

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO**

GLENN HAGELE,

Plaintiff,

vs.

BRENT HANSON, *et al*

Defendant.

Department Number: 53

Case Number: 06AS00839

**ORDER AFTER HEARING RE:
DEFENDANT LAURANELL
BURCH'S MOTION FOR
ATTORNEYS' FEES**

This matter came on regularly for hearing on December 16, 2010 in Department 53 of the Sacramento Superior Court, the Honorable Kevin R Culhane Presiding. The Court having previously posted its Tentative Ruling and oral argument having been taken thereon, the Court took the matter under submission. After consideration of the papers and pleadings on file herein, as well as the arguments of the parties, the Court issued its ruling in a minute order and specified that a formal order be submitted for the Court's signature. As the parties have been unable to agree on the form of the formal order, the Court has prepared and now issues its own Order.

Defendant Burch's motion for attorney fees is granted.

1 Defendant filed a Special Motion to Strike on August 31, 2010. Plaintiff did
2 not oppose the motion. Instead, with the Special Motion to Strike pending,
3 Plaintiff filed a dismissal without prejudice of his two claims against Burch; i.e.
4 defamation and invasion of privacy.

5 The appellate courts have made clear that a plaintiff cannot avoid
6 mandatory fees by dismissing the action prior to hearing on the motion. (*Coltrain v*
7 *Shewalter* (1998) 66 Cal App 4th 94, 106-107. However, the fee motion is
8 dependent upon a determination of the merits of the Anti-SLAPP motion. The trial
9 court is required to rule on the merits of the motion, and to award attorney fees
10 "when a defendant demonstrates that plaintiff's action falls within the provisions of
11 subdivision (b) and the plaintiff is unable to establish a reasonable probability of
12 success. (*Church of Scientology v. Wollersheim* (1996) 42 Cal App 4th 628, 653-
13 655, overruled on another ground in *Equilon Enterprises v. Consumer Cause,*
14 *Inc.*, (2002) 29 Cal 4th 53. See also *Liu v. Moore*, (1999) 69 Cal.App.4th 745,
15 752, and *Pfeiffer Venice Properties v. Bernard* (2002) 101 Cal App 4th 211, 218.)
16 As the *Liu* court stated, any other rule would deprive the SLAPP defendant of
17 statutorily authorized fees, frustrating the purpose of the statute's remedial
18 provisions (*Liu v. Moore, supra*, 69 Cal App 4th at 752-753.) Accordingly, the
19 merits of the Anti-SLAPP motion must be determined.

20 Background of the Instant Dispute

21 Defendant Laurantell Burch is medical research scientist with a Ph.D in
22 molecular biology and genetics. She is employed as a director at the National
23 Institute of Environmental Health Scientists in North Carolina. (Second Burch
24 declaration at p.1) In 2004 her eyes were seriously damaged after she underwent
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1 Lasik surgery at Duke University. As a result of this surgery, she suffers from
2 serious and apparently permanent eye damage (Second Burch declaration at
3 p.2) Accordingly, since 2004 Burch has applied her science background to the
4 study of medical literature relating to the complications that can arise from corneal
5 refractive surgery such as Lasik (*Id*). She believes that the potential
6 complications of Lasik eye surgery are frequently understated by surgeons, who
7 have a monetary interest in a patient's decision to undergo Lasik surgery (*Id.*)
8 Accordingly, she has posted information on patient bulletin boards regarding the
9 risks associated with Lasik surgery. According to her declaration, there are no
10 fewer than 20 websites devoted to the discussion of the risks associated with
11 Lasik surgery. Ms Burch' declaration further states that there have been
12 numerous television segments devoted to the risks associated with Lasik surgery,
13 and that in 2008 the United States Food and Drug administration conducted
14 public hearings concerning these issues (*Id.*) Ms. Burch has filed at least one
15 petition before the Food and Drug Administration, and "owns" a website known as
16 Lasikdisaster.com. (Declaration of Glenn Hagele and Exhibit 5 thereto)

19 Plaintiff Hagele founded and directs an organization called the Council for
20 Refractive Surgery Quality Assurance ("CRSQA") Plaintiff states that this is a
21 "patient advocacy" group. (Hagele Points and Authorities (P's&A's) at 12). This
22 organization monitors all internet bulletin boards, newsgroups and other public
23 forums that pertain to refractive eye surgery According to statements attributed to
24 Hagele in the Burchell declaration, the function of CRSQA is such that "If an anti-
25 refractive surgery zealot makes inflammatory statements, we provide a balanced
26 response " (Second Burch declaration at p 3)
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1 According to papers filed by Hagele, in his capacity as Executive Director
2 of CRSQA and as its spokesperson, he has participated in media interviews
3 regarding Lasik surgery and also testified in connection therewith before the US
4 Food and Drug Administration (P's&A's at 12) In addition, the Burchell
5 declaration makes clear that Hagele has repeatedly commented in the public
6 media, sometimes in less than glowing terms, regarding individuals who have
7 suffered adverse outcomes from Lasik surgery (Second Burch declaration at p 4-
8 6).

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10 Plaintiff Hagele's Complaint

11 In ruling on an Anti-Slapp Motion to Strike, a trial court is required to
12 consider the pleadings and the supporting and opposing affidavits stating the
13 facts upon which the liability or defense is based. (§425 16, subd. (b).) The
14 Complaint that is the subject of the instant motion is a First Amended Complaint,
15 styled *Glenn Hagele v. Brent Hanson and Does 1-20*. Although this pleading was
16 filed in 2006, Burchell was only added to the action by virtue of Plaintiff's Doe
17 amendment in July, 2010.

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19 The First Amended Complaint ("FAC") contains two causes of action In
20 the first, plaintiff alleges that defendant *Hanson* caused to be published on certain
21 websites an allegedly defamatory letter, suggesting that Hanson had recovered a
22 judgment against Hagele in case number 03M300136 in the Circuit Court of Cook
23 County (FAC para 5). The FAC specifically alleges that the letter was published
24 on " . . . websites, internet bulletin boards, public newsgroups. . . and other
25 publicly accessible forums " (FAC 7). The First Cause of Action alleges that the
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1 implication that Hanson obtained a judgment is false, and that in fact the
2 underlying case was dismissed.

3 The Second Cause of Action in the FAC is styled "Invasion of Privacy " In
4 this cause of action plaintiff claims that "Defendants" displayed and posted on
5 various websites certain allegedly private information about plaintiff, including his
6 full name, date of birth, social security number *etc* (FAC para. 9). According to
7 the FAC, the posting of such material was "offensive" and " not of legitimate
8 public concern." As noted above, the July 2010 amendment of plaintiff's complaint
9 added no new charging allegations; defendant Burchell was simply added as a
10 defendant by Doe Amendment.

12 The pleadings and documents submitted in connection with this motion
13 include the evidence upon which the foregoing claims are based As to the First
14 Cause of Action, the allegedly defamatory letter is directed to one Brent Hanson
15 by one Ace Judgment Recovery Service It recites generally that an examination
16 of court records at the Rolling Meadows Municipal Court showed that Hanson had
17 recovered a stated sum from Hagele, and offered the company's services to
18 Hanson should he need assistance in collecting the alleged debt (Hagele
19 Declaration and Exh. 1 thereto).

21 The Second Cause of Action is predicated upon the alleged posting, again
22 on websites, internet bulletin boards, public newsgroups and other publicly
23 accessible forums, of certain public records. The first is an abstract of judgment in
24 Sacramento Superior Court case number DRR 364279-0, consisting of a filed
25 abstract of judgment in that case. The second consists of pages from "Schedule
26 F-- Creditors Holding Unsecured Claims" in a Bankruptcy proceeding styled In re
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1 Glenn F Hagele The "private information" which underlies plaintiff's invasion of
2 privacy claims is in fact information set forth in these court documents. (Hagele
3 Declaration and Exhibits 1 and 2 thereto).

4 Analysis

5 California's Anti-Slapp Statute

6 Code of Civil Procedure section 425.16 was enacted in 1992 to dismiss at
7 an early stage non-meritorious litigation meant to chill the valid exercise of the
8 constitutional rights of freedom of speech and petition in connection with a public
9 issue (*Lafayette Morehouse, Inc. v Chronicle Publishing Co* (1995) 37 Cal App
10 4th 855, 858 (superceded by statute as stated in *Damon v. Ocean Hills*
11 *Journalism Club* (2000) 85 Cal App 4th 468, 477). These meritless suits,
12 referred to under the acronym SLAPP, or strategic lawsuit against public
13 participation, are subject to a special motion to strike unless the person asserting
14 that cause of action establishes by the pleadings and affidavits a probability that
15 he or she will prevail (*Ibid.*; § 425.16, subd. (b)(1).) Section 425.16, subdivision
16 (a) provides that "[t]he Legislature finds and declares that there has been a
17 disturbing increase in lawsuits brought primarily to chill the valid exercise of the
18 constitutional rights of freedom of speech and petition for the redress of
19 grievances The Legislature finds and declares that it is in the public interest to
20 encourage continued participation in matters of public significance, and that this
21 participation should not be chilled through abuse of the judicial process." In 1997,
22 the Legislature amended the statute to add the following language to section
23 425.16, subdivision (a): "To this end, this section shall be construed broadly."
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1 Procedure for Determining Anti-Slapp Motions

2 It has been frequently stated that courts called upon to resolve Anti-SLAPP
3 motions engage in a two step analysis. The Court must first determine whether a
4 plaintiff's causes of action arise from acts by a defendant in furtherance of the
5 defendant's rights of petition or free speech in connection with a public issue.
6 (*Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal. App. 4th
7 713, 721, disapproved on another ground in *Briggs v. Eden Council for Hope &*
8 *Opportunity* (1999) 19 Cal 4th 1106, 1123, fn. 10) If the moving party carries this
9 initial burden, the burden shifts to the plaintiff to demonstrate with evidence a
10 reasonable probability that he or she will prevail on the claims at trial. In such
11 cases, the motion should be granted if plaintiff fails to make a prima facie showing
12 of facts which, if proved at trial, would support a judgment in his or her favor.
13 (*Church of Scientology v. Wollersheim* (1996) 42 Cal App 4th 628, overruled on
14 another ground in *Equilon Enterprises v Consumer Cause, Inc* , (2002) 29 Cal
15 4th 53). Whether section 425.16 applies in the first instance, and whether the
16 plaintiff has shown a probability of prevailing, are reviewed independently on
17 appeal. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal. App 4th 993, 999;
18 *Damon v Ocean Hills Journalism Club* (2000) 85 Cal App. 4th 468, 474).

21 Application in this Case

22 As noted above, the moving party bears the initial burden to establish that
23 plaintiff's causes of action arise from acts by defendants in furtherance of
24 defendants' rights of petition or free speech in connection with a public issue.
25 (*Mission Oaks Ranch, Ltd v County of Santa Barbara* (1998) 65 Cal. App. 4th
26 713, 721, disapproved on another ground in *Briggs v. Eden Council for Hope &*
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1 *Opportunity* (1999) 19 Cal 4th 1106, 1123, fn 10). In her effort to carry this
2 burden, defendant's papers repeatedly note that defendant only came into
3 contact with plaintiff as a result of her statements regarding the risks associated
4 with Lasik surgery, and that she was named in this action only as a result of
5 plaintiff's campaigns against those who are publicly critical of persons who
6 allegedly understate the risks associated with Lasik. (Moving papers at p 8)
7 Indeed, Burch stresses that she only came into contact with plaintiff as a result of
8 her speech regarding the risks associated with the Lasik procedure, and that
9 plaintiff's claims against her " . . . can only have arisen out of Burch's participation
10 in a public forum . . ." (*Id.* See also Burch Reply at p 3).

12 Were this the extent of plaintiff's showing, the inquiry would be at an end
13 This is so because the Anti-SLAPP statute's definitional focus is not the form of
14 the plaintiff's cause of action but, rather, the defendant's activity that gives rise to
15 his or her asserted liability, and whether that activity constitutes protected speech
16 or petitioning (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92; accord, *Stewart v*
17 *Rolling Stone LLC* (2010) 181 Cal App 4th 664, 679). The mere fact an action
18 was filed after protected activity took place does not mean it arose from that
19 activity." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76–77) Nor does the
20 fact "[t]hat a cause of action arguably may have been triggered by protected
21 activity" necessarily mean that it arises from such activity (*Id.* at p. 78.) Rather,
22 the trial court must instead focus on the substance of the plaintiff's lawsuit in
23 analyzing the first prong of a special motion to strike. (*Peregrine Funding, Inc v*
24 *Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 669–670).
25 In the Anti-SLAPP context, the critical point is whether the plaintiff's cause of
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1 action is itself based on an act in furtherance of the defendant's right of petition or
2 free speech. (*City of Cotati v. Cashman* (2002) 29 Cal 4th 69, 78.)

3 Accordingly, the motion necessarily turns on whether the moving party has
4 demonstrated that plaintiff's claims fall within one of the four categories described
5 in Section 425.16, subdivision (e), defining subdivision (b)'s phrase, "act in
6 furtherance of a person's right of petition or free speech under the United States
7 or California Constitution in connection with a public issue."

8 Subdivision (e) provides "As used in this section, 'act in furtherance of a
9 person's right of petition or free speech under the United States or California
10 Constitution in connection with a public issue' includes

11 (1) any written or oral statement or writing made before a legislative,
12 executive, or judicial proceeding, or any other official proceeding
13 authorized by law;

14 (2) any written or oral statement or writing made in connection with an
15 issue under consideration or review by a legislative, executive, or
16 judicial body, or any other official proceeding authorized by law,

17 (3) any written or oral statement or writing made in a place open to the
18 public or a public forum in connection with an issue of public interest;
19 or

20 (4) any other conduct in furtherance of the exercise of the
21 constitutional right of petition or the constitutional right of free speech
22 in connection with a public issue or an issue of public interest

23 Analysis of the facts upon which plaintiff's claims are based shows that the
24 moving party has carried her burden in this regard
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1 As noted above, plaintiff's First Cause of Action for Defamation is
2 predicated upon the publication, on an internet website, of a letter directed to one
3 Brent Hanson by one Ace Judgment Recovery Service. The letter states that an
4 examination of court records at the Rolling Meadows Municipal Court showed that
5 Hanson had recovered a judgment in a stated sum against Hagele Hagele
6 claims that this letter does not deal with the risks associated with Lasik surgery,
7 and hence cannot be said to be "in connection with an issue of public interest" for
8 purposes of Section 425.16 (e) 3 or 4.
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10 The court does not agree In analyzing the question of whether the "liability
11 producing act" occurs in connection with a public issue or an issue of public
12 interest, the courts have made clear that each case must be considered in light of
13 its unique facts (*Integrated Healthcare Holdings, Inc. v. Michael Fitzgibbons*,
14 (2006) 140 Cal. App. 4th 515, 526). Nevertheless, some general guideposts
15 regarding the identification of cases involving an issue of public interest have
16 been developed.
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18 Of course, the test is easily met when the topic of the challenged
19 publication is a topic of public concern. (See, e.g., *M G. v Time Warner, Inc*
20 (2001) 89 Cal.App.4th 623, [general topic of child molestation in youth sports is
21 an issue which, like domestic violence, is significant and of public interest]) Yet
22 contrary to plaintiff's assertions in opposition to the instant motion, the
23 requirement that the asserted liability occur in connection with a "public issue or
24 an issue of public interest," for purposes of subdivisions (3) and (4) is not narrowly
25 limited to such cases.
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1 To the contrary, the cases make clear that these statutory requirements
2 are also met when the subject communication concerns a person or entity in the
3 public eye (*Rivero v. American Federation of State, County and Municipal*
4 *Employees, AFL-CIO*, (2003) 105 Cal App 4th 913, 924) These cases
5 repeatedly make clear that when persons voluntarily inject themselves into the
6 public eye or public controversy, they necessarily subject themselves to inevitable
7 scrutiny -- including even potential ridicule -- by members of the public (See, e.g.,
8 *Seelig v. Infinity Broadcasting Corp.*, (2002) 97 Cal. App. 4th 798 [participant on
9 television show injected herself into the public eye; characterization of plaintiff as
10 a "local loser" and "skank" were made in connection with issue of public interest
11 for purposes of Anti-Slapp statute]; *Sipple v. Foundation for National Progress*
12 (1999) 71 Cal. App. 4th 226 [media consultant had been profiled in the media
13 scores of times; charges of domestic abuse by prior spouse constituted issue of
14 public concern], *Church of Scientology v. Wollersheim* (1996) 42 Cal App 4th
15 628, overruled on another ground in *Equilon Enterprises v. Consumer Cause,*
16 *Inc.*, (2002) 29 Cal 4th 53 [matters of public interest can include activities that
17 involve private persons or engaged in activities that may affect many individuals],
18 *Rivero v. American Federation of State, County and Municipal Employees, AFL-*
19 *CIO*, (2003) 105 Cal App 4th 913 [conduct of workplace supervisor who had
20 received no prior public or media coverage did not rise to the level of a public
21 issue]; *Integrated Healthcare Holdings, Inc v. Fitzgibbons* (2006) 140 Cal App
22 4th 515 [e-mail communication regarding financial stability of company
23 purchasing hospital constitutes issue of public interest because activity could
24 impact healthcare needs of county residents]).
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1 Measured against these standards it is clear that plaintiff is a person who
2 has voluntarily placed himself in the public eye (*See Wilbanks v. Wolk* (2004) 121
3 Cal App 4th 883, 898). As noted above, the evidence shows that there are no
4 fewer than 20 websites devoted to the discussion of the risks associated with
5 Lasik surgery; that there have been numerous television segments devoted to this
6 topic; and that in 2008 the United States Food and Drug administration conducted
7 public hearings concerning these issues.
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9 Plaintiff Hagele founded and directs CRSQA -- which he describes as a
10 patient advocacy group -- that monitors all internet bulletin boards, newsgroups
11 and other public forums for the specific purpose of responding to what are
12 deemed inflammatory statements in these public forums. (*Compare Wilbanks v*
13 *Wolk* (2004) 121 Cal App 4th 883, 898 [report pertaining to viaticals broker
14 constituted consumer information regarding industry touching a large number of
15 persons and hence constituted matter of public interest]) According to Hagele's
16 own website, he and his organization have been quoted or referenced in at least
17 30 articles. (Burch declaration at p. 3) Hagele acknowledges that he has
18 participated in media interviews regarding Lasik surgery, and in fact testified in
19 connection therewith before the US Food and Drug Administration. (*Id*). Hagele
20 himself has repeatedly commented in the web postings *etc* , regarding individuals
21 who have suffered adverse outcomes from Lasik surgery (Second
22 Burch declaration at p 4-6) It is thus clear that Hagele has injected himself
23 repeatedly into a widespread public controversy regarding not only the risks
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1 associated with Lasik surgery, but the bona fides of those who publicly criticize
2 the Lasik industry ¹

3 Given plaintiff's status as a person who has clearly placed himself in the
4 center of a widespread public controversy, criticism and even ridicule directed
5 toward him occur in connection with a public issue or an issue of public interest

6 This is even more so within the context of the present case. The evidence
7 presented by defendant demonstrates that defendant has contributed to patient
8 bulletin boards by generally asserting her belief that the risks associated with
9 Lasik surgery are frequently understated, because Lasik surgeons have a
10 financial motivation to do so. Information posted about a primary spokesperson of
11 the Lasik industry suggesting a failure to pay his debts (the "defamatory letter") or
12 prior efforts to discharge his debts without payment (the bankruptcy schedules)
13 occurred in connection with a public issue or an issue of public interest. This is
14 particularly true when it is considered that that legislature has directed that
15 §425 16, subd. (e)(3), like all of section 425 16, is to be "construed broadly" so as
16 to encourage participation by all segments of our society in vigorous public
17 debate related to issues of public interest. (See *Averill v. Superior Court* (1996)
18 121 Cal App 4th 883, 1175-1176).² Defendant has carried her burden to
19 establish that plaintiff's causes of action arise from acts by defendants in
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25 ¹ At least one case has analogized the Web to a public bulletin board. (*Wilbanks v. Wolk* (2004) 121 Cal App 4th
26 883, 897)

27 ² It is also to be noted that the allegedly defamatory letter that forms the basis of the first Cause of Action, like the
28 Bankruptcy Court Schedule that forms the basis of the Second Cause of Action, pertains to an issue presented in
the context of a matter under review by a judicial body, and hence likely falls under CCP 425 16 (e) (1) and (2) as
well. (*Sipple v. Foundation for National Progress* (1999) 71 Cal App 4th 226, 237-238)

1 furtherance of defendants' rights of petition or free speech in connection with a
2 public issue.

3 Of course, the fact that a moving defendant carries this initial burden does
4 not mean that a case is dismissed, it merely means that the case is further
5 scrutinized to determine whether the case has minimal merit through a showing
6 by the plaintiff that he possesses a probability of prevailing on the merits (See
7 *Navellier v. Sletten*, 29 Cal 4th 82, 93-94). In order to establish the requisite
8 probability of prevailing, the plaintiff need only have stated and substantiated a
9 legally sufficient claim (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19
10 Cal.4th 1106, 1123 quoting *Rosenthal v. Great Western Fin. Securities Corp*
11 (1996) 14 Cal.4th 394, 412) In this setting, the plaintiff must demonstrate that
12 the complaint is both legally sufficient and supported by a sufficient prima facie
13 showing of facts to sustain a favorable judgment if the evidence submitted by the
14 plaintiff is credited (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811,
15 821 The plaintiff may only carry this burden through the production of admissible
16 evidence. (*Ludwig v. Superior Court* (1995) 37 Cal App 4th 8, 15-16).

19 Plaintiff has failed to demonstrate a probability of prevailing on the merits in
20 this case. In the first place, plaintiff has failed to demonstrate with admissible
21 evidence that defendant "published" the allegedly defamatory letter or the so-
22 called "private information." Defendant has produced evidence that she neither
23 published the allegedly defamatory letter nor the private information (Burch
24 declaration pages 27, 28, 31, Exhibit K.) In response, plaintiff has submitted
25 excerpts from deposition testimony from an earlier proceeding, and Burch has
26 submitted the entire deposition. The deposition demonstrates that a website
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1 owned by the defendant contained a link to another website, and that a third
2 party, without plaintiff's knowledge, posted the information on the other website
3 (Exhibit J to Second Declaration of Burch). However, 47 U S C 230(c) provides
4 that website operators and their users cannot be held liable for Internet content
5 posted by another user, and cannot be considered to be the "publishers" thereof
6 Accordingly, plaintiff has failed to demonstrate a probability of prevailing on either
7 the first or second causes of action

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9 Moreover, the activities described above clearly demonstrate that plaintiff is
10 a limited purpose public figure. (See *Gilbert v Sykes* (2007) 147 Cal. App 4th 13,
11 25). As such, to demonstrate a probability of success on the defamation claim,
12 he was required to identify evidence showing not only that the allegedly
13 defamatory publication was false, but that defendant acted with actual malice.
14 (*Gilbert, supra*, 147 Ca. App 4th at p 26, citing *Annette F v. Sharon S* (2004) 119
15 Cal App 4th 1146) Plaintiff has made no effort to carry his burden in this regard
16 Plaintiff's evidence and briefing do not address the issue, and in all events
17 defendant's deposition, attached as Exhibit J to defendant's second declaration,
18 affirmatively negates malice as it demonstrates that defendant did not agree with
19 Hanson's alleged activities. For this reason as well, plaintiff has failed to
20 demonstrate a probability of prevailing on the first cause of action.

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22 In addition to the foregoing, plaintiff's second cause of action for invasion
23 of privacy is based upon the alleged publication of nothing more than public court
24 documents. (Hagele declaration paras.1 and 2) However, both the United States
25 Supreme Court and the California Supreme Court have made clear that the First
26 Amendment precludes liability for the publication of facts contained in public
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1 official records. (*Cox Broadcasting Corporation v. Cohn* (1975) 420 U.S. 469;
2 *Okla. Publishing Co. v. District Court* (1975) 430 U S 308, *Smith v. Daily Mail*
3 *Publishing Co.* (1979) 443 U.S. 97; *The Florida Star v. B.J.F.* (1989) 491 U.S.
4 524, *Gates v. Discovery Communications, Inc.*, (2004) 34 Cal. 4th 679; *Taus v*
5 *Loftus* (2007) 40 Cal 4th 683). For this reason as well, plaintiff has failed to
6 demonstrate a probability of prevailing on the second cause of action.³

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8 Motion for Attorney Fees

9 To some extent, the appellate courts have disagreed regarding the precise
10 methodology determining the availability of attorney fees when, as here, a case is
11 voluntarily dismissed while an Anti-Slapp motion is pending. Some cases simply
12 direct that trial court should rule on the merits of the motion, and award attorney
13 fees when a defendant demonstrates that plaintiff's action falls within the
14 provisions of subdivision (b) and the plaintiff is unable to establish a reasonable
15 probability of success. (See *Liu v Moore*, (1999) 69 Cal App.4th 745, 752 and
16 *Pfeiffer Venice Properties v. Bernard* (2002) 101 Cal App 4th 211, 218)
17 Applying that standard, defendant is entitled to her fees, as the Anti-Slapp motion
18 is meritorious and the purpose of the statute would be defeated if plaintiff could
19 avoid the application of the statute by dismissing the case following the filing of
20 the motion.
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26 ³ This is also dispositive of plaintiff's claim that Section 425 16 does not apply because the person who posted the
27 private information acted "illegally " (See Hagele P's & A's pp 10-11) Putting aside the fact that the allegedly
28 private information was disclosed in court documents filed by Hagele when he sought Bankruptcy Court relief, the
foregoing cases make clear that the publication of facts contained in public official records constitutes no form of
criminal act

1 Other cases suggest that the trial court must determine the prevailing party
2 in such circumstances, with the plaintiff bearing the burden of overcoming the
3 presumption that defendant was the prevailing party. (See *Coltrain v Shewalter*,
4 *supra*, 66 Cal App.4th 94,106-107 Where this test is applied, the Court is
5 required to determine which party realized its objectives in the litigation. (*Id*)

6 By this measure, defendant is plainly the prevailing party. Plaintiff has
7 adduced no evidence that he achieved any legitimate goal when he dismissed his
8 claims; to the contrary he states that he dismissed his claims when it became
9 apparent to him the Burch was not going to settle He also declares that he
10 dismissed his complaint for health reasons, but he had health issues before he
11 sued defendant in California and he continues to litigate this case against other
12 defendants In all events, the health reasons that Hagele identifies are simply
13 those which he attributes to prosecuting the lawsuit which he initiated Clearly,
14 defendant was the prevailing party here, because defendant achieved her
15 objectives and plaintiff did not Under either of the foregoing standards,
16 defendant is entitled to attorneys fees under the Anti-Slapp statute

17 The methodology for setting attorneys fees under CCP 425 16 is set forth
18 in *Ketchum v. Moses* (2001) 24 Cal 4th 1122 The factors relevant to setting the
19 lodestar are set forth therein, and are not repeated at length here The Court has
20 examined the hourly rates charged by the attorneys involved, and considers them
21 to be well within the range of rates charged by attorneys of similar experience for
22 similar work in the relevant legal community. Indeed, the Court considers the
23 hourly rates to be on the lower end of the scale Moreover, the court finds that
24 the hours dedicated to the litigation of the Anti-Slapp motion, as set forth in the
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1 Furth declaration, to be at the lower end of the expected range given the nature of
2 the matters litigated.

3 Defendant is awarded attorney fees and costs in the amount of \$16,857.
4 This is the total amount of fees incurred in presenting the SLAPP motion, but
5 excludes fees associated with the demurrer and motion to quash. It also does not
6 include costs associated with the related motions. Although permissible under
7 *Ketchum*, the Court has not considered any enhancement to the lodestar figure
8 as none was requested here.
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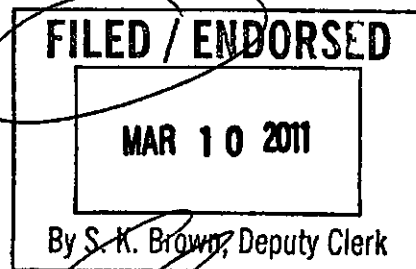
10 The foregoing also does not encompass fees associated with the
11 presentation of the motion for fees. As noted in the record of the oral argument,
12 any such request may be presented in a subsequent motion provided that the
13 same is timely filed. The foregoing also does not encompass any fees associated
14 with any appellate proceedings, as any such award must await the resolution of
15 such proceedings.
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18 Date: 3/10/11

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20 Honorable KEVIN R. CULHANE
21 Judge of the Superior Court of California,
22 County of Sacramento
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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO



Glenn Hagele

Case Number: 06AS00839

vs.

Brent Hanson

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the Clerk of the Superior Court of California, County of Sacramento, certify that I am not a party to this cause, and on the date shown below I served the foregoing Order After Hearing re: Attorneys' Fees by depositing true copies thereof, enclosed in separate, sealed envelopes with the postage fully prepaid, in the United States Mail at Sacramento, California, each of which envelopes was addressed respectively to the persons and addresses shown below:

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I, the undersigned Deputy Clerk, declare under penalty of perjury that the foregoing is true and correct.

Dated: March 11, 2011

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

By: S. Brown,
Deputy Clerk

