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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

BLAKE TOLLISON SHELTON, an individual,

Plaintiff,

vs.

BAUER PUBLISHING COMPANY, L.P.; BAUER MAGAZINE L.P.; BAUER MEDIA GROUP, INC.; BAUER, INC.; BAUER NORTH AMERICA, INC.; BAUER MEDIA GROUP USA, LLC; and DOES 1-20, inclusive,

Defendants.

Case No. **15-cv-09057-CAS-AGR**

DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES

Date: March 28, 2016
Time: 10:00 a.m.

Assigned to the Hon. Christina A. Snyder
Courtroom: 5

[Declarations of David Perel, Adriane Schwartz with Exhibits A through P filed concurrently]

Action Filed: October 19, 2015

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 28, 2016, at 10:00 a.m. or as soon thereafter as the matter may be heard, in Department 8 of the United States District Court for the Central District of California, located at 312 N. Spring Street, Los Angeles, California 90012, defendants Bauer Publishing Company, L.P., Bauer Magazine L.P., Bauer Media Group, Inc., Bauer Inc., Heinrich Bauer North America, Inc. and Bauer Media Group USA (collectively "Bauer") will and hereby do move this Court, pursuant to California Code of Civil Procedure § 425.16, for an order striking plaintiff Blake Shelton's October 19, 2015 Complaint ("Complaint") in its entirety as against Bauer.

Because Shelton's causes of action for libel and false light invasion of privacy arise from an article published in *In Touch* and target Bauer's exercise of its free-speech rights about an issue of public interest, those causes of action are subject to a special motion to strike under California Code of Civil Procedure § 425.16. The burden thus shifts to Shelton to establish a probability that he will prevail on his claim. C.C.P. § 425.16(b)(1). He cannot meet that burden for each of the following independent reasons:

- Shelton cannot establish a probability of prevailing on his libel claim because the statements identified in the Complaint are substantially true, non-defamatory, or protected opinion, and thus non-actionable.
- Shelton is libel-proof with regards to the article's reporting on his drinking.
- Even assuming the statements Shelton identified were actionable, he cannot establish a probability of prevailing for the independent reason that he has failed to adequately plead actual malice, *i.e.* that Bauer knew the article to be false, or harbored serious doubts about its accuracy and even if it was properly pled, Shelton cannot establish actual malice. Given Bauer's reliance on Shelton's own richly cultivated public

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persona, prior published reports with the same or similar information and its multiple sources, Shelton cannot show by the necessary clear and convincing evidence that Bauer published the story with actual malice.[1]

This Motion is based on this Notice; on the attached Memorandum of Points and Authorities; on the Declarations of David Perel and Adriane Schwartz with Exhibits A through P annexed thereto; on all matters of which this Court may take judicial notice; on all pleadings, files and records in this action; and on such other argument as may be received by this Court at the hearing on this Motion.

For these reasons, Bauer respectfully requests that the Court grant this Motion, enter judgment in favor of Bauer and against Shelton, and award Bauer its attorneys' fees and costs incurred in defending this action pursuant to C.C.P. § 425.16(c).[2]

DATED: February 26, 2016

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JOHN M. BROWNING (*Pro Hac Vice*)

By: /s/ Alonzo Wickers IV
Alonzo Wickers IV

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[1] The parties discussed the merits of Bauer's anti-SLAPP motion on multiple occasions by telephone and written correspondence, but were unable to resolve the dispute. By letter dated February 5, 2016, counsel for Shelton definitively informed counsel for Bauer that he had considered Bauer's position, had rejected its arguments and that Bauer should proceed with its anti-SLAPP motion. Therefore, this motion is made following the conferences of counsel pursuant to L.R. 7-3.

[2] Section 425.16(c) mandates that a prevailing defendant "shall" recover its attorneys' fees and costs incurred in defending claims that fall within the statute. If the Court grants this Motion, Bauer will file a noticed motion to recover its attorneys' fees and costs.

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BAUER MEDIA GROUP USA, LLC

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STATUTES

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MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF ARGUMENT

Blake Shelton, the "superstar" country music singer, alleges in this action that *In Touch* magazine defamed him in a September 28, 2015 article that reported on his excessive drinking habits and how they have taken a toll on his well-being, contributed to the breakdown of his marriage and caused his friends to become so concerned that they have urged him to go to rehab (the "Article"). Shelton ignores that he has staked his reputation on heavy drinking: he tweets more than 15 million Twitter followers almost daily with messages crowing about how much he drinks and is famous for his signature Twitter tagline, "Drunk." Shelton also ignores the years of press – which went unchallenged by any legal claims – documenting how his ex-wife, among others, were so upset by his alcohol consumption that she told him to go to rehab. By this action, Shelton attempts to walk back a public image he created. Yet the law does not allow for selective amnesia. In short, Shelton "cannot fault [Bauer] for relying on his own statements" establishing that he is a "drunk." *Newton v. NBC*, 930 F.2d, 662, 684 (9th Cir. 1990).

Bauer did not just rely on Shelton's own well-developed public image or the multiple unchallenged reports of Shelton's excessive drinking; the editors also spoke to sources who confirmed that Shelton's friends and colleagues had urged him to seek help. These sources also provided detailed accounts of Shelton's drunken escapades described in the Article (many of which Shelton does not challenge). In the end, Bauer believed the Article, and each challenged statement, to be absolutely true.

To provide for the "fast and inexpensive unmasking and dismissal" of claims, like Shelton's, that target expressive works about matters of public interest, the California Legislature enacted the anti-SLAPP statute, Code of Civil Procedure § 425.16. *Ludwig v. Superior Court*, 37 Cal. App. 4th 8, 16, 43 Cal. Rptr. 2d 350, 356 (1995). *See also* Cal. Civ. Proc. Code § 425.16(e)(4). Under Section 425.16,

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such claims must be stricken at the outset of a lawsuit unless the plaintiff presents *admissible evidence* to establish that he has a "probability" of prevailing on the merits. Cal. Civ. Proc. Code § 425.16(b). To meet his burden, the plaintiff must substantiate his claims and must overcome any applicable defenses. *See Bradbury v. Superior Court*, 49 Cal. App. 4th 1108, 1117, 57 Cal. Rptr. 2d 207, 213 (1996). Here, Bauer can readily satisfy its burden of demonstrating that Shelton's libel claim arises from Bauer's exercise of its free speech rights concerning a matter of public interest. The claim is subject to a special motion to strike under California's anti-SLAPP statute, Code of Civil Procedure § 425.16. Under Section 425.16, the burden then shifts to Plaintiff to demonstrate – with admissible evidence – that he has a probability of prevailing on each of his claims.

Shelton cannot meet his burden. At the heart of virtually every challenged statement is the well-documented fact that Shelton drinks to excess. Yet, this core fact is either substantially true based on Shelton's own statements or he has made himself "libel proof" with respect to stories about his drinking. Other challenged statements are not defamatory as a matter of law ("partying" with women when unmarried) or are opinion (he "hit rock bottom"). Even assuming that Shelton could establish falsity and that each statement is defamatory, the action *still* fails because he has not plead, nor could he establish, that Bauer published the Article with actual malice (*i.e.*, subjectively knowing the Article was false, or having serious doubts about its accuracy). Bauer relied on Shelton's own richly cultivated personality, multiple previously published and unchallenged reports, and numerous sources it found credible. Plaintiff cannot demonstrate any possibility – much less the required "probability" – of establishing actual malice by "clear and convincing" evidence. Accordingly, the claims should be stricken.[3]

[3] As set forth below in Section IV.C, Plaintiff's duplicative claim for false light invasion of privacy is barred for the same reasons as his libel claim.

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II. SUMMARY OF FACTS

Listing but a few of his achievements, the Complaint introduces Blake Shelton as "a country music superstar boasting three gold records, twenty number one country singles, and five Grammy nominations. Mr. Shelton is also known as a judge and coach on the Emmy-winning television program, *The Voice*." Compl. ¶16. Shelton has long been a fixture of entertainment news because of his high profile marriage to (and divorce from) country music star Miranda Lambert.

Shelton "actively cultivates his persona, including via social media," primarily on his Twitter account, @blakeshelton, which he uses "multiple times a day on average." Compl. ¶18. What the Complaint neglects to mention is that the persona Shelton cultivates on Twitter is that of an unashamedly heavy drinker. Since 2009, he has amassed nearly 50 pages of tweets related to excessive alcohol consumption, including numerous descriptions of drinking early in the day, at work, or "being [so drunk that he is] passed out face first." Declaration of David Perel ("Perel Decl.) at ¶¶19-20, Ex. D. By 2011, Shelton was so well known for his drunken tweets that CNN asked him about them at an awards show. *Id*. at ¶22, Ex. G. His dead serious response, "I drink alcohol and always will until I die and I don't care if you like it or not." *Id*. Similarly, when faced with criticism of his Twitter persona from his record label, Shelton was defiant and refused to tone down his pronouncements of drunkenness. *Id*. at ¶21 Ex. F. By his own extensive efforts, Shelton has become synonymous with his trademark Twitter sign-off: "Drunk."[4]

Shelton's well crafted "Drunk" persona was further documented by articles published for years about how Shelton's drinking was out of control and causing

[4] It has come to Bauer's attention that Shelton appears to have deleted a large number of Tweets after he commenced this action, including many tweets concerning his drinking. Perel Decl. ¶20 n. 2. "A litigant has a duty to preserve evidence it knows or should know is relevant to litigation" and sanctions may be appropriate if Shelton has failed to meet his obligations by destroying this clearly relevant information. *Cyntegra, Inc. v. Idexx Labs., Inc.*, CV 06-4170 PSG (CTx), 2007 U.S. Dist. LEXIS 97417, at *7 (C.D. Cal. Sept. 21, 2007) (citation omitted).

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health problems, including serious heart problems. *Id*. at ¶¶19, 25, Exs. C & M. It has also been reported that his ex-wife, Ms. Lambert, was fed up with his drinking and demanded that he go to rehab. *Id*. at ¶¶23-24, Exs. J & K. *In Touch* reported in August that Lambert had come home to find a drunk Shelton throwing a party with "six naked women" in attendance. Declaration of Adriane Schwartz ("Schwartz Decl.") at ¶17, Ex. O. Shelton never challenged these statements (or myriad similar claims about his drinking and marriage) with a legal claim prior to filing suit here; nor was Bauer aware of any correction to these reports.

Against this backdrop, *In Touch* editors received information that Shelton's drinking and wild behavior were escalating and that his friends were so concerned about his well-being that they wanted him to go to rehab. Perel Decl. ¶¶27-35. Consistent with a previous report that Shelton was on a "Booze Bender after Miranda Lambert Split," Bauer learned from a source that Shelton was drinking heavily and "partying" with multiple women while on a trip to Cancun for a bachelor party. Perel Decl. Ex. K; Schwartz Decl. ¶¶9-15. Together with other sourcing on similar drunken exploits, *In Touch* made the decision to publish the Article since readers care about Blake Shelton and, more generally, binge drinking and alcoholism are serious public health issues in our culture and public figures like Mr. Shelton are by no means immune to them. Perel Decl. ¶8.

The Article included eight of Shelton's trademark "Drunk" tweets in a sidebar to further document Shelton's excessive drinking. While the Complaint asserts that these Tweets were "cherry picked" (Compl. ¶29), Bauer had more than 50 pages of similar (or worse) tweets to choose from that also extolled the virtues of heavy drinking. Perel Decl. ¶¶19-20. Moreover, contrary to what the Complaint claims, Bauer *did* reach out to Shelton's representatives at Warner Music Group before publication to solicit comment. *Id.* at 10-12, Ex. B. Shelton's representatives failed to reply, which was understood as a tacit admission that the story was true. *Id*. at ¶11.

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In sum, *In Touch* published the Article based on Shelton's highly-publicized reputation, multiple previously published reports and numerous independent sources. In the end, the magazine and its editors absolutely believed in the truth of the story, and most certainly had no serious doubts about its accuracy. Perel Decl. ¶¶2, 36; Schwartz Decl. ¶¶2, 21.

In his Complaint, Shelton asserts two causes of action against Bauer, for libel and false light invasion of privacy. Compl. ¶¶33-56. Without any specific facts to refute the statements in the Article or to show how the Article could possibly harm Shelton's reputation, the Complaint demands at least $2 million in damages.

III. SHELTON'S LAWSUIT IS SUBJECT TO A SPECIAL MOTION TO STRIKE

A. The Anti-SLAPP Statute Broadly Protects Media Defendants Against Libel Claims

In 1992, the California Legislature enacted C.C.P. § 425.16 "to discourage suits that masquerade as ordinary lawsuits but are brought to deter common citizens from exercising their political or legal rights or to punish them for doing so." *Sarver v. Chartier*, NO. 11-56986, 12-55429, 2016 U.S. App. LEXIS 2664, at *17-18 (9th Cir. Feb. 17, 2016) (quotation omitted). Accordingly, the purpose of the statute is "to nip … in the bud" meritless claims that target a defendant's exercise of free-speech rights. *Braun v. Chronicle Publ.*, 52 Cal. App. 4th 1036, 1042, 61 Cal. Rptr. 2d 58, 61 (1997).

The statute provides that any "cause of action against a person arising from any act of that person in furtherance of that person's right of … free speech ... 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 [he] will prevail on the claim." C.C.P. § 425.16(b)(1). Five years later, responding to court decisions that interpreted the statute too narrowly, the California Legislature amended Section 425.16(a) to ensure that it "shall be construed broadly." The

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California Supreme Court later declared that this "broad construction … is desirable from the standpoint of judicial efficiency," and "that [a narrow construction] would serve Californians poorly." *Briggs v. Eden Council*, 19 Cal. 4th 1106, 1121-22, 81 Cal. Rptr. 2d 471, 480 (1999).

In *Navellier v. Sletten*, 29 Cal. 4th 82, 88, 124 Cal. Rptr. 2d 530, 535 (2002), the Court outlined the "two-step process for determining whether an action" must be stricken under Section 425.16. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity." *Id.* To make this showing, the defendant must demonstrate that the alleged conduct "underlying the plaintiff's cause [of action] fits one of the categories spelled out in section 425.16, subdivision (e)." *Id.* Those categories include:

> … (3) any written or oral statement or writing made [by the defendant] in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct [by the defendant] in furtherance of the exercise of the constitutional right ... of free speech in connection with a public issue or an issue of public interest.

C.C.P. § 425.16(e)(3)-(4). If the claim arises from conduct falling within one of these categories, the court "must then determine whether the plaintiff has demonstrated a probability of prevailing." *Navellier*, 29 Cal. 4th at 88, 124 Cal. Rptr.2d at 535. If the plaintiff cannot meet this burden, his claim must be stricken. *Id.*[5]

B. Shelton's Libel Claim is Subject To a Special Motion To Strike Under Subsections (e)(3) and (e)(4).

The libel claim arises solely from the Article which reports on the adverse effects of Shelton's drinking and its role in the breakdown of his marriage.

[5] The Federal Courts in this Circuit have routinely applied California's anti-SLAPP law when deciding state law claims in diversity actions. *See, e.g.*, *Sarver*, 2016 U.S. App. LEXIS 2664; *Price v, Stossel*, 620 F.3d 992, 998-98 (9th Cir. 2010) (statute applied to diversity case removed from Los Angeles County Superior Court to Central District of California).

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Complaint at ¶¶24-26; 34-37. The Article is protected under Section 425.16(e)(3) and (e)(4) of the SLAPP law.

Subsection (e)(4) extends the statute's protection to any conduct "in furtherance of the exercise of the constitutional right … of free speech in connection with … an issue of public interest." Bauer's Article plainly involves the exercise of free-speech rights and enjoys "full First Amendment protection." *Hoffman v. Capital Cities/ABC*, 255 F.3d 1180, 1186 (9th Cir. 2001) (*Los Angeles* magazine feature on Hollywood fashion was constitutionally protected). That the story appeared in an entertainment-news magazine is irrelevant; as the California Supreme Court declared, "constitutional guarantees of freedom of expression apply with equal force to … a news report or an entertainment feature." *Shulman v. Group W Prods.*, 18 Cal. 4th 200, 220, 74 Cal. Rptr. 2d 843, 856 (1998).

Likewise, there is no doubt that Bauer's Article relates to an "issue of public interest," within the terms of subsection (e)(4). Courts in California "construe public issue or public interest broadly in light of the statute's stated purpose to encourage participation in matters of public importance or consequence." *Sarver*, 2016 U.S. App. LEXIS 2664, at *19 (citation and quotes omitted). The Article falls squarely into two well-established "public interest" categories: (i) "statements concerning a person or entity in the public eye" and (ii) "topic[s] of widespread, public interest." *Id.* at *19-20 (*citing Rivero v. Am. Fed'n of State, Cnty., & Mun. Emps.*, 105 Cal. App. 4th 913, -22-25, 130 Cal. Rptr. 2d 81, 88-90 (Cal. Ct. App. 2003)). Shelton, who describes himself as a "country music superstar" (Compl. ¶16), cannot dispute that he is "no stranger to the media and he puts himself in the public spotlight." *See Beckham v. Bauer Publishing Co., L.P.*, No. CV 10-7980-R, 2011 U.S. Dist. LEXIS 32269, at *2 (C.D. Cal. Mar. 17, 2011) (SLAPP law applies because Beckham is "in the public eye"). *See also*, Perel Decl. at ¶¶4, 18, Ex. C; Schwartz Decl. at ¶7. Shelton's status "in the public eye" alone brings the Article within the statute.

The Article independently qualifies because Shelton's drinking and the impact

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it had on the breakdown of his marriage are "topics of widespread, public interest." It is well established that "the issue need not be 'significant' to be protected by the anti-SLAPP statute – it is enough that it is one in which the public takes an interest." *Nygard, Inc. v. UUSI-Kertulla*, 159 Cal. App. 4th. 1027, 1042, 72 Cal. Rptr. 3d 210, 220 (2008). Under this definition, celebrity news qualifies as a topic of public interest. Accordingly, in *Beckham*, the court held that a story in *In Touch* about "[a]llegations of [David Beckham's] alleged affairs would be a topic of interest to a wide variety of people." 2011 U.S. Dist. LEXIS 32269, at *2-3. Even stories about individuals significantly less famous than Shelton enjoy the protection of the statute when they touch on issues that affect wider society. *See e.g.*, *Seelig v. Infinity Broadcasting Corp.*, 97 Cal. App. 4th 798, 807-08, 119 Cal. Rptpr.2d 108, 115 (2002) (criticism of reality show contestant was of "significant interest to the public" because of what the show "signified about the condition of American society.").

Shelton himself ensured that his drinking is a topic of public interest by promoting himself as a heavy drinker in media interviews and through his incessant "Drunk" tweets. Perel Decl. ¶¶19-24. Taking Shelton's lead, the Article reports on the toll that Shelton's increasingly heavy drinking took on his life and marriage because these are serious public health issues. *Id*. at ¶8. The underlying message of the Article, which is to explain why Shelton's concerned friends have told him, "[i]t's time to check yourself into a facility," clearly relates to serious issues worthy of full First Amendment protection. Perel Decl. ¶¶6-8, Ex. A. Nor is Shelton the first celebrity to have garnered substantial public attention concerning the breakdown of his marriage to a celebrity or for conspicuous womanizing. Perel Decl. ¶9. Courts have found reports on famous affairs to concern "an issue of public interest." *Beckham*, 2011 U.S. Dist. LEXIS 32269, at *2-3.[6]

[6] Subsection (e)(3) independently extends the statute's reach to any statement made in "a public forum in connection with an issue of public interest." In *Annette F. v. Sharon S.*, 119 Cal. App. 4th 1146, 1161, 15 Cal. Rptr. 3d 100, 110 (2004), the court held that "a news publication is a 'public forum' within the meaning of the anti-

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IV. SHELTON CANNOT SHOW A PROBABILITY OF PREVAILING

Because Bauer has made its threshold showing under either subsection (e)(4) or (e)(3), Shelton's claims must be stricken unless he demonstrates a probability that he will prevail. C.C.P. § 425.16 (b)(1). As the court explained in *DuPont Merck Pharm. v. Superior Court*, 78 Cal. App. 4th 562, 568, 92 Cal. Rptr. 2d 755, 760 (2000), "to satisfy its burden under the second prong of the anti-SLAPP statute, it is not sufficient that plaintiffs' complaint survive a demurrer" or motion to dismiss. Instead, the plaintiff must "meet the defendant's constitutional defenses," *Robertson v. Rodriguez*, 36 Cal. App. 4th 347, 359, 42 Cal. Rptr. 2d 464, 470 (1995), and present "competent evidence" showing that he will "probably prevail at trial." *Bradbury*, 49 Cal. App. 4th at 1117, 57 Cal. Rptr. 2d at 213. Shelton's libel claim fails for several independent reasons: the central fact at issue is Shelton's excessive drinking, which is either substantially true or is barred since Shelton is libel proof on that issue. Other statements are classic opinions, while others are not defamatory. Even assuming any of the challenged statements were actionable, Shelton cannot establish with clear and convincing evidence that Bauer published the Article knowing it was false or with serious doubts as to its accuracy. For these reasons, the Complaint must be stricken.

A. Shelton's Claim Will Fail Because the Statements He Identifies Are Not Actionable

As a threshold matter, the only statements at issue here are the statements Shelton specifically identifies in his Complaint (the "Statements"). Courts in the Ninth Circuit recognize that California law requires that "the words constituting an alleged libel must be specifically identified, if not pleaded verbatim, in the complaint." *Kechera House Buddhist Ass'n Malay v. Doe*, 15-cv-00332-DMR, 2015

SLAPP statute if it is a vehicle for discussion of public issues and it is distributed to a large and interested community." *In Touch* is a national magazine that reports on entertainment news. Perel Decl. ¶3. For this reason, *In Touch* is a "public forum," protected under subsection (e)(3).

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U.S. Dist. LEXIS 126124, at *15 (N.D. Cal. Sept. 18, 2015) (*citing Kahn v. Bower*, 232 Cal. App. 3d 1599, 1612 n.5, 284 Cal. Rptr. 244 (1991)). Indeed, the Complaint expressly limits the "Statements" at issue to those allegedly "false statements set forth in … Paragraph 26." Compl.¶26. Therefore, although Shelton attempts to generally allege that the Article "as a whole" is false (*id*, ¶¶'s 35-36), he does not in fact challenge as false numerous, far more damaging, statements about his drinking and womanizing in the Article that underscore the central thrust of the Article, including (but not limited to) the statements that he engaged in an "alcohol fueled rendezvous" with a hotel guest in Cancun, that he "was so obliterated, he urinated on a mailbox in public," that "Miranda started videotaping Blake's drunken antics… because he never believed or remembered what he did" and that "he has been known to down vodka before noon." Perel Decl. ¶16, Ex. A.

1. The Statements About Shelton's Drinking Are Substantially True or Not Defamatory

At its heart, the Complaint contends the Article "falsely and maliciously suggests that Mr. Shelton is in rehab." Compl. ¶24. Based on this interpretation, Shelton complains that the Article defamed him because "he is not in rehab, his 'close circle' is not trying to seek an intervention, and he is, in fact, hard at work on *The Voice* and other projects." *Id*. ¶4. Yet the Article is clear that Shelton has not gone to rehab, that he "won't listen" to calls for him to go to rehab and that he is "throwing himself into the new season of *The Voice*…" Perel Decl. ¶¶6-7. Despite Shelton's protestations, the Article and Shelton are clearly in total agreement.[7]

[7] Shelton's interpretation that the cover headline "suggest[s]" that Shelton "checked himself into rehab," Compl. ¶25, is an impermissibly strained reading. The headline does not state that Shelton actually went to rehab. Instead, the headline is prescriptive and reflects how those close to Shelton have said he *should* go to rehab to deal with his (undisputed) heavy drinking. Perel Decl. ¶7. The correct reading of the headline is underscored when it is read together with the cover subheading "[h]ow his friends begged him to stop joking about drinking & get help" and the body of the Article, as it must be. *See Balzaga v. Fox News Network LLC*, 173 Cal. App. 4th 1325, 1338, 93 Cal. Rptr. 3d 782,793 (2009) ("[W]hen the alleged defamatory statement is contained in a headline, the headline must be read in conjunction with the entire article, and when so read the conclusion and inferences

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Even assuming *arguendo* that the headline could be read as stating Shelton went to rehab, there is nothing inherently defamatory about electing to seek treatment for drinking. The only possible defamatory predicate is that rehab implies that Shelton has drinking issues – a fact that is irrefutably true based on his own richly cultivated reputation. Shelton's claim that a man with an extensive history of excessive drinking could be defamed by a false report that he went to rehab is analogous to a line of cases where convicted criminals challenged statements that they had turned law enforcement informant. In those cases, the plaintiff admitted the defamatory predicate – *i.e.* that he or she committed a crime – but challenged the non-defamatory statement that plaintiff attempted to mitigate the impact of their crime by assisting law enforcement. In each of these cases, courts consistently hold that "even accepting that the statements at issue are false… plaintiff's claim must be rejected" because "[i]n order to be libelous… a false statement must hold the plaintiff up to ridicule or scorn in the minds of 'right thinking persons'; those who would think ill of one who legitimately cooperates with law enforcement officials are not such persons." *Agnant v. Shakur*, 30 F. Supp. 2d 420, 424 (S.D.N.Y. 1998).[8] So too here, Shelton cannot state a claim for defamation on the ground that the Article suggested that he should go to rehab. In the minds of right thinking persons, it would

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alleged by the plaintiff must be supported."); *Forsher v. Bugliosi*, 26 Cal. 3d 792, 803, 163 Cal. Rptr. 628, 634 (1980) ("[C]ourts must refrain from scrutinizing what is not said to find a defamatory meaning which the article does not convey to a lay reader."). *But, see, Kaelin v. Globe Communs. Corp.*, 162 F.3d 1036, 1041 (9th Cir. 1998) (noting whether cover headline was actionable is a question for the jury where "the totality of the circumstances showed the editor's intent to mislead readers"). Accordingly, a plaintiff must "establish that [defendant] intended to convey the defamatory implication … with convincing clarity." *Dodds v. American Broadcasting Co.*, 145 F.3d 1053, 1063-1064 (9th Cir. 1998).

[8] *See also, Clawson v. St. Louis Post-Dispatch, L.L.C.*, 906 A.2d 308, 310 (D.C. Cir. 2006) ("[T]he terms 'informer' and 'FBI informer' are not defamatory as a matter of law; nor are they reasonably capable of a defamatory meaning."); *Michtavi v. New York Daily News*, 587 F.3d 551, 552 (2d Cir. 2009); *Connelly v. McKay*, 176 Misc. 685, 686, 28 N.Y.S.2d 327, 329-30 (Sup. Ct. N.Y. Cty. 1941) ("At most the language claimed to have been used accuses the plaintiff of giving information of violations of law to the proper authorities. Are such acts reprehensible? Is such language defamatory? This court thinks not.").

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be entirely commendable for Shelton to seek rehab considering his undisputed history of bragging about his own drunkenness and his well-publicized behavior while under the influence of alcohol. *See* Perel Decl. ¶¶18-26.

Under the same rationale, it is not actionable to state that Shelton's "friends, colleagues and handlers won't give up on him – and have urged him to seek help," that "[h]is friends are terrified that he could end up dead at this rate" or that "[h]is close friends have talked about an intervention," even assuming these Statements were false (which they are not). Compl. ¶26. Considering Shelton's self-proclaimed history of alcohol abuse, it is simply not defamatory to report that Shelton has friends and colleagues who care enough about his well-being to get him professional help.[9]

In short, to prevail on a defamation claim, Shelton must show that the Article contained a "false" statement that "tends to harm the reputation of [Shelton] as to lower him in the estimation of the community…" *Walleri v. Federal Home Loan Bank*, 83 F.3d 1575, 1583 (9th Cir. 1996) (*quoting* Restatement (Second) of Torts §§ 558, 559 (1976). At the same time, when the gist or sting of the Article is true by Shelton's own admission – that Shelton regularly drinks excessively – a libel action fails. *Wynberg v. Nat'l Enquirer*, 564 F. Supp. 924, 927 (1982) (*citing Alioto v. Cowles Comm'ns, Inc.*, 623 F.2d 616, 619 (9th Cir. 1980) (libel claim fails where plaintiff shows publication "is substantially true in its implication, that is, that the 'gist' or 'sting' of the article, read as a whole is true."). Shelton cannot show that an Article about his excessive drinking "tarnished both his personal and business

[9] The specific claim that the Article reports that Shelton "started drinking at age fourteen as 'a form of coping with his brother's death" relies on an obvious misreading of the text and is likewise not defamatory. *Forsher*, 26 Cal. 3d at 806, 163 Cal. Rptr. At 635 (refusing to find defamatory meaning where "defamatory nature... is so obscure and attenuated as to be beyond the realm of reasonableness."). The Article states only that Shelton "started drinking as a teenager," which is hardly a defamatory statement. Shelton strains to claim that the Article said he "started drinking at age fourteen," when it could not be more clear that the Article reports that his brother died when he was fourteen and "when" he started drinking, "it was a form of coping with his brother's death." Perel Decl. ¶15.

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reputation" (Compl. ¶29) because his personal and professional reputation is synonymous with drunkenness. If Shelton is unhappy with this reality, he only has himself to blame. It was Shelton who adopted "Drunk" as his signature sign off and it was Shelton who published hundreds of statements to millions of followers about how he gets drunk practically on a daily basis, even after record executives criticized him for doing so. Perel Decl. ¶21, Ex. F. And it was Shelton who told a CNN interviewer that "I drink alcohol and always will until I die and I don't care if you like it or not." *Id*. at ¶22. Against this backdrop, it is futile (and bizarre) for Shelton to sue *In Touch* for reporting the very same behavior he has staked his own reputation on.

In a case on similar facts to these, a California court granted a SLAPP motion to strike because plaintiff "failed to demonstrate any *substantial* falsity in the characterization 'Drunk and Chewin' tobaccy.'" *Vogel v. Felice*, 127 Cal. App. 4th 1006, 1021, 26 Cal. Rptr. 3d 350, 363 (2005). Although the plaintiff "denied being an alcoholic," he did not deny that "he consumed alcohol to the point of inebriation, or that he had done so often, or that he liked to do so[,]" which fatally undermined his libel claim. *Id*. Here, not only has Shelton made countless public statements that he drinks to excess, but Shelton has not challenged a litany of drunken incidents involving him published elsewhere or in the Article that are far more worrying than the statements he actually sues on. Specifically, Shelton does not challenge that "one night he was so obliterated, he urinated on a mailbox," that he "down[s] vodka before noon," that "he loves to get hammered and he'll be the first one to tell you that," that he "is known for being drunk at award shows," that his wife "videotaped his drunken antics… because he never believed or remembered what he did," that he "handl[es personal difficulties] with booze," or that he "drinks to the point where he slurs and stumbles." Perel Decl. ¶16.

Even assuming *arguendo* certain statements in the Article were untrue as Shelton claims, "[c]ourts have consistently rejected attempts to base damage claims

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on minor factual errors when the gist of the work, taken as a whole, cannot serve as the basis for a defamation claim." *Partington v. Bugliosi*, 56 F.3d 1147, 1161 (9th Cir. 1995). Therefore, Shelton cannot state a libel claim by disputing only some of the details in the Article because, according to his own words and deeds, the gist of the Article (*i.e.* that he drinks excessively) is true.

2. Shelton is Libel Proof Concerning his Excessive Drinking

Shelton's claim fails for the independent reason that he is libel proof against all statements (including false statements) that he drinks excessively. Courts have held that when "an individual engages in conspicuously anti-social or even criminal behavior, which is widely reported to the public, his reputation diminishes proportionately… [T]here comes a time when the individual's reputation for specific conduct… is sufficiently low in the public's estimation that he can recover only nominal damages for subsequent defamatory statements." *Wynberg*, 564 F. Supp. at 928.[10] In *Wynberg*, plaintiff was a paramour of Elizabeth Taylor's who had "established a specific reputation for taking financial advantage of [her]." *Id*. This reputation was cemented by numerous articles that appeared over the years, which plaintiff tolerated "without objection." *Id.* at 929. The consequence of fostering this peculiarly specific reputation was that plaintiff was deemed "libel proof" and the court found that he could not sue when a magazine subsequently reported that he had financially exploited Ms. Taylor. *Id*. at 928.

Here, Shelton has actively cultivated a reputation as a man who drinks to excess. Not only has he failed to challenge the innumerable reports about his drinking prior to the Article (Perel Decl. ¶17), but via his endless tweets about his drinking, with "Drunk" as his signature tagline, he publicly prides himself on

[10] *See also Hughes v. Hughes*, 122 Cal. App. 4th 931, 939, 19 Cal. Rptr. 3d 247, 253 (2004) ("[P]ast activities can support a conclusion that the statement in question is substantially true…"); *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 303 (2d Cir. 1986) ("[Plaintiff's] libel complaint fails because [plaintiff] was 'libel proof' with respect to the accusation of adultery printed in the… article.").

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drunkenness. *See* Perel Decl. ¶22 ("I drink alcohol and always will until I die and I don't care if you like it or not."). Nor does Shelton even challenge statement after statement in the Article, and reported elsewhere, about his excessive drinking. *Id.* Simply put, Shelton has established a "specific reputation" for drinking to excess and is libel proof as a result. *Wynberg*, 564 F. Supp. at 928.

3. The Article Contains Non-Actionable Opinion

The Statements that "Blake has hit rock bottom," that "Blake's drinking and womanizing are what helped torpedo his four year marriage to Miranda" and that his friends think he should go to rehab (Compl. 26(b), (g), (h)) are all statements of opinion that are "protected by the First Amendment and therefore not actionable." *Partington*, 56 F.3d at 1153(citation omitted); *Wynberg*, 564 at 927 ("Under the controlling laws of defamation, even opinions which criticize the character, habits, motives, and morals of an individual – without more – are non-actionable."). The Ninth Circuit has adopted a three part test for courts to apply to determine, as a matter of law, whether a statement is opinion: "(1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact, (2) whether the defendant used figurative or hyperbolic language that negates that impression and (3) whether the statement is susceptible of being proved true or false." *Partington*, 56 F.3d at 1153. All three factors support a finding here that these statements are opinion.

First, it is clear from the "general tenor" that the Article does not merely present a "dry description of the facts" but instead relies on "personal perspective[s]" from sources aware of the impact heavy drinking has had on Shelton's well-being and marriage, which weighs in favor of a finding of opinion. *Id*. at 56 F.3d at 1153. Readers readily understand that stories like the Article are based on the "personal perspectives" of those close to a celebrity and the Article itself makes that clear. Perel Decl. Ex. A . *See Phantom Touring v. Affiliated Publications*, 953 F.2d 724, 729 (1st Cir. 1992) (holding statements are protected in part because they are found

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"in the type of article generally known to contain more opinionated writing than the typical news report).

Second, "rock bottom" and "helped torpedo his four year marriage" are both textbook examples of rhetorical hyperbole. The Ninth Circuit has held that the "use of hyperbolic language strongly suggests that [a defendant] was not making an objective statement of fact." *Partington*, 56 F.3d at 1157; *see also Monge v. Madison County Record, Inc.*, 802 F. Supp. 2d 1327, 1335 (N.D. Ga. 2011) ("The Article's use of the word 'torpedo' is obvious hyperbole and rhetoric: [plaintiff] did not literally propel a torpedo…"). Further, "an opinion based on…disclosed facts is not actionable when the disclosed facts themselves are not actionable." *Dodds*, 145 F.3d at 1067; *see also Partington*, 56 F.3d at 1156 ("[W]hen a speaker outlines the factual basis for his conclusion, his statement is protected by the First Amendment."). As discussed above, the Article details numerous unchallenged facts about specific instances of Shelton's excessive drinking. Perel Decl. ¶16. These unchallenged statements substantiate the opinions that the sources have reached: that Shelton has a drinking problem and he should consider rehab.

Last, the opinions in the Article about Shelton's health and the breakdown of his marriage are not susceptible of being proven true or false. While Shelton may argue that the Statements in the Article that he has "hit rock bottom" or that his "friends are terrified that he could end up dead" are allegations of a medical fact (*i.e.* that he is an alcoholic), courts have specifically rejected this argument. When people without medical expertise make a comment about another individual's health, which is the case here, "the general public would not reasonably expect [the lay observer] to be making an observation which could be proven true or false in a medical sense." *Campanelli v. Regents of the Univ. of Cal.*, 44 Cal. App. 4th 572, 580, 51 Cal. Rptr. 2d 891, 896 (1996). Moreover, the statement that "drinking and womanizing helped torpedo" Shelton's marriage is not susceptible of being proved true or false, since the question of what may or may not have "helped" contribute to the end of a marriage is

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extremely subjective and complex. In such cases, courts "must allow, even encourage, [writers] to express their opinions concerning public controversies and those who become involved in them." *Partington*, 56 F.3d at 1159.

According to all three factors of the Ninth Circuit's balancing test, it is clear that these Statements are non-actionable opinions as a matter of law.

4. The Statements About Shelton's "Womanizing" in Cancun Are Not Actionable

Shelton also disputes that he "traveled to Mexico for a bachelor party where he partied with strippers, visited strip clubs, and got into a hot tub with two anonymous women," but these statements are not defamatory as a matter of law. Compl. ¶26. While reports of this kind of conduct may have once been considered defamatory, courts have recognized that times have changed and "many forms of sexual activity once regarded as particularly egregious are today thought of in many quarters as not justifying special legal condemnation." *Rangel v. Am. Med. Response West*, 09-cv-01467-AWI-BAM, 2013 U.S. Dist. LEXIS 59579, at *21-22 (E.D. Cal. Apr. 25, 2013) (citation omitted). In this day and age, it is simply not defamatory to report, as the Article does, that a recently divorced country music star accompanied friends to a strip club while on vacation and "partied" in a hot tub with multiple women.[11]

B. Shelton's Libel Claim Will Fail Because He Cannot Establish the Required Level of Fault

Assuming for the purposes only of this motion that Shelton could show that the Article includes false and defamatory Statements – which he cannot – he still

[11] Courts have increasingly recognized that there is nothing defamatory about reporting the sexual conduct of consenting and unattached adults. *See, e.g.*, *Bement v. N.Y.P. Holdings, Inc.*, 307 A.D.2d 86, 92, 760 N.Y.S.2d 133, 137-38 (1st Dep't 2003) (upholding dismissal of a libel claim where article claimed former beauty queen, "slept with" foreign officials while working as a CIA spy); *Freedlander v. Edens Broad, Inc.*, 734 F. Supp. 221, 227 (E.D. Va. 1990) ("in the context of today's social mores, [pre-marital cohabitation] cannot be said to [suggest] behavior involving moral depravity or deviation"), *aff'd*, 923 F.2d 848 (4th Cir. 1991); *Dellefave v. Access Temporaries, Inc.*, No. 99 Civ. 6098 RWS, 2001 WL 25745, at *2, *4 & n.1 (S.D.N.Y. Jan. 10, 2001) (stating "[unmarried] plaintiff was involved in a romantic and/or sexual relationship with a co-employee was not slander …").

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cannot establish a probability of prevailing because he cannot demonstrate by clear and convincing evidence that Bauer published the Statements knowing they were false or with serious doubts as to their accuracy.

1. Shelton is a Public Figure

There can be no dispute that Shelton is a public figure. Shelton's Complaint alleges that he is a "country music superstar" and "is also known for his role as judge and coach on the Emmy-winning television program, *The Voice*." Compl. ¶16. *See, e.g.*, *Cepeda v. Cowles Magazines & Broadcasting, Inc.*, 392 F.2d 417, 419 (9th Cir. 1968) (public figures "include artists, athletes, business people, dilettantes, anyone who is famous or infamous because of who he is or what he has done"); *Tavoulareas v. Piro*, 817 F.2d 762, 772 (D.C. Cir. 1987) ("well-known athlete or entertainer" is "archetype of the general purpose public figure"). Indeed, courts long have recognized individuals far less renowned than Shelton are public figures. *See, e.g.*, *Solano v. Playgirl*, 292 F.3d 1078, 1084 (9th Cir. 2002) (*Baywatch* actor Jose Solano was public figure); *Carafano v. Metrosplash.com*, 207 F. Supp. 2d 1055, 1071 (C.D. Cal. 2002) (*Star Trek: Deep Space Nine* actress Chase Masterson was public figure).

2. Shelton Cannot Establish that the Article Was Published with Actual Malice

The First Amendment imposes a heavy burden on a public figure who files a libel claim. A public figure must prove not only that the statement at issue is false and defamatory, but also that the defendant published the statement with constitutional "actual malice," that is "with 'knowledge that it was false or with reckless disregard of whether it was false or not.'" *Masson v. The New Yorker*, 501 U.S. 496, 510, 111 S.Ct. 2419, 2429, 115 L.Ed.2d 447 (1991) (citations omitted). "The standard of actual malice is a daunting one," *McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1308 (D.C. Cir. 1996), and is necessary to guarantee the "national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open[.]" *New York Times v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct.

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710, 721, 11 L.Ed.2d 686 (1964).

The actual-malice standard focuses exclusively on the defendant's subjective state of mind "at the time of publication." *Bose Corp. v. Consumer Union*, 466 U.S. 485, 512, 104 S.Ct. 1949, 1966, 80 L.Ed.2d 502 (1984). Courts consistently hold that "[k]nowledge of falsity means simply that the defendant was actually aware that the contested publication was false." *Woods v. Evansville Press*, 791 F.2d 480, 484 (7th Cir. 1986) (emphasis added). Similarly, to establish that a defendant published a statement with "reckless disregard" for the truth, a plaintiff must show "that the defendant actually had a 'high degree of awareness of … probable falsity.'" *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 688, 109 S.Ct. 2678, 2696, 105 L.Ed.2d 562 (1989) (emphasis added). "Reckless disregard" is not measured "by what a reasonably prudent man would have published, or would have investigated before publishing." *St. Amant v. Thompson*, 390 U.S. 727, 730-31, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968). "Mere negligence does not suffice" for actual malice, *Masson*, 501 U.S. at 510, nor does "an extreme departure from accepted professional standards of journalism[.]" *Newton*, 930 F.2d at, 669. Instead, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant*, 390 U.S. at 731.

As an additional safeguard, the First Amendment requires a public-figure defamation plaintiff to prove actual malice by "clear and convincing" evidence. *Anderson v. Liberty Lobby*, 477 U.S. 242, 255-57, 106 S.Ct. 2505, 2513-15, 91 L.Ed.2d 202 (1986). "Actual malice cannot be implied and must be proven by direct evidence," which must "be such as to command the unhesitating assent of every reasonable mind." *Beilenson v. Superior Court*, 44 Cal. App. 4th 944, 950, 52 Cal. Rptr.2d 357, 362 (1996). Where a plaintiff opposing an anti-SLAPP motion cannot meet his burden of establishing actual malice, his libel claim must be stricken. *See, e.g., Rosenaur v. Scherer*, 88 Cal. App. 4th 260, 275-78, 105 Cal. Rptr. 2d 674, 684-87 (2001); *Sipple v. Foundation for Nat. Progress*, 71 Cal. App. 4th 226, 248-

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250, 83 Cal. Rptr. 2d 677, 690-92 (1999); *Bradbury*, 49 Cal. App. 4th at 1117.[12]

a. The Complaint Fails to Adequately Plead Actual Malice

Although the California SLAPP law requires a plaintiff to show a probability of prevailing, Shelton fails to clear an even lower hurdle because the Complaint fails to state a cognizable claim of actual malice. "To state a claim for defamation, Plaintiff must allege facts to support each of the … elements of a defamation claim, including actual malice." *Jones v. Lehigh Southwest Cement Co.*, 1:12-cv-633-AWI/JLT, 2012 U.S. Dist. LEXIS 99953, *17 (E.D. Cal. July 18, 2012) (dismissing libel claim on 12(b)(6) motion). A complaint will be dismissed when it "does not provide any specific allegations that would support a finding that [defendant] harbored serious subjective doubts as to the validity of his assertions." *Wynn v. Chanos*, 75 F. Supp. 3d 1228, 1239 (N.D. Cal. 2014).[13]

Shelton has failed to plead actual malice with the requisite specificity. Instead, the Complaint states in conclusory fashion that "The Rehab Story was published with malice or, at minimum, a reckless disregard for the truth." Compl. ¶30. It is well settled that this sort of "conclusory" assertion will not satisfy the "demanding burden for pleading actual malice in defamation actions." *Id*. (quotation omitted). "General allegations that a defendant should have known or should have investigated the truth

[12] Courts repeatedly have granted special motions to strike defamation claims because the plaintiff failed to present clear and convincing evidence that the defendant acted with actual malice. *See*, *e.g.*, *Christian Research Institute v. Alnor*, 148 Cal. App. 4th 71, 55 Cal. Rptr. 3d 600 (2007); *Gilbert v. Sykes*, 147 Cal. App. 4th 13, 53 Cal. Rptr. 3d 752 (2007); *Ghufar v. Bernstein*, 131 Cal. App. 4th 1230, 32 Cal. Rptr. 3d 626 (2005).

[13] The courts of appeals in other circuits that have considered the issue have held that specific facts are required to adequately plead actual malice. *Biro v. Conde Nast*, 807 F.3d 541, 546 (2d Cir. 2015) ("[A] public figure must plead plausible grounds to infer actual malice by alleging enough facts to raise a reasonable expectation that discovery will reveal evidence of actual malice."); *Pippen v. NBC Universal Media, LLC*, 734 F.3d 610, 614 (7th Cir. 2013) (same); *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 58 (1st Cir. 2012) (same).

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of his or her statements do not adequately plead actual malice." *Wynn*, 75 F. Supp. 3d at 1239; *see also Beckham*, 2011 U.S. Dist. LEXIS 32269, at *4 ("[M]erely point[ing] to the fact that Defendants should have found more corroborating evidence" does not suffice to withstand SLAPP motion.).

The one non-conclusory factual allegation Shelton makes with regard to actual malice – that "Bauer did not even give Mr. Shelton notice of what it intended to publish" (Compl. ¶30) – is squarely contradicted by indisputable evidence. The editors of *In Touch* did in fact reach out to Shelton's representatives for comment before publishing the Article and these representatives failed to contradict the story in any way. Perel Decl. ¶10-12. In fact, they chose not to respond, which only furthered the editors' confidence in the story. *Id*. at ¶11.[14] Even if it were true that Bauer failed to reach out for comment, this fact is not sufficient to create a plausible inference that it subjectively believed the Article to be false or showed reckless disregard for the truth. *Sanders v. Hearst Corp.*, No. C 98-04554 MMC, 1999 U.S. Dist. LEXIS 23354, at *5 (N.D. Cal. Feb. 22, 1999) ("Plaintiff alleges that defendant did not call him to verify the story. Failure to verify, however, is inadequate as a matter of law to establish malice.").

b. A Wealth of Evidence and Research Supported Bauer's Belief in the Article and It Did in Fact Believe the Article Was True

Even assuming the Complaint had adequately pled actual malice (which it has not), Shelton cannot begin to meet his burden of demonstrating by clear and convincing evidence that Bauer subjectively believed the Article to be false or had serious doubts about its accuracy. The gist of each challenged Statement – that

[14] This Court "is not obligated to accept as true… allegations that contradict matters properly subject to judicial notice or by exhibit" and cannot credit Shelton's false allegation for this reason. *Wynn*, 75 F. Supp. 3d at 1239 (dismissing for failure to plead actual malice because the facts "directly contradict the other allegations in the complaint regarding… alleged fabrication and disregard for reliable information").

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Shelton drank heavily, people around him like his ex-wife believed he needed help, or that his drinking and partying with women contributed to his divorce – had been widely reported before the Article and was entirely consistent with the public persona Shelton had cultivated. As the Ninth Circuit has held, actual malice is not to be found where a "report did not come out of the blue" but rather built upon on unchallenged press reports already in the public domain. *Jackson v. Paramount Pictures Corp.*, 68 Cal. App. 4th 10, 34, 80 Cal. Rptr. 2d 1, 14 (1998). In *Jackson*, a report about a videotape allegedly showing Michael Jackson performing a sex act on a child was deemed to be published "in good faith" because it was corroborated by a prior article and because Jackson "had been the subject of a lengthy criminal investigation by the district attorney's office which was widely reported in the press." *Id*.

Bauer's editors were well aware of many press reports about Shelton's drinking issues and their impact on his marriage. Perel Decl. ¶¶15-23; Schwartz Decl. ¶7. Bauer was not the first to report that others had urged him to go to rehab or that his drinking had increased following his divorce from Lambert. Perel Decl. ¶¶23-24. ("Miranda Lambert Battling Husband Blake Shelton over his Boozing;" "Drowning His Sorrows! Blake Shelton on Booze Bender after Miranda Lambert Split…"). It had also been reported that Shelton's inappropriate behavior with women while under the influence of alcohol contributed to the breakdown of his marriage. Schwartz Decl. ¶7. Because the editors knew about these previously published reports "which *in their minds* directly and indirectly corroborated [their sources] allegations," there can be no actual malice. *McCoy v. Hearst Corp.*, 42 Cal. 3d 835, 854, 231 Cal. Rptr. 518, 530 (1986).[15]

[15] *See also D.A.R.E. America v. Rolling Stone Magazine*, 101 F. Supp. 2d 1270, 1283 (C.D. Cal. 2000)("Defendants' reliance on the accuracy of information contained in previously published material… is critical in light of the Supreme Court's admonition that mere negligence does not suffice to support a showing of actual malice.") (citation omitted), *aff'd* 270 F.3d 793 (9th Cir. 2001).

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Shelton's position is particularly untenable when Shelton himself is the source of the bulk of the statements that corroborate the gist of the Article: that he drank to excess. As the Ninth Circuit has found, Shelton "cannot fault [Bauer] for relying on his own statements" about his heavy drinking, to corroborate its reporting that friends have urged him to seek help. *Newton*, 930 F.2d at 684 (reversing jury verdict awarding libel damages because there was no actual malice). Even if Shelton were to now argue that his tweets and public statements were jokes or exaggerated, "[i]t would be ironical and certainly inequitable for the plaintiff to profit here from his own misstatements." *Id*. (quotation omitted).

In addition to the previously published articles that contained the same or similar information as the Statements and Shelton's own well-established reputation as a "Drunk," Bauer relied on a number of confidential and non-confidential sources for the particular information at issue. Before publication, Bauer's editors confirmed each and every detail of the Article that Shelton now disputes with multiple sources they deemed credible, who all provided specific details that corroborated the truth of the Statements. Schwartz Decl. ¶¶27-35; Perel Decl. ¶¶9-20. The fact that these sources were unnamed in the Article and are, in some cases, confidential does not diminish Bauer's right to rely on them. *See*, *Newton*, 930 F.2d at 675-76, 683 (no finding of actual malice where journalists corroborated details of story with information from "knowledgeable, confidential source with whom [reporter] had worked before and after" and a second "confidential source"); *DARE America*, 101 F. Supp. 2d at 1283 ("[R]elying on an author's representations about sensitive and anonymous sources is *de rigeur* in the publishing industry as a measure of respect for an author's resources and the privacy of persons volunteering sensitive information."); *Cerrito v. Time Inc.*, 302 F. Supp. 1071 (N.D. Ca. 1969). Shelton himself confirms that these same sources were credible by tacitly admitting much of the information they provided, including that he engaged in an "alcohol fueled rendezvous" with an anonymous hotel guest in Cancun (Schwartz Decl. ¶11), that his

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wife videotaped his blackouts (Perel Decl. at ¶16) and that "[o]ne night he was so obliterated, he urinated on a mailbox in public" (*id.*). Finally, contrary to what the Complaint alleges, Bauer did reach out to Shelton for comment and received no response or information to contradict the Article. In sum, Bauer indisputably believed the Statements were true and had good reasons for that belief. Schwartz Decl. ¶¶2, 21; Perel Decl. ¶¶2, 36. Shelton cannot demonstrate with clear and convincing evidence that Bauer had "knowledge that [the story] was false," *New York Times*, 376 U.S. at 280, or that Bauer had "a high degree of awareness… of probable falsity," as he must do to "establish reckless disregard." *Harte-Hanks*, 491 U.S. at 688.[16]

C. Shelton's False Light Invasion of Privacy Claim Will Not Prevail

The Supreme Court has made clear that a plaintiff may not avoid constitutional defenses to a defamation claim by restyling that claim as one for invasion of privacy, intentional infliction of emotional distress, or any other tort. *See, e.g.*, *New York Times*,376 U.S. at 269 (First Amendment protection does not depend on the label given to cause of action). Similarly, California courts hold that where the gravamen of a claim is the alleged falsity of the defendant's statement, the plaintiff cannot evade constitutional or statutory defenses by giving the claim a name other than defamation.[17]

[16] Shelton's denial that he had an affair with Cady Groves (which appeared in a totally separate article) did not put Bauer "on notice" with regards to stories about his marital infidelity generally. Actual malice "cannot be predicated on mere denials, however vehement," because "such denials are so commonplace… that, in themselves, they hardly alert the conscientious reported to the likelihood of error." *Edwards v. Nat'l Audubon Society*, 556 F.2d 113, 121, (2d Cir. 1977); *see also*, *Robertson*, 36 Cal. App. 4th at 359 (rejecting "boilerplate denial of wrongdoing" as evidence of actual malice).

[17] *See, e.g.*, *Partington*, 56 F.3d at 1160 (rejecting duplicative false light claim "for the same reason that we rejected… defamation claims based on those statements: both statements are protected by the First Amendment regardless of the form of tort alleged"); *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 694 (9th Cir. 1998) (same).

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This basic principle is codified in California's Uniform Single Publication Act, California Civil Code § 3425.3, which provides that "[n]o person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one issue of a … magazine[.]" Under this rule, multiple causes of action founded upon the alleged falsity of a single publication or broadcast must all be dismissed together. *Id.*; *see also Baugh v. CBS, Inc.*, 828 F. Supp. 745, 756 (N.D. Cal. 1993) (same). Here, the Complaint contains a tag along cause of action for false light invasion of privacy that is based on the *same* alleged facts as Shelton's libel claim, specifically the allegedly false Statements at issue. *See* Compl. ¶50. Indeed, with the exception of one paragraph (*id.*) and a few superficial differences, Shelton's false light cause of action is identical to his libel claim. *Compare* Compl. ¶¶33-44 with ¶¶45-56. Therefore, Shelton's false light claim must be dismissed for the same reasons as his libel claim, including his failure to establish actual malice and substantial truth, which are both necessary elements.

V. CONCLUSION

Shelton cannot show a probability of success on either of his libel or false light claims. Accordingly, Bauer respectfully requests that the Court grant this Motion and strike Shelton's Complaint.

DATED: February 26, 2016

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