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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

14 JOHN GROGAN, an individual,

15 Plaintiff,

16 vs.
17

18 JOSEPH PAOLLELA, an individual;
19 JOHN TRIMARCO A.K.A. JACK
20 TRIMARCO, an individual; JACK
21 TRIMARCO & ASSOCIATES
22 POLYGRAPH/INVESTIGATIONS, INC.,
23 a corporation; RALPH HILLIARD,
24 an individual; WORDNET
25 SOLUTIONS, INC., a corporation
and DOES 1 through 20,
inclusive,

Defendants.

) Case No.: BC391778

)
) Honorable Helen I. Bendix
) Dept. 18

)
) MEMORANDUM OF POINTS AND
) AUTHORITIES IN SUPPORT OF
) JOHN TRIMARCO A.K.A. JACK
) TRIMARCO AND JACK TRIMARCO &
) ASSOCIATES POLYGRAPH/
) INVESTIGATIONS, INC.'S
) SPECIAL MOTION TO STRIKE

)
) DATE: September 24, 2008
) TIME: 9:00 a.m.
) DEPT: 18

)
ACTION FILED: 5/30/08
COMPLAINT SERVED: 6/10/08
ANSWER FILED: 7/11/08
TRIAL DATE: No Trial Date

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1 I.

2 SUMMARY OF FACTS

3 Defendants JOHN TRIMARCO A.K.A. JACK TRIMARCO, an
4 individual, and JACK TRIMARCO & ASSOCIATES
5 POLYGRAPH/INVESTIGATIONS, INC., a corporation (hereinafter
6 sometimes collectively "TRIMARCO") respectfully request this
7 Court grant the within Motion based on the Anti-SLAPP statute as
8 TRIMARCO was merely utilizing his right of free speech under the
9 United States and California Constitutions. The alleged remarks
10 are all with reference to the oft-published claims of JOHN
11 GROGAN regarding JOHN GROGAN's education and experience in the
12 realm of polygraph investigation of which TRIMARCO was acutely
13 aware at the time of the public debate between TRIMARCO and JOHN
14 GROGAN while JOHN GROGAN was a guest on the widely-known and
15 publicized Tom Leykis radio program.

16 JOHN GROGAN markets himself as a highly experienced,
17 well-trained, and certified polygraph examiner with a host of
18 degrees, certifications, and other qualities likely to be of
19 great interest to the public with respect to a polygraph
20 examination or examiner. TRIMARCO has personal knowledge of
21 JOHN GROGAN's true experience, academic and employment
22 background, and had been informed of JOHN GROGAN's conviction
23 for fraud, dishonesty, and deceit by the Bureau of Consumer
24 Affairs, the Honorable Judge Hogan presiding, which conviction
25 resulted in the revocation of all of JOHN GROGAN's California
26 licenses which relate to private investigation or the carrying
27 of weapons.

28 ///

1 It cannot be seriously debated that JOHN GROGAN is a public
2 figure in the area of polygraph investigation and examination as
3 he maintains multiple references to his public participation in
4 the television and radio media in his published curriculum
5 vitae. The requirements for granting this Motion are clearly
6 established by the Declaration of JACK TRIMARCO and the
7 Complaint itself which, in combination, provide JOHN GROGAN
8 cannot carry his burden of showing a probability he will prevail
9 as the elements of slander, invasion of privacy, and intentional
10 infliction of emotional distress are not attainable and all
11 comments alleged in the Complaint are privileged.

12 II.

13 THE MOTION IS A VALID PROCEDURE FOR USE BY
14 MOVING PARTY TO PREVENT THE DENIAL OF FREE SPEECH.

15 TRIMARCO respectfully submits the following Points and
16 Authorities in support of his Motion to Strike based upon
17 application of Code of Civil Procedure §425.16 (the Anti-SLAPP
18 statute). As a result of the high number of lawsuits that have
19 previously been filed with the goal of chilling the valid
20 exercise of the constitutional right of freedom of speech and
21 the constitutional right of petition for redress of grievances,
22 a very significant and detailed specific motion to strike is
23 allowed to nip such litigation in the bud and end these types of
24 cases. (C.C.P. §425.16(a).) Said Motion may be made within
25 60 days following service of the Complaint. (C.C.P.
26 §425.16(f).) Once the Court determines a person's right of
27 petition or free speech under the United States or California
28 Constitutions is connected to a public issue, such acts will

1 also be subject to a special motion to strike unless the Court
2 determines the plaintiff has established the probability that
3 the plaintiff will prevail on the claim. (C.C.P.
4 §425.16(b)(1).) In this action, there can be no true debate
5 that Plaintiff is not at least a limited public figure and that
6 the attributes of Plaintiff and discussion of same are public
7 issues. (See Section III hereinbelow.)

8 Plaintiff's action is nothing more than a flagrant attempt
9 to cause TRIMARCO to not remark on Plaintiff's professionalism
10 or lack thereof and Plaintiff's status as an individual who has
11 been found culpable of fraud by a California Administrative Law
12 Judge thus giving rise to Plaintiff's loss of every license held
13 by Plaintiff that relates to private investigation or carrying
14 weapons.

15 An act in furtherance of a person's right of free speech
16 under the United States or California Constitutions in
17 connection with a public issue includes any written or oral
18 statement or writing made in a place open to the public or a
19 public forum in connection with an issue of public interest
20 (C.C.P. §425.16(e)(3)) or any other conduct in furtherance of
21 the exercise of the constitutional right of free speech in
22 connection with a public issue or an issue of public interest.
23 (C.C.P. §425.16(e)(4).)

24 As shown by the Declaration of JACK TRIMARCO, the Complaint
25 was not served until June 10, 2008. (Declaration of Jack
26 Trimarco, p. 4, ¶13, lines 27-28.) Therefore the Motion is
27 timely.

28 ///

1 Further, each of the criteria set forth in C.C.P. §425.16
2 has been met by Defendants and therefore the Motion should be
3 granted.

4 III.

5 THE MOTION SHOULD BE GRANTED AS PLAINTIFF IS A PUBLIC PERSON,
6 THE ISSUE IS A MATTER OF PUBLIC CONCERN, AND PLAINTIFF CANNOT
7 MEET HIS BURDEN OF SHOWING HE WILL PROBABLY PREVAIL.

8 A "SLAPP" suit has been described as a meritless suit filed
9 primarily to chill a defendant's exercise of first amendment
10 rights. (Macias v. Hartwell (1997) 55 Cal.App.4th 669, 672.)
11 Said suits are likely to involve alleged causes of action for
12 defamation and various business torts such as interference with
13 prospective economic advantage or intentional infliction of
14 emotional distress. (See for example Church of Scientology v.
15 Wollersheim (1996) 42 Cal.App.4th 628, 652.) The allegations in
16 the cause before the Court fall exactly within the parameters
17 discussed as being subject to Anti-SLAPP motions.

18 In order to determine whether a litigation will survive a
19 special motion to strike under C.C.P. §425.16, the Court must
20 utilize a two-part or two-prong test. The first prong is to
21 ascertain whether the action is a SLAPP suit. Once that
22 determination is made to that effect, the second prong is to
23 determine whether the plaintiff has established his probability
24 of prevailing on the merits of the complaint. It is important
25 to note that once the first prong has been met, it is the
26 plaintiff's burden to provide the Court with sufficient
27 admissible evidence to permit the Court to determine whether
28 there is a probability the plaintiff will prevail on his claim.

1 (Zamos v. Stroud (2004) 32 Cal.4th 958.)

2 A.

3 THE ALLEGED ACTIVITIES ALL REGARD A

4 PUBLIC ISSUE WHICH IS PROTECTED BY THE STATUTE

5 The only initial burden of a defendant in pursuing an
6 Anti-SLAPP motion is that the defendant must make a prima facie
7 showing that the facts of the litigation arose from an act in
8 furtherance of a defendant's right of petition of free speech.

9 (Rusheen v. Cohen (2006) 37 Cal.4th 1048.) This burden is met
10 by merely demonstrating the act or acts fit one of the
11 categories spelled out in Code of Civil Procedure §425.16(e).

12 (Freeman v. Schack (2007) 154 Cal.App.4th 719.) The defendant
13 does not have to demonstrate plaintiff's intent to chill first
14 amendment rights. (Equilon Enterprises, LLC v. Consumer Cause,
15 Inc. (2002) 29 Cal.4th 53.) Thus, motivation is not at issue.

16 There should be no argument over whether the place of the
17 allegations against TRIMARCO is a "public forum".
18 Traditionally, the definition includes any place that is open to
19 the public where information is freely exchanged, sometimes
20 called a public communication. (Damon v. Ocean Hills Journalism
21 Club (2000) 85 Cal.App.4th 468.) Radio shows certainly are a
22 public forum in the same vein as a TV show which has been found
23 to be a public forum. (Metabolife International, Inc. v.
24 Wornick (Southern District of Cal. 1999) 72 F.Supp.2d 1160.)
25 Specifically, an on-air discussion between talk radio co-hosts
26 has been held to be a public forum. (ComputerXpress, Inc. v.
27 Jackson (2001) 93 Cal.App.4th 993.)

28 ///

1 The same citations mentioned above, Damon and Metabolife,
2 also support the conclusion that private conduct that impacts a
3 broad segment of society or that affects the community in a
4 manner similar to that of a governmental entity is "of public
5 interest". These protected actions also include those of
6 private persons. Where a definable portion of the public is or
7 could be affected, such actions are also considered a matter of
8 public interest in the context of an ongoing controversy,
9 dispute, or discussion, which thus encourages the public policy
10 of encouraging participation in matters of public significance.
11 (See for example Du Charme v. International Brotherhood of
12 Electrical Workers, Local 45 (2003) 110 Cal.4th 107.)

13 Numerous cases have been decided which uphold the concept
14 of public interest being involved when it concerns a person in
15 the public eye or conduct that could affect large numbers of
16 people beyond the direct participants. Here, JOHN GROGAN, as
17 Plaintiff, admits he advertises on a website (JOHN GROGAN
18 Declaration, p. 3, filed in opposition to prior Motion to Strike
19 by Defendant JOSEPH PAOLELLA; JACK TRIMARCO Declaration,
20 Exhibit "C" - GROGAN's curriculum vitae). Matters that include
21 activities of private citizens that would impact the lives of
22 other individuals should certainly be considered matters of
23 public interest. (See for example Church of Scientology v.
24 Wollersheim (1996) 42 Cal.App.4th 628.) Again, there can be no
25 serious debate that JOHN GROGAN inserted himself into a matter
26 of public interest by appearing on not only the show in which
27 the utterances were allegedly made, but admittedly on many other
28 shows. JOHN GROGAN, as Plaintiff, has placed himself in the

1 public interest voluntarily with regard to all of his activities
2 and purported professional concerns in the area of polygraph
3 examination.

4 The overwhelming evidence for this Court supports
5 Defendants' claim that Plaintiff's Complaint arises from
6 Defendants' constitutionally protected free speech. Therefore,
7 as a matter of law, the burden has shifted to the Plaintiff to
8 establish no such protection exists. (Governor Gray Davis
9 Committee v. American Taxpayers Alliance (2002) 102 Cal.App.4th
10 449.) The Court should consider the pleadings, Declarations,
11 and matters that may be judicially noticed with regard to
12 determining whether the Defendants have sustained their initial
13 burden. (Brill Media Company, LLC v. TCW Group, Inc. (2005)
14 132 Cal.App.4th 324.) The Defendants have sustained that
15 burden.

16 B.

17 PLAINTIFF MUST ESTABLISH THE PROBABILITY
18 THAT HE WILL PREVAIL

19 The clear facts of this matter establish that the
20 allegations arise from Defendant TRIMARCO's constitutionally
21 protected free speech and the burden has shifted to Plaintiff to
22 establish the probability that Plaintiff will prevail on
23 whatever claims are asserted against TRIMARCO. (C.C.P.
24 §425.16(b).) To establish probability of success on the merits,
25 the plaintiff must make a prima facie showing of facts that
26 would, if proven at trial, support a judgment in favor of
27 plaintiff. (See for example Wilcox v. Superior Court (1994)
28 27 Cal.App.4th 809.) This is a matter of law. The

1 substantiation required by plaintiff to survive an Anti-SLAPP
2 motion is more than just mere allegations of an unverified
3 Complaint. The plaintiff must provide the Court with sufficient
4 admissible evidence to permit the Court to determine whether
5 there is a probability the plaintiff will prevail. (DuPont
6 Merck Pharmaceutical Company v. Superior Court (2000)
7 78 Cal.App.4th 562.)

8 While Plaintiff has pled three causes of action against
9 TRIMARCO, i.e. slander, invasion of privacy, and intentional
10 infliction of emotional distress, each of the causes of action
11 actually sound in slander as the only allegations complained of
12 against TRIMARCO are indicated in paragraph 10, pages 3 and 4,
13 of the Complaint as allegedly uttered on the air at a radio talk
14 show.

15 Slander is defined as a false and unprivileged publication
16 orally uttered or communicated by radio that "1. Charges any
17 person with crime, or having been indicted, convicted, or
18 punished for crime; ... 3. Tends directly to injure him in
19 respect to his office, profession, trade, or business either by
20 imputing to him general disqualification in those respects which
21 the office or other occupation peculiarly requires, or by
22 imputing something with reference to his office, profession,
23 trade, or business that has a natural tendency to lessen its
24 profits; ..." (Civil Code §46.) The extremely broad definition
25 of slander is understandably limited in that certain individuals
26 are always subject to comments and criticisms regarding the
27 character and qualifications that pertain to the limited subject
28 for which the public figure definition is applicable. "A

1 privileged publication or broadcast is one made: ... (c) in a
2 communication, without malice, to a person interested therein,
3 (1) by one who is also interested, or (2) by one who stands in
4 such a relation to the person interested as to afford a
5 reasonable ground for supposing the motive for the communication
6 to be innocent, or (3) who is requested by the person interested
7 to give the information. ..." (Civil Code §47(c).) As is shown
8 by the Declaration of JACK TRIMARCO and the Declaration of JOHN
9 GROGAN previously filed in this action, JOHN GROGAN is, without
10 a doubt, at least a limited public figure as the public nature
11 of his activities relates to polygraph examinations and
12 qualifications.

13 Statements of opinion are constitutionally protected and
14 are actionable only if they imply the allegation of the
15 undisclosed defamatory facts as their basis. Mere expression of
16 opinion or severe criticism is not actionable even if it
17 adversely reflects on the fitness of the individual. (See for
18 example Baker v. Los Angeles Herald Examiner (1986) 42 Cal.3d
19 254 and Botos v. Los Angeles County Bar Association (1984,
20 2nd District) 151 Cal.App.3d 1083.) It is submitted the
21 following statements which appear in paragraph 10 of the
22 Complaint as allegedly uttered by JACK TRIMARCO, to wit, "John
23 Grogan is a fake"; "You are nothing more than a fraud and you
24 are about to get burned"; "I'm going to get you convicted";
25 "I'll bring in my proof to the D.A. in Ventura County"; and "You
26 perjured yourself" (Complaint, p. 3, line 27 and p. 4, lines 2,
27 3, 4, 5, and 6) are nothing more than threats or opinion.
28 Without further comment which bridges the gap between TRIMARCO's

1 opinion and specific instances of fact which are false, the
2 quoted language cannot be actionable. Additionally, the use of
3 the word "perjured" was clearly premised on TRIMARCO's knowledge
4 of GROGAN declaring under penalty of perjury his "C.V." was true
5 and correct which TRIMARCO knew was patently misleading and
6 false. The alleged comment that GROGAN has been convicted of
7 fraud is true or at least substantially true (Judicial Notice,
8 attachments 1-5). Clearly, GROGAN's convictions caused him to
9 lose each of his California licenses.

10 Likewise, phrases such as "He is not a polygraph examiner"
11 (Complaint, p. 3, line 28) and "He's never graduated from a
12 polygraph school" (Complaint, p. 4, line 2) must be taken in the
13 context of TRIMARCO's knowledge of JOHN GROGAN which includes
14 the fact that JOHN GROGAN has never graduated from any
15 accredited polygraph school. This information is undeniable
16 from a standpoint of TRIMARCO's perception and knowledge in that
17 he had previously received a letter from the very school that
18 JOHN GROGAN claims to have been a graduate (under penalty of
19 perjury) which specifically rebuts GROGAN's claim and disclaims
20 the validity of any so-called "certificate".

21 Where potential defamatory statements are published in
22 public debate, ... , or other settings in which the audience may
23 anticipate efforts by the parties to persuade others to their
24 positions by the use of epithets, fiery rhetoric, or hyperbole
25 which generally might be considered as statements of fact, those
26 potentially defamatory statements may well assume the character
27 of statements of opinion and thus be privileged. (See for
28 example Shumate v. Johnson Publishing Company (1956, 2nd

1 District) 139 Cal.App.2d 121.) When the meaning of the language
2 alleged to be defamatory is ambiguous, the defendant's intent
3 has a bearing on the construction of the language in determining
4 whether it was actually defamatory. Here, it is clear
5 TRIMARCO's intent was to place the knowledge of which he was
6 aware into the public forum to which JOHN GROGAN inserted
7 himself in effect to make the public aware of certain aspects of
8 Mr. GROGAN's history.

9 The fifth cause of action for invasion of privacy against
10 TRIMARCO is only applicable as a right to be free from the
11 wrongful publicizing of one's private affairs and activities
12 which are outside the realm of legitimate public concern.
13 (Smith v. National Broadcasting Company (1956) 138 Cal.App.2d
14 807.) It is respectfully submitted that any such right has
15 undeniably been waived with respect to JOHN GROGAN's activities
16 that relate to polygraph examinations. If posing for a picture
17 in a public place is considered to be a waiver as in Gill v.
18 Hearst Publishing Company (1953) 40 Cal.2d 224, then voluntarily
19 appearing on a radio program and declaring that one is an expert
20 in polygraph examinations certainly must be considered a waiver
21 as well. Likewise, the absolute privilege applicable to
22 publication of fair and true reports applies to an action for
23 invasion of privacy. (C.C. §47(c) and/or (e).) Further, the
24 constitutional protection of free speech precludes liability in
25 a privacy action based upon false reports of matters of public
26 interest in the absence of proof that the defendant published a
27 report with actual malice, which means knowledge of its falsity
28 or in reckless disregard of the truth. (Time, Inc. v. Hill

1 (1967) 385 U.S. 374.) Here, the undisputed facts are that
2 TRIMARCO merely "published" his opinions based upon facts he
3 believed to be true or on opinions which were arrived at as a
4 result of information he received from what he considered to be
5 legitimate sources.

6 The sixth cause of action directed against TRIMARCO for
7 intentional infliction of emotional distress is subject to the
8 same privileges and defenses recognized in actions to recover
9 damages for defamation. (Kachig v. Boothe (1971, 4th District)
10 22 Cal.App.3d 626.) In fact, it is generally held that an
11 independent cause of action cannot be maintained for the
12 intentional infliction of emotional distress based on the very
13 same acts which are insufficient to support a cause of action
14 for defamation. (See for example Flynn v. Higham (1983, 2nd
15 District) 149 Cal.App.3d 677.)

16 IV.

17 SUMMARY

18 Defendant TRIMARCO has shown by admissible evidence that
19 JOHN GROGAN is a public figure in the area of polygraph
20 examinations and polygraph investigations in general. Matters
21 discussed on the radio show were certainly of a public interest
22 and intended to be for the benefit of the public. The burden of
23 showing Plaintiff will probably prevail on his claims thereafter
24 rests solely on the shoulders of Plaintiff. A specific review
25 of each of the utterances should cause this Court to conclude
26 that they are either (1) not slander in the first place as many
27 are mere threats or opinions of actions that TRIMARCO would be
28 taking, (2) comments made in the "heat" of a public forum

1 established primarily to foment such public debate - an arena in
2 which JOHN GROGAN voluntarily placed himself (the Court may also
3 take judicial notice of the general tenure of the Tom Leykis
4 radio show), and/or (3) privileged as fair comment on a public
5 issue with a public person. It is therefore submitted the
6 Motion should be granted in all respects and TRIMARCO be
7 dismissed from this litigation.

8
9 Date: August 6, 2008

Respectfully submitted,

10 LAW OFFICE OF RICHARD A. HARVEY

11
12 By: 

13 Richard A. Harvey, Attorney for
14 Defendants JOHN TRIMARCO
15 A.K.A. JACK TRIMARCO;
16 JACK TRIMARCO & ASSOCIATES
17 POLYGRAPH/INVESTIGATIONS, INC.

18 MPA in Support of Motion to Strike Grogan

1
2 **PROOF OF SERVICE**

3 STATE OF CALIFORNIA, COUNTY OF ORANGE

4 I am employed in the County of Orange, State of California.
5 I am over the age of 18 and not a party to the within Action.
6 My business address is 21076 Bake Parkway, Suite 106, Lake
7 Forest, California 92630.

8 On August 6, 2008, I served the document described as
9 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF JOHN TRIMARCO**
10 **A.K.A. JACK TRIMARCO AND JACK TRIMARCO & ASSOCIATES**
11 **POLYGRAPH/INVESTIGATIONS, INC.'S SPECIAL MOTION TO STRIKE** on the
12 interested parties in this action by placing a true copy thereof
13 enclosed in a sealed envelope addressed as follows:

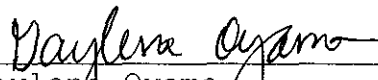
14 SEE ATTACHED SERVICE LIST

15 [XX] (BY MAIL) I caused each such envelope, with postage thereon
16 fully prepaid, to be placed in the United States mail at Lake
17 Forest, California. I am readily familiar with the practice of
18 collection and processing of correspondence for mailing, said
19 practice being that in the ordinary course of business, mail is
20 deposited in the United States Postal Service the same day as it
21 is scheduled for collection. I am aware that on motion of the
22 party served, service is presumed invalid if postal cancellation
23 date or postage meter date is more than one day after date of
24 deposit for mailing in affidavit.

25 [] (By Hand) I caused each envelope to be delivered by hand
26 to:

27 [XX] (STATE) I declare under penalty of perjury under the laws
28 of the State of California that the above is true and correct.

29 Executed on August 6, 2008 at Lake Forest, California.

30
31 
32 Gaylene Oyama

SERVICE LIST

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