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AARON KROWNE and
6 KROWNE CONCEPTS, INC.

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SOLANO
10 FAIRFIELD BRANCH

11 LOAN CENTER OF CALIFORNIA, INC.,

12 Plaintiff,

13 v.

14 AARON KROWNE, an Individual d/b/a ML-
15 IMplode.COM and d/b/a
MORTGAGEIMplode.COM;
16 KROWNE CONCEPTS, INC.,
and DOES 1-50,

17 Defendants.

CASE NO. 029554

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

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

(CCP § 425.16)

Date: July 23, 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

1 “Recent increases in delinquencies and foreclosures in the subprime mortgage
2 market have raised widespread concerns about the possibility of accelerating
3 foreclosures throughout this year and next. While lenders, banks, and securities
4 traders scramble to figure out how to insure themselves from the market
consequences of rising subprime mortgage defaults, local communities are
struggling to stem the tide of foreclosures that impose significant costs on families,
neighborhoods and cities.”

5 - “Sheltering Neighborhoods from the Subprime Foreclosure Storm,”
6 United States Senate Joint Economic Committee Report, April 11,
7 2007 (Krowne Decl., Ex. F).

8 **I. INTRODUCTION**

9 Aaron Krowne passionately believes in open public discussion about issues that affect all of
10 us—the workings of our economy, the business institutions that wreak havoc with it, and the
11 government institutions charged with overseeing those institutions. Krowne has become
12 increasingly concerned about the numbers of foreclosures and the demise of certain segments of the
13 mortgage lending industry, which is causing much angst among the general public and the federal
14 government.

15 To make the public aware of the extent of the problem,. Krowne established a website
16 dedicated to reports from the media and industry insiders concerning the instability of the mortgage
17 lending market. In April, Krowne received an anonymous email about plaintiff Loan Center of
18 California (“LCC”). The email comported with other information about LCC on other websites and
19 in the media. Mr. Krowne posted the message, unedited and without substantive commentary.

20 Immediately, LCC unleashed its attorneys upon Krowne, demanding that he remove the
21 email and all mention of LCC on his website (other than some form of apology). Krowne asked
22 LCC to provide their comments, but LCC refused. LCC threatened to sue Krowne should he not
23 remove the email. Being an individual of not unlimited resources, Krowne reluctantly complied
24 with LCC’s demands.

25 Apparently not satisfied to leave matters at that, LCC filed this lawsuit, perhaps as a shot
26 across the bow to anyone who would dare publish negative information about LCC. LCC’s lawsuit,
27 designed to squelch public speech on an issue of acute public importance, is nothing more than a
28 blatant SLAPP.

1 The State of California has a strong tradition of upholding the rights of individuals to speak
2 out on matters of public concern. This public policy is codified in California’s anti-SLAPP statute,
3 California Code of Civil Procedure § 425.16. Under the law, a person may not be held liable for
4 exercising his free speech rights by speaking out publicly on a matter of public importance.

5 The United States Congress believes that the Internet should be a public forum where people
6 may speak out freely on matters of public concern, and where people should be able to reiterate what
7 was said by others without fear of assuming any tort liability of the quoted third-party as a result of
8 factual inaccuracies. The Congress codified this public policy in the Communications Decency Act
9 (“CDA”) at 47 U.S.C. § 230.

10 LCC’s lawsuit is blatantly barred by both the anti-SLAPP statute and the CDA. Despite the
11 suit’s total lack of merit, Mr. Krowne has nevertheless had to expend thousands of dollars, along
12 with inestimable time and energy, to defend himself. Under the law, LCC’s claims should be
13 stricken, its complaint should be dismissed with prejudice, and LCC should be ordered to reimburse
14 Mr. Krowne for the costs and fees he has incurred. The public policies and laws of our state and
15 federal governments require nothing less.

16
17 **II. FACTUAL BACKGROUND**

18 As housing prices rose over the last decade, lower- and middle-class wage earners found it
19 more difficult to afford a house. To satisfy their demand for housing, lenders came up with exotic
20 mortgage products that were generally designed to allow a buyer to purchase a house with little or no
21 money down and low initial interest rates. These mortgages were variants on the traditional
22 adjustable rate mortgage.

23 One example of such a variant is the “payment option ARM”—a loan that allows a borrower
24 to choose among payment options each month. They may pay either (1) the full monthly principal
25 plus interest amount, (2) an interest only amount, or (3) a minimum payment amount that is less than
26 the interest owed that month. If the borrower chooses the minimum payment, the difference
27 between that amount and the interest amount for that month is added to the principal of the loan. As
28 a result, this option often leads to “negative amortization”—having a loan that is worth more than

1 the current market value of the house. (Krowne Decl., ¶¶ 14-15.)

2 While payment option ARMs may be suitable for individuals who are wealthy or who earn
3 substantial commissions at year-end, they are generally considered inappropriate for lower- and
4 middle-class earners, and those with sub-prime credit (credit scores below 650). Often times,
5 lenders will qualify customers for these loans on the basis of “stated income” These are loans where
6 the borrower need only tell the lender orally how much money the borrower earns. No income
7 verification documentation is required. These loans are also known as “liar loans,” because
8 borrowers often report earning more income than they in fact earn so they may qualify for the loan.
9 (Krowne Decl., ¶ 13, Ex. C.)

10 Because subprime lenders have extended payment option ARMs to individuals with lower
11 credit scores and no income verification, the number of defaults has risen sharply over the past few
12 years, particularly in California.

13 These exotic mortgage lending practices have been a matter of public concern. For example,
14 in March 2006, the Federal Trade Commission held a workshop about these “alternative home
15 mortgage” practices and how consumers may be protected. In 2006, the Federal Reserve Bank held
16 extensive hearings throughout the country about these practices and their consequences. (Krowne
17 Decl., ¶ 17, Ex. D.)

18 In March of this year, the Federal Deposit Insurance Company in conjunction with the
19 Federal Reserve Bank announced a call for comments on a “proposed Statement on Subprime
20 Mortgage Lending to address certain risks and emerging issues relating to subprime mortgage
21 lending practices, specifically, particular adjustable-rate mortgage (ARM) lending products.”
22 (Krowne Decl., Ex. G.) On April 16, the FDIC held a forum to address the issue of problems in the
23 subprime mortgage lending field. The Federal Reserve began holding additional hearing about “liar
24 loans” on June 14, 2007. (Krowne Decl., Ex. C.)

25 The United States Congress has also begun speaking out about the financial instability of the
26 subprime mortgage market. For example, on April 11, 2007, the Joint Economic Committee of the
27 United States Senate issued a report warning of the potential for an economic disaster as a result of
28 these lending practices. (Krowne Decl., Ex. F.) The House Committee on Financial Services is
similarly investigating the issue of subprime lending practices and defaults. (Krowne Decl., Ex. E.)

1 In 2006, Aaron Krowne became increasingly concerned about the condition of the U.S.
2 economy, and particularly about the housing finance market and its oversight. To engender
3 awareness of and discussion about this issue, on December 31, 2006, he established the website
4 www.ml-implode.com (“the Website”).¹ (Krowne Decl., ¶ 9.) The Website presents squibs and
5 links to media articles concerning the failing home lending market. Mr. Krowne also established a
6 forum, www.autodogmatic.com, where readers can discuss these and other issues. The Website
7 contains a link taking users directly to the Autodogmatic user forum. Both the Website and
8 Autodogmatic are free to users.

9 In March 2007, Mr. Krowne established Krowne Concepts, Inc., a Nevada corporation
10 (“KCI”) that now runs and oversees the Website. KCI employs three part-time contractors to
11 maintain and update the Website. Mr. Krowne is the president of KCI and continues to contribute to
12 the Website in that capacity. (Krowne Decl., ¶¶ 1, 5.)

13 Since Mr. Krowne established the Website, he has received certain information about lending
14 firms from non-traditional media sources. Consequently, Mr. Krowne maintains warnings and
15 disclaimers on the Website, alerting readers that the information provided there is “neither definitive
16 nor should it be construed as professional advice.” The Website warns that it is “a community site
17 that depends on community feedback. Factual or alleged factual information presented here does not
18 originate from ml-implode, and all commentary is purely the opinion of the author(s) of this site,
19 unless otherwise quoted from other sources. You should consult a finance professional before
20 making any decisions based on information found at this site.” (Krowne Decl., Ex. O.)

21 Mr. Krowne also voluntarily discloses on the Website that “the proprietor of this site may
22 from time to time, hold short positions in mentioned and related companies.” (Krowne Decl., Ex.
23 O.) In fact, in the history of operating the Website, Mr. Krowne has only ever held one short
24 position in a lending company, and did not write anything on the Website about that company before
25 the company’s demise was widely reported in the media. (Krowne Decl., ¶ 31.)

26 Loan Center of California (“LCC”) is a privately held mortgage bank located in Northern
27

28 ¹ The ML-Implode website can also be accessed through the alternate website addresses
www.mortgagelenderimplode.com and www.lenderimplode.com.

1 California. It operates two websites promoting its loans: www.rateprice.com and
2 www.eNegAm.com (which stands for “negative amortization”). LCC offers the “more popular
3 payment option ARM products” and expands its product eligibility by offering loans to those who do
4 not have adequate credit scores for a prime loan. (Krowne Decl., ¶ 20, Ex. I.) One way LCC is able
5 to qualify borrowers with poor credit is by offering “stated income” loans, also known as “liar
6 loans.” These loans require the borrower to merely tell the mortgage broker what his income is,
7 without any documentation to verify that income. (Krowne Decl., ¶ 13.) Within the past 5 years
8 LCC has funded nearly \$4.2 billion in loans. (Krowne Decl., Ex. I.)

9 Recently, however, LCC has suffered a downturn in its fortunes. On March 23, 2007,
10 mortgage lender Hard Money Loans reported on its website that LLC had refused to loans that it had
11 contracted to fund, and implied that LCC was going out of business. The posting said:

12 Sub-Prime Shakeout

13 Well, the lender closings continue this week with a number of banks closing
14 up shop or halting fundings on loans that have already been approved. One
15 that surprised me a bit was the Loan Center of California. I thought that they
16 were primarily an A paper lender, but news this week from some colleagues
17 indicated that they were not funding loans that had been approved and docs
18 had been signed. That takes a really special operation to do things like that.
Bottom line if you are currently seeking financing for a new purchase or a
refinance loan with a “smaller” lender, you may want to double check and
make sure that everything is on the up and up before you paint yourself into a
corner. (Krowne Decl., ¶ 26, Ex. M.)

19 This story was picked up a few days later by the Daily Republic, a Solano County newspaper
20 located in Suisun City. The Daily Republic reported that LCC had balked on its loans, leaving angry
21 mortgage brokers and their customers scrambling to get alternate funding. The Daily Republic also
22 reported that LCC also laid off about 20 people, or slightly less than 20% of its work force.
23 (Krowne Decl., ¶ 27, Ex. N.)

24 On April 19th—only three weeks after the initial report of layoffs—the Daily Republic
25 reported that LCC was laying off employees yet again. This time LCC had cut its workforce by
26 another 23 people, or about 25%. (Krowne Decl., Ex. R.) Thus in a matter of three weeks, LCC
27 had let go of around 40% of its workforce.

28 Meanwhile, on April 18th, someone claiming to be a former LCC employee sent an

1 anonymous email to Mr. Krowne about the layoffs and other activities at LCC. Mr. Krowne posted
2 this email on the Autodogmatic forum. (Krowne Decl., ¶ 28) Following is the precise posting that
3 Mr. Krowne made on the forum, with Mr. Krowne’s own introductory and closing words (the only
4 words he added) indicated by the use of italics:

5 Posted: Wed Apr 18, 2007 7:22 pm Post subject: *Loan Center of California -*
6 *GONE*

7 *This came in this morning:*

8 "Effective immediately Loan Center of California a Solano County; California
9 based Wholesale lender is closed. After two surges of sweeping layoffs only a
10 skeleton crew remains to sweep up the mess. I was a credit officer whom was
11 just laid off. The company defrauded thousands of borrowers and committed
12 mortgage fraud on several layers for years prior to my employment. Dept of
13 Corporations has a pending audit and the owner Edwardo Blanch is seeking
14 bankruptcy protection due to nearly \$60million in no income loans still on the
15 books. No one is willing to buy the company and several investors have pulled
16 there funding. The company specialized in Alt-A 100% loans including 100%
17 Non-owner occupied; 100% Zero Fico; 100% Negative Amortization. They
18 even did 100% financing for documented illegal aliens with no credit history.
19 The companies credit policy was so skewed it took me nearly a year to re-
20 adjust their logic only to find the owner was secretly booking fraudulent loans
21 that have now jeopardized the company. There website requires a login and
22 there are no current programs available and no pricing. There have been no
23 new loan submissions or fundings for April. The website is
24 www.rateprice.com 1-800-300-5662 the companies ten year history is now
25 over with nearly 150 employees at one time; gone. "

26 *I've gone ahead and posted them as imploded. Any other info I get will be*
27 *added to the entry.* (Krowne Decl., Ex. P.)

28 Mr. Krowne posted this same email on the ML-Implode Website, under the standard website
header "Imploded." On the Website, he added the following text to introduce the email:

- 2007-04-18: Loan Center of California – Wholesale Non-Prime Lender (no MSM story yet)

A source from the company who asked to remain anonymous sent in the following this morning:

Immediately after the email, Mr. Krowne wrote: "That pretty much says it all. Stay tuned for more." (Krowne Decl., Ex. O). Mr. Krowne did not edit the email in any way, either on the Website or on the Autodogmatic forum. (Krowne Decl., ¶ 32.)

Mr. Krowne had reason to believe that the sender of the email intended for it to be posted on the Website because it was sent to the email address Mr. Krowne places on the Website for

1 submissions, and it was sent anonymously. (Krowne Decl., ¶ 28.) Others besides Mr. Krowne
2 apparently also believed the email to be intended for public consumption. Mr. John Hudson, a
3 mortgage professional, posted the exact same anonymous email on his ActiveRain Real Estate
4 Network website, presumably submitted independently. (Krowne Decl., ¶ 33, Ex. Q.)

5 On the same day as Mr. Krowne posted the Email to the Website, LCC’s attorney contacted
6 Mr. Krowne demanding that the posting be immediately removed or else LCC would sue Mr.
7 Krowne. Mr. Krowne deleted the entire posting about LCC from the Website within a day. He left
8 the anonymous email on the Autodogmatic forum, though, asking that anyone with further
9 information please contact him. (Krowne Decl., ¶ 35-36.)

10 Despite Mr. Krowne’s timely cooperation, LCC launched this lawsuit, claiming that Mr.
11 Krowne and KCI had defamed LCC by posting the email and, on that basis, had damaged LCC.

12 13 **III. ARGUMENT**

14 **A. LCC’s SLAPP Suit Should Be Stricken Because It Is Precisely The Type Of** 15 **Lawsuit That California’s Anti-SLAPP Statute Condemns.**

16 California’s anti-SLAPP statute was enacted to prevent plaintiffs from suing others for
17 speaking publicly on matters of public significance. (Code Civ. Proc. § 425.16.) The statute
18 authorizes a “special motion to strike” that dismisses claims “arising from any act of [the
19 defendants] in furtherance of [their] right of petition or free speech . . . , unless the court determines
20 that there is a probability that the plaintiff will prevail on the claim.” (Code Civ. Proc. § 425.16,
21 subd. (b)(1).)

22 Courts engage in a two-step inquiry to resolve anti-SLAPP motions. First, the court decides
23 whether the defendant has made a threshold showing that the challenged cause of action is one
24 arising from protected activity. The moving defendant’s burden is “to demonstrate that the . . . acts
25 of which the plaintiff complains were taken in furtherance of the [defendant]’s right of petition or
26 free speech [Second], if the court finds such a showing has been made, it then determines
27 whether the plaintiff has demonstrated a probability of prevailing on the claim.... [T]he trial court in
28 making these determinations considers the pleadings, and supporting and opposing affidavits stating
the facts upon which the liability or defense is based.” (*Equilon Enter. v. Consumer Cause, Inc.*

1 (2002) 29 Cal.4th 53, 67 [internal quotation marks omitted]; *see also City of Santa Monica v.*
2 *Stewart* (2005) 126 Cal.App.4th 43, 71.)

3 By its own terms, Section 425.16 “shall be construed broadly.” (§ 425.16(a)). “Whenever
4 possible, [the courts] should interpret the First Amendment and section 425.16 in a manner
5 ‘favorable to the exercise of freedom of speech, not to its curtailment.’” (*Wilbanks v. Wolk* (2004)
6 121 Cal.App.4th 883, 17 Cal.Rptr.3d 497 (quoting *Briggs v. Eden Council for Hope & Opportunity*
7 (1999) 19 Cal.4th 1106, 1119, 81 Cal.Rptr.2d 471, 969 P.2d 564).)

8 If Krowne and KC satisfy their burden of showing that this suit is based on their protected
9 speech, it is then up to LCC to show that it has a probability of prevailing on its claim. (*Shekhter v.*
10 *Fin. Indem. Co.* (2001) 89 Cal.App.4th 141, 151, 106 Cal.Rptr.2d 843; *see also City of Santa*
11 *Monica v. Stewart* (2005) 126 Cal.App.4th 43, 71, 34 Cal.Rptr.3d 72 [“The moving party bears the
12 burden on the first issue; the responding party on the second.”].) This LCC cannot do, for its libel
13 claim must fail in light of Section 230 of the Communications Decency Act (47 U.S.C. § 230),
14 which exempts one who publishes or distributes information from a third-party for any libel claims
15 based on that information. Since all of LCC’s other claims are based on its libel claim, they too
16 must fail.

17 **1. LCC’s Lawsuit Attacks Speech That Concerns A Matter Of Public**
18 **Significance—The Breakdown Of The Mortgage Lending Market.**

19 LCC’s claims are based on activity that was clearly taken “in furtherance of a person’s right
20 of ... free speech under the United States or California Constitution in connection with a public
21 issue.” Code Civ. Proc. § 425.16(e). LCC’s lawsuit directly attacks speech that concerns the
22 breakdown of the housing finance market. The gravamen of LCC’s lawsuit is that ML-Implode—a
23 website dedicated to discussing “the housing finance breakdown”—posted an anonymous email
24 warning of LCC’s impending demise and stating that LCC had engaged in improper activities. LCC
25 further complains that this email was posted in ML-Implode’s regular “Imploded” section.

26 The anti-SLAPP statute defines “an act in furtherance of a person’s right of ... free speech”
27 to include “any written or oral statement or writing made in a place open to the public or a public
28 forum in connection with an issue of public interest” or “any other conduct in furtherance of the

1 exercise of the constitutional right of petition or the constitutional right of free speech in connection
2 with a public issue or an issue of public interest.” Code Civ. Proc. § 425.16(e)(3)-(4).

3 ML-Implode is a “public forum.” A web site that the public may view is a “public forum”
4 for purposes of the anti-SLAPP statute . (See, e.g., *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 41 n.4,
5 146 P.3d 510, 51 Cal.Rptr.3d 55 (web sites, such as “newsgroups,” that are accessible to public are
6 “public forums” for purposes of the anti-SLAPP statute); *Wilbanks, supra*, 121 Cal.App.4th 883, at p.
7 895 (statements that public may read on web site are public speech and the web site itself is a public
8 forum).) Furthermore, a website does not lose the “public forum” status simply because its content
9 is selected by its owners, since the website still acts as “a vehicle for communicating a message
10 about public matters to a large and interested community.” (*Wilbanks, supra*, 121 Cal.App.4th, at p.
11 896.) The ML-Implode Website may be viewed and read by anyone with an Internet connection.

12 Furthermore, the Website is focused on an issue of mounting public concern—the state of the
13 mortgage lending industry, particularly the subprime lending industry. The “public interest”
14 component of section 425.16, subdivision (e)(3) and (4) is met when “the statement or activity
15 precipitating the claim involved a topic of widespread public interest,” and “the statement ... in some
16 manner itself contribute[s] to the public debate.” (*Wilbanks, supra*, 121 Cal.App.4th 883, at p. 898.)
17 “Commenting on a matter of public concern is a classic form of speech that lies at the heart of the
18 First Amendment.” (*Annette F. v. Sharon S., supra*, 119 Cal.App.4th at p. 1162, 15 Cal.Rptr.3d 100,
19 citing *Schenck v. Pro-Choice Network* (1997) 519 U.S. 357, 377, 117 S.Ct. 855, 137 L.Ed.2d 1.)

20 As set forth in the fact section above, the subprime loan foreclosure rate and the resulting
21 bankruptcies of many subprime lenders is a matter of widespread public interest. There is an
22 ongoing national debate about this subject, with no less that the Federal Deposit Insurance
23 Corporation, the Federal Reserve Bank, the Federal Trade Commission, the United States House
24 Committee on Financial Services and the United States Senate Joint Economic Committee all
25 holding hearings and issuing reports about this very issue. (See Krowne Decl., ¶ 17 and Exs. B-G.)

26 This matter is also of widespread public interest here in Northern California. As discussed
27 above, there has been a marked increase in the number of foreclosures in Northern California on
28 homes paid for with subprime loans. Borrowers have seen their mortgage payments increase

1 drastically as the initial “teaser rates” on their ARM loans have expired.

2 The Website also contributes to the awareness of and discussion about the subprime lending
3 debate. It is dedicated to discussion of these issues, bringing awareness to readers about the
4 problems with subprime lenders in particular. The Website brings attention to news stories reported
5 elsewhere about this problem. It also lists information received directly by sources, both anonymous
6 and named. The Website provides a link to the Autodogmatic forum, where readers can post
7 messages and engage in discussions about the mortgage lending market. And lest readers take the
8 word of the Website as gospel, the Website includes a notice telling readers that they should not rely
9 on all posts as absolutely true and accurate, since some of the posts come from the community itself.
10 The reader is instead urged to verify the information for himself

11 Mr. Krowne’s act of posting the email on the Website and on Autodogmatic falls squarely
12 within the four corners of the anti-SLAPP statute. This conduct involved posting a writing that was
13 sent to him for posting “in a place open to the public or a public forum in connection with an issue of
14 public interest.” This conduct was “in furtherance of the exercise of ... the constitutional right of
15 free speech in connection with... an issue of public interest.” (Code Civ. Proc. § 425.16(e).)
16 Consequently, the burden now shifts to LCC , which must prove that it has a probability of
17 prevailing on its claims.

18
19 **B. LCC Cannot Prevail On Any Of Its Claims And Its Complaint Should
Be Stricken.**

20 LCC has alleged four causes of action: libel, unfair business practices, intentional
21 interference with contract and negligent interference with contract. All of these claims sound in tort
22 and are all barred by the Communications Decency Act. Furthermore, the last three claims all
23 require some wrongdoing, which LCC has identified as the accuse libel. Consequently, if LCC
24 cannot show a probability of prevailing on its libel claim, it follows that LCC cannot show a
25 probability of prevailing on any of its remaining claims and LCC’s entire complaint should be
26 stricken.

27
28 **1. LCC Cannot Prevail On Its Libel Claim Because That Claim Is Barred
By The Communications Decency Act.**

1 LCC cannot prevail on its libel claim because it is barred by federal law. In the
2 Communications Decency Act of 1996 (the “CDA”), Congress declared: "No provider or user of an
3 interactive computer service shall be treated as the publisher or speaker of any information provided
4 by another information content provider." (47 U.S.C. § 230(c)(1).) “No cause of action may be
5 brought and no liability may be imposed under any State or local law that is inconsistent with this
6 section.” (47 U.S.C. § 230(e)(3).) Simply put, the CDA prohibits libel claims against website hosts
7 and users for the information provided by another.

8 As the California Supreme Court has stated: “These provisions have been widely and
9 consistently interpreted to confer broad immunity against defamation liability for those who use the
10 Internet to publish information that originated from another source.” (*Barrett v. Rosenthal* (2006) 40
11 Cal.4th 33, 39, 146 P.3d 510, 51 Cal.Rptr.3d 55.) Consequently, “plaintiffs who contend they were
12 defamed in an Internet posting may only seek recovery from the original source of the statement.”
13 (*Barrett, supra*, 40 Cal.4th, at p. 40.)

14 In *Barrett*, plaintiff physicians accused defendant Ilena Rosenthal of defaming them when
15 she posted, on two websites, a libelous article about them that she had received via email by a third
16 party.

17 The trial court found that the lawsuit was covered by the anti-SLAPP statute and that the
18 article Rosenthal had posted was in fact libelous. However, the trial court held that Section 230 of
19 the CDA barred any claim against Rosenthal for any defamatory statements in the article because the
20 article had come from a third person and had not been created by Rosenthal herself. (*Barrett, supra*,
21 40 Cal.4th 33, at p. 40-41.)

22 The Court of Appeal upheld the trial court’s finding that the anti-SLAPP statute applied to
23 postings made on a publicly available Internet website available to the public. Nevertheless, the
24 Court of Appeal vacated the trial court’s order because it held that the CDA immunized “publishers”
25 but not distributors. The Court of Appeal found that Rosenthal was a distributor and therefore could
26 be held liable for distributing the libelous statements of another. *Barrett, supra*, 40 Cal.4th 33, at p.
27 41.)

28 The California Supreme Court disagreed with the Court of Appeal’s interpretation of the

1 CDA, and reversed it on that basis. The Court conducted a thorough review of Section 230 of the
2 CDA, its legislative history and the case law interpreting it. It found that “subjecting Internet service
3 providers and users to defamation liability would tend to chill online speech.” (*Barrett, supra*, 40
4 Cal.4th 33, at p. 56.) Despite acknowledging concerns about the breadth of the CDA’s immunity,
5 the Court nevertheless held that “by its terms section 230 exempts Internet intermediaries from
6 defamation liability for republication. The statutory immunity serves to protect online freedom of
7 expression and to encourage self-regulation, as Congress intended. Section 230 has been interpreted
8 literally. It does not permit Internet service providers or users to be sued as ‘distributors,’ nor does it
9 expose ‘active users’ to liability.” (*Barrett, supra*, 40 Cal.4th 33, at p. 63.)

10 Mr. Krowne is in the same (if not a better) position as defendant in *Barrett*. Mr. Krowne
11 reposted an item sent to him, on two websites. He is at least a “user” of those websites (as was the
12 case in *Barrett*) and is the “provider” of the websites as well. The material he posted was authored
13 by a third party, not by Mr. Krowne. Furthermore, the prefatory statements made by Mr. Krowne
14 on the websites were truthful and not themselves defamatory.

15 For the same reasons that plaintiffs could not prevail on their defamation claim against
16 Rosenthal, so too is LCC unable to prevail on its defamation claim against Mr. Krowne or KCI. For
17 this reason, LCC’s complaint should be stricken and its case dismissed with prejudice.

18
19 **2. LCC Cannot Prevail On Any Of Its Other Claims Because They All
20 Depend Upon LCC Winning Its Libel Claim.**

21 The remainder of LCC’s claims are all predicated on LCC proving that Mr. Krowne defamed
22 them. Absent LCC’s libel claim, the remaining causes of action must be dismissed as well.

23 As an initial matter, each of the remaining three claims are barred under the CDA. The CDA
24 bars the assertion of any claim sounding in tort based on the Internet posting by a provider or user of
25 information created by a third-party. (*See* 47 U.S.C. § 230(c)(1) and (e)(3); *Barrett, supra*, 40
26 Cal.4th, at p. 39.) For this reason alone, these claims should be dismissed.

27 Furthermore, each of these claims is predicated on LCC’s libel claim. LCC’s Second Cause
28 of Action for unfair business practices recites as the requisite unfair practice: “Defendants engaged
in an unfair, deceptive, and fraudulent business act by publishing false information regarding

1 Plaintiff to increase income generated from the Websites.” (Plaintiff’s Verified Complaint at ¶ 20.)
2 LCC’s Third and Fourth Causes of action, for intentional and negligent interference with contract,²
3 both allege that the “interference” arose from “publishing the above-described false statements.”
4 (Plaintiff’s Verified Complaint at ¶¶ 25, 29.)

5 Assertion of an unfair business practice claim requires that there be an “unlawful, unfair or
6 fraudulent business acts or practice [or] unfair, deceptive, untrue or misleading advertising [or] any
7 act prohibited by [Bus. & Prof. Code § 17500 *et seq.*].” (Bus. & Prof Code § 17200.) Any claims
8 for intentional or negligent interference with contractual relations require that the defendant has
9 committed some independently wrongful act. (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.*
10 (1995) 11 Cal.4th 376, 392-393, 45 Cal.Rptr.2d 436, 902 P.2d 740.) Since there can be no finding of
11 liability for libel in this case, there can similarly be no finding that Krowne or KCI engaged in unfair
12 business practices or interfered with any contractual relations.

13 14 **3. LCC’s Complaint Should Be Stricken And Its Suit Dismissed With Prejudice**

15 If an anti-SLAPP motion is granted, then the plaintiff may not be permitted to amend its
16 complaint. (*Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1073, 112 Cal.Rptr.2d 397).
17 Amendments could frustrate the Legislature’s objective of providing a “quick and inexpensive
18 method of unmasking and dismissing such suits.” (*Simmons*, 92 Cal.App.4th, at p. 1073.)

19 Because no viable claims remain, plaintiff’s complaint should be stricken. In sum, plaintiff’s
20 lawsuit should be dismissed with prejudice.

21 22 **C. As The Prevailing Defendant, Krowne and KCI Are Entitled To Reimbursement For All Fees And Costs LCC Imposed On Them By LCC’s Lawsuit.**

23
24 The prevailing defendant on the motion to strike “shall be entitled” to recover his attorney
25 fees and costs. (Cal. Code Civ. P. § 425.16(c).) The fee award is mandatory: “(A)ny SLAPP
26

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28 ² California does not recognize a separate claim for “negligent interference with contractual relations” absent a defendant owing some duty of care to the plaintiff. (*Stolz v. Wong Communications Ltd. Partnership* (1994) 25 Cal.App.4th 1811, 1825, 31 Cal.Rptr.2d 229.)

1 defendant who brings a successful motion to strike is entitled to mandatory attorney fees.” (*Ketchum*
2 *v. Moses* (2001) 24 Cal.4th 1122, 1131, 104 Cal.Rptr.2d 377.) The purpose of this section is both to
3 discourage meritless lawsuits and to provide financial relief to SLAPP lawsuit victim. (*City of Los*
4 *Angeles v. Animal Defense League* (2006) 135 Cal.App.4th 606, 627 n.19, 37 Cal.Rptr.3d 632.)

5 Should this motion be granted, Krowne and KCI will present a statement of fees and costs in
6 connection with this litigation.

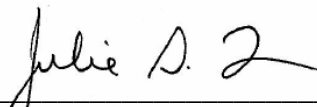
7 **IV. CONCLUSION**

8 LCC’s suit is directly aimed and silencing those who would speak out against it. In posting
9 the email he had received, Mr. Krowne acted not only within the law but within the public interest.
10 For an individual to speak openly in today’s litigious society is an act of courage—one recognized
11 by the California Legislature and protected by the anti-SLAPP suit. Nobody should be squelched for
12 speaking out publicly on an issue of public interest, particularly where, as here, the speech was about
13 a matter of national concern and was merely a republishing of a seemingly credible third-party.

14 For all of the foregoing reasons, this motion to strike should be granted and defendants Aaron
15 Krowne and Krowne Concepts, Inc. should be awarded their fees and costs.

16
17 DATED: June 25, 2007

Respectfully Submitted

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20 _____
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21 Attorney for Defendants
22 Aaron Krowne and Krowne Concepts, Inc.
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