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Attorney for Defendants
AARON KROWNE and
KROWNE CONCEPTS, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SOLANO

VALLEJO BRANCH

LOAN CENTER OF CALIFORNIA, INC.,

Plaintiff,

v.

AARON KROWNE, an Individual d/b/a ML-IMPLODE.COM and d/b/a MORTGAGEIMPLODE.COM; KROWNE CONCEPTS, INC., and DOES 1-50,

Defendants.

CASE NO. FCS029554

ASSIGNED FOR ALL PURPOSES TO
JUDGE R. MICHAEL SMITH
DEPARTMENT 7

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' SPECIAL MOTION TO STRIKE PLAINTIFF'S CLAIMS

(CCP § 425.16)

Date: July 27, 2007
Time: 8:30 a.m.
Arbitration Hearing Date: N/A
Discovery Cut Off: N/A
Discovery Motion Cut Off: N/A
Trial Date: None

I. INTRODUCTION

In its opposition to Defendants' motion to strike, Plaintiff Loan Center of California ("LCC") forwards three arguments:

> 1) That the anti-SLAPP statute does not apply because LCC itself has too little impact on too few people to be a proper subject of public interest, even though LCC is in the business of providing certain risky types of loans that have caused alarm in this country's banking, economic and government sectors;
>
> 2) That the Communications Decency Act does not privilege Defendants' decision to post, under the "Imploded" section of Defendants' Website, a third-party email reporting LCC's demise, nor does it privilege defendant Aaron Krowne's inclusion of the words "Loan Center of California – GONE" as the subject line on a "blog," and thus LCC has shown a probability of succeeding on its defamation claim; and
>
> 3) That defendant Aaron Krowne ("Krowne") is a "staunchly anti-authority and anti-elitist" "anarchist" who uses the Mortgage Implode Websites to "stick it to the man."

For the reasons set forth below, none of these arguments strip Defendants' First Amendment conduct from the protections of either the anti-SLAPP statute or the Communications Decency Act. Dismissal of Plaintiff's case is appropriate.

II. ARGUMENT

A. Information About LCC Was Posted In Connection With A Matter Of Public Interest.

LCC argues that it is not itself an independent object of public interest and, thus, the anti-SLAPP statute does not apply. This argument misapprehends the "public interest" requirement of California's anti-SLAPP statute.

Sections 425.15(e)(3) and (e)(4) of the California Code of Civil Procedure cover speech and conduct that is "in connection with" a "public issue" or "an issue of public interest." "The 'public interest' component of section 425.16, subdivision (e)(3) and (4) is met when 'the statement or activity precipitating the claim involved a topic of widespread public interest,' and 'the statement ... in some manner itself contribute[s] to the public debate.'" (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, 129 Cal.App.4th 1228, 1246 [holding that protests against a private animal testing lab implicated broader issue of public concern, namely animal rights].)

In construing the "public interest" requirement, California courts have repeatedly rejected

LCC's argument that this requirement is not met in discussions of private entities or people who were not themselves independent objects of public interest. For example, in *M.G. v. Time Warner*, defendants Time Warner and HBO had published articles and a TV program about child molestation. In that context, they displayed a photograph of a little league team whose coach had been accused of molestation. Other players and coaches in the photograph sued the defendants for invasion of privacy and other causes. They claimed that the anti-SLAPP statute did not apply because they were private individuals and not themselves the objects of any public interest. *M.G. v. Time Warner* (2001) 89 Cal.App.4th 623, 626.

The court rejected this argument as an overly restrictive interpretation of the public interest requirement. The *M.G.* court found that plaintiff's interpretation of "public issue" was too restrictive:

> Although plaintiffs try to characterize the "public issue" involved as being limited to the narrow question of the identity of the molestation victims [and, thus, excluding the plaintiffs], that definition is too restrictive. The broad topic of the article and the program was not whether a particular child was molested but rather the general topic of child molestation in youth sports, an issue which, like domestic violence, is significant and of public interest.

(*Ibid*.; see also *Lieberman v. KCOP Television, Inc*. (2003) 110 Cal.App.4th 156, 164-165 [unlawful dispensing of controlled substances was an issue of public interest, and few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances]; *Terry v. Davis Community Church* (2005) 131 Cal.App.4th 1534, 1549-1551 [discussion of specific individuals alleged to have engaged in inappropriate behavior with minors, but which affected only a small number of people, was protected as conducted in context of broader public issue; discussing cases]; *Huntingdon Life Sciences*, *supra*.)

Similarly, in *Wilkins v. Wolk*, the court held that disparaging statements concerning a small viatical brokerage and its owner were covered by the anti-SLAPP statute because the statements related to consumer welfare, which was itself an issue of public interest. (*Wilkins v. Wolk* (2004) 121 Cal.App.4th 883, 898-900.) In *Carver v. Bonds* (2005) 135 Cal.App.4th 328, plaintiff podiatrist sued over statements indicating he was dishonestly exaggerating his experience treating professional athletes. The court held that these statements fell within the "public interest" rubric because they

were made in connection with warnings about relying on physician representations, which was deemed an issue of public interest. (*Carver v. Bonds* (2005) 135 Cal.App.4th 328, 342.)

All of these cases involved the discussion of private individuals or entities in the context of a broader discussion of public interest. Similarly, the mention of LCC's alleged woes here occurred in the context of a broader discussion on the Website, namely the growing insolvency and instability of the mortgage lending market resulting from risky lending practices and lax government oversight. This broader discussion concerns an issue of overwhelming public interest, as shown by the involvement of the Federal government, media, and Wall Street. *See* Memorandum Of Points And Authorities In Support Of Defendants' Special Motion To Strike Plaintiff's Claims ("Mot.") at 3:13-28. These lending practices affect literally thousands of Californians and hundreds of thousands of Americans who have taken out these risky loans and whose homes are in jeopardy of foreclosure. *See* Declaration Of Aaron Krowne In Support Of Defendants' Special Motion To Strike Plaintiff's Claims ("Krowne Decl."), ¶¶ 16-17, Exs. A & F. These practices also implicate investors in bonds backing these mortgages. *See* Krowne Decl., Ex. H. LCC cannot argue that mention of it in this context is any less a matter of public interest than, for example, the mention of the viatical brokerage in the *Wilkins* case or the animal testing lab in *Huntingdon Life Sciences*.

LCC does not argue that any other requirements of the anti-SLAPP statute are not met in this case. LCC's argument about the "public interest" requirement has been rejected repeatedly, and should be rejected here as well.[1] The speech of Krowne and KCI here clearly meets the requirements of Section 425.16(e)(3) and (e)(4), rendering an anti-SLAPP motion appropriate.

B. LCC Cannot Prevail On Its Defamation Or Other Claims.

LCC argues that Krowne and KCI have engaged in independent acts of defamation by providing "specific, original content regarding LCC on the Websites and blog," which is not covered

[1] Taken to its logical conclusion, LCC's argument results in an absurdity. Specifically, LCC would rewrite the anti-SLAPP statute and the First Amendment to limit people to speaking about issues of public concern—such as insolvency in the mortgage lending market—in only the most abstract and general terms. As soon as anyone would mention a specific company as a basis for such concern—such as a mortgage lender that became insolvent—they would become exposed to the kind of punitive SLAPP suits that the anti-SLAPP statute is designed to discourage.

by the Communications Decency Act (CDA), Section 230. Specifically, LCC claims that Defendants:

- "described" LCC as "croaked, kaput, and imploded";
- Added LCC to the Website's "List of Defunct Lenders"; and
- Added the words "Loan Center of California – GONE" when posting the third-party email on Krowne's Autodogmatic "blog."[2]

LCC's contentions misstate the facts and again construe the governing statute too narrowly.

First, LCC's argument that Krowne/KCI "described" and "published statements" that LCC was "croaked, kaput, and imploded" implies that the Defendants added these words specifically in connection with LCC. Opp. at 7:3 and 7:21-21. But Defendants did no such thing. Indeed, even LCC itself acknowledges that these three words ***were already on the Website, before there had been any mention of LCC.*** See Opp. at 1:24-2:2. Thus, the fact that Defendants posted information about LCC on a Website that already had these words does not constitute the creation of "original content regarding LCC." This act is indistinguishable from the posting of the third-party email on the Website. The posting of the third-party email on the Website is squarely privileged under Section 230 of the CDA, a fact that LCC does not dispute. *See* Mot. at 11-12; Opp. at 7:1-11 (challenging only "original content," not third-party email). Consequently, LCC's argument based on the appearance of these words on the Website is unpersuasive.

LCC's next argument, concerning Defendants' posting of LCC's name in an index titled "List of Defunct Lenders," should be rejected because it reads the scope of the CDA's immunity too narrowly. Specifically, courts have held that defendants are protected by the CDA's immunity even though they might engage in the "traditional editorial functions of a publisher." *See, e.g., Barrett v. Rosenthal* (2006) 40 Ca.4th 33, 60 fn. 3. By contrast, for a defendant to lose immunity, he must actively participate in the creation or development of the underlying misinformation. *Ibid.*

The creation of an index falls within the "traditional editorial functions of a publisher," as

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[2] A "blog" is a "Web site (or section of a Web site) where users can post a chronological, up-to-date e-journal entry of their thoughts. Each post usually contains a Web link. Basically, it is an open forum communication tool that, depending on the Web site, is either very individualistic or performs a crucial function for a company." *In re Stevens* (2004) 119 Cal.App.4th 1228, 1236, fn. 3 [quoting Jensen, Netlingo the Internet Dictionary (1995-2004)].

evidenced by cases dating back over 100 years. *See, e.g., National Sec. Archive v. U.S. Dept. of Defense* (D.C. Cir. 1989) 880 F.2d 1381, 1387 (describing "devis[ing] indices and finding aids" as editorial acts of a news publisher); *Electronic Privacy Info. Center v. Department of Defense* (D.D.C. 2003) 241 F.Supp.2d 5, 10-12; *Johnson County Sports Auth. v. Shanahan* (Kan. 1972) 210 Kan. 253, 257-258, 499 P.2d 1090, 1095 [defining the preparation of an index by document and a descriptive word index as acts of "editorial judgment."]; *State v. State Journal Co.* (Neb. 1906) 77 Neb. 752, 770, 110 N.W. 763 (*dissent*) [dicta that preparation of indexes is an "editorial labor"].

Similarly, a website's facilitation of users' ability to search for and find information does not constitute the type of "active participation" in content development that falls outside of the CDA's immunity. *Carafano v. Metrosplash.com, Inc.* (9th Cir. 2003) 339 F.3d 1119, 1124.

Krowne's inclusion of an index that allowed a reader to easily locate the third-party email concerning LCC falls squarely within the "traditional editorial functions of a publisher."[3] Additionally, under *Carafano*, inclusion of an ability to search and find information through the use of an index on the Website does not constitute the type of active participation that would take one out of the ambit of CDA immunity. Krowne played no "significant role in creating, developing, or transforming the relevant information" (*id.*, at p. 1125) that forms the crux of LCC's complaint.

Lastly, LCC argues that the inclusion of the subject heading "Loan Center of California – GONE" on the Autodogmatic blog posting also constitutes original content subject to the defamation laws. Interestingly, nowhere does LCC argue that any of LCC's business partners saw this posting or acted upon it. Regardless, Krowne did not play any "significant role in creating, developing, or transforming the relevant information" (*id.*, at p. 1125) by including a subject line on his blog posting. The subject line does not render Krowne liable for the underlying misinformation. *See id.* at 1125 (website's structuring of information into different categories through use of specific questions did not render website responsible for underlying misinformation).

Furthermore, the subject heading, just like that of an email, merely described (accurately) the

[3] Although not expressly argued in their opposition, LCC has alleged that Defendants' act of posting the anonymous email under the "Imploded" heading in and of itself constituted an original statement not privileged by the CDA. For the same reasons that including LCC's name in an index falls within the "traditional editorial functions of a publisher," so too does posting the relevant third-party email in the appropriate place on the Website.

contents of the posting to which it related. Read in the context of its purpose—to identify the subject of the third-party email that was being posted—the subject heading was in fact an accurate description of the email and thus not in and of itself defamatory. The subject line also served the purpose of enabling users to locate the republished third-party email, and falls within the editorial functions exclusion as well.

C. LCC's Ad Hominem Attack On Krowne Is Both Misleading And Irrelevant

LCC takes great pains to point out that Mr. Krowne has described himself, in part, as a "political anarchist" who is "staunchly anti-authority and anti-elitist" and who has created the Website to "stick it to the man." Opp. at 1:18-20; Declaration of Brad Atterbury at ¶ 4, Exs. B & C.

Presumably, LCC has included this information in an attempt to show that Mr. Krowne acted with "actual malice" in posting the email about LCC. However, evidence of a defendant's ill will, desire to injure, or political or profit motive does not suffice to show actual malice. *Garrison v. Louisiana* (1964) 379 U.S. 64, 78-79; *Harte-Hanks Communications, Inc. v. Connaughton* (1989) 491 U.S. 657, 665-667. "speech 'honestly believed,' whatever the speaker's motivation, 'contribute[s] to the free interchange of ideas and the ascertainment of truth.'" *Tavoulareas v. Piro* (D.C. Cir. 1987) 817 F.2d 762, 795 (quoting *Garrison*, 379 U.S. at 73).

Furthermore, LCC cherry-picked the characterizations of Mr. Krowne. Review of Exhibits B and C to the Atterbury declaration also reveal that Mr. Krowne is "intensely interested in topics having to do with freedom and the wellness of society" and is "pro-markets, pro-private property, [and] pro-privacy." Atterbury Decl. Ex. B. Mr. Krowne's request for funds for his Website is also for the purpose of following up on leads more thoroughly and improving the information on the website. Atterbury Decl. Ex. C.

III. CONCLUSION

Mr. Krowne dared to republish a third-party report about the instability of LCC on his Website dedicated to exposing systemic and institutional problems in the mortgage lending

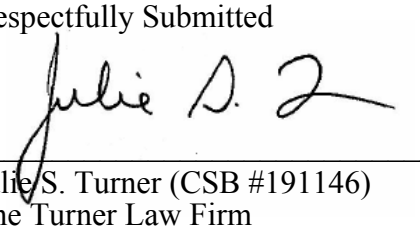
industry—problems that threaten individual borrowers, banking institutions, bond purchasers, the U.S. housing market and the overall U.S. economy. Krowne did not develop or create the information about LCC's alleged demise. He merely placed it on the Website and on his blog, labeled in such a way that readers could readily locate the information. For this, LCC seeks damages in excess of $50,000.

The First Amendment, California's public policy as reflected in the anti-SLAPP statute, and the policy of the United States as reflected in Section 230 of the Communications Decency Act all dictate that LCC's complaint be dismissed.

For the foregoing reasons, Defendants respectfully request that this Court dismiss LCC's complaint with prejudice and award Defendants their attorney's fees and other costs incurred.

DATED: July 20, 2007

Respectfully Submitted



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Defendants.

CASE NO. FCS029554

ASSIGNED FOR ALL PURPOSES TO
JUDGE R. MICHAEL SMITH
DEPARTMENT 7

DEFENDANTS' OBJECTION TO EVIDENCE SUBMITTED BY PLAINTIFF IN SUPPORT OF PLAINTIFF LOAN CENTER OF CALIFORNIA, INC.'S OPPOSITION TO DEFENDANTS' MOTION TO STRIKE

(CCP § 425.16)

Date: July 27, 2007
Time: 8:30 a.m.
Arbitration Hearing Date: N/A
Discovery Cut Off: N/A
Discovery Motion Cut Off: N/A
Trial Date: None

Defendants Aaron Krowne and Krowne Concepts, Inc. submit the following objection to evidence cited by Plaintiff Loan Center of California, Inc. in opposition to Defendants' Special Motion to Strike.

Objection

Defendants object to and move to strike paragraph 9 of the Declaration of Brad Atterbury which states as follows:

"Executives of LCC were told by representatives of Washington Mutual and Credit Suisse, two warehouse lenders who, by contract, provide funding for some of LCC's mortgage loans, that they saw the false information published by Defendants on the Websites and, because of that information, they withdrew approximately $3,800,000 from LCC's bank accounts on that same day…. In addition, many mortgage registrations regarding ownership and servicing rights to LCC's loans were changed from LCC to Washington Mutual through the Mortgage Electronic Registration Service. Washington Mutual also temporarily withdrew its approval of LCC as an approved lender. Other lenders have required LCC to repurchase loans based upon the information from the Websites. I was told that these actions occurred as a direct result of the false information published on the Websites."

Grounds for Objection:

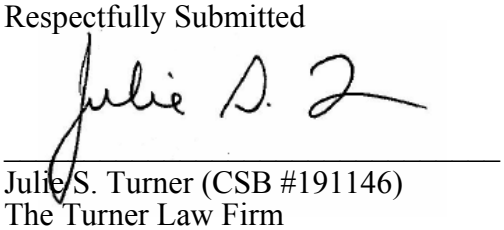
1. "[T]he testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter." (Cal. Evid. Code § 702(a).) This means that percipient witnesses can generally testify only about things they have personally seen or heard or otherwise experienced through their own senses. (Cal. Evid. Code § 702, Comment.) Mr. Atterbury does not declare that he was personally told any of the information recited above. It would appear from Mr. Atterbury's description of his understandings above that he has no personal knowledge of the facts disclosed therein.

2. "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. Except as provided by law, hearsay evidence is inadmissible. (Cal. Evid. Code § 1200(a) and (b).) Paragraph 9 of the Atterbury Declaration constitutes hearsay because it offers the statements of other LCC

executives to prove that LCC suffered harm because of Krowne's conduct. Furthermore, Paragraph 9 constitutes multiple hearsay, because it purports to testify to the statements made by individuals at Washington Mutual and Credit Suise to executives at LCC who then purportedly conveyed those statements to Mr. Atterbury. Furthermore, no recognized exception to the hearsay rule applies. As such, Paragraph 9 is inadmissible and should be stricken.

DATED: July 20, 2007

Respectfully Submitted



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Court's Ruling on Objection:

Date:

Sustained:

Overruled:

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LOAN CENTER OF CALIFORNIA, INC., Plaintiff, v. AARON KROWNE, an Individual d/b/a ML-IMPLODE.COM and d/b/a MORTGAGEIMPLODE.COM; KROWNE CONCEPTS, INC., and DOES 1-50, Defendants.	Case No. FCS029554 PROOF OF SERVICE

I, Julie S. Turner, declare:

I am over the age of 18 years and not a party to this action. My business address is The Turner Law Firm, 344 Tennessee Lane, Palo Alto, California, 94306. I served the within documents:

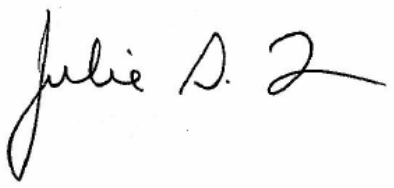
REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' SPECIAL MOTION TO STRIKE PLAINTIFF'S CLAIMS (CCP § 425.16)

DEFENDANTS' OBJECTION TO EVIDENCE SUBMITTED BY PLAINTIFF IN SUPPORT OF PLAINTIFF LOAN CENTER OF CALIFORNIA, INC.'S OPPOSITION TO DEFENDANTS' MOTION TO STRIKE

by transmitting via email the documents listed above to shuber@cotalawfirm.com before 3:00 p.m., and received confirmation of receipt of the same.

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

Date: July 20, 2007



Julie S. Turner