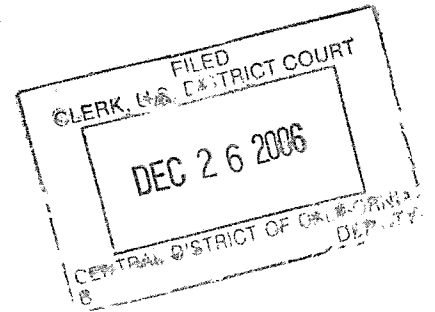


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14 UNITED STATES DISTRICT COURT
15 CENTRAL DISTRICT OF CALIFORNIA

16 **HARLAN ELLISON**, an individual,
17 Plaintiff,

18 vs.

19 **FANTAGRAPHICS, INC.**, a
20 corporation; **GARY GROTH**, an
21 individual; **KIM THOMPSON**, an
22 individual; and **DOES 1 THROUGH**
23 **20**, inclusive,
24 Defendants.

Case No. **CV 06-6532 ABC (FFMx)**
Assigned to the Hon. Audrey B. Collins

**REPLY MEMORANDUM IN
SUPPORT OF DEFENDANTS'
SPECIAL MOTION TO STRIKE
PLAINTIFF'S COMPLAINT**

[Reply Declaration Of John Rory
Eastburg With Exhibits R-T And
Defendants' Evidentiary Objections
Filed Concurrently.]

Date: February 12, 2007
Time: 10:00 a.m.
Ctrm.: 680 Roybal

25 Defendants Fantagraphics Books, Inc. (sued erroneously as Fantagraphics,
26 Inc.), Gary Groth, and Kim Thompson (collectively, "Defendants") respectfully
27 submit the following Reply to plaintiff Harlan Ellison's Opposition ("Opp.") to
28 Defendants' Special Motion To Strike Plaintiff's Complaint Pursuant to California
Code of Civil Procedure § 425.16 (the "Motion").

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1. INTRODUCTION

As set forth in defendants' Motion, the statements that Mr. Ellison identifies in his Complaint either are non-actionable subjective expressions of opinion or rhetorical hyperbole, are substantially true, and/or are fair and accurate accounts of proceedings in the earlier Fleisher lawsuit. Furthermore, the use of Ellison's name on the cover of defendants' book The Writers is an "expressive" use that is privileged under the First Amendment and outside the scope of Civil Code § 3344. Because Ellison's name appears on the cover of the book in an accurate description of the contents of the interview anthology, it cannot support a misappropriation claim.

Despite his claims to the contrary, plaintiff's burden in overcoming an anti-SLAPP motion is not "minimal." Instead, the anti-SLAPP statute requires him to make a sufficient evidentiary showing "to sustain a favorable judgment if [his] evidence is credited." Navellier v. Sletten, 29 Cal. 4th 82, 89, 124 Cal. Rptr. 2d 530 (2002). Plaintiff's Opposition does not come close to meeting this burden. Instead, Mr. Ellison engages in unfounded ad hominem attacks on the defendants that have no relevance whatsoever to the issues raised by defendants' Motion.¹ Because Mr. Ellison has failed to meet his burden, defendants respectfully request that the Court grant this Special Motion to Strike in its entirety, and award them their fees and costs incurred in defending this baseless lawsuit.

2. CODE OF CIVIL PROCEDURE § 425.16 APPLIES TO THE COMPLAINT

Plaintiff's Opposition claims, without support, that Section 425.16 should be interpreted far more narrowly than its plain terms require. Mr. Ellison argues generally that the statute does not apply here because it "grew out of the concern that

¹ Plaintiff's inflammatory and irrelevant accusations against Mr. Groth range from the merely false, such as the accusation that Mr. Groth "co-founded" a "hate group" called "Enemies of Ellison," to the bizarre, such as the claim that Mr. Groth caused plaintiff's heart attack. (Ellison Decl., ¶¶ 8-9.) These and other charges serve here only to confuse the simple and straightforward issues presented in this Motion. The Court need not sort through plaintiff's finger-pointing account of this decades-old verbal feud in order to rule on these discrete legal issues.

1 large private interest plaintiffs (such as real estate developers) were using meritless
2 tort actions to deter or punish individual activists who opposed their views.” (Opp. at
3 3.) Regardless of its origins, the statute has been construed to apply broadly
4 according to its terms, without regard to the relative size or economic power of the
5 parties. See, e.g., Moraga-Orinda Fire Protection Dist. v. Weir, 115 Cal. App. 4th
6 477, 482, 10 Cal. Rptr. 3d 13 (2004); see also Sipple v. Foundation for Nat’l
7 Progress, 71 Cal. App. 4th 226, 240, 83 Cal. Rptr. 2d 677 (1999) (applying statute to
8 a media defendant); Braun v. Chronicle Publ’g Co., (1997) 52 Cal. App. 4th 1036,
9 1045, 61 Cal. Rptr. 2d 58 (1997) (same).

10 **A. Plaintiff Misstates His Evidentiary Burden And This Court’s**
11 **Authority To Grant The Motion As To Each Substantive Claim.**

12 Mr. Ellison fundamentally misconstrues the burden he faces in responding to
13 an anti-SLAPP motion. Contrary to plaintiff’s assertions, this burden is anything but
14 “minimal.” (Opp. at 4.) Rather, the anti-SLAPP statute requires him to make a
15 sufficient evidentiary showing “to sustain a favorable judgment if [his] evidence is
16 credited,” Navellier, 29 Cal. 4th at 89, and he must present “competent evidence”
17 showing that he will “probably prevail at trial.” Bradbury v. Superior Court, 49 Cal.
18 App. 4th 1108, 1117, 57 Cal. Rptr. 2d 207 (1996).

19 Citing Lam v. Ngo, 91 Cal. App. 4th 832, 111 Cal. Rptr. 2d 582 (2001), Mr.
20 Ellison asserts that “an anti-SLAPP motion is “not a substitute for a summary
21 judgment motion.” (Opp. at 4.) But California courts apply the same standards in
22 anti-SLAPP motions that are applied in state and federal summary judgment motions.
23 See, e.g., Navellier v. Sletten, 106 Cal. App. 4th 763, 768, 124 Cal. Rptr. 2d 530
24 (2003) (plaintiff’s burden on a SLAPP motion “is akin to that of a party opposing a
25 motion for summary judgment”).² Likewise, federal courts apply summary judgment

26
27 ² The Lam court distinguished between a summary judgment motion and a
28 SLAPP motion based not on the standards applied, but on the proper subject matter
of each. 91 Cal. App. 4th at 851 n.12 (“[w]e do not address the substantive merits of
each cause of action apart from the question of First Amendment protection”).

1 standards to anti-SLAPP motions in diversity cases. See Rogers v. Home Shopping
2 Network, Inc., 57 F. Supp. 2d 973, 983 (C.D. Cal. 1999).³

3 Mr. Ellison also asserts incorrectly that “an anti-SLAPP motion is only proper
4 against an entire complaint, or an entire cause of action” (Opp. at 8.) It is clear
5 that a court may grant an anti-SLAPP motion as to one cause of action, even if it
6 does not grant the motion as to an entire complaint. See C.C.P. 425.16(b)(1) (statute
7 applies to a “cause of action”); Peregrine Funding, Inc. v. Sheppard Mullin Richter &
8 Hampton, 133 Cal. App. 4th 658, 666, 35 Cal. Rptr. 3d 31 (2005). A plaintiff cannot
9 simply circumvent the statute by lumping different factual scenarios together and
10 labeling them as a single cause of action. A cause of action is “[a] group of operative
11 facts giving rise to one or more bases for suing.” BLACK’S LAW DICTIONARY 235
12 (8th ed. 2004). See also 2 MOORE’S FEDERAL PRACTICE § 2.03 n.68 (a “[c]ause of
13 action is ... essentially a factual situation giving rise to a right to sue). As these
14 definitions make clear, a cause of action arises from a single group of operative facts.

15 Here, Mr. Ellison has taken nine sentences from the book Comics As Art, each
16 about factually separate events that took place months or years apart, and lumped
17 them together in what purports to be a single cause of action for defamation. Then he
18 attempts to rely on the fact that he has indiscriminately grouped all the challenged
19 statements together in order to claim that the Court may not grant any relief to
20 defendants on the anti-SLAPP motion if even just one of the statements is shown to

21
22 ³ The federal court may treat the anti-SLAPP motion as either a Rule 12 or a
23 Rule 56 motion, depending on the grounds for the motion. Rogers, 57 F. Supp. 2d at
24 974-77. Even under the standards of Rule 56, Mr. Ellison has failed to carry his
25 plaintiff “may not rest upon the mere allegations or denials of the adverse party’s
26 pleadings.” Instead, the plaintiff “must set forth facts showing that there is a genuine
27 issue for trial.” Fed. R. Civ. P. 56(e). He must present sufficient admissible
28 evidence to support a verdict in his favor on every element of any claim for which he
has the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106
S. Ct. 2548 (1986). “A mere ‘scintilla’ of evidence will not be sufficient to defeat a
properly supported motion for summary judgment; rather, the nonmoving party must
introduce some significant probative evidence tending to support the complaint.”
Summers v. Teichert & Son, Inc., 127 F.3d 1150, 1152 (9th Cir. 1997).

1 be defamatory. In reality, it is clear that the court may grant defendants' Motion as
2 to any statement that does not share "[a] group of operative facts" with a statement
3 for which plaintiff has shown he will "probably" prevail.

4 **B. The Anti-SLAPP Statute Applies To All Of Plaintiff's Claims.**

5 Section 425.16 applies to any claim arising from free speech activities,
6 regardless of what name the plaintiff gives to the claim. The statute contains "no ...
7 limiting language" that would restrict its protection to certain causes of action.
8 Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 652, 49 Cal. Rptr. 2d
9 620 (1996), disapproved on other grounds, Equilon Enters., LLC v. Consumer Cause,
10 Inc., 29 Cal. 4th 53, 124 Cal. Rptr. 2d 507 (2002).

11 **1. Sections 425.16(e)(2) And 425.16(e)(4) Each Apply Here.**

12 As the Motion demonstrated, the SLAPP statute applies for two independent
13 reasons. First, Section 425.16(e)(2) applies because Mr. Ellison's claims arise from
14 defendants' publication of comments about Ellison's role as a co-defendant with Mr.
15 Groth and Fantagraphics in a previous defamation case in a New York federal court,
16 and from defendants' use of Mr. Ellison's name in relation to the 1980 interview that
17 gave rise to that case. (See Complaint ¶¶ 17-32.) As the court found in Sipple,
18 moving parties "need not separately show" that statements concern an issue of public
19 interest if they relate to judicial proceedings. 71 Cal. App. 4th at 238.⁴

20 Second, the anti-SLAPP statute applies because the statements in question
21 relate to a matter of public interest within the meaning of Section 425.16(e)(4) –
22 namely, the role of plaintiff Harlan Ellison in the well-known 1980 libel suit brought
23

24 ⁴ There is no basis for plaintiff's claim that "Sipple is limited to the facts of
25 that case." (Opp. at 7.) Sipple itself says no such thing, and it explicitly holds that
26 moving parties generally "need not separately show that these statements concern an
27 issue of public interest," citing two other California cases. See 71 Cal. App. 4th at
28 236-37 ("[T]he [Briggs] court agreed with the [Braun] court that in crafting the statute,
the Legislature equated a 'public issue' with the authorized official proceeding to
which it connects. Thus, in making a motion to strike, a defendant need not
demonstrate the existence of a public issue for the purposes of section 425.16,
subdivisions (e)(1) and (e)(2).") (internal citations omitted).

1 by author Mike Fleisher. Consistent with the Legislature’s and California Supreme
2 Court’s mandate, “[t]he definition of ‘public interest’ within the meaning of [Section
3 425.16] has been broadly construed.” Damon v. Ocean Hills Journalism Club, 85
4 Cal. App. 468, 479, 102 Cal. Rptr. 2d 205 (2000). As detailed in the Motion, courts
5 have applied the standards to a wide variety of contexts. (See Motion at 6-7.)

6 Mr. Ellison nevertheless asserts that Section 425.16(e)(4) does not apply here
7 because “obscure” out-of-court conduct by a party from an older case cannot be a
8 matter of public interest. (Opp. at 8.) But the Complaint describes Ellison as “a
9 famous author, screenwriter, commentator and public speaker” as well as a “well-
10 known fearless champion of artist’s rights....” (See Complaint ¶ 1.) And, in his
11 Opposition, he concedes that he is a public figure and the recipient of numerous
12 “coveted” First Amendment awards. (Opp. at 2, 19-20; Ellison Decl. ¶ 10.) Plaintiff
13 cannot have it both ways. He cannot at the same time be, on one hand, a “well-
14 known fearless champion of artist’s rights” and public figure and, on the other hand,
15 a party so “obscure” that his legal actions cannot be matters of public interest.⁵
16 Furthermore, the California Supreme Court has emphasized that even long-concluded
17 court proceedings are matters of public interest. See Gates v. Discovery
18 Communications, Inc., 34 Cal. 4th 679, 693, 21 Cal. Rptr. 3d 663 (2004) (rejecting
19 the argument that the vintage of a court record might dissipate the public’s interest in
20 knowing about it or affect the media’s First Amendment rights to report its contents).

21
22
23 ⁵ Mr. Ellison also argues that actual malice “generally should not be tested on
24 motion to dismiss under California’s anti SLAPP statute.” (Opp. at 17.) Ellison
25 misunderstands the grounds for the Motion. As the Motion sets forth in detail,
26 defendants argue that the challenged statements are all either protected opinion, or
27 are literally or substantially true. (Motion at 8-16.) They further argue that the
28 statements are independently protected by the litigation privilege. (Motion at 17-18.)
Defendants’ Motion does not rely on the absence of “actual malice” or any argument
based on the defendants’ state of mind. Because the presence or absence of
constitutional and common-law malice is irrelevant to the disposition of the Motion,
Ellison’s many pages of accusations about defendants’ state of mind and about
statements supposedly made by attorney Kenneth Norwick are wholly irrelevant.
(See Opp. at 9-12, 17-21; Ellison Decl. ¶¶ 8-9; Petit Decl. ¶¶ 2-3, 7-8.)

1 The cases cited by Mr. Ellison actually support defendants' position. Plaintiff
2 cites Troy Group v. Tilson, 364 F. Supp. 2d 1149 (C.D. Cal. 2005), for the
3 proposition that an issue is "public" for the purposes of the SLAPP statute only if "if
4 it impacts a broad segment of society or affects the community in a manner similar to
5 that of a governmental agency." (Opp. at 6.) But that case found email messages to
6 be matters of public concern, despite the fact that they were sent to just four people
7 and concerned a company that was owned by only about 200 people. 364 F. Supp.
8 2d at 1151. Likewise, plaintiff relies on Seelig v. Infinity Broadcasting Corp., 97
9 Cal. App. 4th 798, 119 Cal. Rptr. 2d 108 (2002). But that case held that a radio
10 deejay's on-air discussion of a contestant on the Fox reality show "Who Wants To
11 Marry a Millionaire?" concerned a matter of public interest within the meaning of the
12 SLAPP statute. Id. at 808. If an email to four people and a radio show discussion
13 about a reality television show qualify as a matter of public concern – as plaintiff's
14 own citations confirm – Mr. Groth's statements about Ellison's role in the cause
15 célèbre Fleisher litigation also must be considered matters of public concern.⁶

16 **2. Section 425.16 Does Not Require An "Intent To Chill" Speech.**

17 Mr. Ellison denies at length that he filed this suit with the intent of chilling the
18 free speech rights of defendants. (See Opp. at 9, 11.) But these self-serving
19 rationales for filing suit are entirely irrelevant, since there is no requirement under
20 Section 425.16 that the defendant prove that the plaintiff filed suit with an "intent to
21 chill" free speech rights. Indeed, in Equilon Enterprises, the California Supreme
22 Court squarely rejected such a requirement, holding that "judicial imposition on
23 section 425.16 of an intent-to-chill proof requirement would contravene the
24 legislative intent expressly stated in section 425.16, as well as that implied by the
25 statute's legislative history." 29 Cal. 4th at 60. Because no showing of ill intent is
26

27 ⁶ In fact, the April 1987 issue of the Comics Journal included 90 pages of
28 coverage of the Fleisher lawsuit, including transcripts, juror interviews, essays, and
reactions from the comics publishing community. (See Defs.' Ex. T.)

1 required for the statute to apply, Mr. Ellison's comments about his "deliberate and
2 measured decision to proceed" with the suit (Opp. at 10) are irrelevant.⁷

3 **3.**

4 **BECAUSE PLAINTIFF HAS NOT PRESENTED EVIDENCE THAT HE**
5 **WILL PROBABLY PREVAIL, HIS CLAIMS MUST BE STRICKEN.**

6 **A. Neither Of The Two Allegedly Defamatory Statements Identified In**
7 **Plaintiff's Complaint Is Actionable.**

8 Plaintiff's Opposition complains that defendants have engaged in "gamesman-
9 like parsing" of the allegedly defamatory statements. Mr. Ellison fails to explain just
10 what "parsing" he objects to. Courts have been clear that defamation plaintiffs are
11 required to specify the exact words that they claim are defamatory. See Des Granges
12 v. Crall, 27 Cal. App. 313, 314-15 (1915). Likewise, courts themselves analyze each
13 allegedly defamatory statement or implication individually to determine whether it is
14 constitutionally protected. See Good Government Group of Seal Beach v. Superior
15 Court, 22 Cal. 3d 672, 680-81, 150 Cal. Rptr. 258 (1978). If defendants' purported
16 "parsing" amounts to no more than evaluating the actual statements made, then it is
17 clear that this "parsing" is in fact the analysis required by the strict standards libel
18 plaintiffs are required to meet.

19 If, however, Ellison's point is that context is important to understanding the
20 meaning of an allegedly defamatory phrase, defendants agree. Indeed, this attention
21 to the context of challenged statements is an important aspect of the substantial truth
22 doctrine. As the Supreme Court explained in Masson v. New Yorker, 501 U.S. 496,
23 111 S. Ct. 2419 (1991), "[m]inor inaccuracies do not amount to falsity so long as 'the
24 substance, the gist, the sting, of the libelous charge be justified.'" The test is whether
25

26 ⁷ In any event, in his Opposition and declaration, Mr. Ellison confirms that he
27 posted statements on an Internet message board that can only be interpreted as
28 admitting that he filed the case at bar for the sole purpose of chilling defendants'
speech by preventing publication of Comics As Art and suppressing future criticism
of him. (See Opp. at 11; Motion at 6-7.)

1 the challenged statements would have a “different effect on the mind of the reader”
2 than if the truth were published; if not, the statements are not actionable. 501 U.S. at
3 517; accord Morningstar, Inc. v. Superior Court, 23 Cal. App. 4th 676, 687, 29 Cal.
4 Rptr. 2d 547 (1994). Because the “gist” and “sting” of the challenged statements is
5 true, “judging the statement ... within the context in which it is made” requires
6 dismissal.

7 **1. The Statements At Issue Are Either Non-Actionable Opinion**
8 **Or Substantially True.**

9 Mr. Ellison’s Complaint identifies, and his Opposition makes reference to, two
10 specific passages in the Comics As Art that he claims are defamatory. (Complaint at
11 ¶¶ 10, 15.) Neither of these passages can support a defamation claim.

12 **First Passage: “One of my favorite stories involves Ellison cutting a**
13 **deal that required him to reimburse Fleisher if he lost a specific**
14 **motion. The judge approved the arrangement and Ellison lost the**
15 **motion but refused to reimburse Fleisher’s out of pocket expenses,**
16 **as agreed. Our lawyer started to realize what a loose canon he was**
17 **when we learned that the judge was about to order U.S. Marshals to**
18 **arrest Ellison for failing to obey a court order. Naturally, Ellison**
19 **coughed it up but only days before he was about to be arrested.”**
20 **(Complaint ¶ 10.)**

21 As discussed in defendants’ Motion, this statement is not actionable for two
22 independent reasons. First, portions of the passage are nonactionable opinion. The
23 Opposition does not even address the fact that Mr. Groth’s characterization of Mr.
24 Ellison as a “loose cannon” is a subjective phrase that is not actionable in any event
25 because it is incapable of being proved true or false. See Milkovich v. Lorain Journal
26 Co., 497 U.S. 1, 19-21, 110 S. Ct. 2695 (1990). Nor does he address the argument
27 that the First Amendment protects statements of belief based on disclosed true facts.
28 Milkovich, 497 U.S. at 27.

29 Second, the passage is not actionable because any factual statements included
30 in it are substantially true. Courts repeatedly have emphasized that federal
31 constitutional protections for speech require a plaintiff to prove that an allegedly
32 defamatory statement is false. See, e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323,

1 340, 94 S. Ct. 2997 (1974). To ensure free expression, courts have recognized that a
2 statement is constitutionally protected as long as it is substantially true. Here, to the
3 extent there are any facts contained in the First Passage, the Motion makes clear that
4 they accurately describe the “gist” of the conflict between plaintiff and Mr. Groth as
5 co-defendants in the previous defamation suit. (Motion at 9-11.)⁸

6 The Opposition cites Weinberg v. Feisel, 110 Cal. App. 4th 1122, 2 Cal. Rptr.
7 3d 385 (2003), for the proposition that “[t]he anti-SLAPP statute does not even apply
8 to defamation actions based on false allegations of criminal conduct not made to law
9 enforcement.” (Opp. at 15.) This is disingenuous. Weinberg did not say that
10 accusations of criminal activity are excluded from the protection of the anti-SLAPP
11 statute, only that allegations of criminal conduct are not automatically subject to the
12 anti-SLAPP statute merely on the theory that all crime is a matter of public interest.
13 See 110 Cal. App. 4th at 1126-27. Contrary to plaintiff’s suggestion, many cases
14 have applied the SLAPP statute to statements that included accusations of criminal
15 conduct. See, e.g., Lieberman v. KCOP Television, Inc., 110 Cal. App. 4th 156, 164,
16 1 Cal. Rptr. 3d 536 (2003) (applying the anti-SLAPP statute to accusation that
17 plaintiff wrote illegitimate prescriptions, a felony, because “[n]ews reports
18 concerning current criminal activity serve important public interests); Terry v. Davis
19 Community Church, 131 Cal. App. 4th 1534, 1538-39, 33 Cal. Rptr. 3d 145 (2005)

20
21 ⁸ Mr. Ellison relies heavily on the declaration of Pat Lyons, who offers his
22 opinion that Ellison never engaged in the wrongful non-payment of legal fees.
23 (Lyons Decl. ¶ 2). This evidence might be relevant if Mr. Lyons had been plaintiff’s
24 only lawyer, if he had been his lawyer during the time period at issue, or if he had
25 been paid by Ellison rather than by Ellison’s insurance company. This is not the
26 case. Exhibits indicate that he was represented by Henry W. Holmes at the time he
27 failed to reimburse Fleisher for his expenses (Defs.’ Ex. J), and by the firm of Esanu
28 Katsky Korin & Siger, which threatened to sue plaintiff for non-payment of his legal
bills. (See Defs.’ Ex. K.) Moreover, Mr. Lyons’ declaration indicates that he was
paid by Fireman’s Fund, an insurance company, rather than by Ellison. (Lyons Decl.
¶ 3). Thus, Mr. Lyons was not in the position of seeking payment directly from Mr.
Ellison. Because Mr. Lyons is not in a position to know whether the statements at
issue are true or false, his declaration as a whole is irrelevant to the truth of the
challenged statements and should be disregarded. See Defendants’ Evidentiary
Objections (filed concurrently).

1 (granting anti-SLAPP motion where plaintiffs were “falsely accused of having an
2 inappropriate sexual relationship with a minor female).

3 Mr. Ellison also argues that the passage is not true, saying that he ultimately
4 arranged for payment of the reimbursement “before he would have presented an
5 ‘inability to comply’ defense at the hearing on contempt” (Opp. at 15.) In other
6 words, plaintiff claims that because he managed to pay his debt on the day he was
7 ordered to show cause, he was not “about to be arrested.” This is mere quibbling
8 over details. Mr. Ellison does not challenge any of the extensive court records
9 submitted by defendants that establish beyond dispute that Ellison was ordered to
10 attend a deposition in New York at Fleisher’s expense and to reimburse Fleisher for
11 travel costs if he lost on the personal jurisdiction motion. (See Defs.’ Exh. A.) Nor
12 does Mr. Ellison challenge the order from United States Magistrate Harold Raby
13 stating that “it appears that [Ellison] has committed conduct constituting contempt of
14 this Court” and ordering him to appear “and show cause why [he] should not be held
15 and adjudged in civil contempt of this Court” (see Defs.’ Exh. H), or the court
16 records that indicate that he did not pay the deposition costs until the day of the
17 Order to Show Cause Hearing – at which, by the court’s own order, he would have
18 been “remanded to the custody of the United States Marshal” had he still not paid.
19 (See Defs.’ Exhs. H, J.)

20 Courts have been clear that substantial truth is sufficient, and that a statement
21 is substantially true – and thus immune from liability – if it accurately conveys the
22 gist of the true events, even if it is not correct in all the particulars. Thus, the Court
23 of Appeal held in Conroy v. Spitzer, 70 Cal. App. 4th 1446, 1453, 83 Cal. Rptr. 2d
24 443 (1999), that a report that a state legislator had been found “guilty” of sexual
25 harassment was substantially accurate, even though the legislator was only
26 “reprimanded” and not found “guilty” of a crime.⁹ Here, Mr. Ellison does not (and
27

28 ⁹ As the court explained: “Even by the late 20th century not everyone has
attended law school – yet – and thus the ordinary reader does not equate the

1 cannot) seriously contest the fact that the Fleisher case court records confirm the
2 substantial truth of the statements in the First Passage. Consequently, nothing in the
3 First Passage can support liability against defendants.

4 **Second Passage: “Being a co-defendant with Ellison made me feel
5 like I was in the Alamo: surrounded on all sides. It is little known
6 that our relationship began to fray very early on. He was always
7 coming up with schemes to wheedle out of paying his bills. One was
8 so brilliantly Machiavellian that it included both stiffing his lawyers
9 and screwing me — at the same time! You just never knew what he
10 was going to come up with next, which meant we had to watch our
11 co-defendant as closely as we watched Fleisher.” (Complaint ¶ 9.)**

12 Plaintiff’s Opposition does not attempt to show that the statements in this
13 passage are false, beyond repeating the assertion that “Ellison was scrupulous in his
14 payment of attorneys’ fees and other costs” and asking the court to review the
15 attached declarations. (Opp. at 14.) The Second Passage is not actionable for two
16 independent reasons.

17 First, nearly all statements in this hyperbolic and colorful passage are
18 subjective phrases incapable of being proved true or false. The phrases used in this
19 challenged statement by Mr. Groth are precisely the type of subjective judgment and
20 rhetorical hyperbole that is constitutionally protected. See, e.g., Old Dominion Letter
21 Carriers v. Austin, 418 U.S. 264, 285-86, 94 S. Ct. 2770 (1974). Second, as laid out
22 in the Motion, the only arguable statements of fact in the passage are substantially
23 true. Indeed, the documents included with plaintiff’s Opposition support, rather than
24 refute, the “gist” and “sting” of the passage. They show, for example, that plaintiff
25 was very late in paying his legal bills, and that he paid only after months of
26 delinquency and excuse-making and in response to repeated entreaties from his
27 lawyers. (See Pl.’s Exs. E, G.)¹⁰ These documents therefore support defendants’

28 colloquial use of ‘guilty’ with criminal guilt.” Id. See also Robertson v. Rodriguez,
36 Cal. App. 4th 347, 359-60, 42 Cal. Rptr. 2d 464 (1995) (report that a city
councilman was “fined” by the city for running an illegal home business was
substantially accurate, even though the councilman agreed to pay only a “civil
compromise” to reimburse the city).

¹⁰ Mr. Ellison includes two letters from Mr. Groth to him which indicate that
they both owed their attorneys money and that they both were reluctant to pay. (See

1 argument that any factual statement in the second passage are substantially true, and
2 belie the Opposition's generic assertion that "Ellison was scrupulous in his payment
3 of attorneys' fees."

4 **2. The Statements At Issue Also Are Privileged As Fair And**
5 **True Reports Of A Judicial Proceeding.**

6 Plaintiff claims that the fair report privilege does not apply here because
7 "Defendants have not engaged in "fair and accurate" reporting of a judicial
8 proceeding." (Opp. at 21.) He adds that the statements "are not 'reports' of 'a
9 judicial proceeding.'" (Id.) Plaintiff is wrong on both counts.

10 First, to satisfy the requirements of a "fair and true" report, the statements need
11 only capture the "substance, the gist, [or] the sting" of the proceeding covered.
12 Hayward v. Watsonville Register, 265 Cal. App. 2d 255, 261-62, 71 Cal. Rptr. 295
13 (1968). There is no further requirement that defendants be "fair" or "fair-minded" in
14 their treatment of the plaintiff. See, e.g., McClatchy Newspapers, Inc. v. Superior
15 Court, 189 Cal. App. 3d 961, 974, 234 Cal. Rptr. 702 (1987) ("[e]ven when the print
16 media publish an accurate report of a statement they know to be false, the protective
17 cloak of [47(d)] remains intact, not penetrated by a finding of malice"). Here, the
18 challenged passages in Comics As Art published on the Internet accurately capture
19 the "gist" or "sting" of the actual facts surrounding Mr. Ellison's conduct in the prior
20 Fleisher litigation, and the comments therefore are privileged regardless of their truth
21 or the defendants' state of mind. (See Motion at 17-18.)

22 Second, Mr. Ellison claims, without support, that his "alleged failure to pay
23 legal bills" does not come within the ambit of the statute because the statements are
24 not "reports" of a judicial proceeding. (Opp. at 21.) But this argument addresses
25

26 Pl.'s Exs. E and G.) These letters serve to confirm that Mr. Ellison (along with Mr.
27 Groth) was delinquent in paying his legal bills. It is irrelevant here whether Mr.
28 Groth was delinquent in paying, since he has not sued anyone for saying that he
attempted to "wheedle" out of his debts. But it is certainly relevant that plaintiff's
own exhibits confirm that he was, in fact, attempting to "wheedle" out of his debt.

1 only subsection 1 of Section 47(d). Even if the challenged statements are not
2 “reports of ... a judicial ... proceeding,” they are certainly reports of things said “said
3 in the course thereof.”¹¹ Indeed, as shown in the Motion, Mr. Groth’s statements are
4 drawn from court records and correspondence from the Fleisher case.¹²

5 **B. Plaintiff Cannot Prevail On His Misappropriation Claim.**

6 As set forth in the Motion, the First Amendment protects against
7 misappropriation claims arising from the dissemination of information about matters
8 of public interest. See, e.g., Midler v. Ford Motor Co., 849 F.2d 460, 462 (9th Cir.
9 1988); Dora v. Frontline Video, Inc., 15 Cal. App. 4th 536, 542-43, 18 Cal. Rptr. 2d
10 790 (1993). First Amendment protection applies equally to statutory and common
11 law claims. See e.g., Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1183-85
12 (9th Cir. 2001); cf. Cardtoons, L.C. v. Major League Baseball Players Ass’n, 95 F.3d
13 959, 969 (10th Cir. 1996).

14
15
16
17 ¹¹ Civil Code § 47(d) provides that “[a] privileged publication or broadcast is
18 one made ... [b]y a fair and true report in, or a communication to, a public journal of
19 (1) a judicial, (2) legislative, or (3) other public official proceeding, or (4) of
20 anything said in the course thereof....”

21 ¹² Plaintiff also claims that recent comments by Mr. Groth “finally” forced him
22 to file this suit. (Opp. at 20.) In fact, statements by Mr. Groth virtually identical to
23 those complained of here have been published on Mr. Ellison’s own website for at
24 least six years – contained in the Gauntlet magazine article that Ellison has attached
25 to his Opposition. (See Ellison Decl., ¶ 8; Pl.’s Ex. A, p. 30-31.) The article quotes
26 Mr. Groth as saying, inter alia, that “Ellison behaved unethically throughout the
27 entire lawsuit” and that Ellison “was trying to get me to pay his legal bills.” (Pl.’s
28 Ex. A, p. 30-31.) Indeed, Mr. Ellison has seen fit to post this article on his own
Internet web site <http://harlanellison.com/foe/bugfuck.htm> since at least 2001. See
Declaration of John Rory Eastburg, ¶ 2 & Exs. R, S.

25 Consent is an absolute defense to defamation. Purcell v. Seguin State Bank,
26 999 F.2d 950, 959 (5th Cir. 1993). “It is axiomatic that ‘invited defamation,’ or the
27 issuance of a defamatory statement wherein the injured party precipitated the
28 statement’s release, is not actionable.” Litman v. Mass. Mut. Life Ins. Co., 739 F.2d
1549, 1560 (11th Cir. 1984) (citing Restatement (Second) of Torts § 583 (1977)).
Here, Mr. Ellison’s Opposition indicates that he has effectively waived any claim for
defamation by posting – and thus publishing – substantially the same “defamatory”
comments by Mr. Groth on Ellison’s own web site for years.

1 In his Opposition, Mr. Ellison accuses defendants of “attempt[ing] to mislead
2 the Court through their citation to [Dora].” (Opp. at 22.) This accusation is baseless.
3 One need only read the case to see that it dealt with both statutory and common-law
4 misappropriation claims. The court noted that it was unclear whether the claim in
5 question was for right to privacy or misappropriation, then stated that:

6 Because we believe that in this case the analysis under both theories
7 would be the same, we need not put too fine a point on it. Whether
8 appellant . . . is seeking damages for injury to his feelings or for the
9 commercial value of his name and likeness, we conclude that the public
10 interest in the subject matter of the program gives rise to a constitutional
11 protection against liability.

12 Id. at 542 (emphasis added). It is thus clear that the Dora court dealt with both
13 invasion of privacy and common-law misappropriation. The court also affirmed
14 summary judgment for the defendants on the statutory misappropriation claim. Id. at
15 546 (“[w]e therefore hold that the use of appellant’s name and likeness is among the
16 uses exempt from consent in Civil Code section 3344, subdivision (d)”)¹³

17 Mr. Ellison likewise fails to address the fact that Section 3344 of the Civil
18 Code expressly exempts from liability the use of an individual’s name or likeness for
19 news and public affairs/public interest purposes. See Civil Code § 3344(d). Ellison
20 argues that the challenged use does not qualify as news or public affairs because
21 Fantagraphics’ book is a “product” that is “offered for sale, for profit, and to court a
22 general readership.” (Opp. at 23.) He then argues that this case should be analyzed
23 according to the standards applied to product labels on herbal remedies. (Id. at 24.)
24 Ellison offers no support for the untenable argument that defendants’ book is a mere
25 “product” in a way that other books, movies, television shows, newspapers, and

26 ¹³ Plaintiff also claims that misappropriation liability exists simply because
27 plaintiff did not consent to the use of his name. This also is wrong. Because
28 expressive works are immunized, it does not matter whether the person who is the
subject of the work gives permission for the use of his name or likeness. Otherwise,
every news report, movie, or biography would constitute misappropriation unless the
subject consented to the publication. The law is to the contrary. See Civil Code
§ 3344(d) (editorial use “shall not constitute a use for which consent is required.”)

1 baseball cards are not. (See Motion at 25.) Contrary to Mr. Ellison's suggestion,
2 courts consistently have held that books, magazines, motion pictures and television
3 shows are expressive works subject to full First Amendment protection. See, e.g.,
4 Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 873, 160 Cal. Rptr. 352
5 (1979); Dora, 15 Cal. App. 4th at 542-43; Hoffman, 255 F.3d at 1183.

6 Likewise, Ellison does not even attempt to refute the argument, set forth in the
7 Motion, that the use of a person's name or likeness in advertising is not actionable
8 where the use is incidental to a protected use – such as where it is used to describe
9 the contents of a book, television program or motion picture that itself is protected as
10 an editorial, news, or public affairs use. See, e.g., Guglielmi, 25 Cal. 3d at 873.¹⁴
11 Here, Mr. Ellison's name on the cover of The Writers is used merely to identify
12 protected content inside the book – it is not used as an advertisement. Even if it were
13 an advertisement, however, it would be merely incidental to the interview within the
14 book, which is nonactionable under Section 3344. In either case, the
15 misappropriation claim should be stricken.

16 4. CONCLUSION

17 Defendants respectfully request that this Court grant their Motion, strike
18 plaintiff's Complaint against them in its entirety, and order plaintiff to pay their
19 attorneys' fees and costs incurred in defending against this meritless lawsuit.

20 DATED: December 22, 2006

DAVIS WRIGHT TREMAINE LLP

21
22 By: 

Andrew J. Thomas

23 Attorneys for Defendants
24
25

26 ¹⁴ Ellison's claim also cannot succeed because he cannot establish that
27 Defendants used his name on the cover of The Writers for an impermissible
28 commercial purpose. See Civ. Code § 3344(e) (use of likeness not actionable simply
because material commercially sponsored or contains paid advertising; rather, there
must be direct connection between use and commercial purpose); accord Hoffman,
255 F.3d at 1183; Newton v. Thomason, 22 F.3d 1455, 1460-61 (9th Cir. 1994).

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On December 26, 2006, I served the following document(s):

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' SPECIAL MOTION TO STRIKE PLAINTIFF'S COMPLAINT

by placing a **true copy or original** in a separate envelope for each addressee named below, with the name and address of the person served shown on the envelope as follows:

John H. Carmichael, Esq.
Law Offices of John H. Carmichael
269 S. Beverly Drive, Suite 395
Beverly Hills, CA 90212

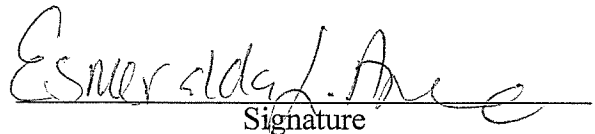
and by sealing the envelope and placing it for collection and delivery by Federal Express with delivery fees paid or provided for in accordance with ordinary business practices.

Executed on December 26, 2006, at Los Angeles, California.

- State I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.
- Federal I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Esmeralda L. Arroyo

Print Name



Signature