

1 This suit was brought by a large national medical company against a dissatisfied consumer
2 whose web site republishes the findings of government bodies and media investigations about the
3 company. Unhappy about this criticism, the company sued the consumer, advancing trademark claims
4 on which the company had already lost in arbitration, as well as state law libel claims. The consumer
5 moved to dismiss, both because the complaint lacks allegations needed to state either a federal or a
6 state law claim, and because the contents of the web site are not actionable as a matter of law. The
7 consumer also moved to strike under the California SLAPP statute. However, because there is no
8 diversity between the parties, the Court will reach the libel claims only if the trademark claims
9 withstand the motion to dismiss.

10 Rather than responding to the motions to dismiss and to strike, plaintiffs sought leave to take
11 discovery addressed to some of the issues raised by the pending motions. Without considering
12 whether the pending motions could be granted on grounds on which plaintiffs did not need discovery,
13 the Magistrate Judge granted the plaintiffs limited discovery pertaining to the libel issues addressed
14 by the SLAPP motion. Plaintiffs have accepted the limitation of discovery to libel issues.

15 However, because discovery on the libel claims would not be permitted if the libel claim were
16 being litigated in state court, and because those claims will **have** to be pursued in that forum if the
17 Court dismissed the federal claims for failure to state a claim, the discovery at issue here can have no
18 impact on the motion to dismiss the trademark claims. Moreover, because there has been no showing
19 that the motion to dismiss or strike the libel claims cannot be granted on grounds not related to actual
20 malice, the order permitting discovery on that issue should be reversed, without prejudice to
21 reconsideration after the Court rules on the pending motion to dismiss and to strike.

22 **PROCEDURAL BACKGROUND**

23 The plaintiffs are Bosley Medical Institute, a large national company that specializes in hair
24 and scalp surgery to avoid the appearance of baldness, and its Illinois affiliate (collectively, “BMI”).
25 Complaint ¶¶ 11-15. They have sued Michael Kremer, a former customer who created two web sites
26 that publicize law enforcement agency findings and media reports concerning the deceptive
27 advertising and improper medical procedures that BMI employs. Motion to Dismiss, Exhibits P &

28

1 Q. The law enforcement investigations have led to professional discipline and fines, in which BMI
2 acquiesced while admitting to numerous damning findings about its conduct. *Id.*, Exhibits F, G, H.

3 This case is not the first legal proceeding brought by BMI against Kremer. Before filing suit,
4 BMI invoked dispute resolution proceedings at the World Intellectual Property Organization, which
5 not only decided that Kremer did not violate BMI's trademark by adopting the domain name
6 "bosleymedical.com," but also declared that BMI's complaint amounted to "cyberbullying," that is,
7 an attempt to intimidate Kremer into giving up his right to criticize BMI. *Id.*, Exhibit E.

8 Unchastened by this loss, BMI filed this action against Kremer. Although the complaint never
9 alleges that Kremer's web site is commercial in any way – a necessary element of a trademark claim
10 – it asserts that Kremer's domain names and web site infringe and dilute BMI's trademark, and
11 constitute "cybersquatting"; the complaint also asserts in rem jurisdiction over the domain names
12 themselves. Complaint, Counts I - VI. Finally, although as a California company BMI cannot bring
13 a diversity suit, BMA invoke pendent jurisdiction as a basis for claiming that Kremer's web sites libel
14 them. *Id.* Counts VII, VIII.

15 Plaintiffs originally filed suit in the Northern District of Illinois. After Kremer moved to
16 dismiss for lack of personal jurisdiction and venue, as well as on substantive grounds, plaintiffs
17 consented to a change of venue to this Court. Kremer then renewed his motion to dismiss on the same
18 grounds advanced in Illinois. He refiled the Illinois affidavit, although the averments that pertained
19 solely to the issue of personal jurisdiction are no longer relevant.

20 The motion to dismiss is based on several grounds. First, Kremer argues that the absence of
21 any allegation that his web site has any commercial character takes the site out of the purview of the
22 trademark laws altogether, that failure to allege that the Illinois affiliate owned or registered the mark
23 deprives it of standing to sue, and that failure to allege inability to gain personal service condemns
24 the assertion of in rem jurisdiction over the domain names. Second, he argues that, because the web
25 sites themselves were referenced in the complaint, they may properly be considered on a motion to
26 dismiss under Rule 12(b)(6). Inspection of these documents, in turn, reveals that the sites are entirely
27 non-commercial, that no person could possibly be confused about whether it was BMI, as opposed
28

1 to a critic of BMI, who was sponsoring the sites, and that Kremer’s use of the BMI name is a fair use
2 and, indeed, is protected by the First Amendment. In sum, the motion argues that the trademark claim
3 challenges clearly protected speech, warranting dismissal under Rule 12(b)(6) without leave to amend.

4 Turning to the libel claims, Kremer’s motion argued first that those claims should be dismissed
5 for lack of federal jurisdiction, both because the dismissal of the trademark claims will leave no basis
6 for jurisdiction, and because the Illinois affiliate, not even mentioned on the site, has no standing to
7 sue. He also argued that the libel claims are not alleged in sufficient detail, because the law requires
8 identification of the allegedly defamatory words, which has not been done.

9 Finally, Kremer urged that even if the complaint could survive dismissal on these grounds, the
10 state law claims should be stricken under the California SLAPP statute because plaintiffs could not
11 show a reasonable probability of success on those claims. In support of these arguments, Kremer
12 relied on the web sites as well as other documents in the public record.

13 Instead of attempting to explain why the above grounds for dismissal and striking have no
14 legal merit, BMI asked that the ruling on these motions be postponed to permit it to take discovery
15 to prepare a response to Kremer’s motion, which, it argues, should be treated as a motion for summary
16 judgment. BMI characterized the original request as being only for “limited discovery,” but in fact
17 it sought discovery on every issue in the case, relating to both the trademark and the libel claims. In
18 response, Kremer argued that the motion for leave to take discovery was premature because BMI must
19 first demonstrate that the motions to dismiss and to strike cannot be granted unless discovery has been
20 allowed, which, Kremer continued, BMI had not done.

21 Magistrate Judge Battaglia addressed the issue of discovery in two stages. He did not
22 consider whether the complaint could be dismissed under Rule 12(b)(6) without granting any
23 discovery, likely because the motion to dismiss was pending before this Court and had not been
24 assigned to him for disposition. However, he rejected BMI’s contention that it was entitled to
25 discovery on the trademark issues in the case (because BMI did not object to that portion of his ruling
26 within the ten days allowed by 28 U.S.C. § 636(b)(1), that decision has become final). He ruled that
27 some limited discovery would be permitted on the libel claims against which the motion to strike had
28

1 been filed, *citing Rogers v. Home Shopping Network*, 57 F. Supp.2d 973 (C.D. Cal. 1999); *Metabolife*
2 *v. Wornick*, 264 F.3d 832 (9th Cir. 2001). The Magistrate Judge reasoned that the federal policy under
3 Rule 56(f) of the Federal Rules of Civil Procedure, which requires that discovery be allowed when
4 needed to oppose a motion for summary judgment, supersedes the California SLAPP statute, which
5 disfavors discovery before a SLAPP motion is decided. February 5 Opinion, at 4-6. Although the
6 Magistrate Judge did not decide that such discovery was strictly “necessary,” in that the motion to
7 strike could not be granted on issues to which the requested discovery was not relevant, he did decide
8 that discovery should be allowed on two libel-related issues raised by the motion to strike, namely,
9 the legal distinction between fact and opinion, and the issue of actual malice. *Id.* at 6. However, he
10 also decided that plaintiffs’ requests for leave to take discovery on these topics were “overly broad
11 and open-ended,” and he directed the parties to file supplemental briefs if the parties could not reach
12 agreement about what discovery should be allowed. *Id.* at 7.

13 BMI requested leave to serve 8 interrogatories and 25 document requests, and to pursue 30
14 deposition topics, that covered the entire range of issues in the case. Its memorandum of law made
15 clear that the primary purpose of most of the discovery requests was to obtain information in support
16 of the trademark claims. In opposition, Kremer reiterated that the motion to dismiss the federal claims
17 was made solely on the face of the complaint coupled with the web sites on which the complaint was
18 based, invoking the rule that documents referenced in the complaint itself may be considered.
19 Accordingly, he argued there was no basis for allowing discovery with respect to the trademark
20 claims. Moreover, defendant argued that the much of the discovery sought in connection with the
21 SLAPP motion went well beyond the limited issues about which the Magistrate Judge’s order had
22 declared that discovery was to be allowed; defendant also argued that because the distinction between
23 fact and opinion was a matter of law, the discovery requests directed at that subject should not be
24 authorized.

25 The Magistrate Judge generally agreed with Kremer’s arguments about the specific discovery
26 to be allowed. The Magistrate Judge ruled that his original order was not intended to allow open-
27 ended discovery on the trademark claims, but rather denied discovery on those issues and allowed
28

1 discovery only on three discrete issues relating to the SLAPP motion. In that regard, the Judge
2 withdrew his approval of discovery relating to the fact-opinion distinction, and granted leave to take
3 discovery only on specified discovery requests pertaining to the issue of actual malice, accepting
4 Kremer’s proposed revisions of those requests.

5 **STANDARD OF REVIEW**

6 A non-dispositive order entered by a magistrate is typically reviewed under the “clearly
7 erroneous or contrary to law standard.” *Grimes v. City & County of San Francisco*, 951 F.2d 236, 241
8 (9th Cir. 1991). Kremer’s objections are entitled to de novo review because they rest on a
9 fundamental question of law: When a defendant has moved to dismiss a complaint as a matter of law
10 and to strike the complaint under the California SLAPP statute, should discovery be allowed where
11 the plaintiffs can show that the defendant has superior access to information on even one factual issue
12 that is raised on the SLAPP motion, or should discovery be allowed only if the plaintiffs can show
13 that the motions to dismiss and to strike cannot be granted on **any** grounds, even those on which no
14 discovery is required.

15 **ARGUMENT**

16 **A. The Policies of the SLAPP Statute and the Policies of Federal Rule 56(f) Should**
17 **Be Reconciled By Allowing Discovery Only If the Complaint Cannot Be**
Dismissed on Any Ground Not Requiring Discovery.

18 California law protects against use of the courts to discourage free speech. Lawsuits that have
19 this intended effect are known as SLAPP suits—Strategic Litigation Against Public Participation.

20 SLAPP suits stifle free speech. They undermine the open expression of ideas,
21 opinions and the disclosure of information. The marketplace of ideas, not the tort
22 system, is the means by which our society evaluates [and validates] those opinions.
The threat of a SLAPP action brings a disquieting stillness to the sound and fury of
legitimate . . . debate.

23 *Beilenson v. Superior Court*, 44 Cal.App.4th 944, 956 (1996)

24 In 1992, the Legislature recognized a “disturbing increase in lawsuits brought primarily to
25 chill the valid exercise of the constitutional rights of freedom of speech and petition,” and found a
26 strong public interest in encouraging “continued participation in matters of public significance.”
27 § 425.16(a). As one court explained:

1 While SLAPP suits “masquerade as ordinary lawsuits” the conceptual features which
2 reveal them as SLAPP’s are that they are generally meritless suits brought by large
3 private interests to deter common citizens from exercising their political or legal
4 rights or to punish them for doing so. . . . Because winning is not a SLAPP plaintiff’s
5 primary motivation, defendants’ traditional safeguards against meritless actions, (suits
6 for malicious prosecution and abuse of process, requests for sanctions) are inadequate
7 to counter SLAPP’s. Instead, the SLAPPER considers any damage or sanction award
8 which the SLAPPEE might eventually recover as merely a cost of doing business. . . .
9 By the time a SLAPP victim can win a “SLAPP-back” suit years later the SLAPP
10 plaintiff will probably already have accomplished its underlying objective.
11 Furthermore, retaliation against the SLAPPER may be counter-productive because it
12 ties up the SLAPPEE’s resources even longer than defending the SLAPP suit itself.

13 *Wilcox v. Superior Court, supra*, 27 Cal.App.4th 809, 816 (1994) (citations omitted).

14 To ensure that “participation [in matters of public significance] not be chilled through abuse
15 of the judicial process,” § 425.16(a), the Legislature established a presumption against the maintenance
16 of litigation arising from any act “in furtherance of the [defendant]’s right of petition or free speech
17 under the United States or California Constitution in connection with a public issue.” § 425.16(b)(1).
18 Once a court determines that such an issue is involved, the cause of action “shall be subject to a
19 special motion to strike, unless the court determines that the plaintiff has established that there is a
20 probability that the plaintiff will prevail on the claim.” *Id.* To ensure that this hard look at the merits
21 comes early in the litigation, the motion to strike must be filed within sixty days of the service of the
22 complaint, § 425.16(f); discovery is stayed pending the court’s decision on the motion, unless the
23 court decides to allow specified discovery for good cause shown, § 425.16(g); the plaintiff justifies
24 its claims by filing briefs showing that its claims have legal merit and affidavits showing enough
25 factual basis for the claims to establish a probability of success on the merits, § 425.16(b)(2); and the
26 court must hear the SLAPP motion within thirty days. § 425.16(f).

27 In *United States v. Lockheed Missiles and Space Co.*, 171 F.3d 1208 (9th Cir. 1999), the Court
28 of Appeals recognized that the SLAPP statute, although procedural in formulation, furthers
“important, substantive state interests” by providing “an additional, unique weapon to the pretrial
arsenal” of an individual who is sued for exercising his right of free speech. *Id.* at 1218. Moreover,
“if the SLAPP provisions are held not to apply in federal court, a litigant interested in bringing
meritless SLAPP claims would have a significant incentive to shop for a federal forum. Conversely,
a litigant otherwise entitled to the protections of the SLAPP statute would find considerable

1 disadvantage in a federal proceeding.” *Id.* Thus, the Court held that the procedures of the SLAPP
2 statute do apply in federal court, at least so long as no federal interests are undermined by application
3 of the SLAPP statute, and hence there is no “direct collision” with the Federal Rules. *Id.* Where the
4 two sets of procedures “can exist side by side, each controlling its own intended sphere of coverage
5 without conflict,” there is no reason to refuse to apply the state rules. *Id.* at 1217.

6 A special motion to strike is in many respects analogous to a motion to dismiss under Federal
7 Rule 12. Like a SLAPP motion, a Rule 12 motion is typically decided without discovery. Thus,
8 discovery does not commence until after the Early Neutral Evaluation, which is not held until after
9 the defendant has answered, Local Rule 16.1(c)(1), and a motion to dismiss under Rule 12 tolls the
10 time for filing an answer. Rule 12(a)(4). Moreover, because a motion to dismiss is based only on the
11 face of the complaint and documents cited or referenced in the complaint, there is normally neither
12 opportunity nor need for discovery to determine whether a Rule 12 motion may be granted.

13 By contrast, Rule 56 expressly addresses the issue of discovery. Rule 56(f) provides that, if
14 the party opposing a motion for summary judgment “cannot for reasons stated present by affidavit
15 facts essential to justify the party’s opposition,” the court may continue the decision on the motion
16 for summary judgment to permit the nonmoving party to pursue discovery of the necessary facts.
17 However, the nonmoving party must show “how the information sought would preclude summary
18 judgment.” *California Union Ins. v. American Diversified Sav.*, 914 F.2d 1271, 1278 (9th Cir. 1990).
19 If summary judgment is sought on multiple grounds, there may be some issues on which discovery
20 may be essential before summary judgment may be granted, and other grounds that can be decided
21 without discovery. In those circumstances, summary judgment may be granted on the grounds on
22 which there is no genuine issue. *E.g.*, *United States v. Bob Stofer Oldsmobile*, 766 F.2d 1147, 1152
23 (7th Cir. 1985) (no continuance to take discovery on plaintiff’s intent where defendant failed to justify
24 denial of summary judgment on bases of reasonable reliance).

25 In libel cases, many federal courts, cognizant of the oppressive impact that litigation can have,
26 deny discovery into confidential sources and other issues bearing on actual malice when the defendant
27 can prevail on other issues in the case. The courts have not hesitated to deny discovery that implicates
28

1 First Amendment rights when it is clear that summary judgment would be granted anyway. *See*
2 *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972) (affirming summary judgment without discovery
3 into reporter’s sources because record was sufficient to decide case); *Nicosia v. DeRooy*, 72 F. Supp.
4 2d 1093, 1110-1111 (N.D. Cal. 1999); *Southwell v. Southern Poverty Law Center*, 949 F. Supp. 1303,
5 1311 (W.D. Mich. 1996). Recognizing the impact that the discovery process can have on free speech
6 rights, courts have been careful to insist that only discovery that is actually needed to decide the
7 motion should be granted. *Bruno & Stillman v. Globe Newspaper Co.*, 633 F.2d 583, 597 (1st Cir.
8 1980); *McBride v. Merrell Dow*, 717 F.2d 1460, 1466-1467 (D.C. Cir. 1983). Even discovery seeking
9 to identify a defendant may burden the defendant’s First Amendment rights and so be denied until the
10 plaintiffs have shown that they have a substantial case on the merits. *See Dendrite Int’l v. Doe*, 342
11 N.J. Super. 134 (App. Div. 2001).

12 Courts also postpone discovery in cases where a public official, sued for having violated
13 constitutional rights, pleads the defense of qualified immunity. The doctrine of qualified immunity
14 protects officials not only from the threat of liability, but also from the rigors of litigation, and
15 consequently a defendant pleading qualified immunity is entitled to a ruling on that defense before
16 the commencement of discovery. *E.g., Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Thus, even if
17 discovery might otherwise be appropriate on some other issues in the case, the official is entitled to
18 have discovery stayed until the issue of qualified immunity has been resolved, including an
19 interlocutory appeal from the denial of immunity if need be. *Behrens v. Pelletier*, 516 U.S. 299
20 (1996).

21 The California SLAPP statute is closely analogous to the doctrine of official immunity because
22 it, too, was adopted by the California legislature to protect persons who have exercised their right of
23 free speech from the rigors of litigation unless the plaintiff bringing the suit has evidence sufficient
24 to show a reasonable probability of success on the merits.

25 The Ninth Circuit has specifically recognized the danger posed by a suit that is filed to wear
26 the defendant down with expensive litigation so that, even if he can prevail in the end, the cost of
27 “free speech” becomes so high that he gives up his rights; at the same time, others who see what this
28

1 company does to its critics will censor themselves. *E.g.*, *Franchise Realty Interstate Corp. v.*
2 *Culinary Workers San Francisco Jt. Bd.*, 542 F.2d 1076, 1083 (9th Cir. 1976). Consequently, “when
3 a plaintiff seeks damages . . . for conduct which is prima facie protected by the First Amendment, the
4 danger that the mere pendency of the action will chill the exercise of First Amendment rights requires
5 more specific allegations than would otherwise be required.” *Kottle v. Northwest Kidney Centers*, 146
6 F.3d 1056, 1063 (9th Cir. 1998); *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1121 *et seq.* (N.D. Cal. 1984).

7 Just as federal courts adapt their procedures to accommodate federal law policies, they can
8 adapt their procedures to accommodate analogous state law policies as well.

9 **B. Discovery Should Not Be Permitted to Oppose a Motion to Dismiss and Motion**
10 **to Strike Unless Plaintiff Can Show That Such Discovery Is “Essential” Because**
11 **the Motions Cannot Be Granted Without Such Discovery.**

12 The two cases on which the Magistrate Judge relied in his order allowing some discovery to
13 plaintiff, *Rogers v. Home Shopping Network*, 57 F. Supp. 2d 973 (C.D. Cal. 1999), and *Metabolife*
14 *v. Warnick*, 264 F.3d 832 (9th Cir. 2001), demonstrate that the discovery-denying procedures of the
15 SLAPP statute often do not collide with federal court procedures. *Rogers* canvassed the various
16 federal and state interests at stake and noted that a special motion to strike can be premised **entirely**
17 on legal arguments, analogous to a Rule 12(b) motion to dismiss, or it can raise factual matters that
18 would be decided, in a state court, by examining affidavits from both sides. When only legal issues
19 are presented, the special motion to strike can be granted without allowing any discovery. 57 F.
20 Supp.2d at 980 (noting that this happened in *Lockheed*). Only when the motion to strike functions
21 in a manner analogous to a motion for summary judgment must Rule 56(f) standards must be applied
22 to decide whether to allow discovery. *Id.* at 980-981.

23 But the fact that a special motion to strike is based on factual rather than legal considerations
24 does not mean that discovery must be allowed before the motion can be decided. In *Metabolife*, the
25 Ninth Circuit held that Rule 56(f)’s policy on allowing discovery collides with section 425.16(g) to
26 the extent that the latter would deny discovery “where the nonmoving party has not had the
27 opportunity to discover information that is **essential to its opposition.**” 264 F.3d at 846 (emphasis
28 added). *Rogers* applied the same standard, allowing discovery before a ruling on the special motion

1 to strike only when “necessary discovery” was at issue, “tak[ing] into account difficulties that the
2 nonmoving party may have in developing the evidence he requires to defend the motion.” 57 F.
3 Supp.2d at 973. The court deferred ruling on the special motion to strike so that Rogers could seek
4 to identify the confidential informant on which the defendant depended to show the basis for its belief
5 that the contested statements were true. 57 F. Supp.2d at 973, 985. In a subsequent decision,
6 however, the court refused to order identification of the source because Rogers had not presented a
7 prima facie case that the defamatory statements were false. *Rogers v. Home Shopping Network*, 73
8 F. Supp. 2d 1140 (C.D. Cal. 1999).

9 Similarly, in *Metabolife*, the district court had recognized the principle that a motion to strike
10 normally cannot be granted on the issue of actual malice because the defendant controls information
11 that the plaintiff would otherwise need to establish a probability of success. 72 F. Supp.2d 1160, 1166
12 (S.D. Cal. 1999). Nevertheless, the court granted the motion to strike because plaintiff had not
13 established a probability of success in showing that certain contested statements were false, *id.* at
14 1174, 1175, 1176, and because other statements were not sufficiently factual to be the subject of a
15 libel action. *Id.* at 1172. The Court of Appeals did not reject the district court’s conclusion that
16 discovery on actual malice was not necessary if the complaint can be stricken on the issue of falsity.
17 Rather, the Court of Appeals reversed some of the rulings with respect to falsity on the ground that
18 the district court had improperly excluded affidavits from expert witnesses on grounds of insufficient
19 reliability, 264 F.3d at 840-845, and then ruled that, on remand, discovery should be allowed on the
20 issue of falsity of one statement because the nature of the contested statement – that “every expert we
21 asked said Metabolife is not safe” – stated facts that were peculiarly within the broadcaster’s control
22 and hence Metabolife was entitled to discovery to identify the experts on which this statement was
23 based before the special motion to strike could be granted. 264 F.3d at 846-847, 848. The Court
24 made clear, however, that it was directing only “limited discovery” with respect to a very specific
25 statement whose actionability under libel law had been carefully considered and whose potential
26 falsity had been shown by the affidavits already submitted by the plaintiff in that case. *Id.* at 848.

27 Likewise, here, Kremer is entitled to a careful vetting of specific statements, which are shown
28

1 to be defamatory and whose falsity has been supported with substantial evidence, before discovery
2 is allowed.

3 **C. BMI Has Not Shown That Discovery Is “Essential to Its Opposition” Because the**
4 **Motion to Dismiss Can Be Granted and the Special Motion to Strike Can Be**
5 **Granted on Issues With Respect to Which No Discovery Is Sought or Needed.**

6 **1. Because Federal Jurisdiction Depends on Federal Claims Whose**
7 **Dismissal Is Sought Under Rule 12(b)(6), the Court Should Postpone Any**
8 **Ruling on the Need for Discovery Until the Court Rules on the Motion to**
9 **Dismiss the Federal Claims.**

10 Discovery should be denied because the only discovery that BMI presently seeks pertains to
11 the state law defamation claims at which Kremer’s SLAPP motion is directed. There is no diversity
12 between the parties because both BMI (the parent company) and Kremer are citizens of California.
13 Consequently, if the federal trademark claims are dismissed, the state claims will have to be dismissed
14 for lack of jurisdiction. *UMW v. Gibbs*, 383 U.S. 715, 726 (1966). Thereafter, the decision whether
15 to allow discovery before a SLAPP motion can be decided will have to be made in state court,
16 assuming that BMI chooses to pursue the libel claims in that forum.

17 Although BMI originally sought discovery in support of its opposition to the motion to dismiss
18 the trademark claims, Kremer opposed that discovery on the ground that his motion could be resolved
19 on the face of the complaint, both because the complaint fails to allege use in commerce for the
20 infringement claim and commercial use for the remaining claims, as required for Lanham Act
21 jurisdiction, as well as by examining the web sites, which can be considered on a motion to dismiss
22 because they are alleged in the complaint and the complaint turns on their contents. The Magistrate
23 correctly decided that BMI does not need discovery in order to file an opposition to that motion to
24 dismiss, and limited discovery to the libel claim. BMI did not file objections to that part of the
25 Magistrate Judge’s decision, which has thus become final.

26 To the extent that there is a difference between the availability of discovery under the SLAPP
27 statute and Rule 56(f), the Rule 56(f) procedures are applicable only to the libel claims, and then only
28 insofar as the Court has pendent jurisdiction. Thus, the considerations of federalism and comity that
animated *UMW v Gibbs* and its warning that federal courts should avoid “needless decisions of state
law,” 383 U.S. at 726, support the reversal of the Magistrate Judge’s decision to allow discovery to

1 proceed on issues relating to the libel claims before this Court has decided whether to dismiss the
2 federal trademark claims.

3 The Ninth Circuit in *Lockheed* warned that forum-shopping would be encouraged if it becomes
4 too easy for SLAPP plaintiffs to avoid the limitations of the SLAPP statute by the simple expedient
5 of bringing state claims to such cases to federal court. 171 F.3d at 1218. Accordingly, no discovery
6 should be permitted at this stage, but BMI should be directed to file a response to the motion to
7 dismiss the trademark claims.

8 **2. Discovery Is Not Needed For the Court to Decide Whether to Dismiss the**
9 **Libel Claims on Their Face.**

10 In addition to moving to strike the libel claims because BMI has not established a probability
11 of success on the facts, Kremer also seeks to have the libel claims dismissed on their face. If this
12 aspect of the motion to dismiss and strike is granted, there will be no need to reach the question of
13 whether plaintiff has enough evidence to show a probability of success on the libel claims, and the
14 entire basis for the discovery will evaporate.

15 Kremer argued in support of his motion to dismiss the libel claims that BMI's failure to
16 identify the defamatory words is fatal to its complaint. Memorandum in Support of Motion to
17 Dismiss, at 22-23. The requirement of identifying the defamatory words is important because, once
18 those words are identified, Kremer may be able to argue that the words express opinions rather than
19 facts, that they exactly match facts that the plaintiffs have admitted in consent decrees, or that they
20 present other grounds for dismissal. By denying Kremer the ability to move to strike particular
21 allegations of defamation on the face of the complaint because the allegations are put so generally,
22 plaintiffs seek to avoid a ruling on this motion to dismiss so that they can continue to gain the
23 maximum harassment value against Kremer before the Court rules in Kremer's favor.

24 For example, plaintiffs took issue with the assertion in Kremer's memorandum in support of
25 his motion to dismiss that the "summaries of several different investigations" are either true or matters
26 of opinion. This defense is not viable, said plaintiffs, because "BMI disputes the factual accuracy of
27 these summaries." Mem. at 4. But which summaries? The complaint does not identify a single
28 "summary" that it contends is false; it simply identifies some topics on which it considers the site

1 inaccurate. And, because the complaint is not specific, Kremer cannot be specific in pointing to the
2 investigatory or other data and comparing it with the content of his web site to show that there is no
3 valid claim for relief as a matter of law. Until each of the supposedly defamatory passages is
4 identified, Kremer cannot specifically rebut the vague allegations of defamation, and the Court cannot
5 decide whether discovery is needed to defeat the motion to strike. Similarly, identification of the
6 specific words said to be actionable is needed before the Court can decide whether a given statement
7 is opinion. Although BMI argued that discovery is needed to decide the opinion question, the
8 distinction between fact and opinion is a matter of law that is frequently decided on a motion to
9 dismiss. *Leidholdt v. LFP, Inc.*, 860 F.2d 890, 893 (9th Cir. 1988); *Gregory v. McDonnell-Douglas*
10 *Corp.*, 17 Cal. 3d 596, 601, 552 P.2d 425, 428 (1976). *Accord Global Telemedia v. Does*, 132 F.
11 Supp.2d 1261, 1271 (C.D. Cal. 2001) (follows *Rogers* by granting SLAPP motion on grounds of
12 opinion without allowing discovery).

13 Kremer has also moved to dismiss on the ground that nothing on the web site is “of and
14 concerning” the Illinois affiliate of BMI. Mem. 23-24. There is no reason to keep the Illinois affiliate
15 in the case, or to allow discovery relevant to that affiliate, unless the Court is persuaded that the
16 affiliate has any libel claims against Kremer. No discovery is needed to address this point.

17 Indeed, a ruling that allowed discovery to proceed on the actual malice issue before the motion
18 to dismiss has been decided would place a SLAPP’ed defendant at a severe disadvantage compared
19 to a defendant who files only a motion to dismiss. Under Section 425.16(f), a special motion to strike
20 must be filed at the outset of the case, within 60 days of the service of the complaint, which is very
21 likely before a court will have ruled on a motion to dismiss under Rule 12(b)(6). If discovery must
22 be allowed to permit a plaintiff to respond to the motion to strike – and particularly if, as the
23 Magistrate Judge ruled, discovery is to be allowed without even a determination that the motion to
24 strike cannot be granted on issues about which plaintiff does not need discovery – then a defendant
25 who has valid grounds for seeking dismissal of the complaint on its face must choose between filing
26 such a motion, which does not afford a ground for seeking discovery, and filing a SLAPP motion.
27 Because the SLAPP statute was enacted to give speakers “an additional, unique weapon to the pretrial
28

1 arsenal,” *Lockheed*, 171 F.3d at 1218,, the Court should not force such a Hobson’s choice on
2 defendants unless the law clearly requires it. It does not.

3 Moreover, the discovery that the Magistrate Judge permitted will have the effect of requiring
4 BMI to identify words alleged to be defamatory. Specifically, in addition to limiting the written
5 discovery requests and oral deposition topics that BMI would be permitted to pursue the Magistrate
6 Judge revised the discovery requests in a manner that requires Kremer to provide information going
7 to the issue of malice only with respect to statements on the web site that BMI has specifically
8 identified as being allegedly defamatory.^{1/} Given that BMI will be compelled to identify specifically
9 the allegedly defamatory words before Kremer is compelled to provide discovery, the Court should
10 avail itself of this specification to decide whether dismissal is appropriate on grounds other than
11 malice (such as because they are not of and concerning either plaintiff, or because they are non-
12 actionable statements of opinion). The Court can and should make that determination before
13 subjecting Kremer to the rigors of discovery.

14 Accordingly, the Court should reverse the Magistrate Judge’s discovery order and require BMI
15 to respond to the motion to dismiss the libel claims.

16 **3. Discovery Is Not “Essential” to BMI’s Opposition Because BMI Can**
17 **Respond to Most Aspects of the Motion to Strike, Which Can Be Granted**
18 **Without Discovery.**

19 The final reason why the Magistrate Judge’s discovery order should be reversed is that the
20 Judge failed to decide whether discovery was “necessary” before BMI could respond to the special
21 motion to strike. Nor did BMI purport to make such a showing. Instead, it argued that, to respond
22 to the aspect of the SLAPP motion that rested on the issue of malice, it needed to take discovery
23 concerning the basis for Kremer’s statements to be able to show that he either knew that statements

24 ^{1/} Kremer had argued that it was unfair and unduly burdensome to be required to provide his
25 basis for making every statement on the two web sites at issue in this case because they
26 contain more than 15,000 words and nearly 800 sentences, but BMI plainly was not alleging
27 that everything on the web sites is actionable defamation. Thus, the discovery requests
28 adopted by the Magistrate Judge require responses only with respect to “the defamatory
statements,” and the approved requests define that terms as including only “those statements
on the web sites whose specific language has been alleged to be among the defamatory
statements over which plaintiffs are suing the defendant.”

1 on his web site were false, or at least that he acted with reckless disregard of probable falsity.

2 The SLAPP motion relied on several grounds for striking the libel claims, including the lack
3 of evidence that the statements were false and the lack of evidence that the statements caused damage,
4 not to speak of the character of some statements as non-actionable opinion and the fact that a number
5 of the statements were not “of and concerning” BMI. BMI should have evidence on all these issues
6 without discovery; indeed, it did not even attempt to argue that it needed discovery before it could
7 respond on the issues of truth, damages, and “of and concerning.” Although BMI did argue that it
8 needed discovery on the issue of “opinion,” the Magistrate Judge denied BMI’s request for leave to
9 take discovery on that issue (BMI objects to that part of the ruling). Only if BMI survives the motion
10 to strike on all of these issues – not to speak of surviving the motion to dismiss – will it be necessary
11 to reach the question of actual malice.

12 Moreover, the point of the SLAPP statute is to protect against baseless suits aimed at chilling
13 speech by requiring the plaintiff to show, at an early stage of the case and before discovery begins,
14 the evidence in support of its claims. If BMI can bring a SLAPP case and then argue that, as in any
15 ordinary slip and fall or commercial case, it can proceed directly to discovery regardless of whether
16 it has any evidence of falsity and damage, and without even identifying the actionable statements, the
17 SLAPP statute will have become a nullity. A plaintiff cannot get into discovery on actual malice
18 when summary judgment is sought on falsity even outside the SLAPP context, and *Metabolife* does
19 not require a different result with regard to when a SLAPP motion. After all, in *Metabolife* the
20 plaintiff was permitted to seek discovery only because it introduced extensive evidence of falsity and
21 because the truth of defendants’ statements about what “experts” said required identification of the
22 experts.

23 Kremer mentioned the issue of malice in his motion to strike because, under section 425.16(f),
24 the special motion to strike must be filed within sixty days of service of the complaint. This occurs
25 before the defendant has the opportunity to take discovery from the plaintiff to test the plaintiff’s basis
26 for suit. Here, because BMI’s libel claims do not even identify the allegedly defamatory words,
27 Kremer cannot know until BMI files its opposition to the special motion to strike whether it will be
28

1 necessary to reach the issue of actual malice at all. However, to preserve the issue of actual malice
2 for consideration on his special motion to strike in the event BMI is able to surmount the remaining
3 issues raised in his motion by showing a probability of success on the merits of those issues, Kremer
4 included a brief discussion of the issue of actual malice in his memorandum.

5 Moreover, although decisions about “actual malice” often cannot be decided without taking
6 discovery, that is not always true. Hypothesize, for example, a libel suit in which Rose Mary Woods
7 sued the *Nation* magazine over a story alleging that she deliberately recorded over eighteen minutes
8 of recording tape to cover up a crime by her employer. The issue of truth might well be litigable if
9 Woods submitted an affidavit asserting her innocence, but there has been so much written about the
10 underlying facts that, given the requirement that actual malice be proved by clear and convincing
11 evidence, the magazine could get summary judgment without allowing **any** discovery by Woods into
12 what it actually knew or whether it had some ulterior motive for writing the story. After all, just as
13 the Court must rule on summary judgment through the prism of the substantive law that governs the
14 claim against which judgment is sought, *Anderson v. Liberty Lobby*, 477 U.S. 242, 254 (1986), so the
15 Court’s ruling on what discovery is “necessary” under Rule 56(f) before summary judgment can be
16 decided must be affected by the California and federal constitutional law that is to be applied to the
17 decision. Until Bosley has identified the alleged defamatory statements and has filed an opposition
18 to the motion to strike setting forth evidence sufficient to show a probability that those statements are
19 false, the Court cannot be certain that discovery is needed to show a probability of success on the
20 element of a defamation action that requires BMI to show that Kremer published the statements with
21 knowledge or reckless disregard of those statements’ probable falsity.

22 On the other hand, allowing BMI’s demand for discovery has a substantial impact on Kremer’s
23 freedom to criticize BMI, and the Court should not decide in a vacuum that any discovery is or is not
24 required. Instead, the Court should require Kremer to respond to the motion to strike, recognizing that
25 the lack of discovery may be one reason advanced to postpone a decision on that motion. Kremer will
26 then have the opportunity to reply to the opposition, and the issue will be cleanly joined.

1 **CONCLUSION**

2 The order granting BMI leave to take some discovery before the Court rules on the motions
3 to dismiss for lack of subject matter jurisdiction and for failure to state a claim on which relief can
4 be granted, and on the parts of the motion to strike on which no discovery is needed, should be
5 reversed.

6 Respectfully submitted,

7
8 Paul Alan Levy
9 Allison M. Zieve
10 PUBLIC CITIZEN LITIGATION GROUP
11 1600 - 20th Street, N.W.
12 Washington, D.C. 20009
13 (202) 588-1000

14 LUCE, FORWARD, HAMILTON & SCRIPPS LLP

15 By _____

16 Charles A. Bird
17 Andrea Kimball
18 Luce, Forward, Hamilton & Scripps LLP
19 600 West Broadway, Suite 2600
20 San Diego, California 92101-3391
21 (619) 236-1414
22 Fax No. (619) 232-8311

23 Attorneys for Defendant

24 Dated: May 6, 2002