Filed 12/13/17 Charney v. Brown CA2/5

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| DOV CHARNEY,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>COLLEEN BROWN,<br><br>Defendant and Respondent. | B268464<br><br>(Los Angeles County Super. Ct. No. BC581602) |

APPEAL from order of the Superior Court of Los Angeles County, Terry A. Green, Judge. Affirmed.

Keith A. Fink & Associates, Keith A. Fink, Olaf J. Muller, and Lauren M. Korbatov, for Plaintiff and Appellant.

Paul Hastings, Paul W. Cane, Jr., Elena R. Baca, Dennis S. Ellis, and Scott Klausner, for Defendant and Respondent.

Plaintiff and appellant Dov Charney appeals from the trial court's order granting defendant and respondent Colleen Brown's special motion to strike Charney's complaint (anti-SLAPP motion)[1] under Code of Civil Procedure section 425.16.[2] Following Charney's highly publicized and contentious termination as chairman and CEO of American Apparel, Inc., Brown, the then-current chairperson, distributed an e-mail to the company's employees assuring them that Charney would not be returning to American Apparel in either capacity, and explaining the underlying reasons for his termination. Charney sued Brown and American Apparel, claiming the e-mail was defamatory and showed him in a false light.[3] Defendants filed a special motion to strike the complaint. The trial court granted the motion, finding that the alleged defamatory statements were made in connection with a public issue or an issue of public interest entitled to protection under section 425.16, subdivision (e)(4), and that Charney failed to demonstrate a probability of success on his claims.

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[1] "SLAPP is an acronym for strategic lawsuit against public participation." (*Kenne v. Stennis* (2014) 230 Cal.App.4th 953, 957, fn. 3.)

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

[3] American Apparel filed for bankruptcy while this appeal was pending and is no longer a party to the appeal.

We affirm.

## FACTS AND PROCEDURAL BACKGROUND

### *The Complaint*

Charney's complaint recounted American Apparel's investigation and its ultimate termination of his employment as chairman and CEO. On or about June 18, 2014, the Board presented Charney with two options: (1) resign and sign over his voting rights to the Board in exchange for a severance package, an opportunity to remain with the company as a consultant, and a positive press release; or (2) be terminated for cause with a termination notice documenting the reasons for his termination leaked to the press. Charney was provided with a notice of intent to terminate, which indicated he would be terminated for breaching his fiduciary duty, violating company sexual harassment and anti-discrimination policies, and misusing corporate assets. The complaint alleged that the reasons for the Board's actions were pretextual and part of a plan to wrest control of the company from Charney. Charney refused to resign and sued for unlawful termination.

Shortly thereafter, Standard General, L.P., approached Charney and offered to lend him sufficient funds to regain control of American Apparel. Soon after executing the agreements, however, Standard General informed Charney that the company's association with him had caused it to lose

investors, and a hostile proxy contest over American Apparel was no longer feasible.

Standard General persuaded Charney to enter into a Nomination, Standstill and Support Agreement (Standstill Agreement) with it and American Apparel on July 9, 2014, under which Standard General effectively took control of American Apparel. As part of the Standstill Agreement, Charney agreed to an impartial investigation into his alleged misconduct and the legality and propriety of the Board's termination of his employment. FTI Consulting, Inc., a private investigation company that had previously been employed by American Apparel, was to conduct the investigation under the oversight of an independent suitability committee, which would make the final determination regarding Charney's employment. Charney would be given an opportunity to review, question, and respond to FTI's findings. Charney later learned that he was not allowed to communicate directly with FTI, but instead had to funnel communications through the Jones Day law firm—which he claimed was concurrently serving as American Apparel's defense counsel in the arbitration relating to Charney's unlawful termination suit.

In December 2014, before the investigation was completed, American Apparel presented Charney with another "consultancy/settlement agreement" and offered to terminate the investigation. The agreement included the requirements that Charney cease attempts to regain control of American Apparel and release all claims against Standard

General, American Apparel, and Brown. Charney rejected the offer and went forward with the investigation, although he believed it to be biased and a sham.

On December 15, 2014, Charney's employment at American Apparel was terminated, purportedly for cause. On April 24, 2015, Brown disseminated an e-mail to all employees describing the circumstances of Charney's termination, assuring employees that Charney would not be returning to American Apparel, and stating, among other things, that "it would be hard to find any Board of any company (public or private) that would be willing to hire Charney as its CEO, executive, or employee. The risk to the company and its the shareholders would just be too great. One of the responsibilities of a Board of Directors is to control risk, and it would be a clear breach of any Board's fiduciary duties to re-hire an individual with Mr. Charney's history of misconduct."

The complaint identified several statements in Brown's e-mail that Charney alleged "contain[ed] falsehoods, exaggerations, and/or inaccuracies" about him, and portrayed him as "someone found liable and/or guilty by 'independent' and 'third party' investigators of committing financial malfeasance and illegal sexual harassment and discrimination sufficient to terminate his employment for 'cause.'" The complaint claimed the statements defamed Charney (first cause of action) and placed him in a false light in the public eye (second cause of action). With respect to both causes of action, Charney asserted that Brown made

the statements with the knowledge that they were false or with reckless indifference to their falsity, causing damage to his personal and professional reputation.

Charney supported the complaint with the "positive" press release provided by the Board in June 2014; the notice of intent to terminate for cause; the Standstill Agreement; a copy of a letter from Charney's counsel to American Apparel requesting his personnel file; and Brown's e-mail.

***Special Motion to Strike***

Brown and American Apparel filed a special motion to strike both causes of action under section 425.16. They argued that Charney's complaint addressed protected activities and was brought for the sole purpose of waging a vendetta against the company, which qualified the statements for protection under section 425.16, subdivisions (e)(3) and (e)(4). The motion alleged that Charney's future with American Apparel was a public issue or an issue of public interest under the anti-SLAPP statute due to the vast publicity the issue had garnered. Charney's employment at American Apparel was also an issue that affected a large number of people. Many workers were deciding whether to continue employment with the company based on its future leadership.

The special motion to strike alleged that Charney could not demonstrate a probability of success on his claims. The e-mail was protected by the common interest privilege,

which shields employers who communicate with their employees regarding the termination of another employee. To defeat the privilege, Charney would have to provide evidence of malice. Charney was also required to present evidence that Brown had acted with malice to prevail on his defamation claim because of his status as a public figure. The complaint failed to allege a single specific allegation of malice. There was no evidence to suggest that the purpose of Brown's e-mail was to vex, annoy, or injure Charney. Charney failed to demonstrate either that Brown knew her statements were false or that she entertained "serious doubts" about their truth. Absent evidence of malice, Charney could not establish that the e-mail was not privileged under the common interest privilege or that it met the requirements for recovery in a defamation action.

The special motion to strike detailed the evidence of Charney's misconduct compiled by FTI during its investigation, including: (1) specific statements Charney made and actions he took that were verbally and physically abusive to employees, in clear violation of the company's sexual harassment and anti-discrimination policies; (2) vulgar, sexually explicit e-mails and text messages Charney sent to models and employees utilizing the company's electronic devices; (3) recordings of sexual encounters Charney had with models during company photoshoots; (4) evidence that Charney encouraged and ratified the conduct of an employee who impersonated former employees and models in blog posts, minimized their claims against

Charney, and posted nude photographs of them resulting in the company paying over $5 million in settlements and awards; (5) evidence that Charney used company funds to pay his own legal fees, received unapproved loans and advances, and removed cash from retail stores without authorization; and (6) evidence that Charney exposed the company to millions of dollars of liability for civil suits.

Defendants also claimed the parties were required by contract to resolve the dispute through arbitration.

The special motion to strike was supported by Brown's declaration. In addition to serving as chairperson of the Board as of December 2014, Brown had been a member of the Board since August 2014, and also served as a member of the suitability committee, the nominating committee, the corporate governance committee, and the audit committee. In her various roles, she reviewed documents related to Charney's investigation and the Board's meeting minutes, including minutes of meetings that occurred prior to her tenure as chairperson when Charney was first suspended.

Brown understood that the audit committee launched an investigation of Charney in the spring of 2014. On June 18, 2014, the independent directors of the company presented Charney with the option to remain as a paid consultant with no supervisory or financial authority, or be suspended pending completion of the investigation. Charney and the Board were not able to reach an agreement regarding either option, so the Board voted unanimously to suspend him. Charney was given the option of a consultancy

position in the hopes that his departure from the company would be uneventful. Charney's suspension was formalized in a suspension letter listing the bases for the Board's decision as described in defendants' special motion.

Brown was aware that Charney resigned as director of American Apparel pursuant to the Standstill Agreement. Based on that agreement, the suitability committee, which was comprised of Brown and two other independent directors, assumed oversight and control of the ongoing investigation of Charney's conduct by FTI. FTI was retained by the audit committee's independent counsel, Jones Day, which had never served as outside general counsel to American Apparel. In the Standstill Agreement filed with the SEC, Charney agreed that he would not return to the company as an employee, officer, or CEO if the suitability committee determined that he was unfit to do so.

Over the months in which Brown served on the suitability committee, she reviewed documents from Charney's investigation that confirmed the instances of misconduct listed in the special motion, which her declaration also described in detail. Charney's conduct violated American Apparel's non-discrimination, anti-retaliation, and anti-harassment (race, ethnicity, and sexual) policies, and its prohibition on the inappropriate use of its electronic resources. On December 15, 2014, the suitability committee voted unanimously that Charney was not suitable to return to the company as a CEO, officer, or employee. The Board subsequently voted to terminate Charney.

Immediately following his termination, Charney began a campaign to malign American Apparel and its new leadership by communicating with employees, investors, and the press. He attempted to incite labor unrest and orchestrated the filing of dozens of claims against the company with the NLRB. Charney's attorney publicly admitted that Charney was "directly involved" in these lawsuits.

Many employees inquired about Charney's status with American Apparel. Some employees sent e-mails to coworkers supporting Charney's return. Brown sent the e-mail that is the subject of the underlying action on April 24, 2015, and attached the notice of intent to terminate. The e-mail set forth the bases for Charney's termination, informed employees regarding Charney's future with the company, and informed employees that the SEC had recently opened an investigation of potential legal violations that occurred during the time Charney was CEO. In the e-mail, Brown also expressed her opinion that Charney would not return to the company in any capacity because he posed too great a risk, and that no board of directors would be willing to hire Charney as its CEO, executive, or employee.

The special motion to strike was also supported by David Danziger's declaration. Danziger served as a member of the American Apparel Board and chaired the audit committee from June 24, 2011, through June 15, 2015. He served on American Apparel's executive succession committee from June 18, 2014, through August 5, 2014, at

which time he served on the suitability committee. Danziger was also the company's interim co-chairman from June 18, 2014, through December 22, 2014.

Danziger attended Board and audit committee meetings, and reviewed and discussed information regarding the company's day-to-day operations, financial statements, forecasts and budgets, press releases relating to the company, information related to investors and investor relations, and information related to Charney's investigation and termination. Danziger was aware that the company employed thousands of workers worldwide and operated 250 stores globally. He also understood that the company had 180 million shares of stock outstanding. He was aware that both the general and financial media regularly covered American Apparel and developments related to the company.

Danziger's declaration included a summary of events that was consistent with Brown's declaration. He knew of the specific instances of misconduct listed in Brown's declaration through documents related to the investigation. Following Charney's initial suspension, Danziger spoke with Johannes Minho Roth of FiveT Capital, which held 12 percent of American Apparel's stock. Roth expressed serious concerns about Charney's role at the company.

In addition to Brown's declaration, defendants attached an order granting American Apparel's Motion for Temporary Restraining Order against Charney, of which the court took judicial notice; the intent to terminate letter; the Standstill Agreement; and a press release regarding the

Standstill Agreement and continuing investigation into Charney's alleged misconduct.

***Opposition to the Special Motion to Strike***

Charney argued in opposition that the e-mail was not protected under section 425.16, subdivisions (e)(1), (e)(2), (e)(3), or (e)(4), and that his claims possessed the requisite minimal merit to survive the motion. He attacked the truth of several statements in the e-mail. He did not address whether the allegations against him were true, but instead argued that "[a]lmost all, if not all, accusations made against [him] and listed in Colleen Brown's Declaration were made *years before* the June 2014 suspension and were *not* 'newly discovered' as Brown falsely claims." Charney argued that defendants had presented no evidence that his claims must be arbitrated, and had waived arbitration by filing the special motion to strike.

Attachments to the opposition included: Charney's declaration;[4] an excerpt from American Apparel's 10-K filed with the SEC on April 1, 2014; the positive press release that would have been released if Charney had agreed to take

[4] The events recounted in Charney's declaration mirrored the facts as stated in the complaint. The trial court sustained almost all of defendants' evidentiary objections to Charney's declaration. As a result, a large portion of the declaration was stricken. Charney does not challenge the trial court's ruling on appeal.

the consultancy option; the notice of intent to terminate; a screenshot of a text from American Apparel Board member Allan Mayer; the Standstill Agreement; a notice relating to the appointment of the arbitrator in Charney's unlawful termination case; American Apparel's financial disclosures from 2014; correspondence between Charney's counsel, American Apparel, and Jones Day; a letter from American Apparel to Charney informing him of his termination; a press release regarding Charney's termination; and American Apparel's quarterly report for the second quarter of 2014.

***Trial Court's Ruling***

The trial court granted the special motion on the basis that the e-mail was an exercise of Brown's free speech in connection with a public issue and an issue of public interest under section 425.16, subdivision (e)(4). The e-mail "set[] forth the basis for the termination of the [CEO] . . . of a publicly traded company with thousands of employees and approximately 180 million shares outstanding. [It] was sent at or around the time the [SEC] initiated an investigation related to Plaintiff's conduct and Defendant Brown was aware that the basis for Plaintiff's termination would be disclosed to the SEC. The grounds for the termination of the CEO could affect a company's stock price. Moreover, the Brown Letter was sent to American Apparel employees in an effort to quell [] labor unrest . . . ."

The trial court ruled that Charney failed to make a showing of a probability of success on his claims. The e-mail was subject to the common interest privilege under Civil Code section 47, subdivision (c), which is only extinguished by malice. Charney conceded that he was a public figure, such that he was required to make a showing of malice to recover on his defamation claim. He offered no evidence that Brown was motivated by ill will or hatred, or that she made the statements with knowledge of their falsity or reckless disregard for the truth. Brown's statements were either not defamatory as a matter of law or statements of opinion. At a minimum, the evidence demonstrated Brown had a reasonable belief that the statements were true.

The court ruled that Charney's false light cause of action was inextricably entwined with his defamation claim, and necessarily failed.

Charney timely appealed.

## DISCUSSION

"'"A SLAPP suit—a strategic lawsuit against public participation—seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances. [Citation.] The Legislature enacted Code of Civil Procedure section 425.16—known as the anti-SLAPP statute—to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights. [Citation.]"

[Citation.]' (*Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 34.) 'The goal [of section 425.16] is to eliminate meritless or retaliatory litigation at an early stage of the proceedings.' (*Seelig v. Infinity Broadcasting Corp*. (2002) 97 Cal.App.4th 798, 806.) That section provides, '[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.' (§ 425.16, subd. (b)(1).)" (*Charney v. Standard General, L.P.* (2017) 10 Cal.App.5th 149, 156 (*Charney*).)

"Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 712 [].) If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success. [Our Supreme Court has] described this second step as a 'summary-judgment-like procedure.' (*Id*. at p. 714.) The court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff's evidence as true, and evaluates the defendant's showing only

to determine if it defeats the plaintiff's claim as a matter of law. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 819–820 [].) '[C]laims with the requisite minimal merit may proceed.' (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 94 [].)" (*Baral v. Schnidt* (2016) 1 Cal.5th 376, 384–385, fn. omitted.) We independently review the trial court's grant of an anti-SLAPP motion. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

***Arising From Protected Activity***

As relevant here, a cause of action arising from an act of a person in furtherance of the person's right of petition or free speech includes "any [] 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" under section 425.16, subdivision (e)(4).

Charney contends that Brown failed to meet this requirement because the contents of the e-mail, which was not made public, were of concern only to American Apparel's workforce and not a matter of widespread interest. Citing to *Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107, 119 (*Du Charme*), Charney argues that because his termination was "not of interest to the public at large . . . the constitutionally protected activity must, at a minimum, occur in the context of an ongoing controversy, debate or discussion," and must

be made to encourage participation. Charney asserts the e-mail's stated purpose was to provide information concerning his termination several months earlier—"a *fait accompli*"—and to "silence rising dissatisfaction in the workforce." The employees who received it were not expected to take any action. Charney further contends that neither his own celebrity nor American Apparel's prominence is sufficient to create an issue of public interest, because the e-mail's statements concerned only the private matter of his termination—a public interest cannot be "broad and amorphous," or simply a matter of curiosity.

We are not persuaded. First, the fact that the e-mail was not made public does not preclude protection under the anti-SLAPP statute. "[S]ection 425.16, subdivision (e)(4) includes conduct in furtherance of free speech rights, regardless whether that conduct occurs in a place where ideas are freely exchanged. Section 425.16, therefore, governs even private communications, so long as they concern a public issue." (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, italics omitted; *Terry v. Davis Community Church* (2005) 131 Cal.App.4th 1534, 1546.)

An issue is public when the statement or activity precipitating the underlying cause of action was "a person or entity in the public eye." (*Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.app.4th 913, 924 (*Rivero*).) Charney concedes he is a public figure. The subject of his termination was of public interest—a major shareholder contacted the Board with

concerns over Charney's relationship with American Apparel, and the company's press release concerning the Standstill Agreement included information about Charney's status at American Apparel going forward. Employees questioned management regarding the situation and lobbied for coworkers to take a position with respect to Charney.

An issue is also public or of public interest when the statement or activity involved "conduct that could directly affect a large number of people beyond the direct participants." (*Rivero*, *supra*, 105 Cal.App.4th at p. 924; see, e.g., *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 479 [homeowners association's governance of 3,000 residents]; *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 15 [environmental effects of mall development]; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1420 [potential safety hazards affecting residents of large condominium complex].) A large number of people were affected by the ongoing leadership struggle at American Apparel and the controversial termination of its founder, chairman, and CEO. As stated in the quarterly report Charney submitted in support of his opposition, American Apparel employed thousands of people worldwide. Those employees would decide whether to stay at the company or seek employment elsewhere based on the company's leadership. Charney's termination also concerned stockholders, as it impacted share values. Because it was connected with a public issue or an issue of public interest, it

is immaterial that the e-mail was sent only to American Apparel's employees.

Second, even if the e-mail had been of concern solely to American Apparel workers, it was sent in the context of an ongoing controversy as *Du Charme* requires. Although this case shares many similarities with *Du Charme*, there the Court of Appeal affirmed the trial court's denial of defendants' anti-SLAPP motion because "Du Charme's termination was a fait accompli; its propriety was no longer at issue. Members of the local were not being urged to take any position on the matter. In fact, *no* action on their part was called for or contemplated." (*Du Charme*, *supra*, 110 Cal.App.4th at p. 118.) The instant case stands in stark contrast to *Du Charme* in this respect. Charney did not accept his termination peaceably. He fought to regain power at American Apparel, instigating a number of lawsuits and inciting labor unrest. Even the arguments in the opening brief—notably that Charney had never agreed not to return to the company's employ and was not prevented from doing so by written agreement or otherwise—belie his assertion that his status at American Apparel was no longer at issue. Employees were uncertain as to the company's leadership and future. Some supported Charney's return and were circulating e-mails encouraging others to align with their cause. The controversy surrounding Charney's termination was ongoing, and Brown's e-mail was intended to urge employees to take the position that Charney's termination was justified and act accordingly, ignoring communications

from coworkers if necessary. Under the circumstances, Charney's claims arise from protected activity under section 425.16, subdivision (e)(4).

***Probability of Success***[5]

Because the challenged claims arise from protected activity, the burden shifts to Charney to demonstrate a probability of success on his claims. Charney contends that many specific statements in Brown's e-mail are defamatory or show him in a false light. Viewing the evidence in the light most favorable to Charney, we conclude that he did not make a prima facie showing of facts sufficient to substantiate his claims. Notably, Charney has failed to offer evidence of malice, which he must prove to establish that the email is not privileged under Civil Code section 47,

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[5] Charney claims that the trial court applied an incorrect standard when determining whether his claims possessed the minimal requisite merit, and failed to credit most of his evidence. Because our review is de novo, the standard the trial court applied and the weight it gave to facts are immaterial. We note however, that the trial court stated it applied a standard akin to that applied to a motion for summary judgment—the correct standard—and further noted that it would reach the same conclusion regardless of which standard it applied.

subdivision (c),[6] and that the e-mail is not entitled to protection under section 425.16, subdivision (e)(4), which requires a showing of malice when the plaintiff is a public figure.[7] Additionally, in many instances Charney has challenged statements that do not constitute defamation as a matter of law, either because they are not provably false statements concerning him, or because they are statements of opinion.

**Law**

"'Defamation is the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or that causes special damage.

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[6] Charney does not specifically address the applicability of Civil Code section 47, subdivision (c), in his opening brief and has arguably waived the issue. However, because Charney's claim that he was defamed as a public figure also turns on whether he presented prima facie evidence of the element of malice—an issue that the opening brief addresses thoroughly—we exercise our discretion to reach the issue of whether the common interest privilege has been extinguished as well.

[7] Charney effectively concedes that malice is required in both instances. He did not argue that the e-mail did not otherwise meet the requirements for common interest privilege under Civil Code 47, subdivision (c), in the trial court or on appeal, and acknowledges that he is a public figure.

[Citation.] Thus, to state a defamation claim, the plaintiff must present evidence of a statement of fact that is provably false. [Citation.] False statements that accuse the plaintiff of criminal conduct are defamatory on their face. [Citation.] [¶] However, statements cannot form the basis of a defamation action if they cannot be reasonably interpreted as stating actual facts about an individual. Thus, rhetorical hyperbole, vigorous epithets, lusty and imaginative expressions of contempt and language used in a loose, figurative sense will not support a defamation action. [Citation.]' [Citation.]" (*Charney*, *supra*, 10 Cal.App.5th at p. 157, fn. omitted.) Nor may "a matter of opinion or subjective judgment . . . support an action for defamation." (*Id*. at p. 158.) Where the plaintiff in a defamation action is a public figure, he or she must additionally plead and prove actual malice to recover damages. (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1260 (*Jackson*).) This requires evidence that the defendant made the statement "'"with knowledge that it was false or with reckless disregard of whether it was false or not."' [Citations.]" (*Ibid*.)

"'False light is a species of invasion of privacy, based on publicity that places a plaintiff before the public in a false light that would be highly offensive to a reasonable person, and where the defendant knew or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed.' (*Price v. Operating Engineers Local Union No. 3* (2011) 195 Cal.App.4th 962, 970.) . . . "'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*, *supra*, 10 Cal.App.5th at p. 1264.)[8]

Civil Code section 47, subdivision (c), which sets forth the common interest privilege, defines a privileged publication as one made "[i]n a communication, without malice, to a person interested therein . . . ." "Parties in a business or contractual relationship have the requisite 'common interest' for the privilege to apply." (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 440.) Specifically, "an employer's statements to employees

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[8] On appeal, Charney argues for the first time that, unlike his defamation claim, his claim of false light does not require a showing of malice "insofar as it is *not* premised on published literal falsehoods." ""[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court."" (*Bank of America, N.A. v. Roberts* (2013) 217 Cal.App.4th 1386, 1398–1399.) Even if Charney had not forfeited this argument by failing to raise it below, his premise is faulty. The false light claim in the complaint was premised entirely on literal falsehoods, not truths cast in a false light. Because Charney's false light claim is completely subsumed in his defamation claim, we will not address it further.

regarding the reasons for termination of another employee generally are privileged." (*Ibid.*; accord *Cuenca v. Safeway San Francisco Employees Fed. Credit Union* (1986) 180 Cal.App.3d 985, 995–996; *Deaile v. General Telephone Co. of California* (1974) 40 Cal.App.3d 841, 849–850.)

"Insofar as the common interest privilege is concerned, malice is not inferred from the communication itself. ([Civ. Code,] § 48.) '"The malice necessary to defeat a qualified privilege is 'actual malice' which is established by a showing that the publication was motivated by hatred or ill will towards the plaintiff *or* by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights (citations)." [Citations.]' [Citations]. [¶] . . . '[M]alice focuses upon the defendant's state of mind, not his [or her] conduct. Mere negligence in inquiry cannot constitute lack of reasonable or probable cause.' [Citation.] . . . 'It is only when the negligence amounts to a reckless or wanton disregard for the truth, so as to reasonably imply a willful disregard for or avoidance of accuracy, that malice is shown.' [Citations.]" (*Noel v. River Hills Wilsons, Inc.* (2003) 113 Cal.App.4th 1363, 1370–1371.) '"[I]t is the speaker's belief regarding the accuracy of his [or her] statements, rather than the truth of the underlying statements themselves, that is relevant to the malice determination.' [Citation.]" (*Id.* at p. 1371.)

**Analysis**

Charney contends Brown acted with malice. He argues that in her role as chairperson and a member of the Board, Brown was in a position to know that the statements were untrue at the time she made them, and yet made the statements with reckless disregard for their truth. Charney has failed to show evidence of malice in all instances. Additionally, many of the statements are not falsehoods relating to Charney himself, are not provably false, or are exaggerations or a matter of opinion—none of which are defamatory as a matter of law. (*Charney*, *supra*, 10 Cal.App.5th at pp. 157–158.)

First, Charney claims the e-mail falsely states he was terminated following an independent investigation handled by FTI, when in fact the investigation was handled by Jones Day, an interested party. It is undisputed that the investigation was not conducted internally, and that Jones Day retained FTI to investigate. "[T]hat the investigation was not 'independent' or impartial is a matter of opinion or subjective judgment and therefore cannot support an action for defamation. (See *Morningstar, Inc. v. Superior Court* (1994) 23 Cal.App.4th 676, 686–687; see also *Standing Committee v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1439.)" (*Charney*, *supra*, 10 Cal.App.5th at p. 158.)

Second, Charney claims the e-mail falsely states he was terminated due to violations of the company's sexual harassment and anti-discrimination policies and misuse of

corporate funds. Charney has provided no evidence to suggest that the Board was motivated to terminate him for any reason other than his misconduct. To the contrary, the termination letter attached to the complaint details Charney's unacceptable behavior and states that he was fired for his actions. There is no basis for concluding that Brown was acting with malice when she wrote that Charney was terminated for the reasons stated. Brown declared that she had reviewed the evidence of Charney's misconduct collected in the investigation. She had reasonable basis to conclude that he was fired for cause.

Third, Charney claims the e-mail falsely states he was found to have failed in his duties by a unanimous Board, whose members he nominated. The e-mail states: "[The termination letter] sets forth the many reasons why Board members who were nominated by Mr. Charney unanimously found that he failed to perform his duties as CEO." Charney offers no evidence that this was untrue. Charney's declaration states that neither he nor Alberto Chehebar voted, and that he only nominated some of the Board members. The e-mail does not state that every Board member was nominated by Charney, but rather that the Board included members Charney nominated, and that the vote to terminate Charney was unanimous. In fact, the vote was unanimous amongst the Board members who participated—Charney could not have voted on his own termination, and Chehebar abstained from voting. Charney has not shown that Brown, who stated that she reviewed the

relevant minutes of that Board meeting, lacked a reasonable basis for making the statements.

Fourth, Charney claims the e-mail falsely states that he "agreed in writing . . . that if he was found to be not suitable by the second investigation, he would not return as CEO, an executive, or as an employee of the Company," and "Mr. Charney put in writing he wouldn't come back, in an agreement filed with the SEC." Section 5, subdivision (d) of the Standstill Agreement attached to the complaint provides: "Charney shall not serve as CEO of the Company or serve as an officer or employee of the Company or any of its subsidiaries unless and until the Investigation is completed and the Suitability Committee makes a Clearance Determination in favor of such service. From the date hereof through the date of the Clearance Determination, Charney shall serve as a consultant to the Company with no supervisory authority over any employees of the Company." It is undisputed that Charney signed the Standstill Agreement, and that it was filed with the SEC. It is also undisputed that the suitability committee found Charney unfit to serve. Thus, as demonstrated by his own evidence, Charney agreed not to return to American Apparel as an employee, officer, or CEO in a written contract filed with the SEC.

Fifth, Charney attacks Brown's statements that "it would be hard to find any Board of any company (public or private) that would be willing to hire Charney as its CEO, executive, or employee. The risk to the company and its

shareholders would just be too great. One of the responsibilities of the Board of Directors is to control risk, and it would be a clear breach of any Board's fiduciary duties to re-hire an individual with Mr. Charney's history of misconduct." Charney provided evidence that American Apparel offered him a consultancy position in June 2014, and again in December 2014 to support his claim that Brown's statements were false and malicious. The Standstill Agreement clearly indicates that serving as a consultant with no supervisory authority is not equivalent to serving as an employee, officer, or CEO. The fact that Charney was offered a consultancy position as a means of encouraging him to leave American Apparel without protest in no way contradicts Brown's statement that no board would be willing to hire him as its CEO, executive, or employee. Moreover, the statement "is a matter of opinion or subjective judgment and therefore cannot support an action for defamation." (*Charney*, *supra*, 10 Cal.App.5th at p. 158.)

Sixth, Charney claims the e-mail falsely states that when he was confronted with the findings of the initial investigation of his conduct, he "requested a second, even more comprehensive investigation to determine if he was suitable to work at American Apparel." This statement is not defamatory, as it has no "'natural tendency to injure or [] cause[] special damage.'" (*Charney*, *supra*, 110 Cal.App.5th at p. 157.)

Seventh, Charney claims the e-mail falsely states that "the Board's second investigation confirmed that Mr.

Charney had repeatedly violated the Company's sexual harassment and anti-discrimination policy and used corporate assets for personal, non-business reasons." Charney offers no evidence that the investigation did not reach this conclusion, and does not deny that the incidents underlying the statement took place.

Eighth, Charney claims the e-mail falsely states "the old way of doing business was not sustainable and brought the Company to the edge of financial ruin." He relies on American Apparel's second quarterly statement from 2014 as proof that the company was not on the edge of financial ruin. The statement shows that American Apparel was operating at a loss in the second quarter of 2014, and had operated at a loss in the second quarter of 2013 as well. As Charney's counsel conceded to the trial court, American Apparel was not faring well at the time Charney was terminated, and given the information in the quarterly report, Brown had a reasonable basis for stating that it was not. The statement that American Apparel was standing on "the edge of financial ruin" may have been an exaggeration, but "rhetorical hyperbole" such as this will not support an action for defamation. (*Charney*, *supra*, 10 Cal.App.5th at p. 157.)

Ninth, Charney claims the e-mail falsely insinuates he was taking "the low road" by stating "the Company's approach has been and will be to take the high road when it comes to Mr. Charney" and "we do not intend to waste time responding . . . through the media." The statement says

nothing about Charney, is not provably false, and expresses a matter of opinion. There is no evidence that it constitutes defamation or that it was made maliciously. (See *Charney*, *supra*, 10 Cal.App.5th at p. 158 [press release statement that former CEO was investigated by independent third party not actionable where statement did not state a falsehood about former CEO, was not "provably false," and was a matter of opinion].)

Following our independent review, we affirm the trial court's grant of the anti-SLAPP motion. Brown met her burden of establishing that the e-mail is protected activity under section 425.16, subdivision (e)(4), and Charney has not provided the minimal proof necessary to demonstrate that he has a probability of success on his claims. His contentions necessarily fail.[9]

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[9] Charney contends that the trial court abused its discretion when it overruled his objections to the declarations of Brown, David Glazek, and Allan Mayer. Of these, only Brown's declaration was offered in support of defendants' special motion to strike. Glazek and Mayer's declarations were filed in support of Standard General's special motion to strike in a related case that was heard concurrently (*Dov Charney v. Standard General, L.P.* (May 12, 2015, BC581130) [nonpub. opn.].) Moreover, none of the trial court's rulings on Charney's evidentiary objections are contained in the record—all of the rulings in the clerk's transcript pertain to Charney's objections to Standard General's evidence. We do not have sufficient evidence to determine whether the trial court abused its discretion. (*Estrada v. Ramirez* (1999) 71 Cal.App.4th 618, 620, fn. 1

## DISPOSITION

The order granting Brown's special motion to strike the complaint is affirmed. Brown may recover costs on appeal.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

RAPHAEL, J.*

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[Failure to present an adequate record on appeal "precludes an adequate review and results in affirmance of the trial court's determination"].)

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.