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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AMERICAN DENTAL ASSOCIATION,
an Illinois non-profit corporation,

Plaintiff,

vs.

SHAWN KHORRAMI, an individual and
doing business as the LAW OFFICES OF
SHAWN KHORRAMI,

Defendants.

CASE NO. CV 02-3853 DT (RZx)

**ORDER DENYING DEFENDANT
SHAWN KHORRAMI'S MOTION TO
DISMISS; DENYING DEFENDANT'S
SPECIAL MOTION TO STRIKE FOR
LEGAL INSUFFICIENCY
PURSUANT TO CALIFORNIA CODE
OF CIVIL PROCEDURE § 425.16;
AND DENYING DEFENDANT'S
SPECIAL MOTION TO STRIKE FOR
EVIDENTIARY INSUFFICIENCY
PURSUANT TO CALIFORNIA CODE
OF CIVIL PROCEDURE § 425.16**

I. BACKGROUND

A. Factual Summary

This action is brought by Plaintiff American Dental Association ("ADA"), a non-profit society of dentists, against Defendant Shawn Khorrami ("Defendant") for Defamation, alleging that Defendant published false and defamatory statements appearing on his website and in his press releases. (See Complaint ¶ 16).

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1 The following facts are alleged in the Complaint:

2 The use of dental amalgam has been widely studied by numerous
3 scientific and consumer organizations that are unrelated to the ADA. (See
4 Complaint, ¶ 6.) There has been published findings on the safety of amalgam by
5 these organizations. (See id.) The ADA has also published scientific studies on
6 the safety of amalgam. (See id. at ¶ 12.) The ADA has no financial or other
7 economic stake in dental amalgam and the use of mercury. (See id. at ¶ 14.) Upon
8 belief, Defendant was aware of these scientific findings and reports when he
9 published the statements at issue. (See id. at ¶ 15.)

10 Defendant issued press releases and operates a website in which he
11 attempts to generate business for his law firm and to promote himself as an expert
12 in lawsuits concerning dental amalgam. (See id. at ¶ 16.) Among other things,
13 Defendant has stated in press releases and on his website:

- 14 (1) “[Defendant’s] firm has been extensively involved in litigation
15 with the American Dental Association, and is well familiar with
16 Plaintiff’s practice and its efforts to conceal the dangers associated
17 with amalgam for the financial benefit of itself and those of organized
18 dentistry.”;
- 19 (2) “The ADA has a vested economic interest in the continued use of
20 mercury and which has exercised undue and unfair pressure on
21 dentists not to warn their patients of the dangers of mercury.”;
- 22 (3) “When scientifically analyzed, amalgam fillings represent nothing
23 more than a con on the U.S. population, orchestrated by the American
24 Dental Association and its web of constituent associations and
25 component societies”
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1 (See id.)¹ Defendant's false and defamatory campaign of self-promotion was
2 published continuously over the internet and continues unabated to this day. (See
3 id. at ¶ 17.) Upon belief, Defendant continues to make statements of a similar
4 nature to others which essentially accuse the ADA of promoting unsafe dental
5 practices by (a) concealing "the dangers associated with amalgam for the financial
6 benefit of itself and those of organized dentistry," (b) "exercising undue and unfair
7 pressure" on dentists because of its purported "vested economic interests in
8 amalgam," (c) perpetuating a "con" on the American public concerning amalgam;
9 and (d) placing its interests above those of its members or their patients.

10 Defendant published the Statements with the intent to convey false
11 and defamatory meanings of and concerning the ADA. (See id. at ¶ 20.) Each and
12 every one of the Statements, implications and meanings is false. (See id. at ¶ 22.)
13 At the time of Defendant's publications of these Statements, Defendants knew that
14 the ADA did not promote or knowingly encourage any unsafe dental practices,
15 that the ADA did not defraud or "con" the public, that the ADA did not "conceal"
16 any danger from the public, that the ADA did not have any economic interest in
17 amalgam, that the ADA did not endanger the public with respect to amalgam by
18 putting its own economic interests above the interests of its members or their
19 patients and that the ADA did not cause any increase in the occurrence of diseases.
20 (See id. at ¶ 24.) As such, Defendant made the false Statements with knowledge
21 of their falsity or with reckless disregard as to their truth or falsity. (See id. at ¶
22 25.)

26 ¹ These statements, which are the basis for this action, will hereinafter be
27 collectively referred to as the "Statements."

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1 On July 2, 2003, this Court denied by minute order Defendant's
2 Request to Hear Defendant's Motion to Dismiss in advance.

3 On July 2, 2003, Defendant filed a Request to Hear Defendant's
4 Opposition to the ADA's Objections to Magistrate Zarefsky's May 9, 2003 Order
5 Granting in Part the ADA's Motion to Compel Further Discovery Responses,
6 which was denied.

7 On July 14, 2003, this Court granted in part and denied in part the
8 ADA's Objections to Magistrate Zarefsky's May 9, 2003 Order Granting in Part
9 the ADA's Motion to Compel Further Discovery Responses.

10 On August 29, 2003, the ADA filed a Motion for an Order Holding
11 Defendant and His Counsel In Contempt of Court and Awarding Sanctions for
12 Violation of Court Orders.

13 On September 2, 2003, Defendant filed an Ex Parte Application for
14 an Order Extending Deadline of July 14, 2003 Order to Respond to Discovery,
15 which this Court granted on September 3, 2003.

16 On September 3, 2003, a Substitution of Counsel was filed on behalf
17 of Defendant.

18 On September 19, 2003, pursuant to Stipulation, this Court ordered
19 the Motion for Contempt and Sanctions withdrawn and the present Motions
20 continued to this date.

21 **II. DISCUSSION**

22 Plaintiff seeks to dismiss the Complaint on the basis that the
23 Statements are privileged under the fair report privilege and the litigation
24 privilege. He also seeks to strike the complaint pursuant to California's Anti-
25 SLAPP Statute.

1 **A. Dismissal of the Complaint Is Not Warranted**

2 **1. The fair report privilege does not apply to protect the**
3 **Statements**

4 In seeking dismissal, Defendant contends that the statements are
5 absolutely privileged pursuant to California Civil Code § 47(d) because they are
6 true and fair reports in, and/or communications to, a public journal of allegations
7 made in litigation.

8 California Civil Code § 47(d) provides that a privileged publication is
9 one made:

10 By a fair and true report in, or a communication to, a
11 public journal, of (a) a judicial, (B) legislative, or (C)
12 other public official proceeding, or (D) of anything said
13 in the course thereof, or (E) of a verified charge or
14 complaint made by any person to a public official, upon
15 which complaint a warrant has been issued.

16 Cal. Civ. Code § 47(d)(1). This privilege is often referred to as “the fair report
17 privilege” or “the reporter’s privilege.”

18 Defendant argues that the privilege applies here because the
19 Statements echo the allegations from the complaints in actions brought on behalf
20 of clients against the ADA and are designed to reach members of the media and
21 the public, including class members and members of the general public who may
22 be affected by those actions.² In response, the ADA argues that Defendant is not a

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24 ² Defendant states that he represents clients in litigation against the ADA.
25 He states that in those actions, his clients, both individuals with personal injuries
26 and health groups concerned with the dangers or mercury, make allegations about
27 the dangers of the elemental mercury that is the primary constituent in dental
28 fillings. He states that the cases allege, among other things, a pattern of unlawful

1 member of the press to whom the fair report privilege applies, and that Defendant
2 materially altered the “gist” of the allegations made in the Amalgam Actions he
3 has filed against the ADA. For the reasons explained below, this Court agrees
4 with the ADA’s arguments.

5 **a. The Statements were not made in a public journal**

6 As set forth in Section 47(d), the privilege applies to a report in “a
7 public journal.” In attacking this element, the ADA argues that Defendant is not a
8 member of the press, and that this privilege was enacted to enable the press to
9 more easily fulfill their role in our democratic society. Defendant, on the other
10 hand, states that since the web site can be considered a “public journal” for
11 purposes of Section 47(d), the privilege applies to the Statements made in that
12 “public journal.”

13 In enacting Section 47(c), “California provided a certain amount of
14 breathing room for newspapers to explain the basis of a judicial proceeding
15 without at the same time opening themselves up to exposure for defamation
16 liability.” Dorsey v. National Enquirer, Inc., 973 F.2d 1431, 1437 (9th Cir. 1992).
17 As another court stated, “different policy considerations are involved when the
18 media are reporting the contents of a judicial proceeding [T]he fair report
19 privilege is required because of the public’s need for information to fulfill its
20 supervisory role over government.” McClatchy Newspapers, Inc. v. Superior

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22 promotion of mercury, concealment of dangers and intimidation toward dental
23 professionals who speak to the public or patients about the dangers. Hereinafter,
24 these actions will be collectively referred to as the “Amalgam Actions.” This
25 Court further notes that Defendant requests this Court to take judicial notice of
26 certain complaints filed in these Amalgam Actions, as well as the text of the web
27 pages the Complaint. See Request for Judicial Notice, filed on October 17, 2002.
28 Because this Request meets the standard for judicial notice as set forth in Federal
Rule of Evidence 201, this Court grants Defendant’s Request for Judicial Notice.

1 Court, 189 Cal. App. 3d 961, 974-75 (1987). Based on these policy
2 considerations, then, it appears that the fair report privilege should not extend to
3 protect the Statements.

4 Defendant, whose interest in making the Statements is apparent, was
5 not merely reporting on a judicial proceeding but was admittedly attempting to
6 generate additional business and clients. See Rothman v. Jackson, 49 Cal. App. 4th
7 1134, 1149 n. 3, 57 Cal. Rptr. 2d 284 (1996) (“The statements at issue in this case
8 simply make assertions which the defendants claim they intended in good faith to
9 make again later, in anticipated litigation. Obviously, the statements are not
10 reports or communications of judicial proceedings.”). Moreover, the website,
11 clearly sponsored and produced by “The Law Offices of Shawn Khorrami
12 [Defendant]”, cannot be considered a “public journal” as intended by Section
13 47(d). While, as noted by Defendant, the Supreme Court has acknowledged that
14 the Internet is “a unique and wholly new medium of worldwide human
15 communication,” Reno v. ACLU, 521 U.S. 844, 850, 117 S. Ct. 2329, 2334, 138
16 L. Ed. 2d 874 (1997), it did not find, or imply, that individual websites are akin to
17 newspapers or magazines or that the author of the website becomes a member of
18 the media. Here, as Defendant admits, his website does not serve to inform the
19 public in general but instead “serves the purpose of informing those members of
20 the public interested in pursuing litigation stemming from the health effects of
21 dental amalgam.” (See Motion, p. 10.)³ As such, the website is more properly
22 considered a profile and advertisement of a law firm rather than an outlet for
23 media reporting. Thus, this Court finds that the fair report privilege does not
24 apply to the Statements because Defendant’s website is not a “public journal.”

25
26 ³ Indeed, even in his Motion, Defendant admits that the Statements “are
27 designed to reach members of the media,” implying that he, himself, is not a
28 member of the media.

1 **b. The Statements were not a fair and true report of a**
2 **judicial proceeding**

3 As also set forth in Section 47(d), the privilege applies to “a fair and
4 true report” of a judicial proceeding. “A report is ‘fair and true’ if it captures the
5 substance, the gist, the sting of the libelous charge.” Crane v. The Arizona
6 Republic, 972 F.2d 1511, 1519 (9th Cir. 1992)(internal quotations and citations
7 omitted). Reports need only convey the substance of the proceedings on which
8 they report, “as measured by their impact on the average reader.” Id. (citing
9 Kilgore v. Younger, 30 Cal. 3d 770 (1982)). They do not need to recite the
10 proceedings verbatim. However, if the deviation is of a “substantial character”
11 that “produces a different effect” on the reader, then the privilege will not apply.
12 Id. (quoting Hayward v. Watsonville Register-Paharonian and Sun, 265 Cal. App.
13 2d 255 (1968)).

14 Under this standard, Defendant claims that the Statements accurately
15 reflect the substance of the various judicial proceedings instituted on behalf of
16 clients against the ADA in the Amalgam Actions. He asserts that a reader of the
17 Statements on the website would garner the same meaning as if one reviewed the
18 actual files. By contrast, the ADA claims that Defendant has not merely provided
19 a “report” about any judicial proceedings but instead has made false accusations
20 against the ADA for, among other things, “orchestrat[ing] a con” on the American
21 public.

22 In evaluating whether the Statements are a “fair and true report,” this
23 Court must consider the ADA’s tandem argument under Section 47(d)(2), which
24 expressly excludes certain communications from the fair report privilege.
25 Specifically, Section 47(d)(2) provides:

1 Nothing in paragraph (1) shall make privileged any
2 communication to a public journal that does any of the
3 following:

4 (A) Violates Rule 5-120 of the State Bar Rules of
5 Professional Conduct.

6 Cal. Civ. Code § 47(d)(2). The ADA asserts that the Statements violate Rule 5-
7 120 of the State Bar Rules of Professional Conduct ("Rule 5-120") and therefore
8 violate Section 47(d)(2). Rule 5-120 warns against attorneys publicizing litigation
9 or investigations, or otherwise making extrajudicial statements, and it provides the
10 type of statements which an attorney may make. See Cal. R. Prof. Conduct 5-
11 120(B)(1)-(6) (a member may state: (1) the claim, offense or defense involved and,
12 except when prohibited by law, the identity of the persons involved; (2) the
13 information contained in a public record; (3) that an investigation of the matter is
14 in progress; (4) the scheduling or result of any step in litigation; (5) a request for
15 assistance in obtaining evidence and information necessary thereto; and (6) a
16 warning of danger concerning the behavior of a person involved, when there is
17 reason to believe that there exists the likelihood of substantial harm to an
18 individual or the public interest).

19 Here, this Court finds that the Statements are not "a fair and true
20 report" of a judicial proceeding. In an effort to promote his litigation business,
21 Defendant presents the Statements to appear as statements of fact rather than as a
22 report of judicial proceedings. It would not be obvious to an average reader that
23 these Statements are part of the litigation, as claimed by Defendant. Defendant
24 attempts to save the Statements by pointing to other statements made within the
25 website which explicitly reference "lawsuits" or "cases" or "litigation." However,
26 it would not be clear to an average reader which of the Statements are actually
27 allegations of these lawsuits as opposed to factual statements. Moreover, the
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1 Statements violate Rule 5-120, and Defendant does not attempt to address this. In
2 determining whether a statement violates Rule 5-120, this Court considers
3 “whether the extrajudicial statement presents information the member knows is
4 false, deceptive, or the use of which would violate Business and Professions Code
5 section 6068(d).” See Discussion to Rule 5-120.⁴ At a minimum, the Statements
6 present information which appears deceptive. Thus, because the Statements are
7 not a “true and fair report” of a judicial proceeding and also violate Section
8 47(d)(2), the fair report privilege does not apply.

9 In light of the foregoing, and the failure of Defendant to establish the
10 elements of the fair report privilege, this Court finds that dismissal is not
11 warranted under Section 47(d).

12 **2. The litigation privilege does not apply to protect the**
13 **Statements**

14 Defendant also argues that the statements are privileged pursuant to
15 Civil Code § 47(b). Specifically, he states that he is absolutely immune from
16 liability because each of the Statements was made in furtherance of realistic and
17 likely future litigation against the ADA and the dental industry.

18 Civil Code § 47(b) provides that a privileged publication is one made
19 in any “judicial proceeding.” In order for this “litigation privilege” to apply, a
20 communication must be (1) made in judicial or quasi-judicial proceedings; (2) by
21 litigants or other participants authorized by law; (3) to achieve the objects of the
22 litigation; and (4) must have some connection or logical relation to the action.

23 Silberg v. Anderson, 50 Cal. 3d 205, 212, 266 Cal. Rptr. 638 (1990). The ADA

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25 ⁴ Business and Professions Code section 6068(d) provides that an attorney
26 shall “employ, for the purpose of maintaining the causes confided to him or her
27 such means only as are consistent with the truth, and never to seek to mislead the
28 judge or any judicial officer by an artifice or false statement of the law.”

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1 argues that this privilege does not apply because the Statements were not made “in
2 judicial proceedings,” are not pre-litigation statements, and were made to non-
3 participants in the action. As explained below, this Court agrees with the ADA.

4 **a. The Statements were not made “in judicial**
5 **proceedings”**

6 The “in judicial proceedings” requirement may be met where
7 statements were made outside the courtroom, but the publication must be
8 “required . . . or permitted . . . by law in the course of a judicial proceeding to
9 achieve the objects of the litigation.” Rothman, 49 Cal. App. 4th at 1142 (quoting
10 Albertson v. Raboff, 46 Cal. 2d 375, 380-81 (1956)). Further, to be privileged, a
11 statement must be related “to an actual or potential issue in an underlying action.”
12 Limandri v. Judkins, 52 Cal. App. 4th 326, 346, 60 Cal. Rptr. 2d 539 (1997). A
13 statement cannot be cloaked in privilege merely because it is contained in a
14 complaint. See Financial Corp. of America v. Wilburn, 189 Cal. App. 3d 764,
15 776, 234 Cal. Rptr. 653 (1987).

16 Here, it is difficult to see how the Statements were achieving the
17 objects of litigation. Instead, they were serving the interests of Defendant.
18 “Communications which only serve interests that happen to parallel or
19 complement a party’s interest in the litigation” do not establish the requisite
20 “connection or logical relation” element, and are not privileged. Rothman, 49 Cal.
21 App. 4th at 1147. Furthermore, while Defendant argues that the Statements were
22 merely the allegations of the Amalgam Actions, the Statements cannot
23 automatically be protected on this basis alone. As such, this Court finds that the
24 “in judicial proceedings” requirement is not met.

25 **b. The Statements are not pre-litigation statements**

26 In addition to the above, Defendant has not shown that the Statements
27 were pre-litigation statements, as he asserts. In the prelitigation context, the
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1 defendant must demonstrate that each statement was “made with a good faith
2 belief in a legally viable claim and in serious contemplation of litigation.”

3 Aronson v. Kinsella, 58 Cal. App. 4th 254, 266, 68 Cal. Rptr. 2d 305 (1997).

4 “More than a mere possibility or vague ‘anticipation’ of litigation must be required
5 for the privilege to attach, or else the privilege may be misused in ways for which
6 there is no public policy justification or purpose.” Edwards v. Centex Real Estate
7 Corp., 53 Cal. App. 4th 15, 33, 61 Cal. Rptr. 2d 518 (1997). Defendant must show
8 “substantial evidence that, at the time [he] made the [Statements], imminent
9 litigation was seriously proposed and actually contemplated in good faith as a
10 means of resolving the parties’ dispute.” Id. at 39. Only “when litigation is no
11 longer a mere possibility, but has instead ripened into a proposed proceeding”
12 does the privilege arise. Id.

13 This Court finds that the Statements cannot properly be considered
14 “pre-litigation statements.” The purpose of the website was to solicit new
15 business rather than to state the imminent filing of claims on behalf of known
16 clients. While Defendant asserts that “[t]he web pages themselves make clear that
17 Khorrami is seeking additional clients and is prepared to file actions on their
18 behalf” (Motion, p. 14.), this assertion falls short of showing that litigation was
19 “seriously proposed and actually contemplated.” See Eisenberg v. Alameda
20 Newspapers, Inc., 74 Cal. App. 4th 1359, 1378-79, 88 Cal. Rptr. 2d 802
21 (1999)(“mere threat of litigation [does not] bring[] the privilege into play”).

22 Defendant relies on the case of Rubin v. Green, 4 Cal. 4th 1187, 17
23 Cal. Rptr. 2d 828 (1993), to assert that the privilege applies here. However, the
24 facts of this case contrast with the facts in Rubin. In Rubin, an owner of a
25 mobilehome park received a notice of intention to commence an action from a
26 resident who purported to act in behalf of all of the residents of the park. In the
27 notice, the resident alleged defects in the operation of the park and sought several

1 remedies. The owner filed an action against the resident and her attorneys,
2 alleging defendants had solicited other residents as clients of the attorneys in
3 anticipation of litigation. The California Supreme Court reversed the Court of
4 Appeal's finding that the litigation privilege did not apply. It stated:

5 [W]e can imagine few communicative acts more clearly
6 within the scope of the privilege than those alleged in the
7 amended complaint, that is, meeting and discussing with
8 Cedar Village residents park conditions and the merits of
9 the proposed failure-to-maintain lawsuit, and filing the
10 complaint and subsequent pleadings in the litigation.

11 Id. at 1195. Clearly, the communications at issue in Rubin fell within the privilege
12 because they bore "some relation" to a lawsuit. Here, by contrast, the Statements
13 were made to unidentified third parties in the hopes that they would contact
14 Defendant to discuss a lawsuit. Without an identified potential plaintiff, the
15 potential claims cannot be known. Moreover, the Rubin Court's discussion relied
16 on by Defendant (see id. at 1197-98) related to the Court's determination that a
17 derivative action based on a claim for unlawful solicitation was not available. It
18 did not relate to the Court's determination regarding the application of the
19 litigation privilege to pre-litigation statements.

20 Thus, in sum, this Court finds that the Statements are not
21 pre-litigation statements for the purposes of the litigation privilege.

22 **c. The Statements were made to non-participants in the**
23 **action**

24 Finally, as a general rule, "[r]epublications to nonparticipants in the
25 action" are not covered by the litigation privilege. Silberg, 50 Cal. 3d at 219; see
26 also Financial Corp. of America, 189 Cal. App. 3d at 778 (attorney's statements to
27 "all persons throughout Northern California" not privileged because the

1 publication was made to persons unconnected with the judicial proceeding); Susan
2 A. v. County of Sonoma, 2 Cal. App. 4th 88, 94, 3 Cal. Rptr. 2d 27
3 (1991)(“publication to the general public through the press” is not privileged);
4 Rothman, 49 Cal. App. 4th at 1151 (no privilege where attorney’s statements were
5 “transmitted to others throughout the world”). Thus, because, as Defendant
6 himself admits, the Statements were published on the website to others
7 unconnected with the proceedings, the Statements are not within the litigation
8 privilege. And even if Defendant claims otherwise - that the Statements were
9 directly connected to the ongoing proceedings, “the litigation privilege should not
10 be extended to ‘litigating in the press.’” Rothman, 49 Cal. App. 4th at 1149.

11 In sum, Defendant cannot establish the requisite factors in order for
12 the litigation privilege to apply. This Court therefore finds that dismissal is not
13 warranted on the basis that the Statements are privileged under Section 47(b).

14 **B. Striking of the Complaint is not warranted**

15 In addition to dismissal, Defendant asks the Court to strike the
16 Complaint pursuant to the California Anti-SLAPP Statute.

17 A SLAPP (“Strategic Lawsuits Against Public Participation”) suit is
18 one wherein the plaintiff alleges injury resulting from petitioning or free speech
19 activities by a defendant that are protected by the federal or state constitutions.
20 California Code of Civil Procedure § 425.16(a), the Anti-SLAPP Statute, was
21 “enacted to allow for early dismissal of meritless first amendment cases aimed at
22 chilling expression through costly, time-consuming litigation.” Metabolife Int’l,
23 Inc. v. Wornick, 264 F.3d 832, 839 (9th Cir. 2001). It provides for “a special
24 motion to strike” by a person against whom a claim has been brought “arising
25 from any act of that person in furtherance of the person’s right of petition or free
26 speech . . . in connection with a public issue.” Cal. Civ. Proc. Code §
27 425.16(b)(1). An “act in furtherance of a person’s right of petition or free speech .

1 . . . in connection with a public issue” includes four categories. See id. at §
2 425.16(e). One category is “any written or oral statement or writing made in a
3 place open to the public or a public forum in connection with an issue of public
4 interest . . . or any other conduct in furtherance of the exercise of the constitutional
5 right of petition or the constitutional right of free speech in connection with a
6 public issue or an issue of public interest.” Id.

7 **1. The Anti-SLAPP Statute does not apply here**

8 The first question is whether the Anti-SLAPP Statute applies here to
9 allow Defendant to raise this motion to strike pursuant to that statute. The ADA
10 argues that it does not because of a new enactment to the Anti-SLAPP Statute
11 which excludes certain statements and conduct from the Anti-SLAPP Statute.

12 **a. Section 425.17 applies to exclude Defendant’s conduct**
13 **from the reach of the Anti-SLAPP Statute**

14 In September 2003, the California Legislature enacted changes to the
15 Anti-SLAPP Statute, effective January 1, 2004, to curb what it found to be “a
16 disturbing abuse of Section 425.16, the Anti-SLAPP Statute, which has
17 undermined the exercise of the constitutional rights of freedom of speech and
18 petition for redress of grievances, contrary to the purpose and intent of Section
19 425.16.” Cal. Civ. Proc. Code § 425.17(a). As such, certain conduct is expressly
20 excluded from the reach of the Anti-SLAPP Statute. Applicable here is the
21 following:

22 Section 425.16 does not apply to any cause of action
23 brought against a person primarily engaged in the
24 business of selling or leasing goods or services,
25 including, but not limited to, insurance, securities, or
26 financial instruments, arising from any statement or
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1 conduct by that person if both of the following
2 conditions exist:

3 (1) The statement or conduct consists of representations
4 of fact about that person’s or a business competitor’s
5 business operations, goods, or services, that is made for
6 the purpose of obtaining approval for, promoting, or
7 securing sales or leases of, or commercial transactions in,
8 the person’s goods or services, or the statement or
9 conduct was made in the course of delivering the
10 person’s good or services.

11 (2) The intended audience is an actual or potential buyer
12 or customer, or a person likely to repeat the statement to,
13 or otherwise influence, an actual or potential buyer or
14 customer, . . . , notwithstanding that the conduct or
15 statement concerns an important public issue.

16 Id. at § 425.17(c).

17 Under this new enactment, the ADA argues that since Defendant
18 published the Statements on his firm’s website to promote his firm’s legal services
19 to potential clients, Defendant’s conduct is expressly excluded from the reach of
20 the Anti-SLAPP Statute. In response, Defendant argues that the new enactment is
21 expressly inapplicable to this action. For the reasons explained below, this Court
22 finds that the exclusion of Section 425.17 applies to the conduct here.

23 The plain language of the statute itself evidences its application here.
24 First, Defendant is “a person primarily engaged in the business of selling . . .
25 services.” Id. at § 425.17(c). Second, the ADA’s cause of action arises from
26 “statement[s] or conduct by that person [Defendant].” Id. Third, the “statement[s]
27 or conduct consists of representations of fact about [Defendant’s] business
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1 operations . . . or services, that is made for the purpose of . . . promoting . . . the
2 person's . . . services" Id. at § 425.17(c)(1). Fourth, the "intended audience
3 is an actual or potential . . . customer, or a person likely to repeat the statement to,
4 or otherwise influence, an actual or potential . . . customer . . . , notwithstanding
5 that the conduct or statement concerns an important public issue." Id. at §
6 425.17(c)(2).

7 In an effort to dispute the applicability of this section, Defendant
8 argues that this exception was intended to reach "litigation between competitors
9 concerning the attributes of their products and services." He then contends that it
10 must be shown that the ADA is a competitor of his. Defendant is incorrect. The
11 statute explicitly states that the statement or conduct must consist of
12 "representations of fact about that person's *or* a business competitor's business
13 operations, goods, or services." Id. at § 425.17(c)(1) (emphasis added).

14 Defendant also attempts to escape the applicability of this section by asserting that
15 the Statements are about public policy issues. Not surprisingly, Defendant is
16 attempting to recharacterize the contents of his website as "speech about
17 substantive policy issues that are the subject of his lawsuits," which is of course,
18 in contrast to his previous characterizations of the contents as "routine discussions
19 about his cases on his firm's websites" (Motion, p. 1.), "informing those members
20 of the public interested in pursuing litigation stemming from the health effects of
21 dental amalgam about the status of past, ongoing and future actions against the
22 ADA" (id. at p. 10), "made in furtherance of realistic and likely future litigation
23 against the ADA" (id.), "to promote himself to potential clients and induce the
24 readers to retain him" (id. at p. 14). Contrary to Defendant's recharacterizations, it
25 is clear that the website and the Statements exist solely to promote Defendant, his
26 firm and his services. In any event, even assuming the conduct at issue could be

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1 characterized as Defendant desires, the exception applies “notwithstanding that the
2 conduct or statement concerns an important public issue.” Id. at § 425.17(c)(2).

3 Thus, this Court finds that the Statements and conduct at issue fall
4 within the provisions of Section 425.17(c).

5 **b. Section 425.17(c) is given prospective application to**
6 **the defamation claim**

7 Since the exclusion in Section 425.17 applies here, the issue becomes
8 whether it should be applied prospectively to the ADA’s claim for defamation. In
9 deciding this issue, this Court is guided by the Supreme Court case of Landgraf v.
10 USI Film Products, 511 U.S. 244, 269-70, 114 S. Ct. 1483, 1499, 128 L. Ed. 2d
11 229 (1994). In Landgraf, the Court acknowledged the presumption against
12 statutory retroactivity, but it also acknowledged that in many situations, a court
13 should “‘apply the law in effect at the time it renders its decision,’ Bradley, 416
14 U.S. at 711, 94 S. Ct. at 2016, even though that law was enacted after the events
15 that gave rise to the suit.” Landgraf, 511 U.S. at 273. It stated:

16 A statute does not operate ‘retrospectively’ merely
17 because it is applied in a case arising from conduct
18 antedating the statute’s enactment, [citation], or upsets
19 expectations based in prior law. Rather, the court must
20 ask whether the new provision attaches new legal
21 consequences to events completed before its enactment.
22 The conclusion that a particular rule operates
23 ‘retroactively’ comes at the end of a process of judgment
24 concerning the nature and extent of the change in the law
25 and the degree of connection between the operation of
26 the new rule and a relevant past event.

1 Id. at 269-70. (Footnote omitted.) The Supreme Court discussed situations
2 wherein application of new statutes passed after the events in suit is
3 “unquestionably proper.” See id. One such situation is a change in procedural
4 rules because of the “diminished reliance interests in matters of procedure.” Id. at
5 275.

6 Here, this Court agrees with the ADA that the Anti-SLAPP statute is
7 procedural.⁵ In Robertson v. Rodriguez, 36 Cal. App. 4th 347, 356, 42 Cal. Rptr.
8 2d 464 (1995), the plaintiff’s libel claim arose in October 1992 and the complaint
9 was filed in November 1992. Upon enactment of the Anti-SLAPP statute, which
10 became effective January 1, 1993, the plaintiff argued that the Anti-SLAPP statute
11 could not be applied to his libel claim because the statute would be given
12 retroactive effect. The Court disagreed, finding the plaintiff’s argument to be
13 meritless: “Section 425.16, a procedural statute, is being applied prospectively to
14 an existing cause of action.” Id. at 356. It continued:

15 A statute does not operate retroactively merely because
16 some of the facts or conditions upon which its
17 application depends came into existence prior to its
18 enactment [¶] Section 425.16 does not change the
19 legal effect of past conduct. It merely is a procedural
20 screening mechanism for determining whether a plaintiff
21 can demonstrate sufficient facts to establish a prima facie
22 case to permit the matter to go to a trier of fact.

23 Therefore, the statute is applicable to a cause of action
24 which arose before its effective date.

25
26 _____
27 ⁵ This Court notes that Defendant offers no argument contrary to the ADA’s
28 position that the Anti-SLAPP Statute is procedural.

1 the Anti-SLAPP Statute applied here, this Court finds that the ADA has
2 established a probability that it will prevail on its defamation claim, as explained
3 below.⁶

4 Defendant argues that the Complaint must be struck pursuant to the
5 Anti-SLAPP statute because the ADA will be unable to make a prima facie
6 showing of actual malice. It claims that should the Court not grant the Special
7 Motion to Strike based on the legal insufficiency of the Complaint, it may consider
8 this Special Motion to Strike to consider whether the ADA can meet the burden of
9 establishing the prima facie evidentiary sufficiency of the Complaint.

10 Consideration of a motion to strike under the anti-SLAPP statute
11 involves a two-part inquiry: (1) the defendant must make an initial prima facie
12 showing that the plaintiff's lawsuit arises from an act in furtherance of the
13 defendant's rights of petition or free speech; and (2) if the defendant makes the
14 prima facie showing, the burden shifts to the plaintiff to demonstrate a probability
15 of prevailing on the challenged claims. Vess v. Ciba Geigy Corp. USA, 317 F.3d
16 1097, 1110 (9th Cir. 2003). "To determine whether plaintiff has met this burden,
17 the test is the same as for a motion for summary judgment. The court may not
18 weigh the evidence or make credibility determinations; doing either would violate
19 plaintiff's right to a jury trial." Colt v. Freedom Communications, Inc., 109 Cal.
20 App. 4th 1551, 1557, 1 Cal. Rptr. 3d 245 (2003). "Although the procedure was
21 designed to help defendants promptly rid themselves of meritless lawsuits, where
22 the underlying lawsuit has even minimal merit the Anti-SLAPP motion must be

23 ⁶ This Court notes that Defendant first argues that the Complaint must be
24 struck pursuant to the California Anti-SLAPP statute because the statements are
25 absolutely privileged, and he relies on the arguments raised with respect to his
26 motion to dismiss. For the same reasons discussed with respect to the motion to
27 dismiss, the striking of the complaint is not warranted on the basis of privilege.

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1 denied and the matter must be tried.” Varian Medical Systems, Inc. v. Delfino,
2 113 Cal. App. 4th 273, 310, 6 Cal. Rptr. 3d 325 (2003).

3 As stated above, Defendant asserts that the ADA will not prevail on
4 its claim for defamation because it cannot show the requisite actual malice. A
5 defamation claim involving a “public figure” requires proof that the alleged
6 defamatory statements were published with “actual malice” - a showing that the
7 publisher acted with knowledge that his statements were false or acted with
8 “reckless disregard” as to whether his statements were false or not. See New York
9 Times Co. v. Sullivan, 376 U.S. 254, 279-80, 84 S. Ct. 710, 11 L. ED. 2d 686
10 (1964). For purposes of this motion, the ADA assumes that it is a “public figure.”
11 As such, the issue before this Court is whether the ADA sets forth sufficient
12 evidence to establish the malice element of its defamation claim.

13 To establish that Defendant made the Statements with actual malice,
14 the ADA advances the following arguments: (a) Defendant fabricated the bases for
15 the Statements; (b) Defendant purposefully avoided the truth; (c) Defendant
16 blindly relied on biased sources; and (d) Defendant blindly relied on “science”
17 which is not generally accepted in the dental community. This Court addresses
18 each of these arguments.

19 **a. Whether Defendant fabricated the bases for the**
20 **Statements**

21 In his Declaration, Defendant identified two individuals as “support”
22 for the Statements (Dr. McRedmond and Dr. Cave), and during his deposition,
23 Defendant identified two additional “sources” of information for the Statements
24 (Dr. Haley and Dr. Lorscheider). The ADA contends that the depositions of these
25 third party witnesses revealed that none of them provided Defendant with any
26 bases for the Statements. It offers the following evidence:

1 Dr. McRedmond: He testified that he did not provide any information
2 to Defendant or his office to support any of the Statements. (McRedmond Depo.
3 at 11-13.) He testified that he never discussed amalgam with Defendant, and he
4 never discussed any issue relating to the ADA with Defendant. (Id. at 17-18.) He
5 testified that he never gave Defendant any information for use in Defendant's
6 website, and he never authorized Defendant to use any information that he
7 provided. (Id. at 19.) Dr. McRedmond testified that he has never published any
8 articles relating to any of the Statements, and he has never given testimony to any
9 public body related to the issues raised by the Statements, or taken a public
10 position related to those issues. (Id. at p. 21.)

11 Dr. Cave: She testified that she never provided any documents or
12 information to Defendant relating to or supporting the Statements. (Cave Depo. at
13 18-21.) She has not published or spoken publicly on such issues. (Id.) She
14 confirmed that she does not know the purpose behind the ADA's policies related
15 to amalgam, and she has never asked anyone at the ADA about its policies related
16 to amalgam. (Id. at 23.) Dr. Cave never gave him any information for publication
17 on his website or to be used as a basis for any publication on his website. (Id. at
18 51-52.)

19 Dr. Haley: He testified that he never provided any information to be
20 included on the website, and Defendant never discussed his website with him.
21 (Haley Depo. at 298-299.) When asked what he told Defendant about ADA's
22 practices, Haley responded that he knew nothing about their practices. (Id. at 127,
23 233-234.) Similarly, Haley testified that knew nothing about ADA's financial
24 interests. (Id. at 128.)

25 Dr. Lorscheider: He testified that Defendant never consulted with him
26 about statements made on Defendant's website; he is not aware of anything
27 Defendant has said in statements or press releases, and he has never seen

SCANNED

1 Defendant's website. (Lorscheider Depo. at 46-47, 82.) Lorscheider provided a
2 declaration to Defendant in another case, but he testified that he did not provide
3 Defendant with any information relating to the ADA's practices and efforts to
4 "conceal the dangers" associated with amalgam, the ADA's financial interest with
5 respect to amalgam, the ADA's "undue and unfair pressure on dentists" relating to
6 warnings about the dangers of mercury and amalgam, or the ADA perpetrating a
7 "con" on the U.S. population relating to dental amalgam. (Id. at 28-39.)

8 This Court finds that a reasonable juror could infer actual malice from
9 this testimony. See St. Amant v. Thompson, 390 U.S. 727,732, 88 S. Ct. 1323, 20
10 L. Ed. 2d 262 (1968) (actual malice can be inferred from evidence that the
11 statements were "fabricated"); Flowers v. Carville, 310 F.3d 1118, 1129 (9th Cir.
12 2002) ("We have held that when a speaker outlines the factual basis for his
13 conclusion, his statement is protected. This assumes, however, that the factual
14 basis itself is true."). "One cannot fairly argue [the defendant's] good faith or
15 avoid liability by claiming that he is relying on the reports of another if the latter's
16 statements or observations are altered or taken out of context." Goldwater v.
17 Ginzburg, 414 F.2d 324, 337 (2d Cir. 1969). As such, one could find that
18 Defendant, by relying on "sources" who state that they provided no information,
19 or have no knowledge, regarding the Statements, entertained serious doubts as to
20 the truth of the Statements or had a high degree of awareness of their probably
21 falsity.

22 **b. Whether Defendant purposefully avoided the truth**

23 The ADA contends that Defendant purposefully avoided the truth in
24 making the Statements, and that there was ample information from other sources
25 available to him that would have raised doubts as to the truth of the Statements. In
26 support of this contention, it offers the following evidence:
27
28

1 Re the “dangers” of amalgam: Defendant came to the conclusion that
2 amalgam was unsafe “pretty immediately,” and he based this conclusion upon “the
3 fact” that amalgam caused “exposure to mercury” (Defendant Depo. at 148-
4 149.) He never asked Dr. Lorscheider about research and findings indicating that
5 dental amalgam is safe, about what was said in any governmental agency’s
6 documents on the subject of amalgam, and about the validity or basis for those
7 documents. (Lorscheider Depo., at 59-61, 76, 80-82, 141.)

8 Re the ADA’s practices and whether the ADA perpetuated a “con” or
9 “concealed” information: Defendant claims that the ADA exerted “pressure” on
10 dentists through the ADA’s “ethical guidelines regarding its stated position on
11 amalgam and its safety, and particularly its ethical codes and Resolution 42H-1986
12” (Defendant Decl., ¶¶ 6, 11, 13.) During his deposition, however, Defendant
13 admitted that he has never asked anyone at the ADA any questions relating to the
14 ADA’s ethical codes, and he never conducted any discovery related to the ADA’s
15 ethical codes prior to the publication of his defamatory statements. (Defendant
16 Depo. at 168-170.) He testified that he is not aware of any disciplinary action by
17 the ADA against any member for violation of its ethical codes. (Id. at 301, 3003.)

18 Re the ADA’s purported “financial interest” in the seal of acceptances
19 program: Defendant admitted that he never made any inquiries regarding how
20 much the Seal of Acceptance program costs the ADA, and he never asked whether
21 the ADA makes any profits from the Seal of Acceptance program. (Id. at 415.)
22 He further admitted that he had knowledge that the ADA does not make profits
23 from the Seal of Acceptance program, and according to Defendant, “it doesn’t
24 matter.” (Id.) Further, Defendant testified that he has no information to dispute
25 the ADA’s claim that it does not make a profit from the Seal of Acceptance
26 program. (Id. at 415-416.)

SCANNED

1 Re the ADA's purported "financial interest" in patents: Defendant
2 admitted that he had no specific recollection of the exact documents which
3 provided him with the information that the ADA purportedly derived a profit from
4 its patents, and he did not produce any such documents in response to the ADA's
5 document requests. Instead, Defendant testified that he learned the information
6 from "documents obtained describing the Health Foundation." (Defendant Depo.
7 at 423-24.) When asked whether he tried to conduct any investigation as to
8 whether or not it is correct that the ADA licensed its patents for money, Defendant
9 responded that the unidentified and unidentifiable documents were "conclusive" to
10 him without any investigation. (Id. at 425-26.)

11 Based on the above evidence, this Court finds that a reasonable juror
12 could infer actual malice based on Defendant's purposeful avoidance of the truth.
13 See, e.g., Harte-Hanks Communications v. Connaughton, 491 U.S. 657, 683-84,
14 109 S. Ct. 2678 (1989) ("one might reasonably infer" actual malice from failure to
15 listen to tapes or interview witnesses before writing of article); Suzuki Motor
16 Corp. v. Consumers Union of United States, Inc., 330 F.3d 1127, 1129 (9th Cir.
17 2003) ("The critical inquiry . . . is whether [the defendant] failed to act reasonably
18 in investigating and responding to contrary studies in a manner that suggested it
19 was attempting purposefully to avoid discovering the truth of the matter.");
20 McFarlane v. Sheridan Square Press, Inc., 91 F.3d 1501, 1510 (D.C. Cir. 1996)(a
21 defendant's failure to examine evidence within easy reach or to make obvious
22 contacts in an effort to confirm its statements would be evidence of "reckless
23 disregard"); Goldwater, 414 F.2d at 333-34 & n. 15 (actual malice finding
24 supported by failure to heed or even disclose warnings about scientific invalidity
25 of survey upon which conclusions in article were based).

1 defendant's actual malice since, inter alia, "defendant knew that its testing
 2 methods had been criticized . . . as unreliable"); Fisher v. Larsen, 138 Cal. App. 3d
 3 627, 639-40, 188 Cal. Rptr. 216 (1982)(defendants could not obtain summary
 4 judgment where, among other things, the plaintiff alleged that the defendants
 5 knew that the source of their information was biased against plaintiff);
 6 Westmoreland v. CBS Inc., 596 F. Supp. 1170, 1174 (S.D.N.Y. 1984)(actual
 7 malice may be found where there is evidence that the reporter "knowingly or
 8 recklessly misstated that evidence to make it seem more convincing or
 9 condemnatory than it is").

10 **d. Whether Defendant blindly relied on "science" which**
 11 **is not generally accepted in the dental community**

12 The ADA contends that Defendant's blind reliance on "science"
 13 which is not generally accepted in the scientific community provides further
 14 evidence of actual malice.

15 In support of this contention, the ADA relies on the case of
 16 Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969). In Goldwater, the
 17 defendants wrote an article about Senator Goldwater, who at the time the
 18 magazine was published was a United States Senator and a candidate for election
 19 to the office of the President of the United States. Id. at 327. Working under the
 20 pre-conceived notion that Senator Goldwater was mentally unfit to serve as
 21 President, the defendants "prepared and sent a letter and a questionnaire to a list of
 22 psychiatrists. The solicited psychiatrists were invited to answer, with their
 23 comments, the question, 'Do you believe Barry Goldwater is psychologically fit to
 24 serve as President of the United States? [] No [] Yes.'" Id. at 329. Upon
 25 receiving this questionnaire, "reputable psychiatrists and the principal psychiatric
 26 professional associations sent letters denying the validity of the project." Id. at
 27 333-34. Despite knowledge of their use of an invalid scientific method,

1 defendants nonetheless published their article with the results of their psychiatric
2 "poll." Id. at 334. The Second Circuit affirmed a judgment in favor of the
3 plaintiff Senator Goldwater, based in part upon the magazine publisher and
4 editor's reliance upon invalid science. Id. at 333-34 & n. 15.

5 This Court agrees that Goldwater is applicable here. The ADA
6 presents evidence that Defendant's own sources admit that the governmental
7 agencies - the FDA, HHS, the CDC, the USPHS, the NIH, and the WHO⁷ - have
8 found that the use of amalgam fillings poses no health risk to the dental patient.
9 (See Cave Depo. at 29, 37; Haley Depo. at 109-111, 117-118, 142; Lorscheider
10 Depo. at 66-68, 70-71.) Both Haley and Lorscheider admitted during their
11 depositions that theirs is not a generally accepted position regarding the safety of
12 dental amalgam. (Haley Depo. at 234-35; Lorscheider Depo. at 38.) The ADA
13 presents evidence that available scientific data and critical reviews of these data by
14 unbiased experts in the fields leads to the conclusion that dental amalgam is a safe
15 and effective restorative material (Li Decl., ¶ 31), and that this conclusion is
16 consistent with the current positions of U.S. and international health authorities,
17 including the USPHS, the FDA, the NIH, the WHO, HHS and the CDC. (Id. at ¶
18 24; Cave Depo. at 29, 37; Haley Depo. at 109-111, 117-18; Lorscheider Depo. at
19 66-68, 70-71.) As such, under Goldwater, Defendant's alleged blind reliance upon
20 science contrary to the generally accepted position of the scientific community is
21 sufficient to establish actual malice to survive this motion.

22 In his Reply, Defendant attempts to respond to the above evidence.
23 However, Defendant's arguments are largely irrelevant at this point of the inquiry.

24 _____
25 ⁷ The FDA is the United States Food and Drug Administration, the HHS is
26 the Health and Human Services, the CDC is the Center for Disease Control, the
27 USPHS is the United States Pubic Health Service, the NIH is the National Institute
of Health, the WHO is the World Health Organization.

1 Specifically, rather than addressing the sufficiency of the ADA's evidence or the
2 underlying legal principles, Defendant attempts to refute the ADA's evidence by
3 pointing to his own evidence regarding the dangers of amalgam and asserting that
4 he had "ample scientific information that supports [his] conclusions." Under the
5 governing standard, though, this Court's determination is limited to whether the
6 ADA has established a probability that it will prevail on the claim. This Court
7 cannot weigh the evidence or determine the credibility of witnesses. "To establish
8 the requisite probability of prevailing, a plaintiff . . . need only 'demonstrate that
9 the complaint is both legally sufficient and supported by a sufficient prima facie
10 showing of facts to sustain a favorable judgment if the evidence submitted by the
11 plaintiff is credited.'" Drum v. Bleau, Fox & Associates, 107 Cal. App. 4th 1009,
12 1018, 132 Cal. Rptr. 2d 602 (2003)(citing Navellier v. Sletten, 29 Cal. 4th 82, 88-
13 89, 124 Cal. Rptr. 2d 530 (2002); see also Briggs v. Eden Council for Hope and
14 Opportunity, 19 Cal. 4th 1106, 1122-23 (1999) (citations omitted; quoting
15 Rosenthal v. Great Western Fin. Securities Corp., 14 Cal. 4th 394, 412, 58 Cal.
16 Rptr. 2d 875 (1996)(stating that courts do not require plaintiff to prove the claim
17 but instead must "read the [Anti-SLAPP] statutes as requiring the court to
18 determine only if the plaintiff has stated and substantiated a legally sufficient
19 claim"). Thus, even assuming that the Anti-SLAPP Statute was applicable, based
20 on this Court's determination that the ADA has sufficiently supported the actual
21 malice element of its claim, this Court finds that the striking of the Complaint is
22 not warranted on this separate and additional basis.

1 **III. CONCLUSION**

2 Accordingly, this Court **denies** Defendant Shawn Khorrami's Motion
3 to Dismiss; **denies** Defendant's Special Motion to Strike for Legal Insufficiency;
4 and **denies** Defendant's Special Motion to Strike for Evidentiary Insufficiency.

5
6 IT IS SO ORDERED.

7
8 DATED: 1-26-04

DICKRAN TEVRIZIAN

Dickran Tevrizian, Judge
United States District Court