

Class Action Target Turns Tables on Ropers

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By **Kate Moser**
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SAN FRANCISCO — Soon after filing a class action last spring against the maker of a dietary supplement called Procera AVH, Thomas Clarke Jr., a partner in the San Francisco office of Ropers, Majeski, Kohn & Bentley, uploaded a video on YouTube about the class action and talked to a television reporter for a news story about the litigation.



Judge Harold Kahn, San Francisco Superior Court
Image: Shelley Eades

Now, Brain Research Labs, the defendant in that class action, has sued Clarke and his law firm, as well as the plaintiff named in the complaint, saying their comments on TV and the Internet are defamatory and have hurt the company's business. In a Friday hearing on a motion to dismiss the lawsuit, the company's lawyers painted Clarke as an attorney who'd gone too far.

"We're here in a court of law to provide justice, to understand when a lawyer crosses the line," John Younesi, of Los Angeles firm Younesi & Yoss, told San Francisco Superior Court Judge Harold Kahn.

The line Clarke crossed, Younesi argued in court, was to accuse his client of being a thief and a killer, and to say that human trials have proven Procera ineffective.

But one of Clarke's lawyers said it's "shocking" that Brain Research Labs would try to chill a valid filing of a lawsuit by suing the lawyer involved. "It's a rather remarkable use of litigation in an attempt to thwart a lawyer and his client's efforts to pursue a class action," said James Wagstaffe, of San Francisco firm Kerr & Wagstaffe, who was there arguing for Clarke as well as for Ropers, Majeski.

The motion to strike the complaint as a SLAPP, or a strategic lawsuit against public participation, was argued primarily by Jacqueline Scott Corley, who joined Kerr & Wagstaffe as a partner at the end of September after clerking for 12 years for Judge Charles Breyer in the Northern District. Zachary Rothenberg, of Santa Monica firm Grodsky & Olecki, argued on behalf of the name plaintiff from the underlying suit.

Interviewed by phone, Clarke said he was surprised that Brain Research Labs thought the "tactic" of suing him would work. "I think that their attorneys have, unfortunately, done them a great disservice by letting them think they had a chance at this," he said.

But Younesi said the only way to "promote justice" in this case is to give his client its day in court: "Otherwise, a lawyer could be able to say virtually anything he wants to say and hide behind a statute."

The complaint ([.pdf](#)) against Clarke argues that Clarke defamed the company on TV and in his nine-minute [YouTube video](#). The complaint in *Brain Research Labs LLC v. Clarke*, 491932, quotes at length from the video, in which Clarke broadly uses words like "scam artists," and says the makers of Procera sell unsuspecting customers a product that doesn't work.

"In 25 years of practice, I've never seen a lawyer go on record to mock somebody in the way that he did," Younesi said, adding that Clarke's audience for the video, which had been viewed about a thousand times as of Friday, goes beyond potential litigants.

While Kahn said at the beginning of the hearing that he was still "not sure" which way to rule, toward the end, most of his tough questions were for Brain Research Labs' lawyers.

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For instance, he asked whether Clarke might have been within bounds in trying to reach class members: "Why isn't this Mr. Clarke a little artfully, maybe a lot rudely, shaking the trees?"

Younesi & Yoss seemed to argue that Clarke's chosen medium was at the heart of the problem: "To do it in the way that Mr. Clarke did it was very insidious, because he reached across continents," Younesi said.

Wagstaffe said the law regardless protects a lawyer's ability to reach out to witnesses and litigants.

"The law doesn't change simply because there's a new communication technique used," he said.

While Yoss argued that the anti-SLAPP motion should be denied because Clarke's statements went "beyond any purpose that is in the class action," her partner made a loftier argument that Clarke shouldn't be able to make statements that damaged the supplement maker with impunity. Later Younesi said Clarke "picked on a particularly vulnerable industry — the supplement industry," adding that it's unfair "when you deep-sea fish for clients and you scam people by saying things that aren't true."

But Clarke's defense lawyers argued in their motion that the lawsuit is a "quintessential" SLAPP lawsuit and a "meritless" defamation suit.

"Ropers, Majeski is one of the most prominent and highly regarded law firms in the country," Wagstaffe said after the hearing. "They are being sued for what presumably would be for millions of dollars because they described a lawsuit to a television reporter in a news story about it, and for going on YouTube.... That's shocking to us."

Kahn commended the lawyers on both sides for well-prepared arguments and said he'd rule "as soon as I'm able to do so."

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