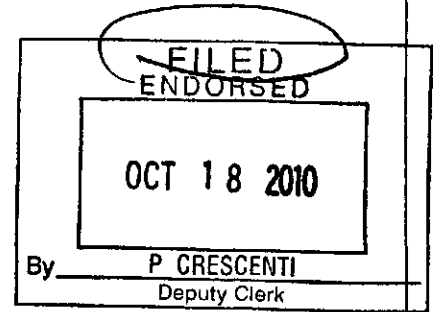


1 Darrell A. Fruth (SBN 213529)  
2 **BROOKS, PIERCE, MCLENDON,**  
3 **HUMPHREY & LEONARD, L.L.P.**  
4 2000 Renaissance Plaza  
5 230 North Elm Street  
6 Greensboro, NC 27410  
7 Tel: (336) 271-3199; Fax: (336) 232-9199

8 Attorney for Defendant Luranell Burch



9  
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
11 **COUNTY OF SACRAMENTO**

12 **GLENN HAGELE,**  
13 **Plaintiff,**  
14 **vs.**  
15 **BRENT HANSON, and DOES 1 through 20,**  
16 **Defendants.**

**CASE NO. 06AS00839**

**SPECIALY APPEARING DEFENDANT  
LAURANELL BURCH'S NOTICE OF  
MOTION; MOTION FOR ATTORNEYS'  
FEES UNDER CCP 425.16(C); AND  
SUPPORTING MEMORANDUM**

**[CCP 425.16(c)]**

**Telephone Appearance  
[C.R.C. 3.670 and L.R. 9.10]**

Date: November 12, 2010  
Time: 2:00 p.m.  
Place: Dept. No. 53

First Amended Complaint  
Filed: November 3, 2006

**BY FAX**

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 NOTICE IS HEREBY GIVEN that on November 12, 2010 at 2:00 p.m., or as soon  
3 thereafter as the matter may be heard, in Department 53 of the above-entitled Court, located at 800  
4 9th Street, Sacramento, California, 95814, specially appearing Defendant Lauranell Burch will and  
5 hereby does appear specially, by and through her attorneys, to present her Motion for Attorneys'  
6 Fees Pursuant to C.C.P. § 425.16(c) requesting attorneys' fees in the amount of \$20,244 and  
7 \$750.60 in costs, or such amount as the Court finds proper, against Plaintiff Glenn Hagele.

8 This motion is brought pursuant to California Code of Civil Procedure section 425.16(c),  
9 which provides that a prevailing defendant on a special motion to strike "shall be entitled" to  
10 recover attorney fees. Here, Plaintiff entered a voluntary dismissal after Burch filed her special  
11 motion to strike. Under well-established law, Burch is entitled to attorneys' fees as a prevailing  
12 defendant under Section 415.6(c), because (1) Plaintiff did not substantially achieve his litigation  
13 goals through settlement or other means, and (2) for the reasons set out in Burch's special motion to  
14 strike, this action is covered by the anti-SLAPP statute and Plaintiff cannot meet his burden of  
15 establishing a probability of prevailing in this action. The Court should therefore award attorneys'  
16 fees to Burch, consistent with the letter and purpose of California's anti-SLAPP law.

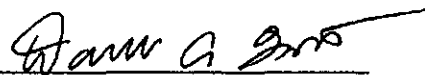
17 This Motion will be based on this Notice of Motion and Motion for Attorneys' Fees  
18 Pursuant to C.C.P. § 425.16(c); the accompanying Memorandum of Points and Authorities, the  
19 Declaration of Darrell A. Fruth in Support of Specially Appearing Defendant Burch's Motion for  
20 Attorneys' Fees; the pleadings, records, and files submitted to the Court in this matter (including  
21 Burch's Special Motion to Strike and supporting papers), together with such further evidence as  
22 may be presented at the hearing before the Court on this Motion.

23 Pursuant to Local Rule 3.04, the court will make a tentative ruling on the merits of this  
24 matter by 2:00 p.m., the court day before the hearing. You may access the court's website at  
25 <http://www.saccourt.ca.gov>. If you do not have online access, you may obtain the tentative ruling  
26 over the telephone by calling (916) 874-8142 and a deputy clerk will read the ruling to you. If you  
27 wish to request oral argument, you must contact the courtroom clerk at (916) 874-7858 (Department  
28 53) or (916) 874-7848 (Department 54) and the opposing party before 4:00 p.m. the court day

1 before the hearing. If you do not call the court and opposing party before 4:00 p.m. on the court day  
2 before the hearing, no hearing will be held.

3 DATED: October 18, 2010

BROOKS, PIERCE, MCLENDON,  
HUMPHREY & LEONARD, L.L.P.

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5 By:   
6 Darrell A. Fruth  
7 Attorney for Defendant Lauranell Burch  
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1           Having established that Hagele's lawsuit was a SLAPP suit covered by Section 425.16,  
2 Burch's anti-SLAPP Motion demonstrated that Hagele could not meet his burden of showing a  
3 substantial probability of success on any of his claims. In particular, Burch's anti-SLAPP Motion  
4 showed that all of Hagele's claims suffered from multiple fatal deficiencies, ranging from Plaintiff's  
5 inability to prove the elements of those claims, to his inability to overcome Burch's constitutional  
6 defenses, to procedural infirmities, including Plaintiff's delay in attempting to add Burch to this  
7 action and the expiration of the limitations periods for those claims.

8           To demonstrate the baseless nature of Hagele's claims, Burch's anti-SLAPP Motion  
9 incorporated arguments from other filings that Burch made on the same day. The anti-SLAPP  
10 Motion pointed to Burch's Demurrer to All Causes of Action in Plaintiff's First Amended  
11 Complaint to help show that Hagele's claims were legally deficient and time-barred. The anti-  
12 SLAPP Motion also referred to Burch's separate Motion to Strike to show that Hagele's claims  
13 were further subject to being stricken or dismissed because Plaintiff failed to name and serve Burch  
14 within three years of instituting this action.

15           Burch attempted to have her anti-SLAPP Motion heard on an expedited basis as  
16 contemplated by California law. Burch noticed her anti-SLAPP Motion for hearing on the date  
17 available from the clerk that provided the most amount of notice to Plaintiff for conducting a  
18 hearing within the thirty day window contemplated for hearing by section 425.16(f) of the  
19 California Code of Civil Procedure. When Plaintiff objected to this hearing date, Burch's attorneys  
20 sought an *ex parte* order shortening the notice period. At the hearing on the *ex parte* application,  
21 Plaintiff agreed to a hearing schedule that provided more time for him to prepare his opposition  
22 papers. Plaintiff, however, did not file and serve timely papers opposing even the first dispositive  
23 motion set for hearing. Before the hearing on that motion, Plaintiff filed a voluntary dismissal,  
24 without prejudice, of all his claims against Burch.

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### III. ARGUMENT

**A. The Court Should Award Attorneys' Fees To Burch As A Prevailing Defendant on her anti-SLAPP Motion.**

California law provides that "a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." Cal. Code of Civil Proc. §425.16(c). This fee-shifting is mandatory: "[A]ny SLAPP defendant who brings a successful motion to strike is entitled to mandatory attorney fees." *Ketchum v Moses*, 24 Cal. 4th 1122, 1131 (2001) (emphasis added). The purpose for such fee awards is both to discourage meritless lawsuits and to provide financial relief to a defendant who has been the victim of an anti-SLAPP lawsuit. See *City of Los Angeles v. Animal Defense League*, 135 Cal. App. 4th 606, 627 (2006).

It is well established that a plaintiff cannot avoid the mandatory fee award requirement by dismissing the action after a special motion to strike (or "anti-SLAPP motion") has been filed. "Persons who threaten the exercise of another's constitutional rights to speak freely and petition for the redress of grievances should be adjudicated to have done so, not permitted to avoid the consequences of their actions by dismissal of the SLAPP suit when the defendant challenges it." *Moore v. Liu*, 69 Cal. App. 4th 745, 752 (1999) (holding that a plaintiff cannot avoid payment of SLAPP defendant's section 425.16 fees and costs by simply dismissing that defendant from the case prior to a hearing on defendant's special motion to strike).

California courts have recognized that if SLAPP plaintiffs could avoid fees simply by dismissing their claims without prejudice, it would frustrate the very purpose of section 425.16:

SLAPP plaintiffs could achieve most of their objective with little risk-by filing a SLAPP suit, forcing the defendant to incur the effort and expense of preparing a special motion to strike, then dismissing the action without prejudice. The specter of the action being refiled (at least until the statute of limitations had run) would continue to have a significant chilling effect on the defendant's exercise of its First Amendment rights. At that point, the plaintiff would have accomplished all the wrongdoing that triggers the defendant's eligibility for attorney's fees, but the defendant would be cheated of redress.

*Coltrain v. Shewalter*, 66 Cal. App. 4th 94, 106-07 (1998). To avoid this result, trial courts retain discretion following a dismissal to determine whether the defendant is a prevailing party for the purposes of a fee award under California's anti-SLAPP statute. *Id* at 107 When making this

1 determination, the critical issue is “which party realized its objectives in the litigation.” *Id* “Since  
2 the defendant’s goal is to make plaintiff go away with its tail between its legs, ordinarily the  
3 prevailing party will be the defendant.” *Id*. To overcome this presumption, the plaintiff must show  
4 that it substantially achieved its goals through a settlement or some other means. *Id*

5 Here, Plaintiff did not achieve any goal in this litigation other than requiring Burch to incur  
6 substantial time and expense in defending her right to free speech against baseless claims. Plaintiff  
7 dismissed his claims unilaterally, not in exchange for any concession from Burch. Indeed, in his  
8 Request for Dismissal, Plaintiff acknowledged that he “is not recovering anything of value by this  
9 action.”

10 That Plaintiff’s purpose was simply to make Burch incur costs is also supported by the  
11 weakness of his claims. When a plaintiff dismisses his claims following the filing of an anti-  
12 SLAPP motion, the court may consider the merits of the special motion to strike to decide if it  
13 should award fees and costs to the defendant as the prevailing party. *See Law Offices of Andrew L*  
14 *Ellis v Yang*, 178 Cal App. 4th 869, 879 (2009). Burch’s anti-SLAPP Motion showed that all of  
15 Hagele’s claims suffered from multiple fatal deficiencies, ranging from Plaintiff’s inability to prove  
16 the elements of those claims, to his inability to overcome Burch’s constitutional defenses, to  
17 procedural infirmities, including Plaintiff’s delay in attempting to add Burch to this action and the  
18 expiration of the limitations periods for those claims. For all of these reasons, which are set out  
19 more fully in Burch’s anti-SLAPP Motion, this Court should determine that the complaint arose  
20 from the exercise of free speech rights and that it was not probable that Plaintiff would prevail on  
21 his claims. *See, e g, Kyle v Carmon*, 71 Cal. App. 4th 901, 918 (affirming fees awarded when  
22 plaintiff dismissed defamation and invasion of privacy claims after being served with anti-SLAPP  
23 motion).

24 Finally, the award of fees is further supported by the timing of Plaintiff’s dismissal in this  
25 action. Plaintiff chose to dismiss his claims after failing to file a timely opposition to Burch’s first  
26 dispositive motion, and before the hearing on the motion. This timing further confirms that Plaintiff  
27 dismissed his claims because they did not have a reasonable chance of succeeding. For all of these  
28 reasons, the Court should award mandatory attorneys’ fees and costs to Burch.

1           **B.     The Court Should Award Reasonable Fees For All The Work Incurred in**  
2           **Preparing the Anti-SLAPP Motion and Related Filings.**

3           While the Court retains discretion to determine which party prevailed, the Court does not  
4 have discretion to deny fees to a prevailing defendant on an anti-SLAPP motion. *See* Cal. Code Civ.  
5 Pro. §425.16(c); *Ketchum v Moses*, 24 Cal. 4th 1122, 1131 (2001). The award must cover “all the  
6 hours *reasonably spent*” in preparing and bringing the anti-SLAPP motion. *Id* at 1133 (original  
7 emphases) (noting that a fee award should compensate for time spent preparing and litigating the  
8 fee request). When determining the fee award under Section 425.16, courts generally apply the  
9 “lodestar” approach by taking the number of hours reasonably expended on the matter multiplied by  
10 the reasonable hourly rate prevailing in the community for similar work. *Id* at 1136. The lodestar  
11 amount may then be adjusted by factors including the moving party’s attorney’s experience and  
12 abilities, and the novelty and difficulty of the issues involved in the motion. *Id*.

13           In this case, Plaintiff’s baseless claims caused attorneys for Burch to spend considerable  
14 time researching, preparing, and filing the anti-SLAPP Motion. As set out in the supporting  
15 Declaration of Darrell A. Fruth, this effort included legal research into the application of the anti-  
16 SLAPP statute to Plaintiff’s claims; research on the multiple grounds that precluded Plaintiff from  
17 prevailing on the merits; marshaling facts and evidence in support of Burch’s arguments, including  
18 the preparation of a 9-page declaration signed by Burch, which attached 13 exhibits; and setting the  
19 anti-SLAPP motion for expedited hearing as contemplated by California law.

20           The attorney time spent on the anti-SLAPP Motion to date totals 66.3 hours. *See*  
21 Declaration of Darrell A. Fruth, ¶¶ 4, 6. At usual hourly rates, this translates into \$16,422 in  
22 attorneys fees. *Id*. Costs to date associated with filing the anti-SLAPP Motion total \$630.60. Thus,  
23 the fees and costs to date directly related to the anti-SLAPP Motion total \$17,052.60.

24           In addition to these fees and costs, Burch’s attorneys also incurred 15.6 hours (\$3,822) on  
25 additional filings that were designed to further elaborate on and amplify arguments raised in the  
26 anti-SLAPP Motion. These additional filings, made on the same day as the anti-SLAPP motion,  
27 included a Motion to Quash Service of Process for Lack of Personal Jurisdiction, a Demurrer to All  
28 Causes of Action in Plaintiff’s First Amended Complaint, which identified Plaintiff’s failure to state

1 claims and showed that his claims were time-barred; and a Motion to Strike the DOE Amendment  
2 as untimely because it was not served within three years of filing the First Amended Complaint.  
3 The latter two filings were expressly incorporated by reference in the anti-SLAPP Motion. Because  
4 these filings were prepared in a strategic and coordinated fashion to support Burch's argument that  
5 Plaintiff's claims did not have a reasonable chance of success, Burch respectfully requests that the  
6 Court include the fees associated with those filings into the fee award. The \$120 in costs associated  
7 with these motions are recoverable "as a matter of right" under Section 1032 of the California Code  
8 of Civil Procedure. The total of all such requested fees and costs (to date) is therefore \$20,244 in  
9 fees and \$750.60 in costs.

10 This Court has recently awarded fees on an anti-SLAPP Motion at a rate of \$250 per hour  
11 for an attorney practicing in Sacramento County. *See Rieger-Hughes v Cain*, Sac. Cty. Sup. Ct.  
12 No. 34-2010-00073501. Here, the effective hourly rate sought is nearly the same, at \$257 per hour.  
13 As such, the requested fees fall within the prevailing hourly rate in the area for comparable services.  
14 Burch additionally submits that the rates of the attorneys who worked on the anti-SLAPP Motion  
15 are reasonable considering the attorneys' experience and expertise, which are set out in the  
16 supporting Declaration of Darrell A. Fruth.

#### 17 IV. CONCLUSION

18 For the foregoing reasons, Defendant Burch specially appears and respectfully requests that  
19 the Court award attorney \$20,244 in fees and \$750.60 in costs against Plaintiff in this action, and  
20 that such award be increased at the time of hearing to include reasonable time spent litigating this  
21 motion.

22 DATED: October 18, 2010

BROOKS, PIERCE, MCLENDON,  
HUMPHREY & LEONARD, L.L.P.

24 By:

  
25 Darrell A. Fruth

Attorney for Defendant Luranell Burch

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**PROOF OF SERVICE**

I, Darrell A. Fruth, declare that I am over the age of eighteen years and not a party to this action. I am an employee of Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P. and my business address is 230 N. Elm Street, Greensboro, North Carolina 27401.

On October 18, 2010, I served the following document:

**SPECIALLY APPEARING DEFENDANT LAURANELL BURCH'S  
NOTICE OF MOTION; MOTION FOR ATTORNEYS' FEES  
UNDER CCP 425.16(C); AND SUPPORTING MEMORANDUM**

on the following parties by placing a true and correct copy thereof enclosed in an envelope or package provided by an overnight delivery carrier, with delivery fees paid or provided for, and addressed to the persons at the addresses below. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

Glenn Hagele  
8543 Everglade Drive  
Sacramento, CA 95826

*In Pro Per*

James R. Donahue  
Michael E. Myers  
Matthew Engebretson  
Caulfield, Davies & Donahue, LLP  
1 Natoma Street  
Folsom, CA 95630

*Attorney for Defendant Brent Hanson*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 18, 2010 in Greensboro, North Carolina.



\_\_\_\_\_  
Darrell A. Fruth