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7 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
8 FOR THE COUNTY OF LOS ANGELES, CENTRAL DISTRICT  
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10 AARON FILLER, M.D., PHD, an individual;  
11 AARON FILLER, M.D., PHD, APC, a  
California Professional Corporation; IMAGE-  
12 BASED SURGICENTER CORPORATION, a  
California Corporation; and NEUROGRAHY  
13 INSTITUTE MEDICAL ASSOCIATES, a  
California Corporation;

14 Plaintiffs,

15 v.

16 SUSAN WALKER, an individual; and DOES  
17 1 to 25, inclusive,

18 Defendants.  
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CASE NO. BC 459485

**DEFENDANT SUSAN WALKER'S  
REPLY TO PLAINTIFFS' OPPOSITION  
TO NOTICE OF MOTION AND  
MOTION TO STRIKE PORTIONS OF  
FIRST AMENDED COMPLAINT**

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

Trial Date: Not Set

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23 Defendant SUSAN WALKER, by and through her counsel of record, Niloo Savis, Esq.,  
24 hereby submits her Reply to Opposition of Plaintiffs (1) AARON FILLER, M.D., PHD; (2)  
25 AARON FILLER, M.D., PHD, APC; (3) IMAGE-BASED SURGICENTER CORPORATION,  
26 (4) NEUROGRAHY INSTITUTE MEDICAL ASSOCIATES to Defendant's Notice of Motion  
27 and Motion to Strike Portions of the First Amended Complaint.  
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1 **I. CALIFORNIA LAW PERMITS A MOTION TO STRIKE PUNITIVE DAMAGES**  
2 **WHERE INSUFFICIENT FACTS ARE PLED TO SUPPORT “FRAUD, OPPRESSION,**  
3 **OR MALICE.”**

4 Contrary to Plaintiffs’ representations, a motion to strike punitive damages allegations may  
5 lie where the claim sued upon would not support an award of punitive damages where the facts  
6 alleged do not rise to the level of “malice, fraud or oppression” required to support a punitive  
7 damages award. Turman v. Turning Point of Central Calif., Inc. (2010) 191 CA4th 53, 63  
8 (allegations of gender discrimination did not show defendant acted with requisite state of mind for  
9 punitive damages); Civil Code § 3294(a). The Turman Court upheld the trial court’s granting of a  
10 motion to strike punitive damages in a gender discrimination case, where plaintiff was “relying  
11 primarily on the underlying facts associated with the cause of action for gender discrimination” to  
12 seek the extraordinary remedy of punitive damages. Id. at 64.

13 Even under the controlling case cited by Plaintiffs as justifying punitive damages, Perkins  
14 v. Superior Court (General Tel Directory Co.) (1981) 117 Cal.App.3d 1, 6, an allegation of  
15 “oppression, fraud and malice” will be stricken where the complaint does not contain “sufficient  
16 facts to support such allegation.” Rutter Group is not controlling authority.

17 Moreover, a pleading alleging punitive damages must allege facts and not conclusions of  
18 law. Logan v. SCRTD (1982) 136 Cal. 3d 116, 185 Cal. Rptr. 878. It is especially critical that an  
19 award of punitive damages be based upon something more than mere allegations because punitive  
20 damages are an extraordinary remedy. It is an disfavored remedy in law; thus, it should be granted  
21 only with the greatest caution. Beck v. State Farm Mutual Auto Ins. Co. (1976) 54 Cal.App.3d  
22 347, 355, 126 Cal.Rptr.602.

23 **II. PLAINTIFFS’ IMPROPERLY RELY ON REPUBLISHED ALLEGATIONS, NOT**  
24 **AUTHORED BY WALKER, TO SUPPORT A PRAYER FOR PUNITIVE**  
25 **DAMAGES.**

26 California law is perfectly clear that online re-publishers of allegedly defamatory content  
27 are totally immune from liability to the defamed party. Barret v. Rosenthal (2006) 40 Cal.4th 33;  
28 Zeran v. America Online (1997) 129 F.3d 327 (adopted in Gentry v. eBay (2002) 99 Cal.App.4th

1 86). There is not a single California case to refute this rule.

2 In Barret v. Rosenthal (2006) 40 Cal.4th 33, the California Supreme Court upheld the trial  
3 court's granting of defendant's Anti-SLAPP motion, finding that the federal Communication  
4 Decency Act protects defendants from civil liability, for defamation and related claims, for  
5 republication of the words of another on the Internet. 47 U.S.C.A. § 230. Defendant Rosenthal  
6 had posted an article about the plaintiffs on two news groups. Rosenthal, *supra*, 40 Cal.4th at 42.  
7 The Communication Decency Act of 1996's immunity provision states: "No provider or *user* of  
8 an interactive computer service shall be treated as the publisher or speaker of any information  
9 provided by another information content provider." In a case of first impression, the Supreme  
10 Court held that this immunity extends to individuals who "distribute," or republish, allegedly  
11 defamatory content on the internet. The Court reasoned by passing the Communication Decency  
12 Act (CDA), Congress has comprehensively immunized republication of defamation online,  
13 including by individual Internet users. This ruling applies to an Internet user, as here, who "has no  
14 supervisory role in the operation of the Internet site where the allegedly defamatory material  
15 appeared and who thus was clearly not a provider of an 'interactive computer service' under the  
16 broad definition provided in the CDA." *Id.* at 43. In other words, the ruling is not limited to the  
17 operators of the website or internet service providers. The Court concluded that, "[u]ntil Congress  
18 chooses to revise the settled law in this area ..., plaintiffs who contend they were defamed in an  
19 Internet posting may only seek recovery from *the original source of the statement.*" *Id.* at pp. 39-  
20 40 (emphasis supplied). According to Witkin, the CDA "have been widely and consistently  
21 interpreted to confer broad immunity against defamation liability for persons using the Internet to  
22 publish information that originates from another source." Witkin, Summary of California Law  
23 (10th ed.), Ch. IX, § 537 (citing Rosenthal).

24 As such, those allegations of the First Amended Complaint where Plaintiffs seek to hold  
25 Walker liable for republishing posts authored by others must be disregarded in determining if  
26 sufficient facts have been alleged to justify punitive damages. Specifically, all of the following  
27 postings, alleged in the First Amended Complaint, are republished from another user's postings  
28 and are, therefore, immune from liability:

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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 5/16/2005, 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).” [First Amended Complaint, ¶12(1).]
2. Walker’s statement that she has seen postings of cases where “Dr. Filler’s treatment resulted in severed nerves and worse outcomes.” [First Amended Complaint, ¶12(7).]

Plaintiffs cannot rely on these republished postings to allege that Defendant acted with “fraud, oppression or malice.” As such, these allegations must be entirely disregarded in the analysis.

**III. THE COMPLAINT DOES NOT SUPPORT A CLAIM FOR PUNITIVE DAMAGES.**

In addition to improperly relying on republished postings, Plaintiffs’ seek to hold Defendant liable for punitive damages not for the statements she said, *but rather for Plaintiffs’ worst possible interpretation of them.* For example, with respect to the use of Wydase, Walker alleged stated in a post: “Wydase is no longer manufactured and has not been manufactured and has not been manufactured for seven years, so I’m 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.” [First Amended Complaint, ¶12(6).] Plaintiffs construe this posting to mean that she is accusing Dr. Filler of “intentionally injecting patients with a material known to cause a slow, painful, unpreventable death in every patient so exposed to Wydase.” [Opp., p. 4, lns. 8-11.] These statements seem to bear little resemblance to each other. How is Walker’s statement that there is a “remote risk” interpreted as “death in every patient”? Another example is the allegation that Walker posted: “I was billed for one procedure that was never conducted.” [First Amended Complaint, ¶12(2).] Since medical billing and coding errors are common and Walker comments on this in other posts, this phrase is consistent with Walker’s other statements

1 that there were billing errors by Filler's staff. Yet, Plaintiffs interpreted this to mean that Walker  
2 is accusing Plaintiffs of "fraud or theft." [Opp., p. 4, lns. 2-3.] Such generous liberties taken with  
3 Defendant's actual words cannot legally form the basis for punitive damages.

4 Finally, to support a claim for punitive damages, Plaintiffs seek to rely on a conclusory  
5 allegation that Defendant "knew said misstatements of fact were false and they made such  
6 publications with specific intent to injure Plaintiffs' positions as medical practitioners." [First  
7 Amended Complaint, ¶17.] Yet, no facts are alleged to show that Walker knew the misstatements  
8 were false or of her intent to injure Plaintiffs' position. In fact, Plaintiffs' own allegations refute  
9 such a conclusory assertion, because Walker states: "I believe he is a very skilled neurosurgeon."  
10 [First Amended Complaint, ¶12(10).] If she had the "specific intent to injure Plaintiffs' positions  
11 as medical practitioners," why would she pay him such a high compliment? Plaintiffs'  
12 allegations are internally inconsistent.

13 Finally, Plaintiffs cannot rely solely on Walker's alleged postings to seek punitive  
14 damages. They fail to cite any facts outside her postings to allege with specificity that she acted  
15 with the requisite type of "shocking" or "despicable conduct that subjects a person to cruel and  
16 unjust hardship." C.C.P. §3294. There was no "evil motive" here. O'Hara v. Western Seven  
17 Trees Corp. Intercoast Management (1977) 142 Cal.Rptr. 487, 75 Cal.App.3d 798.

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DATED: September 21, 2011

SAVIS LAW



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

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**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 September 22, 2011, I served the foregoing document(s) described as:

**DEFENDANT SUSAN WALKER'S REPLY TO PLAINTIFFS' OPPOSITION  
TO NOTICE OF MOTION AND MOTION TO STRIKE PORTIONS  
OF FIRST AMENDED COMPLAINT**

on the interested parties in this action:

by placing // the original  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 September 22, 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.

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Niloo Savis

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**SERVICE LIST**

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