Mark Goldowitz, No. 96418
Paul Clifford, No. 119015
CALIFORNIA ANTI-SLAPP PROJECT
2903 Sacramento Street
Berkeley, California 94702
Phone: (510) 486-9123 x301
Fax: (510) 486-9708
Email: mg@casp.net

Special Counsel for Defendant
Fred Ross

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MERCED

GEORGE LOGAN,

Plaintiff,

vs.

FRED ROSS, as an individual, and DOES I-XX,

Defendants.

Case No. CV000745

DEFENDANT FRED ROSS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SPECIAL MOTION TO THE COMPLAINT AS A MERITLESS SLAPP (C.C.P. § 425.16)

Date: April 8, 2010
Time: 8:15am
Department: 3
Judge: Hon. Carol Ash*
Complaint Filed: January 7, 2010

[filed in conjunction with notice of motion, declarations of Fred Ross and Paul Clifford, request for judicial notice, compendium of federal authorities, and proof of service of moving papers]

*Defendant Fred Ross is filing concurrently herewith a Peremptory Challenge Pursuant to C.C.P. Section 170.6, to Judge Ash.

BY FAX

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INTRODUCTION.

In the 20th Century, the media available to citizen watch dogs evolved from pamphlets and soap boxes, to include newspapers, radio, and television. In the 21st Century, the Internet has restored the voice of the pampleteers and public orators to the average citizen, from the mass media of the often connected and wealthy that dominated the 20th Century. The Internet has given today's citizens platforms such as message boards, blogs and websites to voice their opinions and publish their observations about their government. In the past, if a newspaper or other media chose not to report in detail on government activities, the general public was not aware of them. Today, the Internet not only gives the public more access to governmental proceedings, but anyone can go online and report what he or she knows, or thinks, to the entire world. Some government officials do not appreciate the brighter light that is being shined upon their activities, or the ability of the general public to comment thereon. They prefer that their methods and the results of their efforts be revealed only on their terms. Defendant Fred Ross is one of those 21st Century pamphleteers and plaintiff George Logan is one of those government officials, the City Attorney of Patterson, California.

The statements upon which plaintiff Logan bases his claims are protected by the California anti-SLAPP statute, Code of Civil Procedure[1] section 425.16, as statements in connection with issues under consideration by an official body and statements made in a public forum about issues of public interest. Plaintiff will not be able to sustain his burden of showing a probability of prevailing because, inter alia, Fred Ross did not make the statements alleged in the Complaint and they, in any case, are non-actionable. Defendant Fred Ross' special motion to strike the Complaint should be granted and this SLAPP should be dismissed.

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

I. FACTUAL AND PROCEDURAL BACKGROUND.

A. Defendant Fred Ross.

Defendant Fred Ross[2] grew up in Patterson and cares deeply that its government give the good people of Patterson the service they deserve. That is why Ross posts comments on the Patterson Irrigator website and operates the Patterson Irritator website. Ross started the Irritator website at a time when the City Council was appointing interested landowners to update the City's general plan and appeared to be using the power of their offices to punish those who disagreed with their views. The Patterson Irritator provides a forum not only for Ross' commentary, but for the general public to post its comments about Patterson. (Ross Decl., ¶¶ 2, 4-5.) Ross chose his pseudonym because he was inspired by the original Fred Ross, who organized the poor and workers to stand up for their rights and was a great influence on Cesar Chavez. (Ross Decl., ¶ 5.) Plaintiff Logan alleges that Fred Ross posted defamatory comments about Logan. (Complaint, ¶ 4.)

B. Plaintiff George Logan.

Plaintiff George Logan is the City Attorney for the City of Patterson. (Clifford Decl., ¶ 4, Exhibit B; Defendant's Request for Judicial Notice.) The allegedly defamatory comments were posted in response to an article published in the Patterson Irrigator on October 1, 2009, regarding proposed commercial development in Patterson, and an October 26, 2009, article about the Patterson City Manager. (Clifford Decl., ¶ 3, Exhibit A.) The October 1 article states, "Patterson's city attorney this week released his title and summary of an initiative designed to allow Del Puerto Health Center to move to the Keystone Pacific Business park. . . . The initiative – dubbed by opponents as 'The City of Patterson Healthcare Expansion Act' – was titled 'The Keystone Development Amendment Act' by City Attorney George Logan. The focus of the summary, as well, was more on Keystone than on health care, and advocates became outraged." (Clifford Decl., ¶ 3, Exhibit A.) A comment to this article states, "George Logan is a joke and is also in the pocket of the developers like Smith and Campo." (Clifford Decl., ¶ 3, Exhibit A, p.

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[2] "Fred Ross" is a pseudonym. (Ross Decl., ¶¶ 1-2, 5.)

3.) Similarly, the October 26 article is about the Patterson City Council's review of the quality of the City Manager's performance. The comment discusses the performance of various city officials and includes the comment, "George Logan is a joke!" (Clifford Decl., ¶ 3, Exhibit A, p. 6.)

C. The Complaint.

Plaintiff filed his Complaint on January 7, 2010. It alleges two causes of action, for libel and conspiracy to libel. Both causes of action are based on allegations that defendant defamed plaintiff by publishing critical comments about plaintiff in a newspaper and on a newspaper's website. (Complaint, ¶¶ 4-15.) Specifically, the Complaint alleges that:

> Several times during 2009, the Defendants published written materials in the Patterson Irrigator, a newspaper, and in the Patterson Irrigator website asserting that Plaintiff was "in the pocket" of Patterson developers; that Plaintiff was a "joke."
>
> The assertion "in the pocket of developers" is understood to mean that Plaintiff has been paid off by developers in the City of Patterson to make legal rulings in their favor.
>
> The assertion that Plaintiff is a "joke" is understood to mean that Plaintiff is a subject of general ridicule in the community.
>
> These assertions are false in that Plaintiff has never received any money or thing of value from any developer in or near the City of Patterson and Plaintiff is an accomplished attorney at law.

(Complaint, ¶¶ 4-7.) The second cause of action, for conspiracy to libel, alleges no new facts, but instead depends on the facts already alleged in the Complaint. (See Complaint, ¶¶ 12-16.)

II. PLAINTIFF'S CLAIMS ARE COVERED BY THE ANTI-SLAPP LAW.

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

SLAPPs have been defined as "civil lawsuits . . . aimed at preventing citizens from exercising their political rights or punishing those who have done so." (*Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees Local 483* (1999) 69 Cal.App.4th 1057, 1063.) 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 Code of Civil Procedure 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. 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 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; *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 his 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 defendant's motion must be granted. (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.) For purposes of the anti-SLAPP law, a cross-complaint is treated as a complaint, a cross-complainant as a plaintiff, and a cross-defendant as a defendant. (§ 425.16, subd. (h).)

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

1 covered by the statute:

2 (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
3 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
4 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
5 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.

6

7 **B. Plaintiff's Claims.**

8 Patterson City Attorney Logan alleges two causes of action – one for libel and one for

9 conspiracy to libel. Both claims are based on the allegations that defendant "published written

10 materials in the Patterson Irrigator, a newspaper, and on the Patterson Irrigator website asserting

11 that Plaintiff was 'in the pocket' of Patterson developers; that Plaintiff was a 'joke.'"

12 (Complaint, ¶ 4.) The Complaint alleges further that the "assertion 'in the pocket of developers'

13 is understood to mean that Plaintiff has been paid off by developers in the City of Patterson to

14 make legal rulings in their favor." (Complaint, ¶ 5.) Plaintiff further alleges that the "assertion

15 that Plaintiff is a 'joke' is understood to mean that Plaintiff is a subject of general ridicule in the

16 community." (Complaint, ¶ 6.)

17 **C. Plaintiff's Claims Are Covered Under Subdivision (e)(2).**

18 Subdivision (e)(2) of section 425.16 covers "any written or oral statement or writing

19 made in connection with an issue under consideration or review by a legislative, executive, or

20 judicial body, or any other official proceeding authorized by law." "There is no requirement that

21 the writing or speech be promulgated directly *to* the official body." (*Ludwig v. Superior Court*

22 (1995) 37 Cal.App.4th 8, 17-18 [emphasis in original].) As with the rest of the statute, this

23 provision must be construed broadly. (§ 425.16, subd. (a).)

24 Here, the allegedly wrongful comments were made about plaintiff George Logan who is

25 the City Attorney of Patterson, and about his execution of his duties. (Complaint, ¶¶ 4-6;

26 Clifford Decl., ¶ 3, Exhibit A.) The Complaint alleges that the allegedly defamatory comment

27 that Logan is "in the pocket" of developers gives one the impression that he has been "paid off

28 by developers in the City of Patterson to make legal rulings in their favor." (Complaint, ¶ 5.)

1 The comments upon which the Complaint is apparently based were made in response to articles
2 in the Patterson Irrigator about actions taken by Logan and the Patterson City Council. The first
3 article, dated October 1, 2009, and titled "City, proponents spar over the true goals of health
4 center petition," discusses the title and summary approved by Logan for a local ballot initiative.
5 The second article, dated October 26, 2009, and titled "City manager safe but has 'room for
6 improvement'," discusses the City Council's decision not to fire the City Manager. The
7 comment attached to this article congratulates the community for showing up at the council
8 meeting in large numbers and asserts that it shows the City's leaders that the community is
9 watching what they do, and includes the comment that plaintiff "is a joke." (Clifford Decl., ¶ 3,
10 Exhibit A.) The City Attorney is charged with advising "the city officials in all legal matters
11 pertaining to city business." (Gov. Code, § 41801.) The City Attorney "shall frame all
12 ordinances and resolutions required by the legislative body." (Gov. Code § 41802.) The City
13 Attorney "shall perform other legal services required from time to time by the legislative body."
14 (Gov. Code, § 41803.) Thus, because they were about plaintiff's performance as the City
15 Attorney for Patterson, the allegedly defamatory statements were made in connection with issues
16 under consideration by an executive body and are necessarily protected by subdivision (e)(2).

17 **D. Plaintiffs' Claims Against Defendant Are Subject to Subdivision (e)(3) of the**
18 **Anti-SLAPP Law, Because They Arise from Speech Activity in Connection with a Public Issue or an Issue of Public Interest.**

19 The Complaint is also subject to subdivision (e)(3) of the anti-SLAPP law, because it
20 arises from "statement[s] or writing[s] made in . . . a public forum in connection with an issue of
21 public interest." (§ 425.16, subd. (e)(3).) The requirement that the activity be "'in connection
22 with an issue of public interest' . . . is to be 'construed broadly' so as to encourage participation
23 by all segments of our society in vigorous public debate related to issues of public interest."
24 (*Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 808.) The statements were
25 allegedly published in a newspaper and on the newspaper's website, both of which are public
26 fora. (Complaint, ¶¶ 4, 8-9; *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468,
27 476-478 [newsletter published by a homeowners' club was a public forum under section
28 425.16]; *Wilbanks v. Wolk*, *supra*, 121 Cal.App.4th at pp. 895-97 [websites that are open to the

public and allow public comments are public fora.])

Plaintiff alleges that "The assertion 'in the pocket of developers' is understood to mean that Plaintiff has been paid off by developers in the City of Patterson to make legal rulings in their favor." (Complaint, ¶ 5.) He alleges further that "The assertion that Plaintiff is a 'joke' is understood to mean that Plaintiff is a subject of general ridicule in the community." (Complaint, ¶ 6.) The allegedly wrongful statements by defendant were in connection with a matter of public interest -- a commercial development in Patterson and Logan's involvement therewith and plaintiffs' execution of his duties as City Attorney for the City of Patterson generally. (Clifford Decl., ¶ 3, Exhibit A; see *Damon v. Ocean Hills Journalism Club*, *supra*, 85 Cal.App.4th at pp. 475-480 [statements in a newsletter regarding plaintiff's competency to manage a homeowner's association involve a matter of public interest and are covered by § 425.16].)

Courts have found other issues of less pressing public concern to be matters of public interest under section 425.16. (*Seelig v. Infinity Broadcasting, supra,* 97 Cal.App.4th at pp. 807-8 [a radio "shock jock's" commentary about plaintiff's decision to appear on the television show Who Wants to Marry a Multimillionaire? involved an issue of public interest]; *Ingels v. Westwood One Broadcasting Services, Inc.* (2005) 129 Cal.App.4th 1050, 1064 [interchange on radio call-in talk show regarding whether caller was too old to participate in the show involved a matter of public interest]; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1406 [statement that someone had entered the tenants' locked garage and turned the dial of their water heater off was protected under subd. (e)(4), even though it directly affected only two tenants].)

Therefore, the allegedly wrongful statements of defendant published in a newspaper and on a newspaper's website are protected by subdivision (e)(3).

III. PLAINTIFF CANNOT ESTABLISH A PROBABILITY OF PREVAILING ON HIS CLAIMS.

Since defendant has shown that plaintiff's claims arise from activity protected under section 425.16, the burden shifts to plaintiff to establish a probability of prevailing thereon. He must meet this burden with "competent, admissible evidence." (*Taus v. Loftus* (2007) 40 Cal.4th

683, 729.) Plaintiff will not be able to establish a probability of prevailing on his claims and defendant's special motion to strike must be granted.

Plaintiff cannot amend his Complaint to avoid dismissal. (*Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1054-55 [holding that an amended complaint, seeking to plead the fraud cause of action in greater detail, cannot be used to defeat an anti-SLAPP motion, noting that "there is no express or implied right in section 425.16 to amend a pleading to avoid a SLAPP motion"]; *Roberts v. Los Angeles County Bar Association* (2003) 105 Cal.App.4th 604, 613 [plaintiff cannot amend pleading after denial of anti-SLAPP motion, implying a stay in the proceedings prior to defendant filing an appeal].) *Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 772-773, ["a plaintiff cannot use an eleventh-hour amendment to plead around a motion to strike under the anti-SLAPP statute," noting that "nothing prevented plaintiffs from timely alleging [the proposed new] claim."]; see also *Schaffer v. City and County of San Francisco* (2008) 168 Cal.App.4th 992, 1005; *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1293-94.

Further, a libel complaint (which is what is involved here, since the allegedly actionable statements are written statements on an Internet website) must specifically identify, if not plead verbatim, the words constituting the allegedly libelous statement(s). (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 31.) The complaint must aver the provably false factual assertion, "which is indispensable to any claim for defamation." (*Ibid.*)

Additionally, because plaintiff is a public figure, he must allege that the subject statements were made with actual malice, as discussed below, which he has not done here, so his Complaint is fatally defective. (*Vogel v. Felice* (2005) 127 Cal.App.4th 1006, 1017.)

A. Plaintiff Will Not Be Able to Show That Fred Ross Made the Allegedly Defamatory Statements and Ross Has No Liability for Any Such Statements.

Plaintiff will not be able to show that the allegedly defamatory comments have been made by, or attributed to, Fred Ross, because Fred Ross did not make them, as he declares under penalty of perjury. (Ross Decl., ¶ 3; see Clifford Decl., ¶ 3, Exhibit A.)

B. **The Allegedly Wrongful Statements Are Not Actionable.**

Here, the comments are posted in response to an article in the Irrigator; the post is essentially what used to be called a "letter to the editor." "Letters to the editor are typically laden with literary license for the purpose of expressing one's opinion. . . . [T]he opinion-editorial pages of newspapers . . . are the well-recognized home of opinion and comment." (*Rudnick v. McMillan* (1994) 25 Cal.App.4th 1183, 1193 [citations omitted].) "Courts must be cautious lest we inhibit vigorous public debate about . . . public issues. If we err, it should be on the side of allowing free-flowing discussions of current events. We must allow plenty of 'breathing space' for such commentary." (*Ibid.*; citations omitted.) Clearly, this principle applies to the subject comments about plaintiff Logan.

Further, truth is an absolute defense against civil liability for defamation. (*Hejmadi v. AMFAC, Inc.* (1988) 202 Cal.App.3d 525, 552-553.) Because the subject statements involve matters of public concern, the First Amendment requires plaintiff to prove that they are false. (*Weller v. American Broadcasting Co.* (1991) 232 Cal.App.3d 991, 1010; *James v. San Jose Mercury News* (1993) 17 Cal.App.4th 1, 13.) To do so, plaintiff must prove that the subject statements contain or imply a "provably false factual assertion." (*Moyer v. Amador Valley School Dist.* (1990) 225 Cal.App.3d 720, 724.)

A statement that does not purport to state an actual fact is not defamatory. "There is constitutional protection 'for statements that cannot reasonably [be] interpreted as stating actual facts about an individual. . . . This provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation. . . ." (*James v. San Jose Mercury News, Inc.*, *supra*, 17 Cal.App.4th at p. 13; see also *Aisenson v. American Broadcasting Co.* (1990) 220 Cal.App.3d 146, 157 [rhetorical hyperbole is not actionable].) An opinion is a "'view, judgment or appraisal formed in the mind...' which is the result of a mental process and not capable of proof in terms of truth or falsity." (*Hoffman Company v. E.I. Du Pont de Nemours and Company* (1988) 202 Cal.App.3d 390, 397.)

Even language that generally may be considered a statement of fact assumes the character

of opinion if it is in the context of a public debate or other setting in which the audience anticipates that the speaker is trying to persuade them to her position. (*Okun v. Superior Court* (1981) 29 Cal.3d 442, 450, cert. den. 454 U.S. 1099.) "That which may be a statement of fact under other circumstances may become a statement of opinion when uttered in a political context." (*Desert Sun Publishing Co. v. Superior Court* (1979) 97 Cal.App.3d 49, 52.) The alleged statements here – that plaintiff "is a joke" and is "in the pocket" of developers are clearly such nonactionable opinions.

C. Plaintiff Cannot Prevail Because He Is a Public Figure and Has Not Pled That the Allegedly Defamatory Statements Were Made With Malice.

As City Attorney, plaintiff is a public figure because he is a public official and, therefore, must prove that the statements were made with constitutional malice. (*Brown v. Kelly Broadcasting Company* (1989) 48 Cal.3d 711, 721-22.) For purposes of libel law, a "public official" is a government employee who:

> (1) has, or appears to the public to have, substantial responsibility for or control over the conduct of governmental affairs; (2) usually enjoys significantly greater access to the mass media and therefore a more realistic opportunity to contradict false statements than the private individual; (3) holds a position in government which has such apparent importance that the public has an independent interest in the person's qualifications and performance beyond the general public interest in the qualifications and performance of all government employees; and (4) holds a position which invites public scrutiny and discussion of the person holding it entirely apart from the scrutiny and discussion occasioned by the particular controversy.

(*James v. San Jose Mercury News, Inc.*, *supra*, 17 Cal.App.4th at 10.) A city attorney is a public figure. (*Weingarten v. Block* (1980) 102 Cal.App.3d 129, 139, cert. den. 449 U.S. 899.)[3]

Under the First Amendment, in order to recover in a defamation action, public figures such as Logan must plead and prove by clear and convincing evidence that the defendant's statements were made with "actual malice," *i.e.*, with knowledge that they were false or with reckless disregard of whether or not they were false. (*Reader's Digest Association v. Superior Court* (1984) 37 Cal.3d 244, 256; *Vogel v. Felice*, *supra*, 127 Cal.App.4th at p. 1017.) Logan

[3] Any "doubt as to the public status of a government employee should be resolved in favor of the First Amendment guarantee of freedom of the press and the public's interest in open criticism of government operations." (*Tague v. Citizens for Law & Order, Inc.* (1977) 75 Cal.App.3d Supp. 16, 24.)

must show "that the defendant realized that his statement was false or that he subjectively entertained serious doubts as to the truth of [the] statement." (*Bose Corp. v. Consumers Union* (1984) 466 U.S. 485, 511, fn. 30.) "[O]nly those statements made with a high degree of awareness of their probable falsity" are actionable. (*Garrison v. Louisiana* (1964) 379 U.S. 64, 74.) "The clear and convincing standard requires that the evidence be such as to command the unhesitating assent of every reasonable mind." (*Beilenson v. Superior Court* (1996) 44 Cal.App.4th 944, 950.) This requires plaintiff to demonstrate by clear and convincing proof that the writer entertained serious doubts as to the truth of the publication. (*Reader's Digest Association v. Superior Court*, *supra*, 37 Cal.3d at p. 256.)

Plaintiff cannot prevail on this claim. First, the Complaint does not allege that the allegedly wrongful statements were made with actual malice. The Complaint does not "plead around" that defense. (*Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 824-25 ["Where the complaint's allegations or judicially noticeable facts reveal the existence of an affirmative defense, the "plaintiff must 'plead around' the defense, by alleging specific facts that would avoid the apparent defense. Absent such allegations, the complaint is subject to demurrer for failure to state a cause of action." (Internal punctuation and citations omitted.)].) Therefore, the challenged causes of action are legally insufficient on [their] face" because of this "fatal defect." (*Vogel v. Felice*, *supra*, 127 Cal.App.4th at pp. 1017, 1018.) Further, because the allegedly wrongful statements do not contain any provably false factual assertions, plaintiff cannot prevail on his libel action as a matter of law.

D. The Allegedly Wrongful Statements Are Privileged.

Civil Code § 47(c) provides that a communication is privileged if it is made without malice to an interested person:

> (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information.

(Civil Code § 47(c).) With respect to the conduct of public officers, the general public are "persons interested" in the communication. (*Stockton Newspapers v. Superior Court* (1988) 206

Cal.App.3d 966, 977.) "Malice" means a "state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person." (*Brown v. Kelly Broadcasting Co., supra*, 48 Cal.3d at p. 745.) There is a presumption that the communication was made without malice. (*Swafield v. Universal Esco Corporation* (1969) 271 Cal.App.2d 147, 163.) Plaintiff will not be able to overcome this presumption; therefore, he will not be able to show a probability of prevailing on his claim.

IV. Fred Ross Has a Right to Speak Anonymously.

Defendant has been sued herein as "Fred Ross," which is a pseudonym. (Ross Decl., ¶ 2; Clifford Decl., ¶ 2.) Whether or not defendant's true name should be made known to plaintiff is essentially the issue to be decided in defendant's special motion to strike. If defendant's special motion to strike is granted, plaintiff has no basis for requiring disclosure of defendant's true identity. If the motion is denied, plaintiff will suffer no prejudice, as he will be entitled to pursue discovery regarding defendant's identity. Defendant's right to speak anonymously should be protected until such time as plaintiff and the public have a greater need to know defendant's identity. As defendant's special motion to strike asserts, plaintiff Logan has not stated any actionable claims against defendant and should not be allowed to require Fred Ross to reveal Fred Ross' true identity.

The Supreme Court has repeatedly upheld the First Amendment right to speak anonymously. (*Buckley v. American Constitutional Law Foundation* (1999) 525 U.S. 182, 199-200; *McIntyre v. Ohio Elections Commission* (1995) 514 U.S. 334; *Talley v. California* (1960) 362 U.S. 60.) These cases celebrate the important role played by anonymous or pseudonymous writings through history, from the literary efforts of Shakespeare and Mark Twain through the explicitly political advocacy of the Federalist Papers. As the Supreme Court said in *McIntyre*:

> [A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, ... the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the

content of a publication, is an aspect of the freedom of speech protected by the First Amendment. . . . Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.

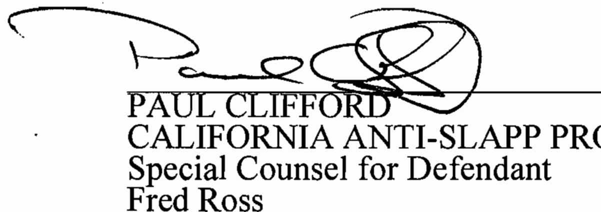
(*McIntyre v. Ohio Elections Commission*, *supra*, 514 U.S. at 341-342, 357 [emphasis added].) The United States Supreme Court has held that a court order to compel production of individuals' identities in a situation that would threaten the exercise of fundamental rights "is subject to the closest scrutiny." (*NAACP v. Alabama* (1958) 357 U.S. 449, 461.)

These rights are fully applicable to speech on the Internet. The Supreme Court has treated the Internet as a fully protected medium for public discourse, which places in the hands of any individual who wants to express his or her views the opportunity, at least in theory, to reach other members of the public hundreds or even thousands of miles away, at virtually no cost; consequently, the Court has held that First Amendment protections are fully applicable to communications over the Internet. (*Reno v. American Civil Liberties Union* (1997) 521 U.S. 844, 864-75.) Until plaintiff can show that he has arguably legitimate claims against Ross, defendant should not be required to disclose defendant's true identity. Because defendant's special motion to strike should be granted, defendant's anonymity will be protected, as the Constitution requires.

CONCLUSION.

Defendant Fred Ross has shown that plaintiff's claims are covered by the anti-SLAPP statute, thereby shifting the burden to plaintiff to show a probability of prevailing on his claims. Plaintiff will not be able to do so and this Court should dismiss the Complaint as a meritless SLAPP.

DATED: March 10, 2010



PAUL CLIFFORD
CALIFORNIA ANTI-SLAPP PROJECT
Special Counsel for Defendant
Fred Ross