UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Present: The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

KANE TIEN	NOT REPORTED
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s)	Attorneys Present for Defendant(s)
None Present	None Present

Proceedings: IN CHAMBERS—ORDER RE DEFENDANTS' MOTIONS TO STRIKE [13, 35, 36]

On March 27, 2020, Plaintiff Michael Sanchez filed a Complaint against Defendants American Media, Inc. ("AMI"), David Pecker, and Dylan Howard. [Doc. #1.] On June 30, 2020, Defendants AMI and Pecker filed a motion to strike ("AMI MTS") the Complaint in its entirety under California's statute restricting Strategic Lawsuits Against Public Participation ("anti-SLAPP"), California Civil Procedure Code section 425.16, which Howard joined. [Doc. # 13.] Defendant Howard also filed a motion to dismiss ("MTD") all claims against him under Federal Rule of Civil Procedure 12(b)(6). [Doc. # 13.] On December 29, 2020, the Court: (1) granted Howard's MTD and dismissed him from the action, with leave to amend (2) *sua sponte* dismissed Pecker for the same reasons, and (3) granted in part Defendants' anti-SLAPP MTS, the remainder of which was held in abeyance pending targeted discovery and supplemental briefing. [Doc. # 32.]

On January 14, 2021, Plaintiff filed a First Amended Complaint ("FAC") asserting claims of (1) libel and (2) aiding and abetting the commission of intentional torts.[1] [Doc. # 33.] On January 19, 2021, Defendants Pecker and Howard ("Individual Defendants") each filed a motion to strike ("Pecker MTS" and "Howard MTS," respectively) the FAC under California's anti-SLAPP statute. [Doc. ## 35, 36]. Plaintiff filed a consolidated Opposition to both Individual Defendants' MTSs. [Doc. # 38.] Individual Defendants each filed a Reply. [Doc. ## 39, 40.]

The parties have also completed targeted discovery and fully briefed the AMI MTS.[2]

[1] After the FAC was filed, the parties stipulated to the dismissal of Plaintiff's claim for conspiracy to commit intentional torts. [Doc. #34.]

[2] The Court considers the remaining issue in the AMI MTS despite the filing of a FAC. It is true that the FAC supersedes the Complaint, and the original Complaint shall be treated as non-existent. *See Ramirez v. Cnty. of San Bernardino*, 806 F.3d 1002, 1008 (9th Cir. 2015). But the arguments raised in the MTS pertain to the defamation claim alleged in the FAC, which is nearly identical to the defamation claim alleged in the Complaint. The Court sees no need to require AMI to file a new anti-SLAPP motion and thereby "exalt form over substance." 6 Fed. Prac. &

For the reasons set forth below, the AMI MTS is **DENIED**, and Howard's and Pecker's MTSs are **GRANTED** in part and **DENIED** in part.

I. FACTUAL AND PROCEDURAL BACKGROUND[3]

A. Allegations in the FAC

Most of the factual allegations in the FAC are identical to those in the original Complaint. The Court incorporates by reference its prior summary of these allegations. December 29, 2020 Order at 1-4.[4] Additional relevant factual allegations in the FAC are summarized below.

Plaintiff has had many years of dealings and negotiations with Howard and Pecker, which developed into personal friendships with both. FAC at ¶¶ 19–20. Plaintiff and Individual Defendants' personal relationships were marked by regular phone calls, text messages and emails, and visits, through which Plaintiff acquired a "keen understanding and insight into AMI's business operations." Plaintiff learned that Howard and Pecker exercised exclusive control over all aspects of AMI, including which leads were followed, which stories got published and when, which stories got "covered up," and when press releases were issued. *Id.* at ¶ 20. At one party in May 2017, Howard told Plaintiff that "nothing gets published or released—without my approval." *Id.* at ¶ 21. Plaintiff understood, however, that in high-profile matters, Howard was required to obtain Pecker's consent and approval. *Id.* at ¶ 22.

Plaintiff discussed his sister Lauren Sanchez's affair with Jeff Bezos with AMI employees, including Howard, between October 2018 and March 2019. *Id.* at ¶ 49. On January 7, 2019, Howard read to Plaintiff over the phone a "request for comment" email Howard intended to send

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Proc. Civ. § 1476 (3d ed.) (noting that when a court is faced with a motion to dismiss a superseded complaint, "[i]f some of the defects raised in the original motion remain in the new pleading, the court simply may consider the motion as being addressed to the amended pleading.").

[3] When considering allegations or evidence relating to an anti-SLAPP motion to strike, federal courts apply "different standards depending on the motion's basis." *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 833 (9th Cir. 2018). For the reasons stated in its December 29, 2020 Order, the Court applies the standard of Federal Rule of Civil Procedure 12(b)(6) to Howard and Pecker's standalone MTSs and thus accepts all factual allegations in the FAC as true solely for the purpose of deciding their motions. The Court examines the record to decide the factual challenges of the AMI MTS held in abeyance pending discovery.

[4] All page references herein are to page numbers inserted in the header of the document by the CM/ECF filing system.

to Bezos and Ms. Sanchez, which included information, some erroneous, that Plaintiff had never provided to or discussed with Defendants. *Id.* at ¶ 51. On January 9, 2019, Howard, with Pecker's knowledge and consent, made the decision to publish the story in *The National Enquirer* ("TNE"), telling Plaintiff, "I'm about to go to press with this entire issue." *Id.* at ¶ 56.

After hearing about Bezos' counter-investigation into the source of the information in the TNE article, on February 2, 2019, Howard texted Plaintiff stating that he was concerned about getting sued and that he had heard that a law firm was hired in preparation for a lawsuit. *Id.* at ¶¶ 58–59. On February 5, 2019, Howard informed Bezos by email that AMI had obtained additional intimate text messages between him and Ms. Sanchez, as well as racy photos of them, including an explicit photo of Bezos' genitals, i.e., a "below-the-belt selfie", and that AMI would publish those materials unless Bezos halted his investigation. *Id.* at ¶ 60. Plaintiff refers to the ten images described in that email as "Pornographic Materials"—in some of the images, Bezos or Ms. Sanchez is only partially clothed, but in others, they are fully clothed, and none depicts any sex acts. *See id.* at ¶ 62 n.11. Plaintiff then texted Howard directly in an attempt to defuse the situation, to which Howard responded that he was "out." *Id.* at ¶ 61.

On February 10, 2019, Pecker's personal attorney, Elkan Abramowitz, appeared on ABC News to argue that (1) Defendants' February 5 email to Bezos referencing the graphic photos did not constitute extortion, (2) TNE's reporting was not politically motivated, and (3) all of Defendants' information about the Bezos affair had been provided by a "single source." *Id.* at ¶ 66. The next day, Plaintiff emailed Howard regarding Defendants' February 5 email to Bezos and Abramowitz's appearance on ABC. Howard responded, "You know never to read everything as gospel." *Id.* at ¶ 67.

On March 31, 2019, AMI issued the following press release:

> Despite the false and unsubstantiated claims of Mr. de Becker, American Media has, and continues to, refute the unsubstantiated claims that the materials for our report were acquired with the help of anyone other than the single source who first brought them to us. The fact of the matter is, *it was Michael Sanchez who tipped the National Enquirer off to the affair on Sept. 10, 2018, and over the course of four months provided all of the materials for our investigation*. His continued efforts to discuss and *falsely represent our reporting*, and *his role in it*, has waived any *source confidentiality*. *There was no involvement by any other third party whatsoever*. (Emphasis added.)

Id. at ¶ 62, n.13 (citing *National Enquirer Says Saudis Didn't Help on Bezos Story*, The Daily Beast (March 31, 2019), https://www.thedailybeast.com/national-enquirer-says-saudis-didnt-help-on-bezos-story (last visited July 12, 2021)).

Plaintiff alleges that Howard and Pecker needed to act in unison in order to authorize AMI's press release, and no other AMI personnel would have been able to issue the press release without their consent and supervision. *Id.* at ¶ 78.

B. Evidence Relating to AMI's Anti-SLAPP MTS

On December 29, 2020, the Court ruled in part on AMI's MTS and struck Plaintiff's claims for intentional infliction of emotional distress ("IIED"), civil conspiracy, and aiding and abetting from his Complaint. [Doc. # 32.] In order to resolve AMI's remaining factual challenge to Plaintiff's defamation claim, the Court ordered limited discovery. *See Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 834 (9th Cir. 2018). The parties conducted discovery on the following topics: (1) from what source(s), if any, AMI received any information relating to its Bezos story prior to Plaintiff's admitted involvement in October 2018; (2) who initiated contact between AMI and Plaintiff regarding the Bezos story; (3) when, how, and to what extent Plaintiff shared the Pornographic Materials with anyone affiliated with AMI; and (4) if AMI in fact possesses the Pornographic Materials, when, how, and from what source(s) AMI received them. December 29, 2019 Order at 16.

After concluding limited discovery, Plaintiff filed his Supplemental Declaration [Doc. # 46], his Supplemental Opposition [Doc. # 63], unsealed exhibits to his Supplemental Opposition [Doc. # 64], one sealed exhibit [Doc. # 65], and the declaration of Nikolaos Tzima Hatziefstathiou [Doc. # 44]. Among Plaintiff's exhibits is an email Howard sent him on November 7, 2018, stating: "I'd like to point out, as you know, we have photos of the two subjects prior to any deal with you – as we had been investigating subject for weeks." Sanchez Decl., Ex. 1 (Howard e-mail) [Doc. # 46-1]. Hatziefstathiou asserts that the initial source of the Bezos-Sanchez affair was not Plaintiff, but Ms. Sanchez's then-husband, Patrick Whitesell, who informed Defendant Howard of the affair in August 2018. Hatziefstathiou Decl. at ¶¶ 10–12. Then a reporter for AMI, Hatziefstathiou attests that Howard assigned him to find a credible alternate source for the affair to cover up Whitesell's tip, linking Howard's motivation to a podcast production deal between AMI and a company associated with Whitesell. *Id.* at ¶¶ 11–34. In another twist, Hatziefstathiou also attests that in June 2019, his laptop, several phones, and other devices containing documents and emails relevant to this litigation were seized by Pennsylvania law enforcement authorities, and he was charged with several misdemeanor violations. *Id.* at ¶¶ 41. According to Hatziefstathiou, AMI reneged on its earlier agreement to cover his litigation costs and put him on administrative

leave. *Id.* at ¶¶ 42–48. Hatziefstathiou resigned from his position at AMI in September 2020. *Id.* at ¶ 48. He describes four locations in which he has stored 10 terabytes of data relating to his Bezos investigation and AMI's questionable legal and investigatory practices. *Id.* at ¶¶ 9, 52.

In response, AMI relies on its Supplemental Reply [Doc. # 54] and five declarations [Doc. ## 55–59]. The evidence includes Plaintiff's deposition testimony admitting to providing all of the photos identified as "Pornographic Materials" in his FAC to AMI, as well as showing AMI reporter Andrea Simpson a photograph of male genitalia from the internet that Plaintiff represented was Bezos's. Gutierrez Decl., Ex. B (Sanchez Depo.) at 37:6-19, 42:6-16, 44:14-21 [Doc. # 57-2]. Much of the rest of AMI's evidence seeks to discredit Hatziefstathiou as a disgruntled former AMI employee without personal knowledge of AMI's investigation into the Bezos-Sanchez affair who made up the Whitesell story. *See, e.g.*, Bonnet Decl. [Doc. # 55]; Gershel Decl. [Doc. # 56]; RJN [Doc. ## 60–61].

AMI and Pecker also filed a Request for Judicial Notice ("RJN") of (1) an online news article from the website *The Wrap* entitled "Endeavor Head Patrick Whitesell Denies He Tipped Off National Enquirer About Jeff Bezos Affair With His Wife," (2) a copy of a Pennsylvania state court criminal docket and sentence pertaining to Hatziefstathiou, and (3) online versions of TNE articles that Hatziefstathiou asserts that he wrote, archived via a website known as The Wayback Machine. [Doc. # 60–61.] The Court **GRANTS** the RJN of the article on *The Wrap* only to "indicate what was in the public realm at the time," not for "whether the contents of those articles were in fact true." *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010)); *see* Gutierrez RJN Decl., Ex. A [Doc. # 61-1]. Because a court may take judicial notice of undisputed matters of public record, including documents on file in federal or state courts, the Court **GRANTS** the RJN with respect to the Pennsylvania state court records because they provide more detail about Hatziefstathiou's arrest and the seizure of his electronics. *See Harris v. Cnty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012); Gutierrez RJN Decl., Ex. B [Doc. # 61-2]. As for the articles archived on the Wayback Machine, "[c]ourts have taken judicial notice of the contents of web pages available through the Wayback Machine as facts that can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned[.]" *UL LLC v. Space Chariot Inc.*, 250 F. Supp. 3d 596, 604 (C.D. Cal. 2017) (collecting cases). A Wayback Machine Records Request Processor has signed a declaration authenticating the Wayback Machine screenshots to be noticed. The Court therefore **GRANTS** the RJN of screenshots of eight TNE articles that Hatziefstathiou attests that he received byline credit for, but which actually state, at the time of the articles' publication, that the articles are written "By National ENQUIRER Staff." *See* Gutierrez RJN Decl., Ex. C [Doc. # 61-3].

II.
DISCUSSION

The legal standard governing anti-SLAPP motions to strike is set forth in the Court's December 29, 2020 Order and need not be repeated here. *See* December 29, 2020 Order at 5-7. As the Court previously concluded, the first anti-SLAPP prong has been met because Defendants showed that the AMI press release constituted a protected activity. *Id.* at 8-10. Thus, the analysis will focus on the second step of an anti-SLAPP inquiry: whether Plaintiff has demonstrated a probability of prevailing on his claims. *See Jarrow Formulas, Inc. v. LaMarche*, 31 Cal. 4th 728, 733 (2003). The Court first addresses the remaining arguments from AMI's MTS, before turning to Howard's and Pecker's motions.

A. AMI's Anti-SLAPP Motion

The only remaining issue in AMI's MTS is whether Plaintiff has established a reasonable probability of prevailing on his defamation claim. The key factual dispute is whether AMI's allegedly defamatory statements in its March 2019 press release are truthful. Specifically, the parties dispute whether "it was Michael Sanchez who tipped the National Enquirer off to the affair on Sept. 10, 2018," as AMI asserted in the press release, and whether any source other than Plaintiff produced the Pornographic Materials to Defendants. December 29, 2020 Order at 13.

As an initial matter, the Court must decide the proper legal standard to apply on this second step of the anti-SLAPP inquiry. On one hand, the Ninth Circuit stated in *Planned Parenthood* that, after permitting discovery, courts should apply Federal Rule of Civil Procedure 56's "genuine dispute of material fact" standard, rather than California Code of Civil Procedure section 425.16's "reasonable probability" standard. *See* 890 F.3d at 834 ("A contrary reading of these anti-SLAPP provisions would lead to the stark collision of the state rules of procedure with the governing Federal Rules of Civil Procedure while in a federal district court."). This conclusion is consistent with the concurrences in *Makaeff v. Trump Univ., LLC*, 715 F.3d 254 (9th Cir. 2013), describing the tension between the anti-SLAPP statute and federal procedural rules. *See id.* at 272–75 (Kozinski, J., concurring) and 272–76 (Paez, J, concurring). On the other hand, the Ninth Circuit did not take *Makaeff* up *en banc* to resolve the central issue of whether the California anti-SLAPP standard applied in federal court, and *Planned Parenthood* cannot and does not explicitly announce its reversal of existing Ninth Circuit precedent applying California's reasonable probability standard. *See Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 840 (9th Cir. 2001); *see also Todd v. Lovecruft*, No. CV 19-01751-DMR, 2020 WL 60199, at *7 (N.D. Cal. Jan. 6, 2020) (discussing the effect of *Planned Parenthood*). In this case, the Court concludes that it need not resolve those

questions. Under either the Rule 56 standard or the California anti-SLAPP standard, Plaintiff's claim survives.

1. Statements regarding the source of the Pornographic Materials

Plaintiff's own deposition testimony undermines part of his defamation claim. A defense to defamation is "substantial truth," *i.e.*, when "the substance of the charge be proved true, irrespective of slight inaccuracy in the details." *Hughes v. Hughes*, 122 Cal. App. 4th 931, 936 (2004). Plaintiff admitted that he provided AMI with explicit text messages and copies of nine of the ten photographs that the parties call Pornographic Materials. Sanchez Depo. at 37:6-19, 42:6-16, 44:14-21.[5] He also showed a picture of male genitals he found on the Internet to AMI reporter Andrea Simpson, representing that the image was of Bezos. *Id.* at 54:4-7. It is unclear who at AMI, if anyone, realized that the "below-the-belt selfie" Plaintiff had shown Simpson was not of Bezos at the time the TNE articles and the press release were published. Thus, even though Plaintiff argues that he did not provide any racy or explicit photographs to AMI, the evidence is uncontroverted that he in fact did so. Plaintiff also has provided no evidence of any other source for those photos.

AMI's statement that Plaintiff provided "all of the materials for [AMI's] investigation," in the context of him supplying the ten images referred to as "Pornographic Materials," is therefore substantially true. *See Hughes v. Hughes*, 122 Cal. App. 4th 931, 936 (2004) (providing that a statement is not false so long as "the substance, the gist, the sting, of the libelous charge be justified.") (citation omitted)). Generally, whether a statement is substantially true is a question left to the factfinder. *Id.* at 936-37. But in this case, in light of Plaintiff's own testimony, there is also no question that the following portion of AMI's press release is true: that he "falsely represent[ed] [AMI's] reporting, and his role in it," by denying that he ever possessed the Pornographic Materials.

Any defamatory sense of those words—that he sold to a tabloid his own sister's intimate texts and racy images of his own sister and her boyfriend, as well as a "below-the-belt selfie"—is also substantially true. He therefore cannot establish a probability of prevailing on a defamation claim based on that true statement.

[5] Plaintiff now argues that those photos are not "pornographic, quasipornographic, sexual, or offensive in nature," despite referring to them as such in his Complaint and FAC. Sanchez Supp. Decl. at ¶ 5 [Doc. # 46]; *see, e.g.*, FAC at ¶ 62. Although he disagrees with the pornographic or quasi-pornographic terms used to describe those photos, he does not deny that he did in fact provide those personal photos of Bezos and Ms. Sanchez to AMI.

2. Statements regarding whether Plaintiff was the first or only source

It is less clear whether the other allegedly defamatory statements in the press release are also true: "[I]t was Michael Sanchez who tipped the National Enquirer off to the affair on Sept. 10, 2018 . . . .," he "provided all of the materials for [TNE's] investigation," and "[t]here was no involvement by any third party whatsoever." FAC ¶ 62, n.13.

Plaintiff presents evidence supporting his claim that those statements are false. First, Howard admitted in an email that AMI had photos of Bezos and Ms. Sanchez "prior to any deal with [Plaintiff] – as we had been investigating subject for weeks." Sanchez Decl., Ex. 1 (Howard e-mail) [Doc. # 46-1].

Second, Hatziefstathiou's declaration supports Plaintiff's new assertion that another individual, Patrick Whitesell, first tipped off a TNE reporter to the affair in August 2018. Hatziefstathiou attests that Howard informed him over the phone on August 10, 2018 that Whitesell was the true source of the affair but did not want to be named as the source in order to have a "get out of divorce free card"; and assigned Hatziefstathiou to do a "deep dive" into Bezos' life to find an alternate source in order to protect Whitesell's identity. Hatziefstathiou Decl. at ¶¶ 10-12. This is a complete departure from Plaintiff's original theory, still espoused in his FAC, that the first tip of the affair and source of Pornographic Materials was the Saudi Arabian government's illegal hack of Bezos' cellphone. *See* FAC at ¶¶ 41-43. But Plaintiff also provides a handwritten note Hatziefstathiou took of his August 10, 2018 call with Howard, including notes saying "re: Jeff Bezos," "a get out of divorce free card," "need . . . confirmation – no PW involvement," and "NO EMAIL."[6] Hatziefstathiou Decl., Ex. 2 [Doc. # 44-2]. The other documents attached to Hatziefstathiou's declaration confirm that he worked on the "deep dive" into Bezos' "rags to riches story." *See* Hatziefstathiou Decl., Ex. 5 [Doc. # 44-5]. They are, however, inconclusive as to whether he in fact received an assignment to investigate the affair to protect Whitesell's identity. He also includes email exchanges the day after TNE broke the news of the affair on January 9, 2019, citing to a change to Whitesell's Wikipedia page indicating that his marriage to Ms. Sanchez ended in 2019, and a tabloid article published on January 10, 2019, describing Whitesell as happily "cruising around L.A." *Id.*, Ex. 14. The Wikipedia change and the tabloid article struck Hatziefstathiou as "inconsistent with the intended narrative that Mr. Whitesell had been blindsided by his wife's infidelity." *Id.* at ¶¶ 25–27. Two months later, in the midst of Bezos' and AMI's public spat over the Pornographic Materials, Hatziefstathiou received a document preservation memorandum from AMI's legal team requesting that Hatziefstathiou preserve all documents

[6] AMI appears to question the note's authenticity, but does not argue that it is inadmissible. AMI Supp. Reply at 22 [Doc. # 54]. In any event, Hatziefstathiou authenticated the note by attesting that he wrote it. Hatziefstathiou Decl. at ¶ 10.

concerning AMI's solicitation and/or receipt of Bezos' personal communications or photos. *Id.* at ¶ 37, Ex. 21. Other exhibits relate to his disagreement with AMI about whether the laptop or hard drive seized by Pennsylvania police in June 2019 belonged to AMI, and to what extent AMI would provide his legal defense in the Pennsylvania action. *Id.* at ¶¶ 41–48, Exs. 25–30. All of this evidence, taken together, gives rise to the inference that AMI originally learned of the Bezos affair through a source other than Plaintiff.

Defendants do not refute Howard's email admission that TNE had been investigating "subject" for weeks and already had photos of Bezos and Ms. Sanchez prior to his deal with Plaintiff, although they provide significant evidence disputing Hatziefstathiou's declaration and documents. Howard denies that he gave Hatziefstathiou any assignment concerning the Bezos affair or that Whitesell was ever a source for AMI at all. Howard Decl. at ¶ 6 [Doc. # 58]. He asserts that Hatziefstathiou's claims of working on the Bezos affair story are "pure fiction." *Id.* at ¶ 7. He corroborates, to a degree, two other elements of Hatziefstathiou's declaration: (1) Howard worked on a podcast production deal between AMI and a business in which Whitesell was involved, and (2) he and Robertson had asked AMI reporters, including Hatziefstathiou, to investigate Bezos' daily life, before anyone at AMI had information about an affair. *Id.* at ¶¶ 9–10. Howard also attests that Hatziefstathiou received shared byline credit on only one TNE article about Bezos, relating to an interview Hatziefstathiou did with Bezos' aunt, and not on any affair-related story. *Id.* at ¶ 11. According to a log of texts exchanged on January 9, 2019, the day the initial Bezos story on TNE went live, Robertson confirmed to Simpson that Hatziefstathiou would receive a byline on the story only because he did interviews with Bezos' family, but that he "didn't know the big story" of the affair. Robertson Decl., Ex. A [Doc. # 59-1]. Wayback Machine screenshots of the TNE articles that Hatziefstathiou claimed he worked on indicate that at the time of publication, the articles were written merely by "The National ENQUIRER Staff." Gutierrez RJN Decl., Ex. C [Doc. # 61-3]. According to AMI's Executive Vice President of Digital Operations, each of those bylines was modified months later to say "By Nik Hatziefstathiou" on TNE's content management system ("CMS") by an unidentified CMS user, and Hatziefstathiou had the CMS credentials on those dates to be able to modify the bylines. Bonnett Decl. at ¶¶ 4–10 [Doc. # 55].

Under the anti-SLAPP standard, the Court does not make credibility determinations or weigh the evidence. *See Christian Rsch. Inst. v. Alnor*, 148 Cal. App. 4th 71, 82, 84 (2007). The only reason the Court may discount Hatziefstathiou's declaration is if it is inadmissible or utterly conclusory and lacking any detailed facts or supporting evidence. *See id.* at 80. Hatziefstathiou has provided sufficient evidence to survive that lenient standard. More importantly, Howard's own admission supports Plaintiff's assertion that someone else tipped AMI off to the story. The Court therefore does not find that, under the anti-SLAPP statute's "probability of prevailing"

standard, Defendants are entitled to strike Plaintiff's FAC as a matter of law. In addition, under the Rule 56 standard, this record certainly presents a triable issue of material fact as to the truth or falsity of AMI's claim that Plaintiff was the first or only source for their story on the Bezos affair.

Because Plaintiff has established that his defamation claim may have merit with regard to AMI's statements that Plaintiff was the first or only source of the information at issue, the entire defamation cause of action may proceed, and the Court **DENIES** AMI's motion to strike the defamation claim.

B. Individual Defendants' Motions

Pecker and Howard each filed anti-SLAPP motions challenging the legal sufficiency of Plaintiff's claims of defamation and aiding and abetting against them. The Court therefore applies the Federal Rule of Civil Procedure 12(b)(6) standard to each claim. *See Planned Parenthood*, 890 F.3d at 834.

1. Defamation

A corporation's officer may be held liable for an intentional tort he committed on behalf of the corporation, regardless of whether the corporation is also liable. *Deerpoint Grp., Inc. v. Agrigenix, LLC*, 393 F. Supp. 3d 968, 978 (E.D. Cal. 2019) (citing *Frances T. v. Vill. Green Owners Ass'n*, 42 Cal. 3d 490, 504 (1986)). But only someone "who takes a responsible part in a publication of defamatory material," including a newspaper editor, "may be held liable for the publication." *Overstock.com*, 151 Cal. App. 4th at 712; *see also Wyatt v. Union Mortg. Co.*, 24 Cal. 3d 773, 785 (1979) ("Directors and officers of a corporation are not rendered personally liable for its torts merely because of their official positions, but may become liable if they directly ordered, authorized or participated in the tortious conduct."). Both Howard and Pecker argue that the FAC fails to allege that they took "a responsible part" in issuing the press release. Howard MTS at 10; Pecker MTS at 8-9.

The FAC contains sufficient allegations as to both men's involvement. Both are alleged to have substantial control over AMI and final decision-making authority over the publication of articles and press releases. Howard took a lead role in investigating and publishing the Bezos article and in emailing Bezos himself that AMI had obtained additional graphic images of Bezos and Ms. Sanchez. Due to his decision-making authority with respect to the Bezos article and email, Howard worked with and knew of the sources for the investigation. Thus, although Plaintiff's allegations about Howard's general authority as Vice President and Chief Content Officer at AMI are insufficient by themselves, those allegations *combined* with Plaintiff's allegations about

Howard's lead role in investigating Bezos and publishing the TNE article lead to a plausible inference that Howard was responsible for the press release's language pinning Plaintiff as the tipster who provided all materials for the investigation. *See* FAC at ¶¶ 48–51, 56.

In addition, the fact that Pecker is AMI's Chairman and Chief Executive officer, combined with Plaintiff's allegations that Pecker sent his personal attorney, not AMI's counsel, to appear on television and make statements that were later repeated in the press release, allows the Court to draw the reasonable inference that Pecker also took a responsible part in the press release's publication. *See* FAC at ¶¶ 66, 69.

Accordingly, the Court **DENIES** both Individual Defendants' motions as to the defamation claim.

2. Aiding and Abetting

California has adopted the common law rule for subjecting a defendant to liability for aiding and abetting a tort. Liability for aiding and abetting a tort applies where a person "gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person." *Casey v. U.S. Bank Nat. Assn.*, 127 Cal. App. 4th 1138, 1144 (2005). But under the agent immunity rule, an agent is immune from liability for acts undertaken on behalf of the principal which are within the legitimate scope of his authority because he and the corporation are one and the same, and a principal cannot aid and abet itself. *Villains, Inc. v. Am. Economy Ins. Co.*, 870 F. Supp. 2d 792, 795 (N.D. Cal. 2012) (citing *Everest Investors 8 v. Whitehall Real Estate P'ship XI*, 100 Cal. App. 4th 1102, 1108 (2002)).

Here, the FAC alleges that both Individual Defendants acted on behalf of AMI within the scope of their authority by taking a responsible part in issuing the press release. Therefore, as stated above, Plaintiff has sufficiently alleged that they are primary tortfeasors and individually liable. Plaintiff cites to no authority, however, indicating that Pecker and Howard can be both personally liable and secondarily liable for the same tort. Because Pecker and Howard are directors and officers of AMI, and therefore are agents of AMI, the core concept underlying the agent immunity rule applies. A corporation cannot conspire with or aid and abet itself, and Plaintiff does not allege that Pecker and Howard acted outside the scope of their authority or violated separate duties owed to Plaintiff. *See Black v. Bank of America*, 30 Cal. App. 4th 1, 2, 6 (1994).

The Court therefore **GRANTS** Individual Defendants' motions as to the claim for aiding and abetting, with leave to amend.

III.
CONCLUSION

In light of the foregoing, the Court **DENIES** AMI's MTS [Doc. # 13] and **GRANTS in part** and **DENIES in part** Pecker's MTS [Doc. # 35] and Howard's MTS [Doc. # 36], as follows:

1. All three motions are **DENIED** as to the defamation claim.

2. Pecker's and Howard's motions are **GRANTED, with leave to amend** as to the aiding and abetting claim.

If Plaintiff chooses to file a Second Amended Complaint, he shall do so, or inform Defendants of his intention not to do so, by **August 3, 2021**. Defendants shall file their response within 21 days after the service and filing of the Second Amended Complaint, or notification of Plaintiff's intention to stand on the surviving claims in the FAC.

IT IS SO ORDERED.