

DO63269

**IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT**

OCEAN'S ELEVEN CASINO,

Plaintiff and Respondent,

vs.

TIM ANDERS,

Defendant and Appellant.

After an Order By the San Diego North County Superior Court
Hon. Jacqueline M. Stern
Case No. 37-2012-
00055763-CU-DF-NC

APPELLANT'S REPLY BRIEF

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State of California
Court of Appeal
Fourth Appellate District

CERTIFICATE OF INTERESTED
ENTITIES OR PERSONS

Court of Appeal Case Caption: Ocean's Eleven Casino v. Anders

Court of Appeal Case Number: DO63269

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	
4.	

Please attach additional sheets with Entity or Person Information if necessary.

Please check here if applicable:

There are no interested-entities or parties to list in this Certificate per California Rules of Court, Rule 8.208.

Signature of Attorney/Party Submitting Form

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INTRODUCTION

In spite of the plethora of misleading and abrasive words, written in Respondent's opposition, at issue before this court is just one thing: Did the trial court err in denying Appellant's anti-SLAPP motion on the ground that the posts on Anders' public forum website were not a matter of public interest? The answer is YES. An overabundance of courts have ruled that public interest must be broadly construed (See AOB 24-27 and the cites starting at page 12 herein). In fact this very court is among them having found that *public interest must be broadly construed* in its decision in *Chaker v. Mateo* (2012) 209 Cal.App.4th 1138.

In *Chaker* we have a series of posts about *Chaker's* character and business practices that was posted in a public forum. In the instant case we have hundreds of posts about the character and business practices of Kelegian/Respondent posted in a public forum. Both were and are a matter of public interest. Respondent wants to hide this from the court by claiming their lawsuit is not about free speech but about Anders' theft. Their problem is this alleged 'theft' contention is all based on lies, hearsay and opinions, none of which is admissible.

When Anders put up this public forum website Respondent's attorney, Spencer Skeen, wrote him a threatening letter saying that if Anders didn't take down the public forum that he would, in essence, legally throw everything including the kitchen sink at him. And they have, what is surprising is that there is not a cause of action entitled 'Kitchen Sink.'

The meritless causes of action in Respondent's complaint are designed to do one thing: punish Anders for not taking down his public forum. All causes of action arose out of

Anders refusal to take down his public forum website. (The website can still be accessed by going to: <http://pokercommunitynetwork.com/>)

Past challenges to the anti-SLAPP law sought to import criteria not in the statute to determine if the SLAPP statute applied. Often Plaintiffs claim the Defendant committed criminal misconduct, (as here in repeatedly calling Anders a thief) or must demonstrate their “act” was a “valid” exercise of the first amendment. In response our High Court said: “[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.” *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 66.

The statutory phrase "cause of action . . . arising from" means simply that the defendant's act underlying the plaintiff's cause of action must itself have been an act in furtherance of the right of petition or free speech. (See *ComputerXpress, Inc. v. Jackson*, (2001 4th Dist.), 93 Cal.App.4th 993 at p. 1001.) Clearly Anders’ refusal to take down his public forum website was in furtherance of his, and the hundreds of posters, 1st amendment right of free speech.

Respondent would have you believe that because Appellant says that he is *Dr. Hope, an author and musician*, on his public forum website, that he somehow is using the site to promote his books, implying that books are for sale through the site and his motivation for this public forum website was financial gain. This is untrue, one just has to go to the website (<http://pokercommunitynetwork.com>) to see that there is nothing for sale on this public forum website or check the photo copies of the website as it appeared over a year ago that are

part of the record in this case (AR 10-44.). There was nothing for sale then, there is nothing for sale now.

The reason Appellant pointed out that he is an author and musician on his public forum website was to show that Respondent banned a public figure from its casino. Tim 'Dr. Hope' Anders is a critically acclaimed, award-winning author and musician. Tim 'Dr. Hope' Anders has written 12 books and over 30 songs. He has appeared on TV, radio shows, in numerous articles in newspapers, magazines and other periodicals across the United States and Canada (including numerous times in San Diego's Union Tribune and the North County Times). He has signed thousands of autographs. Tim 'Dr. Hope' Anders has been honored and received awards in front of crowded auditoriums. He has appeared in music videos, one with Chaka Kahn and also as a solo artist. He has recorded numerous CDs and performed live with standup comedian and songwriter Russ T. Nailz.

No, the mentioning that Appellant was an author and musician was not to sell books as alleged, it was to inform the poker playing public that Respondent had banned *Dr. Hope*, a public figure, for sticking up for the employees.

Through a series of bad investments, exacerbated by the downturn in the economy, Anders, the once multi millionaire author, managed to lose almost everything he had. When his legal bills reached 35k he could no longer afford counsel and has been acting as his own attorney for over a year in these two remaining lawsuits (their first lawsuit was dismissed with prejudice). He may not be as skillful as opposing counsel but he has one thing on his side that Respondent doesn't have: **THE TRUTH.**

A. THE SO CALLED ‘THEFT’

Respondent has used the word theft *57 times* in its brief, saying, ‘his theft’ or ‘Anders’ theft.’ There is absolutely no admissible evidence that supports that Anders stole anything. Again this is just another lie to demean the character of Anders in the eyes the court. (CT 216:8-25.)

A Quick History re cap

These are the facts that got the Appellant sued:

1. Employees complained to Anders about how they were being mistreated. They told him that they could be fired just for talking to him about this. They gave Anders copies of threatening memos in the hope that he would talk to the owners with whom he was good friends. Is this theft?
2. Appellant wrote a letter to the majority owner of Respondent complaining about the mistreatment of the employees. Is this theft?
3. Appellant was banned for writing that letter and not divulging the identities of the employees who had given him the memos. Is this theft?
4. Appellant then built a public forum website. Is this theft?
5. Respondent then sent Appellant a threatening letter demanding that the public forum site be taken down. Believing in the 1st Amendment rights of the posters and himself Appellant left the site up. Is this theft?

B. RESPONDENT'S CONSPIRACY THEORY FAILS

Respondent's flimsy theft theory is that Appellant Anders somehow conspired with Todd Chaney, a person who Anders barely knew at the time, to steal 'trade secrets.' This is untrue and unsupported by the facts. Apparently Respondent's employees complained to other patrons of Respondent as well as Anders, Todd Chaney being one of them.

Todd Chaney, a bonded and licensed electrician vendor and customer of Ocean's Eleven Casino, has admitted to going into an unrestricted area of Ocean's Eleven Casino, (where employees took breaks, ate food, and socialized with non-employee friends), and picking up flyers that were left there for the employees. Chaney was aware that he was being video taped when he took the flyers, after all it was he who had installed the video cameras. He did not believe that he was doing anything wrong or illegal at the time nor since. He then made an appointment with Bob Carter, majority interest holder in North County Gaming, a 25% interest holder of the Respondent, and gave him those memos.

His purpose in doing so was to show the owners of Respondent yet another way of how the new management, (Mark Kelegian) was abusing and terrifying the employees. [The fact that employee's were in truth being mistreated is evidenced in this case by the sworn declarations of two former employees, Sherry Trudel (AR 57-61.) and Randall Vanderiet, (AR 63-65.)] When word of this got back to Kelegian he retaliated by calling the Oceanside police and tried to have Chaney arrested for theft. The police then interviewed Chaney. The Oceanside police and District Attorney said there was no crime here and refused to file any charges against Chaney.

Both Anders' and Chaney's phone records show that the first time Chaney contacted Anders was *after* this alleged theft. He contacted Anders to get a copy of the letter that Anders had written to Walter Lack so he could take it to show Bob Carter (part owner of the Respondent) (Anders had let it be known to all his employee and owner friends that he had written such a letter). While these phone records are not admissible here they don't have to be. The burden of proof lies with the Respondent, not the Appellant. They must prove, with admissible evidence, that this alleged conspiracy existed. This they simply cannot do, because there never was any conspiracy. Their so-called 'evidence' that this happened is based solely on declarations based on hearsay and information and belief. This fails the admissibility test. Respondent has no admissible evidence to back up its' claims. The only offer of 'evidence' is the opinions of two men and assertions based on 'information and belief' which are inadmissible and were objected to on that basis. (CT 80-90)

To show a likelihood of success, "[t]he plaintiff's showing of facts must consist of evidence that would be admissible at trial." (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1346 [63 Cal.Rptr.3d 798].) The plaintiff may not rely on the allegations in the complaint or assertions in a declaration based on information and belief. (*Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1496-1498 [45 Cal.Rptr.2d 624]; *Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 45 [134 Cal.Rptr.2d 420].) Thus Respondent's theft/conspiracy theory fails.

C. THE SO CALLED ‘STOLEN’ URL

Respondent’s claim that Anders stole their URL is equally false. Anders bought the domain name oceans11.info, which was offered for sale by GoDaddy.com, and paid for it with U.S. Dollars. Anders stole nothing. Respondent claims that it owns the trademark rights to that name because it contains ‘oceans11’ in the domain name. They do not. Respondent’s trademark is on ‘Ocean’s Eleven Casino,’ not on oceans 11 or oceans eleven. Appellant showed that if you Google the name Ocean’s Eleven you will get over three million websites that will pop up. Do these all infringe on Respondent’s trademark? No, none do. Here are just a few of the plethora of websites that popped up in ANDERS’ Google search: Oceans11.net was registered to Warner Bros. Entertainment Inc. (CT 201.); oceans11.org was registered to Veraprise Inc. (CT 202.); oceanseleven.com was originally registered to Oceans Eleven Resorts, Inc. (CT 203); Other than oceans11.com, (the URL registered to Respondent) the Respondent has no right, title or interest in any of those websites/URLs including oceans11.info. Respondent’s assertion that oceans11.info is a ‘stolen URL’ is clearly false. The facts prove that Respondent has a mark only on Ocean’s Eleven Casino, (CT 160.) not on the ubiquitous oceans11. (CT 216:18-24) For Respondent to say ANDERS stole its’ URL is preposterous.

D. THE TRIAL COURT ERRED MULTIPLE TIMES IN THE CASE

The Court erred when it ruled that Anders could not represent his DBA, Alpine Publishing (CT 106). Appellant filed a Request for Judicial Notice (CT 180-183) showing

the Court that he indeed had the right to represent his DBA and that the court should not strike his DBA's answer for not being represented by an attorney (CT 219:2-28.). The Court erred and ruled that Anders' DBA, Alpine Publishing's answer be stricken.

Respondent claimed that it had the trademark rights to anything with oceans11 in it. They do not as shown above. The Court erred in enjoining Anders from using oceans11.info to access his public forum (CT 178-179).

The trial Court erred in denying Appellant's Special Motion to Strike on the ground that the postings on oceans11.info were not a matter of public interest. (CT 103-104) They are a matter of public interest.

E. APPELLANT HAS SHOWN THAT THE ANTI-SLAPP STATUTE APPLIES

Appellant established in his opening brief that the anti-SLAPP statute, Code of Civil Procedure section 425.16, applies to Respondent's claims, which arise from Anders refusal to take down his public forum website (AOB 20-26). Respondent has not shown the contrary. While Respondent is good at making stuff up (CT 216:8-25.) Respondent has no admissible evidence to support any of its claims. Appellant showed that Respondent has not established a probability of prevailing on its claims. (AOB 27-40) Again, Respondent has failed to show the contrary. The trial court erred in denying Appellant's anti-SLAPP motion.

1. THE TRIAL COURT ERRED IN DENYING APPELLANT'S SPECIAL MOTION TO STRIKE.

As set forth more fully in appellant's opening brief, anti-SLAPP analysis consists of two prongs. On the first, the court determines whether or not the statute applies to the plaintiff's claims. If the statute applies, the burden shifts to the plaintiff to show a probability of prevailing on its claims (the second prong). (AOB 27-40) Appellant has met his burden; Respondent has not met theirs.

A. Section 425.16 Applies to Respondent's Complaint.

Appellants established that section 425.16, subdivision (e)(3), applies to respondent's Complaint, because their claims arise from statements made in a public forum about issues of public interest (AOB 20-26.) Respondent has not effectively rebutted said showing.

B. Respondent's Claims are Subterfuge to Silence Appellant's and His Poster's Constitutionally Protected Speech

Respondent's Opposition Brief repeatedly makes the claim that this is not about free speech but Anders' theft, stating: "*Simply put, theft is not free speech.*" (ROB 9). They cleverly relegate to a latter position their very **FIRST** cause of action, Trade Disparagement, where it states: "*...Defendants have been making false statements regarding Ocean's Eleven, including but not limited to statements that Ocean's Eleven and its management have committed unlawful and illegal business practices.*" (CT 7:18-21.) Clearly this is about free speech, not theft.

To further hide the free speech issue Respondent then says: “*the injunction claim is similarly aimed at stopping Ander’s theft and illegal use of Ocean’s Eleven’s protected property.*” (ROB 10) While this is what they now say in their opposition, their request in their complaint is quite different: “*For an order by the Court to temporarily, preliminarily, and permanently enjoin and restrain Defendants from spreading false information, lies and rumors about Ocean’s Eleven, its management and/or employees.*” (CT 15:24-26.) No matter how they try to mislead the court the truth is this lawsuit was filed to punish Anders for not taking down his public forum website where customers, employees and the general poker playing public expressed their views and opinions in a manner that is guaranteed to them by the 1st Amendment to the Constitution of the United States of America.

Though Respondent is now trying to say that their causes of action are all about ‘theft, not free speech’ their *very own words* in their complaint paints a different story. Each Cause of action at issue in this matter *arise* from First Amendment Protected speech. In the general allegations of the complaint the Plaintiff alleges that the Defendant used the internet to exchange ideas (CT 6:3-28.). The allegations in Paragraph 24 rely upon inflammatory language of a “scheme” by encouraging others on the website to contribute their opinions. Paragraph 27 demands that Anders “*...forego publishing and distributing false information, lies, and rumors about Ocean’s Eleven and its management on the website.*” (CT 7:6-10.)

Each of these paragraphs are incorporated into every cause of action.

Again, as quoted earlier: Often Plaintiffs claim the Defendant committed criminal misconduct, (as here in repeatedly calling Anders a thief) or must demonstrate their “act” was a “valid” exercise of the first amendment. In response our High Court said: “[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.” *Equilon Enterprises v. Consumer Cause, Inc., supra*, (2002) 29 Cal.4th 53, 66. Appellant has shown that CCP section 425.16, applies to all of Respondent’s claims, which all *arose* from Anders refusal to take down his public forum website (AOB 20-26). Respondent has not shown the contrary.

C. Public Interest is to be Broadly Construed

Respondent’s opposition now tries to paint Ocean’s Eleven Casino as being a small privately held casino in Oceanside, CA in which the poker playing public has little interest. This is way different from their complaint where they say: “*Ocean’s Eleven is one of Southern California’s most well-know and respected cardrooms and casinos. In Operation since 1997, Ocean’s Eleven is a major contributor to San Diego County’s economy by employing hundreds of local residents.*” (CT 2:25-27.) Which advertises to: “...*millions of people in California and throughout the United States.*” (CT 6:25.) Here we have a long time customer complaining about being banned in a public forum to warn other consumers how he is being mistreated for speaking up about the mistreatment of the employees and a Respondent that claims the public has no interest in how it treats its customers and employees. Unbelievable.

Respondent characterizes the comments on Anders’ Public Forum website as being about just four employees (the elderly receptionists that were fired for being old). This is untrue. The comments on Anders’ public forum pertains to how the managing partner of the Respondent (Kelegian) treats all the 350 employees of Ocean’s Eleven Casino and exposes

to the world how Mark Kelegian yells at them, insults them, instills fear into them, makes them work off the clock without pay and how customers are negatively effected by this. (AR 10-44.) Kelegian has said in open court that he would ban any customer who made a post on Anders' public forum website. This mistreatment of the customers and the employees not only effects the employees, their families, the customers but the poker playing community at large.

California courts have found the public issue or issue of public interest element to be satisfied by speech on many different subjects. See, e.g., *Sipple v. Foundation For Nat. Progress*, 71 Cal. App. 4th 226 (whether nationally known campaign consultant regarding women's issues engaged in wife-beating is a public issue); *Dove Audio v. Rosenfeld, Meyer & Susman* (2nd Dist. 1996) 47 Cal. App. 4th 777 ("whether money designated for charities was being received by those charities" is a question of public interest); *Beilenson v. Superior Court*, 44Cal. AppAth 944 (1996) (speech alleging unethical conduct of public official is of public interest); *Matson v. Dvorak*, 40 Cal. App. 4th 539 (3rd Dist. 1995) (speech regarding "qualifications of a declared candidate for public office is a public issue").

Anders, a loyal customer for fifteen years, was banned for complaining about the mistreatment of the employees and not identifying the employees who complained to him about their mistreatment. Anders was not the only customer banned for trying to help the employees. Other consumers have a right to know how Respondent mistreats its customers and employees so they can make an informed choice as to whether to patronize such an establishment. If an establishment was violating child labor laws or is using a banned

substance in the preparation of food, or was cheating its customers, the general public would want to know about it. Likewise here.

In *Chaker v. Mateo*, *supra*, (2012) 209 Cal.App.4th 1138 we have a series of posts about *Chaker's* character and business practices that was posted in a public forum. In the instant case we have hundreds of posts about the character and business practices of Kelegian posted in a public forum. The trial court dismissed the *Chaker* case as a SLAPP, saying the posters were exercising their 1st amendment rights and that *Chaker* did not meet the minimal burden required to show he was likely to prevail on his claim, the Appellate Court affirmed.

In their ruling the court quotes:

"The Legislature enacted section 425.16 in 1992 to provide a procedure by which a trial court can `dismiss at an early stage nonmeritorious litigation meant to chill the valid exercise of the constitutional rights of freedom of speech and petition in connection with a public issue.' [Citation.] The statute, as subsequently amended, provides in part:

"(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. 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."

See *Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 467 [137 Cal.Rptr.3d 455]

"Like the SLAPP statute itself, the question whether something is an issue of public interest must be ""construed broadly."" (*Gilbert v. Sykes* (2007) 147 **Cal.App.4th** 13, 23 [53 Cal.Rptr.3d 752]; see *Rivera v. First 465*465 DataBank, Inc.* (2010) 187 **Cal.App.4th** 709, 716 [115 Cal.Rptr.3d 1] (*Rivera*).) An ""issue of public interest"" is "`any issue in which the public is interested.'" (*Rivera*, at p. 716, quoting *Nygård, Inc. v. Uusi-Kerttula* (2008) 159 **Cal.App.4th** 1027, 1042 [72 Cal.Rptr.3d 210].)

Matters of public interest "include activities that involve private persons and entities, especially when a large, powerful organization may impact the lives of many

individuals." *Church of Scientology v. Wollersheim*, 42 Cal. App, 4th 628,650 (1996).

In recognizing that section 425.16 must be interpreted broadly, the California Supreme Court admonished that "an appellate court, whenever possible, should interpret the First Amendment and section 425.16 in a manner "favorable to the exercise of freedom of speech, not its curtailment." *Briggs v. Eden Council/or Hope and Opportunity*, 19 Cal.4th 1106, 1119 (1999), citing *Bradbury v. Superior Court*, 49 Cal. App, 4th 110&,1114, fn. 3. (1996).

Appellant has shown that the only reason for this lawsuit was to punish Anders for not taking down his public forum. In addition to the above Appellant has shown in his opening brief a dozen other citations (AOB 24-27.) that public interest is to be broadly construed. Respondent has failed to show the contrary.

D. Respondent has not shown that it can prevail on any of its claims

1. Respondent Failed to Show a Probability of Prevailing on its' Claim for Trade Disparagement

Although this is the First Cause of Action in the Complaint, once again Respondent relegates it to one of the last issues addressed in its opposition. Why? Because it implicates free speech, something they want to hide. Respondents have said nothing of any substance to invalidate Appellant's argument in his opening brief. (AOB 29.) The opposition posits the notion that the "trade disparagement" is in some manner secondary to the unsubstantiated claims of theft.

What Respondent has done now in its opposition is to allege, *inter alia*, that Mr. Anders posted his letter, the comments of others, as well as his own commentary on the website, which the Respondent alleges is defamatory. Finally after failing to do so in its complaint and its opposition to the motion to strike, Respondent now makes an attempt to identify the words they claim are false and defamatory, by saying that Appellant “*made numerous disparaging statements regarding Ocean’s Eleven and Mr. Kelegian with full knowledge of their falsity,*” (RB 35) They have a major problem with this contention in that all of the statements they claim to be false are in fact true.

Respondent quotes these statements taken from the public forum as being false:

“A short time after Mark saw a copy of that letter from Ocean’s Eleven, Mark had Tim banned from Ocean’s Eleven.” (RB 35)

“As you know Mark had me banned from Ocean’s Eleven, my crime? Being concerned about the treatment of the employees.” (RB 35)

One just has to look at the record and the chain of events to see the truth in those statements.

Respondent then quotes this statement as being false:

‘if poker dealers talk about how they feel to a customer, Mark has said that they will be fired.’ (RB 35)

The truth is many employees came up to Anders and told him that they could be fired for just talking to him. This fact is supported by posts made by employees and customers that are a part of the record in this case:

“Employees are afraid of doing or saying anything to the customers as they are afraid of being fired.” (AR 42)

“The demeanor of the employees indicates an environment of fear and

apprehension.” (AR 41)

“I used to work at Oceans 11 for many years. I am also a victim of Mark’s vicious and cruel behavior.’ (AR 36)

“I’m an employee at Oceans Eleven... I find it strange walking into the building where I’ve known people for years and cannot talk to them. I can remember about a week ago when someone wanted to talk to me and *for fear of losing my job* I had to tell this person to walk and talk with me because I was scared to stand and talk for a few minutes.” (AR 34-35) (emphasis added)

Respondent once again has made statements that are unsupported by the facts in this case.

The complaint alleges “*Anders is responsible as a publisher and distributor of the defamatory comments about Ocean’s Eleven . . .*” (CT 6:16-20.) Again this is yet another false statement. 47 U.S.C. 230. Section(c)(1) provides immunity from liability for providers and users of an "interactive computer service" who publish information provided by others.

Our Supreme Court has addressed this issue in *Barrett v. Rosenthal*, 40 Cal. 4th 33 (2006). “We conclude that section 230 prohibits “distributor” liability for Internet publications. We further hold that section 230(c)(1) immunizes individual “users” of interactive computer services, and that no practical or principled distinction can be drawn between active and passive user.”

2. Respondent Failed to Show a Probability of Prevailing on its’ Claim for Intentional Interference with Economic Relationships

Respondent claims that it “*will prevail on this claim on the same evidence that establishes its trade disparagement claim.*” (ROB 37.) It failed above, it fails here.

Consumer protests against perceived treatment by a business underlies the right to speak out on such practices. Absent this right the Better Business Bureau could not report any criticism of a business. See *Paradise Hills Assocs. v. Procel*, 235 Cal. App. 3d 1528

3. Respondent Failed to Show a Probability of Prevailing on its' Claim for Trademark Infringement

In its' Opposition Respondent tries to make the claim that Trademark infringement claims are not subject to California's anti-SLAPP statue. Respondent now brings this claim to the front of the pack in an effort to support their unsupportable claim of theft. They side step the truth that Appellants alleged infringement arises out of constitutionally protected expressive conduct: the design and maintenance of a public forum website that Mr. Anders uses for public discussion of Respondent's practices as a public casino and employer.

Appellant is not in the Casino business. Appellant is not using Respondent's trademark to unfairly compete with Respondent. Appellant is not selling anything. (See the website AR 10-44.) Rather, Appellant is providing a forum for individuals who have had experiences with Respondent (generally, as employee or consumer) to publish accounts of those experiences to the general public. Appellant is exercising his First Amendment right to criticize Respondent in a non-defamatory manner. Appellant's short time use of Respondent's logo to identify Respondent and the experiences employees and consumers have with Respondent easily falls within the traditional and nominal fair use of the trademark "Ocean's Eleven Casino." See, e.g., *New Kids on the Block v. News America Pub., Inc.*, 971 F.2d 302

(9th Cir. 1992); *Cairns v. Franklin Mint Co.*, 292 F.3d 1139 (9th Cir. 2002); *Playboy Enterprises, Inc. v. Netscape Communications Corp.*, 55 F. Supp. 2d 1070 (S.D. Cal.1999).

While Anders had the legal right to show the logo of the public casino of which he was protesting [See *Thomas v. Fry's Electronics*, 400F.3d 1206 (2005); *New Kids on the Block v. News America Pub., Inc.*, *supra*, 971 F.2d 302 (9th Cir. 1992); *New York Times Co. v. Sullivan*, 376 U.S.254 (1964); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988)] , he, none-the-less, removed the logo from the public forum within 24 hours of receiving Respondent's attorney's letter. This should have been a non-issue since the logo had been removed prior to the filing of both the instant lawsuit and the previous lawsuit.

Respondent is attempting to use Trademark law to stifle free speech. "[U]se of a mark in a purely communicative, non-trademark setting should be permitted or else trademark law could be used as a vehicle to stifle unwelcome discussion." 5 McCarthy, on Trademarks & Unfair Competition, § 31:148 (2002). "Trademark owners pursuing gripe site owners face some potentially insurmountable obstacles: The First Amendment gives substantial protection to operators of genuine gripe sites because they are engaged in noncommercial expression." 2 Gilson, *Trademark Protection & Practice*, § 7A.10,p. 7A-113 (2002).

This leaves us with Respondent's contention that somehow Anders' use of 'Oceans11.info' to access his public forum website infringed on Respondent's trademark. As stated earlier in this brief Appellant showed that Respondent had no mark on 'Oceans11.' If they did then Warner Bros. Entertainment Inc. (CT 201.) and a plethora of others would be sued by Respondent for trademark infringement for using Oceans11 in their domain names. Respondent's assertion that oceans11.info is a 'stolen URL' is clearly false. The facts prove

that Respondent has a mark only on Ocean's Eleven Casino, (CT 160.) not on the ubiquitous oceans11. (CT 216:18-24) For Respondent to say ANDERS stole its' URL is implausible.

As stated in Appellant's Opening Brief (AOB 32-33.) the statutory basis for a Trademark Infringement claim 15 U.S.C. § 1125(a)(1)(A) was reviewed in *Lamparello, v. Falwell; Jerry Falwell Ministries*, 420 F.3d 309 (2005). The court found that the trademark holder, in order to prevail, **must prove all of these five elements**: (1) that it possesses a mark; (2) that the [opposing party] used the mark; (3) that the [opposing party's] use of the mark occurred "in commerce"; (4) that the [opposing party] used the mark "in connection with the sale, offering for sale, distribution, or advertising" of goods or services; and (5) that the [opposing party] used the mark in a manner likely to confuse consumers.

Respondent has failed to meet this criteria. There is no evidence offered to show:

- 1) That Respondent possesses a trademark on 'oceans11.' It merely claims to;
- 2) That Mr. Anders used the actual mark they owned;
- 3) That Mr. Anders used the mark for any commercial purpose; or,
- 4) That Mr. Anders use of the alleged mark was confusing.

In its two most significant recent amendments to the Lanham Act, the Federal Trademark Dilution Act of 1995 ("FTDA") and the Anticybersquatting Consumer Protection Act of 1999 ("ACPA"), Congress left little doubt that it did not intend for trademark laws to impinge the First Amendment rights of critics and commentators. The dilution statute applies to only a "commercial use in commerce of a mark," 15 U.S.C. § 1125(c)(1), and explicitly states that the "[n]oncommercial use of a mark" is not actionable. *Id.* § 1125(c)(4).

Here, there is no commercial use, there are no allegations in the complaint that Mr. Anders is attempting to use the site for advertising, or stealing business, or attempting to sell something with Respondent's brand on it. In fact, like *Lamparello*, Anders' website is designed to provide a public forum to criticize. Further the appearance of the websites are not confusingly similar. In *Lamparello* it stated:

"Looking at the first three factors, the court stated that while Falwell's mark is distinctive and the domain name of Lamparello's website bears a close resemblance to Falwell's, Lamparello's site does not look anything like Falwell's... Lamparello only intended his site to be a forum of criticism. Finally, the two sites provide opposing ideas such that no one who entered one site would be misled into believing it was authorized by the other."

Pictures of Ander's public forum website were lodged with the court. (AR 10-44) One just has to look to see it is a non commercial site that looks *nothing* like Respondent's website at oceans11.com.

Also see *Northland Ins. Companies v. Blaylock*, 115 F.Supp.2d 1108 (D. Minn. 2000) (Defendant's use of the northlandinsurance.com domain name for the purpose of criticizing the plaintiff's insurance company and not for commercial gain did not constitute infringement).

Respondent's claim of Trademark Infringement fails on all levels and cannot prevail at trial.

4. Respondent Failed to Show a Probability of Prevailing on its' Claim for Violation of the Anti-Cyber Squatting Act

Respondents have said nothing of any substance in their Opposition to invalidate Appellant's argument in his opening brief. (AOB 34.) Generally "Cybersquatting," occurs when a registrant obtains a domain name containing another's mark and offers to sell it to the mark holder for a tidy sum. Anders never offered to sell this domain name to anyone. The domain name oceans11.info was used to lawfully access a public forum.

The Anticybersquatting Consumer Protection Act (ACPA), 15 U.S.C. § 1125(d) requires that there be 'bad faith' in the use of a domain name that uses someone else's *registered trademark* in order for there to be cybersquatting. Under 15 U.S.C. § 1125(d)(1)(B)(i)(IV) the lawful noncommercial or fair use of the mark in a web site under the domain name is allowed and not considered bad faith. According to the legislative history fair use includes comparative advertising, comment, criticism, or parody - even where done for profit. Anders used the domain name to access his public forum to comment on Respondent's treatment of customers and employees. Therefore even if Respondent owned a mark on Oceans11 (*which it does not*) Anders would not be in violation of this section.

15 U.S.C. § 1125(d)(1)(B)(ii) "Bad faith intent described under subparagraph (A) shall not be found in any case in which the court determines that the person believed and had reasonable grounds to believe that the use of the domain name was a fair use or otherwise lawful."

Respondent makes the claim that Appellant "*uses Ocean's Eleven's registered mark in the domain name oceans11.info.*" (CT 55:25-26.) Blatantly untrue. Their mark is for Ocean's Eleven Casino, not oceans11. (CT 160) Again, if they owned the mark oceans11 they would be suing Warner Bros. Entertainment for owning and using the domain oceans11.net (CT 201.)

Oceans11.info accessed a place for consumers to vent their dissatisfaction, there is no cybersquatting. *See TMI Inc. v. Maxwell* 368 F.3d 433 (5th Cir. 2004), defendant's operation of a non-commercial gripe site at a domain which varied from plaintiff's mark solely by the subtraction of the letter "s" did not violate either the Federal or Texas State Dilution Acts, nor did it run afoul of the Anticybersquatting Consumer Protection Act ("ACPA"). The Court determined that defendant's actions were motivated by the defendant's desire to inform the public about his dispute with plaintiff and the services it offered him. Likewise here.

5. Respondent Failed to Show a Probability of Prevailing on its' Claim for Misappropriation of Trade Secrets

Respondents have said nothing of any substance in their Opposition to invalidate Appellant's argument in his opening brief. (AOB 36.) Contrary to Respondent's claim that it made reasonable efforts to keep the information in their memos secret, placing memos on counter tops in public areas does not meet that requirement.

Respondent states: "*Anders misappropriated, used, and disclosed its trade secrets. The confidential memos Anders admitted to receiving do have independent economic value.*" (ROB 32)

The memos Anders admitted to receiving from the employees, that Respondent claims were 'Trade Secrets' were in fact 'disclosed' to the world when they were offered into evidence at their failed restraining order hearing. They were not challenged by the Respondent as being a 'Trade Secret' at that time and were entered into evidence and are now part of the public domain. Respondent claims these memos have independent economic

value. One just has to look at the memos Anders received to see the absurdity of their claim.
(AR 67,69.)

6. Respondent Failed to Show a Probability of Prevailing on its' Claim for Conversion

There is no admissible evidence to show that Respondent can meet the elements that must be demonstrated to state such a claim. Chief among these elements is the inability of the rightful owner "to use its property." *de Vries v. Brumback* (1960) 53 Cal. 2d 643, 647.

Once again Respondent is trying to make this court believe the unbelievable: Somehow by Anders having copies of memos, given to him by employees, this somehow has denied Respondent the use of these memos, therefore Anders is guilty of conversion? Ridiculous. First of all Anders lawfully received these memos, he did not steal, or conspire to steal them. In the first lawsuit, when it was being dismissed with prejudice, Mr. Skeen, Kelegian's lawyer, asked the Judge to order Anders to return all the memos that he had gotten from Chaney. The Judge so ordered. To clarify that order Anders asked the Judge if he had to return the memos that were given to him by the *employees*. The Judge said he *did not*. The memos Anders had were given to him by employees, not Chaney. Therefore NO memos were returned to Respondent. These are the same memos that were offered into evidence and not objected to, and are now part of the public domain. Again, one just has to look at the memos Anders received to see the absurdity of their claim. (AR 67,69.) Once more Respondent has said nothing of any substance in their Opposition to invalidate Appellant's argument in his opening brief. (AOB 35.)

7. Respondent Failed to Show a Probability of Prevailing on its' Claim for Trespass

Again Respondent claims that trespass has nothing to do with free speech but then claims that Anders' "agents" passed out flyers to promote his public forum website, which is all about customers and employees exercising their 1st amendment right to voice their opinions and comments, clearly about free speech. When Anders built his public forum website he contacted every employee and customer that he was friends with and told them about the site and asked that they in turn tell everyone they knew about the website. Who ever made up these poorly designed flyers and passed them out is a mystery to Anders, he has denied any relationship with or knowledge of the identity of the persons who passed out these poorly designed flyers. Anders has years of experience in designing business cards, brochures, letterheads, flyers and websites. One just has to look at the lack of quality of the flyer to see Anders had nothing to do with it.

Again, the burden of proof lies with the Respondent, not with Appellant. All they offer to support their claim is the declarations of Kelegian and Gallagher alleging that "agents" of Anders have been sent into the Casino without consent "to distribute flyers regarding Anders' website." Denied in NOL 4, ¶ 50 (AR 52:17-18.). Once again, the Respondent is without a scintilla of evidence to support its' claim. It merely relies on the speculation of the two declarants.

It is relevant to note that even if the Respondent could have submitted any admissible evidence on this point, the allegation states the flyers promote the website. It is the website itself that has given rise to this suit. Thus, the promotion of Anders' public forum website is

an act taken in furtherance of the Right of Free Speech and is protected under the Anti-SLAPP statute.

8. Respondent Failed to Show a Probability of Prevailing on its' Claim for Injunctive Relief

Respondent once again attempts to change the focus from free speech to the unsubstantiated and un-provable claim of theft. A review of the Eighth Cause of Action and its associated Prayer for Relief shows Plaintiff is asking the Court to enjoin the Appellants from "*spreading false information, lies and rumors about Ocean's Eleven, its management and/or employees.*" (CT 15:24-26.) Clearly this is about Appellant's and his posters' 1st Amendment Rights in using Anders' public forum website.

However, in its opposition, the Respondent now attempts to remodel the allegations of the complaint to avoid the attempt to suppress speech. It does so by now completely abandoning the language of "*spreading false information, lies and rumors about Ocean's Eleven, its management and/or employees.*" They again overly reiterate the un-provable claim of Anders' theft and that Ocean's Eleven can, sometime in the unforeseeable future, establish "*that Anders stole and continues to use, without authorization, Ocean's Eleven's property, trade secrets, domain name and trademark rights, among other things.*" (ROB 38.) The time to have brought forth this evidence was in their opposition to the motion to strike. Respondent failed to do so. The record indicates that there is no admissible evidence to support any of their claims. Opinions of declarants and allegations based on information and belief are not enough to pass the admissibility test.

The truth is Anders stole nothing. He was given those memos by disgruntled employees. No admissible evidence exists to the contrary. To claim that they are ‘trade secrets’ is absurd especially after Respondent did not object to them being entered into evidence in their first lawsuit and allowed them to become part of the public domain. To switch from their complaint’s original request, basically to enjoin free speech, is again just trying to masquerade the real purpose of this lawsuit: to punish Anders for not taking down his public forum website.

“... a plaintiff cannot frustrate the purposes of the SLAPP statute through a pleading tactic of combining allegations of protected and non-protected activity under the label of one ‘cause of action.’” (*Fox Searchlight Pictures v. Paladino* (2001 2nd Dist.) 89 Cal.App.4th 294, 308.) Indeed, **“where a cause of action alleges both protected and unprotected activity, the cause of action will be subject to section 425.16... (Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP (2004 1st Dist.) 133 Cal.App.4th 658, 672.).** (Emphasis added.)

Every cause of action in the complaint combines allegations of protected and unprotected activities and therefore all are subject to the anti-SLAPP statute.

F. RESPONDENT’S ATTEMPT TO QUASH APPELLANT’S FIRST AMENDMENT RIGHTS IMPLICATES THE ANTI-SLAPP STATUTE

The First Amendment serves an "informational purpose" that guarantees "the public access to discussion, debate, and the dissemination of information and ideas." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 782, fn. 18; *id.* at p. 783 (1978); See *Bigelow v. Virginia* (1975) 421 U.S. 809, 822, 44 L. Ed. 2d 600, 95 S. Ct. 2222.

The First Amendment ensures that the marketplace of ideas is never reduced to forced silence. "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927).

In 1992, in response to the "disturbing increase" in meritless lawsuits brought "to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances," the Legislature overwhelmingly enacted section 425.16, California's anti-SLAPP law. (Stats. 1992, ch. 726, § 2.) In 1997, the Legislature unanimously amended the statute to expressly state that it "**shall be construed broadly.**"

The instant case is the same type of meritless lawsuit, designed solely to chill the valid exercise of the constitutional right of freedom of speech, that caused the Legislature to enact the anti-SLAPP law. Respondent has continually and wrongfully used the legal system to punish Anders for not taking down his public forum website. Respondent has repeatedly called Anders a thief as subterfuge to quash freedom of speech. They now claim theft is the gravamen of their meritless lawsuit yet the record shows no admissible evidence to support this erroneous claim. The general allegations of the complaint, which are *incorporated into each and every cause of action*, show that the true gravamen of their lawsuit is to quash free speech: that Anders "...forego publishing and distributing false information, lies, and rumors about Ocean's Eleven and its management on the website." (CT 7:8-9.) This case is clearly about using meritless lawsuits to cost Anders exorbitant amounts of time and money. Their goal is to shut down Anders' public forum website and punish Anders for exposing to the world

the truth about Respondent's mistreatment of customers and employees.

Conclusion

Appellant has shown that each and every cause of action arises from Anders' refusal to take down his public forum website thereby implicating California's anti-SLAPP statute. Appellant has shown that 'public interest' is to be 'broadly construed' and the trial court erred in denying Appellant's anti-SLAPP Motion for not being a matter of 'public interest.' Appellant has shown that the mere stating that memos, which are in the public domain, are 'Trade Secrets' does not make them so. Appellant has shown that just by repeatedly calling Anders a thief does not make it so. Appellant has shown that Respondent's attempt to distort the nature of this action as being about 'theft' and not 'free speech' is not supported by any admissible evidence. This lack of admissible evidence is fatal to all of Respondent's causes of action. Respondent has not meet its' burden of proof and thereby Respondent cannot prevail on any of its claims.

Because Appellant has shown that the posts on his public forum website were a matter of public interest and that the Respondent failed to establish the probability of prevailing on any of its' claims with admissible evidence, this Court should reverse the trial court's order denying Appellant's special motion to strike and direct the court to grant said motion.

Dated: January 2, 2014

Respectfully submitted,

Tim Anders, in *Pro Se*

WORD COUNT CERTIFICATION

I, Tim Anders, hereby certify, pursuant to California Rules of Court, Rule 8.204(c)(1), that the word count of my computer program for this consolidated brief indicates that it contains 8,995 words, including footnotes. Executed this 2nd day of January, 2014.

Tim Anders

PROOF OF SERVICE

The undersigned hereby states under the penalty of perjury under the laws of the State of California:

I am over the age of eighteen and not a party to the within cause; and my business address is:
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On this day, I addressed envelopes to:

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Manuela Portuanto