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SACRAMENTO COURTS
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9 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 IN AND FOR THE COUNTY OF SACRAMENTO

-o0o-

11 GLENN HAGELE,

12 Plaintiff,

13 v.

14 BRENT HANSON, and DOES 1 through 20,

15 Defendants.

) Case No. 06AS00839

)
) **DEFENDANT BRENT HANSON'S**
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT OF**
) **MOTION FOR SUMMARY JUDGMENT**

) **DATE: SEPTEMBER 16, 2011**

) **TIME: 2:00 P.M.**

) **DEPT. 53**

Date Action Filed. March 2, 2006

Reservation No: 1572894

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18
19 Defendant, BRENT HANSON, by and through his attorneys, Caulfield, Davies and Donahue,
20 LLP, hereby submits his Memorandum of Points and Authorities in Support of his Motion for Summary
21 Judgment, or, in the Alternative, Summary Adjudication, as to one or more causes of action or claims in
22 Plaintiff's Complaint, as follows:

23 I.

24 INTRODUCTION

25 This action arises from an ongoing dispute between Plaintiff, Glenn Hagele, an advocate for
26 the laser eye surgery industry, and Defendant, Brent Hanson, an opponent of said industry. Plaintiff
27 alleges that Defendant Hanson has made various publications on the Internet which constituted
28 defamation and an invasion of privacy. Plaintiff recently named Luranell Burch as a "Doe"

1 defendant in this matter, alleging the same acts and same causes of action as were alleged against
2 Defendant Hanson. Ms. Burch subsequently filed an Anti-SLAPP motion. Although Plaintiff
3 quickly dismissed his claims against Ms. Burch, she successfully pursued an attorney fee's action
4 against Plaintiff. In arriving at a judgment awarding attorney fees to Ms. Burch, this court made
5 findings of fact and law that are equally applicable to Plaintiff's claims against Defendant Hanson
6 and which have rendered Plaintiff's causes of action in this matter moot and invalid as a matter of
7 law. Defendant Hanson brings the instant Motion for Summary Judgment to have Plaintiff's claims
8 against him dismissed in their entirety.

9 **II.**

10 **STATEMENT OF FACTS**

11 This defamation and invasion of privacy action arises from the publication of various
12 documents on various Internet web sites. Plaintiff filed his Complaint in this matter on or about
13 March 2, 2006 (SSOF 1). Thereafter Plaintiff filed his First Amended Complaint (FAC) in this
14 matter on or about November 3, 2006. (SSOF 2) In July of 2010, Lauranell Burch was added as a
15 Defendant by virtue of Plaintiff's Doe Amendment (SSOF 3). The July 2010 Doe Amendment of
16 Plaintiff's Complaint added no new causes of action and alleged no new facts; defendant Burch was
17 simply added as a defendant without any change to the pleadings. (SSOF 4).

18 On August 21, 2010, Ms. Burch, by and through her attorneys of record in this matter,
19 brought a Special Motion to Strike, commonly referred to as an "Anti-SLAPP" suit. (SSOF 5)
20 Plaintiff did not oppose Defendant Burch's Special Motion to Strike. Prior to the hearing on the
21 merits of Ms. Burch's motion, Plaintiff dismissed his two claims against Ms. Burch. (SSOF 6)
22 Undeterred by this dismissal, Ms. Burch brought an action to recover the attorney's fees and costs
23 she incurred in her defense against Plaintiff's meritless suit. Plaintiff opposed the Motion for Fees
24 and a hearing was held on this matter on December 16, 2010. (SSOF 28) A formal order was issued
25 by the court on March 10, 2011. (SSOF 29) In the course of making its ruling on Ms. Burch's
26 Attorney's Fees Motion, the court made several findings of fact which are equally applicable and
27 binding to the causes of action alleged against Defendant Hanson.

1 Plaintiff's FAC contains two causes of action (SSOF 8) The First Cause of Action alleges
2 that Defendant Hanson caused to be published on certain websites an allegedly defamatory letter,
3 which suggested that Defendant Hanson had recovered a judgment against Plaintiff Hagele in case
4 number 03M300136 in the Circuit Court of Cook County. The FAC specifically alleges that the
5 letter was published on "...websites, internet bulletin boards, public newsgroups...and other publicly
6 accessible forums." The First Cause of Action alleges that the implication of the letter, that Hanson
7 obtained a judgment, is in fact false, and that the underlying case was actually dismissed (SSOF 9)

8 The Second Cause of Action in the FAC is styled "Invasion of Privacy." In this cause of
9 action, Plaintiff claims that "Defendants" displayed and posted allegedly private information about
10 Plaintiff on various websites. According to the FAC, the posting of such material was "offensive"
11 and "...not of legitimate public concern." (SSOF 10) The Second Cause of Action is predicated on
12 the publication of certain public records. These records include an abstract of judgment in
13 Sacramento Superior Court, case number DRR 364279-0, consisting of a filed abstract of judgment
14 in that case. The second document consists of portions of "Schedule F - Creditors Holding Unsecured
15 Claims" in a bankruptcy proceeding styled *In re: Glenn F. Hagele*. (SSOF 11)

16 In coming to a ruling on Defendant Burch's Attorney Fees Motion, the court was required to
17 rule on the merits of the underlying Anti-SLAPP Motion to determine if Plaintiff Hagele would have
18 been able to establish a reasonable probability of success in prevailing in his claims against
19 Defendants. (SSOF 30) In order to make this determination, the court made certain findings of fact
20 and law. The pleadings and documents submitted in connection with Defendant Burch's Motion for
21 Attorneys' Fees included the evidence upon which Plaintiff's claims were based. (SSOF 12)
22 Specifically, the record establishes that the "private information" which underlies plaintiff's invasion
23 of privacy claims is in fact information set forth in the abstract of judgment in Sacramento Superior
24 Court case number DRR364279-0. (SSOF 13)

25 As a threshold issue, the court was forced to determine if Plaintiff was a public or private
26 figure. Evidence submitted by the parties established that questions about the efficacy and safety of
27 the Lasik procedure were a matter of public interest, as they were widely and actively discussed in
28 various media including the internet and television, and that the Federal Government, through the

1 auspices of the Food and Drug Administration, had conducted public hearings in 2008 on these
2 matters. (SSOF 14)

3 Having determined that concerns about the Lasik procedure was a matter of public interest,
4 the court turned its attention to the nexus between Plaintiff's conduct in relation to that issue, and the
5 allegedly defamatory statements made by the Defendants. The evidence is clear that Plaintiff
6 founded and directs the Council for Refractive Surgery Quality Assurance (CRSQA) - which
7 Plaintiff describes as a patient advocacy group - that monitors internet newsgroups, bulletin boards,
8 and other public forums. Plaintiff acknowledges that the express purpose of these activities is to
9 respond to what CRSQA deems to be inflammatory statements made in these public forums. (SSOF
10 15) Plaintiff's own websites allege that he and/or his organization have been quoted or referenced in
11 at least 30 articles on the subject of Lasik surgery. (SSOF 16) Plaintiff has participated in media
12 interviews regarding Lasik surgery and testified on this topic before the U.S. Food and Drug
13 Administration. (SSOF 17) Additionally, Plaintiff has repeatedly commented in web postings and
14 other forums regarding individuals who have suffered from adverse outcomes from Lasik surgery.
15 (SSOF 18)

16 Based on these facts, this court determined that Plaintiff has repeatedly interjected himself
17 into a widespread public controversy regarding not only the risks associated with Lasik surgery, but
18 also the *bona fides* of those who publicly criticize the Lasik industry. (SSOF 19) Therefore, it was
19 the finding of this court that Plaintiff is a person who has voluntarily placed himself in the public eye
20 (SSOF 20) and that he is a limited purpose public figure. (SSOF 21)

21 Given Plaintiff's status as a person who has interjected himself into the center of a
22 widespread public debate, criticism or ridicule directed toward him occur in connection with a public
23 issue, or an issue of public interest (i.e. the safety and efficacy of Lasik surgery). (SSOF 22) The
24 defendants in this matter, critics of the safety of laser corrective surgery, including the Lasik
25 procedure, have argued that the risks associated with the procedure have been understated due to the
26 financial motivations of Lasik surgeons. On this basis, the court held that information posted about a
27 primary spokesperson of the Lasik industry suggesting a failure to pay his debts (the "defamatory
28

1 letter”) or prior efforts to discharge his debts without payment (the bankruptcy schedules) occurred
2 in connection with a public interest or an issue of public interest. (SSOF 23)

3 To prevail in his opposition to the Burch attorney fees motion, Plaintiff needed only to show
4 that he had a legally sufficient claim. (SSOF 24) Plaintiff failed to demonstrate a probability of
5 prevailing on the merits in this case (SSOF 25) and the court appropriately awarded attorney fee to
6 Ms. Burch and against Plaintiff Hagele. As will be shown, insomuch as Plaintiff is a limited purpose
7 public figure, in order to prevail herein he must show that the Defendants acted with malice. Here,
8 there can be no showing of malice. Rather, Defendant Hanson simply did not agree with Plaintiff’s
9 alleged activities in conjunction with the area of public concern (i.e. Lasik surgeries). (SSOF 31) As
10 such Plaintiff has failed to demonstrate a probability of prevailing on the first cause of action. (SSOF
11 26) Plaintiff’s Second Cause of Action for invasion of privacy is based upon the alleged publication
12 of nothing more than public court documents Liability cannot attach for the publication of facts
13 contained in public official records. For this reason, Plaintiff has failed to demonstrate a probability
14 of prevailing on the second cause of action. (SSOF 27)

16 III.

17 SUMMARY JUDGMENT STANDARD

18 A motion for summary judgment shall be granted if all of the papers submitted show that
19 there is no triable issue as to any material fact and that the moving party is entitled to judgment as a
20 matter of law. (C.C.P. §437c(c); *Kaneko v. Yager* (2004) 120 Cal App. 4th 970, 976-977.) In
21 determining whether the papers show that there is no triable issue as to any material fact, the court
22 shall consider all of the evidence set forth in the papers and all inferences reasonably deducible from
23 the evidence. (C.C.P. §437c(c).) Code of Civil Procedure §437c(o)(1) provides that a defendant has
24 met his or her burden of showing that a cause of action has no merit if that party has shown that one
25 or more elements of the cause of action, even if not separately pled, cannot be established, or (CCP
26 §437c(o)(2)), that there is a complete defense to that cause of action. (C.C.P. §437c(o)(1-2);
27 *Vasquez v. Residential Investment, Inc.* (2004) 118 Cal App. 4th 269, 277.) Once the defendant has
28 met that burden, the burden shifts to the plaintiff to show that a triable issue of one or more material

1 facts exists as to that cause of action or a defense thereto. (C.C.P. §437c(p)(2); *Aguilar v. Atlantic*
2 *Richfield Co.* (2001) 25 Cal. 4th 826, 849.) If Plaintiff is unable to do so, summary judgment is
3 proper. (See *First Fidelity Thrift & Loan Association v. Alliance Bank* (1998) 60 Cal.App.4th 1433,
4 1442.)

5 Plaintiff may not rely upon the mere allegations in his pleadings to show that a triable issue
6 of material fact exists but, instead, must set forth the specific facts showing that a triable issue of
7 material fact exists as to that cause of action. (C.C.P. §437c(p)(2); *Aguilar.*, *supra* at p. 849). In
8 summary judgment proceedings, there is a triable issue of material fact if, and only if, the evidence
9 would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the
10 motion in accordance with the applicable standard of proof. (*Kaneko, supra* at p. 977.)

11 A defendant moving for summary judgment may establish that an essential element of the
12 plaintiff's cause of action is absent by reliance on the testimony of witnesses at noticed depositions
13 (*Powers v. Rug Barn* (2004) 117 Cal. App 4th 1011, 1026.)) In support of a summary judgment
14 motion, a defendant may present evidence in support of the contention that the plaintiff does not
15 possess, and cannot reasonably obtain, evidence in support of plaintiff's causes of action. (*Aguliar,*
16 *supra* at p. 855) Put more directly, a defendant may submit, and rely upon, the lack of evidence
17 supporting Plaintiff's causes of action to show that no triable issue of material fact exists and that
18 therefore summary judgment is proper

19 V.

20 **LEGAL ARGUMENT**

21
22 **A. DEFENDANT'S ALLEGEDLEY DEFMATORY CONDUCT WAS WITHOUT**
23 **ACTUAL MALICE, INVOLVED A PUBLIC FIGURE, AND WAS PROTECTED**
24 **EXERCISE OF HIS FIRST AMENDMENT RIGHTS.**

25 Plaintiff's First Amended Complaint ("FAC") alleges two causes of action. (SSOF 6) Under
26 the First Cause of Action, Plaintiff alleges that Defendant Hanson's publication of a letter he received
27 from ACE Recovery Services (the "defamatory letter"), in which is was alleged that Defendant Brent
28 Hanson had recovered a judgment against Plaintiff in a case in the Circuit Court of Cook County,

1 Illinois. (SSOF 7) Plaintiff alleges that the implication that Hanson obtained a judgment was false, and
2 that the publication amounted to defamation.

3 To prevail on a defamation action, Plaintiff must establish that Defendant published or
4 communicated the defamatory statement to a third party. However, absent a showing of actual malice,
5 even false and defamatory statements are entitled to protection under the First Amendment (see *New*
6 *York Times Co. v. Sullivan* (1964) 376 U.S. 254) The constitutional privilege to publish without actual
7 malice applies if the person defamed was a public official or a public figure (see *Gertz v. Robert Welch,*
8 *Inc.* (1974) 418 U.S. 323, 330-339) This constitutional privilege to publish applies to non-media
9 defendants, such as Defendant Brent Hanson, when the publication involves matters of public concern.
10 (see *Miller v. Nestande* (1987) 192 Cal. App. 3d 191, 200)

11 In the companion cases *Curtis Publishing Co. v Butts* and *Associated Press v. Walker* ((1967)
12 388 U.S. 130, the United States Supreme Court broadened the actual malice standard so that it applied
13 to “public figures” as well as public officials. The Court held that, for purposes of the First
14 Amendment, public figures are those individuals who have assumed roles of prominence in society, or
15 those who have thrust themselves to the forefront of particular public controversies in order to influence
16 the resolution of the issue involved. (see *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 345) Public
17 figures may be either general or “all purpose” public figures or “limited purpose”. The California
18 Supreme Court held, in *Reader’s Digest Assn. v. Superior Court* (1984) 37 Cal. 3d 244, 254-255, that
19 the primary factor in this determination is evidence of affirmative actions by which the purported public
20 figures have thrust themselves into the forefront of a particular controversy.

21 In the instant matter, this court has already established as fact that the issue of the risks
22 associated with Lasik eye surgery is a public issue, or an issue of interest to the public(SSOF 11), that
23 by his own voluntary actions including participating in media interviews (SSOF 14) and commenting
24 on web postings regarding individuals who have had adverse Lasik outcomes (SSOF 15); that Plaintiff
25 Hagele has injected himself repeatedly into a widespread public controversy (SSOF 16), that he has
26 placed himself voluntarily in the public eye (SSOF 17); and that he is a limited purpose public figure
27 (SSOF 18).

1 Having established that the risk of Lasik surgery is a matter of widespread public concern, and
2 that Plaintiff's voluntary involvement in this public controversy has rendered him a limited purpose
3 public figure, the analysis now turns to whether the allegedly defamatory actions were committed with
4 "actual malice". Again, this court has already established this factual issue.

5 In adjudicating the Burch Attorney Fees Motion, this court found that one of the arguments
6 advanced by opponents of the Lasik procedure is that the risks associated with the procedure have been
7 understated because Lasik surgeons have a financial incentive to do so. In this context, information
8 posted about a primary spokesperson of the Lasik industry suggesting a failure to pay his debts, or
9 detailing prior efforts to discharge his debts without payment, occurred in connection with a public
10 issue, or an issue of public interest. (SSOF 20) Defendant Hansen did not agree with Plaintiff's alleged
11 activities in conjunction with the area of public concern (i.e. Lasik surgeries), (SSOF 22) and published
12 documents that he believed demonstrated a financial incentive for Plaintiff's advocacy on behalf of the
13 Lasik industry. Based on these factors, this court has previously determined that there was no actual
14 malice behind the allegedly defamatory publication, and that Plaintiff has failed to demonstrate a
15 probability of prevailing on the defamation cause of action. (SSOF 22).

16 Based on the foregoing facts as determined by the court, as a matter of law in this case, Plaintiff
17 has been determined to be a limited purpose public figure, and that the allegedly defamatory conduct
18 occurred in conjunction with his role as a public figure in the ongoing public debate about the risks of
19 Lasik surgery. Defendant's allegedly defamatory actions took place in the context of Defendant's
20 exercise of his First Amendment rights as part of that public debate. As there is no evidence of actual
21 malice, Defendant's exercise of his First Amendment rights was privileged, and, as a matter of law,
22 there can be no liability on Defendant Hanson's behalf. Not only is summary judgment appropriate in
23 this matter, but multiple cases have held that summary judgment is the favored remedy in defamation
24 actions implicating First Amendment interests (see *Good Gov't Group of Seal Beach, Inc. v. Superior*
25 *Court* (1978) 22 Cal. 3d 672, 685; see also: *Morales v. Coastside Scavenger Co.* (1985) 167 Cal. App.
26 3d 731, 736; *Osmond v. EWAP Inc.* (1984) 153 Cal. App. 3d 842, 854; *Desert Sun Publ'g Co. v*
27 *Superior Court* (1979) 97 Cal. App. 3d 49, 53). "[B]ecause unnecessarily protracted litigation would
28 have a chilling effect upon the exercise of First Amendment rights, speedy resolution of cases involving

1 free speech is desirable.” (see *Good Gov’t Group of Seal Beach, Inc v. Superior Court* (1978) 22 Cal.
2 3d 672, 685.) Furthermore, the California Supreme Court has held that summary judgment is the
3 “favored remedy” where, as here, the issue before the court is the existence of actual malice. (see
4 *Reader’s Digest Ass’n v. Superior Court* (1984) 37 Cal. 3d 49, 53.)

5
6 **B. PLAINTIFF CANNOT PREVAIL ON HIS SECOND CAUSE OF ACTION FOR**
7 **INVASION OF PRIVACY AS THE DOCUMENTS THAT FORM THE BASIS OF**
8 **PLAINTIFF’S COMPLAINT WERE PUBLIC RECORDS.**

9 Plaintiff’s Second Cause of Action, as set forth in his FAC, is for Invasion of Privacy, citing to
10 protections offered under both the State and Federal Constitutions. There are three elements for a cause
11 of action for the invasion of privacy in California:

12 (1) First, there must be a specific, legally protected privacy interest
13 These interests “are generally of two classes: (1) interests in precluding the
14 dissemination or misuse of sensitive and confidential information (‘informational
15 privacy’); and (2) interests in making intimate personal decisions or conducting
16 personal activities with out observation, intrusion, or interference (‘autonomy
17 privacy’).” (7C.4th 25.) Whether a legally recognized privacy interest is present is a
18 question of law. (7C.4th 40.)

19 (2) Second, there must be a reasonable expectation of privacy, i.e., “an
20 objective entitlement founded on broadly based and widely accepted community
21 norms,” on plaintiff’s part (7 C.4th 37.) This is also a mixed question of law and
22 fact. (7 C.4th 40.)

23 (3) Third, “[a]ctionable invasions of privacy must be sufficiently serious
24 in their nature, scope, and actual or potential impact to constitute an egregious
25 breach of the social norms underlying the privacy right. Thus, the extent and gravity
26 of the invasion is an indispensable consideration in assessing an alleged invasion of
27 privacy.” (7 C.4th 37.) This is also a mixed question of law and fact. (7 C.4th 40.)

28 In the course of it’s ruling on Defendant Burch’s Motion for Attorney Fee’s, this court established that
those documents, the publication of which Plaintiff claims constituted an invasion of privacy, were in
fact public court documents. (SSOF 23) Plaintiff can have no interest in “precluding the dissemination
of misuse of sensitive and confidential information”, as public court documents are, by definition, not
confidential. Additionally, Plaintiff can have no “no reasonable expectation of privacy” as to court

1 documents that have already been made public. Furthermore, as a matter of law, there is no liability for
2 the publication of facts contained in public official records. (see *Gates v Discovery Communications,*
3 *Inc* (2004) 34 Cal. 4th 679; *Taus v. Loftus* (2007) 40 Cal. 4th 683) For these reasons, Plaintiff's
4 Second Cause of Action has no merit and must be dismissed.
5

6 **VI.**

7 **CONCLUSION**

8
9 As set forth above, Plaintiff Glenn Hagele has repeatedly thrust himself into the ongoing
10 public debate regarding the safety and efficacy of laser corrective surgery, including specifically the
11 Lasik procedure. By his own actions, Plaintiff Hagele has become a limited purpose public figure,
12 as regards this issue of public debate. As such, in order to prevail on his first cause of action for
13 defamation, Plaintiff would have to establish that the allegedly defamatory conduct, which occurred
14 in connection with this matter of ongoing public debate, was undertaken with malice by Defendant
15 Hanson. In adjudicating Defendant Burch's attorney fees motion, this court has found, however, as
16 a matter of fact and law, that no such showing can exist, and that Plaintiff cannot sustain his first
17 cause of action. Likewise, this court has previously determined that the information that forms the
18 basis for Plaintiff's second cause of action, invasion of privacy, was derived from public records
19 and, as a matter of law, cannot give rise to a legitimate action for invasion of privacy. Defendant
20 respectfully requests that the court grant Defendant's Motion for Summary Judgment, and issue an
21 order that Plaintiff's operative Complaint in this matter be dismissed, with prejudice, in its entirety.
22
23

24 Dated. June 29, 2011

CAULFIELD DAVIES & DONAHUE, LLP

25 By: 
26 JAMES R. DONAHUE
27 MICHAEL E. MYERS
28 Attorneys for Defendant,
BRENT HANSON

1 RE: Hagele v. Hanson, et al.
2 Sacramento County Superior Court Case No. 06AS00839

3 CERTIFICATE OF SERVICE

4 I am a citizen of the United States, over 18 years of age, employed in the County of
5 Sacramento, and not a party to the within action. My business address is 1 Natoma Street, Folsom,
6 California 95630.

7 On June 29, 2011, I served the within, **MEMORANDUM OF POINTS AND
8 AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**, on the
9 following parties in said action by placing a true copy thereof enclosed in a sealed envelope
10 addressed as follows:

11 Plaintiff In Pro Per

12 Glenn Hagele
13 8543 Everglade Drive
14 Sacramento, CA 95826
15 (916) 650-1241

16 [] (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the
17 United States mail at Folsom, California. I am familiar with my firm's practice whereby the
18 mail is given the appropriate postage and is placed in a designated area to be deposited in a
19 U.S. mail box in Folsom, California in the ordinary course of business.

20 [] (BY FACSIMILE/TELECOPIER/MAIL) I personally sent to the addressee's telecopier
21 number (noted above) a true copy of the above-described documents. On this same date, I
22 caused a true copy to be placed in the U.S. mail at Folsom, California.

23 [XX] (BY FEDERAL EXPRESS MAIL) I caused such envelope marked for overnight delivery to be
24 placed in the Federal Express Depository in Folsom, California.

25 I declare under penalty of perjury under the laws of the State of California that the foregoing
26 is true and correct and executed on June 29, 2011, at Folsom, California.

27 
28 MICHELLE BOWERS