No. 21-15690

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PLANET AID, INC. AND LISBETH THOMSEN,

Plaintiffs-Appellants,

v.

REVEAL, CENTER FOR INVESTIGATIVE REPORTING,
MATT SMITH, AND AMY WALTERS

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
(Case No. 17-cv-3695-MMC, Hon. Maxine Chesney)

APPELLANTS' OPENING BRIEF

James M. Wagstaffe (95535)
Michael von Loewenfeldt (178665)
Wagstaffe, von Loewenfeldt, Busch & Radwick LLP
100 Pine Street, Suite 2250
San Francisco, Cal. 94111
Tel: (415) 357-8900

Samuel Rosenthal
Nelson Mullins LLP
101 Constitution Ave., N.W.
Washington, D.C. 20001
Tel: (202) 689-2915

Attorneys for Appellants
Planet Aid, Inc. and Lisbeth Thomsen

CORPORATE DISCLOSURE STATEMENT

Planet Aid certifies, pursuant to Federal Rule of Appellate Procedure 26.1 that it has no parent corporation and because it is a not-for-profit, it has no shares that could be owned by any publicly held company. Lisbeth Thomsen is a natural person.

DATED: August 27, 2021

NELSON MULLINS LLP

By /s Samuel Rosenthal
SAMUEL ROSENTHAL

WAGSTAFFE, VON LOEWENFELDT, BUSCH & RADWICK LLP

By /s Michael von Loewenfeldt
MICHAEL VON LOEWENFELDT
Attorneys for Plaintiffs-Appellants

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INTRODUCTION

This is a textbook case of libel per se. The Center for Investigative Reporting ("Reveal") and two of its reporters, Matt Smith and Amy Walters, (collectively "defendants") published a series of articles, radio interviews, and social media posts falsely accusing plaintiffs Planet Aid and Lisbeth Thomsen of (1) skimming between $65 and $90 million of USDA grant funds intended for use in Africa, (2) using falsified invoices to perpetrate that fraud, (3) cheating farmers in the USDA programs, and (4) extorting money from their own workers. The district court held that plaintiffs made a *prima facie* showing that all of these allegations were false. Nevertheless, the court dismissed the entire suit with prejudice under California's anti-SLAPP statute.

First, the court incorrectly held that each plaintiff was a "limited purpose public figure," misapplying the test articulated in *Makaeff v. Trump Univ.*, 715 F.3d 254 (9th Cir. 2013). Without public figure status, malice would not have been required and the motion denied since defendants never disputed a jury could find negligence.

Second, even if malice was required, plaintiffs presented ample evidence from which a jury could find malice. The district court failed to apply the correct standard in reviewing plaintiffs' evidence. Instead, it credited defendants' evidence and held that dismissal is required because a jury might find defendants' denials plausible.

The anti-SLAPP statute, California Civil Code section 425.16, was intended to eliminate "baseless lawsuits" in a proceeding which, like summary judgment, requires that the plaintiffs' evidence be accepted as true. All conflicting inferences and disputed facts must be resolved in plaintiffs' favor. A plaintiff need only show "minimal merit" to defeat the motion. Applying the proper standard, the evidence of defendants' malice is overwhelming.

Defendants orchestrated their "reporting" for what they called "impact." They published known falsehoods and stubbornly disregarded their own doubts. Their reporting was false, not just in extraneous details, but as to every material point. Numerous purported sources have since denied providing the information attributed to them. Other details were just invented by defendants. Defendants failed to consider documents in their possession, and failed to interview known potential sources who would contradict the desired narrative. Instead, defendants relied on people they knew were biased, even using bribes and other inducements as additional encouragement.

A jury could easily conclude that defendants' numerous falsehoods were not the result of mere inadvertence or mistake, but instead that defendants chose to follow Mark Twain's advice: "never let the truth get in the way of a good story." The judgment should be reversed and remanded with instructions to deny the anti-SLAPP motion.

JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. § 1332 because the parties are citizens of different states and the amount in controversy exceeds $75,000. (22-ER-5058.) This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The judgment was entered on March 23, 2021 (1-ER-2) and a timely notice of appeal was filed on April 19, 2021. (23-ER-5374.)

ISSUES PRESENTED

1. While correctly finding that plaintiffs made a *prima facie* showing that 46 of defendants' statements were false, including all core allegations, did the district court err by finding that several peripheral statements were only "slightly inaccurate," or that plaintiffs failed to offer evidence as to falsity?
2. Were Planet Aid and Lisbeth Thomsen limited purpose public figures and therefore required to show that defendants acted with "actual malice"?
3. Did plaintiffs establish a *prima facie* case as to malice by showing that a reasonable jury "might" find that defendants acted with malice, *i.e.* with either knowledge of falsity or reckless disregard of whether their statements were false?

ADDENDUM OF STATUTORY AUTHORITIES

Pursuant to Circuit Rule 28-2.7, all relevant statutory authorities appear in the Addendum.

STATEMENT OF THE CASE

I. Statement of Facts

Planet Aid is a not-for-profit which engages in charitable activities both through donating its own funds to needy causes and through operating charitable programs funded by, among other organizations, the USDA. (1-ER-3-4; 10-ER-2389-90; 14-ER-3157.) A subcontractor, DAPP Malawi, assisted Planet Aid in Malawi. Lisbeth Thomsen was DAPP Malawi's Country Director. (14-ER-3157, ¶6.)

A. The USDA grants for Mozambique and Malawi

Planet Aid was awarded a USDA grant in 2004 to assist impoverished communities in Mozambique. (10-ER-2389 ¶3.) Working with a local subcontractor, Planet Aid fed 80,000 school children daily, developed programs to assist in educating children, and provided soy meals for the population. (10-ER-2389-90 ¶¶4-7.) Numerous audits and reviews, by both the USDA and outside independent auditors and experts, found no deficiencies in the program. (10-ER-2394-96 ¶¶20-26; 12-ER-2780, 2782.)

In 2006, Planet Aid was awarded another USDA grant for several programs in Malawi. (14-ER-3157.) One program assisted approximately 21,000 Malawi farmers by educating them about agricultural methods (the "Farmers Club Program"). (14-ER-3164 ¶37.) A second program developed schools and trained local teachers. (14-ER-3159 ¶13.) A third program educated over 700,000 individuals about HIV/AIDS. (14-ER-3162 ¶26.) In June 2009, the USDA awarded Planet Aid a further grant to continue these programs. (14-ER-3157 ¶7.)

After the Malawi programs concluded, both independent auditors, as well as those at the USDA, found Planet Aid had accounted for the use of all funds, and identified nothing fraudulent or suspicious. (E.g., 4-ER-603-892; 5-ER-894-919, 981-83.) Several independent experts found that Planet Aid's programs achieved all USDA program objectives. (14-ER-3166-68, *infra* at 11.)

B. Defendants' defamatory stories

Notwithstanding Planet Aid's repeated clean bills of health, defendants published a series of stories accusing Planet Aid of stealing USDA money and cheating local farmers and its own employees. Between March 2016 and August 2017, Planet Aid and Thomsen were defamed in twenty publications involving radio, television, internet stories, and hundreds of social media posts. (22-ER-5064-5292.)

Defendants wrote a draft of the sensational story they wanted to tell before learning all the facts. A Senior Radio Editor complained that she was "perturbed by having a script drafted before their investigation was completed." (8-ER-1808). She was told "this is apparently how they do it here for print pieces.... they seem to write a draft of the story before all the reporting is done." (*Id.*) As defendants neared publication, an editor expressed frustration that the lead reporter, defendant Smith, was a "very cynical guy who was belligerent on making changes." (9-ER-2091.) Smith openly hoped the stories would come down "like a large load of bricks," (6-ER-1089-90), which gave meaning to the editor-in-chief's quip in social media: "we live for impact." (5-ER-1031.)

Defendants' so-called "investigation" violated core rules of journalistic ethics, including: (1) attributing statements to sources who made no such statements or told defendants facts directly contrary to what was published (*infra* at 49-50); (2) offering or giving "sources" cash, equipment, or other inducements (*infra* at 62-64), including a bribe to one source for a false confirmation (13-ER-3076 ¶¶3-4), "a good paying job" to another for corroborating allegations (12-ER-2753), or a share in a whistleblower recovery for others if they would corroborate defendants' allegations by "com[ing] on…more strong" in the interview (7-ER-1591); (3) resorting to threats (12-ER-2838 ¶¶4-5); and (4) leading others to believe the defendants actually worked for the government or entities funding the USDA programs. (13-ER-3076 ¶5; 10-ER-2258 ¶6.)

Defendants also altered statements from their sources, (*infra* at 51-53), utilized a Malawi reporter, Kandani Ngwira, for gathering "evidence" even though he had previously been convicted of using his position as a journalist to extort money (6-ER-1244), and relied heavily on other sources they knew were biased against DAPP Malawi. (*Infra* at 60-61.)

The story developed through this "reporting" falsely claimed that plaintiffs siphoned-away 50-70% of $130 million in USDA funds intended for Mozambique and Malawi. (17-ER-3899, 3907.) Defendants admitted that a reasonable reader would have construed those statements to mean that plaintiffs stole $65-90 million from the US government. (7-ER-1457.) But that was impossible because the USDA had only provided Planet Aid a total of $70 million, most of which was paid by Planet Aid to subcontractors. (12-ER-2757 ¶¶8-9.) None of that money was stolen by plaintiffs. (10-ER-2389 ¶2; 12-ER-2756 ¶5, 2780-84; 13-ER-2854 ¶ 6; 14-ER-3156 ¶¶2-4.)

Defendants' stories also falsely said that plaintiffs diverted money to Mexico (22-ER-5181, 5218), used fraudulent invoices (22-ER-5070, 5122), cheated farmers out of livestock and pumps (22-ER-5193), forced employees of DAPP Malawi to pay kickbacks from their salaries (22-ER-5070, 5206, 5217), and that Planet Aid had been found by the government to be diverting money to a fugitive, Amdi Petersen. (22-ER-5065, 5076, 5217.) As the district court held (before nonetheless

dismissing the case), plaintiffs can prove that none of that is true. (1-ER-7-17.)

Defendants knew they were unable to substantiate the story they had set out to tell. They confessed privately to having no "smoking gun" (6-ER-1112) and that, in fact, they knew "very little" about the USDA funds. (6-ER-1238). Defendants tried to enlist a Danish news organization who had attended many interviews to jointly publish the story. It declined the invitation. (10-ER-2192.)

Defendants even admitted below that—despite falsely reporting otherwise—they lacked "knowledge or information sufficient to form a belief" whether all of the USDA programs in Malawi achieved the USDA's objectives by assisting farmers, providing them with equipment and material, planting millions of trees, constructing Teacher Training colleges and training teachers, and educating over 700,000 Malawians about HIV/AIDS. (23-ER-5317 ¶¶42-45).

Defendants told their false stories without any of the editors, who were responsible for fact-checking, reviewing even the independent financial audits in defendants' possession. (*Infra* at 54-55). They were just focused on telling a story creating the type of "impact" defendants openly admit seeking. (5-ER-1031.) For more than a year, defendants told the entire world that Planet Aid and Thomsen had stolen governmental funds and cheated the people they were supposed to help

without even checking the basic documents in their possession, or contacting those sources with the most direct knowledge of the facts.

II. Procedural History

In August 2016, Planet Aid and Thomsen sued defendants in the District of Maryland. (23-ER-5381.) Defendants denied that Reveal employed anyone in Maryland, and moved to dismiss for lack of jurisdiction and venue. (23-ER-5366 ¶5.) Finding an absence of minimum contacts based on defendants' factual presentation, the Maryland district court granted the motion to transfer venue to the Northern District of California. (1-ER-56 et seq.).

After the transfer, plaintiffs learned Reveal's Senior Radio Editor lived in Maryland. (23-ER-5364 ¶5.) Defendants admitted they "erred," but then claimed that this editor was Reveal's *only* Maryland-based employee. (23-ER-5303 ¶5.) This was also untrue; Reveal's Executive Editor had moved to Maryland before thirteen of the twenty stories were published. (23-ER-5295 ¶6.) Defendants also complained that it was "unfair" to make them litigate 3,000 miles from "home." After it became known that defendant Walters was living in Washington, D.C., defendants claimed she had "recently relocated there on a temporary basis." (23-ER-5304 ¶9.) This too was false. (23-ER-5297 ¶¶3-4.)

Once in California, defendants seized upon the California anti-SLAPP procedure and filed a motion to strike the entire case. (16-ER-

3465-3498).[1] Beyond their own self-serving declarations, or those by attorneys, defendants submitted ten declarations they claimed corroborated the stories. Six are by foreign nationals who refused to participate in discovery, and who were beyond the court's subpoena power. (16-ER-3499-3503; 18-ER-4045-4164; 19-ER-4275-4289; 20-ER-4530-4763.) Those taking that position included Ngwira, who was represented by defense counsel, (3-ER-479 ¶32), another source defendants claimed to represent and then changed their mind when asked to accept service of a subpoena, (15-ER-3399), and others told by defendants that they did not need to talk with plaintiffs' counsel. (15-ER-3378-79 ¶3.) Defendants also refused to comply with Federal Rule of Civil Procedure 26(f) by providing addresses needed to serve those individuals pursuant to letters rogatory. (3-ER-481 ¶38; 15-ER-3341, 3364-66.) In response, the district court held it would disregard those witnesses because they were not subject to cross-examination. (1-ER-22 n.17.) Of the four remaining foreign nationals relied upon by defendants (19-ER-4290-09; 21-ER-4765-4972), three ended up submitting declarations opposing the motion to strike. (12-ER-2824-31; 10-ER-2265-66.)

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[1] Defendants obviously were intent on avoiding Maryland's narrower anti-SLAPP statute. See Md. Code Ann., Cts. & Jud. Proc. § 5-807(b) (applies only to suits "brought in bad faith" and "intended" to inhibit free speech rights, with no award of attorney fees).

After limited discovery was allowed, Plaintiffs opposed the motion with declarations from thirty-five witnesses with personal knowledge of the facts, as well as an expert opining on defendants' journalistic practices. (10-ER-2310-2387.) Those declarations included individuals interviewed by defendants who either flatly denied making statements attributed to them in the stories (10-ER-2259 ¶¶7-10; 2266 ¶5; 11-ER-2496-97 ¶¶4-6; 12-ER-2831 ¶7) or told defendants facts at odds with what was published. (10-ER-2250 ¶¶2-6; 2308-09 ¶¶4-8; 12-ER-2825-27; 13-ER-3112-13 ¶4.) Additionally, reviews by five sets of independent experts were produced, finding that Planet Aid achieved all objectives under the USDA programs. (10-ER-2395 ¶22; 11-ER-2501-2612; 12-ER-2690-2748; 14-ER-3226-3277.) Plaintiffs also submitted evidence from internal and external accountants for DAPP Malawi and/or Planet Aid demonstrating that no funds were misused. (10-ER-2241 ¶¶3-5; 12-ER-2756 ¶5; 13-ER-2853 ¶5; 3115-16.) One accountant testified that defendants tried to bribe him to say otherwise. (13-ER-3076 ¶¶3-4.)

Plaintiffs submitted declarations from those responsible for operating the USDA programs, including preparation of the government reports cited in the stories. (10-ER-2272 ¶14, 2393-2394; 13-ER-2854-55; 14-ER-3158 ¶¶10-11.) Plaintiffs also provided declarations from seven witnesses who denied the report that they had been forced to kickback 20-100% of their salaries, including five who had met with defendants or Ngwira, their investigator and co-author. (10-ER-2241-2245; 11-ER-

2483 ¶¶3-4, 2486 ¶18, 2625-28 ¶¶14,26, 2668-74; 12-ER-2831 ¶6; 14-ER-3120 ¶¶6-7, 3287-3288.)

Additionally, plaintiffs provided documents and testimony from defendants themselves questioning both their sources and allegations, and eight additional declarations disputing any remaining allegations raised by defendants' motion. (10-ER-2403-2404; 11-ER-2406-2415; 12-ER-2749-51, 2832-33, 2846-2850; 13-ER-3082-3107; 14-ER-3283-85, 3290.)

Despite all of this evidence, the district court granted the defendants' anti-SLAPP motion. (1-ER-2.) The court first found that forty-six separate statements published by defendants—including all of the most important ones—were false, but that the remaining peripheral allegations contained slight inaccuracies which the court did not consider actionable. (1-ER-7-17.)

After finding that all of the core elements of the stories were false, the district court erred by finding that plaintiffs were limited purpose public figures required to show defendants acted with malice. (1-ER-17-25.) The court then erred again by ruling that malice was not demonstrated. (1-ER-25-44.) The court entered judgment for defendants. (1-ER-2.) This appeal followed. (23-ER-5374.)

SUMMARY OF ARGUMENT

The district court dismissed plaintiffs' case on defendants' motion to strike pursuant to California's anti-SLAPP statute. Under this Court's clear precedent, that statute requires only "minimal merit" and—as on summary judgment—the court must accept as true plaintiffs' evidence and all reasonable inferences in plaintiffs' favor, determining only whether plaintiffs present a *prima facie* case that could lead a reasonable jury to find in their favor.

The district court began correctly by finding that plaintiffs can show 46 of defendants' defamatory assertions—including all of the central points of defendants' stories—were false. But the court then committed two critical errors, each of which requires reversal.

First, the court found that plaintiffs were limited purpose public figures even though there had been no "pre-existing public controversy" related to the defamatory statements as required under *Makaeff,* 715 F.3d at 266. Nor had Planet Aid or Thomsen "voluntarily thrust themselves to the forefront" of any possible "pre-existing controversy."

The court held that Planet Aid was a public figure because of a wholly unrelated prior allegation and more generally because Planet Aid is a charity that fundraises from the public—a shocking ruling that would make virtually all charities and not-for-profits public figures for all purposes. As for Thomsen, the court concluded she was a public figure based not on her own conduct, but on that of her employer.

But for these errors, the anti-SLAPP motion would have been denied because defendants never disputed that they were negligent.

Second, the court failed to apply the "minimal merit" standard for whether a *prima facie* case of malice existed. Instead of deciding all inferences and disputed issues of fact in plaintiffs' favor, as required at this stage, the district court analyzed the plaintiffs' evidence demonstrating malice by looking for competing inferences and speculating whether a jury could possibly draw some contrary inference. That gets the required analysis backwards. The question is whether a reasonable jury *might* find malice, not whether it might not.

A reasonable jury could find malice on this record because defendants (1) published allegations known to be false and others about which they internally expressed serious doubts, (2) made core assertions—as well as many allegations offered to support those assertions—all of which were false, (3) relied on numerous witnesses who denied making statements attributed to them, (4) fabricated evidence, (5) deliberately disregarded documentary evidence in their possession and sources that did not support their pre-conceived story, (7) relied on sources known to be biased, and (8) obtained negative statements about plaintiffs through bribes, inducements, or lies. Taken together, there was far more evidence of malice than the minimal *prima facie* case required to avoid an anti-SLAPP dismissal.

ARGUMENT

I. Dismissal Under California's Anti-SLAPP Statute is Reviewed *De Novo* And Even Cases with "Minimal Merit" Must be Allowed to Proceed

An order granting an anti-SLAPP motion is reviewed *de novo.*[2] *Manzari v. Associated Newspapers*, 830 F.3d 881, 886 (9th Cir. 2016); *Metabolife Int'l v. Wornick*, 264 F.3d 832, 839 (9th Cir. 2001). Although the statute refers to a plaintiff having to show a "reasonable probability of prevailing" at trial, this has been construed only to require at this stage a *prima facie* case sufficient to sustain a jury verdict, even where a case has "minimal merit." *Mindys Cosmetics v. Dakar*, 611 F.3d 590, 598-99 (9th Cir. 2010).

Where a prima facie case involves a factual determination, the "motion must be treated as though it were a motion for summary judgment…." *Planned Parenthood Fed'n of Am. v. Ctr. for Med.*

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[2] Although prior panels have allowed parties to bring a California anti-SLAPP motion in federal court, the majority of courts have held that under *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398-99 (2010), state anti-SLAPP statutes cannot be applied even if they are "consistent with" the federal rules. *La Liberte v. Reid,* 966 F.3d 79, 85 (2d Cir. 2020). If this panel determines that it is bound by prior panel decisions, this Court should address the issue en banc and disallow anti-SLAPP motions. *See, e.g., Makaeff v. Trump Univ., LLC,* 736 F.3d 1180, 1188 (9th Cir. 2013) (Watford, J., joined by Kozinski Ch. J., Pez J., and Bea, J.), dissenting from denial of rehearing *en banc*); *Klocke v. Watson,* 936 F.3d 240, 245 (5th Cir. 2019); *Abbas v. Foreign Policy Group, LLC,* 783 F.3d 1328, 1332-33 (D. C. Cir. 2015); *see also CoreCivic, Inc. v. Candide Grp. LLC,* 2021 WL 1267259 (Alsup, J.) (collecting cases).

Progress, 890 F.3d 828, 833 (9th Cir. 2018). The court cannot resolve factual disputes. Instead it must credit all evidence in the light most favorable to the plaintiff, and must deny the motion unless "no reasonable jury could find for the plaintiff." *Metabolife Int'l*, 264 F.3d at 840; see *Baral v. Schnitt*, 1 Cal. 5th 376, 384-85 (2016); *Brighton Collectibles, LLC v. Hockey*, 65 Cal. App. 5th 99, 104 (2021). Finally, because plaintiffs are responding to defendants' motion, "there's no requirement for a plaintiff to submit evidence to oppose contrary evidence that was never presented by defendants." *Planned Parenthood*, 890 F.3d at 834.

II. The District Court Correctly Found That All 46 of Defendants' Core Statements Were False

The first element of any defamation claim is falsity. *See Balla v. Hall*, 59 Cal. App. 5th 652, 677-78 (2021). Plaintiffs' complaint challenged 51 statements made across 20 publications. The district court correctly found that plaintiffs could show 46 of those statements—falling into five categories—were false. (1-ER-8-17). The court erred, however, by finding a sixth category, outside of defendants' core allegations, contained statements which were only "slightly inaccurate" or erroneously believed, as shown below, that no opposing evidence had been provided. (1-ER-17).

A. Defendants' central thesis was false

The central thesis of defendants' defamatory stories is that Planet Aid had received over $130 million and diverted 50-70% of that amount instead of using it for the USDA programs. (22-ER-5091, 5208-09, 5217, 5285.) Defendant Walters admitted readers would understand that plaintiffs siphoned-away $65 to $90 million. (7-ER-1457.)

Seventeen of the challenged statements fall in this category. (1-ER-8-10.) Defendants' assertion was not only false, it was impossible because the entire amount which Planet Aid had received totaled only $70 million. (12-ER-2757 ¶8.) Moreover, two-thirds of all USDA money received by Planet Aid was properly spent on programs in Mozambique. (10-ER-2392 ¶14, 2402; 12-ER-2782.) In their depositions, defendants conceded they could cite no evidence that funds were fraudulently diverted from programs there. (3-ER-534; 6-ER-1157, 1159; 7-ER-1461.). None were. (10-ER-2402, 12-ER-2782.)

As for Malawi, where the USDA awarded $23 million, both testimony and documents in defendants' possession when the stories were published proved that Planet Aid "complied, in all material respects, with the types of compliance requirements … that could have a material effect on each of its major Federal programs." (e.g., 4-ER-844.) Audit reports from the USDA reflected that no funds had been fraudulently diverted or stolen, (e.g., 5-ER-981), trip reports found that "the Farmers Clubs program has witnessed tremendous progress in

both [Mozambique and Malawi]") (9-ER-2059), and DAPP Malawi's internal accounting documents further confirmed the absence of any fraudulent or suspicious transactions. (13-ER-2855-56 ¶¶10-12.)

The district court correctly found that plaintiffs had sustained their burden of showing that all allegations relating to the diversion of funds from the USDA Programs were false (1-ER-8-11), including defendants' statement to Thomsen that "people in charge of your money said you're stealing money." (1-ER-9.)

B. Plaintiffs did not use fraudulent invoices to steal any funds

In connection with allegations that $65-90 million had been diverted, defendants claimed that millions of dollars intended to help people in Malawi were instead used to pay "fraudulent" invoices. (22-ER-5070, 5122.) Defendants reported that those "fraudulent" invoices consisted of "bills for expert consultants, book translation, travel, medical care and training." (10-ER-2173.) But when asked to identify such invoices, defendants identified audit reports which showed nothing fraudulent or suspicious. (13-ER-2856-57 ¶¶13-17.) Accountants currently and formerly employed by DAPP Malawi, as well by KPMG, also attested to the lack of any fraudulent or suspicious transactions based on internal accounting and other records. (10-ER-2241 ¶4; 12-ER-2756 ¶5; 13-ER-2852-62, 3114-3116.)

Defendants claimed that they were told, for instance, that "millions of dollars" had been diverted to have the same book translated quarter after quarter (6-ER-1308.) Both internal accounting records and audit documents in defendants' possession undoubtedly would have reflected any such expenditures, but instead showed no such payments. (13-ER-2856-57 ¶¶16-17, 2864 ¶44.)

Audit reports cited by defendants also demonstrated the falsity of an allegation by Chiku Malabwe—who had been fired for fraud and tried to extort money from DAPP Malawi by threatening to talk with defendants (14-ER-3174 ¶77.) Malabwe alleged that invoices for travel and training were inflated, but, when pressed for specifics, responded that he would have to look at the documents to answer. (17-ER-3851.) Defendant Smith admitted that, given Malabwe's shady past, Smith needed to "take care and corroborate any facts that he g[ave them]." (6-ER-1143.) No such corroboration or even supposedly fraudulent invoices were produced. When asked to identify any fraudulent invoices relating to travel or training, defendants again cited the audits in their possession, (10-ER-2173-74), which once again disproved their allegations. (13-ER-2876 ¶¶82-84.)

Also proven false were allegations in the stories that two spreadsheets supposedly showed the diversion of funds based on the payment of "millions of dollars" to a Federation of which Planet Aid is a member. (17-ER-3902; 22-ER-5091, 5155.) Smith admitted that he

would have known when the stories were published that one of the two spreadsheets showed the meager sum of approximately $4,000 paid to the Federation from USDA funds (for a legitimate software license), not millions of dollars. (6-ER-1107.) The other spreadsheet reflected no invoices involving USDA funds at all. (12-ER-2760 ¶18.) None of the transactions on either spreadsheet were determined by defendants to be fraudulent. (6-ER-1109-1110.) Even though they wrote in the article that one of the spreadsheets reflected "dubious" expenses (22-ER-5122), neither defendant Smith nor the editor responsible for the line-by-line review could identify any "dubious" transactions on the spreadsheet. (6-ER-1110; 8-ER-1695.)

The same source who made the false claim about the spreadsheets also told defendants that a 2008 balance sheet for DAPP Malawi corroborated his allegations about millions of dollars being paid to the Federation by showing amounts paid for manuals. It showed no such thing. (13-ER-2857-58 ¶¶16-21.) Nor were any other invoices inflated, fabricated, or even remotely suspicious (13-ER-2857 ¶17.)

Another allegation was that DAPP Malawi paid higher prices for items by making purchases outside Malawi (22-ER-5091), which defendants supported with a bank statement showing the purchase of computer equipment from Hong Kong. (22-ER-5091.) But the individual making that claim had personally approved those purchases based on competitive bids showing *lower* prices than could be obtained in Malawi.

(13-ER-2862-63 ¶¶38-40, 3026.) Smith confided to colleagues that the transactions were nothing more than a "mystery he would like to solve." (6-ER-1239.) Defendants claimed that another invoice showed double billing (22-ER-5092), which was not true. (13-ER-2368-69 ¶¶56-57, 3051.) Defendant Smith testified that he was unable to explain what was meant in the invoice (6-ER-1172, 1174), and that he never looked at the internal accounting documents in his possession to corroborate the allegation. (6-ER-1174.)

The district court correctly found that it was defendants' assertions which were false, not the invoices. (1-ER-15-16.)

C. Plaintiffs did not divert any USDA funds to Mexico

Defendants falsely reported that former DAPP Malawi employee Jackson Mtimbuka was told by "his bosses" that USDA money was going "directly to Mexico." (17-ER-3908.) Yet Mtimbuka submitted a declaration denying making that statement, and claiming also that he was unaware of any such conversation with his "bosses." (12-ER-2831 ¶7.) Like other allegations, the district court correctly found defendants' allegation was false. (1-ER-9, 11.)

D. Plaintiffs did not cheat farmers out of livestock, equipment or supplies

Defendants falsely reported that plaintiffs cheated Malawi farmers out of well pumps and livestock, including by selling, rather than giving-away, pumps. (22-ER-5095, 5192.) They also alleged that farmers told them that they had not received the livestock and well pumps reported to the USDA, (22-ER-5133), and that "in every instance" farmers said it was a "lie" to say that their lives had changed as a result of the USDA program. (17-ER-3904.)

Every farmer interviewed by defendants, as well as three others from the villages visited by defendants, submitted declarations for plaintiffs disputing defendants' assertions and establishing falsity. (10-ER-2258 ¶10, 2266 ¶5; 11-ER-2496-97 ¶6; 12-ER-2827 ¶¶9-12; 13-ER-3112-13.) Several reports by outside experts also contradicted defendants' allegations. (11-ER-2502-03 ¶¶5-6; 2514-2518, 2562-63 ¶¶8-9, 2570-75; 12-ER-2692-93, 2704-08; 14-ER-3234-36.) Plaintiffs also submitted evidence from those supervising the program that farmers had received everything required to be distributed as part of the program. (10-ER-2272-78; 14-ER-3163-64.) Defendants, by contrast, denied knowing even what Planet Aid was obligated to provide. (6-ER-1116; 7-ER-1419; 1430-1435.)

The district correctly found that defendants' statements—13 in all—were false. (1-ER-11-13.)

E. Plaintiffs' employees were not forced to pay kickbacks

Defendants also distorted facts relating to membership in a group involved in social and charitable activities into an alleged scheme to extort money. The group collected small amounts from members on a voluntary basis for activities such as birthday parties, trips, or community civic projects. (11-ER-2482 ¶4; 12-ER-2831 ¶6.) Referring to that group, defendants falsely reported that they had spoken to "about a dozen African members of the Teachers Group" and that "[a]ll of them gave a portion of their salary to the group. From 20-100%, everything they earned." (17-ER-3900.)

As the district court found, defendants' reporting was false. (1-ER-13-15.) One source, Mtimbuka, explicitly told defendants he had contributed nothing. (7-ER-1446.) Two others identified by defendants in interrogatories never joined the Teacher's Group, (14-ER-3177 ¶92), and others contributed just a few dollars some months and nothing other times. (10-ER-2244 ¶4; 11-ER-2669 ¶5; 14-ER-3287 ¶¶4-5.) No one interviewed by defendants contributed 20-100% of their salaries as defendants reported. (14-ER-3177 ¶¶92, 93.)

Defendants also falsely reported that employees were paid less than amounts reported to the USDA. (1-ER-15.) No support for that assertion exists; documents obtained by defendants through FOIA requests proved the opposite. (12-ER-2774 ¶¶ 66-69.) The court agreed. (1-ER-15.)

F. The district court erred in finding that plaintiffs failed to offer evidence in support of the remaining peripheral allegations, or that they were only "slightly inaccurate"

Despite finding that all of defendants' central claims could be proven false, the court erroneously found that no evidence was presented as to several of defendants' peripheral allegations. (1-ER-15-16). Plaintiffs claimed that: (l) it was false to allege that a Danish citizen named Amdi Peterson was controlling USDA funds (22-ER-5064), and using them for his own benefit, (22-ER-5049, 5217, 5181); and (2) DAPP Malawi employees filed a complaint against DAPP Malawi, alleging abusive working conditions, including being required to work 365 days per year, (22-ER-5179), when, in fact, they denied such allegations and filed claims against DAPP Malawi only after being told by Ngwira they could win an award by making such allegations against DAPP Malawi. Plaintiffs provided direct evidence as to both sets of allegations: Peterson (3-ER-450; 10-ER-2399 ¶¶37-38; 14-ER-3176 ¶¶85-89); Ngwira (3-ER-461; 11-ER-2668 ¶3; 14-ER-3287 ¶2.)

The court also erred in finding that a few statements were merely "slightly inaccurate," (1-ER-16-17.) Defendants attempted to grab the readers' attention by reporting that Planet Aid was under investigation, and had been found by government investigators to be part of a global money laundering operation. (22-ER-5064, 5217.) Defendants' "global money laundering operation" allegation was specious. Years before the

start of the USDA program, Danish prosecutors sought the FBI's help obtaining evidence against Amidi Petersen on unrelated charges. Any allegations about Planet Aid were dismissed by the lead Danish investigator, who told defendants that he found nothing relating to Planet Aid. (9-ER-1977.) Defendants were also aware that the Danish case involving Petersen did not involve the USDA program. (8-ER-1847; 11-ER-2410 ¶8.) As for money laundering, the key source who supposedly confirmed such a money laundering operation, Emmanuel Phiri, recounted how defendants tried to bribe him. (13-ER-3076 ¶¶3-4.)

But the allegation was too salacious for defendants to give up. Defendants quoted a source as saying: "You don't give millions of dollars to a group that is being investigated for fraud, tax evasion and pilfering of humanitarian funds. . . . But that is precisely what the USDA did." (22-ER-5099.) The court erroneously considered the above quote to be only a "slight inaccuracy" (1-ER-17). But the source making that statement told Smith that no investigation was being conducted. She told him, instead, that she had complained to the FBI and IRS about Planet Aid but the "bozos [i.e. the authorities] didn't do anything," and gave her the "brush off." (10-ER-2213.) Knowing it was false, defendants printed her statement about Planet Aid being investigated anyway.

Defendants themselves acknowledged that any action by the FBI, in Smith's words, had "fizzled" years before the USDA program started.

(10-ER-2219). Indeed, Smith had been told that government officials thought he and the other defendants just "want[ed] to smear people and allege no one is following up." (10-ER-2221.)

It was totally false—not just "slightly inaccurate"—to allege that Planet Aid was under investigation when receiving USDA funds and was found to be a part of a "global money laundering operation" in which a Danish cult leader was using USDA funds for his own benefit.

In sum, this case is not one where defendants made one or two misstatements. Defendants made over 50 false and defamatory statements about plaintiffs for more than a year, including allegations which went to the core of their reports. The district court correctly held that plaintiffs met their burden of presenting evidence of falsity with respect to all core allegations and virtually every other. After that, however, the district court's opinion made several key missteps that resulted in erroneously dismissing the lawsuit with prejudice.

III. The District Court Erred in Finding That Plaintiffs Were Both Limited Purpose Public Figures

Ordinarily, defamation about a matter that is arguably one of public concern merely requires a showing of negligence. *Gardner v. Martino*, 563 F.3d 981, 989 (9th Cir. 2009) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974)). Defendants made no attempt to meet that standard. Instead, they argued that both Planet Aid and Thomsen were limited purpose public figures required to show constitutional

malice (i.e. knowing or reckless disregard of the facts) by clear and convincing evidence. The district court erroneously agreed. (1-ER-25.) That decision is reviewed *de novo*. *Manzari*, 880 F.3d at 888.

Finding that a plaintiff is a limited purpose public figure requires three elements: (1) the defamatory stories must relate to a "particular pre-existing controversy"; (2) the plaintiffs must have "voluntarily thrust" themselves into *that* controversy; and (3) the defamatory publications must relate to the plaintiffs' participation in *that* controversy. *Makaeff,* 715 F.3d at 266. None of those elements were satisfied.

A. Defendants were not reporting on a "particular pre-existing controversy"

Publications about matters that are not already a public controversy cannot render their targets public figures. "Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979). The limited purpose public figure doctrine requires that there had already been a "particular pre-existing controversy giving rise to the defamation." *Makaeff*, 715 F.3d at 266.

Defendants' own testimony proves that their articles were not part of any pre-existing controversy. Defendant Smith conceded that the topic of their stories "had not received public scrutiny." (19-ER-4323 ₱7.)

Both Walters and Editor-in-Chief Pyle concurred that no one had reported on the issue of USDA funding before. (3-ER-574.) They wanted to write a "new story" (13-ER-3085 ¶12), and no one wanted a story that would feel "old." (3-ER-574.)

Instead of accepting defendants' own admissions, the district court erroneously concluded that *any* controversy regarding either plaintiff, no matter how unrelated to USDA funding, was sufficient. (1-ER-20.) But that is not the test. There must be a "particular" prior controversy that "giv[es] rise to the defamation." *Makaeff*, 715 F.3d at 266.

The prior articles about Planet Aid cited by the district court were about issues unrelated to the USDA program, and fell into two categories: challenging the use of recycling bins for used clothing, not just by Planet Aid but by others in the same industry; (e.g., 16-ER-3560-62; 3571-72; 3574-77), and second, charges brought against Petersen in Denmark. (e.g., 16-ER-3548-3552). Not one of the prior stories even mentioned the USDA program. Nor do the articles mention any government funding of Planet Aid.

The "pre-existing controversy" used to justify treating Thomsen as a limited public figure was even less defined but still does not relate to the USDA programs. Many of the articles do not even identify any controversy at all, and instead applaud DAPP Malawi's work serving the poor, without even mentioning Thomsen. (e.g., 17-ER-4024-43.) The

three remaining articles make no mention of Thomsen or refer to her in a single sentence, as explained below. (17-ER-4005-13.)

B. Planet Aid and Thomsen did not voluntarily thrust themselves into any pre-existing controversy

Planet Aid and Thomsen also did nothing that would satisfy the second prong of the *Makaeff* test, which required that each voluntarily place themselves in a position to "achieve special prominence" by "'thrust[ing] themselves to the forefront' of the controversies so as to become factors in their ultimate resolution." *Makaeff*, 715 F.3d at 265 (quoting *Gertz*, 418 U.S. at 345). They also had no "regular and continuing access to the media." *See Hutchinson*, 443 U.S. at 136; *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976). "Trivial or tangential participation [in a controversy] is not enough. … The plaintiff either must have been purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy to have an impact on its resolution." *Waldbaum v. Fairchild Publications*, 627 F.2d 1287, 1298 (D.C. Cir. 1980).

1. Planet Aid did not thrust itself to the forefront of any controversy

Other than articles discussing Planet Aid's fundraising efforts, (1-ER-18), the district court cited only two articles as somehow showing that Planet Aid made statements which "thrust itself" into a public

controversy. (1-ER-18-19.) A total of three lines in the first article were devoted to Planet Aid's denial of allegations that Petersen had some involvement in its operations generally, with half a line taken up by noting that Planet Aid refused an interview. (16-ER-3561.)

The second article cited by the court (16-ER-3574-77) dealt with a decision by the Sixth Circuit upholding Planet Aid's First Amendment right to use collection bins for its clothing recycling program. A total of six lines were devoted to comment by Planet Aid, four of which noted that it "supports proper regulation of recycled clothing donation bins," and looked forward to reasonable regulation of bins (16-ER-3575-76.) A total of one line was devoted to Planet Aid's denial that it was controlled by the group led by Petersen. (16-ER-3576.)

Planet Aid's denial of these allegations falls far short of the *Makaeff* test. A plaintiff does not thrust itself into a public controversy when it denies the press' statement or takes the newspaper to court as "the only redress available." *Time, Inc.*, 424 U.S. at 457; *see also Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 167-68 (1979). "Media access that becomes available only "'after and in response to" damaging publicity does not make someone a public figure.'" *La Liberte,* 966 F.3d at 91 (quoting *Khawar v. Globe*, 19 Cal. 4th 254, 266 (1998)). Simply mentioning a plaintiff's denials in a previous story cannot mean that the plaintiff is "voluntarily thrusting themselves to the forefront" of a controversy.

The trial court incorrectly analogized this case to *Jankovic v. Int's Crisis Group*, 822 F.3d 576 (D.C. Cir. 2016), where a businessman sued for defamation after an international non-profit accused him of benefiting from the corrupt Serbian regime. Jankovic was "an outspoken supporter, financial backer, and advisor" of the Serbian government; he published articles in newspapers about the public controversy and he "engaged in conduct that he knew markedly raised the chances that he would become embroiled in a public controversy." *Id.* at p. 587. His "choosing to engage himself in reform … is what gave him 'special prominence' the public controversy." *Id.* at 589. No remotely similar facts exist here.

The district court offered an alternate rationale: plaintiffs' fundraising efforts "invited public attention." (1-ER-18.) But merely inviting public attention does not make a company a public figure. It is well settled that advertising alone – no matter how aggressive – is insufficient unless there was a nexus between the plaintiff's statements made in connection with the advertising and the "particular pre-existing controversy" giving rise to the defamation. *See Makaeff*, 715 F.3d at 269 (finding a "direct relationship" between "Trump University's promotional messages and Makaeff's allegedly defamatory statements"); *see also id.* at 268 (quoting *Blue Ridge Bank v. Veribanc*, Inc., 866 F.2d 681, 687 (4th Cir.1989) (requiring "not only . . . extensive

aggressive advertising" but also, a "'direct relationship between the promotional message and the subsequent defamation.'")).

The court found that Planet Aid's "solicitation efforts" sufficed to establish a nexus between Planet Aid's promotional statements and the defamatory statements. (1-ER-20.) But those efforts had nothing to do with the subject of the defamatory articles. They dealt with Planet Aid's efforts to urge the public to donate used clothing, both for environmental reasons and so it could then donate to charitable causes. (e.g., 16-ER-3601-02.) That bears no relationship to allegations that Planet Aid won grants from the USDA and then stole the funds.

The rationale set forth in *Makaeff* and the cases it cites make clear that plaintiffs here also did not engage in aggressive advertising sufficient to render them public figures. *See, e.g., Makaeff,* 715 F.2d at 268-269 (plaintiffs used "online, social media, local and national newspaper, and radio advertisements for free introductory seminars"); *Steaks Unlimited, Inc. v. Deaner,* 623 F.2d 264, 268-269 (3d Cir. 1980) (plaintiff unleashing aggressive advertising campaign via radio, newspapers, signs and handbills with associated promotional messages). Virtually the only activity claimed to support an "aggressive advertising campaign" are social media or press releases containing discussions of Planet Aid activities without any showing that they triggered a "controversy." (16-ER-3596-3671.)

Nor does soliciting or receiving governmental funds make someone a public figure. In *Hutchinson*, the Supreme Court rejected that argument, holding that a "concern about general public expenditures . . . is shared by most and relates to most public expenditures; it is not sufficient to make [a plaintiff] a public figure." 443 U.S. at 135. Planet Aid did nothing to interject itself into any controversy, much less the one drummed up by defendants.

2. Thomsen did not thrust herself into any controversy

As for Thomsen, there was no evidence that she personally interjected herself into the "forefront" of any controversy or that she had engaged in any advertising whatsoever, much less the aggressive advertising demanded by *Makaeff*.

The district court reasoned that because Thomsen was the "public face" of DAPP Malawi, she could be held to have been involved in any controversy relating to DAPP Malawi. (1-ER-21.) But even aside from the lack of evidence that would make DAPP Malawi a limited public figure, Thomsen cannot be held to be a public figure simply based on her employer's conduct. "Merely doing business with parties to a public controversy does not elevate one to public figure status." *Vegod Corp. v. American Broadcasting*, 25 Cal.3d 763, 769 (1979). "A private individual is not automatically transformed into a public figure just by becoming

involved in or associated with a matter that attracts public attention." *Khawar*, 19 Cal. 4th at 267 (quoting *Wolston*, 443 U.S. at 167).

The ruling with respect to Thompson is impossible to square with *Makaeff*. The Court there held that "[a]lthough Donald Trump is the founder and chairman of Trump University, he is not so 'inextricably intertwined' with Trump University's corporate structure and daily affairs as to in effect be the alter ego of the University." *Makaeff*, 715 F.3d at 266. Indeed, Thomsen's role at DAPP Malawi hardly rises to the same prominence Trump had to Trump University, and was even less than the plaintiff in *Hutchinson,* who was held *not* to be a limited purpose public figure even though he had: (l) led a charity obtaining federal funds, (2) been mentioned in newspapers reporting on the funds and his charitable activities, (3) published writings to professionals in his field, (4) won an award for his use of the funds, and (5) responded to news reports. *Hutchinson*, 443 U.S. at 134-35.

Defendants relied on two articles over a fourteen-year period. In one, Thomsen did nothing more than deny that Petersen had any role in DAPP Malawi. (17-ER-4006.) The second contains no statement at all by Thomsen, reporting only that she was married to Ole Thomsen, who also said or did nothing to interject himself into the story cited below. (17-ER-4008.) Neither article shows that Thomsen interjected herself into any controversy, much less through "regular and continuing access to the media." *Hutchinson*, 443 U.S. at 136.

Nor is occasional social media sufficient to constitute an "aggressive advertising" campaign. Thomsen does not even have a Facebook or other social media account. (14-ER-3156-57 ¶5.) She was depicted in social media in only 10 out of 161 social media messages claimed by defendants as evidence (16-ER-3673-3715), often along with many other individuals. (16-ER-3698.) Instead of "thrusting herself to the forefront of any controversy," none of the exhibits mentioning Thomsen offered by defendants even relate to any controversy. There was no basis for finding that Thomsen interjected herself into a public controversy.

C. Any articles were not about plaintiffs' so-called participation in any prior controversy

Finally, because the district court failed to identify with any clarity what "particular pre-existing controversy" existed, it glossed over the third element, which required that defendants show that the articles related to each plaintiffs' participation in the supposed pre-existing controversy. For instance, if the controversy somehow related to a Planet Aid's recycled clothing program or general fundraising, which is what many articles proffered by defendants were about (e.g., 16-ER-3527-28; 3534-36; 3574-77), there is not a scintilla of evidence that Thomsen played any role in that program and none of defendants' defamatory articles suggested otherwise.

The district court failed to correctly apply any of the elements of the limited purpose public figure test. Both Planet Aid and Thomsen were private figures, not limited purpose public ones, and only needed to show negligence to obtain damages for defamation. *Gardner*, 563 F.3d at 989. This error compels reversal and denial of the anti-SLAPP motion because defendants did not even dispute that they were negligent.

IV. Even if Malice Were Required, the Anti-SLAPP Motion Should Have Been Denied Because Plaintiffs Offered Ample Evidence to Support a *Prima Facie* Case of Malice

A. The district court's malice analysis applied the wrong standard and should be reversed

At trial, a public figure plaintiff must "prove[] by clear and convincing evidence that the defendant published the defamatory statement with actual malice, i.e., with 'knowledge that it was false or with reckless disregard of whether it was false or not.'" *Kaelin v. Globe Communs. Corp.*, 162 F.3d 1036, 1039 (9th Cir. 1998). But "at the anti-SLAPP stage" dismissal is required only if the "plaintiff presents an insufficient legal basis for [the claim], or if, on the basis of the facts shown by the plaintiff, no reasonable jury could find for the plaintiff." *Makaeff*, 715 F.3d at 261; *see also Wynn v. Bloom*, 852 Fed.Appx. 262, 264 (9th Cir. 2021) (denying motion even if the "result may not be certain or perhaps even likely").

As the California Supreme Court has repeatedly held:

> the plaintiff's second-step burden is a limited one. The plaintiff need not prove her case to the court; the bar sits lower, at a demonstration of "minimal merit." At this stage, "'[t]he 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.'"

Wilson v. Cable News Network, Inc., 7 Cal. 5th 871, 891 (2019) (citations omitted); see *Manzari*, 830 F.3d at 887; *Mindys Cosmetics*, 611 F.3d at 599; *Metabolife Int'l, Inc.*, 264 F.3d at 840; *cf. Suzuki Motors Corp. v. Consumers Union*, 292 F.3d 1192, 1199 (9th Cir. 2002) (on summary judgment, actual malice is subject to the same triable issue of fact burden as any other issue).

Prior to dismissing the case, the district court described plaintiffs' burden as higher than would be required on summary judgment. The court opined that plaintiffs needed to "put on a case [at the anti-SLAPP stage] as you would if you went in front of a jury and prove up all . . . these statements are lies," and then stated: "while some of the procedural standards are perhaps similar to a motion for summary judgment, the burden is a lot higher in these motions…." (15-ER-3295.) While not expressly repeated in the court's written order, the

court's analysis of malice in its order is consistent with its earlier, erroneous description of how an anti-SLAPP motion works.

Consistent with the views it had expressed earlier, the court did not impose only a "minimal burden" on plaintiffs, or "evaluate[] the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law." Application of the wrong standard permeated every aspect of the district court's malice analysis. It failed to credit all of plaintiffs' evidence and resolve any conflicts in plaintiffs' favor. Instead of considering whether plaintiffs made a *prima facie* case in which a juror "might" infer malice from defendants' conduct, the court considered evidence offered by defendants which the jury was not required to believe, and then analyzed defendants' evidence to determine whether it was "inconsistent with" evidence offered by plaintiffs. (1-ER-28.)

The court also erroneously considered whether defendants' view of the evidence was an "equally reasonable inference" to be drawn. (1-ER-31.) It disagreed with plaintiffs' "characterization" of testimony by pointing to other testimony. (1-ER-28.) It found that defendants' errors could be excused by the purported ambiguity or complexity of records, and found that "defendants' interpretation [] was one of a number of possible rational interpretations." (1-ER-33.) The court also inferred that defendants' universal inability to recall key facts was consistent with good faith (1-ER-34, n.26), even though this Court's pattern jury

instructions recognize that a reasonable juror may reject a witness' testimony completely based on "the witness's memory," *see* Ninth Circuit Manual of Model Civil Jury Instruction, §1.11 (2007), and the rationalization offered by the court cannot defeat malice as a matter of law. *See Palin v. New York Times*, 940 F.3d 804, 814 (2d Cir. 2019) (rejecting testimony that an editor's failure to recall looking at contrary authority could preclude a finding of malice).

The court was required to "accept [plaintiffs'] evidence as true [] and indulge in every reasonable inference to be drawn from that evidence." *Brighton Collectibles, LLC*, 65 Cal. App. 5th at 104 (internal quotations omitted). Application of the proper standard on *de novo* review demonstrates that plaintiffs made "a *prima facie* showing of facts to sustain a favorable judgment." *Metabolife Int'l*, 264 F.3d at 840.

B. Plaintiffs produced numerous types of evidence that, alone and in combination, support a jury finding of malice

Plaintiffs submitted more than ample evidence to create a *prima facie* case of actual malice. Because "direct evidence of actual malice is rare," malice may "be proved through inference and circumstantial evidence alone," *Sindi v. El-Moslimany*, 896 F.3d 1, 16 (1st Cir. 2018). A jury can find malice from "any direct or indirect evidence" "from which the ultimate fact could be inferred." *Herbert v. Lando*, 441 U.S. 153, 161, 164 (1979). This Court put it well in *Eastwood v. National*

Enquirer, 123 F.3d 1249 (9th Cir. 1997): "As we have yet to see a defendant who admits to entertaining serious subjective doubt about the authenticity of an article it published, we must be guided by circumstantial evidence. By examining the editors' actions we try to understand their motives." *Id*. at 1253.

1. Defendants' own admissions establish the publication of facts known to be false, and that they ignored doubts about other facts

Before addressing the circumstantial evidence, plaintiffs submitted that "rare" direct evidence of malice: defendants published facts they knew were false, and also ignored other facts or internally-expressed "serious doubts as to the truth of the publication" in other respects. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

a. Defendants' admissions regarding their allegation of siphoning-away $65-90 million demonstrates malice

Defendants told readers that Planet Aid "siphoned away" $65-90 million. (7-ER-1457, 1580; 17-ER-3907; 22-ER-5285.) But, based on their own admissions, they knew that was not true.

First, Planet Aid had received $70 million not $130 million. (12-ER-2757 ¶8.) Defendants had even published a different article explaining that fact. (22-ER-5107.) The Executive Editor warned that

defendants needed to be "clear and not confusing" that Planet Aid never received $130 or $133 million. (7-ER-1588.) But defendants turned around and falsely reported that Planet Aid had received over $130 million in the podcast which aired in June—just two weeks after the editor's comment—as well as sixty-three other times in subsequent stories and social media. (e.g., 22-ER-5139, 5188, 5217, 5282-83, 5285.) See *Masson v. New Yorker Magazine*, 501 U.S. 496, 510 (1991) (even "a single sentence may be a basis for an action for libel even though buried in a much larger text.").

Second, defendants knew that two-thirds of the $70 million received by Planet Aid, $45 million, had been spent in Mozambique. (22-ER-5107.) Defendants admitted below that they lacked any factual basis for alleging that *any* amount had been fraudulently diverted from programs in Mozambique. (3-ER-534; 6-ER-1157; 7-ER-1461.)

Based on these facts, a jury could find that defendants knew that it was impossible for Planet Aid to have siphoned-away $65-90 million. The fact that the central theme and most important details of a story are not only false but literally impossible demonstrates malice. *Christian Research Institute v. Alnor*, 148 Cal. App. 4th 71, 85 (2007) (malice shown by allegation that was so "inherently improbable" that the defendant should have had reason to doubt its truth).

The district court, however, landed on a different inference by essentially construing the story as relating only to Malawi, even though

a senior editor testified that allegations about Mozambique constituted an "important" part of the story. (8-ER-1842.) The court also erroneously concluded that even if defendants had no evidence supporting their allegation that $65-90 million had been fraudulently siphoned away, it was sufficient if any amount had been stolen from programs in Malawi. (1-ER-27.) But the district court's analysis is a non-sequitur. Substantial truth is not a defense to malice. It goes to falsity and only excuses "slight inaccuracies" regarding factual assertions. *See Masson,* 501 U.S. at 516-17. In order to assess falsity, the court considers whether a statement has "a different effect on the mind of the reader from that which the pleaded truth would have produced." *Jackson v. Mayweather*, 10 Cal. App. 5th 1240, 1262-63 (2017).

The "pleaded truth" means those facts as to which plaintiffs can make a *prima facie* showing. *Jackson*, 10 Cal. App. 5th at 1262-63. The district court agreed that plaintiffs made a *prima facie* showing that there was *no* theft of *any* funds. (1-ER-8-11.) Obviously, the fact that no money was stolen does not leave a reader with the same impression as alleging that $65-90 million dollars was stolen. Moreover, substantial truth poses a jury question, not a ground for anti-SLAPP dismissal. *Hughes v. Hughes*, 122 Cal. App. 4th 931, 936-37 (2004); *Thompson v. Dignity Health*, 823 Fed.Appx. 527, 531 (9th Cir. 2020).

Defendants admissions also undermine any effort to defeat malice by arguing that their reporting was based on alleged sources identified as "insiders" in answers to interrogatories, but who refused to be cross-examined. (10-ER-2136-40 [referring to Longwe, Chitosi, Goteka]). "Liability for repetition of a libel may not be avoided by the mere expedient of adding the truthful caveat that one heard the statement from somebody else." *Flowers v. Carville*, 310 F.3d 1118, 1131 (9th Cir. 2002). That holding is particularly apt here since defendants' Executive Editor admitted to his colleagues that none of those alleged "insiders," could support publishing as a matter of fact that least half the USDA funds had been fraudulently siphoned away. (8-ER-1717.) Other than one source discussed below, no evidence was offered that any of the identified sources even made such a statement, and others vigorously disputed having done so. (*Infra* at 53.)

Moreover, the district court held that it would disregard declarations by the alleged "insiders," who refused to be cross-examined. (1-ER-22, n.17.) Consideration of those declarations without discovery would violate the Federal Rules, which "don't contemplate that a defendant may get a case dismissed for factual insufficiency while concealing evidence that supports a plaintiffs' case." *Makaeff*, 715 F.3d at 274; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) (court is entitled to proceed with the motion only "as long as the

plaintiff has had a full opportunity to conduct discovery"); Fed.R.Civ.P. 56(d).

Because these declarants were beyond the court's subpoena power, they were unavailable, requiring that defendants satisfy some exception to the hearsay rule and the court make detailed findings for the declarations to be admissible. *See Mutelles Unies v. Kroll & Linstrom*, 957 F.3d 707, 713 (9th Cir. 2011). Here there was neither. The declarations were therefore inadmissible at trial, and as such, inadmissible on the motion to strike under Rule 56(c)(4) (declaration supporting summary judgment must "set out facts that would be admissible in evidence."). *See Luitpold Pharmaceuticals, Inc., v. Geistlich Sohne A.G.*, No. 11 Civ. 681, 2015 WL 13860904, *1 (S.D.N.Y., 7/24/2015) ("[t]o the extent the declaration is inadmissible at trial – as it is [due to the declarant's unavailability] – it is necessarily inadmissible on summary judgment").

Nor can a finding of malice be defeated based on sources the jury was not required to accept, including the sole source who alleged that at least half the USDA funds had been siphoned away or stolen: former DAPP Malawi employee Harrison Longwe. (22-ER-5209.) He too refused to be cross-examined, leading the court to conclude that it could not rely upon his declaration. (1-ER-22, n.17.) On top of that, defendants themselves doubted whether they should rely on him. Prior to publication, one editor called Longwe's statement "problematic" since he

was "guessing." (9-ER-2097.) A second warned against publishing his statement (as well as others) as a "fact" or "flat statement that can be sup[ported [sic]." (8-ER-1717.) A third commented "oof this is pretty weak" when told of Longwe's statement. (9-ER-2113.) The fourth and last editor noted that Longwe's statement was supposedly corroborated by "insiders" (it wasn't), but admitted that he had no idea as to the identity of those insiders or even what was meant by the term "insider" in the story. (9-ER-1944-45.) Defendant Smith himself described Longwe as being like a "blind person trying to describe the foot of an elephant," unable to say what happened to the USDA money since he "only knew so much." (9-ER-1975.)

The district court remarkably concluded that defendants' admissions of doubt about Longwe were "unavailing" because a jury could conclude these comments were made before finishing the fact-checking and the concerns were later resolved. (1-ER-31.) It was not the district court's role to decide what *defense* inferences were reasonable or outweighed other evidence. The inference drawn by the district court was not even the most reasonable one, and was based on testimony which the jury was entitled to reject. The editors themselves could not recall what caused them to dismiss their concerns about Longwe's statement. (9-ER-1968-69; 8-ER-1660.) The editor who called Longwe's statement "problematic" justified her willingness to still rely on him based on her false statement that they had "quite a number of people

giving us a lot of numbers within that range." (3-ER-508.) She was unable to name even one such individual. (3-ER-506.) In fact, none existed.

b. Defendants' admissions regarding "cheating" farmers demonstrates malice

The court found that "there is no evidence that defendants did not see what they claimed to have seen" in villages. (1-ER-35.) On the contrary, defendants' own admissions establish the falsity of their statements. They reported that defendants cheated farmers by giving them only one well pump for free (22-ER-5095, 5192), when Walters and Smith admitted in their declarations they knew seven pumps had been delivered to the very same village discussed in the story (17-ER-3975; 19-ER-4343), and five in another village (17-ER-3964 ¶ 18), which met or exceeded USDA contract requirements. (10-ER-2273 ¶17.) Defendants falsely published that other villages were cheated out of twenty-five pumps (22-ER-5094), when Walters admitted just one week later: "no, they were only supposed to get one [pump]." (7-ER-1434; 22-ER-5228.) And defendants told readers that villagers had been cheated out of livestock by receiving only one goat and one pig, which died (22-ER-5071, 5191-92.) Yet defendants admitted in their declarations that in the very same village referenced in the stories ten animals were given away (19-ER-4304 ¶8), and six given away in a second village (17-ER-

3964 ¶18), which, once again, met or exceeded contract requirements. (10-ER-2275 ¶¶24-25.)

Defendants even reported that *every* farmer they interviewed said that it was a lie to say that farmers benefitted in any way from the USDA Farmers Club Program or that their lives had changed as a result of the USDA programs. (17-ER-3904.) Walters knew that the statement was false since she commented after an interview that Tiyanjane Chikaonda had just told her that well pumps provided by Planet Aid prevented her family from getting sick and were "the best thing that ever happened to her family." (7-ER-1409.) Walters tried to justify her blatantly false account of what they had been told by farmers by testifying that she wasn't relying on Chikaonda in the story because she "wasn't a farmer," (7-ER-1405-06.) Defendants' interrogatory answers stated five times that based, *inter alia*, on information from Walters, Chikaonda was one of the "farmers" to whom defendants were referring in the stories. (10-ER-2161, 2167, 2170 (twice), 2175.)

c. Defendants themselves expressed "serious doubts" about other allegations

The evidence proves defendants ignored other doubts too. For example, Smith told his colleagues privately that records supposedly showing payments to a Hong Kong company for computer equipment was far from evidence of fraud, as they alleged (22-ER-5091), but only

"a mystery [they] would like to solve." (6-ER-1239). Similarly, despite alleging that USDA funds went directly to Mexico, defendants confessed privately that they knew "very little" about what happened to the USDA money, (6-ER-1238), and that even after looking "at every last document" obtained from Planet Aid's computers, they had "no smoking gun as to what [plaintiffs] are doing with the money." (6-ER-1112.) Even the editor-in-chief admitted that they should not "tease" the readers with information they had not obtained. (10-ER-2182.)

The district court erred by finding that defendants' doubts about what they were publishing were capable of "equally reasonable inferences." (1-ER-31, 44.) That is not the test. The court was required to accept plaintiffs' evidence and "indulge every reasonable inference" in plaintiffs' favor. *Brighton Collectibles, LLC*, 65 Cal. App. 5th at 103-104.

2. The fact that all of defendants' core allegations were false demonstrates malice

Turning to circumstantial evidence, the scale and centrality of the falsehoods is itself strong evidence of malice. This is not a case where one or two errors were made within the context of a larger publication. As discussed above, the district court found that the central theses of defendants' publications and all significant supporting details were false. (1-ER-8-7.) Indulging in "every reasonable inference" in plaintiffs' favor, *Brighton Collectibles, LLC*, 65 Cal. App. 5th at 104, an inference

of malice is "rational or reasonable" on these facts. *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542 (9th Cir. 1989).

3. Sworn testimony by sources denying that they made statements attributed to them in the stories demonstrates malice

A reasonable jury could find that malice was also shown by declarations from defendants' purported sources denying making statements attributed to them. *Biro v. Conde Nast*, 807 F.3d 541, 545 (2d Cir. 2015) (malice established where the "purported source denies giving the information"); *Goldwater v. Ginzburg*, 414 F.2d 324, 337 (2nd Cir. 1969) ("One cannot fairly argue his good faith or avoid liability by claiming that he is relying on the reports of another if the latter's statements or observations are altered. . . .").

Numerous witnesses, including those identified as "key sources," testified in declarations that they never made statements attributed to them by defendants. Village leader Chikaonda was reported as saying that he was the only one in his village to receive a well pump, (22-ER-5095), but he testified: "[T]his is not true, as I never told them anything like that." (10-ER-2266 ¶5.) Chief Chibwana was reported as saying that he had been forced to pay DAPP Malawi $100 for a well pump. (10-ER-2229, 22-ER-5095.) He instead testified: "I never told [the reporters] that I had paid any money to DAPP in relation to the pumps." (10-ER-2259 ¶10.) Former DAPP Malawi employee Mtimbuka

was alleged in one of the stories to have said that farmers were cheated out of agricultural inputs by plaintiffs (22-ER-5193), but testified that he was unaware of any such evidence and that his statements were "taken out of context [by defendants] to suggest that farmers were cheated." (12-ER-2831 ¶5.) Other farmers similarly either denied making statements attributed to them or testified that they told defendants the opposite of what was reported. (11-ER-2496-97 ¶6; 12-ER-2827 ¶¶9-12; 13-ER-3113 ¶4.) And while defendants wrote in their stories that "accountants" had corroborated their allegations about the theft of USDA funds (22-ER-5127), former DAPP Malawi accountant Bokosi told defendants that no such thing had occurred. (10-ER-2241 ¶¶3-4.)

The above examples by no means reflect all of the statements or evidence that might lead a jury to conclude defendants deliberately lied or were reckless in their reporting. But even one of these examples would provide sufficient evidence for a jury to infer malice as to the others. It is a common law maxim and "the general law of the Ninth Circuit" that where a witness testifies falsely as to any material fact the jury can disbelieve his entire testimony. *Li v. Holder*, 738 F.3d 1160, 1164-65 (9th Cir. 2013). Based on that maxim, if a jury were to conclude that defendants lied about any of their sources or allegations, it could find that they did so as to other reporting as well.

4. Evidence that defendants fabricated statements and encouraged others to do so, demonstrates malice

Defendants also urged sources to fabricate statements. Fabrication of quotes and other information is the quintessential proof of malice. *Readers Digest Assn v. Superior Court*, 437 Cal. 3d 244 (1984) ("[M]alice may be inferred where … 'a story is fabricated by the defendant'"); see also *St. Amant*, 390 U.S. at 732 ("Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant").

One source on the Podcast, Kamwendo, claimed that farmers were cheated out of livestock. (17-ER-3891.) Kamwendo was a tailor, not a farmer (15-ER-3312 ¶2), and told defendants that he had never "participated in the program." (15-ER-3312-13 ¶¶5,7.) Defendants "insisted that [he] should grant the interview and say the things that [he] said during the interview" anyway. (*Id.*) Defendants also falsely told listeners during a radio interview that Kamwendo, along with former DAPP Malawi employee Mtimbuka, were both farmers deprived of benefits under the USDA program. (22-ER-5235.) But defendants knew that Kamwendo had nothing to do with that program. (11-ER-2618 ¶ 3; 15-ER-3313 ¶7.) Similarly, Mtimbuka was not a farmer, but a former employee fired for trying to embezzle funds meant for those farmers. (14-ER-3166 ¶42.)

Defendants also fabricated the statement that every African member of the Teachers Group interviewed by them had been forced to contribute 20-100% of their salaries to that group. (17-ER-3900.) None had. (14-ER-3177 ¶93.) Defendant Smith could not even say whether individuals he had identified in answers to interrogatories had made ***any*** contributions. (6-ER-1177-78.)

Defendants even physically manipulated evidence to conceal facts they knew would have been important to a reader and which would cast doubt on the stories. Former DAPP Malawi employee Longwe's blockbuster statement that 70% of USDA funds had been fraudulent siphoned away (17-ER-3902), was based on Longwe's purported belief in the interview that "with the $80 million [provided for Malawi], the impact . . . was supposed to be huge." (7-ER-1523.) Aware that Longwe had overstated by four times the amount received for Malawi, Smith instructed Walters to "isolate" Longwe's mistake from the tape, (7-ER-1523), and then played his altered statement on the Podcast. (17-ER-3902.) A jury could reasonably conclude that defendants altered the tape of Longwe's interview to avoid listeners drawing the same conclusion as Reveal's editor, who found Longwe's statement to be "problematic" because he was "guessing." (9-ER-2097.) *See Price v. Stossel*, 620 F.2d 992, 1002 (9th Cir. 2010) ("Even if a fabricated quotation asserts something that is true as a factual matter," the fabrication itself may render it defamatory).

Similarly, defendants fabricated statements that "insiders," other than Longwe, had confirmed that half the USDA funds had been fraudulently diverted. (22-ER-5208.) But the only such "insiders" who submitted declarations are the ones the court declined to consider since they refused to be cross-examined. (1-ER-22 n.17.) Moreover, no evidence was offered that any of those individuals cited by them as being "insiders" (10-ER-2137-40), corroborated defendants' allegation. One cited individual was the accountant defendants tried to bribe (13-ER-3076 ¶¶3-4), and another provided a declaration disputing the truth of what was published and stating she had never even been interviewed by defendants. (14-ER-3284-85.) None had any relationship whatsoever to the programs in Mozambique, (10-ER-2397 ¶29), and the supposed "fact checkers" could not even say who the "insiders" were who made the statement published in the stories. (9-ER-1944-45; 3-ER-506.) Based on the foregoing, a reasonable jury could conclude that defendants deliberately falsified information and falsely attributed it to manufactured sources.

5. Defendants' failure to consider contradictory documentary evidence in their possession demonstrates malice

Another badge of malice is defendants' failure to reconcile, or even look at, the very documents cited as supporting their allegations. Malice is properly inferred where there is a "failure to investigate, which was a

product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of the subject charges…." *King v. US National Bank Assoc.*, 53 Cal. App. 5th 675, 702 (2020) (cleaned up). Here, the district court found that documents in defendants' possession actually demonstrated the falsity of their allegations. (1-ER-11.) Defendants' decision to ignore this evidence alerting them to the probable falsity of their claims supports an inference of actual malice. *Antonovich v. Superior Court*, 234 Cal. App. 3d 1041, 1049 (1991).

Such evidence included the 2013 and 2014 spreadsheets alleged to show millions of dollars being diverted from USDA funds, (17-ER-3902; 22-ER-5091, 5155, 5208), but which showed approximately $4,000 in legitimate expenditures. (6-ER-1107; 12-ER-2760 ¶18.) Even though they were cited in three separate stories, (22-ER-5091, 5155, 5208), those responsible for fact-checking had no recollection of ever looking at those documents. (8-ER-1695; 3-ER-552-53; 9-ER-1943.)

Nor did editors review independent audit reports and DAPP Malawi internal accounting documents cited by defendants in their interrogatory answers as showing the use of fraudulent invoices relating to "bills for expert consultants, book translation, travel, medical care and training." (10-ER-2173-74.) Those audit and accounting documents similarly showed nothing of the sort. (13-ER-2857 ¶¶16-17; 14-ER-3159 ¶12.)

Editors responsible for fact-checking the articles called the audit reports "weighty evidence" (8-ER-1692), and sufficiently important that they should have been (but weren't) hyperlinked to the stories. (8-ER-1829-30.) Editors fact-checking the stories could not recall looking at the independent audit reports. (3-ER-522-23, 530; 8-ER-1691; 9-ER-1955.)[3]

Defendants also failed to obtain documents they knew were required to corroborate key allegations. After Smith was told that "millions" of dollars had been spent translating the same book quarter after quarter, Smith told colleagues that "to use it, we'd need to find out what book it was" as well as other details and corroborating documentation. (6-ER-1308.) Smith told his colleagues that it was "worth the effort to really nail . . . down" that information. (*Id.*) Not a single invoice or any of the information identified by Smith was obtained. (6-ER-1172.) The allegations about book translations were published anyway. (22-ER-5090.)

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[3] Instead of addressing the independent audit reports cited in defendants' own interrogatory answers as the basis for their allegations, (10-ER-2172-74), the court noted that defendants made a passing reference in their stories to government audits finding no issues or problems. (1-ER-35). If anything, government audits finding nothing suspicious made it all the more reckless to ignore the independent audits of both Planet Aid and DAPP Malawi since defendants cited those documents as supposedly supporting their specific allegations.

Defendants also alleged that official USDA reports showed that farmers were cheated out of livestock and agricultural inputs. (22-5133.) Those reports showed the opposite. (10-ER-2272-78.) Walters admitted being unable to say those reports cited by them in the stories even supported what was published. (7-ER-1428, 1430.) Again, those fact-checking the stories could not recall even looking at those reports (3-ER-514; 8-ER-1673, 1857; 9-ER-1981), even though they were repeatedly referenced in the stories. (e.g., 22-ER-5133, 5241.)

Another document admitted by defendants to be important in establishing the truth as to their allegations was a report by an independent expert. Smith confessed that the report provided a "swimmingly positive" assessment of the USDA program, and that defendants were "going to need an answer" to how that expert reached those conclusions since he had researched the programs "first-hand." (6-ER-1312.) Smith had the expert's telephone number but never contacted him. (6-ER-1177.) Fact-checkers were unable to confirm having looked at the report. (3-ER-579.)

Defendants alleged also that invoices reflecting repayment by DAPP Malawi for computers previously purchased on its behalf showed double billing (22-ER-5092), even though defendants were unable in discovery to offer any understanding of those invoices (6-ER-1174; 8-ER-1859), and editors responsible for fact-checking the stories were unable to testify that they had even looked at the invoices found by the

court to falsely allege that any double billing had occurred. (3-ER-545-46; 8-ER-1859.)

That same pattern is reflected in bank deposit slips allegedly shown to defendants and reflecting that DAPP Malawi employees were required to kickback 20-100% of their salaries. (17-ER-3900.) Those same records reflected that no employee contributed any such amount, and many contributed nothing. (11-ER-2626-27 ¶¶15-21; 14-ER-3121-22 ¶¶10-11.) Once again, those fact-checking the stories denied being able to recall looking at those documents. (3-ER-588; 8-ER-1851-52; 9-ER-1940.)

It is hard to imagine how evidence could more clearly establish that defendants "failed to use readily available means to verify the accuracy of the claim … by inspecting relevant documents or other evidence." *Khawar*, 19 Cal. 4th at 276. Such a "deliberate decision not to acquire knowledge" from documents in defendants' possession demonstrates malice. *Id.* at 276-77.

6. Failure to consider sources who would contradict defendants' allegations further demonstrates malice.

Malice is shown not only by the failure to review important documents, but also the failure to interview "obvious witnesses who could have confirmed or disproved the allegations…", *Khawar*, 19 Cal. 4th at 276, especially those with "the same access to the facts" as those

relied upon for the stories. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989).

Obviously, those with knowledge of the accounting were critical to an evaluation of defendants' core allegations. Defendants themselves wrote that "unusual accounting raises suspicions" (22-ER-5089), and repeatedly cited internal accounting documents in the stories. (e.g., 22-ER-5089, 5155.) Defendants' interrogatory answers identified the audit and accounting documents as evidencing the fraudulent invoices and "internal financial documents" identified in the stories. (10-ER-2172-73.) And finally, defendants told readers that their allegations had been corroborated by "accountants" familiar with relevant documents. (22-ER-5070.)

But defendants deliberately ignored anyone "who had the same access to the facts" as the source relied upon by defendants. *Harte-Hanks*, 491 U.S. at 692. In fact, defendants "disregarded reliable sources and appeared to rely on unreliable ones." *Balla*, at 684. The sole individual who supported their accounting claims was Longwe (22-ER-5090), who had not even been hired as a permanent employee until after the USDA program ended (14-ER-3175-76 ¶83), and who was regarded by defendants as "problematic" and merely "guessing." (9-ER-2097.) By contrast, defendants' investigator and co-author interviewed two former DAPP Malawi accountants, Emmanuel Phiri (13-ER-3076-77) and Mary Bokosi (10-ER-2241-42), who were directly involved in

internal accounting and audits. After Bokosi told defendants' investigator and co-author, Ngwira, that no fraud had occurred (10-ER-2241 ¶4), she was never contacted again by defendants. Emmanuel Phiri stated that after he refused to confirm what defendants wanted to hear, they stopped calling him. (13-ER-3077 ¶8.)

Not only did defendants give short shrift to Bokosi and Phiri, but they ignored completely three other accountants known to them and who they knew were uniquely qualified to comment on the allegations since – unlike Longwe – they were ultimately responsible for ensuring the accuracy of internal accounting, audits and government reports in question. (12-ER-2755-58 ¶¶3,11; 13-ER-2853-56 ¶¶4,10,12.)

One accountant was Longwe's supervisor, Bruce Phiri, who was actually responsible for the spreadsheets and the 2008 Balance Sheet alleged by defendants to support allegations regarding the diversion of millions of dollars in invoices, (13-ER-2857-58 ¶¶18-21; 2860-61 ¶30-32.) He also was responsible for the internal accounting documents at DAPP Malawi generally. (13-ER-2853 ¶4.) Along with Bruce Phiri, Planet Aid CFO Meehan provided the information in government reports similarly relied upon by defendants in the stories, and ensured the accuracy of information provided to auditors. (12-ER-2755-58 ¶¶3,12.) Both Phiri and Meehan were directly involved in the USDA audit, and available to address any allegations by Longwe (who had no involvement in the USDA audit) that invoices relating to that audit were fabricated. (12-

ER-2765-66; 13-ER-2867 ¶¶53-54.) The third, Tembo, was the KPMG auditor responsible for the audits claimed by defendants to evidence the diversion of funds through fraudulent invoices. (13-ER-3115.) Had they been interviewed by defendants, all three would have told defendants that their allegations were false. (10-ER-2241; 12-ER-2756 ¶5; 13-ER-2853 ¶5, 3115-16.)

Defendants thus did not merely fail to interview others with "the same access to the facts;" they made a deliberate decision to ignore those most knowledgeable who "might confirm the falsity" of their allegations. That choice – to avoid learning the actual facts – supports a finding of malice.

7. Reliance on biased sources demonstrates malice

"Recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *Harte-Hanks,* 491 U.S. 657 *at* 688 (citing *St. Amant,* 390 U.S at 732).

Three of defendants' sources—Malabwe, Mtimbuka, and Munthali—had been fired by DAPP Malawi: two for embezzlement or fraud and a third who was actively suing DAPP Malawi while being interviewed. (10-ER-2281-82 ¶¶43-44; 14-ER-3166 ¶42.) A fourth—Goteka—previously sued DAPP Malawi alleging that he had not been paid all of his salary after leaving. (20-ER-4546.) The jury could find

that reliance on such witnesses—particularly when others were ignored—supports malice.

As for Longwe, he was unhappy about being passed over for a promotion and resigned shortly thereafter. (14-ER-3176 ¶84.) Defendants themselves doubted using his statements since he was "guessing" about things. (9-ER-2097.) Defendants had more than enough reason for those doubts. Among a long list of other false allegations, Longwe falsely claimed that: (1) invoices were fabricated for an audit in 2015, even though his allegation was flatly refuted by how accounting documents were maintained and audits conducted at DAPP Malawi, (13-ER-2867-68 ¶¶53-55); (2) while employed there he relied on a document which did not even exist at that time (13-ER-2863-64 ¶41); (3) another document had been prepared by DAPP Malawi employees when it obviously had not been, (13-ER-2865 ¶45); and (4) he saw kickbacks being paid into a bank account held by Thomsen's husband when no such account was even open when Longwe was working there. (14-ER-3123 ¶15.)

Reliance on statements where there was clearly "reason to doubt" what those sources were saying, when coupled with the fact that defendants ignored those with direct knowledge of critical facts, is more than sufficient to infer malice.

8. Obtaining "information" through inducements demonstrates malice

A jury could also find that derogatory false information about defendants was obtained by promises of personal gain, and outright lies, all of which further supports a finding of malice. Plainly, paying for information "calls into question the credibility of the information." (7-ER-1509.) Indeed, defendants' Executive Editor confessed that if allegations in plaintiffs' declarations are true, which must be assumed at this stage, it would "call into question Reveal's reporting generally on the story." (8-ER-1628-29.)

The record is replete with improper efforts by Ngwira to buy quotes that matched the story they wanted to tell. Sources were evidently lured by the prospect of lifechanging rewards as whistleblowers under the False Claims Act if they corroborated defendants' stories. Mpeta was told that if he would come on "more strong" in the interview there was a greater likelihood he could share in a recovery. (7-ER-1591.) As Ngwira told Smith when discussing Malabwe, "being on the side of the whistleblower one stands to gain" through their cooperation. (10-ER-2184.) Smith was unable to recall whether there were others as to whom there were discussions about recovery under the False Claims Act. (6-ER-1171.)

Two DAPP Malawi employees, Kumwenda and Wandale, were told by Ngwira that they could obtain back-pay by making allegations

against DAPP Malawi. (11-ER-2668 ¶3; 14-ER-3287 ¶2.) Village leader Chibwana was told that if he "expose[d] those who had stolen from the village," his village would receive fifty water pumps. (10-ER-2259 ¶9.) Another farmer, Molande, responded to a similar offer of water pumps. (12-ER-2827 ¶11.) Yet another farmer, Kachera, was told that if he "could convince the [defendants that they] . . . were lacking farming inputs such as livestock, seeds, fertilizer, or other farming items, [defendants] could then help us obtain those items." (11-ER-2496 ¶2.) Six were given cash for which reimbursement was sought, (6-ER-1265, 1270, 1272, 1276, 1278-79; 7-ER-1470), even though payments amounted to as much as two months salary, and Ngwira either presented no receipts or ones which failed to match the payments. (13-ER-2878 ¶¶88-100.) All of the payments conflicted with Ngwira's representation that he had paid sources only "strictly upon presentation of receipts," or as to others, that they received no money "whatsoever." (17-ER-3998 ¶20.)

Additionally, at least four sources testified to being told (falsely) that they had been cheated, explaining any negative comments. *See* Molande (12-ER-2827 ¶11 ["I said some bad things . . . because I was upset by what I was told."]); Samson (13-ER-3112-13 ¶4 [was upset about being falsely told he was cheated out of motorbikes]); Chibwana, (10-ER-2259 ¶8 [told that farmers in "Njuli had been cheated in the Farmers Club Program"]). Similarly, Kamwendo was falsely told that

"millions had been donated by the U.S. Government to be spent in Mataka on the farming program," (15-ER-3313), when Mataka was not even part of the US Government program. (14-ER-3170, ¶59).

It is no answer that plaintiffs had not proved that every single source had received a payment, promised a benefit or told lies about the program. (1-ER-36.) One source said he had been told by defendants' co-author and agent, Ngwira, that all sources had been offered money. (13-ER-3076 ¶ 4.) In all events, a jury would not require proof positive as to every source, and could find that defendants had lied to other sources if they lied as to any one of them. *Li v. Holder*, 738 F.3d at 1164.

9. The totality of the evidence viewed in the light most favorable to plaintiffs requires denial of the motion

Like anything proven by inference and circumstantial evidence, a juror can find malice based on the totality of the evidence. *See Manzari*, 830 F.3d at 892; *Kaelin*, 162 F.3d at 1042. As discussed above, the jury in this case would be presented with a pile of evidence of malice: a pre-designed story chock full of false statements, witnesses who denied saying what defendants quoted, others who were bribed or threatened, and yet other witnesses and documents ignored because their information did not fit defendants' pre-determined narrative. A reasonable juror hearing that evidence could readily conclude that defendants either knowingly lied or were reckless about the truth of what they "reported."

CONCLUSION

Plaintiffs offered far more than the "minimal merit" required to defeat an anti-SLAPP motion. Even the district court agreed that plaintiffs could prove that virtually every challenged defamatory statement—and each of the central ones—was false. The district court erred by requiring a showing of malice, and then erred again, by failing to apply settled authority governing the review of the evidence at this juncture. The district court's judgment should be reversed and the case remanded with instructions to deny defendants' anti-SLAPP motion.

DATED: August 27, 2021

NELSON MULLINS LLP

By /s Samuel Rosenthal
SAMUEL ROSENTHAL

WAGSTAFFE, VON LOEWENFELDT, BUSCH & RADWICK LLP

By /s Michael von Loewenfeldt
MICHAEL VON LOEWENFELDT
Attorneys for Plaintiffs-Appellants

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Appellants states that they are not aware of any related cases pending in this Court.

DATED: August 27, 2021

WAGSTAFFE, VON LOEWENFELDT, BUSCH & RADWICK LLP

By /s Michael von Loewenfeldt
MICHAEL VON LOEWENFELDT

Attorneys for Plaintiffs-Appellants

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ADDENDUM

Fed.R.Civ.P. 56

(a) MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) TIME TO FILE A MOTION. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) PROCEDURES.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set

out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) WHEN FACTS ARE UNAVAILABLE TO THE NONMOVANT. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) FAILING TO PROPERLY SUPPORT OR ADDRESS A FACT. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) JUDGMENT INDEPENDENT OF THE MOTION. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party;or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) FAILING TO GRANT ALL THE REQUESTED RELIEF. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

(h) AFFIDAVIT OR DECLARATION SUBMITTED IN BAD FAITH. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or

solely for delay, the court — after notice and a reasonable time to respond — may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

California Code, Code of Civil Procedure, § 425.16

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b)(1) 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.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

(c)(1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike

shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5 .

(2) A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section 6259 , 11130 , 11130.3 , 54960 , or 54960.1 of the Government Code . Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs pursuant to subdivision (d) of Section 6259 , or Section 11130.5 or 54960.5, of the Government Code .

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, “act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue” includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1 .

(j)(1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.