Docket No. 14-55329

In the

UNITED STATES COURT OF APPEALS

for the

NINTH CIRCUIT

LEAH MANZARI p/k/a DANNI ASHE,

Plaintiff, Appellee,

v.

ASSOCIATED NEWSPAPERS LTD.,

Defendant, Appellant.

Appeal from the Decision of the United States District Court for the Central District of California, No 13-CV-6830-GW(PJWx) - Honorable George H. Wu.

ANSWERING BRIEF OF APPELLEE

STEVEN WEINBERG
WEIN LAW GROUP, LLP
1925 CENTURY PARK EAST, 2120
LOS ANGELES, CA 90067
(310) 598-7005
(310) 582-5294
Steven@WeinLawGroup.com

Attorneys for Plaintiff and Appellee LEAH MANZARI p/k/a DANNI ASHE

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I. INTRODUCTION

Conspicuously absent from ANL's opening brief is an accurate portrayal of the tabloid news article this case is about, the prevailing law controlling the outcome, and the District Court's thoughtful and reasoned decision below. This is no surprise. ANL and its so-called newspapers are the worst of the tabloid press and its internet arm "*MailOnline*" is a monster. By some accounts, it is the most highly trafficked English-speaking online paper in the world with an estimated 10 million visitors a day. While its audience is formidable, its tactics to lure readers are less than laudable.

As will be shown at trial, basic journalism ethics are casually ignored in favor of perverse sensationalism and editors routinely publish information they know to be false as "click-bait." *MailOnline's* indifference to the truth was recently the subject of legitimate news when it was forced to apologize to actor George Clooney for "reporting" that his mother-in-law was opposed his marriage to her daughter for religious reasons (among other things). Notably, *MailOnline* didn't just apologize to Clooney, it also acknowledged that the article was not true, an admission that came only after Clooney wrote a scathing editorial in USA Today attacking it for frequently publishing fabricated articles where "facts make no difference." Clooney then refused to accept the apology calling it "the worst kind of tabloid" that constructed a "premeditated lie" to make a profit.

Of course, this case is not about a mega-celebrity like George Clooney. Instead, this case is about a former nude model and Internet entrepreneur from the 1990s named Danni Ashe. Yet, *MailOnline's* conduct *vis-a vis* Mr. Clooney is symptomatic of its folly here. In this case, ANL published a sexually provocative photograph of plaintiff, Leah Manzari (p/ka/ "Danni Ashe") to bait passersby to read its article about a female

performer in the adult film industry who had tested positive for the HIV virus ("Article"). Though hidden away in ANL's appendix (and never accurately described)[1], below is the Article as it appeared in *MailOnline* on August 22:

Porn industry shuts down with immediate effect after 'female performer' tests positive for HIV

By JAMES NYE

PUBLISHED: 01:10 EST, 22 August 2013 | UPDATED: 01:10 EST, 22 August 2013

The adult film industry in San Fernando Valley in California, announced a moratorium on the making of porn films Wednesday after an actor tested positive for HIV.

The performer was not immediately identified and officials didn't say when the positive test was recorded.

The actor's sex partners are currently being tested by doctors with Adult Production Health and Safety Services, which works with the porn industry.

X-Biz, an adult industry trade magazine, reported that the performer with the HIV-positive test is female and new to the industry says the **Los Angeles Daily News**.

© Frederic Neema/Sygma/Corbis

Moratorium: The porn industry in California was shocked on Wednesday by the announcement that a performer had tested HIV positive

'The moratorium will be lifted once the risk of transmission has been eliminated,' Diane Duke, executive director of the industry trade group the Free Speech Coalition, told the Associated Press in an e-mail.

She added that the actor is not believed to have been infected on a film set.

More...
Now for his ultimate embarrassment: Sydney Leathers releases porn film 'Weiner And Me'
Revealed: The porn map of the world

'In fact, since 2004 there have only been two cases of performers testing positive for HIV and neither of those situations involved on-set transmission,' Duke said.

'The current situation would bring the number to three cases in nearly 10 years, not just in Los Angeles but nationwide.'

FEMAIL TODAY


She's crossed the borderline! Madonna, 55, shows off her gold grills as she pays a visit to the Hard Candy fitness studio in Rome
Striking accessory


Hold on tight! Kourtney Kardashian protectively cradles daughter Penelope close as she continues to model her array of micro shorts
Doting mother-of-two


Lady Gaga finally censors herself with pixelated glasses...but still can't resist a cheeky peek of cleavage
Pop star stepped out in NYC


Isn't basketball season over? Lamar Odom seen loading large amounts of luggage into his car amid continuing reports of marriage trouble
In Calabasas, CA


Headphones, Khroma make-up, and Arthur George socks: Inside Kylie Jenner's $1,000 Sweet 16 party favours
Kardashians didn't pay a cent towards them


Has they friendship turned to love? Jason Segel and Cameron Diaz enjoy dinner for two then shop for groceries
Friends since starring in Bad Teacher in 2011

The reunion is on:

[1] Among other things, ANL claims the Article was accompanied by "three stock photos" and claims Plaintiff had nothing to complain about since the article had images of *other* females (Opening Brief ("Op. Br.") at 2-3). The other photos, however, did not lead the story, nor were the other female's faces (or names) readily identifiable like Plaintiff's.

Although clearly identified in photograph as the "female performer" who had tested positive for the HIV virus (*her stage name "Danni" is even seen in blue neon light above her*), Plaintiff had never tested positive for HIV, nor had she ever been a performer in hardcore pornographic films. When ANL refused to publish a retraction (and furtively replaced Plaintiff's photo with a *blurred image* of another model with a disclaimer),[2] Plaintiff filed an action for defamation and false light on September 17, 2013.[3]

Despite facts which are a text book example of defamation/false light, ANL sought to clothe its misdeeds in the guise of the First Amendment and filed a motion in the District Court pursuant to California's anti-SLAPP law Code of Civil Procedure § 426.16 ("anti-SLAPP"). In its anti-SLAPP motion ("Motion"), ANL claimed -- just as it does here -- the Article was not "of and concerning" Plaintiff because it contained fine print saying the HIV positive actor was "not immediately identified."

ANL also argued Plaintiff was an "all purpose" public figure (requiring her to prove actual malice) and that because MailOnline's reporters submitted declarations swearing they did not know who Plaintiff was and did not *intend* to convey any defamatory meaning, they did not have the

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[2] ER 124, 358.

[3] Contrary to ANL's claim that Plaintiff's image was removed from the Internet and only available for "two days" (Op. Br. at 3), Plaintiff's image is still available on ANL's Internet web server as of the fling of this brief and is still being distributed worldwide in syndicated articles:

- http://i.dailymail.co.uk/i/pix/2013/08/22/article-2399665-1B677257000005DC-242_634x421.jpg
- http://www.floridanewsgrio.com/latest-addition/38818-porn-industry-shuts-down-with-immediate-effect-after-female-performer-tests-positive-for-hiv.html
- http://mrconservative.com/2013/08/23221-porn-industry-shut-down-after-porn-star-tests-positive-for-hiv/

requisite subjective intent as per the decisions in *Newton v. NBC* (9th Cir. 1990) 930 F.2d. 662 and *Dodds v. ABC* (9th Cir 1988) 145 F.3d 1053.

The District Court thoughtfully considered each of ANL's arguments and unequivocally rejected them. As to ANL's "of and concerning" objection, the Court focused on the entire layout of the Article as the best evidence that it could reasonably be construed by a jury as being about Plaintiff, regardless of any "fine print":

> "[T]here is little doubt that - given the prominence of Plaintiffs photo and the overarching headline- the Article's titular mention of an HIV - positive performer could reasonably be interpreted as referring to Plaintiff. [Citation] The bold headline is written in significantly larger font than the text in the remainder of the Article, and states unambiguously that a 'female performer' and 'tests positive for HIV[.]' Compl, Ex. A. Moreover, the caption underneath Plaintiff's photograph - which, again, actually displays Plaintiffs stage name 'Danni' in neon light- states . . . a performer had tested HIV positive[.]". . . Thus, under the circumstances here, the Court would find that, even though the body of the Article states that the performer was "not immediately identified" . . . the juxtaposition of Plaintiffs photo with the large, bold headline at the top of the Article - as well as the bold language in the photo caption - could reasonably imply the defamatory meaning . . . [Citations] Where a publication is reasonably susceptible of a defamatory meaning, a factual question for the jury exists. [Citations]

(ER 30-31, citations to *Kaelin v. Globe Communications Corp.* (9th Cir. 1998) 162 F.3d 1036; *Price v. Stossel* (9th Cir. 2010) 620 F.3d 992 and *Church of Scientology of California v. Flynn* (9th Cir. 1984) 744 F. 2d 694

The District Court also thoughtfully considered and then rejected ANL's second argument that the declarations from its reporters magically

immunized ANL from liability based on *Newton* and *Dodds* (because they supposedly did not intend to convey a defamatory impression). The District Court focused chiefly on the reporters' own admissions under oath that they *knew*: (1) Plaintiff was not HIV positive; and (2) was not the female performer with HIV, *but published the Article anyway*, finding a jury could reasonably conclude ANL intended to convey an impression known to be false:

> "'The fact that we can't look inside the editors' minds doesn't stop us from reaching conclusions about their thoughts; subjective standards are nearly always satisfied by circumstantial proof (as in most criminal prosecutions).' *Eastwood*, 123 F.3d at 1256 n.20. Here, having considered the totality of the choices and admissions made by the Mail Online's staff, the Court would find that a jury could reasonably conclude that those who created the Article intended to convey the impression – known by them to be false – that Plaintiff tested positive for HIV. Id. at 1256; Docket No. 36 at 9."

(ER 20 citing *Eastwood v. Superior Court* (1983) 149 Cal. App. 3d 409)

The District Court further distinguished both *Dodds* and *Newton* as entirely inapposite in the present case:

> "Unlike *Dodds* or *Newton*, the circumstantial evidence of Defendant's subjective knowledge of falsity and/or intentional recklessness in this case is much stronger. Initially, Defendant never possessed any evidence (e.g. statements from a source) to suggest that Plaintiff was the person who tested positive for HIV, and both Nye and Forbes admit in their declarations that they never believed she had HIV. Nye Decl. ¶¶ 8-9; Forbes Decl. ¶¶ 6-7. Moreover, unlike the comparatively in-depth TV segment in *Dodds* – much of which was based on interviews with sources who affirmatively told ABC that Judge Dodds used a crystal ball in connection with his role as a

> judicial officer – here Defendant published a short online piece without having any clue who Plaintiff was, but admittedly *knowing* that the person who tested positive for HIV had *not* been identified."

(ER 20-21, emphasis in original.)

Next, the District Court pointed to a screen capture of the Corbis image database ANL's reporters used to obtain Plaintiff's image which was submitted by Plaintiff in opposition to ANL's motion (see, ER 311). The screen capture revealed critical information about Plaintiff (and the Corbis image) available to ANL that its reporters *ignored*:

> "Defendant selected Plaintiff's photo from a Corbis image database describing Plaintiff as posing in 'one of her studios in Los Angeles in 2000' and – despite Nye and Forbes' subjective belief that Plaintiff was *not* the performer who recently tested positive for HIV in 2013 – Defendant nevertheless intentionally chose to feature Plaintiff prominently on the first page underneath the headline 'Porn industry shuts down with immediate effect after 'female performer' tests positive for HIV.' Compl. ¶ 24, Ex. A. ¶ Thus, given the date on the Corbis image database, Defendant also arguably had obvious reasons to doubt that Plaintiff was even actively performing in the adult film industry as of 2013. *See also Kaelin v. Globe Communications* (9th Cir. 1998) 162 F.3d at 1042 ('The editors' statements of their subjective intention are matters of credibility for a jury.')"

(ER 21, fn. 3, emphasis in original.)

Finally, the Court highlighted the complete inconsistency in ANL's argument where on the one hand, ANL asserted Plaintiff is a mega-celebrity (such that she should be treated as an "all purpose" public figure)

but, on the other, even its own reporters had no clue who she was or even bothered to investigate that basic fact before publishing:

> "Defendant suggests both that (1) Plaintiff is so well known that she is an all-purpose public figure for the purposes of defamation; and that (2) neither Nye or Forbes knew who Plaintiff was and thus could not have intended to convey that she was HIV positive. Compare, e.g., Docket No. 20 at 22-24 with Nye Decl. ¶ 8. Setting aside whether Defendant actually *knew* who Plaintiff was, the declarations in the record demonstrate that no one on Defendant's staff believed that Plaintiff was HIV positive, nor did Defendant have any information to suggest that Plaintiff was HIV positive. Indeed, despite reports that the actress had not yet been identified, no one at the Mail Online bothered to investigate Plaintiff's identity, period. As stated above, Plaintiff may prevail if Defendant had obvious reasons to doubt the veracity of its reporting, but engaged in purposeful avoidance of the truth. *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968); *Eastwood*, 123 F.3d at 1251; *Harte-Hanks*, 491 U.S. at 692; cf. *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir. 1976) (en banc) (willful blindness tantamount to knowledge)."

(ER 21, footnote 3, emphasis in original.)

Apart from now falsely claiming the District Court relied solely on the "Article itself" as evidence Defendants intended to convey a defamatory meaning,[4] ANL makes the same arguments in this appeal as it did below. As explained *infra*, District Court's ruling is correct and should be affirmed.

First, the offending Article is "of and concerning" Plaintiff. This is true whether the finding is made directly (because Plaintiff's picture -- *with her*

[4] ANL claims the District Court concluded the use of plaintiff's photo in the Article was "itself sufficient evidence" that defendant intended to convey the false implication. See, Op. Br. at 19-20. District Court, however, considered far more than the Article "itself" in making its findings, including ANL's reporters' own declarations and the Corbis database screen capture.

name in lights -- was used to illustrate the article), or by implication, because MailOnline juxtaposed her picture with headlines implicating her and chose not to clarify to its readers that the pictured model (Plaintiff) was not the adult film actress who tested positive for HIV.

Second, even if Plaintiff (a former nude model who achieved some modest media coverage for her entrepreneurial successes on the Internet seventeen years ago) is an "all-purpose" public figure similar to a mega-celebrity like George Clooney, then she adequately demonstrated a "probability" that ANL acted with actual malice in publishing the Article knowing she was not HIV infected performer. Accordingly, ANL's appeal should be rejected and the District Court's order affirmed in all respects.

II. STATEMENT OF THE CASE

A. Leah Manzari (p/k/a Danni Ashe)

Plaintiff is a former nude model and founder and former CEO of Danni's Hard Drive, a pioneering soft-core adult entertainment web site launched in 1995. Throughout her career, including her entrepreneurship in the soft core adult internet business, she used the professional name "Danni Ashe." (ER 317, Manzari Decl. ¶¶ 2-3.)

Plaintiff appeared in both USA Today and the Wall Street Journal in 1997 in stories highlighting the fact that Plaintiff's website ("Danni.com") was one of the very few online that actually made money. At that time, the vast majority of internet ventures lost money and survived only on venture capital. (ER 317, ¶ 4.)

Apart from the website's success in the soft-core adult entertainment[5] industry nearly two decades ago, Plaintiff was also considered the most

[5] Plaintiff has been happily married throughout her 20 year career. (ER 318, ¶ 15.) During the entire span, Plaintiff maintained firm boundaries and performed only "soft-

"downloaded woman on the Internet" between the years of 1996 and 2000. (ER 317, ¶ 8.)

During the time frame in which Plaintiff garnered some modest media attention, Plaintiff was interviewed and appeared in media outlets chiefly because of her success as an entrepreneur in the Internet business. (ER 317, ¶ 9.) Despite some limited "sweeps" exposure of Plaintiff's business savvy and success seventeen years ago, Plaintiff was never a mainstream actress, never appeared in any theatrically released films or network/commercial television programs and never became a "household word." (ER 317, ¶ 9.)

Plaintiff has never sought media exposure or interviews concerning the adult film business, nor has she ever voluntarily thrust herself into any debate concerning that industry. (ER 318, ¶ 10.)

Plaintiff's only "public" position concerning the adult industry was giving testimony to congressional committees about protecting children from inappropriate content online. On August 3rd, 2000 Plaintiff testified before the COPA Commission in relation the proposed passage of COPA. On October 20th 2000, Plaintiff testified before the National Research Council on similar issues of protecting minors from nudity online. Plaintiff was involved in these hearings because it pertained directly to her area of public notoriety; namely *the Internet*. (ER 318, ¶ 11.)

Plaintiff has never taken a public position or sought or received media attention concerning: (1) the use of condoms in adult films; (2) legislation or proposed legislation regarding the use of condoms in adult films or in any respect; (3) the mechanisms or procedures used to screen adult industry

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core" depictions of full nudity and only soft (no penetration) love scenes with only women. (ER 318 ¶¶ 16-17.).

performers for STDs or legislation regarding same; or (4) the symptoms, effects, cure, treatment or public management of HIV or Aids. (ER 318, ¶ 12.) Plaintiff has never sought media attention concerning any aspect of the hardcore adult film industry. (ER 318, ¶ 13.)

Since selling Danni.com in 2004, Plaintiff has been inactive in the soft-core adult entertainment business and has pursued life entirely away from that business or the public eye. (ER 319, ¶ 14.)

B. MailOnline's Admissions

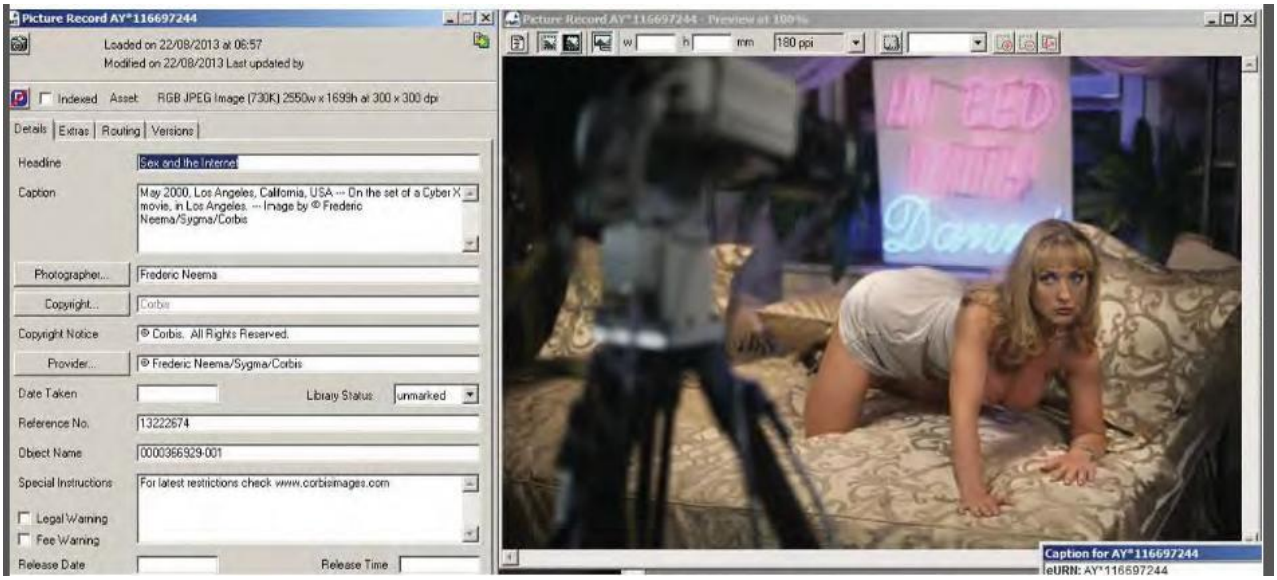
MailOnline submitted declarations of its reporters James Nye and Jack Forbes to the District Court in support of its anti-SLAPP motion. Based on the declarations, on August 22, 2013, MailOnline reporter Nye was asked by an unnamed *MailOnline* editor to write up a story for the *MailOnline* website about an Associated Press Report that the "pornographic film industry" had shut down following disclosure that an unnamed actor tested positive for the HIV virus. (ER 64, Declaration of James Nye ¶ 3.)

After drafting the article, Nye asked MailOnline's "photo desk" to provide him with a suitable image to accompany the article. (ER 64, ¶ 4.)

In response, Forbes, an assistant photo editor for *MailOnline* searched the archives of Corbis Images, a stock photo licensing site, for suitable images. According to Forbes, he located the image of Plaintiff and then "uploaded [it] . . to [MailOnline's] photo file server." (ER 77, Declaration of Jack Forbes ¶¶ 3-5.)

Nye was provided a copy of Plaintiff's image via the *MailOnline's* "file sharing software" and found Plaintiff's image suitable. According to Nye, the caption of the image -- as it appeared in the file sharing software -- was "being on the set of a pornographic movie" and headlined "Sex and the

Internet." (ER 64, ¶ 6.) According to Nye, the screen shot below is an accurate depiction of the image as it appeared in *MailOnline's* file sharing software (Id., ER 75.)

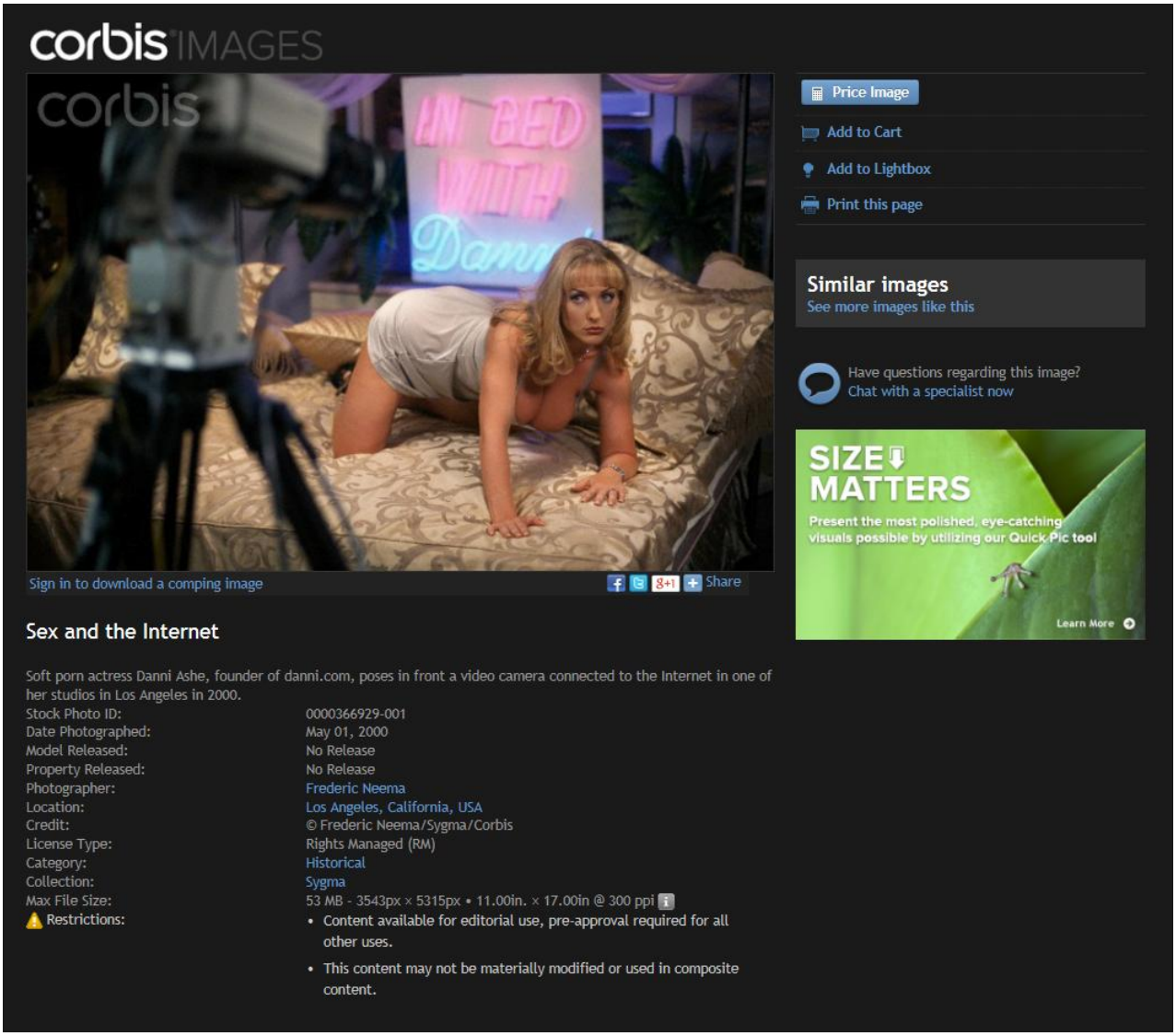


Nye claims that at the time he drafted the article, he did not know the name of the actress shown in the image. (ER 65, ¶ 8.)

In opposition to ANL's anti-SLAPP motion, Plaintiff submitted a screenshot of the image as it appeared on the Corbis website on August 24, 2013. (ER 311, Weinberg Decl., Exhibit "A.") Curiously, the image, as it appeared on the Corbis website (shown on the next page below), contains markedly different information than what appeared on the *MailOnline* file sharing software:

/ / /

/ / /



The data shown on the Corbis site includes the following description of the image:

> **"Soft porn actress, Danni Ashe, founder of danni.com, poses in front of a video camera connected to the Internet in one of her studios in Los Angeles in 2000."** (ER 311.)

No explanation was provided by *MailOnline* (or its "journalists") as to why critical information on the Corbis website about the image (including Plaintiff's name, her role as a "soft core" actress and that she was simply "posing" on the bed rather than "performing" in a pornographic movie) was omitted from *MailOnline's* file sharing software.

C. The Article

On August 22, 2013, MailOnline published the Article with Plaintiff's image from the Corbis website. (ER 95, Complaint at ¶ 24-27.)

While *MailOnline* could have easily taken measures to protect Plaintiff's reputation from being harmed by the Article, it chose not to. For example, MailOnline could have captioned the image with a disclaimer: "[t]his is an image is of Danni Ashe who is not the female performer referenced in the article" or "file footage" or "stock photo." None of these measures taken. (ER 96, ¶ 28.)

On August 22, 2013, Plaintiff demanded that *MailOnline* cease and desist from any further use of her name, image or likeness in connection with the Article and that it publish a retraction. (ER 96 ¶¶ 31-32.) On August 24, 2013, *MailOnline* deleted Plaintiff's image from its Article and replaced it with an image of another model, this time blurring out the image so that the new model's identity was protected. *MailOnline* captioned the new photo "stock image" so readers would not be misled into believing the image was of the actress who had tested positive (ER 97, ¶ 33.)

III. ARGUMENT

A. The District Court Correctly Ruled Plaintiff Adequately Demonstrated A "Probability" of Prevailing

In order to satisfy due process, the burden placed on a plaintiff opposing an anti-SLAPP motion must be compatible with the early stage at which the motion is brought and heard and the limited opportunity to conduct discovery. *Looney v. Superior Court* (1993) 16 Cal.App.4th 521, 537-538. Under this lightened burden, the Court must accept as true all evidence favorable to plaintiff. *Consumer Justice Center v. Trimedica International, Inc.* (2003) 107 Cal.App.4th 595, 605 ("plaintiffs burden to

establish a probability of prevailing on its claims must be compatible with the early stage in which the motion is brought and the parties limited opportunity conduct discovery. We do not weigh the evidence but accept as true all evidence favorable to plaintiffs"); *HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.

Likewise, a plaintiff need only establish a reasonable probability of success, not a "substantial probability." As per the California Supreme Court, an anti-SLAPP motion is properly denied where plaintiff demonstrates even "minimal merit." *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, citing *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 and *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 738. *See*, *also*, *Metabalife International v. Wornick* (9th Cir. 2001) 264 F.3rd 832, 840 (plaintiff need only show a 'reasonable probability' of prevailing); *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 438, fn. 5 ("the anti-SLAPP statute requires only `a minimum level of legal sufficiency and triability"). As the District Court correctly determined, Plaintiff demonstrated the requisite "probability" of success on her claims warranting denial of the instant appeal.

B. The District Court Correctly Ruled the Article is Directly "Of and Concerning" Plaintiff Because Plaintiff's name is Visible

To establish liability for defamation, it must be shown the contested statements are "of and concerning" plaintiff, either directly by name, or by clear implication. *Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1044. In assessing whether a statement is of and concerning the plaintiff, the work is construed as a whole. *Dong v. Bd of Trusteees of Leland*

Stanford Jr. Univ. (1987) 191 Cal.App.3d 1572, 1587; *Robinson v. HSBC Bank USA* (N.D. Cal. 2010) 732 F.Supp.2d 976, 986.

Here, the Article can be reasonably construed as being directly about Plaintiff. While Plaintiff's name is not mentioned in the body of the Article itself, the photographic image accompanying and illustrating the Article prominently features Plaintiff and her professional name "Danni" can be seen in a bright neon light display above and behind Plaintiff's likeness. The word "Danni" is by far the largest typeface seen in the entire article and it is larger than the bold headlines. There can be no better direct evidence the Article is "of and concerning" Plaintiff than the fact that her name is shown literally "in lights." This fact was not lost on the District Court:

> "Initially, the Court would reject Defendant's contention that the Article is not 'of and concerning' Plaintiff because the Article was not actually written about her. . . [T]he caption underneath Plaintiff's photograph- which, again, actually displays Plaintiffs stage name 'Danni' in neon light- states that '[t]he porn industry in California was shocked on Wednesday by the announcement that a performer had tested HIV positive[.]' . . . [T]there is no requirement that the person defamed be mentioned specifically by name in a publication . . [a]lthough arguably this publication did in some sense refer to Plaintiff by 'name,' given the fact that her stage name appears in a neon light behind her in the photograph."

(ER 31, fn. 7.)

The District Court's finding concerning Plaintiff's name appearing "in lights" in the Article was correct and its ruling the Article was "of and concerning" Plaintiff should not be disturbed on appeal but rather affirmed in all respects.

C. The District Court Correctly Ruled The Article Is "Of and Concerning" Plaintiff by Implication

In *Blatty v. New York Times*, *supra*, the California Supreme Court held that a plaintiff need not be mentioned by name in an offending publication but rather, may be identified by "implication." *Blatty*, *supra*, at fn. 1 ("[W]e emphasize, the plaintiff need not be mentioned by name, but may be identified by clear implication.") When a "defendant juxtaposes a series of facts so as to imply a defamatory connection between them, or otherwise creates a defamatory implication, he may be held responsible for the defamatory implication, even though the particular facts are correct." *Price v. Stossel, supra* at 1003 (quoting *Weller v. Am. Broad Co.* (1991) 232 Cal. App. 3d 991, 1004).

Defamation can arise from the publication of the plaintiff's photograph in conjunction with a defamatory statement, even in the absence of any express textual connection between the statement and the photograph." 50 Am. Jur.2d Libel and Slander § 131 (2013); *see also Church of Scientology of California, supra at* 697 ("Under California law,' [t]here is no requirement that the person defamed be mentioned by name .... It is sufficient if from the evidence the jury can infer that the defamatory statement applies to the plaintiff ... [or] if the publication points to the plaintiff by description or circumstances tending to identify him.'") (quoting *DiGiorgio Fruit Corp. v. AFL-CIO* (1963) 215 Cal. App. 2d 560, 569); *see also Yow v. Nat'l Enquirer, Inc.*(E.D. Cal. 2008) 550 F. Supp. 2d 1179, 1183-84 ("If the Court finds the statements are 'of and concerning' Plaintiff, then the Court undertakes the analysis whether the statements are capable of conveying defamatory meaning and it is for the jury to determine if it was so understood.") (citing *Court v. San Juan Unified School Dist.* (1995) 33 Cal.

App. 4th 1491, 1500). "What a newspaper article actually says or carries to its readers must be judged by the publication as a whole. *The headlines alone may be enough to make libelous per se an otherwise innocuous article*." *Kaelin v. Globe Communications Corp., supra at* 1041 (emphasis in original) (citation omitted).

Many cases involving implied defamation involve the use of photographs. According to a leading treatise: “When a plaintiff's photograph is used in a publication, courts will almost always find the communication to be "of and concerning" the plaintiff.” *Smolla*, Law of Defamation 2d. §4:41. This is not a new concept. Over a century ago, the United States Supreme Court decided a case similar to the dispute here. *See*, *e.g.*, *Peck v. Tribune Co.* (1909) 214 U.S. 185, 190, 29 S.Ct. 554, 556, 53 L.Ed. 960.

In *Peck*, a woman’s photograph was erroneously printed in connection with an advertisement for whiskey. The advertisement falsely associated the plaintiff with the beverage and also said she endorsed its use for medicinal purposes in her vocation as a nurse. None of it was true. The Court (by Justice Holmes) ruled that the mere insertion of the plaintiff’s picture led to an inference that she used and endorsed the product. Peck at 189-190.

Similarly, in *Triangle Publications v. Chumley* (1984) 317 S.E.2d 534, a TV Guide advertisement for a program on teenage pregnancies was headlined in bold: "**Guess what Lori found out today**." The ad contained a photograph of a diary lying open on a desktop; written across the page was the following entry: "Dear Diary, I found out today that I am pregnant. What will I do now?" Directly below the diary page was a photograph of the plaintiff embracing a young man. Like ANL argues here, the defendants

claimed that the advertisement was not "of and concerning" the plaintiff, basing their contention on the fact that the plaintiff's name had not been used—rather, a substitute name had been printed in the ad. The court rejected this defense and held bold print in the advertisement and the strategic placement of the plaintiff's picture could lead a jury reasonably to perceive the photograph as depicting the plaintiff as the pregnant teenager. *See*, *also*, *Peoples Bank & Trust Co. v. Globe Int'l Publishing Co.* (8th Cir. 1992) 978 F.2d 1065 (Sun tabloid liable for using picture of plaintiff to illustrate article about an odd pregnancy that had nothing to do with the plaintiff); *Clark v. American Broadcasting Cos.* (6th Cir. 1982) 684 F.2d 1208 (plaintiff shown walking on street in television documentary entitled "Sex for Sale"); 9 *Duncan v. WJLA-TV* (D.D.C. 1984) 10 Media L. Rep. (BNA) 1395 ("pedestrian on the street" shot as background for a story on herpes); *Palmisano v. Modernismo Publications* (1983) 98 A.D.2d 953 (photograph used without consent in a homosexual magazine); *Crump v. Beckley Newspapers, Inc.* (1984) 320 S.E.2d 70 (photo of a female minor used to illustrate a story on harassment of women minors); *Davis v. High Society* (1983) 90 A.D.2d 374 (plaintiff erroneously identified as person depicted in photo of semi-nude boxer).

Similar to all the cases referenced above, in this matter, *MailOnline* published an image of Plaintiff posed seductively on a bed to flag attention to an article about the hardcore pornographic film industry led by the bold headline: **"Porn industry shuts down with immediate effect after 'female performer' tests positive for HIV."** The caption below Plaintiff's photo further implicated Plaintiff and contains *no disclaimer* that the photo is merely a "stock image" and not of the actress mentioned in the Article. Just as in *Peck* (and the other cases cited above) when Plaintiff's

photograph is juxtaposed with the headline and both are viewed in context, a defamatory message conveyed. The District Court's ruling in this respect is consistent with prevailing law and should be affirmed (ER 30-31)

D. The District Court Correctly Ruled ANL Was Not Entitled To Immunity By Way of The "Fine Print"

Defamation law should be grounded in common sense, in how ordinary readers read and ordinary viewers view. Narrowly and technically parsing material line-by-line is not an appropriate approach. *Norris v. Bangor Publishing Co.* (1999) 53 F. Supp. 2d 495. California uses the "reasonable construction rule" to interpret allegedly defamatory language which is the application of the general principle that words are to be construed in context to determine their effect on recipients. *San Francisco Bay Guardian, Inc. v. Superior Court* (1993) 17 Cal.App.4th 655. Words are viewed in total context to determine their impact on the average recipient. *See, Kaplan v. Newsweek Magazine, Inc.* (N.D. Cal. 1984) 10 Media L. Rep. (BNA) 2142, 4143. Statements should be interpreted as the average person would most naturally understand them. *Hughes v. Hughes* (2004) 122 Cal.App.4th 931; Smolla, *Law of Defamation* (2d ed.1997-2004), § 5:22. If a statement is susceptible of different constructions, resolution of the ambiguity is a question of fact for the jury. *Flowers v. Carville* (9th Cir. 2002) 310 F.3d 1118.

While articles should be generally construed as a whole, headlines in an article may be construed apart from accompanying text because the public frequently reads only the headline. *Las Vegas Sun, Inc. v. Franklin* (1958) 74 Nev. 282; *Schermerhorn v. Rosenberg* (1980) 73 A.D.2d 276,

287 ("That the defamatory meaning of the headline may be dispelled by a reading of the entire article is of no avail to the publisher.").[6]

"The defamatory character of language is measured `according to the sense and meaning ... which such language may fairly be presumed to have conveyed to those to whom it was published.'" (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 447. "In determining whether statements are of a defamatory nature. . . 'a court is to place itself in the situation of the hearer or reader, and determine the sense or meaning of the language . . . according to its natural and popular construction.'" *Morningstar, Inc. v. Superior Court* (1994) 23 Cal.App.4th 676, 688.

In *Kaelin v. Globe Communications Corp.* (9th Cir. 1998) 162 F.3d 1036, O.J. Simpson's houseguest sued the National Examiner for printing the headline: "COPS THINK KATO DID IT!... he fears they want him for perjury." Even though the text of the article *explained the headline* and was not defamatory, Kaelin sued for libel. The Globe contended (like ANL here) that even if the headline was defamatory, the totality of the publication was not because the text of the article clarified the headline. In rejecting the Globe's argument, the Court ruled "headlines are not . . . liability-free zones" and that a reasonable juror could find a headline defamatory *regardless of the explanatory text in the article*: "a single sentence may be the basis for an action in libel even though buried in a much longer text ...." *Kaelin*, *supra*, 162 F.3d at p. 1040, citation omitted.

[6] Consistent with prevailing law, the District Court here also observed that context and medium of the message can play an important role in how the message is perceived stating: "[s]ince this publication appeared on the internet, the extent to which a defamatory meaning may have been exacerbated could have varied depending on the device or software through which the Article was viewed. The Article may have appeared in different formatting depending on whether it was viewed in Apple's Safari browser, for example, or in Google Chrome. Similarly, the Article may have appeared differently when viewed on a smartphone or desktop computer." (ER 31, fn. 8.)

Similarly, in *McNair v. Hearst Corporation* (9th Cir. 1974) 494 F.2d 1309, a newspaper published an article in which the headline and the first two paragraphs stated the plaintiff (an attorney) received an unreasonable amount of fees in a case and that, as a result of these high fees, the plaintiff now owned the client's home. (Id. at pp. 1310-1311.) Reading the entire article to its conclusion, the reader would understand that the client's loss of her home was a result of her former husband's failure to meet his financial obligations. (Ibid.) The lower court granted summary judgment in favor of the newspaper, on the basis that "the article read in its entirety was actually true." (Id. at p. 1311.) The Ninth Circuit reversed, concluding that it was a *jury question* whether the entire article "eliminated the impact of any false impression created at the outset." (Id. at p. 1310.)

In *Stanton v. Metro Corp.* (1st Cir. 2006) 438 F.3d 119, 122-124, the defendant published an article with the headline: “The Mating Habits of the Suburban High School Teenager.” A smaller sub-headline contained the words: “They hook up online. They hook up in real life. With prom season looming, meet your kids—they might know more about sex than you do.” Plaintiff, a female student at the school was pictured in a photograph that occupied the entire first page of the article. Unlike the facts here, the article included a disclaimer which read: “The individuals pictured are unrelated to the people or events described in this story.”

Plaintiff sued for defamation on the theory that her photograph, when construed in light of the headlines and sub-headlines conveyed the meaning that she was promiscuous. The Court held the disclaimer language was ineffective given the possibility that some reasonable readers would not read the disclaimer and the possibility that some reasonable readers would simply read the headlines quickly and draw a

juxtaposition between the headlines and the photographs, it could not be said that no reasonable reader would draw the conclusion that the plaintiff was one of the promiscuous teenagers described in the article.[7]

See, *also*, *Davis v. Hearst* (1911) 160 Cal. 143 (nondefamatory text did not negate the effect of defamatory headlines.); *Wandt v. Hearst's Chicago American* (1906) 129 Wis. 419, 421 (photograph of plaintiff mistakenly used in article about “suicide fiend”; even though the name of the person referred to as a "suicide fiend" was given, the juxtaposition of the plaintiff's photograph with the article was, in effect, a statement that the plaintiff was a "suicide fiend.")

As it did in the District Court, ANL cites “fine print” in the Article (stating the HIV infected actress “was not immediately identified”) as a basis for immunity. The District Court analyzed the applicable law (cited above) and rejected ANL’s argument stating:

> “[T]he Court would find that, even though the body of the Article states that the performer was "not immediately identified" . . . the juxtaposition of Plaintiffs photo with the large, bold headline at the top of the Article - as well as the bold language in the photo caption - could reasonably imply the defamatory meaning that Plaintiff . . . tested positive for HIV and was the cause of the porn industry shutdown. *Stossel*, 620 F.3d at 1003; *Kaelin*, 162 F.3d at 1040-41 (finding that it "clear" under California law that headlines are not "liability-free" zones and holding that "plaintiff ha[d] come forward with clear and convincing evidence to get to a jury on the issue of whether the headlines are susceptible of a false and defamatory meaning."). Where a publication is reasonably susceptible of a defamatory

[7] Like the District Court here, the Court in *Stanton* also considered the medium in which the article appeared and the audience to which it was targeted: “The publication was ‘general interest regional magazine’ and noted that with such periodicals: “the public frequently reads only the headline of the article or reads the article itself so hastily or imperfectly as not to realize its full significance.”

> meaning, a factual question for the jury exists. *Kaelin*, 162 F.3d at 1040."

(ER 30-31, fn. 8.)

The District Court correctly found that the MailOnline's layout of the Article -- as a whole -- together with manner in which it might have been displayed, was reasonably susceptible to a defamatory meaning despite the words "not immediately identified." Accordingly, the District Court's order should not be disturbed on appeal and its ruling affirmed.

E. The District Court Correctly Rejected Cases Cited By ANL Below

None of the cases cited by ANL apply to the facts here or govern the outcome as correctly held by the District Court. *Blatty*, *supra* involved the author of the Exorcist who claimed that his novel "Legion" should have been ranked the Time's "best seller" list due to sales figures and sued for trade libel. The California Supreme Court held the best seller list did not refer to Blatty (either directly or by implication) and therefore was not "of and concerning" Blatty. The California Supreme Court focused on the fact the statement involved a group, not an individual: "When, as in this case, the statement that is alleged to be injuriously false concerns a group -- here, books currently in print and their authors -- the plaintiff faces a "difficult and sometimes insurmountable task. . . [citation]." *Blatty, supra* at 1046 [citations omitted]. This case is unlike *Blatty* and does not involve group defamation.

ANL's heavy reliance on the unpublished decision in *Prince v. Out Publishing*, 30 Med. L. Rptr. 1289 is equally misplaced. In *Prince*, a photograph of plaintiff dancing shirtless on an elevated platform was used in a story entitled "Dirty Dancing" about drug use and unsafe sex at wild

parties. The court denied relief based on the juxtaposition of the photograph because the article was about *parties* attended by many "thousands" of people. The Court ruled the claim failed because the gathering plaintiff attended was *open to the public*, at least 1,000 people were present at the party, and plaintiff voluntarily danced up on an elevated platform. This case is nothing like the facts in *Prince*. Among other things, the Article was not about a community of people who frequented massive dance parties, but rather a single "female performer" who tested positive for the HIV virus.

MailOnline's citation to *Balzaga v. Fox News Network, LLC* (2009) 173 Cal.App.4th 1325, 1340 is equally inapposite. In *Balzaga*, the plaintiffs pictures were flashed on the screen of a four minute television news interview of a photographer where the entire segment was captioned across the bottom of the screen: "Manhunt at the Border" The subject of the television news report was a photographer who falsely claimed he was attacked by Hispanic farm workers when he tried to take their pictures and his search to find the perpetrators. Plaintiffs sued Fox claiming the juxtaposition of their photographers and the caption "Manhunt at the Border" created the false impression that the police were hunting for them. At the hearing on Fox's anti-SLAPP motion, the court stated after watching the video: "It's pretty clear if there is a manhunt, it's by this guy [the photographer], it's not a police manhunt, it's this Monti guy. . . There's no mention of police, manhunt, there's no inference of it." *Balzaga* at 1335.

On appeal, the Court affirmed, focusing on the absence of any language in the telecast which suggested *the police* were conducting a search and highlighted that Fox specifically stated the opposite in its report:

> "On our review of this telecast, it is not reasonably probable that a viewer would conclude that the manhunt caption was characterizing the actions of law enforcement officials. Instead, the only reasonable conclusion is that the caption refers to Monti's own search for plaintiffs and his belief that they should be charged with an assault crime. ¶ *The audio did not contain any suggestion that the police were conducting an organized search for these men at the border. In fact, the newscasters said just the opposite: that the police officers were investigating the incident and the police lieutenant did not necessarily agree with Monti's version of the events.*"

Balzaga at 1340, emphasis added.

This case is nothing like the facts on *Balzaga*. In *Balzanga,* the defendant's publication/broadcast contained *clear exculpatory language dispelling any notion plaintiff had been defamed*, i.e., "the newscasters said just the opposite . . . " Here, unlike *Balzaga*, nothing in the Article published by MailOnline directly disclaims Plaintiff's contentions or comprises the type of exculpatory language found controlling in *Balzaga*.[8]

F. The District Court Correctly Ruled The Article is Susceptible Of A Defamatory Meaning

Numerous reported cases have held that defamatory meaning is conveyed by photographs, exactly as Plaintiff alleged and proved below. *Solano v. Playgirl, Inc.* (9th Cir. 2002) 292 F.3d 1078, 1083; *Stanton v. Metro Corp.* (1st Cir. 2006) 438 F.3d 119, 122-124; *Selleck v. Globe International, Inc.* (1985)166 Cal. App. 3d 1123; *Dunlap v. Philadelphia*

[8] MailOnline's reliance *Houseman v. Publicaciones Paso del Norte, S.A. De C.V.* (Tex. App. 2007) 242 S.W.3d 518, *Gaimo v. Literary Guild* (1981) 79 A.D.2d 917 and *Cibenko v. Worth Publishers* (D.N.J. 1981) 510 F.Supp. 761 are similarly misplaced. Unlike here, each of the publications in those cases contained specific exculpatory language dispelling the defamatory allegation at issue.

Newspapers, Inc. (1982) 301 Pa. Super. 475, 448 A.2d 6; Strong v. Oklahoma Publishing Co. (Okla. Ct. App. 1995) 24 Media L. Rep. (BNA) 1315; *Burton v. Crowell Publishing Co.* (2d Cir. 1936) 82 F.2d 154.

In *Solano*, a Baywatch actor sued Playgirl magazine for false light because it had placed his photograph on its cover creating the false impression that he had posed nude for the magazine. The Ninth Circuit held that when Solano's photograph and headlines on the cover were viewed in context there was a defamatory message was conveyed by Playgirl. A defendant, the court noted, "is liable for what is insinuated as well as for what is stated explicitly."

In *Dunlap*, a newspaper article contained the headline "Wide Police Corruption Revealed" and was accompanied by a photograph of a police car stopped outside of a "known gambling location." The article described the plaintiff police officer as "more likely than not" to have been the officer in the photographed car. The court held that the article was capable of a defamatory meaning, since a reasonable person could construe the article, photograph, and caption to indicate that the plaintiff had been bribed.

In *Selleck*, the court ruled that headlines, taken together with the caption to a photograph of plaintiff gave the false impression that the father of actor Tom Selleck had granted an interview to the Globe. Those elements were found to be reasonably susceptible of a defamatory meaning.

In *Strong*, a photograph of plaintiff with caption wrongly stating he was an alleged rapist and burglar conveyed a defamatory meaning, even if plaintiff was not specifically named in the article or photo.

Similar to all the cases referenced above, in this matter, *MailOnline* published an image of Plaintiff posed seductively on a bed to tempt web

surfers to view to an article about the hardcore pornographic film industry Just as in *Solano* (and the other cases cited above) when Plaintiff's image was juxtaposed with the headline and both are viewed in context, a defamatory message was conveyed as correctly held by the District Court.

G. Plaintiff is Not an All Purpose Public Figure

In *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, the Supreme Court defined 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." Courts are generally loath to find a plaintiff an "all purpose" public figure. "[T]his status is reserved for those 'larger than life' megacelebrities, many of whom are entertainment or sports figures, that bring color to the American landscape." 3 Smolla, Law of Defamation 2d § 2:80. The Court in *Gertz* stated that "[s]ome occupy positions of such pervasive power and influence that they are deemed public figures for all purposes." *Gertz* at 345. The Gertz opinion also specifies that the all purpose public figure is rare, and the all purpose status should not be conferred lightly: "We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life." *Gertz* at 352.

Entertainers and other Mega celebrities are examples of individuals who achieve public figure status by sheer fame and position—the hallmarks of the all purpose public figure. In the United States entertainers such as Michael Jackson, Johnny Carson, Carol Burnett, and Clint Eastwood must accept that as a quid pro quo for their success their lives will be subject to

pervasive scrutiny—a scrutiny that goes beyond their roles strictly as entertainers and extends to inquiry into matters as "private" as their marriages, social habits, and romantic liaisons. Such entertainers, and even their spouses, often become public figures for all purposes, no matter how unwelcome that status may be. *See*, *e.g.*, *Jackson v. Paramount Pictures Corp*. (1998) 68 Cal. App. 4th 10 (Michael Jackson was public figure in a defamation action); *Barry v. Time, Inc.* (N.D. Cal. 1984) 584 F. Supp. 110, 1115 (basketball coach not an all-purpose public figure); *Carson v. Allied News Co.* (7th Cir. 1976) 529 F.2d 209, 209–10 (Johnny Carson); *Burnett v. National Enquirer, Inc.* (1983) 144 Cal. App. 3d, 997, 193 (Carol Burnett); *Eastwood v. Superior Court* (1983) 149 Cal. App. 3d 409 (Clint Eastwood).

The burden of establishing public figure status is on the defendant. *See Robert D. Sack & Sandra S. Baron*, Libel, Slander, and Related Problems § 5.4.1, at 275 (2d ed. 1994), citing *Reliance Ins. Co. v. Barron's* (S.D.N.Y. 1977) 442 F. Supp. 1341, 1346; *Time, Inc. v. Firestone* (1976) 442 U.S. 448, 454-58 (defendant bears burden because he gets benefit from the enhanced fault protections that attach to classification of the plaintiff as a public figure).

Unlike any of the mega-celebrities listed above like Michael Jackson, Elvis, Carol Burnett, Plaintiff has attained no such general fame and notoriety or “pervasive power and influence as to be deemed an all purpose public figure under *Gertz*. Rather, Plaintiff appeared in USA Today and the Wall Street Journal in 1997 in stories about her business. While Plaintiff was at one time considered “the most downloaded woman on the Internet” that was almost two decades ago.

During the time frame in which Plaintiff garnered some modest media attention, Plaintiff was interviewed and appeared in media outlets chiefly because of her success as an entrepreneur in the Internet business. (ER 317, ¶ 9.) Despite some limited "sweeps" exposure of Plaintiff's business success seventeen years ago, Plaintiff was never a mainstream actress, never appeared in any theatrically released films or network/commercial television programs and never became a "household word." (ER 317, ¶ 9.)

Contrary to ANL's contention, Plaintiff's career and public exposure are nothing like that of the plaintiff in *Carafano v. Metrosplash.com Inc.* (C.D. Cal. 2002) 207 F. Supp. 2d 1055, 1070–1071. In *Carafano*, unlike Ms. Manzari, plaintiff was a popular television and film actress who enjoyed general fame and notoriety. Carafano appeared in Star Trek: Deep Space Nine, 'the number one syndicated television show in the world.'" Carafano also boasted that her Star Trek character was so popular that it was the subject of an action figure and a trading card. Carafano also on the network television shows General Hospital and ER. She co-hosted a news magazine show on the Sci-Fi and hosted NBC Saturday Night at the Movies along with appearing in numerous feature films where she had lead and supporting roles including hit Mel Brooks film, Robin Hood: Men in Tights. Carafano made infomercials and television commercials, including a national TVs ads and her namesake character was an answer on the game show Jeopardy.

Rather than *Carafano*, Plaintiff's public exposure is similar *Lerman v. Flynt Distributing Co., Inc.* (2d Cir. 1984) 745 F.2d 123 where the court declined to find plaintiff was a general all-purpose public figure even though she had achieved international renown as the author of nine sex oriented novels (which had sold in the millions), she had achieved a world-wide fans

and following, she frequently appeared as a guest on national TV and granted interviews to the mass media. Lerman's photograph was also prominently displayed on the jackets of all her novels and her first novel was translated into 32 languages with many books being made into movies. The Court, citing *Gertz* ruled: "Ms. Lerman is not that rare person the *Gertz* decision identifies as an all purpose public figure." Like the plaintiff in *Lerman*, Ms. Manzari is far from an all purpose public figure.[9]

ANL's citation to *Thomas v. L.A. Times Commc'ns, LLC* (C.D. Cal. 2002) 189 F.Supp.2d 1005, 1011 is equally misplaced. In *Thomas*, the plaintiff's experiences during World War II were published in an autobiography called "Test of Courage" and he later established a foreign language institute. The LA Times published an article critical of plaintiff's WWII contentions and the legitimacy of his school. The Court ruled that publication of the biography (plus numerous interviews and press quotes about his life) made Thomas a *limited purpose public figure* respecting issues pertaining to Thomas' contentions about his experiences during WWII and his language school:

[9] ANL's citations to *Carlisle v. Fawcett Publ'ns, Inc*. (1962) 201 Cal.App.2d 733, *Douglass v. Hustler, Inc.* (7th Cir. 1985) 769 F.2d 1128, 1141 and *Re v. Gannett Co.* (1984) 480 A.2d 662, 5665 are inapposite. *Carlisle,* a pre *New York Times* and *Gertz* case involved the former husband of movie star and worldwide celebrity Janet Leigh. in which the Court held that "people closely related to such public figures in their activities must also to some extent lose their right to the privacy that one unconnected with the famous or notorious would have." In *Douglass*, the plaintiff had done much more than just pose nude for Playboy. Instead, she also appeared in television commercials, television dramas and in movies, including a starring role in the film "Breaking Away." *See*, 607 F.Supp. 816 (1984). In *Re*: the court cited to *Vitale v. National Lampoon, Inc.*, (E.D.Pa 1978) F.Supp. 442 which held only "we rule that with respect to her role in Playboy magazine, and for that limited purpose only, plaintiff is a public figure to the readership of that magazine." The plaintiff was thus, not an all-purpose general public figure by virtue of appearing in Playboy magazine.

> "By cooperating with the publication of the book, Thomas has invited public attention — and public scrutiny — to his life. . .at least with respect to his World War II participation and his teaching methods, the Court finds that Thomas is a [limited] public figure."

Thomas at 1009.

Here, unlike *Thomas*, Plaintiff has had no books -- let alone *autobiographies* -- written about her. Additionally, as explained further below, nor is the defamatory statement at issue in this case in reference to anything pertaining to the modest media attention Plaintiff received seventeen years ago.

H. Plaintiff is Not a Limited Purpose Public Figure

The second category from *Gertz* is that of the "limited purpose" 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." *Gertz*, 418 U.S. at 351. 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 or her role in a public controversy.** *Id*. (emphasis added). *See*, *also*, *Reader's Digest Association v. Superior Court* (1984) 37 Cal.3rd 244, 253–254 (limited purpose public figure subject to actual malice standard only as to allegedly defamatory publications related to his or her role in the public issue).

The limited purpose public figures are people who have voluntarily "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz* at 345. As such the initial question in determining whether or not a person is a limited purpose public figure is to "identify the public controversy" *Barry, supra at*

115. This test was explained in *Waldbaum v Fairchild Publications, Inc. (D.C.Cir.1980) 627 F.2d 1287*, as follows: "As the first step in it's inquiry the court must isolate the public controversy . . . and define its contours, the judge must examine whether persons actually were discussing some specific question." *id*.

The cases decided since *New York Times* and *Gertz* make it clear that a person should not be considered a public figure merely because the person happens to be involved in a controversy that is newsworthy. *Time, Inc. supra,* at 448. Rather, as the court recognized in *Vegod Corp. v American Broadcasting Companies, Inc.* (1979) 25 Cal.3d 763: "a limited public figure plaintiff must have undertaken some *voluntary act* through which he seeks to influence the resolution of public issues involved. As such, the mere involvement of a person in a matter which the media deems to be of interest to the public does not in and of itself require that such a person become a public figure for purposes of a subsequent libel action."

Here, Plaintiff has never sought media exposure or interviews concerning the use of condoms in the adult film business or resulting health issues, nor has she ever voluntarily thrust herself into any debate concerning that industry. Plaintiff's only "public" position concerning the adult entertainment industry (generally) was giving testimony to congressional committees in 2000 in relation the proposed passage of COPA and the protecting minors from inappropriate content *online*. Plaintiff was involved in these hearings because it pertained directly to her limited area of notoriety at the time; namely *the Internet*.

Plaintiff has never taken a public position or sought or received media attention concerning: (1) the use of condoms in adult films; (2) legislation or proposed legislation regarding the use of condoms in adult films or in any

respect; (3) the mechanisms or procedures used to screen adult industry performers for STDs or legislation regarding same; or (4) the symptoms, effects, cure, treatment or public management of HIV or Aids.

ANL contends its freedom of speech rights were triggered because the offending Article stems from the debate over the use of condoms in the adult film business, the health risks of that industry and effects of HIV. Plaintiff, however, has not, nor has she ever, "voluntarily thrust" herself to the forefront of the "public controversy" in order "influence the outcome of any of the issues" in those areas. As per the authority above, Plaintiff is not a limited public figure regarding those issues or any issues in this case at all. See, e.g., *Hutchinson v. Proxmire*, (1979) 443 U.S. 111; *Wolston v. Readers' Digest Assn., Inc.* (1979) 443 U.S. 157. Plaintiff, thus need only have plead that *MailOnline* was negligent in publishing her image in the Article. *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711 ("a private person need prove only negligence (rather than malice) to recover for defamation.")

I. The District Court Correctly Ruled That Plaintiff Demonstrated a "Probability" ANL Published the Article with Reckless Disregard for the Truth

Even if Plaintiff was required to show "a probability" of actual malice below (rather than negligence), she did.

"To show actual malice, plaintiffs must demonstrate [defendant] either knew his statement was false or subjectively entertained serious doubt his statement was truthful." *Christian Research Inst. v. Alnor* (2007) 148 Cal. App. 4th 71, 84-85 (citing *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 511). "Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." *Id* (citation

omitted) A defamation plaintiff may rely on inferences drawn from circumstantial evidence to show actual malice." *Alnor*, 148 Cal. App. 4th at 84. (citation omitted). "A failure to investigate . . . [and] reliance upon sources known to be unreliable . . . may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication." *Reader's Digest*, 37 Cal. 3d at 258 (internal alterations omitted). Thus, an inference of malice may be drawn "when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation ... [or] where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *Alnor*, 148 Cal. App. 4th at 84-85 (quoting *St. Amant v. Thompson* (1968) 390 U.S. 727, 732.

The Ninth Circuit has recognized that it has "yet to see the defendant who admits to entertaining serious subjective doubts about the authenticity of an article is published." *Eastwood*, *supra* at 1253. As a result, courts "must be guided by circumstantial evidence. By examining editor's actions, we try to extend understand their motives." *Id*. *See*, *also*, *Christian Research Institute v. Alnor* (2008) 165 Cal. App. 4th 1315 (defamation plaintiff may rely on inferences drawn from circumstantial evidence to prove actual malice); *St. Amant v. Thompson* (1968) 390 U.S. 727, 732 (malice can be inferred when the publishers allegations are so inherently improbable that only a reckless man would've put them in circulation); *Mason v. New Yorker Magazine Inc*. (9th Cir. 1992) 960 F.2d 896, 900 (where direct proof of actual analysis missing, "the jury may nevertheless infer that publisher was aware of the falsity.") Circumstantial evidence of actual malice is construed in light most favorable to plaintiff. *Solano, supra,* "The editors' statements of their subjective intention are matters of

credibility for a jury." *See Kaelin*, 162 F.3d at 1042. Plaintiff may prevail if Defendant had obvious reasons to doubt the veracity of its reporting, but engaged in purposeful avoidance of the truth. *St. Amant v. Thompson, supra at* 730; *Eastwood*, 123 F.3d at 1251; *Harte-Hanks*, 491 U.S. at 692; cf. *United States v. Jewell* (9th Cir. 1976) 532 F.2d 697, 700 (en banc) (willful blindness tantamount to knowledge)."

Following the District Court's review of the prevailing law and the evidence admitted (inclusive of ANL's reporters' declarations and the Corbis screen capture (ER 317)), the District Court ruled Plaintiff had met her burden of showing a probability of successfully proving reckless disregard:

> ". . .Defendant's own declarations appear to establish as much. James Nye- the Article's author- admitted that '[a]t no time' did he believe that 'the woman in the Photograph was the actor who allegedly tested positive for the HIV as described in the Article.' Nye Decl. ¶ 8. Jack Forbes- the Mail Online photo editor-similarly admitted that he did 'not believe that the Article was about the woman in the photograph' but instead considered the photo to be a 'general visual representation of the pornographic film industry." Forbes Decl. ¶ 6. In other words, at the time they selected her photo, both Nye and Forbes 'subjectively entertained serious doubt' that Plaintiff was the performer who tested positive for HIV. Alnor, 148 Cal. App. 4th at 84-85. Given that the actor's identity was unclear at the time the Article was published, there were also, of course, 'obvious reasons to doubt' that Danni Ashe was the actress who actually tested positive for HIV."

(ER 31-32.)

The District Court also noted the impact of the Corbis screen capture on the issue of reckless disregard:

> "[A]s Plaintiff points out, the data shown on Corbis' image database-from which Defendant selected the photo -listed Plaintiffs name and described her as posing 'in one of her studios in Los Angeles in 2000.' Docket No. 29 at 12. Nothing from the Corbis database suggested that Plaintiff was the performer mentioned in the Article's headline or discussed underneath the photo caption, much less that she was actively performing in adult entertainment in August of 2013."

(ER 32. fn. 10.)

As to Nye and Forbe's claims of innocence (and absence of subjective intent), the District Court stated such matters were for the jury to decide as per *Kaelin*, 162 F.3d at 1042:

> "While both Nye and Forbes affirm that they did not intend to imply that Plaintiff tested positive for HIV (and the Article itself states that the performer "was not immediately identified"), such intentions and small-print qualifications do not negate a conclusion that the Article was published with reckless disregard as to an implied truth: namely, that Plaintiff was the HIV -positive performer who shut down the porn industry. As explained above, a defamation plaintiff 'may rely on inferences drawn from circumstantial evidence to show actual malice[.]' *Reader's Digest*, 37 Cal. 3d at 258. In this case, a jury could reasonably credit inferences drawn from the circumstantial evidence in the record to conclude that Defendant acted with reckless disregard for truth in publishing the Article."

(ER 31. fn. 9, citing Kaelin at 1042.)

The District Court's reasoning is sound and should not be disturbed on appeal. Here, given the declarations field by ANL's reporters, a reasonable jury could infer that *MailOnline* staff entertained some doubt about publishing the image, but went ahead anyway.

In the same vein, a reasonable jury could find ANL acted with reckless disregard by ignoring critical information about Plaintiff's image embedded in Corbis website when the image was downloaded to *MailOnline* system. (ER 317)[10] The data from Corbis includes an *accurate* the description of the Photograph which was available to *MailOnline*: **"Soft porn actress, Danni Ashe, founder of danni.com, poses in front of a video camera connected to the Internet in one of her studios in Los Angeles in 2000."** (Id.) *MailOnline* ignored (or worse, deleted) the accurate information about Plaintiff's image (including Plaintiff's name, her role as a "soft core" actress and that she was "posing" on a bed rather than "performing" in a pornographic movie in 2000 rather than 2013). Based on these facts, a reasonable jury could easily conclude ANL purposefully avoided the truth or "willful blindness" which is tantamount to knowledge of falsity. *St. Amant v. Thompson*, *supra* at 730 (1968); *Eastwood*, *supra* at 1251; *Harte-Hanks*, 491 U.S. at 692; cf. *United States v. Jewell*, supra at 700 (willful blindness tantamount to knowledge). The District Court's order denying ANL's motion should be affirmed.

J. The District Correctly Determined that Newton and Dodds Are Not Controlling

The District Court considered and then rejected ANL's argument that the declarations from its reporters magically immunized ANL from liability

[10] Even though ANL objected to the Corbis screenshot, the District Court declined to rule on the objection and ANL never pressed for a ruling. Under California law, the objection is deemed waived and is "not preserved for appeal." *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670 ; *Soukup v. Law Offices of Herbert Hafif, supra* at fn. 17; *Gallant v. City of Carson* (2005) 128 Cal.App.4th 705, 710. In reviewing a trial court's order denying an anti-SLAPP motion, the Court considers "all the evidence presented by the parties." *Slauson Partnership v. Ochoa* (2003) 112 Cal.App.4th 1005, 1014, fn. 4.

based on *Newton* and *Dodds* (because they supposedly did not intend to convey a defamatory impression). The District Court focused chiefly on the reporters' own admissions under oath that they *knew*: (1) Plaintiff was not HIV positive; and (2) was not the female performer with HIV, *but published the Article anyway*, finding a jury could reasonably conclude ANL intended to convey an impression known to be false.

> "'The fact that we can't look inside the editors' minds doesn't stop us from reaching conclusions about their thoughts; subjective standards are nearly always satisfied by circumstantial proof (as in most criminal prosecutions).' *Eastwood*, 123 F.3d at 1256 n.20. Here, having considered the totality of the choices and admissions made by the Mail Online's staff, the Court would find that a jury could reasonably conclude that those who created the Article intended to convey the impression – known by them to be false – that Plaintiff tested positive for HIV. Id. at 1256; Docket No. 36 at 9."

(ER 20 citing *Eastwood v. Superior Court, supra, at* 409)

In response to ANL's urging and after taking the matter under submission, the District Court further distinguished both *Dodds* and *Newton* as entirely inapposite in the present case:

> "Unlike *Dodds* or *Newton*, the circumstantial evidence of Defendant's subjective knowledge of falsity and/or intentional recklessness in this case is much stronger. Initially, Defendant never possessed any evidence (e.g. statements from a source) to suggest that Plaintiff was the person who tested positive for HIV, and both Nye and Forbes admit in their declarations that they never believed she had HIV. Nye Decl. ¶¶ 8-9; Forbes Decl. ¶¶ 6-7. Moreover, unlike the comparatively in-depth TV segment in *Dodds* – much of which was based on interviews with sources who affirmatively told ABC that

> Judge Dodds used a crystal ball in connection with his role as a judicial officer – here Defendant published a short online piece without having any clue who Plaintiff was, but admittedly *knowing* that the person who tested positive for HIV had *not* been identified."

(ER 20-21, emphasis in original.)

Next, the District Court pointed Corbis screen capture that ANL's reporter's *ignored*:

> "Defendant selected Plaintiff's photo from a Corbis image database describing Plaintiff as posing in 'one of her studios in Los Angeles in 2000' and – despite Nye and Forbes' subjective belief that Plaintiff was *not* the performer who recently tested positive for HIV in 2013 – Defendant nevertheless intentionally chose to feature Plaintiff prominently on the first page underneath the headline 'Porn industry shuts down with immediate effect after 'female performer' tests positive for HIV.' Compl. ¶ 24, Ex. A. ¶ Thus, given the date on the Corbis image database, Defendant also arguably had obvious reasons to doubt that Plaintiff was even actively performing in the adult film industry as of 2013. *See also Kaelin v. Globe Communications* (9th Cir. 1998) 162 F.3d at 1042 ('The editors' statements of their subjective intention are matters of credibility for a jury.')"

(ER 21, fn. 3, emphasis in original.)

Finally, the Court highlighted that ANL's own reporters claimed they had no clue who Plaintiff was or even bothered to investigate that basic fact before publishing:

> "Defendant suggests both that (1) Plaintiff is so well known that she is an all-purpose public figure for the purposes of defamation; and that (2) neither Nye or Forbes knew who Plaintiff was and thus could not

> have intended to convey that she was HIV positive. Compare, e.g., Docket No. 20 at 22-24 with Nye Decl. ¶ 8. Setting aside whether Defendant actually *knew* who Plaintiff was, the declarations in the record demonstrate that no one on Defendant's staff believed that Plaintiff was HIV positive, nor did Defendant have any information to suggest that Plaintiff was HIV positive. Indeed, despite reports that the actress had not yet been identified, no one at the Mail Online bothered to investigate Plaintiff's identity, period. As stated above, Plaintiff may prevail if Defendant had obvious reasons to doubt the veracity of its reporting, but engaged in purposeful avoidance of the truth. *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968); *Eastwood*, 123 F.3d at 1251; *Harte-Hanks*, 491 U.S. at 692; cf. *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir. 1976) (en banc) (willful blindness tantamount to knowledge)."

(ER 21, footnote 3, emphasis in original.)

The District Court's findings are correct with respect to *Newton* and *Dodds* and should not be disturbed on appeal. Both cases are completely inapposite and do not control the outcome here.

In *Newton*, mega-celebrity Wayne Newton sued NBC for broadcasting a report suggesting he had ties to the mob and that his purchase of a hotel was funded (secretly) through organized crime money. The case was tried to a local Las Vegas jury and following a 37 day trial, the jury awarded Newton more than $19 million in damages. On appeal, *and following a comprehensive review of all the trial testimony*, the Court concluded that no actual malice was proved because the evidence established the journalists (Ross & Silverman) had conducted a very extensive and complete investigation of the matter prior to broadcasting the report (including requesting interviews with Newton himself). Based on the

investigation, the reporters reasonably decided to discount the credibility of a certain source of information which could have been exculpatory:

> "In this case, the undisputed evidence shows that NBC and its journalists were not reckless in disregarding Moreno's information about threats. Ross and Silverman testified that they were uncomfortable with Moreno because they knew that federal and state authorities had investigated Moreno's own considerable connections with organized crime figures. The journalists also testified that they believed Moreno to be an unreliable source [making contradicting statements]. . . Our review of the uncontroverted testimony, together with the cumulation of the circumstantial and documentary evidence, reveals almost no evidence of actual malice, much less clear and convincing proof."

Newton at 683, 689.

It goes without saying, the facts and issues in *Newton* are bear no resemblance to the present case. In *Newton*, the Court's review was following a 37 day jury trial in which extensive testimony had been received. Moreover, such testimony demonstrated clearly that the news organization defendant had conducted a full and complete investigation of the matter prior to reporting the story and while certain errors were made, such errors were resulting from otherwise reasoned, deliberate and thoughtful credibility determinations about sources made by seasoned and experienced journalists.

Here, unlike in *Newton*, ANL seeks a dispositive determination of its liability at the inception of the case (rather than after a full and fair trial on the merits). Additionally, unlike the journalists in Newton, ANL's reporters conducted zero investigation into the appropriateness of using Plaintiff's image to lead the Article and in fact, purposefully ignored information available to them which likely would have led them to not use Plaintiff's

image. *Newton* does not help ANL and in fact supports denying ANL's quest for reversal.

The same is true for *Dodds*; it does not aid ANL. As observed by the District Court, *Dodds* involved a television news story based on extensive interviews with sources who affirmatively told ABC that Judge Dodds (a public official) used a crystal ball in connection with his role as a judicial officer. After extensive discovery and depositions, ABC moved for summary judgment. On appeal the Court reviewed the evidence:

> "[N]umerous sources informed ABC that they were personally aware of Judge Dodds's use of the crystal ball in the manner suggested by the litigants who actually appeared in the broadcast. These additional sources included other litigants, a former clerk, and attorneys who had dealings with Judge Dodds. . . ABC had no particular cause to doubt the veracity of the people whom it interviewed. There is nothing in the record to suggest that Johnson, Hart, and the former clerk were prone to exaggeration or lying or would deliberately engage in such conduct."

Dodds, *supra* at 1061, 1063

Based on the evidence in the record, the Court concluded that ABC was entitled to judgment because it's journalists had not engaged in "purposeful avoidance of truth":

> "[ABC] did not engage in purposeful avoidance of the truth, but rather sought out the best possible source to refute the allegations, either by providing direct evidence or supplying the names of persons who could do so. That source was Judge Dodds. Dodds, however, refused to answer the investigator's questions or to furnish any information at all . . ."

Dodds, *supra* at 1063

Unlike *Dodds*, this case involves practically no investigation of facts prior to publication and instead contains evidence which a jury could find comprises a purposeful avoidance of truth. ANL never possessed any evidence (e.g. statements from a source) to suggest that Plaintiff was the person who tested positive for HIV, and both Nye and Forbes admit in their declarations that they never believed she had HIV. Nye Decl. ¶¶ 8-9; Forbes Decl. ¶¶ 6-7. Moreover, unlike the comparatively in-depth TV segment in Dodds, here ANL published a short online piece without having any clue who Plaintiff was, but admittedly *knowing* that the person who tested positive for HIV had *not* been identified. The District Court's order should be affirmed.

K. The District Court Correctly Declined to Dismiss Plaintif's False Light Cause of Action on an Anti-SLAPP Motion

An anti-SLAPP motion is not the proper procedural vehicle to address a false light invasion of privacy claim because it cannot be said that "[plaintiffs'] lawsuit is meritless and 'brought primarily to chill the valid exercise of the constitutional rights of freedom of speech[.]") *See*, *e.g*., *MG. v. Time Warner, Inc*. (2001) 89 Cal. App. 4th 623, 636-37. As per MG, the Court correctly declined to dismiss Plaintiff's Second Cause of Action for false light invasion of privacy.

IV. CONCLUSION

If a picture is worth a thousand words, it may also lie, and be defamatory. The offending Article here was "of and concerning" Ms. Manzari. This is true whether the Article was directly "of and concerning" Plaintiff (because an image with her name "in lights" was used to lead the Article), or by clear implication, because *MailOnline* juxtaposed her picture with headlines clearly implicating her -- and chose not to clarify to its visitor

that the pictured model (Ms. Manzari) was not the adult film actress who tested positive for HIV.

Additionally, even if Plaintiff (a former nude model who achieved some modest media coverage for her entrepreneurial successes on the Internet seventeen years ago) is an "all-purpose" public figure similar to a mega-celebrity like George Clooney, then she adequately demonstrated a "probability" that ANL acted with actual malice in publishing the Article knowing she was not HIV infected performer. Accordingly, ANL's appeal should be rejected and the District Court's order affirmed in all respects.

Respectfully submitted,

Dated: November 10, 2014 WEIN LAW GROUP, LLP

By: /S/_____
STEVEN L. WEINBERG
Attorneys for Plaintiff - Appellee
Leah Manzari

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, and Ninth Circuit Rule 32-1, I hereby certify that:

1. The foregoing Brief of Appellee Leah Manzari complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because, according to the word count of the word-processing system used to prepare the brief, the brief contains 1,461 words, excluding the corporate disclosure statement, table of contents, table of authorities, and certificates of counsel.

2. The foregoing Brief of Appellee Leah Manzari complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Arial font.

Dated: November 10, 2014 WEIN LAW GROUP, LLP

By:__/S/_____
STEVEN L. WEINBERG
Attorneys for Plaintiff - Appellee Leah Manzari

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, plaintiff states: To the best of Appellee's knowledge, there are no related cases pending in this Court.

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 10, 2014 WEIN LAW GROUP, LLP

By: _/S/_____
STEVEN L. WEINBERG
Attorneys for Plaintiff - Appellee
Leah Manzari