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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO, NORTH DISTRICT

BRUCE J. KELMAN, **Plaintiff** **v.** **SHARON KRAMER,** **Defendant.**	**CASE NO. GIN044539** **Memorandum of Points and Authorities in Support of a Motion for Judgment Notwithstanding the Verdict** **Assigned for All Purposes To Hon. Lisa C. Schall, Department 31** **Scheduled Hearing Date: December 12, 2008**

MEMORANDUM OF POINTS AND AUTHORATIES IN SUPPORT OF A JUDGMENT NOTWITHSTANDING THE VERDICT

I.

INTRODUCTION

In this motion Defendant Sharon Kramer Pro Per (herein after "Defendant") seeks to have a new judgment not withstanding the jury verdict that is currently in favor of Plaintiff Bruce J. Kelman (herein after "Plaintiff"). The jury found that the weight of the evidence presented at trial was *not* sufficient to render a verdict for Plaintiff. **Only *after* the jurors considered hearsay evidence, highly prejudicial to Defendant that was *not* entered into evidence did Plaintiff obtain the nine votes necessary for a favorable verdict.** Although possibly inadvertently, the jurors violated CACI 5009, which states "Your decision must be based on your personal evaluation of evidence presented in this case." Attached hereto collectively as **Exhibit 1** is the Declaration of Juror Shelby Stuntz., Declaration of Lincoln Bandlow , and Trial Exhibit No.53. Ms. Stuntz states that evidence considered by the jury

that was not discussed in trial were emails among Veritox employees referring to Defendant as a "cyberstalker". These emails were in the list of exhibits to potentially illustrate how much the litigation proponents of the insurance industry hate Defendant for successfully exposing their conflicts of interest, even calling her names. But by Defendant not being able to present her evidence showing why they hate her, the emails were of no benefit in trial and could have (did) served to be prejudicial to Defendant. The emails were read aloud by a juror on the second day of deliberations. Only after hearing and reading the highly prejudicial hearsay evidence that Defendant harbored *personal malice* for Plaintiff, did the jury reach a verdict in favor of Plaintiff. According to Ms. Stuntz, two of the jurors changed their votes on the issue of *actual malice* (while really finding *personal malice*) and stated that this non-trial entered evidence was the reason for their change. Trial exhibit No. 53 was invoices that were presented in Plaintiff's July deposition and were presented as evidence in trial. The documents that were erroneously attached by Defense Counsel were also from this July deposition, but were unrelated to the invoices. It is unclear to Defendant Pro Per how these emails got before the jury. The emails attributed statements to Defendant that Defendant never made; and which Defendant did not have the opportunity to refute by it not being evidence that was entered into trial. This contributed to the fact that Defendant did not receive a fair trial. **No valid jury verdict was reached between Plaintiff Kelman and Defendant based on the weight of the evidence presented in trial. .**

Besides the matter of an unfair deliberation by jurors considering non-trial entered evidence, what is relevant about this is not whether the jury thought Defendant is or is not a cyberstalker. It is the fact that two jurors flipped their votes and determined this new evidence proved ***actual malice*** while this was only evidence of ***personal malice*** not related to whether Defendant believed she wrote the truth. Based on no new evidence that Defendant doubted the validity of her words, "altered his under oath statements", the jury attributed purported *personal malice* as the proof that plaintiff had serious doubts about the truth of the statement. Because they viewed new evidence not presented in trial that indicated to them Defendant was an out of control "cyberstalker" who would be inclined to write false statements as a general practice borne from *personal malice* over the mold issue, **the jury lost sight of the fact, or did not understand that actual malice needs to proven by clear and convincing evidence that Defendant did not believe what she wrote in the press release to be the truth.**

Actual malice is the publication of defamatory material "with knowledge that it was false or reckless disregard of whether it was false or not." Even if Defendant was indeed a cyberstalker with obsessive personal malice, this would not be clear and convincing evidence that she wrote the phrase “altered his under oath statements” with reckless disregard of whether it was false or not. The “cyberstalking” evidence the jury considered when reaching their Plaintiff verdict of actual malice solely from circumstantial evidence of personal malice *proves* it is a fact that the jury did not understand the difference between personal malice and the clear and convincing evidence required to find actual malice.

Actual malice is the publication of defamatory material "with knowledge that it was false or reckless disregard of whether it was false or not." Actual malice involves making a statement with "knowledge of falsity or reckless disregard as to truth or falsity." *Masson, 501 U.S. at 511k*, *Harte-Hanks Communications, Inc., 491 U.S. 657; Anderson v. Liberty Lobby, 477 U.S. 242, 244 (1986);*

Since a jury verdict in a defamation case can only be supported when the actual malice is shown by clear and convincing evidence, rather than by a preponderance of evidence as in most other cases, the evidence and all the inferences which can reasonably be drawn from it must meet the higher standard. (Emphasis added.) *Edwards v. Hall 234 Cal.App.3d 886 (1991)* As noted above, even the jury found that Plaintiff presented *no clear and convincing evidence at trial* that proved Defendant did not believe the truth of her own words and thus practiced actual malice. Nor did Plaintiff present any clear and convincing evidence that Defendant meant perjury when she wrote the word “altered”. In fact, Defendant testified she did not think the altered testimony was perjury.

However, the following is the definition of actual malice provided to this jury. Attached hereto as **Exhibit 2** is the Plaintiff's Special Jury Instruction Proof of Actual Malice which states,

> Actual malice may be proved by circumstantial evidence. Although personal ill will by itself is not sufficient to prove actual malice, a combination of Kramer's anger, hostility toward the Plaintiffs, failure to investigate or subsequent conduct may all constitute circumstantial evidence that acutal ctual malice existed. Evidence alone of Kramer's animoisty, hatred, spite or ill will toward Kelman or GlobalTox does not establish actual malice.

In other words, the jury was instructed that it had been predeterimined Defendant had "ill will, anger, hostility, animosity, hatred, spite" toward Kelman and GlobalTox and that it had been predetermined Defendant did not properly investigate before writing. Under this false predetermined premise, the jury was asked to make an unbiased determination if Defendant acted with actual malice when she wrote "altered his under oath statements". Plaintiff Counsel did quite a job of providing false and inferring evidence on the issue of *personal malice* throughout the trial and the entire case; and even got it into the jury instructions that was predeterimined Defendant had personal malice for Plaintiff and that she failed to investigate. **But nowhere did Plaintiff prove his case of actual malice by the standard of *clear and convincing evidence.* Nowhere did Plaintiff provide any evidence that Defendant did not believe her writing to be correct when authoring her public participation press release in March of 2005.** Attached hereto as Exhibit _ is the Declaration of Sharon Kramer

II

STATEMENT OF FACTS

As set forth in detail below, the judgment rendered in this case is substantively without merit and should be set aside by the Courts. When presenting his case at trial, Plaintiff Counsel relied on the following six elements which were used to establish the façade that Defendant had *personal malice* for Plaintiff. None of these six elements of Plaintiff's case prove *actual malice* by clear and convincing evidence:

Biased Jury Instructions On The Issue Of Actual Malice

Plaintiff Counsel repeatedly sent out inferences of reasons Defendant could harbor *personal malice* for Plaintiff and from this the jury could infer this personal malice as circumstantial evidence in support of *actual malic.* As noted above the jury was not given proper instruction to follow that actual malice must be determined at the higher level of clear and convincing evidence. Nor were they given proper instruction that failure to investigate does not constitute clear and convincing evidence of actual malice.

A JNOV in a libel action must be granted when a verdict is supported only by inferences that are contrary to "clear, positive, and uncontradicted evidence of such a nature that it cannot be disbelieved". It is clear and uncontradicted that Plaintiff Counsel was able to present the jury with predetermined findings of personal malice and failure to investigate

causing a biased premise before the jury made their first vote. Although, no affidavit is presented with this Motion, Defendant spoke with Jury Foreman Roy Litzenberg today, who confirmed that the jury was told this Plaintiff offered Instruction is what they were to follow as the definition of actual malice. Mr. Litzenberg indicated they sent a message to the Judge late in second of the two day deliberations asking if this is what they were to use, to which the Judge sent a message back saying it was. Contrary to the jury instructions, throughout this entire case not one piece of evidence was ever presented that Defendant had "anger, hostility, ill will, animosity, hatred, or spite" toward Plaintiff Kelman in 2005, when authoring her press release. Even the heated email that was directed to AIHA for allowing the "ilks of GlobalTox" to give a (false) science webinar did not mention Plaintiff Kelman.

Inferences Of Personal Malice Based On False Testimony Before The Courts.

In this case, the purported 2003 deposition testimony given by Plaintiff in Defendant's case with Mercury and used throughout this case inferring and even stating this purported testimony was the reason Defendant would harbor personal malice for Plaintiff, was in fact, never given by Plaintiff in the Mercury case. As taken from one of Plaintiff's three declarations in this case, the following is the testimony that was provably never given by Plaintiff in the Mercury case but was used extensively in this case as evidence of personal malice:

> *"She [Defendant] apparently felt that the remediation work had been inadequately done, and that she and her daughter had suffered life-threatening diseases as a result. I testified that the type and amount of mold in the Kramer house could not have caused the life-threatening illnesses that she claimed."*

And as parroted by Plaintiff Counsel as the reason for Defendant's personal malice within his briefs:

> *"Dr. Kelman testified in a deposition that the type and amount of mold in the Kramer house could not have caused the life- threatening illnesses that Kramer claimed. Apparently furious that the science conflicted with her dreams of a remodeled house, Kramer launched into an obsessive campaign to destroy the reputation of Dr. Kelman and GlobalTox."*

Beside the fact that this is false testimony repeatedly given before the Courts that wrongfully impacted pretrial rulings, it was also used to falsely infer Defendant would have

reason to harbor *personal malice* for Plaintiff and thus wrongfully infer that she had reason to practice *actual malice* when writing "altered his under oath statements". Attached hereto as **Exhibit 3** is Defendant's Supplemental Objection To Judgment dated and filed September __ 2008, in which **Defendant details and documents how many times the Courts have been repeatedly told this testimony was never given while making rulings that Defendant *could* have had reason for malice stemming from the case of Mercury vs. Kramer.** Attached hereto collectively as **Exhibit 4** is the Declaration of John Richards, the attorney who took the 2003 deposition of Plaintiff, and the Declaration of his co-counsel, William J. Brown stating that the Appellate Court, when determining the anti-SLAPP motion, refused to take judicial notice that this was false testimony on issue of malice being presented before their Courts

Abuse of Judicial Discretion of Excluding Defendant's Experts And Evidence

Plaintiff Counsel relied on his role of false testimony on the issue of malice in causing the limiting of Defendant's defense by influencing an abuse of judicial discretion causing exclusion of evidence and experts necessary for Defendant to explain how she knew and for what purpose Plaintiff was altering descriptions when forced to discuss the connection of two questionable public policy papers in front of a jury. Attached hereto as **Exhibit 5** is Plaintiff's Motion in Limine requesting all reference to the science of mold and published writings of Defendant on the subject of Plaintiff's conflicts of interest be excluded along with other relevant evidence Defendant needed to defend herself. As is noted in Defense Counsel, Lincoln Bandlow's declaration referenced in Exhibit 1,

> "In particular, Mrs. Kramer's understanding of (1) the science that formed the basis of plaintiff Bruce Kelman's frequent testimony and writings on the issue of the dangers of mold exposure and (2) the relationship between the ACOEM Paper and the Manhattan Institute Report and the effect of that relationship on the testimony of Bruce Kelman in not only the *Haynes* case, but any future testimony that Kelman might provide. Her understanding of these two crucial points directly and materially effected her state of mind when she wrote the press release and why she wrote the words "altered his under oath statements" that were the entire basis for plaintiffs' claims in this action. The Court, however, over my strenuous objections, consistently prevented me and Mrs. Kramer from presenting this crucial evidence to the jury.

A JNOV For The Defense, Plaintiff Has Wrongfully Influenced Rulings And Motions By Providing False Testimony Of Significant Impact Before The Courts.

Once the attorney realizes that he or she has misled the court, even innocently, he or she has an affirmative duty to immediately inform the court and to request that it set aside any orders based upon such misrepresentation; also counsel should not attempt to benefit from such improvidently entered orders. Datig v. Dove Books, 73 Cal.App.4th, 964, (1999). The additional significance of Plaintiff's false testimony regarding the Mecury case is that it caused the Courts to falsely believe Defendant's public participation press release was possibly a personal vendetta on the part of Defendant borne out of anger because Plaintiff and Defendant had a bad "history" stemming from the Mercury case. Nothing could be further from the truth. Not a shred of evidence was presented in this case that Defendant harbored personal malice for any of the expert witnesses in the Mercury case nor would she have reason to harbor personal malice for Plaintiff when writing in 2005. Defendant wrote the public participation press release to increase public awareness of a deceit in science by exposing conflicted interests of ACOEM, the Manhattan Institute and the Chamber of Commerce; and how an expert witness in mold litigation unsuccessfully sought to hide the relationship of these papers from the eyes of a jury. Because of the wrong perception of the Courts thinking Plaintiffs science and it dubious usages played no part in Defendant's writing; and that the Mercury case was a cause ill will, the Courts wrongfully excluded evidence and experts at Plaintiff's requests and over Defendant's objections through motions in limine that Defendant required to prove her case. Attached hereto collectively as Exhibit 6 is various exhibits that the jury was not permitted to read they are: published writing by and about Defendant's exposure of Plaintiff and others' conflicts of interest, a Wall Street Journal article about the Plaintiff's science, a request for a Congressional hearing, approximately 20 non-profits and unions representing thousands supporting this hearing and a letter from Senator Edward Kennedy requesting that the Federal Government Accountability Office conduct an audit into the issue. **By misleading the courts to believe the Mercury case was a reason Defendant would write "altered his under oath statements" out of spite and revenge, Plaintiff Counsel also successfully mislead the Courts to believe that the conflicted interests of the science Plaintiff presents before the courts, would not be a reason for Plaintiff to alter when forced to describe the relationship of the policy papers in front of a jury. The Courts were mislead to frame**

the scope of the trial with the predetermined outcome of no other viable explanation for the use of the word "altered" than the meaning of "perjury". The fact that no such testimony was ever given by Plaintiff in the Mercury case is supported by clear, positive and uncontradicted evidence, as is the fact that Plaintiff Counsel continued to present this false evidence to the Courts long after knowing it was false and knowing the impact it was having on the case. (See Exhibit 3) As an example of Defendant not being able to present her case on the issue of malice because the science of mold was completely excluded, Dr. Harriet Ammann was the expert witness who was to testify on behalf of Defendant but was excluded from doing so. She was not there to prove to the jury that mold causes illness. One of the areas she was to testify, was that there is no way Plaintiff could have given the testimony he claimed in 2003 and was thus providing false reason to the Courts for malice. Attached hereto as **Exhibit 7** is the declaration and CV of Dr. Harriet Ammann, Senior Toxicologist Washington State Department of Health, Retired. She was going to testify that as a toxicologist with a Phd, Plaintiff would not have been qualified to render the expert opinion he claimed he did in the Mercury case. Therefore, it is not possible this purported testimony would have been a reason for Defendant to harbor personal malice for Plaintiff, or a reason to infer this supposed personal malice would cause defendant to act with actual malice when she wrote, "altered his under oath statements". And certainly no reason to frame a scope of a trial by unreasonably limiting Defendant's experts, evidence and defense. By the science of mold being completely excluded, Defendant was not able to show the jury or the Courts that Plaintiff lied to the Courts on the issue *personal malice* while inferring reason for purported actual malice.

Using Ill Gotten Advantage From Misleading The Courts To Character Assassinate

Plaintiff Counsel relied on Defendant not being able to discuss the science while he could discuss racketeering, McCarthyism and front groups implying Defendant is a conspiracy theory nut who harbors blind rage personal malice for those who do not agree with her unscientific opinion over the science of the mold issue. Not attached hereto as Exhibit 8, is the excerpts of the trial testimony to support the questions by Plaintiff Counsel that defendant was defenseless to answer.. As this case that has been meant to cause hardship and silence Defendant has cost hundreds of thousands of dollars, Defendant could not afford to request an expedited copy of the transcript and will provide relevant

documentation will it is available. Attached hereto as **Exhibit 7** is a website page that since December of 2007, has been available to the public and used to help Defendant raise funds to offset the costs of defending herself from this frivolous lawsuit; a lawsuit meant to silence Defendant from further exposing Plaintiff and others'conflicted interest when in court and when establishing public policy. On this website it is clearly explained what Defendant meant by the phrase "altered his under oath statements." Also on this site is a link to the actual testimony of Plaintiff and the actual press release of Defendant. This is so people may decided for themselves if Plaintiff altered his under oath statements and what Defendant meant by this phrase. Hardly evidence of actual malice. Thus far, approximately $100,000 has been raised from this site that has helped to offset the approximate $400,000 it has cost Defendant for speaking out about conflicts of interest in medical science causing a deceit in public health policy to the detriment of the American public. Attached hereto as **Exhibit 10** is Defendant's deposition January 3, 2008. Plaintiff was in attendance, is aware and has been since no later than this date of this website and exactly what Defendant meant by the phrase he continued to alleged is a libelously false accusation of perjury. **Plaintiff knew Defendant was writing about his conflicts of interest in science he sought to hide from the Haynes jury by altering his under oath statements.This was the reason for the motion in limines to exclude the science and Defendant's writings of conflicts of interest from the trial and the eyes of the jury.**

By keeping out the science, throughout the trial Plaintiff Counsel was able to infer that Defendant would harbor personal malice for Plaintiff by inferring that Defendant was a vindictive, unscientific, kook, zealot, conspiracy theory, alarmist, disgruntled litigant, nut case who decided to target Plaintiff in her blinded fury over the mold issue. By Plaintiff Counsel discussing racketeering, inferring McCarthyism, and asking questions about front groups, with Defendant being precluded from discussing or providing evidence of the conflicts of interest and mass marketing of the deceit behind the science that Plaintiff presents in the courts or Defendant's expert witness not being allowed to testify to the validity of Defendant's concerns about conflicts of interest and substantiating that Plaintiff and Plaintiff Counsel repeated lied to the courts on the issue of malice; Defendant was unable to properly rebut these false inferences of Plaintiff Counsel that made Defendant appear to be an unscientific loose cannon in the eyes of the jury. Attached as **Exhibit 8** is

the declaration of Mary Mulvey Jacobson, who has successfully lobbied for change along with Defendant. Ms. Jacobson was to serve as a character witness discussing Defendant's advocacy work and successes at removing Plaintiff's science from public policy. However with Defendant not being able to present any such evidence, it was futile for Ms. Jacobson to testify. At one point, Defendant recalls saying while on the stand, "Your Honor, I don't think I can do this without discussing the science". The reply was, "Well try." In closing arguments, Mr. Bandlow was stopped twice from discussing Plaintiff's science. The best he could get out before the jury was "They were trying to shut her up." The jury was left with the impression that maybe Defendant should be shut up because she was just a zealot kook with nothing of real significance to say over the the conflicts surrounding the mold issue. Plaintiff Counsel was able to use this character assassination against court imposed defenseless Defendant to infer that Defendant's advocacy work at outing conflicted interests was frivolous. He was able to instill the concept in the jury's mind that Defendant's blinded fury against Plaintiff was outrageous personal malice and that would be circumstantial evidence to cause Defendant to practice actual malice.

False Statements Causing Errors In Pre-trial Rulings And Errors In Framing The Scope And Evidence Of The Trial

Plaintiff Counsel relied on repeated false declaration testimony of Plaintiff as to why Defendant would harbor personal malice stemming from the case of Mercury vs. Kramer. A JNOV should be granted when a prior motion dismissing the case should have been granted. In this case, both the anti-SLAPP ruling and the Motion for Summary Judgment ruling should have been granted. Plaintiff and Plaintiff Counsel presented false evidence on the issue of malice before the courts that was contrary to "clear, positive, and uncontradicted evidence of such a nature that it cannot be disbelieved". Still both courts concluded Defendant *could have* had malice based on no legitimate evidence ever presented to either court supporting this. **It is unclear to Defendant why the Courts were not concerned that false testimony was being presented on a key issue causing the case to continue.**. The same false testimony before the courts caused the trial judge to believe the scope of the trial should be framed around the purported ill will stemming from the Mercury case and that the science of Plaintiff was not relevant to the case, state of mild, or Defendant's defense for writing "altered his under oath statements.

By Law, The JNOV Must Be Granted. Plaintiff Did Not Prove Actual Malice By Clear and Convincing Evidence.

Plaintiff did not prove *actual malice* on the part of Defendant by clear and convincing evidence presented in trial because **he provided no evidence** that Defendant does not believe describing two papers as being connected and not connected at the same time, in Defendant's mind, is altering testimony. Attached hereto collectively as **Exhibit 9** is the transcript of Plaintiff's testimony in the Haynes and an email from the Hayne's attorney. **The evidence in this trial transcript is of such a nature that it cannot be disbelieved that Plaintiff was describing the two controversial policy papers as both separate works and at the same time, one a translation of the other. All the false testimony and inferences of *personal malice* in the world that are contrary to this uncontradictable fact will not change Plaintiff's altering descriptions in the Haynes trial. Whether the Courts understand the significance of this altering testimony is not relevant. Defendant does. This case is about Defendant's state of mind when writing the phrase "altered his under oath statements".** The jury reached their Plaintiff verdict on evidence, directive, misconduct and findings of *personal malice* but not on clear and convincing evidence proving *actual malice.* Since a jury verdict in a defamation case can only be supported when the *actual malice* is shown by clear and convincing evidence, rather than by a preponderance of evidence as in most other cases, the evidence and all the inferences which can reasonably be drawn from it must meet the higher standard. A JNOV in favor of defendant is proper where no evidence of sufficient substantiality supports the verdict in plaintiff's favor, determined by disregarding evidence on defendant's behalf, giving plaintiff's evidence all the value to which it is legally entitled, and indulging in every legitimate inference that may be drawn from that evidence. Reynolds v.Willson 51 C2d 94, 99, 331, P2d 48, 51. Plaintiff did not provide sufficient sustainability of clear and convincing evidence that Defendant acted with *actual malice*. Therefore, as a matter of law a Judgment Notwithstanding the Verdict must be granted to Defendant.

Signed October 30, 2008.

Respectfully submitted,

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Sharon Kramer, Defendant Pro Per