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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

KEITH GILABERT,

Plaintiff,

-vs-

ANN C. LOGUE, ANN LOGUE.com, AARON KROWNE, ANITA BARTHOLOMEW, Hf-impolde.com, hfimpolde.com, hedgefundimlode.com, hedgefundimplosion.com, implode-explode.com, blog.ml-implode.com, builder-implode.com and DOES 1-50, inclusive

Defendants.

Case No: CV13-00578 GHK (MRWx)

MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING DEFENDANT'S SPECIAL MOTION TO STRIKE

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MEMORANDUM OF POINTS AND AUTHORITES SUPPORTING DEFENDANT'S SPECIAL MOTION TO STRIKE

Introduction

This is a Strategic Lawsuit Against Public Participation – a SLAPP – of which this Court can and should summarily dispose.

Plaintiff Keith Gilabert was convicted of conspiracy in this Court in connection with a fraudulent hedge fund, which he operated between 2001 and 2005. In a related civil action, he was enjoined from further violations of the securities laws, and ordered to disgorge more than $9 million in ill-gotten profits.

Ann Logue is an established author who has published several books on investing. In a book published in August 2006, she used Gilabert and his fund as a brief example of a suspicious hedge fund which, with even minimal due diligence, prudent investors would have known to avoid. She repeated this information and analysis on her website, annlogue.com, in November 2011.

Based upon those statements, Gilabert has sued Logue for defamation. His claim is frivolous and properly subject to a special motion to strike.

As we shall see, every one of the allegedly defamatory statements in this case was made in a public forum, and each concerned a matter of public interest. Under *Code. Civ. Proc. §* 425.16(b)(1), Gilabert must demonstrate that he has a probability of succeeding on the merits of his claim, or see his claims stricken.

But Gilabert cannot succeed on the merits. He is at least a limited purpose public figure, for purposes of discussions regarding his conviction, but cannot prove, by clear and convincing evidence, that the statements at issue here were made with actual malice. Even assuming that Gilabert is a purely private figure, he cannot prevail. The "gist and sting" of the statements at issue are true, and Logue needs to establish nothing more, under California law, to defeat his defamation claim.

I. Factual Background & Procedural History

A. Ann Logue and Her Article

Defendant Ann Logue is an established author who teaches finance at the University of Illinois at Chicago.[1]

In August 2006, Logue published her first book, *Hedge Funds for Dummies*, which contained background information and practical advice for investors, including a section on the warning signs of fraud and misconduct.[2]

In a sidebar discussing the warning signs of fraud, Logue included two paragraphs about a failed and fraudulent entity called the GLT Venture Fund ("GLT"). She used GLT as an example of a hedge fund whose suspect nature could have been discerned with even a little due diligence. Logue pointed out that GLT was founded in 2000, but claimed a positive track record dating back to 1997, and that its manager – Keith Gilabert – had been stripped of his investment advisor registration by the California Department of Corporations.

To promote her book, Logue contributed as a guest author to HF-Implode, a website maintained by Aaron Krowne which tracks the ups, but mostly the downs, of the hedge fund industry. The material in her post was drawn from the sidebar paragraphs dealing with GLT.[3] It was published in September 2007.

The article remained online for four years. What happened during those years matters a great deal to this case, and we will address it soon. For now, we skip ahead to the demand which directly preceded this litigation. In November 2011, Keith Gilabert wrote to Aaron Krowne, demanding that the Logue article be removed from HF-Implode, and threatening to sue if it was not.

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[1]Ex. A, Declaration of Ann C. Logue, (Hereafter "Logue Decl.") at ¶ 4.

[2]Logue Decl., at ¶ 5.

[3]Logue Decl., at ¶ 6; Ex. B., Second Declaration of Aaron Krowne, (Herefter "Second Krowne Decl.") at ¶ 3.

Krowne related this demand to Logue, removed the article from his site, and replaced it with an explanation as to why it was gone.[4]

Logue, meanwhile, stood by her writing. On November 18, 2011, she posted the article to annlogue.com, bracketed by an explanation as to why Krowne had removed it from his site, and a statement reaffirming the accuracy of her work:

> I agreed to move the original post here, because I stand behind what I wrote. It is all backed by primary sources, specifically a complaint by the US Securities and Exchange Commission, the cease and desist order from the California Department of Corporations, and Gilabert's own guilty plea as reported by the US Department of Justice.[5]

In April 2012, Keith Gilabert issued a press release, in which he announced that he was suing Logue for $10,000,000.00.[6]

B. Procedural History

On November 14, 2012, Gilabert actually sued. He named, as defendants, Logue, Krowne, a commentator on annlogue.com named Anita Bartholomew, and a host of nominal entities with no jural existence.[7] Gilabert alleges that Logue defamed him in five statements that appeared in the November 2011 article, as follows:

> On or about November 18, 2011 Defendant Ann Logue published a false and misleading article stating that Plaintiff Gilabert:
>
> 1. Raised $14.1 million from investors.

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[4]Second Krowne Decl., at ¶ 3.

[5]Logue Decl., at ¶ 9 and Decl. Ex. 3.

[6]Logue Decl., at ¶ 10 and Decl. Ex. 4.

[7]Complaint for Damages, pg. 1, Ex. A to Gilabert v. Logue CV13-00578 GHK, Docket No. 1 (Hereafter 'Complaint') Notice of Removal, at 8. Gilabert issued a second press release regarding the suit on November 16, 2012. Logue Decl., at ¶ 10 and Decl. Ex. 5.

2. Received commission kickbacks from a broker.

3. Charged management fees on phony profits.

4. Mass marketed the fund.

5. Claimed the fund had performance dating back to 1997.

6. Ann Logue published these false and misleading comments knowingly.[8]

Gilabert attempted to serve Logue personally on December 27, 2012, but did not succeed in doing so.[9] Logue removed to this Court on January 25, 2013, and timely filed her Answer, pursuant to Fed. R. Civ. P. 81(c)(2)(C), on January 30, 2013.

On February 15, 2013, undersigned counsel were served with a voluntary notice of dismissal without prejudice pursuant to Fed. R. Civ. P. 41(a)(1).[10]

Because Logue has already answered, Gilabert cannot dismiss his claim against her without consent or leave of court. Logue seeks the vindication of having this frivolous suit against her dismissed as a SLAPP, and the attorney fees to which she is entitled, under *Code Civ. Proc. §* 425.16 subd.(c)(1), as the victim of a SLAPP. She is unwilling to consent to a voluntary dismissal without prejudice.

Under *Code Civ. Proc. §* 425.16 subd. (f), this special motion to strike may be filed within sixty days of the date on which the complaint is served.

C. The Facts: Gilabert is a Convicted Fraud

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[8]Complaint, at ¶ 17.

[9]Service was attempted by handing a copy of the summons and complaint on Logue's minor son at their Chicago home. Logue Decl., at ¶ 11. Notwithstanding this, and after removal, Gilabert attempted to file a default judgment in Los Angeles County Superior Court. His motion failed, in that the Court found that service had never been perfected. Ex. C., Declaration of Rebekah Dezso, (Hereafter "Dezso Decl") at ¶ 4-5.

[10]Dezso Decl., at ¶ 6.

Ann Logue stands behind what she has written for good reason: it is true, and is supported by documents filed in, and judgments entered by, this Court.

Between September 2001 and January 2005, Keith Gilabert managed GLT. He and Justin Paperny raised millions from investors over a four year period.[11] In April 2006, the United States filed an information in this Court, charging Gilabert with one count of Conspiracy in violation of 18 U.S.C. § 371. He waived indictment and initially plead not guilty in May 2006, before entering a guilty plea in June 2006, which the Court accepted.[12] In February 2008, he was sentenced to sixty months incarceration, for what Judge Wilson called as a "dastardly fraud that caused a lot of havoc and unhappiness to a lot of people."[13] Judge Wilson noted:

> And the sentence is deserved. Every bit of it.
>
> I agree with the Guidelines analysis, and in any event, I imposed the statutory maximum. Frankly, had the statutory maximum not been in place, there is a decent chance I would have gone beyond that.[14]

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[11] *See Securities and Exchange Comm. v. CMG-Capital Management Group Holding Co, LLC, et al.*, Case No. 2:06-CV-2595-GHK-JWJ (Hereafter "CMG Capital"), Docket No. 1, Complaint, at ¶¶ 3-4; *See Also*: *United States v. Paperny*, Case No. 2:07-CR-00060-SVW, Doc. 5, Plea Agreement for Defendant Justin Paperny, at Ex. A, ¶ e. Pursuant to Evid. R. 201, this Court may take judicial notice of pleadings and judgments filed in other cases before it. *Peviani v. Hostess Brands, Inc*. (C.D. Cal. 2010) 750 F.Supp.2d 1111, 1117.

[12] *See United States v. Gilabert*,(Hereafter "Gilabert") Case No. 2:06-CR-00319-SVW: Docket No. 1, Information; Docket No. 11, Minutes of Post-Indictment Arraignment; Docket No. 15, Waiver of Indictment, and; Docket No. 17, Minutes of Change of Plea Hearing.

[13] *Gilabert*, Docket No. 49, Transcript of Sentencing Hearing, February 25, 2008, at 38: Doc. 44 (Position Paper) at 2 (stating statutory maximum as sixty months).

[14] *Gilabert*, Docket No. 49, Tr. at 38-39 (imposition of sentence).

Gilabert was ordered to pay restitution in the amount of $1,003,572.57, a sum which did not include the additional $6,490,734.00 which broker UBS had previously paid to victims based upon his misconduct, nor the more than $9 million in ill-gotten profits he was ordered to disgorge in parallel civil proceedings.[15]

While his criminal case was pending, the Securities and Exchange Commission filed a civil action against Gilabert and CMG Capital, an entity Gilabert controlled. In its complaint, the SEC alleged that Gilabert operated a "classic Ponzi scheme," paying earlier victims with the investments of those defrauded later in the scheme.[16] The Complaint alleged that Gilabert received over $14.1 million from thirty-eight investors between January 2001 and September 2005, soliciting investors online and through mass mailings.[17] According to the SEC Complaint, Gilabert claimed the fund had annual returns of between 26.4% and 27.6% between January 1997 and 2004. Gilabert would later claim annual returns of some 36% for the fund. In fact, the fund – which was not even formed until March 2000 – lost money every year.[18]

In December 2006, this Court entered a default judgment against Gilabert and CMG Capital, enjoining them from future violations of the securities laws.[19] Gilabert and CMG Capital were ordered to disgorge the profits they earned in connection with the misconduct alleged in the complaint, in the amount of $9,293,052.09.[20]

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[15] *Gilabert*, Docket No. 49, Tr. at 21 (UBS reimbursements) and 37 (restitution ordered); Doc. 44, Position Paper, at 8-9 (UBS reimbursements and victim losses).

[16] *CMG-Capital*, Docket No. 1, Complaint at ¶ 20.

[17] *Id*., at ¶¶ 11, 14.

[18] *Id*., at ¶¶ 14, 15 and 18.

[19] *CMG-Capital*, Docket No. 20, Final Judgment, at §§ I - VI.

[20] Id., at § VII.

D. The Article and the SEC Complaint

The statements by which Gilabert claims to have been defamed were neither false nor misleading. They accurately portray Gilabert for what he is – a convicted financial fraud – and are based squarely upon prior proceedings in this Court, upon which Logue relied in her book and article.[21]

The claim that Gilabert raised $14.1 million from investors is not defamatory. It is, moreover, supported by Paragraph 4 of the SEC Complaint.

The claim that Gilabert received commission kickbacks from a broker is consistent with the allegations in Paragraphs 5 and 19 of the SEC Complaint, which state that Gilabert pocketed some $700,000.00 in broker commission rebates.

The claim that Gilabert charged management fees on phony profits is supported by Paragraphs 5, 6, 14 and 19 of the Complaint, which state that the fund was never profitable, outline the compensation scheme for the fund managers, and states that investor funds were misappropriated.

The claim that Gilabert mass marketed the fund directly tracks allegations found in Paragraphs 12, 13 and 17 of the Complaint, which address mass mailings and the use of internet marketing by the fund.

Finally, the claim that Gilabert claimed the fund had a performance record dating back to 1997 is directly supported by Paragraph 16 of the Complaint.

While Gilabert defaulted in the SEC action, it bears emphasis that it was upon the strength of these very allegations that this Court, in December 2006, ordered him to disgorge more than $9 million in ill-gotten gains.

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[21]Logue Decl., at ¶ 12.A (establishing source material); CMG Capital, Docket No. 1, Complaint, at ¶¶ 4, 12, 13, 14, 16, 17 and 19.

Keith Gilabert is a fraud. He was convicted of conspiracy in connection with his fraud, and as a result of his wrongdoing was ordered by this Court, in two separate judgments, to pay more than $10 million to his victims.

On these facts, Gilabert's claim that he has been defamed, and that his business reputation has been harmed by Logue, to the tune of $10 million, is absurd on its face, and this lawsuit – which is premised on that claim – is patently frivolous.

II. Law & Argument

In 1992, in response to an alarming increase in meritless suits brought "to chill the valid exercise of the constitutional right of freedom of speech," the California Legislature enacted the anti-SLAPP law, Section 425.16 of the Code of Civil Procedure.[22] Five years later, the Legislature voted unanimously to amend the statute to include language expressly declaring that it "shall be construed broadly." (Stats. 1997, ch. 271, § 1; amended § 425.16 subd. (a)).

From the outset, the California Supreme Court has held that the anti-SLAPP statute should be read in a manner "'favorable to the exercise of freedom of speech, not to its curtailment,'" *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1119 [81 Cal.Rptr.2d 471] (quoting *Bradbury v. Superior Court*, 49 Cal.App.4th 1108, 1114 (2d Dt. 1996), fn. 3 [57 Cal.Rptr.2d 207]).

A defendant invoking the protections of Section 425.16 bears only the burden of demonstrating that her speech falls within the ambit of what that section was enacted to protect.

If she can make a prima facie case that it does, then the burden shifts to the plaintiff who – in order to survive the motion to strike – must demonstrate that it is

[22]See legislative findings at *Cal. Code. Civ. Proc. §* 425.16(a).

probable that he will prevail on the merits of his claim. *Navellier v. Sletten* (2002) 29 Cal.4th 82, 95, [124 Cal.Rptr.2d 530].

> First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. (§ 425.16,(b)(1).) If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim. "Only a cause of action that satisfies both prongs of the anti-SLAPP statute i.e., that arises from protected speech or petitioning and lacks even minimal merit" is a SLAPP, subject to being stricken under the statute.

Oasis West Realty, LLC v. Goldman (2011) 51 Cal.4th 811, 819-20 [124 Cal.Rptr.3d 256, 262] (citing *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76 [124 Cal.Rptr.2d 519] and quoting *Navellier, supra,* 29 Cal.4th at 89).

The defendant need not demonstrate that the suit was brought for purposes of harassment or intimidation; indeed, the plaintiff's motives for suing are irrelevant. *Doe v. Gangland Productions, Inc.* (C.D. Cal. 2011) 802 F.Supp.2d 1116, 1120.

> "[T]he only thing the defendant needs to establish to invoke the [potential] protection of the SLAPP statute is that the challenged lawsuit arose from an act on the part of the defendant in furtherance of her right of petition or free speech. From that fact the court may [effectively] presume the purpose of the action was to chill the defendant's exercise of First Amendment rights. It is then up to the plaintiff to rebut the presumption by showing a reasonable probability of success on the merits."

Equilon Enterprises v. Consumer Cause, Inc. (2002) 29 Cal.4th 53, 61 [124 Cal.Rptr.2d 507, 514] (quoting *Fox Searchlight Pictures, Inc. v. Paladino,* 89

Cal.App.4th 294, 307 (2d Dt. 2001) [106 Cal.Rptr.2d 906, 917] (ellipses by the *Equilon* court).

"A trial court in making these determinations considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'" *Equilon*, *supra*, 29 Cal.4th at 67. This matter falls squarely within the realm of cases to which the anti-SLAPP statute was intended to apply.

A. The Content that Logue Published on Her Website is Protected by Section 425.16

Section 425.16 provides, in pertinent part:

> (b)(1) A cause of action against a person arising 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 shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.
>
> * * *
>
> (e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (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, or (4) 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.

Code Civ. Proc., § 425.16(b)(1) and (e) (West 2013).

The article which forms the basis of Gilabert's complaint unquestionably appeared in a public forum, and concerned matters of public interest, within the meaning of Section 425.16(e)(3).

1. Public Forum

As noted in the Complaint, the allegedly defamatory statements giving rise to this action were published by Logue on her own website, on November 18, 2012.

Online publication implicates Section 425.16(e)(3), no less than publication in older public fora.

This Court has held that: "'Under its plain meaning, a public forum is not limited to a physical setting, but also includes other forms of public communication such as electronic communication media like the internet.'" *New.Net, Inc. v. Lavasoft* (C.D. Cal. 2004) 356 F.Supp.2d 1090, 1107 (quoting *ComputerXpress, Inc. v. Jackson,* 93 Cal.App.4th 993, 1006 (4th Dt. 2001) [113 Cal.Rptr.2d 625, 638]. "Web sites accessible to the public . . . are 'public forums' for purposes of the anti-SLAPP statute." *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 41 fn.4 [51 Cal.Rptr.3d 55, 59] (citing: *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* 129 Cal.App.4th 1228, 1247 (4th Dt. 2005) [29 Cal.Rptr.3d 521]; *Wilbanks v. Wolk*, 121 Cal.App.4th 883, 895 (1st Dt. 2004) [17 Cal.Rptr.3d 497]; *ComputerXpress*, *supra*, 93 Cal.App.4th at 1007; *MCSi, Inc. v. Woods* (N.D.Cal.2003) 290 F.Supp.2d 1030, 1033; *New.Net*, *supra*, 356 F.Supp.2d at 1107).

A website that is accessible without charge, where the public "may read the views and information posted, and also post their opinions on the site is deemed to be a public forum." *New.Net, Inc.*, 356 F.Supp.2d at 1107 (citing *Global Telemedia*

Intern., Inc. v. Doe 1 (C.D.Cal.2001) 132 F.Supp.2d 1261, 1264). "This is the case because such websites satisfy the requirement that a public forum be 'a place open to the public where information is freely exchanged.'" *New.Net, Inc.*, 356 F.Supp.2d at 1107 (quoting *Damon v. Ocean Hills Journalism Club*, 85 Cal.App.4th 468, 475 (4th Dt. 2000) [102 Cal.Rptr.2d 205]).

Logue's website is open to the public, free of charge, and always has been. Members of the public are free to comment on the content there, and their comments are posted on the site, a fact illustrated by Paragraph 19 of the Complaint, which recounts the supposedly defamatory comments posted there by Anita Bartholomew.[23] Plainly, the expression at issue in this case took place in a public forum.

2. Public Interest

The California Supreme Court has not formulated a precise test for what constitutes a "matter of public interest" under Section 425.16 subd. (e)(3), but it has held that that language is to be construed broadly. *Hilton v. Hallmark Cards* (9th Cir. 2007), 599 F.3d 894, 905-06. The preamble to the anti-SLAPP law provides:

> The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly

Code Civ. Proc., § 425.16(a)(West 2013).

That said, California appellate courts have approached the "public interest" requirement in different ways. Under either of two approaches, this case involves speech on matters of public interest.

[23]Logue Decl., ¶ 14; Complaint, Docket No. 1, Ex. A, at ¶¶ 17, 19.

a. The *Rivero* Approach

The First and Fourth Districts have hewed to a test established *Rivero v. American Federation of State, County, and Municipal Employees, AFL-CIO,* 105 Cal.App.4th 913, 924 (1st Dt. 2003) [130 Cal.Rptr.2d 81, 89], finding a matter of public interest when a statement either: (a) involves a person in the public eye; (b) involves conduct that could directly affect a large number of people beyond the direct participants, or; (c) involves a matter of widespread public interest. *Hilton, supra*, 599 F.3d at 906 (citing: *Rivero, supra*, 105 Cal.App.4th at 924; *Commonwealth Energy Corp. v. Investor Data Exchange, Inc.*, 110 Cal.App.4th 26, 34 (4th Dt. 2003) [1 Cal.Rptr.3d 390, 394] (citing, with approval, the *Rivero* formulation).

Keith Gilabert is plainly a figure in the public eye. When *Hedge Funds for Dummies* was published in August 2006, Gilabert had only two months earlier entered a guilty plea in connection with the criminal charge against him.

His plea, his conviction, and the settlement of related claims were the subject of articles in the Los Angeles Times.[24] That alone suffices to make him a public figure, and to keep him in the public eye, for purposes of discussing his conviction.

> "There can be no doubt that one quite legitimate function of the press is that of educating or reminding the public as to past history, and that the recall of former public figures, the revival of past events that once were news, can properly be a matter of present public interest."

*Wasser v. San Diego Union,*191 Cal.App.3d 1455, 1462 (4th Dt. 1987) [236 Cal.Rptr. 772, 776](quoting Prosser, *Privacy*, 48 CAL. L. REV. 383, 418 and holding that the

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[24]Kathy M. Kristof, *Hedge Fund Chief to Plead Guilty*, L.A. TIMES, April 29, 2006. Staff, *Ex-broker settles GLT lawsuit*, L.A. TIMES, January 18, 2008.

murder trial of a physician in 1974 remained a matter of public interest "as a matter of law" when revived by newspaper in 1986).

In fact, Gilabert seems eager to remain in the public eye and devotes a great deal of energy toward that end. A Google search shows that he maintains at least five websites, several of which continue to portray him as a "hedge fund manager" with no mention of his conviction and debarment by the SEC and the California Department of Corporations.[25] In addition, the website of the "Renovatio Group," which touts itself as "one of the world's leading independent organizations dedicated to defending and protecting human rights," lists Keith Gilabert as its Director.

His biography on that site line states that "[i]n 2002, one of the most difficult trading environment in the history of the stock market, Keith Gilabert returned 15% net of profits to his clients." [26] This is the conduct for which Gilabert was convicted.

The Federal Bureau of Investigation estimates that over 8,000 hedge funds manage a combined total of $1.3 trillion in assets, and warns investors that limited oversight makes hedge funds a tempting vehicle for fraud.[27]

The exposure of Bernard L. Madoff as a fraud in December 2008 led to losses of some $20 billion.[28] Since then, investigations and convictions relating to hedge

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[25] *See*: http://keithgilabert.blogspot.com (where "Hedge Fund Manager Keith Gilabert discusses the social and economic issues that impact our lives today"); http://k.gilabert.wordpress.com (with updates involving ongoing litigation involving Gilabert); both http://keithgilaberttruth.com and http://keithgilabertfoundation.net (soliciting donations for various causes); http://keithgilabert.net (which publishes financial advice) and http://keithegilabert.com (which bills itself as "the Official Keith Gilabert Website").

[26] *See* http://renovatiogroup.org (last accessed February 18, 2013).

[27] *See* http://www.fbi.gov/about-us/investigate/white_collar/hedge-fund-fraud, last accessed February 18, 2013.

[28] *See* generally, Trustee's Eighth Interim Report, November 5, 2012, in *SIPC v. Bernard L. Madoff Investments, Inc.*, Case. No. 08-1789 (bankruptcy, S.D.N.Y.), available online at http://www.madofftrustee.com/document/reports (last accessed February 18, 2013).

fund fraud have been constant.[29] It is indisputable that hedge funds are a matter of public interest. Logue's own book, *Hedge Funds for Dummies*, is but one of hundreds of books on the subject, and has alone sold more than 22,000 copies.[30]

The assertion of a general public interest here in no mere fig leaf behind which to hide a personal vendetta.

Hedge Funds for Dummies contains 360 pages of advice and information. Gilabert is mentioned in two paragraphs, as just one of examples of what investors should regard as suspect. The online articles abstracted from that book were not about Gilabert, so much as they were about prudent investing. Gilabert was an example, used during a bona fide discussion of a larger public issue.

The fact that the discussion mentions an individual by name does not alter that analysis. In *Gilbert v. Sykes*, 147 Cal.App.4th 13, 23 (3d Dt. 2007) [53 Cal.Rptr.3d 752, 761], a prominent plastic surgeon, Sykes, sued for defamation after being singled out for criticism on a website created by a former patient, who described the surgery he had performed on her as botched, and beyond the scope of what she had authorized.

The patient filed a special motion to strike under Section 425.16, which Sykes opposed, claiming that the website was essentially about him and not a larger, bona fide matter of public interest. The Court of Appeals disagreed.

> Sykes assert[ed] that statements on the Web site do not contribute to the public debate because they only concern Gilbert's interactions with him. He is wrong.

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[29]A recent Lexis-Nexis search for articles published in major world newspapers since 1999 with "hedge fund fraud" as the subject reveals 341 stories. Logue Decl., at ¶ 15. The SEC website, at http://www.sec.gov/news/press.shtml (last accessed February 19, 2013), teems with releases relating to the investigation and prosecution, by that agency, of hedge fund fraud.

[30]Logue Decl., at ¶ 15.

Gilbert, 147 Cal.App.4th at 23.

The Court of Appeals found that there was widespread public interest in the subject of plastic surgery, and that the patient's website contributed to a national dialogue on that topic in at least two important ways: first, by raising awareness of the risks inherent in plastic surgery, using of a real-life example of surgery gone wrong, and; second, by providing a forum in which potential patients could discuss their choices, learn warning signs of which to beware, and obtain more information. *Gilbert*, 147 Cal. App.4th at 23-24.

In similar cases, state appellate courts have found that the mention of – and even the focus on – a named individual does not preclude the finding that a speaker has addressed a matter of broad public interest. *Hecimovich v. Encinal School Parent Teacher Organization,* 203 Cal.App.4th 450, 468 (1st Dt. 2012) [137 Cal.Rptr.3d 455, 469] (remarks about a terminated volunteer coach implicated public issues of athletic safety and parent-coach relations); *M.G. v. Time Warner, Inc*., 89 Cal.App.4th 623, 629 (4th. Dt. 2001) [107 Cal.Rptr.2d 504, 509] (broadcast and photo of a little league team involved an issue of public concern, child molestation, despite having depicted specific coaches and players); *McGarry v. University of San Diego*,154 Cal.App.4th 97, 109 (4th Dt. 2007) [64 Cal.Rptr.3d 467, 476] (the mid-season termination of a college coaching contract was a legitimate matter of public interest).

Courts have gone even further in recognizing an abiding public interest in information useful to consumers. In *Wilbanks v. Wolk*, 121 Cal.App.4th 883, 899 (4th Dt. 2004) [17 Cal.Rptr.3d 497], the First Appellate District held that speech about brokers selling viatical settlements did not fit neatly into any of the three categories of public interest speech laid out in *Rivero*, but implicated Section 425.16 nonetheless.

> Wolk's comments on plaintiffs' business practices do not meet these criteria, as plaintiffs are not in the public eye, their business

> practices do not affect a large number of people and their business practices are not, in and of themselves, a topic of widespread public interest. Consumer information, however, at least when it affects a large number of persons, also generally is viewed as information concerning a matter of public interest.
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> Here, it appears that the viatical industry touches a large number of persons, both those who sell their insurance policies and those who invest in viatical settlements.
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> It is undisputed that Wolk has studied the industry, has written books on it, and that her Web site provides consumer information about it, including educating consumers about the potential for fraud. As relevant here, Wolk identifies the brokers she believes have engaged in unethical or questionable practices, and provides information for the purpose of aiding viators and investors to choose between brokers. The information provided by Wolk on this topic, including the statements at issue here, was more than a report of some earlier conduct or proceeding; it was consumer protection information.

Wilbanks, 121 Cal.App.4th at 898-99 (citing *Paradise Hills Associates v. Procel* (1991) 235 Cal.App.3d 1528 [1 Cal.Rptr.2d 514]). Precisely the same can be said of the information published by Ann Logue.

b. The *Weinberg* Approach

The Third District has taken a somewhat different approach to the question of what constitutes a matter of public interest:

> First, "public interest" does not equate with mere curiosity. Second, a matter of public interest should be something of concern to a substantial number of people. Thus, a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest. Third, there should be some degree of closeness between the challenged statements and the asserted public interest; the assertion of a broad and amorphous public interest is not sufficient. Fourth, the focus of the speaker's conduct should be the public interest rather than a mere effort to gather ammunition for another round of private controversy. Finally . . . [a] person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people.

Hilton, 599 F.3d at 906–07 (citing *Weinberg v. Feisel*, 110 Cal.App.4th 1122, 1131–32 (3rd Dt. 2003) [2 Cal.Rptr.3d 385]). Under this formulation, the information published regarding Gilabert was no less a matter of public interest.

First, this is not a case in which the defendant is seeking to conflate the public interest with a morbid public curiosity, and can accordingly be distinguished from *Time, Inc. v. Firestone* (1976) 424 U.S. 448, 453 [96 S.Ct. 958, 965, 47 L.Ed.2d 154].

In that case, the Supreme Court held that public curiosity about the private lives of the rich and famous does not, in and of itself, make them "public figures" for purposes of the First Amendment analysis germane to state-law defamation claims.

The *Weinberg* court grounded the first of its "public interest" tests on *Firestone*, but this case involves nothing like the scandal-sheet gossip at issue there. Logue did write about Gilabert's private life, and there is no reason to believe she

sought to exploit public curiosity about him. Rather, she wrote about his federal case, because it exemplified certain red flags of which investors ought to beware.[31]

Second, we have already established that hedge funds, prudent hedge fund investing, and the risks that attend such investments are matters of concern to a large number of people. Indeed, the advice provided by Logue herself meets that criterion; more than 22,000 copies of *Hedge Funds for Dummies* have been sold.

Third, there is an obvious and close nexus between the speech here and the public interest at issue. Everything of which the Plaintiff complains in Paragraph 17 of his Complaint relates to the lesson Logue sought to teach: that GLT was a fraud, that its claims of success should have been suspect, and that diligent investors had the wherewithal to see that for themselves.

The link between what Gilabert did and what Logue wrote is not "amorphous" nor – as was the case in *Hutchinson v. Proxmire* (1979) 443 U.S. 111, 134 [99 S.Ct. 2675, 2688, 61 L.Ed.2d 411] – is it one which Gilabert shares in common with multitudes. Gilabert was not singled out for any other reason than that his crime was a useful example of certain symptoms, about which investors need be wary.

Fourth, Logue published the information she did not to settle a private score, but to exemplify certain investor risks, and when challenged, to stand by what she had written. It is true that she republished information on her own website after Gilabert threatened to sue her. But what is crucial here is **what** she republished. Her factual allegations – the ones over which Gilabert has sued – were the same in November 2011 as they had been in August 2006. This underscores that Logue had no private axe to grind. Even after Gilabert threatened to sue her, she acted

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[31]That said, in sharp contrast to the plaintiff in *Firestone*, 424 U.S. at 453, Gilabert has continued to inject himself into the public sphere, and to characterize himself as an "investor" and a "hedge fund manager" in promotional websites, notwithstanding the injunction entered by this Court and his debarment from that industry. *See supra*, this Memorandum at fn. 25 and 26 and accompanying text.

professionally, and stuck to the same facts she had published more than five years before.

Fifth, Logue did not endeavor to turn private information into a public dispute through the mass dissemination of private facts, because she did not publish private facts at all. The allegations in her article were based upon the SEC Complaint filed in this Court in *CMG Capital*, upon this judgment of this Court in that case, and upon Gilabert having plead guilty to the conspiracy charge against him. None of this information was private – all of it was in the public domain.

3. Logue Meets Her Burden Under Section 425.16 (b)(1)

The contested expression was (a) published in a public forum, and (b) about a matter of public interest, under both of the related-but-distinct tests employed by the state appellate courts. As such, the burden is upon Gilabert to demonstrate his probable success on the merits of his claim, or to face dismissal per Section 425.16.

B. Gilabert Cannot Demonstrate a Probability of Success on the Merits of His Claim.

To survive this special motion to strike, Gilabert must now "demonstrate that 'the complaint is legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.'" *Price v. Stossel* (9th Cir. 2010) 620 F.3d 992, 1000 (citations omitted).

While the nature of that showing differs – depending upon whether Gilabert is considered a limited-purpose public figure for purposes of discussions relating to his conviction, or merely a private figure – in neither case can Gilabert prevail.

1. Gilabert Is a Limited Purpose Public Figure But Cannot Show That Logue Published with Actual Malice.

The First Amendment prohibits states from imposing defamation liability without fault on speakers whose remarks concern public figures or matters of public concern. *Philadelphia Newspapers, Inc. v. Hepps* (1986) 475 U.S. 767, 773 [106 S.Ct. 1558, 1562, 89 L.Ed.2d 783](collecting cases).[32]

When a "plaintiff is found to be a limited purpose public figure, plaintiff 'must establish a probability that he or she can produce clear and convincing evidence that allegedly defamatory statements were made with knowledge of their falsity or with reckless disregard of their truth or falsity.'" *Harkonen*, *supra*, 880 F.Supp.2d at 1078-79 (quoting *Overstock.com, Inc. v. Gradient Analytics, Inc.*, 151 Cal.App.4th 688, 700 (1st Dt. 2007) [61 Cal.Rptr.3d 29](citing *New York Times Co. v. Sullivan*, (1964) 376 U.S. 254, 279 [84 S.Ct. 710, 11 L.Ed.2d 686]).

While one does not become a limited purpose public figure merely by having been involved in criminal activity, *Wolston v. Reader's Digest Ass'n, Inc.* (1979) 443 U.S. 157 [99 S.Ct. 2701, 61 L.Ed.2d 450], Gilabert none-the-less fits the bill.

As an initial matter, his trial and conviction involved issues that "had foreseeable and substantial ramifications for nonparticipants," hallmarks of a public controversy. *Copp v. Paxton*, 45 Cal.App.4th 829, 845 (1st Dt. 1996) [52 Cal.Rptr.2d 831, 844]. Gilabert defrauded dozens of victims. His prosecution and conviction

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[32]The familiar "actual malice" standard of *New York Times* applies not only to general public figures, but to limited-purpose public figures as well, when the speech in question touches upon the subject of their notoriety. *Mosesian v. McClatchy Newspapers*, 233 Cal.App.3d 1685, 1689 (5th Dt. 1991) [285 Cal.Rptr. 430, 432]. "[T]he 'limited purpose' or 'vortex' public figure, an individual who 'voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.'" *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 253 [208 Cal.Rptr. 137, 142, 690 P.2d 610, 615].

helped to combat fraud and to ensure greater public confidence in the securities industry. His conviction was a matter of public interest, reported in the mainstream press, and his story, as Logue has demonstrated, still provides a useful cautionary tale to investors.

Significantly, Gilabert, since his release from federal custody, has by his own acts renewed his conviction as a matter of public interest.

In November 2011 he demanded that Aaron Krowne remove the article that Logue had contributed to HF-Implode years earlier. His written demand alleged that the article was false, in the five ways later alleged in his complaint. Krowne complied with that request, silencing criticism of Gilabert on at least one website.[33]

In making that demand, Gilabert sought to shape an ongoing public discussion regarding his conviction. One who enters a public discussion in order to shape public opinion, by virtue of that conduct becomes a limited purpose public figure with respect to that controversy. *See, e.g.: Denney v. Lawrence*, 22 Cal.App.4th 927, 936 (4th Dt. 1994) [27 Cal.Rptr.2d 556, 561](brother who sought to influence public perception of his brother's involvement in a murder thereby became a limited purpose public figure for purposes of discussions relating to that crime).

Gilabert still promotes himself online as a financial advisor, and threatened both Krowne and Logue with this defamation action for accurately reporting on his conviction. He is, in this light, a limited purpose public figure in the same sense as the plaintiff in *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 256 [208 Cal.Rptr. 137, 144], albeit writ small.

In that case, the founders of Synanon, a drug-addiction treatment program, pursued a systematic campaign to silence their critics in the press, and to maintain a positive reputation. They did so, inter alia, by demanding that newspapers retract

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[33]Second Krowne Decl., at ¶¶ 3.

negative articles, threatening to sue those that did not. Their efforts at reputation management made them limited-purpose public figures. *Id.*, 37 Cal.3d at 254-56.

While Gilabert has acted on a far smaller stage, his story in the same. He actively promotes himself online, while threatening those who write about his criminal past with defamation suits. By engaging in "'voluntary [affirmative] act[ion] through which he seeks to influence the resolution of the public issues involved,'" Gilabert has ensured his own status as a limited purpose public figure. *Thomas v. Los Angeles Times Communications*, LLC (C.D. Cal. 2002) 189 F.Supp.2d 1005, 1011 *aff'd sub nom. Thomas v. Los Angeles Times Communications LLC* (9th Cir. 2002) 45 Fed.Appx. 801 (quoting *Reader's Digest, supra*, 37 Cal. App.3d at 254).

To succeed as a limited-purpose public figure Gilabert must establish, by clear and convincing evidence, that Logue published with actual malice.

Logue has testified that she had – and still has – a good faith belief that what she wrote was true.[34] There is no knowing falsehood here. Nor was there a reckless disregard for the truth. Every one of the assertions over which Gilabert has sued can be traced to the SEC complaint filed in *CMG Capital*. Those claims were signed by attorneys representing the United States, filed in this Court with the warranties implied by Civ. R. 11(b), and supported the judgment entered by this Court. To demonstrate reckless disregard "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *McCoy v. Hearst Corp*. (1986) 42 Cal.3d 835, 860 [231 Cal.Rptr. 518, 535]. Gilabert can adduce no such evidence.

[34]Logue Decl. at ¶ 13.

2. Even As A Private Figure, Gilabert Cannot Prevail

At the very least, as a private figure alleging defamation, Gilabert must demonstrate a probability of prevailing on each element of his claim. "Under California law, to state a prima facie case of defamation, a plaintiff must show (1) 'the intentional publication' of (2) 'a statement of fact' that (3) is 'false' (4) 'unprivileged,' and (5) 'has a natural tendency to injure or which causes special damage.'" *Harkonen v. Fleming* (N.D. Cal. 2012) 880 F.Supp.2d 1071, 1078 (quoting *Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645 [85 Cal.Rptr.2d 397]). The requirement that the publication be "false" has a special meaning.

> Under California law "[i]t is well settled that a defendant is not required in an action of libel to justify every word of the alleged defamatory matter; it is sufficient if the substance, the gist, the sting of the libelous charge be justified, and if the gist of the charge be established by the evidence the defendant has made his case." Furthermore, a "slight inaccuracy in the details will not prevent a judgment for the defendant, if the inaccuracy does not change the complexion of the affair so as to affect the reader of the article differently".

Manufactured Home Communities, Inc. v. County of San Diego (9th Cir. 2011) 655 F.3d 1171, 1178 (quoting *Gilbert, supra*, 147 Cal.App.4th at 28 (internal quotation marks and citation omitted by the Ninth Circuit).

The gist and sting of what Logue wrote about Gilabert is straightforward: his fund was a fraud and its deceptions could have been uncovered by investors in the exercise of due diligence. Those statements are true. Gilabert may quibble about how much he raised from investors, or whether improperly retained commission rebates constitute kickbacks, but such hairsplitting is beside the point.

As Logue wrote – Keith Gilabert pled guilty: that's a fact. He was convicted of conspiracy, ordered to disgorge over $10,000,000.00 to his victims, and has been

drummed out of the investment business. All of what Logue wrote on her website is true. None of what she wrote could harm Gilabert, and his reputation, any more than these bare facts already have.

III. Conclusion

Logue's special motion to strike should be granted.

Dated: February 25, 2013

Respectfully submitted,

Weston, Garrou & Mooney

By: /s/ Jerome H. Mooney, III

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PROOF OF SERVICE
[Pursuant to Local Rule 5-3.2]

On February 25, 2013, I served the within document(s) in this action entitled:

MEMORANDUM OF POINTS AND AUTHORITES SUPPORTING DEFENDANT'S SPECIAL MOTION TO STRIKE

on the interested parties in this action, by placing a true copy thereof enclosed in a sealed envelope, first-class, with postage thereon fully prepaid, and either: (1) personally delivery it to our firm's mailroom employees(s) for deposit with the United States Postal Service pursuant to our firm's ordinary business practice; or (2) personally depositing such correspondence directly in the United States mail, addressed as follows:

Keith Gilabert
26839 Peppertree Drive
Valencia, CA 91381

I declare under penalty of perjury under the laws under the laws of the United States and the State of California that the foregoing is true and correct.

Executed on February 25, 2013, at Los Angeles, California.

/s/ Arthur Bartholomew_