SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

ENDORSED
FILED
ALAMEDA COUNTY

JUL 25 2001

CLERK OF THE SUPERIOR COURT
By E. Opelski-Erickson, Deputy

STEPHEN J. BARRETT, M.D., TERRY POLEVOY, M.D., CHRISTOPHER E. GRELL, Plaintiffs, v. HULDA CLARK, TIM BOLEN, JAN BOLEN, JURIMED, DR. CLARK RESEARCH ASSOCIATION, DAVID P. AMREIN, ILENA ROSENTHAL, AND DOES 1 TO 100, Defendants.	No. 833021-5 ORDER GRANTING DEFENDANT'S *SPECIAL MOTION TO STRIKE* (CODE CIV. PROC. §425.16)

A Special Motion to Strike pursuant to Code Civ. Proc. §425.16 and for attorney's fees and costs ("the motion") was filed on behalf of Defendant Ilena Rosenthal ("Rosenthal") in the case filed by Plaintiffs Steven J. Barrett, M.D., Terry Polevoy, M.D., and Christopher E. Grell (when referred to collectively, "Plaintiffs"). The motion came on regularly for hearing on May 30, 2001, in Department 31 of the above-entitled Court, the Honorable James A. Richman presiding. Mark Goldowtiz appeared on behalf of Rosenthal, and Christopher Grell appeared on behalf of Plaintiffs.

Plaintiffs' Opposition requested leave "to conduct discovery to provide additional evidence should the Court rule that Plaintiffs' reply [sic] is insufficient"

(Opposition, hereinafter cited "Opp.," 7:18-21), and counsel for Plaintiffs made a similar request at the hearing. The Court ordered supplemental briefing on that request, which briefing was received, that on behalf of Plaintiffs on June 11, 2001 and that on behalf of Rosenthal on June 21, 2001, at which time the matter was deemed submitted.

The Court has considered the papers and evidence submitted on behalf of the parties, including the supplemental briefs, and the oral arguments presented at the hearing, and, good cause appearing, now issues its Order (1) denying Plaintiffs' request for discovery, and (2) granting the motion.

1. The Parties

Plaintiffs allege that Barrett is a medical journalist and consultant who "has achieved national renown as a consumer advocate"; that he runs the Quackwatch website, which "is a guide to health fraud, quackery, and intelligent consumer decision"; and that "[h]e is also a board member of the National Council Against Health Fraud (NCAHF), a nonprofit consumer-protection organization." (Complaint, ¶ 12.) Barrett has actively pursued publicity for himself and his views, thrusting himself to the forefront of the controversy over alternative medicine. His Quackwatch website alone claims to have had more than 1.7 million visitors since January 1997, in addition to which he operates five other websites. Indeed, Barrett's own Declaration in opposition to the motion testifies that he has written 48 books, 10 textbooks chapters, and "hundreds of articles" in

lay and scientific publications. He also testifies that he hosts and maintains six websites containing more than 1200 pages of information related to making intelligent decisions about health. Finally, Barrett says, he is listed in Marquis' Who's Who in America and received the 2001 Distinguished Service to Health Education Award from the American Association for Health Education.

Plaintiffs allege that Polevoy practices medicine in Canada and, "like Dr. Barrett, he operates a large Website that exposes health frauds and quackery." (Complaint, ¶ 13.)

Plaintiff Grell is an attorney, who has a "special interest in cases involving health fraud or harm caused by herbal products." (Complaint, ¶ 14.)

Defendants collectively can be best described as people and entities who advocate alternative medicine. The first named defendant is Hulda Clark, alleged to be "an unlicensed naturopath who...operates a clinic in California and Mexico" and who "claims that all cancers and other diseases are caused by 'parasites, toxins, and pollutants' and can be cured within a few days by administering a low voltage electric current, herbs, and other non-standard modalities." (Complaint, ¶ 1.). Various of the defendants are alleged to act in concert with one another, specifically to benefit or assist defendant Clark (e.g. Complaint, ¶¶ 4, 5, and 17); and defendants Tim and Jan Bolen are alleged to do business as defendant Jurimed to assist alternative health practitioners, and also as "publicists for Dr. Clark." (Complaint, ¶ 17.)

As to Rosenthal, the moving defendant here, the Complaint alleges that she "directs the Humantics Foundation for Women, and is author of the self-published book, "Breast Implants: The Myths, The Facts, The Women." She also operates an Internet discussion group, alt.support.breast-implant, to which she has posted more than 8,000 messages since the middle of 1999." (Complaint, ¶ 6.)

2. The Allegations of the Complaint

Plaintiffs' Complaint is verified, contains 58 paragraphs, and has 15 exhibits. The Complaint names seven specific defendants, against whom it asserts three causes of action, all alleged against all defendants: (1) libel, (2) libel per se, and (3) conspiracy.

Paragraph 8 of the Complaint lumps all seven named defendants together, first asserting that they, along with Does 1-100, wrote "numerous writings and publications" which were "allegedly performed by or on behalf of" all named defendants, thereafter collectively referred to as "Defendant Publishers" or "Defendants." In short, the Complaint makes numerous allegations that "defendants published the allegedly defamatory publications" without differentiation among defendants or without specifying which particular defendant made which specific statement.

However, the Complaint does make five specific charges as pertinent to Rosenthal, as follows:

a) Paragraph 18: Rosenthal "repeatedly posted" "at least one" libelous message to newsgroups, which apparently refers to the message discussed in Paragraphs 35 and 36 of the Complaint, that shortly after August 14, 2000, Rosenthal republished to two Usenet newsgroups messages "accusing Dr. Polevoy of stalking women and urging 'health activists...from around the world' to file complaints to government officials, media organizations, and regulatory agencies."

b) Paragraph 36: Rosenthal "posted messages about Dr. Barrett's threat [to sue her for the allegedly defamatory message she had posted] accompanied by a copy of the libelous message."

c) Paragraph 37: On June 28, 2000, Rosenthal posted a message to an alternative health newsgroup containing the false statement that Dr. Barrett had "bunches of $$$$ coming to him to run" his website.

d) Paragraph 38: On or about August 18, 2000, Rosenthal posted to a newsgroup a message falsely stating that "Quackwatch appears to be a power-hungry, misguided bunch of pseudoscientific socialistic bigots," is an "industry funded organization," and is being sued by many doctors and health organizations.

e) Paragraph 39: On October 9, 2000, Rosenthal posted a message to a newsgroup which referred to Drs. Barrett and Polevoy as "quacks."

The above allegations are contained in the first cause of action, and are incorporated by reference in the second (Paragraph 49) and third (Paragraph 54) causes of action.

3. The Motion and the Anti-SLAPP Law.

Rosenthal's motion is premised on Code of Civil Procedure section 425.16 (hereinafter "Section 425.16"), California's anti-SLAPP law.[1] According to its preamble, section 425.16 was enacted by the Legislature in 1992 to address a stated concern over "the disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances." (Section 425.16, subd. (a).) The procedural device afforded by the statute is designed to allow for "prompt disclosure" and "a fast and inexpensive dismissal" of SLAPP suits. (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 816-817, 823.)

In 1997, the Legislature amended Section 425.16 to expressly mandate that it "shall be construed broadly." (Stats. 1997, ch. 271, §1; amending section 425.16, subd. (a).) [2] Shortly thereafter, the Supreme Court issued its first opinion construing the anti-SLAPP law and directed that the courts, "whenever possible, should interpret the First Amendment and section 425.16 in a manner 'favorable to the exercise of freedom of speech, not to its curtailment.'" (*Briggs v. Eden*

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[1] SLAPP is an acronym for "Strategic Lawsuits Against Public Participation."

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

Council for Hope and Opportunity (1999) 19 Cal.4th 1106, 1119 ("Briggs"), quoting *Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1170, 1176.)

Such mandate for broad construction was most recently discussed in *M.G. v. Time Warner, Inc.* (2001) 89 Cal. App. 4th 623, 628-629. In first holding that the anti-SLAPP law could be used by powerful media defendants, the Court of Appeal explained how broadly the law has been applied, noting as follows:

> Both legislative mandate and judicial interpretation have expanded the application of the anti-SLAPP statute beyond its paradigmatic origins. At first, it was envisioned that the anti-SLAPP statute would be limited to situations involving "powerful and wealthy plaintiffs, such as developers, against impecunious protestors...." [cite] The state Legislature, however, has directed that section 425.16 be interpreted broadly. [cite] Furthermore, a number of courts have approved the use of the anti-SLAPP statute by media defendants like those here. [cite] Therefore, although in this situation, powerful corporate defendants are employing the anti-SLAPP statute against individuals of lesser strength and means, we are constrained by the authorities to permit its use against plaintiffs of this ilk.

To effectuate its broad public purpose, section 425.16 creates an accelerated two-step procedure for disposing of SLAPP lawsuits. In the first step, the defendant bringing a Special Motion to Strike must establish that the lawsuit arises from "any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitutions in connection with a public issue." (Section 425.16, subd. (b); *Wilcox v. Superior Court*, supra, 27 Cal.App.4th at 820.) The defendant may meet this burden by showing the act which forms the basis for the plaintiff's cause of action is "an act in furtherance of

[the] person's right of petition or free speech," which phrase is defined in section 425.16, subdivision (e) as:

1. any written or oral statement or writing made before a legislative, executive, or judicial body, or any other official proceeding authorized by law;

2. any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other proceeding authorized by law;

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; [or]

4. any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

If the defendant meets this burden, in the second step, the burden shifts to the plaintiff to demonstrate a probability that the plaintiff will prevail on the claim. (Section 425.16, subd. (b).) To meet this burden, the plaintiff must demonstrate that his or her complaint is legally sufficient and is supported by a sufficient prima facie showing of admissible facts to sustain a favorable judgment. (*Wilcox v. Superior Court*, supra, 27 Cal.App.4th at 823.) Once the appropriate evidence is submitted, the Special Motion to Strike must be granted "unless the court determines that the plaintiff has established that there is a probability that [he or she] will prevail on the claim." (Ibid.)

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4. Analysis

A. The Publications Deal With An Issue Of Public Interest

As previously noted, section 425.16, subdivision (e) defines the types of acts covered by the SLAPP law, and includes four illustrative sub-parts. Specifically, section 425.16(e)(3) and (e)(4) provide that acts falling within the statute's protection include: "(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; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

As also noted, the statute expressly mandates that it is to be construed broadly. Indeed, even before that mandate, what constitutes a matter of public interest has been broadly construed in the SLAPP context. Illustrative is the statement by the *Court of Appeal in Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 650-651:

> Although matters of public interest include legislative and governmental activities, they may also include activities that involve private persons and entities, especially when a large, powerful organization may impact the lives of many individuals. Examples are product liability suits, real estate or investment scams, etc. The record reflects the fact that the Church [of Scientology] is a matter of public interest, as evidenced by media coverage and the extent of the Church's membership and assets.

Similarly, *Damon v. Ocean Hills Journalism Club*, (1999) 85 Cal.App.4th 468, 479, held that "The definition of 'public interest' within the meaning of the anti-SLAPP statute has been broadly construed to include not only governmental matters, but also private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a government entity." (Also see *Sipple v. Foundation for National Progress* (1999) 71 Cal.App.4th 226, 238-240 [statements that a nationally-known political consultant had physically and verbally abused his former wives determined to be a matter of public interest]; cf. *Nicosia v. Rooy* (N.D.Cal. 1999) 72 F.Supp.2d 1093, 1110 [critical statements about biographer of Jack Kerouac deemed to involve a matter of public interest].)

Most recently, in *M.G. v. Time Warner, Inc.*, supra, the Court of Appeal held that section 425.16 applied to a photograph of a Little League team published in *Sports Illustrated* and then shown on an HBO television show, which photograph was used to illustrate stories about adult coaches who sexually molest youths playing team sports. The Court held that the photograph concerned a broad public issue, noting: "Although plaintiffs try to characterize the 'public issue' involved as being limited to the narrow question of the identity of the molestation victims, that definition is too restrictive. The broad topic of the article and the program was not whether a particular child was molested but rather the general topic of child molestation in youth sports, an issue which, like domestic violence, is significant and of public interest." (89 Cal.App.4th at 629.)

Applying the language and rationale of the foregoing authorities here, the Court concludes that the publications upon which Plaintiffs' defamation claims rest concern an issue of public interest.

The issue which Plaintiffs and their critics address -- the validity or invalidity of alternative medicine -- concerns a highly controversial matter which is of significant public importance and interest, affecting the health of millions of people and involving billions of dollars. (Rosenthal Decl., ¶¶ 23-25, and especially Exhs. M and N.) Moreover, by maintaining their numerous websites and publishing and speaking widely about these issues, plaintiffs Barrett and Polevoy themselves must believe that the public is interested in their criticisms of alternative medicine. Finally, the substantial publicity received by these plaintiffs is more evidence that the issue is a matter of public interest.

In two different places in their Opposition (Opp. 4:20-6:2 and 11:26-12:24), Plaintiffs assert, however half-heartedly, that the "postings" are not in connection with a public issue. In claimed support Plaintiffs cite only *Zhao v. Wong* (1996) 48 Cal.App.4th 1114, a case that was expressly disapproved in *Briggs*, which observed that "*Zhao* is incorrect in its assertion that the only activities qualifying for statutory protection are those which meet the lofty standard of pertaining to the heart of self government." (*Briggs*, supra, 19 Cal.4th at 1116, quoting with approval *Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1046-1047.) Plaintiffs' reliance is not to be condoned. And is not availing.

B. Plaintiffs Cannot Establish a Probability of Prevailing on Their Claims.

(i) The Applicable Law

As noted, once a defendant makes a prima facie showing under section 425.16 that the lawsuit arises from speech covered by the statute, the burden shifts to Plaintiffs to establish a probability of prevailing on their claims. Plaintiffs' showing must be made by competent and admissible evidence. (*Wilcox v. Superior Court*, supra, 27 Cal.App.4th at 820, 830; *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1497-98; *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 15-16, 21, fn. 16, 25.) "The test is similar to the standard applied to evidentiary showings in summary judgment motions pursuant to Code of Civil Procedure §437(c) and requires that the showing be made by competent admissible evidence within the personal knowledge of the declarant." (*Church of Scientology v. Wollersheim*, supra, 42 Cal.App.4th at 654.) The Court concludes that Plaintiffs have failed to prove by competent and admissible evidence a prima facie case of defamation in this instance.

To establish defamation, Plaintiffs must come forward with admissible evidence on at least four scores.

First, Plaintiffs must show that the matters complained of were "published," i.e., that the statements were communicated to some third person who understood their defamatory meaning and their application to the Plaintiffs. (See Witkin, Summary of California Law (9th ed. 1988), Vol. 5, § 476, pp.560-561.)

Second, Plaintiffs must affirmatively show that the statements at issue are false. (*Hejmadi v. AMFAC, Inc.* (1988) 202 Cal.App.3d 525, 552-553 [truth is an absolute defense against civil liability for defamation].) Moreover, because the statements at issue pertain to a matter of public concern, the burden rests squarely on Plaintiffs to prove falsity. (*Philadelphia News, Inc. v. Hepps* (1986) 475 U.S. 767, 787-788; see *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 747; *Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 373-375.) Plaintiffs must in addition show that statements contained or implied a "false factual assertion" about them. (*Moyer v. Amador Valley Joint Union High School District* (1990) 225 Cal.App.3d 720, 724-725 ("Moyer").) Statements that cannot "reasonably [be] interpreted as stating actual facts about an individual" because they are expressed in "loose, figurative or hyperbolic language," and/or the context and tenor of the statements "negate the impression that the author seriously is maintaining an assertion of actual fact" about the plaintiff are not provably false, and as such, will not provide a legal basis for defamation. (*Milkovich v. Lorain Journal* (1990) 497 U.S. 1, 21.)

Third, Plaintiffs must show that the statements at issue are defamatory. In defamation actions, it is entirely appropriate for the Court to determine in the first instance "whether the publication could reasonably have been understood to have a libelous meaning." (*Kapellas v. Kofman* (1969) 1 Cal.3d 20, 34, fn.14.) Thus, Plaintiffs must show the statements involve "a false and unprivileged

publication...which exposes [them] to hatred, contempt, ridicule, or obloquy, or which causes [them] to be shunned or avoided, or which has a tendency to injure [them] in [their] occupation." (Civil Code section 45.)

Fourth, Plaintiffs must establish that as a result of the publications Plaintiffs suffered actual monetary damages. While at common law compensatory damages for defamation-related claims were available without evidence of loss, the United States Supreme Court has held that a plaintiff must produce "competent evidence of actual injury" in order to state a constitutional claim for defamation arising from matters of public concern. (*Gertz v. Robert Welch* (1974) 418 U.S. 323, 350.)

Plaintiffs here cannot meet the evidentiary burdens with which they are faced, for each of several reasons.

(ii) Rosenthal Has Published Nothing About Plaintiff Grell

Initially, the Court notes that plaintiff Grell's claim fails the publication requirement, that is, an affirmative showing by him that the statements at issue were directed at or concerned him in some way. Notably, Grell is not mentioned in any publication which Rosenthal is alleged to have made, and presented no evidence to show that any reader reasonably understood the publications to refer to him. Indeed, at the hearing plaintiff Grell as much as conceded the motion as against him.

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(iii) Plaintiffs Cannot Establish That Most Of The Statements At Issue Are Demonstrably False Statements Of Fact

Plaintiffs complain that Rosenthal has posted to Internet newsgroups her views that plaintiffs Barrett and Polevoy are "quacks"; that Barrett is "arrogant" and a "bully"; and that Barrett has tried to "extort" her. Such statements are not actionable, because they do not contain provably false assertions of fact, but rather are expressions of subjective judgment. As Justice Swager observed in *Copp v. Paxton* (1996) 45 Cal.App.4th 829: "The issue whether a communication was a statement of fact or opinion is a question of law to be decided by the Court. In making the distinction, the courts have regarded as opinion any 'broad, unfocused and wholly subjective comment,' such as that the plaintiff was a 'shady practitioner,' 'crook,' or 'crooked politician.' Similarly, in *Moyer*, this court found no cause of action for statements in a high school newspaper that the plaintiff was 'the worst teacher at FHS' and 'a babbler.' The former was clearly 'an expression of subjective judgment.' And the epithet 'babbler' could be reasonably understood only 'as a form of exaggerated expression conveying the student-speaker's disapproval of plaintiff's teaching or speaking style.' (Cits. omitted; 45 Cal.App.4th at 837-838.) To the same effect, see *Morningstar, Inc. v. Superior Court* (1994) 23 Cal.App.4th 676, 691, n.5, citing cases holding that (a) referring to township clerk as "playing hide and seek" with township funds, (b) referring to William Buckley as a "fellow traveler of fascism," and (c) referring to a change of membership on public board as "sleazy sleight of hand," are nonlibelous because

the comments are phrased in vituperative terms or because the language was used in a "loose or figurative" sense.

Plaintiffs' Opposition ignores Rosenthal's discussion on this issue, and does not meaningfully attempt to argue that any of those statements are actionable. Instead, Plaintiffs' Opposition cites a passage from defendant Tim Bolen's piece, reposted by Rosenthal, as containing provably false statements of fact (Opp. 14:9-24), which contention is discussed below, in part (iv).

Plaintiffs' Opposition does cite several old defamation cases, primarily from the years 1916 through 1939 and one in 1955. (Opp. 8:17-28.) However, as Rosenthal points out, the boundaries of permissible public discourse have evolved significantly in the last half century, and as her Reply aptly summarizes it: "Although it may have been actionable to call someone a 'hypocrite' in 1916, or an 'old witch' in 1955 (Opp. 8:24-9:5), today calling someone a 'thief' and a 'liar' in a public debate has been held to be constitutionally-protected rhetorical hyperbole. (*Rosenaur v. Scherer* (2001) 88 Cal.App.4th 260, 280.)"

The conclusion that Rosenthal's statements discussed above are protected opinion or rhetoric is also supported by the forum and context in which the statements were made, that is, in the "the general cacophony of an Internet" newsgroup, "part of an on-going free-wheeling and highly animated exchange" about health issues, where the "the postings are full of hyperbole, invective, short-hand phrases and language not generally found in fact-based documents." (*Global*

Telemedia International v. Doe 1 aka BUSTEDAGAIN40 (C.D.Cal. 2001) 132 F.Supp.2d 1261, 1267, 1269-1270 [holding critical comments about plaintiff in Internet chat-room, including that it "screwed" investors out of their money and lied to them, to be non-actionable opinion and rhetoric]. Also see *Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 601: "[W]here potentially defamatory statements are published in a public debate, ... or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion.")

In sum, the Court concludes that, with one exception, the publications attributed to Rosenthal are not statements of fact, and thus will not support any plaintiff's claim for libel. The one exception, that is, the one statement that appears to be factual, is the posting by Rosenthal of the self-described "opinion piece" by Tim Bolen claiming plaintiff Polevoy stalked Christine McPhee, and the Court turns to discussion of that statement.

(iv) Rosenthal's Statement About Polevoy Is Protected By Federal Law

The Complaint alleges in pertinent part that sometime after August 14, 2000 Rosenthal "repeatedly posted" to newsgroups "at least one" libelous message, (Paragraph 18), which message was that Polevoy stalked Christine McPhee. Because Plaintiffs specifically pleaded that such message was in fact originally

posted by Tim Bolen and was reposted by Rosenthal, Rosenthal's moving papers contended that 47 U.S.C. §230 shielded her from liability. Plaintiffs' Opposition eschewed any reference to, much less discussion of, this argument and Rosenthal's Reply urged that the issue was conceded. At the hearing the Court confronted counsel for Plaintiffs about this, and Plaintiffs' Supplemental Memorandum does address the issue. (Supplemental Memorandum, hereinafter cited "Supp. Opp.," 5:21-10:14.) But not successfully.

47 U.S.C. §230 is part of the Communications Decency Act enacted by Congress in 1996 ("the Act"), and includes provisions creating immunity for certain communications on the Internet. As pertinent here, 47 U.S.C. §230(c)(1) provides that: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[3] And Section 230(e)(3) provides in relevant part: "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."

These protections for covered communications were enacted "to promote the continued development of the Internet and other interactive computer services

[3] Section 230(f)(2) defines "interactive computer service" as any information service system, or access software provider that provides or enables computer access by multiple user to a computer server..." Section 230(f)(3) defines "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer serve. Section 230(f)(4) defines "access software provider" as "a provider of software (including client or server software), or enabling tools that do any one or more of the following: (A) filter, screen, allow, or disallow content; (B) pick, choose, analyze, or digest content; or (C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content."

and other interactive media," and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." (47 U.S.C. §230(b)(1),(2).) "[B]y its plain language , §230[(c)(1)] creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." (*Zeran v. American Online* (4th Cir. 1997) 129 F.3d 327, 330, cited with approval in *Kathleen R. v. City of Livermore* (2001) 87 Cal.App.4th 684, 692.) Thus, §230(c)(1) provides immunity to users, as well as providers, of interactive computer services.

It is undisputed that Rosenthal did not "create" or "develop" the information in defendant Bolen's piece. Thus, as a user of an interactive computer service, that is, a newsgroup, Rosenthal is not the publisher or speaker of Bolen's piece. Thus, she cannot be civilly liable for posting it on the Internet. She is immune.

Plaintiffs contend that to apply Section 230 would be contrary to one of the purposes of the Community Decency Act, specifically to ensure vigorous enforcement of federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer." (Supp. Opp. 6:24-27, citing 47 USC § 230(b)(5).) This argument is without merit, because §§ 230(c)(1) and (e)(3) merely provide for immunity from civil liability, and the Act expressly provides that it has no effect on federal criminal statutes. (47 USC §230(e)(1).)

Plaintiffs also assert that so applying the act is inconsistent with the statement in *Zeran* that "None of this means, of course, that the original culpable party who posts defamatory messages would escape accountability." (Supp. Opp., 7:1-5.) However, the "original culpable party" is the "information content provider," the person who "created" the information. As to Bolen's piece, that is Bolen, not Rosenthal.

In sum and in short, no plaintiff has any claim against Rosenthal: Grell is not even mentioned; Barrett can show no statement of fact, false or otherwise; and the one statement of fact to which Polevoy can point, the reposting of the Bolen piece, will not subject Rosenthal to liability. But assuming *arguendo* Barrett and Polevoy could point to a statement that would support a libel claim, their claims would fail because they are public figures.

(v) Plaintiffs Barrett and Polevoy Are Public Figures, Whose Claims Fail Because They Cannot Show Actual Malice

(a) Barrett and Polevoy are Public Figures

Plaintiffs are all described above, essentially based on their own views of themselves, which descriptions would appear to make Plaintiffs Barrett and Polevoy public figures. Were not that enough, Rosenthal's Declaration embellishes the picture, demonstrating that in June, 2000 Barrett and Polevoy were interviewed on a two-part PBS television show about defendant Clark, and that on February 23, 2001, Barrett was interviewed on the Today show. Moreover, Barrett authored an article on "How to Spot a Quack" for the March 5, 2001, issue of

Time's monthly magazine "On," and *Time* itself published an article on Barrett in its April 20, 2001 issue, entitled "The Man Who Loves To Bust Quacks." The article states that "Barrett has become one of America's premier debunkers of what he likes to call quackery." Indeed, Barrett himself is quoted in the article as saying: "Twenty years ago, I had trouble getting my ideas through to the media. Today I am the media." (Rosenthal Decl., ¶¶ 55-57 and Exs. O, U, & V.)

In light of all this, it hardly needs citation of authority to demonstrate that Barrett and Polovey are public figures. Plaintiffs hardly contend otherwise.

(b) Barrett and Polevoy Cannot Show Malice

It is well settled that where, as here, the publications at issue concern a public figure, actual malice may not be presumed. To the contrary, Plaintiffs bear the burden of proving actual malice, and it must be proved by clear and convincing evidence. (See *Copp v. Paxton,* supra, 45 Cal.App.4th at 846.) This means that Plaintiffs must show not only that the statements they attribute to Defendants were false and defamatory, but also that they were published with actual knowledge of their falsity or otherwise circulated with reckless disregard of whether they were false or not. (Id.) Moreover, "[t]he burden of proof by clear and convincing evidence requires a finding of high probability. The evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong so as to command the unhesitating assent of every reasonable mind." (Ibid.) Plaintiffs cannot meet the burden with which they are faced.

In their Opposition to the motion, Plaintiffs point to three factors which they contend are prima facie evidence of actual malice: (1) the tenor of the statements at issue; (2) the fact that the statements were circulated without any attempt by defendants to "learn the truth about Plaintiffs' conduct"; and (3) the statement by Rosenthal upon learning that she had been sued that she "despises" Plaintiffs. None of these presents sufficient prima facie evidence of actual malice.

First, as explained above, the tenor of the statements here provides little, if any, evidence on the issue of actual malice. Indeed, the very fact that the statements contain hyperbole, invective, and animated descriptive passages establishes them as non-defamatory expressions of opinion -- not provably false assertions of fact that were demonstrably false at the time they were made. (See *Global Telemedia International v. Doe 1*, supra, 132 F.Supp.2d at 1269-1270; *Rosenaur v. Scherer*, supra, 88 Cal.App.4th at 280.)

Second, there is no requirement that one first "learn the truth" before making statements concerning a public figure. As the United States Supreme Court has held: "reckless conduct is not measured by whether a reasonably prudent [person] would have published, or would have investigated before publishing. There must [instead] be sufficient evidence to permit the conclusion that defendant in fact entertained serious doubts as to the truth of his [or her] publication." (*St. Amant v. Thompson* (1968) 390 U.S. 727, 731.) In this instance,

there is no evidence, let alone clear and convincing evidence, that Rosenthal in fact entertained serious doubts as to the truth of their publications.

Third, Rosenthal's expression that she "despises" Plaintiffs, coming as it did only after having being sued, avails Plaintiffs of nothing. This Court surmises that most people would not react well to the news that they have been named as a defendant in a contentious and potentially long and expensive lawsuit. But, Rosenthal's reaction to being sued provides no evidence of her subjective intent at the in time critical to the actual malice analysis, the time at which she circulated the statements on the Internet. But even if the Court were to read Rosenthal's post-filing e-mail as evidence that she was motivated by her dislike of Plaintiffs to circulate critical statements about them on the Internet, such evidence does not constitute actual malice. "'Actual malice' under the New York Times standard focuses on the defendant's attitude toward the truth or falsity of [her] published material rather than on the defendant's attitude toward plaintiff.' Under this standard, ill will does not constitute proof of knowledge of falsity." (*Gomes v. Fried* (1982) 136 Cal.App.3d 924, 934 [internal citations omitted].)

In short, Plaintiffs have not come forward with sufficient prima facie evidence of actual malice to establish a probability of prevailing on their defamation claims.

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(vi) Plaintiffs' Claims Also Fail for Lack of Evidence of Actual Monetary Damages

Last, Plaintiffs' claims suffer the additional fatal defect in their damages allegations. While at common law compensatory damages for defamation-related injuries were available without evidence of loss, the United States Supreme Court has held that the First Amendment prohibits an award of presumed damages for false and defamatory statements involving matters of public concern. (See *Gertz v. Robert Welch*, supra, 418 U.S. at 350.) Thus, under *Gertz*, a public figure plaintiff must produce "competent evidence of actual injury" to state a constitutional claim for defamation. (Ibid.) In this instance, however, Plaintiffs have submitted no evidence that they suffered any actual monetary damage as a result of Defendants' publications. Having failed to establish that they suffered any monetary damage of any kind, Plaintiffs' claims are properly stricken for failure to show that they have prima facie merit. (See *Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, 1176.)

C. Plaintiffs Have Not Shown Good Cause for Discovery

As noted, Plaintiffs Opposition requested, "[a]s an aside," the right to conduct discovery, a request renewed at the hearing. The Court requested further briefing on Plaintiffs' request, which was received, and the Court now addresses that request.

Preliminarily, the Court rejects Rosenthal's contention that the request must be denied on the basis that Plaintiffs never filed a noticed motion seeking such

discovery as required by subdivision (g) of Section 425.16. (See 10. ["The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision."]; also see *Evans v. Unkow*, supra, 38 Cal.App.4th at 1499 [request for discovery denied when not made by noticed motion: "The failure to comply with the statute by making a timely and proper showing below makes his discovery request meritless."]; and *Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 357 [request for discovery in opposition papers denied because not made by noticed motion].) Instead, the Court reaches the merits of Plaintiffs' request, and concludes that it is wanting.

It is probably enough to note, as demonstrated above, that no plaintiff has asserted a cognizable claim for defamation against Rosenthal: Grell is not even mentioned by her; Barrett can show no statement of fact, false or otherwise, made by her; and the one statement of fact about Polevoy, the reposting of the Bolen piece, will not subject her to liability. Plaintiffs' request is also wanting because they have failed to demonstrate good cause.

In their Supplemental Memorandum filed after the hearing, requested by the Court on the issue of discovery, Plaintiffs devote less than 4 of 17 pages to the request for discovery. (Supp. Opp. 13:5-16:18). There, with little discussion, Plaintiffs request the right to conduct discovery on damages and malice. (See Supp. Opp., 17:1-2; see also 12:22-24.) Neither request is well taken.

The only justification Plaintiffs give for their request to conduct discovery to determine their own damages is their vague assertion, without explanation or support, that "[e]vidence of Plaintiffs' damages is in part, under the control of the University and other people that deal with Plaintiffs." (Supp. Opp. 14:2-3; see also 11:15-17.) Plaintiffs do not explain why anyone else knows better than they do what damages they have allegedly suffered, nor who those people are or what specific discovery they seek to obtain from them.

Plaintiffs' claimed justification for discovery regarding actual malice is the following: "Plaintiffs would like to be able to depose Ilena Rosenthal, Tim Bolen, and Ms. McFee [sic] in order to determine what evidence they had to show that the statements they made were not made with reckless disregard for the truth." (Supp. Brief 12:24-27.)

Plaintiffs' request to depose defendant Bolen and Ms. McPhee is fatuous. Whether Bolen or McPhee made their statements with actual malice is irrelevant to whether Rosenthal posted Bolen's piece with actual malice. As for deposing Rosenthal, Plaintiffs say they want to see what evidence she had to show that her statements were not made with actual malice. However, Plaintiffs' request falls short because they do not "explain what additional facts [they] expect to uncover..." (*Sipple v. Foundation for National Progress*, supra, 71 Cal.App.4th at 247.)

The Court is aware that if a plaintiff makes a timely and proper showing for discovery, a Court should liberally exercise its discretion to allow such discovery, when "evidence to establish a prima facie case is reasonably shown to be held, or known, by defendant." (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th. 855, 868.) But such liberality applies only if the plaintiff demonstrates "that a defendant or a witness possess evidence needed by plaintiff to establish a prima facie case." (Id.) Plaintiffs have failed to satisfy this prerequisite. They have not made an adequate showing to justify discovery.

5. Conclusion

Based on the above, the Court concludes that Section 425.16 applies to Plaintiffs' Complaint, and that no Plaintiff has established by competent evidence a probability that he will prevail on his claim. Accordingly, Rosenthal's motion will be granted, and Rosenthal will be awarded reasonable attorney's fees and costs according to proof.

IT IS SO ORDERED.

Dated: July 25, 2001

JAMES A. RICHMAN

James A. Richman
Judge of the Superior Court

CLERK'S DECLARATION OF MAILING

I certify that I am not a party to this cause and that I caused a true copy of the foregoing ORDER GRANTING DEFENDANT'S SPECIAL MOTION TO STRIKE (CODE CIV. PROC. §425.16) to be mailed, first-class, postage pre-paid, in a sealed envelope, addressed as shown below. Executed, deposited and mailed in Oakland, California on July 25, 2001.

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