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PATRICIA HEDLUND

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF KERN

DAVID LEE SEIDNER,

Plaintiff,

vs.

HOMETOWN PUBLISHING LLC, dba The Mountain Enterprise and dba The Mountain Pioneer, PATRICIA HEDLUND, aka Patricia Hedlund, JACK THROCKMORTON, and DOES 1-100, inclusive,

Defendants.

Case No. S-1500-CV 258273

DEFENDANTS HOMETOWN PUBLISHING LLC'S AND PATRICIA HEDLUND'S SPECIAL MOTION TO STRIKE PLAINTIFF'S COMPLAINT

Date: October 26, 2006
Time: 8:30 a.m.
Judge: Hon. Sidney P. Chapin
Dept.: 4

Action Filed: May 26, 2006

C.C.P. § 425.16

[Declaration of Patricia Hedlund with Exhibits A-P and Declaration of Jack Throckmorton wit Exhibits Q-W and Non-California Authorities filed concurrently]

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 26, 2006, at 8:30 a.m. or as soon thereafter as matter may be heard, in Department 4 of the Kern County Superior Court, located at 1415 Truxt

Avenue, Bakersfield, California 93301, defendants Hometown Publishing LLC and Patricia Hedlund (collectively "Hometown") will and hereby do move this Court, pursuant to Code of Civil Procedure § 425.16, for an order striking plaintiff David Lee Seidner's Complaint in its entirety with prejudice.

All of Seidner's causes of action arise from publications in Hometown's newspapers, *The Mountain Enterprise* and *The Mountain Pioneer*, and target Hometown's exercise of its free-speech rights about an issue of public interest. These causes of action therefore are subject to a special motion to strike under Section 425.16. The burden thus shifts to Seidner to establish a probability that he will prevail on his claims. C.C.P. § 425.16(b)(1). *See* Section 3. He cannot meet that burden for each of the following reasons:

1. The defamation claim and related claim for declaratory relief should be stricken because Seidner did not send an adequate request for correction under the requirements of Civil Code § 48(a), and did not allege special damages. *See* Section 4.A.
2. The defamation claim and related claim for declaratory relief should be stricken for the independent reason that they are nonactionable because the four disputed statements are:
   (a) not defamatory;
   (b) true or substantially true;
   (c) constitutionally protected subjective opinion;
   (d) not published with constitutional malice. *See* Section 4.B.
3. The injunctive relief claim should be stricken because it is not an independent cause of action, the underlying statements are not actionable, and because it seeks a prior restraint that violates the federal and state constitutions. *See* Section 4.C.
4. The conspiracy claim should be stricken because it is duplicative of the defamation claim and is barred by the First Amendment. Independently, the conspiracy claim fails because a conspiracy cannot be alleged as a tort that is separate from the underlying alleged wrong and because Hometown does not owe an independent legal duty to Seidner. *See* Section 4.D

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This Motion is based on this Notice; on the attached Memorandum of Points and Authorities; on the concurrently filed Declaration of Patricia Hedlund with Exhibits A -P and Declaration of Jack Throckmorton with Exhibits Q-W; on all matters of which this Court may take judicial notice; on all pleadings, files and records in this action; and on such other argument as may be received by this Court at the hearing on this Motion.

For these reasons, Hometown respectfully requests that the Court grant this Motion, enter judgment in favor of Hometown and against Seidner, and award Hometown its attorneys' fees and costs incurred in defending this action pursuant to C.C.P. § 425.16(c).[1]

DATED: September 29, 2006

DAVIS WRIGHT TREMAINE LLP
THOMAS R. BURKE
SUSAN E. SEAGER

By: _____
Susan E. Seager

Attorneys for Defendants
HOMETOWN PUBLISHING LLC and
PATRICIA HEDLUND

[1] Section 425.16(c) mandates that a prevailing defendant "shall" recover its attorneys' fees and costs incurred in defending claims that fall within the statute. If the Court grants this Motion, Hometown will file a noticed motion to recover its attorneys' fees and costs.

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MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION

This is a retaliatory defamation lawsuit that seeks to punish two small-town newspapers for exercising their First Amendment right to report about a bitterly fought election campaign in a community of **6,000** residents in an isolated corner of southwest Kern County. Plaintiff was on the losing end of that election – in a landslide – and more than a year later has resorted to this lawsuit. His defamation claim is entirely without merit because he never demanded a correction and cannot prove a loss of special damages from the statements he challenges, which requires that his defamation claim be stricken. Plaintiff's defamation claim is independently barred because the four challenged statements are substantially true, not defamatory, constitutionally protected subjective opinions, and not published with constitutional malice. Plaintiff's claims for conspiracy and injunctive relief are absurd and unconstitutional. This lawsuit is precisely the kind of groundless action that California's anti-SLAPP statute was designed to quickly dismiss.

2. FACTUAL BACKGROUND

This lawsuit was brought by plaintiff David Lee Seidner, a self-described "real estate investor and landlord" and political strategist who thrust himself into the center of a 2005 political campaign battle over five seats on the Board of Directors for the Pine Mountain Club Property Owners Association, a community of about 4,000 full-time residents. Complaint ¶ 1; Declaration of Patricia Hedlund ¶¶ 19-20, 23-24, Exs. I-J, O. Seidner voluntarily injected himself into the campaign by buying full-page political advertisements that he signed with his own name, sending letters to the editor to the newspapers, and making public statements defining campaign themes. *Id.* ¶¶ 19-20, 23-24, Exs. I-J, O. Association voters soundly rejected Seidner and his slate of candidates. Ex. P.

Unable to accept the voters' decision, Seidner brought this action against defendants Hometown Publishing LLC, publisher of *The Mountain Pioneer* and *The Mountain Enterprise* newspapers, Managing Editor Patricia Hedlund (collectively, "Hometown"), and successful Board candidate Jack Throckmorton. Seidner has alleged causes of action for defamation, declaratory relief, injunctive relief, and common law conspiracy. Ignoring this nation's time-honored

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constitutional bar on court-ordered censorship, Seidner asks this Court to permanently bar Hometown from publishing any "false and derogatory statements" about Seidner. Compl. p. 9, ¶ 4.

Seidner alleges that the following four publications in the Hometown newspapers contained false and defamatory statements: *Publication #1*. Political advertisement, "David Lee Seidner – Take the Accounting Challenge." The advertisement reports that Seidner, as vice chair of the Association's Finance and Budget Committee, purchased a used Association truck for $2,000 below "the Kelly Blue Book price," "apparently had insider information about the disposal of association trucks," "got a brother-in-law price before the rest of us got to bid," and used his savings "for political ads." Compl. ¶ 8; Ex. K. Candidate Throckmorton wrote the advertisement based on the fact that he obtained a canceled check showing that Seidner had purchased a 2000 Ford F150 pickup truck for $2,000 below the Association's advertised price shortly after it was advertised. Throckmorton Decl. ¶¶ 3-5; Exs. Q-S.

Throckmorton's advertisement also contained a copy of a May 23, 2005 letter from Gary A. Porter, a certified public accountant hired by the Association to perform an audit in 1998-1999. Porter's letter criticizes Seidner for his "reckless" characterization of the audit, which Seidner said in his advertisement (Ex. I) showed that the Board was "on the verge of bankruptcy." Porter's letter explained that the Board reduced its budget surplus to abide with state law forbidding nonprofit associations from accumulating profits, and was not near bankruptcy. Throckmorton Decl. ¶¶ 7-9; Exs. K-L.

Publication #2. Editor's Note, "The Plain Truth." The Editor's Note reports that Hedlund interviewed Porter, who repeated his criticism of Seidner's characterization of the Porter's 1998-1999 audit of the Board's finances in Seidner's political advertisement. Compl. ¶ 2; Ex.M. Hedlund reported that Porter told her that Seidner's advertisement reached an "improper conclusion" about the audit. Hedlund relied on her interview with Porter and her review of Porter's May 23, 2005 letter. Hedlund Decl. ¶¶ 24(2); Ex. L.

Publication #3. Editor's Corner, "Bear Valley Springs Assessments Drop to $888 for 2005-2006." The Editor's Note by Hedlund reports that CPA Porter "said his year end audit of the 1998-99 financials for Pine Mountain Club Property Owners Association had been used in an

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inappropriate manner in a paid ad placed by David Seidner." The Editor's Note also opines that the "intent of the ad was to discredit two candidates" for the Board. Compl. ¶ 10; Ex. N. Hedlund relied on her interview with Porter, her review of his May 23, 2005 letter, and the Seidner advertisement. Hedlund Decl. ¶ 24(3); Ex. L.

Publication #4. Letter to the Editor by Jack Throckmorton, "Golf Buddy Gone Bad." Throckmorton's letter to the editor again refers to CPA Porter's criticism of Seidner's political advertisements about the 1998-1999 audit, and states that "[a]s many of you realize, Seidner's allegations [about the Board's past finances] have been termed reckless by the association's auditor, who served at the time in question." Ex. O; Compl. ¶ 11. Throckmorton relied on the May 23, 2005 letter by Porter as the basis for his opinion. Throckmorton Decl. ¶ 10.

3. SEIDNER'S LAWSUIT IS SUBJECT TO A SPECIAL MOTION TO STRIKE.

A. The Anti-SLAPP Statute Broadly Protects Media Defendants Against Libel Claims.

In 1992, the Legislature enacted Code of Civil Procedure § 425.16, in response to its perception "that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech…." C.C.P. § 425.16(a). The statute provides a "fast and inexpensive unmasking and dismissal" of lawsuits like this one that target the exercise of First Amendment rights. *Ludwig v. Superior Court*, 37 Cal. App. 4th 8, 16 (1995). The statute requires courts to construe the statute "broadly." C.C.P. § 425.16(a); *Briggs v. Eden Council*, 19 Cal. 4th 1106, 1121-22 (1999).

A court must undertake a "two-step process for determining whether an action" must be stricken under Section 425.16. *Navellier v. Sletten*, 29 Cal. 4th 82, 88 (2002). "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity." *Id.* The categories of protected activity include:

> … (3) any written or oral statement or writing made [by the defendant] in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct [by the defendant] in furtherance of the exercise of the constitutional right ... of free speech in connection with a public issue or an issue of public interest.

C.C.P. § 425.16(e)(3)-(4). If the claim arises from conduct falling within one of these categories, the court "must then determine whether the plaintiff has demonstrated a probability of prevailing."

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Navellier, 29 Cal. 4th at 88. If the plaintiff cannot meet this burden, his claim must be stricken. *Id.* The protection of § 425.16 extends to all kinds of claims arising from First Amendment activities, not just defamation or slander claims. *Id.* at 92. It is "not the form of the plaintiff's cause of action but, rather, the defendant's activity that gives rise" to the plaintiff's claim, "and whether that activity constitutes protected speech or petitioning." *Id.* Courts have used the statute to strike claims for defamation, conspiracy, and injunctive relief. *ComputerXpress, Inc. v. Jackson*, 93 Cal. App. 4th 993, 1015 (2001).

B. All of Seidner's Claims Are Subject To a Special Motion To Strike Under C.C.P. § 425.16(e)(4) and (e)(3).

There is no doubt that the Seidner's defamation and conspiracy claims and related claims for declaratory and injunctive relief arise from Hometown publications, which involve an exercise of "free speech" activities (news gathering, news reporting, political speech) and no dispute that the publications relate to an "issue of public interest," as defined in C.C.P. § 425.16(e)(4). Consistent with the Legislature's mandate, "[t]he definition of 'public interest' within the meaning of the anti-SLAPP statute has been broadly construed to include not only governmental matters, but also private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a government entity." *Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468, 479 (2000).

In *Damon*, a case remarkably similar to this one, the court held that the defendant was entitled to bring a special motion to strike a lawsuit that arose from statements about a private homeowners' association election. *Id.* at 471-473. The court explained that a "homeowners' association board is in effect a quasi-government entity paralleling in almost every case the powers, duties, and responsibilities of a municipal government." *Id.* at 475 (quotation and citation omitted). The court emphasized that the debate over management of private homeowners' associations is of "critical importance to a large segment of our population" because "[f]or many Californians, the homeowners' association functions as a second municipal government." *Id.* at 479 (citation omitted). Accordingly, the court held in *Damon* that statements published in a newsletter for a 3,000-member private homeowners' association relating to the association's "Board elections and

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recall campaigns" "pertained to issues of public interest" under C.C.P. § 425.16(e)(4) and that the lawsuit was subject to dismissal under the anti-SLAPP statute. *Id.* *See also Macias v. Hartwell*, 55 Cal. App. 4th 669, 673-674 (1997) (Section 425.6(e)(4) "applies to suits involving statements made during a political campaign" for a labor union election); *Rosenhaur v. Scherer*, 88 Cal. App. 4th 260, 273-274 (2001) ("section 425.16 applies to actions arising from statements made in political campaigns by politicians and their supporters, including statements made in campaign literature").

In *Sipple v. Foundation for Nat'l Progress*, 71 Cal. App. 4th 226, 238-240 (1999), the court held that a magazine article about allegations that a political consultant abused his ex-wives concerned an issue of public interest. The court held the consultant's decision to "inject[] himself into the controversy by using his influential position and ready access to the press to define" the themes of the political campaign (including family values) qualified as matters of public interest as defined by the anti-SLAPP statute. *Id.* at 239.

Just as in *Damon*, *Macias*, and *Sipple*, Seidner's lawsuit arises from free speech activity protected by the anti-SLAPP statute. Hometown's publications reported about a Board election campaign and heated public debate about the future of the self-governed residential community of approximately 4,000 full-time and 2,000 part-time residents, 2,300 homes, and 60 businesses. Hedlund Decl. ¶¶ 8, 11-18, Exs. C-O. The publications reported about Seidner's involvement in the campaign, and more general themes of self-government, Association finances, and the future of the Pine Mountain Club community. *Id.* All of these issues are unquestionably issues of public interest as that concept has been defined in *Damon*, *Macias*, and *Sipple* and the other cases discussed above. Seidner's lawsuit thus is subject to a special motion to strike under Section 425.16(e)(4).

The Mountain Pioneer and *The Mountain Enterprise* also qualify for protection under Section 425.16(e)(3), which extends the statute's protection to any claim arising from a statement made in "a public forum in connection with an issue of public interest." *See Damon*, 85 Cal. App. 4th at 476-477 (private homeowners' association's newsletter distributed to 3,000 homeowners was a "public forum" under Section 425.16(e)(3) because it "was a vehicle for communicating a message about public matters to a large and interested community") *Macias*, 55 Cal. App. 4th at

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674 (union campaign flyer is "recognized public forum under the SLAPP statute"). Hometown's newspapers provide a public forum for the 12,000 residents and businesses in the Mountain Communities and the newspapers' estimated 8,000 readers. Hedlund Decl. ¶¶ 5-6. Like the publications in *Damon* and *Macias*, the four challenged statements about the election related to a matter of public interest under Section 425.16(e)(3).

4. SEIDNER CANNOT SHOW A PROBABILITY OF PREVAILING.

Because Hometown has made its threshold showing of protection under the anti-SLAPP statute under subsection (e)(4) and (e)(3), Seidner's claims must be stricken unless he demonstrates a probability that he will prevail. C.C.P. § 425.16(b)(1). As the court explained in *DuPont Merck Pharm. v. Superior Court*, 78 Cal. App. 4th 562, 568 (2000), "to satisfy its burden under the second prong of the anti-SLAPP statute, it is not sufficient that plaintiff's complaint survive a demurrer." Instead, the plaintiff must "meet the defendant's constitutional defenses," *Robertson v. Rodriguez*, 36 Cal. App. 4th 347, 359 (1995), and present "competent evidence" showing that he will "probably prevail at trial." *Bradbury v. Superior Court*, 49 Cal. App. 4th 1108, 1117 (1996). Because Seidner's claims are barred by the following constitutional and statutory defenses, his Complaint must be stricken.

A. Seidner's Defamation Claim Is Barred Under Civil Code § 48a.

California Civil Code Section 48a imposes an onerous burden on defamation plaintiffs to send a timely, particularized request for correction to the publisher *and* to plead and prove special damages. *Gomes v. Fried*, 136 Cal. App. 3d 924, 938-941 (1982). For the defamation plaintiff who fails to seek a correction under the exact terms of the statute *and* fails to allege special damages, his defamation claim fails entirely. *Id.* at 940-941. Seidner's failure to satisfy these two requirements mandates the dismissal of Seidner's defamation claim.

Section 48a provides that a defamation plaintiff must "serve[s] upon the publisher, at the place of publication … a written notice specifying the statements claimed to be libelous and demanding that the same be corrected" to recover general and punitive damages. The plaintiff must submit the correction demand to the publisher within 20 days of the publication, and the correction demand must state with "particularity" the statements claimed to be defamatory. *Id.* at 938. Notice

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is deemed sufficient only if the "publisher can without difficulty determine the words that contain the sting and should be retracted." *Id.* at 937 (citations omitted). The adequacy of a correction demand is a question of law for the court to decide. *Id.* at 936. In *Gomes*, the court entered judgment for the publisher after determining that the defamation plaintiff did not send an adequate correction demand to the publisher and did not prove special damages. *Id*. at 941.

The same is true of Seidner. He did not demand a correction within 20 days of *any* specific statement of the four disputed statements described in the Complaint. Hedlund Decl. ¶¶ 25. Instead, Seidner sent emails to Hedlund complaining about various letters to the editor and advertisements, and discussing his plans to submit rebuttal letters and advertisements. *Id.* This does not come close to satisfying the particularized requirements of the retraction statute. *Gomes*, 136 Cal. App. 3d at 938. Given Seidner's failed to submit an adequate retraction, Section 48a prohibits him from recovering general or punitive damages.

Seidner's only conceivable recovery would be for special damages (out-of-pocket losses), and then only for such damages "as the plaintiff alleges and proves he has expended as a result of the libel, and no other." Civ. Code § 48a. But Seidner did **not** plead *any* special damages. Consequently, his defamation claim should be stricken.

B. Seidner's Defamation Claim And Related Claim for Declaratory Relief Also Must Be Stricken Because the Statements Identified in the Complaint Are Not Actionable.

1. The Statements at Issue Are Not Defamatory.

"Defamation is an invasion of the interest in reputation." *Smith v. Maldonado*, 72 Cal. App. 4th 637, 645 (1999). Mere "childish name-calling" is not defamatory, nor are "vigorous epithets." *Polydoros v. Twentieth Century Fox Film Corp*., 67 Cal. App. 4th 318, 326-327 (1997). A defamatory statement must expose the plaintiff "to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Civ. Code § 45.

Seidner cannot show that he is subject to hatred, being shunned, or injured in his occupation as a "real estate investor and landlord" merely because Hometown published statements during a political campaign that he "apparently used insider information" to buy a used truck at a "brother-

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in-law-price" from the Association, or used his savings to buy political advertisements. At worst, these statements imply that Seidner is a shrewd businessman who moved quickly to buy a used truck at a low price. This truthful information is in no way harmful to his reputation.[2]

Nor is it defamatory to report that Seidner made an "improper" use of the CPA's report or reached an "improper conclusion" about the CPA report, or to report that the CPA termed Seidner's use of the CPA's report for a political advertisement was "reckless" or "inappropriate," or that Seidner had the "intent" to use the CPA report to "discredit" two rival candidates. These terms are merely the name-calling that is typical in a political campaign and that do not rise to the level of causing plaintiff to be hatred, subjected to public ridicule, or injured in his occupation. Indeed, all of these activities are precisely what campaign advisors are supposed to do: use information to discredit rival candidates.

2. The Four Disputed Statements Are True or Substantially True.

Defamatory remarks must be false to be actionable. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). Where, as here, a media publication relates to a matter of public concern, the plaintiff has the burden of proving falsity. *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 776-78 (1986); *Miller v. Nestande*, 192 Cal. App. 3d 191, 198 (1987).

Under the First Amendment, a statement need only be "substantially true" to be protected. *Masson v. New Yorker Magazine*, 501 U.S. 496, 516-17 (1991). Even if the defendant cannot "justify every word of the alleged defamatory matter; it is sufficient if the substance of the charge be proved, irrespective of slight inaccuracy in the details." *Id.* "Minor inaccuracies do not amount to falsity so long as the 'substance, the gist, the sting, of the libelous charge be justified.'" *Id.*

Seidner's defamation claim fails because he cannot establish that any of the statements are false. Although Hometown does not have the burden of proving the truth of the statements, it can establish that the challenged statements are true or substantially true.

[2] Throckmorton's statement in the advertisement that the Association disposed of its used trucks "hundreds of thousands of miles before the end of their useful lives" is a statement about the Association, and is not "of and concerning" Seidner. The implication therefore is not actionable. *New York Times v. Sullivan*, 376 U.S. 254, 288 (1964).

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Publication #1 (reporting about Seidner's purchase of truck for $2,000 below advertised price and Seidner's "reckless" use of audit to allege Association was on "the verge of bankruptcy"). Significantly, Seidner does not dispute the truth of the statement that he paid $5,500 for a 2000 Ford F150 pickup truck just one day after it was advertised for $7,7771 – because this fact is true. Throckmorton Decl. ¶¶ 3-6; Exs. Q-S. Seidner merely complains that he did not have "insider information" and he did not save money buying the truck at $2,000 below the advertised price. Compl. ¶ 8:20-28. But Throckmorton's statements are substantially true because Seidner purchased the truck before others had the chance and he saved $2,000 from the advertised price. Nor does Seidner dispute that the Association's CPA used the word "reckless" to describe Seidner's advertisement that claimed that the Association had been "on the verge of bankruptcy" because that is the word used by the CPA in a published letter. Ex. L

Publications # 2, #3, #4 (statements about Seidner's "reckless," "improper," and "inappropriate" characterization of the Porter's 1998-1999 audit). The statements that Seidner's political advertisement (Ex. I) was "reckless," "improper," and "inappropriate" are substantially true because CPA Porter stated that his audit did not establish that the Association was "on the verge of bankruptcy," as Seidner contended, but, rather that the Board was complying with the laws governing nonprofit entities. Ex. L.

3. The Statements Are Protected Opinion.

Of course, it is not enough to simply say that a statement is protected by the First Amendment by prefacing it with the words, "in my opinion." *Milkovich v. Lorain Journal Co*., 497 U.S. 1, 19-21 (1990). But the Court has made clear that a statement is constitutionally protected as "opinion" under the following circumstances: (1) the speaker employs "loose, figurative, or hyperbolic language" in a "public debate" that "cannot reasonably be interpreted as stating actual facts"; (2) the statements are purely subjective and cannot be proved by a core of objective evidence; or (3) the opinions are buttressed by true facts. *Id.* at 19-21.

a. The Disputed Statements Are Non-Actionable Hyperbole.

It is not defamatory to call a candidate a "thief" and "liar" during a "heated" confrontation between candidates during a political campaign because the words are reasonably interpreted to be

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classic political rhetoric – "loose, figurative, or hyperbolic language that is constitutionally protected because no one would take it literally." *Rosenhaur v. Scherer,* 88 Cal. App. 4th 260, 280-81 (2001). The "editorial context" must be regarded "as a powerful element in construing as opinion what otherwise might be deemed fact." *Ferlauto v. Hamsher*, 74 Cal. App. 4th 1394, 1401 (1999). Viewed in context, letters to the editor are often couched in terms of speculation and conjecture and "rhetorical hyperbole," which signals to the reader that the statements are exaggerations or subjective opinions. *See Diez v. Pear*son, 834 S.W.2d 250, 251 (Mo. Ct. App. 1992) (letters to editor about "lies and deceit" by government officials protected as subjective opinion); *Kotlikoff v. The Community News*, 444 A.2d 1086, 1091 (N.J. 1982) (same for letter to editor accusing small town mayor of "engag[ing] in a huge coverup").

Under this constitutional protection for rhetorical opinion, Hometown's publication of the words "insider," "improper," "inappropriate," and "reckless" are protected opinion because they were published during the heat of a political campaign, where readers reasonably understood that candidates and their supporters were using rhetorical hyperbole and exaggerations. *See Rosenhaur,* 88 Cal. App. 4th at 280-81.

b. The Disputed Statements Are Non-Verifiable Opinions.

Statements that cannot be proved true or false by objective evidence also are protected under the opinion doctrine. In *West v. Thomson Newspapers*, 872 P.2d 999 (Utah 1994), a case that is particularly instructive here, the Utah Supreme Court held that an accusation that a political candidate intended to trick voters by misrepresenting his political position was non-verifiable. "Whether [plaintiff] actually intended to dupe voters into electing him mayor by misrepresenting his position on municipal power is something only [plaintiff] knows, not something that is subject to objective verification." *Id.* at 1019. Courts have rejected defamation claims that are based on words that are non-factual, non-verifiable opinions about the motivations or characteristics of plaintiffs, such as "sleazy," J*ames v. San Jose Mercury News*, 17 Cal. App. 4th 1, 13-15 (1993); "misleading," *Groden v. Random House, Inc.*, 61 F.3d 1045, 1051 (2d Cir. 1995); or "dishonest," *Standing Comm. on Discipline v. Yagman,* 55 F.3d 1430, 1440 (9th Cir. 1995).

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Based on this rule, Hometown's publication of opinion that "the intent" of Seidner's advertisement was to discredit" other candidates is protected opinion because it is impossible to know or prove the "intent" of Seidner's advertisement. Similarly, the words "insider," "improper," "inappropriate," and "reckless" are subjective terms that are incapable of being verified by a core of objective evidence.

c. The Published Opinions Are Supported by True Facts.

Independently, Hometown's statements are protected because they are subjective opinions based on disclosed true facts. "[W]hen an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment. *Partington v. Bugliosi*, 56 F.3d 1147, 1156-1157 (9th Cir. 1995).

In this case, the opinions published by Hometown were buttressed by true facts. The Throckmorton advertisement (Publication #1) explained that Seidner bought a used Association truck at a below-market price to support its opinion that Seidner "apparently" obtained "insider" information. Ex. K. Seidner does not dispute that he paid less than the advertised price for the truck.

The Throckmorton advertisement and letter to the editor (Publications #1 and #4) and Hedlund's two Editor's Notes (Publications #2 and #3) disclosed the facts that supported their opinions that Seidner claim that the Association Board was "on the verge of bankruptcy" was "improper," "inappropriate," and "reckless." Exs. M-O. Hedlund and Throckmorton disclosed that CPA Porter said that the Board merely reduced its fund reserves to comply with the state law requirement that nonprofit corporations not accrue profits. Exs. L-O. Hedlund's and Throckmorton's opinions that Seidner's use of the audit in his campaign advertisements to allege the near-bankruptcy was "improper," "inappropriate," and "reckless" are based on disclosed the facts, which allowed the readers to reach their own opinions on the matter. *Partington*, 56 F.3d at 1156-1157. Because all of Hometown's statements are constitutionally protected opinion, Seidner's defamation claim must be stricken.

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4. Seidner's Defamation Claim Fails Because He Is a Public Figure Who Cannot Show that Hometown Published with Constitutional Malice.

a. Seidner Is a Limited Purpose Public Figure.

Individuals who voluntarily "thrust themselves to the forefront of particular public controversies" or "into the vortex of [a] public issue" "invite attention and comment" and "the risk of closer public scrutiny than otherwise might be the case." *Gertz*, 418 U.S. at 343-345. *See also Reader's Digest Assn. v. Superior Court*, 37 Cal. 3d 244, 253-255 (1984). "Thus, one who undertakes a voluntary act through which he seeks to influence the resolution of the public issues involved is a public figure." *Sipple*, 71 Cal. App. 4th at 247. In *Sipple*, the court held that a political campaign advisor was a public figure because he thrust himself into the public debate over campaign themes. *Id.* at 239-240.

It cannot be disputed that Seidner's highly visible participation in the campaign rendered him a limited purpose public figure. Seidner voluntarily thrust himself into the 2005 Board election campaign by taking an active, public role as campaign advisor to The Plain Speakers slate of Board candidates. Hedlund Decl. ¶¶ 19-20. Seidner publicly directed the campaign themes by signing full-page political advertisements and a letter to the editor with his own name, all of which were published in the Hometown newspapers, and by speaking about the campaign during Association meetings and "political coffees" in homes attended by dozens of members. Hedlund Decl. ¶¶ 19-20; Exs. L-J, O. Seidner became a shadow candidate whose views became the focus of the campaign as much – if not more than – any of the individual candidates he supported.

b. Seidner Cannot Establish Clear and Convincing Evidence of Constitutional Malice.

A public figure who files a libel claim must prove not only that the statement at issue is false and defamatory, but also that the defendant published the statement with constitutional "actual malice," that is "with 'knowledge that it was false or with reckless disregard of whether it was false or not.'" *Masson v. The New Yorker*, 501 U.S. 496, 510 (1991) (citations omitted). To establish that a defendant published a statement with "reckless disregard" for the truth, a plaintiff must show "that the defendant *actually had a 'high degree of awareness of ... probable falsity*.'" *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 688 (1989) (emphasis added). "Mere negligence

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does not suffice" to show actual malice, *Masson*, 501 U.S. at 510, nor does "an extreme departure from accepted professional standards of journalism[.]" *Newton v. NBC*, 930 F.2d 662, 669 (9th Cir. 1990).

Seidner, like many libel plaintiffs, has confused common law malice or ill will with constitutional malice. *See* Compl. ¶ 8 (alleging Hometown published false statements about Seidner "with hatred or ill will toward Plaintiff"). As the California Supreme Court has emphasized, "[i]ll will toward the plaintiff [and] bad motives are not elements of" constitutional actual malice. *McCoy v. Hearst*, 42 Cal. 3d 835, 872 (1986). Even if a reporter "did not like" the plaintiff, and the disputed statements "were less than objective," the only question before this Court is: "was there clear and convincing evidence that [the defendant] did not believe [her publications were] true?" *Fletcher v. San Jose Mercury News*, 216 Cal. App. 3d 172, 189 (1989).

The First Amendment also requires a public-figure defamation plaintiff to prove actual malice by "clear and convincing" evidence. *Anderson v. Liberty Lobby*, 477 U.S. 242, 255-57 (1986). Where a plaintiff opposing an anti-SLAPP motion cannot establish constitutional malice with clear and convincing evidence, his libel claim must be stricken. *See, e.g.*, *Rosenaur*, 88 Cal. App. 4th at 275-78; *Sipple*, 71 Cal. App. 4th at 248-250; *Bradbury*, 49 Cal. App. 4th at 1117.

Under these circumstances, Seidner cannot meet his burden of showing with clear and convincing evidence that Hometown had "knowledge that [the publications were] false." *New York Times*, 376 U.S. at 280. Nor can he show that Hometown had "a high degree of awareness … of probable falsity," as he must do to establish "reckless disregard." *Harte-Hanks*, 491 U.S. at 688. Here, as Hedlund makes clear, she had no reason to doubt the credibility of CPA Porter, who was hired by the Board. Hedlund Decl. ¶ 27. She had known Throckmorton for several years, and relied on him as a source because he had been on the Board and /or Association Finance Committee for several years. Hedlund ¶ 26. Because Seidner cannot show that Hometown published the challenged statements with constitutional malice, Seidner's defamation claim and related declaratory relief claim should be stricken for this independent reason.

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C. Seidner's Claim for Injunctive Relief Seeks an Unconstitutional Prior Restraint.

The U.S. Supreme Court has declared that prior restraints of the press may be permitted, if at all, "only in exceptional cases," such as a wartime injunction to "prevent actual obstruction to [government] recruiting service [for the military draft] or the publication of the sailing dates of transports or the number and location of troops," or to prevent "incitements to acts of violence and the overthrow by force of orderly government." *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931). In *Near*, the Court vacated an injunction against a newspaper as "the essence of censorship," even though the publications sought to be enjoined were found to be false and defamatory. *Id.* at 710, 713.

The California Supreme Court, relying on the even more protective California Constitution (Cal. Const., art. I, § 2(a)), has stated that the "publication of information about a person, without regard to truth, falsity, or defamatory character of that information, [is] not subject to prior restraint" where the speech involves "governmental affairs" and "discussions of candidates." *Wilson v. Superior Court*, 13 Cal. 3d 652, 659-660 (1975) (brackets, quotation, and citation omitted). In *Wilson*, the court struck down an injunction barring distribution of political leaflets, even though the leaflets may have been false or deceptive. *Id.* at 661-665.

Seidner's third cause of action seeks to permanently enjoin "Defendants from publishing any false and derogatory statements concerning Plaintiff[.]" Compl. ¶ 25. Seidner cannot show a probability of prevailing with his request for injunctive relief for several reasons. *First*, a "cause of action for an injunction [is] improper as an injunction is a remedy not a cause of action." *Roberts v. Los Angeles County Bar Assn.*, 105 Cal. App. 4th 604, 618 (2003). *Second*, there is no legal basis for injunctive relief because Seidner's underlying defamation claim is barred by constitutional and statutory defenses, as discussed in Section 4.B. *Third*, injunctions barring future publications about public issues violate the federal and state constitutions, even if the statement may be false and defamatory. *Wilson*, 13 Cal. 3d at 661-665. Because Seidner's third cause of action for injunctive relief is procedurally defective and violates the state and federal constitutions, it must be stricken.

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D. Seidner's Claim for Conspiracy Fails To State a Cause of Action.

Seidner's vaguely plead conspiracy claim apparently alleges that Hometown and Throckmorton conspired to "mislead" Association "members" about the election issues by publishing the disputed publications to win the election. Compl. ¶ 12. This publication-based claim is duplicative of the defamation claim and is barred by the same constitutional defenses.

Independently, the conspiracy claim fails because "[a] conspiracy cannot be alleged as a tort separate from the underlying wrong it is organized to achieve." *ComputerXpress*, 93 Cal. App. 4th at 1015 (citation omitted). Where the underlying tort fails – here the tort of defamation – the conspiracy cause of action also fails. *Id.* Seidner's conspiracy claim also fails because he does not allege a necessary element – that Hometown had a "preexisting legal duty" to Seidner that is "independent of the conspiracy itself." *Chavers v. Gatke Corp.*, 107 Cal. App. 4th 606, 613-614 (2003). No amendment could cure this defect because Hometown does not owe Seidner any independent legal duty. For all of these reasons, Seidner's conspiracy claim must be stricken.

5. CONCLUSION

Because Seidner cannot show a probability of prevailing on his claims, Hometown respectfully requests that the Court grant this Motion and strike Seidner's Complaint with prejudice.

DATED: September 29, 2006

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