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7 MARC SAYER AND RENEE BRODEN

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF ORANGE

10 GENTLE GIANTS RESCUE AND
11 ADOPTIONS, INC. A California Non-Profit
12 Public Benefit Corporation, BURT WARD,
13 an individual, and TRACY WARD, an
14 Individual,

15 Plaintiffs,

16 v.

17 BARBARA LAID, an Individual, MARC
18 SAYER, an Individual, RENEE BRODEN,
19 an Individual, JAMIE GARCIA, an
20 Individual, and DOES 1 through 100
21 Inclusive,

22 Defendants,

CASE NUMBER: 05 CC 09035

POINTS AND AUTHORITIES IN SUPPORT
OF DEFENDANT'S MOTION TO STRIKE
THE PLAINTIFFS COMPLAINT AS A
STRATEGIC LITIGATION AGAINST
PUBLIC PARTICIPATION SUIT
{C.C.P. § 425.16 et.seq.}

HON: DEREK G. JOHNSON
TIME: 1:45 P.M.
DEPT: C7
DATE: JANUARY 3, 2006

23 Defendants MARC SAYER (hereinafter Mr. Sayer), and RENEE BRODEN (Hereinafter
24 Ms. Broden) severing themselves from all other defendants in this matter, each as individuals by
25 and through their attorney, M. DAVID MEAGHER, Esq., hereby separately move this respected
26 Court for a Special Motion to Strike the Petition for Civil Harassment by Plaintiffs as a SLAPP
27 Suit under the provisions of Code of Civil Procedure § 425.16.

28 Mr. Sayer and Ms. Broden face an unparalleled assault on their constitutionally protected

POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STRIKE COMPLAINT AS A SLAPP

1 free speech rights by Gentle Giants Rescue and Adoption, Inc., Burt Ward and Tracy Ward
2 (Collectively the Plaintiffs), for acts arising out of free speech, on a public issue, in a public
3 forum. In addition to the standard harassment tactic of a SLAPP plaintiff to seek punitive
4 damages, Plaintiffs ask this Court to enter an unconstitutional order to enjoin speech.

5 The issues raised in this matter flow from a public discussion on the internet, related to
6 the care and adoption of large breed dogs. Much of the web-site content which is subject to this
7 suit is opinion, or the republication of material and therefore enjoys immunity under federal law
8 from any action. The proper care and adoption of large breed dogs is a significant public issue
9 that has resulted in many thousands of web-sites for public discussion, as well as a nation-wide
10 network of individuals and organizations who dedicate their time, efforts and resources to
11 ensuring these animals are properly cared for.

12 In true SLAPP fashion, the complaint is painfully vague as to who is alleged to have said
13 what, is vague as to what specifically was alleged to have been said, to whom publication was
14 made, and to what governmental agencies reports were made.

15 I.

16 HISTORY OF THIS MATTER

17 The Plaintiffs operate a dog rescue and adoption center under a conditional use permit in
18 the City of Norco, Riverside County, California. Because an informal group known as ROARS
19 made a complaint to the City of Norco, the Santa Ana Regional Water Quality Control Board
20 (SARWQCB) inspectors toured Plaintiffs operation conducting tests in a ravine immediately
21 adjacent to the property. The inspectors determined that there was an unacceptable level of
22 pollution flowing through the ravine and that Plaintiffs were at least somewhat responsible. These
23 allegations were the subject of a newspaper article in the Press-Enterprise Newspaper.

24 The Newspaper article stated that the Plaintiffs were subject to an investigation, citing as
25 its source the SARWQCB investigation and a finding that in the ravine immediately adjacent their
26 property, the fecal bacteria count was forty (40) times higher than the legal limit, and officials
27 concluded that the Plaintiffs dog shelter was partly responsible. Plaintiff then installed a septic
28 system on the Gentle Giant property and no further action was taken by the SARWQCB.

1 As a consequence of the newspaper article, Plaintiff Burt Ward¹, as an individual filed a
2 libel action against the Newspaper and the reporter. This matter was Riverside Superior Court
3 Case Number RIC 40072. The newspaper and the reporter filed a Special Motion to Strike the
4 Complaint by Ward as a SLAPP. This Special Motion to Strike the Complaint of Ward as a
5 SLAPP was granted. Please see Exhibit "1", a true and correct copy of the ORDER granting the
6 special Motion to Strike as a SLAPP, attached to the Notice of Lodgment and incorporated by
7 reference². Defendants request Judicial Notice of this ORDER.

8 Having failed with the Press-Enterprise suit, Plaintiffs bring this SLAPP suit in hopes of
9 intimidating these defendants and others into not expressing their legitimate concern over the care
10 of the dogs that are taken in by Plaintiff Gentle Giant . The complaint alleges a wide range of
11 causes of action each flowing directly from a report to a governmental agency, followed by an
12 exchange of ideas on a matter of public interest, in a public forum. Therefore, this matter is
13 subject to review under C.C.P. § 425.16 et.seq.

14 II.

15 SCOPE OF THE SLAPP STATUTE

16 The broad scope and purpose of the Anti-SLAPP statute as set forth in C.C.P. 425.16(a), is
17 to promptly and inexpensively dismiss merit-less SLAPP suits that infringe upon our fundamental
18 constitutional rights of petition and free speech.³ In 1997, the Legislature amended Section
19 425.16 to expressly mandate that it "shall be construed broadly." (Stats.1997, ch. 271, §§ 1;
20 amending section 425.16, subd. (a).) Thereafter, the Supreme Court issued its first opinion
21 construing the anti-SLAPP law, directing that courts, "whenever possible, should interpret the
22 First Amendment and section 425.16 in a manner 'favorable to the exercise of freedom of speech,
23 not to its curtailment.'" (*Briggs v. Eden Council for Hope and Opportunity* (1999) 19 Cal.4 th
24 1106, 1119 ("*Briggs*"), quoting *Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1170, 1176.)

25
26 ¹ Burt Ward is a former actor who portrayed "Robin" in the Batman Television series in the 1960's. He
27 routinely uses his status as a celebrity to promote his dog shelter through television and print media.

28 ² Unless otherwise specified, all Exhibits are attached to the Notice of Lodgement, filed and served
concurrently with this Motion.

³ *Wilcox v. Superior Court* (1994) 27 Cal.App. 4h 809, 822.

1 **The True Nature of a SLAPP Action**

2 The SLAPP Plaintiff's intent is not to win the litigation, only to intimidate and harass
3 critics into silence by tying up their resources in costly and time consuming litigation. The instant
4 action is just such an example. On September 7, 2005, Mr. Sayer received a letter by E-mail from
5 attorney Sanford Passman. This letter is attached to NOI, as Exhibit "2" and is incorporated by
6 reference. The letter resorts to a most unprofessional personal style of attack on Mr. Sayer, and
7 concludes with the threat of financial ruin by litigation. This suit is his threat coming to fruition.

8 The Causes of action at issue in this matter arise from petition and free speech. In the
9 general allegations the Plaintiffs allege that the Defendants used the internet to exchange idea
10 (Please see Plaintiffs Complaint at Page 3, paragraph 12, line 23). The allegations in paragraph 12
11 include the statement that complaints were made to governmental agencies. This paragraph is
12 incorporated into each and every cause of action. The Seventh Cause of Action for Injunctive
13 Relief seeks an Order from this Court enjoining speech, unequivocally unconstitutional.

14 Petition related activity and speech are subject to the protection of C.C.P. § 425.16 (e)
15 which states in relevant part: "As used in this section, "act in furtherance of a person's right of
16 petition or free speech under the United States or California Constitution in connection with a
17 public issue" includes:

18 (e)(1) any written or oral statement or writing made before a legislative, executive, or
19 judicial proceeding, or any other official proceeding authorized by law;

20 (e)(2) any written or oral statement or writing made in connection with an issue 'under
21 consideration or review' by a legislative, executive, or judicial body, or any other official
22 proceeding authorized by law;

23 (e)(3) any written or oral statement or writing made in a place open to the public or a
24 public forum in connection with an issue of public interest;

25 (e)(4) or any other conduct in furtherance of the exercise of the constitutional right of
26 petition or the constitutional right of free speech in connection with a public issue or an issue of
27 public interest.

28 The complaint to a governmental agency, and the material on the internet web-site subject

1 to this SLAPP attack provide individuals an opportunity and a public forum to exchange ideas,
2 concerns and ideas related to the care and well being of large breed dogs. This unparalleled attack
3 on Mr. Sayer's and Ms. Broden's First Amendment Rights fall squarely under C.C.P. 425.16
4 (e)(1)(2)(3) and (4), therefore this entire complaint is subject to a Special Motion to Strike as a
5 SLAPP.

6 III

7 PROCEDURAL MECHANICS OF THE SLAPP MOTION

8 C.C.P. § 425.16(b) (1) provides for a burden shifting process in all lawsuits that arise from
9 "any act in furtherance" of free speech and/or petition/litigation-related activity. Mr. Sayer and
10 Ms. Broden have the initial burden of making a "Prima facie case" that the activity upon which the
11 complaint is based is an oral or written statement of a type defined in any one of the threshold
12 criteria set forth in CCP § 425.16(e) (1) through (e)(4), which specify the precise contours of the
13 petition and free speech activity covered by CCP § 425.16 (b) (1) Subdivision (b)(2) provides:
14 "In making its determination, the Court "shall" consider the pleadings, and supporting and
15 opposing affidavits stating the facts upon which the liability or defense is based."

16 Past challenges to the anti-SLAPP law sought to import criteria not in the statute to
17 determine if the SLAPP statute applied. Often SLAPP Plaintiff's claim the Defendant must
18 demonstrate their "act" was a "valid" exercise of the first amendment or right of petition. In
19 response our High Court said: "[T]he only thing the defendant needs to establish to invoke the
20 [potential] protection of the SLAPP statute is that the challenged lawsuit arose from an act
21 on the part of the defendant in furtherance of her right of petition or free speech." *Equilon*
22 *Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 66. {Emphasis Added} There are no
23 exceptions which have been carved out from this clear ruling.

24 Once the defendant establishes that the complaint is based on activity defined in any one
25 of the subdivisions (e)(1) through (e)(4), the burden then shifts to plaintiff under (b)(1) to
26 establish a "probability of prevailing on the merits" by offering Admissible evidence that, if
27 credited, would entitle plaintiff to judgment as a matter of law on each and every cause of action.

28 This means the plaintiff must adduce admissible evidence that, if credited would defeat all

1 affirmative defenses raised in the pleadings⁴. *Wilcox* is the quintessential SLAPP case that clearly
2 and precisely delineates the complex procedural mechanics of the burden shifting process
3 prescribed by subdivision (b)(1) of the Anti-SLAPP statute.

4 If Plaintiffs fail to meet the (b)(1) burden articulated in *Wilcox*, this Complaint shall, be
5 subject to a special motion to strike. "Special motions to strike are akin to early summary
6 judgment motions. **Once a SLAPP motion is filed, no leave to amend may be granted**⁵.

7
8 **IV.**

9 **ARGUMENT AND AUTHORITY**

10 **A) SUBDIVISION (e)(2) PROTECTS ANY COMMUNICATIONS MADE IN CONNECTION WITH AN ISSUE UNDER REVIEW BY A GOVERNMENTAL AGENCY**

11 (e)(2)... ANY written or oral statement or writing made IN CONNECTION WITH
12 an issue 'UNDER CONSIDERATION OR REVIEW' by a legislative, executive, or
judicial body, or any other official proceeding authorized by law; ...

13 **B) SUBDIVISION (e)(3) PROTECTS ANY SPEECH MADE IN A PUBLIC FORUM IN CONNECTION WITH AN ISSUE OF PUBLIC INTEREST**

14 (3) any written or oral statement or writing made in a place open to the public or a public
15 forum in connection with an issue of public interest;

16 **C) SUBDIVISION (e)(4) PROTECTS ANY CONDUCT IN FURTHERANCE OF THE RIGHT OF PETITION, OR FREE SPEECH**

17 (e)(4) . . .or any other conduct in furtherance of the exercise of the constitutional
18 right of petition or the constitutional right of free speech in connection with a public
19 issue or an issue of public interest

20 **D) AN INJUNCTION WILL NOT BE GRANTED WHERE THE RESTRAINT INTERFERES WITH THE FREEDOM OF SPEECH**

21 "The California Constitution gives "[e]very person" an affirmative right to free speech
22 (Cal. Const., art. I, § 2, subd. (a)). Accordingly, we have held that our free speech clause
23 is "more definitive and inclusive than the First Amendment" (*Wilson v. Superior Court* (1975))"

24
25 ⁴. *Wilcox, supra*, 27 Cal.App.4th, at 823-824.

26 ⁵. *Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, holding "[w]e believe that granting leave to
27 amend the complaint after the court finds the defendant had established its prima facie case would be jamming a
28 procedural square peg into a statutory round hole. Also see *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* 122 Cal.App.4th 1049

1 **E) FEDERAL PREEMPTION AND FREE SPEECH:**

2 **47 U.S.C. § 230 (e)(3): "No cause of action may be brought and no liability may be**
3 **imposed under any State or local law that is inconsistent with this section."**

4 **SLAPP as it applies to Mr. Sayer:**

5 The thrust of the allegations against Mr. Sayer are that he owns and operates an internet
6 web-site known as "ROARS." In the Plaintiffs complaint, at Page 4, paragraph 13, the Plaintiffs
7 allege that individuals who had believed that they had a negative experience with Plaintiffs could
8 go to the web-site "ROARS" and post their own experiences.

9 The essence of this allegation is that Defendant Sayer is involved in ROARS and therefore
10 by the fact that he permits, hosts or otherwise contributes to the web-site, he defamed the
11 Plaintiffs with negative information. All seven causes of action incorporate paragraphs 1 through
12 23, alleging that Mr. Sayer operated the web-site known as ROARS, he made a complaint to a
13 governmental agency, and through his comments and hosting of this web-site he has defamed,
14 caused a trade libel, intentionally interfered with Plaintiffs business, and caused them grievous
15 emotional harm through public humiliation⁶

16 Even if all of the internet comments were by the defendants, "It is well settled that a
17 defendant is not required in an action of libel to justify every word of the alleged defamatory
18 matter; it is sufficient if the substance, the gist, the sting of the libelous charge be justified, and if
19 the gist of the charge be established by the evidence the defendant has made his case." (*Kurata v.*
20 *Los Angeles News Pub. Co., supra*, 4 Cal.App.2d 224, 227.) "

21 1) (e)(2) . . . any written or oral statement or writing made In connection with an issue 'under
22 consideration or review' by a legislative, executive, or judicial body, or any other official
23 proceeding authorized by law; ...

24 The complaint alleges that complaints by Defendants led to the investigation by
25 SARWQCB are false and libelous. However, as demonstrated by the granting of the Motion to
26

27 ⁶ It is disingenuous for Plaintiff Burt Ward to claim that he has been subject to "humiliation" based on
28 individuals posting comments about him on the internet. In 1995, Mr. Ward published an autobiography entitled
"Boy Wonder: My Life in Tights," in which he graphically regales the reader with his "thousands" of sexual
conquests, including sex with at least two underage girls.

1 Strike Mr. Ward's complaint against the Press-Enterprise as a SLAPP on this very issue, it is
2 substantially true (NOL Exhibit "1"). In *Colt v. Freedom Communications, Inc.* (2003 4th Dist.)
3 109 Cal.App.4th 1551 The court was confronted with a similar case. The Plaintiff alleged that
4 published reports were not accurate, therefore not privileged. The Court ruled: "It is not necessary
5 to go through each of plaintiffs' parsing of words and sentences in the articles published by
6 defendants to demonstrate that their quarrel with the language of the articles involves a level of
7 exegesis beyond the ken of the average reader of newspaper articles. The articles fairly describe
8 the gist of plaintiffs' misconduct. As noted, the privilege applies unless the differences between
9 the facts and the manner in which they are described are "of such a 'substantial character' that
10 [they] 'produce a different effect' on the reader . . ."

11 In the instant case, Gentle Giant was investigated by a governmental agency, and prior to a
12 formal finding, Plaintiffs undertook remedial steps to address the concerns of the agency.
13 Therefore the commentary is substantially true. Please see NOL Exhibit "3" the letter from the
14 Water Quality Board to Mr. Ward.

15 Subsections (e)(3) and (4) provide SLAPP protection to issues of public discourse.
16 Defendants concede Mr. Sayer is a participant in the public discussion and in the public forum
17 known as the world wide web. Plaintiffs allege inter alia that Mr. Sayer posts the comments of
18 others, as well as his own commentary on the web-site, which the Plaintiffs allege are defamatory.
19 However, Plaintiffs make no attempt to identify the precise language they claim is false, or who
20 the actual speaker of these alleged statements are. Rather they rely on broad brush allegations
21 which if read in their proper context reveals that Mr. Sayer and Ms. Broden may have republished
22 unflattering commentary about the Plaintiffs.

23 The safety and care of these dogs are a public issue. In *Damon v. Ocean Hills Journalism*
24 *Club*, (1999) 85 Cal.App.4th 468, 479, it was held that "The definition of 'public interest' within
25 the meaning of the anti-SLAPP statute has been broadly construed to include not only
26 governmental matters, but also private conduct that impacts a broad segment of society and/or that
27 affects a community in a manner similar to that of a government entity." (Also see *Sipple v.*
28 *Foundation for National Progress* (1999) 71 Cal.App.4th 226, 238-240 [statements that a

1 nationally-known political consultant had physically and verbally abused his former wives
2 determined to be a matter of public interest]; cf. *Nicosia v. Rooy* (N.D.Cal.1999) 72 F.Supp.2d
3 1093, 1110 [critical statements about biographer of Jack Kerouac deemed to involve a matter of
4 public interest].)

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

14 In this matter, public interest is served by a discussion as to whether or not the animals in
15 the care of Plaintiffs are in fact properly cared for, and not creating an environmental hazard. This
16 is particularly true in light of the fact that the Complaint repeatedly highlights the status of
17 Plaintiff Gentle Giant as a Non-Profit Public Benefit Corporation, under IRS Code 501(3)(c)
18 which permits tax deductible donations to be made to the company. Gentle Giant actively solicits
19 donations on their web-site.

20 **Public Forum:**

21 The issue of public interest and public forum were addressed in *ComputerXpress, Inc. v.*
22 *Jackson* (2001) 93 Cal.App.4th 993 [Fourth Dist., Div. Two]. In *ComputerXpress* the Court
23 reviewed prior cases which have addressed public interest and public forum. As to the issue of
24 Public Forum, the Court, quoting *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th
25 468 , 475. adopted the rule that: "Under its plain meaning, a public forum is not limited to a
26 physical setting, but also includes other forms of public communication." (*Id.*, at p. 476.) Thus,
27 the court in *Damon v. Ocean Hills Journalism Club* held that a homeowners' association
28 newsletter was a public forum for purposes of section 425.16, because it was "a vehicle for open

1 discussion of public issues and was widely distributed to all interested parties" (*Id.*, at p.
2 478.) Here the interested parties extends to nationwide discussion groups and public forums (See
3 Plaintiffs Complaint at page 3, paragraph 12) via the internet. Well beyond a small number of
4 homeowners described in *Damon*.

5 Apropos to this case, the court in *Hatch v. Superior Court* (2000) 80 Cal.App.4th 170
6 noted that Internet communications have been described as "classical forum communications." (*Id.*
7 ., at p. 201, fn. omitted.) [93 Cal.App.4th 1007].

8 Mr. Sayer and Ms. Broden are participants in an ongoing and spirited dialog with others
9 who are concerned about the well-being of animals, on a web-site which is free and open to
10 anyone. Availability to the Public and an Exchange of Information is a "Public Forum", the Court
11 found that it is enough to satisfy the criteria for a public forum set forth in *Damon v. Ocean Hills*
12 *Journalism Club*, *supra*, 85 Cal.App.4th 468: by interacting with "a place that is open to the
13 public where information is freely exchanged." (*Id.*, at p. 475.)

14 **Public Interest:**

15 The remaining issue is whether defendants' statement on the Web site was made "in
16 connection with an issue of public interest." (§ 425.16, subd. (e)(3).)

17 *Global Telemedia International, Inc. v. Doe*, *supra*, 132 F.Supp.2d 1261 is a case with
18 closely analogous facts. The plaintiff, a publicly traded company, sued the defendants inter alia for
19 interference with prospective economic advantage based on messages the defendants posted on
20 the Raging Bull bulletin boards (a publically accessible web-site). The messages criticized the
21 plaintiff and its management.

22 The court held the messages concerned a public issue for purposes of section 425.16.
23 Here, like in *Global Telemedia*, there is a significant number of the general public who care
24 deeply about the well-being of these large breed dogs. There are formal and informal groups on a
25 National as well as International level. (Please see Declaration of Mr. Sayer, NOL Exhibit "4",
26 and the Declaration of Ms. Broden, NOL Exhibit "5.") These groups constitute an interested
27 community within the meaning of (e)(3) and (4).

28 Plaintiffs allege that Mr. Sayer has accused them of violating federal laws related to the

1 tax exempt status. Mr. Sayer does not accuse them of any violations of law, he merely posted the
2 public tax record of this tax exempt corporation. Noting that the projected budget calls for a
3 significant salary to be paid to Ms. Ward. He then questions if the expenditures are made in the
4 best interest of the animals. (Please see Mr. Sayer's Declaration, NOL Exhibit "4.") Dog
5 breeders, rescuers, and the adopting public have a legitimate interest in where donations they are
6 making to this non-profit corporation are in fact being spent. Mr. Sayer identifies that
7 approximately 1/3 of income of Gentle Giants was devoted to the salary and taxes of Plaintiff
8 Tracy Ward (Please see Mr. Sayer's Declaration, NOL Exhibit "4.")

9 The Plaintiffs Complaint is a classic example of attempting to mask a SLAPP suit by
10 alleging extreme misconduct, and weaving protected activity into the allegations of misconduct.
11 "Furthermore, a plaintiff cannot frustrate the purposes of the SLAPP statute through a pleading
12 tactic of combining allegations of protected and nonprotected activity under the label of one
13 "cause of action." *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1852 [16
14 Cal.Rptr.2d 458].

15 **SLAPP as it applies to Ms. Broden:**

16 As with Mr. Sayer, Plaintiffs fail to provide a single specific statement alleged to be
17 attributed to Ms. Broden. The only allegation made with respect to Ms. Broden is contained in
18 Plaintiffs Complaint at page 6, paragraph 21. Plaintiffs allege she republished comments from a
19 third party source on a message board called Danesonline.com that accused Plaintiffs of
20 misconduct. This is a significant example of the intended harassment by Plaintiffs. The alleged
21 web-site commentary was not by Ms. Broden, but by a third party. Please see Declaration of Ms.
22 Broden at NOL Exhibit "5." Republished material is privileged under 47 U.S.C. § 230.

23 As shown above, comments related to the care and well being of large breed dogs is a
24 public issue. The internet is a public forum, therefore, the complaint is subject to review under
25 C.C.P. § 425.16(e)(3) and (4). Plaintiffs also incorporate Ms. Broden into the allegation that she
26 complained to a governmental agency, as such it is subject to review under C.C.P. § 425.16(2).

27 **Federal Preemption and Free Speech:**

28 The Communications Decency Act was enacted by Congress in 1996. It is located at 47

1 U.S.C. § 230. The statute includes provisions creating immunity for certain communications on
2 the Internet. Section 230(e)(3) provides in relevant part: "No cause of action may be brought and
3 no liability may be imposed under any State or local law that is inconsistent with this section."

4 One such protected internet communication is addressed in Section 230(f)(3), which
5 defines "information content provider" as "any person or entity that is responsible, in whole or in
6 part, for the creation or development of information provided through the Internet or any other
7 interactive computer server. In Plaintiffs Complaint at Page 4, paragraph 15, Page 5, paragraphs
8 19 and 20, Page 6, paragraphs 21 and 22, the Plaintiffs acknowledge that the web-sites are for
9 third party interactive postings.

10 By the plain language of § 230, there is a federal preemption immunity to any cause of
11 action that would make service providers liable for information originating with a third-party user
12 of the service." (*Zeran v. American Online* (4th Cir.1997) 129 F.3d 327, 330, cited with approval
13 in *Kathleen R. v. City of Livermore* (2001) 87 Cal.App.4 th 684, 692.) § 230(c)(1) provides
14 immunity to users, as well as providers, of interactive computer services.

15 In *Barrett v. Clark*, 2001 WL 881259, 2001 Extra LEXIS 46, the Court was confronted
16 with a matter similar in many respects to this case. The Plaintiffs filed a complaint against a
17 number of defendants they perceived as detractors. One of the defendants was a woman named
18 Rosenthal. The allegations were (1) libel, (2) libel per se, and (3) conspiracy related to an article
19 written by defendant Bolin. At issue was the Defendants right to republish information on the
20 internet. After a comprehensive analysis of the impact of §230, the Court said "It is undisputed
21 that Rosenthal did not "create" or "develop" the information in defendant Bolen's piece. Thus, as a
22 user of an interactive computer service, that is, a newsgroup, Rosenthal is not the publisher or
23 speaker of Bolen's piece. Thus, she cannot be civilly liable for posting it on the Internet. She is
24 immune." concluding the SLAPP must be granted as to all causes of action.

25 It cannot be reasonably disputed that Mr. Sayer and Ms. Broden provide internet
26 availability to third parties to post their comments and experiences with Plaintiffs. The Plaintiffs
27 allege this in their Complaint at Pages 4, 5, and 6. Therefore, republishing others comments are
28 immune from suit based on Federal Preemption. Like Rosenthal in *Barrett* neither Mr. Sayer nor

1 Ms. Broden can be civilly liable for posting republished information on the Internet. Each of these
2 defendants enjoys absolute immunity.

3 **Restraint on Free Speech of is Unconstitutional:**

4 In the seventh Cause of Action, Plaintiffs seek an injunction of speech. At Page 12, in
5 paragraph 59, they expressly incorporate those allegations contained in paragraph 1 through 23,
6 subjecting this matter to review as a SLAPP. A review of the Seventh Cause of Action and its
7 associated Prayer for Relief (located in Plaintiffs Complaint at Page 14) shows Plaintiffs asking
8 this Court to enjoin the Defendants from "publishing, disseminating, or otherwise providing to
9 any person or entity, in any medium, any information about the Plaintiffs, or each of them."

10 This request is unconstitutional on its face. Our state Constitution prohibits prior
11 restraints on speech: "Every person may freely speak, write and publish his or her sentiments on
12 all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty
13 of speech or press." (Cal. Const., art. I, § 2, subd. (a); and see *Dailey v. Superior Court* (1896) 112
14 Cal. 94, 100.) This provision is "[a] protective provision more definitive and inclusive than the
15 First Amendment." (*Wilson v. Superior Court* (1975) 13 Cal.3d 652 , 658.) **Our Supreme Court**
16 **has stated that the "publication of information about a person, 'without regard to truth,**
17 **falsity, or defamatory character of that information,' [is] not subject to prior restraint."** (*Id.*
18 at p. 659; and see *Gilbert v. National Enquirer, Inc.* (1996) 43 Cal.App.4th 1135 , 1148.)

19 In *Rosicrucion Fellowship v. The Rosicrucion Fellowship Non-Sectarian Church* 39 Cal.
20 2d 121 (1952) the State Supreme Court ruled that Injunction is not a relief where first amendment
21 free speech is at issue. The High Court quoted the United States Supreme Court in *Near v.*
22 *Minnesota ex rel* 283 US 697. "Temporary restraining orders and permanent injunctions- i.e. ,
23 court orders that actually forbid speech activities-are classic examples of prior restraints."
24 (*Alexander v. United States* , *supra* , 509 U.S. at p. 550.) Prior restraints on pure speech are highly
25 disfavored and presumptively a violation of the First Amendment. (*Hurvitz v. Hoefflin* (2000) 84
26 Cal.App.4th 1232 , 1241.) This is true even when the speech is expected to be of the type that is
27 not constitutionally protected. (See *Near v. Minnesota* (1931) 283 U.S. 697, 704-705 [rejecting
28 restraint on publication of any periodical containing malicious, scandalous and defamatory

1 matter]; and see *New York Times*, *supra*, 403 U.S. at pp. 718-726 [national security interest in
2 suppressing classified information in Pentagon Papers did not outrank First Amendment right of
3 press to publish classified information].)

4 The concept that speech may be enjoined is inconsistent with constitutional guarantees and
5 raises the specter of censorship in a most pernicious form.

6 This Court can do no less than the Court in *Barrett* and grant Defendants' Special Motion
7 To Strike As A SLAPP this frivolous petition. This matter is one which falls squarely within the
8 contours of the SLAPP statute, and therefore this matter must be struck as a SLAPP suit.

9 **Plaintiffs Cannot Establish a Probability of Prevailing on their Claims**

10 **I. DEFENDANTS HAVE MET THEIR BURDEN OF PROOF THAT THIS**
11 **COMPLAINT IS SUBJECT TO REVIEW UNDER C.C.P. § 425.16**

12 By the showing made above, Mr. Sayer and Ms. Broden have satisfied their burden to
13 demonstrate this matter is subject to a Special Motion to Strike as a SLAPP under C.C.P. §
14 425.16(e)(2), (3) and (e)(4). Now the burden shifts to Plaintiffs to establish a probability of
15 prevailing on his claim. The showing must be made by competent and admissible evidence.
16 *Wilcox v. Superior Court*, *supra*, 27 Cal.App.4 th at 820, 830; *Evans v. Unkow* (1995) 38
17 Cal.App.4th 1490, 1497-98; *Ludwig v. Superior Court* (1995) 37 Cal.App.4 th 8, 15-16, 21, fn.
18 16, 25.) "The test is similar to the standard applied to evidentiary showings in summary judgment
19 motions pursuant to Code of Civil Procedure § 437(c) and requires that the showing be made by
20 competent admissible evidence within the personal knowledge of the declarant." (*Church of*
21 *Scientology v. Wollersheim*, *supra*, 42 Cal.App.4 th at 654.)

22 In this matter, for Plaintiffs to prevail, they must establish that:

23 No complaint was made to a governmental agency, and that the web-site is not
24 constitutionally protected free speech. This requires admissible evidence, which negates all
25 affirmative defenses. Our Supreme Court recognized that "[e]rroneous statement is inevitable in
26 free debate, and . . . must be protected if the freedoms of expression are to have the "breathing
27 space" that they "need . . . to survive." [Citation.]" (*Reader's Digest Assn. v. Superior Court*,
28 *supra*, 37 Cal.3d at p. 261, quoting from *New York Times Co. v. Sullivan*, *supra*, 376 U.S. 254.)

1 News articles, in other words, need only convey the substance of the proceedings on which they
2 report, as measured by their impact on the average reader. [Citations.]" (*Crane v. Arizona*
3 *Republic*, *supra*, 972 F.2d at p. 1519.)

4 This matter is one which falls squarely within the contours of the SLAPP statute. As a
5 matter of law this Court must make a finding that this matter is a SLAPP as defined by C.C.P. §
6 425.16, and that Plaintiffs cannot meet their burden of proof.

7 **CONCLUSION**

8 This SLAPP complaint was filed for the purpose of harassment. The goal was to punish
9 the Defendants and serve as an example to others that exercising their right of free speech will
10 result in the Plaintiffs filing suit. Mr. Sayer and Ms. Broden have met the initial threshold burden
11 under subdivision (b)(1) in that the acts upon which this petition is based, arise out of petition and
12 free speech related activity. Therefore these statements are covered in CCP § 425.16 subdivision
13 (e)(2), (3) and (4).

14 Finally, Defendants respectfully requests this court issue a written statement of decision
15 pursuant to CCP § 632 specifically delineating the legal and evidentiary support for this court's
16 ruling on the issues of whether she has established a prima facie case under subdivision (e) and
17 whether Plaintiff has met the burden of establishing a probability of prevailing on the merits of the
18 claim within the meaning of subdivision (b) of CCP § 425.16.

19 DATED: October 20, 2005

20
21 Respectfully Submitted:
22 **LAW OFFICES OF M. DAVID MEAGHER**

23 

24 By: →

25 **M. DAVID MEAGHER, ESQ.**
26 Attorney for Defendants and Moving Parties
27 MARC SAYER and RENEE BRODEN
28

1 M. DAVID MEAGHER, ESQ. SBN 171151
2 LAW OFFICES OF M. DAVID MEAGHER
3 333 S. JUNIPER STREET, SUITE 217
4 ESCONDIDO, CA 92025
5 (760) 743-2200

6 ATTORNEYS FOR DEFENDANTS
7 MARC SAYER AND RENEE BRODEN

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF ORANGE

10 GENTLE GIANTS RESCUE AND
11 ADOPTIONS, INC. A California Non-Profit
12 Public Benefit Corporation, BURT WARD,
13 an individual, and TRACY WARD, an
14 Individual,

15 Plaintiffs,

16 v.

17 BARBARA LAIRD, an Individual, MARC
18 SAYER, an Individual, RENEE BRODEN,
19 an Individual, JAMIE GARCIA, an
20 Individual, and DOES 1 through 100
21 Inclusive,

22 Defendants,

CASE NUMBER: 05 CC 09035

DEFENDANTS MARC SAYER AND
RENEE BRODEN'S NOTICE OF MOTION
AND MOTION TO STRIKE THE
PLAINTIFFS COMPLAINT AS A
STRATEGIC LITIGATION AGAINST
PUBLIC PARTICIPATION SUIT
{C.C.P. § 425.16 et.seq.}

HON: DEREK G. JOHNSON
TIME: 1:45 P.M.
DEPT. C7
DATE: JANUARY 3, 2006

23
24 DEFENDANTS MARC SAYER AND RENEE BRODEN, by and through their attorney,
25 M. DAVID MEAGHER, Esq., hereby gives the following NOTICE:

26 TO: Plaintiffs and their ATTORNEYS OF RECORD:

27 PLEASE TAKE NOTICE that on JANUARY 3, 2006 at 1:45 P.M. in Department C7 in
28 the above titled Court, located at 700 West Main St. Santa Ana, California, Defendants will

NOTICE OF MOTION AND MOTION TO STRIKE UNVERIFIED COMPLAINT AS A SLAPP

1 will move and does move This Respected Court for an Order Striking the Unverified Cross-
2 Complaint of GENTLE GIANTS RESCUE AND ADOPTIONS, INC. A California Non-Profit
3 Public Benefit Corporation, BURT WARD, an individual, and TRACY WARD, an Individual,
4 as a SLAPP under C.C.P. § 425.16.

5 This motion will be brought on the grounds that this action is a SLAPP suit as defined by
6 C.C.P. § 425.16, and Plaintiffs cannot as a matter of law prevail on this action.

7 This motion will be based upon this Notice of Motion and Motion, the Declarations of M.
8 David Meagher, Esq., MARC SAYER, and RENEE BRODEN, in support hereof, the POINTS
9 and AUTHORITIES in support of this motion, Notice of Lodgment with Exhibits 1 - 9, Request
10 for Judicial Notice, and any other documentary or oral evidence which may be presented at the
11 hearing of this motion.

12 ///

13 DATED: October 11, 2005

14
15 **Respectfully Submitted,**
LAW OFFICES OF M. DAVID MEAGHER

16
17 By: _____
18 **M. DAVID MEAGHER, ESQ.**
Attorneys for Defendants
19 **MARC SAYER AND RENEE BRODEN**
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5 (760) 743-2200

6 ATTORNEYS FOR DEFENDANTS
7 MARC SAYER AND RENEE BRODEN

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF ORANGE

10 GENTLE GIANTS RESCUE AND
11 ADOPTIONS, INC. A California Non-Profit
12 Public Benefit Corporation, BURT WARD,
13 an individual, and TRACY WARD, an
14 Individual,

15 Plaintiffs,

16 v.

17 BARBARA LAIRD, an Individual, MARC
18 SAYER, an Individual, RENEE BRODEN,
19 an Individual, JAMIE GARCIA, an
20 Individual, and DOES 1 through 100
21 Inclusive,

22 Defendants,

CASE NUMBER: 05 CC 09035

DEFENDANTS MARC SAYER AND
RENEE BRODEN'S REQUEST FOR
JUDICIAL NOTICE OF EXHIBITS 1, 2,
AND 5.
{EVI.C. §§ 451, 452}
{C.C.P. § 425.16 et.seq.}

HON: DEREK G. JOHNSON
TIME: 1:45 P.M.
DEPT: C7
DATE: JANUARY 3, 2006

23 Defendants MARC SAYER and RENEE BRODEN by and through their attorney, M.
24 DAVID MEAGHER, Esq., hereby respectfully request this Court take Judicial Notice of those
25 Exhibits described below, attached to Defendants' NOTICE OF LODGMENT, filed and served
26 concurrently with this request.

27 **Evi. C. § 451.** Judicial notice shall be taken of the following: (a) The decisional,
28 constitutional, and public statutory law of this state and of the United States and the provisions of

1 any charter described in Section 3, 4, or 5 of Article XI of the California Constitution. (b) Any
2 matter made a subject of judicial notice by Section 11343.6, 11344.6, or 18576 of the
3 Government Code or by Section 1507 of Title 44 of the United States Code. (c) Rules of
4 professional conduct for members of the bar adopted pursuant to Section 6076 of the Business
5 and Professions Code and rules of practice and procedure for the courts of this state adopted by
6 the Judicial Council. (d) Rules of pleading, practice, and procedure prescribed by the United
7 States Supreme Court, such as the Rules of the United States Supreme Court, the Federal Rules
8 of Civil Procedure, the Federal Rules of Criminal Procedure, the Admiralty Rules, the Rules of
9 the Court of Claims, the Rules of the Customs Court, and the General Orders and Forms in
10 Bankruptcy. (e) The true signification of all English words and phrases and of all legal
11 expressions. (f) Facts and propositions of generalized knowledge that are so universally known
12 that they cannot reasonably be the subject of dispute.

13 **Evi. C. § 452. Judicial notice** may be taken of the following matters to the extent that
14 they are not embraced within Section 451: (a) The decisional, constitutional, and statutory law of
15 any state of the United States and the resolutions and private acts of the Congress of the United
16 States and of the Legislature of this state. (b) Regulations and legislative enactments issued by or
17 under the authority of the United States or any public entity in the United States. (c) Official acts
18 of the legislative, executive, and **judicial** departments of the United States and of any state of the
19 United States. (d) Records of (1) any court of this state or (2) any court of record of the United
20 States or of any state of the United States. (e) Rules of court of (1) any court of this state or (2)
21 any court of record of the United States or of any state of the United States.

22 Under Evi. C. § 452

23 Exhibit 1. A true and correct copy of Superior Court Of Riverside, case number RIC 403
24 072, ORDER Granting the Special Motion to Strike Complaint of Burt Ward v.
25 Press-Enterprise Company et.al. As a SLAPP.

26 Under Evi. C. § 451(f)

27 Exhibit 3. California Regional Water Quality Control Board Draft Letter to Burt
28 Ward, Dated April 2, 2003.

1 Exhibit 5. Press-Enterprise Newspaper Article Dated June 3, 2005, by Paige Austin,
2 Reporter. This Newspaper is a paper of general circulation in Riverside County
3

4 Dated: October 12, 2005
5
6

7 Respectfully Submitted:
8 **LAW OFFICES OF M. DAVID MEAGHER**

9 By: _____
10 **M. DAVID MEAGHER, ESQ.**
11 **Attorneys for Defendant and Moving Party**
12 **MARC SAYER AND RENEE BRODEN**
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