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SHARON KRAMER

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

BRUCE KELMAN, GLOBALTOX, INC.,	)	Case No.: GIN 044539
	)	
Plaintiffs,	)	DEFENDANT'S NOTICE OF MOTION
	)	AND MOTION TO STRIKE PLAINTIFFS'
v.	)	COMPLAINT PURSUANT TO C.C.P. §
	)	425.16
SHARON KRAMER, and DOES 1 through 20,	)	
inclusive,	)	DATE: September 30, 2005
	)	TIME: 1:30 p.m.
Defendants.	)	DEPT: 28
	)	Initial pleading: 5/16/05
	)	Trial date: Not set
	)	

TO PLAINTIFFS AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on September 30, 2005, at 1:30 p.m., or as soon thereafter as this matter can be heard in Department 28 of the above-entitled court, located at 325 S Melrose Drive, Vista, CA 92083, Defendant Sharon Kramer will move this Court for an order striking all causes of action alleged in Plaintiffs' complaint, and for defendant's attorneys' fees and costs.

1 The motion will be made pursuant to *Code of Civil Procedure* section 425.16 on the
2 grounds that the basis of all Plaintiffs' causes of action were written or oral statements made
3 before a judicial proceeding or were made in connection with an issue under consideration by a
4 judicial body, and further that the statement was made in a public forum in connection with an
5 issue of public interest.

6 The motion will be based upon this notice, memorandum of points and authorities,
7 request for judicial notice, the declaration of Sharon Kramer, all filed and served herewith, and
8 on any oral and documentary evidence that may be presented at the hearing on this motion.
9

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11
12 DATED: July 1, 2005

13 William J. Brown III
14 Attorneys for Defendant
15 SHARON KRAMER
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 This action squarely fits the public policy reason for the enactment of *Code of Civil*
5 *Procedure § 425.16 et seq.* That is, it was filed for one reason, to intimidate Defendant Sharon
6 Kramer, from expressing her opinion about the rigged, biased, pre-bought “research” regarding
7 the dangers of certain molds in the indoor environment, and the causation of real physical injury
8 by exposure to those molds.
9

10 Defendant herself was the victim of mold exposure to penicillium/aspergillus which has
11 been shown to cause health problems. Four years after the exposure, she is still taking antifungal
12 medication to fight mycotic disease. Naturally, this has motivated her to speak out on the dangers
13 of indoor mold.

14 Defendant has expressed her opinions on several different internet sites regarding the
15 health effects of exposures to certain fungi, she has collected numerous sad tales of deeply
16 damaged people whose lives have been permanently altered because of injuries suffered due to
17 mold exposure in schools, homes, and at work. She has also prepared materials for presentation
18 to Congress on that same subject.

19
20 Plaintiffs were paid \$40,000.00 by the Manhattan Institute, a conservative think-tank
21 which beards for the United States Chamber of Commerce, to create a document designed to
22 mislead the public and triers of fact about the the risks of mold exposure in an indoor
23 environment. In an Arizona case, Kilian v. Equity Residential Trust, case #CCV0211573 ,
24 Plaintiff Kelman admitted this fact. In Haynes v. Adair Homes, the Oregon case referred to in the
25

1 complaint, Plaintiff Kelman denied under oath on the stand that his company, GlobalTox, Inc.,
2 had been paid by Manhattan Institute to do a revision of a document prepared for the American
3 College of Occupational and Environmental Medicine (ACOEM). When shown the transcript of
4 his testimony, he recanted his perjurious denial. The jury obviously did not believe his
5 “opinion” testimony that mold exposure cannot cause physical injury after this severe
6 impeachment and his wildly rambling, inconsistent explanation, as it rendered an award to
7 Plaintiffs.

8
9 Defendant Sharon Kramer commented in a press release put on the website, PRWeb,
10 which noted this change in the context of a jury finding a causal connection between indoor mold
11 exposure and neurological injury, but more importantly showed that Kelman’s exaggerated
12 bogus “opinion” was not believed. This verdict is now on appeal. Not only was this release a
13 comment about a judicial proceeding, it was made in a public forum about an issue of public
14 interest.

15 There have been numerous articles on the issue of indoor mold causing injury. (See the
16 declaration of Sharon Kramer) It has been the subject of sharply divergent and strongly held
17 opinion by physicians, toxicologists, and microbiologists, among others. The connection
18 between indoor mold exposure and physical injury is clearly the subject of intense public
19 interest.

20
21 Clearly Defendant meets three separate bases for the application of *Code of Civil*
22 *Procedure § 425.16*.

23 Even more clearly, the within libel action is that type of action meant to be eradicated by
24 the provisions of *Code of Civil Procedure § 425.16*.

1 Finally, Plaintiffs' ham-handed action must be squashed because the so-called
2 defamatory statement is true and, as a matter of law, Plaintiff cannot show that the action has a
3 reasonable probability of success, for it is absolutely meritless.

4 Defendant, Sharon Kramer, moves to strike the cause of action alleged for libel in
5 Plaintiffs' complaint pursuant to *Code of Civil Procedure* § 425.16. The basis of the cause of
6 action was a written statement made about a matter before a judicial proceeding or was made in
7 connection with an issue under consideration by a judicial body, and was a discussion of issues
8 of great public interest in a public forum, or other discussions of public interest.
9

10 11 **II.**

12 **STATUTORY BASIS FOR SPECIAL MOTION TO STRIKE**

13 *Code of Civil Procedure* § 425.16(b)(1) provides that "[a] cause of action against a
14 person arising from any act of that person in furtherance of a person's right of petition or free
15 speech under the United States or California Constitution in connection with a public issue shall
16 be subject to a special motion to strike, unless the court determines that the plaintiff has
17 established that there is a probability that the plaintiff will prevail on the claim."

18 As used in this section, "act in furtherance of a person's right of petition or free speech
19 under the United States or California Constitution in connection with a public issue" includes:
20 (1) any written or oral statement or writing made before a legislative, executive, or judicial
21 proceeding, or any other official proceeding authorized by law; (2) any written or oral statement
22 or writing made in connection with an issue under consideration or review by a legislative,
23 executive, or judicial body, or any other official proceeding authorized by law; (3) any written or
24

1 oral statement or writing made in a place open to the public or in a public forum in connection
2 with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the
3 constitutional right of petition or the constitutional right of free speech in connection with a
4 public issue or an issue of public interest.” *C.C.P. § 425.16(e)*.

5 In addition, “[i]n any action subject to subdivision (b), a prevailing defendant on a special
6 motion to strike shall be entitled to recover his or her attorney’s fees and costs.” *C.C.P. §*
7 *425.16(c)*.

8 9 III

10 PLAINTIFFS’ COMPLAINT SHOULD BE STRICKEN

11 *Code of Civil Procedure § 425.16* was enacted to provide a procedural remedy to resolve
12 SLAPP suits (strategic lawsuits against public participation) expeditiously, and requires the
13 moving party to bear the initial burden of establishing a prima facie showing that the plaintiff’s
14 cause of action arises from the defendant’s free speech or petition activity.

15 In Gallimore v. State Farm Fire & Casualty Ins. Co. (2002) 102 Cal.App.4th 1388, the
16 court stated:

17 In 1992, the Legislature enacted section 425.16 in an effort to curtail
18 lawsuits brought primarily “to chill the valid exercise of ... freedom of speech
19 and petition for redress of grievances” and “to encourage continued participation
20 in matters of public significance.” The section authorizes a special motion to
21 strike “[a] cause of action against a person arising from any act of that person in
22 furtherance of the person’s right of petition or free speech under the United States
23 or California Constitution in connection with a public issue...” The goal is to
24 eliminate meritless or retaliatory litigation at an early stage of the proceedings.
25 The statute directs the trial court to grant the special motion to strike “unless the
court determines that the plaintiff has established that there is a probability that
the plaintiff will prevail on the claim.”

1 The statutory language establishes a two-part test. First, it must be
2 determined whether plaintiff's cause of action arose from acts by defendants in
3 furtherance of defendant's right of petition or free speech in connection with a
4 public issue. "A defendant meets this burden by demonstrating that the *act*
5 *underlying* the plaintiff's cause fits one of the categories spelled out in section
6 425.16, subdivision (e)." Assuming this threshold condition is satisfied, it must
7 then be determined that plaintiff has established a reasonable probability of
8 success on his or her claims at trial. The defendant has the burden on the first
9 issue; the plaintiff has the burden on the second;

10 It is only when the defendant has met that threshold burden and then
11 plaintiff fails to make a prima facie showing of facts, which, if proved at trial,
12 would support a judgment in plaintiff's favor, that the motion to strike must be
13 granted. Whether section 425.16 applies and whether the plaintiff has shown a
14 probability of prevailing are both legal questions which we review independently
15 on appeal.

16 * * *

17 Section 425.16 applies to any cause of action arising from an "act in
18 furtherance of a person's right of petition or free speech under the United States
19 or California Constitution in connection with a public issue." As used in
20 section 425.16, an act in furtherance of a person's right of petition or free
21 speech includes: "(1) any written or oral statement or writing made before a
22 legislative, executive, or judicial proceeding, or any other official proceeding
23 authorized by law; (2) any written or oral statement or writing made in
24 connection with an issue under consideration or review by a legislative,
25 executive, or judicial body, or any other official proceeding authorized by law;
(3) any written or oral statement or writing made in a place open to the public
or in 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."

* * *

The defendant's burden requires that it demonstrate that the plaintiff's
cause of action arose from some act of the defendant that was taken *in furtherance*
of the defendant's constitutional rights of petition or free speech.

See also Navellier v. Sletten (2002) 29 Cal.4th 82, where the Supreme Court stated:

The anti-SLAPP statute's definitional focus is not the form of the
plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to
his or her asserted liability- and whether that activity constitutes protected speech
or petitioning. Evidently, "[t]he Legislature recognized that 'all kinds of claims
could achieve the objective of a SLAPP suit to interfere with and burden the
defendant's exercise of his or her rights.'" "Considering the purpose of the

1 [anti-SLAPP] provision, expressly stated, the nature or form of the action is not
2 what is critical but rather that it is against a person who had exercised certain rights."

(Emphasis added.)

3 IV

4 **DEFENDANT'S P.R.WEB RELEASE IS COVERED UNDER C.C.P. 425.16 AS A**
5 **COMMENT INVOLVING AN ISSUE PENDING BEFORE A JUDICIAL PROCEEDING**

6 Mrs. Kramer's press release regards the proceedings of a judicial action which meets one
7 of the subsets of C.C.P. 425.16, ie: (e)(2). In fact, the case is still pending, since Defendant Adair
8 Homes has appealed the jury decision. In Briggs v. Eden Council for Hope & Opportunity
9 (1999) 19 Cal.4th 1006, the California Supreme Court stated:

10 First, the plain, unambiguous language of section 425.16 encompasses
11 plaintiffs' causes of action against ECHO, without any separate "public issue"
12 requirement. ... As noted, for the statute's purposes, an "act in furtherance of a
13 person's right of petition or free speech under the United States or California
14 Constitution in connection with a public issue" includes: Any written or oral
15 statement or writing made in connection with an issue under consideration or
16 review by a legislative, executive, or judicial body, or any other official proceeding
17 authorized by law..." (section 425.16 subd. (e))

18 * * *

19 If, as plaintiffs contend, the operative language in section 425.16,
20 subdivision (b), referring to a person's exercise of First Amendment rights "in
21 connection with a public issue," were meant to function as a separate proof
22 requirement applicable to motions brought under all four clauses of subdivision
23 (e), no purpose would be served by the Legislature's specification in clauses (3)
24 and (4) that covered issues must be "of public interest."

25 * * *

Third, the Court of Appeal's analysis contravenes the specific legislative
intent expressly stated in section 425.16, as well as that implied by the statute's
legislative history as revealed by legislative history materials in the record.

In 1997, after the Court of Appeal's decision in this case, the Legislature
amended section 425.16, effecting no substantive changes to the anti-SLAPP
scheme, but providing that the statute "shall be construed broadly." (Citations.. .
[an appellate court, whenever possible, should interpret the First Amendment

1 and section 425.16 in a manner “favorable to the exercise of freedom of speech,
2 not its curtailment.”].) Our construction of section 425.16 to protect not just
3 statements or writings on public issues, but all statements or writings made before,
or in connection with issues under consideration by, official bodies and proceedings,
is consistent with that purpose, as well as with the statute’s plain language.

4 Where, as here, legislative intent is expressed in unambiguous terms, we must
5 treat the statutory language as conclusive;...

6 * * *

7 We also believe that the broad construction expressly called for in
subdivision (a) of section 425.16 is desirable from the standpoint of judicial
8 efficiency and that our straining to construe the statute as the Court of Appeal
did would serve Californians poorly. In effectively deeming statements and
9 writings made before or connected with issues being considered by any official
proceedings to have public significance per se, the Legislature afforded trial
10 courts a reasonable, bright-line test applicable to a large class of potential
section 425.16 motions.

11 See also Annette F. v. Sharon S. (2004) 119 Cal.App.4th 1146, where, with regard to a
12 letter to the editor of a specialized newspaper discussing an issue pending before a judicial body,
13 the 4th District Court of Appeal stated:

14
15 The libel action is based on allegations made by Sharon in connection with
16 an issue under consideration by a judicial body. (§ 425.16, subd. (e)(2).) In her letter
published in the Gay and Lesbian Times, Sharon expressed her views on this court's
17 controversial *Sharon S.* decision. Annette's adoption petition was pending in the
superior court at the time, and the writ proceedings concerning the validity of
18 second-parent adoptions were pending in the appellate courts. Sharon's allegations
of domestic violence against Annette were directly at issue in the underlying adoption
19 proceedings because Sharon claimed that her consent to Joshua's adoption had been
obtained by fraud or undue influence arising from Annette's acts of domestic violence
20 against her. Annette's allegations of abuse and/or neglect were also relevant to the
parties' competing claims as to Joshua's best interests. Further, Sharon also raised a
21 discovery issue relating to her allegation of domestic violence against Annette.

22 Because Annette's alleged domestic violence against Sharon and the
23 allegations of abuse and/or neglect by Sharon were at issue in the pending adoption
and writ proceedings, Sharon's statements in the Gay and Lesbian Times were
24 "made in connection with an issue under consideration or review by a . . . judicial
body . . . [newspaper articles reporting on investigative audit were made in connection
25 with issue under consideration in official proceeding]; [newspaper articles describing

1 official hearings and court proceedings were made in connection with issue under
2 consideration by judicial body].) (Emphasis added.)

3 Also, in Traditional Cat Assn. Inc. v. Gilbreath (2004) 118 Cal.App.4th 392, the Fourth
4 District Court of Appeal made clear that “reports of judicial proceedings, such as appeared in the
5 Web site, are an exercise of free speech within the meaning of section 425.16.

6 Clearly Defendant meets the condition of C.C.P. 425.16(e)(2) so that this statute applies
7 to Plaintiffs’ libel action.

8 **V**

9 **DEFENDANT’S P.R. WEB PRESS RELEASE IS COVERED UNDER C.C.P. 425.16 AS A**
10 **STATEMENT MADE IN A PUBLIC FORUM IN CONNECTION WITH AN ISSUE OF**
11 **PUBLIC INTEREST**

12 In Traditional Cat Assn. Inc. v. Gilbreath (supra), a San Diego Superior Court appeal, a
13 website posting regarding a litigation between different factions of the cat breeding community
14 was found to be a posting in a public forum and an issue of public interest:

15 As we have noted, the trial court found that the statements which appeared
16 on the Web site and which give rise to Fineran and TTCA’s defamation cause of
17 action were made in furtherance of the defendants’ free speech and petition rights.
18 This aspect of the trial court’s ruling was plainly correct. Given the controversy
19 surrounding the parties’ dispute and its evident notoriety in the cat breeding
20 community, the Web site statements concerned matters of public interest in the
21 cat breeding community.

22 Here, the towering issue of mold litigation arising out of indoor exposures to recognized
23 dangerous mold-causing injury is nation-wide in scope and white-hot in terms of the intensity of
24 the categorically divergent viewpoints. Mrs. Kramer has repeatedly involved herself in the
25 debate because of her own unpleasant experiences and the desire to prevent other victims from
being cheated by professional mountebanks such as Plaintiff herein.

There is no doubt her press release also meets the criteria of C.C.P. 425.16(e)(3). There is
also no doubt that publication on a website or over the internet meets the definition of a public
forum. See Ampex Corp. v. Cargle (May 5, 2005) A106345, First District, Fourth Division:

1 When Cargle decided in August 2001 to join the conversation about the
2 fortunes of Ampex, he did so by posting messages on the Yahoo! message board
3 for Ampex. The question here is whether such postings were made in a public
4 forum, traditionally defined as “ ‘a place that is open to the public where
5 information is freely exchanged.’ ” (*ComputerXpress, Inc. v. Jackson, supra*, 93
6 Cal.App.4th at p. 1006.) The term “public forum” includes forms of public
7 communication other than those occurring in a physical setting. Thus the
8 electronic communication media may constitute public forums. Web sites that
9 are accessible free of charge to any member of the public where members of the
10 public may read the views and information posted, and post their own opinions,
11 meet the definition of a public forum for purposes of section 425.16. Thus the Yahoo!
12 message board maintained for Ampex was a public forum. (Emphasis added.)

13 The Ampex court also held that Internet postings regarding corporate activity constitutes
14 an issue of public importance.

15 See also *Annette F. v. Sharon S.*, (*supra*):

16 Sharon's statements were also "made in a . . . public forum in connection
17 with an issue of public interest." (§ 425.16, subd. (e)(3).) This court has concluded
18 that a news publication is a "public forum" within the meaning of the anti-SLAPP
19 statute if it is a vehicle for discussion of public issues and it is distributed to a large
20 and interested community. (*Damon v. Ocean Hills Journalism Club* (2000) 85
21 Cal.App.4th 468, 475-478 [102 Cal.Rptr.2d 205] [finding homeowners association
22 newsletter to be a public forum].) By this definition, the Gay and Lesbian Times
23 clearly qualifies as a "public forum." (But see *Weinberg v. Feisel* (2003)
24 110 Cal.App.4th 1122, 1130-1131 & fn. 4 [2 Cal.Rptr.3d 385] [declining to follow
25 *Damon*, applying the First Amendment definition of "public forum" used in
connection with speech on public property, and concluding that most newspapers
are not public forums].) Further, Sharon's letter was written "in connection" with
an issue of public interest that potentially affected a large number of children and
adoptive parents beyond the direct participants. (Emphasis added.)

1 The P.R. posting at issue herein was accessed by 142,000+ members of the public (see
2 declaration of Sharon Kramer, PP. 1, and Exhibits 1, 2) and, as can be seen by that figure and the
3 stories of damage contained in the Congressional packet (Exhibit 18 to the declaration of Sharon
4 Kramer), the issue of causation of injury by indoor mold exposure extends well beyond the direct
5 participants in the Haynes case.

V

**DEFENDANT'S P.R. WEB RELEASE IS COVERED UNDER C.C.P. 425.16 AS OTHER
CONDUCT IN FURTHERANCE OF FREE SPEECH IN CONNECTION WITH A
PUBLIC ISSUE OR AN ISSUE OF PUBLIC INTEREST**

Defendant Sharon Kramer's release also meets C.C.P. 425.16(e)(4) as well. It is in furtherance of her attempt to educate the public on the issue of indoor mold exposure causing physical injury due to mycological disease and, as a corollary to that issue, the misleading opinion of nationally known bought men, like Plaintiff, who have a cottage industry based on the denial of causation of injury from that exposure, to the detriment of truly physically damaged mold victims. See Annette F. v. Sharon S., (supra):

Annette's complaint arises from conduct by Sharon "in furtherance of the exercise of the . . . constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(4).) The *Sharon S.* litigation received widespread public attention because of its potential impact on those who had adopted children through second-parent adoptions, particularly in the gay and lesbian community. Commenting on a matter of public concern is a classic form of speech that lies at the heart of the First Amendment. Sharon had a constitutional right to speak out about the issues in the *Sharon S.* litigation, and in doing so, to explain the reasons for her decision to withdraw her consent to the adoption and to challenge its validity. Thus, Sharon's statements in the Gay and Lesbian Times were acts in furtherance of her constitutional right of free speech in connection with an issue of public interest. We conclude that Annette's complaint is within the scope of the anti-SLAPP statute. (Emphasis added.)

VI

**PLAINTIFFS CAN NEVER PREVAIL ON THEIR LIBEL COMPLAINT, SO THEIR
ACTION MUST BE DISMISSED**

First, GlobalTox, Inc. has no factual or legal basis for bringing this action. There is no statement made in the written release discussing the Haynes suit and Kelman's actions as a bought witness therein, which amount to a statement that exposes GlobalTox to contempt,

1 ridicule, or obloquy in its business. (See written posting on PRWeb. A true and correct copy is
2 attached to the Declaration of Sharon Kramer as Exhibit 1)

3 Second, the statement alleged to be false as it pertains to Bruce Kelman is, in fact, true.

4 Third, Kelman, by the very allegations of the complaint, is a public figure and, as such,
5 must show actual malice on the part of Mrs. Kramer – something which by no stretch of far-
6 fetched linguistic tricks can be accomplished.

7 Fourth, the Civil Code privilege of fair comment protects Defendant’s publication of her
8 take on the events and outcome of the Haynes action at the trial court stage.

9 Fifth, the fair recitation of the proceedings of a judicial matter is also privileged
10 under the Civil Code.

11
12 A. The Statement In The Press Release Is True, So The Action Fails

13
14 In Seeling v. Infinity Broadcasting Corp. (2002) 97 Cal.App.4th 778, the court set forth in
15 evaluating a C.C.P. 425.16 motion to strike what the plaintiff must prove once defendant has
16 shown on a prima facie basis that he or she has met one of the four areas of speech to which that
17 statute pertains:

18 With defendants having established a prima facie case that they were sued
19 after exercising their First Amendment right to speech in a public forum in
20 connection with an issue of public interest, the burden then shifts to plaintiff to
21 establish there is a probability that she will prevail on her claims. To meet this
22 burden, plaintiff must “demonstrate the complaint is legally sufficient and
23 supported by a sufficient prima facie showing of facts to sustain a favorable
24 judgment if the evidence submitted by the plaintiff is credited. “The burden on
25 the plaintiff is similar to the standard used in determining motions for nonsuit,
directed verdict, or summary judgment. To make our determination, we consider
“the pleadings, and supporting and opposing affidavits stating the facts upon which
the liability or defense is based.” (section 425.16, subd. (b)(2).) The motion to
strike should be granted if, as a matter of law, “the properly pleaded facts do not
support a claim for relief. (Emphasis added.)

1 As a matter of law, the complaint fails. The transcript of the Haynes testimony by
2 Plaintiff Kelman shows that he altered his testimony on an issue of credibility and bias when
3 confronted with his prior testimony in the Kilian matter in the State of Arizona. (See portions of
4 both transcripts attached to the Declaration of Sharon Kramer as Exhibits 5 and 8) Any
5 reasonable person would (as the jury in Haynes must have) conclude that Kelman was less than
6 candid in his first answer and only changed his answer when confronted with his prior testimony.
7 Ironically, when he was candid in Kilian, the court sitting as the trier of fact bought his bilious
8 opinion on lack of causation, but when he was not in Haynes, the jury as trier of fact rejected his
9 snake oil view.

10 Even if not exactly accurate, if the gist of the statement is true, there can be no
11 defamatory statement. In Hughes v. Hughes (2004) 122 Cal.App.4th 931 the court stated:

12 “Defamation is effected by either of the following: (a) Libel; (b) Slander.”
13 Civ. Code, § 44.) To constitute libel or slander, the published statement must be
14 false. (Civ. Code, §§ 45, 46.) To establish the defense of truth—i.e., that the
statement is not false—defendants do not have to prove the “literal truth” of the
statement at issue. “[S]o long as the imputation is substantially true so as to justify
the ‘gist or sting’ of the remark” the truth defense is established.

15 The United States Supreme Court said, “The common law of libel takes but
16 one approach to the question of falsity, regardless of the form of the communication.
17 [Citations.] It overlooks minor inaccuracies and concentrates upon substantial truth.
18 As in other jurisdictions, California law permits the defense of substantial truth and
19 would absolve a defendant even if [he or] she cannot ‘justify every word of the
20 alleged defamatory matter; it is sufficient if the substance of the charge be proved
21 true, irrespective of slight inaccuracy in the details.’ [Citations.] . . . Minor
22 inaccuracies do not amount to falsity so long as ‘the substance, the gist, the sting,
23 of the libelous charge be justified.’ [Citations.] Put another way, the statement is
24 not considered false unless it ‘would have a different effect on the mind of the reader
25 from that which the pleaded truth would have produced.’ (Emphasis added.)

See also Seelig v. Infinity Broadcasting Corp. Supra:

There can be no recovery for defamation without a falsehood. Thus, to
state a defamation claim that survives a First Amendment challenge, plaintiff must
present evidence of a statement of fact that is provably false. The dispositive

1 question after the *Milkovich* case is whether a reasonable trier of fact could conclude
2 that the published statements imply a provably false factual assertion.

3 To ascertain whether the statements in question are provably false factual assertions,
4 courts consider the “ ‘totality of the circumstances.’ ” “ ‘First, the language of the
5 statement is examined. For words to be defamatory, they must be understood in a
6 defamatory sense Next, the context in which the statement was made must be
7 considered. . . . This contextual analysis demands that the courts look at the nature
8 and full content of the communication and to the knowledge and understanding
9 of the audience to whom the publication was directed.’ ” This crucial question
10 of whether challenged statements convey the requisite factual imputation is
11 ordinarily a question of law for the court. (Emphasis added.)

12 B. Kelman Is A Public Figure And Must Prove Actual Malice

13 In his Complaint (P. 3, pp. 6 & 7, lines: 3-26) Plaintiff Kelman asserts that he is highly
14 credentialed and an expert in two countries, who has an input in governmental and corporate
15 policy making on a national scale. By his own words, he has acknowledged that he is a public
16 figure. At least he is a limited public figure who still must prove actual malice.

17 Edwards v. Hall (1991) 234 Cal.App.3d 886 states:

18 In defamation actions brought by a public figure, "because unnecessarily
19 protracted litigation would have a chilling effect upon the exercise of First
20 Amendment rights, speedy resolution of cases involving free speech is desirable.
21 Therefore, summary judgment is a favored remedy, and upon such a motion the trial
22 court must determine whether there is a sufficient showing of malice to warrant
23 submission of that issue to the jury." Court of Appeal decisions echo this approving
24 view of summary judgment, though cautioning that summary disposition is not
25 appropriate if a triable issue of fact exists.

[T]he standard of review of First Amendment defamation actions, as in all summary
judgment cases, is whether the record, construed in a light most favorable to the party
against whom the judgment has been entered, demonstrates there are genuine issues
of fact which, if proven, would support a jury verdict for that party. Since, however,
a jury verdict in a defamation case can only be supported when the actual malice is
shown by clear and convincing evidence, rather than by a preponderance of evidence
as in most other cases, [citation], the evidence and all the inferences which can
reasonably be drawn from it must meet the higher standard. (Emphasis added.)

1 The rule "that the clear-and-convincing standard of proof should be taken into
2 account in ruling on summary judgment motions does not denigrate the role of the
3 jury. It by no means authorizes trial on affidavits. Credibility determinations, the
4 weighing of the evidence, and the drawing of legitimate inferences from the facts
5 are jury functions, not those of a judge, whether he is ruling on a motion for
6 summary judgment or for a directed verdict. The evidence of the nonmovant is to
7 be believed, and all justifiable inferences are to be drawn in his favor. [Citation.]
Neither do we suggest that the trial courts should act other than with caution in
granting summary judgment or that the trial court may not deny summary
judgment in a case where there is reason to believe that the better course would
be to proceed to a full trial.

* * *

8 As previously noted, "[w]hen, as here, the plaintiff is a public figure, he cannot
9 recover unless he proves by clear and convincing evidence that the defendant
10 published the defamatory statement with actual malice, i.e., with 'knowledge
11 that it was false or with reckless disregard of whether it was false or not.' Mere
12 negligence does not suffice. Rather the plaintiff must demonstrate that the
author 'in fact entertained serious doubts as to the truth of his publication,' or
acted with a 'high degree of awareness of ... probable falsity,' (Emphasis added.)

13 Neither Kelman nor GlobalTox can prove actual malice on the part of Mrs. Kramer under
14 any circumstances in the factual context of this action. Kelman's own words defeat this claim.

15 In Annette F v. Sharon S, *supra* the court held:

16 Because Annette's libel action is within the scope of the anti-SLAPP statute,
17 she bears the burden of demonstrating "a probability that [she] will prevail on the
18 claim" in order to defeat Sharon's special motion to strike. (§ 425.16, subd. (b)(1).)
In applying this prong of the anti-SLAPP statute to libel claims, courts must take
into account whether the plaintiff is a public figure who must prove actual malice
by clear and convincing evidence.

19 We conclude that Annette is a limited purpose public figure who must prove actual
20 malice by clear and convincing evidence in order to prevail on her libel claim.
21 Annette has failed to establish a probability of meeting this burden with respect to
22 Sharon's statement that Annette was a "convicted perpetrator of domestic violence."
23 Further, Annette has failed to establish a probability of proving the falsehood of
24 Sharon's statement that Annette "made repeated false accusations of child abuse
25 and neglect" against her. Thus, we conclude that the trial court erred in denying
the special motion to strike the complaint. (Emphasis added.)

In *New York Times Co. v. Sullivan* (1964) [376 U.S. 254](#), the United States Supreme Court held that "public officials" may not prevail in an action for libel relating to

1 their official conduct without proof that the allegedly false statement was made
2 with "actual malice." Three years later, the court held that the same rule applies
to private plaintiffs who are "public figures."

3 In *Gertz v. Robert Welch, Inc.* (1974) [418 U.S. 323](#) (*Gertz*), the court recognized
4 two different categories of public figures. The first is the "all purpose" public figure
who has "achiev[ed] such pervasive fame or notoriety that he becomes a public
5 figure for all purposes and in all contexts." The second is the "limited purpose"
6 or "vortex" public figure who "voluntarily injects himself or is drawn into a
particular public controversy and thereby becomes a public figure for a limited
7 range of issues." (*Id.* at 351.) "Unlike the 'all purpose' public figure, the 'limited
purpose' public figure loses certain protection for his reputation only to the extent
8 that the allegedly defamatory communication relates to his role in a public
controversy."

9 Annette clearly has not achieved such "pervasive fame or notoriety" as to be
considered an "all purpose" public figure. (*Gertz, supra*, 418 U.S. at p. 351.) We
10 must therefore decide whether Annette is a "limited purpose" public figure, and
if so, for what limited purposes. "[S]uch a determination is often a close question
11 which can only be resolved by considering the totality of the circumstances which
comprise each individual controversy."

12
13 "To characterize a plaintiff as a limited purpose public figure, the courts must first
find that there was a public controversy."

14 ***

15 The United States Supreme Court has not specifically defined the meaning of a
"public controversy." However, the Court of Appeals for the District of Columbia
16 has defined the term to mean "a dispute that in fact has received public attention
because its ramifications will be felt by persons who are not direct participants."
17 "If the issue was being debated publicly and if it had foreseeable and substantial
ramifications for nonparticipants, it was a public controversy." The *Waldbaum*
18 formulation of a public controversy has been followed in California. By this
definition, this court's *Sharon S.* decision regarding the validity of second-parent
19 adoptions was clearly a matter of public controversy at the time Sharon made her
allegedly defamatory statements.

20 A "limited purpose public figure" must ordinarily "have undertaken some *voluntary*
21 act through which he seeks to influence the resolution of the public issues involved."
Public figures generally "invite attention and comment." Although *Gertz* suggested
22 that it is theoretically possible to become a public figure by being drawn into a
particular "public controversy" without purposeful action, such a characterization
23 is reserved "for an individual who, despite never having *voluntarily* engaged the
public's attention in an attempt to influence the outcome of a public controversy,
24 nonetheless has acquired such public prominence in relation to the controversy as

1 to permit media access sufficient to effectively counter media-published defamatory
2 statements."

3 * * *

4[Earthquake safety expert who participated in public debate on earthquake
5 disaster mitigation was a limited purpose public figure].... Individual who sought
6 publication of two articles about a nature preserve made himself a limited purpose
7 public figure]

8 * * *

9 A public figure suing for libel must therefore establish a probability that she will be
10 able to produce clear and convincing evidence of actual malice. "The clear and
11 convincing standard requires that the evidence be such as to command the unhesitating
12 assent of every reasonable mind. (Emphasis added.)

13 The actual malice standard of *New York Times v. Sullivan, supra*, requires a showing
14 that the allegedly false statement was made "with knowledge that it was false or with
15 reckless disregard of whether it was false or not." The reckless disregard standard
16 requires a "high degree of awareness of . . . probable falsity" "There must be
17 sufficient evidence to permit the conclusion that the defendant in fact entertained
18 serious doubts as to the truth of his publication." Gross or even extreme negligence
19 will not suffice to establish actual malice; the defendant must have made the
20 statement with knowledge that the statement was false or with "actual doubt
21 concerning the truth of the publication.

22 The existence of actual malice turns on the defendant's subjective belief as to the
23 truthfulness of the allegedly false statement. Actual malice may be proved by direct or
24 circumstantial evidence. Factors such as failure to investigate, anger and hostility, and
25 reliance on sources known to be unreliable or biased "may in an appropriate case,
indicate that the publisher himself had serious doubts regarding the truth of his
publication." However, any one of these factors, standing alone, may be insufficient to
prove actual malice or even raise a triable issue of fact. (Emphasis added.)

See also Ampex Corp. v. Gargle, supra:

In the context of an anti-SLAPP suit, courts must consider the pertinent
burden of proof in ascertaining whether the plaintiff has shown a probability of
prevailing. Thus, limited purpose public figures such as respondents who sue for
defamation must establish a probability that they can produce clear and convincing
evidence that the allegedly defamatory statements were made with knowledge of
their falsity or with reckless disregard of their truth or falsity. To meet the clear and
convincing standard, the evidence must be such "as to command the unhesitating
assent of every reasonable mind.' "

1 The reckless disregard test requires a high degree of awareness of the probable
2 falsity of the defendant’s statement. “ ‘There must be sufficient evidence to permit
3 the conclusion that the defendant in fact entertained serious doubts as to the truth
4 of his publication.’ ” This is a subjective test, focused on the defendant’s attitude
5 toward the veracity of the published material, as opposed to his or her attitude
6 toward the plaintiff.

7 Actual malice may be proved by circumstantial or direct evidence. However, we
8 will not infer actual malice solely from evidence of ill will, personal spite or bad
9 motive. (Emphasis added.)

10 C. Defendant’s Fair Comment On The *Haynes* Case Is Privileged Under The Civil Code

11 Defendant Sharon Kramer meets the definition of the common interest privilege under
12 Civil Code 47(c) insofar as her protected audience are those injured victims of toxic mold
13 exposure and advocates for those victims. See Kashian v. Harriman (2002) 98 Cal.App.4th 892:

14 Civil Code section 47, subdivision (c) codifies the common law privilege
15 of common interest, “which protected communications made in good faith on a
16 subject in which the speaker and hearer shared an interest or duty. ...

17 “The word ‘interested’ as used in the statute refers to a more direct and immediate
18 concern. That concern is something other than mere general or idle curiosity of
19 the general readership of newspapers and magazines. One authority explains the
20 statutory interest as follows: (1) The ‘interest’ applies to a defendant who ‘is
21 protecting his own pecuniary or proprietary interest.’ (2) The required ‘relation’
22 between the parties to the communication is a contractual, business or similar
23 relationship, such as ‘between partners, corporate officers and members of
24 incorporated associations’ or between ‘union members [and] union officers....

25 This definition is not exclusive, however, and the cases have taken an “eclectic
approach” toward interpreting the statute.

The lesson we deduce from these cases is that the scope of the privilege under
section 47, subdivision 3 [now subd. (c)] is not capable of precise or categorical
definition, and that its application in a particular case depends upon an evaluation
of the competing interests which defamation law and the privilege are designed to
serve.”

1 D. Defendant's Fair Reporting Of The Outcome Of The *Haynes* Case Is Privileged Under The
2 Civil Code

3 As previously cited in Traditional Cat Assn. v. Gilbreath, supra, and Ampex Corp. v.
4 Cargle, supra, Defendant Sharon Kramer's press release to an internationally accessed website
5 also meets the definition of Civil Code 47(d)(1) which states, in part:

6 By a fair and true report in, or a communication to, a public journal, of (A) a
7 judicial, ... or (D) of anything said in the course thereof, ...

8 See also Gates v. Discovery Communications, Inc. (2004) 34 Cal.4th 679, where the
9 Supreme Court held that the publication of a judicial record even as to a private person, let alone
10 a public figure, was privileged as to a defamation action, and an invasion of privacy action as
11 well.

12
13 Defendants demurred to both causes of action, contending plaintiff was a
14 limited-purpose public figure and could not demonstrate that defendants had made
15 any defamatory statements with malice. Defendants also filed a special motion to
16 strike the invasion of privacy claim under Code of Civil Procedure section 425.16
17 (section 425.16), the anti-SLAPP^[2] statute.

18 Stating that "the gist or sting of [defendants'] report was accurate," the trial court
19 sustained without leave to amend defendants' demurrer to the defamation cause of
20 action. On the ground that "there is no authority which precludes civil liability for
21 truthful publication of private facts regardless of whether the information is
22 newsworthy," however, the court overruled the demurrer to the invasion of privacy
23 cause of action. The court also denied defendants' anti-SLAPP motion as to the
24 invasion of privacy cause of action, concluding that plaintiff had demonstrated a
25 likelihood of prevailing thereon. (See § 425.16, subd. (b)(1).)

21 * * *

22 Plaintiff bases the cause of action on *Briscoe v. Reader's Digest Association, Inc.*
23 (1971) 4 Cal.3d 529 [93 Cal.Rptr. 866] (*Briscoe*), wherein we held that actionable
24 invasion of privacy may occur through the reckless, offensive, injurious publication
25 of true, but not newsworthy, information concerning the criminal past of a
rehabilitated convict. (*Id.* at p. 543.) Defendants argue that *Briscoe* has been
overruled by subsequent high court decisions, at least with respect to information

1 a publisher obtains from public (i.e., not sealed) official records of judicial
2 proceedings. For the following reasons, we agree with defendants. (Emphasis added.)

3 * * *

4 “The court explained that the reporting of information concerning the operation of
5 every part of government, including the judiciary, was of great importance and
6 entitled to strong protection. The court noted that the law of privacy recognized
7 that the interest in privacy fades when the information involved was already in the
8 public record.

9 “The court emphasized that by putting information in an official court record, the
10 state must presume that the public interest was being served. It stated that public
11 records by their very nature are of interest to the public and an important benefit is
12 performed when they are published. The court stated such reporting was important
13 to our form of government and then concluded: ‘In preserving that form of
14 government the First and Fourteenth Amendments command nothing less than
15 that the States may not impose sanctions on the publication of truthful information
16 contained in official court records open to public inspection.’

17 **CONCLUSION**

18 Therefore, because Defendant meets three of the bases for the protection of the anti-
19 SLAPP provision; the within action is a bare-faced SLAPP suit for libel; the alleged libelous
20 statement is true; Plaintiff is a limited public figure and could never show actual malice; and the
21 utterance is privileged under Civil Code 47(c) and (d)(1), this motion under Code of Civil
22 Procedure § 425.16 must be granted and Defendant given her fees and costs.

23 DATED: July 1, 2005

24 _____
25 William J. Brown III
Attorneys for Defendant
SHARON KRAMER