UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AMERICAN DENTAL ASSOCIATION, an Illinois non-profit corporation,

Plaintiff,

vs.

SHAWN KHORRAMI, an individual and doing business as the LAW OFFICES OF SHAWN KHORRAMI,

Defendants.

CASE NO. CV 02-3853 DT (RZx)

ORDER **DENYING** DEFENDANT SHAWN KHORRAMI'S MOTION TO DISMISS; **DENYING** DEFENDANT'S SPECIAL MOTION TO STRIKE FOR LEGAL INSUFFICIENCY PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE § 425.16; AND **DENYING** DEFENDANT'S SPECIAL MOTION TO STRIKE FOR EVIDENTIARY INSUFFICIENCY PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE § 425.16

I. BACKGROUND

A. Factual Summary

This action is brought by Plaintiff American Dental Association ("ADA"), a non-profit society of dentists, against Defendant Shawn Khorrami ("Defendant") for Defamation, alleging that Defendant published false and defamatory statements appearing on his website and in his press releases. (See Complaint ¶ 16).

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The following facts are alleged in the Complaint:

The use of dental amalgam has been widely studied by numerous scientific and consumer organizations that are unrelated to the ADA. (See Complaint, ¶ 6.) There has been published findings on the safety of amalgam by these organizations. (See id.) The ADA has also published scientific studies on the safety of amalgam. (See id. at ¶ 12.) The ADA has no financial or other economic stake in dental amalgam and the use of mercury. (See id. at ¶ 14.) Upon belief, Defendant was aware of these scientific findings and reports when he published the statements at issue. (See id. at ¶ 15.)

Defendant issued press releases and operates a website in which he attempts to generate business for his law firm and to promote himself as an expert in lawsuits concerning dental amalgam. (See id. at ¶ 16.) Among other things, Defendant has stated in press releases and on his website:

> (1) "[Defendant's] firm has been extensively involved in litigation with the American Dental Association, and is well familiar with Plaintiff's practice and its efforts to conceal the dangers associated with amalgam for the financial benefit of itself and those of organized dentistry.";
>
> (2) "The ADA has a vested economic interest in the continued use of mercury and which has exercised undue and unfair pressure on dentists not to warn their patients of the dangers of mercury.";
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> (3) "When scientifically analyzed, amalgam fillings represent nothing more than a con on the U.S. population, orchestrated by the American Dental Association and its web of constituent associations and component societies . . . ."

(See id.)[1] Defendant's false and defamatory campaign of self-promotion was published continuously over the internet and continues unabated to this day. (See id. at ¶ 17.) Upon belief, Defendant continues to make statements of a similar nature to others which essentially accuse the ADA of promoting unsafe dental practices by (a) concealing "the dangers associated with amalgam for the financial benefit of itself and those of organized dentistry," (b) "exercising undue and unfair pressure" on dentists because of its purported "vested economic interests in amalgam," (c) perpetuating a "con" on the American public concerning amalgam; and (d) placing its interests above those of its members or their patients.

Defendant published the Statements with the intent to convey false and defamatory meanings of and concerning the ADA. (See id. at ¶ 20.) Each and every one of the Statements, implications and meanings is false. (See id. at ¶ 22.) At the time of Defendant's publications of these Statements, Defendants knew that the ADA did not promote or knowingly encourage any unsafe dental practices, that the ADA did not defraud or "con" the public, that the ADA did not "conceal" any danger from the public, that the ADA did not have any economic interest in amalgam, that the ADA did not endanger the public with respect to amalgam by putting its own economic interests above the interests of its members or their patients and that the ADA did not cause any increase n the occurrence of diseases. (See id. at ¶ 24.) As such, Defendant made the false Statements with knowledge of their falsity or with reckless disregard as to their truth or falsity. (See id. at ¶ 25.)

[1] These statements, which are the basis for this action, will hereinafter be collectively referred to as the "Statements."

B. Procedural Summary

On May 14, 2002, the ADA filed its Complaint for Defamation in the United States District Court for the Central District of California based on diversity jurisdiction.

On October 17, 2002, Defendant filed the following motions: (1) Motion to Dismiss pursuant to Rule 12(b)(6); (2) Special Motion to Strike for Legal Insufficiency pursuant to Cal. Code Civ. Proc. § 425.16; (3) Special Motion to Strike for Prima Facie Evidentiary insufficiency pursuant to Cal. Code Civ. Proc. § 425.16; and (4) Request for Judicial Notice in Support of Motion to Dismiss and Special Motions to Strike, which are currently before this Court.

On October 30, 2002, the ADA filed a Motion for Leave to Conduct Discovery in Support of its Opposition to Defendant's Motion to Strike.

On November 18, 2002, an Order Granting Defendant's Second Request for Judicial Notice and Granting American Dental Association's Motion for Leave to Conduct Discovery in Support of Opposition to Motion to Strike was filed.

On February 18, 2003, the ADA and Defendant filed a Joint Stipulation Pursuant to Local Rule 37-2 Regarding Responses to Document Requests and Special Interrogatories.

On May 9, 2003, Magistrate Judge Ralph Zarefsky ("Magistrate Zarefsky") signed a Memorandum and Order Granting in Part the ADA's Motion to Compel Further Discovery Responses.

On May 30, 2003, the ADA filed Objections to Magistrate Zarefsky's May 9, 2003 Order Granting in Part The ADA's Motion to Compel Further Discovery Responses.

On June 30, 2003, Defendant filed a Request to Hear Defendant's Motion to Dismiss in advance of the hearing date of August 18, 2003.

On July 2, 2003, this Court denied by minute order Defendant's Request to Hear Defendant's Motion to Dismiss in advance.

On July 2, 2003, Defendant filed a Request to Hear Defendant's Opposition to the ADA's Objections to Magistrate Zarefsky's May 9, 2003 Order Granting in Part the ADA's Motion to Compel Further Discovery Responses, which was denied.

On July 14, 2003, this Court granted in part and denied in part the ADA's Objections to Magistrate Zarefsky's May 9, 2003 Order Granting in Part the ADA's Motion to Compel Further Discovery Responses.

On August 29, 2003, the ADA filed a Motion for an Order Holding Defendant and His Counsel In Contempt of Court and Awarding Sanctions for Violation of Court Orders.

On September 2, 2003, Defendant filed an Ex Parte Application for an Order Extending Deadline of July 14, 2003 Order to Respond to Discovery, which this Court granted on September 3, 2003.

On September 3, 2003, a Substitution of Counsel was filed on behalf of Defendant.

On September 19, 2003, pursuant to Stipulation, this Court ordered the Motion for Contempt and Sanctions withdrawn and the present Motions continued to this date.

II. DISCUSSION

Plaintiff seeks to dismiss the Complaint on the basis that the Statements are privileged under the fair report privilege and the litigation privilege. He also seeks to strike the complaint pursuant to California's Anti-SLAPP Statute.

A. Dismissal of the Complaint Is Not Warranted

1. The fair report privilege does not apply to protect the Statements

In seeking dismissal, Defendant contends that the statements are absolutely privileged pursuant to California Civil Code § 47(d) because they are true and fair reports in, and/or communications to, a public journal of allegations made in litigation.

California Civil Code § 47(d) provides that a privileged publication is one made:

> By a fair and true report in, or a communication to, a public journal, of (a) a judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything said in the course thereof, or (E) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant has been issued.

Cal. Civ. Code § 47(d)(1). This privilege is often referred to as "the fair report privilege" or "the reporter's privilege."

Defendant argues that the privilege applies here because the Statements echo the allegations from the complaints in actions brought on behalf of clients against the ADA and are designed to reach members of the media and the public, including class members and members of the general public who may be affected by those actions.[2] In response, the ADA argues that Defendant is not a

[2] Defendant states that he represents clients in litigation against the ADA. He states that in those actions, his clients, both individuals with personal injuries and health groups concerned with the dangers or mercury, make allegations about the dangers of the elemental mercury that is the primary constituent in dental fillings. He states that the cases allege, among other things, a pattern of unlawful

member of the press to whom the fair report privilege applies, and that Defendant materially altered the "gist" of the allegations made in the Amalgam Actions he has filed against the ADA. For the reasons explained below, this Court agrees with the ADA's arguments.

a. The Statements were not made in a public journal

As set forth in Section 47(d), the privilege applies to a report in "a public journal." In attacking this element, the ADA argues that Defendant is not a member of the press, and that this privilege was enacted to enable the press to more easily fulfill their role in our democratic society. Defendant, on the other hand, states that since the web site can be considered a "public journal" for purposes of Section 47(d), the privilege applies to the Statements made in that "public journal."

In enacting Section 47(c), "California provided a certain amount of breathing room for newspapers to explain the basis of a judicial proceeding without at the same time opening themselves up to exposure for defamation liability." Dorsey v. National Enquirer, Inc., 973 F.2d 1431, 1437 (9th Cir. 1992). As another court stated, "different policy considerations are involved when the media are reporting the contents of a judicial proceeding . . . . [T]he fair report privilege is required because of the public's need for information to fulfill its supervisory role over government." McClatchy Newspapers, Inc. v. Superior

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promotion of mercury, concealment of dangers and intimidation toward dental professionals who speak to the public or patients about the dangers. Hereinafter, these actions will be collectively referred to as the "Amalgam Actions." This Court further notes that Defendant requests this Court to take judicial notice of certain complaints filed in these Amalgam Actions, as well as the text of the web pages the Complaint. See Request for Judicial Notice, filed on October 17, 2002. Because this Request meets the standard for judicial notice as set forth in Federal Rule of Evidence 201, this Court grants Defendant's Request for Judicial Notice.

Court, 189 Cal. App. 3d 961, 974-75 (1987). Based on these policy considerations, then, it appears that the fair report privilege should not extend to protect the Statements.

Defendant, whose interest in making the Statements is apparent, was not merely reporting on a judicial proceeding but was admittedly attempting to generate additional business and clients. See Rothman v. Jackson, 49 Cal. App. 4th 1134, 1149 n. 3, 57 Cal. Rptr. 2d 284 (1996)("The statements at issue in this case simply make assertions which the defendants claim they intended in good faith to make again later, in anticipated litigation. Obviously, the statements are not reports or communications of judicial proceedings."). Moreover, the website, clearly sponsored and produced by "The Law Offices of Shawn Khorrami [Defendant]", cannot be considered a "pubic journal" as intended by Section 47(d). While, as noted by Defendant, the Supreme Court has acknowledged that the Internet is "a unique and wholly new medium of worldwide human communication," Reno v. ACLU, 521 U.S. 844, 850, 117 S. Ct. 2329, 2334, 138 L. Ed. 2d 874 (1997), it did not find, or imply, that individual websites are akin to newspapers or magazines or that the author of the website becomes a member of the media. Here, as Defendant admits, his website does not serve to inform the public in general but instead "serves the purpose of informing those members of the public interested in pursuing litigation stemming from the health effects of dental amalgam." (See Motion, p. 10.)[3] As such, the website is more properly considered a profile and advertisement of a law firm rather than an outlet for media reporting. Thus, this Court finds that the fair report privilege does not apply to the Statements because Defendant's website is not a "public journal."

[3] Indeed, even in his Motion, Defendant admits that the Statements "are designed to reach members of the media," implying that he, himself, is not a member of the media.

b. The Statements were not a fair and true report of a judicial proceeding

As also set forth in Section 47(d), the privilege applies to "a fair and true report" of a judicial proceeding. "A report is 'fair and true' if it captures the substance, the gist, the sting of the libelous charge." Crane v. The Arizona Republic, 972 F.2d 1511, 1519 (9th Cir. 1992)(internal quotations and citations omitted). Reports need only convey the substance of the proceedings on which they report, "as measured by their impact on the average reader." Id. (citing Kilgore v. Younger, 30 Cal. 3d 770 (1982)). They do not need to recite the proceedings verbatim. However, if the deviation is of a "substantial character" that "produces a different effect" on the reader, then the privilege will not apply. Id. (quoting Hayward v. Watsonville Register-Paharonian and Sun, 265 Cal. App. 2d 255 (1968)).

Under this standard, Defendant claims that the Statements accurately reflect the substance of the various judicial proceedings instituted on behalf of clients against the ADA in the Amalgam Actions. He asserts that a reader of the Statements on the website would garner the same meaning as if one reviewed the actual files. By contrast, the ADA claims that Defendant has not merely provided a "report" about any judicial proceedings but instead has made false accusations against the ADA for, among other things, "orchestrat[ing] a con" on the American public.

In evaluating whether the Statements are a "fair and true report," this Court must consider the ADA's tandem argument under Section 47(d)(2), which expressly excludes certain communications from the fair report privilege. Specifically, Section 47(d)(2) provides:

> Nothing in paragraph (1) shall make privileged any communication to a public journal that does any of the following:
>
> (A) Violates Rule 5-120 of the State Bar Rules of Professional Conduct.

Cal. Civ. Code § 47(d)(2). The ADA asserts that the Statements violate Rule 5-120 of the State Bar Rules of Professional Conduct ("Rule 5-120") and therefore violate Section 47(d)(2). Rule 5-120 warns against attorneys publicizing litigation or investigations, or otherwise making extrajudicial statements, and it provides the type of statements which an attorney may make. See Cal. R. Prof. Conduct 5-120(B)(1)-(6) (a member may state: (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved; (2) the information contained in a public record; (3) that an investigation of the matter is in progress; (4) the scheduling or result of any step in litigation; (5) a request for assistance in obtaining evidence and information necessary thereto; and (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or the public interest).

Here, this Court finds that the Statements are not "a fair and true report" of a judicial proceeding. In an effort to promote his litigation business, Defendant presents the Statements to appear as statements of fact rather than as a report of judicial proceedings. It would not be obvious to an average reader that these Statements are part of the litigation, as claimed by Defendant. Defendant attempts to save the Statements by pointing to other statements made within the website which explicitly reference "lawsuits" or "cases" or "litigation." However, it would not be clear to an average reader which of the Statements are actually allegations of these lawsuits as opposed to factual statements. Moreover, the

Statements violate Rule 5-120, and Defendant does not attempt to address this. In determining whether a statement violates Rule 5-120, this Court considers "whether the extrajudicial statement presents information the member knows is false, deceptive, or the use of which would violate Business and Professions Code section 6068(d)." See Discussion to Rule 5-120.[4] At a minimum, the Statements present information which appears deceptive. Thus, because the Statements are not a "true and fair report" of a judicial proceeding and also violate Section 47(d)(2), the fair report privilege does not apply.

In light of the foregoing, and the failure of Defendant to establish the elements of the fair report privilege, this Court finds that dismissal is not warranted under Section 47(d).

2. The litigation privilege does not apply to protect the Statements

Defendant also argues that the statements are privileged pursuant to Civil Code § 47(b). Specifically, he states that he is absolutely immune from liability because each of the Statements was made in furtherance of realistic and likely future litigation against the ADA and the dental industry.

Civil Code § 47(b) provides that a privileged publication is one made in any "judicial proceeding." In order for this "litigation privilege" to apply, a communication must be (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) must have some connection or logical relation to the action. Silberg v. Anderson, 50 Cal. 3d 205, 212, 266 Cal. Rptr. 638 (1990). The ADA

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[4] Business and Professions Code section 6068(d) provides that an attorney shall "employ, for the purpose of maintaining the causes confided to him or her such means only as are consistent with the truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of the law."

argues that this privilege does not apply because the Statements were not made "in judicial proceedings," are not pre-litigation statements, and were made to non-participants in the action. As explained below, this Court agrees with the ADA.

a. The Statements were not made "in judicial proceedings"

The "in judicial proceedings" requirement may be met where statements were made outside the courtroom, but the publication must be "required . . . or permitted . . . by law in the course of a judicial proceeding to achieve the objects of the litigation." Rothman, 49 Cal. App. 4th at 1142 (quoting Albertson v. Raboff, 46 Cal. 2d 375, 380-81 (1956)). Further, to be privileged, a statement must be related "to an actual or potential issue in an underlying action." Limandri v. Judkins, 52 Cal. App. 4th 326, 346, 60 Cal. Rptr. 2d 539 (1997). A statement cannot be cloaked in privilege merely because it is contained in a complaint. See Financial Corp. of America v. Wilburn, 189 Cal. App. 3d 764, 776, 234 Cal. Rptr. 653 (1987).

Here, it is difficult to see how the Statements were achieving the objects of litigation. Instead, they were serving the interests of Defendant. "Communications which only serve interests that happen to parallel or complement a party's interest in the litigation" do not establish the requisite "connection or logical relation" element, and are not privileged. Rothman, 49 Cal. App. 4th at 1147. Furthermore, while Defendant argues that the Statements were merely the allegations of the Amalgam Actions, the Statements cannot automatically be protected on this basis alone. As such, this Court finds that the "in judicial proceedings" requirement is not met.

b. The Statements are not pre-litigation statements

In addition to the above, Defendant has not shown that the Statements were pre-litigation statements, as he asserts. In the prelitigation context, the

defendant must demonstrate that each statement was "made with a good faith belief in a legally viable claim and in serious contemplation of litigation." Aronson v. Kinsella, 58 Cal. App. 4th 254, 266, 68 Cal. Rptr. 2d 305 (1997). "More than a mere possibility or vague 'anticipation' of litigation must be required for the privilege to attach, or else the privilege may be misused in ways for which there is no public policy justification or purpose." Edwards v. Centex Real Estate Corp., 53 Cal. App. 4th 15, 33, 61 Cal. Rptr. 2d 518 (1997). Defendant must show "substantial evidence that, at the time [he] made the [Statements], imminent litigation was seriously proposed and actually contemplated in good faith as a means of resolving the parties' dispute." Id. at 39. Only "when litigation is no longer a mere possibility, but has instead ripened into a proposed proceeding" does the privilege arise. Id.

This Court finds that the Statements cannot properly be considered "pre-litigation statements." The purpose of the website was to solicit new business rather than to state the imminent filing of claims on behalf of known clients. While Defendant asserts that "[t]he web pages themselves make clear that Khorrami is seeking additional clients and is prepared to file actions on their behalf" (Motion, p. 14.), this assertion falls short of showing that litigation was "seriously proposed and actually contemplated." See Eisenberg v. Alameda Newspapers, Inc., 74 Cal. App. 4th 1359, 1378-79, 88 Cal. Rptr. 2d 802 (1999)("mere threat of litigation [does not] bring[] the privilege into play").

Defendant relies on the case of Rubin v. Green, 4 Cal. 4th 1187, 17 Cal. Rptr. 2d 828 (1993), to assert that the privilege applies here. However, the facts of this case contrast with the facts in Rubin. In Rubin, an owner of a mobilehome park received a notice of intention to commence an action from a resident who purported to act in behalf of all of the residents of the park. In the notice, the resident alleged defects in the operation of the park and sought several

remedies. The owner filed an action against the resident and her attorneys, alleging defendants had solicited other residents as clients of the attorneys in anticipation of litigation. The California Supreme Court reversed the Court of Appeal's finding that the litigation privilege did not apply. It stated:

> [W]e can imagine few communicative acts more clearly within the scope of the privilege than those alleged in the amended complaint, that is, meeting and discussing with Cedar Village residents park conditions and the merits of the proposed failure-to-maintain lawsuit, and filing the complaint and subsequent pleadings in the litigation.

Id. at 1195. Clearly, the communications at issue in Rubin fell within the privilege because they bore "some relation" to a lawsuit. Here, by contrast, the Statements were made to unidentified third parties in the hopes that they would contact Defendant to discuss a lawsuit. Without an identified potential plaintiff, the potential claims cannot be known. Moreover, the Rubin Court's discussion relied on by Defendant (see id. at 1197-98) related to the Court's determination that a derivative action based on a claim for unlawful solicitation was not available. It did not relate to the Court's determination regarding the application of the litigation privilege to pre-litigation statements.

Thus, in sum, this Court finds that the Statements are not pre-litigation statements for the purposes of the litigation privilege.

c. The Statements were made to non-participants in the action

Finally, as a general rule, "[r]epublications to nonparticipants in the action" are not covered by the litigation privilege. Silberg, 50 Cal. 3d at 219; see also Financial Corp. of America, 189 Cal. App. 3d at 778 (attorney's statements to "all persons throughout Northern California" not privileged because the

publication was made to persons unconnected with the judicial proceeding); Susan A. v. County of Sonoma, 2 Cal. App. 4th 88, 94, 3 Cal. Rptr. 2d 27 (1991)("publication to the general public through the press" is not privileged); Rothman, 49 Cal. App. 4th at 1151 (no privilege where attorney's statements were "transmitted to others throughout the world"). Thus, because, as Defendant himself admits, the Statements were published on the website to others unconnected with the proceedings, the Statements are not within the litigation privilege. And even if Defendant claims otherwise - that the Statements were directly connected to the ongoing proceedings, "the litigation privilege should not be extended to 'litigating in the press.'" Rothman, 49 Cal. App. 4th at 1149.

In sum, Defendant cannot establish the requisite factors in order for the litigation privilege to apply. This Court therefore finds that dismissal is not warranted on the basis that the Statements are privileged under Section 47(b).

B. Striking of the Complaint is not warranted

In addition to dismissal, Defendant asks the Court to strike the Complaint pursuant to the California Anti-SLAPP Statute.

A SLAPP ("Strategic Lawsuits Against Public Participation") suit is one wherein the plaintiff alleges injury resulting from petitioning or free speech activities by a defendant that are protected by the federal or state constitutions. California Code of Civil Procedure § 425.16(a), the Anti-SLAPP Statute, was "enacted to allow for early dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation." Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 839 (9th Cir. 2001). It provides for "a special motion to strike" by a person against whom a claim has been brought "arising from any act of that person in furtherance of the person's right of petition or free speech . . . in connection with a public issue." Cal. Civ. Proc. Code § 425.16(b)(1). An "act in furtherance of a person's right of petition or free speech .

. . in connection with a public issue" includes four categories. See id. at § 425.16(e). One category is "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 . . . 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." Id.

1. The Anti-SLAPP Statute does not apply here

The first question is whether the Anti-SLAPP Statute applies here to allow Defendant to raise this motion to strike pursuant to that statute. The ADA argues that it does not because of a new enactment to the Anti-SLAPP Statute which excludes certain statements and conduct from the Anti-SLAPP Statute.

a. Section 425.17 applies to exclude Defendant's conduct from the reach of the Anti-SLAPP Statute

In September 2003, the California Legislature enacted changes to the Anti-SLAPP Statute, effective January 1, 2004, to curb what it found to be "a disturbing abuse of Section 425.16, the Anti-SLAPP Statute, which has undermined the exercise of the constitutional rights of freedom of speech and petition for redress of grievances, contrary to the purpose and intent of Section 425.16." Cal. Civ. Proc. Code § 425.17(a). As such, certain conduct is expressly excluded from the reach of the Anti-SLAPP Statute. Applicable here is the following:

> Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services, including, but not limited to, insurance, securities, or financial instruments, arising from any statement or

> conduct by that person if both of the following conditions exist:
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> (1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's good or services.
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> (2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer, . . . , notwithstanding that the conduct or statement concerns an important public issue.

Id. at § 425.17(c).

Under this new enactment, the ADA argues that since Defendant published the Statements on his firm's website to promote his firm's legal services to potential clients, Defendant's conduct is expressly excluded from the reach of the Anti-SLAPP Statute. In response, Defendant argues that the new enactment is expressly inapplicable to this action. For the reasons explained below, this Court finds that the exclusion of Section 425.17 applies to the conduct here.

The plain language of the statute itself evidences its application here. First, Defendant is "a person primarily engaged in the business of selling . . . services." Id. at § 425.17(c). Second, the ADA's cause of action arises from "statement[s] or conduct by that person [Defendant]." Id. Third, the "statement[s] or conduct consists of representations of fact about [Defendant's] business

operations . . . or services, that is made for the purpose of . . . promoting . . . the person's . . . services . . . ." Id. at § 425.17(c)(1). Fourth, the "intended audience is an actual or potential . . . customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential . . . customer . . ., notwithstanding that the conduct or statement concerns an important public issue." Id. at § 425.17(c)(2).

In an effort to dispute the applicability of this section, Defendant argues that this exception was intended to reach "litigation between competitors concerning the attributes of their products and services." He then contends that it must be shown that the ADA is a competitor of his. Defendant is incorrect. The statute explicitly states that the statement or conduct must consist of "representations of fact about that person's *or* a business competitor's business operations, goods, or services." Id. at § 425.17(c)(1) (emphasis added). Defendant also attempts to escape the applicability of this section by asserting that the Statements are about public policy issues. Not surprisingly, Defendant is attempting to recharacterize the contents of his website as "speech about substantive policy issues that are the subject of his lawsuits," which is of course, in contrast to his previous characterizations of the contents as "routine discussions about his cases on his firm's websites" (Motion, p. 1.), "informing those members of the public interested in pursuing litigation stemming from the health effects of dental amalgam about the status of past, ongoing and future actions against the ADA" (id. at p. 10), "made in furtherance of realistic and likely future litigation against the ADA" (id.), "to promote himself to potential clients and induce the readers to retain him" (id. at p. 14). Contrary to Defendant's recharacterizations, it is clear that the website and the Statements exist solely to promote Defendant, his firm and his services. In any event, even assuming the conduct at issue could be

characterized as Defendant desires, the exception applies "notwithstanding that the conduct or statement concerns an important public issue." Id. at § 425.17(c)(2).

Thus, this Court finds that the Statements and conduct at issue fall within the provisions of Section 425.17(c).

b. Section 425.17(c) is given prospective application to the defamation claim

Since the exclusion in Section 425.17 applies here, the issue becomes whether it should be applied prospectively to the ADA's claim for defamation. In deciding this issue, this Court is guided by the Supreme Court case of Landgraf v. USI Film Products, 511 U.S. 244, 269-70, 114 S. Ct. 1483, 1499, 128 L. Ed. 2d 229 (1994). In Landgraf, the Court acknowledged the presumption against statutory retroactivity, but it also acknowledged that in many situations, a court should "'apply the law in effect at the time it renders its decision,' Bradley, 416 U.S. at 711, 94 S. Ct. at 2016, even though that law was enacted after the events that gave rise to the suit." Landgraf, 511 U.S. at 273. It stated:

> A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, [citation], or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.

Id. at 269-70. (Footnote omitted.) The Supreme Court discussed situations wherein application of new statutes passed after the events in suit is "unquestionably proper." See id. One such situation is a change in procedural rules because of the "diminished reliance interests in matters of procedure." Id. at 275.

Here, this Court agrees with the ADA that the Anti-SLAPP statute is procedural.[5] In Robertson v. Rodriguez, 36 Cal. App. 4th 347, 356, 42 Cal. Rptr. 2d 464 (1995), the plaintiff's libel claim arose in October 1992 and the complaint was filed in November 1992. Upon enactment of the Anti-SLAPP statute, which became effective January 1, 1993, the plaintiff argued that the Anti-SLAPP statute could not be applied to his libel claim because the statute would be given retroactive effect. The Court disagreed, finding the plaintiff's argument to be meritless: "Section 425.16, a procedural statute, is being applied prospectively to an existing cause of action." Id. at 356. It continued:

> A statute does not operate retroactively merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment . . . . [¶] Section 425.16 does not change the legal effect of past conduct. It merely is a procedural screening mechanism for determining whether a plaintiff can demonstrate sufficient facts to establish a prima facie case to permit the matter to go to a trier of fact. Therefore, the statute is applicable to a cause of action which arose before its effective date.

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[5] This Court notes that Defendant offers no argument contrary to the ADA's position that the Anti-SLAPP Statute is procedural.

Id. at 356 (citations omitted); see also Briggs v. Eden Council for Hope and Opportunity, 19 Cal. 4th 1106, 1119 n. 7, 81 Cal. Rptr. 2d 471 (1999) (acknowledging that "section 425.16 is a procedural statute that properly is applied prospectively to an existing cause of action").

Thus, since the Anti-SLAPP Statute is "procedural," there can be no doubt that a subsequent enactment to that statute is also "procedural." Indeed, the purpose of the Anti-SLAPP Statute and the subsequent enactment of Section 425.17 is, under the appropriate circumstance, to test the sufficiency of a claim brought against a person exercising the right to free speech. However, should a Court determine "that the plaintiff has established a probability that he or she will prevail on the claim, neither the determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by the determination." Cal. Code of Civ. Proc. § 425.16(b)(3). This language of the statue, then, evidences that this rule of procedure "regulate[s] secondary rather than primary conduct." Landgraf, 511 U.S. at 275. As such, applying "the law in effect at the time [this Court] renders its decision" is not in conflict with the presumption against statutory retroactivity. See id.

Based on the foregoing, this Court finds that application of Section 425.17 here bars Defendant from bringing this special motion to strike under Section 425.16 and that denial of said motion is warranted on this basis.

2. Even if the Anti-SLAPP Statute is applicable, the ADA has produced sufficient evidence to establish its defamation claim for purposes of prevailing on this motion

Based on the above determination, this Court need not address Defendant's further arguments regarding the merits of the special motion to strike. Nonetheless, even assuming that Section 425.17 did not bar this motion and that

the Anti-SLAPP Statute applied here, this Court finds that the ADA has established a probability that it will prevail on its defamation claim, as explained below.[6]

Defendant argues that the Complaint must be struck pursuant to the Anti-SLAPP statute because the ADA will be unable to make a prima facie showing of actual malice. It claims that should the Court not grant the Special Motion to Strike based on the legal insufficiency of the Complaint, it may consider this Special Motion to Strike to consider whether the ADA can meet the burden of establishing the prima facie evidentiary sufficiency of the Complaint.

Consideration of a motion to strike under the anti-SLAPP statute involves a two-part inquiry: (1) the defendant must make an initial prima facie showing that the plaintiff's lawsuit arises from an act in furtherance of the defendant's rights of petition or free speech; and (2) if the defendant makes the prima facie showing, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the challenged claims. Vess v. Ciba Geigy Corp. USA, 317 F.3d 1097, 1110 (9th Cir. 2003). "To determine whether plaintiff has met this burden, the test is the same as for a motion for summary judgment. The court may not weigh the evidence or make credibility determinations; doing either would violate plaintiff's right to a jury trial." Colt v. Freedom Communications, Inc., 109 Cal. App. 4th 1551, 1557, 1 Cal. Rptr. 3d 245 (2003). "Although the procedure was designed to help defendants promptly rid themselves of meritless lawsuits, where the underlying lawsuit has even minimal merit the Anti-SLAPP motion must be

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[6] This Court notes that Defendant first argues that the Complaint must be struck pursuant to the California Anti-SLAPP statute because the statements are absolutely privileged, and he relies on the arguments raised with respect to his motion to dismiss. For the same reasons discussed with respect to the motion to dismiss, the striking of the complaint is not warranted on the basis of privilege.

denied and the matter must be tried." Varian Medical Systems, Inc. v. Delfino, 113 Cal. App. 4th 273, 310, 6 Cal. Rptr. 3d 325 (2003).

As stated above, Defendant asserts that the ADA will not prevail on its claim for defamation because it cannot show the requisite actual malice. A defamation claim involving a "public figure" requires proof that the alleged defamatory statements were published with "actual malice" - a showing that the publisher acted with knowledge that his statements were false or acted with "reckless disregard" as to whether his statements were false or not. See New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 84 S. Ct. 710, 11 L. ED. 2d 686 (1964). For purposes of this motion, the ADA assumes that it is a "public figure." As such, the issue before this Court is whether the ADA sets forth sufficient evidence to establish the malice element of its defamation claim.

To establish that Defendant made the Statements with actual malice, the ADA advances the following arguments: (a) Defendant fabricated the bases for the Statements; (b) Defendant purposefully avoided the truth; (c) Defendant blindly relied on biased sources; and (d) Defendant blindly relied on "science" which is not generally accepted in the dental community. This Court addresses each of these arguments.

a. Whether Defendant fabricated the bases for the Statements

In his Declaration, Defendant identified two individuals as "support" for the Statements (Dr. McRedmond and Dr. Cave), and during his deposition, Defendant identified two additional "sources" of information for the Statements (Dr. Haley and Dr. Lorscheider). The ADA contends that the depositions of these third party witnesses revealed that none of them provided Defendant with any bases for the Statements. It offers the following evidence:

Dr. McRedmond: He testified that he did not provide any information to Defendant or his office to support any of the Statements. (McRedmond Depo. at 11-13.) He testified that he never discussed amalgam with Defendant, and he never discussed any issue relating to the ADA with Defendant. (Id. at 17-18.) He testified that he never gave Defendant any information for use in Defendant's website, and he never authorized Defendant to use any information that he provided. (Id. at 19.) Dr. McRedmond testified that he has never published any articles relating to any of the Statements, and he has never given testimony to any public body related to the issues raised by the Statements, or taken a public position related to those issues. (Id. at p. 21.)

Dr. Cave: She testified that she never provided any documents or information to Defendant relating to or supporting the Statements. (Cave Depo. at 18-21.) She has not published or spoken publicly on such issues. (Id.) She confirmed that she does not know the purpose behind the ADA's policies related to amalgam, and she has never asked anyone at the ADA about its policies related to amalgam. (Id. at 23.) Dr. Cave never gave him any information for publication on his website or to be used as a basis for any publication on his website. (Id. at 51-52.)

Dr. Haley: He testified that he never provided any information to be included on the website, and Defendant never discussed his website with him. (Haley Depo. at 298-299.) When asked what he told Defendant about ADA's practices, Haley responded that he knew nothing about their practices. (Id. at 127, 233-234.) Similarly, Haley testified that knew nothing about ADA's financial interests. (Id. at 128.)

Dr. Lorscheider: He testified that Defendant never consulted with him about statements made on Defendant's website; he is not aware of anything Defendant has said in statements or press releases, and he has never seen

Defendant's website. (Lorscheider Depo. at 46-47, 82.) Lorscheider provided a declaration to Defendant in another case, but he testified that he did not provide Defendant with any information relating to the ADA's practices and efforts to "conceal the dangers" associated with amalgam, the ADA's financial interest with respect to amalgam, the ADA's "undue and unfair pressure on dentists" relating to warnings about the dangers of mercury and amalgam, or the ADA perpetrating a "con" on the U.S. population relating to dental amalgam. (Id. at 28-39.)

This Court finds that a reasonable juror could infer actual malice from this testimony. See St. Amant v. Thompson, 390 U.S. 727,732, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968) (actual malice can be inferred from evidence that the statements were "fabricated"); Flowers v. Carville, 310 F.3d 1118, 1129 (9th Cir. 2002) ("We have held that when a speaker outlines the factual basis for his conclusion, his statement is protected. This assumes, however, that the factual basis itself is true."). "One cannot fairly argue [the defendant's] good faith or avoid liability by claiming that he is relying on the reports of another if the latter's statements or observations are altered or taken out of context." Goldwater v. Ginzburg, 414 F.2d 324, 337 (2d Cir. 1969). As such, one could find that Defendant, by relying on "sources" who state that they provided no information, or have no knowledge, regarding the Statements, entertained serious doubts as to the truth of the Statements or had a high degree of awareness of their probably falsity.

b. Whether Defendant purposefully avoided the truth

The ADA contends that Defendant purposefully avoided the truth in making the Statements, and that there was ample information from other sources available to him that would have raised doubts as to the truth of the Statements. In support of this contention, it offers the following evidence:

Re the "dangers" of amalgam: Defendant came to the conclusion that amalgam was unsafe "pretty immediately," and he based this conclusion upon "the fact" that amalgam caused "exposure to mercury . . . ." (Defendant Depo. at 148-149.) He never asked Dr. Lorschieder about research and findings indicating that dental amalgam is safe, about what was said in any governmental agency's documents on the subject of amalgam, and about the validity or basis for those documents. (Lorscheider Depo., at 59-61, 76, 80-82, 141.)

Re the ADA's practices and whether the ADA perpetuated a "con" or "concealed" information: Defendant claims that the ADA exerted "pressure" on dentists through the ADA's "ethical guidelines regarding its stated position on amalgam and its safety, and particularly its ethical codes and Resolution 42H-1986 . . . ." (Defendant Decl., ¶¶ 6, 11, 13.) During his deposition, however, Defendant admitted that he has never asked anyone at the ADA any questions relating to the ADA's ethical codes, and he never conducted any discovery related to the ADA's ethical codes prior to the publication of his defamatory statements. (Defendant Depo. at 168-170.) He testified that he is not aware of any disciplinary action by the ADA against any member for violation of its ethical codes. (Id. at 301, 3003.)

Re the ADA's purported "financial interest" in the seal of acceptances program: Defendant admitted that he never made any inquiries regarding how much the Seal of Acceptance program costs the ADA, and he never asked whether the ADA makes any profits from the Seal of Acceptance program. (Id. at 415.) He further admitted that he had knowledge that the ADA does not make profits from the Seal of Acceptance program, and according to Defendant, "it doesn't matter." (Id.) Further, Defendant testified that he has no information to dispute the ADA's claim that it does not make a profit from the Seal of Acceptance program. (Id. at 415-416.)

Re the ADA's purported "financial interest" in patents: Defendant admitted that he had no specific recollection of the exact documents which provided him with the information that the ADA purportedly derived a profit from its patents, and he did not produce any such documents in response to the ADA's document requests. Instead, Defendant testified that he learned the information from "documents obtained describing the Health Foundation." (Defendant Depo. at 423-24.) When asked whether he tried to conduct any investigation as to whether or not it is correct that the ADA licensed its patents for money, Defendant responded that the unidentified and unidentifiable documents were "conclusive" to him without any investigation. (Id. at 425-26.)

Based on the above evidence, this Court finds that a reasonable juror could infer actual malice based on Defendant's purposeful avoidance of the truth. See, e.g., Harte-Hanks Communications v. Connaughton, 491 U.S. 657, 683-84, 109 S. Ct. 2678 (1989) ("one might reasonably infer" actual malice from failure to listen to tapes or interview witnesses before writing of article); Suzuki Motor Corp. v. Consumers Union of United States, Inc., 330 F.3d 1127, 1129 (9th Cir. 2003) ("The critical inquiry . . . is whether [the defendant] failed to act reasonably in investigating and responding to contrary studies in a manner that suggested it was attempting purposefully to avoid discovering the truth of the matter."); McFarlane v. Sheridan Square Press, Inc., 91 F.3d 1501, 1510 (D.C. Cir. 1996)(a defendant's failure to examine evidence within easy reach or to make obvious contacts in an effort to confirm its statements would be evidence of "reckless disregard"); Goldwater, 414 F.2d at 333-34 & n. 15 (actual malice finding supported by failure to heed or even disclose warnings about scientific invalidity of survey upon which conclusions in article were based).

c. Whether Defendant blindly relied on biased sources

The ADA contends that the record contains overwhelming evidence that Defendant relied on biased and unreliable sources in making the Statements. It offers the following in support of this contention:

Defendant's blind reliance upon zealous advocates: Haley admitted multiple times that he is considered "biased" on the issue of the safety of dental amalgam. (Haley Depo. at 148, 187, 191, 63.) Haley's position on dental amalgam is so far outside the mainstream that the dean of the dental school at the University of Kentucky filed a complaint against Haley "to the upper administration;" he is not allowed to speak with faculty about his position on the amalgam issue, and the dental students have been instructed not to listen to him because he will "contaminate their minds." (Id. at 201, 205.)

Defendant's reliance upon other advocates against the use of dental amalgam: Defendant recalled only one specific conference call or group meeting that he had with experts. The participants in this meeting, which purportedly occurred in 2001, consisted of "[a]dvocates" of "ceasing the use of amalgam" and "scientists." Defendant could not name any scientific expert present at this meeting. (Defendant Depo. at 199-202.) Defendant also admitted that his alleged defamatory statements were based in part on conversations that he had with a group known as "DAMS," and another group known as "IAOMT," both of which advocate against the use of dental amalgam. (Id. at 267-68, 323-24.)

This Court finds that the above evidence could support a finding of actual malice. See, e.g., Curtis Publishing v. Butts, 388 U.S. 130, 156-57, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967)(where the information is from an unreliable source, failure to investigate the truth of allegations received from this source may support a finding of actual malice); Isuzu Motors Ltd., 66 F. Supp. 2d at 1125 (holding that plaintiff had raised a genuine issue of material fact as to the

defendant's actual malice since, inter alia, "defendant knew that its testing methods had been criticized . . . as unreliable"); Fisher v. Larsen, 138 Cal. App. 3d 627, 639-40, 188 Cal. Rptr. 216 (1982)(defendants could not obtain summary judgment where, among other things, the plaintiff alleged that the defendants knew that the source of their information was biased against plaintiff); Westmoreland v. CBS Inc., 596 F. Supp. 1170, 1174 (S.D.N.Y. 1984)(actual malice may be found where there is evidence that the reporter "knowingly or recklessly misstated that evidence to make it seem more convincing or condemnatory than it is").

d. Whether Defendant blindly relied on "science" which is not generally accepted in the dental community

The ADA contends that Defendant's blind reliance on "science" which is not generally accepted in the scientific community provides further evidence of actual malice.

In support of this contention, the ADA relies on the case of Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969). In Goldwater, the defendants wrote an article about Senator Goldwater, who at the time the magazine was published was a United States Senator and a candidate for election to the office of the President of the United States. Id. at 327. Working under the pre-conceived notion that Senator Goldwater was mentally unfit to serve as President, the defendants "prepared and sent a letter and a questionnaire to a list of psychiatrists. The solicited psychiatrists were invited to anser, with their comments, the question, 'Do you believe Barry Goldwater is psychologically fit to serve as President of the United States? [ ]No [ ] Yes.'" Id. at 329. Upon receiving this questionnaire, "reputable psychiatrists and the principal psychiatric professional associations sent letters denying the validity of the project." Id. at 333-34. Despite knowledge of their use of an invalid scientific method,

defendants nonetheless published their article with the results of their psychiatric "poll." Id. at 334. The Second Circuit affirmed a judgment in favor of the plaintiff Senator Goldwater, based in part upon the magazine publisher and editor's reliance upon invalid science. Id. at 333-34 & n. 15.

This Court agrees that Goldwater is applicable here. The ADA presents evidence that Defendant's own sources admit that the governmental agencies - the FDA, HHS, the CDC, the USPHS, the NIH, and the WHO[7] - have found that the use of amalgam fillings poses no health risk to the dental patient. (See Cave Depo. at 29, 37; Haley Depo. at 109-111, 117-118, 142; Lorscheider Depo. at 66-68, 70-71.) Both Haley and Lorscheider admitted during their depositions that theirs is not a generally accepted position regarding the safety of dental amalgam. (Haley Depo. at 234-35; Lorscheider Depo. at 38.) The ADA presents evidence that available scientific data and critical reviews of these data by unbiased experts in the fields leads to the conclusion that dental amalgam is a safe and effective restorative material (Li Decl., ¶ 31), and that this conclusion is consistent with the current positions of U.S. and international health authorities, including the USPHS, the FDA, the NIH, the WHO, HHS and the CDC. (Id. at ¶ 24; Cave Depo. at 29, 37; Haley Depo. at 109-111, 117-18; Lorscheider Depo. at 66-68, 70-71.) As such, under Goldwater, Defendant's alleged blind reliance upon science contrary to the generally accepted position of the scientific community is sufficient to establish actual malice to survive this motion.

In his Reply, Defendant attempts to respond to the above evidence. However, Defendant's arguments are largely irrelevant at this point of the inquiry.

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[7] The FDA is the United States Food and Drug Administration, the HHS is the Health and Human Services, the CDC is the Center for Disease Control, the USPHS is the United States Pubic Health Service, the NIH is the National Institute of Health, the WHO is the World Health Organization.

Specifically, rather than addressing the sufficiency of the ADA's evidence or the underlying legal principles, Defendant attempts to refute the ADA's evidence by pointing to his own evidence regarding the dangers of amalgam and asserting that he had "ample scientific information that supports [his] conclusions." Under the governing standard, though, this Court's determination is limited to whether the ADA has established a probability that it will prevail on the claim. This Court cannot weigh the evidence or determine the credibility of witnesses. "To establish the requisite probability of prevailing, a plaintiff . . . need only 'demonstrate that the complaint 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.'" Drum v. Bleau, Fox & Associates, 107 Cal. App. 4th 1009, 1018, 132 Cal. Rptr. 2d 602 (2003)(citing Navellier v. Sletten, 29 Cal. 4th 82, 88-89, 124 Cal. Rptr. 2d 530 (2002); see also Briggs v. Eden Council for Hope and Opportunity, 19 Cal. 4th 1106, 1122-23 (1999) (citations omitted; quoting Rosenthal v. Great Western Fin. Securities Corp., 14 Cal. 4th 394, 412, 58 Cal. Rptr. 2d 875 (1996)(stating that courts do not require plaintiff to prove the claim but instead must "read the [Anti-SLAPP] statutes as requiring the court to determine only if the plaintiff has stated and substantiated a legally sufficient claim"). Thus, even assuming that the Anti-SLAPP Statute was applicable, based on this Court's determination that the ADA has sufficiently supported the actual malice element of its claim, this Court finds that the striking of the Complaint is not warranted on this separate and additional basis.

III. CONCLUSION

Accordingly, this Court **denies** Defendant Shawn Khorrami's Motion to Dismiss; **denies** Defendant's Special Motion to Strike for Legal Insufficiency; and **denies** Defendant's Special Motion to Strike for Evidentiary Insufficiency.

IT IS SO ORDERED.

DATED: 1-26-04

DICKRAN TEVRIZIAN

Dickran Tevrizian, Judge
United States District Court