

OPPOSING
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6 AARON FILLER, MD, PHD, AARON FILLER, MD, PHD,
APC; IMAGE BASED SURGICENTER CORPORATION;
7 and NEUROGRAPHY INSTITUTE MEDICAL ASSOCIATES

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF LOS ANGELES
10 CENTRAL DISTRICT

11 AARON FILLER, MD, PHD, an individual;
AARON FILLER, MD, PHD, APC, a
12 California Professional Corporation; IMAGE
BASED SURGICENTER CORPORATION,
13 a California Corporation; and
NEUROGRAPHY INSTITUTE MEDICAL
14 ASSOCIATES, a California Professional
Corporation,

15 Plaintiffs,

16 vs.

17
18 SUSAN H. WALKER, an individual; DOES
1 through 25, inclusive,

19 Defendants.

) CASE NO. BC462605

) Assigned for all purposes to:

) Honorable Terry A. Green
Dept. 14

) **OPPOSITION TO DEFENDANT'S
MOTION TO STRIKE PORTIONS OF
THE COMPLAINT**

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

) Complaint Filed:
Trial Date: None Set

21
22 Plaintiffs AARON FILLER, MD, PHD, an individual; AARON FILLER, MD, PHD,
23 APC, a California professional corporation; IMAGE BASED SURGICENTER
24 CORPORATION, a California corporation; and NEUROGRAPHY INSTITUTE MEDICAL
25 ASSOCIATES, a California professional corporation, ("Plaintiffs") herein oppose the motion to
26 strike portions of the complaint filed by Defendant Susan H. Walker ("Defendant" or "Walker");

27 ///
28 ///

1 **I. STANDARD OF REVIEW ON A MOTION TO STRIKE.**

2 A motion to strike lies either: (1) to strike any “irrelevant, false or improper matter
3 inserted in any pleading” or (2) to strike any pleading or part thereof “not drawn or filed in
4 conformity with the laws of this state, a court rule or order of court.” CCP § 436. As with
5 demurrers, the grounds for a motion to strike must appear on the face of the pleading under
6 attack, or from matter which the court may judicially notice (e.g., the court’s own files or
7 records). CCP § 437.

8 However, failure to state facts sufficient to state a cause of action is grounds for a general
9 demurrer, **but not for a CCP § 436 motion to strike.** *Ferraro v. Camarlinghi (2008) 161*
10 *Cal.App.4th 509, 528.* Yet, that is exactly what Defendant is attempting to do with her motion to
11 strike. Defendant specifically asserts that the basis for her motion is that “Plaintiffs have not
12 alleged sufficient facts to justify recovery of exemplary damages” and seeks to “strike Plaintiff’s
13 entire claim for exemplary damages . . .”. See notice of motion to strike, page 2 and also
14 amended notice of motion to strike, p. 2. To the extent that Defendant is seeking to strike a claim
15 for failure to state a cause of action, the proper vehicle for that is a demurrer. The instant motion
16 to strike should be denied on that basis.

17 **II. THE PRAYER SEEKING PUNITIVE DAMAGES, AND PARAGRAPHS 17 AND**
18 **AND 24, SHOULD NOT BE STRICKEN AS IRRELEVANT OR IMMATERIAL**
19 **MATTER, BECAUSE THE COMPLAINT AS A WHOLE STATES FACTS**
20 **SUFFICIENT TO SUPPORT CLAIM FOR PUNITIVE DAMAGES.**

21 Defendant erroneously claims that Plaintiff’s Prayer for Relief for punitive damages must
22 be stricken as “irrelevant, false or improper” because no legal bases or allegations justify such
23 relief. Defendant, again, is arguing that Plaintiffs failed to state a cause of action - which is not a
24 proper basis for a motion to strike, but rather a demurrer. Notwithstanding, Plaintiffs’ complaint
25 does assert sufficient facts to state a claim for punitive damages.

26 According to several older cases, punitive damages cannot be pled generally (i.e.
27 allegations that defendant acted with oppression, fraud and malice toward plaintiff are merely
28 legal conclusions.) This is the very argument made by Defendant; however, courts are

1 increasingly liberal as to what constitutes sufficient “fact” pleading on a claim for punitive
2 damages. **The complaint will be read as a whole so that even conclusory allegations may**
3 **suffice when read in context with facts alleged as to the defendant’s wrongful conduct.**
4 *Perkins v. Sup. Ct. (General Tel. Directory Co.)* (1981) 117 Cal.App.3d, 1, 6-7; *Clauson v. Sup.*
5 *Ct. (Pedus Services, Inc.)* (1998) 67 Cal.App.4th 1253, 1255. **Conclusory allegations will not**
6 **be stricken when they are supported by other, factual allegations found in the complaint.**
7 *Perkins v. Sup. Ct. (General Tel. Directory Co.)* (1981) 117 Cal.App.3d, 1, 6. For example, an
8 allegation that defendant was guilty of “oppression, fraud and malice” could **not** be stricken
9 where the complaint contained sufficient facts to support such allegation. *Id.*

10 Moreover, Rutter’s practice guide, Civil Procedure Before Trial is instructive on this
11 issue:

12 “Whether specific pleadings is still required is unclear. The Supreme Court
13 has stated that *fraud* complaints are the “last remaining habitat of the
14 common law notion that a complaint should be sufficiently specific that the
15 court can weed out nonmeritorious actions on the basis of the pleadings.” **If**
16 **so, this would exclude punitive damages claims.** [Rutter Group: Civil
17 Proc. Before Trial, Ch. 6 [6:158], pp. 6-50 through 6-51(2011)]

18 Notwithstanding the above, Plaintiffs’ complaint pleads facts sufficient, when read as a
19 whole, to support their claim for punitive damages. Defendant’s claim that “Ms. Walker’s
20 allegedly defamatory statements **mostly** relate to incorrect billing by [Plaintiffs’] office staff and
21 the high expense of her medical treatment, which exceeded \$50,000 for two injections” is
22 completely disingenuous. If the Court reviews the complaint, it will see that the alleged
23 defamatory statements go far beyond mere complaints about billing errors or the high expense of
24 medical treatment. The most heinous of the defamatory statements alleged in the complaint to
25 have been published by Defendant include:

26 • her false statement that information Dr. Filler suggested posed an unusually high risk
27 of death to patients and that she hopes reading her posting would “cause him reflect on his
28 practice, and change his incredibly arrogant attitude **before he kills someone (assuming he**

1 hasn't already" [Complaint, paragraph 12(1)]

2 • **falsely asserting fraud or theft** by claiming that she was "billed for one procedure
3 that was never conducted" [Complaint, paragraph 12(2)]

4 • **falsely asserting that Plaintiffs were being investigated for fraud** by State Farm
5 Insurance [Complaint, paragraph 12(3)-(4)]

6 • **falsely stating that Dr. Filler and his staff are "libelous thieves"**[Complaint,
7 paragraph 12(5)]

8 • **falsely stating that Dr. Filler is intentionally injecting patients with a material**
9 **known to cause a slow, painful, unpreventable death in every patient so exposed to Wydase,**
10 **a material which Dr. Filler and the other Plaintiffs, in fact, do not use** [Complaint, paragraph
11 12(6)],

12 • **and finally, by falsely asserting that Dr. Filler's surgeries have resulted in severed**
13 **nerves – which causes immediate permanent paralysis – even though Dr. Filler has never**
14 **severed any patient's nerve** [Complaint, paragraph 12(7)].

15 Clearly, the above statements go beyond mere complaints about inaccurate billing and the
16 expense of medical treatment provided to Defendant. These statements are defamatory on their
17 face, as alleged in paragraph 14 of the complaint, in that they charge Plaintiffs with improper,
18 illegal, or immoral conduct, subject Plaintiffs to hatred, contempt, ridicule or obloquy and injure
19 Plaintiffs in their trade and business by imputing to them a lack of integrity, professionalism and
20 honesty, and have a natural tendency to lesson their ability to conduct business in the medical
21 field. The allegations themselves contain sufficient evidence of malice, oppression or fraud to
22 state a claim for punitive damages. **Further, paragraph 17 of the complaint (*the very***
23 ***paragraph Defendant seeks to strike*) alleges malice very specifically:**

24 "The above-described publications were published by Defendant, and each
25 of them, with malice **in that they knew said misstatements of fact were**
26 **false and they made said publications with the specific intent to injure**
27 **Plaintiffs' positions as medical practitioners.** Such conduct justifies
28 punitive damages." [Complaint, ¶ 17; emphasis added.]

1 The facts pled in the defamation cause of action are sufficient to warrant a claim for
2 punitive damages and the requested motion to strike portions of the complaint claiming
3 entitlement to such damages should be denied in its entirety. To the extent that this court finds
4 otherwise, such defect is capable of being cured by amending the complaint to plead facts that
5 establish Defendant acted with malice.

6 **III. FURTHER, IF DEFECTS IN THE COMPLAINT ARE CORRECTABLE, THE**
7 **COURT SHOULD GRANT LEAVE TO AMEND THE COMPLAINT TO CURE**
8 **SUCH DEFECTS; FAILURE TO DO SO IS AN ABUSE OF DISCRETION.**

9 As with demurrers, motions to strike are disfavored. The policy of the law is to construe
10 pleadings “liberally . . . with a view to substantial justice” (CCP § 452). Judges read allegations
11 of a pleading subject to a motion to strike **as a whole, all parts in their context, and assume**
12 **their truth.”** *Clauson v. Sup.Ct. (Pedus Services, Inc.)* (1998) 67 Cal.App4th 1253, 1255.
13 Therefore, as long as the defect is correctable, an amended pleading will usually be allowed.
14 *Grieves v. Sup.Ct. (Fox)* (1984) 157 Cal.App.3d 159, 168 – relying on CCP §576, which
15 authorizes courts to allow amendment of pleadings at any time “in furtherance of justice;” *Price*
16 *v. Dames & Moore* (2001) 92 Cal.App.4th 355, 360. Thus, it is “generally an abuse of
17 **discretion to deny leave to amend** because the drastic step of denial of the opportunity to correct
18 the curable defect effectively terminates the pleader’s action.” *CLD Const. Inc. v. City of Ramon,*
19 (2004), 120 Cal.App.4th 1141, 1146; CCP § 472a(d); *Vaccaro v. Kaiman* (1998) 63 Cal.App.4th
20 761, 768-769.

21 **Indeed, in the case of an original complaint, plaintiff need not even request leave to**
22 **amend: “Unless the complaint shows on its face it is incapable of amendment, denial of**
23 **leave to amend constitutes an abuse of discretion, irrespective of whether leave to amend is**
24 **requested or not.** *McDonald v. Sup.Ct. (Flintkote Co.)* (1986) 180 Cal.App.3d 297, 303-304;
25 *City of Stockton v. Sup. Ct. (Civic Partners Stockton, LLC)* (2007) 42 Cal.4th 730, 747.

26 Even if this Court is inclined to follow older cases, which require more specific fact
27 pleading, the complaint is certainly capable of correction on its face – as Plaintiffs can cure any
28 alleged defaults by amending the complaint to include more specific facts which establish that

1 Defendant acted with malice, oppression or fraud in making the alleged defamatory statements.
2 As such, if this Court is inclined to agree that the facts, as pled, are not sufficient to support a
3 claim of punitive damages, Plaintiffs should be afforded the opportunity to amend the complaint
4 to more specifically plead facts establishing malice, oppression or fraud.

5 **IV. DEFENDANT’S ARGUMENT THAT “PLAINTIFFS MUST PLEAD FACTS TO**
6 **SHOW HOW DEFENDANT ACTED WITH MALICE, OPPRESSION OR FRAUD**
7 **AS TO EACH PARTICULAR PLAINTIFF” DOES NOT SEEK ANY SPECIFIC**
8 **LANGUAGE TO BE STRICKEN FROM THE COMPLAINT, NOR IS IT**
9 **SUPPORTED BY ANY LEGAL AUTHORITY.**

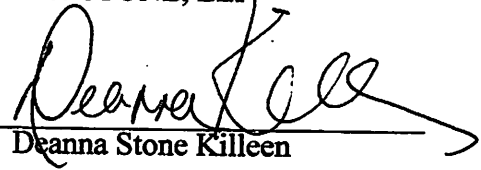
10 Defendant’s final argument that “Plaintiffs must plead facts to show how Defendant acted
11 with malice, oppression or fraud as to each particular plaintiff” does not seek any specific
12 language be stricken from the complaint and, on that basis, is not the proper basis of a motion to
13 strike. Moreover, Defendant cites to absolutely no legal authority for her argument. None. Her
14 final argument, instead, appears to be couched as a request for amendment, rather than a request
15 to strike portions of the complaint as irrelevant or immaterial matter. Since she cites no legal
16 authority for this proposition and does not state what language should be stricken from the
17 complaint to cure this defect, her argument should be disregarded in its entirety.

18 **V. CONCLUSION.**

19 Plaintiffs assert that the complaint, as a whole, states facts sufficient to establish a claim
20 for punitive damages and that the instant motion to strike portions of the complaint be denied. To
21 the extent that the Court is inclined to agree that the punitive damages allegations require more
22 specificity, however, Plaintiffs respectfully request leave to amend the complaint be granted to
23 more specifically pled factual allegations establishing the requisite malice, oppression or fraud to
24 sustain a claim for punitive damages.

25 DATED: September 13, 2011

MORRIS & STONE, LLP,

26
27 By: 
28 Deanna Stone Killeen

Attorneys for All Plaintiffs

1 STATE OF CALIFORNIA)
2 COUNTY OF LOS ANGELES)

3 **PROOF OF SERVICE**

4 I am employed in the County of Orange, State of California. I am over the age of 18 and
5 not a party to the within action. My business address is 17852 E. 17th St., Suite 201, Tustin , CA
6 92780. On September 15, 2011, I served the foregoing documents described as:

7 **OPPOSITION TO DEFENDANT'S MOTION TO STRIKE PORTIONS OF THE**
8 **COMPLAINT** on the interested parties in this action by placing true and correct copies thereof
9 in a sealed envelope, addressed as follows:

10 **Niloo Savis, Esq.**
11 **1901 Avenue of the Stars, Suite 200**
12 **Los Angeles, CA 90067**

13 _____ (By Regular Mail) I am readily familiar with this firm's practice of collection and
14 processing correspondence for mailing. I placed in a sealed envelope, addressed to the
15 party or parties indicated above, and deposited with the U.S. Postal Service on that same
16 day in the ordinary course of business. I am aware that on motion of party served, service
17 is presumed invalid if postal cancellation date or postage meter date is more than one (1)
18 day after deposit for mailing in affidavit.

19 _____ (By Facsimile Service) by transmitting a true and correct copy thereof to the above-
20 referenced facsimile number no later than 5:00 p.m. The transmission was reported as
21 complete without error by a transmission report issued by the facsimile machine.

22 X (By Overnight Mail Service) by placing that above-referenced documents in Overnite
23 Express envelopes, and depositing them in an Overnite Express drop box located at
24 Tustin, California for delivery the next day.

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

27 _____
28 **Madison Morris**