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Superior Court of California
County of Los Angeles

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David W. Slayton, Executive Officer/Clerk of Court
By: Gerardo Garcia, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES - WEST DISTRICT

SHAWN CARTER, Plaintiff(s), vs. THE BUZBEE LAW FIRM, ANTHONY G. BUZBEE, Defendant(s).	CASE NO(S).: 24SMCV05637 ORDER REGARDING DEFENDANTS THE BUZBEE LAW FIRM AND ANTHONY G. BUZBEE'S SPECIAL MOTION TO STRIKE Dept.: I Hearing Date: 4/8/2025 Hearing Time: 1:30pm

I. Background

A. Procedural Posture

Plaintiff John Doe, later identified as Shawn Carter ("Carter"), filed this defamation and extortion action against defendants The Buzbee Law Firm and Anthony G. Buzbee (collectively "defendants"). Currently before the court is defendants' special motion to strike ("SMS") the FAC. Carter opposes.

The instant SMS has a long history. The original hearing was set for February 25, and the court, after hearing oral argument, adjourned the hearing to give the parties an opportunity to address new evidence Carter claimed to have. The court had hoped the parties could agree on a briefing schedule, but, alas, such was not the case. Even so, the additional papers have been filed.

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One question, addressed below, is whether the court ought to consider any of the new evidence Carter has submitted. Carter requested that the court consider it via an *ex parte* application. Defendants contend that the new evidence is improper procedurally and that even were it considered, the motion ought still be granted. Carter takes a different view. The new evidence was the focal point of the hearing on April 8.

Having researched the arguments raised (and with the benefit of additional oral argument on April 8), the court now issues this ruling. Much of the discussion below is taken from the court's earlier tentative(s) because it (they) still applies. However, the court deals with the motion as originally brought and also the new submissions.

As noted in the prior tentative, there is a fairly high amount of rhetoric here. The court understands why that would be. The allegations—on both sides—are salacious, and the court wonders whether the court is the real audience for some of the language used. The court reminds counsel that the court's duty is to decide the case according to law. Content, and not adjectives, will carry the day. This admonishment rings especially true in light of the new evidence and repeated filings by both parties.

B. Original Evidence

According to the evidence, in 2024, defendants began representing survivors of rapper Sean Combs's ("Diddy") sexual abuse. (Buzbee Decl., ¶4.) After Diddy's arrest in September 2024, defendants publicly announced they would represent over 50 people who claimed that they had been victims of sexual assault and abuse by Diddy or those close to him. (*Id.* at ¶5.) Defendants held a press conference on October 1 where Buzbee indicated that his firm would locate other survivors of Diddy's abuse and identify individuals who had committed or aided the abuse alongside Diddy. (*Ibid.*) On October 20, defendants filed suit against Diddy in New York. (*Ibid.*)

On or about November 5, 2024, defendants sent two demand letters ("Letters") to Carter's counsel. (Buzbee Decl., ¶9.) The Letters accused Carter of raping two minors. (Carter Decl., ¶¶2-3.) In the Letters, defendants gave Carter the choice of attending confidential mediation where "something of substance" would be given to the survivors or, if Carter did not agree, then

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defendants would "take a different course" and file a lawsuit against Carter. (*Id.* at ¶5; Buzbee Decl., ¶¶9-10.) Carter did not take part in mediation, so defendants amended their New York action to name Carter as a defendant in the case brought by Jane Doe. (Buzbee Decl., ¶¶12-13.)

Prior to sending the Letters, Buzbee spoke at various media events and press conferences about his representation of at least 120 survivors. (Carter Decl., ¶6.) In the operative First Amended Complaint ("FAC"), Carter takes issue with various particular statements made by defendants, specifically:

1. Statement A—October 2 comments made on the Stephen A. Smith Show: " 'I want to make sure I capture a wide net and capture everybody involved, and that's what I'm—that's what I'm trying to do. And part of the—part of the purpose of the press conference was to encourage people that witnessed some of these events to come forward, and that's happening now. I want to make sure that anyone that facilitated this, egged it on, participated, benefited from, profited from, they're involved too because that's really— that's really what needs to happen here. It happens—it happens in other cases like that. You want to make sure that you include everyone, especially those that enabled and were complicit. He even admitted: 'You know, obviously, a lot of this is hard to corroborate.' " (FAC, ¶99(a).)
2. Statement B—October 3 comments on the Chris Hansen Show: "Buzbee accused 'facilitators' of misconduct, claiming they 'should be prosecuted and put underneath [sic] the jail.' He further said: 'I expect the [Combs] indictment and the charges in the indictment will grow. I expect other people will be implicated, so I think that, like I say, I think we're only seeing the tip of the iceberg here.' " (*Id.* at ¶99(b).)
3. Statement C—October 7 comment on the Shaun Atwood podcast: "Buzbee threatened that 'there are going to be some people named in these cases that are going to raise some eyebrows . . . if you were a bank and you were somehow facilitating this by allowing, you know, hundreds and hundreds of thousands of dollars of cash to be withdrawn to be used for various things, or you were some sort of pharmacy that ordered large volumes of particular drugs were being purchased or maybe you were a hotel or a club or this type of activity was taking place, you're going to be named.' " (*Id.* at ¶99(c).)
4. Statement D—October 8 comment during Piers Morgan interview: " 'It may not be big names at first, but—but we have a long list of names.' " (*Id.* at ¶99(d).)

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5. Statement E—November 18, 2024, comment: " 'Buzbee referred to his client in the New York action as a 'sexual assault survivor[],' which is reasonably understood to refer to Mr. Carter as the perpetrator of the alleged assault.' " (*Id.* at ¶99(e).)

6. Statement F—December 10 TMZ article: "TMZ reported that 'Buzbee said he's not ruling out filing rape charges against [Mr. Carter] with New York authorities,' and further stated, 'What happens next is up to my client. It's her case and what she decides to do you will find out in due course.' The article also noted, 'Jay-Z's rape accuser might take the music mogul's advice and file a criminal complaint against him after slapping him with a civil suit alleging sexual assault, according to her attorney Tony Buzbee.' " (*Id.* at ¶99(f).)

These six statements are the basis of Carter's defamation action against defendants. (FAC, ¶¶97-108.) Carter also takes issue with Buzbee "liking" a post on X that speculated about Carter's alleged involvement. (*Id.* at ¶¶52, 96-97, 105.) Meanwhile, the two Letters to Carter's counsel form the basis of the extortion cause of action. (*Id.* at ¶¶92-95.) The third cause of action for intentional infliction of emotional distress ("IIED") relies on the foregoing conduct. (*Id.* at ¶110.)

B. New Evidence

At the February 25 hearing, Carter's counsel made a surprise announcement. He stated that he had learned of new evidence. At the hearing, he could not divulge what the evidence was, and that is what gave rise to the continuance. Carter has since submitted supplemental declarations that he believes bolsters his claims as to both extortion and defamation. In response, defendants submitted declarations, and finally, Carter submitted supplemental-supplemental declarations. The court sets them forth now.

The principal new evidence comes from two private investigators, Christine Henderson and James Butler. Both declare that they do not work for Carter or Carter's counsel. (Henderson Decl., ¶1 ["I was not hired by Plaintiff or Plaintiff's attorneys to perform the investigation I describe in this declaration."]; Butler Decl., ¶1 [same].) They state that they found Jane Doe and had a conversation with her. (Henderson Decl., ¶3.)[1] During that conversation, both state that Jane Doe appeared calm and relaxed. (*Id.* at ¶¶5-6.) According to the investigators, Doe stated

[1] The two declarations are almost identical, so the court cites to the Henderson declaration only. A transcript was also submitted. The transcript was not inconsistent with the declarations, but it puts them in a context not as favorable for Carter.

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that she saw an ad from another law firm regarding the Diddy abuse. (*Id.* at ¶8(a).) She said that she contacted that firm and was referred to Buzbee's firm in Texas. (*Id.* at ¶8(b).) She stated that she was flown to Texas by Buzbee's firm in December 2024. (*Id.* at ¶8(c), fn. 1.) She denied that Carter raped her or had anything to do with the incident. (*Id.* at ¶8(d)-(h).) Rather, she stated that Diddy raped her and that a female celebrity watched. (*Id.* at ¶8(e).) She stated that although Carter was at the party, he had nothing to do with anything. (*Id.* at ¶8(g).) According to the investigators, she stated that during her meeting with Buzbee, it was the lawyer that suggested that Carter had culpability and pushed her into that position. (*Id.* at ¶8(e)-(f).) She was told that if she named him, she would recover a lot of money. (*Id.* at ¶8(i).) When the investigator asked her to sign a declaration, she asked "but how does this help me?" (*Id.* at ¶9.) She stated to the investigators that she dropped the New York lawsuit because Buzbee told her that Carter had threatened to kill her. (*Id.* at ¶8(j).) (Carter denies making any such threat.) By implication, Carter contends that Doe also, therefore, had not authorized the demand letter that Carter asserts was extortion.

Carter also submitted a declaration by another investigator, Pillinger. That investigator said that it was easy to find information on the internet through sites that can be accessed by the public that would call Doe's competence or credibility into question.

None of these declarations name Doe. But all three investigators have a high level of confidence that they know Doe's identity, and the two who spoke to her state that she confirmed that she is the person who filed the New York lawsuit. (Henderson Decl., ¶3 ["We met with Ms. Doe on the front porch of her home in Alabama. Ms. Doe confirmed that she was, in fact, the Jane Doe plaintiff in the lawsuit"].)

In opposition, defendants submitted their own evidence. They deny the assertions Doe purportedly made (although not that she made them). (Buzbee 3/11/25 Decl., ¶10.) Buzbee also submitted multiple declarations signed by Doe (using the pseudonym) confirming that Carter did rape her at the party and that the allegations in the New York lawsuit against Carter were true. (Doe 3/11/25 Decl., ¶9.) She stated that she felt intimidated and afraid when she was confronted by the two investigators—not only that they approached her, but also that she knew who she was

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and where she lived given that she had believed that her identity was confidential. (*Id.* at ¶7.) She states that she was alarmed by this. (*Ibid.*) She further stated that she did authorize the demand letter before Buzbee sent it. (Doe 3/3/25 Decl., ¶8 ["I authorized Mr. Buzbee and The Buzbee Law Firm to send a demand letter to Jay-Z, and to initiate legal proceedings against him in the New York Action"].) She stated that she dropped the law suit in New York because she was afraid for her life and as she realized more and more what litigating through trial would actually entail, but not because the allegations were false. (*Id.* at ¶9.)

There is also a declaration from an attorney discussing the negotiations leading to the dismissal of the New York case. According to that declaration, the suit was not dismissed because it was meritless, nor was the dismissal unilateral. (Kasowitz Decl., ¶¶4-8.) Rather, it was dismissed because all parties—plaintiff and defendant—believed it was best for everyone to stand down; in other words, the dismissal was more in the nature of a walkaway settlement than a unilateral decision to drop the suit for nothing. (*Id.* at ¶6.) Defendants also suggests that Carter's timeline—that Jane Doe did not meet Buzbee until December and that it was at that meeting that Buzbee suggested naming Carter—makes no sense. (Buzbee 3/11/25 Decl., ¶¶3-9.) The letters had already been written and the lawsuit already amended in New York. (*Id.* at ¶¶6-9.) Buzbee also notes that Doe had sworn out two declarations against Carter that predated the meeting. (*Id.* at ¶¶7-8.) According to the defense, it just makes no sense at all that Doe would submit declarations regarding Carter's involvement predating the purported meeting if Buzbee first raised Carter's involvement at the meeting.

After the last hearing, the court requested that Carter produce the actual sound recording. The court ordered that all identifying information be redacted from the recording, such that the recording is just the actual sound of what has been presented in the transcriptions already before the court. Carter has submitted the recording, properly authenticated, and the court has listened to it. Again, there is no identifying information on the recording that was filed and the words on the audio are consistent with the transcript.

After the audio recording and authenticating documents were lodged with the court, there was another round of evidentiary objections and submissions. This includes defendants' May 19

objections, Carter's May 20 response, Carter's June 11 Request for Judicial Notice ("RJN"), defendants' June 11 objection to the RJN, and defendants' June 13 supplemental response to the RJN. These new pleadings are not authorized. That said, the court has considered them, but did not find that the new pleadings changed the analysis.

II. Legal Standards

The California Legislature has authorized a special motion to strike in lawsuits that seek to "chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (Code Civ. Proc., § 425.16, subd. (a).) Code of Civil Procedure section 425.16, subdivision (b)(1) provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." This is a powerful weapon designed to provide a potent tool for a defendant who can show that the lawsuit is really being used to stifle the exercise of certain constitutional rights. First, the motion is brought at the pleading stage—it has the potential of having a lawsuit dismissed at the outset. Second, absent a showing of good cause, the filing of the motion freezes discovery (although the court notes that Carter seeks an order allowing discovery here). Unlike almost any other motion of which the court is aware, a plaintiff will be required to produce evidence to support the claim without the benefit of any formal discovery. Consider that compared to a summary judgment motion. A summary judgment motion must be continued if the opposing party can establish that discovery is likely to yield evidence to defeat the motion to allow that evidence to be obtained; not so here. Third, in an SMS, the plaintiff must come forward with evidence to defeat the motion. In the summary judgment context (unlike federal law), the opposing party need only present evidence after the moving party has made a *prima facie* showing that the opposing party cannot prevail. Fourth, an SMS need not dispose of the entire case or even an entire cause of action; specific allegations can be stricken. In a motion for summary judgment or summary adjudication, generally the motion must resolve the entire case or at least an entire cause of action. Fifth, a successful movant in an

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SMS is entitled to fees as a matter of right, while a successful opponent can recover fees only if the motion was frivolous and filed for an improper purpose. Sixth, if an SMS is denied, the order denying it is immediately appealable. All of that is strong medicine. But even though it is strong, it serves an important public purpose, and as such it is not to be applied with disfavor.

The SMS structure gives rise to a two-step process for determining whether the SMS should be granted. First, the court decides whether the defendant has made a threshold showing that the challenged claims or causes of action arise from a protected activity. (See Code Civ. Proc., § 425.16, subd. (b)(1).) "A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in [section 425.16,] subdivision (e)." (*Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1043.) The California Supreme Court has summarized the analysis as follows: "At that stage, we said, the moving defendant must identify the acts alleged in the complaint that it asserts are protected and what claims for relief are predicated on them. In turn, a court should examine whether those acts are protected and supply the basis for any claims. It does not matter that other unprotected acts may also have been alleged within what has been labeled a single cause of action; these are 'disregarded at this stage.' (*Baral*, *supra*, 1 Cal.5th at p. 396.) So long as a 'court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached' with respect to these claims. (*Ibid.*)" (*Bonni v. St. Joseph Health System* (2021) 11 Cal.5th 995, 1010, parallel citations omitted.)

If the defendant makes that threshold showing, the burden shifts to the plaintiff to establish a likelihood of prevailing on the complaint, which has sometimes been referred to as "minimal merit." (See Code Civ. Proc., § 425.16, subd. (b)(1).) The burden on the plaintiff is like the burden imposed to defeat a summary judgment motion: the plaintiff must submit admissible evidence showing that it can prevail. (*Billauer v. Escobar-Eck* (2023) 88 Cal.App.5th 953, 962.) The court does not weigh the evidence or determine issues of credibility, nor does the court resolve any factual disputes. (*Ibid.*) Rather, as in a summary judgment motion, if the plaintiff can put forward evidence that, if true, would establish its claim in light of all reasonable favorable inferences, then the SMS will be denied. (*Ibid.*) This would not be intuitively obvious from the

SMS statute, which speaks of a "probability" that plaintiff will prevail and does not expressly refer to the summary judgment standard. But the statute has been so interpreted because it is plain that although the Legislature intended the motion to protect important constitutional rights, the Legislature did not intend the motion to be so powerful as to deny the opposing party due process.

III. Evidentiary Objections and Other Matters

A. Original Filings

In their original reply, defendants filed evidentiary objections. Those objections to the Carter declaration are DISREGARDED. Defendants objected to almost every line of Carter's declaration. Indeed, only the first paragraph of the Carter declaration escaped from this broadside of objections. Many of the objections are plainly without merit. For example, where Carter describes his understanding of the Letters and disputes the veracity of the events described therein in Objection Nos. 1-3, defendants object that Carter cannot testify to Buzbee's or the survivor's intentions or motivations. Carter is not attesting to defendants' motivations or intentions, but to his innocence. He is allowed to do that. Defendants are reminded of our Supreme Court's statement in *Reid v. Google* (2010) 50 Cal.4th 512, 532-533 that only meritorious objections should be raised. Objections should only be to evidence that makes a difference. Here, the objections do not meet that standard and constitute the " 'blunderbuss objections to virtually every item of evidence' " that the *Reid* Court explicitly warned against. If defendants have made any meritorious objection, it is lost within the pages of unmeritorious objections. That said, the court does not believe that these objections are the pivot upon which the motion turns.

The objections to the Merri A. Baldwin declaration are DISREGARDED for the same reason. Defendants objected to every paragraph. In any event, the court did not rely on this declaration in its analysis.

That leaves the Schwartz declaration. Defendants again object to almost every paragraph, but this time the issue is more elementary: authentication. Defendants go through almost each piece of evidence proffered by Schwartz and state that each one is not properly authenticated. For example, defendants argue that Exhibit 1, which is the transcript of Buzbee's October 1, 2024, press conference, is inadmissible because Schwartz failed to state that the underlying recording

is a true and accurate representation of the event in question. This is correct. While each transcript has a declaration from the reporter indicating that they accurately set forth the words in the recording, there is no statement from anyone stating that the recording itself is an accurate representation of the event in question. With that said, the court observes that there is no actual dispute as to whether the transcripts are accurate representations of what was said in the recording at issue. Defendants do not dispute the underlying recording's veracity or state that the transcripts are inaccurate representations of what Buzbee said in interviews and at press conferences. As such, this objection seems curable. Carter's showing may be satisfied if "it is reasonably possible the evidence . . . will be admissible at trial." (*Sweetwater Union High School Dist. v. Gilbane Building Co.* (2019) 6 Cal.5th 931, 947.) (More on *Sweetwater* later—a lot more.) This rule is most easily applied where the defect is one of authentication or obviously curable foundation. Here, the purported defect is authentication of the underlying recordings. All of this would be admissible if the creator or some other person, like a custodian of records, were to state that the video, Instagram posts, X statement, and other items were accurate representations of what was said, posted, or "liked." Thus, it is "reasonably possible" that the evidence will be authenticated at trial. Objection Nos. 1-11 and 15-16 are OVERRULED. The court also notes that while discovery is generally not allowed with regard to a SMS, the court would make an exception here if that is what it took to resolve these technical objections that only a lawyer could love (and even lawyers don't love them). To the extent that the evidence, if authenticated, is sufficient to defeat the motion, it would be a miscarriage of justice and a perversion of the Legislature's worthy intent to throw an otherwise potentially meritorious case out of court on that kind of issue.

Objection Nos. 12-13 are to news articles on TMZ and NBC News. Unlike the foregoing transcripts or posts, Buzbee did not author these documents or participate in their creation. The court originally stated it would judicially notice these articles because *Sweetwater* was not an exact fit here. But at the hearing, Carter's counsel pushed back, stating that *Sweetwater* extended further than the court gave it credit for, and would allow for these articles to be admitted. Having reread *Sweetwater*, the court must agree that *Sweetwater*'s scope stretches farther than the court originally thought, although not as far as the court thought at the most recent hearing.

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As applied here, *Sweetwater* supports the consideration of the NBC News and TMZ articles, regardless of whether Buzbee authored them. The articles are not categorically barred, nor are they indisputably inadmissible. Objection Nos. 12-13 are OVERRULED and the court has considered the articles on the second prong analysis. But there is an important caveat. The court will consider them for the point of stating that the articles could have been found without undue effort. However, the court still does not believe that it can consider them for their truth.

Objection No. 14 concerns the Good Charlotte tour schedule and history from the website link, https://www.concertarchives.org/bands/goodcharlotte. The court previously sustained the objection and does so again. The court believes Carter can likely obtain testimony from someone regarding the Good Charlotte tour schedule for trial, even if it is not this website in particular, but the website is probably not admissible at this point to establish the fact. With that said, the motion does not turn on this piece of evidence.

Both parties also filed requests for judicial notice with their original briefing. Defendants' request for judicial notice of Diddy's indictment and various news articles is GRANTED. (See Evid. Code, § 452, subds. (d), (h).) The court only notices the existence of these materials, not the truth of the accusations contained therein.

Carter requests judicial notice of a voluntary dismissal of the New York action by Buzbee on behalf of his client. Notably, this request for judicial notice was filed on February 18, even though the original opposition was filed and due on February 10. However, the dismissal was filed on February 14 and was not available at the time the opposition was filed. There is good cause to file the belated request, and there is no prejudice articulated by defendants. The request is therefore GRANTED. Again, the motion does not stand or fall on this piece of evidence.

Carter also requests judicial notice of statements made by defendants with regard to an action by Carter filed in Alabama. That suit is similar to this one, but Jane Doe is a defendant there (and it is in federal court, not state court). Buzbee has moved to dismiss in that case for a lack of personal jurisdiction and Carter asserts he made damning admissions in his motion. The court will take notice of the filing, but the court does not believe that this evidence is particularly relevant and it is not really a factor in the court's decision.

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B. New Evidence

The new evidence from Carter, if taken at face value, changes a lot. Recall that Carter's burden is not to show that he will win; it is just to show that there is a disputed issue of material fact. So, for defendants to prevail on the motion in the teeth of this new evidence, they must show that the evidence ought not be considered for its truth at all. The court therefore first discusses why it is considering the evidence and then any evidentiary issues.

The court is not inclined to disregard the new evidence out of hand as untimely or coming too late (meaning after the original opposition was filed). That is not as easy a decision as might first appear. The whole point of the SMS procedure is to give a speedy protection to one being sued for the exercise of certain constitutional rights. Among other things, that means that the plaintiff ought to have some good reason to believe in the case's merits before the lawsuit is filed. The more typical file-first-and-get-evidence-later model—which is often how litigation works—is not available. As discussed above, the point is to provide a strong protection for the exercise of those rights. At the same time, though, the Legislature did not want to chill the right to sue for wrongful conduct to the point where tortfeasors get a pass from being held accountable to the harm they cause their victims. The court reads the law as being such that the Legislature attempted to strike a careful balance and that the trial courts have a role to play in keeping the balance true. Discovery is not allowed by right; but it may be allowed in the court's discretion. The Evidence Code is somewhat relaxed (as the court discusses in more detail regarding *Sweetwater*), but not over-much.

This court's view is that justice is not served by throwing a case out by virtue of a matter of timing. While it is true that Carter did not have this evidence at the time he filed his suit, the evidence is confirmatory of the evidence he did have—his own alleged knowledge that the accusations against him were false. (The court is not saying that the accusations were in fact false; the court is adopting the rule discussed above that the court must accept Carter's evidence as true at this stage, just as it would in deciding a motion for summary judgment. Carter's declaration of innocence was filed with the original opposition.) The court strikes the balance by agreeing with Carter that the evidence cannot be dismissed out of hand. To that extent, then,

Carter's *ex parte* application is GRANTED. However, while the court will consider the evidence, that does not mean it is admissible. These evidentiary issues are discussed below.

1. Evidentiary Issues – New Evidence

Preliminarily, the court does not intend to rule on each individual evidentiary objection filed after the February 25 hearing. This ruling would likely balloon this already lengthy decision in length. The discussion below generally captures the court's views on the evidence and its admissibility.

There are two main issues that Buzbee raises: (1) the timeline of events in light of the new evidence; and (2) whether the new evidence is admissible. As to the timing issue, the court shares some of those worries. As Buzbee tells the tale, to take the new evidence at face value would result in a temporal anomaly. It would not make sense to conclude that Carter was first mentioned by anyone on December 11, 2024, which is after his name had actually come to light in the context of this case.

But while the court has concerns, ultimately the court cannot read the evidence in quite so cramped a style as does Buzbee. The more reasonable inference is either that Doe is mistaken about the date or (and this is what the court actually thinks) that this is the date she first met Buzbee directly, but not the first time the name had been brought up by her to others (or by others to her) in the firm. The court also notes that the December date was not actually given by Doe, but rather assumed inferentially by the investigators because Doe pegged the meeting to the time she flew to Texas and the Texas trip had to do with an NBC interview and that interview was in mid-December. That is an inference that the investigator made, not a date that Doe gave, and as such, the court cannot use that alone to view the declaration as weightless. Nor, having listened to the interview, does the court believe that this is what Doe meant. Doe did say that this was the first time that she met Buzbee, but she never said that this was the first contact with the firm. And, while Doe did say that Buzbee was pushing Carter's involvement, she did not say that his name had never before come up. The court believes that the fairest reading of the transcript (and certainly the one the court would and will adopt if the transcript is otherwise admissible) is that Carter was implicated before December 11, 2024. Of course, if December 11, 2024, is really the

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first time that Doe mentioned Carter's name (and then only after being pressured into doing so), then the timeline suffers from a time warp. The court also notes that in deciding an SMS—as is also the case in resolving a summary judgment motion—the court must construe the evidence liberally and broadly as submitted by the party opposing the motion.

Assuming that one gets past the date, the issue goes to the force of the evidence. And by force, the court means is it zero or more than zero. The court need not calibrate beyond that. For the evidence to be considered, it must come into the case in one of three ways: (1) it is admissible as is; (2) it comes in under *Sweetwater*; or (3) it will come in because the court will allow discovery. Carter argues for all three.[2]

a. Admissible As Is

At the most recent hearing on April 8, Carter argued that the statements in the investigators' declarations were admissible as co-conspirator admissions, *res gestae*, or statements against interest (or some combination thereof). The court will discuss them all.

Doe's statements are not co-conspirator admissions. " 'Hearsay evidence is of course generally inadmissible. (Evid. Code, § 1200.) Hearsay statements by coconspirators, however, may nevertheless be admitted against a party if, at the threshold, the offering party presents "independent evidence to establish prima facie the existence of . . . [a] conspiracy." ' (*People v. Hardy*, *supra*, 2 Cal.4th at p. 139.)" (*People v. Thompson* (2016) 1 Cal.5th 1043, 1108, parallel citations omitted.) The court is willing to assume that Carter can make a preliminary showing regarding the existence of a conspiracy between defendants and Doe when they named Carter in the New York action in the sense that they were acting in concert. But that is about all he can

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[2] In all cases, there is the problem that Doe remains anonymous. The court will assume that both parties are or would be willing to identify Doe *in camera*. The court does have concern as to whether it can consider any of this without some assurance that Doe is really the person she purports to be. And defendants' declaration from Doe is of questionable value given that the signature does not name a name. Naming Doe *in camera* hardly seems to put Doe's identity at risk. In fact, it appears that every party in the courtroom knows who Doe is (except the court). Letting the court in on that information will not add materially to any risk to Doe. Having said that, at least on this record, the court is confident that it is proper for her identity not to be in the public record. Doe is allegedly the victim of sexual abuse as a minor. Indeed, as discussed below, Carter's submissions do not cast doubt as to the alleged rape by Diddy (although the court is not stating that Diddy in fact committed a crime—that is for a different tribunal). The court believes that allowing Doe to remain anonymous in this proceeding easily satisfies the relevant tests. Should it become necessary, the court will require that the parties disclose her identity *in camera* to the court. It is just that it is not necessary now.

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show. "Pursuant to Evidence Code section 1223, '[o]nce independent proof of a conspiracy has been shown, three preliminary facts must be established: "(1) that the declarant was participating in a conspiracy at the time of the declaration; (2) that the declaration was in furtherance of the objective of that conspiracy; and (3) that at the time of the declaration the party against whom the evidence is offered was participating or would later participate in the conspiracy." ' (*Hardy, supra*, at p. 139, quoting *People v. Leach* (1975) 15 Cal.3d 419, 430–431, fn. 10.)" (*Id.* at p. 1108, parallel citations and internal footnote omitted.) The statements were not made while Doe was participating in any conspiracy, nor was it made prior to or during any conspiracy. The New York case had been dismissed by the time Doe made the statements to the investigators. So Evidence Code section 1223 simply does not work. And even if Carter could get past that, the statements to the investigators hardly seem to be in furtherance of the conspiracy. If anything, they are contrary to the conspiracy's alleged aims.

Carter's *res gestae* argument is not convincing either. Preliminarily, the phrase as Carter uses it is somewhat imprecise. "Older practitioners will remember the popularity of the phrase 'res gestae.' As Witkin says, (Witkin, Calif. Evidence, 2d ed., p. 517), 'The early cases use the phrase "declarations part of the res gestae" loosely to describe several sorts of admissible hearsay and nonhearsay statements including verbal acts and excited or spontaneous utterances.' However, the new Evidence Code, modern writers and modern courts have abandoned the use of this rather ill-defined phrase. Res gestae has now gone the way of the great auk, the passenger pigeon and high button shoes. It was, in its time, a handy gadget. When an attorney could think of no other reason for the introduction of hearsay, he would simply utter the magic words 'res gestae' and often as not, get the testimony in." (*People v. Orduno* (1978) 80 Cal.App.3d 738, 744; see also, *People v. Bush* (1943) 56 Cal.App.2d 877, 883 [discussing res gestae as used in cases involving lewd and lascivious acts against a minor but requiring some element of spontaneity].) The court agrees with that analysis. Use of the magic incantation "res gestae" cannot convert inadmissible hearsay into admissible evidence. It never really did, and it certainly does not do so now. Indeed, the Evidence Code pointedly (at least the court thinks it was pointed)

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does not use the phrase. If Carter wants to get the recording in, Carter has to look to the actual Evidence Code, not to a bygone era.

At the hearing, Carter also insisted that Doe's statements did not constitute hearsay because they were akin to statements of independent legal significance. (See generally, Evid. Code, § 1240.) Statements of independent legal significance are nonhearsay. " ' "If a fact in controversy is whether certain words were spoken or written and not whether the words were true, evidence that these words were spoken or written is admissible as nonhearsay evidence." ' (*People v. Fields* (1998) 61 Cal.App.4th 1063, 1068–1069, quoting 1 Jefferson, Cal. Evidence Benchbook (3d ed. 1997) Hearsay and Nonhearsay Evidence, § 1.45, p. 31; see *Jazayeri v. Mao, supra,* 174 Cal.App.4th at p. 316 ['Documents not offered for the truth of the matter asserted are, by definition, not hearsay.']; 1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, § 31, p. 714 [where ' "the very fact in controversy is whether certain things were said or done ... the words or acts are admissible not as hearsay[,] but as original evidence" ']; Fed. Rules Evid. 801(c), Advisory Committee Note ['If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay'].) Written or spoken words offered as original evidence rather than for their truth are generally referred to as 'operative facts.' (*Jazayeri v. Mao, supra,* 174 Cal.App.4th at p. 316; *People v. Fields, supra,* 61 Cal.App.4th at p. 1069.)" (*People v. Smith* (2009) 179 Cal.App.4th 986, 1003, parallel citations omitted.)

Thus, Carter is right that if the words have independent jural significant, they are admissible. But he is wrong in his contention that the words have such significance. Doe's statements are not ones of independent legal significance because the truth of her statements matters. In other words, this is not a case where the fact that she made the statement matters; instead, what matters is whether her statements about Carter's involvement and Buzbee's supposed scheme are true.

Relatedly, Carter suggested that the statements are *res gestae* because they are part of what a prosecutor would have to prove were this a criminal case. The court is not really sure what to make of that. The theory is that were this an extortion case, Doe's statement would be *res gestae*

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because it is part of the crime itself. But that court views that as no different than the independent legal significance test. If the defendant in an extortion case said, "Lots of crime in this neighborhood. You probably ought to give me $100/week and then I'll make sure that nothing bad happens to your business. We wouldn't want anything bad to happen to your business, right? It would be a shame if your business burned down." That statement would, apparently, be part of the *res gestae*. But the point is that it would not matter if the person making the statement really intended to burn down the store if the $100 payment was not made; the point is that the statement contained an implied threat and the crime is committed whether or not the speaker is serious. Applying that to the instant case, then, Carter seems to contend that the recording is not part of the tort—either the tort of extortion or defamation; rather, Carter asserts, it is evidence that might be used to prove the tort (assuming the statements are true). But the court simply cannot agree with Carter's analysis. The court just does not see that the statement comes in under the somewhat amorphous *res gestae* doctrine.[3]

Finally, there is Carter's assertion that the investigators' declarations contain statements against interest. (See Evid. Code, § 1230.) And this is Carter's strongest argument. "The extent of this hearsay exception was defined in *People v. Leach* (1975) 15 Cal.3d 419, 441. The court there concluded that, '[i]n the absence of any legislative declaration to the contrary,' not all statements which implicate the declarant are admissible against the nondeclarant. (*Id.* at p. 441.) Only those statements or portions of statements that are specifically disserving of the penal interest of the declarant were deemed sufficiently trustworthy to be admissible. Statements not specifically disserving were characterized as 'collateral' statements and inadmissible." (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 328, parallel citations omitted.) Although no one has briefed the issue, this court has to assume that New York has malicious prosecution rules similar to California's law on the subject. It seems likely that filing a lawsuit as a plaintiff when one

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[3] To illustrate the difference, the court often uses the following test: would the party proffering the evidence proffer it if everyone knew the statement was false? If the answer is yes, then there is no truth component and the words have independent legal significance. If the answer is no, then there is a hearsay problem. Consider a person who says, "I will give you $100 if you promise to give me your watch." To which the other person responds, "I accept." It does not matter whether the first person was telling the truth when the offer was made; the words had the jural significance of being an offer whether the speaker meant them or not. The same is true of the "I accept" phrase; it is jurally significant as an acceptance. A contract is formed even if one of the speakers had no intention of performing.

knows that the facts alleged are false would open the plaintiff up to a lawsuit in tort. (Indeed, the court understands that such is the gravamen of the Alabama suit.) And making a statement that one knows will lead to significant legal liability—even if not criminal liability—is a statement against interest. If that is the case, then the statement is admissible as is under this doctrine. But the analysis as to whether these statements were truly against Doe's interest are more difficult than the court initially believed.

Carter must demonstrate that the individual statements he wants to submit fit within the exception. The Henderson declaration provides at least 12 statements by Doe. Presumably, Carter believes all 12 are admissible and that is why he did not undertake any particularized analysis of each statement. That is fine because the same general analysis applies to all. But it is worth noting that the test goes statement by statement.

Defendants argue that the statements are not reliable and point to other portions in the transcript where Doe's statements are not totally clear. The only evidence on the context of Doe's statements is the transcript, as the two investigators have her statements on tape. (Apparently, Alabama, where the conversation occurred, allows one party consent to a secret recording, unlike California.) So, presumably, the first question is whether the tape is admissible at all under any circumstances. Were the interview done in California, the answer would be no. Under Penal Code section 632, it is a crime to record a confidential communication without the consent of all involved. There is no indication that Doe was aware she was being recorded, and thus the court believes it would have been a crime had the recording obtained here. But California does not export its law to other jurisdictions. The question is not whether the recording would be allowed here; the question is whether the recording was allowed where it occurred: Alabama.

The court's understanding is that the tape is at least arguably legally obtained. Carter asserts that Alabama is a state in which only the consent of one party is required (and many states have similar laws). Because one-party consent is the law of the land where the recording occurred, the court does not believe that the recording is *per se* inadmissible. (And, even if it were, the declaration by the investigators would be proper; it is just that those declarations might have less force.)

Assuming the court accepts the transcripts as lawful, defendants make a powerful point on trustworthiness. This is because a statement against interest is admissible only if the circumstances surrounding the statement are such as to suggest some degree of trustworthiness. "To determine whether a declaration against interest is trustworthy, the trial court 'must look to the totality of the circumstances in which the statement was made, whether the declarant spoke from personal knowledge, the possible motivation of the declarant, what was actually said by the declarant and anything else relevant to the inquiry. [Citations.]' (*Greenberger, supra,* 58 Cal.App.4th at p. 334.)" (*People v. Bryden* (1998) 63 Cal.App.4th 159, 175, parallel citations omitted.) Notwithstanding the investigators' declarations, the transcript of the discussion with Doe casts doubt on the reliability of her statements. Once she finds out who the investigators are, she demands to know who they hired them and how they found out where she lived. (Henderson Suppl. Decl., Exh. A, p. 2:21-25.) She then gives short responses to some questions and then again expresses concern as to how they knew about her. (*Id.* at p. 4:1-3 ["I'm just curious as to how y'all found out, or figured out who I am and where I am, because they said they wouldn't release it even."].) Aside from those articulated concerns, Doe's own statements on Carter's involvement are contradictory. On her very first recitation of what happened, she names Carter as an involved party. (*Id.* at pp. 5:22-6:8.) Then she discusses Carter in response to the investigators' questions, but her responses are terse or unclear. (See, e.g., *id.* at pp. 10:21-11:1.) Later in the transcript, she expresses fear that she was found by the investigators and Carter. (*Id.* at p. 13:4, 8-9 ["I don't want [Carter] getting mad at me. [¶] . . . But you're saying he found me and you guys are here because he found me"].) The investigators attempt to allay her concerns and then request confirmation that she was not raped by Carter; Doe agrees that she was not. (*Id.* at pp. 13:24-14:5.)

Basically, the transcript is not as clear as either party would like. Doe submitted her own declarations thereafter, asserting that she felt intimidated and threatened by the investigators. (Doe 3/1/25 Decl., ¶¶4-10.) Of course, both investigators provide declarations stating that Doe's affect during the interview seemed fine and she did not make them leave (although it sounds like

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at some point she went into the house and shut the door on them); they add that Doe's statements to the contrary are not credible. (Henderson Suppl. Decl., ¶¶6-21.)

It is the court's job to determine whether a statement is trustworthy by considering its context and the speaker's motivation, among other things. (See *People v. Smith* (2017) 10 Cal.App.5th 297, 303-304.) But this implies that the court must weigh the evidence. The court posed this question to the parties at the April 8 hearing, asking whether it had the power to weigh the evidence on reliability on a SMS. After all, the court cannot weigh the evidence on this type of motion. There was no clear answer at the hearing, likely due to the inability to research that question in the moment. But even after the hearing, the court could not find a SMS case discussing whether the court could weigh the evidence in making a reliability determination.

However, the court found a case discussing the analysis in the context of a motion for summary judgment. And as has been oft-repeated, the second prong functions like a motion for summary judgment. In *Cheal v. El Camino Hospital* (2014) 223 Cal.App.4th 736, a hospital employee sued her employer, the hospital, for age discrimination, wrongful termination, and retaliation. (*Id.* at p. 740.) The hospital filed a motion for summary judgment, which the trial court granted. (*Ibid.*) The plaintiff appealed, and one of her arguments was that the trial court improperly excluded a declaration from Diana Hendry, who attested that plaintiff's supervisor Kim Bandelier once confessed to Hendry that she preferred younger and pregnant workers and was worried that other people would notice this favoritism. (*Id.* at p. 755.) The *Cheal* court held that the trial court erred in sustaining the hospital's objection, as the Bandelier's statements to Hendry were statements against Bandelier's interest. (*Id.* at p. 757.) In particular, the court stated that there was a sufficient indicia of reliability to admit the statement. (*Id.* at p. 760 ["We also note that Bandelier's statement to Hendry, if actually made, appears highly reliable. Certainly no one was in a better position than Bandelier to know whether she had been 'favoring the younger and pregnant' employees. The utterance took place in a purely private, personal setting. No motive to fabricate has been suggested"].) But the court noted that, in making this analysis, it was taking the standards of a motion for summary judgment into consideration, i.e., reading the evidence in the opposing party's favor. (*Ibid.*) "We conclude that for purposes of summary

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judgment, at least, the statement in question was admissible as a declaration against interest. To the extent the question involved any discretion, the trial court's implied determination to the contrary was an abuse of discretion. As we observed at the outset, in ruling on motions for summary judgment courts are to ' "liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." ' (*Conroy v. Regents of University of Cal.* (2009) 45 Cal.4th 1244, 1249–1250, quoting *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037; see *Stationers Corp. v. Dun & Bradstreet, Inc.* (1965) 62 Cal.2d 412, 417 ['In examining the sufficiency of affidavits filed in connection with the motion, the affidavits of the moving party are strictly construed and those of his opponent liberally construed, and doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion.'].)" (*Ibid.*, parallel citations omitted.)

The *Cheal* ruling provides an analytical guide for how the court must determine the reliability issue here. Given the standards controlling the reliability test and a SMS, the court will weigh the evidence to make a reliability determination, but in making that determination, will construe all evidence in Carter's favor. If that results in sufficient indicia of reliability, then the statements will be admissible. This analysis applies only to this motion, and does not constitute the court's final view on the reliability of Doe's statements. Put another way, the court looks at it like this. If this had come up at the trial, would the court keep the statement out on the theory that it is not reliable enough to warrant admission as a statement against interest, or would it allow the jury to hear the evidence and instruct the jury that it is up to them to decide whether to credit the statement or not? So this is sort of a meta-weighing of the evidence. The policies that drive the rule that all inferences must be in favor of the party opposing the motion drive the conclusion here that the court should view the test in that light and view its decision whether the evidence is admissible in that light.

Here, the statements meet the reliability test because the court cannot say, as a matter of law, that the statements are untrustworthy. According to the investigators, Doe seemed fine, did not cut them off, and answered their questions fully. As an aside, the court focuses on the admissibility of the declarations in this context for a reason: the transcript of the Alabama

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recording only goes so far with regard to affect. The court has read the transcript, and can hear the voices in the recording. But it cannot see how Doe was reacting or see her body language. That said, there is enough evidence in the declarations (and transcript, if considered) to support an indicia of reliability. At the end of the day, were this issue to come up at trial, the court would likely allow the evidence to be heard by the jury, but instruct the jury that it is up to them what weight, *if any*, they would give to the statements.

Despite the above, there is an important qualification in the court's analysis. Evidence Code section 1230 only applies to statements made by Doe, not statements made by Buzbee (or other attorneys) to Doe. Any statement by Buzbee to Doe needs to be nonhearsay or covered by another hearsay exception. "Double hearsay is admissible if a justification for admitting the evidence rebuts the hearsay objection at each level. (Evid. Code, § 1201; see *Lake*, *supra*, 16 Cal.4th at pp. 461-462 [admitting party admission in police report]; cf. *Walker v. Superior Court* (2021) 12 Cal.5th 177, 201 [suggesting probation reports can be admissible as official records under proper circumstances].)" (*Jane IL Doe v. Brightstar Residential Inc.* (2022) 76 Cal.App.5th 171, 178, parallel citations omitted.)

Carter has failed to make any such showing as to Buzbee's statements to Doe that Doe then communicated to the investigators. And even if he did make such a showing, it immediately runs into *Sweetwater*, as discussed below. As such, the only statements against interest that might be admissible are those in paragraph (8)(d) and (h) in the March 5 Henderson declaration.[4] These are Doe's statements to Henderson stating that Carter did not rape her. The majority of paragraph (8)(e) might also be admissible up until the comma; anything thereafter about what Buzbee suggested is inadmissible.

Which brings the court to the final problem on whether the transcript is admissible "as is" under a statement against interest test, and this is the one that the court cannot get past. The interest to which the statement is against is the danger of a malicious prosecution suit under New York law. Well and good such as it is and as far as it goes. But there is a strange aspect to this. The investigators throughout the interview consistently told Doe that Carter viewed her as a

[4] The supplemental Henderson declaration relies on the transcript, so it is of no use here.

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victim here—that Carter thought that she was being taken advantage of by Buzbee. The tenor and tone of the interview was such that Doe would reasonably believe that if she supported the investigators' narrative—that Carter had nothing to do with any sexual assault and that it was the law firm that was making her say the contrary—that she need not worry about any legal action Carter might take against her. They did not say that expressly, but having listened to the tape, there is really no other way to interpret it. They were not saying words to the effect that if she admitted that the claims against Carter were false, they were still about to serve her with a civil complaint. In fact, the fairest reading is the contrary: if she cooperated, but perhaps only if she cooperated, Carter would not sue her. Read in that light, the court does not believe that these were statements were statements against interest at all. Further, the investigators were inconsistent on Doe's anonymity. At times, they suggested that they would keep her name secret no matter what. But at other times, they suggested that they would keep her name confidential only if she cooperated with them. The court believes that Doe could very reasonably view this as an implicit threat that cooperation was the way to stay out of the limelight and out of the press.

So all of that is a rather lengthy way of saying that the admissions were not really against Doe's interest at all, at least in the context of the discussion. It was in Doe's interest to go along with the investigators here because that way she would not be sued for malicious prosecution; it was in Doe's interest to go along with the investigators here because that would keep her name out of the press. Accordingly, at the end of the day (and at the end of this lengthy exegesis), the court cannot conclude that this was really against her interest. After all, the point of the exception is that one will not likely make a false statement where doing so would absolve one of civil or criminal liability but the truth would not. That is what drives the commonsense exception to the hearsay rule that a statement against interest is admissible. Here, though, Doe's interest in the interview was to go along with the suggestions the investigators made. The foundation for the exception just does not apply. (The court takes just a moment to emphasize that the investigators were hardly giving Doe the "third degree" or making overt threats. Their tenor and tone was civil and respectful throughout the interview. They were polite and friendly. But the court must take their words in context. They came on Doe unannounced and without warning, obliquely and

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reluctantly admitting that they were—sort of—there on Carter's indirect behalf and with a potential issue of disclosure and litigation looming in the background—or even foreground. The court reads and hears the audio tape in context and puts itself, as it believes it must, in Doe's shoes and trying to view the situation as she must have viewed it.) In sum, the audio is not admissible "as is."

b. *Sweetwater*

If the declarations are not admissible on their own, the question arises whether the court can consider them under *Sweetwater*. In *Sweetwater*, our Supreme Court concluded, "In sum, at the second stage of an anti-SLAPP hearing, the court may consider affidavits, declarations, and their equivalents if it is reasonably possible the proffered evidence set out in those statements will be admissible at trial. Conversely, if the evidence relied upon *cannot* be admitted at trial, because it is categorically barred or undisputed factual circumstances show inadmissibility, the court may not consider it in the face of an objection. If an evidentiary objection is made, the plaintiff may attempt to cure the asserted defect or demonstrate the defect is curable." (*Sweetwater, supra,* 6 Cal.5th at p. 949, emphasis in original.) This would extend to hearsay objections as well, which the *Sweetwater* Court explicitly addressed. (*Id.* at pp. 946-947 [applying relaxed SMS standard to hearsay evidence].) This standard, the Court stated, both comported with legislative intent and also protected plaintiffs who could not take discovery. "To strike a complaint for failure to meet evidentiary obstacles that may be overcome at trial would not serve the SLAPP Act's protective purposes. Ultimately, the SLAPP Act was 'intended to end meritless SLAPP suits early without great cost to the target' (*Newport Harbor Ventures, supra,* 4 Cal.5th at p. 644), *not* to abort potentially meritorious claims due to a lack of discovery. Notwithstanding the discovery stay, the court has discretion to order, upon good cause, specified discovery if required to overcome the hurdle of potential inadmissibility. (§ 425.16, subd. (g).)" (*Id.* at p. 949, emphasis in original, parallel citations omitted.)

Having re-read the case, the court better understands its logic, and it is not as broad as the court believed at the prior hearing. As just stated, the point of the SMS statute is not to get lots of cases thrown out, even those with potential merit. The goal is to weed out the meritless cases

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brought for the purpose of chilling the exercise of constitutional rights. Too rigid an adherence to the Evidence Code erodes that purpose. However, this exception as applied to hearsay only goes so far. Defendants aptly called the court's attention to *Sanchez v. Bezos* (2022) 80 Cal.App.5th 750. In *Sanchez*, plaintiff Sanchez provided a declaration recounting out-of-court statements provided by plaintiff relating statements he heard by reporters to prove that defendant Bezos made defamatory comments (i.e., the element of publication). (*Id.* at p. 760.) The trial court excluded the evidence as hearsay and rejected plaintiff's reading of *Sweetwater*. (*Id.* at p. 761.) Plaintiff had argued that *Sweetwater* permitted the introduction of hearsay evidence, as long as it was reasonably possible the witness would appear and testify at trial. (*Id.* at pp. 760-761.) The trial court rejected this interpretation of *Sweetwater* twice, and the matter was appealed. (*Id.* at p. 762.) On appeal, the *Sanchez* court agreed with the trial court.

The *Sanchez* court summarized *Sweetwater*'s holdings. "*Sweetwater* has two main holdings. First, the Supreme Court extended the statutory hearsay exception for affidavits and declarations in anti-SLAPP proceedings to other evidence submitted under oath or penalty of perjury, such as plea forms and grand jury testimony. (*Sweetwater, supra*, 6 Cal.5th at p. 945.) Second, while acknowledging the rule that courts may consider affidavits and their equivalents for anti-SLAPP purposes only to the extent they contain evidence admissible at trial, the Supreme Court clarified that parties need not establish all preconditions to admissibility at the anti-SLAPP stage. Rather, 'evidence may be considered at the anti-SLAPP motion stage if it is *reasonably possible* the evidence set out in supporting affidavits, declarations or their equivalent will be admissible at trial.' (*Id.* at p. 947, italics added.)" (*Id.* at p. 774, italics by *Sanchez* court.)

The *Sanchez* court then discussed the infirmities in the plaintiff's evidentiary showing and how *Sweetwater* could not cure the defects. There, the plaintiff offered evidence that he had heard from reporters that they had heard others state that defendant had made certain comments about plaintiff. That evidence was rejected as hearsay. But critically, that was because there were two layers of hearsay in plaintiff's proffer. As the court concluded, "In the instant case, had the reporters submitted their own declarations attesting under penalty of perjury to the defamatory comments defendants purportedly made to them, or testified to those facts under oath in another

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proceeding, that evidence would be comparable to the plea forms and grand jury transcripts in *Sweetwater*. In those circumstances, the reporters' statements, as reflected in their declarations or testimony, would be 'made by competent witnesses with personal knowledge of the facts they swear to be true.' (*Sweetwater, supra*, 6 Cal.5th at pp. 944–945.) Those statements, moreover, likely would be admissible if the reporters repeated them at trial. The reporters' statements recounted in plaintiff's declaration, however, are insufficient to show 'that admissible evidence exists to prove plaintiff's claims' (*id.* at pp. 944–945), because they were not made under oath or penalty of perjury, and the hearsay rule bars plaintiff from testifying as to what the reporters told him to prove publication of purported defamation by defendants." (*Id.* at p. 775–776.)

In other words, the *Sanchez* court could accept plaintiff's evidence there that the reporters had made the statements to plaintiff. But those statements were themselves only relevant if *their* statements were true; that is, that they actually did hear the defendant utter the allegedly defamatory words. The court was not persuaded by plaintiff's contention that the reporters would likely verify that they made the statements were they called at trial. The court reasoned that the *Sweetwater* exception only worked if *plaintiff's* statement would likely be admissible at trial. But it would not be admissible because it was hearsay, and plaintiff's analysis as to what would happen if he called the reporters to testify was not sufficient.

The same defect noted by the *Sanchez* court as to the plaintiff's evidence applies to Carter's evidence. In *Sanchez*, the court did not have a declaration from the reporters about Bezos' statements. Here, the declarant of Buzbee's statements is Doe. Yet the court does not have a declaration under penalty of perjury from Doe indicating that Buzbee told her to lie about Carter's involvement. (In fact, the declaration the court does have is to the contrary.)

Further, Carter otherwise runs into the second holding of *Sweetwater*, and that is whether it is "reasonably possible" that Buzbee's statements will be admissible at trial. "Further, although under *Sweetwater* a plaintiff need not satisfy all preconditions to admissibility at the time of the anti-SLAPP hearing, the plaintiff nonetheless must demonstrate it is 'reasonably possible' the evidence 'will be admissible at trial.' (*Sweetwater, supra*, 6 Cal.5th at p. 947.) Plaintiff's speculation as to what might happen at trial is insufficient to show a reasonable possibility that

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his hearsay testimony will be admitted under the prior inconsistent statement exception." (*Sanchez, supra,* 80 Cal.App.5th at p. 777.) Carter must demonstrate that it is reasonably possible that he will be able to present evidence of Buzbee's statements at trial and yet Buzbee denies ever making that statement. (3/11/25 Buzbee Decl., ¶10.)

But, as with just about everything else in this case, the inquiry does not quite end there. First, the court ought to note in the interests of full disclosure that it is not fully convinced by the articulated logic in *Sanchez*, although the court believes that the *Sanchez* decision is rightly decided as to result. As the court stated at the last hearing, if read a little more broadly, *Sweetwater* provides the court with a somewhat flexible and precise tool to measure the distance between achieving the important legislative objective of protecting speech from lawsuits designed to squelch it on the one hand, and slamming the courthouse doors from those who are the victims of defamation and other torts but cannot prove all of the elements using admissible evidence without some discovery on the other hand. By allowing trial courts a more nuanced way to measure whether evidence can be considered in the second prong analysis, trial courts are able to avoid ordering discovery—something the Legislature explicitly discouraged and something that could be a rather blunt instrument at times—or dismissing what might be a meritorious case at what is essentially the pleading stage. The court agrees with *Sanchez* that *Sweetwater* must have its limits. Rank speculation cannot qualify under *Sweetwater*, for if it did, the legislative purpose would be greatly undermined, allowing anyone with a filing fee to claim that it will get evidence eventually and thereby avoid the danger of an SMS. But the court believes that there must be a point that is a little bit further from admissible evidence than a declaration under oath to qualify. Where ought the line to be drawn? Simply allowing it to be drawn based on the exercise of the trial court's sound discretion could be too blurry a line. It would have the effect of destroying the certainty that the Legislature meant to create under the SMS statute and make meaningful appellate review more difficult. And appellate review is an important feature of the SMS statute, allowing an unsuccessful movant immediate and meaningful access to the Court of Appeal for what is in many ways *de novo* review of the trial court's decision. If left to its own devices, this court might draw the line at looking at whether the evidence is of a nature where there is a substantial likelihood

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that, if discovery were allowed, it could be converted into admissible evidence, or where there is a high likelihood that the evidence would be admitted at trial. In *Sweetwater*, of course, that was a relatively easy showing because the prior statement was made under oath. The missing hearsay link would be no bar were even a modicum of discovery allowed. In *Sanchez*, it was a more difficult showing because the key statement was not under oath at all, leading that court to view it as all too possible that the declarant would simply deny the key fact.

Having said all of that, the court notes that these musings are, at least to some degree, not directly on point. The court need not agree that *Sanchez* was in all respects rightly decided or that perhaps some aspects of it might have gone too far. This court is a trial court. As a matter of our judicial system and as a matter of power under *Auto Equity*, it is well settled that this court must follow *Sanchez*. Period. Full stop. The court is aware of no appellate authority questioning *Sanchez* or reaching a different rule or conclusion. Therefore, this court is bound to follow *Sanchez* fairly read and applied, and it will do so.

With that, then, the court suggests this thought experiment. The investigator's declarations are certainly admissible for the truth of what the investigators said therein, including what they heard—no one questions that. The issue is whether the declarations are admissible for the truth of what Doe said. In other words, that Doe said the words in the declaration is something for which there is evidence, as the investigators heard it with their own ears (and so has the court through the audio file). But that does not make Doe's statements true. And plainly they are being offered for the truth of the statements, for if Doe's statements are not true, then they do not advance Carter's case at all. Which leads us to the experiment. Assume that at trial, Doe were called to the stand. And further assume that she was asked "Did you tell the investigators that Carter had nothing to do with the sexual assault?" Doe would very likely admit that she did—after all, it is on tape. What then? Now, she has admitted to the statement *herself* directly. She can, of course, deny the truth of the statement or try to explain it away, but the question arises whether that would be an issue for the jury to decide—was she telling the truth then or at trial? That would suggest that even under *Sweetwater* as explained in *Sanchez*, perhaps there is hope for Carter. However, there is another component to this hypothetical line of questioning. Before

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Doe could answer the question, Buzbee's counsel would object "hearsay." That is because hearsay can apply even to a declarant on the stand. After all, the statement at issue—the statement to the investigators—is still an out-of-court statement made by the declarant offered for the truth of the matter asserted. Accordingly, if the hearsay objection were made then, it would have a similar thrust to the one made now.

But in that case, Carter might respond by contending that the statement is admissible as a prior inconsistent statement—that is, a prior statement that is inconsistent with a statement by the witness at the hearing. (Ev. Code § 1235.) In our hypothetical, Doe might well have already testified that in fact Carter had assaulted her. If it would come in under that exception, then it might be admissible at trial, and perhaps therefore admissible now. Not a high threshold. Presumably Carter would preface the question by asking Doe, "Did Carter sexually assault you?" Doe would presumably answer, "Yes, he did." After which, the question could be asked of Doe (or the investigators, for that matter) whether the prior statement was made by Doe that Carter did not assault her. The problem, of course, is that Doe made no such statement here. The closest one comes is her declaration *in response to* the investigator's declaration in which she states that Carter did in fact assault her. But because it is in response to the declaration at issue, it is not enough.

The bottom line is that in light of *Sanchez* as it is written, this is just a bridge too far. The hypothetical might work, and in fact it might be enough under a broad reading of *Sweetwater*. After all, it is hard to imagine a situation where Doe would not be called as a witness (or deposed) and in which she would not claim Carter was liable. (And, of course, if she testified to the opposite, then the investigators' declarations would not be needed at all.) Under the court's prior reading of *Sweetwater*, that would probably be enough. But the court believes that it is not enough under *Sanchez*. In fact, this is pretty close to the precise fact pattern in *Sanchez*. Here, like there, plaintiff relies on the theory that he could call the declarant (in that case the reporters; in this case Doe) to the stand and either the underlying statement would be given at the hearing or the otherwise hearsay statement could be admitted as a prior inconsistent statement. But that logic is exactly what the *Sanchez* court rejected. (*Sanchez*, *supra*, 80 Cal.App.5th at pp. 776-777.) The

court is aware that in *Sanchez*, the court discussed why the reporters might not actually give inconsistent testimony, whereas in this case it is hard to see how that could come to pass. But the general holding is clear: "If a plaintiff could preemptively assert [section 1235], it would eviscerate the hearsay rule for purposes of anti-SLAPP proceedings, because it is always theoretically possible the original declarant will appear at trial and contradict his or her earlier statement." (*Ibid.*) While this court believes that under the somewhat unique facts of this case there is virtually no possibility that Doe would not testify at trial (or at deposition) in a way that would likely make the prior statement admissible, that does not seem to be enough.

Therefore, the Butler and Henderson declarations are not enough to give rise to evidence that what Doe said to them is true. And if the truth of her statements cannot be admitted, then the declarations are of no moment, and the objections to them on that ground must be SUSTAINED. Accordingly, *Sweetwater*, as explained in *Sanchez*, provides Carter no lifeline.

c. Further Discovery

The third option, as requested by Carter, is to have Doe deposed. The court is not inclined to allow that. The court is quite concerned that once the discovery door opens even a crack, it will be hard to keep it from opening entirely. Further, that deposition will need to be subject to a protective order, at least for the time being. Doe is not a party to the instant litigation, and she states that she is a victim of a horrible crime when she was a youth. While she apparently denied that Carter had anything to do with it to the investigators, she never denied the event with Diddy; she has adhered to that throughout. The victim of an alleged crime, especially a heinous one like this one, ought to be given some consideration by the court, and this court will do so, although the court considers the matter a close one.

And things have a way of getting out. This court, frankly, lacks complete confidence that the deposition transcript will not find its way to the press. There are too many examples of that sort of thing happening in litigation. The court is not saying it has happened in this case, but one need not search the press archives very long or very hard to find instances in other cases where it has happened. Given that discovery in the context of an SMS motion is to be sparingly allowed,

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the fact that Doe is not a party to this case, and the trauma that Doe underwent if in fact the crime occurred (whether or not Carter was involved), the court will not allow discovery.

Carter also asks to take Buzbee's deposition. The court will not grant that request. The court has no confidence that his deposition will be narrow or narrowly tailored. It is exactly the sort of thing the Legislature sought to bar when it passed the SMS statute. The court also does not see how a deposition will clarify existing evidentiary issues on this motion. The court has much respect for plaintiff's counsel, but the court just does not see counsel having a "Perry Mason Moment" (for those of us ancient enough to recall what always happened when Perry Mason cross-examined a witness).

The court is aware of the odd juxtaposition of the *Sweetwater* issue and the question whether to allow Doe's deposition. That, in fact, is precisely why the court would read *Sweetwater* a bit more broadly than did the *Sanchez* court. But in making its determination, the court is considering a number of factors. First, as stated above, Doe is not a party to this case. As a third party, the court will be more solicitous of her rights than in other cases. Second, although the New York court did not impose an order forever keeping Doe's identity confidential (it only limited the use of Doe's true name in that litigation), it was plainly worried about the effect that this case could have on Doe's life. Third, this court did listen to the audio. Although the investigators stated that Doe's affect was calm and relaxed throughout, that is not what the court heard. To the court's ear, Doe was concerned and distressed that the investigators had discovered who she was and where she lived. She did not expect to see them on her property and knocking on her door. At times, her voice dropped down to a whisper. And her statements changed from the start of the interview—when she did seem to implicate Carter—to the end. While that might well be because (as Carter suggests) she was feeling more comfortable and confident that Carter was not planning to sue her and saw her as a victim—it could also be because she was afraid that by failing to cooperate her name and address would become known or that Carter's willingness to view her as a victim and not as a potential defendant was contingent on her cooperation. To be sure, those words were never expressly uttered by the investigators, although only one of them was clear and unambiguous on the point while the other did seem to

say words that could be taken that way. But the court puts itself in Doe's shoes a bit. She had dropped the New York action. She claims that she did so because Buzbee (or his firm) told her that Carter was planning to kill her if she continued in the litigation against him. That suggests a certain level of fear and anxiety. She did drop the suit, but instead of now being left alone, Carter's investigators knocked on her door unannounced having learned her identity and address. Having heard the entire audio (except for a few identifying words that were redacted), the court is not convinced that Doe was quite as at ease as the investigators suggest. That goes to whether this court is inclined to then put her through the stress of a deposition that the court cannot guarantee will remain confidential. The court just cannot bring itself to do that. Which is why the court wishes that the *Sweetwater* doctrine were just a teeny bit more flexible.

2. Miscellaneous Issues

There are a couple more wrinkles. One is how this evidence was obtained. The investigators declare that they are not working for Carter or his law firm. (Henderson Decl., ¶1.) That leaves the obvious question, then, of who their employer might be. It could be that they are freelance and, having obtained the information at hand, they decided to give it to Carter. Or it could be that they worked—albeit perhaps indirectly—for Carter or his counsel. In fact, the transcript raises significant questions as to who exactly retained the investigators:

> JAMES ROBERT BUTLER: Okay, that's all right. Listen, we definitely appreciate that you're being honest, because like you said, again, when, when it comes to like Jay-Z, we're kind of here on kind of his behalf-ish, because we believe that he said 'I don't even know what--you know I had no part of that.' And if you were pushed into saying that, that's something that's kind of worthwhile to us.
>
> CHARLOTTE HENDERSON: Yeah.
>
> [JANE DOE]: You're here on Jay-Z's behalf?
>
> JAMES ROBERT BUTLER: Not on his behalf--
>
> CHARLOTTE HENDERSON: Indirectly. But Jay-Z had nothing to do with this, correct?

(Henderson Suppl. Decl., Exh. A, p. 10:12-21.)

That leads directly to an ethical question because being "indirectly" present on Carter's behalf seems suspicious. Buzbee claims that Doe is still his client, and Doe seems to confirm it.

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At a minimum, the court has no reason to believe that such is not the case. If that is true, then there is the question whether Carter or his counsel "indirectly" sought to question a person known to be represented by counsel. If that was done at the firm's behest, it leads to ethical concerns. But while a question is raised, the court does not view the question as sufficient to strike the evidence. If it is an ethical concern, that might go not to admissibility (or eventual admissibility) but rather to some other remedy such as a referral to the State Bar. (Carter's counsel has denied having anything to do with the investigators' approach to Doe, and the court takes counsel at their word on this point. Were the court forced to come down on the issue, the court would conclude that counsel had nothing to do with the interview.) But the issue becomes more difficult given the Alabama case that Carter has filed against Buzbee, Doe, and others.[5] Given that, the court has some concerns even assuming that the investigators were there at Carter's behest personally or through intermediaries. There is no ethical bar to one litigant approaching the opposing litigant directly and not through counsel, but the facts of this approach are a bit distasteful. Further, while the investigators claim that Carter did not send them, it simply beggars reason to believe that he was unaware of it—or at least that if in fact he was not told, it was only to give him plausible deniability.

Another wrinkle is the fact that Doe's statements were not known to Carter when he filed the lawsuit. But the court is not convinced that matters either. As discussed above, the court does not believe that the law requires that the motion be opposed using only information or evidence known to the plaintiff when suit was filed. As long as the evidence (or the information within *Sweetwater*) is known before the motion is granted, it will count.

A third wrinkle is John Doe. All of this evidence involves Jane Doe, but none involves John Doe—who never actually sued Carter. But if there is sufficient evidence to believe that there is a triable issue of fact as to whether Buzbee essentially pressured Jane Doe into the New

[5] There are motions to dismiss in that Alabama case. Buzbee and some defendants contend that there is no personal jurisdiction over them in Alabama. The court understands that Doe is not making that assertion, but seeks to dismiss the case on other grounds. Carter has recently submitted evidence related to what he claims to be an admission in that case that might change the analysis here, but the court does not see it that way.

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York suit, there is enough evidence to lead to a reasonable inference that the situation is no different as to John Doe. They will stand or fall together.

IV. Court's Ruling and Analysis

A. Acts in Furtherance of the Right of Petition or Free Speech

To invoke Code of Civil Procedure section 425.16, a defendant need only demonstrate that a suit arises from the defendant's exercise of free speech or petition rights. (See Code Civ. Proc., § 425.16, subd. (b); *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) "At this first step, courts are to 'consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability.' (*Park, supra*, 2 Cal.5th at p. 1063.) The defendant's burden is to identify what acts each challenged claim rests on and to show how those acts are protected under a statutorily defined category of protected activity. (*Wilson, supra*, 7 Cal.5th at p. 884.)" (*Bonni, supra,* 11 Cal.5th at p. 1009, parallel citations omitted.) "In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (Code Civ. Proc., § 425.16, subd. (b)(2).)

There are two separate categories of purportedly protected activity. The first are the Letters to Carter, and the second are various statements made in press conferences and other avenues. The analysis is different, and the court begins with the pre-litigation Letters.

1. Pre-Litigation Letters

Defendants argue that the two Letters sent to Carter in November 2024 are protected activity under subdivision (e)(2). Code of Civil Procedure section 425.16, subdivision (e)(2) protects any statement made "in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law[.]" "Courts 'have looked to the litigation privilege as an aid in construing the scope of section 425.16, subdivision (e)(1) and (2) with respect to the first step of the two-step anti-SLAPP inquiry—that is, by examining the scope of the litigation privilege to determine whether a given communication falls within the ambit of subdivision (e)(1) and (2).' " (*Kettler v. Gould* (2018) 22 Cal.App.5th 593, 607, citing *Flatley v. Mauro* (2006) 39 Cal.4th 299, 322-323.) "To be privileged under

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[Civil Code] section 47, a [pre-litigation] statement must be 'reasonably relevant' to pending or *contemplated* litigation. . . The reasonable relevancy requirement of section 47 is analogous to the 'in connection with' standard of section 425.16, subdivision (e)(2)." (*Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1266, collecting cases, emphasis in original.) "Accordingly, although litigation may not have commenced, if a statement 'concern[s] the subject of the dispute' and is made 'in anticipation of litigation "contemplated in good faith and under serious consideration," ' (*Rohde, supra,* 154 Cal.App.4th at p. 36, quoting *Action Apartment, supra*, 41 Cal.4th at p. 1251) then the statement may be petitioning activity protected by section 425.16." (*Id.* at p. 1268, parallel citations omitted.)

Defendants assert that the Letters were sent in serious contemplation of a lawsuit based on the allegations stated therein. To that end, Buzbee proposed confidential mediation as a way to avoid the pending civil lawsuit. (Buzbee Decl., ¶¶9-10.) Defendants argue that the Letters therefore constitute protected pre-litigation demand letters.

In opposition, Carter disagrees, contending that the Letters are not protected conduct because they constitute extortion as a matter of law under the doctrine articulated by our Supreme Court in *Flatley v. Mauro* (2006) 39 Cal.4th 299 and *Mendoza v. Hamzeh* (2013) 215 Cal.App.4th 799. Under *Flatley*, our Supreme Court held that a pre-litigation letter is not always privileged and protected. (*Flatley*, *supra*, 39 Cal.4th at p. 320.) There, defendant wrote to plaintiff and demanded money in settlement of a purported claim. (*Id.* at pp. 307-309.) The letter included a threat that, if the settlement was not forthcoming, a lot of potentially embarrassing information, unrelated to the potential litigation, would become public much to plaintiff's detriment. (*Ibid.*) Specifically, the letter noted that absent a speedy settlement, the defendant would do an in-depth investigation into plaintiff's personal assets and make public information about his immigration, social security use, and tax levies, with the statement that defendant was positive the media worldwide would enjoy what was found. (*Id.* at pp. 308-309.) The letter also accused Flatley of rape. (*Id.* at p. 308.) The letter, according to the *Flatley* Court, constituted extortion as a matter of law. (*Id.* at pp. 330-332.) However, at the same time the Court noted that the circumstances in *Flatley* were extreme and the "opinion should not be read to imply that rude, aggressive, or

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even belligerent prelitigation negotiations, whether verbal or written, that may include threats to file a lawsuit, report criminal behavior to authorities or publicize allegations of wrongdoing, necessarily constitute extortion." (*Id.* at p. 332, fn. 16.) Instead, the matter would be considered on a case-by-case basis, depending on whether the defendant concedes that the actions were unlawful as a matter of law, or the evidence conclusively establishes as much. (*Id.* at p. 320.) Thus, matters are not protected on the first prong if the defendant concedes they are unlawful as a matter of law or the evidence establishes as much.

The narrow nature of the *Flatley* exception as applied to extortion was discussed in *Mendoza v. Hamzeh*, where the Court of Appeal stated: "Regardless of whether Mendoza committed any crime or wrongdoing or owed Chow money, Hamzeh's threat to report criminal conduct to enforcement agencies and to Mendoza's customers and vendors, *coupled with a demand for money,* constitutes 'criminal extortion as a matter of law,' as articulated in *Flatley.* (39 Cal.4th at p. 330.)" (*Mendoza, supra*, 215 Cal.App.4th at p. 806, emphasis by *Mendoza* court.)

As defendants note the limits of *Flatley* were tested in *Malin v. Singer* (2013) 217 Cal.App.4th 1283. There, defendant's counsel wrote a litigation demand letter seeking money and threatening that, absent a settlement, suit would follow. (*Id.* at pp. 1288-1289.) The Court of Appeal distinguished *Flatley* and held that the suit should be dismissed under the SMS statute. (*Id.* at pp. 1298-1300.) In distinguishing *Flatley*, the appellate court put weight on the fact that the information that would be exposed was tied directly to the claims that would be asserted in the potential complaint. (*Id.* at p. 1299.) In addition, the letter in *Malin* did not threaten to report plaintiff to a prosecutorial agency unless a settlement was reached. (*Ibid.*)

At least if one puts aside the new evidence, the case here falls comfortably within *Malin.* No matter how Carter characterizes the Letters, the court has a hard time seeing them as extortion as a matter of law on their face. Both *Flatley* and *Mendoza* concerned letters where the author demanded money from the recipient and if the recipient failed to pay, the author either threatened to expose information unrelated to the potential lawsuit or threatened to report the recipient to the authorities, or both. The Letters here note Carter's long relationship with Diddy, detail the

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purported wrongful acts at issue, and then request confidential mediation. (Schwartz Decl., Exhs. 3-4.) If Carter refused mediation, then defendants threatened to file a civil case, which is pretty much what every pre-litigation demand letter does. Specifically, the Letters state that, "If my office fails to hear from you or your designee by close of business on November 19, 2024, we will take a different course. [¶] Should this demand to reasonably mediate not be accepted, Mr. Doe will have no choice but to file suit in a court of law and seek all legal remedies available." (*Id.* at Exh. 3, internal bold and italic omitted; see Exh. 4 [same but as to Ms. Doe].) There is no demand for a particular sum of money, although that is not enough to protect the Letters. The real problem for Carter is that the mediation request is about the sexual abuse allegations underpinning a potential civil case, and nothing else. There are no extraneous allegations as to publicizing other unrelated and unsavory things related to Carter and there are no promises to refrain from going to law enforcement if Carter agrees to mediate and does settle. It is for that reason that Carter's attempt to distinguish *Malin* fails. While it is true that the alleged conduct here constitutes criminal activity, defendants fall well short of threatening to go to the police *unless* Carter pays up. Selling silence as to law enforcement for money is extortion, but there is no promise of silence in the criminal context here. And selling silence for money in the civil context is not extortion; it is a settlement with a non-disclosure element. While there is a swirling public debate about the social utility of non-disclosure agreements, for the most part they remain lawful, and they are lawful here.

Carter points to statements in the Letters that the Does have no interest in causing a "public spectacle" and that they want "something of substance" to be offered at the mediation. (Schwartz Decl., Exhs. 3-4.) There is an unmistakable inference here that any lawsuit will result in widespread media coverage and that defendants' clients want money to settle the lawsuit. But that is similar to *Malin*, as the statements in the Letters have a rational relationship to the substance of a pending lawsuit. It is just a fact that Carter is a public figure, and it is just a fact that the allegations at issue are newsworthy.

Carter argues that the context within which those Letters were sent demonstrate that they were extortion as a matter of law. He is referring to Buzbee's statements from press conferences

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and interviews where he stated he encouraged his clients to speak with the authorities or that he would file rape charges in New York. These statements do not change the analysis. To the extent Carter is using these statements to prove that the Letters are extortion, the court does not see how that works. Carter relies on *Stenehjem v. Sareen* (2014) 226 Cal.App.4th 1405, but that case is factually distinguishable. In *Stenehjem*, the court held that an email threatening to file a false criminal complaint against the recipient unless he paid money to the author was extortion as a matter of law. The author, Stenehjem, argued on appeal that the email that animated his cross-complaint was not extortion because it was a benign request to meet Sareen to discuss their issues. The court disagreed. "Stenehjem's stated 'request to discuss the matter,' viewing the totality of the e-mail and the six-month history leading up to its transmission, was in reality a demand to negotiate and settle his personal claims or else face the potential exposure of unrelated allegations that Sareen had committed criminal acts. The fact that Stenehjem's threats may have been 'veiled' (*Harrington, supra,* 260 A.2d at p. 699), or 'half-couched in legalese does not disguise their essential character as extortion. [Citations.]' (*Flatley, supra,* 39 Cal.4th at pp. 330-331.)" (*Id.* at p. 1425, parallel citations omitted.) The "six-month history" preceding the extortionate email concerned communications between the parties, not communications to the press. (*Id.* at p. 1415 [detailing the history of communications and escalating demands by Stenehjem].)

Unlike *Stenehjem*, Buzbee's press conference and interview statements were never communicated directly to Carter and were not part of the allegedly extortionate course of conduct towards him. And the exposure threatened in the Letters was directly about the facts giving rise to the alleged tort. Further, Carter never thought those press statements were about him until he received the Letters. (Carter Decl., ¶4 ["These allegations, which I learned of for the first time through these demand letters, were shocking to me and have absolutely no basis in fact"].) Whatever context they provide, it does not transform the Letters into extortion as a matter of law. And recall that there is a reason that the court keeps saying "as a matter of law." *Flatley* only applies where the letter is extortion as a matter of law. Where there is a factual question, the *Malin* rule applies. Here, defendants knew what they were doing. The Letters were very carefully crafted to stay on the *Malin* side of the line. Plainly there was a threat that if Carter refused to

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pay up (albeit through mediation) he would find himself on the bottom side of the "v." in a civil lawsuit filed by defendants' two clients, and that the lawsuit would undoubtedly generate significant and negative press and publicity, but that if he did pay, defendants' clients would not file a lawsuit and, inferentially, would not go public either. And that is exactly what happened when Carter refused to mediate, at least as to Jane Doe. But even so—and the Letters really cannot really be read any other way—the Letters are protected. The Letters offer a confidential settlement of a scandalous civil lawsuit. Under *Malin*, that is not extortion. (The court reiterates that had the letter gone a step further and stated that defendants' clients would go to the police *unless* Carter mediated, that *would* have been extortion. But the Letters neither say nor imply that.)

In addition, there is the issue of the John Doe letter. Carter challenges whether it was sent in good faith and serious consideration of litigation because no lawsuit was ever filed on behalf of John Doe. The fact that litigation was never filed does not mean that defendants were not seriously contemplating litigation at the time the letter was sent. Buzbee also attests that he chose to send the Letters after investigating the allegations and he seriously was contemplating litigation when the Letters were sent. (Buzbee Decl., ¶¶7-9.) Bolstering that statement is the fact that out of the two Letters, one actually resulted in litigation.

The new evidence does not change the outcome on the first prong, even assuming it were admissible—although it becomes a closer question. According to Carter, if one accepts Doe's statements to the investigators at face value, then she at least inferentially did not authorize the settlement letter to be sent or even conclude that she was going to sue Carter at the time the Letters were mailed. He claims that without a present intent to bring a lawsuit, the Letters start to look more like extortion than an attempt to settle a civil suit. If the court accepted Carter's view of the evidence it might change the analysis on the first prong. After all, in order for the Letters to be protected under subdivision (e)(2), the Letters must have been sent in anticipation of litigation contemplated in *good faith* and under serious consideration. (See *Neville, supra,* 160 Cal.App.4th at p. 1268.)

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The problem is, of course, that the court cannot accept this reasoning. Even were the new evidence admissible, Buzbee would satisfy the first prong. Malicious pre-litigation Letters that are sent as a prelude to litigation are still protected. " 'The "good faith [and under] serious consideration" requirement is not a test for malice. (*Aronson v. Kinsella* (1997) 58 Cal.App.4th 254, 266.) Instead, it focuses on whether the litigation was genuinely contemplated' (*Anapol, supra*, 211 Cal.App.4th at p. 824), and it protects prelitigation communications made in genuine contemplation of litigation while excluding from protection communications made when litigation is 'just a negotiating tactic or a hypothetical possibility [Citations]. [¶] The requirement to show that litigation is seriously contemplated ensures that prelitigation communications are actually connected to litigation and that their protection therefore furthers the anti-SLAPP statute's purpose of early dismissal of meritless lawsuits that arise from protected petitioning activity. (§ 425.16, subd. (a); *Anapol, supra*, 211 Cal.App.4th at p. 824 [the good faith and serious consideration requirement "guarantees that hollow threats of litigation are not protected"]; cf. *Action Apartment* [*Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232,] 1251 [the policy underlying the litigation privilege of affording " 'the utmost freedom of access to the courts' " is furthered only if litigation is "seriously considered"].)' (*Bel Air, supra*, 20 Cal.App.5th at pp. 940–941.)" (*Medallion Film LLC v. Loeb & Loeb LLP* (2024) 100 Cal.App.5th 1272, 1285–1286, parallel citations omitted, review denied June 12, 2024.)

Carter's analysis requires the court to take the "good faith and serious contemplation" standard as a shorthand for malice. That is not correct. The Letters pass the first prong.

2. Statements A-F and the "Like"

Next are the six statements listed in paragraph 99 that were made in various fora, as well as defendants' "like" of a post that speculated about Carter's involvement in the sexual assaults and that Carter was at least one of the unnamed people to which defendants had previously referred. (FAC, ¶¶41-52.) Defendants contend that these activities are protected under section 425.16, subdivision (e)(3) and (4). Subdivision (e)(3) protects "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest," while subdivision (e)(4) protects "any other conduct in furtherance of the exercise of

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the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Code Civ. Proc., § 425.16, subd. (e)(3)-(4).) What constitutes a statement made in connection with an issue of public interest is the same under subdivisions (e)(3) and (4). (*Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107, 115-119.) To determine whether a statement comes within these subdivisions, there is a(nother) two-step test. "First, we ask what 'public issue or [ ] issue of public interest' the speech in question implicates—a question we answer by looking to the content of the speech. (§ 425.16, subd. (e)(4).) Second, we ask what functional relationship exists between the speech and the public conversation about some matter of public interest." (*FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 149–150.)

"California's anti-SLAPP jurisprudence has 'struggled' to define what makes something an issue of public, rather than private, interest. (*Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 621.)" (*Dubac v. Itkoff* (2024) 101 Cal.App.5th 540, 548, parallel citations omitted.) "On some points, however, judges have 'ably' distilled the characteristics of a public issue. (*Geiser, supra,* 13 Cal.5th at p. 1248.) Five factors generally tend to make a statement implicate a public interest: [¶] 1. The statement concerns a person or entity in the public eye; [¶] 2. the statement concerns conduct that could directly affect a large number of people beyond the direct participants; [¶] 3. the statement concerns a topic of widespread public interest; [¶] 4. the issue is of concern to a substantial number of people; or [¶] 5. the issue has been the subject of extensive media coverage. (*Ibid.*)" (*Id.* at pp. 548-549, parallel citations omitted.)

The Statements and the "like" all concern the same public issue, namely the Diddy sexual abuse case and who else might have been involved. All concern someone famous in the public eye. It is Carter's and Diddy's celebrity and the public's interest in their private lives that elevates these issues. (See *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1347 ["The public's fascination with Brando and widespread public interest in his personal life made Brando's decisions concerning the distribution of his assets a public issue or an issue of public interest. Although Hall was a private person and may not have voluntarily sought publicity or to comment publicly on Brando's will, she nevertheless became involved in an issue of public interest by virtue

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of being named in Brando's will"].) Further, it is in the public interest to prosecute widespread sexual abuse either criminally or civilly, and the public is obviously interested in this subject. The news coverage and defendants' multiple interviews with the press establish as much. The first step of the *FilmOn* analysis has been strongly established.

The second step requires a consideration of "whether a defendant—through public or private speech or conduct—participated in, or furthered, the discourse that makes an issue one of public interest." (*FilmOn, supra,* 7 Cal.5th at p. 151.) "[W]e reject the proposition that any connection at all—however fleeting or tangential—between the challenged conduct and an issue of public interest would suffice to satisfy the requirements of section 425.16, subdivision (e)(4). . . At a sufficiently high level of generalization, any conduct can appear rationally related to a broader issue of public importance. What a court scrutinizing the nature of speech in the anti-SLAPP context must focus on is the speech at hand, rather than the prospects that such speech may conceivably have indirect consequences for an issue of public concern." (*Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 625.)

There is a functional relationship here between the Statements, the "like," and the public issue. The interviews are publicizing defendants' cases related to the Diddy sexual abuse, and the "like" identifies Carter as someone involved in the abuse. Many of the Statements also concern Buzbee's investigations into the abuse and the eventual prosecution of those involved. Through the interviews and articles, defendants expanded the audience for the sexual abuse allegations and Buzbee's cases about those issues. To the court, these Statements and the "like" furthered the discussion on the Diddy sexual abuse case by establishing how wide-ranging the abuse and participants were and indicating that there would be justice for the survivors. The second factor of the *FilmOn* analysis is met. The burden therefore shifts as to all of the Statements at issue. Nor would this part of the analysis be affected by the new evidence.

B. Likelihood of Success

If the defendant makes a threshold showing that the challenged cause of action is one arising from protected activity, the burden shifts to the plaintiff to establish a likelihood of prevailing on the complaint. (See Code Civ. Proc., § 425.16, subd. (b)(1).) "[T]he plaintiff 'must

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demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' (*Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548.)" (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821, parallel citation omitted.) A trial court does not weigh the evidence or its comparative strength. (*Ibid.*) However, a trial court "should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim." (*Ibid.*)

1. Litigation Privilege

Defendants assert that the Letters and communications are covered by the litigation privilege, such that the first cause of action for extortion and third cause of action for IIED fail. In analyzing this issue, defendants must demonstrate a probability of prevailing on the merits by making a *prima facie* showing that the privilege applies, which they essentially did in prong one. Then Carter must produce admissible evidence sufficient to overcome the claimed privilege. The litigation privilege (also referred to as the "absolute" privilege) is codified in Civil Code section 47, subdivision (b) and "immuniz[es] participants from liability for torts arising from communications made during judicial proceedings[.]" (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 214.) The privilege applies to any "communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Id.* at p. 212.) "The privilege is 'absolute in nature, applying "to *all* publications, irrespective of their maliciousness." ' (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1241.) ' "Any doubt about whether the privilege applies is resolved in favor of applying it." ' (*Finton Construction, supra*, 238 Cal.App.4th at p. 212.)" (*Optional Capital, supra,* 18 Cal.App.5th at p. 116, parallel citations omitted, emphasis by *Action Apartment* Court.)

The Letters are pre-litigation demand letters and thus, according to defendants, are privileged. "A prelitigation communication is privileged only when it relates to litigation that is contemplated in good faith and under serious consideration." (*Action Apartment, supra,* 41 Cal.4th at p. 1251, internal citations omitted.) "In order for respondents to be able to take

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advantage of the privilege by applying it to their *own* communications, they must establish that at the time they made the subject communications, they *themselves* actually contemplated prospective litigation, seriously and in good faith." (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 39, emphasis in original.) Defendants have made the requisite showing here. They indicate that they vetted claims that were called into their hotline and sent demand Letters for two clients based on these investigations. (Buzbee Decl., ¶7.) The Letters themselves invited confidential mediation as a way to resolve the dispute, but if it was rejected, the two clients would file suit. (*Id.* at Exhs. 1-2.) Ultimately, that is what one of the clients, Jane Doe, did. (*Id.* at ¶¶12-13.) Given this context, it seems that defendants were contemplating litigation in good faith at the time of sending the Letters. Based on the Letters, some sort of dispute resolution would take place, either in mediation or in open court. (*Id.* at Exh. 1 ["Should this demand to reasonably mediate not be accepted, Ms. Doe will have no choice but to file suit in a court of law and see all legal remedies available."].) As noted previously, the fact that John Doe chose not to litigate does not mean that defendants were not seriously contemplating litigation on John Doe's behalf when the letter was sent. Nor are Buzbee's statements on this issue are conclusory because they rely on contextual statements to support that conclusion. (The court notes that the fact that defendants sought mediation and not a particular sum of money works to their favor. The presence of a proper mediator is the sort of safeguard that makes it more likely that defendants in fact did contemplate litigation. A mediator would press a party to accept a far lower settlement where the facts would not support the claim or where the potential plaintiff had no intention of bringing a lawsuit. That said, this observation is not the thing that changes the outcome or the court's conclusion. Which is why this comment is in parentheses.)

The new evidence (were it admissible) might change the outcome, though, at least were it read as broadly as Carter suggests. For Carter reads the transcript as demonstrating that Doe had not authorized any suit against Carter as of the time the Letters were written. Were the court to read the transcript that broadly, Carter would have a point. While the Letters on their face might be enough to trigger the privilege for a prong one analysis, if they were not in fact written in contemplation of litigation that would mean that the privilege would not apply (as discussed

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above) and therefore Carter might have defeated the motion under prong two. The problem with that, though, is that the court does not believe that the transcript is quite so robust and non-sensical as Carter suggests. Given a more rational reading, the most that one could say is that Buzbee contemplated litigation in bad faith. But bad faith is not a defense to the privilege; rather bad faith simply means that a malicious prosecution action can succeed. Because malicious prosecution is not a cause of action here, even were there a showing of bad faith based on the new evidence, the motion would succeed as to the Letters.

The Statements are more difficult. It is important to note that the analysis on the first prong under subdivisions (e)(3) and (e)(4) is not a shortcut analysis on the litigation privilege. The problem with the Statements here is that they do not have a functional connection to any filed litigation. It is undisputed that this case was not yet filed when the majority of the Statements were made, specifically Statements A-D. This is an important distinction. While the Statements are, in the court's view, comfortably protected, the protection is far less robust if they are not subject to the litigation privilege. The litigation privilege is, as set forth above, absolute—or close to it in the context of pre-suit communications. Even if a statement was knowingly false and made with malicious intent, it is protected. The only recovery that the person on the receiving end of the statement might have is an eventual malicious prosecution suit after prevailing on the merits.[6] But speech in general, though protected by the United States and California Constitutions, does not enjoy such a strong protective shield. Therefore, it is critical to determine whether the Statements are protected by the litigation privilege or are more generally protected as free speech or communications about a topic of public interest.

The distinction is illustrated by *Rothman v. Jackson* (1996) 49 Cal.App.4th 1134. There, attorney Rothman was retained by a child to sue singer Michael Jackson for various torts. (*Id.* at

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[6] There is an interesting question whether the above statement is true in this case. The court has discussed the litigation privilege with regard to California law and the shield it carves for statements made in that regard, as well as the remedy for being sued by someone who has no basis to believe that the allegations are true. The court is confident that it has stated California law correctly, but the underlying suit was not filed here; it was filed in New York. New York law might be different as to the remedy for filing a malicious action, and it might well be that California ought not export the litigation privilege in Civil Code section 47 to lawsuits filed in other states that have a less potent privilege. However, no one has briefed this issue nor has anyone suggested that New York and California law differ on this point. For purposes of this analysis, the court will assume that New York and California law are identical, and therefore the above analysis would govern.

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p. 1138.) Rothman began investigating the claims and negotiating with Jackson (and other defendants related to Jackson) but did not file a lawsuit yet. (*Ibid.*) During that time, a psychological evaluation of the child was leaked, resulting in a "firestorm" of media interest, due to the nature of the allegations against Jackson himself. (*Ibid.*) The Jackson defendants responded to this firestorm by calling a press conference and making other statements to the media, wherein they denied the allegations and accused Rothman and his clients of fabricating the charges to extort money from Jackson. (*Id.* at p. 1139.) Rothman felt he had to withdraw due to the damage to his professional reputation and later filed suit against the Jackson defendants for defamation and other torts. (*Ibid.*) The Jackson defendants demurred, arguing that the press conference statements were absolutely privileged under Civil Code section 47, subdivision (b). (*Ibid.*) The trial court agreed and sustained the demurrer on that basis. (*Ibid.*) But that conclusion did not hold.

"On appeal, the *Rothman* court held that the litigation privilege did not apply. After surveying the relevant law, the court concluded that, to be sufficiently in furtherance of the litigation, the communication must 'function intrinsically, and apart from any consideration of the speaker's intent, to *advance a litigant's case*,' noting examples such as the actual pleadings, a lis pendens, demand letters and communications directed towards settlement, communications between a law firm and persons with potential claims, and investigatory interviews. (*Rothman, supra*, 49 Cal.App.4th at p. 1148, italics added.) The statements made to the press to vindicate Jackson did not advance any litigation and, therefore, were not protected by the litigation privilege. (*Id.* at p. 1149.)" (*Argentieri v. Zuckerberg* (2017) 8 Cal.App.5th 768, 786, parallel citations omitted, emphasis by *Argentieri* court.) In other words, any statement about a case or a potential case will not of necessity be protected by the litigation privilege, although it may nonetheless be viewed as speech and thus protected. To enjoy the strong and near absolute protection of the litigation privilege, the statement must be in furtherance of the litigation, and somewhat directly so. Speech about actions that are the topic of future litigation will not suffice.

That applies here. None of the Statements to the press or on X advance the New York case or otherwise serve its purposes. As the Court of Appeal has put it, "it follows that the

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'connection or logical relation' which a communication must bear to litigation in order for the privilege to apply, is a *functional* connection. That is to say, the *communicative act*—be it a document filed with the court, a letter between counsel or an oral statement—must function as a necessary or useful step in the litigation process and must serve its purposes." (*Rothman, supra,* 49 Cal.App.4th at p. 1146, emphasis in original.) The Statements here were made for publicity purposes and to create interest around defendants' cases. The court can also infer that defendants were asking people to give them information about people or entities that were involved and perhaps to encourage victims or potential plaintiffs to contact defendants. Those are not improper motives, but they are not closely enough linked to actual litigation specifically at issue here to come within the litigation privilege. A generic ask to the public for information on the Diddy sexual abuse scheme is not a functional or necessary step in the litigation process, at least with regard to statements that implicate others. Investigating a particular claim is likely within the privilege, but speaking to the press for publicity or to obtain more information is not. "In sum, we hold that the litigation privilege should not be extended to 'litigating in the press.' Such an extension would not serve the purposes of the privilege; indeed, it would serve no purpose but to provide immunity to those who would inflict upon our system of justice the damage which litigating in the press generally causes: poisoning of jury pools and bringing disrepute upon both the judiciary and the bar." (*Id.* at p. 1149; see also, *GetFugu, Inc. v. Patton Boggs LLP* (2013) 220 Cal.App.4th 141, 154 [press release and tweet not shielded by absolute litigation privilege]; *Argentieri, supra,* 8 Cal.App.5th 768, 786-787 [e-mail to the press not subject to absolute privilege].)

The *Rothman* court was careful to note that circumstances may exist where statements to the press might be protected. "Finally, the defendants argue that not all statements to the media are necessarily unconnected to the litigation, or made to *persons* unconnected to the litigation. Granted, circumstances can be imagined in which a publication or other communication enterprise is a participant in particular litigation, or the litigation sufficiently impacts the entire audience of, for example, a trade journal or other highly specialized publication that a statement to that publication or enterprise may qualify for the privilege." (*Rothman, supra,* 49 Cal.App.4th

at pp. 1150–1151, emphasis in original.) However, the court stated that situation was not in front of it. The same is true here. Although defendants were inviting people to tell them about the case, the comments were to the generic public, without any cases being filed yet against any of the unnamed participants in the scheme. This is especially true with regard to Statements A-D, made at a time when defendants were possibly (and perhaps probably) unaware or unsure if Carter was involved. As to Statements E-F, both were made immediately before or during the instant litigation and those Statements are therefore closer in substance to the litigation itself. However, the original problem remains: there is no functional relationship between Buzbee's bravado on X or in a newspaper article, and any litigation.

That leaves the "like." The court does not see how it comes within the litigation privilege at all and defendants do not explain it either. It fairly obviously does not bear a functional relationship to the litigation. The court is aware that in considering the litigation privilege, doubts as to its application are generally resolved in favor of applying it. But even that rule has its limits. The court does not believe that the Legislature meant to immunize comments made to the press from civil suits if the comments were otherwise defamatory unless the connection to a specific piece of litigation was clear and direct. That is just not the situation here.

The litigation privilege therefore only protects the demand Letters sent by defendants and they cannot form the basis of any claim against defendants. This means the motion is GRANTED as to the extortion cause of action, which is predicated solely and only on the demand Letters. (FAC, ¶92.) The motion is GRANTED in part as to the third cause of action for IIED, to the extent that the demand Letters are part of the outrageous course of conduct alleged (which the court does for purposes of this motion). That does not of necessity mean that the motion is denied as to the remainder; it only means that the analysis is different.

2. Defamation

Carter argues that his defamation claim, as predicated on the six Statements and the "like," survives the SMS. " 'Defamation requires the intentional publication of a false statement of fact that has a natural tendency to injure the plaintiff's reputation or that causes special damage.' (*Burrill v. Nair* (2013) 217 Cal.App.4th 357, 383.) The elements of a defamation claim are (1) a

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publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 720; *Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1369.)" (*J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87, 97, parallel citations omitted.) There is no dispute as to the element of publication here, so the court does not address it.

Of and Concerning

"An otherwise defamatory statement is actionable only if it is 'of and concerning' the plaintiff. 'The "of and concerning" or specific reference requirement limits the right of action for injurious falsehood, granting it to those who are the direct object of criticism and denying it to those who merely complain of nonspecific statements that they believe cause them some hurt.' (*Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1044.) To satisfy the requirement, the plaintiff must show the statement expressly mentions her or refers to her by reasonable implication. (*Id.* at p. 1046.) The plaintiff must also show the statement was understood by at least one third person to have concerned her. (*Bartholomew v. YouTube, LLC* (2017) 17 Cal.App.5th 1217, 1231; see *Neary v. Regents of University of California* (1986) 185 Cal.App.3d 1136, 1147 ['For publication to occur the defamatory matter must be communicated to a third party who understands the defamatory meaning and its applicability to the plaintiff.'].)" (*Dickinson v. Cosby* (2019) 37 Cal.App.5th 1138, 1160, parallel citations omitted.)

Carter argues that he satisfies this element due to defendants' media crusade that resulted in the audience reasonably believing that the Statements were about Carter. The court agrees as to Statement F, which concerns statements explicitly referring to Carter as the rapist or seeking to file rape charges against him. The same applies to the "like," which at least (strongly) inferentially identified Carter as Celebrity A in Jane Doe's complaint. (Schwartz Decl., Exh. 14 [November 19 act of liking post].) The other Statements are less explicit and do not refer to Carter by name. Carter insists that is immaterial given that the audience understood that the comments were about him. In particular, he returns to the "like." According to Carter, that basically retroactively specified that the preceding Statements A-E were "of and concerning" him. Further,

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the "like" demonstrates that at least one member of the public was aware that the Statements (or at least one of them) were in fact of and concerning him.

This makes sense as to Statement E, which was made on November 18. (Schwartz Decl., Exh. 13.) The Statement occurred the day before the "like," and places it in immediate context. "To determine whether the allegedly defamatory statements are of and concerning Dickinson, we must consider the totality of the circumstances. (See *D.A.R.E. America v. Rolling Stone Magazine*, *supra*, 101 F.Supp.2d at p. 1290 [applying California law].) This requires examination of the 'nature and full content of the communication and . . . the knowledge and understanding of the audience to whom the publication was directed.' (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 261.)" (*Dickinson, supra,* 37 Cal.App.5th at p. 1160, parallel citations omitted.) Both Statement E and the "like" occurred on the same social media platform within a small span of time, November 18 to 19. Further, both concern the same subject matter, i.e., the lawsuit against defendants. The "like" put Statement E into context.

Statements A-D were made in early October, however, and that leads to a(nother) temporal issue. The earliest Statement was October 2 and the latest was October 8. The court is not sure the "like" reaches that far back due to the lack of specificity in some of the interviews (as discussed below). The timeline works against Carter: Buzbee held the first press conference on October 1, had a series of interviews from October 2 through 8, filed the lawsuit against Diddy only on October 20, sent the demand Letters to Carter on November 5, and filed the New York Action against Carter on December 8. (Buzbee Decl., ¶¶5, 9, 13.) The furthest back that the "like" potentially reaches is Statement D, although even there is approximately a month and a half between the "like" and the last interview. Context for Statement D implies that Buzbee may have known of Carter's potential involvement by that time:

> PIERS MORGAN: Right. I mean, how big an eyebrow raise are we talking about? Because you've been hearing a lot of names, presumably in the process of all these calls coming in. [¶] And you're a pretty smart lawyer, so you can probably work out the wheat from the chaff in terms of legitimate, plausible claims here, in terms of victims. *I mean, are we talking about names as big as Diddy potentially?*

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> TONY BUZBEE: *I expect so. I expect so.* You know, obviously those are the names that people are interested in, but I've tried to make sure people focus also on corporate entities to include banks and hotels and perhaps even pharmaceutical entities that were that were maybe not directly involved, but were certainly benefiting and profiting from this kind of activity. You know, those I'm interested in as well. [¶] *But there will -- there -- you know, we've seen all over social media the pictures and video of all the various individuals that attended these parties.*

(Schwartz Decl., Exh. 21, pp. 10:22-11:20, emphasis added.)

With that framing, at least as of October 8, Buzbee was strongly implying that very famous people, at Diddy's level, may be implicated. The court previously concluded that this implication created an inference that Buzbee already knew Carter was an accomplice. But despite its earlier decision concluding this was enough to satisfy the "of and concerning" test for purposes of defamation, the court has struggled with this conclusion because it relied on heavy, if not untenable, inferences in Carter's favor.

After hearing oral argument, the court believes that its concerns were valid. First, the court remains concerned about the time lapse between Statement D and the time Carter was named. Timing questions are discussed a bit below, so the court will not here give a "spoiler" to that discussion. (The reader will just have to keep going.) But the question dogs the court. Further, while Statement D certainly *could* pertain to Carter, and the court can reasonably infer that Carter would fit the description of celebrities therein, that is not enough. The "of and concerning" test requires more than a conclusion that the plaintiff *could* be the person to whom the speaker referred; it requires that a person hearing the comment *would* view the comment to be about the plaintiff. In its prior decision, the court relied on *Dickinson*, *supra*, 37 Cal.App.5th at pp. 1162-1163. But that case is distinguishable. There was evidence there that a third party could have heard the statement and understood it was about the plaintiff. The court lacks such evidence here.

On reflection, the court believes that is just too wide a chasm. It is like saying that a member of a particular large group is a criminal (as opposed to all members). Where the group consists of many people, a single member of the group cannot sue for defamation on that basis alone. While it might well be known that the plaintiff is a member of the group, the statement

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does not say that every member is a criminal, only that a particular unidentified member is a criminal. A reasonable listener might well view every member with some suspicion, but that is not enough. The right to free speech is consistent with defamation only because defamation requires the link between the false statement and the individual bringing the action. There is no evidence of which the court is aware that a listener to Statement D would conclude that it was about Carter at the time it was made. (Contrast that to Statement E, where someone did make the connection.) True, the close relationship between Carter and Diddy was hardly a Hollywood secret. But that is not enough to tether Statement D to Carter for defamation purposes. The court therefore concludes that Statement D fails the "of and concerning" test.

The inferences are even more tenuous with Statements A-C. Looking through the transcripts, there is no reference in those Statements to a famous celebrity on Diddy's level that attended his parties and is complicit. (See Schwartz Decl., Exhs. 2, 8-9.) At best, there is Buzbee's October 2 interview with Stephen A. Smith where he discusses the *potential* of other famous parties.

> STEPHEN SMITH: Without naming names -- because certainly I appreciate you being responsible enough and, dare I say, I would have been responsible enough to say I'm not -- I'm not going to even get into names of allegations. I wouldn't put that out there. But may I ask you, from a general perspective or a generic perspective, are these alleged co-conspirators -- are they public figures? Are they well-known people in Hollywood in the music industry? Are they people who worked for P. Diddy Combs? Could you be specific in that regard?
>
> TONY BUZBEE: I would say yes to all of the above. Yeah. People that –
>
> STEPHEN SMITH: Yes to all of the above?
>
> TONY BUZBEE: All the above. People that -- names that you would know.

(*Id.* at Exh. 8, pp. 12:13-13:7.)

There is nothing in the foregoing quote that would implicate or even refer to Carter. "Names you would know" is not enough; the court just does not see it, even if it views the evidence in Carter's favor. And Carter did not work for Diddy. The statement is just too

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generalized for the court to conclude that it even might meet the "of and concerning" test. The same applies to the interviews with Hansen and Attwood. Buzbee indicates generally that famous people may be implicated, but there are no further specifics that would lead any person to believe Buzbee was particularly discussing Carter. (Schwartz Decl., Exh. 2, pp. 7:13-9:9 [noting that celebrities might be named], 19:6-22:3 [stating that celebrities that allowed these things to happen at parties they attended are complicit and the list of indictments will grow], 23:15-24:18 [same]; Exh. 9, pp. 42:4-45:1 [discussing that other individuals or people in Diddy's orbit may be implicated].) His comments implicate celebrities and non-celebrities equally.

That leads to the interesting question whether a statement that was not "of and concerning" the plaintiff at the time it was made can become of and concerning the plaintiff by way of a later reference. (This is the reference to which the court adverted above.) The answer to that lies in the contextual analysis discussed above. Consider the following hypothetical thought experiment. A defendant states "I am going to reveal the name of the heinous criminal at midnight tonight on my website." At that moment, the statement is of and concerning no one; no one could know who the heinous criminal was by dint of that statement. And if at midnight the website remains blank, there will be no defamation. But if at midnight the website states "Bill Smith" and nothing else, the situation changes. Of course, the name "Bill Smith" is not itself defamatory; it makes no assertions of fact or anything else. But the two statements read together would certainly be defamatory (at least if the other elements are met). One cannot look at either statement in isolation; rather one must look at the statements in context and taken together. But consider what happens if the facts change. The first statement is "I know who the heinous criminal is." Again, standing alone, there is no defamation. Nine months later, the name "Bill Smith" appears on the website. The timing is likely too far apart—at least without more facts—to support the notion that one reading the website nine months later and seeing the name would then equate it to the earlier statement such that the earlier statement, even in context, would retroactively become defamatory.

That is the issue that arises here. Statements A-D are remote in time, making the question somewhat of a close one. Whether the time lapse is too long will be a function of the comment

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made and the strength of the contextual linkage. The court knows, of course, Statements A-D did not occur nine months before Carter's name emerged—only about a month or so later. But for now, the court cannot say that the one month lag is long enough such that the public had forgotten defendants' statements that there were other celebrities who were responsible for the crimes asserted, and defendants seemed to take steps to keep the issue alive in the public's mind and to keep themselves front and center in it as a matter of law. That means that a time lapse alone will not take the statements out of the realm of potential defamation. But that only means that the court must take the next step and consider the time lapse in conjunction with the actual words used.

In its prior decision, the court concluded that resolution of that issue would ultimately be an issue of fact for the jury, at least with regard to Statement D. But the court now believes that this issue can, and should, be resolved as a matter of law. The answer to the court's temporal riddle above concerning timing must be found by looking at the juxtaposition of the right to free speech and the right to sue for defamation. While a powerful shield, the right to free speech will not protect one from cute comments designed to find a hyper-technical loophole to defame another. The website hypothetical is just that. It is someone trying to defame another (or at least make a negative statement about another) but find a clever way to avoid liability. The law will not permit that form to prevail over the substance of the tort. But where the statements simply come later such that there is no reason to believe that the lapse is due to some ulterior motive, the thumb is on the scale of free speech. Here, there is simply no evidence that the lapse in time between Statement D and the amendment of the New York lawsuit or Carter's naming was done to avoid defamation liability. It is simply not reasonably inferable that a listener who ultimately recognized that Carter was one of the defendants unnamed in the New York suit would go back and retroactively view Statement D as being defamatory.

The analysis is simpler regarding Statements A-C. Those statements did not identify a celebrity of Carter's stature. In fact, those statements did not focus on star power celebrities at all. The statements talked about banks or other entities that enabled Diddy as opposed to other celebrities that allegedly engaged in the same behavior. The linkage is weaker there, and the court

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is not convinced that the one month gap, coupled with the vaguer references in those statements, would have led a reasonable person to identify those statements with Carter. On this record, they would not. The court also states that although it does believe that some time lapse can be overcome—as in the example above—the test starts to stretch exponentially as time passes.

The question is easier still as to Statements E-F and the "like," although the outcome is different. Those statements were made much closer in time to the revelation of Carter's name—in fact, the "like" *was* the revelation. And given the "like," we know that at least one person was able to figure out that Carter was one of the unnamed defendants in the New York action before he was formally named.

For these reasons, the court is inclined to GRANT the motion as to Statements A-D, but to find that statements E-F and the "like" make it through this element. The court notes that the new evidence does not change this ruling. If the statements were not "of and concerning" Carter, then they were not. Nothing in the new evidence would be relevant to that inquiry.

Defamatory Per Se

Carter next contends that the Statements both impute criminal conduct to him and expose him to public hatred, contempt, ridicule, and disgrace. "With respect to slander per se, the trial court decides if the alleged statement falls within Civil Code section 46, subdivisions (1) through (4). It is then for the trier of fact to determine if the statement is defamatory." (*Regalia v. The Nethercutt Collection* (2009) 172 Cal.App.4th 361, 368.) Civil Code section 46 states that publications that charge "any person with crime, or with having been indicted, convicted, or punished for crime" and/or tend "directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits" constitute defamation. (Civ. Code, § 46, subds. (1), (3).)

At least some of the Statements and the "like" link Carter to the sexual abuse and rape allegations made by Jane Doe. That necessarily charges Carter with the crime of rape. The court believes that Statements E-F and the "like" meet this requirement. Statement E discusses this

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lawsuit but refers to Jane Doe as a sexual assault survivor; by later "liking" a post, Buzbee implies that Carter is the rapist in question. Statement F contains Buzbee's statement, restated in TMZ, that he was not ruling out rape charges against Carter. At the hearing, defendants' counsel asserted that there is nothing actually defamatory in Statement F, as Buzbee only states Jane Doe will go to the police. That is not completely accurate. Buzbee is reported as having said " 'he's not ruling out filing rape charges against [Mr. Carter] with New York authorities,' " and that would certainly suggest that Carter is a rapist. (FAC, ¶99(f).) That is defamatory (if false).

False Assertions of Fact

Carter contends that Statements E-F and "like" are false assertions of fact. "It is the province of the court to determine whether a statement is actionable as a statement of fact susceptible of a defamatory meaning, versus a nonactionable statement of opinion privileged under the First Amendment. '[I]t is a question of law for the court whether a challenged statement is reasonably susceptible of an interpretation which implies a provably false assertion of actual fact. If that question is answered in the affirmative, the jury may be called upon to determine whether such an interpretation was in fact conveyed.' (*Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1608; see *Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 601.)" (*John Doe 2 v. Superior Court* (2016) 1 Cal.App.5th 1300, 1312, parallel citations omitted.)

The court agrees that these read as assertions of fact and there is at least a triable issue of fact as to whether they are false. In the interviews and on this motion, Buzbee continuously emphasized the investigations he undertook to confirm whether the allegations were truthful. (See, e.g., Schwartz Decl., Exh. 8, p. 8:12-17 ["but we are sifting through that and trying to, you know, make sure that we identify and vet people that have real claims, legitimate, credible claims."].) "A court construing an allegedly defamatory statement must consider the statement in the context in which it was made. 'In determining whether statements are of a defamatory nature, and therefore actionable, " 'a court is to place itself in the situation of the hearer or reader, and determine the sense or meaning of the language of the complaint for libelous publication according to its natural and popular construction.' That is to say, the publication is to be measured not so much by its effect when subjected to the critical analysis of a mind trained in the law, but

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by the natural and probable effect upon the mind of the average reader." ' (*Morningstar, Inc. v. Superior Court* (1994) 23 Cal.App.4th 676, 688.)" (*John Doe 2, supra,* 1 Cal.App.5th at p. 1312, parallel citations omitted.)

Statements E-F are factual in nature, and, read in context, so is the "like." The context indicates that Buzbee is proceeding with caution and only pursuing claims that have merit. An average listener would believe that Buzbee's statements truthfully implicated Carter as a rapist.

In reply, defendants assert that the Statements do not even name Carter. This is true for some of the Statements. But as discussed previously, Carter did not need to be explicitly named where context makes it clear, for present purposes, that the comments were about him.

Falsity/Actual Malice

A plaintiff in a defamation action must prove the statement is false by a preponderance of the evidence. (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 81.) Carter presents his own declaration stating he did not sexually assault anyone and notes that the press has reported on material inconsistencies in Jane Doe's testimony. (Carter Decl., ¶4; Schwartz Decl., Exh. 16.) That is sufficient to satisfy his burden in a normal case for purposes of this motion.

Next, there is the question of actual malice, which is one of the hardest questions presented by this motion. Because of Carter's celebrity status and the public interest of the case he must present enough evidence to support an inference that Buzbee "made the challenged statements with 'actual malice' as that term is used in *Sullivan, supra,* 376 U.S. at pages 279–280, i.e., 'with knowledge that it was false or with reckless disregard of whether it was false or not.' " (*Vogel v. Felice* (2005) 127 Cal.App.4th 1006, 1017, parallel citations omitted.) "A defamation plaintiff may rely on inferences drawn from circumstantial evidence to show actual malice. (*Reader's Digest, supra,* 37 Cal.3d at pp. 257–258.) 'A failure to investigate [fn. omitted] [citation], anger and hostility toward the plaintiff [citation], reliance upon sources known to be unreliable [citations], or known to be biased against the plaintiff [citations]—such factors may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication.' (*Id.* at p. 258.) Thus, malice may be inferred where, for example, 'a story is

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fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call.' (*St. Amant v. Thompson* (1968) 390 U.S. 727, 732.) Similarly, an inference of malice may be drawn 'when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation[,] . . . [or] where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. [fn. omitted.]' (*Ibid.*) Conversely, '[t]he failure to conduct a thorough and objective investigation, standing alone, does not prove actual malice, nor even necessarily raise a triable issue of fact on that controversy. [Citations.] Similarly, mere proof of ill will on the part of the publisher may likewise be insufficient. [Citation.]' (*Reader's Digest, supra,* 37 Cal.3d at p. 258.)" (*Christian Research, supra,* 148 Cal.App.4th at pp. 84–85, parallel citations omitted.)

Carter argues that NBC published an article noting inconsistencies in his accuser's story. (Schwartz Decl., Exh. 16.) That is true. The NBC investigation revealed supposed issues in Jane Doe's story, most importantly that her father could not remember driving five hours from their home in Rochester to pick her up in New York City, something one might presume he would recall assuming it is true. (*Id.* at p. 5.) Further, defendants have since dismissed the New York Action with prejudice. (Carter RJN, Exh. A.) The question, then, is whether there is some obligation that a lawyer has to investigate a client's factual assertions before bringing suit or making a statement in public assuming that those assertions are not patently frivolous on their face in order to avoid a defamation suit. The answer is not so clear as one might think.

First, while the NBC investigation supposedly revealed the above, the court is far from sure that it can accept the findings in the investigation as true for purposes of this motion. Those findings are hearsay, so from an evidentiary standpoint the court cannot take them as facts. But even so, the argument is that it would have given Buzbee pause had he learned of it. But "pause" is not the same thing as actual malice.

Second, it could well be, and likely is, the case that a lawyer who believes the client in such a situation will defeat a malicious prosecution suit. But that is in part because of the nature of the attorney/client relationship and the interplay between that relationship and access to the courts. The court is unaware of authority that suggests that the same is true once the lawyer moves

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outside the litigation context. In other words, the law will protect a lawyer who is bringing a suit to vindicate a client's rights even if it is later shown that the client was lying and that a reasonable investigation by the lawyer might have so revealed. But when the lawyer steps outside of that zone and starts giving press releases or press conferences, the court does not believe that the lawyer has any protection greater than anyone else. Yet that does not really answer the question, either. For while the court is not sure if there are cases regarding the failure to investigate in the context of an attorney-client relationship, there are many cases discussing the general failure to investigate in the context of the actual malice standard.

"[T]o support a finding of actual malice, the failure to investigate must fairly be characterized as demonstrating the speaker purposefully avoided the truth or deliberately decided not to acquire knowledge of facts that might confirm the probable falsity of charges. (*Antonovich v. Superior Court* (1991) 234 Cal.App.3d 1041, 1049.)" (*McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 114, parallel citations omitted.) The case *Collins v. Waters* (2023) 92 Cal.App.5th 70 provides guidance. During her re-election campaign, incumbent politician Maxine Waters made a series of statements about her opponent, Joe E. Collins III. (*Id.* at p. 73.) She accused him of being dishonorably discharged from the Navy, which Collins vehemently denied. (*Ibid.*) Collins publicized a purportedly official document demonstrating as much. (*Ibid.*) Collins sued Waters for defamation, and she responded by filing an SMS. (*Id.* at pp. 73-74.) The trial court granted the motion, but the Court of Appeal reversed. (*Id.* at p. 74.)

At issue was the element of actual malice. The Court of Appeal surveyed a series of cases where courts held that the element of actual malice was met where the failure to investigate was equivalent to the purposeful avoidance of the truth or deliberate decision not to acquire knowledge from readily available sources that would verify the accuracy of the claim at issue. (*Collins, supra,* 92 Cal.App.5th at pp. 82-84 [analyzing *Harte-Hanks*, *Khawar*, and *Antonovich*].) "A fact finder could conclude Waters was like Journal News, Globe, and Antonovich: do not ask if you are committed to the project and would rather not know. After they are told that potentially devastating information is easily available, decisionmakers who opt for ignorance instead of ready truth can be willfully blind. If fact finders drew this inference, Collins's proof could constitute

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clear and convincing evidence of subjective actual malice. Reasonable minds could unhesitatingly agree that people *purposefully* ignorant about the truth can have a high degree of subjective awareness of probable falsity of a claim they deliberately avoid checking. At this preliminary stage of the case, then, Waters has not defeated Collins's suit as a matter of law. (See *Monster*, *supra*, 7 Cal.5th at p. 788, [court evaluates the defendant's showing to determine if it defeats the plaintiff's claim as a matter of law].)" (*Id.* at p. 85, emphasis in original.) Waters did not confirm whether the discharge document provided by Collins was real, even though it certainly looked official (and she still had not checked at the time of filing her SMS and appellate briefing). (*Id.* at pp. 84-85.) That, the court held, was sufficient to establish actual malice for purposes of the second prong analysis. (*Id.* at p. 85.)

This is the analysis to apply here. And applying it, the court cannot say that as a general matter a lawyer has some obligation to do an investigation to determine whether a client is telling the truth before making statements about the case. Indeed, any other outcome could chill the attorney/client relationship and free speech because under such circumstances it would be far too easy to start second-guessing what the attorney should have done, how deep the investigation should have gone, what leads should have been followed, and so on and so on. Doing so after the fact would put attorneys at too great a risk and would chill the exercise of First Amendment rights. It is one thing to say that where there is an obvious and key reference that will conclusively determine whether the statement was true or not—such as was the situation in *Waters*—it equates to willful ignorance not to look at all. The court just cannot say such is the situation here. True, it might well be that Good Charlotte's tour schedule could be relatively easily ascertained, but even assuming that the schedule was such as to be inconsistent with Doe's statement, it would not of necessity mean that she made up the whole thing. And the father's recollection is the same sort of thing. Without more, then, the failure to do what NBC did (assuming Buzbee would have obtained the same information) is not enough to show malice. (It would be different if the party to which Doe referred had never occurred; that is very easy to verify. But the party did occur.)

But Carter claims there is more. Carter notes that defendants stated that they had carefully investigated the claims of those claiming to have been abused by Carter before taking Doe on as

a client. In particular, defendants expressly stated that they were in fact doing an investigation and were only pursuing claims that panned out. (See generally, *Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 711 ["This model supports an inference of malice, namely that Gradient relied on information from biased sources, *made statements in its reports without doing the necessary investigation and due diligence*, and made statements with defamatory implication to achieve a preconceived result. This dynamic, described in detail by Anifantis, suffices to show a reasonable probability that the statements discussed above were made with actual malice. *That Gradient promoted itself as independent and objective when the opposite was true cinches our conclusion.*"], emphasis added.)

That makes the question closer. And in its original analysis, the court concluded that it was enough. The court reasoned that Buzbee did not need to say he had carefully vetted each plaintiff to make sure that their story was accurate, but having done so, his failure to do the vetting coupled with a showing that the client's statement was false could be enough, at least under a "minimal merit" standard. On reflection, though, the court is no longer of that view. Once again, this gets in just too deeply into second-guessing after the fact the extent of the investigation. Had there been no investigation at all, that might be one thing. But here, that is not the case (putting the new evidence to one side). Carter cannot show that Buzbee did nothing at all, and Buzbee has submitted evidence that he did do some investigation in the sense that Doe was interviewed at length by the firm. There is also evidence of Carter and Diddy's close relationship and the fact that it appears to be undisputed that both were present at the venue where the alleged act occurred. The question therefore turns on whether the court is willing to second guess (or have a jury second guess) what a reasonable investigation ought to be. That test is potentially too heavy of a burden in the free speech context, and turns the robust actual malice requirement into something more of a factual hurdle that will forever be litigated, chilling speech.

In that light, and at least absent any red flags that would indicate that Doe's story was not credible, the court cannot say that Buzbee's statement that clients were vetted is enough to allow the court to infer actual malice because the vetting process was not all that Carter might wish it were. In other words, there is a difference in the court's mind as to whether there could be a

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finding of actual malice when Buzbee claimed to have done an investigation but did nothing (yes) versus when Buzbee claimed to have done an investigation but it was arguably not deep enough (no). At most, Carter's evidence suggests that Buzbee could have done more, and that had he done so, he might have—or even would have—learned of facts that might have given him pause before accepting Doe's assertions. But in the context of free speech, the court will be very slow to start dictating how deep the investigation needed to go to defeat actual malice. Even at this stage, when the court must view Carter's evidence liberally and cannot weigh the evidence, starting down that path will inevitably lead to a direct conflict with constitutionally protected speech.

Which brings us to the new evidence. The court turns first to the declaration by an investigator that one could recreate the NBC investigation with ease and find other information about Doe that might be a problem. As discussed above, that is not enough. There is little new in that declaration beyond that which was in the NBC report. And even the information in the investigator's declaration is not conclusive. That simply does not move the needle.

Next there is the fact that Jane Doe dismissed her case with prejudice and John Doe never filed. That does not of necessity establish that the case was dismissed or not filed because there was no truth to the assertions. As to John Doe, it is not enough. That he ultimately did not file suit is not enough for the court to infer actual malice. As to Jane Doe, the problem is that the dismissal is not as pure as Carter might wish. It is one thing for Doe to dismiss the case on the eve of a dispositive motion; perhaps if a dismissal with prejudice occurs the day before the summary judgment hearing or after a tentative order granting summary judgment is made, one can presume that there was no merit to the case at all. But there is evidence that Buzbee has presented (in the form of an email exchange between counsel) that the dismissal here was more in the nature of a negotiated "stand down" than a concession that the case had no merit to start. That also fits well with the narrative that Doe was willing to drop the case in part because she believed she was in danger. (Of course, the source of that belief is Buzbee, or his firm, which is itself somewhat of a problem; just not one that is dispositive here.)

Further, a dismissal does not mean that Buzbee was acting with actual malice at the time suit was brought. That would be true even were the court in a better position to conclude that the reason the suit was dismissed was because the plaintiff (or counsel) eventually concluded that the suit had no merit. And there are other reasons why a plaintiff in a case like this might dismiss the action. The New York litigation would have taken a toll on Doe even if her allegations were true. She would have been subjected to intense media scrutiny as well as the potential of at least a public relations attack by Carter. And her past is her past. The media and public attention would not have stopped with the event in question; her entire life would have (or could have) become an open book. This court does not know if there are other things in Doe's life that she would prefer to keep private, but it hardly requires a creative genius to imagine that there might be. It could well be that she would prefer that those things not be spread upon the public record. The point is not to conclude one way or the other what motivated Doe to drop the litigation in New York. It is only to say that the dismissal does not give rise to an inference of actual malice, even viewing the evidence in Carter's favor.

All of that said, the situation would change, and change dramatically, if the investigators' declarations as to the conversation with Doe were admissible for the truth of what Doe stated. For if that were the case, then there would be some evidence not only that Carter had nothing to do with any sexual assault on Doe, but that Buzbee knew it in the sense that (according to Doe) it was Buzbee that kept pressing to get Doe to implicate Carter. That pressure, coupled with the statement by Buzbee that he had investigated the claims, would be enough to support an inference of actual malice. Therefore, *but for the court's evidentiary ruling*, the court would come out the other way on this motion. However, for the reasons set forth above, the court cannot agree that the investigators' statements are admissible because they would be relevant only if Doe's statements therein were true, and the court believes that Doe's statements were hearsay.

The court turns very briefly to the question of special damages. The court believes that Carter has made the necessary showing for that. The showing required (which is something relevant to a defamation *per se* case) is that there were damages to Carter's property, business, trade, profession, or occupation. (See Civ. Code, §§ 45a [a plaintiff must plead and prove special

damages for defamation per quod]; 48a, subd. (d)(2) [defining special damages]; Carter Decl., ¶20.) While it is true that it is the entity he controls that lost the bookings, the court would view the two as closely enough related such that a loss for the entity is a loss for Carter, at least at this stage of the proceedings.

Accordingly, the court believes that Carter has not made the sufficient showing under prong two of the SMS test to withstand the motion. Again, that is because, and only because, the court believes that the investigators' declarations cannot be considered, even under *Sweetwater*. Were the court to consider those declarations for the truth of what Doe told the investigators, the court would believe that there is a triable issue of fact as to actual malice, and the motion would be denied as to Statements E-F and the "like." However, because the court does not believe that it can consider the truth of Doe's statements given *Sanchez*, the court must GRANT the motion.

3. IIED

The court turns quickly to the IIED claim. " ' "[T]o state a cause of action for intentional infliction of emotional distress a plaintiff must show: (1) outrageous conduct by the defendant; (2) the defendant's intention of causing or reckless disregard of the probability of causing emotional distress; (3) the plaintiff's suffering severe or extreme emotional distress; and (4) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." ' (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1259, quoting *Trerice v. Blue Cross of California* (1989) 209 Cal.App.3d 878, 883.)" (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 832, parallel citations omitted.)

That analysis is largely the same as to defamation, though not precisely the same; after all, "actual malice" is a term that is associated with defamation, not IIED. But the court cannot find daylight in this context. To say that actual malice is required for defamation but not for IIED based on speech essentially does away with the actual malice test altogether as a bulwark against attacks on free speech related to public figures. The court believes that where the IIED is based solely on the alleged falsity of speech, that tort will stand or fall with defamation. Accordingly, the motion is GRANTED as to this cause of action as well.

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V. Conclusion

The court wants to emphasize that this is a difficult motion, and that the new evidence has thrown a monkey wrench into the court's reasoning, or at least its original reasoning. The court also recognizes that it is painfully obvious that the court is struggling with this motion. In fact, the court has issued a series of tentative decisions, each different (and sometimes significantly so) than the one before. And all of them had denied the motion at least in part. After spending just about all of the time permitted under the California Constitution to consider the question, though, the court has (finally) come to ground. This is the last iteration and is the court's final word.

An SMS is a powerful tool. It is designed to protect important constitutional rights and thus ought not to be denied lightly, but it closes the courthouse door, so it ought not be granted lightly either. Where, as here, the underlying case involves accusations of a truly horrible crime, the court must tread especially carefully. The Constitution and constitutional rights cannot thrive where the courts become a weapon to invoke silence out of fear of litigation, but neither can due process survive when the courthouse doors slam shut in the face of one wrongly accused. Our Legislature sought to find a carefully crafted rule to balance those competing vital interests; to allow lawsuits to be litigated where there is reason to believe a wrong was done, but to throw them out speedily where they are being used to silence discussion or impede justice rather than further it. This court has tried to balance these competing values and has ultimately come out on the side of dismissing the action, although the court is not wholly satisfied that this is the outcome that best serves the legislative and constitutional doctrines. All of that said (and at length), this court is only the first stop on the parties' SMS journey. It will be for the Court of Appeal to determine whether the court got it right or wrong, and whether the suit ought to go forward or ought to end. Stay tuned.

In any event, the motion is GRANTED.

DATED: June 30 2025

Hon. Mark H. Epstein
Judge of the Superior Court