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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 REPLY BRIEF

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INTRODUCTION

Nothing in the First Amendment or California libel law requires jurors or courts to check common sense at the door or to contort language and context to find innocent meaning or nonactionable opinion. Nothing requires viewing damning juxtaposition and dripping sarcasm as “curiosity” or a falsely touted “smoking gun” as “defending” the character assassination victim’s candor.

But that is what appellees (collectively “ABC”) ask. They attempt to dissect language divorced from its overall presentation and effect. ABC did not present an academic commentary on conflicting religious viewpoints. This wasn’t “Meet The Press,” an off-the-cuff talk radio show or an Internet blog rant. ABC’s

program – as teased and presented – was a purported *news* program, a muckraking *factual* exposé ostensibly produced by its own investigative journalism.

Absent the *factual* assertions and implications, ABC’s reporting did not warrant ABC’s news reporters’ and anchors’ breathless, emphatic delivery.

Certainly, a reasonable juror could so conclude. Both this Court’s *and* Supreme Court precedent dictate that whether a reasonable juror might perceive implied false factual assertions is the threshold, not this Court’s interpretation.

A reasonable juror could well understand ABC’s broadcasts as factual and as falsely accusing Rev. Price. ABC cannot escape liability “for having the foresight or literary facility to secrete a ‘classic and coolly-crafted libel’ in the overtones of a facially neutral statement” nor is there “a loophole through which media defendants can escape liability for ‘high-profile’ defamatory stories

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insinuating what they may not state.” *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 829 (Iowa 2007) (citations and quotation marks omitted).

Faced with its indisputably factual presentation, ABC argues that the falsity evidence here is not admissible. But ABC itself submitted most of that evidence, did not object to much of it, and never obtained a ruling as to the limited evidence it did object to. It waived any evidentiary issue.

Rev. Price established a *prima facie* case. The judgment should be reversed.

I. ABC IGNORES THE GOVERNING STANDARD: A REASONABLE JUROR VIEWING ALL EVIDENCE AND INFERENCES IN REV. PRICE’S FAVOR.

Strikingly, ABC’s brief focuses on ABC’s evidence and spins all evidence

and inferences in *ABC's* favor. But the anti-SLAPP motion standard – a standard the Seventh Amendment requires – is that all evidence and inferences must be construed in *Rev. Price's* favor. [Rosenthal](#) v. *Great W. Fin. Sec. Corp.*, 14 Cal. 4th 394, 412, 58 Cal. Rptr. 2d 875, 885 (1996). ABC ignores this governing standard.





Ignoring this Court's binding precedents, ABC argues that courts alone determine what an "average" viewer might understand the broadcasts to convey. Not so. The question is *not* whether a *court's* "assessment that each of the[] statements is properly interpreted as an assertion of opinion rather than fact" but rather whether "a reasonable factfinder could disagree with that assessment."

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[Manufactured Home](#) Cmtys., Inc. v. *County of San Diego*, 544 F.3d 959, 964 (9th Cir. 2008). "[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.'" *Id.* at 963 (citations omitted, emphasis added). Unless this Court can "declare as a matter of law that no reasonable person could construe [the statements] as provably false," it must reverse. *Id.* at 964. This standard comes directly from the Supreme Court: "The dispositive question [is] . . . whether a *reasonable factfinder* could conclude that the statements . . . imply an assertion that [is provably false]." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990) (emphasis added); see *Gardner v. Martino*, 563 F.3d 981, 987 (9th Cir. 2009) (same).

Although containing some loose language, the California cases ABC cites

agree. For example, *Rosenauro v. Scherer*, 88 Cal. App. 4th 260, 264-65  , 105 Cal. Rptr. 2d 674, 677-78 (2001), holds that a statement is only necessarily “protected by the First Amendment when *no one* could reasonably interpret them as a defamatory fact. [Citation.]” (Emphasis added.) Likewise, *Weller v. American Broadcasting Cos., Inc.*, 232 Cal. App. 3d 991, 1002, 283 Cal. Rptr. 644, 651   (1991), addresses what “the news reports in this case *could have been* understood as implying” (Emphasis added.) The standard is not a court’s interpretation, but the broad ballpark of meaning, including factual assertions, that “a reasonable trier of fact could conclude that the published statements imply.” [Nygard, Inc. v.](#)

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Uusi-Kerttula, 159 Cal. App. 4th 1027, 1048, 72 Cal. Rptr. 3d 210, 226   (2008) (following *Milkovich*).

ABC ignores this standard. It asks this Court, not a reasonable factfinder, to determine the meaning conveyed. That is wrong. The issue is whether a reasonable juror, construing all evidence and inferences in Rev. Price’s favor, could rationally determine that the broadcasts conveyed defamatory factual meaning.

II. ABC’S EVIDENTIARY ARGUMENTS ARE UNFOUNDED.

ABC spends much of its brief arguing about the admissibility of evidence supporting Rev. Price’s claim. The district court did not rule on that basis. ABC’s appellate effort to justify the district court’s result on this unrelieved-upon basis is misspent.


A. ABC Waived Its Evidentiary Objections.



As discussed in section B, below, ABC submitted much of the evidence it complains about on appeal. As to that evidence, ABC never raised any evidentiary objection in the district court. *See* Reply Excerpt of Record 1-3 (ABC's objections limited to declarations Rev. Price submitted). As to that





¹ ABC also spends much space arguing that Rev. Price is a public figure and that its report addresses a public controversy. Rev. Price has never contended otherwise. So why does ABC spend pages on the point unless, perhaps, to seek to discredit Rev. Price personally?

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evidence, it *waived* any objection. *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1058 n.5  (9th Cir. 2003).

ABC further waived those evidentiary objections that it made by not obtaining a ruling *in the district court*. “The failure of a litigant to request a ruling is a waiver of the right to raise any issue before this Court concerning admissibility.” *Fenton v. Freedman*, 748 F.2d 1358, 1360  (9th Cir. 1984); *accord Ramirez v. City of Buena Park*, 560 F.3d 1012, 1026  (9th Cir. 2008) (rule applied to summary judgment motion). A party does not get to raise unruled upon admissibility issues anew on appeal.














And, ABC has waived its evidentiary arguments on appeal. It incorporates by reference 212 pages of evidentiary objections it made in the district court. Appellees' Brief “AeB” 44. That is improper. *Noel v. Hall*, 568 F.3d 743, 745 n.1  (9th Cir. 2009); 9th Cir. R. 28-1  (b). In its brief, ABC presents no coherent evidentiary argument beyond ipse dixit characterizations; it has thereby independently waived any inadmissibility assertion on appeal. 9th Cir. R. 28-1  (b); *see FDIC v. Garner*, 126 F.3d 1138, 1145  (9th Cir. 1997) (party waives on appeal



point for which it presents no [case law](#) or argument).



ABC attempts to avoid its evidentiary problem by focusing on the substantive anti-SLAPP motion standard that a plaintiff must present sufficient admissible evidence to support a prima facie case. It argues that an appellate court should consider the admissibility of unobjected to record evidence. That's wrong as a matter of both federal evidentiary law and California substantive law.

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Federal law governs anti-SLAPP motion procedural issues. [Verizon](#)  *Del.*, *Inc. v. Covad Commc'ns Co.*, 377 F.3d 1081, 1091   (9th Cir. 2004); *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 845-46   (9th Cir. 2001); *see Estate of Tucker ex rel. Tucker v. Interscope Records*, *Inc.*, 515 F.3d 1019, 1029   (9th Cir. 2008) (federal procedural rules govern diversity action). In the summary judgment context, where Federal Rule of Civil Procedure 56(e)(1) comparably requires admissible evidence, evidence a party fails to object to *or* on which it fails to obtain a ruling on its objection is deemed admissible. *E.g.*, *Skillsky v. Lucky Stores, Inc.*, 893 F.2d 1088, 1095   (9th Cir. 1990) (testimony deemed admissible for summary judgment purposes as to party who did not object to it); *Fireguard Sprinkler Sys., Inc. v. Scottsdale*  *Ins. Co.*, 864 F.2d 648, 651-52 & n.2   (9th Cir. 1988) (failure to object to allegedly defective evidence waives the objection for summary judgment purposes); 10B Charles Alan Wright, et al., *Federal Practice and Procedure*, § 2738 at 372-73 & n.53 (3d ed. 1998); *see Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1066-67 *Shepardize*®  (9th Cir. 1996) (evidentiary sufficiency argument improperly premised upon expert testimony reliability/admissibility where no objection made or ruling obtained in district court). Indeed, hearsay evidence

which *could be* submitted in admissible form at trial suffices to defeat summary judgment. *Fraser v. Goodale*, 342 F.3d 1032, 1037   (9th Cir. 2003).



California anti-SLAPP law is the same. Anti-SLAPP motion evidence submitted without objection or ruling is deemed admissible. *Gallant v. City of Carson*, 128 Cal. App. 4th 705, 711-12, 27 Cal. Rptr. 3d 318, 322-23   (2005);

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Gallagher v. Connell, 123 Cal. App. 4th 1260, 1268, 20 Cal. Rptr. 3d 673, 679   (2004) (unobjected hearsay). ABC does not get to rework the evidentiary record by asking this Court to revisit what evidence may be admissible when ABC waived any evidentiary objections.

B. ABC Cannot Complain About The Admissibility Of Evidence It Proffered.

There is a further problem with ABC's evidentiary quibbling. ABC proffered most of the falsity evidence. A party may not both proffer evidence and then later complain that it should not be admissible. *E.g.*, *Black v. Hesse*, 869 F.2d 420, 422 (8th Cir. 1989) (“We cannot find error in the admission of evidence which Hesse’s counsel solicited without objection”); *All Am. Life & Cas. Co. v. Oceanic Trade Alliance Council Int’l, Inc.*, 756 F.2d 474, 479-80   (6th Cir. 1985) (“where the injection of allegedly inadmissible evidence is attributable to the action of the party seeking to exclude that evidence, its introduction does not constitute reversible error”). Here, ABC proffered much of the key evidence.

For example, ABC submitted the evidence that Rev. Price’s church discloses its financial records. ER 111 n.7, 118 ¶ 12, 134-35; *see also* ER 119 ¶ 21, 138, 158. 209. ABC submitted Rev. Price’s full 1997 sermon. ER 209 at 3:17-4:53:

2 None of the cases that ABC cites involves waived evidentiary objections or defense proffered evidence.

3 ABC claims that the church's statements, both as ABC's retraction

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see ER 119 ¶ 21. *ABC submitted* its "retraction" admitting it had taken the Rev.

Price sermon clip out of context and that Rev. Price's church claimed full financial disclosure and a salary commensurate with his extensive responsibilities. ER 111 n.7, 118 ¶ 12, 119 ¶ 21, 134-35, 138, 158, 209. *ABC* proffered exhibits demonstrating that Rev. Price humbly attributes his prosperity to the beneficence of God. ER 195, 199, 210 (audio files 4&5). And, *ABC's* evidence outlines Rev. Price's "prosperity gospel" that God rewards in this life righteous believers with material benefits, a teaching fundamental to Rev. Price's reconciliation of religion and material prosperity, a message *ABC never* mentioned in its broadcasts. ER 163, 178-89, 201.

As with its waived objections, *ABC* cannot claim inadmissibility to dodge the evidence that *it* proffered supporting – indeed establishing – Rev. Price's prima facie case.

C. ABC Cannot Avoid Rev. Price's Unequivocal Refutation Of Its Claims.

ABC goes so far as to suggest that Rev. Price's denial that he ever owned a 25-room mansion, a yacht, a helicopter, seven automobiles, or a private jet, somehow does not prove anything. ER 252. Rev. Price's own testimony as to


▷ (...continued)

relayed and as the church's rebuttal tape reflects, are hearsay and that the church should have submitted some new declaration. AeB 45-46. But a party need not duplicate evidence that the other party has already put in the record without any evidentiary qualification.

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what property he does or does not own is beyond question admissible. Relying on

Vogel v. Felice, 127 Cal. App. 4th 1006, 1021-22, 26 Cal. Rptr. 2d 350, 361-63 

(2005), ABC suggests that his denial was not unqualified and therefore not good

enough. AeB 34. In *Vogel*, one political candidate accused another of owing


thousands of dollars in unpaid spousal and child support. The plaintiff did not

dispute that he currently or at one time owed outstanding support obligations.

Rather, his response was implicitly qualified, indeed Clintonesque: "I do not owe

my wife and kids *thousands*." *Vogel*, 127 Cal.App.4th at 1021 *Shepardize*[®] , 26 Cal. Rptr. 2d at

362 (emphasis added.) It created a "negative pregnant" that he owed outstanding

support obligations to some extent. *Id.* at 1022, 26 Cal. Rptr. 2d at 362 *Shepardize*[®] .

There is no such negative pregnant, qualification or gamesplaying in Rev.

Price's declaration. He says that ABC's attribution "is false. I do not own, and

have never owned, a yacht. I do not own, and have never owned, a helicopter. I

do not own, and have never owned 7 luxury automobiles and I do not own, and

have never owned, a private jet. And while my home is quite lovely, it is not a

25 room mansion. At the time of the broadcast I owned 3 cars and, presently, I

own 2 cars." ER 252. His statement is simple, straightforward and unequivocal.

The governing legal standard requires that it be construed, and all inferences be

made, in his favor. It is hard to image a clearer refutation of ABC's statement.

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⁴ *Vogel's* "negative pregnant" approach is likely wrong. A court is to "neither 'weigh credibility [nor] compare the weight of the evidence. Rather, . . . [it must] accept as true the evidence favorable to the plaintiff [citation] and

evaluate the defendant's evidence only to determine if it has defeated that


(continued...)

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D. ABC's Tactical Ploy – Limiting Its Motion To Falsity And Convincing The District Court To Bar Intent Discovery – Made Relevant How Viewers, In Fact, Understood Its Broadcasts.


If a speaker *intends* a defamatory meaning and viewers, in fact, understand such a meaning, the statements are actionable *regardless* of what a hypothetical reasonable viewer might understand: “The meaning of a communication is that which the recipient correctly . . . understands that it was *intended* to express.”

Restatement (Second) of Torts § 563  (1976) (emphasis added). “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 ordinary person would not recognize it.*” *Id.*, cmt. b (emphasis added); *see id.* cmt. c (“If the defamatory meaning is *not* intended, it must be a reasonable construction of the language,” emphasis added).

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California follows this Restatement position. *Savage v. Pac. Gas & Elec. Co.*, 21 Cal. App. 4th 434, 447, 26 Cal. Rptr. 2d 305, 313  (1993) (statement defamatory even though only select few would have so understood it; expressly following section 563). Thus: Speaker's intent + viewer's understanding = defamation.



4 (...continued)




submitted by the plaintiff as a matter of law.’ [Citation.]” *Flatley v. Mauro*, 39 Cal. 4th 299, 326, 139 P.3d 2, 19  (2006). Implying a “negative pregnant” is weighing the evidence and its credibility.

⁵ In citing section 563 comment c, ABC omits the important qualification that the comment only applies where a particular defamatory meaning *was not intended*. *See* AeB 45 n.17.

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Accordingly, if ABC *intended* a particular unapparent defamatory meaning, viewers' understanding of that meaning is relevant. But through tactical gamesmanship ABC has kept unresolved the meaning it intended. It purported to "take off the table" its intent and to limit its motion to "falsity." *See* ER 11-12, 75 [asserting that motion's sole issue will be "whether any statements of fact about Plaintiff were false"], 97-99 [arguing intent not to be at issue in anti-SLAPP motion], 112 [motion limited to falsity]. On that basis, it enlisted the district court to forestall discovery as to its intent. *See* ER 212-223, 288. ABC must live with the consequence of its tactics: ABC must be presumed to have intended any meaning, even one not readily apparent, in fact understood.

On appeal, Rev. Price seeks only to hold ABC to the standard that it proffered in the district court – that only falsity, not any limitation on ABC's intent, would at issue. By virtue of the district court's discovery order, obtained at its behest and on its representation that Rev. Price possessed all information necessary to oppose the anti-SLAPP motion, ABC is judicially estopped from denying, for anti-SLAPP motion purposes, any intent relevant to determining the meaning its broadcasts conveyed and thereby to any falsity. *See United Nat'l Ins. Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772, 779-80   (9th Cir. 2009). ABC cannot have its cake and eat it too; it cannot both preclude discovery on its intent and deny that it intended the implications that viewers understood.


Rev. Price's obligation, thus, was to present evidence as to what viewers, in fact, understood. *See Sunward Corp. v. Dun & Bradstreet*,  *Inc.*, 811 F.2d 511  .

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517, 519 (10th Cir. 1987) (plaintiff did not bear its proof burden where it failed to present evidence as to recipients' understanding of statements that were not reasonably viewed as defamatory on their face). He did so. *See* ER 255-56 ¶¶ 4, 258 ¶ 3(b), 265 ¶ 4, 269 ¶ 3, 274 ¶ 4, 282-83 ¶¶ 3-4, 286 ¶¶ 3, 6. Given ABC's tactical choices, a corresponding ABC intent must be presumed, making the viewers' declarations not only admissible, but central to determining the meaning that ABC's broadcasts conveyed.

E. Expert Evidence As To Reasonably Conveyed Meaning Is Admissible.

ABC also claims that expert testimony regarding the meaning conveyed to reasonable lay viewers is irrelevant. ABC does not challenge the expert's credentials or the legitimacy and value of linguistics as an academic discipline. Rather, ABC's claim is that the broadcasts' defamatory meaning is purely a legal question. That's wrong. As discussed above, the standard is whether, based on the evidence, a reasonable *juror* could find the broadcast to contain provably false assertions. In determining what meaning a reasonable juror might find to be conveyed, a court necessarily needs to consider any evidence that legitimately may be before the jury.

ABC does not, and cannot, contest that *Weller* directly holds expert linguistic evidence relevant to determining the meaning that a reasonable juror might find imbued in a broadcast. 232 Cal. App. 3d at 1007 *Shepardize*®  -08, 283 Cal. Rptr. 3d

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at 654. ABC claims that *Weller* only reached that conclusion after first determining the meaning to which the statements were reasonably susceptible. But that the appellate court first addressed the susceptibility argument and found that it could dispose of it without expert evidence does not mean that the expert evidence is only redundantly admissible if the defamatory factual meaning is readily apparent. To the contrary, the same process should apply as when a court considers extrinsic evidence in determining whether contract language is reasonably susceptible to a proffered meaning – the evidence is provisionally admissible, to be disregarded only if even with that evidence the proffered meaning is insupportable. *See Miller v. Glen Miller Prods.*, 454 F.3d 975, 989-90   (9th Cir. 2006) (quoting *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 37, 442 P.2d 641, 644   (1968)).










The cases ABC cites are readily distinguishable. The meaning of contract language *absent extrinsic evidence* is a question of law. The meaning of broadcasts and their implications and innuendoes is not. *See* Section I, *supra*. Rather, that issue is treated like contract language *with extrinsic evidence*. It is only a question of law if there is no possible actionable construction *after* considering extrinsic, e.g., expert, evidence.

Prof. Finnegan's testimony, thus, was directly relevant to determining what meaning a reasonable juror might ascribe to ABC's broadcasts.

**III.A REASONABLE JUROR COULD WELL CONCLUDE THAT ABC
LEVELED SPECIFIC, FALSE FACTUAL CHARGES AGAINST
REV. PRICE OSTENSIBLY FLOWING FROM ITS OWN
INVESTIGATION.**

**A. ABC Broadcasts Must Be Judged By Their Overall Context And
Tenor – That Is, As Purported Factual Reporting Based On Its
Own Investigation.**

1. ABC’s broadcasts were factual.

The meaning that a reasonable juror might ascribe to ABC’s broadcasts here includes defamatory *factual* statements. “[T]he publication is to be measured not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader.” *MacLeod v. Tribune Publ’g Co.*, 52 Cal. 2d 536, 547, 343 P.2d 36, 41-42   (1959). Nothing in the First Amendment protects a broadcast ostensibly framed as a factual report just because [the broadcaster](#)  (or counsel) can disingenuously pull out a supposed qualifying word or two to claim nonactionable subjective opinion. *See Milkovich*, 497 U.S. at 19 *Shepardize*®  (purported opinion column sufficiently conveyed factual content to be actionable); *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1055   (9th Cir. 1990) (same). And, as a *video* broadcast, not just the words, but the delivery, visual components, and superimposed titles, equally convey meaning. *White v. Fraternal Order of Police*, 909 F.2d 512, 526   (D.C. Cir. 1990). The broadcasts’ context and tenor are critical. *Gardner*, 563 F.3d at 987 *Shepardize*® .

Here, the broadcasts were presented as factual, objective *news* reporting and

investigative journalism in a television news magazine. See *Waller*, 222 Cal. App.

investigative journalism in a television news magazine. *See* *Wetter*, 252 Cal. App.

3d at 1003-05, 283 Cal. Rptr. at 651-53 *Shepardize*®. One of ABC's teasers even interrupts the day's headline news story. ER 149. ABC does not dispute the district court's finding that "the general tenor of the entire work tends to create the impression that [ABC was] asserting an objective fact . . ." ER 297. This was not "a radio talk show program that contains many of the elements that would reduce the audience's expectation of learning an objective fact . . ." *Gardner*, 563 F.3d at 988; *see Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 1176-78, 72 Cal. Rptr. 3d 231, 247-50 (2008) (no one would think Internet rant asserted actual facts). ABC has not contended – because it cannot – that every reasonable viewer would necessarily have believed that its "20/20" newsmagazine was presenting subjective opinion. ABC cites to no obvious hyperbole or exaggeration.

To the contrary, ABC says it was just antiseptically "rais[ing] a question . . . that had long fueled public debate." AeB 56. But it clearly did more. ABC and its reporter, John **Stossel**, were "saying Enough," had "taken on the case," and asked rhetorically "Is it time for someone to say enough?" ABC was presenting an ostensibly *factually supported* viewpoint.

Nor was, as it claims, ABC subjectively commenting on Rev. Price's theology – the "prosperity gospel" that he proclaims. ABC never *mentioned* Rev. Price's "prosperity gospel." How could ABC have been commenting on something that it hid from its viewers? Its *only* theological references were to the

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Bible as ostensibly teaching the difficulty of the wealthy making it to heaven, to Leonard's "degree of sacrifice" views, and to a "godly life" at odds with wealth. It proffered those views as givens, not as controversial subjects.

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A reasonable juror could well conclude that ABC was proffering fact, not commentary.

2. ABC's broadcasts were investigative and implied a storehouse of supporting facts.

ABC's broadcasts were not only factual, they were overtly premised on investigation and strongly suggested that ABC had further supporting facts. ABC made broad generalizations, implied that it had investigated, and then proffered specific examples to support its generalizations. That necessarily leads a reasonable viewer to infer that ABC had further, undisclosed facts. ABC said broadly that "they're raking in a fortune from the faithful," ER 142, and asked rhetorically "how much of what you give do they keep for themselves? Is it time for someone to say enough?" ER 30 ¶ 22(f), 143. Elsewhere it promised to present someone to say that "they" (e.g., Rev. Price) "are squandering our money." ER 29-30 ¶ 22(e), 153.

⁶ ABC off-handedly stated [the Leonard](#) "admits he has theological differences" with one of the ministries *not* run by Rev. Price, ER 147, but nowhere even hints at differences with Rev. Price, let alone what the nature of those theological differences might be.

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It then supported these generalizations with specific examples, e.g., Rev. Price's supposed deception of his church members. And, ABC implies that these examples are the result of its far-reaching investigation. For example, it says that John Stossel "has taken on the case," discusses how "the ABC affiliate in Dallas

[‘News 8 Now’] checked . . . out” one accusation, and brings on a supposed expert, “a hotshot money manager for [Templeton](#) Investments,” to validate its reporting. ER 144, 151. The overall tenor is that ABC has a wealth of supporting facts from *its own* investigation, facts confirmed by a touted “expert.” It plays an exemplar of Leonard’s “research group,” Ministry Watch, performing a phone investigation and represents that Leonard “had the expertise . . . and said I’m gonna investigate these ministries” ER 145, 153. The implication is that ABC is not presenting opinion, but its own and Leonard’s investigation results.

ABC’s claim that it was only using “colorful language” to retell Leonard’s subjective views – fully disclosing its complete reliance on him and his research – is nonsense. ABC’s teasers said “*John Stossel* takes us inside the lives of some preachers and says ‘[E]nough’”; “And *John Stossel* is here to say ‘[E]nough’”; “And wouldn’t you know that John *Stossel himself* has said, enough . . . and *he’s* taken on the case”; “*John Stossel* is here to say ‘Enough.’” ER 27-28 ¶ 22(a), 149; ER 28 ¶ 22(b), 150, ER 28 ¶ 22(c), 151; ER 28-29 ¶ 22(d), 152 (emphasis added). Juxtaposing the church member’s quote that ABC obtained and Rev. Price’s sermon was ABC’s device, not Leonard’s.





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Plus, ABC did not just relate Leonard’s accusations, it adopted them, building up Leonard as an unimpeachable authority on ministries that “take your money but [do] not tell you a thing about how they’re gonna spend that money.” ER 144-46. And, Leonard’s views are *factual*, not subjective. He disavows his “theological differences . . . [as] affect[ing] his financial assessments” ER 147. ABC is liable both as a “talemaker” for its own reporting and as a

“talebearer” for parroting Leonard’s accusations. *See Flowers v. Carville*, 310 F.3d 1118, 1128 (9th Cir. 2002) (citations omitted).

Reasonable viewers could conclude that ABC and its adopted expert Leonard conducted extensive factual investigations and that any express or implied generic accusations were supported by a wealth of further, undisclosed research.

3. ABC is liable for its teasers.

ABC tries to ignore its teasers, ER 149-56, not mentioning them in its statement of facts nor, indeed, until pages 54 to 55 of its brief. No wonder. The teasers undeniably communicate defamatory *factual* meaning. *See* AOB 7-9. Like a headline, the teasers are independently actionable. *Kaelin v. Globe Commc’ns Corp.*, 162 F.3d 1036, 1040-41   (9th Cir. 1998) (headline); *Empire Printing Co. v. Roden*, 247 F.2d 8, 14   (9th Cir. 1957) (same).

B. To Be “Provably False” Only Requires That The True/False Determination Be Premised On A “Core Of Objective Evidence.”

ABC recites by rote that its accusations against Rev. Price have to be “provably false.” But it does not discuss what that means. *See* AOB 28-30. All that is required is that truth or falsity be resolvable based on a “core of objective evidence” or “an articulation of an objectively verifiable event.” *Milkovich*, 497 U.S. at 21-22. The requirement affects only the *burden* of proof, not the *quantum*

of proof required. AOB 30. Only “wholly subjective” statements are protected,

[Manufactured Home](#) v. Cmtys., 544 F.3d at 965 *Shepardize*; even “somewhat subjective determinations” are actionable where “they are based on factual observations to a sufficient extent to imply an assertion of fact,” *Unelko*, 912 F.2d at 1055 *Shepardize*; see *Weller*, 232 Cal. App. 3d at 1005, 283 Cal. Rptr. at 653 *Shepardize* (“grossly inflated price” is provably false given available, if inexact, expert valuation testimony).

ABC’s factual assertions here more than meet the relevant standard.

C. A Core Of Objective Evidence Undeniably Shows The Falsity Of ABC’s Statements.

Given the tenor of the news reports and teasers, what factual allegations are made?:

! The video clip that ABC presented showed Rev. Price boasting about his *own* wealth.

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! Rev. Price owns a 25 room mansion, a 6 million dollar yacht, a helicopter and 7 luxury automobiles.

! Rev. Price boasts about owning *those particular things* and does so *in the manner represented* in the video clip – coldly, as a matter of personal pride, without any reference to a higher power.

! Rev. Price *deceives* congregants and other donors.

! Rev. Price’s ministry does not reveal its finances.

! Rev. Price preaches one thing but practices another.

! And, implicitly, Rev. Price wrongly diverts to his own personal use donations to, and the funds of, the ministries he guides.

ABC says there's no falsity there. Let's review the evidence:

- ! ABC *admits* that the video clip of Rev. Price was a misrepresentation, that “[w]e’d used his quote out of context.” ER 204; *see* AeB 23 n.9.
- ! Rev. Price denies ever having owned the specified items. ER 252.
- ! Rev. Price uniformly describes his prosperity as a blessing flowing from God and attributes it to God and thereby shows modesty and humility, not personal pride. ER 163, 195, 199, 210.
- ! Rev. Price and his church routinely disclose their finances to the church’s congregation. ER 111 n.7, 118 ¶ 12, 134-35; *see also* ER 119 ¶ 21, 138, 158, 209. ABC claims that contrary evidence exists.

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AeB 9-10, 15-16. But on an anti-SLAPP motion a court does not weigh the evidence to determine who is right.

- ! Rev. Price preaches – as ABC admits – a “prosperity gospel” and his personal prosperity is entirely consistent with that preaching.
- ! Rev. Price’s church pays him “a salary commensurate with his duties.” ER 111 & n.7, 134-35, 138, 158.

There is simply no reasonable debate as to a *prima facie* falsity case.

Instead, ABC focuses on its bogus admissibility claims, debunked above, and on seeking to unduly narrow what, in fact, it said and conveyed.

D. ABC's Attempts To Limit What It Said And Implied Are Unfounded.

ABC seeks to sanitize its broadcasts, unreasonably spinning individual words and phrases out of the context and ignoring the broadcasts' gist and tenor, e.g., its reporters' and anchors' dripping, breathless delivery. That doesn't work.

John Stossel was outraged, not curious or defending Rev. Price. For example, ABC strains credulity with its construct that juxtaposing a congregant stating that her donations are being put to "excellent use" with "*and yet*, her pastor, Fred Price, boasts" about personal wealth somehow reflects mere "curiosity" on John **Stossel**'s part and its statement that John **Stossel**, in fact, "defend[s]" Rev. Price's candor. AeB 54 n.27 (original emphasis). A simple

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viewing of the broadcasts reflects otherwise. It's not "curiosity" when ABC says "they're raking in a fortune from the faithful." ER 142. Nor is it curiosity or to Rev. Price's defense when "John **Stossel** says 'Enough!'"

ABC strongly implied that Rev. Price preaches something other than prosperity. ABC does not dispute that it portrayed Rev. Price as leading a wealthy lifestyle. It claims that it never *expressly* said he preached a contrary austere life. AeB 56-57. But it undoubtedly *implied* that his lifestyle was contrary to his preaching: "*The Bible discusses how difficult it is for the wealthy to reach heaven*, but that hasn't stopped some preachers from attaining vast fortunes." ER 29 ¶ 22(e), 153 (emphasis added.) "6 million dollar yachts, private jets, Rolls Royces – sound like the good life? *What about the godly life?*" ER 28 ¶ 22(a), 149

(emphasis added). “These are preachers, preachers. [Second anchor] . . .

Preachers . . . , imagine this, . . . lounging on multimillion-dollar yachts.”

ER 151. The 20/20 report leads with “they *preach* the gospel of giving to God”

and 30 seconds later says “[a]nd yet, her pastor, Fred Price, boasts” of his personal

wealth. ER 143 (emphasis added). ABC repeatedly *contrasts* a wealthy lifestyle

with preaching a godly life. Its tone of shock and outrage reinforces the contrast.

Even the term it uses – *preachers* – implies that the contrasting lifestyle is at odds

7 The only reference to a yacht in the 20/20 report is in Rev. Price’s sermon that ABC used out of context. It is clear that the referenced “preachers” therefore include Rev. Price.

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with something they are saying. *See Stevens*, 728 N.W.2d at 831 *Shepardize*® (true statement that newspaper sports columnist rarely attended games he wrote about libelously implied he should have been attending games).

ABC implied factually criminal conduct. ABC claims that it didn’t accuse Rev. Price of any crime. Perhaps not expressly, but a reasonable juror could find that implication – as actual viewers did. *See* ER 265-66, 274, 277, 280. ABC may not have used the words “theft,” “embezzlement,” or “fraud” but it certainly implied such *conduct*: Obtaining moneys, whether as donations or otherwise, by false pretenses, wrongfully taking church moneys, diverting moneys intended for the church to personal use. *See* AOB 51-52.

Here’s what ABC said: “[T]hey’re raking in a fortune from the faithful.”

ER 142. “[T]hey preach the gospel of giving to God. But how much of what you


give do they keep for themselves? ER 143. “[W]hat I give to this church, I


give do they keep for themselves: ER 143. “[W]hat I give to this church, I know that my money is being put to excellent use without one question.” [John **Stossel**] ‘And yet her pastor, Fred Price boasts’” about his supposed personal fortune. ER 143, 153-54. “[Leonard] ‘[T]here’s a very high probability that something is wrong here.’” ER 146. Rhetorically: “Is it time for someone to say enough?” ER 143, coupled with the repeated teasers that John **Stossel** has said


8 “Preacher” itself connotes a religious teacher who has undertaken an austere lifestyle. Since the 1200s, friars in the Catholic Order of Preachers (the “Dominicans”) have vowed poverty. *See* The Order of Preachers, Friars, http://curia.op.org/en/index.php?option=com_content&view=article&id=45&Itemid=55; The Order of Preachers, History & More, Saint Dominic, http://curia.op.org/en/index.php?option=com_content&view=article&id=50&Itemid=61.

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“enough” and repeated graphics of “Enough!” ER 149, 150, 151, 152, 153. ABC may not peddle one impression to the public and claim another, innocent one in court. *See Stevens*, 728 N.W.2d at 829 *Shepardize*® .

Even the district court found that the broadcasts implied that Rev. Price was “unethical” and “corrupt.” ER 296-97 & n.5. The district court’s hair-splitting between noncriminally and criminally “unethical” or “corrupt” (the district court’s words) amounts to “the critical analysis of a mind trained in the law,” that does not necessarily reflect “the natural and probable effect upon the mind of the average [viewer].” *See MacLeod*, 52 Cal.2d at 547, 343 P.2d at 41-42 *Shepardize*® . Actual viewers did not understand the accusation to be so limited and reasonable jurors do not have to accept such legal hair splitting.

Dodds v. American Broadcasting Co., 145 F.3d 1053  (9th Cir. 1998), is not to the contrary. There, the plaintiff state court trial judge claimed to have been defamed because a negative report about him aired between reports about other

judges who, in fact, had been accused of crimes. He pointed to *no* factual allegation, express *or* implied, leveled against him in the broadcast that would have constituted a crime. Rather, he claimed implied associational guilt based on the segments' sequencing: "ABC made no explicit statement that Judge Dodds had engaged in conduct that was equivalent to the actions of a felon . . . He relies principally on the fact that the segment sandwiched his story in between stories on two other judges each of whom was accused of serious felonious activities. In particular, he asserts that 'the broadcast could have been seen by a reasonable

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viewer as saying that [he] was liable *for conduct not even discussed*' and that the broadcast 'left the impression that [he] had committed undisclosed felonies.'" *Id.* at 1065 (emphasis added).

Here ABC implied that Rev. Price engaged in specific *factual* conduct – obtaining money by false pretenses, diverting moneys properly belonging to the church for personal use – that undoubtedly constitute crimes. *Flowers*, 310 F.3d at 1127-29 – holding that presidential campaign aides' accusations that plaintiff had "doctored" and "selectively edited" (audio) tapes "insinuates deception" and conveys an accusation of a crime – not *Dodds*, is the relevant precedent.

ABC did not disavow all criminal accusations. ABC's claim that its report disavowed any illegality is untrue. The report mentioned that one ministry claimed to comply with all *IRS* regulations and that ministries are exempt from reporting their finances. ER 144-45. But complying with legal reporting requirements does not dispel implied *other* criminal conduct. A CEO may comply with all SEC reporting regulations and still illegally loot millions from a

corporation. Regulatory loopholes and an absence of underlying criminal behavior are not the same.

ABC does not dispute that it implied that Rev. Price is dishonest, corrupt and unethical. ABC does not contest the district court's finding that it implied Rev. Price was dishonest, unethical and corrupt or that such a statement is actionable if it "imply[s] the speaker's possession of undisclosed supporting facts." *Mamou v. Trendwest Resorts, Inc.*, 165 Cal. App. 4th 686, 728  , 81 Cal.

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Rptr. 3d 406, 440-41 (2008). ABC contends that it did not suggest that it had further, undisclosed supporting facts. AeB 47 & n.18. That is not so. *See supra*, section III.A.2.

Even without implied additional facts, calling a minister dishonest, corrupt, or unethical is inherently defamatory. *See* AOB 26. For a minister, the professional the standard is unambiguous, absolute and objective: Thou shalt not steal. *Exodus* 20:15; *Deuteronomy* 5:16. Whether Rev. Price violated this Commandment is not wholly subjective, *see* Section I.B.; ABC implied specific, objectively measurable theft and deceit.

IV. ABC CANNOT ESCAPE LIABILITY BY CLAIMING

“SUBSTANTIAL TRUTH.”

ABC attempts to avoid its broadcasts' undeniable falsity by claiming that certain statements were substantially true. To be substantially true, a statement has to be provable. ABC, thus, concedes that the specified statements are provable as true or false.

ABC's reliance on substantial truth, however, is ultimately misdirected

because what it claims is substantially true – that Rev. Price leads a prosperous lifestyle – is not what it represented – that he leads an extravagant “Lifestyles of the Rich and Famous,” that he *boasts* about that lifestyle, and that he boasts about things that he admittedly does not own.

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A. ABC Did Not Simply Accuse Rev. Price Of Being Prosperous, It Accused Him Of Owning Specific Things And Of “Boasting” About It.

ABC claims substantial truth because Rev. Price readily admits his prosperity. But that’s not what ABC accused him of. ABC falsely said that he owned a 25 room mansion, \$6 million yacht, a helicopter, seven luxury automobiles, and a jet. In fact, he owns an upscale home, one luxury automobile, a luxury watch, and travels on his church’s corporate jet. A reasonable juror could well find that is not the same as the gist of ABC’s report of extreme wealth – “vast fortunes” in ABC’s words. ER 153. A reasonable juror could find that an extra \$6 million yacht, a helicopter here, a handful of luxury automobiles there, is not a mere minor inaccuracy.

And, ABC’s portrayed not just what Rev. Price owned, but what he *boasted* of owning. Those who know Rev. Price know he does not own such things. The false light of Rev. Price boasting about things he does not own is as defamatory as anything else.

B. Rev. Price Is Humble, Not Boastful.




ABC's picture of Rev. Price boasting about the prosperity he enjoys is likewise not substantially true. Rev. Price, no doubt, publicly proclaims his prosperity. He preaches a prosperity gospel. But preaching prosperity from God

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and boasting are not the same thing. The sermon clip that ABC used shows a man talking about wealth as a *personal* attribute, haughtily and immodestly.

Misrepresenting *how* Rev. Price talks about his prosperity undoubtedly is actionable: “[R]egardless of the 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.”

Masson v. New Yorker Magazine, Inc. , 501 U.S. 496, 511   (1991) (emphasis added). *Masson*, thus, rejects ABC's claim that its “boasting” characterization of an out of context quote is protected commentary. *Id.* 9

A reasonable juror could well find that ABC's portrayal is not how Rev. Price speaks of his prosperity. ABC cites various of Rev. Price's published comments about his prosperity, but again, out of context. It omits Rev. Price's consistent, next-breath remarks that his prosperity is a blessing from God, flows from God, and is not a personal achievement but evidences God's beneficence. Compare AOB 13 with AeB 38-39. These remarks uniformly reflect *humility and modesty*, the *opposite* of boasting. A reasonable juror could well conclude that ABC's misrepresented exemplar of Rev. Price “boast[ing]” is nothing like how he discusses his prosperity in real life.

⁹ Under ABC's theory, it could broadcast out of context Tina Fey playing Sarah Palin, claim that it is Palin "boasting" about her foreign policy expertise, and be free from suit. *See* www.nbc.com/Saturday_Night_Live/video/clips/palin_hillary_open/656281/.

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**C. ABC's Substantial Truth Theory Does Not Negate Its Broad
Innuendo.**

ABC makes no claim of substantial truth as to its implied representations that Rev. Price preaches one thing but practices another, has engaged in criminal conduct, is dishonest, unethical, or corrupt or does not disclose his finances (ABC claims *disputed* truth as to the latter).

CONCLUSION

A reasonable juror could find that ABC's broadcasts here – the teasers and the 20/20 report, separately and together – were a "hit piece," that is, a report masquerading as objective journalism, taking statements and facts out of context to project a sense of authority and credibility, in order to engage in a character attack. Unlike an appellate brief, viewers do not have law clerks to check the veracity of the cited facts and authority. The hit piece victim is left to defamation law for recourse. Nothing in the First Amendment protects unfair and deceptive hit pieces premised, as here, upon factual misrepresentation.

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The judgment should be reversed and the case remanded for trial on Rev.

Price's claims.

Dated: September 21, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Circuit Rule 32-1

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this Appellant's Reply Brief is proportionately spaced, has a typeface of 14 points or more, and contains **6,959** words excluding the title page, signature block, tables, statement of related cases, corporate disclosure statement, this certificate of compliance, and proof of service.

Dated: September 21, 2009

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Signature s/ [ROBERT A. OLSON](#) ▼

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U.S. Court of Appeals Docket Number(s):

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