Niloo Savis, Esq. (SBN 186809)
SAVIS LAW
1901 Avenue of the Stars, Suite 200
Los Angeles, CA 90067
Tel: (310) 461-1560
Fax: (310) 734-1525

Attorneys for Defendant Susan Walker

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES, CENTRAL DISTRICT

AARON FILLER, M.D., PHD, an individual; AARON FILLER, M.D., PHD, APC, a California Professional Corporation; IMAGE-BASED SURGICENTER CORPORATION, a California Corporation; and NEUROGRAHY INSTITUTE MEDICAL ASSOCIATES, a California Corporation;

Plaintiffs,

v.

SUSAN WALKER, an individual; and DOES 1 to 25, inclusive,

Defendants.

CASE NO. BC 462605

DEFENDANT SUSAN WALKER'S NOTICE OF MOTION TO STRIKE COMPLAINT PURSUANT TO C.C.P. §425.16

Date: April 19, 2012
Time: 8:30 a.m.
Dept: 48

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

WHEREAS on February 9, 2012, the Honorable Elizabeth Allen White ruled that the above-captioned and the matter of *Filler v. Walker*, LASC Case No. BC 459485, are related and thereby, transferred the above-captioned action to Department 48;

Niloo Savis, Esq. (SBN 186809)
SAVIS LAW
1901 Avenue of the Stars, Suite 200
Los Angeles, CA 90067
Tel: (310) 461-1560
Fax: (310) 734-1525

Attorneys for Defendant Susan Walker

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES, CENTRAL DISTRICT

AARON FILLER, M.D., PHD, an individual; AARON FILLER, M.D., PHD, APC, a California Professional Corporation; IMAGE-BASED SURGICENTER CORPORATION, a California Corporation; and NEUROGRAHY INSTITUTE MEDICAL ASSOCIATES, a California Corporation;

Plaintiffs,

v.

SUSAN WALKER, an individual; and DOES 1 to 25, inclusive,

Defendants.

CASE NO. BC 459485

DEFENDANT SUSAN WALKER'S NOTICE OF MOTION AND MOTION TO STRIKE COMPLAINT PURSUANT TO C.C.P. §425.16

FILED CONCURRENTLY WITH:
1. Declaration of Agnes Grogran, R.N.
2. Declaration of Defendant Susan Walker
3. Declaration of San Juanita Gonzalez
4. Declaration of Gerald Sacks, M.D.
5. Request for Judicial Notice
6. Declaration of Niloo Savis

Date: September 28, 2011
Time: 8:45 a.m.
Dept: 14

////

////

////

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on September 28, 2011 at 8:45 a.m. in Department 14 of this Court, located at 111 North Hill Street, Los Angeles, CA 90012, Defendant SUSAN WALKER, by and through her counsel of record, Niloo Savis, Esq., will move to strike both causes of action in the Complaint by Plaintiffs (1) AARON FILLER, M.D., PHD; (2) AARON FILLER, M.D., PHD, APC; (3) IMAGE-BASED SURGICENTER CORPORATION, (4) NEUROGRAHY INSTITUTE MEDICAL ASSOCIATES(collectively "Plaintiffs"), on the basis that Plaintiffs cannot meet their burden of establishing that Defendant Susan Walker posted defamatory comments about them on the internet.

This Motion will be brought based on California Code of Civil Procedure § 425.16 and California Civil Code §45, et. seq. and will be based on this Notice of Motion, the Memorandum of Points and Authorities served and filed herewith, the Declarations of Niloo Savis, Susan Walker, Agnes Grogan, R.N., Gerald Sacks, M.D., and San Juanita Gonzalez, a Request for Judicial Notice, and on the record, file and pleadings herein, all matters of which this Court may take judicial notice, and on such evidence and argument as may be presented hereinafter at the hearing on the Motion.

DATED: August 24, 2011

SAVIS LAW

By: _____
NILOO SAVIS, ESQ.
Attorneys for Defendant Susan Walker

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Dr. Aaron Filler, a neurosurgeon, is the world's self-proclaimed "leading expert in the treatment of nerve pain," and has "revolutionized nerve pain treatment." In February 2011, Susan Walker, who suffers from chronic pain, sought medical treatment from Dr. Filler. He performed two magnetic resonance scans on her and two MRI guided injections in one day. Her neck and hip pain did not improve. He billed her over $56,000 for the services. After he had received approximately $30,000 in payment, he sued her to collect the rest. After she commented on the internet, including on RateMd.com, about her experience with Dr. Filler and his staff, he sued her again – this time for defamation.

SLAPP suits, such as the present Complaint, are lawsuits without merit and are "filed to dissuade or punish the exercise of" a defendant's constitutional right to free speech. The protections of Code of Civil Procedure Section 425.16 are triggered and shield Walker from liability because the dissemination of consumer information about medical care is a vital "public issue" and the internet is a "public forum." Plaintiffs cannot meet their evidentiary burden of proving that they will prevail on the merits of their case. Moreover, Dr. Filler is unquestionably a "public figure," by virtue of his curriculum vitae alone. As a public figure, he cannot meet his burden of proving that Walker posted anything about him with "actual malice," i.e. knowing the statements to be false. Finally, most of the postings refer only to Dr. Filler, and to none of his affiliated facilities named as Plaintiffs.

The Anti-SLAPP statute applies to Plaintiffs' Complaint and Plaintiffs cannot prove that Walker's statements were false, defamatory, not mere opinions, and made with "actual malice." As such, the Complaint must be stricken because the First Amendment and California law preclude Plaintiffs' claims.

II. THE ANTI-SLAPP STATUTE APPLIES TO PLAINTIFFS' COMPLAINT BECAUSE IT ARISES FROM "ACT[S] IN FURTHERANCE OF" MS. WALKER'S CONSTITUTIONAL RIGHT TO FREE SPEECH.

SLAPP suits, such as the present Complaint, are lawsuits without merit and are "filed to dissuade or punish the exercise of First Amendment rights of defendants." Lafayette Morehouse, Inc. v. Chronicle Pub 'g Co. (1995) 37 Cal. App. 4th 855, 858. "Anti-SLAPP statutes such as section 425.16 provide a procedural remedy to expose and dismiss at an early stage such nonmeritorious actions which chill... 'the valid exercise of the constitutional rights of freedom of speech." Id. at 858-59 (quoting C.C.P. § 425.16(a)). In addition, the anti-SLAPP statute must be construed broadly to protect the constitutional rights of petition and free speech. C.C.P. §425.16(a); Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal. 4th 1106, 1119-20. "[W]henever possible, [the courts] should interpret the First Amendment and section 425.16 in a manner 'favorable to the exercise of freedom of speech, not its curtailment." Id. at 1119 (quoting Bradbury v. Superior Court (1996) 49 Cal. App. 4th 1108, 1114, n. 3).

California Code of Civil Procedure Section 425.16 provides as follows:

> "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." C.C.P. §425.16(b)(l).
>
> "[An] act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: ... (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**, or (4) 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**." C.C.P. §425.16(e) (emphasis supplied).

However, the categories in subdivision (e) are not all-inclusive, and the anti-SLAPP statute applies to the exercise of free speech even if it does not fall within the enumerated categories. Averill v. Superior Court (1996) 42 Cal. App. 4th 1170, 1176. Moreover, causes of action for defamation and intentional interference with prospective economic advantage are precisely the type of claims

to which the SLAPP statute is intended to apply. Gallimore v. State Farm Fire & Cas. Ins. Co. (2002) 102 Cal.App.4th 1388, 1400; Thomas v. Quintero (2005) 126 Cal.App.4th 635, 651.

A. THE WEBSITES WHERE MS. WALKER POSTED HER COMMENTS ARE "PUBLIC FORUMS."

Internet venues are "public forums" under Section 425.16. The recent case of Wong v Jing (2010) 189 CA4th 1354, 1366, summarizes the supporting authority for this rule:

> "It is settled that '[w]eb sites accessible to the public ... are public forums for purposes of the anti-SLAPP statute.' (Barrett v. Rosenthal (2006) 40 Cal.4th 33, 41, fn. 4, 51 Cal.Rptr.3d 55, 146 P.3d 510; e.g., Ampex Corp. v. Cargle (2005) 128 Cal.App.4th 1569, 1576, 27 Cal.Rptr.3d 863 [Yahoo Web site message board qualifies as public forum]; Vogel v. Felice (2005) 127 Cal.App.4th 1006, 1010, 1015, 26 Cal.Rptr.3d 350 [Web site listing " ' "Top Ten Dumb Asses" ' "]; Wilbanks v. Wolk (2004) 121 Cal.App.4th 883, 897, 17 Cal.Rptr.3d 497 [posting on a consumer watchdogs Web site]; Bernardo v. Planned Parenthood Federation of America (2004) 115 Cal.App.4th 322, 358, 9 Cal.Rptr.3d 197 [posting on defendant organizations Web site]; ComputerXpress, Inc. v. Jackson (2001) 93 Cal.App.4th 993, 1006, 113 Cal.Rptr.2d 625 [two Web sites qualified as public forums].)"

"Cases construing the term "public forum" as used in Section 425.16 have noted that the term 'is traditionally defined a place that is open to the public where information is freely exchanged'." ComputerXpress, Inc. v. Jackson (2001) 93 Cal. App. 4th 993, 1006. "A public forum is not limited to a physical setting, but also includes other forms of public communication." Damon v. Ocean Hills Journalism Club (2000) 85 Cal. App. 4th 468, 476 (finding homeowners' association newsletter is "public forum").

The allegedly defamatory statements about Plaintiffs were posted primarily on two websites: RunningForums.com and RateMD.com. [Savis Decl., Exh. A, Complaint, ¶12.] Both websites are on the Internet, meaning this information "is accessible to anyone who chooses to visit [the] Web site." Wilbanks, *supra,* 121 Cal. App. 4th at 895. Any person can access the information on the site without payment or membership. [Walker Decl., ¶1.] As a result, Walker's statements "hardly could be more public." Id.; *see also* ComputerXpress, *supra,* 93 Cal. App. 4th at 1006-07. Therefore, the information posted on the Website constitutes statements made in a "public forum," under Section 425.16.

Even if the websites are not public forums, Walker's communications fall under Section

425.16(e)(4), which protects conduct in furtherance of free speech, regardless of whether the conduct occurs in a public forum. Wilbanks, *supra,* 121 Cal. App. 4th at 897-898. California courts uniformly construe "conduct" in furtherance of free speech under C.C.P. §425.16(e) to include oral or written statements. Id.

B. CONSUMER PROTECTION INFORMATION AND EDUCATION IS UNIFORMLY FOUND TO BE AN ISSUE OF SIGNIFICANT "PUBLIC INTEREST."

The matters posted by Walker on the websites are matters of significant public interest. California courts set forth the principal that websites directed at "consumer protection information" affect issues of "public interest" and are protected by the First Amendment. Carver v. Bonds (2005) 135 Cal.App.4th 328, 343-4. In Wilbanks, 121 Cal.App.4th at 898-900, the Court held that postings that warned others not to use the plaintiffs' services, which were intended to aid consumers in choosing among service providers, were "directly connected to an issue of public concern." To find a "public interest," courts focus on factors such as whether the person who is the subject of the alleged defamation is "in the public eye," whether the statement involved conduct that affects large numbers of people beyond the direct participants, and whether the statement involve a topic of widespread interest." Id.; Carver, *supra,* at 343-4. As such, "[c]onsumer information ... when it affects a large number of persons, also generally is viewed as information concerning a matter of public interest." Wilbanks, *supra*, 121 Cal. App. 4th at 898; *see also* Melaleuca, Inc. v. Clark (1998) 66 Cal. App. 4th 1344, 1363 (finding that a book containing theories regarding nutritional practices and the avoidance of substances suspected of causing serious illness "addressed matters of obvious widespread public interest"); Paradise Hills Associates v. Procel (1991) 235 Cal.App.3d 1528 (First Amendment protected a consumer's statements about the quality of a seller's products and service and her unhappiness with them, finding, in part, that the statements concerned a matter of public interest.)

According to the Center for Disease Control, 25% of Americans experience pain at some point during their life. Millions of American suffer from chronic pain and struggle with seeking effective treatment for it, rendering it a topic of widespread interest. [Savis Decl., Exh. B, CDC

Report.] In Filler's own article about nerve pain, he claims that 1.5 million people each year suffer from sciatica, which he claims is often misdiagnosed and misunderstood. [Walker Decl., ¶11, Exh.11, Piriformis Article, p.1.] In another article by Filler published in 2007 in the Oxford University Press, Filler writes: "A well informed patient is most likely to get the best and most effective treatment," supporting the ideas of consumer protection and education. He then writes about raised public awareness of ways in which "financial incentives can distort the medical advice of spinal surgeons" and further states that when a surgeon's choice of the type of treatment is subject to heavy financial influence that may not be apparent to the patient, a meaningful disclosure is appropriate. [Walker Decl., ¶12, Exh.12.]

Consumer information and experience regarding the risks, benefits, treatment options, and the costs of seeking the aid of a medical professional in dealing with pain management affect a significant public interest, especially where the pain derives from controversial and experimental types of diagnoses and treatments. Ms. Walker's posts fall within this category. She made statements about the costs of Dr. Filler's procedures and her experience in seeking pain management treatment from him generally. [Complaint, ¶12.] She addressed all the topics that Dr. Filler himself placed on many public websites to call attention to himself and his treatment centers. Finally, Dr. Filler is unquestionably a public figure in the public eye, as detailed in Section III below.

Here, posts also appeared on websites geared towards providing just such consumer information. According to the information page on RateMD.com, "[t]he purpose of the site is to be a resource for people who want to find a good doctor or dentist. Where else can you find out what others think of your doctor? When choosing a doctor, wouldn't you like some information first? It also gives you, the patient, a place to voice your opinion. Your opinion will help others find good doctors and dentists." [Walker Decl., ¶1, Exh. 1.] Similarly, RunningForums.Com is geared towards runners and active people and aims to provide a forum where they can discuss not only sports and running, but also all issues that arise from their active lifestyle, including pain management. According to the forum index page of the site, it also encourages discussion of "off topic issues." Finally, the tenth allegedly defamatory statement was published on NervePain.tv,

which is a consumer information site for patients suffering from nerve pain to gather consumer information about treatment options from various medical professionals. Id.

Because both claims in the Complaint arise from acts in furtherance of Walker's right to free speech, Section 425.16 applies to the Complaint. Therefore, unless Plaintiffs can show their claims have a probability of succeeding, their Complaint must be stricken.

III. DR. FILLER CANNOT MEET HIS BURDEN, AS A PUBLIC FIGURE, THAT MS. WALKER ACTED WITH "ACTUAL MALICE" IN POSTING HER COMMENTS.

The cases have recognized two types of public figures: (1) "all purpose public figures" who "occupy positions of such persuasive power and influence that they are deemed public figures, for all purposes," and (2) *Limited-Purpose Public Figures* who are public figures only with respect to some particular controversy or set of events. Gertz v. Robert Welch (1974) 418 U.S. 323, 94 S.Ct. 2997, 3009. A limited-purpose public figure "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." Id. When asked to determine "public figure" status, courts look for evidence of affirmative actions by which purported 'public figures' have thrust themselves into the forefront of particular public controversies." Id. at 890. As detailed in Walker's declaration and its exhibits, Plaintiff, Dr. Aaron G. Filler has both the power and influence to be considered a public figure and he has also thrust himself into the forefront of many issues pertaining to health care, neurosurgery, technology, intellectual property, and other related issues. If he is not a public figure he is a public figure for a limited purpose.

A. DR. FILLER IS A PUBLIC FIGURE.

Dr. Filler was a public figure at the time of the publication. "Public figures' are those persons who, though not public officials, are 'involved in issues in which the public has a justified and important interest.' Such figures are, of course, numerous and include artists, athletes, business people, dilettantes, anyone who is famous or infamous because of who he is or what he has done. Cepeda v. Cowles Magazines and Broadcasting, Inc. (9 Cir. 1968) 392 F.2d 417, 419 (*cert. den.* 393 U.S. 840, 89 S.Ct. 117, 21 L.Ed.2d 110).

The courts attention is directed to Dr. Filler's curriculum vitae. [Walker Decl., Exh. 10.]

Only one conclusion can be drawn from Dr. Filler's 32 page CV: he is a public figure. He is a Diplomate with the American Board of Neurological Surgery, a Fellow of the Royal College of Surgeons in England, Director of three Institutes, and a section editor of a textbook on Neurological surgery. He lists 14 cross continental academic positions. He is a licensed M.D. in California, Pennsylvania, Utah, New York, and the U.K., has received 7 academic honors and awards, has 4 editorial appointments, lists himself as CEO and Co-Founder of 3 businesses, has authored 29 publications, has been granted 11 patents, has 7 patents pending, has authored 7 academic chapters, has made 76 academic presentations all over the world, lectured worldwide on 83 occasions, and authored 7 books. He has been also appeared on major media no less than 15 times and on networks such as the New York Times, LA Times, London Times Die Welt, Associated Press, Science News, Discover, The Economist, CNN, ABC, Fox BBC, CBS, Reuters, Forbes, and MSNBC. The Oxford University Blog identified Dr. Filler as "one of the world's leading authorities on nerve and spinal surgery." [Savis Decl., Exh. C.] Moreover, he has injected himself into the public debate about patents and technology by initiating two high profile lawsuits against the Regents of the University of California and Siemens Medical regarding an invention in the field of imaging technology. [Req. Jud. Not., Exhs. A&B.]

B. ALTERNATIVELY, DR. FILLER IS A LIMITED-PURPOSE PUBLIC FIGURE.

If Dr. Filler does not rise to the level of a general public figure, in the alternative, he certainly is a limited purpose public figure. Dr. Filler's formidable experience in the medical fields, encompassed by his 32 page resume, undoubtedly quality him as "one of the world's leading authorities." In fact, he describes himself on his website as "the world's leading expert in treatment of nerve pain [who has] revolutionized nerve-pain treatment by inventing several new technologies." [Savis Decl., Exh. F.] In Copp v. Paxton (1996) 45 Cal.App.4th 829, 844, the court found a person who posed as an expert on earthquake safety measures to be a public figure for a limited purpose. In Franklin v. Benevolent & Protective Order of Elks (1979) 97 Cal.App.3d 915, 929, the court relied on U.S. Supreme Court decisions to conclude a limited purpose public figure 'must have voluntarily and actively sought, in connection with any given matter of public

interest, to *influence* the resolution of the issues involved.'" Dr. Filler's resume and patent lawsuits are proof that he has relinquished his interest in the protection of his own name. His internationally placed publications, in all media forms including books, radio, TV, articles in magazines, professional journals, and public websites, evidence Dr. Filler's efforts to actively seek public exposure in connection to his diagnosis and treatment of nerve pain. Little doubt remains that Dr. Filler is a public figure, limited or otherwise.

C. MS. WALKER COULD NOT HAVE ACTED WITH "ACTUAL MALICE" BECAUSE SHE BELIEVED THE TRUTH OF THE STATEMENTS SHE POSTED ON THE INTERNET.

A defamation claim against a public figure may be stricken pursuant to the anti-SLAPP statute for failure to establish that statements were made with "actual malice," meaning with knowledge that it was false or with reckless disregard of whether or not it was false. Robertson v. Rodriguez (1995) 36 Cal. App. 4th 347, 355-57. "One who publishes a false and defamatory communication concerning a public official or public figure in regard to his conduct, fitness or role in that capacity is subject to liability, *if, but only if,* he (a) knows that the statement is false and that it defames the other person, or (b) acts in reckless disregard of these matters." Rest.2d, Torts §580A (applying the actual malice rule articulated in New York Times Co. v. Sullivan (1964) 376 U.S. 254.

On its face, the Complaint is deficient in that it lacks any allegation that Walker posted her comments with knowledge of its falsity, or with a reckless disregard for the truth. Instead, Plaintiffs allege, as part of their punitive damages, that Walker acted "with reckless disregard for the interests of Plaintiffs." [Savis Decl., Exh. A, Complaint, p. 7.] Such allegations do not establish the actual malice necessary to support Plaintiffs' claims. Ampex Corp. v. Cargle (2005) 128 Cal. App. 4th 1569, 1578-79. Furthermore, it is Plaintiffs' burden to prove, by admissible evidence, a probability of success on the merits of their claims. Actual malice requires that Walker knew her statements were false when she made them, or that she entertained serious doubts as to the truth of her statements. Id. at 1579. Plaintiffs cannot meet their burden of proof because Walker believes the content of her postings to be truthful, as detailed below. [Walker Decl., ¶9.]

IV. PLAINTIFFS CANNOT DEMONSTRATE A PROBABILITY THAT THEY WILL PREVAIL ON THEIR CLAIMS BECAUSE CALIFORNIA LAW AND THE FIRST AMENDEMENT PRECLUDE THEIR CLAIMS.

Once the defendant meets her initial burden of making a prima facie showing that Plaintiffs' claims are subject to Section 425.16, then the burden shifts to Plaintiffs to establish that each challenged cause of action is legally sufficient and there's "a probability of prevailing on merits of their claims, i.e. make a prima facie showing of facts which would, if proved at trial, support a judgment in plaintiff's favor." Wilbanks v. Wolk (2004) 121 Cal.App.4th 883, 894 (citations omitted); C.C.P. §425.16(b)(1). This showing must be made by admissible evidence, and the standard applied to the evidence is the same as that used in determining motions for directed verdict or summary judgment. Ludwig v. Superior Court (1995) 37 Cal. App. 4th 8, 15; Kyle v. Carmon (1999) 71 Cal. App. 4th 901, 907. The motion to strike must be granted "if the evidence introduced either negates or fails to reveal the actual existence of a triable claim..." Ludwig, 37 Cal. App. 4th at 15.

As detailed below, Plaintiffs have not pled, and cannot prove, adequate claims against Walker. Indeed, the facts demonstrate that the Complaint's claims are barred as a matter of law. Therefore, the Complaint should be stricken, as required by Section 425.16.

A. PLAINTIFFS CANNOT MEET THEIR CONSTITUTIONAL BURDEN OF PLEADING AND PROVING THE STATEMENTS MADE BY MS. WALKER WERE FALSE, DEFAMATORY AND MADE WITH "MALICE."

"Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injury him in his occupation." Civil Code § 45. Where the language of the defamation cause of action is "ambiguous and an explanation is necessary to establish the defamatory meaning, the pleader must (1) allege his or her interpretation of the defamatory meaning of the language (the innuendo); and (2) support that interpretation by alleging facts showing that the readers or hearers to whom it was published would understand it in that defamatory sense (the inducement). *See* Barnes-Hind v.

Superior Court (1986) 181 Cal.App.3d 377, 387; *see also* Witkin, California Procedure (5th ed.), Ch. IX, §741.

Under California law, Plaintiffs have the burden of pleading and proving the falsity of the statements on which their claims are based. Blatty v. New York Times Co. 42 Cal.3d 1033 (1986) 42 Cal. 3d 1033, 1042; Morningstar, Inc. v. Superior Court (1994) 23 Cal. App. 4th 676, 686. In addition, where a statement is ambiguous or susceptible to an innocent meaning, and not defamatory on its face, the plaintiff must plead and prove the facts showing its defamatory meaning as well as special damages. Smith, 72 Cal. App. 4th 12 at 645-46 (1999); *see also* ComputerXpress, 93 Cal. App. 4th at 1011; Civil Code § 45a. The court must determine, *as a matter of law,* whether a statement is susceptible to the defamatory interpretation given to it by Plaintiffs. MacLeod v. Tribune Pub. Co. (1959) 52 Cal. 2d 15 536, 546-47; Kahn v. Bower (1991) 232 Cal. App. 3d 1599, 1608. In doing so, "the publication in question must be considered in its entirety; it may not be divided into segments and each portion treated as a separate unit. It must be read as a whole in order to understand its import… Monterey Plaza Hotel v. Hotel Employees & Rest. Employees (1999) 69 Cal. App. 4th 1057, 1064-65. Moreover, "[a] statement is not defamatory unless it can reasonably be viewed as declaring or implying a provably false factual assertion… and it is apparent from the "context and tenor" of the statement "that the [speaker] seriously is maintaining an assertion of actual fact." Carver v. Bonds (2005) 135 Cal.App.4th 328, 344 (citations ommited)."

The entire basis of Plaintiffs' claims concerning the allegedly defamatory postings are contained in paragraph 12 of the Complaint. These statements, however, are either true, based on opinion, or republished from another source.

1. **Posting Number 1:** *"Now imagine how many more cases went to arbitration. Imagine how many more cases are located at other court houses (this list is two years dated). Malpractice 8/12/2003, Malpractice 6/16/2005, Malpractice 4/3/1998, Malpractice 3/10/1997, Malpractice 11/14/1996... Again, my purpose in writing this is to attempt to save another patient from what I am going through. You would not wish this on your worst enemy. If Dr. Filler reads this, I would hope it would cause him to reflect on his practice, and change his incredibly arrogant attitude before he kills someone (assuming he hasn't already)" (9/20/10 0 RunningForums.com)*

This language was not spoken by Ms. Walker. She republished on RunningForums.com a post originally published by a former, disgruntled patient of Dr. Filler on the website iSpine.org. [Walker Decl., Exhs. 2-3, ¶2.] Contrary to the contents of this post, Walker repeatedly stated in her posts that Dr. Filler is a "very skilled neurosurgeon." [Walker Decl., Exh. 9, ¶8.] According to the iSpine website information page, "iSpine is an acronym for the International Spine Patient Information Network" and is intended to be a community forum for "information relevant to spine patients." Id. Ms. Walker republished the post verbatim, without modifying a single word. [Walker Decl., Exhs. 2-3, ¶2.]

Even if the *original* publisher's words are defamatory, Ms. Walker is not liable for republishing those words. In Barret v. Rosenthal (2006) 40 Cal.4th 33, the California Supreme Court upheld the trial court's granting of defendant's Anti-SLAPP motion, finding that the federal Communication Decency Act protects defendants from civil liability, for defamation and related claims, for republication of the words of another on the Internet. 47 U.S.C.A. § 230. Defendant Rosenthal had posted an article about the plaintiffs on two news groups. Rosenthal, *supra,* 40 Cal.4th at 42. The Communication Decency Act of 1996's immunity provision states: "No provider or *user* of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." In a case of first impression, the Supreme Court held that this immunity extends to individuals who "distribute," or republish, allegedly defamatory content on the internet, even where the individual has "no supervisory role in the operation of the internet site where the allegedly defamatory material appeared." Id. at 43. The Court further refused to distinguish between "active" and "passive" users, relying on the public policy that that "the statutory immunity serves to protect online freedom of expression…" Id. at 62-63. The Court concluded that, "[u]ntil Congress chooses to revise the settled law in this area ..., plaintiffs who contend they were defamed in an Internet posting may only seek recovery from *the original source of the statement*." Id. at pp. 39-40 (emphasis supplied).

This case is on point and grants immunity to Ms. Walker. She was an individual "user" of an internet site (RunningForums.com) where she republished allegedly defamatory statements about Dr. Filler by a different person on a different website (iSpine.org). The fact that she added

a few comments prior to the post also do not give rise to liability because she did not make any material contributions to the information originally posted. Phan v. Pham (2010) 182 Cal.App.4th 323 (citing Rosenthal with approval and finding that introduction to defamatory email did not materially alter it).

Even if Section 230 does not immunize Ms. Walker's postings, Plaintiffs cannot overcome their burden of proof that the comments were false and made with malice. First, Dr. Filler has in fact been the subject of medical malpractice suits filed on the dates referenced in the post, as reflected in the docket of the Los Angeles Superior Court. [Savis Decl., Exh. D.] Moreover, the statement asks the reader to consider and "imagine." Plaintiffs' interpretation of this post, that this statement means Dr. Filler posed an unusually high risk of death to patients, cannot reasonably be read into Defendant's statement. [Savis Decl., Exh. A, Complaint, p.3, ln26-27.] The statements were made as "hyperbole" and "exaggeration," not statements of true facts. Expressions of subjective judgment, such as Dr. Filler's personality trait of arrogance, are in the nature of protected speech. Moyer v. Amador Valley Joint Union High School (1990) 225 Cal.App.3d 720, 725-526. Finally, the purpose stated for the statement, to save another patient from what she is going through, entrenches the statement firmly as a public interest statement.

2. Posting Number 2: *I was billed for one procedure that was never conducted. (4/3/11 RateMDS.com)*

This comment is not defamatory on its face. It was interpreted unreasonably in the complaint to constitute a statement of fraud. If anything, it is a statement of medical misbilling, which is known by the public to be commonplace in medical and insurance practices. This is also confirmed in paragraph 12(10) where the statement about the billing is referred to as "serious errors in billing," not fraud.

Even if this comment is arguably defamatory, Walker cannot be found liable for it because she had a reasonable basis to believe it was true, and, therefore, acted without malice in making it. Walker's statement was based on an Explanation of Benefits issued by her health insurer, Blue Cross, which denied coverage of a $2900 charge by Dr. Filler's practice because "The medical records supplied to us by [Dr. Filler] do not document that this service was performed. Therefore,

we are unable to provide benefits for this charge." [Walker Decl., Exh. 19, ¶21.]

3. **Posting Number 3:** *"...their fraud unit is investigating, State Farm, Sue Walker, check it out. Louise has had direct communication from them (Sam Gonzales SF) regarding their ongoing review." (10/19/10 RateMDs.com)*

4. **Posting Number 4:** *There is a current fraud investigation underway, Louise was informed of this early in September and I confirmed it with State Farm yesterday, (2/18/10 RateMDs.com)*

These statements are not defamatory on their face. First, this statement, and the entire post dated 10-19-2010 in which it appears, do not identify the Plaintiffs by name and does not allege how anyone would know the target of the statement or investigation was one or more of the Plaintiffs. It only vaguely refers to "Louise," without providing her business affiliation or last name. Moreover, Plaintiffs must support their interpretation by alleging facts showing that the readers to whom it was published would understand it in that defamatory sense. Witkin, California Procedure (5th ed.), Ch. IX, §741. The Court can make a determination of the existence of defamation as a matter of law.

Even if these statements are defamatory, State Farm did submit the billing by Dr. Filler's office to their internal fraud investigation unit, as detailed in the Declaration of San Juanita Gonzalez, the claims representative from State Farm Auto responsible for handling this claim. [Gonzalez Decl., ¶14.] In September 2010, State Farm received "corrected billing" from Dr. Filler's office, reflecting significant changes to the diagnostic and procedure codes for medical services provided to Walker. [Id. at ¶11]. This prompted State Farm to internally investigate the issue through their "Special Investigations Unit," including contacting Dr. Filler's office to make inquiries about the billing issues. [Id. at ¶14]. As such, Walker reasonably believed her statements that State Farm's fraud unit was investigating to be true.

5. **Posting Number 5:** *Dr. Filler and his staff are the aggressive irresponsible, libelous thieves, - not me. (10/13/10 RateMDs.com)*

This post is set forth entirely out of context. In an earlier post on the same website, Dr. Aaron Filler refers to Sue Walker as follows: "we have a person who believes in aggressive theft, libel and irresponsibility." [Walker Decl., Exh. 5, ¶4.] In response, Walker makes the above

statement. In Carver, the Court explains why such a statement of hyperbole is not defamatory:

> "'Rhetorical hyperbole,''vigorous epithet[s],' 'lusty and imaginative expression[s] of ... contempt,' and language used 'in a loose, figurative sense' have all been accorded constitutional protection." (Ferlauto v. Hamsher (1999) 74 Cal.App. 4th 1394, 1401, 88 Cal.Rptr.2d 843.) Thus, calling someone a liar was not actionable in Rosenaur v. Scherer (2001) 88 Cal.App.4th 260, 280, 105 Cal.Rptr.2d 674, where the statement was made in a heated oral exchange during a chance encounter of opponents in a political campaign. In those circumstances, the charge was one that "no reasonable person would [have] take[n] literally," and was "the type of loose, figurative, or hyperbolic language that is constitutionally protected." (Ibid.)

Opinions or expressions of subjective judgment are in the nature of protected speech. Milkovich v Loraine Journal (1990) 497, US 1, 110 S.Ct 2695, Moyer v Amador Valley Joint Union High School, (1990) 225 Cal. App. 3d 720, 725. In Moyer, a school teacher sued the high school and a student for allegedly defamatory comments made about him the school newspaper that he is "the worst teacher at the school." Id. The Court of Appeal upheld the trial court's decision to sustain defendants' demurrer without leave to amend, holding that the allegedly defamatory statements "could not reasonably be understood to state facts about plaintiff" and was "an expression of subjective judgment by the speaker." Id. at 725. Moreover, the Court held that the determination as "whether the statement was fact or opinion was held to be a question of law for the court." Id. at 724. As stated by the California Supreme Court in Blatty v. New York Times Co. (1987) 42 Cal.3d 1033, 1044: "Statements of opinion, '[h]owever pernicious,' are immunized by the First Amendment in order to insure that their 'correction [depends] not on the conscience of judges but on the competition o other ideas."

It is abundantly clear that Ms. Walker did not intend these comments as a provable "assertions of fact," but rather a matter of hyperbole and opinion. A statement is not defamatory unless " it is apparent from the 'context and tenor' of the statement "that the [speaker] seriously is maintaining an assertion of actual fact." Carver v. Bonds (2005) 135 Cal.App.4th 328, 344 (citations ommited)." It would be apparent to any reader that this statement is not an assertion of actual fact. It is a privileged statement of opinion.

6. **Posting Number 6:** *Wydase is no longer manufactured and has not been manufactured in at least seven years, so I am not sure why Filler refers to the use of Wydase, and given the remote risk of CSE transmission that it poses, injecting it directly adjacent to a nerve does not seem advised. (1/31/11 RunningForums.com)*

Plaintiffs interpret this post to signify that "Dr. Filler is intentionally injecting patients with a material known to cause a slow painful unpreventable death in every patient so exposed." [Savis Decl., Exh. A, Complaint, §12(6).] Nothing in the statement can reasonably be understood to mean that Dr. Filler (or any of the other Plaintiffs) is injecting patients with a material known to kill patients. Plaintiffs have unreasonably interpreted this statement. It is merely Walker's opinion that injecting Wydase is inadvisable. Even Dr. Filler admits he has stopped using Wydase. Even if this statement is defamatory, it is true. Gerald Sacks, M.D., states in his declaration as follows:

> "Given the incidents of Bovine Spongiform Encephalopathy (BSE) in the United Kingdom, there is increased concern and awareness in the medical community about the possible risk of transmission of BSE through the use of pharmaceutical products in which bovine materials are used during manufacture. Based on my experience and knowledge of the medical literature regarding the use of Wydase as a pharmaceutical product, generically known as hyuluronidase, I have chosen not to use Wydase in my medical practice. To the best of my knowledge, many other pain management physicians have opted to avoid the use of Wydase due to the potential risks." [Dr. Sacks Decl., ¶13.]

Dr. Sack's opinion is based in part on a World Health Organization report dated 2003, which states that, "on the basis of current scientific knowledge about the agents causing BSE…., the ideal situation would be to avoid the use of bovine materials in the manufacture of any biological or pharmaceutical product." [Dr. Sacks Decl., Exh. ¶12, Exh. I.] Moreover, as set forth in the Food and Drug Administration post, Wydase, also known as Hyaluronidase, is no longer being marketed. Id. Based on the foregoing, the gist of Walker's statement was factually true, even if it extended beyond an opinion.

7. **Posting Number 7:** *Look at the doctor rating sites and see how Dr. Filler is rated by patients. You will see a lot of what is on this board, glowing reviews and glowering criticism, mostly based on money and bad office staff experiences, many*

also though on failed surgeries and cases where Filler's treatment resulted in severing nerves and worse outcomes. (9/18/10 RunningForums.com)

First, this statement merely directs readers to visit other sites for information. A public forum debate is obviously ongoing. Nowhere is paralysis mentioned, even though Plaintiffs suggest severed nerves cause "immediate permanent paralysis." Nowhere are Plaintiffs other than Dr. Filler mentioned. Nowhere in the statement does it say that Walker has seen information documenting that Dr. Filler has severed nerves -- that caused immediate permanent paralysis. Again, expressions of subjective judgment are in the nature of protected speech. Moyer, 225 Cal.App.3d at 225. Plaintiffs' interpretation of the meaning of this statement is unreasonable.

Second, Plaintiffs posit that Walker is *falsely* stating that she saw such posts. Plaintiffs are not questioning the veracity of the statements, but whether such posts actually exist. In fact, Walker's declaration attaches posts she read prior to posting this comment that discuss negative outcomes for other patients after treatment by Dr. Filler. For example, on June 19, 2010, a patient named "Nick" posts that: "My surgery [with Dr. Filler] was in January 2009. The surgery didn't help at all, but Dr. Filler accidentally *severed a nerve* during the procedure, causing the skin on the entire back of my thigh permanently go numb while also causing constant burning under the skin places that didn't hurt before." [Walker Decl., Exh. 20, ¶24.] Another post refers to a woman "who had surgery with filler and is now bedridden…she now needs a walker." Id. While these posts may or may not be true, as a republisher, Walker believed in the truth of her statement when she posted this comment. As such, it is not defamatory.

8. Posting Number 8: *1.5 hrs in the Image-based Surgi-Center. Not bad. Too bad it didn't work.*

First, the statement "too bad it didn't work" is not defamatory on its face. It merely suggests that the author does not believe the procedure benefited her – but that is not due to Dr. Filler's skills. In fact, she repeatedly posts that she believes he is an excellent

neurosurgeon. The statement cannot be construed to mean that IBSC offers ineffective procedures. Second, Walker's cell phone records show that both medical procedures by Dr. Filler on February 17, 2010 lasted a maximum of 1.5 hours, including recovery. [Walker Decl., Exh. 21, Cell phone log.] Originally, my appointment was at 5 pm. I waited hours for my procedure. At 7:54 pm, I received a call on my cell phone from my husband. Since cell phones are not permitted in the surgery room, it is clear the procedure had not begun as of about 8 pm. I answered the next incoming call from my husband at 10:32 pm, at which time the procedures were completed. Id. As such, the statement that I was in the surgicenter for 1.5 hours is true.

> 9. **Posting Number 9:** *I expect to be similarly taken care of for the balances for the Institute of Nerve Medicine and the Image based Surgery Center. But I will continue to get the work out about his unconscionable fees and incompetent and rude billing staff. I have YET to get an accurate billing that I can use to appeal to insurance.*
>
> 10. **Posting Number 10:** *Be forewarned, Dr. Filler is outrageously expensive. I saw him for an exam two MRNs and MRI injections in my neck and hip. Total time, less than three hours. Total cost: $53,000. I believed he is a very skilled neurosurgeon, but I see no need for him to charge such outrageous fee. And his office staff made serious errors in billing, do not return multiple phone messages, but they are very quick to send out their erroneous bills, repeatedly, and threaten collections actions.*

These are clearly statements of opinion. The California Supreme Court has ruled that when a *lay person* makes a statement that a doctor charges excessive fees, there is no defamation. Slaughter vs. Friedman (1982) 649 P. 2d 886, 32 Cal. 3rd, 149. One test of a statement's defamatory nature is how the average reader or listener would interpret the remark. The statement that a doctor's fees are excessive is only defamatory if it is made by someone in the same profession, i.e. another neurosurgeon. And considering somebody "rude" is also a matter of opinion.

Moreover, even if it is defamatory, the statements are true. First, Filler himself admits his

fees are "expensive"! [Walker Decl., ¶4, Exh. 5.] Also, Dr. Gerald Sacks, an expert in pain management, opines that, "the total charge of approximately $56,000 for the referenced medical services provided to Susan Walker by Plaintiffs is at the high end of the range of the usual charges for such services in the Los Angeles area." [Sacks Decl., ¶14.] Second, Agnes Grogan, R.N., opines that there are multiple billing errors by Dr. Filler's staff, including overcharging, making unauthorized credit card charges, not sufficiently crediting Walker for payments made to a collection agency, and not honoring contractual limits on her payment obligations. [Grogan Decl., ¶¶13-16.] Walker also testifies that she made multiple phone calls to Filler's staff that were not returned. [Walker Decl., ¶23.] And there is no dispute that Filler billed over $53,000 to Walker for his medical services as reflected in a pleading filed by Filler himself. [RJN, FAC, ¶52 ("Plaintiff did provide medical services [Walker] totaling $56,000."] It is clear from the foregoing, that the "gist" of Walker's statements are true, to the extent they are not opinions.

B. PLAINTIFFS CANNOT ESTABLISH THEIR CLAIMS BECAUSE MS. WALKER'S COMMENTS WERE NOT "OF AND CONCERNING" THEM, AS THEY PRIMARILY REFERRED TO DR. FILLER.

Four separate entities are identified as Plaintiffs in paragraphs 1 through 4 of the Complaint: (1) Dr. Aaron Filler; (2) Dr. Filler's professional corporation; (3) Image-Based Surgicenter, and (4) Neurography Insitute. Not a single allegation explains what relationship, if any, exists among these Plaintiffs. Yet, throughout the complaint, the allegations refer to the Plaintiffs as if they are one unit. To prevail, Plaintiffs must produce evidence as to how Walker's comments specifically defamed *each particular Plaintiff*. *See* Blatty v. N.Y. Times Co. (1987) 42 Cal.3d 1033. Paragraph 12, subparts (1) to (12), of the Complaint sets forth the material allegations of defamation against Plaintiffs. Looking only at the statements purportedly made by the Walker on the public websites, Plaintiff Dr. Aaron Filler is mentioned in only 5 paragraphs, paragraphs 12 (1), 12(5) , 12(6), to 12(7), and 12(10), but in no other. Plaintiffs "*Institute* for

Nerve Medicine" and "Image Based Surgicenter Corporation" are only mentioned once, in paragraph 12(9), but in no other. Plaintiff Neurography Institute Medical Associates is not mentioned at all. These statements, without more evidence, do not suffice to prove defamation as to each Defendant. In conclusion, these cursory and conclusory allegations cannot, as a matter of law, support a claim of exemplary damages based on privileged statements made on the internet.

III. CONCLUSION

For the reasons set forth herein, Defendant Susan Walker respectfully requests that the Court strike both causes of action in Plaintiffs' Complaint and to award Plaintiff reasonable attorneys' fees.

DATED: August 24, 2011

SAVIS LAW

By: _____
NILOO SAVIS, ESQ.
Attorneys for Defendant Susan Walker

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California; I am over the age of 18 and not a party to the within action; my business address is 1901 Avenue of the Stars, Suite 200, Los Angeles, California 90067.

On August 24, 2011, I served the foregoing document(s) described as:

DEFENDANT SUSAN WALKER'S NOTICE OF MOTION AND MOTION TO STRIKE PORTIONS OF COMPLAINT

on the interested parties in this action:

/X/ by placing / / the original /X/ a true copy thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED LIST

☒ (BY MAIL) I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service. This correspondence shall be deposited with the United States Postal Service, postage pre-paid, this same day in the ordinary course of business at our office's address in Los Angeles, California. Service made pursuant to this paragraph, upon motion of a party served, shall be presumed invalid if the postal cancellation date of postage meter date on the envelope is more than one day after the date of deposit for mailing contained in this affidavit.

☐ (BY OVERNIGHT DELIVERY SERVICE) I served the foregoing document by Federal Express, an express service carrier which provides overnight delivery. I placed true copies of the foregoing document in a sealed envelope or package designated by the express service carrier, addressed to each interested party as set forth above, with fees for overnight delivery paid or provided.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the above named addressee(s).

☐ (BY FACSIMILE) I caused such documents to be delivered via facsimile to the offices of the addressee(s) at the following facsimile number:

Executed on August 24, 2011, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Niloo Savis

SERVICE LIST

Aaron P. Morris, Esq. Deanna Stone Killeen, Esq. MORRIS & STONE, LLP 17852 E. 17th St., Suite 201 Tustin, CA 92780 Tel: (714) 954-0700	Attorneys for Plaintiffs AARON FILLER, M.D., NEUROGRAHY INSTITUTE MEDICAL ASSOCIATES, INC.; IMAGE-BASED SURGICENTER CORPORATION; INSTITUTE FOR NERVE MEDICINE MEDICAL GROUP, INC.