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IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF CALIFORNIA
IN AND FOR THE FIRST APPELLATE DISTRICT

AMPEX CORPORATION,
EDWARD J. BRAMSON,

Plaintiffs and Respondents,

v.

J.DOE 1, AKA 'EXAMPEX' ON YAHOO!,
AKA SCOTT CARGLE

Defendant and Appellant.

**District Court of Appeal
Case No. A106345**

DIVISION FOUR

Superior Court No. C01-03627

APPELLANT'S OPENING BRIEF

DEPARTMENT 02
THE HONORABLE BARBARA ZUNIGA
JUDGE OF THE SUPERIOR COURT, CONTRA COSTA COUNTY

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ISSUE PRESENTED

Should Respondents, a large publicly-traded corporation and its Chairman and CEO, who filed a defamation suit against an anonymous poster on an Internet message board despite their inability to prove that the poster made false statements of fact with constitutional malice that caused actual injury, be required to pay Appellant's attorney's fees and costs under California's anti-SLAPP statute?

STATEMENT OF THE CASE

Following a February 3, 2004 hearing, the trial court wrongly denied Appellant Scott Cargle's request for attorney's fees pursuant to California Code of Civil Procedure § 425.16. The court should have held that Appellant was the prevailing party on his Special Motion to Strike and ordered Respondent Plaintiffs to pay Appellant's attorney's fees because this is a meritless suit arising out of Appellant's First Amendment protected speech on an Internet message board. The trial court improperly failed to rule for Appellant because it (1) disregarded the evidence and affidavits filed in support of the Special Motion to Strike, contrary to the explicit statutory directive and (2) erroneously found on the basis of the pleadings alone that Respondents met the burden of showing they were likely to prevail on the merits of their claim.

This appeal arises from a defamation suit Respondents Ampex Corporation and Edward J. Bramson filed on September 7, 2001 against John Doe 1, also known as "exampex", in retaliation for statements posted to a Yahoo! message board devoted to the topic of Ampex Corporation. Yahoo! establishes and maintains message boards on the Internet for hundreds of companies where any user can post comments. See *MCSi, Inc. v. Woods* (N.D. Cal. 2003) 290 F.Supp.2d 1030, 1033; *Dendrite Int'l, Inc. v. John Doe No. 3* (N.J. Super. Ct. Ch. Div. 2001) 775 A.2d

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756, 761-62. “Exampex” was the Yahoo! user name for appellant Scott Cargle, a former employee of iNEXTV, a division of Ampex. Appellant used the name “exampex” to participate in the Yahoo! message board discussion about the financial failure of iNEXTV under Edward Bramson’s management.

On January 10, 2002, Appellant, as John Doe/”exampex”, timely filed a Special Motion to Strike under California Code of Civil Procedure § 425.16. (See page 001 of Clerk’s Transcript filed August 14, 2002 in the previous appeal of this matter, Case No.A099344, and incorporated into the Clerk’s Transcript filed May 18, 2004 in the present appeal, Case No. A106345. Hereinafter, references to the August 14, 2002 Clerk’s Transcript will be designated “CT” and references to the May 18, 2004 Clerk’s Transcript will be designated “CT2”.) Respondents subsequently learned, around March 20, 2002, that “exampex” was Mr. Cargle’s Yahoo! user name and that Mr. Cargle was a New York resident. (See CT 059) Approximately a week later, before the hearing on the Special Motion to Strike, and only a few days before Respondents’ Opposition to the Motion was due, Respondents voluntarily dismissed the California defamation suit. On March 28, 2002, Respondents filed a suit in New York, making a defamation allegation identical to the one they had just dismissed in California. (CT 049, 050, 081) To this date, Respondents have taken no action whatsoever in the New York matter.

After some dispute between the parties as to whether the Special Motion to Strike should remain on calendar, the trial court held a hearing on the motion on April 23, 2002. (CT 081, 471) At that hearing, the trial court denied the request for fees, incorrectly ruling that the court had no jurisdiction to decide Appellant’s fees request because the case had been dismissed. (CT 473) The Appellant appealed and this Court reversed and remanded in an order dated April 30, 2003, ruling that Appellant was entitled to a prevailing party determination pursuant to the reasoning of Liu v. Moore (1998) 69 Cal.App.4th 745, 748. (CT2 002) The Remittitur was filed July 8, 2003. (CT2 001)

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On August 7, 2003, Appellant filed a Motion for Attorney's Fees and Costs on Appeal, based on the same facts and law underlying his January 10, 2001 Special Motion to Strike. (CT2 009) The trial court essentially consolidated the January 10, 2001 and August 7, 2003 motions since they presented the same issue of whether Appellant was the prevailing party under section 425.16. It then asked the parties to submit supplemental briefing on the issue of whether and when the Respondents must plead and prove damages. The parties submitted that briefing as requested. (CT2 056-076)

The matter was heard on February 3, 2004. At the hearing, the trial court expressed confusion as to whether it should consider the evidence, declarations and affidavits submitted in support of and opposition to the section 425.16 motion. The trial court decided not to consider **any** of the evidence and to rule based on the pleadings alone. (RT February 3, 2004 at pp. 6, 15-16, 19.) It then denied Appellant's Special Motion to Strike and Motion for Attorney's Fees. On February 23, 2004, the court signed a Proposed Order submitted by Plaintiffs. (CT2 077)

The trial court ruling is appealable under California Code of Civil Procedure § 904.1. Cal. Code of Civ. Proc. § 425.16(j). This Court reviews the merit of Appellant's Special Motion to Strike *de novo*. Annette F. v. Sharon S. (2004) 119 Cal.App.4th 1146, 1159; Governor Gray Davis Com. v. American Taxpayers Alliance (2002) 102 Cal.App.4th 449, 456; ComputerXpress, Inc. v. Jackson (2001) 93 Cal.App.4th 993, 999. Appellant asks this Court to determine that he is the prevailing party on the Special Motion to Strike, and to order Respondents to pay his attorney's fees and costs at the trial level and on appeal.

STATEMENT OF FACTS

Appellant Scott Cargle formerly worked for iNEXTV, a New York based subsidiary of Ampex, run by CEO Edward Bramson. Ampex is a publicly traded

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company that has inserted itself into the public arena through its public website and numerous press releases. (CT 71, Declaration of Granick in Support of Motion to Strike Complaint.) At the time of Appellant's Internet postings, Ampex had published over sixty press releases, including two specifically about iNEXTV, detailing Ampex's large investment in the project (CT 71, Granick Decl., citing Exhibit I-51, located at CT 284-287) and its discontinuation of the project in 2001 at a multi-million dollar loss (Id., citing Exhibit I6, located at CT137-139.) Ampex's website contains numerous statements by Bramson detailing the dire financial condition of the company and the central importance of iNEXTV to the future of Ampex. (Id., citing Exhibit B located at CT90-93.) In addition, Ampex has chosen to publicly post its SEC filings on its website. (Id., citing Exhibit J located at CT 315.) Ampex also has over 59,000,000 shares outstanding. (Id., citing Exhibit K located at CT 316-318.)

Yahoo!, an Internet Service Provider that does business in both California and New York, offers hundreds of financial message boards, each devoted to a particular publicly traded company. One of the message boards is devoted to Ampex Corporation, and the messages on that board are set up for discussion that company. Anyone can post messages on the board or read the messages posted at <http://messages.yahoo.com/?action=q&board=axc>. (See Dendrite Int'l, Inc. v. John Doe No. 3 (N.J. Super. Ct. Ch. Div. 2001) 775 A.2d 756, 761-62; CT 007.) As of April 17, 2002, there were more than 119,000 postings on the Ampex Yahoo! Message Board. (CT 71, Granick Decl., citing Exhibit L at CT 319)

Appellant posted messages expressing opinions critical of iNEXTV's management on the Yahoo! message board devoted to Ampex under his account username "exampex." (See CT 059, Declaration of Scott Cargle) Respondents Ampex Corporation and its CEO Edward Bramson sued Mr. Cargle for opinions he offered in these messages. Respondents complain about Appellant's statements that "the [iNEXTV] equipment was cheap (my son has better TV equipment at his

high school) and the majority of the production staff were interns,” “I just wonder how the crooks fooled everyone for so long,” “every time we had an original idea or an exciting concept, it was shot down,” and “It was total incompetence,” among others. (CT 103-05, Attachment 10-F to Complaint, Decl. Granick Ex. F)

Because Appellant’s messages are non-actionable opinion, Appellant filed a Special Motion to Strike pursuant to Code of Civil Procedure section 425.16, California’s anti-SLAPP law, arguing that the statements were made in a public forum (Yahoo! Internet message boards) about a matter of public interest (publicly traded Ampex and its officers), and that the lawsuit was meritless (based on non-actionable opinions, causing Respondents no damage and made with the honest belief that the statements were accurate). (CT 001) Rather than risk a favorable ruling for Appellant, Ampex dismissed their original complaint and filed an identical complaint in New York on March 28, 2002. (CT 050, 081) Appellant answered the claims, but Respondents have done absolutely nothing in the New York case.

At the April 23, 2002 hearing regarding Appellant’s motion to strike and request for fees, Judge Van De Poel sitting as trial court erroneously held that the court had no jurisdiction to decide the question of prevailing party. (CT 476) This Court reversed on appeal, holding that “Respondents’ dismissal of the complaint did not deprive the court of jurisdiction to decide appellant’s request for attorney fees on his section 425.16 motion” and directing the court to determine the prevailing party in accordance with the test set forth in Liu v. Moore (1998) 69 Cal.App.4th 745, 752. (CT2 005)

On remand, the trial court asked for additional briefing on the issue of whether Respondents were obligated to present evidence that Appellant’s statements caused them actual damage. The parties did so. Appellant argued that evidence of actual damage was required because Appellant spoke about public figures on a matter of public concern and no action for defamation lies unless the

statements caused actual damage or were made with knowledge or reckless disregard for the fact that the statements were false. (CT2 56-63)

At the hearing held on February 3, 2004, Judge Zuniga sitting as trial court stated that the court was uncertain about the status of evidence and affidavits the parties submitted in support of and opposition to the motions. At the April 23, 2002 hearing, Judge Van De Poel did not rule on Respondents' or Appellant's objections to evidence and the parties did not argue the issue. However, the proposed order drafted by Respondents and signed by Judge Van De Poel stated that that he sustained Plaintiffs'/Respondents' hearsay and lack of authentication objections, but overruled all other evidentiary objections. (CT 475-76)

After Appellant's successful appeal, on remand, Judge Zuniga, sitting as trial court, stated that she was not certain whether she was bound by the Judge Van De Poel's evidentiary rulings, especially in light of the fact that she "would not necessarily agree with some of his rulings" (February 3, 2004 RT 8) and that his ruling denying the motion was reversed on appeal (February 3, 2004 RT 7). Rather than ask for additional briefing on the subject, Judge Zuniga simply refused to consider any evidence or affidavits submitted in support of and opposition to the Motions. The court stated,

I should have had you brief this particular issue for me. Most of that evidence, and this is – his statements were those actions that were raised by plaintiff and were sustained by Judge Van De Poel. Nobody made a motion to reconsider his evidentiary rulings... .

So it's really–it's very troubling to me. He ruled on all the evidentiary issues– and this is what is troubling– and then he found that he had no jurisdiction to rule on the issue for attorney's fees.

The matter then goes up on appeal. It comes back down again, and the issue– it's a legal issue whether or not there was– it's not whether the was a motion to reconsider, but whether I'm bound by his evidentiary rulings or not. (February 3, 2004 RT 6-7)

Counsel for Appellant pointed out to the court that it is the Plaintiffs' burden to come forward with evidence that they were likely to prevail at trial, and that in making that determination, the court must consider that the burden of proof at trial is high; constitutional malice must be proven by clear and convincing evidence. (February 3, 2004 RT 9) After further argument, the court indicated that it would rule based on the pleadings alone and not consider any of the evidence, declarations or affidavits submitted by the parties.

I did stay away from the evidentiary issues, going strictly to the pleadings, because I don't want to go back and visit – I don't know where – it's – I don't know where I am with respect to those evidentiary issues, based on the Court of Appeal, but it's been based on the pleadings and on – not on the theory, not on the declarations on which all of Judge Van De Poel's rulings pertain. (February 3, 2004 RT 15-16)

.It may be if it goes up to the Court of Appeal again, they're going to send it back down and tell me to look at the evidentiary issues. But I'm not really relying on the evidence with respect to what Judge Van de Poel did. (Id. at 19)

Counsel for Appellant then asked for clarification:

Just for the record, you weren't relying on the evidentiary – the declaration? And I was just curious as to what evidence the Court finds persuasive of the clear and convincing showing of actual malice?

The court:

The evidence that counsel presented in their papers, sir; that is, their pleadings. There's sufficient circumstances, based on the pleadings themselves, to show actual malice, sir, and constitutional malice. You may not agree, but reasonable minds disagree, sir. Unfortunately, this reasonable mind is wearing the robe. (February 3, 2004 RT 19)

Unfortunately for Appellant, the court failed to follow section 425.16, which is crystal clear and directive. "In making its [prevailing party] determination, the court shall consider the pleadings, **and supporting and opposing affidavits** stating the facts upon which the liability or defense is based." CCP §425.16(b)(2), emphasis added. The Court then compounded its error by **APPELLANT'S OPENING BRIEF**

holding that in the absence of evidence, Respondents had somehow met their burden of proof and demonstrated a likelihood of success on the merits. Appellant brings this appeal seeking a reversal of the trial court's denial of Appellant's request for attorney's fees under the anti-SLAPP statute. Appellant asks this Court to hold that he is the prevailing party under section 425.16 and entitled to costs and attorneys' fees for the trial and appellate proceedings.

SUMMARY OF ARGUMENT

Under the California anti-SLAPP statute, a Special Motion to Strike must be granted where (1) the cause of action arises from constitutionally protected speech in connection with a public issue, and (2) the plaintiff fails to establish a probability of success on the claim. Appellant posted his opinions about the reasons for the downfall of iNEXTV on an Internet message board open to the public, in the midst of heated public debate on this matter. This speech was made in a public forum in connection with an issue of public interest. Therefore, the Respondents must meet the heavy burden of substantiating all the elements of their libel claim.

The trial court erroneously found that Respondents met their burden of proof based on pleadings alone, rather than on evidence. Pleadings alone can never fulfill a plaintiff's obligations under the California anti-SLAPP statute, and for this reason alone, the lower court should be reversed.

Furthermore, Respondents' evidence fails to substantiate their libel claim in three independent ways. Because the subjects of the unflattering opinions at issue—the Ampex Corporation and its Chairman and CEO Edward Bramson—are limited purpose public figures under libel law, Respondents must produce clear and convincing evidence of Appellant's actual malice. But Respondents' evidence, which consists solely of their own statements that Appellant's opinions are false, do not meet this high standard of proof. Second, because Appellant's remarks

concern matters of public interest, Respondents are not entitled to presume damages, but must plead and prove actual injury. But they provide no evidence of actual injury. Third, Respondents cannot establish that the statements at issue are false statements of fact, rather than non-actionable opinion, hyperbole, and rhetoric. Postings on Internet message boards are typically non-actionable, since the context and content of the postings identifies them to reasonable readers as statements of opinion rather than fact. Moreover, respondents failed to produce evidence to substantiate their allegations of falsity, as required. For these reasons, Respondents' claim is a meritless SLAPP.

Therefore Appellant should be declared the prevailing party on the Special Motion to Strike, and granted fees and costs as required by statute.

ARGUMENT

I. THIS SUIT ARISES FROM THE EXACT KIND OF ACTIVITY THAT SECTION 425.16 IS MEANT TO PROTECT: CONSTITUTIONALLY PROTECTED SPEECH IN CONNECTION WITH A MATTER OF PUBLIC INTEREST

On August 21, 2001, in response to public speculation about the collapse of iNEXTV and its causes and ramifications, Appellant Scott Cargle decided to speak out. He went to the Yahoo! Internet message board devoted to the discussion of Ampex Corporation and began to share with the public his opinion of why iNEXTV failed. Appellant's actions are paradigmatic examples of activities in furtherance of one's right of free speech to which section 425.16 applies. A cause of action "against any person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a Special Motion to Strike." Cal. Code Civ. Proc. § 425.16(b)(1). Among the categories of acts in furtherance of one's right of free speech defined by § 425.16 (e)(3) and (4) are:

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

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

Appellant's speech consisted of written statements posted in a public forum in connection with an issue of public interest, thereby qualifying for protection under §§ 425.16(e)(3) and (4).

Once Appellant makes that showing, Respondents' must produce evidence to prove that their claim is "both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by plaintiff is credited." Wilson v. Parker, Covert & Chidester (2002) 28 Cal.4th 811, 821.

A. Appellant Made His Comments on an Internet Message Board Open to the Public – a Classic “Public Forum.”

The speech underlying this lawsuit was made in a “public forum” and is therefore protected under the California anti-SLAPP statute.

Yahoo!'s Internet message boards are public forums. A public forum is “is traditionally defined as a place that is open to the public where information is freely exchanged.” ComputerXpress, Inc. v. Jackson (2001) 93 Cal. App. 4th 993, 1006 (quoting Damon v. Ocean Hills Journalism Club (2000) 85 Cal.App.4th 468, 475). “Under its plain meaning, a public forum is not limited to a physical setting, but also includes other forms of public communication.” Id. Internet communications are “classical forum communications.” Id.

In ComputerXpress, Inc. the public company plaintiff alleged that several individuals made false and disparaging comments on the Internet about its

business. *Id.* at 998. These comments were published on the message board of a Website devoted to discussion of public companies and on another site established by defendants. *Id.* at 1006. The Court of Appeals held that these statements were made in a public forum for the purposes of § 425.15(e)(3). *Id.* at 1007.

In MCSi, Inc. v. Woods a federal district court recently ruled that the Yahoo! message board devoted to discussion of the plaintiff public company meets the “public forum” test of section 425.16. (N.D. Cal. 2003) 290 F.Supp.2d 1030, 1033. The court held that a Yahoo! message board “dedicated to the discussion of a large, publicly traded corporation is a ‘public forum’ for purposes of CCP § 425.16.” *Id.*

These cases correctly recognize that Internet message boards are a new technology, but a classic public forum. The Yahoo! message board for Ampex Corporation was established, according to the board’s first posted announcement, for the purpose of “discuss[ing] the future prospects of the company and shar[ing] it with others.” (CT 007, Motion to Strike Complaint, p. 2). The boards are accessible to the public over the Internet, where any and all interested parties can read or post messages. The Yahoo! board dedicated to Ampex generated over 112,000 postings, as of August 21, 2001, the date of the first posting at issue here. (CT 330, Granick Decl., Ex. P.) Appellant’s posts were among the hundreds of thousands of messages that continue to make up this lively, spirited electronic marketplace of ideas.

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B. Appellant Spoke Out in Connection With a Matter of Public Interest When, in Response to Public Speculation About the Collapse of iNEXTV, He Offered His Opinion on the Management of a Widely Held, Public Company That Used the Internet to Promote its Own Version of Events.

In the midst of public interest in and speculation about the collapse of iNEXTV, Appellant decided to offer his opinion about the circumstances behind these controversial events. The reasons for iNEXTV's collapse were and are a matter of public interest. "Whether...speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." Connick v. Myers (1983) 461 U.S. 138, 147-148. To make this determination in the context of Internet postings about corporate activity, courts consider the relevant factors of (1) whether the company is publicly traded, (2) the number of investors, and (3) whether the company made use of press releases in an effort to promote itself, among others. ComputerXpress, Inc., supra, 93 Cal.App.4th at 1007-08.

In ComputerXpress, Inc., the Court of Appeals used these factors to determine that the defendants' allegedly disparaging Internet messages were made in connection with an issue of public interest. Id. at 1008. Among the postings at issue were: "When the people who have ..been duped into this stock realize the scam they were coaxed into, my guess is that there will be hell to pay;" "they never have real substance behind their news;" "the suckers jump in before verifying anything" and then "jump out when they see it was more BS than PR." Id. at 1012. The plaintiff corporation was publicly traded, with between 12,000,000 and 24,000,000 shares outstanding, and had issued numerous press releases. Id. at 1007. Therefore, the Court held that these comments concerned matters of public interest. Id.

The Court's reasoning in ComputerXpress, Inc. follows that of a federal court in Global Telemedia v. John Doe 1 (C.D. Cal. 2001) 132 F.Supp.2d 1261. There the district court, applying section 425.16, considered Internet postings critical of the plaintiff company and its management. The postings at issue included the following: "...another day with GMTI steering the sinking ship, but don't worry they are headed for calmer waters of the caribbean where your money will

be safe from federal authorities.” “uncle ernie trust your stomach, that feeling that says we are being manipulated by the company so that they can fly the coop again.” “I have never witnessed such blatant mis-management, these people hold our money and they dictate after they lie how it will be used.” *Id.* at 1269. The court held that these postings were made in connection with an issue of public interest because the company was publicly traded with as many as 18,000 investors, and had inserted itself into the public arena by means of numerous press releases. *Id.* at 1265. The court explained that “A publicly traded company with many thousands of investors is of public interest because its successes or failures will affect not only individual investors, but in the case of large companies, potentially market sectors or the markets as a whole. This is particularly so when the company voluntarily trumpets its good news through the media in order to gain the attention of current and prospective investors.” *Id.* at 1265.

Courts have held that statement of much narrower interest than those at issue here are made in connection with issues of public interest under section 425.16. *See, e.g., Traditional Cat Ass’n, Inc. v. Gilbreath* (2004) 118 Cal.App.4th 392, 397 (granting motion to strike in a defamation action based on statements about plaintiffs on Web site devoted to cat breeding, because “statements concerned matters of public interest in the cat breeding community”); *Annette F. v. Shanon S.* (2004) 119 Cal.App.4th 1146, 1162 (granting motion to strike in a defamation action based on defendant’s statements “explain[ing] the reasons for her decision to withdraw her consent to the adoption and to challenge its validity”).

When Appellant offered his opinions about the events behind the downfall of iNEXTV, he was speaking on a matter of public interest. Appellant’s speech concerned the management practices of iNEXTV and its Chairman, with obvious relevance to the prospects of the Ampex Corporation. Ampex Corporation is a publicly traded company with over 59,000,000 shares outstanding—more than twice as many as the plaintiff in *ComputerXpress, Inc.* (CT 318, Decl. Granick, ¶

Ex. K.) Moreover, Ampex has inserted itself into the public arena by means of some 60 press releases issued by the company and posted on the Internet since January 1998. (CT 071, Decl. Granick, ¶ 8, citing Ex. I-1 through I-60 at CT 123ff.)

One of these press releases, dated July 19, 2001 and posted and maintained on the Internet, injected the opinion of Ampex Corporation into the public speculation about the downfall of iNEXTV. The corporation blamed external conditions for the decision to close down iNEXTV: “Ampex attributed the decision to the difficulty in obtaining additional funding for iNEXTV due to adverse capital market conditions for Internet-based companies.” (CT 138, Decl. Granick, Ex. I-6).

The causes and ramifications of this decision were a topic of public interest, as demonstrated by the heated discussion on the Yahoo! message board during this period. For example, a posting on July 31, 2001 by “tinyclassifiedads” under the subject “The only way to screw up AXC [Ampex] this bad” continues: “would have been to TRY. Lassie could have done a better job than Bramson.” (CT 340, Decl. Granick Ex. W). On August 14, 2001, a posting by “nateill” under the subject “GOD! I’VE BEEN GONE” read, “FOR A COUPLE OF MONTHS. THAT INCOMPETENT BRIT FINALLY BROKE THE COMPANY—DIDENT [sic] HE? MY GOD, WAS THERE NOT ANYBODY WATCHING THE HEN HOUSE WHILE THIS MENTAL RETARD WAS RUNNING LOOSE?? GOD, [] I DON[’]T BELIVEVE THIS!!” (CT 344, Decl. Granick, Ex. R).

On August 21, 2001, Appellant offered his opinion in the context of this heated public controversy and speculation. Indeed, one of Appellant’s statements cited by Respondents in their complaint reveals that Appellant’s speech was prompted by his awareness of the public speculation over the failure of iNEXTV. “I just thought that after all this speculation about what happened, it might be interesting to hear from someone who saw.” (CT 105, Attachment 10F to Complaint, ¶ 6, Decl. Granick Ex. F.)

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Appellant's speech was made in a public forum in connection with a matter of public interest. Therefore Appellant's speech meets the threshold requirements of section 425.16 and the burden shifts to Respondents to prove that the case is not a meritless SLAPP. Cal. Code Civ. Proc. § 425.16(b)(1); Liu v Moore, (1999) 69 Cal.App.4th 745, 752.

II. THE TRIAL COURT VIOLATED THE EXPRESS LANGUAGE OF SECTION 425.16 WHEN IT IMPROPERLY REFUSED TO CONSIDER EVIDENCE AND AFFIDAVITS RELEVANT TO THE QUESTION OF WHETHER APPELLANT IS THE PREVAILING PARTY

Respondents must produce actual evidence to meet their burden of showing that this suit has legal merit. Pleadings alone are not evidence and can never meet the Respondents' burden of proof. (See, e.g. 6 Witkin, California Procedure, PWT, sec. 201: "Because the object of a summary judgment proceeding is to discover proof, the adverse party must file an affidavit or other evidence in opposition to a motion that is supported by evidence; he cannot rely on a pleading alone, regardless of whether it is verified.") The probability-of-prevailing standard in section 425.16 requires Plaintiffs to "demonstrate that the [claim] is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." Rosenaur v. Scherer (2001) 88 Cal.App.4th 260, 274. In determining the potential merit of Plaintiffs' claim, the Court:

... considers the pleadings and evidentiary submissions of both the plaintiff and the defendant [and] though the court does not weigh the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.

Jarrow Formulas, Inc. v. LaMarche (2003) 31 Cal.4th 728, 741 fn. 10 (quotation, citation omitted). The Supreme Court of California has reiterated that to survive a

motion to strike “the plaintiff must state[] and **substantiate**[] a legally sufficient claim.” Jarrow, supra, at 741 (quotation, citation omitted, emphasis added).

Respondents cannot prevail without declarations and affidavits that both demonstrate the merits of its claim and refute the Appellant’s defenses. “Section 425.16, by requiring scrutiny of the supporting and opposing affidavits stating the facts upon which the liability or defense is based, calls upon the plaintiff to meet the defendant's constitutional defenses, such as lack of actual malice. This burden is ‘met in the same manner the plaintiff meets the burden of demonstrating the merits of its causes of action: by showing the defendant's purported constitutional defenses are not applicable to the case as a matter of law or by a prima facie showing of facts which, if accepted by the trier of fact, would negate such defenses.’” Robertson v. Rodriguez, (1995) 36 Cal.App.4th 347, 359 (citations omitted). Here, the trial court ruled based on Respondents’ pleadings alone. When counsel asked the court to point to the evidence of actual malice, the court stated that “[t]here’s sufficient circumstances, based on the pleadings themselves, to show actual malice, sir, and constitutional malice.” Respondents do not meet their burden of proof in the absence of declarations. The trial court cannot both refuse to consider the evidence and declarations and also find that Plaintiffs meet their burden of showing they were likely to prevail on their defamation claim. For this reason alone, the trial court ruling should be reversed.

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III. RESPONDENTS FAILED TO DEMONSTRATE A PROBABILITY OF PREVAILING ON THE MERITS OF THEIR CLAIM THAT APPELLANT’S OPINIONS WERE ACTIONABLE DEFAMATION

Even if Respondents evidence is credited, they did not demonstrate a probability of prevailing on the merits of their claim that Appellant’s opinions were actionable defamation. Opinion statements are not defamatory. Additionally, the First Amendment requires defamation plaintiffs to prove actual malice and actual

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damages when speaking about public figures or on a matter of public interest. When determining whether a plaintiff has established a probability of prevailing on a libel claim under section 425.16, courts must consider whether the speech was related to a “public figure” or an “issue of public concern.” Annette F. v. Sharon S. (2004) 119 Cal.App.4th 1146, 1167 (citing Rosenaur v. Scherer (2001) 88 Cal.App.4th 260, 274); Brown v. Kelly Broadcasting Co. (1989) 48 Cal.3d 711, 747. Here, Respondents were limited public figures, and Appellant spoke out on a matter of public concern. Therefore, Respondents must prove actual malice and actual damages meeting a “clear and convincing” standard of proof. Since the statements were opinion, Appellant made them in good faith, and Respondents suffered no damages as a result, Appellant should prevail.

A. Respondents Are Limited Purpose Public Figures Who Are Required to Counter Unflattering Remarks With Their Own Speech Rather Than Through the Legal Process Unless They Can Demonstrate Actual Malice – Which They Have Not.

Respondents are limited purpose public figures. Thus, they must “prove by clear and convincing evidence that an allegedly defamatory statement was made with knowledge of its falsity or in reckless disregard of its truth or falsity.” Copp v. Paxton (1996) 45 Cal.App.4th 829, 845. Respondents cannot meet this standard; they have not offered any evidence to do so.

The First Amendment requires that public figures prove actual malice by clear and convincing evidence in any libel action based on communications related to their role in public issues. Private plaintiffs who are “public figures” cannot prevail on an action for libel unless they demonstrate actual malice. Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323. In Gertz, the Court recognized two different categories of public figures: the first is the “all purpose” public figure who has achieved “such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts;” the second is the “limited purpose” public figure

who “voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.” *Id.* at 351. The California Supreme Court has explained that the limited purpose public figure “loses certain protection for his reputation only to the extent that the allegedly defamatory communication relates to his role in a public controversy.” Reader's Digest Ass'n. v. Superior Court (1984) 37 Cal.3d 244, 253-54.

Where a plaintiff is a limited purpose public figure, a libel action can survive a special motion to strike only if there is clear and convincing evidence of actual malice. Annette F. v. Sharon S. (2004) 119 Cal.App.4th 1146, 1167. The clear and convincing standard places a heavy burden on a plaintiff's success. “The evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of every reasonable mind.” *Id.*

In the context of defamation claims, actual malice does not mean that Appellant acted with ill will towards Respondents. Rather, actual malice means that at the time of publication, the publisher “in fact entertained serious doubts as to the truth of his publication.” St. Amant v. Thompson (1968) 390 U.S. 727, 731. What matters is “the defendant's subjective belief as to the truthfulness of the allegedly false statement.” Annette F., *supra*, 119 Cal.App.4th at 1167.

Both Edward Bramson and Ampex are limited purpose public figures who must prove by clear and convincing evidence that Appellant spoke with actual malice. A plaintiff's status as a public figure is a matter of law. *Id.* at 252-53. California courts apply a three-step analysis to the question of whether a party is a limited purpose public figure. Copp v. Paxton (1996) 45 Cal.App.4th 829, 845. First, there must be a public controversy: “If the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy.” *Id.* Courts must next determine that the plaintiff undertook “some voluntary act through which he seeks to influence the resolution of the public issues involved;” but it is not necessary to show that he actually achieves

prominence in the public debate, rather it is sufficient that he “attempts to thrust himself into the public eye.” Id. at 845-46. “Finally, the alleged defamation must have been germane to the plaintiff’s participation in the controversy.” Id. at 846.

In Annette F. v. Sharon S. the court ruled that the plaintiff, who had publicized her same-sex commitment ceremony and her efforts toward second-parent adoption, was a limited purpose public figure. Annette F. v. Sharon S. (2004) 119 Cal.App.4th 1146, 1164. The defendant had erroneously called the plaintiff a “convicted perpetrator of domestic violence” in a letter published in a newspaper. The court used the Copp test to determine that the plaintiff was a limited purpose public figure. First, the plaintiff’s legal attempts to adopt the defendant’s son had received attention in the press, generating a public controversy. Id. Next, the plaintiff had deliberately sought attention in the press to promote same-sex marriage and second-parent adoption, including setting up a web site for this purpose. Id. Third, the court found that the allegedly defamatory statements related to the plaintiff’s role in the controversy, because when the defendant erroneously called her a “convicted perpetrator” in the press, the defendant was in fact arguing against plaintiff’s attempts to gain legal custody of children. Id. at 1166. Therefore the court held that the public debate about these highly private matters had made the plaintiff a limited purpose public figure for the purposes of section 425.16. Because the plaintiff could not meet the heightened evidentiary standards imposed by this status, her suit was dismissed as a SLAPP. Id. at 1172.

California courts have held a wide variety of persons to be limited purpose public figures. See Copp v. Paxton (1996) 45 Cal.App.4th 829 (earthquake safety expert who participated in public debate on earthquake disaster mitigation was a limited purpose public figure); Nadel v. Regents of University of California (1994) 28 Cal.App.4th 1251, 1269 (individuals who protested volleyball courts in People's Park and expressed their views in public and in the press were limited

purpose public figures); Rudnick v. McMillan (1994) 25 Cal.App.4th 1183, 1189-91 (individual who sought publication of two articles about a nature preserve made himself a limited purpose public figure); Denney v. Lawrence (1994) 22 Cal.App.4th 927, 933-36 (individual who gave press interviews about a controversy surrounding his brother's arrest, conviction, and sentencing for killing wife was a limited purpose public figure).

Respondents' attempts to influence the public's opinion on a public controversy suffices to make them limited purpose public figures. The three elements of the Copp test are satisfied here. First, the downfall of iNEXTV was a public controversy. Respondents' own press release promoting their version of the story, and the activity on the Yahoo! message board show that the circumstances of that failure were publicly debated. (CT 138, Decl. Granick, Ex. I-6; CT 340 Decl. Granick Ex. W) The downfall of Ampex's multi-million dollar foray into Internet television had foreseeable and substantial ramifications for nonparticipants, since there were some 59,000,000 shares of Ampex stock outstanding. (CT 318, Decl. Granick, Ex. K)

Second, Respondents took a position on the culpability for the downfall of iNEXTV, voluntarily injecting themselves into the controversy. The corporation blamed "capital market conditions" for the downfall of iNEXTV. (CT 138, Decl. Granick, Ex. I-6) Furthermore, Chairman and CEO Bramson regularly posted on the Internet letters explaining his understanding of iNEXTV's importance to Ampex's business prospects. (CT 090-03, Decl. Granick, Ex. B)

Third, Appellant's postings were directly germane to the Respondents' participation in the controversy. Appellant's comments were his opinions about the strength of the management at iNEXTV. Appellant meant to respond to the company's and Bramson's official version of events, which blamed "capital market conditions" for the venture's problems. Because he passionately disagreed with this representation, Appellant felt compelled to present the other side of the story,

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which included his unflattering view of management decision-making. (CT 034) The First Amendment protects Appellant’s right to offer these unflattering portraits because they are germane to the Respondents’ participation in the public controversy.

Respondents did not meet their burden of proving that Appellant spoke with either knowledge of falsity or reckless disregard for truth. Respondents are required to produce evidence of Appellant’s mental state “sufficiently strong to command the unhesitating assent of every reasonable mind.” Copp v. Paxton (1996) 45 Cal.App.4th 829, 846.

While Respondents have circumstantial evidence that Appellant did not like Ampex or Bramson, courts may not infer actual malice solely from evidence of personal spite, ill will, or bad motive. In Annette F., the defendant admitted the falsity of the alleged defamation of the plaintiff as a “convicted perpetrator of domestic violence,” but the court held that in the absence of direct evidence of actual malice, circumstantial evidence of ill will or bad motive cannot, as a matter of law, suffice. 119 Cal.App.4th 1146, 1168-69, supra. In the absence of direct evidence of the defendant’s state of mind, the plaintiff argued that circumstantial evidence established a prima facie showing of actual malice. In particular, the plaintiff alleged that the defendant “felt extreme anger and hostility toward” the plaintiff, that the defendant was “overwhelmed by the desire to salvage her own reputation at the expense of [plaintiff’s],” and that the defendant’s allegedly defamatory statement “was not uttered in the heat of argument” but rather in a context where “she had ample opportunity to check the accuracy” of the statement. Id. at 1169. But the court held that “[n]one of these facts, individually or in combination, suffice to establish a probability of proving actual malice by clear and convincing evidence. Actual malice may not be inferred solely from evidence of personal spite, ill will, or bad motive. Similarly, mere failure to investigate the truthfulness of a statement, even when a reasonably prudent person would have

done so, is insufficient.” *Id.* (citing Harte-Hanks Communications, Inc. v. Connaughton (1989) 491 U.S. 657, 666-67).

While Respondents produced no evidence of actual malice, Appellant submitted uncontroverted declarations that he reasonably believes his opinions are well-founded, and that he did not speak with reckless disregard for the truth. (CT 060-64, Cargle Decl. ¶¶4-16.). Respondents have done no more than allege that some of Appellants statements are literally false—and that is not sufficient. They have not offered any evidence of knowledge of falsity or reckless disregard of truth, much less clear and convincing evidence. That is an insurmountable obstacle for the Respondents’ claim of libel, and hence they cannot show a probability of prevailing on their claim.

B. Respondents Have Not Established Any Damages Caused By Appellant’s Speech On a Matter of Public Concern, Because They Cannot Show Either Constitutional Malice or Actual Injury.

Respondents’ case also fails because they suffered no damages. Because Appellant spoke on a matter of public concern, Respondents, whether private or public figures, must prove either either constitutional malice or actual injury, and cannot presume damages. Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 348-50.).

In Gertz the United States Supreme Court ruled that “States may not permit recovery of presumed ..damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.” Gertz, supra (1974) 418 U.S. 323, 348. Further, the Court held that “the private defamation plaintiff who establishes liability under a less demanding standard than [constitutional malice] may recover only such damages as are sufficient to compensate him for actual injury.” *Id.* at 350. In Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., the

Court limited this rule to speech involving matters of public concern. (1985) 472 U.S. 749, 761.

In Global Telemedia Int'l, Inc. v. Doe 1 the court ruled a defamation action a meritless SLAPP because there were no actual damages caused by the alleged Internet defamation. (C.D. Cal. 2001) 132 F. Supp. 2d 1261. A publicly traded company sued the authors of Internet messages for libel and the court found that section 425.16 applied, requiring the plaintiff to prove actual damages. The court then held that even though plaintiff alleged that the stock price had fallen dramatically, “there is no correlation between [defendant’s] posting and the drop in stock prices.” Id. at 1270. Thus, in the absence of any evidence of causation, the court found that the plaintiff did not show a probability of success on the damages element, and hence failed to carry its burden under section 425.16.

In Forsher v. Bugliosi, the California Supreme Court rejected a defamation plaintiff’s argument that he sufficiently established special damages by alleging damage “in an amount, which, as yet, cannot be ascertained and will be proven at trial.” (1980) 26 Cal.3d 792, 807. The Court held that the plaintiff “should have been able to plead injury to property, business, trade, profession, or occupation, if these interests have been injured even though the monetary extent might not have been ascertainable.” Id.

Here, Appellant spoke on a matter of public concern, hence presumed damages are barred. Respondents have not, and cannot, establish knowledge of falsity or reckless disregard for the truth. Thus Respondents must plead and prove actual injury. But they have not done so because they have no actual injury. Respondents merely allege that Appellant’s remarks are “facially defamatory,” and that these “caused damage to plaintiff’s business and personal reputations.” (CT 105, Attachment 10-F to Complaint, ¶¶ 8 and 9, Decl. Granick Ex. F). This is not sufficient to substantiate actual injury. Unlike the situation in Global Telemedia Int'l, Inc. there is nothing in the financial performance of Ampex Corporation stock

to provide any grounds for actual injury—there was no substantial change in the stock’s value after Appellant’s postings. (CT 71, Granick Decl. ¶6 citing Ex. C at CT 094-95) Nor is there circumstantial evidence of injury in the responses on the Yahoo! message board, which were generally skeptical of Appellant’s messages. (See CT 325, 326, 328, Granick Decl., Ex. O) Since Respondents are not entitled to a presumption of damages, but must plead and prove actual injury, their claim is fatally deficient.

C. Respondents Have Not Met Their Burden of Proving That the Statements at Issue Are False Statements of Fact, Rather Than Non-Actionable Opinion, Hyperbole, and Rhetoric.

A third fatal deficiency in Respondents’ case is their failure to show that Appellant’s comments were actionable false statements of fact, rather than non-actionable opinion. Mere opinions are not actionable under defamation law. ComputerXpress, Inc., supra, at 1010-11. Even apparently factual statements are non-actionable if they are “too vague to be taken as fact by a reasonable reader.” ComputerXpress, Inc., supra, at 1013. “To decide whether a statement is fact or opinion, a court must put itself in the place of an average reader and determine the natural and probable effect of the statement, considering both the language and the context.” Id. at 1011. Context includes “the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation.” Underwager v. Channel 9 Australia (9th Cir. 1995) 69 F.3d 361, 366. Hyperbolic statements are non-actionable, “provid[ing] assurance that public debate will not suffer for lack of ‘imaginative expression’ or the ‘rhetorical hyperbole’ which has traditionally added much to the discourse of our Nation.” Rosenauro v. Scherer (2001) 88 Cal.App.4th 260, 280 (citing Milkovich v. Lorain Journal Co. (1990) 497 U.S. 1, 20).

“[W]hen speech involves a matter of public concern, a private-figure plaintiff has the burden of proving the falsity of the defamation.” Brown v. Kelly

Broadcasting Co. (1989) 48 Cal.3d 711, 747. Thus, Respondents are not entitled to a presumption of falsity even if the courts finds prima facie defamatory statements. See also Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767.

Courts routinely hold that statements disparaging the business activities of a company are non-actionable opinion. See Greenbelt Pub. Assn. v. Bresler (1970) 398 U.S. 6, 13-14 (describing developer's negotiating position as "blackmail" not actionable) and Morningstar, Inc. v. Superior Court (1994) 23 Cal.App.4th 676 ("Lies, Damn Lies and Fund Advertisements," held not to imply that a fund lied).

In Global Telemedia, Inc. v. John Doe 1 the court rejected as non-actionable opinion several Internet messages in of the same kind as at issue here. (C.D. Cal. 2001) 132 F.Supp. 2d 1261, 1269-70. Among these non-actionable messages was the following: "I have never witnessed such blatant mismanagement, these people hold our money and they dictate after they lie how it will be used..greatest joke on the boards." Id. at 1269. The court noted that "the statement contains exaggerated speech and broad generalities, all indicia of opinion," and held that "a reasonable reader would not think that the poster was stating facts about the company, but rather expressing displeasure at the way the company was run." Id. at 1270.

In ComputerXpress, Inc. v. Jackson, the court ruled similar Internet statements critical of the plaintiff company to be non-actionable opinion. (2001) 93 Cal.App.4th 993, 1013. The non-defamatory statements included: "When the people who have ..been duped into this stock realize the scam they were coaxed into, my guess is that there will be hell to pay"; "they never have real substance behind their news;" and "the suckers jump in before verifying anything" and then "jump out when they see it was more BS than PR." Id. at 1012. The court ruled that the "tone and content" of such remarks identified them as statements of opinion and not of fact, noting that like other Internet postings they were "hyperbolic, informal, and lacking the characteristics of typical fact-based documents." Id.

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1. *The context of Appellant’s statements on the Yahoo! message board show that they are non-actionable opinions.*

The Yahoo! message board is by definition a forum for opinions, not facts. The service provider places a banner at the bottom of every page which states, “Reminder: This board is not connected with the company. These messages are only the opinion of the poster, are no substitute for your own research, and should not be relied upon for trading or any other purpose.” (CT 323, Decl. Granick, Ex. N).

The behavior of participants bears out that it is opinion, not fact, that is found in the board’s messages. The message board is populated with posts that are obscene, ridiculous, speculative, and sarcastic. For example, a message immediately preceding one posted by “exampex” was titled “ampex sucky sucko stock” and the message text read: “lose money on this one oh yeah screwed up management oh yeah lack of company direction oh yeah bankruptcy filing oh yeah.” (CT 319, Granick Decl., Ex. M). The posts demonstrate the informal, free-wheeling, and typically exaggerated discourse found on Internet message boards. The reasonable readers of this message board were well aware that the posts they read needed to be treated as mere opinions.

2. *The language of Appellant’s statements posted on the Yahoo! message board show that they are non-actionable opinions.*

The language and overall tenor of the messages at issue here further signal that the statements are the speaker’s opinion. Appellant’s posts are full of opinionated language: “the content was so boring and stale,” “the production values sucked,” “[t]hink visual musak.” Instead of offering facts, he merely gives his opinions and solicits others: “Who is really fascinated by video? Anyone here?” He sarcastically labels the management “geniuses,” “crooks,” “a bunch of old guys,” and in obvious exaggeration exclaims “it was total incompetence.” He also calls one

manager “such a buffoon;” he refers to his former work-place as “the hell-hole.” (CT 504).

Furthermore, the declarative statements cited by Respondents fit the description of “too vague to be taken as fact by a reasonable reader.” ComputerXpress, Inc., *supra*, 93 Cal.App.4th at 1013. Appellants characterization of iNEXTV as “the most miserable, sleazy, cheap operation I have ever worked for” would not strike any reasonable reader as something that could be proved true or false. Nor would his vague allegation that “they spent millions before they even looked for a market.” This statement is exactly like the one made by the defendants in ComputerXpress that “the suckers jump in before verifying anything.” Here, as in that case, the statement is protected opinion.

Indeed, other participants on the message board saw Appellant’s posts as mere opinion. In response to the opinion that Ampex’s concepts were “bland and uninformative,” one post states, “seriously, I doubt this person [exampex] is the real McCoy because he or she could offer more specifics without posting a check stub” (CT 324, Granick Decl., Ex. O; *see also* CT 326, 328, *id.*) Skeptical responses like these make it clear that readers understood Appellant’s posts were mere opinions, to which the only appropriate response is for other readers, including Respondents, to add their own opinions to the mix.

3. *Respondents have failed to provide evidence of falsity.*

Respondents have failed to substantiate allegations of falsity as required under section 425.16(b). “[T]he plaintiff cannot simply rely on the allegations in the complaint, but must provide the court with sufficient evidence to permit the court to determine whether there is a probability that the plaintiff will prevail.”

ComputerXpress v. Jackson (2001) 93 Cal.App.4th 993, 1010 (quotations and citations omitted). Respondents have not put forth any evidence to rebut the opinion that the company’s market research was poor, that the websites were

frequently inoperative, or that the INEXTV equipment was cheap. If Respondents really thought Appellant made factual claims, they could have presented documents or affidavits showing (1) how much they spent on market research for iNEXTV and on what dates; (2) the percentage of the time the websites were down, (3) the actual number of complaints they received for website malfunctions, etc., (4) the price paid for the video equipment and the type of equipment used, including an expert declaration that the equipment was of professional quality, (5) the percentage of iNEXTV staff that were interns, or (6) a declaration stating that the studio equipment was usable.

Respondents have simply repeated the allegations of the complaint in their opposition to Appellant's Special Motion to Strike. (CT 044, Opp'n to Special Motion to Strike, p. 12) However, that is not sufficient. Respondents have failed to demonstrate the falsity of the alleged statements, as required by section 425.16(b).

IV. APPELLANT ASKS THIS COURT TO HOLD THAT HE IS THE "PREVAILING PARTY" UNDER SECTION 425.16 AND TO AWARD COSTS AND FEES AS REQUIRED BY THE STATUTE

This Court should, based on the fully developed trial court record before it, make the appropriate finding that Appellant is entitled to attorney's fees and costs. One of the purposes of the anti-SLAPP statute is to protect innocent defendants from vexatious litigation. Appellant has suffered through over three years of litigation to vindicate his rights in this meritless suit. In the course of this case, Respondents have vigorously refused to abandon even the most obviously frivolous claims. For example, they insisted that Appellant filed his Motion to Strike while he was in default, an argument this Court rejected on appeal and called "bizarre." Worse, they refused to pay Appellant his costs on appeal, approximately \$1,800, requiring Appellant to file papers necessary to garnish Edward Bramson's wages in order to recover the money.

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This case has been briefed and re-briefed, litigated and re-litigated. The record is complete. This Court has the authority to review the question of whether Appellant is the prevailing party *de novo* based on that record. Therefore, Appellant asks that this Court make that determination once and for all, and protect Appellant from the additional expense and burden of returning for a third time to the trial court to vindicate his rights and enjoy the protection that the anti-SLAPP statute provides him. Awarding Appellant his costs and fees is necessary to make Appellant whole in light of Respondent's meritless SLAPP.

CONCLUSION

The California Legislature directs that the Anti-SLAPP statute "shall be construed broadly" so that vigorous participation in matters of public significance "not be chilled." Cal. Code. Civ. Proc. § 425.16(a). Appellant has demonstrated that the present cause of action arises from constitutionally protected speech in connection with a public issue, and that the Respondent has failed to establish a probability of success on its claim. For these reasons, Appellant requests that this Court reverse, hold that Appellant is the prevailing party, and direct the trial court to grant Appellant's all fees and costs in accordance with section 425.16.

Dated: September 20, 2004

Respectfully submitted,

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Attorneys for Appellant
Scott Cargle

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CERTIFICATE OF COMPLIANCE

I, Jennifer Granick, counsel for Appellant in the instant matter *Ampex Corporation et al. v. Cargle*, Case No. A106345, hereby certify that the foregoing document was prepared pursuant to and in compliance with California Rule of Court Section 14(c)(1). The brief contains a total of 10,425 words and was formatted in Times Roman, 13-point typeface.

I declare under the penalty that the foregoing is true and correct.

Dated: September 20, 2004

Respectfully submitted,

Jennifer Stisa Granick
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

PROOF OF SERVICE

I, the undersigned hereby declare:

I am over eighteen years of age and not a party to the above action. My business address is 559 Nathan Abbott Way, Stanford, CA 94305-8610.

On the date set forth below, I caused to be served the following documents:

APPELLANT'S OPENING BRIEF

via Federal Express, by placing five (5) true and correct copies of the above-mentioned document in a properly addressed and sealed envelope in a pickup box routinely maintained by Federal Express, in conformity with the usual business practices of the Stanford Law School, on the following interested parties:

Clerk of the Court
Superior Court of California
County of Contra Costa
725 Court Street
Martinez, California 94553

Clerk of the Court
State of California
Supreme Court
350 McAllister Street
San Francisco, California 94102-4783

and *via* Federal Express, by placing one (1) true copy of the above-mentioned document in a properly addressed and sealed envelope in a pickup box routinely maintained by Federal Express, in conformity with the usual business practices of the Stanford Law School, on the following interested parties:

Michael Prough, Esq.
Morison-Knox Holden Melendez & Prough, LLP
500 Ygnacio Valley Road, Suite 450
Walnut Creek, CA 94596
(925) 937-9990 (phone)

PROOF OF SERVICE

I declare, under the penalty of perjury under the laws of the State of California, that the foregoing is true and correct. Executed this 20th day of September 2004 at Palo Alto, California.

Joanne Newman

PROOF OF SERVICE