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6 Attorneys for Defendant  
TOM McIVER

8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA

10 AL SECKEL,  
11 Plaintiff,  
12 v.  
13 TOM McIVER,  
14 Defendant.

Case No. CV07-3134 GAF (JCx)  
DEFENDANT TOM McIVER'S  
ANSWER TO FIRST AMENDED  
COMPLAINT  
Magistrate Judge: Jacqueline Chooljian  
Trial: July 24, 2008  
Pre Trial Conf: June 25, 2008  
Discovery Cutoff: May 11, 2008  
Motion Cutoff: May 21, 2008  
DEMAND FOR JURY TRIAL

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19 Defendant Tom McIver hereby responds to the First Amended Complaint  
20 (hereinafter "FAC") of Al Seckel as follows:

- 21 1. Answering paragraph 1 of the FAC, Defendant is without sufficient  
22 knowledge or information to form a belief as to the truth of the allegations contained  
23 in said paragraph, and on that basis denies each and every allegation contained  
24 therein.
- 25 2. Answering paragraph 2 of the FAC, Defendant admits all allegations  
26 contained therein.
- 27 3. Answering paragraph 3 of the FAC, Defendant admits all allegations  
28 contained therein.

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1           4.     Answering paragraph 4 of the FAC, Defendant denies all allegations  
2 contained therein.

3           5.     Answering paragraph 5 of the FAC, Defendant admits that this court has  
4 personal jurisdiction over him and that certain unsolicited correspondence was sent  
5 to various persons about Plaintiff. Defendant specifically denies that any  
6 correspondence or communication regarding Plaintiff that he sent to anyone was  
7 defamatory. Defendant denies all other allegations contained in paragraph 5 of the  
8 FAC.

9           6.     Answering paragraph 6 of the FAC, Defendant admits all allegations  
10 contained therein.

11          7.     Answering paragraph 7 of the FAC, Defendant is without sufficient  
12 knowledge or information to form a belief as to the truth of the allegations contained  
13 in said paragraph, and on that basis denies each and every allegation contained  
14 therein.

15          8.     Answering paragraph 8 of the FAC, Defendant is without sufficient  
16 knowledge or information to form a belief as to the truth of the allegations contained  
17 in sub-paragraph, and on that basis denies each and every allegation contained  
18 therein.

19          9.     Answering paragraph 9 of the FAC, Defendant denies each and every  
20 allegation contained therein, other than that Plaintiff may have been an acquaintance  
21 of those persons listed.

22          10.    Answering paragraph 10 of the FAC, Defendant is without sufficient  
23 knowledge or information to form a belief as to the truth of the allegations contained  
24 in that paragraph, and on that basis denies each and every allegation contained  
25 therein.

26          11.    Answering paragraph 11 of the FAC, Defendant denies each and every  
27 allegation contained therein, other than that Plaintiff apparently had some association  
28 with the referenced laboratories.

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1           12. Answering paragraph 12 of the FAC, Defendant denies each and every  
2 allegation contained therein.

3           13. Answering paragraph 13 of the FAC, Defendant denies each and every  
4 allegation contained therein.

5           14. Answering paragraph 14 of the FAC, Defendant denies each and every  
6 allegation contained therein.

7           15. Answering paragraph 15 of the FAC, Defendant denies each and every  
8 allegation contained therein.

9           16. Answering paragraph 16 of the FAC, Defendant denies that any of the  
10 matter which he posted on Wikipedia was defamatory in any sense. Wikipedia  
11 editors (administrators) removed remarks by both Plaintiff and Defendant, marking  
12 said deletions with: "Removed personal attack, unverifiable original research, and/or  
13 possible libel". These deletions included numerous libelous statements and overt  
14 legal threats made by Plaintiff. Defendant has copies of the versions both before and  
15 after the deletions, although Plaintiff attempted to get his libelous published remarks  
16 permanently deleted. Defendant's deleted remarks were true, and were removed  
17 primarily because they were what Wikipedia calls "unverifiable original research"  
18 containing negative [i.e., unflattering even if true] information.

19           17. Answering paragraph 17 of the FAC, Defendant admits all allegations  
20 contained therein.

21           18. Answering paragraph 18 of the FAC, Defendant denies each and every  
22 allegation contained therein. All quotes contained in paragraph 18 are from Eric  
23 Krieg's website posted several years ago by Krieg and not altered or edited since.  
24 The statements referred to in paragraph 18 are true or substantially true or protected  
25 opinion and were not made within the last year. Additionally, some of the  
26 statements are quoted out of context, and Defendant clearly stated that some of the  
27 phrases alleged to be defamatory were as reported to him by others. Defendant used  
28 the term "looted" as being substantially if not literally true, and as metaphorically

1 true (hyperbole and informal usage).

2 19. Answering paragraph 19 of the FAC, Defendant admits sending an  
3 unsolicited e-mail to Daniel B. Meier containing the quoted statements. Defendant  
4 denies that said e-mail was sent within the last 12 months. Defendant is without  
5 sufficient knowledge or information to form a belief as to the truth of the other  
6 allegations contained in paragraph 19 and on that basis denies each and every such  
7 allegation contained therein.

8 20. Answering paragraph 20 of the FAC, Defendant admits sending  
9 unsolicited e-mails to Shin Shimojo and Christof Koch. Defendant denies the  
10 remaining allegations contained in paragraph 20 of the FAC.

11 21. Answering paragraph 21 of the FAC, Defendant admits reporting that  
12 others had accused Plaintiff of having embezzled and pocketed money from the  
13 Southern California Skeptics. The remaining portion of this paragraph involves a  
14 legal conclusion.

15 22. Answering paragraph 22 of the FAC, Defendant admits all allegations  
16 contained therein, other than that the subject communication was “confidential”,  
17 which is denied.

18 23. Answering paragraph 23 of the FAC, Defendant admits sending the  
19 referenced communication, but denies that it was sent “secretly”.

20 24. Answering paragraph 24 of the FAC, Defendant admits sending the  
21 referenced communication to John Siegenthaler, Sr., but denies sending it to John  
22 Siegenthaler, Jr. Defendant denies that the referenced e-mail was “confidential”.

23 25. Answering paragraph 25 of the FAC, Defendant admits all allegations  
24 contained therein.

25 26. Answering paragraph 26 of the FAC, Defendant admits sending the  
26 referenced June 3, 2006 e-mail to Douglas Hofstadter. Defendant further admits  
27 pasting into the Hofstadter e-mail an e-mail from Pat Linse containing the language  
28 referenced in paragraph 26. Defendant denies that the pasted matter was defamatory.

1 Defendant further denies that the communication was “confidential”.

2 27. Answering paragraph 27 of the FAC, Defendant admits sending the  
3 referenced e-mail, but contests the description of it as “secret,” since such term is  
4 vague and ambiguous.

5 28. Answering paragraph 28 of the FAC, Defendant admits all allegations  
6 contained therein.

7 29. Answering paragraph 29 of the FAC, Defendant denies each and every  
8 allegation contained therein.

9 30. Answering paragraph 30 of the FAC, Defendant denies each and every  
10 allegation contained therein.

11 31. Answering paragraph 31 of the FAC, Defendant admits receiving the  
12 referenced June 12, 2006 e-mail from Beth White. Defendant denies that said  
13 communication is attached as Exhibit E to the FAC served on Defendant.

14 32. Answering paragraph 32 of the FAC, Defendant admits all allegations  
15 contained therein.

16 33. Answering paragraph 33 of the FAC, Defendant admits all allegations  
17 contained therein.

18 34. Answering paragraph 34 of the FAC, Defendant denies all allegation  
19 contained therein other than that he sent an unsolicited letter to Steve Allen in the  
20 early 1990s which includes the quoted language.

21 35. Answering paragraph 35 of the FAC, Defendant admits that Steve Allen  
22 sent Defendant the referenced letter which contains the quoted language, a copy of  
23 which is attached as Exhibit G to the FAC. Defendant is without sufficient  
24 knowledge or information to form a belief as to the truth of the remaining allegations  
25 contained in paragraph 35 of the FAC and on that basis denies each and every such  
26 allegation contained there.

27 36. Answering paragraph 36 of the FAC, Defendant denies each and every  
28 allegation contained therein.

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1           37. Answering paragraph 37 of the FAC, Defendant admits all allegations  
2 contained therein with the exception of the August 21, 2006 e-mail being attached as  
3 Exhibit F to the FAC.

4           38. Answering paragraph 38 of the FAC, Defendant admits all allegations  
5 contained therein.

6           39. Answering paragraph 39 of the FAC, Defendant admits sending an  
7 unsolicited e-mail to Larry Wilson on or about June 2, 2007 containing the quoted  
8 statement. Defendant denies that said e-mail is attached as Exhibit I to the FAC.

9           40. Answering paragraph 40 of the FAC, Defendant denies that the  
10 referenced e-mail was sent to Suzanne Paul and denies that it was sent on June 2,  
11 2005. Defendant did sent an e-mail to Paul Nelson containing the quoted language  
12 on June 2, 2006, which Paul Nelson responded to and which is attached as Exhibit J  
13 to the FAC. Paul Nelson is the husband of Suzanne Paul.

14           41. Answering paragraph 41 of the FAC, Defendant admits all allegations  
15 contained therein.

16           42. Answering paragraph 42 of the FAC, Defendant denies each and every  
17 allegation contained therein.

18           43. Answering paragraph 43 of the FAC, Defendant admits sending the  
19 June 1, 2006 e-mail to Susan Martinez-Conde containing the quoted language.  
20 Defendant denies that said e-mail is attached as Exhibit J to the FAC. Defendant  
21 further admits that he had no prior contact with Martinez-Conde and no scholarly  
22 interest in optical illusions, although he does have a casual interest in such illusions.  
23 In Wikipedia Plaintiff claimed he was "sponsoring" the contest. Martinez-Conde  
24 confirmed that he was a judge one year and had donated prize money during the  
25 previous year. Defendant is without sufficient knowledge or information to form a  
26 belief as to the truth of the other allegations contained in paragraph 43, and on that  
27 basis denies each and every such allegation contained therein.

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1           44. Answering paragraph 44 of the FAC, Defendant denies all allegation  
2 contained therein, with the exception that Defendant admits that he has never  
3 communicated with Plaintiff regarding his business and scholarly activities relating  
4 to optical illusions and has had no direct contact with Plaintiff in approximately 20  
5 years. Defendant particularly denies that the referenced e-mail was “particularly  
6 reprehensible”, as Martinez-Conde’s response thereto indicates that she was grateful  
7 for Defendant’s warning about Plaintiff and that Defendant was not the first to warn  
8 her about “potential problems with [Plaintiff]” and that because of these concerns,  
9 she and her organization were keeping an “arms-length relationship with [Plaintiff]”.  
10 Defendant wrote to Martinez-Conde specifically to check Plaintiff’s claim about  
11 “sponsorship” of the contest.

12           45. Answering paragraph 45 of the FAC, Defendant admits all allegations  
13 contained therein, although Defendant denies that he believed Eric Krieg would  
14 disseminate the referenced e-mail further.

15           46. Answering paragraph 46 of the FAC, Defendant denies each and every  
16 allegation contained therein.

17           47. Answering paragraph 47 of the FAC, Defendant denies each and every  
18 allegation contained therein.

19           48. Answering paragraph 48 of the FAC, Defendant denies each and every  
20 allegation contained therein.

21           49. Answering paragraph 49 of the FAC, Defendant admits all allegations  
22 contained therein.

23           50. Answering paragraph 50 of the FAC, Defendant denies each and every  
24 allegation contained therein.

25           51. Answering paragraph 51 of the FAC, Defendant admits all allegations  
26 contained therein.

27           52. Answering paragraph 52 of the FAC, Defendant admits all allegations  
28 contained therein.

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1           53. Answering paragraph 53 of the FAC, Defendant admits all allegations  
2 contained therein.

3           54. Answering paragraph 54 of the FAC, Defendant admits all allegations  
4 contained therein.

5           55. Answering paragraph 55 of the FAC, Defendant admits all allegations  
6 contained therein.

7           56. Answering paragraph 56 of the FAC, Defendant admits all allegations  
8 contained therein.

9           57. Answering paragraph 57 of the FAC, Defendant admits sending the  
10 referenced e-mail but denies that it was directed to Joyce Nakamura specifically.

11           58. Answering paragraph 58 of the FAC, Defendant admits all allegations  
12 contained therein.

13           59. Answering paragraph 59 of the FAC, Defendant admits all allegations  
14 contained therein.

15           60. Answering paragraph 60 of the FAC, Defendant admits sending the  
16 referenced e-mail to Beth White. Defendant denies all other allegations contained in  
17 paragraph 60 of the FAC.

18           61. Answering paragraph 61 of the FAC, Defendant is without sufficient  
19 knowledge or information to form a belief as to the truth of the allegations contained  
20 in said paragraph, and on that basis denies each and every allegation contained  
21 therein.

22           62. Answering paragraph 62 of the FAC, Defendant admits all allegations  
23 contained therein.

24           63. Answering paragraph 63 of the FAC, Defendant is without sufficient  
25 knowledge or information to form a belief as to the truth of the allegations contained  
26 in said paragraph, and on that basis denies each and every allegation contained  
27 therein.

28           64. Answering paragraph 64 of the FAC, Defendant denies each and every

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1 allegation contained therein.

2 65. Answering paragraph 65 of the FAC, Defendant denies each and every  
3 allegation contained therein.

4 66. Answering paragraph 66 of the FAC, Defendant denies each and every  
5 allegation contained therein.

6 67. Answering paragraph 67 of the FAC, Defendant denies each and every  
7 allegation contained therein.

8 68. Answering paragraph 68 of the FAC, Defendant denies each and every  
9 allegation contained therein.

10 69. Answering paragraph 69 of the FAC, Defendant denies each and every  
11 allegation contained therein.

12 70. Answering paragraph 70 of the FAC, Defendant denies each and every  
13 allegation contained therein.

14 71. Answering paragraph 71 of the FAC, Defendant admits all allegations  
15 contained therein.

16 72. Answering paragraph 72 of the FAC, Defendant admits all allegations  
17 contained therein.

18 73. Answering paragraph 73 of the FAC, Defendant denies all allegation  
19 contained therein with the exception that he did send a letter to Steve Allen in the  
20 1990s and had had no prior contact with Allen. Defendant denies that said letter was  
21 defamatory.

22 74. Answering paragraph 74 of the FAC, Defendant admits that Allen  
23 responded with the referenced language and that this is the only letter Defendant  
24 received from Allen. Defendant is without sufficient knowledge or information to  
25 form a belief as to the truth of the other allegations contained in paragraph 74 and on  
26 that basis denies each and every such other allegation.

27 75. Answering paragraph 75 of the FAC, Defendant denies each and every  
28 allegation contained therein.

1           76. Answering paragraph 76 of the FAC, Defendant denies each and every  
2 allegation contained therein.

3           77. Answering paragraph 77 of the FAC, Defendant admits that the  
4 statements contained in the first sentence of said paragraph. Defendant denies all  
5 other allegations contained in paragraph 77.

6           78. Answering paragraph 78 of the FAC, Defendant denies each and every  
7 allegation contained therein.

8           79. Answering paragraph 79 of the FAC, Defendant denies each and every  
9 allegation contained therein.

10          80. Answering paragraph 80 of the FAC, Defendant denies each and every  
11 allegation contained therein.

12          81. Answering paragraph 81 of the FAC, Defendant admits all allegations  
13 contained therein.

14          82. Answering paragraph 82 of the FAC, Defendant admits all allegations  
15 contained therein.

16          83. Answering paragraph 83 of the FAC, Defendant admits that the scientist  
17 referred to was Beth White. Defendant denies all remaining allegations in paragraph  
18 83 of the FAC.

19          84. Answering paragraph 84 of the FAC, Defendant denies each and every  
20 allegation contained therein.

21          85. Answering paragraph 85 of the FAC, Defendant denies each and every  
22 allegation contained therein.

23          86. Answering paragraph 86 of the FAC, Defendant is without sufficient  
24 knowledge or information to form a belief as to the truth of the allegations contained  
25 in said paragraph, and on that basis denies each and every allegation contained  
26 therein.

27          87. Answering paragraph 87 of the FAC, "Defendant admits that, after  
28 investigating the matter, he learned that the assault with a deadly weapon charge was

1 ultimately dismissed due to credibility problems involving the former spouse. As  
2 evidenced by defendant's communications on this issue, defendant never stated or  
3 implied to the contrary."

4 88. Answering paragraph 88 of the FAC, Defendant denies each and every  
5 allegation contained therein.

6 89. Answering paragraph 89 of the FAC, Defendant denies each and every  
7 allegation contained therein.

8 90. Answering paragraph 90 of the FAC, Defendant denies each and every  
9 allegation contained therein.

10 91. Answering paragraph 91 of the FAC, Defendant denies each and every  
11 allegation contained therein.

12 92. Answering paragraph 92 of the FAC, Defendant admits all allegations  
13 contained therein.

14 93. Answering paragraph 93 of the FAC, Defendant denies each and every  
15 allegation contained therein.

16 94. Answering paragraph 94 of the FAC, Defendant denies each and every  
17 allegation contained therein.

18 95. Answering paragraph 95 of the FAC, Defendant denies each and every  
19 allegation contained therein.

20 96. Answering paragraph 96 of the FAC, Defendant admits that Beth White  
21 sent him a link to some photos of Plaintiff's home that she obtained off the internet.  
22 Defendant found other publicly available photos off the internet. Defendant further  
23 admits that Beth White sent to him a guest list for a social gathering at Plaintiff's  
24 home which Plaintiff had sent to her. Defendant denies the remaining allegations in  
25 this paragraph.

26 97. Answering paragraph 97 of the FAC, Defendant denies each and every  
27 allegation contained therein.

28 98. Answering paragraph 98 of the FAC, Defendant denies each and every

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1 allegation contained therein.

2 99. Answering paragraph 99 of the FAC, Defendant denies each and every  
3 allegation contained therein.

4 100. Answering paragraph 100 of the FAC, Defendant denies each and every  
5 allegation contained therein.

6 101. Answering paragraph 101 of the FAC, Defendant denies each and every  
7 allegation contained therein.

8 102. Answering paragraph 102 of the FAC, Defendant denies each and every  
9 allegation contained therein.

10 103. Answering paragraph 103 of the FAC, Defendant denies each and every  
11 allegation contained therein.

12 104. Answering paragraph 104 of the FAC, Defendant admits all allegations  
13 contained therein.

14 105. Answering paragraph 105 of the FAC, Defendant denies each and every  
15 allegation contained therein.

16 106. Answering paragraph 106 of the FAC, Defendant denies each and every  
17 allegation contained therein.

18 107. Answering paragraph 107 of the FAC, Defendant denies each and every  
19 allegation contained therein.

20 108. Answering paragraph 08 of the FAC, Defendant denies each and every  
21 allegation contained therein.

22 109. Answering paragraph 109 of the FAC, Defendant denies each and every  
23 allegation contained therein.

24 110. Answering paragraph 110 of the FAC, Defendant denies each and every  
25 allegation contained therein.

26 111. Answering paragraph 111 of the FAC, Defendant denies each and every  
27 allegation contained therein.

28 112. Answering paragraph 112 of the FAC, Defendant denies each and every

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1 allegation contained therein.

2 113. Answering paragraph 113 of the FAC, Defendant denies each and every  
3 allegation contained therein.

4 114. Answering paragraph 114 of the FAC, Defendant denies each and every  
5 allegation contained therein.

6 115. Answering paragraph 115 of the FAC, Defendant admits all allegations  
7 contained therein.

8 116. Answering paragraph 116 of the FAC, Defendant denies each and every  
9 allegation contained therein.

10 117. Answering paragraph 117 of the FAC, Defendant denies each and every  
11 allegation contained therein.

12 118. Answering paragraph 118 of the FAC, Defendant admits all allegations  
13 contained therein.

14 119. Answering paragraph 119 of the FAC, Defendant denies each and every  
15 allegation contained therein.

16 120. Answering paragraph 120 of the FAC, Defendant denies each and every  
17 allegation contained therein.

18 121. Answering paragraph 121 of the FAC, Defendant denies each and every  
19 allegation contained therein.

20 122. Answering paragraph 122 of the FAC, Defendant denies each and every  
21 allegation contained therein.

22 **AFFIRMATIVE DEFENSES**

23  
24 **FIRST AFFIRMATIVE DEFENSE**

25 **(Truth)**

26 123. As a first affirmative defense, Defendant contends that all of the  
27 allegedly defamatory statements were true or substantially true and thus not in fact  
28 defamatory.

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**SECOND AFFIRMATIVE DEFENSE**

**(Statute of Limitations)**

124. As a second affirmative defense, Defendant asserts that all causes of action are barred by the applicable statute of limitations, including but not limited to *Code of Civil Procedure* §§ 340(c), 335.1 and 343.

**THIRD AFFIRMATIVE DEFENSE**

**(Opinion)**

125. As a third affirmative defense, Defendant asserts that some of the alleged defamatory statements were statements of opinion, rather than fact, and thus not actionable.

**FOURTH AFFIRMATIVE DEFENSE**

**(Code of Civil Procedure § 425.16)**

126. As a fourth affirmative defense, Defendant asserts that all causes of action alleged in the FAC are subject to a special motion to strike under *Code of Civil Procedure* § 425.16 in that they are designed to chill the valid exercise of Defendant's constitutional right of freedom of speech.

**FIFTH AFFIRMATIVE DEFENSE**

**(Failure to State a Claim Upon Which Relief Can Be Granted)**

127. As a fifth affirmative defense, Defendant asserts that all causes of action alleged in the FAC fail to state a claim upon which relief can be granted.

**SIXTH AFFIRMATIVE DEFENSE**

**(Plaintiff's Public Figure Status)**

128. As a sixth affirmative defense, Defendant asserts that Plaintiff is a public figure as to each of the alleged defamatory statements and thus must establish that said statements were not only defamatory but made with knowing falsity or reckless disregard for their truth. Defendant contends that none of the alleged defamatory statements were made with knowing falsity or reckless disregard for their truth.

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**SEVENTH AFFIRMATIVE DEFENSE**

**(Unclean Hands)**

129. As a seventh affirmative defense, Defendant asserts that Plaintiff's FAC is barred by the equitable doctrine of unclean hands.

**EIGHTH AFFIRMATIVE DEFENSE**

**(Laches)**

130. As an eighth affirmative defense, Defendant asserts that Plaintiff's FAC is barred by the equitable doctrine of laches.

**NINTH AFFIRMATIVE DEFENSE**

**(Adequate Legal Remedy)**

131. As a ninth affirmative defense, Defendant asserts that Plaintiff's claim for injunctive relief is improper because Plaintiff has an adequate legal remedy.

**TENTH AFFIRMATIVE DEFENSE**

**(No Irreparable Injury)**

132. As a tenth affirmative defense, Defendant asserts that Plaintiff's claim for injunctive relief is without basis as Plaintiff has not and will not suffer any irreparable injury as a result of any act or conduct of Defendant.

**ELEVENTH AFFIRMATIVE DEFENSE**

**(Clear and Convincing Evidence Standard)**

133. As an eleventh affirmative defense, Defendant asserts that the constitutional requirement of actual malice in public figure defamation cases requires "clear and convincing evidence" of knowledge of falsity or reckless disregard as to truth.

**TWELFTH AFFIRMATIVE DEFENSE**

**(Actual Malice Required for Punitive Damages)**

134. As a twelfth affirmative defense, Defendant asserts that Plaintiff has no entitlement to punitive damages in that the alleged defamatory statements were not made with actual malice.

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**THIRTEENTH AFFIRMATIVE DEFENSE**

**(Unconstitutionality of Punitive Damages)**

135. As a thirteenth affirmative defense, Defendant asserts that the imposition of punitive damages against Defendant would violate the Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and would also be unconstitutional under the California Constitution’s Due Process Clause.

**FOURTEENTH AFFIRMATIVE DEFENSE**

**(Litigation Privilege)**

136. As a fourteenth affirmative defense, Defendant asserts that the acts complained of in the FAC protected by the litigation privilege codified in *California Civil Code* § 47.

**FIFTEENTH AFFIRMATIVE DEFENSE**

**(Absolute Privilege)**

137. As a fifteenth affirmative defense, Defendant asserts that the alleged defamatory statements are subject to absolute privilege.

**SIXTEENTH AFFIRMATIVE DEFENSE**

**(Failure to Mitigate Damages)**

138. As a sixteenth affirmative defense, Defendant is informed and believes, and thereupon alleges, that any recovery by Plaintiff is barred by his failure to mitigate damages, or that any recovery must be reduced by those damages that Plaintiff, by virtue of his own acts and/or the acts or omissions of others chargeable to him, failed to mitigate. This defense is alleged in the alternative and does not admit any of the allegations contained in the FAC.

**SEVENTEENTH AFFIRMATIVE DEFENSE**

**(Uncertain, Ambiguous, and Unintelligible FAC)**

139. As a seventeenth affirmative defense, Defendant is informed and believes, and thereupon alleges, that the FAC is uncertain, ambiguous, and

1 unintelligible in that Plaintiff, by virtue of his own acts and/or the acts or omissions  
2 of others chargeable to him, did not consistently define the terms employed in the  
3 FAC with respect to various parties and properties, and is otherwise unintelligible.  
4 This defense is alleged in the alternative and does not admit any of the allegations  
5 contained in the FAC.

6 **EIGHTEENTH AFFIRMATIVE DEFENSE**

7 **(Lack of Leave to File FAC)**

8 140. As a eighteenth affirmative defense, Defendant is informed and  
9 believes, and thereupon alleges, that the FAC filed and served on Defendant is not  
10 the FAC the Court granted leave to file, as it includes additional allegations and  
11 causes of action than the proposed FAC.

12 **NINETEENTH AFFIRMATIVE DEFENSE**

13 **(Right to Add Additional Affirmative Defenses)**

14 141. As a nineteenth affirmative defense, Defendant is informed and  
15 believes, and thereupon alleges, that because the FAC herein is couched in  
16 conclusory terms, Defendant presently has insufficient knowledge or information on  
17 which to form a belief as to whether it may have additional, as yet unstated,  
18 affirmative defenses available and cannot fully anticipate all affirmative defenses  
19 that may be applicable to the within Action. Accordingly, the right to assert  
20 additional affirmative defenses, if and to the extent that such affirmative defenses are  
21 applicable, is hereby reserved. This defense is alleged in the alternative and does not  
22 admit any of the allegations contained in the FAC.

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WHEREFORE, Defendants prays as follows:

1. That judgment be entered in favor of Defendant and against Plaintiff.
2. That Plaintiff take nothing by his First Amended Complaint and that said First Amended Complaint be dismissed in its entirety, with prejudice.
3. That Defendant be awarded costs of suit herein.
4. For any such other and further relief as the Court deems just and proper.

DATED: February 27, 2008

WOLFE & WYMAN LLP

By: s Eric T. Lamhofer  
 SAMUEL A. WYMAN  
 ERIC T. LAMHOFER  
 Attorneys for Defendant  
**TOM McIVER**

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**WOLFE & WYMAN LLP**  
 ATTORNEYS & COUNSELORS AT LAW

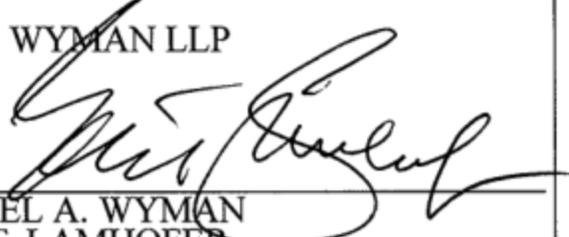
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WHEREFORE, Defendants prays as follows:

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DATED: February 27, 2008

WOLFE & WYMAN LLP

By: 

SAMUEL A. WYMAN  
ERIC T. LAMHOFER  
Attorneys for Defendant  
**TOM McIVER**

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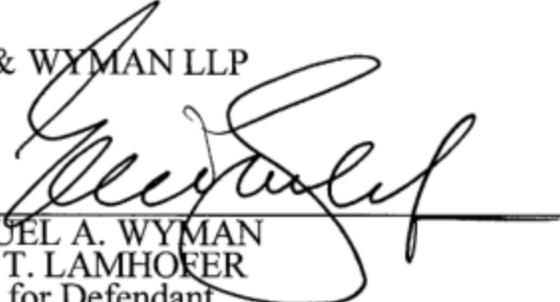
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**DEMAND FOR JURY TRIAL**

Defendant demands trial by jury as to all claims contained in the First Amended Complaint.

DATED: February 27, 2008

WOLFE & WYMAN LLP

By:   
SAMUEL A. WYMAN  
ERIC T. LAMHOFFER  
Attorneys for Defendant  
**TOM McIVER**

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SAMUEL A. WYMAN  
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