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COUNTY OF RIVERSIDE

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JUN 23 2004

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF RIVERSIDE

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**BY FAX**

BURT WARD,

Plaintiff,

vs.

THE PRESS-ENTERPRISE COMPANY,  
PAIGE AUSTIN, and DOES 1 through 50,

Defendants.

Case No. RIC 403072

~~PROPOSED~~ ORDER GRANTING  
DEFENDANTS' SPECIAL MOTION TO  
STRIKE PLAINTIFF'S COMPLAINT

Judge: Hon. Sharon J. Waters  
Dept. 6

Action Filed: November 12, 2003

**ORIGINAL**

On May 20, 2004, the Special Motion To Strike Plaintiff's Complaint brought by defendants The Press-Enterprise Company and Paige Austin (collectively, "defendants") pursuant to C.C.P. § 425.16, came on regularly for hearing before this Court, the Honorable Sharon J. Waters, Judge, presiding. Kelli L. Sager and Jack Clarke, Jr., appeared on behalf of defendants and Paul Hoffman and Michael Morrison appeared on behalf of plaintiff Burt Ward.

This Court, having read and considered the supporting points and authorities and evidence, having heard the argument of counsel, and good cause appearing therefor, issues the following Order granting the Special Motion To Strike Plaintiff's Complaint.

[PROPOSED] ORDER

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1  
2 **1.**  
3 **PLAINTIFF'S LAWSUIT ARISES FROM DEFENDANTS' CONDUCT IN**  
4 **FURTHERANCE OF THEIR FREE SPEECH RIGHTS AND IS SUBJECT TO A SPECIAL**  
5 **MOTION TO STRIKE UNDER C.C.P. § 425.16**

6 Code of Civil Procedure § 425.16 was enacted by the Legislature as a "carefully crafted  
7 scheme for disposing of SLAPP's quickly and at minimal expense to taxpayers and litigants" to  
8 ensure that meritless lawsuits do not chill constitutionally protected free speech and petitioning  
9 activity and "to encourage continued participation in matters of public significance[.]"<sup>1</sup> Equilon  
10 Enterprises, LLC v. Consumer Cause, Inc., 29 Cal. 4th 53, 60, 66 (2002). Section 425.16 requires a  
11 court to "engage in a two-step process." Id. at 67. First, the court determines whether the  
12 defendant has made "a threshold showing" that defendant's "act or acts of which the plaintiff  
13 complains were taken 'in furtherance of the defendant's right of petition or free speech under the  
14 United States or California Constitution in connection with a public issue,' as defined in the  
15 statute." Id., quoting C.C.P. § 425.16(b)(1) (brackets omitted). Section 425.16(e) expressly defines  
16 an "act in furtherance of free speech" to include "any written or oral statement or writing made in  
17 connection with an issue under consideration or review by ... any ... official proceeding authorized  
18 by law," C.C.P. § 425.16(e)(2), or "any other conduct in furtherance of the exercise of the  
19 constitutional right of free speech in connection with an issue of public interest." C.C.P.  
20 § 425.16(e)(4).

21 Once the defendant makes this threshold showing, the court "then determines whether the  
22 plaintiff has demonstrated a probability of prevailing on the claim," based on the court's analysis of  
23 "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or  
24 defense is based." Equilon, 29 Cal. 4th at 67, citing C.C.P. § 425.16(b)(1).

25 Plaintiff has not disputed that Section 425.16 applies to the single cause of action for libel  
26 alleged in the Complaint, nor could there be any question about the application of the statute.  
27 Plaintiff's claim is based exclusively on statements and alleged implications in defendants' April 2,  
28

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<sup>1</sup> SLAPP is an acronym for Strategic Lawsuits Against Public Participation. Equilon, 29 Cal. 4th at 57 n.1.

1 2003 news article and May 3, 2003 "Clarification." (Complaint at ¶¶ 1a-1c; 8-31; Exhibits A-B to  
2 Complaint.)<sup>2</sup> Defendants' news reports plainly constitute acts in furtherance of their right of free  
3 speech. See, e.g., Braun v. Chronicle Publ. Co., 52 Cal. App. 4th 1036, 1045 (1997) (news  
4 reporting involves the exercise of free speech rights).

5 Moreover, these publications fell within Section 425.16(e)(2) because they reported about  
6 the investigation and action by the Santa Ana Regional Water Quality Control Board into alleged  
7 run-off water pollution, which is a "government proceeding." Braun, 52 Cal. App. 4th at 1043-45  
8 (newspaper articles about state audit were protected written statements "in connection with" official  
9 government proceeding under Section 425.16(e).)

10 Defendants' publications also fell within Section 425.16(e)(4) because they related to an  
11 issue of public interest. See, e.g., Dixon v. Superior Court, 30 Cal. App. 4th 733, 744 (1994)  
12 (defendant who wrote letters to state university criticizing its environmental impact study of  
13 development exercised First Amendment rights in connection with matter of public interest under  
14 § 425.16(e)); Ludwig v. Superior Court, 37 Cal. App. 4th 8, 12, 15 (1995) (developer who

15  
16 <sup>2</sup> Plaintiff asserts that the following six statements are false and defamatory and/or contain  
17 false and defamatory implications, including that plaintiff is a "polluter" and was "ordered" to clean  
up pollution:

18 (1) "DOGS: Fecal bacteria is found in a Norco creek behind land where Burt Ward keeps  
Great Danes";

19 (2) "The Santa Ana Regional Water Quality Control Board on Tuesday directed Burt Ward  
20 to clean up water runoff from his Great Dane Rescue Center after samples taken contained  
unacceptable levels of fecal bacteria";

21 (3) "Water flows from Ward's property into a small creek that washes into the Santa Ana  
22 River, said Milasol Gaslan of the Santa Ana Regional Water Quality Control Board. A sample of  
that runoff taken in February contained at least 40 times the fecal bacteria level acceptable for such  
23 a creek, she said";

24 (4) "On Tuesday, board officials asked Ward to submit plans to fix the problem or face  
possible fines or closure. He offered to install a septic tank, a measure that could solve the  
25 problem, Gaslan said";

26 (5) "The story did not allude to any written document"; and

27 (6) "Agency officials advised Ward ... in a verbal directive that runoff from the kennel  
28 contributed to an abnormally high fecal bacteria count and that steps had to be taken to mitigate that  
condition." (See Complaint at ¶¶ 1a-1c; 9-13; Exhibits A-B to Complaint.)

1 organized protests at city council meeting and orchestrated litigation to block development based  
 2 on environmental impact exercised First Amendment rights in connection with a matter of a public  
 3 interest under § 425.16(e)). Thus, Section 425.16 applies here.

4 **2.**  
 5 **PLAINTIFF FAILED TO ESTABLISH A PROBABILITY OF PREVAILING.**

6 Because defendants demonstrated that plaintiff's cause of action arises from conduct  
 7 protected under Section 425.16, the burden shifted to plaintiff to establish "a probability of  
 8 prevailing on the claim[s]." Equilon, 29 Cal. 4th at 67; C.C.P. § 425.16(b)(1). To satisfy this  
 9 burden, plaintiff had to "meet ... defendant[s'] constitutional defenses," Robertson v. Rodriguez, 36  
 10 Cal. App. 4th 347, 359 (1995), meet defendants' statutory defenses, Braun, 52 Cal. App. 4th at  
 11 1048, and make a sufficient evidentiary showing "to sustain a favorable judgment if [his] evidence  
 12 ... is credited." Navellier v. Sletten, 29 Cal. 4th 82, 88 (2002). Plaintiff failed to meet this burden  
 13 for each of the independent reasons set forth below.

14 **A. Plaintiff Failed To Show That The Statements And Alleged Implications Were False.**

15 Because the publications involved a matter of public interest, which plaintiff conceded, the  
 16 First Amendment places the burden on plaintiff to prove that the statements and alleged  
 17 implications are false. Philadelphia Newspapers v. Hepps, 475 U.S. 767, 776-78 (1986); Miller v.  
 18 Nestande, 192 Cal. App. 3d 191, 198 (1987). Both sides agree that under the First Amendment, a  
 19 statement is not false if it is "substantially true." Masson v. New Yorker Magazine, 501 U.S. 496,  
 20 516-17 (1991). "Minor inaccuracies do not amount to falsity so long as the 'substance, the gist, the  
 21 sting, of the libelous charge be justified.'" Id. If the literal true facts would not place the plaintiff  
 22 in a better light than he is portrayed in the article, the publication is not "false," and, consequently,  
 23 is not actionable. Id. See also Morningstar v. Superior Court, 23 Cal. App. 4th 676, 687 (1994)  
 24 (same).

25 Plaintiff failed to present admissible evidence demonstrating that any of defendants'  
 26 statements or alleged implications is false. The gist of plaintiff's Complaint was his claim that the  
 27 challenged statements falsely implied that he was a "polluter." (Complaint at ¶ 1a.) But plaintiff  
 28 offered no competent evidence that there was no pollution coming from his property. He also

1 admitted that he installed a septic tank after reviewing the Board's lab results and speaking to  
2 Board officials about the suspected pollution coming from his property. (Burt Ward Declaration at  
3 ¶ 5.)

4 Moreover, the declarations from the Board's employees, lab reports, photographs, and draft  
5 "Notice of Violation" letter, and plaintiff's declaration and Complaint, make clear that the pollution  
6 agency did initiate an investigation and enforcement action against plaintiff, and that the agency  
7 concluded that plaintiff was partially responsible for the pollution. Among other things, the  
8 evidence established the following incontrovertible facts:

- 9 • The Santa Ana Regional Water Quality Control Board conducted an inquiry into  
10 allegations of alleged runoff pollution from plaintiff's Great Dane Rescue Center in  
11 response to a neighbor's complaint. (Exhibits 1-3; Exhibit 6 at ¶¶ 3-4.)
- 12 • Agency tests showed fecal bacteria in a ravine immediately adjacent to Plaintiff's  
13 property was 40 times higher than the legal limit for water in the nearby Santa Ana River,  
14 and officials concluded that the dog shelter was at least partly responsible. (Exhibits 1-3;  
15 Exhibit 4 at ¶ 5; Exhibit 6 at ¶¶ 3-4.)
- 16 • Board officials drafted a letter to plaintiff titled "NOTICE OF VIOLATION: FAILURE  
17 TO COMPLY WITH THE CALIFORNIA WATER CODE AND THE FEDERAL  
18 WATER ACT," which stated that tests showed "a significant amount of waste material  
19 could be coming in contact with storm water leaving [plaintiff's] residence" and which  
20 requested plaintiff to submit a plan "to control the discharge of pollutants in runoff from  
21 your residence." (Exhibit 1, Exhibit 4 at ¶ 3.)
- 22 • Plaintiff obtained a copy of the Board's pollution test results on April 1, 2004. (Burt  
23 Ward Declaration at ¶ 5.)
- 24 • A Board official verbally informed plaintiff of the elevated bacteria levels in the adjacent  
25 ravine and "discussed with [plaintiff] his options to avoid any future possible problems  
26 concerning the runoff from the Great Dane Rescue" dog shelter. (Exhibit 4 at ¶ 5)  
27 (emphasis added).

28

1 • Plaintiff admits that he offered to install a septic tank as a solution to the runoff problem.  
2 and that after it was installed, a Board employee inspected the septic tank and concluded  
3 that “the coliform [bacteria] contribution to the runoff from Mr. Ward’s rescue operation  
4 [was] minimized if not eliminated” by the septic tank. (Exhibit 5 at ¶ 5; Exhibit 6 at ¶¶ 4, 6;  
5 Burt Ward Decl. at ¶ 14) (emphasis added). The Board therefore considered the matter  
6 “closed.” (Id.)

7 Based on the admissible evidence presented, it is substantially true that the Board believed  
8 plaintiff was at a minimum partially responsible for the run-off pollution in the ravine next to his  
9 property.

10 Plaintiff also alleged that the statements falsely reported and implied that Board officials  
11 issued a formal written “order” or “directive” commanding him to clean up the pollution.  
12 (Complaint at ¶¶ 1b, 1c, 10, 13b.) But plaintiff did not provide any admissible evidence refuting  
13 that (1) the Board drafted a “Notice of Violation” letter addressed to plaintiff “requesting” that he  
14 clean up the pollution from his dog shelter, (2) Board employees orally discussed with plaintiff  
15 their findings and his “options” for correcting “any future possible problems concerning the run-off  
16 from the Great Dane Rescue,” (3) plaintiff reviewed the pollution test results, (4) plaintiff offered to  
17 connect a septic tank to remedy the problem, and (5) when plaintiff did connect the tank, the Board  
18 inspected it and based on this change, declared the matter “closed.” (Exhibits 1-3; Exhibit 4 at  
19 ¶¶ 3, 5; Exhibit 5 at ¶ 5; Exhibit 6 at ¶¶ 4, 6; Burt Ward Decl. at ¶¶ 5, 14.) In light of this  
20 uncontroverted sequence of events, plaintiff’s claim that he was never “directed” to do anything is a  
21 distinction without a difference. He acted based on the Board’s findings, and the Board closed its  
22 investigation as a direct result of plaintiff’s remedial action.

23 Courts repeatedly have rejected claims of falsity in circumstances like the ones presented  
24 here. See, e.g., Rouch v. Enquirer, 478 N.W.2d 205, 216, 219 (Mich. 1992) (newspaper report that  
25 suspect had been arrested on rape “charges” substantially true, even though suspect was only  
26 booked and never charged; reporters not required to “recapitulate technical legal terminology  
27 employed by courts or law enforcement personnel where popular words might be clearer for the lay  
28 reader”); Conroy v. Spitzer, 70 Cal. App. 4th 1446, 1453 (1999) (granting special motion to strike

1 on substantial truth grounds; holding that report that state legislator had been found "guilty" of  
2 sexual harassment was substantially true, even though legislator only "reprimanded" and not found  
3 "guilty" of crime); Robertson v. Rodriguez, 36 Cal. App. 4th 347, 359 (1995) (granting special  
4 motion to strike on substantial truth grounds; holding that report that city councilman was "fined"  
5 by city for running illegal home business was substantially true, even though councilman agreed to  
6 pay only "civil compromise" to reimburse city for investigation and enforcement costs).

7 Because plaintiff failed to present admissible evidence demonstrating that defendants' news  
8 reports were false, and because the evidence and plaintiff's own admissions demonstrate that the  
9 statements at issue were substantially true, plaintiff has failed to establish a probability of  
10 prevailing on his libel claim.

11 **B. Plaintiff Failed To Show That The Statements And Alleged Implications Were Not  
12 Privileged Reports Of Official Government Proceedings Under Civil Code § 47(d) And  
The First Amendment.**

13 Plaintiff's libel claim also fails because he cannot overcome the protection for substantially  
14 accurate reporting about government proceedings and records provided under the First Amendment  
15 and Civil Code § 47(d). See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495-96 (1975) (First  
16 Amendment protects accurate reports of governmental proceedings); Reeves v. ABC, 719 F.2d 602,  
17 607 (2d Cir. 1983) (same); Braun, 52 Cal. App. 4th at 1036 ("fair and true" newspaper report about  
18 government audit is privileged under Section 47(d)); Hayward v. Watsonville Register, 265 Cal.  
19 App. 2d 255, 259-60 (1968) (statement made by person connected with government proceeding  
20 about "circumstances" of case is privileged "fair and true" report under Section 47(d)).

21 Under California law, preliminary investigations by public agencies are "public official  
22 proceedings" for purposes of Section 47(d). For example, in Braun, 52 Cal. App. 4th at 1051-52,  
23 the court held that a newspaper article about non-public investigation by State Auditor is privileged  
24 "fair and true" report of "official proceeding" under Section 47(d). See also Hagberg v. California  
25 Federal Bank FSB, 32 Cal. 4th 350, 362 (2004) ("official proceeding" privilege is not restricted to  
26 "formal" enforcement proceedings, and includes citizen complaints to government agencies); King  
27 v. Borges, 28 Cal. App. 3d 27, 32-34 (1972) (citizen complaint to state Division of Real Estate is  
28 "official proceeding" under Section 47); Wise v. Thrifty Payless, Inc., 83 Cal. App. 4th 1296, 1303

1 (2000) (malicious report to Department of Motor Vehicles was "official proceeding" under Section  
2 47). The privilege also applies to the media's reports about statements made by parties connected  
3 with official proceedings, Dorsey v. National Enquirer, 973 F.2d 1431, 1437 (9th Cir. 1992), and  
4 the "basis and background" of a government proceeding. Braun, 52 Cal. App. 4th at 1050.

5 A "fair and true" report is not required to be a verbatim republication. The publication  
6 complained of need only be "substantially in accord" with the material relied upon. Handlesman v.  
7 San Francisco Chronicle, 11 Cal. App. 3d 381, 386-387 (1970). "It is sufficient if the substance,  
8 the gist, the sting of the libelous charge [can] be justified." Siipple v. Foundation for Nat'l Progress,  
9 71 Cal. App. 4th 226, 242 (1999). Accord Reader's Digest Ass'n v. Superior Court, 37 Cal. 3d  
10 244, 261-262 n.13 (1984) (Section 47(d) permits "a certain degree of flexibility/literary license in  
11 defining 'fair report.'"). As with application of the substantial truth protection, courts evaluating  
12 the "fair report" requirement have held that statements are "not to be judged by the standard of  
13 accuracy that would be adopted if [they] were ... report[s] of a professional law reporter or a trained  
14 lawyer." Handlesman, 11 Cal. App. 3d at 386-387. Instead, the challenged statements are to be  
15 "measured by the natural and probable effect on the mind of the average reader" and "how those in  
16 the community where the matters were published would reasonably understand them." Id.

17 In Colt v. Freedom Commun., Inc., 109 Cal. App. 4th 1551 (2003), the plaintiffs alleged  
18 that a newspaper inaccurately described an Securities and Exchange Commission proceeding by  
19 using lay terms, such as "pump and dump scenario" and "worthless" stock, and stating that the SEC  
20 "caught" the plaintiff. 109 Cal. App. 4th at 1559-60. The court rejected plaintiffs' challenges as a  
21 mere "parsing of words and sentences," and concluded that the "quarrel with the language of the  
22 articles involves a level of exegesis beyond the ken of the average reader of newspaper articles."  
23 Id. The court concluded that the linguistic differences were not of a "substantial character," and  
24 that the "effect on readers of the articles would have been substantially the same as the effect on  
25 [average] readers of the SEC complaint." Id. at 1560.

26 The same is true here. Whether the Board issued a formal written order, or did plaintiff the  
27 favor of informally advising him of the pollution concern and allowing him to take remedial steps,  
28 would not cause an average reader to come to any different conclusion about these events. The



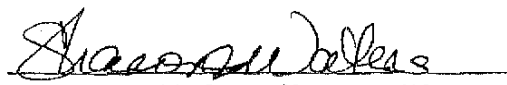
1 Board declarations, lab results, photographs and draft "Notice of Violation" letter establish that the  
 2 agency investigated allegations about plaintiff's property by testing a ravine behind his dog shelter.  
 3 found elevated levels of fecal bacteria in that ravine, believed plaintiff was at least partly  
 4 responsible for the pollution, orally communicated its findings to plaintiff, and considered the  
 5 matter "closed" after Ward installed a septic tank. (Exhibits 1-3; Exhibit 4 at ¶¶ 3, 5; Exhibit 5 at ¶  
 6 5; Exhibit 6 at ¶¶ 3-4, 6; Burt Ward Decl. at ¶¶ 5, 14; see also Exhibit 7 at 23.) The Board's  
 7 investigation and oral communications with plaintiff constituted at minimum an "informal  
 8 enforcement proceeding" under the state guidelines, the gist of which was fairly described in  
 9 defendants' publications. Thus, plaintiff's claim independently is barred under the constitutional  
 10 and California statutory fair report privilege.

11 **3.**  
**CONCLUSION**

12 For all of the reasons set forth above, this Court hereby orders that:

- 13 (1) Defendants The Press-Enterprise Company's and Paige Austin's Special Motion to  
 14 Strike Plaintiff's Complaint is **GRANTED**;  
 15 (2) Plaintiff's Complaint shall be dismissed in its entirety with prejudice;  
 16 (3) Judgment shall be entered in favor of defendants The Press-Enterprise Company and  
 17 Paige Austin and against plaintiff Burt Ward; and  
 18 (4) Plaintiff Burt Ward shall be ordered to pay defendants The Press-Enterprise Company  
 19 and Paige Austin their mandatory attorneys' fees and costs pursuant to C.C.P. § 426.16(c) upon the  
 20 filing of a noticed motion.

21 DATED: June 15, 2004

22   
 23 Honorable Judge Sharon A. Waters  
 24 Judge, Riverside County Superior Court

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