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ROBERT HAUGH

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF SANTA CLARA**

**DOWNTOWN SUPERIOR COURT**

SANTA CLARA EAGLE PUBLISHING COMPANY, INC., a California Corporation d/b/a The Santa Clara Weekly; MILES BARBER, an individual;

Plaintiffs,

v.

ROBERT HAUGH, an individual; and DOES 1 through 10, inclusive,

Defendants.

Case No.: 17CV306012

Judge: Judge Mary E. Arand

**DEFENDANT ROBERT HAUGH'S NOTICE OF MOTION AND SPECIAL MOTION TO STRIKE PURSUANT TO CODE OF CIVIL PROCEDURE § 425.16**

Date: May 16, 2017
Time: 9:00 a.m.
Dept: D-09

Action Filed: February 6, 2017

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that on May 16, 2017, at 9:00 a.m., or as soon thereafter as the matter may be heard, in Department D-09 of the above-entitled Court, located at191 N. First Street, San Jose, California, Defendant Robert Haugh (hereinafter "Defendant") will move the Court for an order striking the Complaint and awarding attorney fees pursuant to California Code of Civil Procedure § 425.16.

This motion is based on this Notice, the Memorandum of Points and Authorities filed herewith, the Declarations of Robert Haugh and Kenneth P. White and exhibits thereto filed

concurrently, the records and pleadings on file herein, and on such other evidence as may be presented at the argument on the matter.

DATED: March 24, 2017

Respectfully submitted,

BROWN WHITE & OSBORN LLP

By _____

KENNETH P. WHITE
Attorneys for Defendant
ROBERT HAUGH

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## MEMORANDUM OF POINTS AND AUTHORITIES

## I.

## INTRODUCTION

This case presents a classic story – a minor local luminary, incensed at bad press, abuses the legal system to lash out at critics, hoping that the ruinous expense of litigation will crush them even if the claim has no merit. Fortunately, California has a robust remedy: California Code of Civil Procedure § 425.16, the Anti-SLAPP Statute ("Section 425.16"). The Court should employ it to strike the complaint in this case, which is utterly meritless.

Plaintiffs, the offended minor local luminaries, are a local paper and its publisher. Plaintiff Santa Clara Eagle Publishing Company does business as the Santa Clara Weekly ("SCW"), and Miles Barber ("Mr. Barber") is its publisher. The SCW reports and comments upon local politics in Santa Clara. So does Defendant Robert Haugh ("Mr. Haugh"), who operates a web site called Santa Clara News Online ("the Site"). The SCW and the Site cover the same patch but have taken different stances on local candidates and issues, and have traded barbs.

Now Plaintiffs sue Mr. Haugh, claiming that he's used the Site to interfere with the SCW's relationship with Santa Clara, misappropriated the trade name "Santa Clara News online, defamed it and Mr. Barber, and put them in a false light. Plaintiffs' Complaint is notably and strategically vague. It complaints of false statements, but does not cite or attach ***even a single blog post or statement***, ***nor does it quote even one statement on the Site***. Instead, Plaintiffs claim that Mr. Haugh made the following vaguely defined *categories* of statements, which Plaintiffs claim are false:

- "[T]hat the 49'ers had bought out the weekly and that the weekly serves as nothing more than a proxy for the 49'ers business interest,"
- "[T]hat Miles Barber is a misogynist and the Weekly's criticism of the women of the city council were [sic] based on a desire to remove all women from the council,"
- "[T]hat the Weekly was not authorized to publish legal notices,"

- "[T]hat the Weekly's advertisers do not see a return on investment,"
- "[T]hat Plaintiff has been skipping publication dates," and
- "[T]hat numerous facts published by the weekly were not true." (Complaint at ¶¶ 15, 26, 31, 36.)

This calculated ambiguity might evade a demurrer, but it cannot evade a Motion to Strike under Section 425.16, which permits the Court to consider the blog posts in question. Those posts show that Plaintiffs have flatly misrepresented the facts to this Court in their verified Complaint. They have misrepresented clear statements of opinion as statements of fact, misrepresented guest letters as statements made by Mr. Haugh, and fabricated statements entirely. The statements they have misrepresented are – in their *actual* form – absolutely protected by the First Amendment to the United States Constitution and Section 230 of the Communications Decency Act of 1996. In short, Plaintiffs – though putatively journalists themselves – have sued Mr. Haugh for protected journalistic criticism and comment. In other words, they have filed a classic SLAPP suit.

Mr. Haugh easily carries his initial burden under Section 425.16 to demonstrate that Complaint attacks protected speech. Because that speech is constitutionally protected – and because Plaintiffs have provably misrepresented facts in their verified Complaint – Plaintiffs cannot carry their burden of showing they can prevail on the merits. This Court should grant the motion, strike the Complaint, and award Mr. Haugh his attorney fees.

## II.

## PERTINENT FACTS

In evaluating a motion to strike under Section 425.16, this Court may consider not just the Complaint and judicially noticeable materials, but evidence submitted by declaration. (§ 425.16, subd. (b)(2); Brill Media Co., LLC v. TCW Group, Inc., (2005) 132 Cal.App.4th 324, 329.) Critically, this prevents Plaintiffs from evading review by strategic vagueness in their Complaint.

Plaintiff SCW publishes a weekly newspaper, the Santa Clara Weekly. (Complaint at ¶ 6.) Plaintiff Barber is the SCW's CEO, publisher, and sole shareholder. (*Id.)* The SCW

covers – among other things – local politics in Santa Clara, California. (*See, e.g.,* Exhibits X – CC[1].) Mr. Barber writes a column for the SCW, in which he frequently uses vivid language about local politics. For instance, Mr. Barber has attacked Santa Clara's Mayor and accused her of abuse of power (Exhibit Z), referred to the November 2016 election as a "coup with good people being demonized and the Inquisition resurrected" (Exhibit AA), and derided the Mayor of Santa Clara as "desparate" and denigrated City Council members as people who "can barely spell their name." (Exhibit R.)

Defendant Robert Haugh has worked as a journalist in the Silicon Valley for more than 15 years. (Declaration of Robert Haugh ("Haugh Decl.") at ¶ 2.) On October 20, 2016, Mr. Haugh launched the Site, known as "Santa Clara News Online." (*Ibid.;* Exhibit T.) The Site was initially located at stantaclaranews.wordpress.com until Mr. Haugh registered santaclaranews.org on October 27, 2016. (Haugh Decl. at ¶ 13; Exh. U.) On November 21, 2017, more than a month after Mr. Haugh began publishing the Site under the name "Santa Clara News Online," Plaintiffs filed a Fictitious Business Name application purporting to lay claim to that name, and in January 2017 published the claim. (Haugh Decl. at ¶ 13; Exh. V, W.)

The Site, like the SCW, covers issues including local politics in Santa Clara. (Haugh Decl. at ¶ 2.) The Site has covered issues like critiques of the SCW's coverage of city politics (Exhibits A, B, C, F), campaign contributions to candidates for local office (Exhibit E), local election results and resulting changes in political fortunes (Exhibit H, L), disputes between the city and the San Francisco 49ers (Exhibit K, O), and local development (Exhibit N). The Site also publishes letters from guest writers, and allows users to comment on the posts. (Haugh Decl. at ¶¶ 8, 14.) Mr. Haugh does not write the guest letters and does not write any of the comments except those under his own name. (Haugh Decl. at ¶14.)

Most of Mr. Haugh's posts on the Site are explicitly titled as opinions. (Exh. A, B, C, D, F, G, H, I, J, K, L, M.) Mr. Barber objected to some of Mr. Haugh's opinions. On

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[1] All exhibits are attached to the concurrently filed Declaration of Robert Haugh.

December 15, 2016, Mr. Barber sent Mr. Haugh an email titled "Your Opinion Blog," demanding that Mr. Haugh cease unspecified "disparaging inaccurate statements" about Mr. Barber (here Mr. Barber referred to himself in the third person) and SCW. (Haugh Decl. at ¶ 12; Exhibit R.) Mr. Haugh invited Mr. Barber to specify what statements Mr. Barber found to be inaccurate and to provide evidence. (Haugh Decl. at ¶ 12; Exh. S.)

Mr. Barber did not, in fact, specify what statements on the Site he believed were false, nor offer evidence supporting that belief. Instead, he filed the Complaint, asserting causes of action for (1) Intentional Interference With Prospective Economic Advantage, (2) Misappropriation of Trade Names, (3) Defamation, (4) False Light, and (5) Trade Libel. Remarkably, the Complaint does not attach a single blog post from the Site, specify a single blog post by date or title, or offer a single quotation from the Site. Instead, it offers broad characterizations of statements Plaintiffs claim have appeared on the Site:

- "[T]hat the 49'ers had bought out the weekly and that the weekly serves as nothing more than a proxy for the 49'ers business interest,"
- "[T]hat Miles Barber is a misogynist and the Weekly's criticism of the women of the city council were [sic] based on a desire to remove all women from the council,"
- "[T]hat the Weekly was not authorized to publish legal notices,"
- "[T]hat the Weekly's advertisers do not see a return on investment,"
- "[T]hat Plaintiff has been skipping publication dates," and
- "[T]hat numerous facts published by the weekly were not true." (Complaint at ¶¶ 15, 26, 31, 36.)

These vague assertions mischaracterize the actual content of the Site:

- On the Site, in columns explicitly labeled as opinion, Mr. Haugh identified facts underlying his questions about whether the SCW was "serving the needs of the San Francisco 49ers": that the SCW had run a large 49ers ad nearly every week since 2010, that an associate editor of SCW promoted the 49ers' sponsorship of her non-profit arts event, and that a Political Action Committee called BluPac associated with the 49ers reprinted stories printed in the SCW. (Haugh Decl. at ¶

5; Exh. B, C, G.)

- The Site has never called Mr. Barber a "misogynist." It has criticized him for a column in the SCW (Exh. R) in which he derided female City Council members, saying they could "barely spell their name." (Haugh Decl. at ¶¶ 6-7; Exh. C, I, M.)
- Mr. Haugh has not asserted that Plaintiffs are unauthorized to print legal notices. Rather, in a guest letter written by Burt Field, Mr. Field explained that he had written to the City Clerk and City Auditor asking questions about whether the SCW met the requirements for legal notices. (Haugh Decl. at ¶ 8; Exh. P.)
- The Site's sole reference to advertiser "return on investment" in the SCW came from a column – expressly labeled an opinion – in which Mr. Haugh referred to the fact that most of the candidates who advertised in the SCW in the 2016 local election were not elected. (Haugh Decl. at ¶ 9; Exh. L.)
- Contrary to Plaintiffs' claim, the Site is not aware of any post asserting that the SCW has skipped publication dates. (Haugh Decl. at ¶ 10.)
- Though the Site has questioned factual claims in the SCW, each time it has done s so in opinion pieces that have expressly stated the basis for the question. (Haugh Decl. at ¶ 11; Exh. A, F, I.)

## III.

## ARGUMENT

### A. California's Anti-SLAPP Statute Protects Mr. Haugh's Free Speech From Plaintiffs' Vexatious Assault

Section 425.16, California's Anti-SLAPP Statute, helps defend against the "disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16.) An Anti-SLAPP motion like this one triggers a familiar two-step process.

First, Mr. Haugh must make a prima facie showing that the conduct cited in the Complaint concerns or arises from "any act of that person in furtherance of the person's right

of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." (§ 425.16, subd. (b)(1); *Governor Gray Davis Committee v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 458–59.) In determining whether Mr. Doe has sustained his initial burden, the Court considers the pleadings, declarations and matters that may be judicially noticed. (§ 425.16, subd. (b)(2); *Brill Media Co., LLC, supra,* 132 Cal.App.4th at 329.)

Second, once Mr. Haugh carries his burden (as he easily does), the burden shifts to Plaintiffs to show that they have a probability of prevailing on their claim. (§ 425.16, subd. (b)(1); *Premier Med. Mgmt. Systems, Inc. v. California Ins. Guar. Ass'n* (2006) 136 Cal.App.4th 464, 476 ["plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment"].) Plaintiffs' burden "resembles the burden he would have in fending off a motion for summary judgment or directed verdict." *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 53. Plaintiffs must therefore submit *admissible evidence* to oppose an anti-SLAPP motion. (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.) If Plaintiffs can't even state a cause of action, by definition they can't meet this standard. (*Vogel v. Felice* (2005) 127 Cal.App.4th 1006, 1017 [plaintiff cannot show a probability of success where claim is legally insufficient on its face]).

If Plantiffs cannot carry their burden, the Court must strike the Complaint and award attorney fees and costs to Mr. Haugh. (§ 425.16, subd. (c).)

**B. <u>The Complaint Arises From Mr. Haugh's Protected Speech</u>**

Mr. Haugh easily carries his burden under the first prong of the anti-SLAPP statute. That statute applies to the following expression:

> (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) ***any written or***

> ***oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest***; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest. (§ 425.16, subd. (e) [emphasis added].)

It does not matter what guise or cause of action Plaintiffs use to attack the protected expression. If the factual conduct described in the Complaint falls into one of these categories, it triggers the anti-SLAPP statute. (*Martinez v. Metabolife Intern., Inc.* (2003) 113 Cal.App.4th 181, 187 ["a plaintiff cannot avoid operation of the anti-SLAPP statute by attempting, through artifices of pleading, to characterize an action as a 'garden variety breach of contract [or] fraud claim' when in fact the liability claim is based on protected speech or conduct."].)

Here, the Complaint openly attacks statements in a public forum on matters of public interest. The Site is a quintessential public forum. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1006-07 [internet site is a public forum].) The local political issues vaguely referenced in the Complaint – and actually covered on the site – are classic subjects of public interest. (*Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1042 [matter of public interest is "any issue in which the public is interested"]; Cross v. Cooper (2011) 197 Cal.App.4th 357, 372-73.) Plaintiffs can't evade Section 425.16 by dressing up their defamation claim in different guides; each cause of action attacks speech at its core. (*City of Costa Mesa v. D'Alessio Investments LLC* (2013) 214 Cal.App.4th 358, 375 [Section 425.16 applied to claims of trade libel and intentional interference with prospective economic advantage based on speech]; *M.G. v. Time Warner, Inc.* (2001) 89 Cal.App.4th 623, 629 [Section 425.16 applied to false light claim].)

This is more than enough to carry Mr. Haugh's initial burden, especially in light of the Legislature's instructions that courts interpret the anti-SLAPP statute broadly. (*Martinez, supra*, 113 Cal.App.4th 181, 187; § 425.16, subd. (a).)

The burden therefore shifts to Plaintiffs to show a probability of prevailing on the

merits. (§ 425.16, subd. (b)(1).) They cannot do so.

### C. Because Mr. Haugh's Speech Is Protected, Plaintiffs Cannot Carry Their Burden Under Section 425.16

Plaintiffs cannot show a probability of prevailing on their five causes of action for three key reasons:

- Under the Communications Decency Act of 1996, Mr. Haugh is not liable for the content of guest letters as a matter of law.
- Plaintiffs cannot establish that the Site printed provably false statements of fact, as required for all of their causes of action.
- The indisputable facts show that Plaintiffs' misappropriation of trade name claim is fabricated.

#### 1. Mr. Haugh Cannot Be Held Liable, As A Matter Of Law, For Statements In Guest Letters

Because the Complaint is so strategically vague, it is difficult to determine exactly what statements on the Site Plaintiffs mean to complain about. However, in at least two instances, it appears that Plaintiffs are attacking guest letters, not content written by Mr. Haugh:

- The Complaint asserts that the Site stated that the SCW is not authorized to publish legal notices. The only statement remotely resembling this came in a guest letter from Burt Field. (Haugh Decl. at ¶ 8; Exh. P.) In that letter, Mr. Field commented on a SCW post by Mr. Barber complaining about criticism of the SCW, and explained how he had sent the Santa Clara City Clerk and City Auditor a letter asking questions including "Is the Santa Clara Weekly a paper of general circulation as is required of publications where the city places legal notices?" (Exh. P.)
- The Complaint asserts that the Site falsely states that "numerous facts published by the weekly were not true." In a January 31, 2017 guest letter, Kirk Vartan asserted that the SCW had misquoted him and that it inaccurately described his

position on a public issue. (Exh. Q.)

Even if these statements were actionable – and as is set forth below, they are not – Mr. Haugh cannot be held liable for them as a matter of law under the Communications Decency Act of 1996, 47 U.S.C. § 230(c)(1) ("Section 230").

Put simply, Section 230 immunizes a web site from liability for comments, posts, or other content created by others, like guests or commenters. In the language of the statute, an "interactive computer service" cannot be treated as the publisher or speaker of information provided by another "information content provider." (*Delfino v. Agilent Technologies* (2006) 145 Cal.App.4th 790, 805 [collecting cases applying Section 230].) Section 230 provides "broad immunity against defamation liability for those who use the Internet to publish information that originated from another source." (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 39-40.) "Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, or alter content – are barred." (*Hassell v. Bird* (2016) 247 Cal.App.4th 1336, 1362, quoting *Zeran v. America Online, Inc.* (4th Cir. 1997) 129 F.3d 327, 330.)

Here, Mr. Haugh operated the Site, an "interactive computer service." The guest letters at issue were written by third parties, Mr. Field and Mr. Vartan, not by Mr. Haugh. (Haugh Decl. at ¶¶ 8, 11(d).) Therefore Mr. Haugh cannot be held liable for their content. To the extent the Complaint relies on those guest letters, it must fail.

**2. <u>Plaintiffs' Claims Fail Because They Attack Protected Opinions</u>**

Plaintiffs' First Cause of Action for Intentional Interference With Prospective Economic Advantage, Third Cause of Action for Defamation, Fourth Cause of Action for False Light, and Fifth Cause of Action for Trade Libel all rely on an assertion that Mr. Haugh published false statements of fact about Plaintiffs. Because Plaintiffs cannot identify, much less prove, any false statements of fact, all of these claims necessarily fail.

Each of these causes of action requires a false statement of fact, not merely a statement of disparaging opinion:

- The tort of **defamation** "involves (a) a publication that is (b) false, (c) defamatory,

and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage." (*Taus v. Loftus* (2007) 40 Cal.4th 683, 720.) To be defamatory a statement "must contain a false statement of fact." (*Gregory v. McDonnell* (1976) 17 Cal.3d 596, 600-01.) Only provably false statements of fact can be defamatory; insults, hyperbole, and "loose and figurative expressions of opinion" cannot be. (*Paterno v. Superior Court* (2008) 163 Cal.App.4th 1342, 1356.) "Rhetorical hyperbole," "vigorous epithet," "lusty and imaginative expression of [ ] contempt," and language used "in a loose, figurative sense" are all protected by the First Amendment. (*Greenbelt Pub. Assn. v. Bresler* (1970) 398 U.S. 6, 14.)

- A **false light** claim is the equivalent of a defamation claim and must meet the same requirements. (*Aisenson v. American Broadcasting Co.* (1990) 220 Cal.App.3d 146.)
- To prove **intentional interference with prospective economic advantage**, a plaintiff must prove that (1) the plaintiff had an economic relationship with a third party with a probability of future economic benefit to the plaintiff, (2) the defendant knew the relationship, (3) the defendant committed an intentional act designed to disrupt the relationship, (4) the relationship was actually disrupted, and (5) economic harm proximately caused by the defendant's wrongful act. (*City of Costa Mesa, supra*, 214 Cal.App.4th at 376; *Edwards v. Arthur Anderson LLP* (2008) 44 Cal.4th 937, 944.) The intentional act must be independently wrongful. (*City of Costa Mesa, supra*, 214 Cal.App.4th at 376; *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1158.) Opinions, hyperbole, and insults are insufficient. (*ComputerXpress*, 93 Cal.App.4th at 1014.)
- To prove **trade libel**, a plaintiff must prove the defendant published *false statements* disparaging the plaintiff's property in a way that the publisher should recognize is likely to cause a pecuniary loss. (*City of Costa Mesa, supra,* 214 Cal.App.4th at 376; *ComputerXpress, supra,* 93 Cal.App.4th 993, 1010.) Opinions cannot be trade libel. (*ComputerXpress*, 93 Cal.App. at 1010-11.)

Plaintiffs cannot show a probability of prevailing on any of these claims because they cannot identify and prove false statements of fact, as opposed to disparaging or critical statements of opinion, which are protected by the First Amendment. An opinion *can* be defamatory if it "implies a provably false assertion of fact." (*Integrated Healthcare Holdings, Inc. v. Fitzgibbons* (2006) 140 Cal.App.4th 515, 527.) However, an opinion is not actionable if it does not imply provably false facts, or "if it discloses all the statements of fact on which the opinion is based and those statements are true." (*Id., quoting Ruiz v. Harbor View Community Association* (2005) 134 Cal.App.4th 1456, 1471.)

Whether a statement is one of fact or one of opinion or hyperbole is a question of law for the court. (*Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 809-10.) In making this determination, California courts look at the totality of the circumstances, including both the words used and their context. (*Ibid., citing Rudnick v. McMillan* (1994) 25 Cal.App.4th 1183, 1191.) In considering the context of a statement, courts examine the "knowledge and understanding of the audience to whom the publication was directed." (*Seelig, supra*, 97 Cal.App.4th at 809-810; *Moyer v. Amador Valley J. Union High School Dist.* (1990) 225 Cal.App.3d 722, 724.) A statement made by a publication known for hyperbole is therefore more likely to be taken as hyperbole and not fact. In *Seelig*, for instance, the court considered the "irreverence" of a morning ratio program "which may strike some as humorous and others as gratuitously disparaging" in determining that "no reasonable listener" could take the challenged statements as factual pronouncements. (97 Cal.App.4th at p. 811.)

Similarly, statements in an adversarial setting are more likely to be interpreted as hyperbole and not fact. "[W]here potentially defamatory statements are published in a ... setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion." (*Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 601[statements in a bulletin attacking the motives of union officers in a labor dispute].)

Moreover, California courts are much more likely to interpret political rhetoric as hyperbole and not as a statement of literal fact. (*Beilenson v. Superior Cour*t, 44 Cal.App.4th 944, 950 (1996) [campaign mailer charging politician with "ripp[ing] off" taxpayers "when taken in context with the other information contained in the mailer [is] rhetorical hyperbole common in political debate" and not defamatory].)

Finally, many California courts have noted that statements in internet fora like blogs and message boards are much more likely to be interpreted as opinions rather than facts. In *Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, the court reviewed numerous authorities for the proposition that "online blogs and message boards are places where readers expect to see strongly worded opinions rather than objective facts." (*Id.* at pp. 696-97.) The court emphasized that in determining whether a statement is taken as fact or bluster, the court must consider how someone familiar with the context would view them: "Rogers's statements must be viewed from the perspective of the average reader of an Internet site such as Craigslist's 'Rants and Raves,' not the Bank or a banking expert who might view them as conveying some special meaning." (Ibid.)

Here, Plaintiffs cannot establish that the Site made provably false statements of fact, as opposed to political opinion.

***The "misogynist" claim:*** The Complaint falsely asserts that the Site called Mr. Barber a "misogynist." (Complaint at ¶ 15.) This is simply not true. (Haugh Decl. at ¶ 15.) Rather – without using that word – the Site criticized Mr. Barber for deriding female City Council members as being people who could "barely spell their name." (Haugh Decl. at ¶¶ 6-7; Exh. R [Barber column using insult]; C, I, M [critical Site posts].) The Site posts criticizing Mr. Barber's rhetoric are explicitly labeled as opinion (Exh. C, I, M), and Mr. Barber cannot identify any provably false statement of fact in them. Criticizing someone for using obnoxious language is not defamatory, no matter how much it might offend.

***The 49ers Opinions:*** Plaintiffs claim that the Site stated that "the 49ers bought out the weekly and the weekly serves as nothing more than a proxy for 49ers business interest." (Complaint at ¶ 15.) This is a broad generalization about the actual content of the Site. Mr.

Haugh has written several posts expressly labeled "Opinion" in which he has discussed connections between the SCW and the San Francisco 49ers. (Exhibits B, C, G.) In those opinion pieces, Mr. Haugh said that "there are concerns that [SCW] is also serving the needs of the 49ers," asked "Do the 49ers 'own' the Santa Clara Weekly?", and discussed evidence connecting SCW to a PAC associated with the 49ers. (Haugh Decl. at ¶ 5; Exh. B, C, G.). Those posts disclosed the *facts* on which Mr. Haugh based his opinions and questions:

- His statement that "there are concerns" was based on statements to him by Santa Clara residents (Haugh Decl. at ¶ 5);
- His questions about the connection between the SCW and the 49ers were explicitly based on the SCW running a large ad for the 49ers nearly every week since 2010, and a SCW associate editor promoting 49ers sponsorship of her non-profit arts event and the SCW running a story about it. (*Id.*)
- He asked Mr. Barber and the SCW for a comment on the issue and did not get a response. (*Id.*)
- His questions about the connection between the SCW and BluPAC was expressly based on BluPac reprinting SCW stories on BluPac's website within days of those stories running. (*Id.*)

In short, Mr. Haugh did not offer a provably false factual statement that SCW is a "proxy for 49ers business interests." Instead, he reported that citizens had concerns about the connection, asked questions about a potential connection, and provided the facts that underlay his questions. Tellingly, Mr. Barber himself referred to this reporting as "Your Opinion Blog" in his threatening email to Mr. Haugh. (Haugh Decl. at ¶ 12.)

***Questions About Legal Notices:*** Plaintiffs falsely assert that Mr. Haugh stated that SCW is not authorized to publish legal notices. (Complaint at ¶ 15.) As is discussed above, this claim attempts to hold Mr. Haugh liable for statements in a guest letter, which Section 230 prohibits. (Exhibit P.) However, even if Mr. Haugh *could* be held liable for the guest letter, it still doesn't reflect a false statement of fact. Rather, in the letter, guest letter writer Burt Field responded to complaints about criticism in the SCW by noting that he had sent a

letter to the Santa Clara City Clerk and City Auditor *asking questions*, including *asking* "Is the Santa Clara Weekly a paper of general circulation as is required of publications where the city places legal notices?" (Haugh Decl. at ¶8; Exhibit P.) This – a quote from a letter from a citizen to a public official, including a question about whether or not SCW complies with the law -- is not a provably false statement of fact, and Plaintiffs cannot establish otherwise.

***The Statement About Return on Investment:*** Plaintiffs complain that Mr. Haugh said that "the Weekly's advertisers do not see a return on investment." (Complaint at ¶ 15.) Plaintiffs have removed this statement from the context that demonstrates it is an opinion about a limited issue. On December 15, 2016, Mr. Haugh published a column titled "Lessons From The Election – Opinion," subtitled "Santa Clara Focus – An Opinion." (Haugh Decl. at ¶ 9; Exh. L.) The post contained Mr. Haugh's opinions about the results of Santa Clara's local elections in November 2016. One item read "The Santa Clara Weekly is a waste of money. Most of the advertisers, especially during the election cycle, did not see a return on investment." (Exh. L.) This referred to the fact that 10 of 12 election candidates who advertised in the SCW lost their election. (Haugh Decl. at ¶ 9.) The statement was expressly (and repeatedly) couched as opinion, used language "waste of money" that could not be taken as provably true or false, and was expressly connected to electoral politics.

***Skipping Publication Dates***: The Complaint asserts that Mr. Haugh stated that the SCW has been "skipping publication dates." That is not true. (Haugh Decl. at ¶ 10.) It's not clear to what Plaintiffs refer. If they are referring to something in a guest letter or by a guest commenter, Mr. Haugh is not liable for it, as is discussed above.

***Questioning False Statements in the SCW:*** Plaintiffs complain that Mr. Haugh has stated "[T]hat numerous facts published by the weekly were not true." (Complaint at ¶¶ 15.) The Site has questioned and challenged statements in the SCW, each time providing a basis for its opinions.

- In one of the Site's first posts, titled "Santa Clara Focus – Opinion," Mr. Haugh questioned and criticized the SCW's reporting on Fair Political Practices

Commission complaints filed by attorney John Mlnarik. (Haugh Decl. at ¶ 11; Exh. A.) Mr. Haugh opined that Mr. Mlnarik lacked credibility because he had been subject to an FPPC complaint himself, had sued a blogger for online content, had lost a City Council race, and had paid to advertise in the SCW, which was reporting approvingly on his complaints. (*Ibid.*) In other words, Mr. Haugh expressed an opinion based on disclosed facts. Perhaps coincidentally – or perhaps not – Mr. Mlnarik is the lead attorney in this vexatious SLAPP suit against Mr. Haugh.

- In a November 3, 2016 post titled "Striking Out Miles Barber – Santa Clara Focus (Opinion)", Mr. Haugh questioned and criticized Mr. Barber's claim that the SCW had learned that there was a District Attorney investigation into the Mayor. (Haugh Decl. at ¶ 11; Exh. F.) Mr. Haugh expressly disclosed the factual basis for his opinion: in his personal experience working at the SCW it did not have sources at the DA's Office, and the DA's Office wouldn't confirm the claim. (*Ibid*.) Mr. Haugh also questioned Mr. Barber's assertion that the Mayor had made a misleading statement, linking a Mercury News story supporting the statement. (*Ibid.*) Finally, Mr. Haugh mocked Mr. Barber's statement that the SCW had "just discovered" a lawsuit against the city, pointing out that the SCW had already reported on the matter and that it involved a letter, not a lawsuit. (*Ibid.*)
- In a November 15, 2016 post entitled "Santa Clara Focus – Opinion," Mr. Haugh again questioned SCW assertions and again supplied the factual basis for his opinions. (Haugh Decl. at ¶ 11; Exh. I.) Mr. Haugh again pointed out that SCW was mischaracterizing a legal threat as a lawsuit, that its calculation of the percentage of citizens who voted counted all citizens rather than registered voters, and that SCW's characterization of Santa Clara as a "divided city" was not supported by overwhelming votes for ballot measures and reelected incumbents. (*Ibid.*)

- On January 31, 2017, the Site ran a guest letter from Kirk Vartan, who asserted that the SCW had misquoted him and misrepresented his position on an issue. (Haugh Decl. at ¶ 11; Exh. Q.) As is noted above, Mr. Haugh is not responsible for Mr. Vartan's guest letter as a matter of law. Even if he could be, Mr. Vartan's letter expressly stated the facts on which it was based – Mr. Vartan's personal knowledge of what he said and what his positions were. (*Ibid.*)

***Plaintiffs cannot show false statements of provable fact:*** Based on the foregoing, Plaintiffs cannot prevail on their false-statement-based causes of action because they cannot establish provable false statements of fact. The statements apparently referenced by their strategically vague Complaint are either political opinions or opinions premised on expressly stated facts. The following factors conclusively establish that the Complaint attacks opinion, not fact:

- Mr. Haugh's columns are expressly – and sometimes repeatedly – labeled as opinion. (*ComputerXpress*, *supra,* 93 Cal.App.4th at 1013 (text expressly labeled as opinion taken as opinion).
- Mr. Barber referred to Mr. Haugh's statements as opinions in his emailed threat, which referred to "Your Opinion Blog." (Haugh Decl. at ¶ 12; Exh. R.) Notably, when invited, he refused to specify what statements were false and what evidence proved them false. (Exh. S.)
- The statements were made in political opinion columns, and thus are only identifiable as opinions, not provable facts. (*Beilenson*, *supra*, 44 Cal.App.4th at 950 [political rhetoric more likely to be taken as opinion and not provable fact]; *Gregory*, *supra,* 17 Cal.3d at 601 [adversarial writing more likely to be taken as hyperbole and not fact].
- The statements were made on an online blog. Blogs and similar online publications are far more likely to be taken as opinion and hyperbole than fact. *Summit Bank,* supra, 206 Cal.App.4th at 696-97 ["online blogs and message boards are places where readers expect to see strongly worded opinions rather than

objective facts."]; *ComputerXpress, supra,* 93 Cal.App.4th at 1013 (disparaging statements like "inferior quality" and "scam" on web site were opinion.)

- To the extent any of the opinions implied facts, Mr. Haugh expressly explained those facts. *(Integrated Healthcare Holdings, Inc., supra,* 140 Cal.App.4th at 527.)

In short, Plaintiffs cannot present evidence that Mr. Haugh offered any provably false statements of fact, as is required to support their First, Third, Fourth, and Fifth causes of action. Therefore the Court should grant the Section 425.16 motion.

**3. Plaintiffs Cannot Prevail On Their "Misappropriation of Trade Name" Claim**

Plaintiffs' Second Cause of Action is for "Misappropriation of Trade Name." In it, Plaintiffs assert that Mr. Haugh misappropriated the trade name "Santa Clara News Online," which they registered as a DBA. (Complaint at ¶¶ 19-20.)

Plaintiffs cannot prevail on this wholly fabricated claim. By "Misappropriation of Trade Name," they apparently mean to plead a common law misappropriation. To prove such a claim, they must prove that (1) Plaintiffs have made a "substantial investment of time, effort, and money into creating the thing misappropriated such that the court can characterize the thing as a kind of property right," (2) Mr. Haugh has appropriated the thing at little or no cost, and (3) Mr. Haugh has injured Plaintiffs. (*Hollywood Screentest of America, Inc. v. NBC Universal, Inc.* (2007) 151 Cal.App.4th 631, 650.)

Plaintiffs can't carry this burden, because they have misrepresented the sequence of events in their verified Complaint. Mr. Haugh launched the Site – using the name "Santa Clara News Online" – on October 20, 2016. (Haugh Decl. at ¶ 13, Exhibit T.) He registered the domain santaclaranews.org – where the Site now resides – on October 26, 2016. (Haugh Decl. at ¶ 13; Exh. U.) Contrary to his representations, Mr. Barber did not register "Santa Clara News Online" as a DBA until November 21, 2016, ***more than a month after Mr. Haugh began using the name***. (Haugh Decl. at ¶ 13; Exh. V, W.) The sequence is clear: Mr. Haugh launched the site, Mr. Barber reacted a month later by registering the name as a

DBA, and then Mr. Barber turned around and misrepresented to this Court that he had been there first. Because Mr. Barber can't make a prima facie showing that he invested substantial time and money into the name before Mr. Haugh used it (or, for that matter, at all), Plaintiffs cannot carry their burden of showing they can prevail on the claim.

**D. The Court Should Award Mr. Haugh His Attorney Fees**

A "prevailing defendant" on a motion to strike "***shall be entitled***" to recover attorney fees and costs. (Code Civ. Proc. § 425.16, subd. (c) [emphasis added].) The fee award is mandatory, and may be sought in three ways: (1) the party may request fees in the motion; (2) the party may make a noticed motion for fees after the ruling on the anti-SLAPP motion; or (3) the party may include the fee request in the cost bill after entry of judgment. (*American Humane Ass'n v. Los Angeles Times Communications*, (2001) 92 Cal.App.4th 1095, 1103.)

Here, Mr. Doe will submit a motion for fees after the hearing on this motion.

**IV.**

**CONCLUSION**

For the foregoing reasons, the Mr. Haugh respectfully requests that the Court strike the Complaint and award his fees and costs.

DATED: March 24, 2017

Respectfully submitted,

BROWN WHITE & OSBORN LLP

By _____

KENNETH P. WHITE
Attorneys for Defendant
ROBERT HAUGH

**PROOF OF SERVICE**
**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 333 South Hope Street, 40th Floor, Los Angeles, California 90071.

On March 24, 2017, I served the following document(s) described as: **DEFENDANT ROBERT HAUGH'S NOTICE OF MOTION AND SPECIAL MOTION TO STRIKE PURSUANT TO CODE OF CIVIL PROCEDURE § 425.16** in this action by placing true copies thereof enclosed in sealed envelopes and/or packages addressed as follows:

John L. Mlnarik
Nina C. Decker
William W. Winters
2930 Bowers Avenue
Santa Clara, CA 95051

Tel.: 408.919.0088
Fax: 408.919.0188

☒ **BY MAIL:** I deposited such envelope in the mail at 333 South Hope Street, 40th Floor, Los Angeles, California 90071. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

☐ **BY FACSIMILE:** I served said document(s) to be transmitted by facsimile pursuant to Rule 2008 of the California Rules of Court. The telephone number of the sending facsimile machine was 213/613-0550. The name(s) and facsimile machine telephone number(s) of the person(s) served are set forth in the service list.

☐ **BY OVERNIGHT DELIVERY:** I served such envelope or package to be delivered on the same day to an authorized courier or driver authorized by the overnight service carrier to receive documents, in an envelope or package designated by the overnight service carrier.

☐ **BY HAND DELIVERY:** I caused such envelope(s) to be delivered by hand to the above addressee(s).

☐ **BY ELECTRONIC MAIL:** On the above-mentioned date, from Los Angeles, California, I caused each such document to be transmitted electronically to the party(ies) at the e-mail address(es) indicated below. To the best of my knowledge, the transmission was reported as complete, and no error was reported that the electronic transmission was not completed.

☒ **STATE:** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 24, 2017, at Los Angeles, California.

S. Khadavi

Sharlene Khadavi

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