

C.A. No. 09-55087

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FREDERICK K.C. PRICE

Plaintiff and Appellant,

vs.

JOHN STOSSEL; GLENN RUPPEL;
AMERICAN BROADCASTING COMPANIES, INC.;
OLE ANTHONY AND TRINITY FOUNDATION, INC.

Defendants and Appellees.

Appeal From The United States District Court
For The Central District of California
Honorable R. Gary Klaunser, Judge Presiding
D.C. No. CV 08-03936RGK-FFM

**APPELLANT'S OPENING BRIEF
PROPOSED ADDENDUM
(Subject to Pending Motion for Leave to File)**

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JURISDICTIONAL STATEMENT

District Court Jurisdiction. The district court had diversity subject matter jurisdiction under 28 U.S.C. § 1332. ER 25-26 ¶¶ 9-12, 16; ER 48-49 ¶¶ 10-11, 16; ER 63 ¶¶ 12, 16.

Appellate Jurisdiction. The district court entered a final judgment of dismissal. ER 298. This court has jurisdiction under 28 U.S.C. § 1291.

The district court entered judgment on January 9, 2009, and Rev. Price timely appealed twelve days later, ER 298, 305 (Vol. II);¹ Fed. R. App. P. 4(a).

¹ All cited Excerpt of Record pages appear in Volume I unless otherwise indicated.

ISSUES PRESENTED

1. Under de novo review and viewing the evidence most favorably to the plaintiff, could a reasonable juror conclude that television news broadcasts misrepresenting a video clip of a minister's sermon about a hypothetically wealthy but spiritually unfulfilled person as the minister "boast[ing]" about his own wealth constitutes an "exact quotation [taken] out of context [to] distort meaning" and thereby actionable defamation under *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 515, 111 S. Ct. 2419, 2432, 115 L. Ed. 2d 44 (1991)?

2. Under de novo review and viewing the evidence (including expert linguistic analysis) most favorably to the plaintiff, could a reasonable juror find that television news broadcasts that:
 - juxtaposed a minister "preach[ing] giving to God" and a church member's opinion that "money is being put to excellent use" with the minister purportedly "boast[ing]" about his wealth;
 - portrayed the minister as leading a "Lifestyle of the Rich and Famous";
 - asked how "much of what you give do they keep for themselves?";
 - proffered an expert opinion that donors were being "hosed" by not being told how donations are spent;
 - purported to "take on the case"; and
 - purported to say "Enough!"

insinuated that the minister is (a) hypocritical, (b) deceives donors, (c) is not transparent in his financial dealings, (d) misappropriates church funds for personal gain, (e) engages in criminal activity (embezzlement, larceny by false pretense, RICO violations) or (f) otherwise acts dishonestly? If so, can such implied accusations coupled with an admittedly false exaggeration of the minister's wealth constitute either objectively false facts or "expressions of 'opinion' . . . imply[ing] an assertion of objective[ly] [false] fact" that are actionable defamation under *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18, 110 S. Ct. 2695, 2705, 111 L. Ed. 2d 1 (1990)?

3. As an issue for en banc review: Is a California Code of Civil Procedure section 425.16 anti-SLAPP motion to strike proper in a federal court diversity action?²

² "SLAPP is an acronym for 'strategic lawsuit against public participation.' The anti-SLAPP statute permits summary dismissal of actions 'arising from any act of [the defendant] in furtherance of the person's right of petition or free speech' unless the plaintiff can show a probability of success on the claim." *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 927 n.2 (9th Cir. 2006) (citations omitted).

INTRODUCTION

“Half a truth is a whole lie.”

Leo Rosten, *Leo Rosten’s Treasury of Jewish Quotations*, 462
(Bantam Books 1972).

“A lie which is half a truth is ever the blackest of lies.”

Alfred Lord Tennyson, “The Grandmother” (1864), *available at*
[http://www.everypoet.com/archive/poetry/Tennyson/tennyson_](http://www.everypoet.com/archive/poetry/Tennyson/tennyson_contents_the_grandmother.htm)
[contents_the_grandmother.htm](http://www.everypoet.com/archive/poetry/Tennyson/tennyson_contents_the_grandmother.htm) (last visited July 9, 2009).

In a series of broadcasts culminating in a “20/20” news magazine broadcast, ABC either directly claimed, or strongly insinuated, that plaintiff Reverend Frederick Price is a hypocrite who preaches poverty but who has obtained great personal wealth by misappropriating funds from his church without telling donors. Painting Rev. Price as vain and arrogant, ABC juxtaposed one church member’s statement that she believes her “money is being put to excellent use” with the immediate rejoinder, “[a]nd yet her pastor, Fred Price, boasts” about his great wealth, playing a video clip of Rev. Price purportedly doing just that. The video clip made the accusation particularly powerful because the evidence of pride and arrogance apparently came from Rev. Price’s own words, voice, intonation and gestures.

Only ABC did not tell the full story. The video clip of Rev. Price that ABC played was not (as it knew) Rev. Price talking about himself, but giving a sermon or parable about a hypothetical immensely wealthy but spiritually unsatisfied individual. Rev. Price was not “boasting” about himself, he was making a rhetorical point about others. Although Rev. Price freely discusses his prosperity (which is not to the exaggerated level of his sermon’s example) he does so humbly, not boastfully. Boasting is as much about how something is said as what is said. ABC knowingly lied about how Rev. Price discusses his prosperity.

Nor did ABC tell the whole story about Rev. Price’s integrity and forthrightness. Its broadcasts undoubtedly paint Rev. Price as a hypocrite and deceiver. They assert that his prosperity is at odds with what ABC insinuates he preaches is a “godly life” in which it is “difficult . . . for the wealthy to reach heaven.” But what ABC did not tell its viewers—but readily proffers in court—is that Rev. Price preaches a “prosperity gospel” in which he openly speaks of his material prosperity as consistent with a godly life and as a blessing from God. And, despite ABC’s contrary accusation, he and his church regularly disclose financial arrangements to the congregation. Again, ABC used a half-truth—that Rev. Price admits to personal affluence—to paint a distorted picture of a hypocrite and deceiver that it knew to be false.

And that’s not all. Touting that “John Stossel is here to say ‘enough’” “and is ‘taking on the case,’” ABC news anchors, with voices full of incredulity, outrage, shock, and scandal, all but expressly accused Rev. Price of stealing from

church coffers and defrauding church members. Stossel's report confirms the impression by harping on Rev. Price's financial good fortune and supposed secret financial dealings and proffering a featured guest, an "expert," who proclaims that "donors are being hosed" because they "don't know" what is going on and stating that there is a "very high probability that something is wrong there." In tone and calculated effect ABC's broadcasts suggested an undisclosed factual basis for concluding that Rev. Price's affluence is ill-gotten.

ABC wrongly, knowingly, and without justification stained Rev. Price's reputation and deprived him of the good name which, as a religious minister, is his stock in trade. Its sensationalized, inaccurate portrayal, presented under the guise of news reporting, exemplifies the out of context distortions, misleading factual half-truths, and implied factual allegations that the Supreme Court in *Masson* and *Milkovich* held the First Amendment does *not* protect.

The district court erred in holding otherwise. Its dismissal of Rev. Price's lawsuit should be reversed.

STATEMENT OF THE CASE

A. Reverend Price Sues ABC, Reporter John Stossel And Others For Defamation Arising Out Of A Derogatory “20/20” Broadcast And Various Promotional “Teaser” Broadcasts.

Plaintiff Reverend Frederick K.C. Price sued ABC, reporter John Stossel, producer Glenn Ruppel and others (collectively ABC) for defamation and intentional infliction of emotional distress. ER 21-40. Reverend Price’s claims arise from an ABC “20/20” news magazine broadcast report entitled “Enough!” and ABC’s “Good Morning America” broadcast of promotional teasers and a mini-report plugging the “20/20” report. ER 23-24, 27-31; *see* ER 47-49.³

The Teasers and Mini-Report. On March 23, 2007, ABC’s “Good Morning America” news program “teased” a “20/20” broadcast to air that evening, entitled “Enough!” hosted by John Stossel. “Good Morning America” ran five teasers that morning, each showing footage of Rev. Price and others, while show host Diane Sawyer commented:

- “6 million dollar yachts, private jets, Rolls Royces - sound like the good life? What about the godly life? John Stossel takes us inside the lives of some preachers and says ‘[E]nough’.” ER 27-28 ¶ 22(a), 149.

³ The entirety of the broadcasts appear at ER 140-56 (transcripts), 204, 206 (video); a CD-ROM conditionally accompanies this brief as an addendum subject to the panel’s determination of the pending motion for leave to file it with the brief. *See also* ER 42.

- “Look at these mansions; this Rolls Royce. Think they’re owned by moguls? No they’re owned by preachers. And John Stossel is here to say ‘[E]nough’.” ER 28 ¶ 22(b), 150.
- “Does this look like something out of ‘Lifestyles of The Rich and Famous’? If you think so, you are wrong.” John Stossel has said “Enough!” and is “taking on the case.” ER 28 ¶ 22(c), 151.
- “Mansions, yachts, Rolls Royces—the jet set life? Guess again. This is how some major league preachers really live. John Stossel is here to say ‘Enough’.” ER 28-29 ¶ 22(d), 152.

The final “Good Morning America” teaser was a 2 minute mini-report. The words “MINISTERS WITH MANSIONS AND ROLLS ROYCES” appeared at the bottom of the screen in block capital letters throughout the teaser. “Good Morning America” co-anchor Robin Roberts began by saying, “The bible discusses how difficult it is for the wealthy to reach heaven, but that hasn’t stopped some preachers from attaining vast fortunes.” John Stossel then explained that “20/20” that night would feature a man who investigated church finances because he believed the preachers “are squandering our money.” ER 29-30 ¶ 22(e), 153.

As footage of several preachers making requests for donations was shown, Stossel asked if the donors’ money is going to good use. Then “Good Morning America” shows Rev. Price’s church service, followed by a church member saying that she knows that her money is “being put to excellent use.” Mr. Stossel

immediately interjects, “And yet her pastor, Fred Price, boasts that (a video clip of a portion of a 1997 sermon is then shown with Rev. Price appearing to personally say) ‘I live in a 25 room mansion, I have my own 6 million dollar yacht, I have my own private jet and I have my own helicopter and I have 7 luxury automobiles, . . .’” While showing a close up of a Rolls Royce, Mr. Stossel continues: “At least he tells people about it. But many preachers don’t advertise how well they live . . .” Co-anchor Roberts then says that “20/20” will focus on people who have said that “this has to stop.” ER 29-30 ¶ 22(e), 153-55.

The 20/20 Broadcast. That evening ABC aired its “20/20” news program with Stossel’s segment entitled “Enough!” Mr. Stossel began by asking rhetorically, “They preach the gospel of giving to God. But how much of what you give do they keep for themselves? Is it time for someone to say enough?” ER 30 ¶ 22(f), 143; *see also* ER 142-43 (“Announcer: When ‘20/20’ returns, they’re raking in a fortune from the faithful. . . . But God only knows how all that money is spent. John Stossel: So you call up and say ‘I’d like to know where your money is going.’ And they say, ‘Go to hell?’”) In the piece, he focuses on the extravagance of certain preachers and shows Rev. Price’s church service in progress. ER 30 ¶ 22(f), 142-47, 204.

The “20/20” broadcast repeats the previously “teased” segment where one of Rev. Price’s church’s members states that she knows that her money is “being put to excellent use” with Mr. Stossel immediately interjecting, “And yet her pastor, Fred Price, boasts that [using the 1997 sermon clip] ‘I live in a 25 room mansion, I

have my own 6 million dollar yacht, I have my own private jet and I have my own helicopter and I have 7 luxury automobiles,” showing a close up of a Rolls Royce. ER 30 ¶ 22(f), 143, 206.

Mr. Stossel presents a supposed expert, Rusty Leonard, who states that “donors are being hosed” by not being told how their money is spent. ER 30 ¶ 22(f), 145. Leonard puts Rev. Price on a list of “bad guys” failing his test for financial disclosure and that there exists a “high probability that there is something wrong there.” ER 146, 290.

The complaint alleges that the video clip of Rev. Price was, in fact, part of a sermon where Rev. Price was speaking about a hypothetical person and not himself and distorts Rev. Price’s humility and financial situation. ER 23, 30-31 ¶ 23; *see* ER 134-35, 138, 158. It further alleges that the other implications of ABC’s broadcasts—that Rev. Price is a hypocrite, that he defrauds donors, that he misappropriates and does not openly account for church funds, that he is dishonest—are all false. ER 30-31 ¶¶ 23, 25(a). It alleges that ABC either knew the statements—express and implied—were false or recklessly broadcast them. ER 34-37 ¶ 27.

B. ABC Thwarts Reverend Price’s Discovery Of Its Intent.

Rev. Price initiated discovery to confirm the message that ABC intended to communicate and that ABC knew that its accusations were false when made. *See* ER 72-73, 83-84, 93-94; Dk. 39. ABC refused to comply asserting that it intended

to bring an anti-SLAPP motion limited to the ground that no statement made was provably false and that therefore any evidence as to the meaning it intended to communicate via its broadcasts was, for the moment, irrelevant. ER 89-92; *see* ER 103. The district court refused to compel discovery on the ground that ABC's intent was irrelevant to the sole ground—falsity—to which ABC would limit its anti-SLAPP motion. ER 211-23, 288.

C. ABC's Statutory California Anti-SLAPP Motion.

ABC moved to dismiss the action under California Code of Civil Procedure section 425.16 (the "anti-SLAPP" statute).⁴ ER 110. It limited its motion to the sole ground that Rev. Price allegedly could not establish the falsity or provable falsity of the accusations or innuendos its broadcasts made against him. ER 112 & n.9, 113, 293 & n.2.

ABC tendered its broadcasts, confirming their content as alleged. ER 142-55, 204, 206. It admitted that it had broadcast out of context Rev. Price's sermon about a hypothetical person, *not* himself, and had represented it as showing Rev. Price boasting about his own assets. ER 111 & n.7, 134-35, 138, 158. ABC further admitted that Rev. Price's church contends that it pays Rev. Price a salary commensurate with his duties and openly shares its financial information. *Id.*

⁴ The anti-SLAPP statute requires early dismissal of certain defamation and related claims unless the plaintiff can present a prima facie evidentiary case at the outset of the lawsuit. See footnote 2, *supra*,

Nonetheless, ABC asserted that the “gist” or “sting” of its broadcast was true because Rev. Price is prosperous (even if he does not own the assets represented) and he publicly proclaims his prosperity. Dk. 52 at 19. It asserted that any other accusation or implication in the broadcasts was non-actionable opinion protected by the First Amendment. *Id.* at 20-21.

D. The Falsity Evidence.

ABC itself presented evidence that Rev. Price, personally and through his church, denied any financial improprieties and asserted that, in fact, his church’s financial books were open and made available to the congregation. ER 111 n.7, 118 ¶ 12, 134-35; *see also* ER 119 ¶ 21, 138, 158, 209, 262 ¶ 6.

ABC also presented Rev. Price’s full 1997 sermon, the sermon it had selectively played. In it Rev. Price speaks of a hypothetical man, not his personal wealth. ER 209 at 3:17-4:53; *see* ER 119 ¶ 21, 279-80 ¶ 3. Rev. Price denied that he owned the assets referred to in his sermon—a 25-room mansion, a yacht, a helicopter, seven automobiles, or a private jet. ER 252.

ABC attached various exhibits to the effect that Rev. Price admitted owning a beautiful home, a luxury automobile and an expensive watch. ER 172, 199, 210; *see* ER 163. Those documents further explain, however, that Rev. Price publicly professes that it is “almost embarrassing” how material wealth comes to him and his wife as a result of God’s beneficence. ER 195; *see also* ER 199 (“The upshot of the thing was that the Lord gave us a beautiful home”), 210 (audio files 4&5)

(“How in the world could you walk into a palatial house up on the hill that is paid for, you got a Rolls Royce sitting in front of the house, its paid for, how in the world could you forget God? How could you forget the Lord is the one who gave you that?” “Everywhere I look I see God. . . . I look at my arm, I look at my watch to see what time it is, I have to remember God, God is the one who gave me that watch, didn’t pay a dime for it, God gave it to me. . . . that watch cost \$8,500”).

ABC’s evidence further outlines Rev. Price’s “prosperity gospel” that God rewards in this life righteous believers with material benefits. ER 163 (“The pastor points to his own wealth, including his luxury home and cars, as living proof that the message is true”), 178-89, 201 (“God’s financial plan has a twofold purpose. First, it is to provide our own material, physical, and financial needs. Second—and this is equally as important as the first—it is to finance the proclamation of the Gospel. Deuteronomy 8:18 tells us that God gives us power to get wealth, so that He may establish His covenant. He wants us to prosper as individuals—and in our prospering, the family of God will prosper.”).

Edward Finegan, a linguistics professor at the University of Southern California, reviewed the ABC broadcasts and opined that their tone and vocal expression, especially of the teasers and mini-report, was “nothing short of sensational . . . creat[ing] a sense of incredulity, shock, and scandal” ER 243 ¶ 19. He further opined that a reasonable viewer would conclude, based on ABC’s presentation, that Rev. Price was “deceitful, hypocritical,” had “duped”

“hoodwinked” and “deceived” church members, “misappropriat[ing] the donations,” and “had illegitimately taken millions of dollars from his unsuspecting parishioners to sustain a lavishly exorbitant lifestyle.” ER 239 ¶¶ 6, 8, 241 ¶¶ 13-14, 242-43 ¶¶ 16, 18-19, 244 ¶ 23, 246-47 ¶ 29. He opined that the entire tone of the broadcasts was one of “outrage and . . . scandal [at] the deceit by which contributors are duped by the preachers.” ER 245 ¶ 25.

Various viewers also declared that they understood the broadcasts as implicitly labeling Rev. Price an “arrogant and duplicitous man” and a “thief” and “greedy crook” who had stolen church funds or the donations of unsuspecting church members to support his lifestyle and that ABC “wouldn’t air such a story unless they had proof.” ER 255-56 ¶ 4, 258 ¶ 3(b), 262 ¶ 6, 265 ¶ 4, 269 ¶ 3, 274 ¶ 4, 277 ¶ 4, 282-83 ¶¶ 3-4, 286 ¶¶ 3, 6.

E. The District Court Holds That ABC’s Accusations And Insinuations Are Not Provably False And, Hence, Not Actionable Under The First Amendment, Entering Judgment For ABC.

The district court summarized Rev. Price’s position as asserting “that the ABC [b]roadcasts, taken as a whole, falsely imply that Plaintiff is a ‘corrupt and vain preacher who has engaged in unethical/criminal conduct to support his lifestyle and is arrogant enough to openly boast of his conduct to his parishioners.’” ER 296. For the most part, it agreed: “In reviewing the broadcasts as a whole, including both audio (text and tone) and visual, [it found] that a

reasonable person could conclude the interpretation [Rev. Price] proffers, but without the criminal component.” *Id.*⁵

Likewise, the district court agreed with Rev. Price that “[i]t is well-established that ‘if the defendant juxtaposes a series of facts so as to imply a defamatory connection between them, or otherwise creates a defamatory implication, he may be held responsible for the defamatory implication, even though the particular facts are correct.’” *Id.* (citation omitted).

The district court further agreed that, “[a]s [ABC] admit[s,] the [video] Clip [of Rev. Price preaching] was presented out of context. Specifically, the Clip was an excerpt of a sermon Plaintiff gave ten years earlier regarding a hypothetical man with great material wealth, but an emotionally and spiritually unhappy life. The portions of the sermon that provided such context were omitted from [ABC’s broadcasts].” ER 294. It also noted that “the level of wealth between the person described by the Clip, and the person described by the evidence [i.e., Rev. Price], may differ in magnitude.” ER 295.

Nonetheless, it concluded that, in its view, Rev. Price “lives a surprisingly and uncommonly wealthy, luxurious material lifestyle relative to his profession as

⁵ Inconsistently with such a “broadcasts as a whole” approach, the district court concurrently assumed that Rev. Price limited his claims to three specific statements. ER 293. That’s clearly wrong. Rev. Price challenged the broadcasts as a whole and their multiple accusations and implications. ER 237-87 (evidence addressing gist of broadcasts as a whole); ER 224-36 (arguing that broadcasts implied arrogant, self-condemnatory boasting, vanity, deceitful, hypocritical behavior, stealing, and misappropriation of donations and moneys and that they must be considered as a whole rather than segregating out specific statements).

a minister.” *Id.* That coupled with Rev. Price’s role “as an advocate and minister of the ‘prosperity gospel,’ . . . [who] openly touts his own material prosperity,” in the district court’s opinion, made ABC’s portrayal of Rev. Price boasting about undue wealth—including “the manner and expression of the [sermon video] Clip, as well as the attribution of the statement being made by [Rev. Price]”—to be “substantially true.” *Id.* at 295-96.

The district court held that the remainder of the ABC broadcasts’ aspersions, which it generalized as accusing Rev. Price of “corrupt,” but not criminal conduct, were “expressions of subjective judgment, too vague to constitute provably false assertions of fact.” ER 297 & n.5. It so concluded even though it found that “the general tenor of the entire work tends to create the impression that [ABC was] asserting an objective fact; and . . . [ABC did] not use sufficient figurative or hyperbolic language to negate that impression.” ER 297.

The district court entered a judgment of dismissal in favor of all defendants. ER 299. It thereafter awarded ABC \$170,865 in attorney’s fees under California Code of Civil Procedure section 425.16, subdivision (c). Dk. 99. The attorney fee award is the subject of a separate appeal, no. 09-55464. *See* Dk. 100.

STATEMENT OF FACTS

The relevant facts are set forth in the preceding Statement of the Case. The actual broadcasts are not disputed. *See* ER 42, 142-47, 149-56. The district court's description of the broadcasts confirms this. ER 289-92. As discussed above, ABC expressly limited its motion to falsity, substantial truth, and provable falsity; accordingly, for present purposes it must be presumed that ABC's broadcasts had specific negative connotations which ABC, in fact, intended.

SUMMARY OF ARGUMENT

The district court's grant of an anti-SLAPP motion is reviewed de novo. All evidence and inferences are construed most favorably to the appellant. The sole question is whether *a reasonable juror* could find that ABC made *false factual* assertions. A reasonable juror could find ABC's broadcasts factual and false in the following ways:

- The broadcasts expressly portray Rev. Price as boastful of his wealth. ABC argued that is substantially true because Rev. Price readily and publicly admits his prosperity and lives a good, indeed, privileged life. But living a good life and "boasting" about it are two different things. Although Rev. Price proclaims his prosperity, a reasonable juror could well find that he is not boastful about it in the way ABC misleadingly portrayed. ABC's broadcasts omit describing *why* Rev. Price proclaims his good life and how he represents its source. Rev. Price's belief and message are that God has rewarded him for being righteous; he is not boastful about his wealth as a personal attribute but as a reflection of God's glory. It is one thing to unqualifiedly boast about privilege, it is quite another to humbly give thanks to a Supreme Being.

- A reasonable juror could well view the ABC broadcasts as painting Rev. Price as a hypocrite who preaches poverty but leads the good life. But the ABC broadcasts critically omit Rev. Price's "prosperity gospel" that God recognizes and rewards in this life those who are true to Him. So understood, Rev. Price's personal prosperity is entirely consistent with his avowed and very public

preaching. But ABC did not say that. It strongly intimated the contrary. A reasonable juror could find that misleading and false.

- A reasonable juror could find that the ABC broadcasts asserted that Rev. Price was not transparent in his financial dealings with his church. That was untrue. Likewise, a reasonable juror could find false the implied accusation that Rev. Price deceived and defrauded donors and church members.

- ABC's misuse of Rev. Price's sermon tape falsely attributed substantially greater assets to Rev. Price than he owns. ABC, nonetheless, argued that because Rev. Price is prosperous its exaggeration should not matter. A reasonable juror could conclude that the difference in degree portrayed is material. In addition, ABC's portrayal was that Rev. Price was boasting about assets that he does not own. Rev. Price has never done so and the portrayal of him inflating his worth is false.

- A reasonable juror, assisted by the undisputed expert linguistic analysis and viewers' actual understandings, could well find that ABC's broadcasts falsely accused Rev. Price of fraudulently obtaining donations and illegitimately misappropriating funds given to his church, thereby committing crimes—e.g., embezzlement and larceny by false pretense.

- Even if no crime could be implied, a reasonable juror could find that ABC's broadcasts' implied assertion that Rev. Price is dishonest—illegitimately and deceptively obtaining, misappropriating or diverting funds to his own personal use—is a factual claim that can be proven false, not mere subjective opinion.

Finally, Rev. Price reserves for en banc review whether a state-law anti-SLAPP motion procedure is proper in this federal court diversity action.

ARGUMENT

I. STANDARD OF REVIEW: THIS COURT REVIEWS DE NOVO THE GRANT OF AN ANTI-SLAPP MOTION, CONSTRUING ALL EVIDENCE IN REVEREND PRICE'S FAVOR.

A. This Court Reviews De Novo Whether A Reasonable Juror Could Construe The Broadcasts As Provably False.

“A district court’s grant of a special motion to strike under California’s anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16, is . . . reviewed de novo.” *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 676 (9th Cir. 2005).

The question is *not* whether this court might agree with the district court’s “assessment that each of the[] statements [at issue] is properly interpreted as an assertion of opinion rather than fact” but rather whether “a reasonable factfinder could disagree with that assessment.” *Manufactured Home Cmtys., Inc. v. County of San Diego*, 544 F.3d 959, 964 (9th Cir. 2008). Unless this Court can “declare as a matter of law that no reasonable person could construe [the statements at issue] as provably false,” it must reverse the grant of the anti-SLAPP motion. *Id.*; *Metabolife Int’l, Inc. v. Wornick*, 264 F.3d 832, 840 (9th Cir. 2001) (like nonsuit or a directed verdict, an anti-SLAPP motion may only be granted “when ‘no reasonable jury’ could find for the plaintiff”).

“The critical determination is whether the allegedly defamatory statements ‘convey[] a false factual imputation.’ . . . [I]f the challenged statement or statements are ‘reasonably susceptible of an interpretation which implies a

provably false assertion of fact,’ then they may be considered by the jury ‘to determine whether such an interpretation was in fact conveyed.’” *Manufactured Home*, 544 F.3d at 963 (citations omitted); see *Nygaard, Inc. v. Uusi-Kertulla*, 159 Cal. App. 4th 1027, 1048, 72 Cal. Rptr. 3d 210, 226 (2008).

B. This Court Must Construe All Facts And Inferences In Reverend Price’s Favor.

This court must “not weigh the evidence, but accept[s] as true all evidence favorable to the plaintiff.” *Consumer Justice Ctr. v. Trimedica Int’l, Inc.*, 107 Cal. App. 4th 595, 605, 132 Cal. Rptr. 2d 191, 197 (2003); see generally *Manufactured Home*, 544 F.3d at 963-65; *Mann v. Quality Old Time Serv., Inc.*, 120 Cal. App. 4th 90, 105-06, 15 Cal. Rptr. 3d 215, 223 (2004) (court may not “weigh the . . . comparative probative strength of competing evidence”).

The standard of proof is comparable to summary judgment or nonsuit. “A plaintiff is not required ‘to prove the specified claim to the trial court; rather, so as to not deprive the plaintiff of a jury trial [right], the appropriate inquiry is whether the plaintiff has stated and substantiated a legally sufficient claim” *Mann*, 120 Cal. App. 4th at 105, 15 Cal. Rptr. 3d at 223 (citations omitted); *Rogers v. Home Shopping Network, Inc.*, 57 F. Supp. 2d 973 (C.D. Cal. 1999) (section 425.16 special motion to strike governed by Fed. R. Civ. P. 56 summary judgment evidentiary standards). A plaintiff need only make “a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the

plaintiff is credited.” *Metabolife*, 264 F.3d at 840 (citation omitted); *Navellier v. Sletten*, 29 Cal. 4th 82, 88-89, 124 Cal. Rptr. 2d 530 (2002) (citation omitted).

Crediting all of plaintiff’s evidence is constitutionally required. Otherwise, defamation plaintiffs subject to the anti-SLAPP regime would be denied their Seventh Amendment jury trial right. “[T]he potential deprivation of jury trial that might result were these statutes construed to require the plaintiff first to prove the specified claim to the trial court, [requires courts to] read the statutes as requiring the court to determine only if the plaintiff has stated and substantiated a legally sufficient claim.” *Rosenthal v. Great W. Fin. Sec. Corp.*, 14 Cal. 4th 394, 412, 58 Cal. Rptr. 2d 875 (1996) (citations omitted).

Courts “consider the defendant’s opposing evidence, *but only to determine if it defeats the plaintiff’s showing as a matter of law.*” *Ross v. Kish*, 145 Cal. App. 4th 188, 197, 51 Cal. Rptr. 3d 484, 492 (2006) (emphasis added, citations omitted).

C. Plaintiff’s Evidence To Be Credited Includes Expert Linguistic Testimony As To How A Reasonable Viewer Would Understand The Broadcasts And Viewers’ Testimony As To Their Understanding Of The Broadcasts’ Intended Meaning.

A linguistics expert—Professor Finegan here—can explain such things as “how certain rhetorical devices or patterns of speech convey implicit meaning” and can “appl[y] these techniques to the broadcasts in dispute and elucidate[] how the

context, juxtaposition of certain pieces of information, the choice of words, and the tone and inflection of the speakers, were likely to affect the viewer's understanding of what was being said expressly and implicitly. [¶] Although the average juror no doubt could also listen to the broadcasts and understand their meaning, he or she is not as well equipped as is a linguist to explain the disparity between the words expressly stated and the implicit meaning conveyed. To the extent that linguistics provides a method to articulate how and why the broadcasts implied [false factual assertions], it may . . . aid[] the jury in identifying the evidentiary basis of the implicit meaning they perceived." *Weller v. Am. Broad. Cos.*, 232 Cal. App. 3d 991, 1008, 283 Cal. Rptr. 644 (1991); *see also Montandon v. Triangle Publ'ns, Inc.*, 45 Cal. App. 3d 938, 945, 120 Cal. Rptr. 186, 190 (1975) (similar expert linguistic testimony on meaning introduced). Accordingly, such expert testimony of meaning must be credited on an anti-SLAPP motion.

Likewise, if a speaker intends a particular meaning and that meaning is so understood by viewers, that meaning must be accepted even if it is not apparent to a court. "If the maker of the communication intends to defame the other and if the person to whom it is made so understands it, the meaning so intended and understood is to be attached to it. This is true although the meaning is so subtly expressed that the ordinary person would not recognize it." Restatement (Second) of Torts § 563 cmt. b (1976); *see MacLeod v. Tribune Publ'g Co.*, 52 Cal.2d 536, 551, 343 P.2d 36 (1959) (per Traynor, J., intended defamatory meaning actually so understood suffices regardless of possible innocent interpretation). Because ABC

and the district court foreclosed any discovery as to ABC's intent—discovery that would otherwise be available under *Metabolife*, 264 F.3d at 845—it must be presumed that ABC intended any implication that, in fact, was understood by viewers, no matter how “subtly expressed.” Thus, the viewers' understanding of ABC's broadcasts must be credited on this anti-SLAPP motion as the actual meaning of those broadcasts. *See* ER 255-56 ¶ 4, 258 ¶ 3(b), 265 ¶ 4, 269 ¶ 3, 274 ¶ 4, 282-83 ¶¶ 3-4, 286 ¶¶ 3, 6.

The district court brushed off the expert and viewer declarations of meaning as “not provid[ing] any assistance in determining [the] issue.” ER 296 n.4. To the extent that the declarations go beyond what a reasonable juror would have to conclude from the face of the broadcasts, they are relevant and must be credited. Expert linguistic evidence assists in determining the meaning that a reasonable juror could find conveyed by the various rhetorical devices ABC employed. *Weller*, 232 Cal. App. 3d 991, 283 Cal. Rptr. 644. Likewise, the viewers' declarations evidence “subtly expressed” meanings that ABC—having precluded discovery as to its intention must be presumed to have intended. *See* Restatement (Second) of Torts § 563 cmt. b. At this stage, the meanings so evidenced must be accepted.

II. A REASONABLE JUROR COULD FIND ABC’S BROADCASTS TO BE OBJECTIVELY FALSE.

A. Actionable Defamation Requires No More Than That A Reasonable Juror Could Conclude That The Broadcasts, Considering Their Tone And Context, Conveyed Factual Assertions, Not Entirely Subjective Opinion.

1. If false, ABC’s insinuations and innuendo against Reverend Price are undoubtedly defamatory under California law.

In California every person is “responsible for the abuse of [the free speech] right.” Cal. Const. art. I, § 2, subd. (a). To that end, California makes actionable as “[s]lander . . . a false and unprivileged publication, orally uttered, [or broadcast over airwaves] which: 1. Charges any person with crime, . . . 3. Tends directly to injure him in respect to his office, profession, trade or business, . . . [or] 5. . . . by natural consequence, causes actual damage.” Cal. Civ. Code, § 46. This “include[s] almost any language which, upon its face, has a natural tendency to injure a person’s reputation, either generally, or with respect to his occupation.” *Washer v. Bank of America*, 21 Cal. 2d 822, 827, 136 P.2d 297, 300 (1943) (citations omitted). Accusing a clergyman of dishonesty, deceit and misappropriation of funds fits the bill. *See id.* (accusing employee of dishonesty); *Semple v. Andrews*, 27 Cal. App. 2d 228, 234-35, 81 P.2d 203 (1938).

The offending assertion need not be explicit; implied assertions—e.g., insinuation, innuendo—are equally actionable. ER 296; *Milkovich*, 497 U.S. at 18-

19; *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1052-53 (9th Cir. 1990); *Weller*, 232 Cal. App. 3d at 1003 n.10, 283 Cal. Rptr. at 652 n.10. Such implied assertions are often the most damning: ““A charge need not be made directly; indeed, the venom and sting of an accusation is usually more effective when made by insinuations. The floating calumny which each reader may affix to any and every official act which his aroused suspicion may lay hold of is capable of inflicting graver injury and injustice than a direct, specific charge, which may be squarely met and refuted, if untrue.”” *Empire Printing Co. v. Roden*, 247 F.2d 8, 14 (9th Cir. 1957) (citation omitted).

2. A statement need only assert or imply objective facts to be provably false.

ABC limited its anti-SLAPP motion to the issues of falsity and whether statements are “provably false.” ER 112 & n.9, 113, 289. Actual falsity poses little analytical problem. A jury may find a statement—e.g., that Rev. Price was in fact boasting about his prosperity; that Rev. Price owns particular assets—true or false.

But ABC also claimed that much of its innuendo, the truth of which it did not attempt to prove, was not “provably false” and therefore not constitutionally actionable. In the district court it wielded the “provably false” phrase as if it were a rigidly mechanical test that limits defamation claims to falsehoods that can

incontrovertably be rebutted by absolutely verifiable evidence with no room for reasonable interpretation. The “provably false” standard is no such thing.

The standard is a First Amendment constitutional limit articulated in *Milkovich* that prevents a jury from imposing liability for subjective opinions.⁶ 497 U.S. at 20. *Milkovich* recaps that “a statement on matters of public concern must be provable as false before there can be liability under state defamation law” *Id.* At the same time, *Milkovich* makes clear—and directly holds—that factual assertions are not protected just because they may be cloaked in the language of opinion or rhetorical question or are implied rather than express. *Id.* at 18-19. What is provably false is a jury question unless every reasonable juror would have to conclude that the broadcasts were solely subjective opinion. *Manufactured Home*, 544 F.3d at 963-64 & n.2. Nothing in *Milkovich* suggests that a jury can only consider precisely verifiable factual assertions without regard to context or circumstance. Rather, the contrary is true.

If a true/false determination can be made on a “core of objective evidence” and through “an articulation of an objectively verifiable event” it is provably false. *Milkovich*, 497 U.S. at 21-22. Nowhere does the First Amendment require checking at the door reason, common sense or a jury’s ability to discern what

⁶ California law hews strictly to the *Milkovich* line. *E.g.*, *Rodriguez v. Panayiotou*, 314 F.3d 979, 987 (9th Cir. 2002) (California’s “provably false” standard flows from *Milkovich* and affords no broader protection than required by the First Amendment); *Brown v. Kelly Broad. Co.*, 48 Cal.3d 711, 745-46, 257 Cal. Rptr. 708, 729-30 (1989) (California constitution affords no greater protection for defamation than federal constitution does); *Nygaard*, 159 Cal. App. 4th at 1048-49, 72 Cal. Rptr. 3d at 225-26.

really was going on. The test is not one of formalistic syntactical and literary analysis but rather simply what a reasonable juror, given context, tone, etc., might determine to be “the meaning a statement conveys to a reasonable reader.” *Masson*, 501 U.S. at 515-17 (“Meaning is the life of language.”).

Thus, a plaintiff need not establish absolute falsity in some philosophical sense. Rather, the test is practical. The standard is whether a reasonable juror can find the statement untrue by a real world measure. Exact precision is *not* required. The statement need only be *reasonably* determinable as false based in substantial part on objective facts. Although truth or falsity should be verifiable, “[v]erifiability is not a property that either does or does not obtain. Rather, it is a property that may be present in varying degrees.” Frederick Schauer, *Language, Truth and the First Amendment: An Essay in Memory of Harry Canter*, 64 Va. L. Rev. 263, 276-81 (1978).

For example, whether a product—a purported windshield cleanser—“worked” satisfactorily can be proven true or false. “Although these are somewhat subjective determinations, they are based on factual observations to a sufficient extent to imply an assertion of fact. Whether [the product] repels rain, facilitates window cleaning, and increases visibility are all capable of being proved true or false.” *Unelko*, 912 F.2d at 1055; *see also Weller*, 232 Cal. App. 3d at 1005, 283 Cal. Rptr. at 653 (although candelabra’s valuation not an exact science or subject to precise determination, a news report that museum paid a “grossly inflated price” could be provably false given available expert valuation testimony).

Thus, even where some degree of opinion is involved, the First Amendment allows a claim where “a reasonable listener could conclude that [the] statements were founded *in part* on an objective, factual basis” *Manufactured Home*, 544 F.3d at 965 (emphasis added) (reasonable juror could find provably false statements that mobile home park owner had reputation for driving out elderly tenants, was less than honest regarding a sewage situation, and that the incoming district attorney intended to launch an investigation).

Ultimately, the question is not what particular words were used or the precision of their descriptive power, but what the jury could reasonably conclude was the “gist” or “sting” of the statement and whether that gist or sting can be measured by an objective standard. *See Crane v. Arizona Republic*, 972 F.2d 1511, 1523 (9th Cir. 1992). The “provably false” criteria only makes a difference where the evidence is so ambiguous or evenly matched that the burden of proof decides the outcome. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776, 106 S. Ct. 1558, 1563-64, 89 L. Ed. 2d 783 (1986).

A reasonable juror, taking into account both reasonable meaning and what at this stage must be ABC’s presumed intended meaning, could well find that ABC’s broadcasts conveyed specific factual assertions, directly, implicitly, and even subtly.

3. A reasonable juror could find the context, tone and insinuations of the news broadcasts here as conveying factual assertions, not pure opinion.

Among the factors separating a subjective opinion from a provably false objective assertion are the context and nature of the broadcast, the language used, the tenor of the comments, and susceptibility to proof. *E.g.*, *Unelko*, 912 F.2d at 1053-55; *see Edwards v. Hall*, 234 Cal. App. 3d 886, 903-04, 285 Cal. Rptr. 810, 820-21 (1991).

The context, tone, and tenor of the statements at issue here would allow a reasonable juror to conclude that they were factual assertions. The broadcasts were part of various purportedly objective *news* programs. *See* ABC News, <http://abcnews.go.com/2020/story?id=126119&page=1> (last visited July 9, 2009) (ABC's official biography of Mr. Stossel refers to "20/20" as a "highly acclaimed *newsmagazine*") (emphasis added). As the district court found, "the general tenor of the entire work tends to create the impression that [ABC was] asserting an objective fact" ER 297.

The broadcasts were a purported news exposé, with the tantalizing title "Enough!" "The tone of the reports from the outset suggested that the [news program] had uncovered some shady dealings." *Weller*, 232 Cal. App. 3d at 1004 n.11, 283 Cal. Rptr. at 652. The teasers were "nothing short of sensational . . . creat[ing] a sense of incredulity, shock, . . . scandal" and outrage. ER 243 ¶ 19, 245 ¶ 25. They breathlessly suggest factual revelation of serious wrongdoing

through investigative journalism, not a critique of facts known or available to all. *See Kaelin v. Globe Comm'ns Corp.*, 162 F.3d 1036, 1040-41 (9th Cir. 1998) (headline alone can be defamatory no matter how balanced the ensuing story); *Empire Printing Co.*, 247 F.2d at 14 (same). There was no satire or evident hyperbole. *See* ER 297; *cf. Unelko*, 912 F.2d at 1055 (factual assertion during avowedly satirical segment of “60 Minutes” newsmagazine actionable).

Following in the muckraker tradition, ABC’s “20/20” show and Mr. Stossel purport to report *facts*, not opinion, and to expose corruption and venality. *See Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 904, 17 Cal. Rptr. 3d 497, 511 (2004) (defendant’s “own position as a crusader and watchdog to the industry also works against any argument that she was merely stating the facts and drawing her own opinion from them. . . . [she] clearly expected readers to rely on her opinions as reflecting the truth”). ABC bolstered its factual gravitas with the supporting opinion of supposed expert, Rusty Leonard of Ministry Watch. *See Weller*, 232 Cal. App. 3d at 1002-03, 283 Cal. Rptr. at 651-52 (news report proffering supposed expert support for allegation could reasonably be viewed as making factual assertion).

ABC’s broadcasts also strongly implied that ABC had further details of wrongdoing. A statement can “convey an actual imputation of fact if [it] implie[s] the speaker’s possession of undisclosed supporting facts.” *Mamou v. Trendwest Resorts, Inc.*, 165 Cal. App. 4th 686, 728, 81 Cal. Rptr. 3d 406, 440 (2008). When an “opinion implies knowledge of facts which may lead to a defamatory

conclusion, the implied facts must themselves be true.” *Rodriguez*, 314 F.3d at 986 (citations and internal quotations omitted). Here, ABC’s express assertions of “Enough!,” “this has to stop,” “Is it time for someone to say ‘enough’?,” “a very high probability that something’s wrong,” and that ministers “are squandering our money,” ER 143, 146, 149-56, 290-91, strongly suggest that it has incriminating evidence against the subjects of its broadcasts. So, too, ABC lumped Rev. Price with others as to whom it presented specific evidence. ABC’s broadcasts, in both phraseology and tone, strongly intimated that ABC had evidence of specific wrongdoing as to Rev. Price as well. *See* ER 262 ¶ 6 (viewers’ reaction that ABC “wouldn’t air such a story unless they had proof”).

There is no doubt that a reasonable juror viewing ABC’s broadcasts could conclude that ABC was conveying a *factual* assertion of improprieties—directly, impliedly and by suggesting that it possessed a factual basis for scandal. As we now discuss, a reasonable juror could conclude that the ABC broadcasts conveyed *factual* assertions that were not true under a reasonably objective standard and were not merely asserting subjective opinion.

B. A Reasonable Juror Could Conclude That ABC Knowingly Used The Out Of Context Clip Of Reverend Price's Sermon To Falsely Portray Him As Unrepentantly Boastful, Hypocritical, And Deceitful.

Perhaps the broadcasts' most glaring misrepresentation is the assertion that Rev. Price "boasts" of great wealth followed by a video clip of Rev. Price's sermon where he is speaking not about himself but about a hypothetical spiritually unsatisfied individual. The clip is presented as if it is somehow a secret recording of Rev. Price expressing his true feelings about himself. Of course, that's not the case at all. Rev. Price's words are in a sense literally true—he spoke them—but they do not have the meaning that ABC's broadcast attributes to them.

They are rather the classic quotation out of context. "[A]n exact quotation out of context can distort meaning, although the speaker did use each reported word." *Masson* 501 U.S. at 515. "Statements, although perhaps 'true' when viewed in isolation, may create an overall false impression when considered in context." *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 984-85 (9th Cir. 2002) (citing *Dixson v. Newsweek, Inc.*, 562 F.2d 626, 631 (10th Cir. 1977) ["A publisher may not escape liability for defamation when it takes words out of context and uses them to convey a false representation of fact"]); *Metabolife*, 264 F.3d at 847-48 (editing "if abused" qualifier out of "You can die from this product" statement is actionable); *Crane*, 972 F.2d at 1522 (although individual statements were true, their juxtaposition could convey false impression that plaintiff had been

lying); *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 115 (Tex. 2000) (“[A] plaintiff can bring a claim for defamation when discrete facts, literally or substantially true, are published in such a way that they create a substantially false and defamatory impression by omitting material facts or juxtaposing facts in a misleading way”); *Montandon*, 45 Cal. App. 3d at 944, 120 Cal. Rptr. at 189-90 (TV Guide listing that author would appear on show entitled “From Party Girl To Call Girl” omitting that she would appear with another guest, a prostitute, was defamatory as implying that author was a call girl).

A contextually misleading quotation in and of itself constitutes a provably false assertion. Here, ABC’s out-of-context use of Rev. Price’s sermon video clip resulted in at least three false or distorted express or implied meanings: that he was (1) arrogant and boastful, (2) a hypocrite, and (3) deceitful.

1. The ABC broadcasts falsely misattributed a sermon by Reverend Price about another as an example of Reverend Price “boast[ing]” about his own wealth.

First, ABC expressly portrayed Rev. Price as arrogant and boastful: “yet her pastor, Fred Price, *boasts*” about his wealth. ER 143, 153-54, 290 (emphasis added). Admittedly, an accusation of boasting or arrogance might be an opinion. But ABC does not just offer that opinion, it supports it with an asserted fact—an example of Rev. Price purportedly boasting about himself, not just quoting him but showing him in supposed full form on a video clip with voice and intonation. Of

course, the example isn't true. It is not Rev. Price even talking about himself. The intonation and effect are purely rhetorical as part of a parable-like sermon speaking of a hypothetical person decidedly *not* himself.

An opinion predicated on a falsely asserted factual premise is actionable defamation: “[I]f the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact.” *Milkovich*, 497 U.S. at 19-20; *Rodriguez*, 314 F.3d at 987 (*opinion* that arrest was improper was actionable as based on specific, objectively provable accusations about officer’s tactics). Protection for an opinion based on stated facts, thus, is limited to where “the factual basis itself is true.” *Flowers v. Carville*, 310 F.3d 1118, 1129 (9th Cir. 2002). If the fact relied upon (here that Rev. Price was talking about himself) is provably untrue, the opinion based on that false premise is actionable. *Id.*

ABC and the district court argued that Rev. Price freely discusses his prosperity. ER 295. But freely discussing and “boasting”—asserting with excessive pride or vaingloriously—are two different things. *See* Merriam-Webster Online Dictionary 2009, “boast” <http://www.merriam-webster.com/dictionary/boast> (last visited July 9, 2009). “Boasting” is often as much about tone and form of expression as about the actual words used. It is not just Rev. Price’s own words that were misleadingly used against him, it was his own voice, tone and expression. “[T]elevision news reporting is a different, more powerful genre than newsprint. With television, ‘we must also take into account the impact of the visual effects as

well as the text because “the television medium offers the publisher the opportunity, through visual presentation, to emphasize certain segments in ways that cannot be ascertained from a mere reading of the transcript.” . . . Television touches more senses than does the print media, and the standards for finding defamation cannot be woodenly applied without taking into account the kind of medium by which the message was delivered.” *White v. Fraternal Order of Police*, 909 F.2d 512, 526 (D.C. Cir. 1990) (citation omitted). Taking full advantage of its medium, ABC used not only Rev. Price’s own words, but also his own voice, intonation and gestures to indict himself.

Viewers’ *only* opportunity to judge for themselves the accuracy of ABC’s “boasting” accusation was the video clip that ABC admits was *not* Rev. Price boasting. Unless a juror would have to conclude that all of Rev. Price’s other statements have the same form of expression, the same unqualified wording, the same intonation, the same inflection, the same body language so necessary to conveying meaning (in his parable-sermon Rev. Price made like someone who was boasting), the same pride and vanity, then a reasonable juror could well conclude that ABC falsified the *factual* basis which it expressly used to supports its boasting characterization.

A juror would not necessarily equate Rev. Price’s other statements with his sermon. Although Rev. Price freely acknowledges his prosperity, he does so in the context of his “prosperity gospel.” ER 295-96; *see* ER 163, 178-79. A reasonable juror could well find that he does so not boastfully but grateful to the bounty of

God: “Money comes to Betty [Plaintiff’s wife] and me in such a way *that is almost embarrassing.*” ER 195, 295 (emphasis added). “The upshot of the thing was that the Lord gave us a beautiful home. . . .” ER 199. “How in the world could you walk into a palatial house up on the hill that is paid for, you got a Rolls Royce sitting in front of the house, its paid for, how in the world could you forget God? How could you forget the Lord is the one who gave you that?” ER 210 (audio file 4). “Everywhere I look I see God. . . . I look at my arm, I look at my watch to see what time it is, I have to remember God, God is the one who gave me that watch, didn’t pay a dime for it, God gave it to me. . . . that watch cost \$8,500.” ER 210 (audio file 5). A reasonable juror could understand the tone and effect of his actual comments as humble and grateful, not boastful. But the reasonable viewer never had the chance to make that evaluation because ABC provided only a false view of Rev. Price’s own words.

The impression of boasting, of course, is all the worse because it is Rev. Price’s own words, own voice, and own intonation that ABC distorts to condemn him. This is precisely what the Supreme Court held in *Masson* to be actionable. “A self-condemnatory quotation may carry more force than criticism by another. It is against self-interest to admit one’s own criminal liability, arrogance, or lack of integrity, and so all the more easy to credit when it happens.” 501 U.S. at 512. “[R]egardless of truth or falsity of the factual matters asserted within the quoted statement, the attribution may result in injury to reputation *because the manner of expression* or even the fact that the statement was made indicates a negative

personal trait or an attitude the speaker does not hold.” *Id.* at 511 (emphasis added). Thus, a false or misleading attribution *is itself* an objective falsity, even if the underlying facts quoted are true so long as the attribution has a derogatory effect that otherwise would not obtain.⁷

The statements that *Masson* held actionable are illustrative. In *Masson* an author sensationalized a story by attributing quotes to plaintiff psychoanalyst that:

- (1) other senior colleagues thought of him as an “intellectual gigolo,”
- (2) he intended to use Freud’s estate, of which he was caretaker, for “sex, women, and fun,”
- (3) he was the “greatest analyst ever,” and
- (4) that he told a colleague that “he had the wrong man” in response to a request to “do the honorable thing.” *Masson*, 501 U.S. at 522-25.

There was *some* basis for at least the gist of each of the purported quotes, but the overall impression was distorted:

- (1) it was true that his senior colleagues had disagreed with him and dismissed him from a privileged post, but he never said that they labeled him an “intellectual gigolo”;
- (2) it was true that plaintiff had said that he planned to have great parties at the Freud estate and that he and another analyst intended “to pass women on to each other,” but he had never connected the two;

⁷ ABC’s misuse of Rev. Price’s sermon is no less false than if it had broadcast a clip of Tina Fey from Saturday Night Live and claimed that it was Sarah Palin speaking.

(3) it was true that he claimed to hold theories that would revolutionize or destroy psychoanalysis and clearly had a high regard for himself; but his boasting did not reach the level of claiming to be the “greatest”;⁸ and

(4) it was true that he said that his colleague “had the wrong man,” but he did so in response to a blandishment that if he remained silent he would save face and might ultimately be reinstated, *not* in rejecting “doing the honorable thing.” *Masson*, 501 U.S. at 522-25.

Thus, in *Masson* there was arguably a kernel of truth in the alleged self-made statements at issue, but the picture painted of the plaintiff as ““full of braggadocio, impossibly arrogant”” was premised on half-truths and distortions. 501 U.S. at 501 (citation omitted). *Masson* holds that the First Amendment does not protect such distortion.

Similarly, ABC used the out of context half-truth video clip to paint a distorted picture of Rev. Price as “boast[ful],” (ABC’s word), vain and arrogant (the district court’s words). ER 143, 153, 297. Had viewers known that the proffered video clip was Rev. Price talking as if he were the hypothetical person of his parable, not as his true self, the reaction to whether he was boastful

⁸ See *Masson v. New Yorker Magazine, Inc.*, 895 F.2d 1535, 1550-51 (9th Cir. 1990) (Kozinski J., dissenting) (in context claim to a unique view with which no one else agreed “sounds much less narcissistic” and was “a far cry from asserting that others will see him as ‘the greatest analyst who ever lived’” even though “there is a healthy element of boasting in [the plaintiff’s actual] statement [such as results when] people often take pride in holding unpopular positions”) *majority opinion overruled by Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991) *remanded to* 960 F.2d 896 (9th Cir. 1992).

undoubtedly would have been far different. Having lied about its supporting evidence, ABC is not protected by the First Amendment.

2. The ABC broadcasts falsely implied that Reverend Price is a hypocrite, never mentioning his “prosperity gospel.”

Second, ABC used the clip to imply that Rev. Price is a hypocrite. ABC, in just about so many words, said that Rev. Price lived an excessively material life while preaching something else: “They preach the gospel of giving to God. But how much of what you give do they keep for themselves?” “6 million dollar yachts, private jets, Rolls Royces—sound like the good life? What about the godly life? John Stossel . . . says ‘enough.’” “Does this look like something out of ‘Lifestyles of The Rich and Famous? If it’s your guess, you are wrong. These are preachers, preachers.” “The Bible discusses how difficult it is for the wealthy to reach Heaven. But that hasn’t kept some preachers from attaining vast fortunes.” ER 143, 149, 151, 153, 290-91. The broadcasts are dripping with the insinuation of hypocrisy. *See White*, 909 F.2d at 526 (“Because a court must examine the entire context of a publication, the court should also consider dramatic intonations by the announcer in determining whether the broadcast conveys a defamatory meaning”) (citation omitted). A reasonable juror could certainly so conclude. *See* ER 243 (“[V]iewers were led to anticipate a portrait of . . . hypocritical . . . behavior by some of those who preach the word of God and the gospel of giving.”).

But is it true? No. Although it is true that Rev. Price is prosperous (but by no means to the extent that ABC represents), that is *consistent* with his “prosperity gospel” theology. Rev. Price preaches that prosperity reflects God’s bounty to the godly (although as his sermon demonstrates, he does not believe that all who are prosperous are godly). *See* ER 171-72, 182-89, 195, 199, 210 (audio file 4&5).

ABC was all too willing to tell the district court about Rev. Price’s “prosperity gospel,” but it willfully withheld this same information from its broadcast viewers, instead strongly intimating that Rev. Price preaches a completely contrary teaching that the “[t]he Bible discusses how difficult it is for the wealthy to reach Heaven.” ER 153, 289. Omitting this aspect of Rev. Price’s preaching and world view completely distorts the message communicated about him. *See Van Buskirk*, 284 F.3d at 984 (omitting critical qualifying facts—there that the medications plaintiff had taken for nervous disorder were not mind altering, did not affect mental stability and had ceased ten years earlier—made statements about medication use defamatory.).

One may not agree with Rev. Price’s theology (although he is not either the first nor alone in espousing such a view, *see* David Van Biema & Jeff Chu, *Does God Want You To Be Rich*, Time Magazine (Sept. 10, 2006)), but he is *not* (at least a reasonable juror could so find) the hypocrite that the ABC broadcasts portray him as.

And, although in some contexts a charge of hypocrisy might be an unprovable opinion, that is not so here. Here, a reasonable jury could find, that

ABC implied that Rev. Price preached one thing—renouncing wealth and material comforts—but acted contrary to his own preaching by accepting such wealth and material comforts. But what Rev. Price preaches—his prosperity gospel—is objectively provable.

3. The ABC broadcasts falsely implied that Reverend Price deceived donors and church members.

ABC also used the video clip to paint Rev. Price as deceitful. As the linguistics expert detailed, ABC’s juxtaposition of various clips (e.g., the expression of trust in Rev. Price’s use of funds placed next to Rev. Price’s supposed “boast” about a lavish lifestyle) and the various lead ins and follow ups to the clip create the “distinct and inevitable” impression that Rev. Price “has . . . duped” his congregation and “is leading [a lavish life] *on the backs of deceived parishioners*” who have been “hoodwinked.” ER 240-41; *see id.* at 243 (viewers told to anticipate exposé of “deceitful” conduct). On top of it all, ABC proffers Mr. Leonard’s testimony that church members are “being hosed” because they do not know about Rev. Price’s finances and that there is a “very high probability that something is wrong there.” ER 143-46. It’s hard not to come away with that impression upon viewing the broadcasts as a whole. Certainly, a reasonable juror could come to that conclusion.

It matters not whether the proffered information about Rev. Price’s wealth or even his “boasting” are true. “[T]he touchstone of implied defamation claims is an

artificial juxtaposition of two true statements or the material omission of facts that would render the challenged statement(s) non-defamatory. Under this definition, a defendant does not avoid liability by simply establishing the truth of the individual statement(s); rather, the defendant must also defend the juxtaposition of two statements or the omission of certain facts.” *Toney v. WCCO Television*, 85 F.3d 383, 387 (8th Cir. 1996) (statements, the juxtaposition of which implied that plaintiff dealt in stolen animals, could be defamatory by implication regardless of their individual truth.)

Is the falsity of a deceitfulness accusation subject to objective proof? It is if the claim is that the plaintiff has not told others about his prosperity—which is what a reasonable juror could deduce that the broadcasts here represented—and yet there is direct, objective evidence, presented by ABC no less, that Rev. Price tells the world about his prosperity and his church opens its books to its members. *See* ER 111 n.7, 118 ¶ 12, 119 ¶ 21, 158, 209, 262 ¶ 6.

C. A Reasonable Juror Could Conclude That ABC Falsely Accused Reverend Price Of A Lack Of Financial Transparency In His Church Dealings.

Other aspects of ABC’s broadcasts were also provably false. One thrust and gist of the ABC broadcasts was that certain ministers, Rev. Price among them, were not financially transparent as to where donations were going and the source of their income and assets. The segment lead-in is: “[T]hey’re raking in a fortune

from the faithful. . . . But God only know how all that money is spent. . . . So you call up and say ‘I’d like to know where your money is going.’ And they say ‘Go to hell’?” ER 142-43. The broadcast then starts with the rhetorical questions “how much of what you give do they [Rev. Price and others] keep for themselves? Is it time to say ‘enough’?” ER 143, 290. It then juxtaposes one of the members of Rev. Price’s congregation “stat[ing] that she believes her ‘money is being put to excellent use’” with the assertion that “her pastor, Fred Price, boasts” of great wealth, with the clear implication that the congregation member has been misled. ER 240 ¶ 11, 290.

What follows is an interview with Mr. Leonard of the authoritatively named “Ministry Watch.” ABC validates and, in effect, adopts Mr. Leonard’s views, describing him in glowing terms as “a deeply religious man” who “left a lucrative Wall Street career ‘because he thought it was un-Christian [for ministers, including Rev. Price to] ask donors for money but [not] reveal how they spend it.’” ER 144-46, 290 (brackets in original). It then flashes a Ministry Watch “Transparency List,” which includes Rev. Price’s ministry, Ever Increasing Faith Ministries, as one of the “bad guys,” with Mr. Leonard stating that there is “a very high probability that something is wrong there.” ER 145-46, 290.

A reasonable juror could quite easily conclude that ABC’s broadcasts accused Rev. Price of not informing those who donate to his ministry about how the money is spent. Indeed, that is the *likely* conclusion. But the question at this

stage is not whether such a conclusion is likely, it is whether it is one that a reasonable juror *could* reach.

Nor can ABC hide behind Mr. Leonard's statements and claim that it is not responsible for broadcasting them. "[T]he venerable principle [is] that a person who repeats a defamatory statement is generally as liable as the one who first utters it: [¶] On the quaint homespun logic that '[t]alebearers are as bad as talemakers,' each repetition of a defamatory statement by a new person constitutes a new publication, rendering the repeater liable for that new publication." *Flowers*, 310 F.3d at 1128 (citations omitted).

And, a reasonable juror could well conclude that the broadcast accusation is false. Rev. Price's church routinely distributes its financial reports to the congregation; ABC's own retraction admits as much. ER 111 n.7, 118 ¶ 12, 119 ¶ 21, 134-35, 138, 158, 209, 262 ¶ 6. Construing the evidence most favorably to Rev. Price, a reasonable juror could well conclude that ABC's broadcasts falsely accused Rev. Price of hiding how contributions to the church were being used. *See generally Overstock.com, Inc. v. Gradient Analytics, Inc.*, 151 Cal. App. 4th 688, 703-05, 61 Cal. Rptr. 3d 29, 41-43 (2007) (reports' "opinion" that company changed accounting procedures improperly to hide true financial picture were provably false and actionable). That, too, suffices to support Rev. Price's lawsuit.

D. A Reasonable Juror Could Conclude That ABC's Exaggeration Of Reverend Price's Prosperity Was A Material Falsehood.

Nor is ABC's report substantively correct as to Rev. Price's purported wealth. ABC's out of context use of Rev. Price's sermon undeniably had him claiming to own assets—a 25-room mansion, a \$6 million yacht, a helicopter, an airplane, seven luxury automobiles—that he does not own. ER 143, 153-54, 295 (ascribing ownership of those assets is “literally false”). There is no question that the facts that ABC misrepresented Rev. Price as “admitting” were untrue. ER 251, 293.

Nor is the “gist” or “sting” of the accusations true. *See Masson*, 501 U.S. at 517 (“[m]inor inaccuracies do not amount to falsity so long as ‘the substance, the gist, the sting, of the libelous charge be justified.’”). Rev. Price's “beautiful home” and “luxury car” do not necessarily fit the “Lifestyles of the Rich and Famous” characterization in ABC's broadcasts. *Compare* ER 151 with 180, 199. Could a reasonable juror conclude that the gist and sting of ABC's exaggeration is far worse than the truth? Absolutely. One man's prosperity is another's obscene wealth. A reasonable jury could view an extra \$6 million yacht, helicopter, airplane, and multiple luxury automobiles as hardly “minor inaccuracies.”

The gist and sting of the excessive wealth exaggeration is multiplied by the fact that ABC represented that Rev. Price was *boasting* about these things that he does not own. A viewer who knows what Rev. Price owns (he makes no secret of what he owns—ABC's evidence is from published sources) could readily conclude

that he was overly prideful or delusional in boasting about things that he does not own.

A statement is not substantially true if it “would have a different effect on the mind of the reader [or viewer] from that which the pleaded truth would have produced.” *Masson*, 501 U.S. at 517 (quoting R. Sack, *Libel, Slander, and Related Problems* 139 (1980)). Here, a reasonable juror could well conclude that a true representation of Rev. Price’s prosperity (as someone who works tirelessly running a far flung, large ministry) might have had a different effect on the mind of a viewer, especially a viewer familiar with Rev. Price’s previously disclosed prosperity and, as such, ABC’s exaggeration was not substantially true. *See Metabolife*, 264 F.3d at 849-50. (triable issue of fact existed as to substantial truth where product’s main ingredient was natural ephridine rather than the reported synthetic ephridine and the effects of the two were the same but differed in magnitude with the synthetic being more powerful).

E. A Reasonable Juror Could Conclude That ABC Falsely Accused Reverend Price Of Crimes.

A reasonable juror could also well conclude that ABC’s broadcasts, fairly viewed, accused Rev. Price of crimes. The district court found that the broadcasts implied corrupt conduct but that although corrupt conduct could be criminal, from its perspective, the broadcasts did not imply criminality here. ER 296-97 n.5.

Where, why and how the district court drew the criminal/non-criminal line is unclear and unexplained.

In fact, the district court's arbitrary and idiosyncratic line-drawing is unjustified and unjustifiable. Any reasonable inference or meaning capable of being conveyed by the broadcasts must be indulged to determine whether a criminal accusation is implicit. *See Flowers*, 310 F.3d at 1127-28 (presidential candidate's campaign aides' accusations that plaintiff had "doctored" documents could be viewed as alleging a crime). Here, as the linguistics expert opined, the message, gist, and thrust of the whole series of ABC broadcasts was that Rev. Price was *illegitimately* funding his lifestyle from "donations intended for other purposes," had engaged in "misappropriation," was "exploiting credulous followers duped into believing that their 'giving to God' would not go to preachers' personal bank accounts," that "the funds that support [his] lifestyle[] are *misappropriated from church donations*," and that "Rev. Fred Price had *illegitimately taken* millions of dollars from his unsuspecting parishioners to sustain a lavishly exorbitant lifestyle for himself." ER 240 ¶¶ 10-11, 241 ¶¶ 13-14, 242 ¶ 16, 244 ¶ 23, 246-47 ¶¶ 28-29 (emphasis added). Various viewers, too, understood (consistent with what has to be presumed to be ABC's intended meaning) the broadcasts to accuse Rev. Price of being a "thief" and a "greedy crook," who had "stolen church funds or the donations of unsuspecting church members to support his lifestyle." ER 268 ¶ 12, 274 ¶ 4, 277 ¶ 4, 282-83 ¶¶ 3-4, 286 ¶ 6.

Those understandings are borne out by common sense. A church member thinks her donations are being put to excellent use, but in the next breath ABC says “and, yet, her pastor Rev. Price boasts” about his personal wealth. ER 290. ABC says “They preach the gospel of giving to God. But how much of what you give do they keep for themselves? Is it time to say ‘enough?’” ER 143. The implication is clear: The subject ministers (including Rev. Price) are pocketing money that they are not entitled to.

The “enough” theme is reinforced throughout the teaser build up to the broadcast: “John Stossel takes us inside the lives of some preachers and says ‘enough.’” “And John Stossel is here to say ‘enough.’” “Stossel has said ‘enough’ and is ‘taking on the case,’” “the Report will feature a man who investigates church finances because he believes some ministries are ‘squandering our money’.” ER 149-53, 291.

Indeed, the “taking on the case” reference suggests—particularly to a viewer conversant in the television genre—a criminal proceeding or something that deserves to be one. *See* Random House, *Unabridged Dictionary*, at 321 (2d ed. 1993) “case” (defn. 10b.: “a set of facts giving rise to a legal claim”); Yahoo TV, <http://tv.yahoo.com/cold-case/show/35076> (last visited July 9, 2009) (television show “Cold Case” involves a detective investigating “‘cold cases,’ crimes that have never been solved”) (emphasis added); TV Guide, www.tvguide.com/tvshows/law-order/100255 (last visited July 9, 2009) (“Law and Order” television show presents “gripping headline-inspired storylines and two

distinct halves: the investigation of *the crime*, followed by the prosecution of *the case* in court”) (emphasis added).

The question is not whether the implication of misappropriation, deceit or other crime is the only possible interpretation of ABC’s broadcasts, it is whether that is a *plausible* interpretation that a reasonable juror might adopt. *E.g.*, *Manufactured Home*, 544 F.3d at 963.

Although televangelists and other charitable organizations may not be legally required to disclose financial information or information on how donations are spent (as the “20/20” broadcast notes in passing), *see* ER 296, disclosure requirements are not the only crimes potentially at issue or forming a subtext to the broadcasts. Both deceptively soliciting charitable donations and embezzling from a charitable organization are *crimes*. *E.g.*, Cal. Penal Code § 484 (2008) (larceny by false pretense); Cal. Penal Code § 503 (2008) (embezzlement: “the fraudulent appropriation of property by a person to whom it has been intrusted”); *People v. Talbot*, 220 Cal. 3, 28 P.2d 1051 (1934) (corporate executives who openly took and accounted for advances against their salaries for personal use were guilty of embezzlement); *Commonwealth v. Nadal-Ginard*, 674 N.E.2d 645 (Mass. App. Ct. 1997) (charitable organization’s CEO using organization’s funds for personal purposes guilty of larceny). Although mere nondisclosure of fundraising costs may not be a crime, misrepresenting how the funds are to be used may be. *Compare Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 606, 123 S. Ct. 1829, 155 L. Ed. 2d 793 (2003) (fundraising cost nondisclosure protected) *with*

United States v. Lyons, 472 F.3d 1055 (9th Cir. 2007) (defendants who set up church and misrepresented that raised funds, net of fundraising expenses, would go to charitable purposes guilty of RICO violations where vast majority of funds, net of fundraising expenses, went to pay defendants' lifestyle).

A reasonable juror could well conclude that ABC implied that Rev. Price committed multiple crimes. As the district court implicitly recognized, such an accusation would be provably false.

F. Accusations Of Noncriminal Dishonesty Can Be Provably False.

Even if a reasonable juror were not to view the ABC broadcasts as implicitly accusing Rev. Price of crimes, they are still actionable. At a minimum, the broadcasts accuse Rev. Price of dishonesty. The district court generalized that the overall effect of the broadcasts was to label Rev. Price noncriminally "corrupt." ER 296-97 & nn.4-5. Having applied this label, it held that its generalization was a purely subjective opinion (the broadcasts did not use the word "corrupt") without looking at the constituent *factual* bases implied by the broadcasts. ER 297. The broadcasts' undoubtedly included implications of specific dishonest conduct: e.g., misappropriating—stealing— church funds, lying to donors and church members. *See Washer*, 21 Cal.2d at 828 (allegation of employee dishonesty slander per se even if no crime implied). That the conduct might not be criminal (e.g., because it is protected by the First Amendment, *see Madigan*, 538 U.S. at 606; ER 144, 296 [the report states conduct allowed by regulations, implying that the conduct is

dishonest but that the regulations are not tight enough]), does not mean that it cannot still be provably false in an objective manner.

Either Rev. Price let the world know about his personal financial status (as ABC's own evidence shows, *see* ER 163, 171-72, 195, 199, 210) or he did not, deceiving donors in the process when soliciting contributions as ABC's broadcasts insinuate, *see* ER 239-40; either Rev. Price and his church were forthcoming with how donations were spent (as ABC's own evidence shows, *see* ER 111 n.7, 118 ¶ 12, 119 ¶ 21, 133-34, 138, 158, 209) or they were not as ABC's broadcasts undeniably imply, *see* ER 142, 144-46, 240 ¶ 11, 241 ¶ 13, 242 ¶ 16; either Rev. Price took church funds that he had no right to take as ABC suggests, ER 240 ¶¶ 10-11, 241 ¶¶ 13-14, 242 ¶ 16, 244 ¶ 23, 246 ¶ 28, 247 ¶ 29, or he did not. These are not judgments that require an evaluation of subjective notions of right, wrong, morality, or justice. They are matters that are objectively determinable based on a "core of objective evidence" and "an articulation of objectively verifiable event[s]." *Milkovich*, 497 U.S. at 21-22 (citations omitted); *see Metabolife*, 264 F.3d at 848 (statement that "every expert that we asked" found product unsafe, implied consensus of scientific opinion that was provably false).

The clear gist of ABC's broadcasts was not that ABC disagreed with Rev. Price's lifestyle on some moral or subjective basis but that Rev. Price was dishonest—not intellectually, but tangibly. Certainly a reasonable juror could so conclude. The implication of dishonesty was enhanced by the vernacular accusation that donors were being "hosed." ER 145, 290. Regardless whether the

words used might have a precise, provable meaning and regardless whether the broadcasts might also have a more generalized insinuation of corruption, the *facts* that they implied—specific dishonesty—are undoubtedly subject to direct proof.

The accusations here are no different than that at issue in *Flowers* where “[a] statement that [the plaintiff] ‘selectively edited’ [audio] tapes could . . . be defamatory. While somewhat . . . neutral, it still insinuates *deception*.” 310 F.3d at 1127-28 (emphasis added). So, too, ABC’s broadcasts imply that Rev. Price selectively skimmed and used donations for personal purposes and imply specific types of deception—the withholding of specific information and secretly taking moneys. That is objectively demonstrable.

Indeed, as here, “statements . . . that [plaintiff] lacked integrity, that he was unethical—could be found to convey an actual imputation of fact if they implied the speaker’s possession of undisclosed supporting facts.” *Mamou*, 165 Cal. App. 4th at 728, 81 Cal. Rptr. 3d at 440-41. “[A] jury could quite reasonably . . . [find that the] comments did not convey a mere unprovable opinion but implied the possession of undisclosed, and provably false, defamatory facts.” *Id.* (citation omitted). That ABC proffered facts as to others with whom it lumped Rev. Price suggested that it had further facts as to Rev. Price as well. That’s the whole tone and tenor of the broadcasts. *E.g.*, ER 297. That’s what the jury could find here—that ABC’s broadcasts implied that ABC had facts showing that Rev. Price misappropriated funds—stole—and deceived.

Thus, even if a reasonable juror could find no implied crime accusation, *per se*, ABC's broadcasts are still actionable as implying provably true or false accusations of dishonesty.

III. THIS COURT SHOULD REVISIT EN BANC WHETHER A CALIFORNIA ANTI-SLAPP MOTION IS PROPERLY BROUGHT IN FEDERAL COURT UNDER DIVERSITY JURISDICTION.

As just discussed, on the merits, the district court erred in granting the California anti-SLAPP motion. But an even more fundamental error exists. The district court should never have even entertained that motion. It is improper in federal court.

We acknowledge, however, that various Ninth Circuit panels have approved an abridged California Code of Civil Procedure section 425.16 anti-SLAPP motion to strike procedure in federal court diversity actions brought under California law. *E.g., Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1109 (9th Cir. 2003); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 971 (9th Cir. 1999). In particular, this Court's panels have approved bringing such a motion, shifting the burden of production from the party seeking dismissal to the party seeking to pursue a claim, and awarding attorney's fees against an unsuccessful plaintiff.

At the same time, section 425.16's discovery and pleading amendment limitations have been deemed at odds with express federal procedural rules.

Verizon Del., Inc. v. Covad Commc'ns Co., 377 F.3d 1081, 1091 (9th Cir. 2004) (section 425.16's mandate barring amendment of the complaint contravenes Fed. R. Civ. P. 15(a)); *Metabolife*, 264 F.3d at 845-46 (section 425.16's discovery-limiting provisions conflict with Fed. R. Civ. P. 56).

The current panel precedent allowing patchwork application of California Code of Civil Procedure section 425.16 in federal diversity cases binds this panel. Nonetheless, Rev. Price believes that the *Vess-Newsham* line of decisions is in error and should be renounced by this Court en banc. The California anti-SLAPP motion procedure is at odds with both Federal Rules of Civil Procedure 12(b) and (d) (governing motions to dismiss, making failure to state a claim a defense and requiring any motion involving matter outside of the pleadings to be treated as a motion for summary judgment) and 56 (governing motions for summary judgment) and established precedent regarding burden shifting in summary judgment motions. *E.g.*, *Estate of Tucker ex rel. Tucker v. Interscope Records, Inc.*, 515 F.3d 1019, 1029 (9th Cir. 2008) ("Federal rather than California procedural rules govern this diversity action"; applying federal *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986) rule regarding burden of production in summary judgment motion, rather than California procedural rule);⁹ *cf. Stuborn Ltd. P'ship v. Bernstein*, 245 F. Supp. 2d 312, 316 (D. Mass. 2003) (Massachusetts's anti-SLAPP statute is procedural and does not apply to federal

⁹ See also *Gasaway v. Northwestern Mut. Life Ins. Co.*, 26 F.3d 957, 960 (9th Cir. 1994); *Caesar Elecs. Inc. v. Andrews*, 905 F.2d 287, 289 n.3 (9th Cir. 1990); *Bank of California, N.A. v. Opie*, 663 F.2d 977, 979 (9th Cir. 1981).

diversity cases); *Baker v. Coxe*, 940 F. Supp. 409, 417 (D. Mass. 1996), *aff'd*, 230 F.3d 470 (1st Cir. 2000) (same).

Interpreting California Code of Civil Procedure section 425.16 as a substantive rather than procedural rule (as the *Vess-Newsham* line of cases appears to hold) creates serious constitutional problems. As presently constituted, California's anti-SLAPP scheme favors some speech and speakers over others. Compare Cal. Civ. Proc. Code § 425.16 (2008) with *id.* at § 425.17 (excluding certain speakers and types of speech from section 425.16). That is something that California cannot do as a matter of substantive law—it cannot discriminate as to remedies based on the speaker or subject matter. *E.g.*, *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828-29, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995) (“Discrimination against speech because of its message is presumed to be unconstitutional”) (citation omitted); *R.A.V. v. City of St. Paul*, 505 U.S. 373, 384, 112 S. Ct. 2538, 2543, 120 L. Ed. 2d 305 (1992) (“the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government”); *Chaker v. Crogan*, 428 F.3d 1215 (9th Cir. 2005) (criminalizing false complaint against peace officers but not false statements supporting officers is unconstitutional viewpoint discrimination).

And, the most substantive part of the statute is constitutionally suspect. The statute awards attorney's fees to a successful defendant, *but not* to a successful plaintiff, upon a mere showing that the suit will not succeed, a determination which can include, e.g., a close question as to whether particular statements are “provably

false” or constitute unprovable opinion. By doing so, the statute unconstitutionally imposes a one-sided burden on plaintiff’s First Amendment right to petition. *See BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524, 122 S. Ct. 2390, 2395, 153 L. Ed. 2d 499 (2002) (access to courts is part of right to petition; party may be punished for sham litigation, but not for good faith litigation); *Molski v. Evergreen Dynasty Corp.*, 521 F.3d 1215, 1216 (9th Cir. 2008) (Berzon, J., dissenting, from denial of rehearing en banc). And the statute does so in the context where the plaintiff—Rev. Price—is simply protecting his own speech rights, his right to have his speech accurately reported. Can there be any doubt that if a statute required a plaintiff to make a prima facie showing before initiating a suit against a governmental entity that it would unconstitutionally burden the right to petition? If so, then requiring the same showing before allowing a plaintiff to seek legal redress from media defendants and others who engage in defamatory speech or conduct likewise unconstitutionally burdens the right to petition based on the nature and subject matter of the wrong complained of. The statute substantively prefers ABC’s speech rights over Rev. Price’s right to petition. That it cannot do.

As only this Court en banc can change the circuit precedent regarding the availability of a California Code of Civil Procedure section 425.16 in a federal court diversity action, Rev. Price reserves the right to pursue this argument by petition for rehearing en banc.

CONCLUSION

Nothing in the law requires reasonable jurors to check their common sense at the door. The ABC broadcasts paint Rev. Price as boastful (ABC's term), a hypocrite, deceitful and dishonest. If that's not the impression taken away from the broadcasts, a viewer just wasn't paying attention. A reasonable juror could certainly so conclude. And, at least on this record where ABC has stymied discovery on the subject, that has to be assumed what ABC intended. Balanced reporting does not draw ratings, sensational factual accusations do.

A reasonable juror could well find that ABC's breathless teasers and sensational phrasing was intended to and did convey *factual* allegations. Were those accusations true, though? No. That can be shown by *objective* fact. ABC's broadcast "boasting" example undeniably was not boasting at all—it was a sermon about a hypothetical person. ABC's implication of hypocrisy misleadingly failed to reveal Rev. Price's prosperity gospel message. ABC's accusations of corruption and deceit are objectively false given the evidence of Rev. Price's financial transparency. And ABC's exaggerations of Rev. Price's wealth are objectively wrong.

The district court erred in granting the anti-SLAPP motion to dismiss. The judgment should be reversed as to all defendants and Rev. Price should be allowed to proceed with his claims.

Dated: July 9, 2009

Respectfully submitted,

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