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**CALIFORNIA DEFAMATION LAW BLOG**

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES—CENTRAL DISTRICT**

**JOHN GROGAN, an individual,**

**CASE NO.: BC 391778**

**Plaintiff,**

[ASSIGNED FOR ALL PURPOSES TO  
JUDGE HELEN I. BENDIX]

**v.**

**JOSEPH PAOLLELA, an individual;  
JOHN TRIMARCO A.K.A JACK  
TRIMARCO, an individual; JACK  
TRIMARCO & ASSOCIATES  
POLYGRAPH/INVESTIGATIONS, INC., a  
corporation; RALPH HILLIARD, an  
individual; WORDNET SOLUTIONS, INC.,  
a corporation and DOES 1 through 20,  
inclusive,**

**PLAINTIFF’S MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
OPPOSITION TO DEFENDANT  
JOSEPH PAOLELLA’S NOTICE OF  
DEMURRER AND DEMURRER TO  
COMPLAINT**

**DATE: October 16, 2008  
TIME: 9 a.m.  
DEPT: 18**

**Defendants.**

[UNLIMITED JURISDICTION]

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1 Plaintiff John Grogan (“Plaintiff”) respectfully submits this Memorandum of Points and  
2 Authorities in opposition to Defendant Joseph Paoella’s (“Defendant”) Notice of Demurrer and  
3 Demurrer to Complaint.

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5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I. INTRODUCTION**

7 On May 30, 2008, Plaintiff filed a complaint alleging defamation, invasion of privacy  
8 (false light), and intentional infliction of emotional distress against the Defendant and others.  
9 Defendant filed a special motion to strike (“anti-SLAPP”) under *Civil Code of Procedure* section  
10 425.16 on June 27, 2008. The motion was heard on July 22, 2008, at 9:00 a.m. in department 18.  
11 This court denied Defendant’s anti-SLAPP motion.

12 Defendant filed the instant demurrer on September 3, 2008. Defendant contends that the  
13 Complaint is uncertain and does not state facts sufficient to constitute a cause of action.  
14 However, as set forth below, Plaintiff’s Complaint properly states each of the three causes of  
15 action contained therein.

16  
17 **II. STANDARDS FOR RULING ON DEMURRER**

18 A party may demur when a complaint “does not state facts sufficient to constitute a cause  
19 of action.” *Code of Civil Procedure* § 430.10(e). In determining the sufficiency of a pleading  
20 against a demurrer, the court must look *exclusively* to facts alleged in the pleadings. *Blank v.*  
21 *Kirwan* (1985) 39 Cal.3d 311, 318. This includes matters shown in exhibits attached to the  
22 complaint and incorporated by reference. *Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94;  
23 *Barnett v. Fireman’s Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 505. “No other extrinsic  
24 evidence can be considered (i.e., no ‘speaking demurrers’).” WEIL & BROWN, CAL. PRO.  
25 BEFORE TRIAL (The Rutter Group 2008) § 7:8; *Ion Equip. Corp. v. Nelson* (1980) 110  
26 Cal.App.3d 868, 881 (error for court to consider facts asserted in memorandum supporting  
27 demurrer).

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1           **III.     PLAINTIFF’S COMPLAINT PROPERLY STATES A CAUSE OF ACTION**  
2           **FOR DEFAMATION AND INVASION OF PRIVACY**

3           Defendant contends that the Complaint does not state facts sufficient to constitute a cause  
4 of action. The basis of his contention is that: (a) Plaintiff failed to allege that the letter  
5 (“Letter”) at issue was unprivileged, and (b) the Letter is absolutely privileged under *Civil Code*  
6 section 47, subdivision 2. Each of Defendant’s arguments is flawed and incorrect as a matter of  
7 law.

8           Defendant believes that Plaintiff was required to plead that the Letter was unprivileged.  
9 But “[p]rivilege is a **substantive defense** in defamation actions, normally pleaded by the  
10 defendant.” 5 Witkin Cal. Proc. (4th ed. 1997) Plead, § 701, p. 161 (emphasis added). Indeed,  
11 [t]he general rule is that a privilege must be pleaded as an affirmative defense.” *Tschirky v. Sup.*  
12 *Ct.* (1981) 124 Cal.App.3d 534, 538; *see* CACI 1704 (lack of privilege not an essential factual  
13 element to establish defamation). Accordingly, it is crystal-clear that Plaintiff was not required  
14 to plead a lack of privilege in the Complaint. Therefore, Defendant’s first argument fails.

15           Defendant also maintains that the Letter is absolutely privileged under *Civil Code* section  
16 47, subdivision 2. It may be that Defendant believes the Letter was published in connection with  
17 a judicial proceeding and is therefore absolutely privileged under *Civil Code* section 47(b)(2).  
18 Defendant wrote in his “Statement of Facts,” the following: “. . . the letter was solicited for use  
19 in connection with litigation in Case No. D324446 of the Ventura County Superior Court.” But  
20 *nowhere* in the Complaint is there even a hint that the Letter was published in connection with a  
21 judicial proceeding. The Complaint merely sets forth some of the alleged defamatory remarks  
22 made by the Defendant in the Letter. Complaint, ¶9, LL. 8-17. The Letter itself does not  
23 describe the purpose for which it was written. Complaint, Exhibit 2. It is apparent, therefore,  
24 that Defendant is asking the Court to look beyond the pleadings and the Letter, which the Court  
25 may not do as a matter of law. *Ion Equip. Corp. v. Nelson, supra*, at 881. As a consequence,  
26 Defendant’s second argument fails.

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