly, Yelp should have prevailed. Respondent failed to – indeed, could not – establish a probability of prevailing on her claims against Yelp. Section 230 of the CDA provides, inter alia, that providers of an interactive computer service are immune from civil liability for publishing third party content on the Internet. (See *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 39-40.) Section 230(f)(2) broadly defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server. . . ." Websites are interactive computer services under section 230. (*Fair Housing Council of San Fernando Valley v. Roommate.com, LLC* (9th Cir. 2008) 521 F.3d 1157, 1162.) The Post was published by Jing, a third party, on Yelp's website. (I CT 2:11-16, 29:7-24.) Therefore, Yelp cannot be held liable for publication of the Post. Since Yelp cannot be held liable on respondent's libel claim against it, her negligent infliction of emotional distress claim and request for injunctive relief against Yelp must also fail.

CONCLUSION.

Respondent's Complaint arises from website statements that are clearly protected by the anti-SLAPP law, and respondent did not show that her claims have any merit. Therefore, this Court should reverse the trial court's order denying appellants' special motion to strike and direct the court to grant said motion, including as to Yelp. In addition, this Court should award appellants their reasonable fees and costs, including their fees and costs on appeal. (§ 425.16, subd. (c); *Church of Scientology v. Wollersheim, supra,* 42 Cal.App.4th at pp. 659-660.)

Dated: July 15, 2009

Respectfully submitted,



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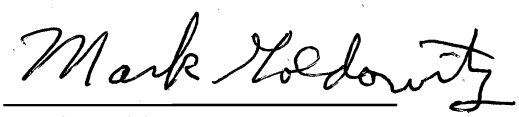
WORD COUNT CERTIFICATION

I, Mark Goldowitz, hereby certify, pursuant to California Rules of Court, Rule 8.204(c)(1), that the word count of my computer program for this consolidated brief indicates that it contains 13,239 words, including footnotes. Executed this 15th day of July, 2009.



Mark Goldowitz

PROOF OF SERVICE

The undersigned hereby states under the penalty of perjury under the laws of the State of California:

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Dated: July 15, 2009

Kim Lehmkuhl