I.

INTRODUCTION

Defendant appeals denial of a motion to dismiss a strategic lawsuit against public participation (SLAPP) under Code of Civil Procedure section 425.16 (the anti-SLAPP statute).

Plaintiffs accused Defendant of making libelous statements over the Internet. Defendant denied making the statements. The lower court denied the motion, holding that, had Defendant made the statements complained of, Plaintiff's lawsuit would **chill** his speech; that, because defendant did not make the statements as alleged in the complaint, the complaint could not "chill defendant's speech because defendant was not engaged in free speech." In *Equilon Enterprises, LLC v. Consumer Cause, Inc.* (No. S094877, published August 29, 2002) ____ Cal.4th _____ the California Supreme Court held that a defendant need not demonstrate that a suit was brought with the intent to chill the defendant's exercise of constitutional speech in order to obtain a dismissal under the anti-SLAPP statute.

The above ruling appears to present one additional issue: does the anti-SLAPP statute apply were the defendant denies making the libelous statements alleged in the complaint? Defendant argues

in the affirmative: an admission is not a prerequisite to application of the statute.

II.
STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The original complaint was filed by plaintiffs Bidbay.com (hereinafter "BIDBAY") and George Tannous ("TANNOUS") on April 2, 2002 against defendant and appellant Bruce Spry, Jr., named as "Bruce Spry" (hereinafter "SPRY"). [App. 002] The First Amended Complaint was filed on April 17, 2002. [App. 007]

Plaintiffs alleged three separate causes of action against SPRY: the First Cause of Action for Libel Per Se; the Second Cause of Action for Intentional Interference With Prospective Business Advantage; and the Fifth Cause of Action for Disparagement of Business Name.

SPRY's Answer [App. 015] and Special Anti-Slapp Motion to Strike (including Exhibit A and Annex of Federal Cases and Statutes) [App. 022-174], the supporting declarations of SPRY (including Exhibits B, C, D and E) [App. 175-193], and of his attorney, Asher Aaron Levin, (including Exhibits F1 through F3, inclusive and G1 through G9, inclusive) [App. 194-220]

were all filed on May 22, 2002.

Plaintiffs' Opposition was filed on June 11, 2002 including Declarations of TANNOUS and attorney, Barzin Barry Sabahat [App. 221].

SPRY's Reply Brief, including Declarations of SPRY and Asher Aaron Levin was filed on June 14, 2002 (including Exhibits H and I) [App. 240].

This matter was heard on June 21, 2002 before the Honorable Charles W. Stoll, Judge Presiding.

The Minute Order denying the Special Motion to Strike under Section 425.16 was entered on June 21, 2002 [App. 264]. The Notice of Ruling, prepared by Defendant/Appellant, was filed on July 2, 2002 [App. 265].

On July 3, 2002, SPRY filed his timely Notice of Appeal combined with Notice Designating Papers and Records; Notice Re Preparation of Reporter's Transcripts; Notice of Filing of Certificate of Court Reporter Waiving Deposit; and Notice of Lodging of Original Transcript. [App. 269].

B. STATEMENT OF MATERIAL FACTS

Plaintiff BIDBAY.COM , Inc., also known as "AuctionDiner.com", ("BIDBAY"), is an on-line (Internet) auction site [App. 008] and Plaintiff George Tannous ("TANNOUS") is its president and CEO

[App. 008]. BIDBAY claims to have nearly five million registered users [Exhibit G-8 - App. 217] and is said to be America's second largest online auction site [Exhibit G-6 - App. 215].

Defendant/Appellant BRUCE SPRY, JR., is a gardener who supplements his living by auctioning items on the Internet [App. 175-176]. He was also active in various Internet forums such as chat rooms and message boards[1] and, until filing of the lawsuit, was a volunteer moderator in a chat room at another website [App. 176]. SPRY's usernames and e-mail names were and are "snowhunter", "snowhunter1" and "snowhunte" [App. 178].

Beginning in early 2000, SPRY was a member of BIDBAY.COM and a seller on BIDBAY.COM, doing volunteer work at BIDBAY including going to member meetings and otherwise participating [App. 176].

In early 2001, SPRY complained to TANNOUS and to BIDBAY technical staff about problems that he had listing his items for sale on BIDBAY (and/or

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[1] E-mail is a means for an individual to send an electronic message - generally akin to a note or letter, to another individual or to a group of addressees. A message board is an address where such messages may be posted and can be read later. A chat room allows communication between two or more individuals in real time dialogue: by typing messages to one another that appear almost immediately on the others' computer screens.

Auctiondiner) [App. 176]. In April, 2001, TANNOUS confronted SPRY in the BIDBAY chat room and stated that SPRY ("Snowhunter") never made any sound comments about glitches with the site, just made many accusations about bidbay. TANNOUS asked SPRY, "If you don't like us, then why stay???" SPRY responded in the chat room [App. 176], saying that he [SPRY] cared about people, members and friends and that if TANNOUS wanted him to leave, he would leave. SPRY noted that he had specified the problems "*repeatedly*, *listing glitches*, *identifier problems*, *duplicates*, *contests not working correctly* ...", etc., and was completely ignored. SPRY accused TANNOUS of, inter alia, repeatedly lying to membership. Exhibit H [App. 255] is a printout of this exchange [App. 252].

In reaction to his candor, SPRY was suspended from BIDBAY and his listings were deleted. [App. 252] Further, TANNOUS threatened SPRY with a slander action. [App. 252].[2]

On April 2, 2002 Plaintiffs filed the complaint herein. [App. 002-005] On April 17, 2002, Plaintiffs filed their First Amended Complaint. [App. 007-014]

Paragraphs 7 and 8 of the First Amended Complaint discuss BIDBAY message boards and chat rooms offered

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[2] SPRY was later invited back to Bidbay, but last used it in or about September, 2001 [App. 176].

to members for the exchange of ideas and information and allege that SPRY is a member of the BIDBAY message boards and chat rooms as well as other message boards and chat rooms not affiliated with BIDBAY. [App. 009 -lines 6-12]

The charging allegations of the First Amended Complaint are contained in paragraph 10:

> "From the period between the year 2000 through the date of this complaint, Defendant has been making representations to the other members of Bidbay.com as well as public in general, on these message boards and chat rooms. Among others, these representations were that Bidbay.com or AuctionDiner.com sells child pornography, and that George Tannous fails to file and/or pay his taxes on time." [App. 009, lines 18-22]

On April 10, 2002, TANNOUS posted a message on the AuctionDiner chat room site announcing the lawsuit, correctly identifying Bruce Spry as Snowhunter and incorrectly identifying him as "Crycheck", and "the Light" [App. 178]. The message also noted that the suit named 100 DOES many of whom would be served with subpoenas within the week and identified 16 separate web names and/or websites, including Snowhunter. SPRY, and the others named, were said to have "defamed us, libled us, copyright infringements, manipulated

us, used us, **talked about us**, and we're of the opinion that their mission is to take us down or to use us." (Emphasis added). Exhibit B [App. 180-181] is a printout of the chat room posting [App. 177-178].

On April 15, 2002, Plaintiffs' attorney sent an email to Mootropolis, one of the "accused" and noted Plaintiffs' intent to find the people who "are defaming AuctionDiner and its affiliates, employees and attorneys" and to "add them to the ONE lawsuit and add the causes of action against them [App. 178, App. 186]." Exhibit C [App. 182-187] is a printout of this email [App. 178].

On May 22, 2002 SPRY filed his Notice of Special Motion and Special Anti-Slapp Motion [App. 022-174, including Annex and Exhibit], the Declarations of Bruce Spry [App. 175-193, including Exhibits] and of Asher Aaron Levin [App. 194-220, including Exhibits]. On June 11, 2002, Plaintiffs filed their opposition [App. 221-239]; on June 14, 2002, SPRY filed his reply brief [App. 240-263, including Exhibits].

SPRY's declarations (filed with the Motion and with the Reply brief) recite his involvement with the Internet as an online auctioneer, participant in various Internet forums and, until the filing of the lawsuit, as a volunteer moderator in a chat room [App. 176]; his membership in Bidbay.com, participation as a volunteer and attendance at member meetings [App.

176]; his complaints about glitches at Bidbay, the chat room exchange with TANNOUS and TANNOUS' threat of a slander suit [App. 176, 251-252, 255]; and admit a dislike of TANNOUS and a belief that TANNOUS is not honest [App. 179, 251].

SPRY's declarations also provide evidence of Plaintiffs' publication of the lawsuit and attempt to suppress free speech and discussion, as evidenced by TANNOUS' posting on the AuctionDiner website on April 10, 2002 [App. 177-178 and Exhibit B, App. 180-181] and attorney Sabahat's letter to Mootropolis.com on April 15 [App. 178, Exhibit C, App. 182-187].

SPRY's declarations also specifically denied that SPRY made the statements alleged regarding child pornography and/or Tannous's taxes [App. 177, 252, 253].

Plaintiffs raised four arguments in opposition to the motion: (1) That SPRY was acting as an agent for a competitor of BIDBAY.COM (i.e., as a volunteer moderator") at the time of the allegedly libelous statements and that, therefore, section 425.16 does not apply [App. 224]. No evidence of any nexus between the alleged agency and the alleged statements was presented. (2) That the statements were not made in a public forum. The complaint appears to allege publication on Bidbay.com chat rooms and message boards as well as on chat rooms and message boards not

affiliated with BIDBAY (App. 009, lines 6-12 and 18-22). Although the complaint does not allege the specific chat rooms and message boards (or the date or time) of the alleged statements, TANNOUS's declaration in opposition to the motion states that publication was on both the AuctionDiner (BIDBAY) website and at the Auction Saloon website and that TANNOUS was cut off from latter chat room "within a few hours" after he had gotten onto the site and attempted to respond to the accusations (to defend himself. [App. 225, 230] Based thereon, TANNOUS argued that the statements were not made in a public forum. (3) That SPRY's declaration was untrustworthy and lacks credibility. No evidence was presented to substantiate a rather bizarre attack on SPRY's credibility. [App. 226-227] (4) That Plaintiffs could demonstrate the probability of prevailing. The primary basis for this argument is the alleged lack of credibility of SPRY's declaration [App. 227-228].

TANNOUS's declaration is inadmissible: lacking foundation and failing to satisfy the requirements of the Secondary Evidence Rule. Even if TANNOUS' declaration was admissible, it fails to establish malice against a public figure and fails to show why the communication is not protected by the common interest privilege.

C. THE ORDER OF THE SUPERIOR COURT; STATEMENT OF APPEALABILITY

On June 21, 2002 Judge Stoll issued his Order in denying the Special Anti-Slapp Motion. The Court recognized that Defendant bears the initial burden of showing that the Plaintiff's claim is based on an act of the Defendant in furtherance of his right to free speech [R.T. 4 line 25-5 - R.T. 5 line 3]. The Court then held that:

> "THE DEFENDANT ARGUES THAT HE DID NOT MAKE THE STATEMENTS AND THAT THE PLAINTIFF CANNOT PROVE HIS CLAIMS. THE DEFENDANT PROVIDES HIS OWN DECLARATION TO SHOW THAT HE NEVER DISCUSSED THE PLAINTIFF'S TAX SITUATION, THAT HE DOES NOT KNOW THE PLAINTIFF'S TAX SITUATION, THAT HE NEVER PUBLISHED ANY INFORMATION THAT THE PLAINTIFF WAS SELLING CHILD PORNOGRAPHY. THUS, THE DEFENDANT'S EVIDENCE SHOWS THAT THE DEFENDANT WAS NOT ENGAGED IN ANY ACT IN FURTHERANCE OF HIS RIGHT TO FREE SPEECH."
>
> "THE DEFENDANT'S EVIDENCE SHOWS THAT HE MISUNDERSTANDS THE INTENT OF SECTION 425.16, THE ANTI-SLAPP STATUTE. SUBDIVISION (A) OF CCP SECTION 425.16 STATES THAT THE LEGISLATIVE INTENT OF THIS SECTION IS TO STOP THE USE OF JUDICIAL PROCESS TO CHILL SPEECH. IF THE DEFENDANT WERE

MAKING STATEMENTS REGARDING CHILD PORNOGRAPHY OR PLAINTIFF'S TAX SITUATION, THEN PLAINTIFF'S LAWSUIT WOULD CHILL HIS SPEECH. HOWEVER, SINCE THE DEFENDANT STATES UNDER OATH OF PERJURY THAT HE DID NOT MAKE THE STATEMENTS, THE PLAINTIFF'S COMPLAINT CANNOT CHILL HIS SPEECH BECAUSE THE DEFENDANT WAS NOT ENGAGED IN FREE SPEECH."

"SINCE THE DEFENDANT'S EVIDENCE SHOWS THAT THE PLAINTIFF'S COMPLAINT IS NOT CHILLING ACTS OF THE DEFENDANT IN FURTHERANCE OF HIS RIGHT TO FREE SPEECH, CCP SECTION 425.16 IS NOT THE PROPER REMEDY."

"WHILE I DON'T PRACTICE LAW ANY LONGER, WHAT APPEARS TO THE COURT IS THE DEFENDANT SHOULD HAVE FILED A DEMURRER TO THIS COMPLAINT OR MOVED FOR SUMMARY JUDGMENT."

"WE ARE DENYING THE MOTION."

(R.T. 5, line 6- 6, line 9)

Code of Civil Procedure Section 425.16(j) makes an order granting or denying a special motion to strike appealable under Code of Civil Procedure section 904.1.

D. STANDARD OF REVIEW ON APPEAL

On appeal from denial of a motion under the

strategic lawsuit against public participation (SLAPP) statute, the Court of Appeal reviews the record independently to determine whether the trial court ruled correctly. *Foothills Townhome Assn. V. Christiansen* (1998) 65 Cal.App.4th 688, 695. To similar effect, on appeal from an order of dismissal pursuant to section 425.16, the Court of Appeal exercises its independent judgment to determine whether defendants acted in furtherance of their rights of petition or free speech in connection with a public issue and, if defendants meet their burden, whether plaintiffs have produced sufficient admissible evidence to establish the probability of prevailing on the merits of each cause of action asserted. *Mission Oaks v. County of Santa Barbara* (1998) 65 Cal.App. 4th 1, 5-6.

III.

ARGUMENT

THE FIRST, SECOND AND FIFTH CAUSES OF ACTION ARE SUBJECT TO THE ANTI-SLAPP STATUTE.

The California Anti-SLAPP Law (CCP §425.16) was Enacted to Protect the Fundamental Constitutional Rights of Petition and Speech and Is to Be Construed Broadly.

In 1992, in response to the "disturbing increase" in meritless lawsuits brought "to chill the valid exercise of constitutional rights of freedom of speech", the Legislature enacted Code of Civil Procedure Section 425.16 to protect against such SLAPP suits[3].

§425.16 creates an accelerated two-step procedure for disposing of SLAPP suits. In the first step, defendant must make a prima facie showing the statute applies to him or her, i.e., that a cause of action arises from "any act of that person [defendant] in furtherance of the person's right of petition or free speech ... in connection with a public issue" (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 819-820). An act in furtherance of a persons right of petition or free speech is defined to include "any written or oral statement or writing includes.... any written or statement or writing made in a place open to the public or a public forum in connection with an issue of public interest." §425.16(e).

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[3] §425.16 (a), as amended in 1997, provides: "The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To that end, this section shall be construed broadly."

In 1997, the Legislature amended the statute to expressly mandate that it be construed broadly. In 1999, the Supreme Court issued its first opinion on the anti-SLAPP law, directing that courts, "whenever possible, should interpret the First Amendment and section 425.16 in a manner 'favorable to the exercise of freedom of speech, not to its curtailment." (*Briggs v. Eden Council for Hope and Opportunity* (1999) 19 Cal.4th 1106, 1119).

In the second step, the burden shifts to the plaintiff to establish "that there is a probability that the Plaintiff will prevail on the claim." §425.16(b).

A. THE ALLEGATIONS OF THE COMPLAINT ARE COVERED BY §425.16 BECAUSE THEY ARISE OUT OF THE RIGHT TO SPEAK OUT ON A PUBLIC ISSUE IN A PUBLIC FORUM.

Plaintiff alleges, against, all defendants, that:

> "From the period between the year 2000 and the date of this complaint, Defendant has been making representations to other members of Bidbay.com as well as public in general, **on these message boards and on chat rooms.[emphasis added]** Among others, these representations were that Bidbay.com or AuctionDiner.com sells child pornography, and that George Tannous fails to file and/or pay his taxes on time." [App. 009]

These are the only representations alleged in the First and Second Causes of Action. Plaintiffs further

allege in ¶24 (incorporated into the Fifth Cause of Action) that the business entity defendants made allegations that TANNOUS was a criminal and that BIDBAY was involved in illegal activities. [App. 011]

1. Message boards and chat rooms constitute public forums.

Cases construing the term "public forum" as used in Section 425.16 have noted that the term "is traditionally defined as a place that is open to the public where information is freely exchanged". *Damon v. Ocean Hills Journalism Club 2000* 85 Cal. App.4th 468, 475. "Under its plain meaning, a public forum is not limited to a physical setting, but also includes other forms of public communication.' (Id. at P. 476). In *Metabolife International, Inc. vs. Wornick* (S.D. Cal. 1999) 72 F.Supp.2d, 1160, 1175, a Federal Court held that a widely disseminated television broadcast was "undoubtedly a public forum" for purposes of Section 425.16. In *Computer Xpress, Inc. vs. Jackson* (2001) 93 Cal.App.4th 993 the court noted that two websites in questions were open and free to anyone who wanted to read the messages, the membership was free and entitled members to post messages. The court concluded that the websites were public forums, presenting "even a stronger case for qualification as public forums" than the newsletter involved in Damon. Newspapers exercise editorial control over access to their pages but websites often times do not. To like effect, please see Nicosia v. De Rooy (N.D. Cal. 1999)

72 F. Supp.2d 1093, 1096 [website is a public forum], Reno v. ACLU (1997) 521 U.S. 844, 853, 870 [Internet is a vast platform to address world-wide audience; chat rooms allow any person to become a town crier].

Plaintiffs' complaint alleges that BIDBAY.COM offered its members a forum in which to exchange ideas and information, whether personal or business in nature [App. 009, lines 6-9]; that MOOTROPOLIS.COM provided a forum for members of AUCTIONCOW.COM to post their messages and chat [App. 009, lines 2-5]; that SPRY is a member to Bidbay .com chat rooms and other chat rooms not affiliated with BIDBAY. [App. 9, lines 10-12]; and that defendant made the representations **on these message boards and chat rooms**. By their own complaint, Plaintiffs have admitted that the communications complained of herein were communicated in a public forum.

TANNOUS' declares that the "libel" was published at both AuctionDiner (BIDBAY) and Auction Saloon websites. He states that, after getting on the Auction Saloon chat site to protect himself, he was locked out a couple of hours later. [App. 230] Plaintiffs argue that, as a result, Auction Saloon was not a public forum., citing *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal. App. 4th 993, 1007. [App. 225]

Even if one were to accept TANNOUS' declaration as true and ignore the inconsistency with his pleadings, Mr. Tannous appears to acknowledge that he spent a couple of hours on the Auction Saloon website defending himself. The right of a website, television

station, talk radio station or newspaper to exercise editorial control over access to its site does not mean that it is not a public forum. *ComputerXpress*, supra, citing *Damon v. Ocean Hills Journalism Club* (supra) 85 Cal. App. 4th 468 as an example.

2. The Information Posted regarding BIDBAY Was an Issue of Public Interest.

Plaintiff BIDBAY.COM also known as AUCTIONDINER.COM is an interactive Internet auction website. All offerings on the website are obviously an issue of public interest to those involved in searching for product, to members of BIDBAY, auctioneers and consumers. Further, the issue of child pornography on the Internet is a public issue and the subject of substantial legislation, including the Federal Communications Decency Act of 1996 (47 U.S. Code §230, Annex 1 [App. 171-173]).

3. The Information Posted regarding TANNOUS Was an Issue of Public Interest.

In addition, TANNOUS claims to have been libeled by statements allegedly made by defendant that he did not file and/or pay his taxes on time: Plaintiff characterizes this as “tax evasion”, although tardiness seems more an accurate description. Is this characterization libelous? It **is** an issue of public interest.

In the case of *Sipple v. Foundation for National Progress et al.* (1999) 71 Cal. App. 4th 226, plaintiff was a political consultant who produced advertising. A magazine published an article detailing a custody dispute between and his former wife. Plaintiff sued charging the magazine with libel, intentional infliction interference with contract and intentional interference with prospective economic advantage. One of the issues that he raised was that his treatment of his previous wives was not a public issue and that the trial court erred in finding the article came within the protection of Anti-SLAPP legislation.

The court recognized that the 1997 amendment to Section 425.16 required that the statute be give a broad interpretation (Id. at page 235) and disagreed with Plaintiff's argument. The court noted that domestic violence is an extremely important public issue in our society. To the extent that the characterization described in the complaint constitutes a characterization of TANNOUS as a tax evader, this is also an extremely important public issue in our society and should be protected by the Anti-SLAPP legislation.

In addition, TANNOUS is a public figure, CEO, former IRS officer and CPA. (Please see discussion at Paragraph B.3., below.)

4. The Lower Court erred in requiring a showing that the action was brought to chill SPRY'S exercise of free speech. The Lower Court erred in failing to consider the pleadings and in using SPRY's denial that he made the alleged statements as the basis for holding that section 425.16 did not apply.

In Equilon Enterprises, LLC v. Consumer Cause, Inc. (No. S094877, published August 29, 2002) ____ Cal.4th _____ the Supreme Court held that a defendant need not demonstrate that a suit was brought with the intent to chill the defendant's exercise of constitutional speech in order to obtain a dismissal under the anti-SLAPP statute.

Additionally, the lower court appeared to hold that, because SPRY denied under oath the allegations regarding his publication of libel, SPRY was not engaged in free speech for purposes of section 425.16. [R.T. 5, line 6 - R.T. 6, line 9]

In making such ruling, the lower court ignored the language of Code Civil Procedure section 425.16(b)(2), requiring the court "to consider the pleadings" as well as the supporting and opposing affidavits as well as the instruction in Section 425.16(a) that the section be construed broadly. The First Amended Complaint alleges libelous statements in public forums (Internet chat rooms and message boards) and in connection with a public issue. [App. 009, lines 6-12,

App. 009, lines 18-22] The fact that SPRY denies making these representations does not take this case out of the purview of the anti-SLAPP statute. Plaintiff's complaint cannot be ignored for the purpose of establishing that the complaint arose out of free speech. In addition, SPRY had other communications over the Internet with regards to TANNOUS and/or BIDBAY and alleges TANNOUS' threat of a libel suit arising out of the prior communications. It is unreasonable to allow TANNOUS to continue with his suit based upon false charges while true charges would clearly fall within the ambit of the statute.

B. PLAINTIFFS HAVE NOT ESTABLISHED A PROBABILITY OF PREVAILING ON THE CLAIMS HEREIN.

To meet its burden, a **plaintiff must demonstrate that his or her complaint is legally sufficient and is supported by a sufficient prima facie showing of admissible facts to sustain a favorable judgment.** (Wilcox v. Superior Court, supra, 27 Cal.App.4th at 823).

1. The Complaint Does Not Sufficiently Plead Libel.

A libel complaint must specifically identify the allegedly libelous statements so that the defendant

has notice of the particular charges he is required to answer.

> "The general rule is that the words constituting an alleged libel must be specifically identified, if not pleaded verbatim, in the complaint." *Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1612, fn. 5.

Libel is based upon a publication in writing, printing or other fixed representation to the eye. Civil Code §45. Such a requirement is not difficult to comply with in this action: it is easy to print out the contents of a chat room communication (as did SPRY and his attorney: please see [App. 180-181, 182-187, 200-206 and 255,by way of example).

Herein, Plaintiffs have not specifically plead the words written, identified the writer, identified the date or dates of publication, or identified the specific chat rooms and billboards where each such alleged publication occurred or the persons making said publications. [App. 9, lines 18-22]

If these statements were posted by others on a chat room that he moderated, or if he re-posted these statements, SPRY would be protected by the Communications Decency Act, 47 U.S.C. 230, which creates an immunity for communications "when provided by another information content provider".[App. 171-

173][4]

If these statements were posted prior to April 2, 2001 (the complaint was originally filed on April 2, 2002 and complaint alleges statements made “From the period between the year 2000 through the date of this complaint":[App. 9, line 18]), the complaint may be barred by the one year statute of limitations, Code of Civil Procedure §340(3).

The complaint fails to adequately plead libel. The Second and Fifth causes of action are based upon the libel allegations of the First cause of action and likewise fail.

2. Plaintiff has not made a sufficient prima facie showing of admissible facts to sustain a favorable judgment.

Plaintiffs offer the declarations of Mr. Sabahat and of TANNOUS in support to evidence their claim. Such declarations are insufficient to sustain a favorable judgement.

Mr. Sabahat’s declaration does not address any of

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[4] 47 U.S.C.230 (c)(1) provides that: “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.” §230(e)(3) provides that: “No cause of action may be brought and no liability imposed under any State or local law that is inconsistent with this section.”

the issues presented in the complaint. [App. 231-233] He does, however, report that he informed SPRY's attorney that BIDBAY is willing to dismiss the action and all SPRY has to do is to "make a commitment to refrain from any further defamation." [App. 232, lines 10-13][5]

TANNOUS's declaration is defective. Evidence Code section 403 places a burden upon the proponent of evidence as to preliminary facts, including personal knowledge of the witness (§403(2), the authenticity of a writing (§403(3) and where the proffered evidence is of a statement or other conduct of a particular person, whether that person made the statement or so conducted himself.

Herein, TANNOUS has failed to establish facts sufficient to admit his testimony as to the alleged statements attributed to SPRY. His declaration (as well as the complaint) is bereft of supporting facts: he does not state the date or time of the alleged publication. There is insufficient information

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[5] In response to said declaration, SPRY's attorney, Mr. Levin, indicated that Mr. Sabahat had indicated that he had proof that SPRY made the statements alleged in the complaint. Mr. Levin asked Mr. Sabahat to furnish proof so that they could, perhaps, talk about an early resolution. Mr. Sabahat failed to furnish such evidence, either informally or in the opposition to the motion. [App. 258, line 21 to App. 259, lin 4]

furnished for a trier of fact to determine that such a publication actually took place.

TANNOUS does not state what user name was used[6]. The case of *People v. Witt* (1975) 53 Cal.App.3d 154, involved an analogous situation. Two brothers were charged with conspiracy to defraud an estate and beneficiaries. The prosecutor produced evidence that neither of the brothers was a relative of decedent testator. Defendants called a witness who testified that, shortly before the testator's death, she received a telephone call from a person who identified herself as the testator and said that she one of the brothers had been using her car to take her wherever she wanted to go and that she thought a lot of the brother. The prosecutor objected on the grounds of lack of relevancy and authentication. The objection was sustained. The witness did not know the testator

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[6] TANNOUS's e-mail posting of April 10, 2002 [App. 180] states as a fact that SPRY uses the names "Crycheck" and "the light". Although SPRY has denied this allegation under oath [App. 178, lines 8-11], Appellant assumes that TANNOUS believed the "other members" who allegedly "brought forth" these names and did not make this statement knowing it to be false and with the intent to damage SPRY. In light of his "honest belief, TANNOUS' declaration is curiously unclear and deficient in that it fails to identify SPRY by his user name in attributing these representations to SPRY.

and had not received other calls from her: the caller could not be independently identified. *People v. Witt*, supra, at p. 173, cited in Jefferson, California Evidence Benchbook 2d Ed. §24.4(3).

Likewise, in this action, TANNOUS cannot independently identify the party who allegedly made the libelous statements. He has failed to specify that Snowhunter made the statements and has no facts to justify his claim that SPRY operated under a different user name. He cannot identify Crycheck or whatever other name might have been used by a person making the alleged libelous statements.

Additionally, the statements regarding the contents of the chat room postings violate the Secondary Evidence Rule and are therefore inadmissable. Evidence Code Section 1521 makes secondary evidence generally admissible. However 1521 the "mandatory exceptions set forth in subdivisions (a)(1) and (a)(2) provide further protections against unreliable secondary evidence" Law Revision Commission Comments 1998. Section 1521(a) states the rule that the court shall exclude secondary evidence of a writing if <u>either</u>:

> "(1) A genuine dispute exists concerning material terms of the writing and justice requires the exclusion;
>
> "(2) Admission of the secondary evidence

would be unfair."

A "Writing" is defined in Evidence Code section 250 and includes every means of recording upon any tangible thing any form of communication. There must be a writing to be a libel (Civil Code §45).

Evidence Code Section 1523 states the general rule excluding oral testimony to prove the content of a writing:

> "(a) Except as provided by statute, oral testimony is not admissible to prove the contents of a writing.
>
> (b) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the proponent does not have possession or control of a copy of the writing and the original is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence.
>
> (c) Oral testimony of the content of a writing is not made inadmissible by subdivision (a)if the proponent does not have possession or control of the original or a copy of the writing and either of the following conditions is satisfied:
>
> (1) Neither the writing nor a copy of the writing was reasonably procurable by the proponent by use of the court's process or by

other available means.

(2) The writing is not closely related to the controlling issues and it would be expedient to require its production."

The Secondary Evidence Rule (continuing and clarifying the prior "Best Evidence Rule" and exceptions thereto) was designed to prevent possible erroneous interpretations of a writing by requiring production of the original when available. In this case, the original - or a printed or computer copy of the original - would be the best evidence of SPRY'S alleged libel: of the very existence of the statement, the identity of the person posting the message, whether the statement was made as a statement of opinion or of fact and the tone and content of the statement[7].

Under the §1521 analysis (which requires only one

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[7] In *ComputerXpress, Inc. v. Jackson*, supra, 93 Cal. App. 4th 993, the Court recognized that whether a statement is fact or opinion is one of law. In that case, the tone and content of computer postings (over 100 pages of printouts were produced by Plaintiff) identified them as statements of opinion and not fact. The postings were replete with "explicit statements of opinion" in the form of "IMO", meaning "in my opinion". Similarly, SPRY used "JMHO", meaning "just my humble opinion" [App. 252, lines 6-7] in his postings, such as Exhibit H [App. 255].

basis for exclusion), it is clear **both** that a genuine dispute exists as to the material terms (and the very existence) of any such writing. [App. 177, lines 3-10; App. 252 line 27-App.253 line 2]; **and that** it would be unfair to allow secondary **oral** evidence of the purported "writing". SPRY would not have objected to production of a printout of the alleged libelous conversation: it is the absence of such a printout or record that makes admission of the declaration so unfair. It is extremely difficult for Defendant to prove a negative (i.e., there was no such statement made): it would have been easy for Plaintiff to provide a copy of the alleged publication.

Applying Section 1523, no basis has been shown for applying an exception to the general rule of inadmissibility of an oral statement. Under §1523 (b), no evidence was offered by Plaintiffs that the alleged written libelous statements were not in the possession or control of Plaintiffs. In fact, attorney Sabahat represented that he had "proof" of the libel - but failed to provide such proof. [App. 258, line 21 - App. 259 line 4] The fact is that the alleged statements made at the AuctionDiner (BIDBAY) chat rooms was controlled by BIDBAY. No one other than BIDBAY had the ability to erase or destroy such chat room communications. As to each alleged defamation, no reason or excuse is given for failure

to print out such communication. If it was important, why was it not printed out?

Applying Section 1523(c)(1), there is no showing by Plaintiff that the alleged written libelous statements were not readily procurable by Plaintiffs.

While SPRY's moving papers and reply papers contain numerous printouts documenting the exchanges between the parties, further communications by TANNOUS and his attorney evidencing an intent to chill speech, Internet discussions of BIDBAY's actions and the litigation, **Plaintiff's papers include no printed or electronic evidence of the alleged chat room communications**). [App. 229-230] In fact, as SPRY notes in his reply declaration (and as anyone who makes use of the Internet on a regular basis would know), it is an easy thing to print out e-mail or chat room communications [App. 252, lines 17-26]. TANNOUS admits to constantly monitoring the message boards at competing websites [App. 229, lines 11-13]. He and the people working for BIDBAY certainly had the expertise and ability to print out the alleged statements. It is difficult to imagine the justification for TANNOUS to claim that the his employees were unable to print out the libelous communications, and he did not attempt to justify his failure to provide such evidence.

With regards to the alleged publications on the AuctionDiner (BIDBAY) web site, TANNOUS is the

President and CEO; BIDBAY is a Plaintiff. How is it that they did not produce printouts of the alleged defamation?

Finally, these alleged publications are central to the controlling issues of this case and that §1523(c)(2) is therefore inapplicable.

Plaintiffs have produced no admissible evidence of libelous statements by SPRY.

3. **Had Plaintiff Supplied Prima Facie Evidence of the "Libel", Plaintiffs still had the burden of and failed to show by clear and convincing proof that SPRY made any statements with actual malice.**

Under the First Amendment, defendants who are sued by public figures for defamation have special protections, for two reasons:

> " First, ... public figures are generally less vulnerable to injury from defamation because of their ability to resort to effective 'self-help.' Such persons ordinarily enjoy considerably greater access than private individuals to the media and other channels of communication. This access in turn enables them to counter criticism and to expose the fallacies of defamatory statements. Second, and more significantly,... public figures are less deserving of protection

than private persons because public figures, like public officials, have voluntarily exposed themselves to increase risk of injury from defamatory falsehood concerning them." (Readers Digest Association v. Superior Court (1984) 37 Cal. 3d 244, 253, citing and quoting Gertz v. Robert Welch (1974) 48 U.S. 323, 344-345 [internal citations omitted]).

TANNOUS has appeared in television advertisements for his accounting firm, TANNOUS & AFFILIATES; he has been vocal, active and recognizable in both open meetings and chat room communications of BIDBAY and AUCTIONDINER; he has issued numerous press releases under his name with regards to BIDBAY (please see Exhibits A [App 040], Declaration of Asher Aaron Levin [at APP 195, lines 2 - App. 196, line 14] and Exhibits thereto [App. 197-219, inclusive]). The Internet contains dozens of items that appear to refer to TANNOUS, including a news item dated January 7, 1986 concerning a consent decree entered into between the Federal Trad Commission and a "credit repair clinic" charged with misleading customers - wherein a George Tannous was one of the founders; and the report of a cease and desist order issued April, 1999 against "George Tannous & Affiliates" in offering tax preparation and accounting services without having filed a franchise application with the California

Commissioner of Corporations. [App. 178, line 22 - App. 179, line 1, App. 188- 191, App. 192].

TANNOUS has taken advantage of his opportunity to "self-help" by posting his messages (including Exhibit B to SPRY's declaration [App. 180-181] on **his** (i.e., BIDBAY's) website. Additionally, please see Declaration of Asher Aaron Levin and Exhibit collectively labeled F thereto. [App. 197-199]

Thus, Plaintiff TANNOUS must show not only the probability that he will prevail on his claim, that SPRY made the alleged statements **and that he will be able to show by clear and convincing proof that SPRY made the statements with actual malice**, i.e., with actual knowledge that the statements were false or with a reckless disregard of whether they were or were not false. ***Reader's Digest***, supra, 37 Cal. 3d at p. 256.

4. The Alleged Statements About Plaintiffs Are Also Protected by the Common Interest Privilege.

A communication is privileged if it is made without malice to an interested person:"by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the

communications to be innocent, or (3) who is requested by the person interested to give the information. Civil Code §47(c). When the communication is not directed t the world at large, but to a smaller group on a subject of interest to them, it is subject to the common interest privilege" *(Institute of Athletic Motivation v. University of Illinois* (1980) 114 Cal. App. 3d 1, 12). The representations are alleged to have been made in BIDBAY and other message boards and chat rooms related to on line auctions: to people who shared a common interest.

IV
CONCLUSION

The policy favoring early disposition of cases which impinge on First Amendment rights applies squarely to this case. Plaintiffs' lawsuit arises out of claims that Defendant acted in furtherance of his First Amendment speech rights and is intended to silence, punish and retaliate against him for perceived exercising of those rights; to silence other voices who criticize or disagree with Plaintiffs.

Therefore, the First, Second and Fifth Causes of Action are subject to the anti-SLAPP law.

Plaintiffs have introduced no admissible evidence to show a probability of prevailing on any of their respective claims against defendant SPRY.

Even if TANNOUS's declaration could be considered to show the contents of the alleged libel, he still has not shown by clear and convincing proof **that SPRY made the statements** or that SPRY made the statements with actual malice. Finally, absent proof of malice, such statements are privileged as statements of common interest.

Plaintiffs may not amend the complaint so as to avoid the bar of the anti-Slapp rule.[8]

Therefore, Defendant prays that the special motion to strike be granted, that TANNOUS's first cause of

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[8] Amendment of pleadings is not allowed under §425.16 once a court has found the required connection to First Amendment speech. *Simmons v. Allstate Insurance Co.* (2001) 92 Cal. App.4th 1068

action and BIDBAY'S first, second and fifth causes of action should be dismissed as to defendant SPRY, with prejudice and that defendant be awarded his costs and reasonable attorneys fees on both the lower court and appellate court level.

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ASHER AARON LEVIN Bar No. 71650
LAW OFFICES OF LEVY, MCMAHON & LEVIN

16830 Ventura Boulevard, Suite 500
Encino, California 91436
(818) 981-4556

MICHAEL S. DUBERCHIN Bar No. 108338
LAW OFFICES OF MICHAEL S. DUBERCHIN
4768 Park Granada, Suite 212
Calabasas, California 91302
(818) 222-7484

Attorneys for Defendant and
Appellant BRUCE SPRY, JR.