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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF YUBA

11
12 LANG HER,
13 Plaintiff,
14 v.
15 NAO XIONG, GER XIONG, VANG XIONG,
16 YEE XIONG, and Does 1 to 500,
17 Defendants.

Case No. YCSCCVCV 16-0000441

UNLIMITED JURISDICTION

**DEFENDANTS NAO XIONG, GER
XIONG, VANG XIONG, AND YEE
XIONG'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF SPECIAL MOTION TO
STRIKE (CCP § 425.16)**

Date: October 3, 2016
Time: 10:00 a.m.
Judge: Hon. Stephen W. Berrier
Dept: 4

Complaint Filed: May 20, 2016
Trial Date: None

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1 Plaintiff Lang Her ("Plaintiff") filed a Complaint for Damages ("Complaint") with four
2 causes of action: (1) defamation per se, (2) libel per se, (3) slander per se, and (4) fraud.
3 Defendants Nao Xiong ("Nao"), Ger Xiong ("Ger"), Vang Xiong ("Vang"), and Yee Xiong
4 ("Yee") (collectively "Defendants") timely filed an Answer and now respectfully submit this
5 Memorandum of Points and Authorities in support of their Special Motion to Strike the
6 Complaint pursuant to Code of Civil Procedure section 425.16, California's anti-SLAPP statute.

7 **I. INTRODUCTION**

8 California's anti-SLAPP statute provides for the early dismissal of meritless claims that
9 target constitutionally protected speech. Where a defendant can show the claims arise out of the
10 exercise of free speech rights on a matter of public interest, the plaintiff must then establish a
11 probability of prevailing on the merits. If the plaintiff cannot make such a showing, the statute
12 requires that the complaint be dismissed. Here, Defendants' First Amendment rights to speak out
13 against a rape must be protected and must not be squelched by a meritless defamation lawsuit
14 brought by the same perpetrator the Defendants are speaking out against. This case serves as the
15 paradigm for the type of SLAPP lawsuit the California legislature sought to end: meritless
16 defamation claims. Furthermore, as a matter of public policy, defamation lawsuits must not
17 become the preferred means by which violent felons re-victimize their victims.

18 As explained in greater detail below, Plaintiff's claims fall squarely within the anti-
19 SLAPP statute. Not only were Defendants' posts to Facebook "made in connection with an issue
20 under consideration" by an executive and judicial body, the posts also had a connection with an
21 issue of public interest. Furthermore, because Plaintiff cannot prove the falsity of Defendants'
22 posts calling Plaintiff a rapist, Plaintiff cannot satisfy his burden of establishing a probability of
23 prevailing on the merits of his claims. Accordingly, each of Plaintiff's causes of action must be
24 stricken, and reasonable attorneys' fees and costs awarded to Defendants.

25 **II. STATEMENT OF FACTS**

26 On or around July 9, 2012, Plaintiff raped Yee. As described in the Probation Report
27 prepared in advance of Plaintiff's sentencing hearing, an officer from the Davis Police
28 Department was dispatched on July 11, 2012 "for a report of a rape." (Declaration of Vang

1 Xiong (“Vang Decl.”), Aug. 31, 2016, Ex. A (hereinafter, “Prob. Rep.”), at 4.)¹ According to the
2 Probation Report, Yee told the police officer that on the night of July 9, 2012, she had “way too
3 much to drink” before she “passed out” on the Plaintiff’s roommate’s bed:

4 At some point, she woke up to a feeling of intense pressure on her lower body and
5 pain in her vagina. She realized that [Plaintiff] was on top of her. He was having
6 sexual intercourse with her without her consent. Her arms were pinned down by
7 his, and she was unable to speak. . . . Shortly after she woke up, [Plaintiff] ceased
8 the assault, pulled up [Yee’s] pants, and got into his bed.

8 (Prob. Rep. at 4.)

9 The following day, Yee reported these events to a professor and to a friend. (*Id.* at 5, 6.)
10 A sexual assault examination was performed at a hospital. (*Id.* at 4.) Yee met with investigators
11 from the Davis Police Department on July 17, 2012, and she again described how she awoke to
12 Plaintiff raping her. (*Id.* at 5-6.)

13 In both a pretext telephone call from Yee on July 26, 2012, and a call with an investigator
14 on August 8, 2012, Plaintiff denied having any sexual contact with Yee. (*Id.* at 6-7.) However,
15 Plaintiff later provided a DNA sample and a subsequent forensic analysis “revealed that it
16 matched the semen found on [Yee’s] panty liner and a vaginal swab collected during the sexual
17 assault examination.” (*Id.* at 7.) Moreover, “[e]xperts concluded that the trace amount of semen
18 found inside [Yee’s] vagina suggested that it was deposited there as a result of penetration.” (*Id.*
19 at 7.)

20 On January 23, 2013, Yee placed another pretext telephone call to Plaintiff. (*Id.* at 8.)
21 This time, however, Plaintiff stated that he inserted his penis into Yee’s vagina, that he did not
22 know why he did so, and that the act had been on his mind ever since. (*Id.*)

23 While the Davis Police Department was investigating the case, the University of
24 California, Davis conducted its own investigation. On or about November 30, 2012, Yee
25 received a letter from the University stating that an investigations coordinator had “determined
26

27 ¹ The information in the Probation Report “was derived from Davis Police Department
28 report #12-2625, a transcript of a recorded interview of [Plaintiff] by Detective Ariel Pineda on
 August 8, 2012, a transcript of [Plaintiff’s] testimony from jury trial proceeding on May 19, 2015,
 and additional discovery.” Prob. Rep. at 3-4.

1 that a preponderance of the evidence supports the finding that Mr. Her had sex with [Yee] without
2 [Yee's] consent" (Vang Decl., Ex. C.) According to the Probation Report, Plaintiff decided
3 not to contest the charges and the finding of the investigation that he sexually assaulted Yee, and
4 Plaintiff was subsequently dismissed from the University. (Prob. Rep. at 8.)

5 On October 16, 2013, the Yolo County District Attorney's Office filed a criminal
6 complaint against Plaintiff with one count of rape of an intoxicated person. (Vang Decl., Ex. D
7 [Crim. Compl. (filed October 16, 2013)].) Plaintiff was then arrested on April 14, 2014 and
8 released on bail two weeks later. (Prob. Rep. at 8.) Yolo County Superior Court Judge Paul K.
9 Richardson subsequently held a preliminary hearing and found probable cause to believe that
10 Plaintiff had committed the charged rape offense. (Vang Decl., Ex. E [Minute Order, Oct. 15,
11 2014].) In an Information dated October 28, 2014, the Yolo County District Attorney's office
12 charged Plaintiff with "rape of an intoxicated person" and "rape of an unconscious person."
13 (Vang Decl., Ex. F [Information (filed 10/28/14)].)

14 Yee testified at Plaintiff's jury trial in May 2015, again consistently describing how she
15 awoke to Plaintiff raping her on the night of July 9, 2012. (Vang Decl., Ex. G [Excerpt from
16 Yee's testimony, May 2015].) Plaintiff also testified at the trial. (Prob. Rep. at 8.) Plaintiff
17 stated that on the night of July 9, 2012, Yee was very intoxicated, she had difficulty maintaining
18 her balance, and he and another individual assisted her up the stairs to Plaintiff's bedroom. (*Id.* at
19 8-9.) Plaintiff further stated that he went back down stairs, but returned to the bedroom after the
20 other guests departed. (*Id.* at 9.) According to Plaintiff and in contrast to his earlier recollections,
21 Yee began kissing and touching him, and he believed that she wanted to have intercourse. (*Id.*)
22 Plaintiff claimed that although he removed some of his and Yee's clothing, he did not touch her
23 vagina or have intercourse with her because he could not maintain an erection. (*Id.*)²

24 On May 20, 2015, Judge Richardson declared a mistrial because the jury was unable to
25 reach a verdict. The matter was "continued to Thursday, May 28, 2015 at 8:30 AM for Trial
26 Setting in Department 1." (Vang Decl., Ex. H [Minute Order, May 20, 2015].) On May 21,

27
28 ² The Davis Vanguard published articles on the trial—which included uses of "rape"—on
May 14 and May 16, 2016. (Vang Decl., Exs. J, R.)

1 2015, Ger allegedly posted on Facebook that Plaintiff was a rapist. (Compl. at 2.) According to
2 the Complaint, “[t]hereafter,” Ger, Yee, Nao, and Vang Xiong continued to call Plaintiff a rapist
3 in social media posts. (*Id.*) Plaintiff further alleges that Vang “copied Halloween photos of the
4 Plaintiff” (*Id.* at 3.)

5 On May 21, 2015, Vang posted the following text to Facebook:

6 Rapists destroy lives. Rapists hurt all of us, not just their victims. During the past
7 nearly three years, my sister has been enduring constant physical pain and
8 psychological trauma. The cause? My sister was raped. We still have not gotten
justice for her.

9 If you consider me as one of your friends; if you consider my sister as a friend and
10 would like to help her by showing your support, please let me know.

11 For some summary (not complete) information about the case against her
12 perpetrator, see (People of California v. Lang Her, Case No. 13-4199):
13 [http://www.davisvanguard.org/2015/05/trial-opens-into-the-sexual-assault-of-uc-](http://www.davisvanguard.org/2015/05/trial-opens-into-the-sexual-assault-of-uc-davis-student/)
davis-student/

14 Lang Her was expelled from the University of California, Davis.

15 (Vang Decl., ¶ 13; *see* Ex. I [postings on Facebook].)

16 Ger also posted to Facebook on May 21, 2015: “We will not be silenced. We will fight
17 for justice against Lang Her, who is a rapist.” (*Id.* at ¶ 14.) Additionally, Ger posted the
18 following to Facebook:

19 Briefly after Lang Her had been arrested and bailed out, his parents and clan elders
20 came over to our home. They urged my sister to stay quiet and urged her to retract
21 statements she’s made to the Davis Police Department. They made 2 offers:
MONEY OR MARRIAGE.

22 NO. We will NOT accept bribery. We will NOT let our sister marry a coward and
23 a rapist. We will NEVER be silenced. WE WILL FIGHT FOR JUSTICE AND
HOLD LANG HER ACCOUNTABLE FOR HIS ACTIONS.

24 (*Id.* at ¶ 15.) Yee, Nao, and Vang then shared that post on their own Facebook pages. (*Id.*)

25 On June 18, 2015; the Yolo County District Attorney filed a First Amended Information
26 charging Plaintiff with “rape of an intoxicated person,” “rape of an unconscious person,” and
27 sexual battery. (Vang Decl., Ex. K [First Am. Information (executed May 28, 2015)].) A second
28 ///

1 jury trial concluded with another deadlocked jury—with ten jurors favoring a guilty verdict—on
2 February 29, 2016. (Vang Decl., Ex. L [Minute Order, Feb. 29, 2016].)

3 As the case was headed for a third trial, on May 13, 2016, Plaintiff entered a plea of “no
4 contest” to a felony violation of Penal Code section 245(a)(4) (assault by means of force likely to
5 produce great bodily injury). (Prob. Rep. at 9; *see* Vang Decl., Ex. U [Keene, *Plea Deal Resolves*
6 *Davis Rape Case Headed for Third Trial*, The Davis Enterprise (May 15, 2016) p. A3].) As part
7 of his plea, Plaintiff agreed to a minimum of three months of sex offender counseling and to
8 register as a sex offender for the five-year term of probation under Penal Code section 290. (*Id.*
9 at 1; *see* Vang Decl., Ex. N [Minute Order, May 13, 2016].) On July 19, 2016, Plaintiff was
10 sentenced to those terms and 365 days in the Yolo County Jail. (Vang Decl., Ex. P [Order
11 Admitting Defendant to Formal Probation].) Yee provided a victim impact statement at the
12 hearing in which she again stated that “[Plaintiff] raped me,” and referred to Plaintiff as a rapist
13 throughout the statement. (Vang Decl., Ex. Q [Victim Impact Statement (July 19, 2016)]; Vang
14 Decl., Ex. W [Holley, *She Endured Two Trials and Public Shaming, but After Four Years, Her*
15 *Attacker is Going to Jail*, The Washington Post (July 26, 2016)].)

16 Plaintiff filed the Complaint in this action on May 20, 2016, exactly one week after
17 entering a plea deal in which he pled “no contest” to felony assault and agreed to sex offender
18 counseling and sex offender registration. (Compl. at 1.) Yee and Vang were served with the
19 Complaint as they were walking out of the Yolo County courthouse following Plaintiff’s
20 sentencing hearing. (Vang Decl., ¶ 24.) Defendants timely filed an Answer on August 11, 2016
21 that denied all of Plaintiff’s allegations.

22 **III. STANDARD OF REVIEW FOR ANTI-SLAPP MOTION**

23 “A SLAPP suit—a strategic lawsuit against public participation—seeks to chill or punish
24 a party’s exercise of constitutional rights to free speech” (*Tamkin v. CBS Broadcasting, Inc.*
25 (2011) 193 Cal.App.4th 133, 142.) California’s anti-SLAPP statute provides a remedy to dispose
26 of lawsuits aimed at conduct by the defendant that involves the valid exercise of constitutional
27
28

1 rights. (*Id.*; Code Civ. Proc., § 425.16.)³ The purposes of the anti-SLAPP statute are to protect
2 defendants from being hauled into court simply because they exercised their constitutional rights
3 and to save them from the burden of litigation by quickly exposing and expelling these suits from
4 the judicial process. (*See Varian Med. Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 193.)

5 A defendant bears the burden to show that the anti-SLAPP statute applies to plaintiff's
6 cause of action. If so, plaintiff must then establish a probability he or she will prevail on the
7 merits of the claim. (Section 425.16, subd. (b)(1).) In ruling on an anti-SLAPP motion, the court
8 may consider the pleadings and any supporting or opposing affidavits stating facts relevant to the
9 claims or defenses. (Section 425.16, subd. (b)(2).)

10 **IV. ARGUMENT**

11 **A. Plaintiff's Claims Are Subject to the Anti-SLAPP Statute.**

12 The California legislature has directed courts that the anti-SLAPP statute "shall be
13 construed broadly." (Section 425.16, subd. (a).) This directive is "expressed in unambiguous
14 terms," and courts "must treat the statutory language as conclusive"; the "broad construction
15 expressly called for [in section 425.16, subd. (a)] is desirable from the standpoint of judicial
16 efficiency," while a narrow construction "would serve Californians poorly." (*Briggs v. Eden*
17 *Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1121-22.)

18 California's anti-SLAPP statute states: "A cause of action against a person arising from
19 any act of that person in furtherance of the *person's right of petition or free speech* under the
20 United States Constitution or the California Constitution in connection with a public issue shall
21 be subject to a special motion to strike" (Section 425.16, subd. (b)(1) [emphasis added].)
22 Thus, "[a] claim is subject to the anti-SLAPP statute if it arises from one of the four categories of
23 protected activity set forth in section 425.16, subdivision (e)." (*See Summit Bank v. Rogers*
24 (2012) 206 Cal.App.4th 669, 693.) Subdivision (e) identifies the following as acts in furtherance
25 of the freedom of speech relevant to this motion:

26 ///

27
28 ³ Unless otherwise indicated, all further statutory references are to the California Code of
Civil Procedure.

1 (2) any written or oral statement or writing made in connection with an issue under
2 consideration or review by a legislative, executive, or judicial body, or any other
3 official proceeding authorized by law, (3) any written or oral statement or writing
4 made in a place open to the public or a public forum in connection with an issue of
5 public interest, or (4) any other conduct in furtherance of the exercise of the
6 constitutional right of petition or the constitutional right of free speech in
7 connection with a public issue or an issue of public interest.

8 (Section 425.16, subd. (e)(2)-(4).)

9 As explained in greater detail below, Plaintiff's claims are based on written statements
10 Defendants' posted on a public forum in conjunction with an issue of public interest (*i.e.*, the
11 prosecution of a rape and sexual assault case) under consideration by an executive and a judicial
12 body. Accordingly, Defendants' speech challenged by Plaintiff as defamatory meets the First
13 Amendment protection requirements under section 425.16(e).

14 **1. Defendants' Social Media Posts Were Made in Connection with an**
15 **Issue under Consideration by an Executive and a Judicial Body.**

16 Section 425.16(e) makes clear that a written statement "made in connection with an issue
17 under consideration or review" by an executive body is an act in furtherance of freedom of speech
18 and therefore protected by the anti-SLAPP statute. Here, Defendants' posts were made in
19 connection with an issue under consideration in a judicial proceeding by the Yolo County District
20 Attorney's Office: whether to pursue a second trial of Plaintiff to secure a rape conviction. The
21 timing of the challenged posts alone demonstrates an undeniable connection with that issue. The
22 Complaint alleges that Ger "posted to Facebook that Plaintiff was a rapist" on May 21, 2015.
23 (Compl. at 2.) But the Complaint fails to mention that just one day prior, the judge presiding over
24 the first trial declared a mistrial, dismissed the jury, and continued the case "to Thursday, May 28,
25 2015 at 8:30 AM for Trial Setting in Department 1." (Vang Decl., Ex. H [Minute Order, May 20,
26 2015].) Thus, Vang and his siblings had just eight days to rally public support for further
27 prosecution of Plaintiff. The substance of Defendants' posts further indicates a connection to a
28 public issue: one post included a link to media coverage of the trial and directly solicited the
support of friends; the other two declared a "fight for justice" and a vow *against* silence. (Vang
Decl., ¶¶ 13-15.) Because the written posts have an undeniable connection with an issue under

1 review by an executive and judicial body, the posts are acts in further of freedom of speech and
2 within the protection of the anti-SLAPP statute.

3 **2. Sharing Yee's Story on Social Media Websites is an Act in**
4 **Furtherance of Defendants' Free Speech Rights.**

5 To determine whether a lawsuit arises from acts in furtherance of free speech, the "focus
6 is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise
7 to his or her asserted liability—and whether that activity constitutes protected speech or
8 petitioning." (*Nevellier v. Sletten* (2002) 29 Cal.4th 82, 92.) The California Court of Appeal has
9 consistently held that online posts are within the aegis of the anti-SLAPP statute: "Without doubt,
10 Internet message boards are places 'open to the public or a public forum' for purposes of section
11 425.16." (*Summit Bank*, 206 Cal.App.4th at 693 [collecting cases].)

12 Plaintiff's lawsuit is based entirely on Defendants' written posts to social media websites.
13 Specifically, Plaintiff alleges that Defendants posted to Facebook that Plaintiff was a rapist and
14 that Vang "copied Halloween photos of the Plaintiff" (Compl. at 3.) According to Plaintiff,
15 Defendants shared those posts with others "and requested that they disseminate . . . to any person
16 that they could distribute it to." (*Id.* at 2.) Plaintiff contends that Defendants took such actions
17 "to alienate [Plaintiff] from the Hmong community." (*Id.* at 4.)

18 Thus, Plaintiff's claims arise from Defendants' posts to social media websites, which were
19 acts in furtherance of Defendants' right to freedom of speech. The anti-SLAPP statute therefore
20 applies if Defendants' posts have a "connection with an issue of public interest." (Section
21 425.16, subd. (b)(1).) As set forth below, the anti-SLAPP statute applies because of the
22 connection with an issue of public interest, specifically the decision whether to again seek a rape
23 conviction against Plaintiff. Speech, like Defendants' postings, urging the general public to
24 advocate to the District Attorney's office to continue seeking justice and bring a new rape trial
25 falls squarely within an issue of significant public interest.

26 **3. The Rape is an Issue of Public Interest.**

27 The definition of the "public issue" requirement, like other aspects of the statute, must be
28 construed broadly. (Section 425.16(a); *see also Equilon Enters., LLC v. Consumer Cause, Inc.*

1 (2002) 29 Cal.4th 53, 60, fn. 3 [discussing legislative intent to prevent courts from narrowly
2 construing the public issue requirement in the anti-SLAPP statute].) The Court of Appeal has
3 held that “‘an issue of public interest’ within the meaning of section 425.16, subdivision (e)(3) is
4 *any issue in which the public is interested.*” (*Nygård, Inc. v. Uusi-Kerttula* (2008) 159
5 Cal.App.4th 1027, 1039 [emphasis in original].) It is enough that the public, or a broad segment
6 of the public, takes an interest in the speech. (*Id.*; *Damon v. Ocean Hills Journalism Club* (2000)
7 85 Cal.App.4th 468, 479; *DuCharme v. Int’l Broth. of Elec. Workers, Local 45* (2003) 110
8 Cal.App.4th 107, 115-16.) Moreover, the Court of Appeal has held that the public has an interest
9 in the dissemination of information regarding registered sex offenders and protecting others from
10 sexual predators. (*See Mendoza v. ADP Screening and Selection Servs., Inc.* (2010) 182
11 Cal.App.4th 1644, 1653 [noting “the public’s strong interest in the dissemination of information
12 regarding registered sex offenders”]; *Terry v. Davis Cmty. Church* (2005) 131 Cal.App.4th 1534,
13 1547 [“the communications clearly involved issues of public interest, because they involved the
14 societal interest in protecting a substantial number of children from predators”].)

15 The media coverage of Plaintiff’s rape of Yee demonstrates that the subject is an issue of
16 public interest. The Davis Vanguard, The Davis Enterprise, and The Sacramento Bee have
17 published articles on the rape and related criminal proceedings. (*See Vang Decl., Exs. J, R-X.*)
18 Additionally, Yee’s story has garnered national interest, as evidenced by recent coverage in both
19 The Washington Post and The Huffington Post. (*See Vang Decl., Exs. W, X.*) The media
20 coverage is consistent with the findings of the Court of Appeal that the public has a strong interest
21 in disseminating information regarding registered sex offenders and protecting others from sexual
22 predators. (*See Mendoza*, 182 Cal.App.4th at 1653; *Terry*, 131 Cal.App. 4th at 1547.) Moreover,
23 that Plaintiff was not ultimately convicted of rape charges does not mean the rape was not an
24 issue of public interest. (*See Terry*, 131 Cal.App.4th at 1547.)

25 Thus, Plaintiff’s claims are based solely on Defendants’ posts to Facebook. Because those
26 posts are acts in furtherance of Defendants’ freedom of speech and have a connection with an
27 issue of public interest, Defendants have satisfied their burden under the anti-SLAPP statute. The

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1 Court must therefore dismiss this action unless Plaintiff carries his burden of proving there is a
2 probability that he will prevail on his claims. Plaintiff cannot satisfy that burden.

3 **B. Plaintiff's Claims Fail as a Matter of Law.**

4 To prove a probability of prevailing on a claim and therefore survive an anti-SLAPP
5 motion, "the plaintiff must demonstrate that the complaint is legally sufficient and supported by a
6 prima facie showing of facts to support a favorable judgment if the evidence submitted by the
7 plaintiff is accepted." (*Kenne v. Stennis* (2014) 230 Cal.App.4th 953, 962.) In making that
8 determination, courts are to consider "the pleadings and evidentiary submissions of both the
9 plaintiff and the defendant." (*Id.*) "Although the court does not weigh the credibility or
10 comparative probative strength of competing evidence, it should grant the motion if, as a matter
11 of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish
12 evidentiary support for the claim." (*Id.* at 962-63 [citations and internal quotation marks
13 omitted].) "Section 425.16 therefore establishes a procedure where the trial court evaluates the
14 merits of the lawsuit using a summary judgment-like procedure at an early stage of the litigation."
15 (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.)

16 Each of Plaintiff's claims for defamation, slander, libel, and fraud "arise from . . . false
17 and defamatory statements about Plaintiff committing a sexual crime" (Compl. at 1.)
18 Plaintiff cannot prevail on his first three causes of action because he cannot make a prima facie
19 showing of facts that Defendants' social media posts were false. Additionally, Plaintiff cannot
20 prevail on his fraud claim, which is based on Civil Code section 1572, because there is no
21 evidence of a contract between Plaintiff and Defendants.

22 **1. Plaintiff Will Not Prevail on the Defamation Claims.**

23 **a. Plaintiff Bears the Burden of Proving Falsity.**

24 The Complaint correctly notes that Plaintiff bears the burden of proving that Defendants'
25 alleged defamatory statements were false. (Compl. at 2 ["Defamation involves (1) a publication
26 that is (2) false"].) "[T]he burden to prove falsity shifts to the plaintiff when the statement
27 relates to an issue of public concern, even when the plaintiff is not a public figure." (*Integrated
28 Healthcare Holdings, Inc. v. Fitzgibbons* (2006) 140 Cal.App.4th 515, 528 [citing

1 *Philadelphia Newspapers, Inc. v. Hepps* (1988) 475 U.S. 767]; *see also Brown v. Kelly*
2 *Broadcasting Co.* (1989) 48 Cal.3d 711, 747 [“When the speech involves a matter of public
3 concern, a private-figure plaintiff has the burden of proving the falsity of the defamation”].)
4 Furthermore, Plaintiff must prove by a preponderance of evidence that Defendants’ alleged
5 statements were false. (*Christian Research Inst. v. Alnor* (2007) 148 Cal.App.4th 71, 82.)

6 In *Fitzgibbons*, the Court of Appeal concluded that because the underlying issue was a
7 public issue for purposes of the first prong of the anti-SLAPP analysis, the issue was also one
8 of public concern for purposes of shifting the burden of falsity. (*See* 140 Cal.App.4th at 529
9 [“Because we have determined the e-mail at issue related to an issue of public concern,
10 [plaintiff] bears the burden of demonstrating the challenged statements are false.”].) Again,
11 not only has the Court of Appeal found that the public has a strong interest in disseminating
12 information regarding registered sex offenders and protecting others from sexual predators,
13 national media coverage of Plaintiff’s rape of Yee demonstrates that Defendants’ posts
14 involved a matter of public concern. (*See Vang Decl., Exs. W, X.*) Because Defendants’
15 alleged statements relate to an issue of public concern, Plaintiff bears the burden of proving
16 falsity. As explained in greater detail below, Plaintiff cannot satisfy that burden.

17 **b. Plaintiff Cannot Prove that Defendants’ Statements were False.**

18 The Complaint suggests, without any elaboration or documentation, that the Facebook
19 posts “about Plaintiff committing a sexual crime” are “false.” (Compl. at 1.) A conclusory
20 allegation in an unverified complaint is not a prima facie showing of facts sufficient to support a
21 favorable judgment. Moreover, even if Plaintiff somehow produces evidence that he did not
22 “commit[] a sexual crime” and is not a rapist, Defendants’ evidence defeats Plaintiff’s attempt to
23 establish evidentiary support. The dispositive evidence on this issue is the “Declaration” that
24 Plaintiff signed under penalty of perjury on May 13, 2016 in connection with his criminal
25 prosecution for the rape of Yee. (*Vang Decl., Ex. M.*) In that Declaration, Plaintiff pled no
26 contest to felony assault by means of force likely to cause great bodily injury. (*Id.*)⁴ The
27

28 ⁴ Plaintiff’s felony plea is admissible in this action. (*See Pen. Code, § 1016; Evid. Code, § 1300.*)

1 probation terms that Plaintiff agreed to are of even greater significance: a “minimum of three
2 months sex offender counseling” and registration “as a sex offender” for the five-year term of
3 probation. (*Id.*) Both of those provisions are initialed “LH.” (*Id.*) Additionally, the “Order
4 Admitting Defendant to Formal Probation,” signed by both the sentencing judge and Plaintiff,
5 imposed probation under those very terms. (Vang Decl., Ex. P.)

6 Furthermore, the applicable standard for dismissing a defamation claim is “substantial
7 truth,” not absolute truth:

8 California law permits the defense of substantial truth and would absolve a
9 defendant even if she cannot justify every word of the alleged defamatory matter;
10 it is sufficient if the substance of the charge be proved true, irrespective of slight
inaccuracy in the details. . . . Minor inaccuracies do not amount to falsity so long
as the substance, the gist, the sting, of the libelous charge be justified.

11 (*Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 516-17 [citations and
12 internal quotation marks omitted].) Here, Plaintiff alleges the Defendants’ posts “about Plaintiff
13 committing a sexual crime” and calling Plaintiff “a rapist” were false. (Compl. 1-4.) Plaintiff
14 does not allege that Defendants misrepresented the outcome of the first jury trial and posted that
15 Plaintiff was a “convicted rapist.” To the extent Plaintiff believes his acts on July 9, 2012 did not
16 amount to rape because he was not convicted of rape, Defendants’ posts calling Plaintiff a rapist
17 were nonetheless substantially true. (*Cf. Guccione v. Hustler Magazine, Inc.* (2d Cir. 1986) 800
18 F.2d 298, 302 [explaining that calling plaintiff an “adulterer” was substantially true in light of
19 plaintiff’s “adulterous conduct”].) Moreover, Plaintiff cannot escape the reality that the general
20 public identifies individuals as “rapists” even in the absence of a conviction for a “rape” offense.
21 In light of this general usage and understanding of the term “rapist,” Plaintiff cannot overcome
22 the substantial truth of Defendants’ statements that Plaintiff is a rapist.

23 Here, there is a mountain of evidence indicating the substantial truth of a post calling
24 Plaintiff a rapist: the University of California, Davis investigations coordinator determined that “a
25 preponderance of the evidence supports the finding that Mr. Her had sex with [Yee] without
26 [Yee’s] consent” (*See Black’s Law Dict.* (10th ed. 2014) p. 1450, col. 1 [defining rape as
27 “[u]nlawful sexual activity (esp. intercourse) with a person (usu. a female) without consent and
28 usu. by force or threat of injury”].); the Yolo County District Attorney’s Office had sought twice

1 to convict Plaintiff of two “rape” offenses; Yee testified under oath at Plaintiff’s jury trials that
2 Plaintiff had raped her; The Davis Enterprise had reported on the jury trial for rape offenses; and
3 Plaintiff has signed a voluntary agreement, under penalty of perjury, to undergo sex offender
4 counselling and to register as a sex offender. Thus, there is incontrovertible evidence that
5 demonstrates the substantial truth of Defendants’ statements that Plaintiff is a rapist.

6 Because Plaintiff cannot carry his burden of producing evidence that he did not “commit[]
7 a sexual crime” and is not a rapist, the Court must grant Defendants’ special motion to strike.

8 **c. Defendants’ Social Media Posts are not Actionable.**

9 “In determining whether disparaging remarks are actionable defamation . . . the
10 dispositive question is whether a reasonable fact finder could conclude the published statement
11 declares or implies a provably false assertion of fact.” (*Integrated Healthcare Holdings, Inc. v.*
12 *Fitzgibbons* (2006) 140 Cal.App.4th 515, 526 [citation and internal quotation marks
13 omitted].) “[A]n opinion based on implied, undisclosed facts is actionable if the speaker has no
14 factual basis for the opinion. An opinion is not actionable if it discloses all the statements of fact
15 on which the opinion is based and those statements are true.” (*Id.* at 527.)

16 Here, Defendants social media posts that Plaintiff is a rapist are not actionable because
17 such posts do not declare or imply a provably false assertion of fact. The aforementioned
18 “Declaration” and “Order Admitting Defendant to Final Probation” (*see* Vang Decl., Exs. M, P)
19 make clear that opining that Plaintiff is a rapist is not a provably false assertion of fact. (*Cf. Del*
20 *Junco v. Hufnagel* (2007) 150 Cal.App.4th 789, 793, 798 [statements that doctor “has no
21 specialized medical training in . . . female medicine” and “is a vascular student” are provably
22 false statements of fact, not opinions, because plaintiff was trained in gynecology and a
23 licensed vascular surgeon].) Moreover, the posts in which Defendants opine that Plaintiff is a
24 rapist disclose the factual basis for that opinion: Plaintiff raped Yee. Because the posts identified
25 the facts underlying the opinion that Plaintiff is a rapist, the opinion is actionable only if the facts
26 are false. (*See Fitzgibbons*, 140 Cal.App.4th at 528 [“Because the e-mail discloses the facts
27 underlying Fitzgibbons’s opinions, the opinions are actionable only if these facts are false.”].) As
28 discussed above, the facts underlying the opinion that Plaintiff is a rapist are not false.

1 d. **Republication of Plaintiff's Halloween Photographs Does Not**
2 **Amount to Libel.**

3 Plaintiff's second cause of action is a claim for libel per se. (Compl. at 3.) In support of
4 that cause of action, Plaintiff alleges that Vang "without permission or consent, copied Halloween
5 photos of the Plaintiff and used them to portray him as a disturbed individual, placing him in a
6 false light." (*Id.*) Plaintiff does not allege any other facts regarding this alleged republication,
7 and there is no suggestion that Vang altered or modified the images. Without any such allegation,
8 Vang's publication of the images cannot be "false," even if the photographs portray Plaintiff "as a
9 disturbed individual."

10 The Complaint also fails to identify the source from which Vang allegedly "copied" the
11 photographs. The source, however, may be dispositive. Facebook's Statement of Rights and
12 Responsibilities state: "When you publish content or information using the Public setting, it
13 means that *you are allowing everyone, including people off of Facebook, to access and use that*
14 *information*, and to associate it with you (*i.e.*, your name and profile picture)." (*Statement of*
15 *Rights and Responsibilities*, Facebook <<https://www.facebook.com/terms>> (as of August 24,
16 2016) [emphasis added].) If Plaintiff published the photographs on Facebook, he consented to
17 allowing "everyone, including people off of Facebook, *to access and use* that information,"
18 including Vang's alleged republication of those photographs. Consent, of course, is an absolute
19 defense to Plaintiff's claim for libel per se, and "[o]ne of the primary purposes of the doctrine of
20 consent in defamation law is to prevent a party from inviting or inducing indiscretion and thereby
21 laying the foundation of a lawsuit for his own pecuniary gain." (*Royer v. Steinberg* (1979) 90
22 Cal.App.3d 490, 498, 504 ["One of the oldest and most widely recognized defenses to the
23 publication of defamatory matter is the doctrine of consent, which has been classified as a form of
24 absolute privilege."].)

25 Because Plaintiff's claim for libel per se is legally deficient, the Court must strike the
26 claim pursuant to section 425.16.

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1 **2. The Court Must Strike Plaintiff's Fraud Claim.**


2 The only authority cited in support of Plaintiff's fourth cause of action ("Fraud") is Civil
3 Code section 1572. (Compl. at 4.) That statute, however, is not at all applicable to this action.
4 Section 1572 defines fraud as an act "committed by a party to the contract, or with his
5 connivance, with intent to deceive another party thereto, or to induce him to enter the contract[.]"
6 (Civ. Code, § 1572.) However, Plaintiff has not alleged and cannot prove the existence of any
7 contract between Plaintiff and Defendants, let alone that Defendants fraudulently induced
8 Plaintiff into entering a contract. Plaintiff therefore cannot carry his burden of proving a
9 probability to prevail on his fraud claim, and the Court must accordingly strike that cause of
10 action.

11 **V. CONCLUSION**

12 This entire action is based on acts in furtherance of Defendants' right to freedom of
13 speech and petition. Because Defendants' posts to Facebook concerned a matter of public
14 interest—specifically, Plaintiff's rape of Yee—the anti-SLAAP statute protects Defendants'
15 speech. Furthermore, Plaintiff cannot establish a probability of prevailing on his claims because
16 Plaintiff cannot prove that he is not a rapist, particularly in light of his felony assault conviction,
17 agreement to participate in sex offender counseling, and agreement to register as a sex offender.
18 Plaintiff also cannot establish a probability of prevailing on his fraud claim, as there is no
19 evidence or even allegation of a contract between Plaintiff and Defendants or a fraudulent
20 inducement to enter a contract. Because Plaintiff cannot carry his burden of prevailing on any of
21 his causes of action, this Court must grant this special motion to strike and dismiss this action
22 pursuant to California Code of Civil Procedure section 425.16. Defendants hereby request that
23 the Court strike and dismiss Plaintiff's Complaint, and award Defendants attorneys' fees and
24 costs pursuant to section 425.16(c)(1).

1 Dated: September 6, 2016

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