Hearing Date: 12/13/2024
Department: 37

HEARING DATE: Friday, December 13, 2024

CASE NUMBER: 24STCV17141

CASE NAME: *Nomi Abadi v. Daniel Elfman*

MOVING PARTY: Defendant Daniel Elfman

OPPOSING PARTY: Plaintiff Nomi Abadi

TRIAL DATE: Not Set

PROOF OF SERVICE: OK

PROCEEDING: **Special Motion to Strike (CCP § 425.16.)**

OPPOSITION: 25 November 2024

REPLY: 3 December 2024

TENTATIVE: Defendant Elfman's special motion to strike is denied.

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Background

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On July 10, 2024, Nomi Abadi ("Plaintiff") filed a Complaint against Daniel Elfman ("Defendant") and Does 1 to 10, alleging a single cause of action for defamation per se. The Complaint alleges that famed film and music composer, Defendant Elfman, defamed Plaintiff in a July 29, 2023, *Rolling Stone* article in which Defendant painted Plaintiff as a spurned lover who retaliated against Defendant by making false sexual misconduct allegations against him.

Defendant Elfman has filed this Special Motion to Strike under CCP § 425.1. Plaintiff opposes the Motion. The matter is now before the court.

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Request for Judicial Notice

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The Court may take judicial notice of "facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code § 452(h).) The Court may take judicial notice of records of any court of record of the United States. (*Id.* at § 452(d)(2).) However, the court may only judicially notice the existence of the record, not that its contents are the truth. (*Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1565.)

Defendant Elfman **requests judicial notice of the following:**

Exhibit 1: Nomi Abadi's Wikipedia page, which is available at: https://en.wikipedia.org/wiki/Nomi_Abadi#:~:text=Nomi%20Abadi%20is%20an%20American%20born%20SyrianEgyptian%20Jewish%20pianist,%20vocalist,#:~:text=Nomi%20Abadi%20is%20an%20American%20born%20Syrian- Egyptian%20Jewish%20pianist,%20vocalist.

Granted. "While we may take judicial notice of the existence of the audit report, Web sites, and blogs, we may not accept their contents as true." (*Ragland v. U.S. Bank National Assn*. (2012) 209 Cal.App.4th 182, 193.)

Exhibit 2: An article published by *The Hollywood Reporter*, dated December 10, 2021, entitled "#MeToo Missed Us: Female Composers Speak Out," which is available at https://www.hollywoodreporter.com/

Speak Out,'" which is available at https://www.hollywoodreporter.com/news/music-news/female-composers-metoo-missed-us1235058603/?fbclid=IwAR2EP327M6cW7jl3xm_0J0YObMXgwgRNOql1Kh3PUKCBHJtHD_UYLsA_h4.

Granted. (See *Ragland*, *supra*, 209 Cal.App.4th at p. 193.)

Exhibit 3: An article published by *The Guardian*, dated February 21, 2023, entitled "The Hollywood crisis #MeToo missed: 'Every female composer has been through it,'" which is available at https://www.theguardian.com/film/2023/feb/20/film-scoring-hollywood-misconductabuse-harassment-metoo.

Granted. (See *Ragland*, *supra*, 209 Cal.App.4th at p. 193.)

Exhibit 4: An article published by *Voice of OC*, dated January 5, 2023, entitled "Residents Demand Investigation Into Sexual Abuse Allegations at OC School of the Arts," which is available at https://voiceofoc.org/2023/01/residents-demand-investigation-into-sexual-abuseallegations-at-oc-school-of-the-arts/.

Granted. (See *Ragland*, *supra*, 209 Cal.App.4th at p. 193.)

Exhibit 5: An article published by *Rolling Stone*, dated February 4, 2023, entitled "Sexual Assault Survivors Call Out Music Industry Ahead of Grammys," which is available at https://www.rollingstone.com/music/music-news/sexual-assault-survivors-grammys-1234673714.

Granted. (See *Ragland*, *supra*, 209 Cal.App.4th at p. 193.)

Exhibit 6: An article published by *Variety*, dated February 3, 2023,

entitled “Sexual Assault Survivors Speak Out on Grammy Weekend: ‘The Music Industry is the Catholic Church on Steroids,’” which is available at https://variety.com/2023/music/news/sexual-assault-jeff-anderson-nick-carter-marilyn-manson-1235512594/.

Granted. (See *Ragland*, *supra*, 209 Cal.App.4th at p. 193.)

Exhibit 7: An article published by the *OC Register*, dated November 3, 2022, entitled “OSCA lunch break met by demonstrators alleging sexual misconduct,” which is available at https://www.ocregister.com/2022/11/03/osca-lunch-break-met-by-demonstrators-alleging-sexualmisconduct.

Granted. (See *Ragland*, *supra*, 209 Cal.App.4th at p. 193.)

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evidentiary objections

Defendant Elfman’s Evidentiary Objections to the Declaration of Plaintiff Nomi Abadi:

Objections 1 to 44 are overruled.

Plaintiff’s Evidentiary Objections to the Declaration of Melisa McGregor:

Objection No. 1 is sustained due to lack of personal knowledge.

Objection No. 2 is overruled.

Plaintiff’s Evidentiary Objections to the Declaration of Christopher O’Riley:

Objections Nos. 3, 6, 10, 11, and 12 are overruled.

Objections Nos. 4, 8, and 9 are sustained due to lack of foundation.

Objection Nos. 5, and 7 are overruled due to hearsay.

Plaintiff's Evidentiary Objections to the Declaration of Rose Ruin:

Objections Nos. 13, 16, 17, 19, 21, 22, 24-27, and 29 are sustained due to hearsay.

Objection No. 15 is overruled *as to the statement "My impression from Ms. Abadi's statements and text messages was that she had romantic ambitions with Mr. Elfman"* but sustained as to the statement: *"For instance, Ms. Abadi stated that her communications with Mr. Elfman were 'Just fun loving. Don't sense any flirtation from him.'"*

Objection Nos. 14, 18, 20, 23, and 28 are overruled as the statements are admissible as a party admission.

Plaintiff's Evidentiary Objections to the Declaration of Defendant Daniel Elfman:

Objection Nos. 30, 31, 33, 37, 43, and 45 are overruled.

Objection No. 39 as to Paragraph 12:8-9 is overruled, sustained as to lines 8 to 9 as to the sentence: "I learned that she began making wild accusations to various people about me, and expressed a deep anger toward me" due lack of foundation. Paragraph 12:10 to 12: "For instance, I understand that Ms. Abadi told a close friend that she wasn't sure whether she wanted to destroy me or take my money" is sustained due to hearsay.

Objection No. 32 is sustained due to lack of foundation for asserted fact.

Objection Nos. 35 to 36 and 42 are sustained as the Declarant is testifying about the contents of a writing in violation of the Best Evidence Rule. (Evid. Code, §§ 1521, 1523.)

Objection 41 is overruled as to the statement in Paragraph 14:24-15: "Therefore, in 2018, I entered a Settlement Agreement with Ms. Abadi

“Therefore, in 201[illegible], I entered a Settlement Agreement with Ms. Abadi, agreeing to make installment payments until December 2022. Objection 41 is sustained as to the objection to Paragraph 14:25-17: “This agreement also included terms for confidentiality, non-disparagement, arbitration for disputes, and liquidated damages for any breach” because the Declarant is testifying to the contents of a writing in violation of the Best Evidence Rule. (Evid. Code, §§ 1521, 1523.)

Plaintiff’s Evidentiary Objections to the Declaration of Rebecca Kaufman:

Objection Nos. 46, 48, and 49 are overruled.

Objection No. 47 is sustained as the Declarant is testifying as to the contents of the writing in violation of the Best Evidence Rule. (Evid. Code, §§ 1521, 1523.)

anti-slapP motion

I. Legal Standard

CCP § 425.16 sets forth the procedure governing anti-SLAPP motions. ¿ In pertinent part, the statute 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.” (CCP, § 425.16, subd. (b)(1).) “[A]n anti-SLAPP motion, like a conventional motion to strike, may be used to attack parts of a count as pleaded.” (*Baral v. Schnitt*¿(2016) 1 Cal.5th 376, 393.) The purpose of the statute is to identify and dispose of lawsuits brought to chill the valid exercise of a litigant’s constitutional right of petition or free speech. (Code Civ. Proc., § 425.16, subd. (a); *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1055-1056.)¿¿¿¿¿

Courts employ a two-step process to evaluate anti-SLAPP motions. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 61.) To invoke the statute's protections, the defendant must first show that the challenged lawsuit arises from protected activity, such as an act in furtherance of the right of petition or free speech. (*Ibid*.) From this fact, courts "'presume the purpose of the action was to chill the defendant's exercise of First Amendment rights.¿ It is then up to the plaintiff to rebut the presumption by showing a reasonable probability of success on the merits.'" (*Ibid.*) In determining whether the plaintiff has carried this burden, the trial court considers "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (CCP, § 425.16, subd. (b)(2); see *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291.)¿¿¿¿

II. Discussion

Defendant Elfman has filed this special motion to strike because he asserts that this action arises from protected activity and should be dismissed.

The Complaint alleges that on July 29, 2023, *Rolling Stone* published an article entitled "Danny Elfman Settled a Sexual-Harassment Allegation for $830,000" (the "July 2023 Article"). (Compl, ¶¶ 3, 4, 10, 25, 70.) In the *Rolling Stone* article, *Defendant* Elfman alleged that Plaintiff's allegations were "'vicious and wholly false,'" the "'intention was to break up [his] marriage and replace [his] wife,'" and as a spurned lover, Plaintiff retaliated via "fabricated sexual harassment allegations to make him 'pay for rejecting her,' and that '[Defendant has] 'done nothing indecent or wrong.'" (Compl., ¶ 11; RJN Ex. 2 at pp. 3-4.)

The July 2023 Article in *Rolling Stone* stated that Plaintiff had sued Elfman for failing to pay pursuant to a settlement agreement. (Elfman, Decl., ¶ 20, Ex. 15 [July 2023 Article].) The *Rolling Stone* article stated that "Elfman provided a starkly different account of the nature of his and Abadi's relationship." (*Id*.) "In a lengthy response to Rolling Stone's inquiries, Elfman, through an attorney, denied all of Abadi's allegations

inquiries, Elfman, through an attorney, denied all of Abadi's allegations, including claims that he'd ever exposed himself to Abadi or masturbated in front of her." (*Id*.) The *Rolling Stone* quoted Defendant Elfman as stating:

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"How do I respond to accusations so serious that being innocent is not a valid defense? It is excruciating to consider that a 50-year career may be destroyed in one news cycle as a result of vicious and wholly false allegations about sexual misconduct," Elfman says in a statement to Rolling Stone. "Ms. Abadi's allegations are simply not true. I allowed someone to get close to me without knowing that I was her 'childhood crush' and that her intention was to break up my marriage and replace my wife. When this person realized that I wanted distance from her, she made it clear that I would pay for having rejected her. I allowed an ill-advised friendship to have far-reaching consequences, and that error in judgment is entirely my fault. I have done nothing indecent or wrong, and my lawyers stand ready to prove with voluminous evidence that these accusations are false. This is the last I will say on this subject."

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(Elfman Decl., ¶ 20, Ex. 15.)

Step 1: Defendant Elfman's Alleged Wrongful Conduct Arose out of A Protected Activity

"In ruling on a defendant's anti-SLAPP motion, the trial court engages in a two-step analysis." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) First, the court determines "whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity," which includes the defendants' right of petition, or free speech, under the constitution, in connection with issues of public interest. (*Ibid*; CCP, § 425.16.)¿"[T]he 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." (*Bonni v. St. Joseph Health System* (2021) 11 Cal.5th 995, 1010 (*Bonni I*).)

Defendant Elfman asserts that his statements made to *Rolling Stone* are protected because they were expressly made in anticipation of litigation. (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 784 [“communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege” and “are equally entitled to the benefits of section 425.16.”].) While Plaintiff disputes that the statements made to *Rolling Stone* are prelitigation activity, Plaintiff fails to dispute Defendant Elfman’s second contention, that his statements are protected activity because they concern issues of public interest.

Section 425.16(e)(4) protects any conduct in furtherance of the exercise of free speech or petition rights “in connection with a public issue or an issue of public interest[.]” (CCP § 425.16(e)(3)-(4).) “To fall within the scope of subdivision (e)(3) and (4) of the anti-SLAPP statute, a defendant must establish: (1) that the challenged statement or conduct implicates a public issue or a matter of public interest; and (2) that the speech or conduct was made “in connection with” a public issue or a matter of public interest.” (*Bernstein v. LaBeouf* (2019) 43 Cal.App.5th 15, 22 citing CCP § 425.16(e)(3)-(4).)

“In articulating what constitutes a matter of public interest, courts look to certain specific considerations, such as whether the subject of the speech or activity ‘was a person or entity in the public eye’ or ‘could affect large numbers of people beyond the direct participants’ [citation]; and whether the activity ‘occur[red] in the context of an ongoing controversy, dispute or discussion’ [citation], or ‘affect[ed] a community in a manner similar to that of a governmental entity.’ ” (*FilmOn.com Inc. v. DoubleVerify Inc*. (2019) 7 Cal.5th 133, 145-146, 246 (*FilmOn*).) “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. [Citation.] Second, we ask what functional relationship exists between the speech and the public conversation about some matter of public interest.” (*Id*. at pp. 149–150.) “‘We hold likewise: that a statement is about a person or entity in the public eye may be sufficient, but is not necessary, to establish the statement is ‘free

sufficient, but is not necessary, to establish the statement is 'free speech in connection with a public issue or an issue of public interest.' [Citations.] " (*Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 902.) A public figure is someone with "general fame or notoriety in the community, and pervasive involvement in the affairs of society[.]" (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 352.)

The Complaint asserts that Defendant Elfman is:

[A]n internationally-known American film and television composer with millions of fans worldwide. Formerly the frontman and writer of new wave ska rock band Oingo Boingo from 1979-1995, Elfman has composed over 100 feature film scores (including *The Nightmare Before Christmas*, *Alice In Wonderland*, *Spider*-Man 1-3), and composed for television (*The Simpsons, Wednesday*), and various concert works. Elfman has received a Grammy award, three Emmy awards and four Oscar nominations.

(Compl., ¶ 29.) This fact is not disputed by Defendant Elfman. (Elfman Decl., ¶ 30, RJN Exs. 2-7.)

Plaintiff's opposition fails to dispute that Defendant Elfman is a public figure. The *Rolling Stone* article highlights Defendant Elfman's involvement as a matter of public interest due to his status as a renowned film composer entangled in public allegations of sexual misconduct. Furthermore, sexual misconduct is a public issue of great public concern given the prominence of the #MeToo movement and the increase in allegations within the film and television industry. (See *Dickinson v. Cosby* (2019) 37 Cal.App.5th 1138, 1161 (*Dickinson*) [Asserting that sexual misconduct allegations against a public figure "was a topic of considerable public interest."]; *Coleman v. Grand* (E.D.N.Y. 2021) 523 F.Supp.3d 244, 259.)

Defendant Elfman satisfies his burden under the first step of the Anti-SLAPP statute because he is a public figure involved in a topic of considerable public interest. Therefore, the court need not decide if

considerable public interest. Therefore, the court need not decide if Defendant Elfman's statements are protected under the litigation privilege under the first part of the anti-SLAPP analysis.

Step 2: Plaintiffs' Reasonable Probability of Success on the Merits

"The plaintiff need only establish that his or her claim has 'minimal merit' [citation] to avoid being stricken as a SLAPP." (*Soukup, supra*, 39 Cal.4th at p. 291.) "The trial court merely determines whether a prima facie showing has been made that would warrant the claim going forward." (*HMS Capital, Inc. v. Lawyers Title Co*.¿(2004) 118 Cal.App.4th 204, 212.) "The court considers the pleadings and evidence submitted by both sides but does not weigh credibility or compare the weight of the evidence. Rather, the court's responsibility is to accept as true the evidence favorable to the plaintiff¿[citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.¿[Citation.] The trial court merely determines whether a prima facie showing has been made that would warrant the claim going forward."¿(*Id*. at p. 212.)¿¿¿

"The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage." (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1259 (*Jackson*) [internal citation omitted].) "In general, leaving aside certain qualifications that are not relevant in this case, a written communication that is false, that is not protected by any privilege, and that exposes a person to contempt or ridicule or certain other reputational injuries, constitutes libel." (*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1242.)

First, for Plaintiff to prevail on her defamation claim, she must show that the statement was not privileged, meaning that the litigation privilege does not apply to Defendant Elfman's statement. Defendant Elfman claims that the allegedly defamatory statements made in the July 2023 Article are protected by the litigation privilege because they were made

Article are protected by the litigation privilege because they were made pursuant to a demand letter contemplating a lawsuit against *Rolling Stone.* (See *Dickinson*, *supra*, 17 Cal.App.5th at p. 683 [Noting “[t]here is some dispute in the case law as to which party bears the burden of proof on an affirmative defense in the context of an anti-SLAPP motion” but “regardless of the burden of proof, the court must determine whether plaintiff can establish a prima facie case of prevailing, or whether defendant has defeated plaintiff's evidence as a matter of law.”].)

i. Background on Prior Suits Involving the Parties

The Parties do not dispute that on or about February 2018, Defendant Elfman received a demand letter from Plaintiff’s attorney accusing Defendant Elfman of intentional infliction of emotional distress. (Elfman Decl., ¶ 13, Ex. 11 [Feb. 2018 Demand Letter].) Fearing backlash given the #MeToo movement, Defendant Elfman entered into a Settlement Agreement with Plaintiff that included “included terms for confidentiality, non-disparagement, arbitration for disputes, and liquidated damages for any breach.” (*Id*., ¶ 14.) Defendant Elman asserts that in early 2023, he was contacted by *Rolling Stone* regarding the allegations Plaintiff had made against Defendant Elfman. (*Id*., ¶ 16; Abadi Decl., ¶ 26.)

Defendant Elfman states that to prevent the story from becoming public “and in anticipation of potential litigation against Rolling Stone and those responsible if I was defamed”, Elfman’s counsel sent a letter to *Rolling Stone* on March 6, 2023 (the “March 2023 Letter”) denying Plaintiff’s allegations. (Elfman Decl., ¶ 17.) Elfman asserts “[t]he function of the March 2023 Letter was, in significant part, to put Rolling Stone on notice of the existence of facts controverting Ms. Abadi’s allegations, in anticipation of potential litigation against Rolling Stone for defamation if it published her false allegations.” (*Ibid*.) “When the March 2023 Letter was sent to Rolling Stone, I was seriously contemplating litigation against that magazine if it published a defamatory article about me based on Ms. Abadi’s allegation.” (*Id*. at p. 19.) “The March 2023 Letter was sent, in part, in preparation for such a litigation.” (*Ibid*.)

litigation." (*Ibid*.)

Defendant Elfman's counsel, Rebecca Kaufman, confirms Elfman's statements that the March 2023 Letter sent by her to *Rolling Stone* was "an effort to prevent publication of those false and defamatory allegations—and in anticipation of potential litigation against Rolling Stone and other culpable parties should those allegations be published[.]" (Kaufman Decl., ¶ 4, Ex. 12 [March 2023 Letter].) Defendant Elfman initially believed the March 2023 Letter had been effective, until *Rolling Stone* published the article in July 2023 ("July 2023 Article"). (Elfman Decl., Ex. 15.) Elman admits that "[t]he July 2023 Article quoted from the March 2023 Letter and noted my denial of the allegations" and was published by *Rolling Stone* in relation to the lawsuit Plaintiff filed against Elfman for breach of the Settlement Agreement. (*Id*., ¶ 20.)

Kaufman states the March 2023 Letter "was directed to, among other persons, Rolling Stone's deputy general counsel." (Kaufman Decl., ¶ 6.) Specifically, the letter is addressed to Judith Margolin, the Senior Vice President, Deputy General Counsel, and Noah Shachtman the Editor of *Rolling Stone*. (*Id*., Ex. 12.) The March 2023 Letter bears the letterhead of Defense Counsel "Bergeson LLP" and bears the statement "***Personal & Confidential***" and "**NOT FOR PUBLICATION**." (*Id*., Ex. 12 [emphasis original].) The Letter begins:

Dear Ms. Margolin & Mr. Shachtman:

We respond to allegations from Nomi Abadi that our client famed musician and composer Danny Elfman engaged in sexual misconduct.

(Kaufman Decl., Ex. 12 at p. 1.)

The March 2023 Letter states in relevant part:

Mr. Elfman's responses to Rolling Stone's questions conclude this letter. As we discussed, Mr. Elfman is providing some statements on the record, some off the record, and some on background. Statements marked in green are on the record and should be attributed to "a spokesperson for Mr. Elfman." Statements marked in yellow are for background. Statements not marked in color are off the record.

The following statement is the **only on-the-record statement that may be directly attributed to Mr. Elfman:**

"How do I respond to accusations so serious that being innocent is not a valid defense? It is excruciating to consider that a 50-year career may be destroyed in one news cycle as a result of vicious and wholly false allegations about sexual misconduct. Ms. Abadi's allegations are simply not true. I allowed someone to get close to me without knowing that I was her "childhood crush" and that her intention was to break up my marriage and replace my wife. When this person realized that I wanted distance from her, she made it clear that I would pay for having rejected her. I allowed an ill-advised friendship to have far reaching consequences, and that error in judgment is entirely my fault. I have done nothing indecent or wrong, and my lawyers stand ready to prove with voluminous evidence that these accusations are false. This is the last I will say on this subject."

(Kaufman Decl., Ex. 12 at p. 12 [highlight and emphasis in original].) Defendant Elfman's statement made on the record in the March 2023 Letter was later quoted by *Rolling Stone* in the July 2023 Article, which forms the basis of Plaintiff's defamation claim. (Elfman Decl., Ex. 15.)

Defendant Elfman maintains that the March 2023 Letter, including the statements Elfman consented to be made on the record, are protected statements due to the litigation privilege because they were made in anticipation of litigation. (See *Nguyen v. Proton Technology Corp.* (1999) 69 Cal.App.4th 140, 148 [finding prelitigation communications

(1999) 69 Cal.App.4th 140, 148 [finding prelitigation communications, such as a demand letter, relate to an anticipated lawsuit are protected by the litigation privilege.”])

Indicia that the March 2023 Letter was filed in anticipation to a lawsuit against *Rolling Stone* include the following statements:

The false allegations Rolling Stone intends to publish about Mr. Elfman regarding sexual misconduct constitute actionable defamation per se, and he need not show special damages to prevail should he file a lawsuit against your publication. [Citations] The magazine can be held liable for publishing the allegations regardless of whether it is only repeating the statements of sources. [Citations.] Presenting false accusations, even if presented with the subject’s denial, can still amount to actionable defamation. [Citation.]

[. . .]

If Mr. Elfman pursues a defamation claim, the reliability of Ms. Abadi and her claims will be the paramount issue, both in defending against an anticipated anti-SLAPP motion and at trial. We are confident she will prove so unreliable and biased that Mr. Elfman will overcome his burden of proving actual malice against Rolling Stone. [Citation] The same goes for the magazine’s reliance on Ms. Abadi’s six friends. Again, whether Ms. Abadi told six or sixty people, none of them possess firsthand or contemporaneous knowledge. [Citation.]

[. . .]

We caution against publishing Ms. Abadi’s false allegations, as similar ones against other innocent people have proven the death knell to reputations and careers, and Mr. Elfman will have no choice other than to seek redress should Rolling Stone harm his career.

[. . .]

Please let us know if you have further questions. We look forward to meeting with your reporter and sharing numerous documents that demonstrate what really happened and Ms. Abadi's true motives.

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(Kaufman Decl., Ex. 12.)

Ms. Kaufman asserts that after the July 2023 *Rolling Stone* Article was published, Defendant Elfman sent a Retraction Demand. (Kaufman Decl., ¶ 9, Ex. 16.) The Retraction Demand requested retraction of the sexual misconduct claims attributed to Plaintiff made against Elfman, and not of the statements Elfman made to *Rolling Stones* about the falsity of Plaintiff's claims. (*Id*.) The litigation 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 (*Action Apartment Assn.*) [italics original] citing *Silberg v. Anderson* (1990) 50 Cal.3d 205, 216, 266.) "The privilege 'is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards.'" (*Action Apartment Assn.* at p. 1241 citing *Rusheen v. Cohen (*2006) 37 Cal.4th 1048, 1057.)

ii. The Litigation Privilege Does Not Apply to Defendant Elfman's Statements

Plaintiff asserts that this action is not based on Defendant Elfman's comments to *Rolling Stone* but what *Rolling Stone* published with Elfman's consent. For the litigation privilege to apply, the communication "must be 'in furtherance of the objects of the litigation'" and "'be connected with, or have some logical relation to, the action, i.e., that it not be extraneous to the action.' " (*Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1486.) Defendant Elfman

Lane Associates (2008) 160 Cal.App.4th 1467, 1486.) Defendant Elfman asserts that the purpose of the March 2023 Letter was to dissuade *Rolling Stones* against publishing Plaintiff's false allegations due to possible legal action, but fails to explain how authorizing *Rolling Stone* to publish his statements was conduct done in furtherance of his litigation goals against *Rolling Stone*. (Elfman Decl., ¶ 17; Kaufman Decl., ¶ 6.)

"A prelitigation communication is privileged only when it relates to litigation that is contemplated in good faith and under serious consideration." (*Action Apartment Assn*., *supra*, 41 Cal.4th at p. 1251.) The record before the court does not support the finding that the statements contained in the March 2023 Letter were prelitigation communications relating to litigation that was contemplated in good faith and under serious consideration. First, the March 2023 Letter was addressed to both *Rolling Stone*'s general counsel and its editor. Second, Defendant Elfman expressly went on the record and consented to *Rolling Stone* publishing his alleged defamatory statements. Third, the March 2023 Letter did not state it was a "demand letter" nor does such an indication appear on the face of the letter. The substance of the letter appears to be Defendant Elfman's response to *Rolling Stone*'s request for comment regarding Plaintiff's breach of contract suit and prior lawsuit by Plaintiff regarding sexual misconduct allegations. (Kaufman Decl., Ex. 12.) In responding to *Rolling Stone*'s inquiry and authorizing *Rolling Stone* to publish a certain statement, Defendant Elfman's March 2023 Letter functions as a press release rather than a demand letter.

The litigation privilege "does not encompass publication to the general public through the press." (*Susan A. v. County of Sonoma* (1991) 2 Cal.App.4th 88, 94.) "The litigation privilege does not protect press releases." (*Paglia & Associates Construction, Inc. v. Hamilton (*2023) 98 Cal.App.5th 318, 323.) "In sum, we hold that the litigation privilege should not be extended to 'litigating in the press.'" (*Rothman v. Jackson* (1996) 49 Cal.App.4th 1134, 1149.) "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."

jury pools and bringing disrepute upon both the judiciary and the bar. (*Ibid*; see also *Argentieri v. Zuckerberg* (2017) 8 Cal.App.5th 768; *Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 281.)

The contents of the March 2023 Letter reveal that the letter function more as a means of rebutting allegations of sexual misconduct rather than a prelitigation demand. (Kaufman Decl., Ex. 12.) The fact that Defendant Elfman went on the record and expressly consented to *Rolling Stone* publishing the statements at issue, convert the March 2023 Letter to a press release rather than a prelitigation communication protected by the litigation privilege. To allow Defendant Elfman to make statements and permit their publication while hiding behind the litigation privilege would decimate the purpose of the privilege. For this reason, the court does not find that the March 2023 Letter was sent in connection with litigation contemplated in good faith and under serious consideration.

Second, the court is not persuaded that litigation against *Rolling Stone* was seriously contemplated. In *Dickinson v. Cosby* (2017) 17 Cal.App.5th 655, attorneys for the former comedian and actor Bill Cosby, sent a demand letter to media outlets and a press release characterizing the rape allegations made by Janice Dickinson as false. (*Id*. at p. 660.) Dickinson filed a complaint for defamation as to both the demand letter and the press release. (*Id*. at p. 665.) Defendant Cosby filed an anti-SLAPP motion and, as to the demand letter, "Cosby argued that Dickinson could not prevail to the extent her causes of action were based on the demand letter, because the demand letter was a prelitigation communication protected by the absolute litigation privilege." (*Id*. at p. 667.) While the trial court agreed that the demand letter was protected by the litigation privilege, the court of appeal disagreed. "Instead, these facts suggest that the demand letter was a bluff intended to frighten the media outlets into silence (at a time when they could still be silenced), but with no intention to go through with the threat of litigation if they were uncowed." (*Id*. at p. 684.)

Facts that the *Dickinson* Court found dispositive as to whether the demand letter seriously contemplated litigation was the fact that the demand letter did not seriously contemplate litigation. "The demand letter, which was clearly captioned as a confidential demand letter,

stated that Dickinson's allegations were a recently fabricated defamatory lie, and threatened litigation if the outlets were to go ahead with their planned coverage of Dickinson's allegations.” (*Dickinson*, *supra*, 17 Cal.App.5th at pp. 683-684.) Defendant Elfman’s March 2023 Letter was similar to Cosby’s demand letter which was intended “‘to place those media outlets on notice of the falsity of Ms. Dickinson's accusations, and to inform them that the publication of Ms. Dickinson's false and defamatory accusations would be actionable.’ ” (*Id*. at p. 684.) Here, Defendant Elfman sought to put *Rolling Stone* on notice of the falsity of Plaintiff’s claims and allow for the publication of a statement informing the public that Plaintiff’s allegations are false. (Kaufman Decl., Ex. 12.) The *Dickinson* Court further found that “Cosby never sued any media outlet which ran the story, give rise to an inference that the demand letter was not sent in connection with litigation contemplated in good faith and under serious consideration.” (*Ibid.*) Like Cosby, Defendant Elfman did not undertake any action against *Rolling Stone*.

The March 2023 Letter does not contain the words “demand letter” and while it did “caution against publishing Ms. Abadi’s false allegations,” and did warn *Rolling Stone* that the allegations of “misconduct constitute actionable defamation *per se*,” the Letter does not explicitly state that Defendant Elfman will pursue litigation. (Kaufman Decl., Ex. 12.) The Cosby demand letter:

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[E]xplicitly threatened litigation: “If *Good Morning America* proceeds with its planned segment with Ms. Dickinson and recklessly disseminates it instead of checking available information demonstrating its falsity, all those involved will be exposed to very substantial liability. [¶] You proceed at your peril. [¶] This does not constitute a complete or exhaustive statement of all of my client's rights or claims. Nothing stated herein is intended as, nor should it be deemed to constitute a waiver or relinquishment, of any of my client's rights or remedies, whether legal or equitable all of which are hereby expressly reserved. This letter is a confidential legal communication and is not for publication.”

(*Dickinson*, *supra*, 17 Cal.App.5th 655 at p. 663.)

(*Dickinson*, *supra*, 17 Cal.App.5th 655 at p. 683.)

Here, the court fails to find that Defendant Elfman seriously contemplated litigation because the demand letter serves more as press release given Elfman's consent that certain portions of the letter published. ("'No public policy supports extending a privilege to persons who attempt to profit from hollow threats of litigation.'" (*Action Apartment Assn*., *supra*, 41 Cal.4th at p. 1251.) By authorizing *Rolling Stone* to publish statements attributed to Defendant Elfman as contained in the March 2023 Letter, Defendant Elfman sought to shield his actions from liability by hiding behind the litigation privilege. The March 2023 Letter was more than just an attempt to dissuaded *Rolling Stone* from republishing allegations of sexual misconduct by Elfman. It was an effort to litigate the issue before the court of public opinion, permitting Elfman to publicly deny the veracity of Plaintiff's claims while preemptively hiding behind the litigation privilege to prevent any defamation claim.

As the statements authorized for publication in the March 2023 Letter were not connected any purported defamation claim against *Rolling Stone*¸ the Letter functions as an authorized press release, and litigation against *Rolling Stone* was not seriously contemplated in good faith and under serious consideration, the court finds that the litigation privilege does not apply to the statements published in the July 2023 Article.

iii. Action is Not Barred by the One-Year Statute of Limitations

Defendant Elfman asserts that Plaintiff's claims are barred by the one-year statute of limitations because the statements are premised on the statements made to *Rolling Stone* in March 2023. (CCP, § 340(c).) The Complaint, however, expressly states that this action was filed as a result of the July 19, 2023, *Rolling Stone* article and not because of the contents in the March 2023 demand letter. (Compl., ¶ 10.) Consequently, this action was timely filed on July 10, 2024.

iv. The Privileges of Self-Defense and Consent Do Not Apply

Defendant Elfman asserts that his statements were made in self-defense and consented to by Plaintiff due to her orchestrating the publication of the July 2023 Article. (See *Royer v. Steinberg* (1979) 90 Cal.App.3d 490, 498 [“One of the oldest and most widely recognized defenses to the publication of defamatory matter is the doctrine of consent, which has been classified as a form of *absolute privilege*.”].) The fact that the July 2023 Article was published shortly after Plaintiff filed her second suit for breach of contract suit, does not support the inference that *Rolling Stone* published the article at Plaintiff’s inducement because the filing of a lawsuit is public knowledge.

Defendant Elfman presents no evidence that Plaintiff consented to the publication of the July 2023 Article. Plaintiff states that she was approached by *Rolling Stone* but she declined to answer questions and did not consent to the publication of Defendant Elfman’s statements. (Abadi Decl., ¶¶ 27-29.) The July 2023 Article in *Rolling Stone* further states that Plaintiff declined to comment and that it relied on other sources for information. (Elfman Decl., Ex. 15 at p. 3.)

In considering the evidence in an Anti-SLAPP motion “[w]e accept the plaintiff's evidence as true and consider the defendant's evidence only to determine whether it defeats the challenged claim as a matter of law.” (*Bishop v. The Bishop's School* (2022) 86 Cal.App.5th 893, 904.) Based on the record before the court, there is insufficient evidence to find that Plaintiff consented to the publication of the defamatory statements in the July 2023 Article.

v. Plaintiff Establishes a Prima Facie Case for Defamation

Plaintiff’s action asserts that the statements Defendant Elfman made in

Plaintiff's action asserts that the statements Defendant Elfman made in the July 2023 Article constitute facts rather than opinions:

"How do I respond to accusations so serious that being innocent is not a valid defense? It is excruciating to consider that a 50-year career may be destroyed in one news cycle as a result of vicious and wholly false allegations about sexual misconduct . . . Ms. Abadi's allegations are simply not true. I allowed someone to get close to me without knowing that I was her 'childhood crush' and that her intention was to break up my marriage and replace my wife. When this person realized that I wanted distance from her, she made it clear that I would pay for having rejected her. I allowed an ill-advised friendship to have far-reaching consequences, and that error in judgment is entirely my fault. I have done nothing indecent or wrong, and my lawyers stand ready to prove with voluminous evidence that these accusations are false. This is the last I will say on this subject."

(Elfman Decl., Ex. 15.)

Defendant Elfman asserts that the statements in the March 2023 Letter, republished in the July 2023 Article, are an opinion based on his view of what transpired between himself and the Plaintiff, and that conclusions about Plaintiff's conduct and motives are opinions. Defendant Elfman also asserts that what is considered "wrong or indecent" is also a matter of opinion. (See *McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 117 ["concepts [of morality] are infinitely debatable, and their precise meaning is extremely elusive."]; *Partington v. Bugliosi* (9th Cir. 1995) 56 F.3d 1147, 1157 [something "inherently subjective" is "not susceptible of being proved true or false."].)

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"Statements of opinion do not enjoy blanket protection. [Citation.] The issue is whether the statement of opinion implies a statement of fact." (*Dickinson*, *supra*, 17 Cal.App.5th at p. 685.) Simply couching statements in terms of opinions does not dispel their false defamatory implications when the speaker implies "'a knowledge of facts which lead to the [defamatory] conclusion.'" (*McGarry*, *supra*, 154 Cal.App.4th

at p. 112.)

“In determining whether a statement is libelous we look to what is explicitly stated as well as what insinuation and implication can be reasonably drawn from the communication.” (*Forsher v. Bugliosi* (1980) 26 Cal.3d 792, 803.) “‘[I]f the defendant juxtaposes [a] series of facts so as to imply a defamatory connection between them, or [otherwise] creates a defamatory implication ... he may be held responsible for the defamatory implication, ... even though the particular facts are correct.’” (*Issa v. Applegate* (2019) 31 Cal.App.5th 689, 703 (*Issa*) [citations omitted].) “The ‘pertinent question’ is whether a ‘reasonable fact finder’ could conclude that the statements ‘as a whole, or any of its parts, directly made or sufficiently implied a false assertion of defamatory *fact* that tended to injure’ plaintiff's reputation. (*Id*. at p. 703 citing *James v. San Jose Mercury News, Inc*. (1993) 17 Cal.App.4th 1, 13.)

Defendant Elfman cannot allege that certain allegations are mere opinions when the statements taken as a whole imply a statement of fact concerning the Plaintiff, that her allegations are false. “Whether a statement declares or implies a provably false assertion of fact is generally a question of law to be decided by a court.” (*Bishop*, *supra*, 86 Cal.App.5th at pp. 909–910.) “We apply a ‘totality of the circumstances’ test to determine whether a statement is fact or opinion, and whether a statement declares or implies a provably false factual assertion; that is, courts look to the words of the statement itself and the context in which the statement was made. [Citation.]” (*Issa*, *supra*, 31 Cal.App.5th at p. 703.)

The court finds that a reasonable fact finder could conclude that the entire published statement made by Defendant Elfman declares or implies a provable false assertion of fact, that “Ms. Abadi’s allegations are simply not true” and that she has made “wholly false allegations about [Elfman’s] sexual misconduct” because Elfman rejected her advances and Plaintiff wanted Elfman to “pay for having rejected her.” (Elfman Decl., Ex. 15.) The court finds that such a statement constitutes a provable false assertion of fact and not a mere opinion about Plaintiff’s relationship with Elfman. Moreover, Plaintiff provides testimony that the statements in the July 2023 Article harmed her

testimony that the statements in the July 2023 Article harmed her reputation and career aspirations. (Abadi Decl., ¶¶ 31-36.) Defendant Elfman fails to provide evidence that Plaintiff suffered no reputation harm or career setbacks.

Defendant Elfman further asserts that Plaintiff's defamation claim fails because as a limited public figure, she cannot show malice. Where, as here, the plaintiff is a limited public figure, she must prove both that the challenged statement is false, and that the defendant made the libelous statement with 'actual malice.'" (*Edward v. Ellis* (2021) 72 Cal.App.5th 780, 790.) "'If the person defamed is a public figure, he cannot recover unless he proves, by clear and convincing evidence ..., that the libelous statement was made with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.' " (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1260 [[internal citations omitted].)

Plaintiff does not dispute that she is required to show malice. In response to an anti-SLAPP motion, "defamation plaintiffs need not establish malice by clear and convincing evidence." (*Collins v. Waters* (2023) 92 Cal.App.5th 70, 80.) The plaintiff "must meet their minimal burden by introducing sufficient facts to establish a prima facie case of actual malice." (*Ibid*.) "In other words, they must establish a reasonable probability they can produce clear and convincing evidence showing that the statements were made with actual malice." (*Id*.)

Plaintiff's evidence is composed solely of her testimony and snippets of texts sent between Plaintiff and Elfman. (See *e.g*. Abadi Decl.) Meanwhile, Defendant Elfman characterizes his relationship with Elfman as being "platonic and social" and asserts he decided not to renew his friendship with Plaintiff due to a political disagreement. (Elfman Decl., ¶¶ 5, 6, 8.) Elfman also asserts that the allegation that he masturbated in Plaintiff's presence is "categorially false." (*Id*. ¶ 13.) Plaintiff asserts that Elfman masturbated with her on several occasions. (Abadi Decl., ¶¶ 11, 16, 18, 25.)

However, the Parties do not dispute that a nude photo session

However, the Parties do not dispute that a nude photo session involving Plaintiff took place in Paris, France in October 2015. (Abadi Decl., ¶ 11, Ex. D; Elfman Decl., ¶ 7.) Plaintiff also provides evidence of texts reflecting that Elfman shared nude photographs of his body with Plaintiff, with Plaintiff's consent. (Abadi Decl., ¶ 8, Ex. B.) Texts between Elfman and Plaintiff stated she was coming over and Elfman stated that "Maybe I'll even be good and put some clothes on . . . A rarity around here late." (*Id*. ¶ 14, Ex. F.) Plaintiff stated that because of her "eczematic skin issues" Elfman "won't see me in such a light tonight." (*Ibid*.) While Elfman provides texts attributed to Plaintiff, showing that she intended to pursue a relationship with Elfman that was not purely "platonic," (see Rubin Decl., Ex. 8; Abadi Decl., Ex. C), Plaintiff's evidence does show that some her claims have merit and are not "wholly false" as claimed by Elfman.

Moreover, Elfman's admission that he engaged in "naked romping" with Plaintiff in Paris permit the finding that Defendant Elfman's outright denial of all of Plaintiff's claims was knowingly false. (Abadi Decl., ¶ Ex. D; Elfman Decl., ¶ 3.) More importantly, Elfman's denial about masturbating in front of Plaintiff and disrobing in front of her do not disprove Plaintiff's allegations and provide no basis for the court to find Plaintiff's claims lack merit and are wholly false. "The 'burden of establishing a probability of prevailing is not high: We do not weigh credibility, nor do we evaluate the weight of the evidence. Instead, we accept as true all evidence favorable to the plaintiff and assess the defendant's evidence only to determine if it defeats the plaintiff's submission as a matter of law.'" (*Issa*, *supra*,) 31 Cal.App.5th at p. 702 citing *Overstock.com, Inc. v. Gradient Analytics, Inc*. (2007) 151 Cal.App.4th 688, 699–700.)

While Defendant Elfman and Plaintiff disagree as to the nature of their "relationship/friendship," Plaintiff's evidence supports a finding that her claims about sexual misconduct are not "wholly false" and have minimal merit. "Claims with at least minimal merit may proceed." (*Bishop*, *supra*, 86 Cal.App.5th at p. 904.) Moreover, Plaintiff's texts with Elfman establish a probability that Plaintiff can produce clear and convincing evidence that Elfman knowingly made a false statement by categorizing all of Plaintiff's sexual misconduct allegations as "wholly false."

false.

Lastly, Defendant Elfman asserts that Plaintiff fails to plead special damages, but Plaintiff's claim is premised on defamation per se. (See Compl., ¶¶ 63-73.) "A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof." (*Bartholomew v. YouTube, LLC.* (2017) 17 Cal.App.5th 1217, 1226.) As Plaintiff's claims are based on defamation per se rather than defamation per quad, Plaintiff is not required to allege and prove special damages. (See *Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 351.) Even if Plaintiff was required to allege and prove special damages, Plaintiff's complaint pleads special damages, and her declaration also asserts she suffered special damages. (Compl, ¶¶ 27, 73; Abadi Decl., ¶¶ 30-36.)

The special motion to strike is denied.

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<u>Conclusion</u>

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Defendant Elfman's special motion to strike is denied.