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7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF LOS ANGELES

10
11 BARBRA STREISAND, an individual,,)

12 Plaintiff,)

13 vs.)

14 KENNETH ADELMAN, an individual;)
PICTOPIA.COM, a California corporation;)
15 LAYER42.NET, a California corporation; and)
DOE 1 through DOE 20, inclusive.,)

16 Defendants.)
17

Case No. SC077257

**NOTICE OF MOTION AND MOTION OF
DEFENDANT KENNETH ADELMAN TO
STRIKE COMPLAINT PURSUANT TO
CIV. PROC. CODE § 425.16**

Date: July 14, 2003

Time: 1:30 p.m.

Dept.: H (Hon. Allan J. Goodman)

Complaint filed: May 20, 2003

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

2 **PLEASE TAKE NOTICE** that on July 14, 2003 at 1:30 p.m., in Department H of the
3 above-entitled Court, located at 1633 Purdue Ave., Los Angeles, California 90025, defendant
4 Kenneth Adelman will and hereby does move to strike plaintiff Barbra Streisand's Complaint
5 pursuant to Code of Civil Procedure section 425.16 on the grounds that (1) each of the causes of
6 action against Adelman arises from an act in furtherance his right of free speech; and (2) Streisand
7 cannot demonstrate a probability of prevailing on any of the causes of action. Adelman also
8 requests that the Court award him his attorneys' fees and costs under Code of Civil Procedure
9 sections 425.16(c) and 3344.

10 This motion is based on this notice, the accompanying memorandum of points and
11 authorities, the declarations of Laura A. Seigle, Kenneth Adelman, and Mark Liebman and
12 exhibits thereto, the arguments and other evidence as may be presented at or prior to the hearing
13 on this motion, the record and files in this action, and such matters of which the Court may take
14 notice.

15 Dated: June 23, 2003

IRELL & MANELLA LLP
Richard B. Kendall
Laura A. Seigle
Christopher M. Newman

18
19 By: 

Richard B. Kendall
Attorneys for Defendants
Kenneth Adelman and Pictopia.com

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1 INTRODUCTION

2 In her Complaint, plaintiff Barbra Streisand seeks to restrain defendant Kenneth Adelman
3 from exercising his First Amendment right to address a matter of serious public concern – the
4 preservation of the California coastline. As part of a project to record the entire California
5 coastline, Adelman published on his website an aerial photograph (Image 3850) of a section of the
6 Malibu coast that includes Streisand's huge ocean-front estate but neither Streisand nor her family.
7 Ex. A.¹ A visitor to his website then used the interactive "Suggest Caption" function on the
8 website to add a caption to the photograph. The caption reads "Streisand Estate, Malibu."

9 Streisand complains that the photograph and caption intrude on her right to privacy,
10 constitute wrongful publication of private facts, violate her constitutional right to privacy, violate
11 the anti-paparazzi statute, and are a misappropriation of her name. She seeks \$10 million for her
12 alleged (but unspecified) damages and a permanent injunction barring Adelman from displaying or
13 disseminating Image 3850.

14 Streisand's attempt to restrain and punish Adelman's valid exercise of his constitutional
15 right of freedom of speech has no precedent. No California court has ever restrained or punished
16 the publication of an aerial photograph that merely depicts a neighborhood and the exteriors of
17 prominent homes. The Anti-SLAPP statute, Code of Civil Procedure section 425.16, requires that
18 Streisand's Complaint be stricken immediately, because Adelman's photographs constitute speech
19 in connection with a public issue and Streisand cannot demonstrate a "reasonable probability" of
20 success on the merits of her claims. Civ. Proc. Code § 425.16(b)(1). She will fail on her privacy
21 claims because: taking an aerial photograph of a house (but not its inhabitants) from more than
22 2700 feet away without a telephoto camera lens is not unlawful intrusion; photographs of her
23 house and its location are already widely available to the public from other sources; and Streisand
24 has been an outspoken celebrity commentator on numerous public issues including the
25 environment, and has by her own actions made the remodeling of her home in an environmentally
26 sensitive area a matter of public concern. Similarly, her other claims will fail because the anti-
27 paparazzi statute does not apply to houses and it is perfectly appropriate to use Streisand's name in

28 ¹ All exhibits are attached to the accompanying declarations.

1 connection with a matter of public affairs. Finally, the federal Communications Decency Act, 47
2 U.S.C. section 230, preempts any state law claim based on the caption, because a third-party user
3 provided the information in the caption and the Act immunizes a website owner from state claims
4 based on information provided by such third-party "information content providers."

5 **BACKGROUND FACTS**

6 **I. The History Of The California Coastal Records Project**

7 In 2000 Kenneth Adelman conceived of, and in 2002 began work on, the California
8 Coastal Records Project. Adelman sought to develop a pictorial record of the entire California
9 coastline in order to create a database of photographs that could be used to analyze damage caused
10 by illegal coastal activity. Exs. B, C. Adelman plans to update this database by "re-
11 photograph[ing] portions of the coastline every few years, so that the historical data is available
12 for research and enforcement purposes." Complaint, ¶ 8.

13 Adelman used a standard digital camera and lens – a Nikon D1x with a 28-70 mm f/2.8
14 ED-IF AF-S Zoom-Nikkor lens – to take the photographs of the coastline from a helicopter flying
15 offshore at an altitude of 150 to 2000 feet. *Id.* at ¶ 23. Adelman connected his camera to a
16 computer, which enabled him to take photographs of the coastline every few seconds and record
17 the latitude and longitude of the helicopter for each picture. When Adelman snapped the shutter
18 for Image 3850, he was located approximately 2700 feet from Streisand's home. Contrary to
19 Streisand's allegations, Adelman's digital camera and lens produces photographs of lower
20 resolution than a standard 35 mm camera. Moreover, the lens does not extend past 70 mm and
21 thus cannot function as a telephoto lens. Adelman Decl., ¶¶ 2-3.

22 The result of Adelman's endeavor is a website – www.californiacoastline.org – consisting
23 of over 12,200 photographs that depict virtually all 840 miles of the California coastline. His
24 website provides free information to numerous state and local government entities, university
25 researchers, news organizations, and conservancy groups, who are frequent users. The
26 photographs have been used by the Coast Guard in Northern California in performing rescue
27 operations, a group caring for people in wheel chairs who use the website to take virtual tours of
28 the coast, and sea captains who use the photographs for navigation. *Id.* at ¶ 4. The website and

1 the photographs foster interest in coastal preservation by enabling thousands of visitors to admire
2 spectacular panoramic views that they might never be fortunate enough to experience first-hand.

3 Website users may download photographs free of charge, provided they do so for non-
4 commercial or editorial use. Ex. D. Users may also obtain a professional quality reprint of a
5 particular photograph through defendant Pictopia.com. Purchasers cannot, however, request
6 Pictopia to isolate and enlarge just a portion of a photograph. Liebman Decl., ¶ 4. Adelman
7 donates all proceeds from the sale of such reprints to the California Coastal Protection Network.
8 He earns no money from his website or the photographs and personally funds the cost of taking
9 the photographs and all website expenses. Adelman Decl., ¶ 7.

10 **II. The Identifying Information On The Website**

11 The website identifies the photographs in several ways. Each photograph has an
12 identification number. The photograph at issue here is Image 3850. Ex. E. For each photograph,
13 the website notes the latitudinal and longitudinal coordinates of Adelman's helicopter when the
14 photograph is taken. Ex. C. Contrary to Streisand's allegations, the website does not state the
15 coordinates of individual buildings appearing in a photograph. Complaint, ¶ 22. In addition, for
16 each photograph, the website provides a small map showing where the helicopter was located over
17 the ocean when Adelman took the photograph and the portion of the coastline depicted in the
18 photograph. Ex. E. A quick glance at the website reveals that, contrary to Streisand's allegations,
19 this map is not like "a Thomas Guide" and does not reveal Streisand's home address. Complaint,
20 ¶¶ 22, 29, 39, 49. It does not include any street names, address, or other identifying features as are
21 found on a Thomas Guide map and is much smaller than a page in the Thomas Guide. Exs. E, F.

22 Finally, some of the photographs have captions. To facilitate public participation in his
23 project and obtain the benefit of the public's knowledge about the sites along the coastline,
24 Adelman permits users to suggest captions. Any user of the website may add a caption to a
25 photograph by using the "Suggest Caption" function. Ex. G. When a user clicks on a photograph,
26 a box appears on the screen permitting the user to enter a caption. The website requests the user to
27 identify the location of the photograph as part of the caption. *Id.* Slightly more than 5,100 of the
28 photographs have received captions in this manner. Adelman Decl., ¶ 5.

1 Unsurprisingly, many users have added captions that identify a particular stretch of
2 coastline by the most prominent or noteworthy development visible on it. This might be a
3 commercial establishment ("Ritz Carlton Hotel"), industrial facility ("Halaco Industries and slag
4 heap, Oxnard") or famous landmark ("Pt. Conception Lighthouse"). In some cases, it is a
5 prominent private residence ("David Geffen's House, Malibu").² *Id.* Image 3850 falls into this
6 last category, and is captioned "Streisand Estate, Malibu." Ex. E.

7 **III. The Photograph At Issue Here**

8 The photograph containing Streisand's estate depicts a stretch of coastline extending
9 approximately 1000 feet along the eastern face of Point Dume in Malibu. Ex. A. The largest
10 house visible along this portion of coastline is Streisand's large mansion built on a bluff
11 overlooking the ocean. Also prominently featured in the photograph is a lovely strand of beach, a
12 dramatic coastal bluff (somewhat marred by wastewater pipes protruding from the bluff), two
13 additional homes owned by Streisand (one of which is about to be remodeled and expanded into
14 an 11,000 square foot mansion) as well as many neighboring homes. *Id.* One of the other homes
15 featured in the photograph belongs to Streisand's neighbors, who are engaged in a lengthy battle
16 over Streisand's plans to add to her third home a 4500 square foot basement that allegedly could
17 destabilize the bluff. Ex. H (Norma Meyer, *Malibu neighbors fight Streisand 'mansionization'*
18 *plans*, Copley News Service, Feb. 25, 2000).

19 The photograph does not depict Streisand or her family. Indeed, the photograph does not
20 capture any intimate details of Streisand's, or anyone else's, life. This fact is conceded by
21 Streisand's Complaint, which alleges only that impersonal yard and exterior items – "plant
22 arrangements," "the positioning of deck chairs and parasols around Plaintiff's pool," the window
23 layout of her residence and guest house," "the location of garden furniture" – are visible in the
24 photograph. Complaint, ¶ 24. Although the Complaint also alleges that "the interior of the home"
25 is visible, that is simply untrue. *Id.* at ¶ 6. Nothing is visible through the windows shown in the
26 photograph. Ex. A. Even when the photograph is hugely enlarged, nothing is visible through the

27 ² This caption also notes that the photograph shows the "disputed beach access
28 walkway" on Geffen's property. Adelman Decl., ¶ 5. For years, Geffen has been embroiled in
public controversy over his attempts to restrict public beach access adjacent to his property. Ex. J.

1 windows because the photograph lacks the necessary resolution. Ex. I. The only people visible in
2 the photograph are tiny and indistinct figures on the beach and in the water, far from Streisand's
3 property. Ex. A.

4 Streisand alleges that "[t]here is no telling how many people have downloaded the
5 photograph of Plaintiff's property and residence . . . but the numbers could easily already be in the
6 thousands." Complaint, ¶ 22. She is off by several orders of magnitude. In fact, during the
7 previous three and one-half months before the Complaint was served (the download interface was
8 added to the website on February 14, 2003) the download interface was used for Image 3850 only
9 six times (including two downloads by Streisand's own attorneys and perhaps others by Streisand
10 or her neighbors). In contrast, during that same time period the website had a total of 14,418
11 downloads. Similarly, before Streisand filed of this lawsuit, only three reprints of Image 3850
12 had been ordered – one by Streisand's neighbors with whom she is disputing her planned
13 construction and two reprints by Streisand herself. Adelman Decl., ¶ 6; Gatti Decl., ¶ 15.

14 ARGUMENT

15 **I. Streisand Is Attempting To Chill Adelman's Valid Exercise Of His Constitutional** 16 **Right Of Freedom Of Speech And So Her Complaint Must Be Stricken**

17 The single, overriding purpose of Streisand's Complaint is to prevent Adelman from
18 engaging in protected speech by exhibiting on his website a photograph of the coastline including
19 her house, and by permitting searches by a user-suggested caption that identifies Image 3850 as
20 containing Streisand's estate. Even if Streisand has become reclusive and wishes to avoid
21 publicity concerning her beach-front home, these concerns cannot trump the free speech rights of
22 another. "[S]paring citizens from embarrassment, shame, or *even intrusions into their privacy* has
23 never been held to outweigh the guarantees of free speech in our federal and state constitutions."
24 *Hurvitz v Hoefflin*, 84 Cal. App. 4th 1232, 1244 (2001) (emphasis added).

25 This kind of lawsuit targeting another's First Amendment rights has been specifically
26 denounced by the California Legislature, which enacted the Anti-SLAPP statute – Code of Civil
27 Procedure section 425.16 – to counter the "disturbing increase in lawsuits brought primarily to
28 chill the valid exercise of the constitutional right[] of freedom of speech." Civ. Proc. Code

1 § 425.16. The Legislature there "declare[d] that it is in the public interest to encourage continued
2 participation in matters of public significance, and that this participation should not be chilled
3 through abuse of the judicial process." *Id.*

4 Accordingly, section 425.16 entitles a defendant to bring a special motion to strike causes
5 of action "against a person arising from any act of that person in furtherance of the person's right
6 of petition or free speech . . . in connection with a public issue." Civ. Proc. Code § 425.16(b)(1).
7 The defendant need show only that the causes of action arise from an act in furtherance of his right
8 of free speech. *Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 67 (2002). The plaintiff
9 then has the burden of demonstrating a "probability of prevailing on the claim." *Id.* If the plaintiff
10 fails to satisfy her burden, the court must grant the motion to strike. Civ. Proc. Code
11 § 425.16(b)(1). Upon the defendant's motion, all discovery is stayed. *Id.* at § 425.16(g).

12 It is indisputable that the Complaint arises out of Adelman's exercise of his right of free
13 speech in connection with an important public issue – the preservation of the California coastline.
14 As demonstrated below, it is also clear as a matter of both law and fact that Streisand cannot
15 demonstrate a reasonable probability of success. Accordingly, the Complaint must be stricken.

16 **II. Because Adelman's Photographs Address An Issue Of "Vital And Enduring Interest**
17 **To All The People," They Concern A Matter Of Public Interest**

18 The California Legislature defined the activities protected by section 425.16 as including
19 "any written or oral statement or writing made in a place open to the public or a public forum in
20 connection with an issue of public interest," and "any other conduct in furtherance of the exercise
21 of the . . . constitutional right of free speech in connection with a public issue or an issue of public
22 interest." Civ. Proc. Code § 425.16(e). One such matter of public interest is the California coastal
23 zone, which the Legislature has declared is a "distinct and valuable natural resource of vital and
24 enduring interest to all the people" and whose protection is "a paramount concern to present and
25 future residents of the state and nation."³ Pub. Res. Code § 30001. Photographs that address

26 _____
27 ³ The Legislature has further declared that "the public has a right to fully participate in
28 decisions affecting coastal planning, conservation and development; that achievement of sound
coastal conservation and development is dependent upon public understanding and support; and
that the continuing planning and implementation of programs for coastal conservation and
development should include the widest opportunity for public participation." Pub. Res. Code.

1 matters of public interest, such as preservation of the coastline, constitute protected speech under
2 the First Amendment. *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 792, 797
3 (1995) (even poster incorporating photograph of Joe Montana is protected by First Amendment).

4 The acts of which Streisand complains – the captioning and publication of the photograph
5 – fall within section 425.16(e). The Complaint concedes that the photograph is being
6 "disseminated to the general public through the world wide web" (Complaint, ¶ 33; *see also id* at
7 ¶¶ 25, 43, 53, 64, 68) and acknowledges Adelman's purpose in photographing the coastline and
8 making the photographs public "so that historical data is available for research and enforcement
9 purposes." *Id.* at ¶ 8. The website's commentary explains the public affairs purposes of the site.
10 Ex. C. A clearer instance of public speech on a matter of public concern would be difficult to find.

11 **III. Streisand Cannot Demonstrate A Reasonable Probability Of Success On Any Of Her**
12 **Alleged Causes Of Action**

13 Because Streisand complains of acts protected by section 425.16, the Complaint must be
14 stricken unless Streisand can demonstrate a reasonable probability that she will succeed on the
15 merits of her causes of action. This she cannot do.

16 **A. Streisand's Cause Of Action For Intrusion Into Seclusion Will Fail**

17 Streisand's first claim is that Adelman violated her right to privacy by intrusion into
18 seclusion, by "identifying the detailed pictures of Plaintiff's home as hers" and "showing the
19 location of Plaintiff's property." Complaint, ¶ 32. However, the tort of intrusion cannot be based
20 on the publication of information. *Shulman v. Group W Prods., Inc.*, 18 Cal. 4th 200, 240 (1998).
21 Instead, the elements of this tort address solely the *means* by which information is obtained. *Id.*
22 Because the tort of intrusion does not encompass acts of publication of information, all of
23 Streisand's allegations about "*identifying* the location," "*showing* in detail those secluded portions
24 that are not visible to the naked eye," and "*disseminat[ion]* to the general public" are irrelevant to
25 this cause of action. Complaint, ¶ 33 (emphasis added). Instead, to establish this tort, Streisand

26 § 30006. *See also id.* at § 30012 ("an educated and informed citizenry is essential to the well-
27 being of a participatory democracy and is necessary to protect California's finite natural resources,
28 including the quality of its environment . . . through education, individuals can be made aware of
and encouraged to accept their share of the responsibility for protecting and improving the natural
environment").

1 must prove both that she had an "objectively reasonable expectation of seclusion or solitude" in
2 the place where the alleged intrusion took place, and that the alleged intrusion would be "highly
3 offensive to a reasonable person." *Shulman*, 18 Cal. 4th at 231-32.

4 No California court has ever held that taking aerial photographs that happen to include
5 people's homes, *but not the people themselves*, constitutes an act of intrusion into those people's
6 seclusion. To the contrary, in every California case where the court did not reject the intrusion
7 cause of action outright, there were either allegations of *physical* intrusion into homes or places of
8 medical treatment, or allegations of the recording of conversations. *See Schulman*, 18 Cal. 4th at
9 232-33 (intrusion into air ambulance carrying injured patient to hospital and recording of patient's
10 conversation with paramedics); *Sanders v. American Broadcasting Co., Inc.*, 20 Cal. 4th 907, 911
11 (1999) (secret recordings of conversations); *Sanchez-Scott v. Alza Pharmaceuticals*, 86 Cal. App.
12 4th 365, 379 (2001) (intrusion into medical examination room during examination of plaintiff);
13 *Miller v. National Broad. Co.*, 187 Cal. App. 3d 1463, 1484 (1986) (intrusion by camera crew into
14 plaintiff's bedroom while he was being treated for heart attack); *Dietemann v. Time, Inc.*, 449 F.2d
15 245, 248 (9th Cir. 1971) ("clandestine photography of the plaintiff in his den"). In contrast,
16 California courts have held that there is no tortious intrusion where there is "no entry by
17 [defendant] into [plaintiffs'] homes, or even their offices" and no intrusion "into the personal lives,
18 intimate relationships, or any other private affairs of [plaintiffs]." *See Wilkins v. National*
19 *Broadcasting Co., Inc.*, 71 Cal. App. 4th 1066, 1078 (1999).

20 Streisand cannot prove such an intrusion into her home or personal life. She does not
21 allege that Adelman physically entered her home, recorded her conversations, or even took her
22 picture. Indeed, she did not know that Adelman had flown by and taken the photograph until it
23 was already posted on the website. Complaint, ¶ 6. Streisand's allegation that Adelman used a
24 telephoto lens is simply wrong. The most Streisand can allege is that Adelman observed and
25 photographed from afar "the plant arrangements in Plaintiffs' garden," "the positioning of the deck
26 chairs and parasols around Plaintiff's pool," "the window layout of her residence and guest house,"
27 and the like. *Id.* at ¶ 24. None of this depicts anything about her or her family's "personal lives,
28 intimate relationships, or any other private affairs," and absolutely no case law permits the finding

1 of intrusion under these facts. If the law did permit the conclusion that a tort occurs whenever a
2 person photographs someone's house or yard, then every tourist who buys a star map and
3 photographs a star's house would be liable. Every newspaper and television news story showing
4 neighborhood scenes shot from a news helicopter would have to seek permissions from every
5 home owner whose home or back yard is visible. Outdoor photography in any residential area
6 would become problematic. This cannot be and has never been the law.

7 Because Streisand cannot allege, let alone prove, that Adelman committed tortious
8 intrusion by happening to photograph her plants and deck chairs as an incident to his coastline
9 project, she cannot prevail on her first cause of action.

10 **B. The Second Cause Of Action For Publication Of Private Facts Cannot Succeed**

11 Streisand's second cause of action for publication of private facts alleges that by
12 identifying "the location of her home address" and showing "secluded areas of her home,"
13 Adelman revealed private facts that "are not matters of legitimate public concern." Complaint,
14 ¶¶ 39-40. To succeed on this claim, Streisand must establish "(1) public disclosure (2) of a private
15 fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not
16 of legitimate public concern." *Shulman*, 18 Cal. 4th at 214. Moreover, Streisand must disprove a
17 fifth element: newsworthiness. Even when a defendant publicly discloses private facts,
18 "newsworthiness is at the same time a constitutional defense to, or privilege, against liability." *Id.*
19 at 216. Here, the facts at issue are already public, their disclosure was not offensive to a
20 reasonable person, they are of legitimate public concern, and they are newsworthy. There are thus
21 four independent reasons why this cause of action must fail.

22 **1. Streisand's address and photographs of her house are already public**

23 As an initial matter, Streisand cannot prevail on this cause of action because both the
24 appearance and location of her home was public knowledge long before the advent of the website.
25 *Supple v. Chronicle Publishing Co.*, 154 Cal. App. 3d 1040, 1047 (1984) ("there can be no privacy
26 with respect to a matter which is already public"). In 1998, *People* magazine published a cover
27 story advertised on the cover as "Barbra & Brolin, Talking with Hollywood's most surprising –
28 and smitten – couple." Ex. K. The article, with which Streisand and Brolin obviously cooperated,

1 included interviews with Streisand and her husband, who discussed such things as "snuggl[ing] in
2 Streisand's ocean-view bedroom" where they "bring newspapers, books and food into bed and
3 have a wonderful time." *Id.* The article featured a color photograph of her house shot from the
4 same angle as Adelman's photograph and showing her deck chairs, parasols, garden plants,
5 windows, balconies, verandas, and skylights – all part of the supposedly "secluded areas of
6 Plaintiff's property" that were allegedly improperly disclosed by Adelman. *Id.*; Complaint, ¶ 24.
7 The fan website entitled barbratimeless.com also contained, until very recently, detailed
8 photographs of the interior and exterior of her home. Adelman Decl., ¶ 8; Ex. L.

9 In addition, Streisand's street address – a fact that is *not* disclosed on Adelman's website –
10 is publicly available on fan websites and star maps, as are the latitudinal and longitudinal
11 coordinates of her house. Ex. M. Whether Streisand likes it or not, her street address is readily
12 accessible to anyone with access to the Internet (a search for "Streisand Malibu Address" on
13 Google™ brings up Streisand's home address in about 45 seconds⁴) or \$5 to buy a star map.⁵
14 There are also numerous news articles that, unlike the website, reveal the name of the street where
15 Streisand lives. *See, e.g.*, Exs. H, N. On this ground alone, the second cause of action will fail.

16 **2. The publication of the photograph and caption was not offensive**

17 Streisand will also be unable to show that the publication of the photograph identified as
18 her estate would be offensive to a reasonable person. *Hill v. National Collegiate Athletic Assn.*, 7
19 Cal. 4th 1, 26 (1994) (offensiveness depends on "the degree of intrusion, the context, conduct and
20 circumstances surrounding the intrusion as well as the intruder's motives and objectives, the
21 setting into which he intrudes, and the expectations of those whose privacy is invaded"). The
22 photograph reveals nothing of a personal nature. A reasonable person would not be offended by a
23 photograph revealing the positioning of deck chairs and umbrellas on her patio.

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26 ⁴ Until the lawsuit was filed, a Google™ search for Streisand would not find Adelman's
27 website. Adelman designed the caption feature on the website so that the captions would be
invisible to search engines like Google™. Adelman Decl., ¶ 9.

28 ⁵ The California Supreme Court has held that star maps are "are entitled to the same First
Amendment protection as the political candidate and his political pamphlet." *Welton v. City of Los
Angeles*, 18 Cal. 3d 497, 504 (1976).

1 Adelman's "motives and objectives" also cut against a finding of offensiveness. The
2 Complaint acknowledges that Adelman's purpose for the website was to create a historical record
3 of the coastline to enable efforts of environmental preservation.⁶

4 **3. Streisand's estate is of legitimate public concern and newsworthy**

5 Finally, this cause of action must fail because the First Amendment protects the right to
6 publish newsworthy information, even when that information impinges on privacy interests that
7 would otherwise be worthy of protection.⁷ Information is newsworthy if it is (1) "of significant
8 public interest" and (2) there is "[s]ome reasonable proportion . . . maintained between the events
9 or activity that makes the individual a public figure and the private facts to which publicity is
10 given." *Shulman*, 18 Cal. 4th at 222. When the public figure is well-known and willingly entered
11 the public sphere, a greater intrusion into that person's private life is permitted. *Forsher v.*
12 *Bugliosi*, 26 Cal. 3d 792, 811 (1980) ("once a man has become a public figure, or news, he
13 remains a matter of legitimate recall to the public mind to the end of his days"); *Kapellas v.*
14 *Kofman*, 1 Cal. 3d 20, 36-37 (1969) (public interest in scrutinizing candidates for public office and
15 their families outweighs interest in preserving their right to privacy). Entertainment celebrities in
16 particular "have to some extent lost the right of privacy," making their "accomplishments and way
17 of life" legitimate topics of public discussion. *Carlisle v. Fawcett Publications, Inc.*, 201 Cal.
18 App. 2d 733, 746-47 (1962); *Carafano v. Metrosplash.com, Inc.*, 207 F. Supp. 2d 1055, 1069
19 (C.D. Cal. 2002) (granting defendants' summary judgment on actress' invasion of privacy claim
20 because Internet publication of actress' home address and telephone number was newsworthy).

21 As her Complaint trumpets, Streisand is an extremely high profile celebrity – "a renowned
22 singer, actress, movie director, composer and producer." Complaint, ¶ 1. She has entertained the
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24 _____
25 ⁶ In yet another attempt to punish him for speech, Streisand criticizes Adelman for
26 speaking out in response to complaints by Streisand and others. He is entitled to express his belief
27 that homeowners' enjoyment of the coast does not render it an area off-limits to public scrutiny.
28 Complaint, ¶26. Contrary to her suggestion, the visitors Adelman suggested were "delusional"
wrote not to express privacy concerns about their homes but to warn about far-fetched concerns
involving terrorist-caused earthquakes and the like. Ex. O.

⁷ See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (publication of rape victim's
name obtained from police report).

1 United States President at a lavish event at her home.⁸ She has appeared on the cover of *People*
2 magazine to publicize an interview she apparently gave willingly to discuss her home, bedroom
3 activities, and details of her marriage (and provide a picture of her home). Ex. K. She has made
4 her "way of life," including where she lives and entertains the President, a matter of significant
5 public interest.

6 Moreover, the California Legislature has determined that information concerning the
7 coastline and its preservation – such as information about who is living on the coast and
8 contributing to its development and potential degradation – is of significant public interest. Thus,
9 information on the website identifying Streisand as the owner of a huge estate on the edge of a
10 bluff overlooking the ocean is newsworthy, particularly given the public controversy over the
11 issue of whether Streisand's continuing development of her property is threatening the stability of
12 the bluff. Ex. H. Moreover, Streisand's public pronouncements on the importance of
13 environmental conservation and her personal involvement in public environmental issues make
14 her own actions affecting the environment newsworthy.⁹

15 **C. Streisand's Claim Based On A Constitutional Right To Privacy Will Fail**

16 The third cause of action makes the same factual allegations as the second cause of action
17 but purportedly is based on a right to privacy in the California Constitution. The California
18 Supreme Court has held that to bring this cause of action, a plaintiff must establish three elements:
19 (1) a legally protected privacy interest, (2) a reasonable expectation of privacy given the
20 circumstances, and (3) a serious invasion of privacy. *Hill*, 7 Cal. 4th at 35-37. "Serious" means
21 "sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious
22 breach of the social norms underlying the privacy right." *Id.* at 37. Moreover, as with the

23 _____
24 ⁸ Ex P (J. Michael Kennedy, *Convention 2000/The Democratic Convention: Social Whirl*, Los Angeles Times, August 14, 2000 (describing widely-publicized brunch at Streisand's "ultra-swank Malibu compound" in honor of President Clinton, at which as much as ten million dollars were expected to be raised for his presidential library)).

26 ⁹ Ex. Q (Barbra Streisand, *My Thoughts Today: Judges and the Environment* ("the Bush administration will go to any length to defend corporate interests over environmental protection")).
27 Streisand has also spoken about the importance of the First Amendment. *Id.* (Barbra Streisand,
28 *My Thoughts On Freedom Of Speech* ("Thank God the constitution enables all citizens to exercise their freedom of speech to say what they believe. That's what's great about democracy and what's great about this country.")).

1 common law privacy tort, "publication of truthful, lawfully obtained material of legitimate public
2 concern is constitutionally privileged and does not create liability." *Shulman*, 18 Cal. 4th at 227.
3 Indeed, in *Shulman*, the Supreme Court suggested that a privacy claim under the California
4 Constitution is not qualitatively different from common law privacy claims. *Id.*

5 This cause of action fails for the same reasons as the second cause of action – the
6 appearance and location of her estate are already public, and disclosing already public information
7 about the location and appearance of her estate is neither offensive nor an "egregious breach" of
8 the social norms. In addition, the information disclosed is of legitimate public concern. Given the
9 statutorily designated importance of public participation in preservation of California's coastal
10 resources, it is certainly legitimate for the public to be informed as to who is exploiting those
11 resources, whether for residential purposes or otherwise.

12 **D. The Anti-Paparazzi Statute Does Not Apply To A Long-Distance Photograph,**
13 **Taken Without a Telephoto Lens, Of The Ocean And Houses**

14 In addition to the privacy causes of action, Streisand alleges that Adelman is liable under
15 Civil Code section 1708.8 (which was implemented at the behest of celebrities to prevent
16 paparazzi from using physical force and other offensive means in taking pictures of the celebrities)
17 for supposedly "attempt[ing] to capture . . . a type of visual image of Plaintiff engaging in personal
18 activity under circumstances in which she had a reasonable expectation of privacy." Complaint,
19 ¶ 59. To succeed in a cause of action under section 1708.8(b), Streisand must establish that
20 Adelman (1) attempted to capture (2) in a manner that is offensive to a reasonable person (3) a
21 visual image of the plaintiff (4) engaging in a personal or familial activity (5) under circumstances
22 in which the plaintiff had a reasonable expectation of privacy (6) through use of a visual
23 enhancing device without which the image could not have been achieved without a trespass. Civ.
24 Code § 1708.8.

25 One need merely look at the photograph to see that section 1708.8 has no bearing on the
26 facts of this case. The photograph shows no attempt to capture an image of Streisand or any other
27 individual. The photo is obviously panoramic and incidental to the broader purposes of the
28 website, aimed at a large stretch of coastline extending approximately 1000 feet, and is not

1 focused in such a way as even to permit the identification of the persons captured in it, much less
2 do so in an offensive manner. The photograph was taken from approximately 2700 feet away
3 without any trespass or even a telephoto lens, and is not visually enhanced so to capture anything
4 not clearly visible from the vantage point at which it was taken. Adelman Decl., ¶¶ 2-3.

5 **E. The Cause Of Action For Misappropriation Of Streisand's Name Is**
6 **Groundless**

7 In the last cause of action, Streisand alleges under Civil Code section 3344 that Adelman
8 has "misappropriated Plaintiff's name for soliciting interest in www.californiacoastline.org, and
9 selling pictures of the photographs of Plaintiff's property and residence." Complaint, ¶ 67. For an
10 action under section 3344 to succeed, the plaintiff must show that the defendant used plaintiff's
11 name "for purposes of advertising or selling, or soliciting purchases of products, merchandise,
12 goods or services, without such person's prior consent." Civ. Code § 3344(a). "[U]se of a name . .
13 . in connection with any news, public affairs" is exempted. *Id.* at § 3344(d). *See Dora v.*
14 *Frontline Video, Inc.* 15 Cal. App. 4th 536 (1993) (name and likeness of famous surfer as part of
15 documentary about early Malibu surfing culture exempt under section 3344(d)).

16 As a threshold matter, this claim fails under section 3344(d) because use of Streisand's
17 name simply to identify her coastal estate in the context of a documentary record of the coastline
18 is manifestly speech "in connection with . . . news [or] public affairs." Moreover, Streisand cannot
19 prove that Adelman has ever used her name to sell any products. The website was designed so
20 that captions are invisible to search engines. Adelman Decl., ¶ 9. As his website makes clear,
21 selling photographs is not part of his mission, and he earns no money from the sales of
22 photographs by Pictopia. The website allows free downloads – hardly a business model calculated
23 to earn profits. In fact, as of the filing of this lawsuit, only three copies of Image 3850 had been
24 sold – one to Streisand's neighbor and two to Streisand herself. *Id.* at ¶¶ 6-7.

25 **IV. The Claims Based On The Photograph's Caption Are Barred By Section 230 Of The**
26 **Communications Decency Act**

27 Section 230 of the Communications Decency Act provides that "[n]o provider or user of an
28 interactive computer service shall be treated as the publisher or speaker of any information

1 provided by another information content provider." 47 U.S.C. § 230(c)(1). It further provides that
 2 "[n]o cause of action may be brought and no liability may be imposed under any State or local law
 3 that is inconsistent with this section." *Id.* at § 230(e)(3). Thus, when a third party provides
 4 information that is posted on a website, the owner of the website cannot be liable under state law
 5 for causes of action based on that information.¹⁰

6 Streisand alleges in each cause of action that she is harmed by the captioning of the
 7 photograph, which supposedly identifies her estate and "the location of her home address."
 8 Complaint, ¶¶ 22, 29, 39, 49, 58, 68. However, as described above, the captions on the website
 9 are provided by website users through the "Suggest Caption" function. See Part II. Under Section
 10 230, Adelman cannot be liable for these claims based on information provided by third parties.

11 **CONCLUSION**

12 Adelman respectfully requests that the Court strike the Complaint pursuant to section
 13 425.16 and award him his attorneys' fees and costs under sections 425.16(c) and 3344.

14 Dated: June 23, 2003

IRELL & MANELLA LLP

15 By: 

16 Richard B. Kendall
 17 Attorneys for Defendants
 18 Kenneth Adelman and Pictopia.com
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24 ¹⁰ See *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 828-32 (2002) (provider of auction
 25 website not liable for fraudulent item descriptions and seller ratings posted on site by users); *Zeran*
 26 *v. America Online, Inc.*, 129 F.3d 327, 333-34 (4th Cir. 1997) (section 230 forbids imposition of
 27 liability on service providers with knowledge of defamatory content on their services). The
 28 holding in *Carafano*, is not to the contrary. In that case, the court concluded that Matchmaker.com was an information content provider because users created their profiles that were posted on the Matchmaker website by answering specific multiple choice and essay questions written by Matchmaker and that these questions themselves contributed to the content of the third-party user's profile. 203 F. Supp. 2d. at 1066-67. Adelman's website makes no such contribution to the caption. Ex. G.