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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,,) Case No. SC077257
12 Plaintiff,)
13 vs.) **DEFENDANTS' EX PARTE**
14 KENNETH ADELMAN, an individual;) **APPLICATION TO SET HEARING DATE**
15 PICTOPIA.COM, a California corporation;) **AND FOR EXTENSION OF TIME TO**
16 LAYER42.NET, a California corporation; and) **RESPOND TO COMPLAINT;**
DOE 1 through DOE 20, inclusive.,) **MEMORANDUM OF POINTS AND**
17 Defendants.) **AUTHORITIES; DECLARATION OF**
18) **RICHARD B. KENDALL**
Date: June 19, 2003
Time: 8:30 a.m.
Dept.: 95 (Hon. Allan J. Goodman)
Complaint filed: May 20, 2003

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1 Defendants Kenneth Adelman, Layer42.NET, and Pictopia.com ("Defendants") hereby
2 request that: (1) the Court set Defendants' special motion to strike pursuant to Code of Civil
3 Procedure section 425.16 for hearing on July 14, 2003 prior to a hearing on Plaintiff Barbara
4 Streisand's motion for a preliminary injunction to be heard on the same date; and (2) pursuant to
5 Code of Civil Procedure section 1054(a), the Court extend the time for Defendants to respond to
6 Plaintiff's Complaint from June 30 to July 30, 2003. There have been no previous extensions of
7 time for Defendants to respond to the Complaint. Plaintiff has informed Defendants that she does
8 not oppose these requests.

9 Good cause exists for the Court to set the hearing on the special motion to strike for July
10 14. In response to Defendants' advising Plaintiff that Defendants would be filing a special motion
11 to strike within 30 days of the May 30, 2003 service upon Defendants of Plaintiff's Complaint,
12 Plaintiff recently informed Defendants that she intends to move for a preliminary injunction and
13 will be asking this Court to set that motion for hearing on July 14, 2003. Defendants shortly will
14 be filing the special motion to strike, asking the Court to strike the Complaint on the ground that
15 all of Plaintiff's causes of action arise from acts of Defendants in furtherance of their free speech
16 rights under the United States and California Constitutions in connection with a public issue and
17 that Plaintiff cannot show a probability of prevailing on any of her causes of action. The parties
18 agreed that these motions should heard on the same day because Plaintiff's motion will be moot if
19 the Court grants the motion to strike.

20 In addition, good cause exists for the Court to extend the time for Defendants to respond to
21 the Complaint from June 30 to July 30. If Defendants prevail on the special motion to strike, they
22 will not need to respond to the Complaint. Accordingly, in the interests of economy and
23 efficiency, the special motion to strike should be heard and decided before Defendants are
24 required to prepare and file their response to the Complaint.

25 On June 17, 2003, Defendants' counsel notified Plaintiff's counsel, John M. Gatti, located
26 at Alschuler Grossman Stein & Kahan LLP, The Water Garden 1620 26th Street, Fourth Floor,
27 North Tower, Santa Monica, CA 90040-4060, (310) 907-1000, of their intent to file this ex parte
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1 application on June 19, 2003. Plaintiff's counsel stated that Plaintiff would not oppose the
2 application.

3 This ex parte application is based on this application, the accompanying memorandum of
4 points and authorities, attached Declaration of Richard B. Kendall, the record in this case, and
5 such other evidence, arguments, and matters as to which the Court may take notice.

6 Dated: June 18, 2003

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

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By: _____

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Laura A. Seigle
Attorneys for Defendants
Kenneth Adelman, Layer42.NET, and
Pictopia.com

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 By this ex parte application, Defendants Kenneth Adelman, Layer42.NET, and
4 Pictopia.com request that the Court: (1) set Defendants' special motion to strike pursuant to Code
5 of Civil Procedure section 425.16 for hearing on July 14, 2003 prior to a hearing on Plaintiff's
6 motion for a preliminary injunction to be heard on the same date; and (2) extend the time for
7 Defendants to respond to Plaintiff Barbara Streisand's Complaint from June 30 to July 30, 2003.

8 Good cause exists for both requests. Defendants advised Streisand approximately fourteen
9 days ago that Defendants would be filing a special motion to strike the complaint under
10 section 425.16. In response, Streisand advised Defendants that she intends to move for a
11 preliminary injunction and will be asking this Court to set that motion for hearing on July 14,
12 2003. Plaintiff's motion for a preliminary injunction will be moot if the Court grants Defendants'
13 special motion to strike. For reasons of judicial efficiency, these motions should be heard on the
14 same day, and the special motion to strike should be heard first. In addition, if Defendants prevail
15 on the special motion to strike, they will not need to respond to the Complaint. Accordingly, in
16 the interests of economy and efficiency, the time to respond to the Complaint should be extended
17 so that the special motion to strike can be heard and decided before Defendants are required to
18 prepare and file their response.

19 **BACKGROUND FACTS**

20 The subject of this litigation is an aerial photographic record of the California coastline,
21 known as the California Coastal Records Project, created by Kenneth Adelman, on his own
22 initiative and at his own expense. Adelman makes the photographs freely available to the public
23 on his website, californiacoastline.com. The purpose of the photographs and website is to create a
24 record of the coastline that can be used to track environmental damage caused by illegal and ill-
25 advised coastal activity. The result is a database consisting of over 12,200 photographs that depict
26 virtually all 840 miles of the California coastline. In the less than two years since its inception, the
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1 website has provided information free of charge to numerous state and local government entities,
2 university researchers, news organizations, conservancy groups and the general public.¹

3 Streisand's entire Complaint is based on the presence of a single photograph out of the over
4 12,200 photographs appearing on Adelman's website. That photograph depicts the stretch of
5 Malibu coastline containing a lovely strand of beach, a dramatic coastal bluff (somewhat marred
6 by wastewater pipes protruding from the bluff), and a neighborhood along the bluff that contains
7 Streisand's mansion, her two other large homes on the property, (one of which is about to be
8 remodeled and expanded into a second 11,000 square foot mansion), her swimming pool, deck
9 chairs, parasols and gardens. The photograph includes the entire neighborhood and features many
10 other homes besides Streisand's, as well as the beach, the bluff, and the public roads running
11 through the neighborhood. The photograph does not depict Streisand or her family. A copy of the
12 photograph at issue is attached hereto as Exhibit A.

13 Streisand apparently believes that because she does not want a photograph showing her
14 estate to be publicly available, she can force Adelman to remove the photograph from his website,
15 in violation of his First Amendment free speech rights and to the detriment of his efforts to
16 preserve the coastline environment. Her Complaint charges Adelman with five causes of action
17 for supposedly violating her privacy and seeks \$10 million in purported damages on each cause of
18 action.

19 Two weeks ago, Defendants informed Streisand that they would be filing an Anti-SLAPP
20 motion under section 425.16 to strike the complaint within 30 days of the May 30 service of the
21 Complaint. Kendall Decl., ¶ 3. Earlier this week, in response, Streisand informed Defendants that
22 she would be filing a motion for a preliminary injunction and would be making an ex parte
23 application to have the motion heard in early July. The parties agreed that these motions should
24 be heard on July 14, 2003. *Id.* Defendants also informed Streisand that they would be seeking an
25 extension of time to respond to the Complaint, so that the Court can first hear and rule on the
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28 ¹ Layer42.NET hosts the website, and Pictopia.com prints hard copies of specific photographs appearing on the website for purchasers.

1 special motion to strike before Defendants must prepare and file a demurrer. *Id.* at ¶ 4. Plaintiff's
2 counsel stated that Plaintiff would not oppose this request. *Id.*

3 ARGUMENT

4 Good cause exists to set Defendants' special motion to strike for hearing on July 14, 2003,
5 and to extend the time for Defendants to respond to the Complaint because Defendants are likely
6 to prevail on the ir motion, which will moot both Streisand's motion for a preliminary injunction
7 and Defendants' obligation to respond to the Complaint. Defendants will make their special
8 motion to strike under Code of Civil Procedure section 425.16, which prohibits causes of action
9 arising from acts in furtherance of free speech rights under the United States and California
10 Constitutions in connection with a public issue. Under that statute, a court must strike such causes
11 of action unless the plaintiff establishes that there is a probability that the plaintiff will prevail on
12 the claims. Civ. Proc. Code § 425.16(b)(1).

13 It is indisputable that the Complaint arises out of Adelman's exercise of his right of free
14 speech in connection with an important public issue – the preservation of the California coastline.
15 Indeed, the California Legislature has declared that the California coastal zone is a "distinct and
16 valuable natural resource of vital and enduring interest to all the people" and whose protection is
17 "a paramount concern to present and future residents of the state and nation." Pub. Res. Code §
18 30001.

19 It is also clear both as a legal and factual matter that Streisand will not be able to
20 demonstrate a reasonable probability of success. In the special motion to strike, Defendants will
21 show that the location and appearance of her home are a matter of public record and common
22 knowledge and can be found in any number of news items, star maps and fan websites. In
23 addition, public speech about Ms. Streisand's residence is newsworthy and entitled to First
24 Amendment protection. As an extremely high-profile entertainer and political activist, Streisand
25 has repeatedly injected herself and her estate into the public spotlight, for example, by using her
26 estate as the setting for well-publicized political fund raising events.

27 Defendants will also explain in their special motion to strike that Adelman's conduct in
28 taking the photograph was not "highly offensive" to a reasonable person. He neither physically

1 entered her estate nor flew his helicopter in the airspace over her property, and he did not
2 photograph any person, let alone Streisand, engaged in intimate activity. Instead, the sole
3 objective was to photograph the coastline in order to further its conservation, not to sell
4 photographs of celebrities or their estates.

5 Finally, Defendants will show that all of the claims against Layer42.NET and
6 Pictopia.com, as well as certain of the allegations against Adelman, are preempted by section 230
7 of the Communications Decency Act, which states that a website owner or user cannot be liable
8 under state law for causes of action based on information provided by third parties. 47 U.S.C.
9 § 230(c)(1) and (e)(3). Here, Layer42.NET and Pictopia.com do not provide any of the
10 information at issue in this case – the photograph and the caption on the photograph identifying it
11 as Streisand's house – and Adelman did not provide the caption, which was suggested for the
12 photograph at issue by a third-party user of the website.

13 CONCLUSION

14 For all of these reasons, Defendants request that the Court set Defendants' special motion
15 to strike pursuant to Code of Civil Procedure section 425.16 for hearing on July 14, 2003 (or on a
16 convenient date for the Court following July 14) prior to a hearing on Plaintiff's motion for a
17 preliminary injunction to be heard on the same date, and extend the time for Defendants to
18 respond to Plaintiff Barbara Streisand's Complaint from June 30 to July 30, 2003.

19 Dated: June 18, 2003

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

23 By: _____

24 Laura A. Seigle
25 Attorneys for Defendants
26 Kenneth Adelman, Layer42.NET, and
27 Pictopia.com
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DECLARATION OF RICHARD B. KENDALL

I, Richard B. Kendall, declare as follows:

1. I am an attorney at and member of the law firm of Irell & Manella LLP, counsel of record for Defendants in the above-captioned action. I am a member in good standing of the State Bar of California. I have personal knowledge of the facts set forth in this Declaration and, if called as a witness, could and would testify competently to such facts under oath.

2. Attached as Exhibit A is a true and correct copy of the photograph that is the subject of Plaintiff's Complaint.

3. Good cause exists for the Court to set the hearing on Defendants' special motion to strike for July 14, 2003. On or about June 5, 2003, I informed Plaintiff's counsel that within 30 days of the May 30, 2003 service of the Complaint, Defendants would be filing a special motion to strike the Complaint under California Code of Civil Procedure § 425.16. Plaintiff's counsel informed me on June 16, 2003 that Plaintiff intends to move for a preliminary injunction and will be asking this Court to set that motion for hearing on July 14, 2003. Defendants shortly will be filing the special motion to strike and asking the Court to strike the Complaint on the ground that all of Plaintiff's causes of action arise from acts of Defendants in furtherance of their free speech rights under the United States and California Constitutions in connection with a public issue. Plaintiffs' counsel and I agreed that these motions should both be heard on July 14, 2003, or at such later date as will be convenient for the Court, as Plaintiff's motion will be moot if the Court grants the motion to strike.

4. Good cause also exists for the Court to extend the time for Defendants to respond to the Complaint from June 30 to July 30. If Defendants prevail on the special motion to strike, they will not need to respond to the Complaint. Thus, both parties will save time and money if the special motion to strike is heard and decided before Defendants are required to prepare and file a demurrer to the Complaint and Plaintiff is required to file an opposition to the demurrer. Plaintiff's counsel informed me that Plaintiff does not object to this extension of time.

1 5. On June 17, I informed Plaintiff's counsel by telephone call and letter that
2 Defendants would file this ex parte application on June 19. Plaintiff's counsel stated that Plaintiff
3 would not oppose the application. Attached as Exhibit B is a true and correct copy of that letter.

4 Executed on June 18, 2003, at Los Angeles, California.

5 I declare under penalty of perjury under the laws of the State of California that the
6 foregoing is true and correct.

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Richard B. Kendall

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TABLE OF AUTHORITIES

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