COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE SIXTH APPELLATE DISTRICT

No. H031130

MORDECAI TENDLER,

Plaintiff-Appellant,

v.

JOHN DOE,

Defendants-Respondents.

On Appeal from Orders of the Superior Court of California
for the County of Santa Clara
Honorable Neal A. Cabrinha, No. CV064307

BRIEF FOR RESPONDENTS

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July 31, 2007

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COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE SIXTH APPELLATE DISTRICT

Case No. H031130

CERTIFICATE OF INTERESTED PERSONS

Respondent-Defendant

John Doe: Jewish Survivors, Jewish Whistleblower, and New Hempstead News

Entities That Will Receive the Awarded Fees

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In this case, a rabbi defrocked due to serious allegations of sexual abuse sought to silence his online critics, who run blogs discussing sexual abuse in Jewish synagogues. The rabbi, appellant Mordecai Tendler, did so by invoking California law – issuing a California subpoena to California company Google demanding the identity of the bloggers. When it became clear that his in terrorem efforts at scaring his critics into silence were going to fail, and only after the bloggers had gone to the time and effort to bring both a motion to quash and a motion under California's anti-SLAPP law, appellant attempted to fire his California counsel, withdraw his subpoenas and hide from appellees' counsel to avoid the consequences of his actions. In doing so he succeeded in delaying consideration of the motions, but ultimately the Court properly found that the California anti-SLAPP law applied and awarded attorney fees and costs to appellees. This appeal followed.

Appellant's pro se appeal brief says many things, many untrue and inflammatory, but ultimately says little about the single issue before this Court. The only question on appeal is whether the Superior Court properly applied settled California authority providing that a plaintiff cannot avoid liability for attorney fees and costs by voluntarily dismissing an action while a special motion to strike is pending. There is no real dispute on that point; the Superior Court ruling awarding fees and costs to the bloggers was correct and should be affirmed.

STATEMENT OF THE CASE

A. The Underlying Controversy.

This action was brought over speech on four web logs, or "blogs," devoted to issues of sexual and similar abuses by rabbis and other authority figures in the Orthodox Jewish community: www.jewishsurvivors.blogspot.com; www.jewish whistleblower.blogspot.com, www.newhempsteadnews.blogspot.com, and www. rabbinicintegrity.blogspot.com. The plaintiff is Mordecai Tendler, an Orthodox rabbi who served a congregation in New Hempstead, New York. Tendler is a scion of a very distinguished and world-renowned rabbinical family – his father is a world-renowned expert on medical ethics who teaches at Yeshiva University in New York, and his grandfather was the outstanding scholar in Halachic (Jewish) law of this generation. Tendler himself has, according to his supporters in the controversy described below, made a name for himself by involvement in significant feminist issues in the Jewish community.

Over a period of years, Tendler was accused by some of the women in his congregation of abusing his position to have sex with them, such as by telling a woman who was having trouble finding a marriage partner that her problem was that she was too closed to men, and that she needed to have sex with him in order to learn how to open herself up. After several such accusers came forward, Tendler was investigated by a special ethics committee of the Rabbinical Council of America

("RCA"), which in turn hired a private investigation firm to help find the facts. Based on their detailed report, Tendler was expelled from the RCA and, after further controversy, fired by his congregation. Tendler was sued in 2005 by one of his congregants in New York state court; his motion to dismiss was recently denied in part and granted in part. Affidavit of Paul Alan Levy ("Levy Affidavit"), Exhibit 14.[1/]

Tendler and his supporters fought back against the accusations, claiming that they were retaliation for his public advocacy on feminist issues, and that he was denied due process; he also filed suit for libel in a rabbinical court in Israel. Tendler sued his synagogue for reinstatement, and the debate between his supporters and detractors has raged for years. The controversy has been extensively reported both in the Jewish press and in mainstream media sources such as the New York Post and on television. *See* Affidavit of Rabbi Mark Dratch in Support of Special Motion to Strike (collecting news articles showing public discussion of controversy). The controversy has also been extensively discussed on many blogs, including but not limited to the four whose authors Tendler sought to identify through this proceeding.

B. The Ohio Proceeding.

As the rabbi of a congregation in New York, Tendler lived in New York.

[1/] The Levy Affidavit was filed on July 6, 2006, in support of both the Motion to Quash and the accompanying Special Motion to Strike.

Levy Affidavit ¶ 5; his appellate brief shows that he still lives there. Curiously, on February 15, 2006, Tendler filed a petition in an **Ohio** court, invoking Ohio Revised Code § 2317.48 and Rule 34(D) of the Ohio Rules of Civil Procedure. Tendler Exhibit A. The barebones petition said there were false and defamatory statements about Tendler on three blogs – www.jewishsurvivors.blogspot.com, www.rabbinic integrity.blogspot.com, and www.newhempsteadnews.blogspot.com – but did not identify any specific defamatory statements, or offer any evidence that any of the postings were, in fact, false. The petition also did not note that the petitioner lived in New York, much less explain why a New Yorker was seeking redress in Ohio. Even though Ohio Rule 34(D) requires a party seeking prelitigation discovery to serve his request on the anticipated adverse party, no effort was made to notify the bloggers in question that Tendler was seeking to identify them. It would have been simple for Tendler to have given notice to each blogger, even though he did not have their names, either by using the "comment" feature that would have allowed Tendler or his counsel to post a comment revealing the intention to seek discovery, or by looking at the "profiles" on two of the blogs that reveal the operators' email addresses. The Ohio court was not informed that means of notice existed.[2/]

The Ohio Court granted the petition authorizing discovery, Tendler Exhibit

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[2/] The comment feature was disabled on jewishwhistleblower.blogspot.com. However, that blogger's email address is posted on his blog's profile; Tendler could have notified the Doe of his petition that way.

B, and Tendler sent Ohio subpoenas to Google, Inc., a California company that owns and operates Blogspot. However, Google declined to respond to an Ohio subpoena. Meanwhile, on March 16, 2006, the Ohio court notified Tendler's counsel that his proceeding would be dismissed for want of prosecution unless Tendler explained the reasons for delay. Levy Affidavit, Exhibit 1. Tendler filed a status report on March 29, noting that Google was insisting on a California subpoena, and asserting that counsel had, therefore, obtained a commission for subpoenas in California. Levy Affidavit, Exhibit 2. On April 25, 2006, the Ohio court dismissed the case without prejudice to reopening. Levy Affidavit, Exhibit 3. The Ohio court's electronic docket reflects that the case was then closed on April 26, 2006. Levy Affidavit, Exhibit 4.

C. The California Proceeding.

On May 24, 2006, Tendler filed a new case in California, captioned Mordecai Tendler, Plaintiff, v. John Doe, Defendant. The filing included an affidavit of his California counsel, Patrick Guevara, requesting issuance of subpoenas to identify the operators of the four blogs, and averring, incorrectly, that Tendler had petitioned in Ohio for leave to take discovery to identify all four bloggers. In fact, although Mr. Guevara obtained a subpoena to identify the operator of www.jewishwhistleblower.blogspot.com, that blog had never been identified in the Ohio petition. The affidavit attached the Ohio order allowing discovery, but made

no mention of the fact that the Ohio case itself had been dismissed.

In his opening brief, at unnumbered page 5,[3/] Tendler acknowledges that he hired an attorney to represent him "to handle the process" – that is, to initiate this action to obtain subpoenas. As discussed further below, Tendler periodically asserts that he has never been represented by an attorney in California, but this is plainly untrue.

Upon receiving the subpoenas, Google notified the bloggers that subpoenas had been received seeking their identities, and three of the four bloggers – JewishSurvivors; JewishWhistleblower, and NewHempsteadNews – asked undersigned counsel Mr. Levy to represent them in seeking to quash the subpoenas. Mr. Levy contacted Mr. Guevara to notify him of his involvement, and by both voicemail and email told Mr. Guevara that, presumably unknown to Mr. Guevara, the Ohio case had actually been dismissed and hence he had no basis for seeking subpoenas from this Court based on an Ohio order. Levy Affidavit ¶ 3 and Exhibit 5. Mr. Guevara did not respond. After learning from Mr. Guevara's assistant that Mr. Guevara had forwarded Mr. Levy's messages to lead counsel in Ohio, Mr. Levy contacted the Ohio attorney, James Fleisher. Mr. Levy suggested that Tendler withdraw the subpoenas because they had been obtained through misrepresentation

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[3/] Tendler's brief does not have page numbers. We refer to page numbers assigned based on the assumption that the first page after the cover is page 1.

of the status of the case in Ohio, without prejudice to having the Ohio case reopened and new subpoenas being sought. However, Mr. Levy asked for notice so that his clients could oppose reopening. Levy Affidavit, Exhibit 6. Mr. Fleisher represented that the Ohio court's dismissal of the case had been "inadvertent," and that the Court had already reopened the case; he therefore claimed that the procedural problem was "moot." Levy Affidavit, Exhibit 7. Only after making these representations did Mr. Fleisher then proceed to seek reopening of the Ohio case – without giving notice of this effort to the Doe defendants. Levy Affidavit ¶ 5 and Exhibits 10, 11.

Mr. Fleisher gave Google two extensions of time to comply with the subpoena, through July 14, 2006. Levy Affidavit, Exhibit 9. However, because Tendler nevertheless failed to withdraw his subpoenas, defendants filed and served two motions in the court below, dated July 6, 2006 – one motion to quash the subpoenas, and one motion to strike the action under the anti-SLAPP law.

On July 11, 2006, Mr. Fleisher finally told Google that the subpoena issued pursuant to the Ohio court order would be withdrawn, and the Ohio petition for discovery dismissed. Not until two weeks later did Tendler's California counsel, Mr. Guevara, finally file a request for dismissal of the California action; he served the request only on Google, not the Does.[4/] The dismissal was entered on August

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[4/] The proof of service asserts, under oath, that it was served "on the parties in this action," but reflects that it was served only on **Google**.

2, 2007, but the Does were not informed of it until late August. Instead, Mr. Tendler's California counsel apparently called the Superior Court and got the motions taken off calendar, again without informing the Does. Does' counsel finally learned what had happened from the Court when they called to check on the hearing date. Only after they communicated their surprise to Mr. Guevara did he send what he described as a "courtesy copy" of the dismissal to Does' counsel, along with the explanation that, the matter having been dismissed, he (and Mr. Fleisher) were no longer representing Tendler.

At this juncture, the Does were concerned that Tendler's counsel were trying to disclaim any responsibility for the proceeding, while still preventing them from communicating directly with Tendler. Neither Tendler nor his counsel had filed a substitution of counsel under §§ 284 and 285 of the Code of Civil Procedure. Accordingly, the Does scheduled an ex parte hearing on August 29, 2006, to ask the court to put their motions back on the hearing calendar. They also warned Mr. Guevara that, because his client had not filed any substitution of counsel, he was still responsible for representing Tendler in the proceeding. Apparently recognizing his obligation, Mr. Guevara appeared at the ex parte hearing on Tendler's behalf, at which point the court re-set the hearing on the special motion to strike, for October 12, 2006.

Even though Tendler was still represented by counsel at that juncture, neither

Tendler nor his attorney opposed the SLAPP motion. Instead, they launched a series of procedural maneuvers. First, Mr. Guevara attempted to file a substitution of counsel form (Form MC-050), discharging Mr. Guevara and designating Tendler as his own counsel.[5/] However, the form was defective – it did not include any address for Tendler as required by Court Rule 315(b) ("substitution of a party as attorney in propria persona **shall include** the mailing address and telephone number of the party"). Thus, the Doe defendants had no way to notify Tendler of proceedings in the case, or to serve him with papers. Accordingly, undersigned counsel advised Mr. Guevara that the substitution of counsel was fatally defective and that he remained counsel of record until a proper withdrawal was filed, providing an address and telephone number at which Tendler could be reached.[6/] Defendants also treated the purported withdrawal as a form of opposition to their SLAPP motion and filed a reply brief arguing that Tendler's continued procedural maneuvering to try to avoid responsibility was itself evidence that Tendler did not have a probability of success on the merits.

On October 12, 2007, while Mr. Guevara still represented Tendler, the court

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[5/] Given Tendler's claim, discussed elsewhere, that he was **never** represented by counsel in California, we note that Tendler's signature on the form constitutes an acknowledgment that, through that date, his counsel in this case was Mr. Guevara.

[6/] The September 27 substitution does not appear on the Court's docket; apparently, it was rejected for filing because of this defect.

granted the anti-SLAPP motion, noting that a plaintiff "may not avoid liability for attorney fees and costs by voluntarily dismissing an action while a special motion to strike is pending. [See *ARP Pharmacy Services, Inc. v. Gallagher Basset Services, Inc.* (2006) 138 Cal. App.4th 1307, 1323.]" The court further found that defendants had shown that they would have prevailed on the merits of the SLAPP motion but for the voluntary dismissal. Accordingly, the court awarded defendants their attorney fees and costs. Does' counsel promptly served notice of the order on Mr. Guevara on October 12, 2006, thus starting the running of the time for any motion for reconsideration. Cal. Code of Civ. Proc. § 1008(a).

On October 18, 2007, Tendler filed a substitution of counsel form, again designating himself as pro se. He still refused to list his own address and telephone number, providing instead contact information for his brother Hillel Tendler, an attorney in Baltimore, Maryland. By signing this document, which identified Mr. Guevara as the attorney being substituted out of the case, Tendler acknowledged that, up to that date, he was represented by Mr. Guevara in the proceeding. Docket Sequence No. 30.

Pursuant to the court's order granting defendants' special motion to strike, on November 7, 2006, the Doe defendants through their counsel filed their motion seeking $40,496.25 in attorney fees (including a multiplier) and $1,745.64 in costs. Docket Sequence Nos. 31-34. As reflected in the proof of service, and in the Levy

Reply Affidavit later filed on the fee motion, the papers were served on Tendler through his brother's address in Baltimore. In fact, in attempting to set the hearing date for the motion, Does' undersigned counsel attempted to contact Hillel Tendler (no telephone number having been provided for Tendler himself). However, by letter dated November 7, Hillel Tendler wrote to the court, disclaimed any ability or willingness to confer with Does' counsel on behalf of his brother Mordecai Tendler, and provided a street address for Mordecai Tendler.

One week later, Tendler wrote to the court about the possible fee award. By letter dated November 15, 2006, Tendler expressed his outrage that the Does had made a "claim for almost $50,000," but did not make any specific objections to the requested amount. Instead, he limited himself to objecting to the court's SLAPP ruling, and asked that it be reconsidered so that Tendler could enforce his subpoenas and obtain the identities of his anonymous critics. Tendler attached to his letter a series of pages printed from Internet blogs, hardly any of which had been posted by the Doe defendants, and asserted in his unsworn letter that every allegation of sexual impropriety that had been "circulated about me" was false. Nevertheless, he argued that "whether or not these disgusting statements are true or false is not the issue presented to the California judicial system," Letter at 2, because, he claimed, the SLAPP law was limited to protecting citizens who criticize public officials. Accordingly, Tendler asked Judge Cabrinha to "un-do the order" granting the Does'

SLAPP motion, and to issue new subpoenas to Google "in the interest of justice." *Id.* at 4.

Defendants construed the letter as both an opposition to their motion to set a specific amount of attorney fees, as well as a motion for reconsideration, and filed a reply brief dated December 11, 2006. Defendants described their many efforts to serve Tendler, at first through his counsel and then individually, so that he would have a full opportunity to respond to all motions. As reflected in the proof of service, Mr. Levy's affidavit, which noted the January 4, 2007 hearing date in the caption, was served on Tendler. The reply brief argued that the motion for reconsideration was untimely filed and had, in any event, presented neither "new facts" nor law meriting reconsideration of the SLAPP ruling against him.

By letter dated December 27, 2006, Tendler responded to the Does' reply brief by a letter to the Court that he did not serve on the Does. In fact, Tendler claimed that he did not **have** to serve counsel because the Does might post his letter brief on the Internet. In this sur-reply, Tendler insisted that he had never been represented by counsel "in connection with Mr. Levy's and Ms. Cohn's games" – that is, in connection with the SLAPP motion which, he apparently assumed, was a separate proceeding. At the end of the letter, Tendler stated that the January 4 hearing date was inconvenient and asked that it be rescheduled. The clerk rejected the letter in light of Tendler's failure to provide a proof of service, thus making the

letter an ex parte communication with Judge Cabrinha. Tendler re-sent the letter on January 4, 2007, with a copy to Mr. Levy and a one-page cover note to the court asking to be notified "when any hearing is scheduled."

The motion to set a specific amount of fees and costs was heard on January 4, 2007, as scheduled. Even though Tendler had not made any specific arguments about the amount of fees sought, the court scrupulously reviewed the fee request, disallowing some entries and declining to award a multiplier. After that review, the court slashed the fee request by more than half, and Does' counsel was directed to submit a form of order with the amount calculated based on the court's oral instructions. Counsel served a copy of the form of that order on Tendler, who replied to the proposed order with another letter, dated January 10, 2007, asking to reopen the entire matter. Tendler argued that because he was a New York resident, the Court did not have jurisdiction over him, and that because he had never authorized an attorney to represent him to defend the SLAPP motion, the entire proceeding had to be set aside because the Does had served papers on his (supposedly former) counsel in the underlying suit against the Does rather than serving him personally. Letter at 1, ¶¶ 1-5. Tendler objected to the fees sought, but provided nothing more specific about the amount than that it was "excessive." Letter at 2, ¶ 11. Tendler further argued that, because his December 27 letter had asked for a postponement, he was entitled to refuse to attend the hearing on the

assumption that the extension would be granted. *Id.* at 1[7/]

By letter dated January 12, 2007, Does' counsel responded to Tendler's January 10 letter, explaining once again the details of the Does' service on Tendler. Counsel also pointed out that although Tendler included numerous factual representations in his letter, the letter was not verified (and many of the representations were false). Finally, counsel attached the form of order that the court had directed at the January 4 hearing. Tendler replied yet again by letter dated January 18, 2007 (again, an unverified letter), which, among other points, denied that he had ever engaged Mr. Guevara or anybody else to represent him in California, and stated that, in, fact Mr. Guevara had not even represented him in California, even though he admitted that he had hired Mr. Guevara to obtain the California subpoenas to serve on Google. In an order signed January 18, 2007, and filed on January 23, 2007, the court awarded $20,330 in attorney fees.

Tendler filed an appeal on January 8, 2007. He did not serve a copy of the appeal on Does' counsel.

[7/] Tendler did not explain why, upon learning from the receipt of the clerk's rejection letter that his December 27, 2006 letter had not reached the court, he did not at least try to telephone opposing counsel or the clerk's office to advise them of his problem with the date. Instead, Tendler deliberately renewed his request by a letter that he must have recognized would not reach the court until after the hearing date.

ARGUMENT

On appeal, Tendler has failed to articulate, much less support, any credible reason for rejecting the rulings below. Instead, he attempts to distract this Court with ad hominem attacks on the defendants and patently absurd claims that the scandal in which he was the central player – a scandal widely discussed in the press and on the Internet – was not of public interest. None of these arguments were raised below; but even if they had been, they lack any merit.

Mr. Tendler's procedural objections are equally inappropriate, given that he failed to present them timely below, and that his procedural difficulties, if any, were the direct consequence of his own unsuccessful maneuvering to avoid responsibility for the proceeding that he initiated in order to try to scare defendants out of the exercise of their rights of free speech. Accordingly, the judgment should be affirmed.

I. TENDLER'S ACTION AGAINST THE DOES WAS A SLAPP.

The main issue in this appeal is whether the ruling below – finding that Tendler's proceeding was a SLAPP and, as required by the statute, awarding fees expended defending against that SLAPP – was correct. That question is easily answered in the affirmative.

A. The California Anti-SLAPP Law Was Enacted to Protect the Fundamental Constitutional Rights of Petition and Speech and Is to Be Construed Broadly.

In 1992, in response to the "disturbing increase" in meritless lawsuits brought "to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances," the Legislature overwhelmingly enacted California's anti-SLAPP law, Code of Civil Procedure section 425.16, to protect against these SLAPPs. (Subsequent section references herein are to the Code of Civil Procedure unless otherwise indicated.) In 1997, the Legislature unanimously amended the anti-SLAPP statute to mandate expressly that it "shall be construed broadly." Stats. 1997, ch. 271, § 1; amending § 425.16(a). This amendment also added subdivision (e)(4) to the statute, making clear that section 425.16 covers any conduct that furthers petition or speech rights, not just statements and writings. In 1999, the Supreme Court issued its first opinion construing the anti-SLAPP law, directing that courts, "whenever possible, should interpret the First Amendment and section 425.16 in a manner 'favorable to the exercise of freedom of speech, not to its curtailment.'" *Briggs v. Eden Council for Hope and Opportunity,* 19 Cal.4th 1106, 1119 (1999), quoting *Bradbury v. Superior Court*, 49 Cal. App.4th 1108, 1114 n.3 (1996).

The Supreme Court has repeatedly reaffirmed the principle of broad construction of the SLAPP statute. In *Jarrow Formulas v. LaMarche*, 31 Cal.4th

728, 3 Cal. Rptr.3d 636 (2003), a unanimous Court held that malicious prosecution claims were not exempt from the anti-SLAPP law. The opinion emphasized the plain language of the statute, noting that "[n]othing in the statute excludes any particular type of action" and "the express statutory command that this section shall be construed broadly." *Jarrow Formulas*, *supra*, 31 Cal.4th at 742. The statute expressly excludes "any enforcement action brought in the name of the people of the State of California [by one of enumerated officials] acting as a public prosecutor." Every other form of action is included in the scope of the SLAPP law. This action, in which plaintiff seeks an order stripping defendants of their right to speak anonymously because of allegedly defamatory speech, is covered by the SLAPP statute.

B. Tendler's Action Arose from Speech by the Does Protected by Prongs (2), (3), and (4) of the Anti-SLAPP Statute.

The Supreme Court has explained the defendant's burden on a special motion to strike:

> Section 425.16 posits . . . a two-step process for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. (§ 425.16, subd. (b)(1).) "A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e)" *(Braun v. Chronicle Publishing Co.* (1997) 52 Cal. App.4th 1036, 1043). If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim.

Navellier v. Sletten, 29 Cal.4th 82, 88 (2002).

To invoke the protection of the anti-SLAPP statute, a defendant must merely make a prima facie showing that plaintiff's suit arises from any act of defendant in furtherance of the right of petition, and/or the right of free speech in connection with a public issue. § 425.16(b)(1); *Braun v. Chronicle Publishing Co.*, 52 Cal. App.4th 1036, 1042-43 (1997). In deciding whether the initial "arising from" requirement is met, a court considers "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." § 425.16(b). *Navellier*, *supra*, 29 Cal.4th at 89. The statute's definitional focus is not on the form of the plaintiff's suit, but rather on the defendant's activity giving rise to his or her asserted liability and whether that activity constitutes protected speech or petitioning. *Id.* at 92.

Subdivision (e) of the anti-SLAPP statute sets forth four illustrations of the types of acts covered under the statute:

(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

Perusal of the four blogs in question reveal that this action arises from

statements covered under subdivisions (e)(2), (3) and (4) of the anti-SLAPP law. First, the charges against Tendler are the subject of a lawsuit brought by one of his alleged victims against Tendler, and by Tendler against his synagogue over his dismissal. There are also proceedings before a rabbinical court, but this Court need not decide whether such a court is a "judicial body" within the meaning of the SLAPP law because the blogs discuss both issues that are the subject of litigation in the courts of New York state, and the cases themselves. Because those comments form the basis of Tendler's defamation claim, the case is a prima facie SLAPP under subsection (e)(2).

Tendler argues (Br. at 9) that subsection (e)(2) does not apply because "the defamatory statements were made long before any of [the] legal actions surrounding this case were initiated." This argument is belied by Tendler's own representations to the court below. Although Tendler has steadfastly refused to specify the statements over which he is suing the Doe bloggers, every statement contained in his attachment to the November 15 letter was made in 2006 (the earliest was January 10, 2006), which is after the December 20, 2005, filing date of a lawsuit in which the plaintiff alleged that Tendler told her to have sex with him because it would help her open up to men, and thus find a husband. This lawsuit – the suit that Tendler's brief characterizes as being brought by "a woman who claims that I assaulted her," Br. at 5 – is at the center of the public controversy discussed by the Does on their blogs.

Levy Affidavit, Exhibit 14, at 7 (discussing statute of limitations and stating filing date).

Subsections (e)(3) and (4) also apply to the Does' speech. The Internet is a vast public forum, *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), and the issue of sexual abuse by members of the clergy is a matter of intense public interest. The Tendler scandal on which defendants' blogs comment plainly relates to this broader issue. Even taken by itself, the extent of public interest in the Tendler controversy is shown by repeated coverage by both the secular media, such as the New York Post, the Journal News, and New York area television stations, and by various Jewish publications including the Forward and Jewish Week. *See* Dratch Affidavit ¶ 12 and attached articles, filed July 6, 2007. Moreover, a Google search for "Mordecai Tendler" reveals the large number of web sites and blogs that have devoted considerable attention to the Tendler scandal, further evidence of the extent to which this controversy has been a matter of public interest for the past three years.

As one court has noted, "The definition of 'public interest' within the meaning of the anti-SLAPP statute has been broadly construed to include not only governmental matters, but also private conduct that impacts a broad segment of society . . .." *Damon v. Ocean Hills Journalism Club,* 85 Cal. App.4th 468, 479 (2000) . Among the matters that have been judicially accepted as within the "public interest" are statements and a letter regarding a landlord-tenant dispute, *Dowling v.*

Zimmerman, 85 Cal. App.4th 1400, 1420 (2001); communication to city officials and employees about a proposed development, *Tuchscher Development Enterprises v. San Diego Unified Port District*, 106 Cal. App.4th 1219, 1234 (2003); and communications about possible legislation concerning mail order contact lens sales. *1-800-Contacts v. Steinberg,* 107 Cal. App.4th 568, 583 (2003). If these examples of private conduct have enough impact on society to qualify as being of public interest, surely allegations of sexual misconduct by a prominent member of the religious community, that have resulted in several litigations, qualifies as well. Accordingly, defendants' blogs about the Tendler sexual abuse scandal are covered by subsections (e)(3) and (e)(4) of the anti-SLAPP law.

Tendler complains that it was the Doe defendants, not the press, who created the controversy. Br. 9. This argument is demonstrably false – this controversy has been widely reported since at least August 2004, when a detailed account was published in the *Forward*, the leading American Jewish periodical. *See* Schaecter, *Rabbinical Council Is Probing Claims of Sexual Harassment*, attached to the Dratch Affidavit and currently available at http://www.forward.com/articles/rabbinical-council-is-probing-claims-of-sexual-har/ (last viewed July 27, 2007).[8/] Because

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[8/] Two more articles attached to that affidavit were published in March and April of 2005. Tendler's refusal to identify the specific comments that he charges are false and defamatory prevents defendants from saying with more specificity whether they were made after these publications or whether, if they were made before the publications, suit is plainly barred as untimely.

most states have a one year limitations period for libel claims –including California, Code of Civil Procedure § 340(c), New York, New York Civil Practice Law and Rules ("CPLR") Rule 215, and Ohio, Ohio Revised Code § 2305.11 – and Tendler did not initiate his subpoena proceeding even in Ohio until early 2006, he could not possibly be suing over statements made before this article.[9/]

Moreover, the abusive way in which Tendler has pursued this litigation makes it a very typical SLAPP. First, instead of filing suit in his home jurisdiction of New York, where he would have had to file a libel complaint that specifically identified the allegedly defamatory words, *Erlitz v. Segal, Liling, & Erlitz*, 142 App. Div.2d 710, 712, 530 N.Y.S.2d 848 (2d Dept.1988); CPLR Rule 3016(a), Tendler went forum shopping to Ohio, where state law apparently allows him to obtain an ex parte order allowing discovery after filing a petition in entirely conclusory terms.

Yet, even in Ohio, Tendler failed to follow the rules to avoid scrutiny of his claims and tactics. In defiance of the requirement of Ohio law that requires that the adverse party be served, Rule 34(D) of the Ohio Rules of Civil Procedure, Tendler overlooked the parts of the blogs that revealed defendants' contact information.[10/]

[9/] We need not discuss here the question whether the statute of limitations was tolled by the filing in Ohio.

[10/] Each of the blogs identified in the petition had a working "comment" feature that would have allowed Tendler or his counsel to post a comment revealing the intention to seek discovery. Moreover, two of the blogs contained "profiles" that reveal the operators' email addresses; this includes the "Jewish Whistleblower" blog, whose commentary capability has been disabled. The

Then, after the Ohio proceeding was dismissed for want of prosecution, Levy Affidavit, ¶ 2 and Exhibit 3, Tendler filed the present action, representing that he was proceeding on the basis of an order of the Ohio court while hiding from the Court the fact that the Ohio case had already been dismissed. The affidavit requesting issuance of subpoenas also misstated the scope of the Ohio action, because Tendler decided that he wanted to identify the operators of four blogs and represented that he had been given such broad authority, even though his Ohio petition actually alleged false or misleading statements on **three** blogs. And, after the Does' counsel alerted Tendler's counsel to the misrepresentation in his affidavit seeking subpoenas from this Court, and asked for notice if Tendler sought further relief, Tendler deliberately went back to the Ohio court to request reopening of the case without either notifying the Does counsel or notifying the Ohio court that the Does were now represented by counsel.

These abusive litigation tactics continued even after the Does filed their anti-SLAPP motion, when Tendler's counsel claimed that they had been discharged by their client and hence he could not be served through him, yet, even after being supposedly discharged, apparently contacted the clerk's office on Tendler's behalf to have the SLAPP motion taken off calendar, again without notice to the Does. After Tendler's California counsel had to appear at the August 29 hearing because

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Ohio court was not informed that this means of contacting the Does existed.

he had not filed the required substitution of counsel form, he filed a form that failed to include Tendler's address, again trying to prevent Tendler from being served with papers on the pending SLAPP motion. Then, Tendler filed an untimely motion for reconsideration, went through the motions of submitting an untimely request to continue the January 4 hearing to set the amount of fees to be awarded, and made frivolous arguments such as that the California courts have no jurisdiction of his person for wrongs committed in the proceeding that he voluntarily initiated in California, and that he was never notified of hearings nor had the responsibility to respond to motion papers because service on his attorneys did not constitute service on him. This is precisely the sort of abusive tactic at which the SLAPP statute was aimed.[11/]

[11/] Despite the belated representations of Tendler's counsel that the matter would be closed with the withdrawal of the subpoenas, Tendler's reconsideration requests below, November 15 letter, at 4; December 27 letter, at 3, 4, 5, and his opening brief on appeal, Br. at 8, make clear that Tendler **still** intends to pursue discovery proceedings to identify the bloggers, and still hopes to obtain their names without first making **any** evidentiary showing that the bloggers have made false statements of fact. The bloggers were fortunate to have received notice despite Tendler's best efforts to obtain court orders allowing discovery ex parte, and it is apparent that final affirmance of a SLAPP fee award may be needed to deter Tendler from seeking yet another forum in which to pursue his critics. *See City of Los Angeles v. Animal Defense League*, 135 Cal. App. 4th 606, 628 n.19, 37 Cal.Rptr.3d 632, 650 n.19 (Cal. App. 2 Dist. 2006) (part of purpose of SLAPP law is to discourage meritless litigation based on free speech).

C. Tendler's Arguments Against SLAPP Coverage Lack Merit.

Tendler's brief makes three principal arguments about why the SLAPP statute could not possibly apply to him, but none of them are sound. First, he contends that his suit is not intended to chill speech, but simply to seek redress against defamation. Br. 7. However, it is well-established that a defendant need not prove that the plaintiff had the intent to chill free speech. *Equilon Enterprises v. Consumer Cause*, 29 Cal.4th 53, 59, 124 Cal.Rptr.2d 507, 512, 52 P.3d 685, 688 (2002). Defendant need only show that plaintiff's suit "arises from" an act in furtherance of the constitutional right to petition or free speech. *Id.*

Second, Tendler argues that the SLAPP law was not intended to protect parties like the bloggers whom he is suing because, he says, they are not "innocent folks," but have shown "hatred and bad intentions" in their statements, and that the court should give no credence to affidavits submitted to show why the Does have reason to fear being identified, because they are perjurious. Br. at 7-8. But these arguments put the cart before the horse. The question of whether the bloggers have animus may relate to the question of actual malice, which is one of the elements of Tendler's defamation cause of action, but that is an issue that Tendler must address in showing that he has a probability of success on the merits – and it becomes relevant only once Tendler makes a convincing case that he is suing over **false** statements, and over statements of fact and not of opinion, which he has never done.

Similarly, the statements in the Blau and Dratch affidavits about the consequences of being identified as critics of Tendler relate to the "balancing" stage of the test for the identification of anonymous Internet speakers, an issue that relates to "probability of success on the merits" and which, again, need be reached only if Tendler shows false statements of fact. Neither contention undercuts the applicability of the SLAPP law here.

Finally, Tendler argues that he is not one of the SLAPP law's "intended bad actors" because he is, allegedly, not a public figure. This claim fails for at least two reasons. To begin with, Tendler is **at least** a limited-purpose public figure both by virtue of the extensive public controversy over his involvement in sex scandals and his status as the scion of one of the most important rabbinical families in American Orthodox Judaism (making him an involuntary public figure), and by virtue of his position as a rabbi in a major synagogue, his filing of litigation against that synagogue, and his advocacy on feminist issues (making him a voluntary public figure).[12/] But even if Tendler had any realistic chance of avoiding public figure

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[12/] These facts are detailed in the *Jewish Week* articles attached to the Dratch Affidavit, as well as in the Dratch and Blau Affidavits themselves. In his letters seeking reconsideration below, Tendler argued that he was outside the scope of the SLAPP law because he was not a public official, but never challenged his status as a public figure. Tendler's failure to raise this point in the court below waived it for purposes of appeal. *Feduniak v. California Coastal Com'n*, 148 Cal.App.4th 1346, 1381, 56 Cal.Rptr.3d 591, 617 (Cal.App. 6 Dist. 2007); *Newton v. Clemons*, 110 Cal.App.4th 1, 11, 1 Cal.Rptr.3d 90, 98 (Cal.App. 4 Dist. 2003).

status, the First Amendment protects the right to criticize private figures, and so such criticism can be "an act in furtherance of the right of free speech" under section 452.16(b). Moreover, the SLAPP law protects the right to speak on issues that are under review in judicial or administrative proceedings, whether or not they involve public figures or are otherwise about issues of public interest. *Briggs v. ECHO*, 19 Cal.4th 1106, 1113-1114, 81 Cal. Rptr.2d 471, 475-476, 969 P.2d 564, 568-569 (1999). Like Tendler's second objection, this is an issue that goes to the showing that he must make of a probability that he will prevail against the bloggers, by affecting whether Tendler must show actual malice or only negligence. Again, he will reach that stage of the analysis only if he can show that he is suing over false statements of fact.

In sum, Tendler has not provided any reason to reverse the ruling below that his action against the Does was covered by the SLAPP statute. It was his obligation to show that he had a probability of prevailing against them.

II. TENDLER HAS NOT SHOWN ANY PROBABILITY OF PREVAILING AGAINST THE BLOGGERS.

Tendler has utterly failed to carry his burden of showing that he had any likelihood of prevailing on his underlying claim against the bloggers. He refuses to specify the defamatory statements on which he seeks to proceed, so that they can be checked to see whether they are statements of opinion or of fact and whether they were made outside the statute of limitations, and he has produced no evidence that

any statements made about him are false. Even in this Court, where his brief is verified under penalty of perjury, the word "false" appears only twice in his brief – once in contesting the argument made by the Does below that his procedural shenanigans below represented a "shrewd strategy . . . to avoid the anti-SLAPP action," Br. 6, and once in referring, in only the vaguest terms to the injury done to him "by the false accusations." Br. 4. That is the closest that Tendler has come to meeting his evidentiary burden, and it is neither sufficient under the SLAPP law nor timely, since his obligation was to make an evidentiary showing in the trial court.[13/]

Tendler suggests that it is somehow unseemly for a California court to determine whether he has any **legally valid** claims against the Does and whether there is any **evidence** of actionable conduct before enforcing subpoenas, Br. 7, but that is simply the consequence of the fact that Tendler affirmatively and voluntarily chose to use California's legal processes and court system to unmask his critics by compelling responses from a California company. Both the United States and California Constitutions protect the right to speak anonymously. *McIntyre v. Ohio Elections Comm*. 514 U.S. 334, 341-342 (1995); *see also Rancho Publications v. Superior Court*, 68 Cal. App.4th 1538, 1545, 1547, 1549 (1999) (quashing subpoena seeking the names of anonymous authors of nondefamatory advertorials).

[13/] The verification neither states that it is on personal knowledge, nor is qualified as being on information and belief. However, several statements in the brief could not possibly be within Tendler's personal knowledge.

In every state whose courts have addressed the question, when a plaintiff claiming defamation or some other tort seeks to harness government authority to compel an Internet Service Provider to identify the anonymous speaker, the consensus approach of the many courts that have considered such demands is to require at the very least that (1) each of the statements sued on be identified verbatim, (2) the would-be plaintiff show he has legally valid claims, and (3) evidence be presented supporting elements of the cause of action such as falsity.[14/] Although there are no reported decisions yet in the California state courts, the United States District Court for the Northern District of California has strongly endorsed this approach, including the additional requirement, followed in some states, *e.g.*, *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001), that the free speech interests of the speaker be balanced against the interest of the would-be plaintiff. *Highfields*, *supra* note 14.

Because the subpoenas were issued pursuant to California law, any challenge

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[14/] *E.g., Reunion Industries Inc. v. Doe 1,* 2007 WL 1453491, 80 Pa. D. & C.4th 449, 454 (Pa. Com. Pl. Mar. 05, 2007); *McMann v. Doe*, 460 F. Supp.2d 259 (D.Mass. 2006); *Best Western Int'l v. Doe*, 2006 WL 2091695 (D Ariz. July 25, 2006); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005); *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d 969 (N.D. Cal. 2005); *Sony Music Entertainment v. Does 1-40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004); *Alvis Coatings v. Doe*, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004); *La Societe Metro Cash & Carry France v. Time Warner Cable*, 2003 WL 22962857, 36 Conn. L. Rptr. 170 (Conn. Super. 2003); *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001); *Melvin v. Doe*, 49 Pa. D. & C. 4th 449 (2000), *rev'd on other grounds*, 575 Pa. 264, 836 A.2d 42 (2003).

to them **must** be brought in the California courts. The Does could not have challenged the subpoena anywhere else. And any court that is asked to issue an order that could infringe free speech rights – including the right to speak anonymously – is only meeting its constitutional duty when it considers whether the order is **needed** to serve a compelling government interest, and it does nothing unseemly when it applies established rules that sanction actions brought without a probability of success.

Indeed, although Tendler complains about having to make this showing below, he deliberately avoided being put to the same test in Ohio by filing there, without revealing that he was not an Ohio resident, and without giving any notice to the Does so that they could move to quash the proceeding there.[15/] Not only did Tendler not give notice when he first filed his Ohio complaint, but after the Does'

[15/] In his opening brief, Tendler asserts that he filed in Ohio because it is a fact that Rabbi Yosef Blau, who prepared an affidavit for use in this case, "encourage[d] and participate[d]" in defamatory Internet postings about him, Br. at 3, and that he suspects that Blau's statements originated in Ohio. Br. at 4. Apart from the facts that this factual assertion is raised for the first time on appeal, and that Tendler provides no basis whatsoever for his charge that Blau had any involvement in unspecified Internet statements that allegedly defame Tendler, Blau's affidavit reflects that he is an official at Yeshiva University in New York. The notion that Blau lives or speaks in Ohio is absurd. Indeed, if Tendler truly believed his statement (in a verified brief) that Blau is one of his defamers, Tendler would not have needed any discovery to identify defendants; he could simply have sued Blau in his own name. It is apparent that Tendler has no intention of filing a defamation suit against any named defendant who might respond by taking his deposition.

counsel pointed out to Tendler's counsel that, contrary to representations below, the Ohio court had dismissed the proceeding for lack of prosecution, Tendler moved to reopen the Ohio proceeding without giving notice to Does' counsel. And this was not just lack of notice – Tendler's counsel represented that the Ohio case had **already** been reopened, and then **after** making that representation filed a motion in the Ohio court to reopen without giving any notice. The incredible irony of Tendler's "due process" complaints – that he personally did not receive "notice" of proceedings in the court below (when notice had been given to his counsel) – is that Tendler had gone out of his way to deny notice to **either** the Does **or** their counsel. In any event, in light of these shenanigans to avoid having the right of anonymous speech raised in the Ohio court, Doe cannot complain that those objections were presented in California.

In sum, Tendler has not made any showing that he has a probability of prevailing on the merits. The award of SLAPP fees and costs should, therefore, be affirmed.[16/]

[16/] Tendler also objects to the amount of the award, but **none** of his arguments in that respect were presented to the trial court. In this regard, the fee papers were sent to the address designated by Tendler in the October 18 Substitution of Attorney form that he signed, and the reply papers were sent to his home address. He personally submitted argument letters to the trial judge about the motion to set the amount of fees, but did not raise any of the arguments that he now makes about the amount of fees. Tendler also knew of the hearing date but elected not to attend. Moreover, even in the absence of objections from Tendler, the trial judge carefully reviewed the fee request and awarded

III. TENDLER'S PROCEDURAL OBJECTIONS TO THE RULING LACK MERIT.

Tendler advances a series of meritless procedural objections to the SLAPP award.

First, Tendler argues that he "ha[s] no business or presence in California," and that he never "had a lawyer to represent me in" connection with the SLAPP motion below. Br. at 5-6. These arguments appear to repeat the points that Tendler made in his letters to Judge Cabrinha, that the court below lacked jurisdiction of his person, and that delivery of the motion to his attorney was insufficient to require him to respond to that motion. These arguments should be rejected as frivolous. Tendler plainly **did** have Mr. Guevara represent him in California – that's how he got California subpoenas issued. A party who brings a claim in court does not deprive that court of jurisdiction to impose sanctions for having brought the claim wrongfully by the expedient of dismissing the claim before sanctions are sought.

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less than half of the amount sought. Hence, none of Tendler's arguments about the amount of fees awarded have been preserved for appeal. *Feduniak v. California Coastal Com'n*, 148 Cal.App.4th 1346, 1381, 56 Cal.Rptr.3d 591, 617 (Cal.App. 6 Dist. 2007); *Newton v. Clemons*, 110 Cal.App.4th 1, 11, 1 Cal.Rptr.3d 90, 98 (Cal.App. 4 Dist. 2003); *In re Marriage of King*, 80 Cal.App.4th 92, 117, 95 Cal.Rptr.2d 113 (Cal. App. 1 Dist. 2000). It is noted that his argument that fees cannot be awarded to counsel whose representation was pro bono has been repeatedly rejected. *Rosenaur v. Scherer,* 88 Cal.App.4th 260, 283, 105 Cal.Rptr.2d 674, 689 (2001). *See also Lolley v. Campbell*, 28 Cal.4th 367, 374, 121 Cal.Rptr.2d 571, 575, 48 P.3d 1128, 1132, (Cal. 2002).

See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 394-396 (1990). Personally bringing a wrongful legal proceeding in a particular state – or authorizing a lawyer to do so on his behalf – is like any other tort committed in the state, and constitutes "purposeful availment of the forum" sufficient to support personal jurisdiction. *Minerva Marine v. Spiliotes*, 2006 WL 680988 (D.N.J. Mar. 13 2006), at *7. As the Supreme Court held in *Adam v. Saenger*, 303 U.S. 59, 67-68 (1938),

> There is nothing in the Fourteenth Amendment to prevent [California] from adopting a procedure by which a judgment in personam may be rendered in a cross-action against a plaintiff in its courts, upon service of process or of appropriate pleading upon his attorney of record. The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence. It is the price which the state may exact as the condition of opening its courts to the plaintiff.

This case is on all fours with *Saenger*: the SLAPP motion here was served on Tendler's California counsel, who filed the proceeding to obtain California proceedings, and that service was sufficient to impose on Tendler the duty to respond, regardless of whether the motions were sent to him directly.

Tendler also argues that he was never represented by counsel in connection with the SLAPP proceeding, that he "did not have notice of most of the proceedings" below, that he "had no notice of what was happening in California until it was too late," and that for this reason he "did not have the opportunity to defend [him]self." Br. at 5-6. This entire argument rests on an unstated but wholly

false assumption – that the Does' SLAPP motion was a proceeding separate from the case that he authorized Mr. Guevara to file on his behalf in the court below. But the SLAPP motion was not a separate proceeding; it was a part of the very proceeding that Tendler had authorized, and he can no more declare that Mr. Guevara was not his attorney for the purpose of the SLAPP motion than he can disclaim representation to avoid responding to any other motion in the case that he finds inconvenient.

Nor was his "discharge" of his lawyer effective, until he properly substituted other counsel for Mr. Guevara, or substituted himself as a party *in propria persona*. California Code of Civil Procedure, §§ 284, 285. Section 284 provides that the attorney may be changed "1. Upon the consent of both client and attorney, **filed with the clerk, or entered upon the minutes.**" (emphasis added). The fact that Tendler and his attorney(s) reached a private agreement was not sufficient, until that agreement was properly filed in court. Section 285, in turn, provides that when the attorney is changed, "**written notice** of . . . the appearance of the party in person **must** be given to the adverse party. Until then, **he must recognize the former attorney."** (emphasis added). When a party purports to discharge his attorney, but fails to follow this statutory procedure, service of papers must still be made on the attorney, and "service binds the client until the attorney is discharged or substituted out of the case as provided by law." *Forslund v. Forslund*, 225 Cal.App.2d 476,

487-488, 37 Cal.Rptr. 489, 496-497 (Cal.App. 1 Dist. 1964).

Indeed, Tendler's own attorney, Mr. Guevara, evinced his recognition that he was still representing Tendler in August, 2006, by two actions that he took during that month – first, by contacting the clerk on Tendler's behalf to get the Does' SLAPP motion taken off calendar, and second, by appearing at the August 29 ex parte hearing that the Does scheduled in order to get the motion restored to the calendar.

Finally, Tendler himself evinced his recognition of the fact that Mr. Guevara remained his attorney by signing two separate "Substitution of Attorney – Civil" forms, once on September 27, 2006, and again on October 18, 2006. The first form was not effective, because it did not include any address or telephone number for Tendler. California Court Rule 315(b) provides, "substitution of a party as attorney in propria persona **shall include** the mailing address and telephone number of the party." Under sections 284 and 285, and the authority of *Forslund* and the many other California decisions to the same effect, as of September 27 Tendler had not discharged or substituted his attorney "as provided by law," and service was properly made on Mr. Guevara through that time and thereafter. Tendler again acknowledged Mr. Guevara's continued representative authority by signing the second substitution form on October 18. Because the decision holding Tendler liable for the SLAPP was filed on October 12, 2006, before Tendler effectively

discharged Mr. Guevara, he is bound by all papers served on Mr. Guevara, including not only the SLAPP motion papers but also the notification of the SLAPP order. Consequently, Tendler's failure to move for reconsideration within ten days of that order made it untimely under § 1008(a) of the Code of Civil Procedure.[17/]

Finally, in the substitution form that he signed on October 12, Tendler provided the address at which he was to be served – the address of his brother Hillel Tendler who is a practicing attorney in Baltimore, Maryland. The motion for award of a specific amount of attorney fees was served on Tendler at the address that he provided, and his brother's letter to Judge Cabrinha acknowledged that Does' counsel had been contacting him. Thus, Tendler had effective notice of the motion for award of a specific amount of fees, not to speak of notice of the hearing date. Indeed, in his later correspondence to the court below, Tendler conceded that he knew when the hearing was scheduled to be held. Accordingly, Tendler's failure to submit any specific arguments about the size of the fee, and his failure to attend the hearing, do not in any way render the ruling at that hearing defective. Rather, Tendler waived for appeal all the points that he failed to present on the issue of the amount, and, indeed, on the issue of whether he violated the SLAPP law.

In short, Tendler's attempt to use clever procedural arguments to wriggle out

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[17/] Even construed as a motion for reconsideration it was defective because Tendler did not provide any affidavit showing any "new or different facts, circumstances, or law," as also required by § 1008(a).

of responsibility for his SLAPP has failed, and the judgment against him should be affirmed.

CONCLUSION

The judgment of the Superior Court of California for the County of Santa Clara should be affirmed.

Respectfully submitted,

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CERTIFICATE OF WORD LENGTH

I certify that I prepared this brief using Word Perfect in Times Roman, 13 point font, and that Word Perfect counted 9689 words in the brief.

Paul Alan Levy

July 31, 2007

PROOF OF SERVICE

I hereby certify, under penalty of perjury under the laws of the State of California, that on this date I am causing two copies of the foregoing Brief for Respondents to be served by first-class mail, postage prepaid, on the pro se appellant Mordecai Tendler at his home address, 653 Union Road, Spring Valley, New York 10977, and four copies to be served on the Supreme Court at 350 McAllister Street, San Francisco, California 94102-4797.

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