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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ANDREW KEEGAN HEYING, Plaintiff and Appellant, v. ANSCHUTZ ENTERTAINMENT GROUP, INC., et al., Defendants and Respondents.	B276375 (Los Angeles County Super. Ct. No. SC124771)

APPEAL from a judgment of the Superior Court of Los Angeles County. Nancy Newman, Judge. Affirmed.

Solace Law and Kyle Scudiere for Plaintiff and Appellant.

Levine Sullivan Koch & Schulz and Steven D. Zansberg for Defendants and Respondents.

In 2015, the Examiner.com website published an article falsely reporting that actor Andrew Keegan Heying was arrested for selling alcoholic kombucha without a permit. Officials had in fact conducted a raid at the church Heying co-founded, they had confiscated kombucha, and they issued a misdemeanor citation for selling alcohol without a permit, but Heying was not present at the time and was not arrested. Heying sued the corporate owner of the Examiner.com and related companies for defamation, invasion of privacy, negligence, and misappropriation. The defendants filed a motion to strike the complaint as a strategic lawsuit against public participation (anti-SLAPP motion). The trial court granted the motion and dismissed the complaint. We affirm the trial court judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Heying is an actor who has appeared in numerous films and television shows. He is also the co-founder of the Full Circle Venice church (Full Circle Church). The complaint describes Heying as "a local and national community leader, social cause connector and chiefly responsible for supporting and overseeing funding of the Church and its activities geared towards global expansion and humanitarian outreach. [Heying] has been featured on national and local media outlets including but not limited to, ABC's Nightline, the Los Angeles Times and New York Magazine regarding his dedication to building healthy spiritual communities in the 21st Century."

The kombucha raid and news reports

On May 8, 2015, the California Department of Alcoholic Beverage Control (ABC) conducted a raid at the Full Circle Church. The department issued a citation for selling alcohol without a license due to the sale of kombucha—a fermented tea—

at an event being held at the church. On May 13, 2015, the Argonaut newspaper reported on the incident:

"Undercover agents with the California Department of Alcoholic Beverage Control seized several containers of kombucha during a nonprofit fundraising event on Friday night at the Full Circle spiritual center on Rose Avenue in Venice. [¶] ABC agents issued a citation for selling alcohol without a license after they observed the effervescent fermented tea being served, ABC Special Agent in Charge Will Salao said. [¶] 'We're a complaint-driven agency, so when someone notifies us about what might be an illegal activity, we respond to it,' Salao said. 'They were cited for a misdemeanor for selling alcohol without a license.' [¶] Actor Andrew Keegan, a co-founder of the New Age spiritual center, said the temple and events venue was hosting a fundraiser for the Sea Shepherd Conservation Society that night. [¶] '[The Department of Alcoholic Beverage Control] may be a complaint-driven agency, but we're an intention-driven organization and our intentions are pure,' Keegan said. [¶] 'Kombucha is something we'd never imagine to be an illegal substance, and it's frustrating the system has that perspective.' Keegan said. 'We're certainly taking full responsibility for co-creating the event. We try to put our best foot forward. We wanted to raise money for Sea Shepherd as community, that's how Full Circle operates.' "[1]

According to the article, an ABC spokesman said "the citation was given to 'an employee or representative of the church.' " A church spokesperson was also quoted: " 'Part of our spiritual practice is that we serve kombucha. . . . We were very

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[1] Heying concedes the Argonaut's reporting was accurate.

surprised and concerned when we saw the agents wheeling the containers of Kombucha Dog out of the fundraiser.' " The Argonaut reported that the Kombucha Dog website indicated traditional kombucha is a fermented tea that may contain over 0.5 percent alcohol; the site stated Kombucha Dog usually has an alcohol content of no more than 1 percent.

On May 15, 2015, Fox News posted an article online about the incident, bearing the headline: "Andrew Keegan busted for selling kombucha at his New Age temple." In the text, the article stated: "The actor-turned-New Age lifestyle guru was busted by undercover agents from the California Department of Alcoholic Beverage Control (ABC) last Friday for selling illegal kombucha during a fundraising event at his Full Circle spiritual center in Venice, California, reports Argonaut Online. [¶] Keegan, who started his own religion dubbed Full Circle last year, says he was unaware he had been violating any laws by selling kombucha—a fermented tea drink that has low levels of alcohol." The article reprinted the quotes Keegan gave to the Argonaut. The Fox News article also stated: "ABC agents issued Keegan and event organizations a citation for selling alcohol without a license after witnessing the beverage being served."

The Examiner.com post

On May 15, 2015, a four-paragraph article was published on the Examiner.com website. The headline read: "Andrew Keegan arrested for selling illegal kombucha at a New Age temple." The first few sentences of the post continued: "Teenage heartthrob Andrew Keegan has been arrested for selling illegal kombucha at his New Age temple. He is best known for his time on the show 'Party of Five' and the movie '10 Things I Hate About You.' On Friday, Fox News shared about his recent arrest. [¶]

Undercover agents from the California Department of Alcoholic Beverage Control are the ones who arrested him last Friday."

The complaint and anti-SLAPP motion

In September 2015, Heying sued Anschutz Entertainment Group, Inc., AXS Digital Media Group, LLC ("AXS Digital"), AXS Digital, LLC, and 25 doe defendants (collectively "defendants"), all alleged to be the entities which owned, controlled, and published the website Examiner.com.[2] Heying alleged the Examiner.com's post was false because Heying was not arrested for selling illegal kombucha and was not on the church premises when the raid occurred. The complaint asserted claims for defamation, "false light invasion of privacy," negligence, and misappropriation under California common law and Civil Code section 3344.

Defendants responded by filing a motion to strike the complaint pursuant to Code of Civil Procedure section 425.16 (anti-SLAPP motion).[3] Defendants argued the complaint was based on conduct in furtherance of defendants' free speech rights in connection with a public issue or a subject of public interest. Defendants further contended Heying could not establish a probability of prevailing on the merits of his claims because section 230 of the Communications Decency Act barred the suit. Alternatively, defendants argued Heying is a public figure and he could not prove actual malice.

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[2] Defendants assert only AXS Digital Medical Group, LLC owned and operated the Examiner.com website.

[3] All further statutory references are to the Code of Civil Procedure unless otherwise noted.

The copy of the Examiner.com post attached to the complaint did not reveal an author. Defendants produced a four-page copy of the article, the bottom of which indicated the post's author was Mandy Robinson, an "examiner" from Oklahoma City. Defendants asserted Robinson was an independent contractor whose state of mind could not be imputed to defendants. They also argued that even if they could be held liable for Robinson's actions, Heying could not show actual malice because Robinson's post was explicitly based on a Fox News article, and her interpretation of that article was reasonable.

Heying opposed the motion. He argued the challenged statements were not in connection with a public issue. He also asserted he could show actual malice because defendants' business model of not editing or reviewing contributors' content amounted to a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of posts published on the site. Heying further contended the Examiner.com article changed the Fox News article's content and this was further evidence that defendants deliberately avoided the truth. He asserted defendants are information content providers not entitled to immunity under the Communications Decency Act.

In support of their reply briefing, defendants submitted a declaration from Robinson. Robinson declared she had only ever served as an independent contractor of AXS Digital. She was not paid a salary or required to work any set number of hours. She based the article about Heying on a Fox News article that was posted earlier that day. She linked to the Fox News article in her own post. She did not communicate with anyone at AXS Digital about the article before she posted it. According to Robinson, she relied on the Fox News article's report that Heying was "busted."

She explained: "From my awareness of general reporting practices and common parlance, I understood the term 'busted' was synonymous with 'arrested.' "

Robinson further declared: "In reliance on the FOX News report, I fully believed, at the time I authored and posted the Article, that Mr. Heying had been arrested by the California Department of Alcoholic Beverage Control for selling Kombucha containing alcohol. Indeed, at the time I posted the Article to Examiner.com, I had no doubts, whatsoever, that it was accurate, true, and correct."

Heying objected to the Robinson declaration as a prejudicial attempt to "sandbag" him with the belated introduction of new evidence. The trial court overruled all but one of Heying's objections to the Robinson declaration.

The trial court granted the anti-SLAPP motion. The court found the complaint arose from defendants' acts in furtherance of their right to petition, or their right to engage in free speech in connection with a public issue. The court further concluded Heying failed to show a probability of producing clear and convincing evidence demonstrating the challenged statements were made with actual malice. The court similarly found the misappropriation claims were based on defendants' publication of a matter in the public interest and the conduct therefore could not form the basis of a misappropriation claim. The court expressly did not reach defendants' Communications Decency Act defense.

Heying's appeal followed.

DISCUSSION

I. The Trial Court Properly Granted the Anti-SLAPP motion

A. Applicable Legal Principles

"Section 425.16, subdivision (b)(1), provides: 'A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States 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.' The analysis of an anti-SLAPP motion thus involves two steps. 'First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one "arising from" protected activity. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim.' [Citation.] 'Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.' [Citation.] We review an order granting or denying a motion to strike under section 425.16 de novo. [Citation.]" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 819–820.)

B. Defendants Established Heying's Complaint Arises From Protected Activity

Under section 425.16, subdivision (e), an act in furtherance of a person's right of petition or free speech under the United States or California constitution in connection with a public issue includes "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 . . . 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."

Numerous courts have concluded public websites are "public forums" within the meaning of the anti-SLAPP statute. (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 41, fn. 4; *Cross v. Facebook, Inc.* (2017) 14 Cal.App.5th 190, 199; *Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1252.) " 'In general, "[a] public issue is implicated if the subject of the statement or activity underlying the claim . . . was a person or entity in the public eye . . . ." [Citations.]" (*Jackson v. Mayweather, supra,* 10 Cal.App.5th at p. 1254; *Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 807–808 (*Seelig*).) The requirement under section 425.16, subdivision (e)(3) that the challenged comments be made in connection with an issue of public interest, "like all of section 425.16, is to be 'construed broadly' so as to encourage participation by all segments of our society in vigorous public debate related to issues of public interest." (*Seelig,* at p. 808.)

Here, both Heying and the Full Circle Church were in the "public eye." Heying is a self-described celebrity. He declared in these proceedings that in early May 2015, he was utilizing his celebrity and the "Full Circle Church platform" to produce and promote community events. The record reveals that in March 2015, Heying and the church were the subject of lengthy articles in New York magazine and in the Los Angeles Times. Heying's business manager and director of communications for Full Circle Church declared these articles, "due to their broad exposure brought awareness surrounding [Heying's] personal and professional endeavors to a large demographic based upon the national and global reach of each of the publications." The manger further declared that on May 1, 2015, Heying

"was personally profiled about his work as a spiritual leader, humanitarian and social justice leader in a 7-minute piece on ABC's Nightline. The segment was seen by over 1.5 million viewers. . . . It became abundantly clear that after Nightline aired . . . and as a progressive result of the culmination of the above referenced positive press, there was extreme interest in [Heying] as an actor and spiritual leader . . . ."

There was clear public interest in Heying and the activities of the church he co-founded. A government raid on the church for illegal activity, and Heying's alleged arrest as part of that raid, was an issue of public interest. (*Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1042–1043; *Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1132–1133 [public interest not the same as mere curiosity but should be a matter of concern to a substantial number of people; there should be some degree of closeness between the challenged statements and the asserted public interest].)

As we understand his arguments, Heying contends the statement in the Examiner.com article that he was arrested for selling illegal kombucha was not "in connection with" a public issue because the statement was false. However, at this stage in the analysis, our concern is with the nature of the statements, not their truth. Even though it is undisputed that Heying was not arrested, the fact remains that the challenged statements were made on a public forum in connection with an issue of public interest—Heying and the activities of his church. (See e.g., *Price v. Operating Engineers Local Union No. 3* (2011) 195 Cal.App.4th 962, 971 [rejecting argument that challenged statements were not covered under section 425.16 because defamatory speech is illegal].)

This is not a case in which the statements challenged in the complaint are about a non-public person and are only tangentially connected to an amorphous public interest. (*Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 34 [rejecting "synecdoche theory" of public issue where entity was not in the public eye and the subject was not one of widespread public interest].) Heying's own declaration indicates that only days before the raid he was actively putting himself and the church in the public eye, leveraging his celebrity, in order to generate interest in the church's activities. (See *Jackson v. Mayweather, supra,* 10 Cal.App.5th at p. 1255.) Defendants established Heying's complaint arose from protected activity under section 425.16.

C. Heying Did Not Establish a Probability of Prevailing on the Merits of His Claims

Because defendants established that Heying's complaint arose from protected activity under section 425.16, the burden shifted to Heying to demonstrate a probability of prevailing on his claims.

" 'In order to establish a probability of prevailing on the claim (§ 425.16, subd. (b)(1)), a plaintiff responding to an anti-SLAPP motion must " 'state[ ] and substantiate[ ] a legally sufficient claim.' " [Citations.] Put another way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." [Citations.] In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)); though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence

supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim. [Citation.]' [Citations.]" (*Taus v. Loftus* (2007) 40 Cal.4th 683, 713–714.)

We accept as true the evidence favorable to plaintiff. Further, a plaintiff must establish only that the challenged claims have " 'minimal merit' " to defeat an anti-SLAPP motion. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291.)

1. Heying did not establish a probability that he will be able to produce clear and convincing evidence of actual malice

The first two causes of action in Heying's complaint asserted defamation claims. "If the person defamed is a public figure, he cannot recover unless he proves, by clear and convincing evidence [Citation], 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.' [Citation.]" (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 256 (*Reader's Digest*), quoting *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 285–286.) " 'The clear and convincing standard requires that the evidence be such as to command the unhesitating assent of every reasonable mind. [Citation.]' [Citation.]" (*Rosenaur v. Scherer* (2001) 88 Cal.App.4th 260, 274.) In evaluating whether a plaintiff has made a prima facie showing of facts sufficient to sustain a favorable judgment, "we bear in mind the higher clear and convincing standard of proof." (*Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 358.)

Heying does not dispute that he is a public figure and is therefore required to prove actual malice in order to prevail on his defamation claims.[4] Thus, to defeat the anti-SLAPP motion, Heying was required to establish a probability that he will be able to produce clear and convincing evidence of actual malice. (*Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146, 1167 (*Annette F.*).) He asserts he made a prima facie showing of actual malice based on a theory of reckless disregard.

" '[R]eckless conduct is not measured by whether a reasonably prudent [person] would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.' [Citation.] 'The standard is a subjective one-there must be sufficient evidence to permit the conclusion that the defendant actually had a "high degree of awareness of . . . probable falsity." [Citation.]' " (*Antonovich v. Superior Court* (1991) 234 Cal.App.3d 1041, 1048.)

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[4] Defendants have argued that since Robinson was an independent contractor, any actual malice on her part cannot be imputed to defendants and Heying is unable to demonstrate that the false statements were made with actual malice on the part of AXS Digital. However, defendants also argue that even if they could be held liable based on Robinson's state of mind, Heying did not make a prima facie showing that Robinson made the false statements with actual malice. We need not decide whether actual malice on the part of Robinson alone could form the basis of liability as to defendants. Even assuming, as Heying does, that Robinson and defendants are essentially one and the same for liability purposes, Heying failed to establish a probability that he will be able to produce clear and convincing evidence of actual malice.

"Although the issue turns on the subjective good faith of the defendant, the plaintiff may attempt to prove reckless disregard for truth by circumstantial evidence, 'A failure to investigate [citation], anger and hostility toward the plaintiff [citation], reliance upon sources known to be unreliable [citations], or known to be biased against the plaintiff [citations]-such factors may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication.' [Citation.]" (*Copp v. Paxton* (1996) 45 Cal.App.4th 829, 847.) "However, any one of these factors, standing alone, may be insufficient to prove actual malice or even raise a triable issue of fact." (*Annette F., supra,* 119 Cal.App.4th at p. 1167.) "Gross or even extreme negligence will not suffice to establish actual malice; the defendant must have made the statement with knowledge that the statement was false or with 'actual doubt concerning the truth of the publication.' [Citation.]" (*Ibid.*)

a. Failure to acquire knowledge of facts evidenced by the defendants' "inactive" business model

Heying asserts he proffered evidence that defendants made a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of the challenged statements. He points to evidence that, as a matter of course, AXS Digital does not review all articles before they are posted on the site. Heying contends this business model itself "promotes reckless disregard for truth or falsity by its very blueprint and exemplifies the essence of the actual malice standard."

We disagree. The evidence—a declaration and deposition testimony from an AXS Digital executive—indicated the company does not review or edit the contractors' posts. This alone does not create an inference that defendants' manner of doing business is a purposeful avoidance of truth, or a deliberate decision not to

acquire facts that might confirm the probable falsity of any particular article.

Overstock.com, Inc. v. Gradient Analytics, Inc. (2007) 151 Cal.App.4th 688 (*Overstock*), provides a helpful contrast. In *Overstock.com*, the plaintiff offered prima facie evidence of actual malice based in part on the defendant's business model. The defendant published purportedly neutral and objective analytic reports about publicly traded companies. The plaintiff offered evidence that, in reality, the defendant allowed subscribers to order custom reports specially designed to meet customer expectations. Such reports often allowed subscribers to take an advantageous position on the stock of the company analyzed in the report. (*Id.* at pp. 693–696.) The plaintiff provided evidence that a subscriber had ordered custom negative reports about the plaintiff in order to drive down the value of the company's stock. The defendant complied, issuing multiple negative reports, despite being repeatedly advised that some of the statements in the reports were false. (*Id.* at pp. 696–698, 711.)

The court concluded this specific evidence created an inference of malice in that the defendant "relied on information from biased sources, made statements in its reports without doing the necessary investigation and due diligence, and made statements with defamatory implication to achieve a preconceived result. This dynamic, described in detail [in a witness declaration], suffices to show a reasonable probability that the statements discussed above were made with actual malice." (*Overstock, supra,* 151 Cal.App.4th at p. 711.)

In contrast, the only evidence Heying argues supports his theory about defendants' business model is that AXS Digital did not review all material posted on Examiner.com. Unlike the plaintiff in *Overstock.com*, Heying has not offered evidence that defendants routinely relied on biased sources, falsely represented

they had done more investigation than they had, or, as a business practice, "made statements with defamatory implication to achieve a preconceived result." Further, as it relates to the article in this case, defendants' failure to review Robinson's article before posting does not create an inference that defendants entertained serious doubts as to the truth of the publication or a high degree of awareness of probable falsity. The evidence Heying produced regarding defendants' business model was not a prima facie showing of facts that, if true, would support a finding of actual malice.

b. Obvious reason to doubt the truth of the challenged statement

Heying likewise argues there was evidence defendants had obvious reasons to doubt the truth of the challenged statements, specifically: 1) the Fox News article stated Heying and "event organizations" were issued a citation for selling alcohol without a license after witnessing the kombucha being served; and 2) the Fox News article did not report that Heying had been arrested.

That a citation was issued in connection with a criminal violation is not necessarily inconsistent with a person being arrested in connection with the same violation, such that the "citation" statement creates obvious reason to doubt that Heying was arrested. (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 88 [careless interpretation of another person's statement did not establish malice].) Heying also ignores other portions of the Fox News article which indicated he was "busted" for selling kombucha; Heying was quoted in the press as accepting at least some responsibility for the incident; and the special agent in charge was quoted as stating an unspecified "they" were cited for a misdemeanor for selling alcohol without a license. Heying has not established that a layperson confronted

with this information would necessarily draw a distinction between a misdemeanor citation and an arrest. (See *Annette F., supra,* 119 Cal.App.4th at p. 1169 [defendant's explanation that she innocently used the term "convicted" to refer to a noncriminal adjudication was not so implausible as to support inference of actual malice].) Robinson herself declared she believed "busted" meant arrested, and she believed the statements about Heying in her post were true. Heying's evidence does not demonstrate the Fox News article created obvious reason to doubt the truth of a statement that Heying was arrested in connection with the kombucha raid.

c. "Purposeful avoidance of the truth"

Heying contends defendants purposefully avoided the truth about Heying's lack of involvement in the kombucha incident. The evidence Heying cites in support of this argument is that "nothing contained in the Fox News article unequivocally stated that [Heying] had been arrested." Yet, as we explained above, given the ambiguity in the Fox News article, this alone does not support an inference of actual malice.

Heying also asserts the omissions or differences in the Fox News article and the Examiner.com post show defendants purposefully avoided the truth to publish an article that would gain wider exposure with "salacious terminology," get "more clicks" to boost advertisement revenue generated on the page viewed, and to "benefit from meta tagging." But Heying has not established he can produce *evidence* to support this theory.

The only evidence Heying cites is that contributors, rather than receiving a salary, are eligible to receive "incentive payments" that are in part determined by the number of people who view the contributor's article on the Examiner.com website.

He offers no evidence about defendants' advertisement revenue or meta tagging. That some contributors receive incentive payments based on readership does not by itself support Heying's theory that the website knowingly or recklessly publishes false stories to boost traffic to the website. And, critically, it falls far short of creating an inference that defendants, in this case, knew the challenged statements in the Heying post were false or that they doubted the accuracy of the statements. " 'Such a speculative possibility falls short of clear and convincing evidence.' [Citation.]" (*Annette F., supra,* 119 Cal.App.4th at p. 1170.)

d. Fox News article—liability as a republisher

Heying contends defendants cannot escape liability by arguing Robinson relied on the Fox News article because of the common law principle that "one who republishes a defamatory statement is deemed thereby to have adopted it and so may be held liable, together with the person who originated the statement, for resulting injury to the reputation of the defamation victim." (*Khawar v. Globe Internat., Inc.* (1998) 19 Cal.4th 254, 268 (*Khawar*).) Heying asserts defendants cannot "redirect the liability inquiry by forcing the focus of said inquiry upon the Fox News article."

However, the Fox News article is relevant to the evaluation of actual malice on the part of defendants. Robinson declared she believed the statements in her article to be true. Yet, " '[p]rofessions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable

that only a reckless man would have put them in circulation.' [Citation.]" (*Jackson v. Paramount Pictures Corp.* (1998) 68 Cal.App.4th 10, 34, quoting *St. Amant v. Thompson* (1968) 390 U.S. 727, 732.) The Fox News article, and Robinson's reliance on that article, is evidence that statements in her Examiner.com post were not fabricated or a product of her imagination.[5]

In addition, as the California Supreme Court explained in *Reader's Digest,* "[a] publisher does not have to investigate personally, but may rely on the investigation and conclusions of reputable sources. 'Where the publication comes from a known reliable source and there is nothing in the circumstances to suggest inaccuracy, there is no duty to investigate.' [Citations.]" (*Reader's Digest, supra,* 37 Cal.3d at p. 259.) When the claim of actual malice "is based on the republication of a third party's defamatory falsehoods, 'failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient.' [Citation.]" (*Khawar, supra,* 19 Cal.4th at p. 276.) Instead, an actual malice finding requires that there be obvious reasons to doubt the truth or accuracy of the source information, and the republisher failed to acquire facts which could have confirmed or disproved the allegations. (*Ibid; Reader's Digest,* at p. 259.)

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[5] We note Heying's argument regarding the Fox News article is in part a contention that defendants improperly asserted a "wire service defense," which has never been adopted in California. We need not consider defendants' wire service defense. Assuming reliance on the Fox News article did not insulate defendants from liability from defamation or trigger any absolute privilege, the article, and Robinson's reliance on it, remain relevant in the analysis of actual malice.

Even assuming Heying established the Fox News article contained defamatory falsehoods, he has not made a showing that there were obvious reasons to doubt the truth or accuracy of the Fox News article. While being "busted" or arrested in connection with kombucha may seem implausible, that there was a kombucha raid at all was improbable, yet true. And, in light of the Fox News article in its entirety, there was no obvious reason to doubt the truth of the statement that Heying was arrested in connection with the kombucha raid. (*Nadel v. Regents of University of California* (1994) 28 Cal.App.4th 1251, 1270 [no evidence of reckless disregard where evidence demonstrated reliance on information from reputable sources and no reason to doubt accuracy of the information].)

A more careful person or news source may have sought additional information about the kombucha incident beyond one news article. But "[a]ctual malice ' "is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." [Citation.] Lack of due care is not the measure of liability, nor is gross or even extreme negligence.' [Citation.] Thus 'mere failure to investigate the truthfulness of a statement, even when a reasonably prudent person would have done so, is insufficient' to demonstrate actual malice." (*Christian Research Institute v. Alnor*, *supra,* 148 Cal.App.4th at p. 90.)

There is no evidence in the record, which, if true, would indicate defendants harbored doubts as to the truth of the offending post's statements. The false statement that Heying was arrested in connection with the kombucha raid was not

"so far from the truth as to permit an inference of actual malice by clear and convincing evidence," (*Annette F., supra,* 119 Cal.App.4th at p. 1170), even considering the lack of investigation. Heying did not establish a probability of proving actual malice by clear and convincing evidence as required to prevail on his defamation claims.

2. The trial court did not err by not considering defendants' Communications Decency Act defense

In their anti-SLAPP motion, defendants argued they were entitled to immunity under section 230 of the federal Communications Decency Act (47 U.S.C. § 230; "section 230".) Under section 230, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider . . . . No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." (47 U.S.C. § 230, subds. (c)(1) and (e)(3).) "These provisions have been widely and consistently interpreted to confer broad immunity against defamation liability for those who use the Internet to publish information that originated from another source." (*Barrett v. Rosenthal, supra,* 40 Cal.4th at p. 39.)

On appeal, Heying argues the trial court was required to consider defendants' argument under the Communications Decency Act. He contends defendants were not entitled to immunity under section 230 because they are an "information content provider," rather than a publisher of information originating from another source.

Heying fails to articulate why the trial court was required to consider this defense argument given its ultimate resolution of the motion. Even if the trial court had considered the argument and agreed with Heying's position, that analysis would merely have eliminated one defense argument. Heying still needed to demonstrate a probability of prevailing on his claims under state law. The publisher of a false statement about a public figure is not liable absent clear and convincing evidence of actual malice. The trial court could properly first consider whether Heying established a probability that he would be able to produce clear and convincing evidence of actual malice. After concluding he had not, the court had no reason to also consider the section 230 immunity defense. (See e.g., *Cross v. Facebook, Inc., supra,* 14 Cal.App.5th at p. 213 [resolution of case on other grounds eliminated need to address Communications Decency Act immunity].)

3. Heying did not establish a probability of prevailing on his negligence and false light claims

" ' "A 'false light' cause of action is in substance equivalent to a libel claim, and should meet the same requirements of the libel claim, including proof of malice [where malice is required for the libel claim]." ' [Citations.] Indeed, '[w]hen a false light claim is coupled with a defamation claim, the false light claim is essentially superfluous, and stands or falls on whether it meets the same requirements as the defamation cause of action.' [Citation.]" (*Jackson v. Mayweather, supra,* 10 Cal.App.5th at p. 1264; *Kapellas v. Kofman* (1969) 1 Cal.3d 20, 35, fn. 16.)

The same is true of Heying's negligence claim, which was based on the false statements in the article. As explained in *Reader's Digest,* "The *New York Times* decision defined a zone of

constitutional protection within which one could publish concerning a public figure without fear of liability. That constitutional protection does not depend on the label given the stated cause of action . . . liability cannot be imposed on any theory for what has been determined to be a constitutionally protected publication." (*Reader's Digest, supra,* 37 Cal.3d at p. 265.) "Although the limitations that define the First Amendment's zone of protection for the press were established in defamation actions, they are not peculiar to such actions but apply to all claims whose gravamen is the alleged injurious falsehood of a statement . . . and no cause of action 'can claim . . . talismanic immunity from constitutional limitations' [Citation])" (*Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1042.)

As explained above, Heying did not establish a probability that he will be able to produce clear and convincing evidence of actual malice. He therefore did not demonstrate a probability of prevailing on his false light and negligence claims. (*Vogel v. Felice* (2005) 127 Cal.App.4th 1006, 1010, 1018; see *Carafano v. Metrosplash.com Inc.* (C.D.Cal. 2002) 207 F.Supp.2d 1055, 1076–1077.)

4. Heying did not establish a probability of prevailing on his misappropriation claims

Under both Civil Code section 3344 and the common law cause of action for misappropriation, a defendant may be liable for damages caused by the use of a plaintiff's name, photograph, or likeness to the defendant's advantage, without the plaintiff's consent.

"However, no cause of action will lie for the '[p]ublication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it . . . ' [Citation.] . . . [¶] . . . Like the common law cause of action, the statutory cause of action specifically exempts from liability the use of a name or likeness in connection with the reporting of a matter in the public interest. Civil Code section 3344, subdivision (d) provides that no prior consent is required for 'use of a name, . . . photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign . . . .' (Civ. Code, § 3344, subd. (d).)" (*Montana v. San Jose Mercury News, Inc.* (1995) 34 Cal.App.4th 790, 793–794 (*Montana*).)

We have concluded above that the Examiner.com article, which included a photograph of Heying, was speech on a matter of public interest. (*Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 542, [public interest attaches to people who by their mode of living create a bona fide attention to their activities; "public affairs" in section 3344, subdivision (d) may be matters that are not important, but are of interest].)

As we understand his argument, Heying contends defendants used his name and likeness for commercial gain, in that they sought to draw attention to Examiner.com. Heying offers no legal authority to support this argument. (See *Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 413–414 [rejecting argument that use of baseball player factual data and likenesses in publications and videos, to increase interest in baseball and attendance at games, rendered use of the information advertisements].)

Moreover, even when a public figure's name or likeness is used in "advertising," " '[a]dvertising to promote a news medium . . . is not actionable under an appropriation of publicity theory so long as the advertising does not falsely claim that the public figure endorses that news medium.' [Citation.]" (*Montana, supra,* 34 Cal.App.4th at p. 797.) Further, " '[t]hat books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.' [Citation.]" (*Id.* at p. 797, fn. 2.) Heying has not demonstrated a probability of prevailing on his misappropriation claims.[6]

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs and attorney fees on appeal pursuant to section 425.16, subdivision (c). (*Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1271.)

BIGELOW, P. J.

We concur:

FLIER, J. GRIMES, J.

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[6] To the extent the misappropriation claims were based on the argument that the use of Heying's likeness was injurious because it was false, he was required to demonstrate a probability of proving actual malice. (*Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664, 682.)