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7
8 UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10 OAKLAND DIVISION

11
12 JEFFREY DIEHL,

13 Plaintiff,

14 v.

15 MICHAEL CROOK,

16 Defendant.

) No. 06-CV-6800 SBA

)
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT OF**
) **PLAINTIFF'S SPECIAL MOTION TO**
) **STRIKE PURSUANT TO CAL. CIV.**
) **PROC. CODE § 425.16**

) Date: March 27, 2007

) Time: 1:00 p.m.

) Dept.: Courtroom 3, 3rd Floor, Oakland

) Judge: Hon. Sandra B. Armstrong

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19 Trial Date: Not yet set

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TABLE OF AUTHORITIES

Cases

Bierbower v. FHP, Inc., 70 Cal. App. 4th 1, 3 (1999).....16

Braunling v. Countrywide Home Loans, Inc., 220 F.3d 1154, 1158 (9th Cir. 2000).....18

Briggs v. Eden Council for Hope and Opportunity, 19 Cal. 4th 1106, 1115 (1999).....12

Christensen v. Superior Court, 54 Cal. 3d 868, 903 (1991).....18

Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 647 (1996).....12

Cole v. Fair Oaks Fire Prot. Dist., 43 Cal. 3d 148, 155 n. 7 (1987).....18

Colt v. Freedom Communications, Inc., 109 Cal. App. 4th 1551, 1558 (2003).....17

Conley v. Gibson, 355 U.S. 41, 45-46 (1957).19

Crane v. Ariz. Republic, 972 F.2d 1511, 1519 (9th Cir. 1992).....17

Daily Herald Co. v. Munro 838 F.2d 380, 384 (9th Cir. 1988).....10

Davidson v. City of Westminster, 32 Cal. 3d 197, 209 (1982).....18

DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992).....19

Du Charme v. Int’l Bhd. of Elec. Workers, Local 45, 110 Cal. App. 4th 107 (Cal. Ct. App. 2003).10

Everest & Jennings, Inc. v. American Motorists Ins. Co., 23 F.3d 226, 228 (9th Cir. 1994).....19

Gilbert v. Sykes, 2007 Cal. App. LEXIS 107 (Cal. Ct. App., January 26, 2007).....11

Global Telemedia Int’l, Inc. v. Doe I, 132 F. Supp. 2d 1261, 1264 (C. D. Cal. 2001).....10

Globetrotter Software, Inc. v. Elan Computer Group, Inc., 63 F. Supp. 2d 1127, 1129 (N.D. Cal. 1999).....9

Hustler Magazine v. Falwell, 485 U.S. 46 (1988)7,14,16

Jacobsen v. Katzer, 2006 WL 3000473, (N. D. Cal. October 20, 2006).....13

Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).....17

Kashian v. Harriman, 98 Cal. App. 4th 892, 908 (2002).....12

Lafayette Morehouse v. Chronicle Publ’g Co., 37 Cal. App. 4th 855, 864 (1995).....10

Liedholdt v. L.F.P. Inc., 860 F.2d 890 (9th Cir. 1988).....7,14-16

M.G. v. Time Warner, Inc., 89 Cal. App. 4th 623 (Cal. Ct. App. 2001).....11

McClatchy Newspapers, Inc. v. Superior Court, 189 Cal. App. 3d 961, 975 (1987).....17

Miranda v. Clark County, Nev., 279 F.3d 1102, 1106 (9th Cir. 2002)19

New.net, Inc. v. Lavasoft, 356 F. Supp. 2d 1090 (C.D. Cal. 2004).....10

Nicosia v. DeRooy, 72 F. Supp. 2d 1093 (N. D. Cal. 1999)10

Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP, 133 Cal. App. 4th 658, 675-76 (2005).....9

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986).....10

Rubin v. Green, 4 Cal. 4th 1187, 1194-95 (1993).....7

Rutledge v. Arizona Bd. of Regents, 859 F.2d 732, 735 (9th Cir. 1988).....19

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Reno v. ACLU, 521 U.S. 844, 870 (1997)10
Sagan v. Apple Computer, Inc., 874 F. Supp. 1072, 1077 (C. D. Cal. 1994).....24
Schreiber Distrib. Co. v. ServWell Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986).....19
Seelig v. Infinity Radio Corp., 119 Cal. Rptr. 2d 108 (Cal. Ct. App. 2002)11, 15
United States ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 970-71 (9th Cir. 1999).....8
Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1109 (9th Cir. 2003).....8, 14
W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).....19
Wilcox v. Superior Court, 27 Cal. App. 4th 809, 816 (1994).....8, 12, 14

Statutes

42 U.S.C. § 1985(2).....19
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INTRODUCTION

1
2 Defendant Michael Crook's counterclaims are an abuse of the legal process intended to
3 chill and intimidate Plaintiff Jeffrey Diehl. Faced with a meritorious lawsuit for his repeated
4 misuse of the Digital Millennium Copyright Act (DMCA), 17 U.S.C § 512, Crook has responded
5 with baseless tort counterclaims aimed at enlisting this Court in his campaign to silence his critics.
6 Diehl, an online journalist and publisher, respectfully requests that this Court strike Crook's
7 counterclaims and bring an immediate halt to Crook's anti-speech crusade.

8 Crook is a well-known, controversial, and outspoken figure on the Internet. He has
9 published a number of websites, such as racismworks.com, killthefags.com, and
10 foresakethetroops.info, and uses the sites to take controversial positions, such as advocating pay
11 cuts for American troops in Iraq, denying that the Holocaust ever happened, and setting up fake
12 online personal ads seeking sexual encounters so that he can publicly humiliate the men who
13 respond.

14 Despite relying heavily on First Amendment protections for his own activities, Crook has
15 attempted to deny those rights to his critics, including Plaintiff Jeffrey Diehl. First he embarked on
16 a campaign of misusing the DMCA's provisions aimed at stopping copyright infringement to
17 attempt to censor speech critical of him. The campaign was initially successful, resulting in getting
18 a portion of Diehl's website taken down (along with portions of many other websites) and
19 requiring Diehl to find a new internet hosting service. When Diehl brought a lawsuit to stop
20 Crook's harassment, Crook responded by filing frivolous tort counterclaims, similarly aimed at
21 silencing Diehl and punishing him for exercising his First Amendment rights of speech and
22 petition.

23 Such misuse of the law should not stand. While adjudication of Crook's campaign of
24 DMCA abuse must wait, California law provides for an immediate process for striking improper
25 counterclaims aimed at silencing speech. California Code of Civil Procedure Section 425.16
26 (known as the anti-SLAPP law) is designed to strike such meritless claims early in litigation, in
27 order to minimize their chilling effect and prevent them from being used to drive up the cost,
28 burden and delay of adjudication. As explained in detail below, Plaintiff's activities are protected

1 by Section 425.16, the First Amendment, and California’s “fair reporting” privilege. Section
2 425.16 mandates that the counterclaims be stricken and attorneys’ fees awarded to Plaintiff.¹
3

4 STATEMENT OF FACTS

5 1. The Parties

6 Plaintiff Jeffrey Diehl is the editor and publisher of “10 Zen Monkeys,” an Internet magazine,
7 or “webzine” available at www.10zenmonkeys.com. The 10 Zen Monkeys website is currently
8 hosted by Laughing Squid Web Hosting, an independent web hosting service located in San
9 Francisco, California that specializes in providing hosting services to artists, musicians, non-profits
10 and small businesses. When the events underlying this case started, Diehl’s website was hosted by
11 BluFX, which leased hosting server space from another company, called Layered Technologies.

12 Over the past several years, Defendant Michael Crook has owned and operated several
13 websites, including michaelcrook.com; craigslist-perverts.com, and racismworks.com, known
14 collectively as “Michael Crook Internet Properties.” Declaration of Corynne McSherry in Support
15 of Plaintiff’s Special Motion To Strike (“McSherry Decl.”), Ex A-C. Shortly before this filing, on
16 or around January 22, 2007, Crook took all of his websites offline. McSherry Decl., ¶ 5. When
17 they were online, Crook used these sites to highlight his controversial statements and activities—
18 such as claiming U.S. troops are overpaid and that the Holocaust never occurred—to draw viewers
19 to his websites, thereby generating revenue from advertising on the sites. McSherry Decl., Exs. D-
20 E; Defendant’s Answer and Counterclaim, Counterclaim ¶ 3. As Crook stated on his main site,
21 michaelcrook.com, “it’s all about the money.” McSherry Decl., Ex. A.

22 2. Background

23 Ultimately this is a simple motion, whereby the Court need only find that Diehl’s activities
24 are First Amendment-protected acts and that Crook’s claims have no merit. Nevertheless, since
25 this is the first motion filed in the case, Plaintiff provides a more detailed background to help the
26

27 ¹ Should the Court find that Defendant’s claims are not subject to a special motion to strike under
28 Section 425.16, Plaintiff alternatively moves to dismiss them under Fed. R. Civ. P. 12(b)(6) or, at a
minimum, for a more definite statement under Fed. R. Civ. P. 12(e).

1 Court understand the full context.

2 **The Craigslist Article Underlying This Controversy**

3 Plaintiff Jeffrey Diehl first attracted Crook’s ire on September 18, 2006 by publishing an
4 article about Crook’s “Craigslist Perverts” site entitled “In the Company of Jerkoffs” (the
5 “Craigslist Article”). See Complaint, Ex. B. Written by regular contributor Lou Cabron, the
6 Craigslist Article commented on one of Crook’s most controversial “pranks”—his use of the online
7 classified ad site Craigslist to solicit partners for a casual sexual encounter and then publicly
8 expose the respondents without their permission – and compared it to other online actors who
9 participate in similar notorious activities. Specifically, in August and September 2006, Crook –
10 posing as a young woman named “Melissa,” “Amanda,” or “Nicole” – posted the personal ads and
11 then published the responses he received on his website craigslist-perverts.com, including personal
12 information about the respondents, such as photographs, phone numbers, and the names of several
13 respondents’ employers. McSherry Decl., Ex. F. This kind of activity is popularly known as
14 “griefing” – so named for the grief it is intended to cause its victims.

15 The Craigslist Article profiled Crook and his history of “griefing,” including a reference to
16 his controversial stance on American soldiers in Iraq on the www.foresakethetroops.info website.
17 The Article noted that on the site, Crook claimed that the soldiers were over-compensated and that
18 Crook called members of the military “scumbags” and “pukes,” asking “[w]hat idiots risk their life
19 for a country...? Let ‘em die in combat - we don’t need their ilk in this country!” The Craigslist
20 Article also noted that Crook had appeared on the Fox News’ “Hannity and Coombs” show to
21 defend this site and included a direct quote from the show’s co-host Sean Hannity on what he
22 thought of Crook: (“You’re ignorant and you’re a disgrace... You are heartless, you are soulless,
23 you are mean and you are cruel...”) To help illustrate the report, the Craigslist Article included a
24 still image – or “screenshot” – of Crook being interviewed on the show (“Fox News Image”).
25 Complaint, Ex B.

26 **Crook’s Fraudulent DMCA Takedown Campaign**

27 On September 19th, 2006, Crook responded to the Craigslist Article and the Fox News
28 Image by sending a “take-down” notice pursuant to Section 512 of the DMCA to Layered

1 Technologies, an online service provider that leases web-hosting server space to BluFX, who in
2 turn served as the website host for the 10 Zen Monkeys Webzine at the time. In the Notice, Crook
3 stated under penalty of perjury that he was the owner of the copyright in the Fox News Image, that
4 Crook had not authorized the use of the image, and demanded that it be removed.

5 Layered Technologies forwarded the notice to Hunter Hastings at BluFX Hosting.
6 Hastings contacted Diehl and insisted that he remove the photograph. Diehl complied under
7 duress. Because he strongly disagreed with Crook's copyright claim, and was disturbed that
8 BluFX did not challenge it, Diehl also immediately began searching for a new hosting service.

9 On September 20th, Diehl contracted with Laughing Squid to provide hosting services for
10 10 Zen Monkeys and put the Fox News Image back up. Laughing Squid leases server space from
11 RackSpace Managed Hosting ("Rackspace"), an online service provider. On September 22, 2006,
12 Crook sent a second DMCA notice to Rackspace, again demanding that the Fox News Image be
13 taken down pursuant to Section 512 of the DMCA. Complaint, Ex C. That same day, Rackspace
14 forwarded the notice to Scott Beale, owner of Laughing Squid, and demanded that he remove the
15 Fox News Image or else lose access to the server hosting Laughing Squid websites. Beale
16 immediately contacted Diehl and forwarded the Rackspace demand. Diehl again complied under
17 duress. Diehl later found the Fox News Image on an AOL.com website and linked to that image
18 from the Craigslist Article. On October 24, 2006, Crook sent an additional DMCA notice to
19 Rackspace and Laughing Squid, demanding that even the *link* be taken down, once again relying
20 on Section 512. Complaint, Ex D. This notice was also forwarded to Diehl with Rackspace's
21 demand that he remove the link; Diehl again complied under duress.

22 **Diehl's Response To Crook's Fraudulent DMCA Campaign**

23 Because Crook has no valid copyright in the Fox News Image and because any use of the
24 photo was non-infringing fair use pursuant to 17 U.S.C. § 107, Diehl filed the Complaint in the
25 instant case (Dkt. 1) on November 1, 2006, seeking damages and injunctive relief for Crook's
26 DMCA misrepresentations, interference with his web-hosting contracts, and attack on his First
27 Amendment rights. That same day Diehl posted an article about the lawsuit and the events leading
28 to it on the 10 Zen Monkeys website. Defendant's Answer and Counterclaim, Proof Item "B".

1 The article included a link to a website maintained by Diehl’s attorneys, which included, in turn,
2 both a copy of the Complaint and a press release about the lawsuit.

3 **The Internet Club Article**

4 On November 6, 2006, Diehl published a follow-up investigative article (the “Internet Club
5 Article”) on the 10 Zen Monkeys website entitled “Crook’s Internet Club” which noted that part of
6 Crook’s history with the Internet was his participation in 1997 as part of his high school’s “Internet
7 Club.” Defendant’s Answer and Counterclaim, Proof Item “C”. The article included a photograph
8 of Crook with other members of the Internet Club, apparently taken from a high school yearbook.
9 *Id.*

10 **The Call For Evidence**

11 On December 27, 2006, Diehl published another follow-up article on the 10 Zen Monkeys
12 site entitled, “Has Michael Crook Harassed You?” In the article, Diehl asked readers that had been
13 victims of Crook’s fraudulent DMCA notice campaign to share their stories with him in an effort to
14 help him in his civil lawsuit against Crook. McSherry Decl., Ex. G.

15 **Crook’s Counterclaims**

16 On January 5, 2007, Crook filed his Answer and Counterclaims, alleging that Diehl’s
17 publication of the Craigslist Article, filing of this lawsuit, and reporting of it in 10 Zen Monkeys
18 constitutes the tort of intentional infliction of emotion distress (“IIED”) and witness intimidation.
19 *See* Defendant’s Answer and Counterclaim.

20 However, Crook’s own words belie his claims. Since this litigation began, Crook has
21 frequently responded to events on his website. For example, on November 1, 2006, Crook issued a
22 statement characterizing the lawsuit as “garbage filed by hippie lawyers” and inviting the media to
23 contact him for his side of the story. McSherry Decl., Ex. H. On November 4, 2006, Crook created
24 a new website, www.fuckeff.org. On the website, Crook posted the Complaint in this case and
25 correspondence between Plaintiff’s attorneys and Crook. On one of the pages of the website,
26 entitled “Know Your Enemy,” Crook stated “this lawsuit should be fun.” McSherry Decl., Ex. I.

27 In addition, on the “Judgments” Page, Crook stated: “Suffice to say that I am not worried in
28 the least” and “If I were to lose a lawsuit, it won't bother me in the least.” McSherry Decl., Ex. J.

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Moreover, on December 4, 2006, Crook stated on his personal web diary page (called a “blog”) that “[i]f it looks like I'm walking funny, it is because I have lawyers up my ass. But it's not as agitating or concerning as some may think. Actually, it's somewhat entertaining.” McSherry Decl., Ex. K. Finally, on his “Dealing with Bitchy Lawyers” page, Crook states “As you can see, I am not intimidated by lawyers.” McSherry Decl., Ex. L.

1 **SUMMARY OF ARGUMENT**

2 Crook’s counterclaims should be stricken pursuant to California’s anti-SLAPP statute, Cal.
3 Civ. Proc. Code § 425.16. The claims are nothing more than a baseless attempt to punish Diehl for
4 writing about Crook and for filing this lawsuit. California law protects Diehl’s rights of petition
5 and speech by authorizing a special motion to strike, at the outset of the litigation, those claims
6 which are asserted against protected communications, unless the claimant can show a probability of
7 success on the merits for his claim. Crook’s claims must be stricken because, as explained in detail
8 below, he cannot possibly do so.

9 Crook’s emotional distress claim fails for at least three reasons. First, news reporting of
10 facts and publishing of opinions about a public figure like Crook are fully-protected speech under
11 the First Amendment and thus immune from IIED liability. *Hustler Magazine v. Falwell*, 485 U.S.
12 46 (1988); *Liedholdt v. L.F.P. Inc.*, 860 F.2d 890 (9th Cir. 1988). Second, both reporting on this
13 lawsuit and publishing the Complaint are absolutely privileged under California’s “fair reporting”
14 statute as communications pertaining to the status of ongoing litigation. Cal. Civ. Code § 47(d);
15 *Rubin v. Green*, 4 Cal. 4th 1187, 1194-95 (1993). Finally, liability for IIED “does not extend to
16 mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities,” but only to
17 conduct so extreme and outrageous “as to go beyond all possible bonds of decency, and to be
18 regarded as atrocious, and utterly intolerable in a civilized community.” Restatement (Second) of
19 Torts § 46 (2006) (defining the level of extreme conduct required for IIED liability). None of the
20 activities alleged as the basis for Crook’s IIED claim rise anywhere close to this level. Moreover,
21 even if Diehl’s alleged activities could, as a matter of law, give rise to an IIED claim (which they
22 do not), Crook’s own words about the lawsuit show that he was not, in fact, distressed by any of
23 the things upon which he bases his claim.

24 As for Crook’s intimidation claim, none of Diehl’s publications contain any threat to
25 Crook. Absent such a threat, Crook’s claim must fail. Thus, both Crook’s counterclaims must be
26 stricken pursuant to California’s Anti-SLAPP law.

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ARGUMENT

I. Crook’s Counterclaim violates the California Anti-SLAPP Statute

Section 425.16 of the California Code of Civil Procedure is referred to as the “anti-SLAPP statute.” SLAPP suits are “Strategic Lawsuits Against Public Participation.” Section 425.16 prohibits these lawsuits by providing that:

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 or 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.

Cal. Civ. Proc. Code § 425.16(b)(1). The purpose of the anti-SLAPP statute is “to allow early dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1109 (9th Cir. 2003). These are lawsuits that “masquerade as ordinary lawsuits” but are brought to deter common citizens from exercising their political or legal rights or to punish them for doing so. *Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 816 (1994), *overruled on other grounds by Equilon Enter. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 52 (2002) (citations omitted).

Crook’s counterclaim is a paradigmatic example of a SLAPP lawsuit. It is based purely on Diehl’s First Amendment speech and petition activities and has been brought solely to harass Diehl and delay justice in this action. The California Anti-SLAPP statute explicitly prohibits such claims. “The hallmark of a SLAPP suit is that it lacks merit, and is brought with the goals of obtaining an economic advantage over a citizen party by increasing the cost of litigation to the point that the citizen party’s case will be weakened or abandoned, and of deterring future litigation.” *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 970-71 (9th Cir. 1999). According to statements made on his website, these are exactly the goals of Crook’s Counterclaim. McSherry Decl., Ex. J at 3. (stating that if a party were to assert legal claims against him, Crook

1 would “file a lawsuit against the plaintiff for something (after all anyone can sue for anything these
2 days) and suck time and legal fees out of them as a sort of ‘fuck you’ to them.”).

3 In order to strike a claim under Section 425.16, the court must conduct a two-step inquiry.
4 First, it must determine whether the claim arises from protected activities or acts in furtherance of
5 the movant’s right of petition or free speech. *Globetrotter Software, Inc. v. Elan Computer Group,*
6 *Inc.*, 63 F. Supp. 2d 1127, 1129 (N.D. Cal. 1999).

8 Second, if the court finds the activities protected by Section 425.16, the burden shifts to the
9 claimant to demonstrate a probability of prevailing on his claim on the merits. *Id.* Failure to meet
10 his burden results in the claim being stricken. *Id.* This burden is the same as on motion for
11 summary judgment, as if the motion raised affirmative defenses that claimant must make a legal
12 and factual showing sufficient to negate. *Peregrine Funding, Inc. v. Sheppard Mullin Richter &*
13 *Hampton LLP*, 133 Cal. App. 4th 658, 675-76 (2005).

15 **A. Crook’s Emotional Distress Claim is Entirely Based on First Amendment**
16 **Protected Activities**

17 Crooks bases his IIED claim on three activities by Plaintiff: (1) publishing two articles
18 about him (the Craigslist Article and the Internet Club Article); (2) reporting the filing of this
19 lawsuit and the posting the Complaint online; and (3) publishing a “call for evidence” to collect
20 information for this litigation. *See* Defendant’s Answer and Counterclaim, Answer ¶¶ 6, 13, 18-22,
21 and Counterclaim ¶¶ 1-6. As discussed in detail below, all of these activities are protected by the
22 First Amendment and thus, are protected acts subject to Diehl’s special motion to strike under
23 Section 425.16.

24 **1. Publishing the Crook Articles are Protected Activities**

25 First, Crook complains that he was emotionally distressed by the publication of the
26 Craigslist Article, including Diehl’s decision to entitle it “In the Company of Jerkoffs” and the
27 publishing of the Internet Club Article, which included a photograph of him as part of the Internet
28

1 Club in a high school yearbook. Such activities are expressly protected by Section 425.16(e)(3)-
2 (4), which covers:

3 (3) any written or oral statement or writing made in a place open to the public or a public
4 forum in connection with an issue of public interest; ... and

5 (4) or any other conduct in furtherance of the exercise of the constitutional right of petition
6 or the constitutional right of free speech in connection with a public issue or an issue of
7 public interest.

8 Cal. Civ. Proc. Code § 425.16(e)(3)-(4).

9 The Craigslist and Internet Club Articles squarely meet both definitions. First, California
10 Courts have recognized that the Internet is a public forum for purposes of Section 425.16. *See*
11 *New.net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090 (C.D. Cal. 2004) (“Considering that the internet
12 provides ‘the most participatory form of mass speech yet developed,’ ... it is not surprising that
13 courts have uniformly held or, deeming the proposition obvious, simply assumed that internet
14 venues to which members of the public have relatively easy access constitute a ‘public forum’ or a
15 place ‘open to the public’ within the meaning of section 425.16.” (citations omitted)); *see also*
16 *Global Telemedia Int’l, Inc. v. Doe I*, 132 F. Supp. 2d 1261, 1264 (C. D. Cal. 2001) (website is a
17 public forum); *Nicosia v. DeRooy*, 72 F. Supp. 2d 1093 (N. D. Cal. 1999) (Internet newsgroups
18 qualify as public forum); *Du Charme v. Int’l Bhd. of Elec. Workers, Local 45*, 110 Cal. App. 4th
19 107 (Cal. Ct. App. 2003) (Publishing on the Internet is publishing in a public forum). Moreover,
20 there can be no dispute that publishing investigative articles in a magazine (online or otherwise) is
21 a classic exercise of the constitutional right of free speech. *Lafayette Morehouse v. Chronicle*
22 *Publ’g Co.*, 37 Cal. App. 4th 855, 864 (1995) (finding Section 425.16 covers news reporting as part
23 of its protection of free speech); *see also Reno v. ACLU*, 521 U.S. 844, 870 (1997) (there is “no
24 basis for qualifying the level of First Amendment protection that should be applied to” the
25 Internet); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986) (newspaper articles
26 equated with free speech); *Daily Herald Co. v. Munro* 838 F.2d 380, 384 (9th Cir. 1988) (media
27 plaintiffs’ broadcast of the results of exit polling held to be free speech).
28

1 Nor can there be any question that the issues raised by the Crook articles are issues of
2 public interest. Debate about “griefers” like Crook has been vigorous on the Internet and in the
3 press. *See, e.g.*, Richard Siklos, *A Virtual World But Real Money*, N. Y. TIMES, Oct. 19, 2006, at
4 <http://www.nytimes.com/2006/10/19/technology/19virtual.html>; Kristi Lu Stout, *A virtual me? I’ll*
5 *second that*, CNN.com, January 19, 2007,
6 <http://www.cnn.com/2007/TECH/01/18/global.office.secondlife/index.html>; Neva Chonin, *Sex and*
7 *the City*, SAN FRANCISCO CHRONICLE, Sept. 17, 2006, at [http://www.sfgate.com/cgi-](http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2006/09/17/PKG6BKQQA41.DTL)
8 [bin/article.cgi?file=/chronicle/archive/2006/09/17/PKG6BKQQA41.DTL](http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2006/09/17/PKG6BKQQA41.DTL); Valleywag.com,
9 *GRIEFERS: Internet’s Most Wanted: A Rogue Gallery*, January 25, 2007, at
10 <http://valleywag.com/tech/griefers/internets-most-wanted-a-rogues-gallery-231320.php>. The
11 activities of these individuals raise key concerns about privacy, free speech, civility, and proper
12 Internet etiquette. In fact, Crook’s actions (and those of the man he copied, Jason Fortuny) were
13 the subject of numerous news articles *before* 10 Zen Monkeys posted the Craigslist Article. *See,*
14 *e.g.*, Anick Jesdanum, *Prankster posts sex ad replies online*, ASSOCIATED PRESS, September 12,
15 2006, at <http://www.msnbc.msn.com/id/14791788/>. Finally, Crook’s own appearance on Fox News
16 to defend his controversial views at www.foresakethetroops.info makes the evidence of the public
17 interest in him and his online activities overwhelming.

18 Courts that have considered the question of “public interest” have uniformly found cases
19 such as these to fit within the definition under Section 426.15(e). *See Gilbert v. Sykes*, 2007 Cal.
20 App. LEXIS 107 (Cal. Ct. App., January 26, 2007) (finding statements posted on patient’s Internet
21 website chronicling bad experiences with plastic surgeon to be made in a public forum concerning
22 a matter of public interest); *Seelig v. Infinity Radio Corp.*, 119 Cal. Rptr. 2d 108 (Cal. Ct. App.
23 2002) (construing the “public interest” requirement under Section 425.16 broadly “so as to
24 encourage participation by all segments of our society in vigorous public debate” and holding that
25 motives and personal life of contestant on reality television show “Who Wants to Marry A
26 Millionaire?” were matters of “public interest” because she had voluntarily participated in an
27 activity that was subject to public debate); *M.G. v. Time Warner, Inc.*, 89 Cal. App. 4th 623 (Cal.
28 Ct. App. 2001) (article on child molestation accusations was of public interest because of general

1 public interest in the issue). Here, Crook has voluntarily participated in the activity of Internet
2 grieving and subjected himself to extensive public debate. Thus, the publication of the Crook
3 Articles is protected under Section 426.15(e)(3)-(4).

4 5 **2. Reporting the Lawsuit and Posting the Complaint are Protected** 6 **Activities**

7 Crook's complaints about the reporting of this lawsuit and the publishing of the Complaint
8 also fall squarely within section 425.16's protections. *See* Cal. Civ. Code Proc. § 425.16(e)(1)-(2)
9 (protecting communications made about and in connection with a judicial proceeding). This
10 protection derives directly from the right of access to the courts as an aspect of the First
11 Amendment right to petition the government for redress of grievances, *see Church of Scientology*
12 *v. Wollersheim*, 42 Cal. App. 4th 628, 647 (1996), which includes not only the basic act of filing
13 litigation but also participation in litigation-related activities. *Briggs v. Eden Council for Hope and*
14 *Opportunity*, 19 Cal. 4th 1106, 1115 (1999). Thus, claims arising from a party's litigation-related
15 activities are subject to a section 425.16 motion to strike. *Wollersheim*, 42 Cal. App. 4th at 648.

16
17 Interpreting the scope of this protection, courts have "adopted a fairly expansive view of
18 what constitutes litigation-related activities," *Kashian v. Harriman*, 98 Cal. App. 4th 892, 908
19 (2002), and included a wide array of communications and conduct. *See, e.g., Briggs*, 19 Cal. 4th at
20 1115 (protecting conversations with third-parties prior to filing complaint); *Wilcox v. Superior*
21 *Court*, 27 Cal. App. 4th 809 (1994) (protecting memo about litigation distributed to potentially-
22 interested third parties outside the litigation for informational and fund-raising purposes). In
23 addition, reporting on the lawsuit would also qualify as reporting on a matter of public interest
24 under Section 425.16(e)(3)-(4).²

25
26
27 ² Since the reporting of the lawsuit, the webpage devoted to informing the public about the case has
28 received over 33,000 views and the Complaint has been downloaded over 6,000 times. McSherry
Decl., ¶ 15. In addition, several news publications and many websites have covered the suit. *See,*
e.g., Drew Cullen, *How to gag your enemies using the DMCA*, THE REGISTER, November 4, 2006,

1 **3. Publishing the “Call for Evidence” is a Protected Activity**

2 Finally, Crook alleges that he was emotionally distressed as the result of Plaintiff
3 publishing an article on December 27, 2006 seeking information on his actions toward others as
4 evidence to support this suit. Specifically, Crook claims that calling him a “DMCA fraudmeister”
5 and inaccurately stating that he owns the domain www.forsakethetroops.org are “potentially
6 libelous statements and can be perceived as ‘fighting words’ ” and thus are part of his
7 counterclaim.
8

9 To the contrary, this activity is expressly protected by Section 425.16. Diehl’s Call for
10 Evidence was a communication made in connection with this litigation to gather evidence to
11 support it, an activity protected by the Anti-SLAPP Statute. *See Jacobsen v. Katzer*, 2006 WL
12 3000473, (N. D. Cal. October 20, 2006) (holding FOIA request for documents to be used in
13 litigation subject to special motion to strike under Section 425.16). Crook’s counterclaim for use
14 of the phrase “DMCA fraudmeister” only strengthens Diehl’s motion under Section 425.16, as his
15 fraudulent use of the DMCA is exactly the legal dispute that lies at the heart of Plaintiff’s
16 Complaint in the instant case.
17

18 **B. Crook Cannot Succeed on His Emotional Distress Claim**

19 Because all of the activities underlying Crook’s counterclaims are protected by Section
20 425.16, Crook must demonstrate that his counterclaim “is legally sufficient and supported by a
21

22 at http://www.theregister.co.uk/2006/11/04/eff_fights_bogus_dmca_case/; Cammi Clark,
23 *Copyright misuse alleged in lawsuit*, SYRACUSE POST-STANDARD, November 5, 2006, at
<http://www.syracuse.com/news/poststandard/index.ssf?/base/news-2/1162720549155590.xml>;
24 Xenia Jardin, *EFF Sues Michael Crook for Bogus DMCA Claims*, BOINGBOING, November 1, 2006,
at http://www.boingboing.net/2006/11/01/eff_sues_michael_cro.html; Ryan Singel and Kevin
25 Poulsen, *Sued Sex Shamer Defends Takedown Notices*, WIRED NEWS BLOG, November 2, 2006, at
http://blog.wired.com/27bstroke6/2006/11/sued_sex_shamer.html; Nick Ross, *Craigslist*
26 *Encounters: This "Crook"-ed Saga Continues*, SFIST.COM, November 3, 2006, at
www.sfist.com/archives/2006/11/03/craigslist_encounters_this_crooked_saga_continues.php. This
27 is not counting the number of people who have subsequently visited Crook’s own site. Thus, there
is a strong public interest in this lawsuit and the controversies into which Crook has voluntarily
28 injected himself.

1 prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the
2 plaintiff is credited.” *Wilcox*, 27 Cal. App. 4th at 823; *see also Vess*, 317 F.3d at 1109. He cannot
3 do so, for his claims are barred by the First Amendment, the California Fair Reporting Privilege
4 and black-letter law.

5
6 **1. The First Amendment fully protects all of Diehl’s Publications from
IIED Claims**

7 Crook’s emotional distress claim fails as a matter of black-letter law. The legal framework
8 for it was set forth by *Hustler Magazine v. Falwell*, in which the Supreme Court directly addressed
9 the intersection of the First Amendment with claims for Intentional Infliction of Emotional
10 Distress. 485 U.S. 46 (1988). In that case, Hustler Magazine had published a cartoon mocking
11 Reverend Jerry Falwell by depicting him as having engaged in a drunken incestuous rendezvous
12 with his mother in an outhouse. *Id.* at 46. The Supreme Court held that in order to protect the free
13 flow of ideas and opinions in matters of public interest and concern, the First and Fourteenth
14 Amendments prohibit “public figures ... [from] recover[ing] for the tort of intentional infliction of
15 emotional distress by reason of publications ... without showing in addition that the publication
16 contains a false statement of fact which was made with ‘actual malice’, i.e., with knowledge that
17 the statement was false or with reckless disregard as to whether or not it was true.” *Id.* at 56.

18
19
20 The Ninth Circuit came to a similar conclusion six months later in *Liedholdt v. L.F.P., Inc.*,
21 860 F.2d. 890 (9th Cir. 1998). In that case, Hustler Magazine published a regular column called
22 “Asshole of the Month” in which “some personage whose activities Hustler opposes is vilified in
23 graphic terms.” *Id.* at 892. At one point, the column focused its criticism on a nationally-
24 recognized opponent of pornography, Dorchen Liedholdt. *Id.* The column described Liedholdt
25 and her colleagues in “vivid scatological terms” including such phrases as “pus bloated”, “sexually
26 repressed”, “[h]ating men, hating sex, and hating themselves,” and “this frustrated group of sexual
27 fascists.” *Id.* The article was accompanied by a small photograph of Liedholdt’s face
28

1 “superimposed over the buttocks of a bent-over naked man.” *Id.* In response, Liedholdt sued the
2 magazine’s publisher for, *inter alia*, intentional infliction of emotional distress. *Id.*

3 Following *Falwell*, the Ninth Circuit held that Liedholdt’s claim for intentional infliction of
4 emotional distress “must fail” under First Amendment scrutiny. *Id.* at 893. First, it found that any
5 expression of opinion was *per se* protected from IIED liability. *Id.* It then went on to affirm that,
6 as a public figure, Liedholdt could only recover for emotional distress if Hustler had published
7 false statements about her with actual malice. *Id.* Finally, the court held that it “strains credulity”
8 to accept that any of the antagonistic comments published in the magazine could be understood as
9 making false statements of fact about Liedholdt. *Id.* at 894.³ Particularly relevant to the finding
10 was the fact that Hustler’s remarks were part of “an ongoing, heated debate on the subject [of
11 pornography]”, and thus deserved scrupulous protection under the First Amendment. *Id.*

12
13
14 California courts have also granted Anti-SLAPP motions against IIED claims on similar
15 grounds. For example, in *Seelig v. Infinity Broad. Corp.*, 119 Cal. Rptr. 2d 108 (2002), plaintiff
16 participated in the reality television show “Who Wants to Marry A Millionaire?” in which 50
17 contestants competed for the right to marry a wealthy stranger. *Id.* at 111. Plaintiff only appeared
18 on the show for a single minute and was not selected to marry the putative multimillionaire. *Id.*
19 Prior to the show airing, a local radio station in San Francisco invited her to participate in an
20 interview with the morning “Sarah and Vinnie” show, which she refused to do because “she did not
21 want to bring attention to herself or to chance being ridiculed or subjected to public humiliation.”
22 *Id.* at 112. Upon hearing of her refusal, the hosts of the show ridiculed the participant on the air,
23 calling her a “local loser”, a “chicken butt”, and stating that her ex-husband thought she was a “big
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³ It is also noteworthy that Liedholdt sued Hustler’s publisher for misappropriation of her image and that the Ninth Circuit barred that claim under First Amendment principles as well. Liedholdt, 860 F.2d at 895. While Crook has not alleged misappropriation of his image here, the underlying DMCA complaints at issue were over the use of his image; however, the *Liedholdt* case would bar any attempt to amend the complaint and add such a claim.

1 skank.” *Id.* Plaintiff then sued the radio station and some of the hosts for, *inter alia*, intentional
2 infliction of emotional distress. *Id.* at 114. After finding that the California Anti-SLAPP
3 protections applied to the radio broadcast, the Court went on to hold that all these statements were
4 protected under the First Amendment because they were opinions and other statements that could
5 not be proven false. *Id.* at 116-18.
6

7 Here, the Court is faced with similar complaints. Crook, by his own admission, is a public
8 figure. McSherry Decl., Ex. M (describing Crook as “Infamous for numerous websites, including
9 Craigslist Perverts, which caused at least two divorces and three job terminations, I am indeed the
10 infamous Michael Crook– the pride of Syracuse, New York.”); Ex. N (admitting that Crook is the
11 #3 Most Hated Figure on the Internet and wishing he were #1).
12

13 As a public figure, Crook must show that Plaintiff’s publications contain known or reckless
14 falsehoods in order to succeed in his claim for emotional distress. *See Falwell*, 485 U.S. at 56;
15 *Liedholdt*, 860 F.2d at 893. He cannot. Every one of the publications he cites in his Counterclaim
16 contains a true report of his actions, accurate photographs of him, or an opinion as to his motives
17 and the legality and impact of his actions. The only two supposed “facts” that Crook contends are
18 false are that he is a “DMCA Fraudmeister” – a matter of opinion – and the allegation that he
19 owned www.forsakethetroops.org – the result of an unintentional typo. Crook himself admitted
20 during the Fox News interview that he used to own www.forsakethetroops.info. McSherry Decl.,
21 ¶ 18. The mere typographical error of using “.info” on the end of the domain instead of “.org”
22 cannot, as a matter of law, give rise to a claim for defamation. *See Bierbower v. FHP, Inc.*, 70 Cal.
23 App. 4th 1, 3 (Cal. App. Ct. 1999) (typographical errors are not sufficiently defamatory to give rise
24 to legal liability).
25

26 **2. The California Fair Reporting Privilege bars IED claims against**
27 **Reporting on the Lawsuit and the Posting of the Complaint**
28

1 Section 47(d) of the California Civil Code also bars Crook’s emotional distress claim.
2 Section 47(d) prohibits actions based on a publication made “by a fair and true report in, or a
3 communication to, a public journal, of (A) a judicial ... proceeding, or (D) of anything said in the
4 course thereof....” Cal. Civ. Code. § 47(d). This “fair and true reporting” privilege has been
5 broadly interpreted by the courts to provide absolute immunity for any liability related to said
6 publications. *McClatchy Newspapers, Inc. v. Superior Court*, 189 Cal. App. 3d 961, 975 (1987).

8 Moreover, the protections of Section 47(d) are not limited to verbatim accounts of court
9 proceedings or reproductions of court materials but extend to summaries and descriptions of those
10 documents and proceedings as well in order to provide the “breathing space” that freedoms of
11 expression “need ... to survive.” *Colt v. Freedom Communications, Inc.*, 109 Cal. App. 4th 1551,
12 1558 (2003) (holding that materials posted on newspaper’s Internet website were privileged
13 because they related to published articles about an SEC investigation of plaintiff). “As long as the
14 substance and gist of the proceedings are described accurately and the article does not deviate so
15 substantially in character from the underlying proceedings as to produce a different effect on the
16 reader,” it is fully privileged under 47(d). *Id.* (citing *Crane v. Ariz. Republic*, 972 F.2d 1511, 1519
17 (9th Cir. 1992)). Because they fairly and accurately describe the judicial proceeding at issue,
18 Diehl’s reports on the filing of the instant lawsuit and publication of the Complaint are both
19 privileged under Section 47(d).
20
21

22 **3. No Reasonable Jury Could Find Plaintiff’s Actions “Objectionable” or**
23 **that Defendant Has Suffered “Severe Emotional Distress”**

24 Finally, even if the First Amendment and California “Fair Reporting” Privilege did not
25 apply, Crook’s claim for IIED would still fail on its face, as no reasonable jury could find that any
26 of the allegations were “objectionable” or that he had suffered “severe emotional distress.” To
27 establish an intentional infliction claim, the plaintiff must show (1) extreme and outrageous
28 conduct by the defendant with the intention of causing, or reckless disregard of the probability of

1 causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and
2 (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.
3 *Christensen v. Superior Court*, 54 Cal. 3d 868, 903 (1991). Conduct to be outrageous must be so
4 extreme as to exceed all bounds of that usually tolerated in a civilized community. *Davidson v. City*
5 *of Westminster*, 32 Cal. 3d 197, 209 (1982).

6 "Ordinarily mere insulting language, without more, does not constitute outrageous
7 conduct." *Cole v. Fair Oaks Fire Prot. Dist.*, 43 Cal. 3d 148, 155 n. 7 (1987). Moreover, liability
8 based upon an intentional infliction claim "does not extend to mere insults, indignities, threats,
9 annoyances, petty oppressions, or other trivialities." *Molko v. Holy Spirit Ass'n.*, 46 Cal. 3d 1092,
10 1122 (1988) (citing Rest. 2d Torts, § 46, com. d.), *overruled on another ground by Aguilar v. Atl.*
11 *Richfield Co.*, 25 Cal. 4th 826, 854, fn. 19 (2001); *see also Fisher v. San Pedro Peninsula Hosp.*,
12 214 Cal. App. 3d 590, 617 (1989).

13 In his counterclaim, Crook has failed to show that anything Plaintiff published on his
14 website was "so extreme as to exceed all bounds of that usually tolerated in a civilized
15 community." The publications constituted accurate reports and photographs of Crook. They also
16 included accurate reports on this litigation and open requests for further information for use in this
17 litigation. At best, the use of the word "Jerkoff" in the title of the Craigslist Article was insulting,
18 but IIED liability does not and cannot extend to such insults. *Braunling v. Countrywide Home*
19 *Loans, Inc.*, 220 F.3d 1154, 1158 (9th Cir. 2000) (Rude remarks or general insensitivity alone
20 insufficient to support IIED claim). Moreover, Crook himself has posted the Complaint on his own
21 website. McSherry Decl., Ex. O. Such acts clearly belie Crook's allegations of outrageousness.

22 In addition, Crook has admitted, over and over, that he has not suffered from "severe
23 emotional distress." As set forth in Statement of Facts, Section II.F above, Crook publicly insists
24 that the lawsuit is "entertaining" and "fun." McSherry Decl. Exs. K, I. He has explained to his
25 readers, in some detail, "why being sued does not bother me in the least." McSherry Decl., Exs. A,
26 J. With such admissions in the record, no reasonable jury could find that Crook truly suffered
27 severe emotional distress from Plaintiff's conduct.

28 **C. Crook Cannot Succeed On His Intimidation Claim**

1 In addition to his IIED Claim, Crook alleges that Diehl’s First Amendment-protected
2 activities have also intimidated Crook in violation of 42 U.S.C. § 1985(2). Section 1985(2)
3 prohibits parties from conspiring “to deter, by force, intimidation, or threat, any party or witness in
4 any court of the United States from attending such court, or from testifying to any matter pending
5 therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on
6 account of his having so attended or testified....” 42 U.S.C. § 1985(2).
7

8 To succeed in a claim under Section 1985(2), a party must show: (1) a conspiracy between
9 two or more persons, (2) to deter a witness or party by force, intimidation, or threat from attending
10 federal court or testifying freely in a matter there pending, which (3) causes injury to the claimant.
11 *Rutledge v. Arizona Bd. of Regents*, 859 F.2d 732, 735 (9th Cir. 1988). To show a cognizable
12 injury, a claimant must show that the conspiracy “hampered the claimant’s ability to present an
13 effective case in federal court.” *Id.*
14

15 In his Counterclaim, Crook asserts that Diehl has intimidated him as a party and/or witness
16 to this litigation by 1) filing this lawsuit, 2) publishing the Complaint online prior to its filing and
17 service upon him, and 3) “continuing to post harassing material after the legal process began.”
18 Answer and Counterclaim, Answer ¶ 22. Even if these allegations were taken as true, Crook has
19 failed to plead any facts demonstrating how any of these acts have hampered his ability to present
20 an effective case in this action. All of the publications at issue merely report true facts and
21 Constitutionally-protected opinions about Crook or call openly for evidence to support Plaintiff’s
22 case; none of them threaten him in any way or even mention his participation in this litigation.⁴
23 Therefore, Defendant’s claim under Section 1985(2) must fail.
24

25 **D. Diehl is Entitled to Attorneys’ Fees as a Prevailing Anti-SLAPP Movant.**
26

27 ⁴Moreover, as mentioned above, these acts are both protected by the First Amendment and the
28 California Litigation and Fair Reporting privileges and thus cannot be sufficient to give rise to a
claim under 1985(2).

1 As shown above, Diehl has met his burden under Section 425.16 and shown that Crook
2 cannot meet his corresponding burden. Accordingly, Crook’s Counterclaim should be stricken.
3 Moreover, when a party succeeds in specially striking such claims, he is entitled to a mandatory
4 award of attorneys fees. Cal. Civ. Code Proc. § 425.16(c). Pursuant to this section, Diehl
5 respectfully requests an award of reasonable attorneys fees in conjunction with this motion.
6

7 **II. Alternatively, Crook’s IIED Counterclaim Should be Dismissed for Failure to**
8 **State a Claim for Which Relief can be Granted.**

9 In the alternative, Diehl also moves to dismiss Crook’s IIED and intimidation
10 counterclaims under Fed. R. Civ. P. 12(b)(6). Under Federal Rule of Civil Procedure 12(b)(6), a
11 motion to dismiss should be granted if it appears beyond a reasonable doubt that the plaintiff “can
12 prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*,
13 355 U.S. 41, 45-46 (1957). For purposes of such a motion, the complaint is construed in a light
14 most favorable to the plaintiff and all properly pleaded factual allegations are taken as true.
15 *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969); *Everest & Jennings, Inc. v. American Motorists*
16 *Ins. Co.*, 23 F.3d 226, 228 (9th Cir. 1994). However, a Court should not accept as true
17 unreasonable inferences or conclusory allegations cast in the form of factual allegations. *W. Mining*
18 *Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981); *see also Miranda v. Clark County, Nev.*, 279
19 F.3d 1102, 1106 (9th Cir. 2002) (“[C]onclusory allegations of law and unwarranted inferences will
20 not defeat a motion to dismiss for failure to state a claim.”). For the reasons outlined above in
21 Sections I.B and I.C, both Defendant’s claims cannot succeed and therefore, must be dismissed.

22 Moreover, Crook should be denied leave to amend. When a complaint is dismissed for
23 failure to state a claim, “leave to amend should be granted unless the court determines that the
24 allegation of other facts consistent with the challenged pleading could not possibly cure the
25 deficiency.” *Schreiber Distrib. Co. v. ServWell Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).
26 Leave to amend is properly denied “where the amendment would be futile.” *DeSoto v. Yellow*
27 *Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). Here, Plaintiff’s conduct is fully protected by
28

1 law; therefore, no set of factual allegations regarding his publications can succeed and any attempt
2 at amendment should be denied.

3
4 **III. Alternatively, Crook Should Provide A More Definite Statement.**

5 Diehl has attempted to construe Crook’s Counterclaim as broadly and liberally as possible.
6 In doing so, he can only discern two causes of action: Intentional Infliction of Emotional Distress
7 and Witness/Party Intimidation, both of which he has addressed above. However, should the Court
8 determine that other causes of action exist, Diehl asks the Court under Fed. R. Civ. P. 12(e) to
9 order Crook to file a more definite statement as to these claims.

10 Rule 12(e) of the Federal Rules of Civil Procedure provides that “[i]f a pleading is so vague
11 or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party
12 may move for a more definite statement before interposing a responsive pleading.” Fed. R. Civ. P.
13 12(e). Motions for a more definite statement are “proper only where the complaint is so indefinite
14 that the defendant cannot ascertain the nature of the claim being asserted.” *Sagan v. Apple*
15 *Computer, Inc.*, 874 F. Supp. 1072, 1077 (C. D. Cal. 1994). While Plaintiff suspects any claims
16 Crook identifies will violate the California Anti-SLAPP statute and/or be dismissed under 12(b)(6),
17 Diehl cannot adequately respond to such claims (if they even exist) unless they are made clearer.

18 **IV. CONCLUSION**

19 For the reasons stated above, Diehl respectfully requests that this Court strike Crook’s
20 counterclaims and award him his attorneys’ fees.

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DATED: January 29, 2007

Respectfully submitted,

By: _____
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JEFFREY DIEHL

DECLARATION OF SERVICE BY FEDERAL EXPRESS DELIVERY

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I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a resident of the United States and employed in the City and County of San Francisco, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is

2. That on January 8, 2007, declarant served by Federal Express, next day delivery, the

to the parties listed on the attached Service List.

I declare under penalty of perjury that the foregoing is true and correct. Executed this January 8, 2007, at San Francisco, California.

[NAME]