

ROBERT C. HOLTZAPPLE, ESQ. (SBN 145954)
EPSTEIN HOLTZAPPLE CHRISTO LLP
999 Fifth Avenue, Suite 420
San Rafael, CA 94901
Tel: (628) 240-3854
bob@ehc.law

ELECTRONICALLY FILED
Superior Court of California
County of Sonoma
10/2/2023 4:04 PM
Robert Oliver, Clerk of the Court
By: Griselda Zavala, Deputy Clerk

ANNE E. LINDER, ESQ. (*pro hac vice* forthcoming)
DANIEL A. GROSSMAN, ESQ. (*pro hac vice* forthcoming)
ZVMLAW PLLC
777 East Eisenhower Parkway, Suite 910
Ann Arbor, Michigan, 48108
Tel: (734) 794-3070
anne@zvmllaw.com
danny@zvmllaw.com

Attorneys for Plaintiff and
Cross-Defendants Thomas Smith
And Serious Pod LLC

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SONOMA

THOMAS SMITH, an individual; and SERIO
POD LLC, individually and derivatively on
behalf of OPENING ARGUMENTS MEDIA
LLC, a California limited liability company,

Plaintiffs,

vs.

PHILLIP ANDREW TORREZ, an individual;
and DOES 1-10

Defendants,

and

OPENING ARGUMENTS MEDIA LLC, a
California limited liability company, and
OPENING ARGUMENTS FOUNDATION IN
a California nonprofit corporation,

Nominal Defendants

~~[PROPOSED]~~ ORDER DENYING
DEFENDANTS' SPECIAL MOTION TO
STRIKE PORTIONS OF AMENDED
COMPLAINT

~~[PROPOSED]~~ ORDER DENYING DEFENDANTS' SPECIAL MOTION TO STRIKE PORTIONS OF
AMENDED COMPLAINT

Plaintiffs' Special Motion to Strike Portions of Amended Complaint (the "Motion") came on hearing on August 16, 2023 at 3:00 p.m. in Courtroom 17 of the Sonoma County Superior Court before the Honorable Bradford DeMeo presiding.

Moving parties, Defendants and Cross-Claimants ("Defendant"), appeared through their counsel William J. O'Brien of One LLP. Opposing Parties, Plaintiffs and Cross-Defendants ("Plaintiffs"), appeared through their counsel Robert C. Holtzapple of Epstein Holtzapple Christo LLP.

Having review and considered the Motion, and all of the pleadings and declarations filed in support of, and in opposition to, the Motion, and the arguments of counsel, and finding good cause therefore, the Court rules as follows:

Defendant's Special Motion to Strike Portions of Amended Complaint is

DENIED. As explained herein, Defendant fails to demonstrate that the cause of action or allegations at issue arise from protected activity while Plaintiffs have sufficiently established a probability of success.

Facts and History

In their first amended complaint ("FAC"), Plaintiffs complain that Defendant Phillip Andrew Torrez ("Defendant" or "Torrez") engaged in a range of misconduct, including breached agreements with, and duties to, them, in the operation of a podcast business which they jointly created and ran, Nominal Defendant Opening Arguments Media LLC (the "Company"). Plaintiffs allege that Plaintiff Thomas Smith ("Smith") is sole owner and operator of Plaintiff Serious Pod LLC ("Pod"), Pod entered into an agreement (the "Agreement") by which Plaintiffs and Torrez would create and operate the Company, with Pod and Torrez each owning a fifty-percent share; they created Nominal Defendant Opening Arguments Foundation, Inc. ("Foundation") to promote related causes; Smith and Torrez together cohosted the law-related "Opening Argument" ("OA") podcasts which were the business of the Company; they agreed to be equal partners; they made the Agreement

in order to combine the legal talents of Torrez with Smith's talents and notoriety as a "well-known podcasting personality"; and the ventures became very successful.

However, they complain, Torrez began to engage in a range of misconduct. Plaintiffs allege that Torrez engaged in unwanted physical conduct towards Smith which made Smith uncomfortable and caused emotional distress. They also allege that after Religion News Service ("RNS") published an article claiming that women were accusing Torrez of sexual misconduct, the Company started to lose customers and falter, leading the parties to agree that Torrez would take a "hiatus" from the OA podcasts while Smith began to reevaluate his relationship with Torrez, realizing that he had been victimized and abused by Torrez. Moreover, Plaintiffs complain, Torrez essentially took control of the Company and Foundation; locked Smith out of Company accounts and website; seized Company assets for himself; took other actions to sideline Plaintiffs in the Company and Foundation; unilaterally released an OA episode, without Plaintiffs' agreement, in which he defended himself on the air in the name of the Company; deleted posts by Smith without permission; pressured OA guests not to work with Smith; has continued to record OA podcasts without Smith's permission or involvement; blocked users who criticize the Company; obtained the support of Elizabeth Dye ("Dye"), Bryce Blankenagel ("Blankenagel"), and Teresa Gomez ("Gomez") in seizing control of the Company; and overall engaged in conduct harming the Company. Plaintiffs also allege that Torrez and Gomez published a series of false and inflammatory statements of purported fact about Smith, disparaging his contributions to OA, claiming that he had breached a contract with Torrez and took money from the Company account, making false statements about Smith's sexual behavior and marriage, and posting screenshots of a private conversation with a third party.

Motion

Defendant brings a Special Motion to Strike Portions of Amended Complaint pursuant to Code of Civil Procedure section 425.16. He moves the court to strike ¶¶69-77, 156, and 159-165 from the FAC. In short, he is attempting to strike the entire 13th cause of

action for defamation and all supporting allegations regarding the alleged statements which Defendant published about Smith. He contends that allegations fall within the ambit of CCP section 425.16 the alleged statements furthered First Amendment rights as statements in connection with a public issue in a public forum, and there is a functional relationship between the speech and public debate. Defendant asserts that Plaintiffs cannot show a probability of success because Plaintiffs did not specifically identify plead the alleged defamatory statements; Plaintiffs cannot show falsity, actual malice, or knowledge of reckless disregard of the falsity; and Defendant is not responsible for Gomez's actions. He seeks attorney's fees and costs.

Plaintiffs oppose the motion, arguing that they have pleaded defamation sufficiently and have evidence demonstrating the elements for defamation.

Defendant has filed a reply, reasserting his arguments and asserting objections to some of Plaintiffs' evidence.

Applicable Authority

Code of Civil Procedure ("CCP") section 425.16 allows defendants to make a motion to strike the complaint of an alleged Strategic Litigation Against Public Participation ("SLAPP") lawsuit. A SLAPP suit is one brought "primarily to chill the valid exercise of constitutional rights." CCP section 425.16.

Section 425.16 specifies that it "shall be construed broadly" to protect the constitutional right of petition and free speech and it protects a broad variety of conduct which subdivisions (b)(1) and (e) define as being any "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue." See also *Braun v. Chronicle Pub. Co.* (1997) 52 Cal.App.4th 1036, 1044-1045. Subdivision (e) specifies that this includes oral statements or writings "made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law"; or "in connection with an issue under consideration or review" in such proceedings. Section 425.16(e)(1), (2). The statute also covers free speech in general if

related to a matter of public interest, for subdivision (e)(3) includes statements “made in a place open to the public or a public forum in connection with an issue of public interest” while (e)(4) even protects “any other *conduct* in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” (Emphasis added.) Speech or petition activity before a governmental body is protected, therefore, whether or not it involves an issue of public interest. *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1116.

Courts apply a two-part test in determining if something is a matter of public interest or concern. *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 149-150. Courts must decide what “issue of public interest the speech in question implicates—a question we answer by looking to the content of the speech” and then examine the “functional relationship ... between the speech and the public conversation about some matter of public interest.” *Ibid.*

To be a matter of public concern, the speech must do more than merely implicate a public policy. *Rivero v. American Federation of State, County, and Municipal Employees, AFL—CIO* (2003) 105 Cal.App.4th 913, 924; *Baughn v. Dept. of Forestry and Fire Protection* (2016) 246 Cal.App.4th 328, 336-337. Thus, abusive supervision of 8 employees, in a public employment system of 17,000, was not, in of itself, a matter of “public interest.” *Rivero*. Without more, therefore, “although the elimination of sexual harassment implicates a public interest, an investigation by a private employer concerning a small group of people does not rise to a public interest under section 425.16.” *Olaes v. Nationwide Mutual Insurance Co.* (2006) 135 Cal.App.4th 1501, 1510, 1511.

The second part of the test includes determining if the speaker “participated in, or furthered, the discourse that makes an issue one of public interest.” *FilmOn.com Inc. v. DoubleVerify Inc.*, *supra*, 7 Cal. 5th 151, 153. Thus, even though bearing some relationship to issues of public interest, commercial speech, which was private as between parties,

used for commercial purposes only, and “never entered the public sphere,” did not qualify. *Ibid.*

In *Murray v. Tran* (2020) 55 Cal.App.5th 10, at 34, statements regarding a doctor's competence only made to a private group, not designed to be made public, and not to be disclosed to affected patients, did not meet the criteria for public concern.

In *Baughn v. Dept. of Forestry and Fire Protection* (2016) 246 Cal.App.4th 328, plaintiff sued his former employer after the employer told the plaintiff's new employer that plaintiff had a prior record of sexual harassment, and the court found that making such a statement was not a matter of public interest or in connection with a public proceeding. The court stated that a statement that is “a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest.”

In *Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, the defendant, a token collector, made statements to the token collector community that the plaintiff was dishonest and had stolen a token from him, publishing an advertisement in the token collector newsletter, sent letters to other collectors, and discussed his allegations at the token collector society. The plaintiff sued for libel and slander. The defendant brought an anti-SLAPP motion claiming that his statements served the public interest by discussing criminal activity. The court concluded that the defendant's “private campaign” to discredit the plaintiff to a relatively small group of fellow collectors was a private matter and determined that the fact that the statements accused the plaintiff of criminal conduct did not make them a matter of public interest.

The mere fact that the parties involved are “in the public eye” does not necessarily render any such statements or dispute one sufficient to meet the public interest requirement. *Albanese v. Menounos* (2013) 218 CA4th 923, 935-936; *D.C. v. R.R.* (2010) 182 Cal.App.4th 1190, 1228-1229; *Nygård, Inc. v. Uusi-Kerttula* (2008) 159 CA4th 1027, 1039. However, if the figures are so greatly important or prominent so as to lead to widespread public interest or “extensive media scrutiny,” their involvement may transform

the issue into one of public concern. *Yeager v. Holt* (2018) 23 Cal.App. 5th 450, 458; *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1347; *Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1254.

Shifting Burden of Proof

Defendant must make a prima facie showing that Plaintiffs' lawsuit arises from Defendant's protected activity, or exercise of free speech rights in connection with a public issue. *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1365. Once Defendant achieves this, the burden shifts to Plaintiffs to make a prima facie showing of a "probability" that they will prevail on the claims. *Dixon v. Sup.Ct.* (1996) 44 Cal.App.4th 944, 950-953.

A "probability" of success requires Plaintiffs to show a legally sufficient claim *and* a prima facie showing of facts sufficient to support a favorable judgment supported by competent, admissible evidence within the declarant's personal knowledge. *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89; *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291; *Wollersheim, supra*, at 654-655; *Evans v Unkow* (1995) 38 Cal.App. 4th 1490, 1497-1498. Declarations on information and belief are insufficient and generally a party cannot rely on allegations in its own pleadings, even if verified. *Wollersheim, supra*, at 656; *Unkow, supra*, at 1497.

Defamation

Defamation is an invasion of someone's interest in reputation. Civil Code ("CC") section 44; see 5 Witkin, Summary of Cal. Law (11th Ed.2017, May 2023 Update) Torts, section 623. It may be either libel, consisting of publication via writing, printing, or other "fixed representation to the eye," or slander, consisting of publications that are oral or via radio or other broadcasting. CC sections 44, 45, 46, 48.5(4); see also 5 Witkin, *supra*, sections 623-624.

The elements of defamation are 1) a publication by defendant of 2) a statement of fact which is 3) false, 4) defamatory, 5) unprivileged, and 6) has a natural tendency to injure

or which causes special damages. See, e.g., *Taus v. Loftus* (2007) 40 Cal.4th 683, 720; *Smith v. Maldonado* (1999) 72 Cal. App. 4th 637, 645; see also 5 Witkin, Summary of Cal. Law (11th Ed.2017, May 2023 Update) Torts, section 623; 5 Witkin, Cal.Proc. (6th Ed. 2021, March 2023 Update), Pleading, section 732.

Malice is not normally a necessary element for defamation but may be required where the plaintiff seeks punitive damages or if the allegations reveal a qualified privilege which would be a defense absent malice, or if the plaintiffs are public figures. See, e.g., *Davis v. Hearst* (1911) 160 Cal. 143, 156; *Christian Research Institute v. Alnor* (2007) 148 Cal. App. 4th 71, 88, 90 (actual malice required for plaintiffs who are public figures); see also 5 Witkin, Cal.Proc. (6th Ed. 2021, March 2023 Update), Pleading, section 742. At trial, a public figure plaintiff must establish actual malice by clear and convincing evidence but in the context of a special motion to strike, plaintiffs instead must establish only a probability they can produce clear and convincing evidence of actual malice. *Collins v. Waters* (2023) 92 Cal. App. 5th 70, 80; *Edward v. Ellis* (2021) 72 Cal.App.5th 780, 793. Therefore, in opposing a special motion to strike, defamation plaintiffs need not establish malice by clear and convincing evidence; they need only meet their “minimal burden” by introducing sufficient facts to establish a prima facie case of actual malice, i.e., establish a reasonable probability they can produce clear and convincing evidence showing that the statements were made with actual malice. *Collins, supra*; *Young v. CBS Broadcasting, Inc.* (2012) 212 Cal.App.4th 551, 563.

The defamatory information must be “published” or communicated to a third person who understands the defamatory meaning and its application to the plaintiff. *Ringler Associates v. Maryland Cas. Co.* (2000) 80 Cal.App.4th 1165, 1179. The publication may be to a single person. *Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645. The publication may be actionable even if the publication is merely negligent. *Hellar v. Bianco* (1952) 111 Cal.App.2d 424, 426; see also 5 Witkin, *supra*, section 632. Delivering defamatory information, even if delivering it to one’s own agent, for transmission to others

may also amount to actionable publication. See *Kelly v. General Tel.Co.* (1982) 136 Cal.App.3d 278, 284; 5 Witkin, supra, section 630. Repeating or otherwise re-publishing defamatory information may be actionable as well. See *Gilman v. McClatchy* (1896) 111 Cal.606, 612; see also 5 Witkin, supra, section 633.

Truth is, by definition, a complete defense. *Washer v. Bank of America* (1948) 87 Cal.App.2d 501, 509; see also 5 Witkin, Summary of Cal. Law (11th Ed.2017, May 2023 Update) Torts, section 655. The defendant has the burden of pleading and proving truthfulness as a defense. See *Lipman v. Brisbane Elementary School Dist.* (1961) 55 Cal.2d 224, 233; see also 5 Witkin, Summary of Cal. Law (11th Ed.2017, May 2023 Update) Torts, section 659.

The plaintiff may set forth either the exact defamatory words or the substance of the defamatory statement but alleging mere conclusions is insufficient. *Okun v. Sup. Ct.* (1981) 29 Cal. 3d 442, 458 (exact words of the defamatory statement need not be alleged, only the substance); *Ellenberger v. Espinosa* (1994) 30 Cal. App. 4th 943, 951 (may allege specific words, or the substance of statements, although not merely conclusions).

Objections

Defendant presents objections to the Smith declaration and exhibits. These generally are improper opinion or conclusion, lack of relevance, inadmissible hearsay, secondary evidence. These objections are all unpersuasive and are overruled.

First Step: Protected Activity

Defendant contends that the allegations and defamation cause of action arise from protected activity because they arise from statements made in a public forum in connection with an issue of public interest.

Plaintiffs do not clearly dispute this but nonetheless the court finds that the cause of action does not arise on its face from protected speech activity. The court first notes that it is clear that the gravamen of the cause of action is speech conduct, for Plaintiffs are claiming defamation and seeking to hold Defendant liable for speech. The comments were

also made in an open public forum. However, Defendant fails to demonstrate that the statements were made in connection with a matter of public interest. Defendant merely states the conclusion that they were without explaining this. Nothing in the allegations or discussion in the moving papers indicates that the statements qualify as statements on a matter of public interest. As far as is discernable, the statements were made to a limited number of people who had a specific interest in the Company and OA podcasts, and were limited to a dispute between two owners of the Company. The nature of the statements is also limited to issues such as Smith's personal marital life and whether he or Torrez were taking advantage of each other or breaching their duties to one another. In line with the cases set forth above, this does not on its face appear to be a matter of public interest but merely a personal feud with statements of no public importance whatsoever.

The parties also were evidently in the public eye but there is not even a hint that they are so prominent as to garner "widespread" public interest and there is no indication whatsoever of media scrutiny or the like.

Defendant has failed to satisfy his burden on this point.

Second Step: Probability of Success

Defendant asserts that Plaintiffs cannot show a probability of success because Plaintiffs did not specifically identify plead the alleged defamatory statements; Plaintiffs cannot show falsity, actual malice, or knowledge of reckless disregard of the falsity; and Defendant is not responsible for Gomez's actions. Defendant provides some evidence supporting his assertions. Gomez Dec.; Torrez Dec.

Specificity of Pleading

Defendant contends that Plaintiffs do not plead the elements, specifically the defamatory language with enough specificity and make only vague generalizations. This is not persuasive. Plaintiffs clearly allege the substance of the statements. FAC ¶¶69-77. They state that Defendant claimed, in a specific statement posted on the OA Patreon feed on February 15, 2023, that Smith improperly took a specific sum of money from the

Company account. Plaintiffs allege Gomez, starting on February 15, 2023, posted a series of false statements on the OA Facebook page, her own Facebook page, and an OA Subreddit on Reddit, disparaging Smith's contributions to OA, claiming that Smith had breached a contract with Torrez and took "a years [sic] salary from the OA account"; on March 19, 2023 made false statements on Facebook and Discord, a social platform, about Smith's sexual behavior and marriage, and posted screenshots of a private conversation with a third party.

The court finds the allegations to be sufficiently specific about the substance of the statements and to do more than state vague, general conclusions.

Falsity

Defendant contends that the statements were true and that he at least had reason to believe that they were true. He provides some evidence in his declaration to support this. However, the court notes that he has the burden of demonstrating this defense while Plaintiffs provide evidence that the statements were false, that Defendant knew it, and that Defendant knowingly engaged in a campaign to harm and disparage Smith. Smith Dec., ¶¶25-43. They also show that Defendant made these statements as part of his feud with Plaintiffs over the Company. Smith Dec., ¶¶13-18.

Malice

Defendant contends that Smith must show malice because he is a public figure. As noted above, malice is required for public figures bringing a cause of action for defamation. Plaintiffs provide ample evidence of malice given that, at this point, they only need meet a "minimal" burden of establishing a prima facie case of actual malice, or a reasonable probability they can produce clear and convincing evidence showing that the statements were made with actual malice. They show anger and hostility, knowledge of falsity, a feud between the parties, and a repeated pattern of intentional conduct. Smith Dec. generally.

Liability for Gomez's Conduct

Defendant's argument that he cannot be liable for the speech because it was the conduct of Gomez is unpersuasive. Plaintiffs allege that Defendant specifically and actively engaged the assistance of Gomez, among others, in his campaign to ruin and defame Plaintiffs, and to take control of the Company. FAC ¶¶ 6-8, 63, 71-72, 74, 156, 160-161. These allegations include specific, repeated allegations that Defendant, Gomez, and the others acted "in concert" in order to help Defendant take control of the Company, lock Plaintiffs out of accounts and the website, and run the OA podcasts without Plaintiffs, and that Defendant and Gomez specifically worked together to publish the defamatory statements.

As noted above, a defendant who participates in publishing speech such as by transmitting it to an agent to publish, may be liable for the defamatory speech. Moreover, although Plaintiffs have not specifically alleged a "conspiracy," the court cannot ignore the fact that in substance the allegations set forth a basis for holding Defendant liable as part of a conspiracy. The substance of the allegations, not the use or lack of mere titles or specific language, is controlling in determining what a plaintiff is alleging. See, e.g., *Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 908. 'A civil conspiracy is simply a corrupt agreement; it is "... a combination of two or more persons to accomplish an evil or unlawful purpose." [citation].' *117 Sales Corp. v. Olsen* (1978) 80 Cal.App.3d 645, 649. It is essentially merely a device for holding each member liable for the wrong even if they did not directly take part in it. *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 511; *Richard B. LeVine v. Higashi* (2005) 131 Cal.App.4th 566, 574-575; see 5 Witkin, Summary of Cal. Law (11th Ed.2021, May 2021 Update) Torts, section 151. The complaint must plead facts showing the formation and conduct of the conspiracy, the wrongful act of any conspirators, and the resulting injury. *Unruh v. Truck Ins. Exchange* (1972) 7 Cal.3d 616, 631; *117 Sales Corp.*, *supra*. However, in alleging the actual agreement to conspire, a party may simply

generally allege the elements, and need not allege specific facts showing how the parties conspired. *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 47. Essentially, a complaint need merely state 1) the formation and operation of a conspiracy; 2) the wrongful acts pursuant thereto; and 3) the resulting damage. *Ibid.* The allegations include all of the above elements for a conspiracy.

Moreover, Plaintiffs provide evidence showing that Torrez and Gomez worked together to defame Smith. Smith Dec., ¶¶37-43. This includes evidence, such as statements from Gomez herself, describing their close relationship and how she had obtained the information from Defendant.

The court finds that Defendant may potentially be liable for Gomez's conduct.

Probability of Success: Conclusion

Plaintiffs provide sufficient evidence to establish a probability of success as set forth above.

Attorneys' Fees and Costs

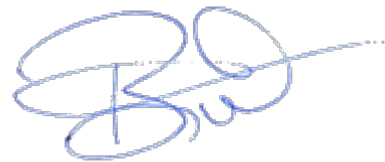
The court will consider the propriety of attorneys' fees and costs in a subsequent motion which the party prevailing on this motion may file.

Conclusion

The court DENIES the motion.

IT IS SO ORDERED.

Dated: 10/2/2023 _____



JUDGE OF THE SUPERIOR COURT

Approved as to form¹:

ONE LLP



William J. O'Brien
Attorneys for Defendant

¹ As conforming to the tentative ruling adopted by the Court, without limitation of any other positions or objections, legal or factual.