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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES, CENTRAL DISTRICT

AARON FILLER, M.D., PHD, an individual; AARON FILLER, M.D., PHD, APC, a California Professional Corporation; IMAGE-BASED SURGICENTER CORPORATION, a California Corporation; and NEUROGRAHY INSTITUTE MEDICAL ASSOCIATES, a California Corporation;

Plaintiffs,

v.

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

Defendants.

CASE NO. BC 462605

NOTICE OF RULING RE DEFENDANT'S MOTION TO STRIKE COMPLAINT PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE §425.16

Date: April 19, 2012
Time: 8:30 a.m.
Dept: 48

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that a hearing was on April 19, 2012 at 8:35 a.m. in Department 48 of Los Angeles Superior Court, located at 111 North Hill Street, Los Angeles, CA 9001, on Defendant Susan Walker's Notice of Motion and Motion to Strike Complaint Pursuant to C.C.P. §425.16. Niloo Savis, Esq., counsel of SAVIS LAW appeared for Defendant SUSAN WALKER. Aaron P. Morris, Esq. of Moris & Stone appeared on behalf of Plaintiffs AARON FILLER, M.D.,

PHD; AARON FILLER, M.D., PHD, APC; IMAGE-BASED SURGICENTER CORPORATION, and NEUROGRAHY INSTITUTE MEDICAL ASSOCIATES.

Upon considering the pleadings and hearing oral argument, as set forth in the ruling attached hereto as **Exhibit "A,"** the Court ruled as follows:

1. Defendant Susan Walker's Notice of Motion and Motion to Strike Portions of Plaintiffs' Complaint Pursuant to California Code of Civil Procedure Section 425.16 is granted.

2. Thereby, Defendant Susan Walker's Demurrer and Motion to Strike Portions of the Complaint are moot.

3. Defendant Susan Walker may file a separately-noticed motion for attorneys' fees.

DATED: April 19, 2012

SAVIS LAW

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

EXHIBIT A

TENTATIVE RULING

HEARING DATE: **April 19, 2012** TRIAL: Not set.

CASE: **Aaron Filler, M.D., et al. v. Susan Walker**

CASE NO.: **BC462605**

Opposed: **Yes.**

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(1) ANTI-SLAPP SPECIAL MOTION TO STRIKE (CCP § 425.16)
(2) DEMURRER
(3) MOTION TO STRIKE

MOVING PARTY: (1), (2) & (3) Defendant Susan Walker

RESPONDING PARTY(S): (1), (2) & (3) Plaintiffs Aaron Filler, MD, PHD, APC; Image Based Surgicenter Corporation; and Neurography Institute Medical Associates, Inc.

PROOF OF SERVICE:

- Correct Address: (1), (2) & (3) Yes.
- 16/21 (CCP § 1005(b)):(1), (2) & (3) OK. Served by mail on February 23, 2012.

- **GRANT anti-SLAPP special motion to strike.**
- **Demurrer and motion to strike portions of complaint are MOOT.**

ANALYSIS

Anti-SLAPP Special Motion to Strike (CCP § 425.16)

Request for Judicial Notice

Defendant requests that the Court take judicial notice of the following: (1) Complaint for Patent Infringement in Neurografix v. Siemens Medical Solutions USA, Inc., U.S.D.C, Western Division, Case No. 10-CV-1990 ODW; (2) Complaint for Inverse Condemnation, et al. in Neurografix v. Regents of the University of California, BC447518. These requests are DENIED because these documents are being offered for the truth of the facts recited therein. However, the Court cannot take judicial notice of facts which are hearsay and which cannot be considered not reasonably subject to dispute. Poseidon Development, Inc. v. Woodland Lane Estates, LLC (2007) 152 Cal.App.4th 1106, 1117. As such these documents are not relevant to this motion. The Court need only take judicial notice of relevant materials. Mangini v. R.J. Reynolds Tobacco Co. (1994) 7 Cal.4th 1057, 1063. The Court may deny a request for judicial notice of

material unnecessary to its decision. Rivera v. First DataBank, Inc. (2010) 187 Cal.App.4th 709, 713.

Defendant's Evidentiary Objections

No. 1: OVERRULED.
No. 2: OVERRULED.
No. 3: OVERRULED.
No. 4: OVERRULED.
No. "4" (second No. 4): SUSTAINED.
No. 5: OVERRULED.
No. 6: SUSTAINED.
No. 7: SUSTAINED.
No. 8: OVERRULED.
No. 9: SUSTAINED.
No. 10: SUSTAINED.
No. 11: SUSTAINED.
No. 12: OVERRULED.
No. 13: OVERRULED.
No. 14: OVERRULED.
No. 15: OVERRULED.
No. 16: OVERRULED.
No. 17: OVERRULED.
No. 18: OVERRULED.
No. 19: OVERRULED.
No. 20: OVERRULED.
No. 21: SUSTAINED.
No. 22: OVERRULED.
No. 23: OVERRULED.
No. 24: OVERRULED.
No. 25: SUSTAINED.
No. 26: SUSTAINED.
No. 27: OVERRULED.
No. 28: OVERRULED.
No. 29: OVERRULED.
No. 30: OVERRULED.
No. 31: OVERRULED.
No. "29" (second No. 29): SUSTAINED.
No. "30" (second No. 30): OVERRULED.
No. "31" (second No. 31): SUSTAINED.
No. 32: OVERRULED.
No. 33: OVERRULED.

1. Re: Whether the Causes of Action Are Subject To Being Stricken Pursuant to CCP § 425.16.

Public Forum and Issue of Public Interest

Per CCP § 425.16(e)(3), "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest" is an "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue," and a cause of action arising from such act is subject to being stricken under CCP § 425.16(b)(1).

Here, the Complaint is based on internet postings by Defendant Walker concerning Dr. Filler and his medical practice. See Complaint, ¶¶ 12(1)-(10).

It is settled that "Web sites accessible to the public ... are 'public forums' for purposes of the anti-SLAPP statute." (Barrett v. Rosenthal (2006) 40 Cal.4th 33, 41, fn. 4 [51 Cal. Rptr. 3d 55, 146 P.3d 510]; see, e.g., Ampex Corp. v. Cargle (2005) 128 Cal.App.4th 1569, 1576 [27 Cal. Rptr. 3d 863] ; [Yahoo! Web site message board qualifies as public forum]; Vogel v. Felice (2005) 127 Cal.App.4th 1006, 1010, 1015 [26 Cal. Rptr. 3d 350] [Web site listing " ' "Top Ten Dumb Asses" ' "]; Wilbanks v. Wolk (2004) 121 Cal.App.4th 883, 897 [17 Cal. Rptr. 3d 497] [posting on a consumer watchdog's Web site]; Bernardo v. Planned Parenthood Federation of America (2004) 115 Cal.App.4th 322, 358 [9 Cal. Rptr. 3d 197] [posting on defendant organization's Web site]; ComputerXpress, Inc. v. Jackson (2001) 93 Cal.App.4th 993, 1006 [113 Cal. Rptr. 2d 625] [two Web sites qualified as public forums].)

Second, although "not every Web site post involves a public issue" (D.C. v. R.R. (2010) 182 Cal.App.4th 1190, 1226 [106 Cal. Rptr. 3d 399]), consumer information that goes beyond a particular interaction between the parties and implicates matters of public concern that can affect many people is generally deemed to involve an issue of public interest for purposes of the anti-SLAPP statute. (Compare, e.g., Carver v. Bonds (2005) 135 Cal.App.4th 328, 343–344 [37 Cal. Rptr. 3d 480] [newspaper article about medical practitioner **involved issue of public interest where information would assist others in choosing doctors**], Wilbanks v. Wolk, supra, 121 Cal.App.4th at p. 898 [statements about insurance broker involved issue of public interest because they constituted a **consumer warning to others with similar problems**], and DuPont Merck Pharmaceutical Co. v. Superior Court (2000) 78 Cal.App.4th 562, 564, 566–567 [92 Cal. Rptr. 2d 755] [claim that manufacturer disseminated false [*1367] information concerning effectiveness of drug used by many was an issue of public interest] with Dyer v. Childress (2007) 147 Cal.App.4th 1273, 1280 [55 Cal. Rptr. 3d 544] [false portrayal of real person in a movie not an issue of public interest], Weinberg v. Feisel (2003) 110 Cal.App.4th 1122, 1132 [2 Cal. Rptr. 3d 385] [published allegation of theft by one token collector against another not an issue of public interest], and Rivero v. American Federation of State, County and

Municipal Employees, AFL-CIO (2003) 105 Cal.App.4th 913, 924 [130 Cal. Rptr. 2d 81] [information published in union newspaper about termination of person who supervised eight people not an issue of public interest].)

Wong v. Jing (2010) 189 Cal.App.4th 1354, 1366-1367 (bold emphasis added).

Here, the statements allegedly published on the internet by Defendant were made in a public forum and concerned a public issue, namely, Defendant's experiences with Dr. Filler as to his office's billing practices and the efficacy of his medical procedure, which constituted the dissemination to other consumers as to information that would be material to their decision to elect to utilized the services of Dr. Filler.

Plaintiff's suggestion that defamation actions are not subject to the anti-SLAPP statute because defamation is not constitutionally protected speech is not persuasive:

> A SLAPP is a civil lawsuit that is aimed at preventing citizens from exercising their political rights or punishing those who have done so. " 'While SLAPP suits masquerade as ordinary lawsuits such as defamation and interference with prospective economic advantage, they are generally meritless suits brought primarily to chill the exercise of free speech or petition rights by the threat of severe economic sanctions against the defendant, and not to vindicate a legally cognizable right.' " (Citations omitted.)

Simpson Strong-Tie Co., Inc. v. Gore (2010) 49 Cal. 4th 12, 21.

The Court finds that Plaintiff's causes of action for defamation and interference with prospective economic advantage arise out of Defendant's "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue," and these causes of action arising from such act are subject to being stricken under CCP § 425.16(b)(1).

The burden shifts to Plaintiff to demonstrate a probability of prevailing on these claims.

2. Re: Whether Plaintiffs Have Established That There Is A Probability They Will Prevail On The Claims – CCP ¶ 425.16(b)(1).

A. Defamation

"The tort of defamation 'involves (a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage.' (5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 529, p. 782, citing Civ. Code, §§ 45–46 and cases.)" Taus v. Loftus (2007) 40 Cal.4th 683, 720.

Public Figure or Limited Public Figure

The Court does not find that Plaintiff Filler is an all-purpose public figure. However, Dr. Filler does appear to be a limited purpose public figure regarding the treatment for piriformis syndrome which Defendant Walker received. Defendant states that she received an estimate of $7,000 to $11,000 in total fees for the diagnosis and treatment of piriformis syndrome with MRNs and MRI guided injections. Walker Decl., ¶ 13. Walker states that on February 16, 2012, Dr. Filler examined her and diagnosed her with thoracic outlet syndrome, which affects her upper extremities. Id. at ¶ 14. On February 17, 2010, magnetic resonance scans of her upper and lower extremities were conducted at Dr. Filler's facility. Id. The procedures for both her lower extremities (piriformis syndrome) and upper extremities (thoracic outlet syndrome) were scheduled to be conducted at 5 pm on February 17, 2010. Id. Shortly prior to the procedures, Defendant was presented with two contracts related to additional costs for Image Based Surgicenter fees, totaling in excess of $31,000. Id.

Defendant has shown that there was a public controversy, i.e., publicly debated issue, about the procedures that Dr. Filler performed on her—the diagnosis and treatment of piriformis syndrome with MRNs and MRI guided injections and that Dr. Filler voluntarily sought to influence resolution of this particular issue. Cabrera, supra, 197 Cal.App.4th at 1088. Exh. 11 to the Walker Declaration is an article published in *Neurosurgery Clinics of North America* Vol. 19, Issue 4, Pages 609-622, authored by Dr. Filler entitled *Piriformis and Related Entrapment Syndromes: Diagnosis & Management*. That article suggests that neurosurgeons refuse to consider piriformis syndrome as the cause of sciatica in their patients and poses the following question, which Dr. Filler addresses: "[W]hy do neurosurgeons persist in resisting the need for education and training for managing pelvic sciatic entrapments?" Page 1. He goes on to suggest that the ignorance is institutionally perpetuated because it is rooted in the "magnificent edifice in which all medical knowledge more or less has been arrayed and organized perfectly." Page 1. He also suggests that neurosurgeons may be concerned about losing insurance payments for the discetomies that are their "bread and butter." Pages 2. Dr. Filler suggests that the paramount concern should instead be: "[H]ow can I best help patients?" Page 2. Dr. Filler's article promotes the utilization of Diagnostic Magnetic Resonance Neurography Imaging, which "neurosurgeons have been slow to incorporate . . . into their diagnostic armamentarium." Pages 2-4. The article also advocates the use of Open Magnetic Resonance-Guided Injections. Pages 4-9. The article concludes that treatment outcomes are "good to excellent with very high efficacy rates in several high quality large-scale outcome studies." Page 11. Indeed, Dr. Filler, himself frames the public debate at Page 11 of the article:

> Neglect of appropriate consideration of piriformis syndrome and failure to adequately evaluate and treat when it is suspected no longer should be considered as an appropriate standard of neurosurgical care. [¶] My counterpart **in this debate** asks the reader to ignore similar results emerging unambiguously from hundreds of patients in three outcome studies by independent groups. Against this, he has only provided a case report on one single patient and a great deal of rhetoric and unsupported opinion yet he suggests that my position warrants Kennedy's epithet about the "great enemy of truth." I think this makes it fair for me to invoke Plato. . . . (Bold emphasis added.)

Dr. Filler's article challenges the conventional wisdom of neurosurgeons to propose that his theory regarding piriformis syndrome and open magnetic resonance-guided injections should be considered. The Court finds that Dr. Filler is a limited public figure regarding this public controversy.

Finally, Defendant's alleged defamation must have been germane to Dr. Filler's participation in the public controversy. Cabrera, supra, 197 Cal.App.4th at 1088. Defendant's statements concern the efficacy of the procedures Dr. Filler performed about he and the inextricable issue of billing practices for those procedures. The Court finds that this requirement has been satisfied.

As such, Dr. Filler must demonstrate a probability of proving by clear and convincing evidence that Defendant Walker published her statements with malice.

Malice

> Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with **'actual malice'--that is, with knowledge that it was false or with reckless disregard of whether it was false or not**." (Id. at pp. 279-280 [84 S. Ct. at p. 726].) The court later explained that the publisher of a defamatory statement acts with reckless disregard amounting to actual malice if, at the time of publication, the publisher "**in fact entertained serious doubts as to the truth of his publication**." (St. Amant v. Thompson (1968) 390 U.S. 727, 731 [88 S. Ct. 1323, 1325, 20 L. Ed. 2d 262].) In Curtis Publishing Co. v. [*263] Butts (1967) 388 U.S. 130, 134 [87 S. Ct. 1975, 1980-1981, 18 L. Ed. 2d 1094], the high court held that this "actual malice" requirement for defamation actions brought by public officials applied also to defamation actions brought by "public figures."

Khawar v. Globe Internat. (1998) 19 Cal.4th 254, 262-63 (bold emphasis added).

> In the landmark decisions, New York Times Co. v. Sullivan (1964) 376 U.S. 254, 296 [11 L. Ed. 2d 686, 717-718, 84 S. Ct. 710, 95 A.L.R.2d 1412] and Gertz v. Robert Welch, Inc., supra, 418 U.S. 323, the United States Supreme Court held that public figures must prove **by clear and convincing evidence** that an allegedly defamatory statement was made **with knowledge of its falsity or in reckless disregard of its truth or falsity**.

Copp v. Paxton (1996) 45 Cal.App.4th 829, 845 (bold emphasis added).

Thus, Plaintiff must prove that the statement was: (1) defamatory; (2) provably false; and that there is clear and convincing evidence that Defendant knew it was false or acted with reckless disregard as to its truth or falsity, i.e., malice.

Defamatory Nature

Here, Plaintiff has submitted only the Declaration of Aaron Filler in support of its opposition. Having considered Plaintiff's evidence in opposition, and the argument offered by Defendant in her points and authorities at Pages 9-17, the Court finds that Plaintiff has not met his burden on this special motion to strike to demonstrate that there is a probability of showing that the statements alleged in ¶ 12(1)-(10) were each: (1) defamatory; (2) provably false; **and/or** that there is clear and convincing evidence that Defendant knew it was false or acted with reckless disregard as to its truth or falsity, i.e., malice. Dr. Filler addresses other statements, which will not be considered if they were not pled in the operative Complaint. "As is true with summary judgment motions, the issues in an anti-SLAPP motion are framed by the pleadings. (Citation omitted.)" Paiva v. Nichols (2008) 168 Cal.App.4th 1007, 1017 (underlining added).

Further, Plaintiff's argument that one who republishes defamatory comments is equally liable for those comments ignores the Supreme Court's interpretation of the Communications Decency Act as it applies to internet republications:

> In the Communications Decency Act of 1996, Congress declared: "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." (47 U.S.C. § 230(c)(1).) "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." (§ 230(e)(3).)

Barrett v. Rosenthal (2006) 40 Cal.4th 33, 39.

> We conclude there is no basis for deriving a special meaning for the term "user" in section 230(c)(1), or any operative distinction between "active" and "passive" Internet use. By declaring that no "user" may be treated as a "publisher" of third party content, **Congress has comprehensively immunized republication by individual Internet users.**
>
> D. Conclusion
>
> We share the concerns of those who have expressed reservations about the Zeran court's broad interpretation of section 230 immunity. The [*63] prospect of blanket immunity for those who intentionally redistribute defamatory statements on the Internet has disturbing implications. Nevertheless, by its terms section 230 exempts Internet intermediaries from defamation liability for republication. The statutory immunity serves to protect online freedom of expression and to encourage self-regulation, as Congress intended. Section 230 has been interpreted literally. **It does not permit Internet** service providers or **users to be sued as "distributors," nor does it expose "active users" to liability.**
>
> Plaintiffs are free under section 230 to pursue the originator of a defamatory Internet publication. Any further expansion of liability must await congressional action.

Barrett, supra, 40 Cal.4th at 62-63 (bold emphasis added).

B. Interference with Prospective Economic Advantage

> In order to prove a claim for intentional interference with prospective economic advantage, a plaintiff has the burden of proving five elements: (1) an economic relationship between the plaintiff and a third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) an intentional act by the defendant, designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the defendant's wrongful act, including an intentional act by the defendant that is designed to disrupt the relationship between the plaintiff and a third party. (Citation omitted.) **The plaintiff must also prove that the interference was wrongful, independent of its interfering character**. (Citation omitted.) **"[A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.**" (Citation omitted.)

Edwards v. Arthur Andersen LLP (2008) 44 Cal. 4th 937, 944 (bold emphasis added).

Thus, the fact that Plaintiffs cannot establish the probability of prevailing on the defamation cause of action, as discussed above, also establishes that Plaintiffs cannot establish an independently wrongful act by Defendant for purposes of this tort.

Conclusion

In light of the foregoing, Plaintiffs have not demonstrated a probability of prevailing on their claims.

The special motion to strike per CCP § 425.16 is GRANTED. Defendant may file a separately-notice motion for attorney's fees.

The demurrer and motion to strike portions of the complaint are MOOT.

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California; I am over the age of 18 and not a party to the within action; my business address is 1901 Avenue of the Stars, Suite 200, Los Angeles, California 90067.

On April 19, 2012, I served the foregoing document(s) described as:

DEFENDANT SUSAN WALKER'S REPLY TO PLAINTIFFS' OPPOSITION TO NOTICE OF MOTION TO STRIKE COMPLAINT PURSUANT TO C.C.P. §425.16

on the interested parties in this action:

/X/ by placing / / the original /X/ a true copy thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED LIST

☒ (BY MAIL) I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service. This correspondence shall be deposited with the United States Postal Service, postage pre-paid, this same day in the ordinary course of business at our office's address in Los Angeles, California. Service made pursuant to this paragraph, upon motion of a party served, shall be presumed invalid if the postal cancellation date of postage meter date on the envelope is more than one day after the date of deposit for mailing contained in this affidavit.

☐ (BY OVERNIGHT DELIVERY SERVICE) I served the foregoing document by Federal Express, an express service carrier which provides overnight delivery. I placed true copies of the foregoing document in a sealed envelope or package designated by the express service carrier, addressed to each interested party as set forth above, with fees for overnight delivery paid or provided.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the above named addressee(s).

☐ (BY FACSIMILE) I caused such documents to be delivered via facsimile to the offices of the addressee(s) at the following facsimile number:

Executed on April 19, 2012, at Los Angeles, California.

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

Niloo Savis

SERVICE LIST

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