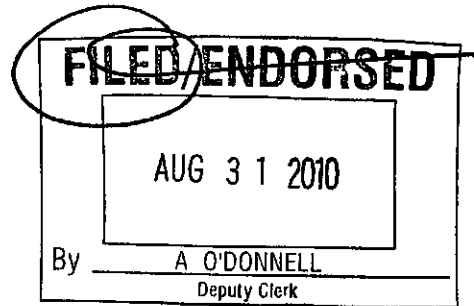


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7 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
8 **COUNTY OF SACRAMENTO**

10 GLENN HAGELE,
11 Plaintiff,
12 vs.
13 BRENT HANSON, and DOES 1 through 20,
14 Defendants.

CASE NO. 06AS00839

**NOTICE OF MOTION; SPECIAL
MOTION TO STRIKE FIRST AMENDED
COMPLAINT AS A SLAPP SUIT
PURSUANT TO SECTION 425.16 CAL.
CODE OF CIVIL PROC.; AND
SUPPORTING MEMORANDUM**

Date: September 24, 2010
Time: 2:00 p.m.
Place: Dept. No. 53
Reservation No.: 1418628

First Amended Complaint
Filed: November 3, 2006



1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 NOTICE IS HEREBY GIVEN that on September 24, 2010 at 2:00 p.m., or as soon
3 thereafter as the matter may be heard, in Department 53 of the above-entitled Court, located at 800
4 9th Street, Sacramento, California, 95814, Defendant Luranell Burch will move the Court for
5 findings and orders as follows:

6 1. Determining that this action is subject to Section 425.16 of the California Code of
7 Civil Procedure;

8 2. Determining that Plaintiff has failed to carry his burden of establishing a probability
9 of prevailing on all and each of the claims asserted against Ms. Burch;

10 3 Striking and dismissing the First Amended Complaint and each individual cause of
11 action as against Ms. Burch; and

12 4. Setting a further hearing to determine an award of attorneys' fees and costs to Ms.
13 Burch pursuant to Section 425.16(c) of the California Code of Civil Procedure

14 This Motion will be made on the grounds that the First Amended Complaint, and each cause
15 of action asserted therein against Ms. Burch, is subject to the provisions of Section 425.16 of the
16 California Code of Civil Procedure, that Plaintiff has not established a probability of prevailing on
17 his claims against Ms Burch, and that Ms. Burch is, accordingly, entitled to the remedy provided by
18 Section 425.16.

19 This Motion will be based on this Notice; the pleadings, records, and files submitted to the
20 Court in this matter; the Second Declaration of Luranell Burch filed and served
21 contemporaneously herewith; and the Memorandum of Points and Authorities, together with such
22 further evidence as may be presented at the hearing before the Court on this Motion.

23 DATED: August 30, 2010

BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, L.L.P.

24
25 By:



26 Darrell A. Fruth
27 Attorney for Defendant Luranell Burch
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TABLE OF CONTENTS

I. INTRODUCTION..1

II. FACTS1

III. ARGUMENT6

 A. California’s Anti-SLAPP Statute6

 B. Plaintiff’s First Amended Complaint Arises Out Of Protected Activity.....7

 C. Plaintiff Cannot Establish A Probability Of Prevailing On His Claims.....9

IV. CONCLUSION14

TABLE OF AUTHORITIES

Cases

<i>Ampex Corp v Cargle</i> , (2005) 128 Cal. App. 4th 1569	12
<i>Briggs v Eden Counsel for Hope and Opportunity</i> , (1999) 19 Cal. 4th 1106	7
<i>Church of Scientology v Wollersheim</i> , (1996) 42 Cal. App. 4th 628	7
<i>City of Cotati v Cashman</i> , (2002) 29 Cal. 4th 69	7
<i>Copp v Paxton</i> , (1996) 45 Cal. App. 4th 829	12
<i>DuPont Merck Pharmaceutical Co v Superior Court</i> , (2000) 78 Cal. App. 4th 562	8
<i>Equilon Enterprises v Consumer Cause, Inc.</i> , (2002), 29 Cal. 4th 53	7
<i>Gates v Discovery Comm'ns, Inc</i> , (2004) 34 Cal. 4th 679	13, 14
<i>Gilbert v Sykes</i> , (2007) 147 Cal. App. 4th 13	10, 11
<i>Kahn v Bower</i> , (1991) 232 Cal. App. 3d 1599	10, 11
<i>Liebermann v KCOP Television, Inc</i> , (2003) 110 Cal. App 4th 156	8
<i>Matson v Dvorak</i> , (1995) 40 Cal. App. 4th 539	9
<i>Navellier v Sletten</i> , (2002) 29 Cal. 4th 82	7

1	<i>New York Times v Sullivan</i> ,	
2	(1964) 376 U.S. 254	12
3	<i>Reader's Digest Ass'n v Superior Court</i> ,	
4	(1984) 37 Cal. 3d 244	12
5	<i>Rivero v Am Fed of State, County and Mun Employees, AFL-CIO</i> ,	
6	(2003) 105 Cal. App. 4th 913	9
7	<i>Wilbanks v Wolk</i> ,	
8	(2004) 121 Cal. App. 4th 883	8
9	<i>Wilcox v Superior Court</i> ,	
10	(1994) 27 Cal. App. 4th 809	7, 8, 9

Statutes and Rules

12	California Civil Code § 45	8
13	California Code of Civil Procedure § 425.16	<i>passim</i>

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 After the passage of nearly four years since the filing of his First Amended Complaint,
4 Plaintiff Glenn Hagele ("Plaintiff") now has purported to add Defendant Luranell Burch ("Burch")
5 to this action by naming her as "Doe 8." As set out in the Second Declaration of Luranell Burch,
6 filed contemporaneously herewith, Plaintiff's effort to bring her into this action represents simply
7 one more instance in a long history of harassment she has received from Plaintiff on account of her
8 engaging in speech protected by the First Amendment to the United States Constitution. In
9 particular, Burch first came into contact with Plaintiff when she learned he was insulting and
10 attacking her in Internet posts for statements she had published on the Internet critical of the LASIK
11 procedure, which is a matter of significant public interest. From there, Plaintiff's campaign to
12 silence Burch and other LASIK critics has only escalated, culminating in Plaintiff's present attempt
13 to pursue baseless defamation and invasion of privacy claims against Burch in this action.

14 Because of the nature of Plaintiff's claims and the context in which they arose, Plaintiff
15 must show that his claims pass muster under Section 425.16 of the California Code of Civil
16 Procedure, California's anti-SLAPP statute. As will be explained below, each of these claims
17 suffers from multiple fatal deficiencies, ranging from Plaintiff's inability to prove the elements of
18 those claims, to his inability to overcome Burch's constitutional defenses, to procedural infirmities,
19 including Plaintiff's delay in attempting to add Burch to this action and the expiration of the
20 limitations periods for those claims. In short, the record is clear that Plaintiff cannot prevail on
21 either a defamation or invasion of privacy theory against Burch, and Plaintiff's First Amended
22 Complaint should therefore be stricken and dismissed pursuant to Section 425 16.

23 **II. FACTS**

24 Burch is a research scientist employed by the National Institute of Environmental Health
25 Sciences ("NIEHS") in the Research Triangle Park, North Carolina, and she resides in Durham,
26 North Carolina. In 2004, Burch underwent LASIK surgery, and the results of her surgery were
27 devastating. Her vision is distorted and blurry, especially in dim light, she has chronic eye
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1 irritation, poor night vision, and she has lost significant contrast sensitivity, which is the ability to
2 distinguish between an object and its background at low levels of light.

3 The risks associated with the LASIK procedure, and the degree of information available to
4 prospective patients who are considering the procedure, represent important public issues. As a
5 result, LASIK has been a widespread subject of discussion on the Internet and in the traditional
6 media. Today, there are no fewer than 20 websites devoted to discussion of LASIK and its risks.
7 There have been numerous television segments and written reports about LASIK, and in 2008 the
8 Food and Drug Administration conducted public hearings concerning LASIK.

9 Given the importance of knowledge about the risks associated with LASIK, and given
10 Burch's own negative experience with the procedure and her qualifications as a trained scientist, in
11 April 2004 Burch began participating in the public discussion over the merits of LASIK. In
12 particular, she has posted information on patient bulletin boards to communicate with other patients
13 and also with those considering LASIK, with the hope that patients would have access to better
14 information about LASIK complications than Burch had prior to her own surgery. Burch has
15 applied her science background to the study of medical literature relating to complications of
16 corneal refractive surgeries such as LASIK. Based on her negative experience with LASIK, and
17 based on her own research and interaction with other persons, Burch believes that complications
18 such as hers are often understated by LASIK surgeons.

19 The statements Burch published on the Internet about LASIK, including statements critical
20 of the LASIK industry, brought her into contact with Plaintiff, who promotes the LASIK industry.
21 Burch first became aware of Plaintiff in approximately October 2004 when she was told he was
22 making posts criticizing her postings about LASIK. As it turned out, Plaintiff has criticized and
23 harassed many people who have attempted to raise concerns about LASIK on the Internet or
24 establish websites and other forums for patients to discuss LASIK, and Burch simply became
25 another one of his targets.

1 Plaintiff is the Executive Director and founder of the Council for Refractive Surgery Quality
2 Assurance ("CRSQA"). CRSQA's website (www.usaeyes.org) makes it clear that CRSQA's
3 mission includes engaging critics of LASIK on the Internet. For example, the website states that:

4 CRSQA representatives monitor all Internet bulletin boards,
5 newsgroups, and other public forums that include information on
6 refractive surgery. If incorrect information is posted, we provide an
7 accurate response. If a patient posts a question, we do the research
8 and provide an answer. If an anti-refractive surgery zealot makes
9 inflammatory statements, we provide a balanced response.

8 Based on the treatment she has received from Plaintiff, Plaintiff plainly considers Burch to be a
9 "zealot."

10 Plaintiff's harassment of Burch has taken many forms. He has made numerous false,
11 negative, and harassing posts about her on the Internet. For example, he has stated:

12 Laurantell "Nell" Burch uses multiple aliases to distribute her
13 misrepresentations, half-truths, lies, and defamation of others.

14 I am saying exactly what I have said. The manipulations,
15 misinterpretations, statements out of context, and distortions of
16 others' statements and medical studies cited by Laurantell Burch in the
17 fantasy called "The Lasik Report" are so far from reason and reality
18 that in my opinion relying on any medical analysis from her is clearly
19 dangerous.

17 Laurantell Burch is employed by the National Institute of
18 Environmental and [sic] Health Sciences (NIEHS) outside of Durham
19 NC as a researcher. It is frightening to think that NIEHS would rely
20 on someone who so clearly manipulates data to fit her agenda.

20 Laurantell Burch is under investigation by the Attorney General of the
21 state of North Carolina where she resides. Her malicious and
22 outrageous acts against me prompted NC lawmakers to clarify their
23 laws regarding publicizing personal identity information – hence the
24 "Burch Clause."

23 Her employer, the National Institute for [sic] Environmental Health
24 Sciences (HIEHS) [sic], a division of the National Institutes of
25 Health, is investigating how the secure NIEHS Internet access of
26 Laurantell "Nell" Burch was used to publish multiple defamatory
27 statements against me by a person who is not authorized to use the
28 secure government access.

1 (See Second Declaration of Lauranell Burch, Ex. C.) These are but a few examples of the
2 statements Plaintiff has made about Burch. Plaintiff has made similar statements about other
3 LASIK critics as well. (See *id.*, ¶16.)

4 Plaintiff also waged a nearly two-year campaign to have Burch fired from her position with
5 NIEHS. This campaign included repeated telephone calls and email communications to personnel
6 at NIEHS and the National Institutes of Health (the "NIH") In fact, in an internal communication
7 an NIH representative described receiving "numerous" messages from Plaintiff. In these
8 communications with Burch's employer, Plaintiff made numerous negative and false statements
9 about Burch. These include the following:

10 Apparently this alleged defamation is being perpetrated with the
11 assistance of an employee of NIEHS.

12 Lauranell Burch is a known accomplice of Brent Hanson. Using
13 multiple aliases, Burch has participated in alleged defamation against
14 me personally and against the patient advocacy I represent using
15 multiple aliases, has participated in alleged defamation against a
16 former colleague at Duke University, has attempted to disrupt
17 professional business relationships between our organization and
18 those who provide our funding, and supports websites and individuals
19 that allegedly defame me personally and/or our organization.

20 I have previous [sic] experienced numerous unpleasant Internet
21 encounters with Ms Burch.

22 In a statement that probably will not surprise anyone who has
23 witnessed Lauranell "Nell" Burch's antics, she attempts to blame me
24 for her publicizing my personal identity and at the same time claims
25 she did not know my personal identity was publicized on her website.

26 After a detailed investigation of the facts, the North Carolina Attorney
27 General issued a "cease and desist" letter to Lauranell "Nell" Burch.

28 I believe that if you review the NIH policies regarding use of its
 computer systems you will find Dr. Burch's actions are in violation of
 NIH [sic] those policies.

1 (See Second Declaration of Lauranell Burch, ¶¶ 20-26, Exs. E-J.) Plaintiff continually raised with
2 NIEHS and NIH an issue relating to the unauthorized use of Burch's computer by another person,
3 even though Plaintiff was told, just four days after he first raised the issue, that it had been resolved
4 internally.

1 Plaintiff also set up a website, www.glennhagele.com, devoted almost entirely to attacking
2 Burch and others. This website contains numerous false and insulting statements about Burch, and
3 it published private personal information about Burch, including her home address, employer,
4 former employer, and e-mail addresses. In many of the negative posts Plaintiff has made about
5 Burch on the Internet, Plaintiff provided links to other negative information he posted about Burch
6 at www.glennhagele.com, and Plaintiff provided the website address to Burch's superiors at
7 NIEHS.

8 As the emails to Burch's employers indicate, as early as April 2007 Plaintiff was accusing
9 Burch of posting certain personal information about Plaintiff on the Internet. However, as Burch
10 has explained on numerous occasions and as Plaintiff himself has acknowledged, Burch did not post
11 on the Internet or otherwise publish Plaintiff's social security number, driver's license number, bank
12 account numbers, credit card numbers or other personal information. In fact, Burch has no web
13 development skills and thus has never placed any content on any website aside from making posts
14 on established bulletin boards

15 In December 2007, Plaintiff sued Burch in North Carolina, again alleging that she had
16 published his personal information on the Internet. Plaintiff's North Carolina attorney deposed
17 Burch in that action on December 18, 2007, and during her testimony she again confirmed that she
18 had not published Plaintiff's personal information. (Second Declaration of Luranell Burch, ¶28,
19 Ex J, pp. 17-21, 34-38.) After Burch's deposition in the North Carolina action, Plaintiff stated in a
20 document *filed in this case*: "It is only in mid-December [2007], after tracking down Luranell
21 Burch, Defendant's [Hanson's] accomplice, and deposing her, was Plaintiff able to determine that it
22 was Defendant [Hanson] that was publishing the offensive material, and not Ms. Burch" (*Id*,
23 Ex. K, pp. 4-5.) Plaintiff voluntarily dismissed his claims against Burch in the North Carolina
24 action in a filing dated July 13, 2010, the same day he sought to add Burch as a Defendant in this
25 action by naming her as "Doe 8."

26 Tellingly, Plaintiff used an *ex parte* temporary restraining order he obtained in the North
27 Carolina action to shut down entirely certain websites devoted to discussion of LASIK. This
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1 occurred despite the fact that the order did not require shutting down websites but rather the
2 removal of any of Plaintiff's personal information. The temporary restraining order was ultimately
3 dissolved when the North Carolina court denied Plaintiff's request for a preliminary injunction.
4 However, the episode further demonstrates Plaintiff's use of litigation against Burch to prevent her
5 and others from engaging in protected speech about LASIK.

6 III. ARGUMENT

7 A. California's Anti-SLAPP Statute.

8 The California Legislature enacted Section 425.16 of the California Code of Civil
9 Procedure, known as California's "anti-SLAPP" statute, to ensure that groundless lawsuits that
10 threaten to chill protected First Amendment freedoms are dismissed early, before they consume
11 substantial time and expense of the defendant. Section 425.16 provides, in pertinent part:

12 (b)(1) A cause of action against a person arising from any act of that
13 person in furtherance of the person's right of petition or free speech
14 under the United States or California Constitution in connection with
15 a public issue shall be subject to a special motion to strike, unless the
16 court determines that the plaintiff has established that there is a
17 probability that the plaintiff will prevail on the claim.

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

21 ...

22 (e) As used in this section, "act in furtherance of a person's right
23 of petition or free speech under the United States or California
24 Constitution in connection with a public issue" includes: (1) any
25 written or oral statement or writing made before a legislative,
26 executive, or judicial proceeding, or any other official proceeding
27 authorized by law; (2) any written or oral statement or writing made
28 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.

1 Motions filed under Section 425.16 are due within 60 days of service of the subject complaint and
2 ordinarily must be noticed for hearing within 30 days. *See* CCP § 425.16(f). The filing of a special
3 motion to strike has the effect of staying discovery. *See* CCP § 425.16(g).

4 By requiring a quickly scheduled hearing on a motion to strike filed under Section 425.16
5 and by staying discovery during the pendency of such a motion, the California Legislature ensured
6 that lawsuits—such as the one filed by Plaintiff here—arising out of speech on an issue of public
7 interest pass a substantial hurdle before moving into the costly discovery phase of litigation. *See,*
8 *e g , Church of Scientology v Wollersheim* (1996) 42 Cal. App. 4th 628, 645 (noting that SLAPP
9 suits are brought to interfere with constitutionally protected rights and achieve their objectives if
10 they deplete defendant’s resources or energy), *disapproved of on other grounds, Equilon*
11 *Enterprises v Consumer Cause, Inc* (2002), 29 Cal. 4th 53, *Wilcox v Superior Court* (1994) 27
12 Cal. App. 4th 809, 816-17 (same), *disapproved of on other grounds, Equilon*, 29 Cal. 4th 53.

13 The analysis this Court must undertake is straightforward. A defendant moving to strike a
14 complaint pursuant to Section 425.16 must first make a prima facie showing that the targeted
15 complaint is one arising from protected activity. *See* CCP § 425.16(b)(1); *see Navellier v. Sletten*
16 (2002) 29 Cal. 4th 82, 88. If the defendant makes this showing, the burden then shifts to the
17 plaintiff to establish a probability of prevailing on the challenged claim or claims. *See* CCP
18 § 425.16(b)(1), *see Navellier*, 29 Cal. 4th at 88. In satisfying its initial burden, the defendant need
19 show only that the plaintiff’s complaint fits into one of the categories listed in Section 425.16(e) and
20 need not prove that the plaintiff intended to chill free speech or that the targeted lawsuit actually
21 chilled free speech. *See Navellier*, 29 Cal. 4th at 88; *Equilon*, 29 Cal. 4th at 66- 67; *City of Cotati v*
22 *Cashman* (2002) 29 Cal. 4th 69, 74-76.

23 **B. Plaintiff’s First Amended Complaint Arises From Protected Activity.**

24 Burch’s initial burden of demonstrating that Plaintiff’s First Amended Complaint arises
25 from protected activity is easily satisfied. The California Supreme Court has given definitive
26 construction to the “arising from” requirement, holding that “the statutory phrase ‘cause of action ...
27 arising from’ means simply that the defendant’s act underlying the plaintiff’s cause of action must
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1 itself have been an act in furtherance of the right of petition or free speech.” *Cotati*, 29 Cal. 4th at
2 78; *see also Briggs v Eden Counsel for Hope and Opportunity* (1999) 19 Cal. 4th 1106, 1114
3 (holding “arising from” language in anti-SLAPP statute means “based upon”). This does not mean
4 that the defendant must establish at this stage that the underlying speech at issue is constitutionally
5 protected as a matter of law. *See Wilcox*, 27 Cal. App. 4th at 819-20. To the contrary, once
6 Section 425.16 is properly invoked by the defendant, the burden shifts to the *plaintiff* to establish a
7 probability of success on its claims, including a probability of successfully establishing that
8 constitutional defenses do not apply. *See Liebermann v KCOP Television, Inc* (2003) 110 Cal.
9 App. 4th 156, 165.

10 Here, Plaintiff’s two causes of action against Burch—styled “Defamation/Libel California
11 Civil Code § 45” and “Invasion of Privacy”—arise from Burch’s speech on an issue of public
12 importance, namely the merits of and risks associated with the LASIK procedure. As set out above,
13 Burch came into contact with Plaintiff because of Burch’s publication on the Internet of statements
14 critical of the LASIK industry and pointing out complications associated with the LASIK
15 procedure. Plaintiff’s efforts to silence Burch’s speech have taken many forms, ranging from
16 insulting and attacking her in posts he has made on the Internet, to creating a website devoted to
17 attacking her and others, to contacting her employer in effort to have her fired, to suing her in North
18 Carolina, to misusing a subsequently dissolved temporary restraining order obtained in North
19 Carolina to completely shut down websites critical of the LASIK procedure and the LASIK
20 industry, to attempting to sue her in California. Plaintiff’s generically alleged defamation claim in
21 this action—that “Defendants” made unspecified defamatory statements about him—can only have
22 arisen out of Burch’s participation in a public forum in the debate over the merits of LASIK.

23 Thus, Plaintiff’s defamation claim and other claims against Burch arise directly from actions
24 Burch has taken in furtherance of her free speech rights, including her right to speak publicly about
25 a matter of public interest. Suing over speech made in a public forum on an issue of public
26 importance plainly triggers the application of Section 425.16. *See, e g, Wilbanks v Wolk* (2004),
27 121 Cal. App. 4th 883, 898-901 (holding statements published on Internet website by consumer
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1 watchdog and providing consumer information triggered application of Section 425.16); *DuPont*
2 *Merck Pharmaceutical Co v. Superior Court* (2000) 78 Cal. App. 4th 562, 566-567 (holding
3 statements concerning effectiveness of blood thinner triggered Section 425.16).

4 Even if Plaintiff contends the alleged defamation arose solely out of statements concerning
5 Plaintiff and his organization, because Plaintiff has thrust himself into the public eye with respect to
6 the public debate over LASIK, statements about him and his organization likewise would trigger
7 application of Section 425.16. *See Rivero v Am. Fed of State, County and Mun. Employees, AFL-*
8 *CIO* (2003) 105 Cal. App. 4th 913, 924 (holding Section 425.16 triggered by statement concerning
9 "a person or entity in the public eye, conduct that could directly affect a large number of people
10 beyond the direct participants[,] or a topic of widespread, public interest.") (citations omitted).
11 Thus, Plaintiff cannot avoid application of Section 425.16 by attempting to narrow the scope of his
12 claims against Burch to statements she made criticizing Plaintiff and his tactics.

13 Accordingly, Burch has made a prima facie showing that Section 425.16 applies to the
14 claims of Plaintiff's First Amended Complaint directed to Burch, and the First Amended Complaint
15 must therefore be stricken as against Burch unless Plaintiff demonstrates a probability of succeeding
16 on his defamation and privacy claims against her. For the reasons set forth below, he cannot do so.

17 **C. Plaintiff Cannot Establish A Probability Of Prevailing On His Claims.**

18 Once the defendant establishes the applicability of Section 425.16, the burden shifts to the
19 plaintiff to demonstrate a probability of prevailing on the claims at issue, or those claims will be
20 stricken. A SLAPP plaintiff meets its burden only by establishing each of the following:

21 1. The SLAPP plaintiff must demonstrate the legal sufficiency of
22 the complaint. *See Wilcox*, 27 Cal. App. 4th at 823-25; *Matson v*
Dvorak (1995) 40 Cal. App. 4th 539, 548.

23 2. The SLAPP plaintiff must adduce admissible evidence
24 sufficient to make out a prima facie case on each claim asserted in the
25 complaint, that is, evidence that would be sufficient at trial to support
a judgment in the plaintiff's favor. *See Wilcox*, 27 Cal. App. 4th at
823-24.

26 3. The SLAPP plaintiff must meet all of the defendant's
27 constitutional defenses, either by showing that the purported defenses
are not applicable as a matter of law or by adducing facts that, if
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1 accepted by the trier of fact, would negate those defenses. See
2 *Wilcox*, 27 Cal. App. 4th at 824.

3 Because Plaintiff cannot demonstrate *any* of these three factors, much less all three, with respect to
4 his claims against Burch, the First Amended Complaint must be stricken as against her. See CCP
5 § 425.16(b)(1).

6 Plaintiff's First Amended Complaint is deficient in a number of serious respects. Its bare
7 allegations fall far short of making out either a defamation or invasion of privacy claim against
8 Burch, especially when the evidence offered in Second Declaration of Luranell Burch is
9 considered. The First Amended Complaint does not specify *any* statement or publication by
10 "Doe 8" that Plaintiff contends is either defamatory or amounts to an invasion of privacy. Instead,
11 Plaintiff merely alleges that "Defendants . . . published, republished, and communicated defamatory
12 statements to persons other than Plaintiff with reckless disregard for truth." (First Amended
13 Complaint, ¶13.) Plaintiff makes no allegation as to what statement, if any, he contends "Doe 8"
14 made about him that is defamatory, when it was made, or who heard or read the statement.¹

15 These deficiencies are fatal to Plaintiff's claim because they render his First Amended
16 Complaint legally insufficient. See *Gilbert v Sykes* (2007) 147 Cal. App. 4th 13, 31-32 (striking
17 plaintiff's defamation claim pursuant to Section 425.16, where "Sykes's allegation that Gilbert
18 misstated the content of unspecified communications between him and Gilbert relating to
19 unspecified procedures that he performed is a paradigm of vagueness, and does not even come close
20 to the specificity required to state an actionable libel claim."). Indeed, the courts of California have
21 specifically held that "[t]he general rule is that the words constituting an alleged libel must be
22 specifically identified, if not pleaded verbatim, in the complaint." *Kahn v Bower* (1991) 232 Cal.
23 App. 3d 1599, 1612, n.5. Thus, "[i]f the pleadings are not adequate to support a cause of action, the
24 plaintiff has failed to carry his burden in resisting the [special] motion [to strike]." *Gilbert*, 147 Cal.
25 App. 4th at 31. Because Plaintiff failed to specify the particulars of any alleged defamation by

26
27
28 ¹ These deficiencies are also the subject of Burch's Demurrer to the First Amended
Complaint, filed contemporaneously herewith.

1 "Doe 8" in his First Amended Complaint, his pleading must be stricken as against Burch pursuant to
2 Section 425.16.

3 Even were Plaintiff to argue that his claims against Burch are limited to the matters defined
4 in the First Amended Complaint as the "Defamatory Letter" (First Amended Complaint, ¶6) and the
5 "Private Information" (First Amended Complaint, ¶9), his pleading still should be stricken under
6 Section 425.16 for lack of specificity. Significantly, Plaintiff does not allege how, if at all, "Doe 8"
7 was involved in the publication of either the "Defamatory Letter" or the "Private Information."
8 Instead, the First Amended Complaint specifically alleges that *Defendant Brent Hanson* published
9 these matters. The only link of any sort between the unnamed Doe Defendants and these matters
10 are the vague allegations that "Plaintiff is informed and believes, and therefore alleges, Defendants,
11 and each of them published, and continue to publish, the Defamatory Letter" (First Amended
12 Complaint, ¶7) and that "Plaintiff is informed and believes, and therefore alleges, Defendants, and
13 each of them publicly published, and continue to publish, Plaintiff's Private Information." (First
14 Amended Complaint, ¶10.) These allegations, which provide no indication whatever of how, when,
15 or to whom Plaintiff contends "Doe 8" published the "Defamatory Letter" or the "Private
16 Information," fall far short of making out a legally sufficient claim. *See Gilbert*, 147 Cal. App. 4th
17 at 31-32, *Kahn*, 232 Cal. App. 3d at 1612, n.5.²

18 Moreover, Burch has now come forward with affirmative evidence proving that in fact she
19 did not publish either the "Defamatory Letter" or the "Private Information." In her Second
20 Declaration, filed in support of this Motion, Burch explained that she has never published the letter
21 described in paragraph 6 of the First Amended Complaint, nor did she have any involvement in its
22 publication (*See* Second Declaration of Laurantell Burch, ¶31.) She also provided testimony that
23 she has never published Plaintiff's personal information, as well as the transcript of her deposition

24 ² As set out in Burch's Demurrer, these claims are in any event time barred. The First
25 Amended Complaint reveals that the "Defamatory Letter" was published in May 2005 and the
26 "Private Information" in May 2006. California's one-year limitations period for defamation (CCP
27 § 340(c)) and two-year limitations period for invasion of privacy (CCP § 335.1) had therefore long
28 expired when Plaintiff purported to name Burch as "Doe 8" on July 13, 2010. As demonstrated in
Burch's separate Motion to Strike, Plaintiff's First Amended Complaint is further subject to being
stricken or dismissed because Plaintiff failed to name and serve Burch within three years of
instituting this action.

1 taken in a North Carolina action also brought by Plaintiff, which contains testimony confirming this
2 fact. (*See id.*, ¶¶27-28.) In fact, after Burch was deposed in North Carolina, Plaintiff made a filing
3 in this action in which he specifically acknowledged that “it was Defendant [Hanson] that was
4 publishing the offensive material, and not Ms. Burch.” (*Id.*, ¶28, Ex. K, pp. 4-5) Plaintiff’s
5 inability to allege, must less prove, that Burch made any actionable statement about him precludes
6 any finding that he has made out a prima facie case on his claims against Burch and therefore
7 entitles Burch to the remedy provided by Section 425.16.

8 Plaintiff’s defamation claim against Burch is further subject to being stricken as a SLAPP
9 claim because Plaintiff has not properly alleged, and cannot prove, that Burch acted with actual
10 malice under *New York Times v. Sullivan* (1964) 376 U.S. 254. California case authorities are clear
11 that a “public figure” bringing a defamation claim must prove by clear and convincing evidence that
12 the defendant acted with the requisite level of constitutional fault, which was termed “actual
13 malice” by the U.S. Supreme Court in *New York Times*. *See Reader’s Digest Ass’n v Superior*
14 *Court* (1984) 37 Cal. 3d 244, 256-57. Under that standard, the plaintiff must prove that the
15 defendant either knew the statement at issue was false or made the statement while entertaining
16 “serious doubts” about its truth. *See id.* In the context of a special motion to strike, Plaintiff must
17 therefore establish a probability that he can produce clear and convincing evidence that Burch
18 published a knowingly false statement about him or acted with reckless disregard of the truth. *See*
19 *Ampex Corp v Cargle* (2005) 128 Cal. App. 4th 1569, 1578-79. As explained below, he cannot
20 make any such showing.

21 Plaintiff in this case is a “limited purpose” public figure because he and his organization,
22 CRSQA, have voluntarily injected themselves in the public debate concerning the LASIK
23 procedure. As Burch’s Second Declaration establishes, when Plaintiff and Burch first came into
24 contact with one another there was already existing a public controversy surrounding the risks
25 associated with LASIK procedure and whether those risks were understated by the LASIK industry.
26 Plaintiff and his organization, as CRSQA’s website makes clear, have voluntarily sought to
27 influence the public debate on these topics by engaging LASIK critics on the Internet, by making
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1 public statements about LASIK in traditional media, and by participating in public hearings on the
2 topic. As a result, Plaintiff constitutes a limited purpose public figure in this area for purposes of
3 *New York Times*. See *Copp v Paxton* (1996) 45 Cal. App 4th 829, 845-846 (setting out elements of
4 limited purpose public figures).

5 Here, Plaintiff has made no bona fide allegation that Burch acted with actual malice, much
6 less adduce the requisite "clear and convincing" evidence that she did so. The First Amended
7 Complaint contains only the conclusory assertion that "Defendants, and each of them, knew or
8 should have known that the defamatory statements were false, or had serious doubts about the truth
9 of the statements, and failed to use reasonable care to determine the truth or falsity of such
10 statement" (First Amended Complaint, §18.) Parroting the legal standard will not suffice.
11 Moreover, Plaintiff offered no specific facts concerning "Doe 8" at all in the First Amended
12 Complaint. Thus, in addition to his failure to allege any particular statement made by "Doe 8,"
13 Plaintiff compounds this deficiency by failing to allege how or why any such statement was made
14 by "Doe 8" with knowledge of its falsity. Finally, in her Second Declaration, Burch has now
15 negated the required element of actual malice. She has offered facts showing that she did not
16 publish the "Defamatory Letter" and has not made any false statement concerning Plaintiff,
17 knowingly or otherwise. (See Second Declaration of Luranell Burch, ¶¶31-32.) On the basis of
18 this record, Plaintiff cannot establish a probability of prevailing on his defamation claim against
19 Burch, and it therefore should be stricken pursuant to Section 425.16.

20 Finally, Plaintiff's invasion of privacy claim is further subject to being stricken because it
21 founders on a required element under California law. As set out above, Plaintiff cannot establish
22 Burch's liability on an invasion of privacy claim because, as Plaintiff himself has acknowledged to
23 the Court, Burch did not publish the "Private Information" described in the First Amended
24 Complaint. In addition to this fatal deficiency, Plaintiff's invasion of privacy claim also fails
25 because he seeks to recover for the publication of truthful facts contained in public records. The
26 California Supreme Court has expressly held that if true facts are contained in government records
27 that are open to public inspection, the publication of those facts cannot give rise to an invasion of
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1 privacy claim. *See Gates v Discovery Comm'ns, Inc* (2004) 34 Cal. 4th 679, 696 ("Accordingly,
2 following *Cox* and its progeny, we conclude that an invasion of privacy claim based on allegations
3 of harm caused by a media defendant's publication of facts obtained from public official records of
4 a criminal proceeding is barred by the First Amendment to the United States Constitution.").

5 Here, the alleged "Private Information" was contained in Plaintiff's publicly available
6 bankruptcy records. These records were subsequently posted on the Internet by someone other than
7 Burch. Because the personal information about Plaintiff included in those records amounts to true
8 facts contained in government records open to the public for inspection, the subsequent posting of
9 those same records on the Internet cannot give rise to an invasion of privacy claim. *See Gates*, 34
10 Cal. 4th at 696. Thus, in addition to the foregoing deficiencies in Plaintiff's claims, Burch's Motion
11 should be granted on the additional ground that Plaintiff cannot establish a probability of prevailing
12 on his invasion of privacy claim.


13 IV. CONCLUSION

14 The purpose of Section 425.16 is to expose and dismiss SLAPP lawsuits brought primarily
15 to chill the exercise of free speech rights. This action falls squarely within the ambit of
16 Section 425.16, and dismissal is appropriate because Plaintiff cannot establish a probability of
17 prevailing on his defamation and invasion of privacy claims against Burch. Should the Court grant
18 this Motion, Burch is entitled to an award of attorneys' fees and costs pursuant to Section 425.16(c).
19 Burch respectfully requests that, in the event this Motion is granted, the Court set a further hearing
20 on that issue.

21 DATED: August 30, 2010

BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, L.L.P.

22
23 By:



Darrell A. Fruth

Attorney for Defendant Laurantell Burch

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