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MICHAEL SHAMES

10
11 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 IN AND FOR THE COUNTY OF SAN DIEGO, CENTRAL DIVISION
13

14 MICHAEL SHAMES, an individual,
15 Plaintiff,

16 v.

17 UTILITY CONSUMERS' ACTION
NETWORK, DAVID PEFFER, MICHAEL
18 AGUIRRE, AND DOES 1 TO 50.

19 Defendants.

20
21 UTILITY CONSUMERS' ACTION
NETWORK, DAVID PEFFER, MICHAEL
AGUIRRE; and DOES 1 to 50,

22 Cross-Complainants,
23

24 v.

25 MICHAEL SHAMES, an individual, and
DOES 51-100, inclusive,

26 Cross-Defendants.
27
28

Case No. 37-2013-00036966-CU-DF-CTL

PLAINTIFF AND CROSS-DEFENDANT
MICHAEL SHAMES' OPPOSITION TO
MICHAEL AGUIRRE'S SPECIAL MOTION
TO STRIKE COMPLAINT PURSUANT TO
CODE OF CIVIL PROCEDURE §425.16

"IMAGED FILE"

Date: September 6, 2013
Time: 10:00 a.m.
Judge: Hon. Ronald S. Prager
Dept: C-71

Complaint Filed: February 28, 2013
Trial Date: None Set

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TABLE OF CONTENTS

I. INTRODUCTION/FACTS 1

II. EACH STATEMENT OF FACT ABOUT SHAMES FITS
SQUARELY WITHIN THE COMMERCIAL SPEECH EXEMPTION
OF CCP § 425.17, SUBD. (c) AS THEY WERE MADE BY A
COMPETITOR ABOUT SHAMES' BUSINESS PRACTICES 3

III. PLAINTIFF WILL PREVAIL ON EACH TARGETED CLAIM 5

 A. *Defendant's Pattern and Practice of Litigation Through the Media* 5

 B. *Plaintiff's Evidence Shows Probability that He Will Prevail* 6

 1. ALLEGATION OF THEFT 6

 2. ALLEGATIONS OF INTERFERENCE/FINANCIAL
 MISMANAGEMENT 7

 C. *Rebuttal to Aguirre's Declarants* 9

 D. *Legal Standards to Be Applied to the Factual Review* 9

 E. *Plaintiff need only show a probability of prevailing on any one statement* 10

 F. *Aguirre Has Failed to Identify the Causes of Action to which SLAPP Applies* .. 11

IV. MALICE 11

V. DAMAGES 12

VI. IT IS WELL SETTLED THAT THE LITIGATION PRIVILEGE OF
CC §47(b) DOES NOT APPLY TO PRESS RELEASES OR OTHER
REPUBLICATIONS OF DEFAMATORY STATEMENTS TO THE
GENERAL PUBLIC 13

VII. CONCLUSION 14

TABLE OF AUTHORITIES

Federal Cases

<i>City of Colton v. Singletary</i> (4th Dist., Div. 2) 2012 WL 1940648 at *13-15	10, 11
<i>Milkovich v. Lorain Journal Co.</i> 497 U.S. 1, 17 (1990)	9, 10

State Cases

<i>Ampex v. Cargle</i> 128 Cal.App.4th 1569	12
<i>Baker v. Los Angeles Herald Examiner</i> (1986) 42 Cal. 3d 254	9
<i>Bradley v. Hartford</i> 30 Cal.App.3d 818	13
<i>Burrill v. Nair</i> (2013) 217 Cal.App.4th 357	11
<i>Carver v. Bonds</i> (2005) 135 Cal.App.4th 328	13
<i>ComputerXpress, Inc. v. Jackson</i> (2001) 93 Cal.App.4th 993	9, 11
<i>Franklin v. Dynamic Details, Inc.</i> (2004) 116 Cal.App.4th 375	10
<i>Hawran v. Hixon</i> (2012) 209 Cal.App.4th 256	12-14
<i>Mann v. Quality Old Time Service</i> (2004) 120 Cal.App.4th 90	10, 11, 13
<i>McGarry v. University of San Diego</i> (2007) 154 Cal.App.4th 97	12
<i>Nguyen-Lam v. Cao</i> (2009) 171 Cal.App.4th 858	13
<i>Oasis West Realty v. Goldman</i> (2011) 51 Cal.4th 811	10, 11
<i>Overstock.com, Inc. v. Gradient Analytics, Inc.</i> 151 Cal.App.4th 688	10

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TABLE OF AUTHORITIES (cont.)

Rothman v. Jackson
(1996) 49 Cal.App.4th 1134 13, 14

Silberg v. Anderson
50 Cal.3d 205 13, 14

Summit Bank v. Rogers
206 Cal.App.4th 669 9

Taus v. Loftus
40 Cal.4th 683 11

Wallace v. McCubbin
196 Cal. App. 4th 1169 11

Young v. CBS
212 Cal.App.4th 551 12

State Statues

California Civil Code section 47 13

California Code of Civil Procedure section 425.16 3, 11

California Code of Civil Procedure section 425.17 3, 14

1 **I. INTRODUCTION/FACTS**

2 When the two adversaries passed one another in a nondescript hallway at a state office
3 building in San Francisco on January 11, 2012, one word was uttered: “payback”. (NOL, Exhibit A,
4 Shames’ Dec, para. 14.) This brief exchange launched Aguirre’s defamation effort to eliminate a
5 competitor and achieve a measure of vengeance. The utterer was a man whose courtroom of choice
6 is the media, where trials can be held quickly and whose rules of evidence spawn from blood sport
7 rather than statutory or common law. The vengeance was for a \$123,000 fee award sought by Aguirre
8 that Plaintiff successfully opposed. (Shames’ Dec, para. 3.) Aguirre got nothing other than a new
9 target at which to direct his bile.

10 The facts presented in this case could serve as a playbook on how to use public media and
11 innuendo to destroy a professional reputation authored by a man who specializes in this particular
12 dark art. While outspoken in the media, Michael Aguirre has intentionally chosen not to speak to this
13 Court. He is the only defendant to decline to testify; preferring that others present his defense.
14 Aguirre used a similar tactic in the media; relying upon highly edited UCAN emails and internal
15 documents along with anonymous sources for his innuendo offensive. As the facts will show below,
16 Michael Aguirre is the ringmaster in a coordinated effort with his two clients -- UCAN
17 employee/whistleblowers -- to attempt to wrest control of a well-established consumer group (UCAN)
18 from a long-time and respected consumer advocate and a UCAN Board that he helped shape.
19 (Shames’ Dec, paras. 4,9.) Aguirre’s goal was to aide his own career in utility advocacy using
20 UCAN’s reputation. His objectives: vengeance and preventing Plaintiff from competing with
21 Aguirre. His means: trial by media.

22 Plaintiff chose not to litigate this matter in the media. Instead, he has amassed a voluminous
23 body of documentary proof a declaration from a highly credible witness to prove that Aguirre
24 maliciously lied about Plaintiff in an effort to damage Plaintiff’s professional reputation.

25 At trial, Plaintiff will be able to fully detail Aguirre’s role in spreading mistruth; some of it
26 was coordinated with UCAN. However, for purposes of Aguirre’s SLAPP motion, Plaintiff presents
27 three published false statements made by Aguirre which state that Plaintiff engaged in 1) theft, 2)
28 misdirection of UCAN monies and 3) white collar crimes. All three were republished from June-

1 October 2012 – a period in which there was no litigation or preparation for litigation by Aguirre
2 against Plaintiff, thus they are not privileged, as asserted by Aguirre.^{1/}

3 However, as will be explained below, a Prong One analysis will reveal that Aguirre’s
4 statements are exempt from SLAPP on the basis of the commercial speech exemption. Moreover,
5 any privilege that may have inured was lost when he republished his allegations in the media. The
6 Court’s Prong Two analysis should conclude in a finding that Plaintiff will probably prevail on each
7 targeted claim based upon competent admissible evidence.

8 For his defense, Aguirre offers the declarations of two UCAN employees (also his clients) to
9 substantiate his motion. (Shames’ Dec, para. 4.) Plaintiff offers a declaration that explains the long
10 and contentious history between himself and Aguirre. (Shames’ Dec, paras. 3-7, 20-26.) Plaintiff,
11 too, relies partially upon the testimony of an “insider”. In this case, Plaintiff offers the declaration
12 of Robert Ames who is a reputable and experienced attorney. Ames – a former partner in Gray, Cary,
13 Ames -- was brought in to assist with UCAN’s operations at the beginning of the Aguirre-UCAN
14 conflict. (Shames’ Dec, para. 19.) Ames provides this Court an important perspective in this case
15 – one that is objective and disinterested. His knowledge and insights are of particular value to this
16 Court because he witnessed first-hand many of the actions in the conflict between Plaintiff and
17 Aguirre and he has first-hand knowledge of the truth as well as the malice that Aguirre held towards
18 Mr. Shames. Ames attests to the Aguirre’s primary motive: to get Shames. Aguirre stated interest
19 was to force UCAN to terminate Plaintiff and he was prepared to drop his action against UCAN
20 Board members if he could get Shames fired. (NOL, Exhibit B, Ames’ Dec, paras. 10-11.)

21 It is also important to note what this case is not about. Liability is *not* predicated upon any
22 statement made to the California Public Utilities Commission (CPUC) or before any other official
23 body. All of Aguirre’s republications occurred after the end of any litigation between Aguirre and
24 Plaintiff so no litigation inures to Aguirre’s statements discussed below.

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27 ///

28 ^{1/} Aguirre Motion, p. 9.

1 **II. EACH STATEMENT OF FACT ABOUT SHAMES FITS SQUARELY WITHIN THE**
2 **COMMERCIAL SPEECH EXEMPTION OF CCP § 425.17, SUBD. (c) AS THEY**
3 **WERE MADE BY A COMPETITOR ABOUT SHAMES' BUSINESS PRACTICES**

4 The relevant facts in this case are not refuted by Aguirre. Plaintiff, Michael Shames,
5 represented customers of SDG&E before the Public Utilities Commission through an organization
6 he helped create in 1983 called Utility Consumers' Action Network (UCAN). (Shames' Dec, para.
7 5.) For over 27 years, he was San Diego's voice, before regulators, the legislature and in the media,
8 serving as an informed and expert counterforce to SDG&E. (Shames' Dec, para. 35.) In June 2012,
9 Plaintiff left UCAN and created a competing advocacy organization called San Diego Consumers'
10 Action Network (SDCAN). (Shames' Dec, para. 35.)

11 CCP § 425.17(c) is pertinent to this matter.^{2/} Aguirre's statements are exempted from CCP
12 § 425.16 because they are commercial speech. While Aguirre has declined to testify in his SLAPP
13 motion, he was outspoken in his pleadings before the CPUC, where he repeatedly complained about
14 competition with UCAN in filings at the CPUC. In two filings at that agency, he complained that
15 Plaintiff, when he representing UCAN, was attempting to "*restrain competition in the*
16 *representations of ratepayers and consumers*". (Shames' Dec., para. 13; NOL, Exhibit 1, p. 20. -
17 emphasis added) In a responsive filing to SDG&E filed two days earlier, Aguirre stated that SDG&E
18 could intimidate Plaintiff, that his client's interests weren't protected by Plaintiff and objected to
19 SDG&E's position that his contribution was duplicative of Plaintiff's. (NOL, Exhibit 2.) Aguirre's
20 own words make clear that Aguirre viewed Plaintiff as a competitor.

21 ///

22 ^{2/} "CCP § 425.16 does not apply to any cause of action brought against a person *'primarily*
23 *engaged in the business selling or leasing goods or services'*... arising from any statement or
24 conduct by that person if both of the following conditions exist:

25 (1) The statement or conduct consists representations of fact about that person's or a
26 business competitor's business operations, goods or services, that is made for the purpose of
27 obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in,
28 the person's goods or services *or the statement or conduct was made in the course of delivering*
the person's goods or services; and

(2) The intended audience is an actual or potential buyer or customer, or a person likely to
repeat the statement to, or otherwise influence, an actual or prospective buyer or customer...

1 Another important point is that Aguirre had been involved in at least 11 ratepayer cases as an
2 intervenor before the CPUC at the time he caused the challenged statements to be republished to the
3 media. (Shames' Dec, para. 37.) He was not just representing two UCAN employees; he was an
4 active participant at the CPUC vying with Plaintiff for representation rights at that regulatory agency.

5 In addition to his own words, Aguirre also presents the testimony of two UCAN employees
6 who admit they viewed Plaintiff as a competitor. Defendant attorney Peffer was also one of Mr.
7 Aguirre's clients in his 2012 action against UCAN Board members. Peffer admits this competitive
8 relationship with Plaintiff's advocacy group (SDCAN) in his declaration filed on behalf of Aguirre:

9 "In the summer of 2012 I learned that Mr. Shames was no longer employed at UCAN.
10 Soon thereafter, I learned that Mr. Shames had organized a competing consumer group
11 called the San Diego Consumers' Action Network ("SDCAN"). ... On June 26, 2012,
12 Mr. Shames, representing SDCAN, filed a motion with the California Public Utilities
13 Commission claiming that SDCAN was UCAN's successor and attempting to claim
14 UCAN's interest in the SDGE General Rate case - Phase 2. UCAN's interest included
15 a large investment of attorney time, attorney work product, and expert testimony.
16 (NOL, Exhibit 3, Peffer Dec paras. 20-21.)

17 Aguirre also chose to present his case through the declaration of Charles Langley, another
18 UCAN employee and former clients. Mr. Langley echoes Aguirre's view on the competitive
19 relationship with Shames:

20 "I also learned that Mr. Shames had filed paperwork to award his new San Diego
21 Consumers' Action Network a key stake in a rate-hike case pending before the
22 ...CPUC. At the time, I consulted with my attorney, Michael Aguirre, about these
23 matters and what could be done to stop Mr. Shames from taking away UCAN's case
24 before the CPUC." (NOL, Exhibit 4, Langley Dec, para. 19.)

25 Aguirre intentionally published (allegedly) factual statements about Shames' business
26 practices and services in connection with the ratepayer cases to the general public and the CPUC via
27 press releases, internet posts and leaks to the media in order to damage Shames' credibility as an
28 intervenor on behalf of San Diego ratepayers before the CPUC, both actual and potential customers
of Shames and the Defendants, and to retain these valuable cases for himself. (Shames' Dec, paras.
72-77.)

Advocacy at the Public Utilities Commission is influenced by an Intervenor Compensation
program that allows for intervenors to be reimbursed for work in proceedings where that intervenor
has made a substantial contribution. (Shames' Dec, paras. 13, 39.) Being recognized as an intervenor

1 is not an easy task, as the Commission has rejected intervenor applicants and has reduced
2 compensation for advocates who duplicate the efforts of others. Moreover, reputation for
3 professionalism and fair dealing has a direct impact upon the effectiveness of advocates at the CPUC.
4 (*Id.*)

5 The target of Aguirre's reputation assassination campaign was clearly the CPUC. (Shames'
6 Dec, para. 43.) This targeting is no better evidenced than the response that Aguirre published after
7 SDCAN's petition to become a party to a CPUC proceeding was rejected. After that decision, Aguirre
8 sent an email to the PUC and all of the parties in the case lauding the agency's decision and
9 supporting the denial of SDCAN's entry into that case. (Shames' Dec, para. 38; NOL, Exhibit 5.)

10 Each of Aguirre's lies was a representation of fact about Shames' business operations, goods,
11 or services that he caused to be published so that they would be transmitted to Plaintiff's actual
12 and/or potential customers.

13 **III. PLAINTIFF WILL PREVAIL ON EACH TARGETED CLAIM**

14 **A. *Defendant's Pattern and Practice of Litigation Through the Media***

15 Aguirre has established a proven reputation for advocating in the media rather than in the
16 courts. (Shames' Dec, para. 30.) Recently, in one high-profile case, Mr. Aguirre had encouraged
17 Jeffrey Baker, a City employee, to leak documents to the San Diego Union-Tribune, relating to the
18 City pension. Mr. Baker is now suing Mr. Aguirre for malpractice. (Shames' Dec, para. 31.)
19 Notably, Baker leaked his documents to a Jeff McDonald of the Union-Tribune, later the
20 UTSanDiego. (*Id.*) Both Mr. McDonald and Mr. Bauder of the San Diego Reader have been frequent
21 beneficiaries of leaked information by Aguirre. (Shames' Dec, para. 32.) Not surprisingly, Aguirre's
22 two "reporter-friends" were also the primary authors of all of the defamatory news stories cited by
23 Plaintiff in this complaint. They were also the only reporters who wrote stories based upon leaked
24 UCAN documents and anonymous sources within UCAN. Mr. Aguirre's reputation for litigation
25 through the media is well-known and was predicted at the beginning of hostilities between Aguirre
26 and Plaintiff by UCAN's independent counsel. (Shames' Dec, paras. 32-33.)

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1 B. *Plaintiff's Evidence Shows Probability that He Will Prevail*

2 1. ALLEGATION OF THEFT

3

PUBLISHED LIE	PUBLISHER	TRUTH
4 Shames, an active 5 attorney at the time, 6 had engaged in 7 theft.	Michael Aguirre via media. (NOL, Exhibits 6-7.)	Every independent audit and investigation conducted by UCAN and third parties have cleared Plaintiff of anything approaching "theft." To the extent that Aguirre was referencing the alleged theft of the \$1 billion SDG&E Rate Case, then it was also false in that UCAN had admitted to Shames and others that it didn't have the money to pursue the case. (Shames' Dec, para. 46.)

9

10 In June 27, 2012 Aguirre accused Plaintiff of theft. The UTSanDiego printed the accusation.
11 In that article, authored by Aguirre "friend" Jeff McDonald, Aguirre states: "What Shames did is
12 theft". The article quotes him as saying Shames taking away something from UCAN. (NOL, Exhibit
13 6.)

14 Aguirre was not misquoted, as evidenced in another publication by his other media "friend"
15 Don Bauder, who quotes Aguirre as stating: *He [SHAMES] is attempting to take property rights that*
16 *belong to UCAN. This should be reported to the U.S. Attorney."* (NOL, Exhibit 7.) There is no
17 ambiguity; Aguirre accused Plaintiff of criminal acts in both articles appearing on the same day.
18 Aguirre has never denied the claims, never sought a retraction and has declined to submit a
19 declaration addressing this defamation.

20 Aguirre lied. Plaintiff did not engage in theft when he sponsored expert testimony in the \$1
21 billion SDG&E General Rate Case. UCAN had informed Plaintiff that it lacked the resources to
22 pursue the case and it had no property rights to the expert testimony developed for that part of the
23 case. (Shames' Dec, para. 46; NOL Exhibit 8.) Aguirre, a licensed attorney, had accused another
24 licensed attorney of a criminal act with absolutely no factual basis and with access to
25 employees/clients who knew that there was no theft. Aguirre's statement was interpreted by
26 Plaintiff's peers as an accusation of theft and would be interpreted as such by any reader of the
27 UTSanDiego or San Diego Reader. (Shames' Dec, para. 47.)

28 ///

2. ALLEGATIONS OF INTERFERENCE/FINANCIAL MISMANAGEMENT

PUBLISHED LIES	PUBLISHER	TRUTH
Misdirection of dedicated grant funds into an illegal "out of state" hedge fund without proper Board authorization.	Michael Aguirre via media and letter. (NOL, Exhibits 9-10.)	The hedge fund investment was not illegal, did not involve any dedicated grant funds and was fully authorized by the Board. In fact, it was promoted by Board members against the advice of Plaintiff. (Shames' Dec, paras. 55-59; Ames' Dec, paras. 20-21.)
Utility Consumers accounts at Morgan Stanley were not subject to a full audit, auditors could not get the documents, the accounts had more than \$260,000 in them and the Dostart findings were wrong.	Michael Aguirre, his declarants. (NOL, Exhibits 9-10.)	Utility Consumers' bank accounts were fully accounted and audited as of July 2012 and contained only \$43,000 as per the UCAN auditors. The auditors confirmed the Dostart findings. (Shames' Dec, para. 52; Ames' Dec, para. 25.)
Shames interfered in an independent investigation into UCAN's finances by limiting the scope of the auditor's review.	UCAN through anonymous leaks of emails connected to Aguirre. Michael Aguirre, his declarants. (NOL, Exhibits 9-10.)	Shames neither made the statements attributed to him nor had the authority to influence the Dostart investigation. (Shames' Dec, paras. 60-63; Ames' Dec, para. 13.)

Beginning on October 31 2012, media began contacting Plaintiff with questions about financial transactions he made in 2005 on behalf of UCAN and his correspondence regarding the independent investigation by attorney Paul Dostart, who was hired in 2011 by the UCAN Board to investigate the allegations of wrongdoing by Aguirre's declarants. In each of these contacts, the reporters expressly referred to internal UCAN emails that had never been produced during any formal discovery. In fact, Aguirre was leaking these emails to the media.. He used them to suggest that Plaintiff had engaged in and then attempted to cover-up the illegal financial transactions. Aguirre's

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1 own declarant (Peffer) admits that these emails were in Aguirre's possession. (NOL, Exhibit 11,
2 Peffer Declaration, para. 25.)^{3/}

3 The subsequent stories that ran relied upon these selectively edited emails and false statements
4 by Aguirre. The stories suggest financial improprieties involving a UCAN investment in Red Rock
5 Fund and Plaintiff allegedly interfering in UCAN's independent investigation into Plaintiff's
6 activities. (See Shames' Dec, paras. 49-62.) In the articles published in the UTSanDiego and Reader,
7 Aguirre states facts, not opinions, that are false. He was quoted as saying:

8 "Misdirecting consumer education trust money to an out-of-state hedge fund is a
9 storm warning that regulators cannot prudently ignore," Aguirre said." (NOL, Exhibit
10 9.)

11 "Aguirre, attorney for the whistle-blowers, was told by a UCAN accountant that there
12 was only a spot check of the misspelled accounts — not a full audit. The board
13 "decided to go into dissolution rather than do an audit." (NOL, Exhibit 10.)

14 Each of Aguirre's factual assertions is provably false and demonstrates a reckless disregard
15 for truth. The falseness of the statements addressed in the supportive declarations, to wit:

- 16 • Audit results by the UCAN auditors turned up no "misdirection of monies" or
17 undocumented financial transactions; (Ames' Dec, paras. 14-15, Shames' Dec, para.
18 58.)
- 19 • The AKT audit completed in July 2012 – three months before Aguirre's defamatory
20 statement – directly contradicts Aguirre and indicates that all monies are fully
21 accounted and the five equities labeled "Utility Consumers Action Network" were
22 identified and totaled no more than \$43,000. (Shames' Dec, para. 60; NOL, Exhibit
23 12, p. 10.)
- 24 • Both the independent attorney and the AKT auditors found no issues relating to those
25 "Consumers" accounts; (Shames' Dec, para. 61.)
- 26 • The AKT audit published three months prior to Aguirre's lie showed that there was
27 never anything close to \$260,000 in the "Consumer accounts at five institutions"
28 complained of by the whistleblowers; (Shames' Dec, paras. 60-63.)
- The Red Rock investment did not involve a misdirection of consumer trust money to
a hedge fund and was not improper. (Shames' Dec, paras. 54-59.)

29 Perhaps the most egregious lies that Aguirre and his declarants spread were about Plaintiff's
30 alleged interference in an internal UCAN investigation of Plaintiff's activities. If true, this would be
31 sanctionable by the State Bar. But it wasn't true. Aguirre's two "reporter-friends" - McDonald and
32 Bauder - wrote misleading stories relying upon these internal UCAN emails that had never been

33 ^{3/} See also Ames' Dec, para. 30; Shames' Dec, para. 48, 56.

1 produced during any formal discovery. Aguirre was leaking these emails to the media to suggest that
2 Plaintiff had been personally using UCAN monies and then attempting to cover-up the illicit
3 transactions. As noted above, Aguirre's own declarant, David Pepper, admits to Aguirre's possession
4 of those emails. (NOL, Exhibit 11.) Aguirre's use of these emails in the media and his assertions
5 pertaining to them were false and malicious. (Shames' Dec, paras. 52, 53, 61, 63; Ames' Dec, paras.
6 13, 15.)

7 **C. *Rebuttal to Aguirre's Declarants***

8 Aguirre has chosen not to testify in this matter. Instead, he relies upon the testimony of his
9 two clients – both UCAN employees. They present declarations asserting facts that are erroneous
10 and/or misleading. This brief is supported by the declarations of Michael Shames and Robert Ames
11 that debunk many of the facts asserted by these deceitful declarants. (Shames' Dec, paras. 64-73;
12 Ames' Dec, paras. 13,32.) As Plaintiff shows in his supporting declarations, the declarations
13 submitted on behalf of Mr. Aguirre are riddled with provably false statements (Shames' Dec, paras.
14 64-65.) and highlight the degree of reckless disregard for truth demonstrated by Aguirre.

15 **D. *Legal Standards to Be Applied to the Factual Review***

16 When Aguirre stated to the press that Plaintiff had committed "theft" and should be reported
17 to the "US Attorney", it was stated as fact. Similarly, when Aguirre asserted that Plaintiff was
18 "misdirecting consumer education trust money to an out-of-state hedge fund...", this was presented
19 as a fact. No reader would have concluded that Aguirre was offering a qualified opinion based upon
20 a hypothetical.

21 As the California Supreme Court has noted, the question is "whether the average reader ...
22 could have reasonably understood the alleged defamatory statement to be one of fact." *Baker v. Los*
23 *Angeles Herald Examiner* (1986) 42 Cal. 3d 254, 260, 261 *see, also ComputerXpress, Inc. v. Jackson*
24 (2001) 93 Cal.App.4th 993, 1011; where the court considers both the language and the probable effect
25 of the statement.) Even where statements appear to be opinions, they may still be actionable. (*Summit*
26 *Bank v. Rogers* 206 Cal.App.4th 669, 696 2012).) In *Milkovich v. Lorain Journal Co.* 497 U.S. 1, 17
27 (1990), the United States Supreme Court moved away from the notion that defamatory statements
28 categorized as opinion as opposed to fact enjoy wholesale protection under the First Amendment.

1 Significantly, the court recognized that expressions of opinion may often imply an assertion
2 of objective fact. (*Milkovich*, p. 18.) The court went on to explain:

3 “If a speaker says, ‘In my opinion John Jones is a liar,’ he implies a knowledge of
4 facts which lead to the conclusion that Jones told an untruth. Even if the speaker states
5 the facts upon which he bases his opinion, if those facts are either incorrect or
6 incomplete, or if his assessment of them is erroneous, the statement may still imply
a false assertion of fact. Simply couching such statements in terms of opinion does not
dispel these implications”(Id. at pp. 18–19.) (See, also, *Overstock.com, Inc. v.*
Gradient Analytics, Inc. 151 Cal.App.4th 688, 699 (2007).)

7 Thus a false statement of fact, whether expressly stated or implied from an expression of
8 opinion, is actionable. The key is not parsing whether a published statement is fact or opinion, but
9 whether a reasonable fact finder could conclude the published statement declares or implies a
10 provably false assertion of fact. (*Franklin v. Dynamic Details, Inc.* (2004) 116 Cal.App.4th 375, 385
11 citing *Milkovich*, supra, 497 U.S. at p. 19.)

12 **E. *Plaintiff need only show a probability of prevailing on any one statement***

13 Plaintiff need only show a probability of prevailing on any one statement that is a basis of
14 liability for a challenged cause of action under the *Mann* rule. Under *Mann v. Quality Old Time*
15 *Service* (2004) 120 Cal.App.4th 90, 106, the Fourth District, Division One held:

16 "If the Plaintiff can prove up "ANY PART OF ITS CLAIM, the Plaintiff has
17 established that its cause of action has some merit and THE ENTIRE CAUSE OF
18 ACTION STANDS. The court need not engage in the time consuming task of
determining whether a Plaintiff can substantiate all theories presented within a single
cause of action. ... " *Mann*, supra, 106.

19 More recently, in 2011, our Supreme Court in *Oasis West Realty v. Goldman* (2011) 51
20 Cal.4th 811 expressly approved of *Mann*'s prong two approach to a cause of action based on more
21 than one protected act or in a mixed cause of action. *Oasis* involved a single cause of action where
22 the liability arose from more than one act as happened in *Mann*.^{4/} The *Oasis* court went on to hold
23 and expressly approve the *Mann* rule as follows:

24 "The complaint identifies a number of acts of alleged misconduct and theories of
25 recovery, but for purposes of reviewing the ruling on an anti-SLAPP motion, it is
sufficient to focus on just one. *Oasis*, supra, 51 Cal.4th at 821.

26 The majority opinion in *City of Colton v. Singletary* (4th/2 2012), rejected *Mann*'s prong-two
27 holding that Plaintiff need only show a probability of prevailing on any one act whether protected or
28

^{4/} *Id.*; *Mann v. Quality Old Time Service* (2004) 120 Cal.App.4th 90, 106.

1 unprotected activity in order to defeat SLAPP motion.^{5/} This court should reject *Colton* and follow
2 the *Mann/Oasis* rule.^{6/} (See, also, *Wallace v. McCubbin* 196 Cal. App. 4th 1169, 1212 (2011).)

3 **F. *Aguirre Has Failed to Identify the Causes of Action to which SLAPP Applies***

4 Nowhere in Aguirre's pleading does he specify the causes of action to which his CCP Section
5 425.16 Motion to Strike applies. (*ComputerXpress, supra*, 1004.) This is a fatal flaw in Aguirre's
6 motion. The Court must not be required to guess at and cure this deficiency. The only causes of
7 action to which SLAPP could be applied relate to Aguirre's defamatory statements and not the causes
8 of action involving his invasion of Plaintiff's privacy.

9 **IV. MALICE**

10 Aguirre claims that Plaintiff has failed to plead constitution malice. (Aguirre memo, p. 12.)
11 He failed to read Plaintiff's complaint in which Plaintiff details specific factual bases for Aguirre's
12 malice.^{7/} Further evidence of his malicious motivations are fully detailed in the Declarations of
13 Michael Shames and Robert Ames in which it is made clear that Aguirre's actions were retaliatory
14 and that his focus was on UCAN firing Plaintiff. (In particular, see Ames' Dec, paras. 10-11.)

15 The malice necessary to defeat a qualified privilege is 'actual malice,' which is established by
16 a showing that the publication was motivated by hatred or ill-will towards the plaintiff or by a
17 showing that the defendant lacked reasonable grounds for belief in the truth of the publication and
18 thereafter acted in reckless disregard of the plaintiff's rights. *Taus v. Loftus* 40 Cal.4th 683, 720
19 (2007).) As set forth in the declarations, Aguirre was motivated by ill will and he lacked reasonable
20 grounds for belief in the truth of their publications.

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22 ///

23 _____
24 ^{5/} *City of Colton v. Singletary* (4th Dist., Div. 2) 2012 WL 1940648 at *13-15.

25 ^{6/} First, *Colton*, a Riverside County case, directly conflicts with *Mann*, which is binding in this
26 District. Second, *Mann* was a unanimous decision whereas *Colton* had a vigorous dissent by Justice
27 Richli in support of the *Mann* rule. Third, with the exception of the *Colton* majority, *Mann* has been
consistently followed in this state since 2004. (See *Colton* dissent). Finally, *Burrill v. Nair* (2013)
217 Cal.App.4th 357, 358-360 squarely disagreed with the *Colton* majority siding with Justice
Richli's dissent and the *Mann* rule.

28 ^{7/} Paragraphs 26,33,62, 99 "Defendant Aguirre's action were malicious and retaliatory", 100
"Further evidence of Aguirre' malice is demonstrated....", 101,

1 Plaintiff notes that in *Young v. CBS* 212 Cal.App.4th 551, 563 (2012), the court held that:

2 "...plaintiff must meet her minimal burden by introducing sufficient facts to establish
3 a prima facie case of actual malice; in other words, to establish a reasonable
4 probability that she can produce clear and convincing evidence showing that the
statements were made with actual malice." (See also, *Ampex v. Cargle* 128
Cal.App.4th 1569, 1578-1579 (2005).)

5 Plaintiff has met this minimal burden.

6 **V. DAMAGES**

7 Aguirre also claims that Plaintiff has failed to plead damages. (Aguirre memo, p. 13.) Aguirre
8 ignores paragraph 113 in Plaintiff's complaint which specifically alleges damages. It also ignores the
9 fact that Plaintiff's complaint includes *defamation per se* cause of action. Moreover, as established
10 in *Hawran v. Hixon* (2012) 209 Cal.App.4th 256 and other cases, defamatory meaning is plain on the
11 face of the document and thus such proof is unnecessary. (*Hawran*, at 291. See, also, *McGarry v.*
12 *University of San Diego* (2007) 154 Cal.App.4th 97, 112.)

13 The damages caused to Mr. Shames' professional reputation are substantial and on-going, as
14 detailed in his declaration. (Shames' Dec, paras. 74-79; See also NOL, Exhibits 13-15.) A poignant
15 example of the damage to Plaintiff's reputation is found in an article written by Aguirre's "media-
16 friend" Don Bauder in July 2008. It counters a UTSanDiego editorial that had criticized Mr. Shames'
17 \$90,000 salary:.

18 "Getting even sillier, the [UT] editorial went on to criticize Shames for making
19 \$90,000 a year over a three-year period. This is peanuts. In big firms, first-year
20 attorneys, right out of law school, can make \$150,000. Shames has been practicing
law for UCAN for 23 years. He says he charges \$350 an hour and that this is half of
21 what SDG&E's outside lawyers charge. SDG&E would not reveal what it pays its
outside attorneys. "Shames could make four times the money if he went to work for
22 the industry," says someone who has studied San Diego utilities for decades, noting
that Semptra paid its chairman \$9.5 million last year and its president \$6.5 million."
(NOL, Exhibit 14.)

23 After Aguirre's smear campaign, Mr. Bauder's attitude had changed dramatically. By 2013,
24 he challenged Mr. Shames' motives in an email:

25 "...there was a symbiotic relationship between SDG&E and you while you were at
26 UCAN. They got huge rate increases and you got intervenor fees on which you took
bonuses that UCAN wants returned. Do you have a response to this?" (NOL, Exhibit
27 15.)

28 ///

1 As a result of the defamation campaign, Plaintiff went from underpaid hero to on-the-take
2 SDG&E collaborator in Mr. Bauder's mind. However, even if the court were to determine that
3 Plaintiff has failed to properly plead malice and/or damages with respect to any cause of action, the
4 court must grant leave to amend solely to conform the pleadings to the evidence adduced in support
5 of Shames' SLAPP opposition. *Nguyen-Lam v. Cao* (2009) 171 Cal.App.4th 858.

6 **VI. IT IS WELL SETTLED THAT THE LITIGATION PRIVILEGE OF CC §47(b) DOES**
7 **NOT APPLY TO PRESS RELEASES OR OTHER REPUBLICATIONS OF**
8 **DEFAMATORY STATEMENTS TO THE GENERAL PUBLIC**

9 Even on Prong Two, Aguirre bears the burden of showing that a privilege or other affirmative
10 defense applies as a matter of law in order to prevail on the defense raised. *Carver v. Bonds* (2005)
11 135 Cal.App.4th 328, 348-349; *Mann, supra*, 120 Cal.App.4th 90, 102-106. Justice O'Rourke's
12 insightful opinion in *Hawran* is highly instructive and closely on point on Prong Two. Justice
13 O'Rourke's observations on the applicability of the litigation privilege of CC § 47(b) in 2012 to the
14 press release cut to the gravamen:

15 "It is questionable whether a press release so widely disseminated to the public
16 at large, as was Sequenom's... press release, can meet the requirements of the
17 official proceeding privilege. ... the court in *Rothman v. Jackson* (1996) 49
18 Cal.App.4th 1134, declined to apply the privilege to press conferences or press
19 releases, explaining that the "'connection or logical relation' which a
20 communication must bear to litigation in order for the privilege to apply, is a
21 *functional* connection,'i.e. the communication must function as a necessary or
22 useful step in the litigation process and must serve its purposes." (*Rothman,*
23 *supra*, 49 Cal.4th at 1146) and cannot be satisfied by communications which only
24 serve interests that happen to parallel or complement a party's interests in the
25 litigation," including vindication in the court of public opinion [AS AGUIRRE
26 HAS ADMITTED TO DOING ON HIS AND PEPPER'S BEHALF] (*Rothman,*
27 *supra*, 49 Cal.App.4th at 1147).... Defendant's evidence... does not demonstrate
28 that... [the] press release furthered some purpose of the SEC investigation
relating to Sequenom's T21 issues, AS OPPOSED TO SUPPLEMENTING
SEQUENOM'S REQUIRED DISCLOSURES TO THE PUBLIC." *Hawran,*
supra, 209 Cal.App.4th 283 [caps added for emphasis].

Moreover, *Rothman, supra*, 49 Cal.4th 1134 is highly instructive:

"Statements to nonparticipants in the action are generally not privileged under
section 47, subdivision (b), and are thus actionable..." *Id.*, at 1141. ... "A LIS
PENDENS IS A FAR CRY FROM A PRESS RELEASE TRUMPETING ONE
PARTY'S VERSION OF A LEGAL DISPUTE, ALBEIT THAT BOTH ARE
ADDRESSED TO THE PUBLIC AT LARGE." *Id.*, at 1142. ... "BUT AN
ATTORNEY WHO WISHES TO LITIGATE HIS CASE IN THE PRESS WILL
DO SO AT HIS OWN RISK." *Id.*, at 1143 relying on (*Bradley v. Hartford* 30
Cal.App.3d 818, 828 (1973) disapproved on other grounds by *Silberg v. Anderson*
50 Cal.3d 205, 217 (1990). [Caps and bolding added for emphasis.]

1 Here, Shames' complaint, to the extent it is based upon Aguirre's statements made in
2 connection with issues under review in various official proceedings, has expressly limited each cause
3 of action only to Aguirre's publications or republications of those statements to the general public and
4 the media. *Hawran, supra*, 209 Cal.App.4th 283-286. Additionally, all of the statements came after
5 litigation ended.

6 The anti-SLAPP statute requires that the statements be: "**made in connection with an issue**
7 **'UNDER REVIEW OR CONSIDERATION' in an official proceeding authorized by law under**
8 **subd(e)(2).** It is undisputed that the Aguirre statements referenced in Plaintiff's complaint were made
9 **after Aguirre's UCAN suit settled.** None of the Aguirre's three statements were related to an on-
10 going official proceeding and were not made in furtherance of the objectives of any proceeding.
11 *Rothman, supra*, 49 Cal.App.4th at 1141.

12 VII. CONCLUSION

13 Plaintiff has demonstrated Aguirre's false representations of fact about Shames' business
14 operations or services to actual or potential customers. Hence, Aguirre's anti-SLAPP motions must
15 be denied as a matter of law under the commercial speech exemption of CCP § 425.17(c).

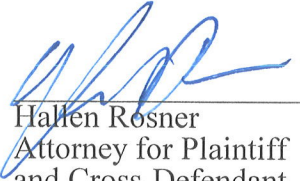
16 Plaintiff has also shown that he will probably prevail on the merits. Finally, Shames has
17 defeated the litigation privilege defense raised by Aguirre and has shown, consistent with *Mann*, that
18 at least one challenged statement constitutes a provably false assertion of fact that naturally harms
19 Plaintiff's business reputation, that those statements are substantially false, were made with no
20 reasonable belief in their truth and with malice.

21
22 Respectfully submitted,

23 Dated: August 23, 2013

ROSNER, BARRY & BABBITT, LLP

24
25 By:


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MICHAEL SHAMES