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7 **UNITED STATES DISTRICT COURT**
8 **CENTRAL DISTRICT OF CALIFORNIA**

9 MARY CUMMINS

10 Plaintiff,

11 vs.

12 AMANDA LOLLAR aka BAT WORLD
SANCTUARY an individual person,
13 BAT WORLD SANCTUARY an
unknown business entity, JOHN DOES 1-
14 10

15 Defendants.

CASE NO. CV11 08081 DMG (MANx)

**DEFENDANTS' NOTICE OF MOTION
AND MOTION FOR SUMMARY
JUDGMENT/PARTIAL SUMMARY
JUDGMENT; MEMORANDUM OF
POINTS AND AUTHORITIES**

Date: August 10, 2012
Time: 9:30 a.m.
Judge: Hon. Dolly M. Gee
Courtroom: 7

Complaint Filed: September 29, 2011

Discovery Cut off: July 3, 2012
Pretrial Conference Date: October 9, 2012
Trial Date: November 6, 2012

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 NOTICE IS HEREBY GIVEN that on August 10, 2012 at 9:30 a.m. or as soon
3 thereafter as the matter can be heard in Courtroom 580 of the above entitled court,
4 located at 255 East Temple Street, Los Angeles, CA 90012, Defendants Amanda
5 Lollar and Bat World Sanctuary (collectively referred to as "Defendants") will move
6 the Court for an order granting summary judgment/partial summary judgment.

7 This motion will be made pursuant to Federal Rule of Civil Procedure 56 on the
8 grounds that:

9 1. The uncontroverted evidence shows that Plaintiff Mary Cummins'
10 ("Plaintiff") First Claim for Relief for Defamation fails as a matter of law because the
11 statements that Plaintiff alleges are defamatory are not actionable. Because Plaintiff is
12 a limited interest public figure under California law, Plaintiff cannot prevail on a cause
13 of action for defamation unless she proves that the allegedly false statements were
14 false and were made by Defendants with actual malice. Here, the statements Plaintiff
15 alleges are defamatory are either true, constitute opinions, or were admittedly made
16 without malice.

17 2. The uncontroverted evidence shows that Plaintiff Mary Cummins'
18 ("Plaintiff") Second Claim for Relief for Defamation Per Se fails as a matter of law
19 because the statements that Plaintiff alleges are defamatory are not actionable. Because
20 Plaintiff is a limited interest public figure under California law, Plaintiff cannot prevail
21 on a cause of action for defamation unless she proves that the allegedly false
22 statements were false and were made by Defendants with actual malice. Here, the
23 statements Plaintiff alleges are defamatory are either true, constitute opinions, or were
24 admittedly made without malice.

25 3. The uncontroverted evidence shows that Plaintiff Mary Cummins'
26 ("Plaintiff") Third Claim for Relief for Intentional Interference with Business
27 Relations fails as a matter of law because it is based on Plaintiff's Defamation Claims.
28

1 Because the statements that Plaintiff alleges are defamatory are not actionable, this
2 claim for relief must also fail as a matter of law.

3 4. The uncontroverted evidence shows that Plaintiff Mary Cummins'
4 ("Plaintiff") Fourth Claim for Relief for Intentional Interference with Prospective
5 Economic Advantage fails as a matter of law because it is based on Plaintiff's
6 Defamation Claims. Because the statements that Plaintiff alleges are defamatory are
7 not actionable, this claim for relief must also fail as a matter of law.

8 5. The uncontroverted evidence shows that Plaintiff Mary Cummins'
9 ("Plaintiff") Fifth Claim for Relief for Intentional Infliction of Emotional Distress fails
10 as a matter of law because it is based on Plaintiff's Defamation Claims. Because the
11 statements that Plaintiff alleges are defamatory are not actionable, this claim for relief
12 must also fail as a matter of law.

13 6. As a matter of law, Plaintiff's Request for a Permanent Injunction falls
14 with her other claims for relief.

15 This motion will be based on this notice, the Memorandum of Points and
16 Authorities, Separate Statement of Undisputed Facts, Index of Evidentiary Exhibits,
17 the Declaration of Stephen MacPhail filed and served herewith, the papers and records
18 on file herein, and such oral and documentary evidence as may be presented at the
19 hearing on this motion.

20
21 Respectfully submitted,

22 BRAGG & KULUVA

23 DATED: July 10, 2012

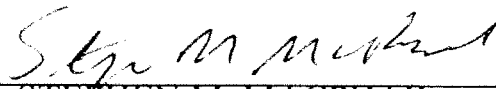
24 By: 
25 STEPHEN M. MACPHAIL
26 Attorneys for Defendants
27 AMANDA LOLLAR and BAT WORLD
28 SANCTUARY

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1
2 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
3 **MOTION FOR SUMMARY JUDGMENT/PARTIAL SUMMARY JUDGMENT**

4 **I. INTRODUCTION**

5 Plaintiff Mary Cummins' lawsuit against Defendants Amanda Lollar ("Lollar")
6 and Bat World Sanctuary ("Bat World") (collectively "Defendants") is but one chapter
7 in Plaintiff's ongoing war against Defendants.

8 Plaintiff runs an animal group in California. Defendants operate a bat sanctuary
9 in Texas. In or about June 2010, Plaintiff attended an internship with Defendants, but
10 left early after allegedly hitting her head on Defendants' property. Following her
11 accident, Plaintiff demanded \$2,500 from Defendants to compensate her for her injury.
12 When Defendants refused, Plaintiff became angry and initiated her campaign of terror
13 against Defendants on the Internet. Defendants have evidence that Plaintiff published
14 countless false attacks against their character, including stories accusing Defendants of
15 abusing animals at their sanctuary.

16 Initially Defendants attempted to defend themselves by responding to the
17 allegations on the Internet. Eventually, Defendants sued Plaintiff in the Northern
18 District of Texas. In May 2012, Defendants obtained a \$6.1 million dollar verdict
19 against Plaintiff.

20 In response to Defendants' Texas lawsuit against her, Plaintiff filed the instant
21 lawsuit in the Central District of California alleging causes of action for (1)
22 defamation; (2) defamation per se (3) intentional interference with business relations;
23 (4) interference with prospective economic advantage and (5) intentional infliction of
24 emotional distress.

25 Although Plaintiff alleges in her Complaint that Defendants made countless
26 defamatory statements about her, Plaintiff admitted in her deposition that her
27 allegations are based generally on her belief that Defendants posted statements that: (1)
28 Plaintiff "was charged with criminal contempt of court;" (2) Defendants "won an

1 injunction against” Plaintiff;” (3) Plaintiff’s “deposition was court-ordered;” and (4)
2 Lollar allegedly alluded to Plaintiff a “psychopath.”

3 Although Plaintiff could identify no actual harm suffered by her, Plaintiff
4 alleges that these “false” statements about her on the Internet have had the tendency to
5 injure Plaintiff’s business.

6 As described more fully herein, Plaintiff’s claims for defamation fail because
7 Plaintiff’s consistent, voluntary presence on the Internet and as a author of wildlife
8 manuals and instructor of approved classes, have rendered her a limited purpose public
9 figure in connection with animal care issues including the rehabilitation of wildlife,
10 and animal abuse. As such, Plaintiff cannot prevail on defamation claims unless
11 Plaintiff proves by clear and convincing evidence that Defendants actually posted false
12 statements about her with actual malice.

13 Here, the majority of the statements upon which Plaintiff bases her claims are
14 not actionable because they are either true, statements of opinions, or were made
15 without actual malice, if they were made by Defendants at all. [Indeed, Defendants
16 believe that Plaintiff has posted the majority of the allegedly defamatory statements
17 about herself.] Plaintiff’s inability to prove that Defendants posted the statements of
18 fact that were false, coupled with her inability to prove actual malice on Defendants’
19 part, is fatal to her claims for defamation and defamation per se.

20 Because Plaintiff’s remaining causes of action for interference with her business
21 and prospective economic advantage, and infliction of emotional distress, are based on
22 Plaintiff’s defamation claims, these causes of action fall with Plaintiff’s defamation
23 claims. Summary judgment is warranted.

24 **II. FACTUAL BACKGROUND**

25 The factual background of this case is short and simple.

26 In or about June 2010, Plaintiff attended an internship with Bat World
27 Sanctuary. [Deposition of Plaintiff Mary Cummins (“Plaintiff’s Depo.”), 39:3-8;
28 138:6-8.] Although the internet was supposed to last 14 days, Plaintiff did not

1 complete the internship. Plaintiff alleges that she left the internship after ten days after
 2 she hit her head, and because she believed that she was not receiving the training she
 3 anticipated.

4 Following Plaintiff's departure, numerous postings about Plaintiff and
 5 Defendants appeared on the Internet. Plaintiff and Defendants each blame the other
 6 for the postings. Defendants vigorously dispute Plaintiff's claims that Defendants
 7 posted defamatory statements about her on the Internet. Instead, Defendants contend
 8 that Plaintiff posted defamatory statements about them¹ and even went so far as to post
 9 statements about herself that she later attempted to pin on Defendants. **However, for**
 10 **the purposes of this motion only, Defendants will treat all of Plaintiff's allegations**
 11 **as true.**

12 Although Defendants had already filed suit against Plaintiff in District Court in
 13 Texas, Plaintiff initiated the instant action instead of filing a counterclaim in the Texas
 14 action. On December 22, 2011, Plaintiff amended her Complaint to allege claims for
 15 defamation, defamation per se, intentional interference with business relations,
 16 intentional interference with prospective economic advantage and intentional infliction
 17 of emotional distress. [First Amended Complaint ("Complaint"), Docket No. 21.]

18 In her Complaint, Plaintiff alleges that Defendants published false statements on
 19 the Internet about Plaintiff that have the tendency to injure Plaintiff's business,
 20 including that statements that (1) Plaintiff has a criminal record; (2) Plaintiff was
 21 convicted of theft of property, forged name on credit card; (3) Plaintiff is a
 22 cyberstalker, cybersquatter; (4) Plaintiff was picked up by police; (5) Plaintiff hacked
 23 into [Defendants] website and email list; (6) Plaintiff was picked up by the LAPD anti-
 24 terrorist task force; (7) Plaintiff "posts pornography in children's chat rooms;" (8)

25
 26 ¹ Indeed, in 2011, Defendants filed a lawsuit against Plaintiff in the the District Court
 27 of Tarrant County, Texas s which was tried in June 2012. Defendants prevailed on all
 28 of its causes of action and judgment was entered against Plaintiff for \$6.1 million.
 [Declaration of Stephen M. MacPhail ("MacPhail Decl."), ¶¶ 1-3 and Exhibits "A"-
 "C."]

1 Plaintiff “commits animal cruelty;” (9) Plaintiff “tortures animals;” and (10) Plaintiff is
2 a “whore.”

3 When questioned about her allegations during her deposition, Plaintiff admitted
4 that she did not actually know who posted the majority of the above statements.
5 [Plaintiff’s Depo., 53:7-18; 84:2-5; 111:16-22; 112:4-14; 126:25-127:3; 131:3-7;
6 132:7-22; 134:17-24; 137:2-5; 138:2-5; 139:6-10.]

7 Plaintiff contends that the following statements were defamatory: (a) Plaintiff is
8 a disgruntled ex-intern [Plaintiff’s Depo., 38:8-12]; (b) Plaintiff asked for \$2,500 a
9 CAT scan [Plaintiff’s Depo., 38:19-22];² (c) Plaintiff bullies and attempts to ruin
10 careers of professionals [Plaintiff’s Depo., 44:17-45:1]; (d) Defendants won an
11 injunction against Plaintiff; [Plaintiff Depo. 58:14-25 and Exh. 4] (e) Plaintiff is using
12 the Internet to harass and defame Defendants [Plaintiff’s Depo., 44:17-45:1; 64:23-
13 65:20; 78:18-79:2; 126:16-22]; (f) Plaintiff made false complaints against Defendants
14 to government organizations [Plaintiff’s Depo., 55:21-56:8]; (g) Government
15 organizations have investigated and found Plaintiff’s complaints to be false [Plaintiff’s
16 Depo., 55:21-56:8]; (h) Plaintiff was charged with criminal contempt [Plaintiff Depo.
17 58:4-13 and Exh. 4]; (i) Plaintiff’s deposition in the Texas action was court-ordered
18 [Plaintiff Depo. 58:9-14, 62: 16 – 63:18 and Exh. 5]; (j) Plaintiff is a psycho, crackpot,
19 nut-bag, and referring to Plaintiff in connection with discussion about symptoms about
20 psychopaths [Plaintiff Depo. 59:23- 60:13, 84:16-20 and Exh. 5]; (k) Defendants
21 posted portions of Texas deposition, edited, out of context [Plaintiff’s Depo., 60:14-
22 23]; (l) Plaintiff posts personal information about people, such as their account
23 numbers and Social Security numbers [Plaintiff’s Depo., 64:23-65:20]; (m) Plaintiff
24 abuses animals [Plaintiff’s Depo., 95:11-19]; (n) Plaintiff downloaded altered videos
25 onto the Internet [Plaintiff’s Depo., 81:5-17].

26
27 ² While Plaintiff denies that she asked for this money, Plaintiff has recently filed
28 another action against Defendants in the Central District of California for injuries she
allegedly sustained while she was attending the internship at their site.

1 Importantly, Plaintiff admitted that she did not have sufficient information to
2 prove that all of the negative statements about her on the Internet were made by
3 Defendants. [Plaintiff's Depo., 53:7-18; 84:2-5; 111:16-22; 112:4-14; 126:25-127:3;
4 131:3-7; 132:7-22; 134:17-24; 137:2-5; 138:2-5; 139:6-10.] In fact, Plaintiff admitted
5 that numerous statements were made by others. [Id.] Also important, Plaintiff was
6 forced to admit that the worst statements about her on the Internet (e.g. that Plaintiff
7 posts pornography in children's chat rooms and that Plaintiff is a terrorist) were made
8 several years before she filed her lawsuit and also before the internship with
9 Defendants. [Plaintiff's Depo., 84:16-85:22.]

10 However, with regard to the majority of the above statements that she attributes
11 to Defendants, Plaintiff provided testimony showing that the statements were in fact
12 not false. For example, Plaintiff admitted in her deposition that an Order to Show
13 cause regarding contempt had been issued against her.

14 Q. Anything else in Exhibit 4 that you contend is
15 defamatory?

16 A. Yes. It says "Cummins was charged with criminal
17 contempt of court." I was not charged with criminal
18 contempt of court.

19 Q. Was an order to show cause re contempt issued in this
20 case?

21 A. Yes. Regular contempt but not criminal contempt.

22 [Plaintiff's Depo., 58:4-13.]

23 The Motion for Criminal Contempt of Court and Order thereon on file with the
24 District Court of Tarrant County, Texas in the matter of *Bat World Sanctuary and*
25 *Amanda Lollar v. Mary Cummins*, Case No. 352-248169-10 reveals that Plaintiff was
26 held in contempt. [See Request for Judicial Notice in Support of Defendant's Motion
27 for Summary Judgment/Partial Summary Judgment ("Request for Judicial Notice"), ¶
28 1 and Exhibit "A" thereto.]

1 Regarding her claim that the statement “Defendants won an injunction against”
2 Plaintiff is defamatory, Plaintiff admitted:

3 Q. And you said it was defamatory that she sought an
4 injunction against you?

5 A. She stated here that “We won an injunction against her.”
6 The injunction was void because I never posted a bond
7 and I believe they knew it at the time.

8 Q. But the injunction had been granted. Just that you failed
9 to post a bond?

10 A. The injunction was granted.

11 Q. And then it became void because the bond hadn’t been
12 posted?

13 A. It was instantly void because they never posted a bond.

14 [Plaintiff’s Depo., 58:14-25.]

15 Regarding her allegation that the statement “Plaintiff’s deposition was court-
16 ordered” was false, Plaintiff testified:

17 Q. Now when your deposition was initially noticed by the
18 plaintiffs in the Texas action did you appear at the date
19 noticed?

20 A. Not the first one because I didn’t get the notice until an
21 hour before the deposition.

22 Q. And what about the second time it was noticed? Did you
23 appear at that time?

24 A. I asked to reschedule because I was getting an attorney
25 and he refused.

26 Q. And did they move to compel the deposition?

27 A. Yes.

28 Q. And the motion was granted?

 A. The motion was granted for a specific date and then that
 date was changed and then it was just mutually agreed
 upon after that.

 Q. So the court had ordered the deposition to occur.
 Subsequently the parties resolved the issue and it became
 upon a mutually agreeable date. Is that correct?

 A. The court ordered a deposition I believe on June 22nd – I
 could be wrong about that date – and then that was later
 changed and I was deposed – mutually agreed upon – on I
 believe August 25th.

1 [Plaintiff's Depo., 61:5-62:2.]

2 The Order Granting Plaintiff's Second Motion to Discovery Sanction on file with
3 the District Court of Tarrant County, Texas in the matter of *Bat World Sanctuary and*
4 *Amanda Lollar v. Mary Cummins*, Case No. 352-248169-10 reveals that the deposition
5 was "court-ordered." [Request for Judicial, ¶ 2 and Exhibit "B" thereto.]

6 Additionally, Plaintiff admitted to submitting complaints, or attempting to
7 submit complaints, about Defendants to the Texas Wildlife Department, Fish & Game
8 Department, USDA, IRS, Texas Department of Health, Texas Veterinary Board, the
9 Mineral Wells Police Department and the City of Mineral Wells. [Plaintiff's Depo.,
10 66:9-20.] Plaintiff claims that Defendants were violating numerous federal and state
11 acts by allowing animals to breed, not properly handling rabid animals, not inspecting
12 animals daily, performing surgery on bats without pain relief and allowing animals to
13 die. [Plaintiff's Depo., 66:9-77:23.] Although Plaintiff claims that Defendants'
14 statement that the above agencies found Plaintiff's complaints to be meritless is untrue,
15 Plaintiff did not know about any action taken against Defendants as a result of her
16 complaints. [Plaintiff's Depo., 70:13-14; 71:14-18; 73:22-24; 74:3-8; 75:5-10; 75:20-
17 24; 77:20-23; 193:15-194:7.]

18 Regarding Plaintiff's claim that the allegation that she bullies and attempts to
19 ruin the careers of professionals, Plaintiff admitted that she has been involved in at
20 least two other lawsuits involving claims similar to the claims in the lawsuit.
21 [Plaintiff's Depo., 30:21-25; 31:6-14.] As noted above, a judgment in the amount of
22 \$6.1 million was entered against Plaintiff and in favor of Defendants in their
23 defamation suit there.

24 Lastly, Plaintiff's complaint that Defendants called Plaintiff a psycho, crackpot,
25 nut-bag, and referred to Plaintiff in connection with discussion about symptoms about
26 psychopaths are statements of opinion, and as shown below, not actionable.

27 Although Plaintiff has alleged that these "false" statements about her on the
28 Internet have had the tendency to injure Plaintiff's business, Plaintiff could identify no

1 damages sustained by her. [Plaintiff's Depo., 99:3-100:25.] Plaintiff contends that her
2 inability to identify damages is not important. Plaintiff argues that persons who might
3 believe the statements would simply choose not to hire her without ever telling her that
4 they chose not to do business with her because of the statements found on the Internet.
5 [Id.]

6 In making her damage claims, Plaintiff has admitted that she has achieved
7 recognition in the fields of wildlife rehabilitation and animal abuse. For example, in
8 her Complaint, Plaintiff admits that she published manuals on wildlife rehabilitation
9 approved by the California Department of Fish & Game. [Complaint, ¶10.] Plaintiff
10 further contends that she instructs CADFG accredited classes to wildlife rehabilitators,
11 veterinarians and animal care professionals. [Id.]

12 Plaintiff also alleges that she plays a prominent role in the prevention of animal
13 abuse. Plaintiff admitted that she trained at the Rio Hondo Police Academy and the
14 California State Humane Association Animal Law Enforcement Academy to
15 investigate animal cruelty and neglect. [Complaint, ¶11.] Plaintiff further points out
16 that she is on the Humane Society of the United States (HSUS) National Disaster
17 Animal Response Team which handles animal cruelty and neglect cases. [Id.]

18 Plaintiff has appeared on or in excess of forty television shows, radio shows,
19 newspaper articles, authored 16 articles, appeared at many local government hearings
20 and press conferences related to wildlife rehabilitation. [Declaration of Stephen M.
21 MacPhail in Support of Defendants' Motion for Summary Judgment/Partial Summary
22 Judgment, ¶¶ 3-5 and Exhibits "B" through "J" thereto.]

23 In sum, the above reflects a willingness by Plaintiff to insert herself into the
24 public debate regarding the care and rehabilitation of wildlife and animal abuse. The
25 success of Plaintiff's animal advocacy group and Plaintiff's economic ventures in this
26 area require that Plaintiff be known as an authority in the public debate regarding these
27 issues.

28 ///

1 **III. LEGAL ANALYSIS**

2 Although Plaintiff's Complaint has alleged five claims for relief, in essence,
3 Plaintiff's Complaint against Defendants is one for defamation. As described more
4 fully herein, Plaintiff's claims for defamation fail because Plaintiff does not have
5 evidence that Defendants posted any actionable false statements of fact about her on
6 the Internet, much less clear and convincing evidence that Defendants posted such
7 statements with *actual malice*. Plaintiff's inability to come forward with such evidence
8 is fatal to her defamation claims given her status as an authority on the issues of animal
9 abuse and wildlife rehabilitation. Because Plaintiff's remaining three claims for relief
10 for interference with her business and intentional infliction of emotional distress are all
11 based on her defamation claims, these claims will fall with the defamation claims.
12 Summary judgment is warranted.

13 **A. Plaintiff First And Second Claims For Relief For Defamation And**
14 **Defamation Per Se Fail As A Matter Of Law Because Plaintiff, A Limited**
15 **Public Figure, Cannot Prove That Defendants Posted Any Allegedly False**
16 **Statements Of Fact With Malice.**

17 "Defamation is an invasion of the interest in reputation. The tort involves the
18 intentional publication of a statement of fact that is false, unprivileged, and has a
19 natural tendency to injure or which causes special damage." *Smith v. Maldonado*, 72
20 Cal.App.4th 637, 645 (1999).

21 Some statements of fact are so egregious that they will always be considered
22 defamatory. Such statements are typically referred to as defamation "per se." These
23 types of statements are assumed to harm the plaintiff's reputation, without further need
24 to prove that harm. Statements are defamatory per se where they falsely impute to the
25 plaintiff one or more of the following things: a criminal offense; a loathsome disease; a
26 matter incompatible with her business, trade, profession, or office; or serious sexual
27 misconduct. California Civil Code § 46. See also Restatement (2d) of Torts, §§ 570-
28 574.

///

1 Truth is an absolute defense to defamation, including per se defamation. If the
2 statement is true, it cannot be defamatory. *Terry v. Davis Community Church*, 131
3 Cal.App.4th 1534, 1553 (2005) (truth is complete defense to defamation claim).

4 Additionally, to be actionable, the statement must involve a provably false
5 **factual** assertion. *Seelig v. Infinity Broadcasting Corp.*, 97 Cal.App.4th 798, 809-810
6 (2002). The Court in *Seelig* explained:

7 Statements do not imply a provably false factual assertion and thus
8 cannot form the basis of a defamation action if they cannot “
9 ‘reasonably [be] interpreted as stating actual facts’ about an
10 individual.” [Citations.] Thus, “rhetorical hyperbole,” “vigorous
11 epithet[s],” “lusty and imaginative expression[s] of ... contempt,” and
12 language used “in a loose, figurative sense” have all been accorded
13 constitutional protection. [Citations.]’ [Citation.] The dispositive
14 question ... is whether a reasonable trier of fact could conclude that the
15 published statements imply a provably false factual assertion.
16 [Citation.]

17 *Seelig*, at 809.

18 Courts have held that “a subjective judgment of the person making the
19 statement,” is not one that implies a provably false factual assertion. *Gallagher v.*
20 *Connell*, 123 Cal.App.4th 1260, 1270, fn. Omitted (2004); *Carver v. Bonds*, 135
21 Cal.App.4th 328, 348 (2005) (concluding statements were not defamatory because they
22 were based on “entirely subjective matters rather than provably false factual
23 assertions”.) Statements of opinion – such as comments that the plaintiff was a “shady
24 practitioner,” “crook,” or “crooked politician” have been regarded too broad,
25 unfocused and wholly subjective so as to be defamatory. *Copp v. Paxton*, 45
26 Cal.App.4th 829, 837 (1996).

27 ///

28 ///

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///

1 **1. The Statements Plaintiff Claims Were Made About Her Are Not**
2 **Actionable Because They Are True And/Or Are Statements Of**
3 **Opinion.**

4 Here, Plaintiff's defamation claims fail because the majority of the alleged
5 defamatory statements Plaintiff claims were made about her are not actionable. As
6 established above, the statements Plaintiff can prove were made by Defendants were
7 either true or substantially true, or were mere statements of opinion. Plaintiff admitted
8 in her deposition that Defendants did obtain a court order to compel her to attend her
9 deposition. While the parties later agreed to change the date of the court-ordered
10 deposition, that agreement did not erase the fact that Defendants had been forced to file
11 a motion to compel her deposition, or the fact that the court granted their motion.

12 Plaintiff also admitted to having made complaints about Defendants to
13 numerous agencies, but that she never learned the outcome of those complaints.
14 Plaintiff further admitted to suing several other individuals for similar claims.

15 Likewise, Plaintiff admitted in her deposition that Defendants' request for an
16 injunction against Plaintiff was granted, and that based on Plaintiff's apparent failure
17 to abide by the terms of that injunction, the Court issued an Order to Show Cause
18 regarding contempt. The fact that the contempt order to show cause was issued in a
19 civil action, as opposed to a criminal action is without consequence because, as
20 described more fully below, the high level of notoriety that Plaintiff has achieved in
21 the public debate concerning animal welfare, necessarily renders such a statement not
22 actionable.

23 **2. With Regard To The Statements That Plaintiff Can Describe As**
24 **False, Plaintiff Cannot Hold Defendants' Liable Because She Has No**
25 **Evidence That Such Statements Were Posted With Actual Malice.**

26 In addition to the above defenses, Courts have carved out exceptions to claims
27 for defamation. For example, in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.
28 Ct. 710 (1964), the United States Supreme Court created an exception for defamatory
 statements made about public officials. The Court held that "public officials" may not

1 in an action for libel relating to any official conduct without proof that the allegedly
2 false statement was made with ‘actual malice.’

3 In the years that followed, the Supreme Court extended that exception to private
4 individuals who are “public figures,” i.e., persons, such as recording artists, movie
5 stars and other, who have “achiev[ed] such pervasive fame or notoriety that they
6 becomes a public figure for all purposes and in all contexts.” *Curtis Publishing Co. v.*
7 *Butts*, 388 U.S. 130, 87 S.Ct. 1975 (1967).

8 In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997 (1974), the
9 Supreme Court created an additional exception for those individuals who – while not
10 public officials or mainstream public figures – had nonetheless achieved a certain level
11 of notoriety in a specific public controversy. *Id.* at. 351. In exchange for their choice
12 to thrust themselves into the public debate, these “limited purpose public figures” as
13 they have come to be known, lose certain protection for their reputation only to the
14 extent that the allegedly defamatory communication relates to his role in a public
15 controversy.” *Annette F. v. Sharon S.*, 119 Cal. App. 4th 1146, 1163 (2004).

16 **Importantly, “[t]he question whether a plaintiff is a public figure [or not] is**
17 **to be determined by the court, not the jury.”** *Stolz v. KSFM 102 FM*, 30 Cal.App.4th
18 195, 203–204 (1994), internal citation omitted.)

19 In order for Plaintiff to be considered a limited purpose public figure (1) there
20 must be a public controversy, which means the issue was debated publicly and had
21 foreseeable and substantial ramifications for nonparticipants; (2) Plaintiff must have
22 undertaken some voluntary act through which she sought to influence resolution of the
23 public issue. In this regard it is sufficient that the plaintiff attempts to thrust him or
24 herself into the public eye. *Gilbert v. Sykes*, 147 Cal. App. 4th 13, 24 (2007) citing
25 *Copp, supra*, 45 Cal. App. 4th at 845-46. Purportedly defamatory statements that are
26 germane to the plaintiff’s participation in the controversy are not actionable. *Id.*

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1 **a. Plaintiff Was Involved In A Public Controversy.**

2 The first element of the test for limited public figure is the existence of a public
3 controversy.” *Annette F.*, *supra*, 119 Cal. App. 4th at 1163 *citing Copp* at 845. Not
4 every private conflict that attracts widespread interest in the general public is
5 considered to be a “public controversy” for this purpose. *Annette F.*, *supra*, 119 Cal.
6 App. 4th at 1163 *citing Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976).

7 While the Supreme Court has not specifically defined the meaning of a “public
8 controversy,” courts of appeal have defined the term to mean “a dispute that in fact has
9 received public attention because its ramifications will be felt by persons who are not
10 direct participants.” *Annette F.*, *supra*, 119 Cal. App. 4th at 1164 *citing Waldbaum v.*
11 *Fairchild Publications, Inc.*, 627 F.2d 1287, 1296 (D.C. Cir. 1980). “If the issue was
12 being debated publicly and if it had foreseeable and substantial ramifications for
13 nonparticipants, it was a public controversy.” *Copp*, *supra*, 45 Cal. App. 4th at 845.

14 Several courts have held that the analysis for determining the public controversy
15 element of the limited purpose public figure determination is similar to the public issue
16 determination within the meaning of the anti-SLAPP statute, Civil Code §425.16(e)(3).
17 *See Cabrera v. Alam*, 197 Cal. App. 4th 1077, 1092 (2011). Indeed, many anti-SLAPP
18 motions are filed in cases involving allegations of defamation by limited purpose
19 public figures.

20 In *Gilbert v. Sykes*, *supra*, 147 Cal. App. 4th 13, the public controversy involved
21 the merits and cons of plastic surgery. The Court found that the topic had “garnered
22 national attention and [was] the focus of widespread public interest.” *Gilbert*, 147 Cal.
23 App. 4th at 25.

24 In *Annette F. v. Sharon S.*, *supra*, 119 Cal. App. 4th 1146, the public
25 controversies at issue included same sex marriages and “second-parent” adoptions by
26 non-biological partners in same sex marriages. *Annette F.*, *supra*, 119 Cal. App. 4th at
27 1164-65. Thus, while the alleged defamatory statements involved the dissolution of the
28 partnership between Annette F and Sharon S in their custody dispute, the decisions

1 made in that case had the potential to set precedent in other cases where non-biological
2 parents sought to adopt the children of their same-sex partner.

3 Here, as shown above, Plaintiff has made herself a public figure regarding issues
4 of animal welfare including the rehabilitation of wildlife and in the abuse of animals.
5 Like the issues of plastic surgery, same-sex marriage and second parent adoptions, the
6 public has an interest in protecting the welfare of animals. Indeed, the State of
7 California has created multiple departments specifically concerned with protecting
8 animal welfare and regulating Californians interactions with animals. These
9 departments include, for example, the California Department of Fish and Game. Laws
10 protecting animals include the Animal Welfare Act, 7 U.S.C. §2131 et seq.; California
11 Penal Code §597 et seq. to name but a few.

12 Thus, the first factor of the limited purpose public figure analysis is met here.

13 **b. Plaintiff Voluntarily Thrust Herself Into The Public**
14 **Controversy.**

15 The second factor requires that the “limited purpose public figure” achieve some
16 notoriety in the public controversy. Many courts have described factor as requiring the
17 limited public figure to “have undertaken some *voluntary* act through which he seeks
18 to influence the resolution of the public issues involved.” *Annette F., supra*, 119 Cal.
19 App. 4th at 1164. Courts have recognized that “Public figures generally ‘invite
20 attention and comment.’” *Id.* citing *Gertz, supra*, 418 U.S. at 345.

21 In order to meet this factor, it is sufficient that the public figure voluntarily
22 thrust herself into the public debate, even if the public figure did not voluntarily insert
23 herself into the portion of the debate she finds defamatory. *Gilbert*, 147 Cal. App. 4th
24 25.

25 In *Gilbert*, a plastic surgeon counter-sued a former patient for defamation after
26 the patient created a website accusing the surgeon of botching her surgery,
27 misrepresenting the risks of the surgery. The surgeon opposed the patient’s anti-
28 SLAPP lawsuit arguing that he was not a public figure because he had not voluntarily

1 thrust himself into the public controversy created by the patient in her website. The
2 Court rejected the surgeon's argument finding that the surgeon's actions advertising
3 his services in the local media; appearing on local television shows; writing articles in
4 medical journals and beauty magazines touting the virtues of cosmetic and
5 reconstructive surgery, and providing expert witness on the subject of cosmetic and
6 reconstructive surgery thrust him into the public debate regarding plastic surgery.
7 *Gilbert*, 147 Cal. App. 4th at 25 citing *Copp, supra*, 45 Cal. App. 4th at 845 ("These
8 facts provide compelling proof that Sykes 'undertook some *voluntary* act through
9 which he seeks to influence the resolution of the public issues (plastic surgery)
10 involved").

11 Specifically, the Court noted:

12 Sykes attempts to avoid this conclusion by playing fast and loose
13 with the definitions. Sykes argues he was not a limited purpose
14 public figure because there was no preexisting public "
15 'controversy' regarding the procedures performed by Dr. Sykes on
16 Ms. Gilbert." (Italics added.) This claim is at war with the concept
17 of a limited purpose public figure.

18 A person *becomes* a limited public figure by injecting himself into
19 the public debate about a topic that concerns a substantial number
20 of people. Once he places himself in the spotlight on a topic of
21 public interest, his private words and conduct relating to that topic
22 become fair game. Sykes would turn this formulation on its head.
23 He would require that the plaintiff generate a broad public
24 controversy through private words or conduct before he could be
25 deemed a public figure, an atrophic definition that would virtually
26 eliminate all vortex public figure candidates.

27 *Gilbert*, 147 Cal. App. 4th at 25.

28 Applying this analysis here, any argument by Plaintiff that her dispute with
Defendants is not a public controversy would be unavailing. As the Court in *Gilbert*
found, Courts determine whether the Plaintiff voluntary thrust herself into a public
controversy by examining the overall debate of which the personal dispute is about.
Additionally, as the Court in *Gilbert* found, it is not necessary to show that the public
figure achieved prominence in the public debate. "It is sufficient that [the public
figure] "'attempt[ed] to thrust himself into the public eye' [citation] or to influence a
public decision." *Gilbert*, 147 Cal. App. 4th at 25 citing *Copp, supra*, 45 Cal. App. 4th

1 at 845-46.

2 Plaintiff's extensive training, appearances on or in excess of forty television
3 shows, radio shows, newspaper articles, authored 16 articles, appearances at many
4 local government hearings and press conferences related to wildlife rehabilitation
5 certainly qualify Plaintiff as a public figure for this action.

6 **c. If Defendants Posted False Statements Of Fact About**
7 **Her, Plaintiff Has No Evidence That They Did So With**
8 **Actual Malice.**

9 "When a defamation action is brought by a public figure, the plaintiff, in order
10 to recover damages, must show – by clear and convincing evidence – that the
11 defendant acted with actual malice in publishing the defamatory communication."
12 *Cabrera*, 147 Cal. App. 4th at 1091; *Annette F.*, *supra*, 119 Cal. App. 4th at 1167. "The
13 clear and convincing standard requires that the evidence be such as to command the
14 unhesitating assent of every reasonable mind." *Annette F.*, *supra*, 119 Cal. App. 4th at
15 1167.

16 In *Annette F.*, the Court noted:

17 The actual malice standard of *New York Times v. Sullivan*,
18 *supra*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 626, requires a
19 showing that the allegedly false statement was made "with
20 knowledge that it was false or with reckless disregard of
21 whether it was false or not." (Citation) The reckless disregard
22 standard requires a "high degree of awareness of ... probable
23 falsity" (Citation) "There must be sufficient evidence to
24 permit the conclusion that the defendant in fact entertained
25 serious doubts as to the truth of his publication." (Citation)
**Gross or even extreme negligence will not suffice to establish
actual malice; the defendant must have made the statement
with knowledge that the statement was false or with "actual
doubt concerning the truth of the publication."**

26 *Annette F.*, *supra*, 119 Cal. App. 4th at 1167 *citing Reader's Digest Assn v.*
27 *Superior Court*, 37 Cal. 3d 244, 259, fn 11 (1984).

28 Importantly, the Court in *Annette F* further found that "[t]he existence of actual

1 malice turns on the defendant's subjective belief as to the truthfulness of the allegedly
2 false statement. *Id.* at 1167. While factors such as failure to investigate, anger and
3 hostility, and reliance on sources known to be unreliable or biased “may in an
4 appropriate case, indicate that the publisher himself had serious doubts regarding the
5 truth of his publication,” the presence of any one of these factors, standing alone, may
6 be insufficient to prove actual malice or even raise a triable issue of fact. *Annette F.*,
7 *supra*, 119 Cal. App. 4th at 1167 *citing Reader’s Digest*, 31 Cal. 3d at 257-58.

8 Here, Plaintiff has no evidence that Defendants posted the large majority of the
9 allegedly defamatory statements found about her on the Internet. However, assuming
10 that Plaintiff could prove that Defendants posted the statements about her, Plaintiff has
11 come forward with no evidence that Defendants made of the statements that she
12 considers to be defamatory with actual malice. Defendants’ anticipate that Plaintiff
13 will likely claim that Defendants must have harbored actual malice because they
14 dislike her. Any such argument would be unavailing. As the Court in *Annette F* found,
15 “[a]ctual malice may not be inferred solely from evidence of personal spite, ill will, or
16 bad motive.” *Annette F.*, *supra*, 119 Cal. App. 4th at 1169 *citing Harte-Hanks*
17 *Communications, Inc. v. Connaughton*, 491 U.S. 657, 666-667 & fn. 7.

18 In any event, by Plaintiff’s own admission, the large majority of statements
19 made about her were substantially true or were mere opinions. Courts have noted that
20 “false statements that have some element of truth to them are logically less susceptible
21 to such a finding.” *Annette F.*, *supra*, 119 Cal. App. 4th at 1170 “Similarly, mere failure
22 to investigate the truthfulness of a statement, even when a reasonably prudent person
23 would have done so, is insufficient.” *Id.* Thus, based on the statements that Plaintiff
24 charges Defendants with making, the Plaintiff’s admissions that at least part of the
25 statements are true, Plaintiff will have a difficult time proving actual malice. Plaintiff’s
26 defamation claims for relief should be dismissed.

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1 **B. Plaintiff Third, Fourth And Fifth Claims For Relief Are All Based On**
 2 **Plaintiff's Defamation Claims And Stand Or Fall With The Defamation**
 3 **Claims.**

4 The constitutional privilege applies not merely to defamation but to "all claims
 5 whose gravamen is the alleged injurious falsehood of a statement." *Gilbert*, 147 Cal.
 6 App. 4th at 34 citing *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1042 (1986).
 7 Thus, the collapse of Plaintiff's defamation claim spells the demise of all other causes
 8 of action in the Complaint such as intentional interference with business relations,
 9 intentional interference with prospective economic advantage and intentional infliction
 10 of emotional distress, all of which allegedly arise from the same publications Plaintiff
 11 attributes to Defendants. *Gilbert*, 147 Cal. App. 4th at 34 citing *Seelig, supra*, 97 Cal.
 12 App. 4th at 812. "As the state Supreme Court observed, " 'to allow an independent
 13 cause of action for the intentional infliction of emotional distress, based on the same
 14 acts which would not support a defamation action, would allow plaintiffs to do
 15 indirectly what they could not do directly. It would also render meaningless any
 16 defense of truth or privilege.' " *Gilbert*, 147 Cal. App. 4th at 34 citing *Fellows v.*
 17 *National Enquirer, Inc.*, 42 Cal.3d 234, 245 (1986). Thus, the remaining claims in
 18 Plaintiff Complaint will stand or fall with her defamation claims. Summary judgment
 is warranted as to Plaintiff's Complaint.

19 For the same reasons, Plaintiff's claim for a permanent injunction fails. As the
 20 court in *Protect Our Communities Foundation v. U.S. Dept. of Agriculture*, ---
 21 F.Supp.2d ----, 2012 WL 113751 at *2 (S.D.Cal.,2012) noted:

22 "A plaintiff seeking a preliminary injunction must establish that he is
 23 likely to succeed on the merits, that he is likely to suffer irreparable harm
 24 in the absence of preliminary relief, that the balance of equities tips in his
 25 favor, and that an injunction is in the public interest." *Winter v. Natural*
 26 *Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249
 27 (2008).

28 An injunction is "not a matter of right, even if irreparable injury might

1 otherwise result.” *Nken v. Holder*, 556 U.S. 418, 129 S.Ct. 1749, 1760,
2 173 L.Ed.2d 550 (2009) (internal quotation marks omitted). Instead, an
3 injunction is “an extraordinary remedy that may only be awarded upon a
4 clear showing that the plaintiff is entitled to such relief.” *Winter*, 555
5 U.S. at 21, 129 S.Ct. 365. The determination whether to grant an
6 injunction is “an exercise of judicial discretion, and the propriety of its
7 issue is dependent upon the circumstances of the particular case.” *Nken*,
8 129 S.Ct. at 1760, 129 S.Ct. 1749 (internal quotation marks omitted).

9 In the present case, Plaintiff is not likely to prevail on the merits and there are no
10 facts justifying this extraordinary remedy. Thus, Plaintiff’s claim a permanent
11 injunction should be denied.

12 **IV. CONCLUSION**

13 Based on the foregoing, Plaintiff cannot prevail on any of her causes of action
14 and Defendants’ Motion for Summary Judgment should be granted in its entirety.
15 Alternatively, Defendants request that the Court grant Summary Adjudication as to
16 those claims the Court finds to be without merit as a matter of law.

17
18 Respectfully submitted,

19 DATED: July 10, 2012

BRAGG & KULUVA

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