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

11 BARBRA STREISAND, an individual,
12 Plaintiff,

13 vs.

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

17 Defendants.
18

CASE NO. SC 077257

[Honorable Allan J. Goodman]

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION TO STRIKE
COMPLAINT PURSUANT TO CIV. PROC.
CODE § 425.16**

**[Filed concurrently with Declarations of
Jonathan E. Stern and Michael E.
Soderberg; and Appendix of Non-California
Authorities]**

Date: July 14, 2003
Time: 1:30 p.m.
Dept.: H

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1 **INTRODUCTION**

2 Defendant Kenneth Adelman (“Adelman”), a self-appointed vigilante of the California
3 skies, attempts to have this Court endorse his proposition that he has an unfettered right to violate
4 the privacy of all coastal dwellers, including plaintiff Barbra Streisand (“Streisand”), under an ill-
5 conceived guise of environmental protection. If Adelman’s rationale were correct, anyone could
6 indulge in the behavior complained about in this action (taking pictures of the secluded portions
7 of homes, identifying where specific people live, and parading such information worldwide on the
8 Internet) with impunity. For example, Adelman might next want to swoop down in his helicopter
9 and take pictures of homes in the vicinity of public parks (and reveal the identity of the owners of
10 such homes) on the pretence that such homes encroach on the natural habitat of certain flora and
11 fauna; or he might do the same with homes close to lakes, rivers, hillsides, reservoirs, or
12 highways, all under the pretext that he is exploring and documenting the environment. No one
13 would be spared. The result would be that privacy rights in California would be eviscerated,
14 rendering null and void California’s and the United State’s constitutional guarantees of privacy.

15 Of course, Adelman possesses no such right. There is no First Amendment right to reveal
16 where people live, nor is there a First Amendment right to intrude upon secluded areas of the
17 home. Both state and federal courts (including the United States Supreme Court), have stated as
18 much. In fact, these courts have emphasized that “the most private of places, the home” is
19 entitled to special protection under our laws. Adelman seeks to demean this special protection.

20 With respect to the privacy causes of action, Adelman states that he cannot have intruded
21 upon Streisand’s home, because he shot his photographs from public airspace, and he cannot have
22 published private facts, because these facts were allegedly publicly available elsewhere. These
23 claims are legally inaccurate and thus irrelevant: (1) the tort of intrusion does not focus on the
24 location of the intruder, but on where the intrusion takes place; if this were not so, then using
25 telescopic devices or other visual aids to look into people’s homes would always be permitted so
26 long as the intruder is on public land such as the street; clearly, this is not the case; (2) the tort of
27 publication is not invalidated because other individuals have previously revealed the same alleged
28 private information; in fact, courts have consistently stated that the opposite is true, even

1 information which is publicly available receives privacy protection. Thus, Streisand will prevail
2 on these causes of action. For reasons explained below, she will also prevail on her
3 misappropriation and Anti-Paparazzi claims.

4 In sum, Adelman asks this Court to throw out Streisand's lawsuit on such broad grounds,
5 that it would leave no one who lives in this state protected from the kind of exposure that he has
6 inflicted on Streisand. Anyone with security concerns, any family with young children, or any
7 person who has chosen a secluded place to live to enjoy a quiet and private existence, will now
8 have to be on the lookout for Adelman (and the like) descending upon them and jeopardizing
9 their and their family's privacy and security by taking pictures of their property and revealing its
10 location on the Internet. In fact, what Adelman is suggesting is that the only legitimate way to
11 protect oneself from his kind of snooping (which he wants this Court to legitimize) would be to
12 build a dome over one's dwelling. Such a ridiculous proposition should not be enshrined into
13 California law. Thus, Adelman's motion should be denied.

14 STATEMENT OF FACTS

15 The Court has already been fully briefed on the factual background of this case. See
16 Motion for Preliminary Injunction ("PI Motion"), at 3-7. To avoid duplicative briefing, this
17 statement of facts is merely a summary of the salient facts underlying this action.

18 Adelman owns a website which publishes photographs of people's homes who live in the
19 vicinity of the California coast. Declaration of John M. Gatti filed along with PI Motion ("Gatti
20 Decl."), Exh. 7. He identifies the location of the homes depicted in each photograph by
21 longitudinal and latitudinal coordinates, by isolating the location on a street map, and, in very few
22 instances such as this, by identifying to whom the particular home belongs. Gatti Decl., Exh. 9.
23 Adelman depicts on his website the photograph of a home captioned "Streisand Estate, Malibu,"
24 in minute details, revealing aspects of that home which are secluded and cannot be observed by
25 the naked eye from any public vantage point. Gatti Decl., Exh. 11. The quality of the pictures is
26 staggering. Adelman admits that he has used the latest developments in cutting-edge
27 photographic technology to enhance the image being viewed by the observer. Gatti Decl., Exh.
28 12. He does this by using high resolution digital technology, which has the same effect as using a

1 high-powered zoom. In fact, Adelman allows the viewer of his website to blow the picture up to
2 poster-size dimensions without losing anything in terms of resolution. Gatti Decl., Exh. 11. The
3 viewer is effectively transported into Streisand's backyard and into the home.

4 Streisand has been singled out by Adelman who has not afforded her the anonymity
5 regarding the location of her home. She values her privacy and her safety, considering she has
6 been the target of paparazzi, stalkers, and specific threats to her physical integrity. Declaration of
7 Barbra Streisand filed along with PI Motion ("Streisand Decl."), ¶2; Declaration of Michael E.
8 Soderberg, Chief of Detectives of the Los Angeles County Sheriff's Department filed
9 concurrently herewith ("Soderberg Decl."), ¶4. He belittles these concerns, and the concerns of
10 average citizens who have either called or written to him to complain about the privacy and
11 security issues raised by his website. In fact, he ridicules these people by publicly mocking them
12 on his website. Gatti Decl., Exh. 17; Declaration of Jonathan E. Stern filed concurrently herewith
13 ("Stern Decl."), Exh. 3. On one such occasion, in a brattish disregard for norms of common
14 decency, he has linked his website to a recording of a message left by a concerned citizen
15 regarding her privacy issues in which the caller reveals **her home phone number**. Stern Decl.,
16 Exh. 4. Thanks to Adelman, one can just click and listen to this message which was clearly
17 intended for his ears only. Id. Ironically, when, due to an oversight, counsel for Plaintiff had
18 included Adelman's home address and phone number in Streisand's ex parte papers, counsel for
19 Adelman objected to making such information part of the public record. If only Adelman would
20 show the same concern for other people's privacy as he does for his own. On another such
21 occasion, Adelman, on his website, included a link to John Gatti's, counsel for Streisand, work e-
22 mail address. Gatti Decl., Exh. 19. Mr. Gatti was flooded with vicious e-mails and links to hard-
23 core pornographic websites which have caused, and continue to cause, severe disruption to his
24 work. Gatti Decl., ¶18. Initially, Adelman refused to take down this link, but after Streisand
25 made this point to the Court in her PI Motion, he did a quick about-turn and removed the link.
26 This has not prevented Mr. Gatti's work e-mail from continuing to be the target of solicitations
27 from hard-core pornographic websites.

1 ARGUMENT

2 I. STREISAND'S VINDICATION OF HER PRIVACY RIGHTS DOES NOT
3 VIOLATE ANY PROTECTED FREE SPEECH INTERESTS

4 California Code of Civil Procedure section 425.16 exists to counter "lawsuits brought
5 *primarily* to chill the valid exercise of the constitutional right[] of freedom of speech." Cal. Civ.
6 Proc. Code § 425.16(a) (emphasis added). Adelman has no valid free speech interests implicated
7 in this case. There is no First Amendment right to reveal the location of an individual's residence
8 and to peer into the private areas of someone's home. Nothing in Adelman's motion indicates
9 any notion to the contrary. To hold otherwise would grant Adelman and the like the unfettered
10 right to identify and publish home addresses or photographs of the secluded areas of people's
11 homes with impunity and thus nullify in one fell swoop all the common law privacy doctrines as
12 well as California's and the United State's constitutional guarantees of privacy. See e.g. Whalen
13 v. Roe, 429 U.S. 589, 599-600 (1978) (holding that the right to privacy embraces an "individual
14 interest in avoiding disclosure of personal matters.") In fact, the Anti-SLAPP statute was **not**
15 designed to punish a plaintiff who seeks to protect her right to privacy.¹ See Paul v. Friedman, 95
16 Cal. App. 4th 853, 861 (2002) (finding that plaintiff's claims for invasion of privacy do not fall
17 "within the ambit of the anti-SLAPP statute.")²

18 Therefore, because Adelman does not have a First Amendment right to violate Streisand's
19 constitutionally-protected privacy rights, and California courts have rejected the notion that an
20 anti-SLAPP motion can defeat a privacy claim, Adelman's instant motion should be denied.
21 Indeed, M.G. v. Time Warner, Inc., 89 Cal. App. 4th 623, 630 (2001) instructs that if one of
22 Streisand's theories of intrusion, public disclosure of private facts, or constitutional privacy "is
23 adequate," the court must deny the motion to strike as to plaintiff's "claims for invasion of
24 _____

25 ¹ Moreover, the California Supreme Court recently reaffirmed the notion that an anti-SLAPP
26 motion cannot defeat a claim for public disclosure of private facts when, on June 18, 2003, it
27 depublished and granted review of an appellate court decision holding otherwise. See Gates v.
28 Discovery, 106 Cal. App. 4th 677, review granted 135 Cal.Rptr.2d 403 (2003).

² Adelman has also asked this court to allow the First Amendment to eradicate all privacy rights
by construing the decision in Hurvitz v. Hoefflin, 84 Cal. App. 4th 1232 (2001) as requiring free
speech to "trump" privacy law. Anti-SLAPP Motion, 5:20-24. Hurvitz involved prior restraints
on free speech and thus is irrelevant to the facts of this case.

1 privacy” in general because they all “are based on identical facts, seek the same damages, and
2 generally constitute an invasion of privacy claim.”

3 **II. STREISAND WILL PREVAIL ON EACH OF HER CAUSES OF ACTION**

4 Since defendants have violated Streisand’s privacy rights, publicity rights, and the anti-
5 paparazzi statute, Streisand will prevail on each of her causes of action. Also, since her complaint
6 does not interfere upon any valid exercise of free speech, defendants’ Anti-SLAPP motion has
7 been entirely frivolous. Therefore, pursuant to section 425.16 of the Code of Civil Procedure, an
8 award of costs and reasonable attorney’s fees is warranted.

9 **A. Streisand’s Cause of Action for Intrusion Will Succeed**

10 The tort of intrusion does not require the existence of an “absolute or complete”
11 expectation of privacy.” Sanchez-Scott v. Alza Pharmaceuticals, 86 Cal. App. 4th 365, 373
12 (2001). Protection under this tort instead “covers ‘spheres’ where an ordinary person in
13 plaintiff’s position could reasonably expect that the particular defendant should be excluded.” Id.
14 The home is such a sphere. In fact, just one week ago, the United States Supreme Court, in
15 finding a constitutional right to privacy, determined that the essence of that right—and the
16 protections that it entails—are to be found in “the most private of places, the home.” Lawrence v.
17 Texas, 2003 WL 21467086, at *6 (U.S. June 26, 2003) (invalidating anti-sodomy statutes); see
18 also Ortiz v. Los Angeles Police Relief Ass’n, 98 Cal. App. 4th 1288, 1301 (2002)(“[t]he right to
19 privacy . . . protects our homes [and] our families.”)

20 Adelman wants to capitalize on the fact that “the intrusion tort has received less judicial
21 attention than the private facts tort,” Shulman v. Group W. Productions, 18 Cal. 4th 200, 230
22 (1998), by distorting the principles underlying this cause of action. He insists that the tort is
23 limited to “either allegations of *physical* intrusion into homes or places of medical treatment, or
24 allegations of the recording of conversations.” Anti-SLAPP Motion, 8:6-8. However, the
25 California Supreme Court has already stated that the tort encompasses “unwarranted sensory
26 intrusions” including “visual or photographic spying.” Id. at 231. Thus, the Court has indicated
27 its willingness to prohibit Adelman’s activities.

28 Adelman also attempts to obfuscate the issue by claiming that intrusion cannot be based

1 on the publication of information. Anti-SLAPP Motion, 7:19-20. Adelman's liability under *this*
2 *tort* arises from *the means* with which he intruded into an area in which Streisand has a legitimate
3 privacy interest. In other words, intrusion **does not** focus on the location of the intruder but on
4 the location of the intrusion. More specifically—though Adelman insists that his photographs are
5 non-intrusive because they were allegedly shot with a non-telephoto lens—the resolution
6 provided by his six megapixel range camera renders the alleged lack of a telephoto lens irrelevant
7 and creates digital photos that reveal intimate, secluded portions of her home that cannot be seen
8 with the naked eye by any bystander not situated on Streisand's property. See People v. Arno, 90
9 Cal. App. 3d 505, 511 (1979) (finding that an individual has a reasonable expectation of privacy
10 when in a location that can only be observed through an optical aid, such as high-powered
11 binoculars). If Adelman were correct in maintaining that the taking of aerial photographs does
12 not constitute intrusion because he took such photographs from public air space, then using a high
13 resolution camera to shoot and then publishing detailed photographs of a nude sunbather relaxing
14 in a gated and high-fenced area would not constitute intrusion. This is not the law. Id. at 511-12
15 (“the reasonable expectation of privacy extends to that which cannot be seen by the naked eye or
16 heard by the unaided ear.”)³ The mere obtaining, publishing, and distributing details of a
17 residence that is closed off from the public constitutes intrusion because it violates the “privacy of
18 the home, which is accorded special consideration in our Constitution, laws, and traditions.”
19 United States Dep't of Defense v. FLRA, 510 U.S. 487, 501 (1994).

20 **B. Streisand's Cause of Action For Publication Will Succeed**

21 **1. Adelman has Publicly Disclosed Private Facts**

22 Defendants claim that they are absolved from liability under this tort because some
23 of the facts that Adelman revealed may be in the public domain. They are incorrect because the
24 public availability of private information does not create a public fact. In United States Dep't of

25 ³ In this light, Adelman's argument that Streisand's proposition means that homeowner
26 permission would be required for all newspaper and television news stories showing
27 neighborhood scenes or that all tourists who photograph star homes from public places are liable
28 for intrusion is difficult to take seriously. Anti-SLAPP Motion, 9:1-5. The tourists' photos will
tend to capture the areas visible to the naked eye from a public vantage point. On the other hand,
Adelman's photographs penetrate through secluded areas that a routine tourist photograph will
not reveal. See Gatti Decl., Exh. 11.

1 Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 767 (1989), for instance,
2 the U.S. Supreme Court found that there is a “privacy interest inherent in the nondisclosure of
3 certain information even where the information may have been at one time public.” Therefore,
4 the “fact that an event is not wholly private does not mean that an individual has no interest in
5 limiting disclosure or dissemination of the information.” Id. at 770. Five years later, the Court
6 again emphasized that “it is true that home addresses are publicly available through sources such
7 as telephone directories . . . but in an organized society, there are few facts that are not at one time
8 or another divulged to another.” FLRA, 510 U.S. at 500. Consequently, “[a]n individual’s
9 interest in controlling the dissemination of information regarding personal matters does not
10 dissolve simply because that information is made available to the public in some form.” Id.; see
11 also City of San Jose v. Superior Court, 74 Cal. App. 4th 1008, 1019 (1999) (holding that people
12 “have a substantial privacy interest in their home addresses” even if these are publicly available).

13 Streisand has expended much effort and expense to keep the details of where she lives
14 private. Streisand Decl., ¶ 2. Just because others have tortiously violated her privacy by
15 publishing these private facts does not mean that the floodgates have now been opened to allow
16 others, like Adelman, to continue to do so. Adelman’s reliance, therefore, on Sipple v. Chronicle
17 Publishing Company, 154 Cal. App. 3d, 1040, 1047 (1984) to suggest that privacy does not exist
18 in a matter that is already public is deceptive. Anti-SLAPP Motion, 9:25-26. Sipple involves the
19 court’s determination that one who “quite candidly concede[s]” that he is a homosexual and
20 would “frankly admit that he was gay” to all who ask, cannot claim that disclosing that he was
21 gay involved revealing a private fact. Id. at 1048. Sipple is therefore referring to instances when
22 information has *lawfully* been made public stating that “there can be no privacy with respect to a
23 matter which is already public.” The Sipple court does not in any way suggest that the tortious
24 revelation of a private fact would suddenly make that information public. Such a holding would
25 unconscionably permit anyone to violate privacy rights so long as one other individual had
26 previously done so.

27 Furthermore, the granting of an interview to *People* magazine, Anti-SLAPP Motion, 9:26-
28 28, does not constitute a waiver of her privacy to all facts related to Streisand and her home. That

1 is because in that instance, Streisand *consented* to the publication of those facts which did not
2 contain highly specific details of where she resided or of her home's layout. Rather, they only
3 consisted of general descriptions of her home coupled with professional photographs that, when
4 published, were hardly of the quality or detail of the photographs published and distributed by
5 defendants. See Anti-SLAPP Motion, Exh, K; Virgil v. Time, 527 F.2d 1122, 1127 (9th Cir.
6 1975) (holding that a public figure can withdraw consent to the publication of facts previously
7 disclosed to a writer given the difference between "disclosure of private facts to an individual . . .
8 and disclosure of the same facts to the public at large.")

9 2. **The Publication of the Private Information was Offensive**

10 In determining whether a publication is offensive courts "emphasiz[e] the
11 importance of the *objective context* of the alleged invasion." Hill v. NCAA, 7 Cal. 4th 1, 25
12 (1994). As noted above, Streisand has taken numerous steps to prevent outsiders from peering
13 into her home and personal life. At the same time, Streisand contends with continued threats to
14 her safety. Streisand Decl., ¶ 3; Soderberg Decl., ¶4 (stating that he is personally "aware of
15 several occasions where Barbra Streisand was the reported victim or target of such incidents.") A
16 reasonable person would be offended to find on the Internet a caption stating "Person X's Estate,
17 Anywhere, USA" next to navigational coordinates, Thomas Guide-like maps, and high resolution
18 photographs of her home, in light of Person X's efforts to keep the location of her home private
19 and in light of her justified security concerns. Soderberg Decl., ¶3 (explaining that "it is far more
20 likely that a public figure will be the victim of stalking incidents including threats of violence to
21 them and their families than others.") Adelman provides exactly such information pertaining to
22 Streisand on his website. He incredibly insists that the map showing the location of Streisand's
23 home is not like "a Thomas Guide" because "it does not reveal Streisand's home address," and
24 does not contain any "identifying features." Anti-SLAPP Motion, p. 3:18-21. This assertion is
25 untrue. Adelman *does* provide "identifying features" such as labeling the location of nearby Point
26 Dume. In fact, a comparison of Adelman's map with the actual Thomas Guide page for the same
27 location illustrates the similarities between these two maps. See Stern Decl., Exh. 5. Therefore,
28 though Streisand's home address is not listed, Adelman's map serves as the functional equivalent

1 of a road map to her home.

2 Evidence of Adelman's offensive conduct is further revealed by his reaction to
3 communications from concerned citizens who consider his actions offensive. Calling these
4 communications "rants," Adelman has published "for your amusement," the full text of e-mails
5 (including e-mail addresses) that he has obtained from individuals offended by his work. Stern
6 Decl., Exh. 3. He has even made available the actual voice mail message that he received from
7 one individual who found that his website was "too intrusive for words," "totally outrageous,"
8 and "intruding on people's rights." Stern Decl., Exh. 4.

9 The offensiveness of this publication is all the more heinous given Streisand's concern for
10 her physical well-being. Streisand Decl, ¶3; Soderberg Decl., ¶4. The California court of appeal
11 has already recognized the dangers in publicly disseminating private facts: "Human experience
12 compels us to conclude that disclosure carries with it serious risks which include, but are not
13 limited to: the nationwide dissemination of the individual's private information . . . and the
14 infliction of threats, force, and violence." Planned Parenthood Golden Gate v. Superior Court, 83
15 Cal. App. 4th 347, 360 (2000).

16 3. **The Location of Streisand's Home is Not Newsworthy**

17 The location of Streisand's private residence is neither newsworthy nor is it a
18 matter of legitimate public concern. Newsworthiness cannot be established because of simple
19 "curiosity", Briscoe v. Reader's Digest Ass'n Inc., 4 Cal. 3d 529, 537 (1971), nor is a fact a
20 matter of legitimate public concern when it results from "a morbid and sensational prying into
21 lives for its own sake." Virgil, 527 F.2d at 1129.

22 Streisand is undeniably a public figure and, as a result, has "*to some extent* lost the right of
23 privacy." Carlisle v. Fawcett Publications, Inc., 201 Cal. App. 2d 733, 746 (1962) (emphasis
24 added). However, in all cases, regardless of celebrity "the line is to be drawn when the publicity
25 ceases to be the giving of information to which the public is entitled." Wasser v. San Diego
26 Union, 191 Cal. App. 3d 1455, 1461 (1987). Irrespective of her appearance on the cover of
27 *People* magazine or the entertaining of a United States president, the public is not entitled to
28

1 know—with specificity— where she lives or what the secluded portions of her home look like.⁴
2 “All material that might attract readers or viewers is not, simply by virtue of its attractiveness, of
3 *legitimate* public interest.” Shulman, 18 Cal. 4th at, 222 (emphasis in original).⁵ If a court were
4 to hold otherwise, the addresses of all public figures—elected officials, police chiefs, CEOs,
5 judges—would be considered newsworthy and a matter of legitimate interest. This would
6 undoubtedly both erode the “special consideration” given to the “privacy of the home,” FLRA,
7 510 U.S. at 501, and destroy the one haven where anyone can expect to express themselves
8 freely, privately and without intrusion: “the most private of places, the home.” Lawrence, 2003
9 WL 21467086, at *6.

10 Publicizing the photographed home as Streisand’s is not newsworthy because it is not
11 related to the preservation of the California coastline. Adelman’s suggestion that it is constitutes
12 a post-hoc justification for his invasion of her privacy. That is because, suddenly claiming that
13 identifying Streisand as the owner of the property is newsworthy on the grounds that controversy
14 surrounds her development of property near the bluff is immaterial. Anti-SLAPP Motion, 12:8-
15 12. Adelman’s website makes no reference to this dispute in the picture. On the other hand,
16 Adelman *does* identify the potentially newsworthy component of David Geffen’s home which is
17 captioned as “David Geffen’s House, Malibu (the disputed beach access walkway featured in
18 Gary Trudeau’s Doonesbury is blocked by a double-hung white wooden gate to the left of the
19 compound.”) Stern Decl., Exhs. 1 and 2.

20 **C. Streisand’s Claim Based On A Constitutional Right to Privacy Will Succeed**

21 Streisand will prevail on her claim that Adelman violated her “inalienable” Constitutional
22 right to privacy. Cal. Const. Art. I, §. 1; see also Porten v. University of San Francisco, 64 Cal.
23 App. 3d 825, 829 (1979) (“the constitutional provision is self-executing Privacy . . . is

24 ⁴ In this regard, it is also worth noting that the webpage makes no suggestion whatsoever why the
25 details identifying the home as Streisand’s is newsworthy.

26 ⁵ Adelman again misdirects the court in citing Carafano v. Metrospalsh.com, Inc., 207 F.Supp. 2d
27 1055, 1069 (C.D. Cal. 2002) for the proposition that the Internet publication of a celebrity’s home
28 address and telephone number is newsworthy. The holding is not a per se rule and contradicts the
weight of California jurisprudence holding that not only do celebrities retain some modicum of
privacy (especially in the home) but that mere curiosity by the public does not make a matter
newsworthy or of legitimate public interest. See e.g., Briscoe v. Reader’s Digest Ass’n Inc., 4
Cal. 3d 529, 537 (1971).

1 considered an inalienable right which may not be violated by anyone.”) Streisand has already
2 shown that she has (1) a legally protected privacy interest and (2) a reasonable expectation of
3 privacy given the circumstances. Since the “constitutional right of privacy under state law is
4 quite broad,” Ortiz, 98 Cal. App. 4th at 1302, and because Streisand has already shown that
5 Adelman’s actions are “highly offensive,” she has likewise proven that the actions constitute (3) a
6 serious invasion of privacy. Hill, 7 Cal. 4th at 39-40.

7 Finally Hill, 7 Cal. 4th at 38, instructs that “if defendant's legitimate objectives can be
8 readily accomplished by alternative means having little or no impact on privacy interests, the
9 prospect of actionable invasion of privacy is enhanced.” There is no doubt that if Adelman were
10 wholly committed to merely “develop[ing] a pictorial record of the entire California coastline,”
11 Anti-SLAPP Motion, 2:8-9, then he could have done so without posting detailed photographs of
12 Streisand’s home and without identifying Streisand as the homeowner and using Streisand’s name
13 to sell pictures of the name.

14 **D. The Anti-Paparazzi Statute Applies To The Photographs Shot By Adelman**

15 Defendants are liable for constructive invasion of privacy for using a visual enhancing
16 device in an “attempt” to photograph Streisand engaging in a “personal or familial activity.” Cal.
17 Civ. Code § 1708.8(b). The statute does not require “a physical trespass” so long as the “image
18 could not have been achieved without a trespass.” Id.

19 Adelman has not shown that he did not intend to capture images of Streisand. Adelman
20 appears fixated on the fact that the photographs were shot from 2700 feet away. Anti-SLAPP
21 Motion, 1:21-22; 2:17-18; 14:2-3. However, the poster-sized image of the Streisand home that
22 one finds when clicking on a thumbnailed image of the house points to the reality that technology
23 has rendered this distance irrelevant. Gatti Decl., Exh. 11. Moreover, had Adelman succeeded in
24 photographing Streisand from afar, the resulting quality of the photograph would be irrelevant
25 since the statute focuses on the attempt to photograph and not the quality of the final product.

26 **E. Streisand Will Succeed in Her Misappropriation Action**

27 Section 3344 of the California Civil Code prevents the unauthorized uses of an
28 individual’s “name, voice, signature, photograph, or likeness, *in any manner*, on or in products,

1 merchandise, or goods.” Cal. Civ. Code §3344(a) (emphasis added). Defendants have done
2 exactly this. A website has captioned Streisand’s name next to the location of her residence and
3 in a manner that was not authorized by Streisand. Each image can be linked to by other websites,
4 or otherwise printed, distributed, or sold. Gatti Decl., Exhs. 7, 10, 14. Furthermore, the
5 publication of Streisand’s home and identifying her as the homeowner has no connection with
6 any issue of public affairs.

7 Section 3344 also requires consent when using another’s name or likeness “for purposes
8 of advertising or selling, or *soliciting purchases* of, products, merchandise, goods or services.
9 Cal. Civ. Code § 3344(a) (emphasis added). Adelman’s website contains numerous solicitations
10 to purchase his photographs, including a separate page for a person to order prints ranging from
11 \$50 to \$120. See e.g., Gatti Decl., Exhs. 7, 10, and 14. The statute does not require that Adelman
12 profit in doing so, it only requires that he facilitate such purchases. Defendants’ liability under
13 this tort, therefore, is without question.

14 **III. STREISAND’S CLAIMS ARE NOT BARRED BY SECTION 230 OF THE**
15 **COMMUNICATIONS DECENCY ACT (“CDA”)**

16 **A. Section 230 of the CDA does Not Grant Defendants Immunity**

17 Defendants (Adelman, Pictopia.com, and Layer42.net) wrongly claim that section 230 of
18 the CDA grants them immunity in this suit. Their interpretation of section 230 violates both the
19 Act’s legislative history and textual integrity. The statute provides that “no provider . . . of an
20 interactive computer service shall be held liable on account of any action voluntarily taken in
21 good faith to restrict access to . . . material that the provider . . . considers to be obscene.” 47
22 U.S.C. §230(c)(2)(A) (emphasis added). Thus, the statute is limited to protecting internet
23 providers who filter indecent content for the benefit of minors. Batzel v. Smith, 2003 WL
24 21453358, at *6 (9th Cir. June 24, 2003) (“[t]he primary goal of the Act was to control the
25 exposure of minors to indecent material” and allowing suit against an “internet content provider”
26 to proceed). As a result, Section 230 states that its purpose is “Protection for ‘good samaritan’
27 blocking and screening of offensive material,” so that “disincentives for the development and
28 utilization of blocking and filtering technologies” are removed. 47 U.S.C. § 230(b)(4).

1 Defendants do not operate to restrict access to materials and do not fit the description of good
2 samaritans under any circumstance. Thus, section 230 of the DCA does not give them immunity.

3 On other hand the statute allows "information content providers" defined as "any person .
4 . . . that is responsible, in whole or **in part**, for the creation or development of information
5 provided through the Internet" to be liable for information that they are responsible for providing
6 through the Internet. See 47 U.S.C. §230(f)(3) (emphasis added). This is so even if defendants
7 were to be considered "interactive computer service" providers.⁶ See Batzel, 2003 WL
8 21453358, at *9-11 (9th Cir. June 24, 2003)(finding that a network that operates as both an
9 internet service provider and information content provider cannot be made immune from
10 liability); Carafano v. Metrospalsh.com, Inc., 207 F.Supp. 2d 1055, 1066-68 (C.D. Cal. 2002).

11 Since Adelman "creat[ed]" and "develop[ed]" the offensive content and did not "simply"
12 create an environment for individuals to "post whatever information they desire," Carafano, 207
13 F.Supp. 2d at 1066, Adelman qualifies as an "internet content provider," regardless of whether a
14 third party posted the "Streisand Estate, Malibu" caption. More specifically, by including
15 photographs of Streisand's home, longitudinal and latitudinal coordinates indicating its location, a
16 map containing identifying features of the area, zoom functions, describing whether the
17 photograph was shot up or down the coast, while only leaving room for a third party to assist in
18 captioning the shot, Gatti Decl., Exh. 10, Adelman took "an active role in developing the [posted]
19 information." Carafano, 207 F.Supp. 3d at 1067.

20 Adelman, in addition to continuing to post and archive information related to this case,
21 has also revealed other ways in which he takes an active role in controlling the information that is
22 posted on his website. Recently, after Mr. Gatti protested, Adelman has removed a link to
23 Streisand's counsel's work e-mail address after he received a large quantity of vituperative and
24 vicious e-mails and links to hard-core pornographic websites. Gatti Decl., ¶18. He has also
25 selectively posted personal communications and information, including both the voice mail and

26 ⁶Although entities other than internet service providers have been considered by California courts
27 to be "interactive computer services," those cases involved entities that were not disputed by the
28 plaintiff to be "interactive computer services," Gentry v. eBay, Inc., 99 Cal. App. 4th 816 (2002),
and entities which provided bulletin board and listserv operations similar to Prodigy circa 1996.
See Batzel, 2003 WL 21453358, at *12; Barrett v. Clark, 2001 WL 881259 (Cal. Sup. Ct. 2001).

1 age, name, and telephone number of one citizen who believed that his activities violated the
2 privacy of others. Stern Decl., Exhs. 3 and 4.

3 In light of Adelman's active participation in creating, developing, and editing his website,
4 while creating the specific context in which privacy rights can be violated, Adelman is an
5 "information content provider" as described in section 230(f)(3). In other words, Adelman is not
6 restricting anything, and it is gatekeepers who are the target of the grant of immunity and not
7 content providers such as Adelman. Thus, he is not immunized by this statute.

8 **B. Section 230 Does Not Immunize Violations of Intellectual Property Rights**

9 The statute also provides that "[n]othing in this section shall be construed to limit . . . any
10 law pertaining to intellectual property." 47 U.S.C. § 230(e)(2). Since Streisand's right of
11 publicity is an intellectual property right, section 230 does not apply to her misappropriation
12 claim against any of the Defendants. See Comedy III Productions, Inc. v. Gary Saderup, Inc., 15
13 Cal. 4th 387, 399 (2001) ("[t]he right of publicity, like copyright, protects a form of intellectual
14 property that society deems to have some social utility.") Furthermore, to the extent that privacy
15 is considered an intellectual property right, all of Defendants' claims under this provision are
16 barred. See e.g., Raymond T. Nimmer & Patricia Ann Krauthaus, Requiem for a Middleweight:
17 The Global Information Superhighway Challenges Virtually All of the Premises of Copyright
18 Law, 6 STAN. L. & POL'Y REV 25, 27 (1994) (explaining that "[p]rivacy is a property right even
19 though, like trade secret law, it is enforced through tort law.").

20 **C. Section 230 Does Not Provide Immunity For Violating Privacy Rights**

21 Another purpose of section 230 is to shield from defamation lawsuits, "family oriented
22 computer network[s]" that hold themselves "out to the public and its members as controlling" and
23 filtering "the content of its computer bulletin boards". Stratton Oakmont, Inc. v. Prodigy Services
24 Company, 1995 WL 323710, at *2 (N.Y. Sup. Ct. May 24, 1995). More specifically, in enacting
25 section 230, Congress set out to "overrule" the decision in Stratton, whereby Prodigy, a computer
26 network with over two million subscribers, was successfully sued for defamatory comments made
27 by an unidentified party on one of its bulletin boards. House Conference Report no. 104-458.

28 Thus, the purpose of section 230 is *not* to protect individuals or entities that violate the

1 privacy rights of others. Adelman is incorrect to suggest otherwise. That is why, perhaps, no
2 California court has extended immunity to any entity for privacy violations.⁷

3 **IV. AN AWARD OF ATTORNEY'S FEES AND COSTS TO PLAINTIFF IS**
4 **WARRANTED BECAUSE THE DEFENDANTS' MOTION IS FRIVOLOUS**

5 "If the court finds that a special motion to strike is frivolous or is solely intended to cause
6 unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff
7 prevailing on the motion, pursuant to" Section 128.6. Cal. Civ. Proc. Code §425.16(c). Here, the
8 Defendants' anti-SLAPP motion was frivolous. The motion disregarded well-established law
9 allowing a plaintiff such as Streisand to vindicate her privacy rights. In fact, as noted above,
10 California courts have not bought into Defendants' argument that the First Amendment trumps
11 privacy rights thus making all such suits subject to dismissal upon an anti-SLAPP motion. In
12 other words, Defendants' claims that the First Amendment permits Defendants' activities with
13 respect to Streisand despite the offensiveness of the publications and the efforts expended by
14 Streisand to preserve her security, is without any legal merit and justifies an award to plaintiff of
15 costs and reasonable attorney's fees under Cal. Civ. Proc. Code §425.16(c).

16 **V. CONCLUSION**

17 For the foregoing reasons, Defendants' motion to strike should be denied and plaintiff
18 should be awarded costs and reasonable attorney's fees.

19 DATED: July 3, 2003

ALSCHULER GROSSMAN STEIN & KAHAN LLP

20
21 By John Gatti / RG
22 John M. Gatti
23 Attorneys for Plaintiff
24 BARBRA STREISAND
25

26 ⁷Note that Adelman and Pictopia.com are also not immune from liability since they do not qualify
27 as "interactive computer service" providers as contemplated by Congress. As the legislative
28 history has shown, Congress sought to overrule Stratton, a case involving an internet service
provider, not a website owner. Adelman and Pictopia.com, on the other hand, respectively
operate a website and online photo shop.