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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

GEORGE ALVAREZ,

Plaintiff and Respondent,

v.

MICHAEL PETERSEN,

Defendant and Appellant.

E052144

(Super.Ct.No. INC10005987)

O P I N I O N

MARIO ALVAREZ,

Plaintiff and Respondent,

v.

MICHAEL PETERSEN,

Defendant and Appellant.

E052578

(Super.Ct.No. INC10005947)

APPEAL from the Superior Court of Riverside County. John G. Evans and Harold W. Hopp, Judges. Affirmed.

Scott Harlow for Defendant and Appellant.

Law Offices of Mark C. Fields and Mark C. Fields for Plaintiffs and Respondents.

In separate actions, plaintiffs and respondents George Alvarez and Mario Alvarez¹ sued defendant and appellant Michael Petersen for libel. They allege that Petersen falsely stated on an Internet Web site that they participated in a Ponzi scheme.

Petersen filed special motions to strike the respective complaints under the anti-SLAPP statute. (Code Civ. Proc., § 425.16.)² The motions were denied. Petersen appealed.

On our own motion, we consolidated the two appeals for purposes of oral argument and decision. After reviewing the motions de novo, we affirm the trial courts' rulings.

I. FACTUAL AND PROCEDURAL SUMMARY

Petersen is a judgment creditor of California Cove Communities, Inc. (California Cove). During the course of postjudgment discovery to enforce the judgment, Petersen learned that plaintiffs have certain business relationships with Matthew Jennings. For example, he states that George and Mario are shareholders and board members of California Cove, and were shareholders and officers of Trussnet USA Inc. and Trussnet USA Development Co. Inc., which merged into China Tel Group Inc. (China Tel); George, Mario, and Jennings are board members of China Tel; George and Jennings are

¹ Because of the identical last names, when we refer to plaintiffs individually, we will refer to them as George or Mario.

² SLAPP is an acronym for strategic lawsuit against public participation.

board members of Westmoore Holdings, Inc. (Westmoore); Westmoore acted as a broker for MKA Capital Group Advisors (MKA); MKA has a subsidiary called MKA Real Estate Opportunity Fund I LLC.

According to Petersen, “[m]illions of dollars were funneled by investors in Westmoore to MKA, then to MKA’s Real Estate Opportunity Fund I LLC,” which loaned millions of dollars to California Cove; California Cove then transferred the money to Trussnet USA Inc., which became China Tel. He describes one series of transactions in which MKA Real Estate Opportunity Fund I LLC transferred \$3 million to California Cove on April 4, 2006; the next day, California Cove transferred \$1.5 million to Trussnet USA Inc. Petersen found no “justification” for these transactions. In early 2009, Petersen filed a complaint with the United States Securities and Exchange Commission (SEC) regarding this “suspect financial transaction.”

On June 18, 2010, an article was posted on the Investor’s Watchdog Web site (<http://investorwatchdog.com/blog/investorwatchblog/?p=1672>), which described an action filed in federal court by the SEC against Jennings. The Investor’s Watchdog Web site is accessible free of charge to members of the public. According to the article, the SEC charged Jennings with operating a \$53 million Ponzi scheme. The article includes the following, which the author of the article attributes to the SEC:

“Matthew Jennings and his companies that collectively operated under the brand name of ‘Westmoore’ raised the money from investors in more than 15 offerings of equity and debt that were not registered with the SEC under the securities laws. To

attract the new investors necessary to sustain the scheme, Jennings and his companies offered exorbitant short-term returns as high as 130 percent annually.

“Rather than financing the operations of Jennings’ businesses, the SEC alleges that Jennings misused new investor funds to pay returns to existing Westmoore investors, and diverted funds into his personal accounts.

“The companies charged in the SEC’s complaint are Westmoore Management LLC, Westmoore Investment L.P., Westmoore Capital Management Inc., and Westmoore Capital LLC.

“According to the SEC’s complaint filed in U.S. District Court for the Central District of California, Jennings operated a corporate shell game through Westmoore, directing the movement of funds among Westmoore’s various accounts to prevent the collapse of the scheme. Jennings treated these accounts as one integrated account from which funds, regardless of their source, could be used as necessary to pay investors promised returns.

“The SEC alleges that Westmoore did not tell investors that it had to rely on proceeds from new investors to pay existing investors. Instead, investors expected that their funds would be used for investments that might ultimately generate returns if the underlying business succeeded.”

The Investor’s Watchdog article does not mention either of the plaintiffs, Trussnet USA Inc., Trussnet USA Development Co. Inc., MKA, or China Tel.

Below the article there is a space where members of the public can post, or blog, their opinion regarding the article. On June 19, 2010, Petersen was informed of the SEC complaint against Jennings and found the story on the Investor's Watchdog Web site. In a blog dated June 19, 2010, someone posted the following on the Web site under the name "Michael Petersen":

"Great article. Still, there is substantially more that you need to investigate on this matter. I am a PI here in California, this rabbit whole [*sic*] goes all the way to China. Westmoore (and Matthew Jennings) are intimately connected with George Alvarez, Mario Alvarez and Jason Sugarman. George Alvarez goes way back with Matthew Jennings (check Nevada corporations) and was on the board of many of the Westmoore entities. Westmoore would get money from investors, forward to MKA Capital (Jason Sugarman) and then funnel the money through a company called California Cove Communities Inc. (a development [*sic*] company) who in turn would funnel the money to a company called Trusset [*sic*] USA Inc. Trussnet essentially became China Tel Group, a publically traded company that, at least when it went public, had on its board of directors George Alvarez, Mario Alvarez, Matthew Jennings and Michael Sugarman (Jason Sugarman's dad or brother I believe). Much of the investors [*sic*] money in Westmoore took this convoluted 'slow boat to China' so to speak. Question is, how long will it be before the SEC connects the dots, if ever? I notified them of this Ponzi scheme two years ago and no action was ever taken, at least not until it was too late." (We will refer to this as the June 19 blog.)

Petersen does not admit or deny that he wrote the June 19 blog. In his brief on appeal, Petersen states that he “does not recall posting” the June 19 blog, but adds that “all statements made therein are substantially true.”

In July 2010, plaintiffs filed in the superior court separate, but substantially identical, complaints against Petersen. They each allege a single cause of action for libel based on the June 19 blog. They also allege that the content of the June 19 blog was republished on a Yahoo message board pertaining to China Tel.

Plaintiffs allege that the June 19 blog falsely states that plaintiffs participated in a Ponzi scheme whereby money from investors in the Westmoore companies was illegally funneled into California Cove, Trussnet USA, Inc., and China Tel. According to plaintiffs, “[n]o such Ponzi scheme existed; [plaintiffs] did not participate in the (non-existent) Ponzi scheme.”

The June 19 blog, plaintiffs allege, “is libelous on its face” and exposes them “to hatred, contempt, ridicule, and obloquy because it accuses [them] of participating in a Ponzi scheme.” Each plaintiff alleges “injury to his business, trade, and occupation, in an amount to be proven at trial but which is alleged, on information and belief, to be not less than twenty-five million dollars (\$25,000,000).”

Petersen filed an anti-SLAPP motion against each plaintiff. George and Mario opposed the motions.

In each case, the respective court found that the alleged defamatory statements arose from protected activity because the statements were made in a public forum (i.e.,

the Internet) and concerned an SEC investigation and investments made in a publicly traded company.³ The courts concluded that Petersen thus satisfied the first prong of the anti-SLAPP analysis.

However, each court denied the anti-SLAPP motion because it further found that the respective plaintiff had established a probability of prevailing on the merits of his claim. The court in George's case stated that the reasonable interpretation of the June 19 blog is that George "was knowingly participating in a Ponzi scheme." George did not have to allege or prove special damages, the court added, because participating in a Ponzi scheme is "a crime, which would expose him to hatred, contempt and which would have a tendency to harm him in his livelihood." Finally, the court rejected Petersen's argument that George is a limited purpose public figure because there was no showing he injected himself into the controversy.

In Mario's case, the court echoed the ruling in George's case. It stated that Mario has shown the probability of success on the merits because the alleged defamatory statements "accuse plaintiff of being involved in a Ponzi scheme, which, of course, is fraud and a crime. Further, the statement is one which has a tendency to injure the plaintiff in his occupation because it relates to plaintiff's business affairs."

³ The rulings in the cases were made by different judges on different days. The anti-SLAPP motion in George's case was heard by Judge John G. Evans on September 16, 2010, and the ruling announced in a notice of ruling on October 4, 2010. The motion in Mario's case was heard by Judge Harold W. Hopp on September 17, 2010. Judge Hopp signed an order denying the motion on November 16, 2010.

II. DISCUSSION

A. *Motions for Admission of Additional Evidence*

Petersen filed two motions in this court for admission of additional evidence. In the first motion, he requests the admission of a copy of an article apparently printed off of the Web site for Forbes Magazine. In the second motion, he seeks admission of: (1) a printout of the article about the SEC's action against Jennings and blog responses thereto from the Investors Watchdog Web site, which includes additional blog responses that were not before the trial courts; (2) a copy of a final judgment filed in the Orange County Superior Court case of *MKA Real Estate Opportunity Fund I, LLC v. Luis Trujillo, et al.* (case No. 30-2009 00117907); and (3) copy of a stipulation for settlement and order thereon filed in the Orange County Superior Court case of *MKA Real Estate Opportunity Fund I, LLC v. Luis Trujillo, et al.* (case No. 30-2008 00116368). We received no opposition to the motions.

In the first motion, Petersen states that the evidence should be admitted "to support the issue of 1) substantial truth of the alleged libelous publications, and 2) that the alleged publication was a statement of opinion of a well known public issue wherein the fact that Westmoore et. al. a) was being charged with a ponzi scheme, b) there was sufficient evidence for the court to issue an injunction against Westmoore, c) that George Alvarez was on the board of both Westmoore and China Tel Group, and d) that China Tel Group and George Alvarez have been implicated and/or connected to other high profile ponzi schemes and investment scams that are general knowledge and universally known within

the financial community.” He gives almost identical reasons in support of the second motion.

Because the records of the Orange County Superior Court are judicially noticeable under Evidence Code section 452, subdivision (d), and the requirements of Evidence Code section 453 are met,⁴ we will take judicial notice of the judgment and the stipulation for settlement. (See Evid. Code, § 459, subd. (a).) However, “while we take judicial notice of the *existence* of the documents in court files, we do not take judicial notice of the truth of the facts asserted in such documents.” (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1266 [Fourth Dist., Div. Two].)

We disagree with Petersen as to whether the printouts of the Forbes article and the Investor’s Watchdog Web site are judicially noticeable. He relies on Evidence Code section 451, subdivision (f), which requires judicial notice be taken of “[f]acts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute.” He also relies on Evidence Code section 452, subdivision (h), which allows a court to take judicial notice of “[f]acts 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.” The proffered printouts do not satisfy the requirements of either of these sections. Moreover, because

⁴ Evidence Code section 453 provides: “The trial court shall take judicial notice of any matter specified in Section 452 if a party requests it and: [¶] (a) Gives each adverse party sufficient notice of the request . . . to enable such adverse party to prepare to meet the request; and [¶] (b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter.”

the printouts were not presented to the trial courts and the trial courts had no opportunity to consider such evidence, we will not admit the evidence in the absence of “exceptional circumstances.” (See *Innovative Business Partnerships, Inc. v. Inland Counties Regional Center, Inc.* (2011) 194 Cal.App.4th 623, 627 [Fourth Dist., Div. Two].) Petersen has not demonstrated such circumstances here. Accordingly, we deny the request to admit the printout of the Forbes article and the Investor’s Watchdog Web site pages.

B. The Anti-SLAPP Law and Our Standard of Review

The anti-SLAPP statute provides in part: “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.” (Code Civ. Proc., § 425.16, subd. (b)(1).)

The statute was enacted “to prevent and deter ‘lawsuits [referred to as SLAPP’s] brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.’ [Citation.] Because these meritless lawsuits seek to deplete ‘the defendant’s energy’ and drain ‘his or her resources’ [citation], the Legislature sought “‘to prevent SLAPPs by ending them early and without great cost to the SLAPP target’” [citation]. [Code of Civil Procedure s]ection 425.16 therefore establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation. [Citation.]

In doing so, [Code of Civil Procedure] section 425.16 seeks to limit the costs of defending against such a lawsuit. [Citation.]” (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.) Courts should broadly construe the statute to further the legislative goals of encouraging participation in matters of public significance and discouraging abuse of the judicial process. (Code Civ. Proc., § 425.16, subd. (a); *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 473.)

The anti-SLAPP statute establishes a “two-step process for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. [Citation.] ‘A defendant meets this burden by demonstrating that the act underlying the plaintiff’s cause fits one of the categories spelled out in [Code of Civil Procedure] section 425.16, subdivision (e)’ [citation]. If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. [Citations.]” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88; see Code Civ. Proc., § 425.16, subd. (b)(1).) To do so, “the plaintiff need only have “stated and substantiated a legally sufficient claim.” [Citations.] ‘Put another way, the plaintiff “must 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.” [Citations.]” (*Navellier v. Sletten, supra*, at pp. 88-89.)

The role of the trial court is not to weigh the credibility or comparative strength of the parties' evidence, but rather to determine whether the defendant's evidence defeats the plaintiff's prima facie showing as a matter of law. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821; *Colt v. Freedom Communications, Inc.* (2003) 109 Cal.App.4th 1551, 1557.) In attempting to establish the existence of a factual dispute, the opposing party may not rely upon the mere allegations or denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, or admissible discovery material, in support of its contention that the dispute exists. (See *South Sutter, LLC v. LJ Sutter Partners, L.P.* (2011) 193 Cal.App.4th 634, 670.)

We independently review whether the anti-SLAPP statute applies and whether plaintiffs have shown a probability of prevailing on the claim. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999 [Fourth Dist., Div. Two].) "In other words, we employ the same two-pronged procedure as the trial court in determining whether the anti-SLAPP motion was properly granted." (*Mendoza v. ADP Screening & Selection Services, Inc.* (2010) 182 Cal.App.4th 1644, 1651-1652.)

C. The First Prong: Whether the Claims Arise from Protected Activity

George's and Mario's libel claims arise from the June 19 blog. In his motion, Petersen asserted that the blog was protected activity under the anti-SLAPP statute because it was published on the Internet in connection with an issue of public interest. The argument is based on clauses 3 and 4 of Code of Civil Procedure section 425.16, subdivision (e), which define protected activity to include: "(3) 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, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” Both trial courts agreed with Petersen on this point.

George and Mario do not dispute that the June 19 blog was posted in a public forum.⁵ They argue, however, that the statements were not made in connection with a public issue or an issue of public interest. We disagree.

The anti-SLAPP statute does not define “public issue” or “issue of public interest.”⁶ Although case law has not precisely defined the boundaries of these terms, courts have identified “three nonexclusive and sometimes overlapping categories of statements that have been given anti-SLAPP protection.” (*Cross v. Cooper* (2011) 197 Cal.App.4th 357, 371, 373.) “The first category comprises cases where the statement or activity precipitating the underlying cause of action [concerned] ‘a person or entity in the public eye.’ [Citation.] The second category comprises cases where the statement or

⁵ “Web sites accessible to the public . . . are ‘public forums’ for purposes of the anti-SLAPP statute.” (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 41, fn. 4; accord, *Kronemyer v. Internet Movie Database Inc.* (2007) 150 Cal.App.4th 941, 950; *Vogel v. Felice* (2005) 127 Cal.App.4th 1006, 1015.)

⁶ Although clause (4) of Code of Civil Procedure section 425.16, subdivision (e) uses the phrases “public issue” and “issue of public interest” disjunctively, there appears to be no substantive difference between them. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2011) ¶ 7:780, p. 7(II)-28 (rev. # 1, 2011).)

activity precipitating the underlying cause of action involved ‘conduct that could directly affect a large number of people beyond the direct participants.’ [Citation.] And the third category comprises cases where the statement or activity precipitating the claim involved ‘a topic of widespread, public interest.’ [Citation.]” (*Ibid.*, fns. omitted, citing *Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 924; see also *Hailstone v. Martinez* (2008) 169 Cal.App.4th 728, 736-737.)

The June 19 blog from which this case arises could fall within the second and third of these categories. The blog was in response to an Internet article about SEC charges against Jennings and the Westmoore entities. According to the article, Jennings and the Westmoore entities orchestrated a \$53 million Ponzi scheme involving investors in more than 15 offerings of equity and debt. The June 19 blog, at a minimum, suggests that George, Mario, and other individuals and businesses, including China Tel, were also involved in the alleged Ponzi scheme. At the relevant time, China Tel was a publicly traded corporation with more than 392,000,000 shares issued and outstanding. The suggestion that China Tel, among others, was involved in a Ponzi scheme could clearly and directly affect the shareholders of China Tel, as well as members of the public who might thereby be dissuaded from purchasing the company’s stock. (See, e.g., *ComputerXpress, Inc. v. Jackson, supra*, 93 Cal.App.4th at pp. 1007-1008.)

The third category of anti-SLAPP cases arise from statements that involve a topic of widespread, public interest. (*Cross v. Cooper, supra*, 197 Cal.App.4th at p. 373.) We

need no citations to support the fact that at least since the discovery of the Ponzi scheme perpetrated by Bernard Madoff, Ponzi schemes are matters of widespread, public interest. Moreover, the public interest in the SEC's allegations of the Jennings/Westmoore Ponzi scheme is indicated by evidence submitted by Petersen of newspaper articles on the subject from the Web sites of the Los Angeles Times and the Orange County Register.

In addition to categorizing anti-SLAPP cases, courts have relied upon certain “guiding principles” gleaned from case law interpreting “public interest” for purposes of the anti-SLAPP statute. (See, e.g., *Hailstone v. Martinez*, *supra*, 169 Cal.App.4th at p. 736.) “For example, ‘public interest’ is not mere curiosity. Further, the matter should be something of concern to a substantial number of people. Accordingly, a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest. Additionally, there should be a degree of closeness between the challenged statements and the asserted public interest. The assertion of a broad and amorphous public interest is not sufficient. Moreover, the focus of the speaker’s conduct should be the public interest, not a private controversy. Finally, a defendant charged with defamation cannot, through his or her own conduct, create a defense by making the claimant a public figure. Otherwise private information is not turned into a matter of public interest simply by its communication to a large number of people.” (*Ibid.*, citing *Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1132-1133.)

Applying these guidelines here, we note that the subject matter of the June 19 blog would undoubtedly concern the shareholders of China Tel as well as anyone with existing

or prospective financial dealings with George, Mario, or the other individuals and businesses mentioned in the blog. There is also a significant degree of closeness between the challenged statements regarding financial misconduct and the public interest in Ponzi schemes. Although George and Mario suggest that Petersen has a personal motivation for the June 19 blog, it appears that Petersen's primary focus is the public interest in exposing a Ponzi scheme.

The final guideline considers whether the defendant is making the plaintiffs public figures by turning private information into an issue of public interest. George and Mario point out that the articles regarding the SEC allegations do not mention the funneling of money from Westmoore investors to China Tel. Nor do the articles mention George or Mario. Thus, even if the blog is related to the public interest in Ponzi schemes in general or, more particularly, to the Jennings/Westmoore SEC charges, there was arguably no issue of public interest with respect to George or Mario until Peterson created one with his blog. For example, if someone posted an Internet blog in response to an article about Bernard Madoff that includes gratuitous comments that George and Mario are running a Ponzi scheme, the author of the blog might not be entitled to protection from George and Mario under the anti-SLAPP statute.

Here, however, the June 19 blog alleges that George and Mario are "intimately connected" with Jennings, the accused Ponzi schemer. The blog also describes a web of interrelated businesses and a chain of financial transactions that are purportedly directly connected to the Ponzi scheme alleged by the SEC. Thus, the June 19 blog does not

appear to be an attempt to manufacture public interest in George, Mario, and the others mentioned in the blog by trying to associate their names with an unrelated wrongdoer. Rather, the author of the blog appears to be seeking to expand the scope of the public's interest in Jennings' alleged Ponzi scheme to include plaintiffs and others.

In light of the foregoing and the Legislature's mandate that we broadly construe the anti-SLAPP statute to encourage public participation in matters of public significance and discourage the use of judicial process to chill such participation, we conclude that Petersen has presented sufficient prima facie evidence to support the conclusion that the statements in the June 19 blog were made in connection with an issue of public interest.

D. The Second Prong: The Plaintiffs' Probability of Prevailing

Under the second prong of the anti-SLAPP analysis, we determine whether plaintiffs have demonstrated a probability of prevailing on the claim. The parties raise the following issues: (1) whether the June 19 blog is libel per se as to George and Mario; (2) whether the statements made in the blog are false; (3) whether Petersen is the author of the June 19 blog; (4) whether the subject statements are opinions and therefore not actionable; and (5) whether plaintiffs are limited public figures for purposes of libel law and, if so, whether the evidence is sufficient to establish that the statements were made with knowledge of falsity or reckless disregard for truth. We address the issues in turn.

1. Libel Per Se as to George and Mario

The Civil Code defines libel as "a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any

person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.” (Civ. Code, § 45.) If the libelous statement is defamatory “without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, [it] is said to be a libel on its face,” or “libel per se.” (Civ. Code, § 45a; *Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 386-387.) If the defamatory statement does require explanatory matter, it is not libel on its face and is not actionable without proof the plaintiff has suffered special damages as a result of the libel. (Civ. Code, § 45a.) Petersen contends plaintiffs failed to allege special damages and, therefore, plaintiffs must prove the statements are libelous on their face. Plaintiffs do not appear to dispute this point.⁷ The question, then, is whether plaintiffs can establish a probability of prevailing on the claim that the June 19 blog constitutes libel per se.

There is a libel per se if a reasonable reader of a statement “would perceive a defamatory meaning without extrinsic aid beyond his or her own intelligence and common sense” (*Barnes-Hind, Inc. v. Superior Court, supra*, 181 Cal.App.3d at p. 386.) The charge that a plaintiff has committed a crime or an act of dishonesty is libel per se. (5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, §§ 542-543, pp. 795-

⁷ Although plaintiffs allege they have “suffered injury to [their] business, trade, and occupation”—the language of special damages (Civ. Code, § 48a, subd. (4)(b))—they have failed to allege the precise nature and amount of damages necessary to an award of special damages. (See, e.g., *Pridonoff v. Balokovich* (1951) 36 Cal.2d 788, 791-792 [“the nature and extent of the loss must be specifically set forth”]; see also *Gomes v. Fried* (1982) 136 Cal.App.3d 924, 939-940 [“special damages must be pled and proved precisely”].)

796.) “[I]t is sufficient if it so reflects on the person’s integrity as to bring him or her into disrepute.” (*Id.*, § 543, p. 796.)

Here, the June 19 blog refers to “this Ponzi scheme.” A Ponzi scheme has been defined as “a fraudulent arrangement in which an entity makes payments to investors from moneys obtained from later investors rather than from any ‘profits’ of the underlying business venture. The fraud consists of funneling proceeds received from new investors to previous investors in the guise of profits from the alleged business venture, thereby cultivating an illusion a legitimate profitmaking business opportunity exists and inducing further investment.” (*People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 906, fn. 2; see also *People v. Williams* (2004) 118 Cal.App.4th 735, 739, fn. 2.) Although we have not been referred to any California penal statute using the term “Ponzi scheme,” the operation of such a scheme has given rise to convictions in this state for grand theft (Pen. Code, § 487, subd. (a)), using false statements in the sale of securities (Corp. Code, §§ 25401, 25540, subd. (a)), and using a scheme to defraud in connection with the sale of securities (Corp. Code, § 25541). (See, e.g., *People v. Smith* (2009) 179 Cal.App.4th 986.)

If the June 19 blog directly and unambiguously accused George and Mario of running a Ponzi scheme, there would be no question that the statement, if false, constituted libel per se. However, according to Petersen, “nowhere in the alleged libelous publication is [George or Mario] accused of any criminal conduct or misconduct at all.” Indeed, if the parts that expressly refer to plaintiffs are viewed in isolation, the blog states

only: (1) Westmoore and Jennings “are intimately connected with” George and Mario; (2) George “goes way back with” Jennings and was on the board of many of the Westmoore entities; and (3) George and Mario were on the board of directors of China Tel when it went public. It does not explicitly state that George or Mario actually participated in a Ponzi scheme.

Plaintiffs view the blog very differently. According to them, the June 19 blog “describes in specific detail the four-step Ponzi scheme by which money was funneled from Westmoore investors to China Tel. Throughout the [blog] the names and interconnection of the participants in that alleged Ponzi scheme are trumpeted: Matthew Jennings; George Alvarez; Mario Alvarez; and Jason Sugarman.” They ask rhetorically: “What other possible meaning can one take from the [blog] other than those were the persons responsible for or participants in the nefarious and criminal conduct described in the [blog]?”

We agree with plaintiffs. We are guided by the “settled legal principles of defamation law” recently summarized by Division One of this court in *Balzaga v. Fox News Network, LLC* (2009) 173 Cal.App.4th 1325: “In determining whether a publication has a defamatory meaning, the courts apply a totality of the circumstances test to review the meaning of the language in context and whether it is susceptible of a meaning alleged by the plaintiff. [Citations.] ‘[A] defamatory meaning must be found, if at all, in a reading of the publication as a whole.’ [Citation.] ‘This is a rule of reason. Defamation actions cannot be based on snippets taken out of context.’ [Citations.]” (*Id.*

at pp. 1337-1338.) The *Balzaga* court continued: “In reviewing an alleged defamatory meaning, “the context in which the statement was made must be considered [¶] This contextual analysis demands that the courts look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed. [Citation.] “[T]he publication in question must be considered in its entirety; ‘[i]t may not be divided into segments and each portion treated as a separate unit.’ [Citation.] It must be read as a whole in order to understand its import and the effect which it was calculated to have on the reader [citations], and construed in the light of the whole scope [of the publication]. [Citation.]”” [Citation.]” (*Id.* at p. 1338.) We thus view the references to plaintiffs in the context of the entire text of the June 19 blog.

A reasonable person reading the blog would easily understand that the author of the blog is asserting that the Ponzi scheme identified by the SEC extends beyond Jennings and the Westmoore entities. It is clear from the blog that the additional business entities mentioned in the blog—including California Cove and China Tel—were participants in the broader scheme by funneling money through various business entities. The businesses, of course, can act only through human agents; someone must direct the alleged funneling of money through the different corporate participants in the scheme—someone with ties to the different entities and to Jennings. The blog author identifies George and Mario as “intimately connected” with Jennings and the Westmoore entities and on the board of directors of China Tel. Although the author does not explicitly claim

that George or Mario was involved in the suspect transactions, the implication of participation is unmistakable. Indeed, given the context of the blog, there would appear to be no other point to mentioning these individuals. Therefore, we conclude that the blog implicitly, and without the need for explanatory matter, accuses plaintiffs of being involved in a Ponzi scheme.

Petersen relies on *McBride v. Crowell-Collier Pub. Co.* (5th Cir. 1952) 196 F.2d 187. That case concerned a story published by *Colliers* titled, “Florida’s Struggle with the Hoodlums,” which identified the business, Continental Press Service, as being controlled by “the former followers of Al Capone.” (*Id.* at p. 188.) The plaintiff, who was the sole owner of Continental Press Service, sued *Colliers* for libel. (*Ibid.*) *Colliers* moved to dismiss the complaint on the ground, among others, that there was no personal defamation of the plaintiff; any claim would have to be for defamation of his business. (*Id.* at p. 189.) The trial court and the Fifth Circuit Court of Appeal agreed with *Colliers*. The reviewing court noted that “[t]he only mention of [the plaintiff] in the article is the simple statement that his father, Arthur B. ‘Mickey’ McBride, for many years the entrepreneur of the [business], now disclaims ownership of Continental. ‘He says all the stock rests in the hands of his son, Edward J. McBride. He says he gave it to the younger McBride when the boy was eighteen and a student at Miami University. The present general manager of Continental in Chicago is Tom Kelly, the younger McBride’s uncle.’” (*Ibid.*) The court explained that the plaintiff is not otherwise referred to “in any way

whatsoever, and nothing in this reference makes any accusation or charge of any kind against him.” (*Ibid.*)

Initially, we note that *McBride* is a 1952 federal case out of the Fifth Circuit. It has not been cited by any California court. It was cited in one Ninth Circuit case involving California law, but only as an example of cases that have “diverge[d] greatly” on the issue of whether an owner of a closely held corporation can maintain an action for a defamatory statement that refers expressly to the business alone. (See *SDV/ACCI, Inc. v. AT&T Corp.* (9th Cir. 2008) 522 F.3d 955, 959.) *McBride* is not controlling authority.

To the extent that *McBride* might have some persuasive authority, it is distinguishable. The *McBride* court apparently concluded that the plaintiff was merely the owner of the corporation’s stock and that any libel action “would be that of the corporation, not that of the owners of its stock.” (*McBride v. Crowell-Collier Pub. Co.*, *supra*, 196 F.2d at p. 189, fn. omitted.) Contrary to the conclusion reached in that case, the June 19 blog implies more than mere stock ownership in the businesses that are perpetrating a Ponzi scheme. George is mentioned three times and Mario twice. They are both described as being “intimately connected” with Jennings; George purportedly “goes way back with Jennings”; and both are on the board of China Tel, the ultimate recipient of the funds obtained through the alleged scheme.

2. The Truth or Falsity of the June 19 Blog

Petersen next contends that plaintiffs cannot establish a probability of prevailing on their libel claims because statements in the June 19 blog are either “substantially true”

or not provably false.⁸ He asserts, for example, that the statements regarding plaintiffs' membership on the China Tel board of directors and George's membership on the board of Westmoore are matters of that corporation's public SEC filings or press releases. Plaintiffs do not dispute these points. The truth of these statements, however, does not set to rest the issue of whether other statements, express or implied, in the blog are false.

Petersen further argues that the statements regarding the "funneling" of money from one entity to another are substantially true and therefore not actionable. He points to evidence indicating that Westmoore Securities Inc. acted as an investment broker for MKA Real Estate Opportunity Fund I LLC; that the MKA fund transferred \$3 million to California Cove on April 4, 2006, which transferred \$1.5 million the following day to Trussnet USA Inc.; and that Trussnet USA Inc. became China Tel in 2008. If "funneling money" includes any transfer of money, Petersen's evidence provides some support for the assertion that money was "funneled" from investors to an MKA entity, then to California Cove, and finally to Trussnet USA Inc. and China Tel.

Plaintiffs dispute each of the steps in the chain of transfers described by Petersen. First, contrary to Petersen's claim that Westmoore transferred (or funneled) money to an MKA entity, plaintiffs assert that the Westmoore entities never loaned or transferred money, directly or indirectly, to MKA entities. Indeed, two MKA entities made loans to

⁸ Petersen asserts that plaintiffs have the burden of proving the falseness of the statements—rather than he having to prove their truth—because the statements involve a matter of public concern. (See *Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 373-375; *Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 202.) Plaintiffs do not address this point.

Westmoore entities; i.e., money was funneled in the direction opposite from the direction alleged by Petersen. These statements are supported by the declaration of Daniel White, general counsel to the subject MKA entities.

Regarding the second step—the alleged funneling of money from MKA entities to California Cove—plaintiffs assert that California Cove or affiliated entities *borrowed* money from MKA entities. The argument is supported by a declaration from Luis Trujillo, the chief executive officer of California Cove. According to Trujillo, all of the MKA loans were on commercially reasonable terms and were secured by residential real estate. Trujillo adds that rather than California Cove funneling money to others, private entities in which George had an interest funneled money to California Cove “in an ultimately unsuccessful effort to keep [California] Cove afloat.”

With respect to the third and fourth steps, involving transfers of money to Trussnet USA Inc. and Trussnet’s transformation into China Tel, plaintiffs presented evidence that Trussnet USA, Inc., a Nevada corporation, became a subsidiary of China Tel through a reverse merger in 2008. According to Trujillo, California Cove never transferred any money, directly or indirectly, to that entity, nor received any money from that business. California Cove did have a lending relationship with another entity with the Trussnet name, but not with the Nevada corporation that was involved with the China Tel merger.

The evidence supplied by plaintiffs, which we must accept as true for purposes of the anti-SLAPP motion, is sufficient to show that the chain of financial transfers described in the June 19 blog are false. Moreover, even if Petersen’s evidence proved

that money was transferred as he describes, it does not establish that the transfers were part of a Ponzi scheme or constituted fraudulent or illegal activity.

3. Whether Petersen is the Author of the June 19 Blog

Petersen argues that George and Mario have no admissible evidence that he is the “Michael Petersen” who posted the June 19 blog. In his opening briefs on appeal, Petersen states that he “does not recall posting the [June 19 blog],” and that he cannot “confirm or deny that the online blog posting was in fact done by [him].” These statements are without citation to the record. Although he submitted a declaration in support of his anti-SLAPP motion, he does not address the issue of whether he is the author of the blog. His argument, however, is that plaintiffs cannot satisfy *their* burden of proving that he is the author. We disagree.

In his declaration, Petersen describes his extensive investigation into financial transactions involving the entities mentioned in the June 19 blog and states that he filed a complaint with the SEC in early 2009. The declaration is signed by Petersen in Palm Desert, California. His investigative efforts are consistent with the identifying statements in the June 19 blog that the author is a “PI” in California who notified the SEC “of this Ponzi scheme two years ago.” Additionally, the June 19 blog reads like a summary of the facts he states he discovered through his investigation. The author is thus someone aware of Petersen’s knowledge and of his SEC complaint. Clearly, the author’s decision to use the name “Michael Petersen” was not a coincidence; if Petersen is not the author of the blog, someone is masquerading as him. If the author is an imposter, Petersen’s unsworn

statement that he does not recall writing the blog and the conspicuous absence of a denial are telling—one who is impersonated in a way that gets him sued for \$25 million would ordinarily be expected to deny the impersonation.

We do not need to decide whether the correlation between Petersen’s knowledge and the facts revealed in the June 19 blog will be sufficient to prove Petersen authored the blog at trial. At this stage of the case, we believe the evidence is sufficient to support an inference that Petersen is the author of the blog.

4. June 19 Blog as Statements of Fact or Opinion

Petersen contends the statements in the June 19 blog are nonactionable statements of opinion. He emphasizes the blog’s use of the phrases, “this rabbit whole [*sic*] goes all the way to China” and “slow boat to China.” We reject the argument. First, the fairly detailed description of how money was funneled through various entities are expressions of facts. As explained above, plaintiffs have submitted evidence, which if true, supports their claim that the alleged chain of transactions is false.

Second, even if the implicit assertion that George and Mario are involved in a Ponzi scheme is considered an opinion, “[s]tatements of opinion that imply a false assertion of fact are actionable.” (*Franklin v. Dynamic Details, Inc.* (2004) 116 Cal.App.4th 375, 385.) The “dispositive question is whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact.” (*Ibid.*) A Ponzi scheme has a readily understood meaning; viz., a fraudulent scheme in which interest or dividends paid to early investors are paid not out of profits

but from funds obtained from later investors. Its essence is an assertion of fact—money provided by recent investors is used to pay the investment return to earlier investors—provable or not by tracing the use of investor funds and the sources of distributions.

The explicit and implicit defamatory statements in the June 19 blog, we conclude, are actionable.

5. Limited Purpose Public Figure

The First and Fourteenth Amendments to the United States Constitution prohibit a public official from recovering damages for defamation relating to his or her official conduct unless the defamatory statement was made with actual malice; that is, with knowledge that it was false or with reckless disregard for whether it was true or false. (*New York Times Company v. Sullivan* (1964) 376 U.S. 254, 279-280.) This rule was later extended to “public figures” for two reasons. (*Wolston v. Reader’s Digest Ass’n, Inc.* (1979) 443 U.S. 157, 163-164.) First, “public figures are less vulnerable to injury from defamatory statements because of their ability to resort to effective ‘self-help.’ They usually enjoy significantly greater access than private individuals to channels of effective communication, which enable them through discussion to counter criticism and expose the falsehood and fallacies of defamatory statements. [Citations.] Second, and more importantly, . . . public figures are less deserving of protection than private persons because public figures, like public officials, have ‘voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.’” (*Id.* at p. 164.)

Courts have distinguished between two classes of public figures. “The first is the ‘all purpose’ public figure who has ‘achiev[ed] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts.’ The second category is that of the ‘limited purpose’ or ‘vortex’ public figure, an individual who ‘voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.’ [Citation.] Unlike the ‘all purpose’ public figure, the ‘limited purpose’ public figure loses certain protection for his reputation only to the extent that the allegedly defamatory communication relates to his role in a public controversy.” (*Reader’s Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 253-254; see *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 351.)

Petersen contends that George and Mario are limited purpose public figures who must prove that the defamatory statements in the June 19 blog were made with actual malice. As evidence of a public controversy, Petersen points to messages posted on Internet Web sites regarding China Tel, the SEC action against Jennings and Westmoore entities, and a private party lawsuit against Westmoore entities. George and Mario, he contends, injected themselves into the public controversies through press releases and conference calls.

Petersen relies on the following evidence: a press release by Westmoore announcing the election of George and Jennings as board members; an SEC filing for China Tel, signed by George, that mentions the resignation of Jennings from the board of directors; a printout of pages from China Tel’s Web site, including information about a

conference call unrelated to the subject of the June 19 blog; printouts of articles on various Web sites regarding Westmoore and China Tel, and one article describing a lawsuit in which it is alleged that MKA was running a Ponzi scheme; and postings by Internet users on a Yahoo message board for China Tel.

We reject Petersen's argument. None of the evidence he refers to supports the conclusion that either George or Mario voluntarily injected himself, or was drawn, into the controversy related to the subject of the June 19 blog. China Tel's SEC filings, press releases, and conference call announcements refer to George or Mario in connection with their roles in that company, but make no mention of any of the matters referred to in the June 19 blog. Most of the Web site articles Petersen provides touch upon various matters concerning China Tel, but do not relate to the subject of the June 19 blog other than to identify plaintiffs as officers or directors of that corporation. The article describing the lawsuit alleging a Ponzi scheme perpetrated by MKA does relate to the subject of the blog (i.e., a Ponzi scheme involving an MKA entity); however, it does not mention George or Mario and does not support the claim that either of them voluntarily injected themselves or were drawn into that controversy. Finally, although some of the Yahoo message board postings relate to the subject matter of the June 19 blog, there is nothing to indicate that George or Mario authored or responded to any of these messages. Based on the evidence submitted, we conclude that plaintiffs are not public figures with respect to the subject of their libel claims.

E. *Conclusion*

Based on our independent review, we agree with the conclusions reached by the trial courts in these cases. Although the June 19 blog qualifies as protected activity under the anti-SLAPP statute, plaintiffs have satisfied their burden of establishing a probability of prevailing on their claims. Accordingly, the trial courts did not err in denying the motions.

III. DISPOSITION

The orders denying Petersen’s anti-SLAPP motions are affirmed. Plaintiffs shall recover their costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

HOLLENHORST
Acting P.J.

McKINSTER
J.