

CERTIFIED FOR PARTIAL PUBLICATION\*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

STEPHEN J. BARRETT et al.,  
Plaintiffs and Appellants,

v.

ILENA ROSENTHAL,  
Defendant and Respondent.

A096451

(Alameda County  
Super. Ct. No. 833021-5)

Stephen J. Barrett, M.D. and Terry Polevoy, M.D. appeal from the trial court's order striking their complaint for libel, libel per se and conspiracy as a strategic lawsuit against public participation under Code of Civil Procedure section 425.16 (hereafter section 425.16 or the anti-SLAPP statute). They challenge the trial court's findings that the anti-SLAPP statute applies to allegedly libelous statements respondent Ilena Rosenthal caused to be distributed on the Internet, and that appellants could not establish a probability of prevailing on their claims. They also challenge the trial court's award of attorney fees and costs to Rosenthal; its refusal to exempt their attorney from the order directing payment of Rosenthal's attorney fees and costs; and its refusal to allow appellants discovery. We shall vacate the order as it applies to appellant Polevoy and affirm it in all other respects.

BACKGROUND

Appellants Barrett and Polevoy are physicians primarily engaged in combating the promotion and use of "alternative" or "nonstandard" healthcare practices and products.

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\* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts III.B, III.C, IV, V, and VI.

Appellants have allegedly achieved national renown as consumer advocates; each maintains Web sites that expose “health frauds and quackery” and provide guides for consumers to make intelligent health care decisions. In their writings, appellants attack “products, services and theories that are marketed with claims that [are] false, unsubstantiated, and/or illegal,” and their work has assertedly “aroused great concern among promoters of such methods,” many of whom believe that destroying appellants’ reputations “would increase [the promoters’] success in the marketplace.” Although he is an American citizen, appellant Polevoy resides and practices medicine in Canada.

Respondent Rosenthal directs the Humantics Foundation for Women, and participates in two Usenet<sup>1</sup> “newsgroups,”<sup>2</sup> which focus on “alternative medicine.” According to appellants, Rosenthal is a particularly active distributor of information via

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<sup>1</sup> “The Usenet has been described as a worldwide community of electronic BBSs [bulletin board servers] that is closely associated with the Internet and with the Internet community. [¶] The messages in Usenet are organized into thousands of topical groups, or ‘Newsgroups’. . . . [¶] As a Usenet user, you read and contribute (‘post’) to your local Usenet site. Each Usenet site distributes its users’ postings to other Usenet sites based on various implicit and explicit configuration settings, and in turn receives postings from other sites. Usenet traffic typically consists of as much as 30 to 50 Mbytes of messages per day. [¶] Usenet is read and contributed to on a daily basis by a total population of millions of people. . . . [¶] There is no specific network that is the Usenet. Usenet traffic flows over a wide range of networks, including the Internet and dial-up phone links.” (*Religious Technology Center v. Netcom On-Line Communications Services, Inc.* (N.D. Cal. 1995) 907 F.Supp. 1361, 1366, fn. 4, quoting Dern, *The Internet Guide for New Users* (1994) at pp. 196-197; see also discussion, *post*, at p. 32, fn. 16.)

<sup>2</sup> “Newsgroups,” like automatic mailing list service (“mail exploders” or “listservs”), chat rooms, and Web sites, are among the various communication and information retrieval methods that can be used by anyone with access to the Internet. (*Reno v. American Civil Liberties Union* (1997) 521 U.S. 844, 851.) “Newsgroups also serve groups of regular participants, but these postings may be read by others as well. There are thousands of such groups, each serving to foster an exchange of information or opinion on a particular topic running the gamut from, say, the music of Wagner to Balkan politics to AIDS prevention to the Chicago Bulls. About 100,000 new messages are posted every day. In most newsgroups, postings are automatically purged at regular intervals.” (*Ibid.*) The communication that takes place via newsgroups is similar to that which takes place in “chat rooms,” in which two or more individuals engage in real-time dialogue, and on the World Wide Web.

the Internet. During a two-year period ending on May 21, 2001, she assertedly “posted 10,900 messages to newsgroups—an average of 15 per calendar day.” Appellants contend that one or both of them were mentioned in more than 200 of these messages, all of which were intended to injure their reputations.

Appellants commenced this civil action for damages action against Rosenthal and others,<sup>3</sup> claiming libel, libel per se, and conspiracy. Christopher E. Grell, appellants’ attorney at trial and in this court, was also a named plaintiff. On May 31, 2001, Grell moved to dismiss his action as against Rosenthal only, and this dismissal was entered on June 4, 2001.

As the trial court noted, the complaint does not specify which of the several defendants posted the many allegedly libelous online statements it describes, and specifically identifies Rosenthal as the poster of only five such statements, which are the following:

(1) On or about August 14, 2000, Rosenthal commenced distributing on two Usenet newsgroups an e-mail message she received from another defendant, Timothy Bolen. According to the complaint, the message accused Dr. Polevoy of “stalking women” and urged “ ‘health activists . . . from around the world’ to file complaints to government officials, media organizations, and regulatory agencies.” Bolen described “THE FACTS” as follows: “Polevoy, police reports show, STALKED Canadian Radio

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<sup>3</sup> The other defendants, who are not parties to this appeal, are Hulda Clark, described in the complaint as “an unlicensed naturopath who resides in California and operates a clinic in California and Mexico . . . [who] claims that all cancers and many other diseases are caused by ‘parasites, toxins, and pollutants’ and can be cured within a few days by administering a low-voltage electric current, herbs and other nonstandard modalities”; the Dr. Clark Research Association, a corporation which allegedly “[p]rovides news and other information about Hulda Clark and her activities, . . . [d]escribes and promotes Dr. Clark’s theories and methods,” and promotes and sells her products and instructional materials; David P. Amrein, the founder and president of the Dr. Clark Research Association; and Tim and Jan Bolen, who allegedly “do business as JURIMED, an entity whose purpose is to assist ‘alternative’ health practitioners faced with regulatory action, criminal prosecution, or other matters that threaten their financial well-being and/or license to practice.”

Personality Christine McPhee, until, terrified, she called in police. He followed her around, affecting disguises, for months—then further terrified her by e-mailing her the details of his stalking actions. Police agencies felt it necessary to assign armed uniformed officers to protect McPhee from Polevoy. Reports show that McPhee was not the only female Polevoy stalked.” Bolen described Polevoy’s conduct as part of a “criminal conspiracy” and urged readers to bring this and other unspecified “criminal” acts to the attention of various governmental agencies and officials, urging them to use their influence to see that “a criminal investigation” of Polevoy’s “subversive” activities “begins immediately.”<sup>4</sup>

(2) Shortly after she first republished Bolen’s message, appellants informed Rosenthal it was false and defamatory, asked that it be withdrawn, and threatened suit if it was not. Rosenthal refused to withdraw the message and, on unspecified dates, posted 32 additional messages on specified Internet newsgroups describing appellants’ threat accompanied by a copy of Bolen’s allegedly defamatory message or a reference back to that message and referring to appellants as, among other things, “quacks.” The title of these messages contained the words: “Slea[z]y ‘Quackbuster’ Scam.”

(3) On June 28, 2000, Rosenthal posted to a specified Internet newsgroup a message referring to Dr. Barrett and “falsely stating that ‘there are bunches of \$\$\$\$ coming to him to run that PRO-AMA anti alt.med website. PR pays well, and surely he takes in more than \$25K per year.’ ”

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<sup>4</sup> The proceedings below were completed before the recent opinion of the Ninth Circuit in *Batzel v. Smith* (9th Cir. 2003) 333 F.3d 1018, which held that the federal statutory immunity available to Internet intermediaries under 47 U.S.C. section 230(c)(1) applies only when “a reasonable person in the position of the service provider or user would conclude that the information was provided for publication on the Internet or other ‘interactive computer service.’ ” (*Batzel*, at p. 1034.) Neither the parties nor the trial court addressed the question whether a reasonable person in Rosenthal’s position would conclude that Bolen’s statement was provided for publication on the Internet, and we think it inappropriate for us to do so. Moreover, as will be seen, our analysis of the federal immunity differs from that of the *Batzel* court. (See discussion, *post*, at pp. 11-37.)

(4) On August 18, 2000, Rosenthal posted to a specified newsgroup “a message falsely stating that ‘Quackwatch appears to be a power-hungry, misguided bunch of pseudoscientific socialist bigots’; is an ‘industry funded organization’; and is being sued by many doctors and health organizations.”

(5) On October 9, 2000, Rosenthal posted to a specified newsgroup a message entitled “Re: Quackbuster Barrett \*is\* a quack - by his own definition,” which repeatedly referred to Drs. Barrett and Polevoy as “quacks.”

After she answered the complaint, Rosenthal filed a special motion to strike the complaint as to her, claiming it was a “strategic lawsuit against public participation” under section 425.16. In a 27-page written order, the trial court granted Rosenthal’s motion to strike finding that her publications of the foregoing statements were acts “in furtherance of [her] right of petition or free speech under the United States or California Constitution in connection with a public issue” (§ 425.16, subd. (b)(1)), and therefore covered by the anti-SLAPP statute. The court also determined appellants could not establish a probability of prevailing on their claims, as the statute requires. This latter determination rested on the conclusions that, with one exception—the statements alleging that appellant Polevoy had engaged in criminal conduct—Rosenthal’s alleged libels were not demonstrably false statements of facts. The trial court also found Rosenthal immune from liability for the reposting of Bolen’s statements under section 230 of the Communications Decency Act (CDA) of 1996 (47 U.S.C. § 230 (section 230)), viewing the statute as protecting her from liability even if the republished charge that Polevoy had engaged in criminal conduct was false and defamatory. Additionally, the court found that appellants could not make a prima facie showing that Rosenthal reposted Bolen’s statements with “actual malice,” as they would need to do in order to establish a probability of prevailing on the merits of their defamation claims, because they were both public figures. Finally, the court found that appellants’ claims failed because appellants had not produced competent evidence they suffered any actual monetary damage as a result of Rosenthal’s publications. The court denied appellants’ request to conduct discovery for the purpose of producing such evidence.

In the published portion of this opinion we discuss the standard of review (part I), find that the trial court correctly concluded that the anti-SLAPP statute applies to this case (part II), and that appellant Barrett failed to make out a case of defamation, but that the court erred in finding appellant Polevoy could not do so due to application of the federal immunity (parts III and III.A). In the unpublished portion we further conclude that the trial court also erred in finding that Polevoy could not prevail because he could not show “actual malice” or actual monetary loss. The court should not have decided the question of malice without allowing discovery as to that issue; and, because the defamatory language is libelous on its face, Polevoy need not allege and prove special damages (parts III.B and III.C). For these reasons we vacate the order granting the special motion to strike pursuant to section 425.16 insofar as it relates to appellant Polevoy and remand the matter for further proceedings. In the unpublished portion we also affirm the ruling that appellants’ counsel was subject to an order requiring payment of attorney fees (part IV), and direct the trial court to recalculate the amount of fees respondent is entitled to receive (part V).

## DISCUSSION

### I.

#### *Burden of Proof and Standard of Review*

Section 425.16 provides, as material, that “[a] cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” (§ 425.16, subd. (b)(1).) This language necessitates a two-step process for determining whether an action is a SLAPP. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88; *Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 918-919.)

In the first step, “the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The

moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue' . . . ." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) If the defendant meets this burden, the burden shifts to the plaintiff to demonstrate a probability he or she will prevail on the claim. (*Ibid.*) "[I]n order to establish the requisite probability of prevailing [citation], the plaintiff need only have 'stated and substantiated a legally sufficient claim.'" [Citations.] 'Put another way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."' [Citations.]" (*Navellier v Sletten, supra*, 29 Cal.4th at pp. 88-89.)

"Whether section 425.16 applies and whether the plaintiff has shown a probability of prevailing are both reviewed independently on appeal. (*Mission Oaks Ranch Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 721, disapproved on another point in *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123, fn. 10; *Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees* (1999) 69 Cal.App.4th 1057, 1064.)" (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999.)

## II.

### *Section 425.16 Applies to This Case*

The trial court's conclusion that respondent's statements were protected by the anti-SLAPP statute explicitly rested on subdivisions (e)(3) and (e)(4) of section 425.16, which declare that " 'an act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes . . . (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public

interest.” The order granting the motion to strike focused upon the public nature of the issue the parties disputed and to which Rosenthal’s allegedly libelous statements related: “the validity or invalidity of alternative medicine.” The court determined that this was “a highly controversial matter which is of significant public importance and interest, affecting the health of millions of people involving billions of dollars.” Appellants do not challenge this determination. Implicitly conceding Rosenthal’s statements relate to “an issue of public interest,” they instead contend that the Internet sites on which Rosenthal posted her statements were not “a place open to the public or a public forum,” as the trial court assumed, and Rosenthal therefore did not post the statements allegedly defaming appellants in furtherance of her right of free speech. This novel contention is difficult to take seriously.

Appellants’ argument rests entirely on the recent opinion in *Golden Gateway Center v. Golden Gateway Tenants Assn.* (2001) 26 Cal.4th 1013. The plurality opinion in that case, which has nothing to do with section 425.16, reads a state action requirement into the free speech clause of the California Constitution. The court held that the actions of a private property owner constitute state action under the free speech clause only if the property is freely and openly accessible to the public. *Golden Gateway* involved a privately owned apartment complex whose owner carefully limited access to the complex to residential tenants and their invitees. Since the owner’s refusal to permit the tenants’ association to distribute its newsletter in the private hallways of the complex did not constitute state action, the association did not have a right under California’s free speech clause to distribute its newsletter in the complex.

So far as the record shows, neither Usenet nor any other interactive computer service on which Rosenthal posted her allegedly defamatory statements ever sought to enjoin her from doing so or to impose any material restriction on her use of the site or that of the public.<sup>5</sup> Moreover, the Internet is not a separate physical place, like a hallway

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<sup>5</sup> Nor, for plaintiffs’ purposes, would it matter much if Rosenthal had violated a valid use restriction. One who drives a car bearing a political message on a bumper sticker is not constitutionally unprotected merely because the private agency from which



in an apartment building, but “a decentralized, global medium of communications—or ‘cyberspace’—that links people, institutions, corporations and governments around the world.” (*American Civil Liberties Union v. Reno* (E.D.Pa. 1996) 929 F.Supp. 824, 831, *affd. sub nom. Reno v. American Civil Liberties Union* (1997) 521 U.S. 844.) The Internet “provides relatively unlimited, low-cost capacity for communication of all kinds. . . . This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.” (*Reno v. American Civil Liberties Union, supra*, 521 U.S. 844, 870.)

Considering that the Internet provides “the most participatory form of mass speech yet developed” (*American Civil Liberties Union v. Reno, supra*, 929 F.Supp. at p. 883), it is not surprising that courts have uniformly held or, deeming the proposition obvious, simply assumed that Internet venues to which members of the public have relatively easy access constitute a “public forum” or a place “open to the public” within the meaning of section 425.16. (See, e.g., *ComputerXpress, Inc. v. Jackson, supra*, 93 Cal.App.4th 993, 1007; *Global Telemedia Intern., Inc. v. Doe* (C.D.Cal. 2001) 132 F.Supp.2d 1261, 1264; *Nicosia v. DeRooy* (N.D.Cal. 1999) 72 F.Supp.2d 1093.) *Golden Gateway* provides no reason to ignore this self-evident truth.

The trial court correctly determined that Rosenthal made the necessary threshold showing that the act or acts of which appellants complain were taken “in furtherance of [her] right of petition or free speech under the United States or California Constitution in connection with a public issue” (§ 425.16, subd. (b)(1)), and were therefore within the

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the vehicle was rented barred the use of bumper stickers. The rental agency might have a remedy for breach of the rental agreement, but those who viewed the message while traveling on the public streets and found it objectionable could not complain on that basis.

ambit of the protection afforded by section 425.16. Thus we turn to the question whether appellants established a probability they will prevail on their defamation claims.

### III.

#### *The Trial Court Erroneously Concluded Appellant Polevoy Could Not Establish a Probability He Will Prevail on His Defamation Claim*

With respect to all but one of the publications attributed to Rosenthal, the trial court's finding that appellants failed to establish a probability they will prevail rested on the conclusion that the statements contained therein could not reasonably be interpreted as stating actual facts, and thus could not support any of appellants' claims for libel. Rosenthal's statements that appellants are "quacks," that appellant Barrett is "arrogant" and a "bully," and that Barrett tried to "extort" her "are not actionable," the court stated, "because they do not contain provably false assertions of fact, but rather are expressions of subjective judgment." Insofar as it relates to Barrett, appellants do not seriously refute this determination, which we find to have been correct. (*Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1.) Accordingly, we shall affirm the ruling granting the motion to strike the complaint as to appellant Barrett.

The single statement the court determined was a provably false statement of fact was that originated by codefendant Bolen "accusing Dr. Polevoy of stalking women and urging 'health activists . . . from around the world' to file complaints to government officials, media organizations, and regulatory agencies." This statement specifically asserted that Polevoy stalked Christine McPhee, a "Canadian radio personality" whose program supported "alternative medicine," as part of a "criminal conspiracy" designed to intimidate McPhee. According to the republished statement, "police reports show" that Polevoy "terrified" McPhee by stalking her "for months" and that he also stalked other unidentified females. The statement urged readers to bring this information to the attention of various governmental authorities, as well as the medical association that regulated Polevoy's practice of medicine, and to ask that they initiate a "criminal investigation" or professional disciplinary proceedings.

The trial court found that although the assertion that Polevoy was guilty of criminal conduct was a provably false statement of fact, Rosenthal’s republication was not actionable for three independent reasons: first, because Rosenthal did not originate but merely republished the defamatory statement, she was immune from suit under section 230 of the CDA; second, because appellants, who are public figures, failed to produce sufficient prima facie evidence of “actual malice”; and, third, because appellants could not establish that they suffered monetary damage of any kind.

We find that the immunity available under section 230 does not bar the imposition of liability in this case, that the trial court’s denial of Polevoy’s request for discovery of evidence pertaining to “actual malice” was an abuse of judicial discretion requiring us to set aside the determination that he cannot show such malice, and that Polevoy was not required to plead special damages, as the republished statement was libelous per se. (Civ. Code, § 45a.)

A.

*The Federal Immunity Does Not Apply*

Section 230 was incorporated by Congress into the final version of the CDA, which amended Title V of the Telecommunications Act of 1996 (P.L. No. 104-104, § 509 (Feb. 8, 1996) 110 Stat. 56). The central question in this case is the extent to which this statute abrogated the common law of defamation.

Under the common law, those who publicize another’s libel may be treated in one of three ways: as primary publishers (such as book or newspaper publishers); as conduits (such as a telephone company); or as distributors (such as a book store, library, or news dealer). Because “they cooperate actively in the publication,” primary publishers, also known as “original publishers,” are generally held to a strict standard of liability comparable to that of authors. (Rest. 2d Torts, § 581(1), com. c, pp. 232-233; Prosser & Keeton, *The Law of Torts* (5th ed. 1984) § 113 at p. 810.) Conduits, which lack the ability to screen and control defamatory speech that may occur over their systems, and are therefore least culpable, are ordinarily immune from liability. (See *Anderson v. New York Telephone Co.* (1974) 35 N.Y.2d 746; see also *Lunney v. Prodigy Services Co.*

(1999) 94 N.Y.2d 242, 249 [in transmitting e-mail, “an ISP [Internet service provider], like a telephone company, is merely a conduit”].) Distributors (sometimes known as “secondary publishers”), whose ability to control defamatory speech lies somewhere between that of primary publishers and conduits, are subject to an intermediate standard of responsibility and may only be held liable as publishers if they know or have reason to know of the defamatory nature of matter they disseminate. (Rest. 2d Torts, § 581(1), coms. d and e, pp. 233-234; see also *Smith v. California* (1959) 361 U.S. 147, 152-153, on the constitutional dimension of the scienter requirement.) Absent such knowledge or reason to know, distributors are entitled to the same freedom from liability enjoyed by mere conduits of defamation.

Section 230(c), entitled “Protection for ‘Good Samaritan’ blocking and screening of offensive material,” consists of two operative provisions, paragraphs (1) and (2).

Paragraph (1) states in material part that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” (§ 230(c)(1).) “Interactive computer service” is elsewhere defined as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.” (§ 230(f)(2).) An “information content provider,” who is not an intermediary and is therefore not protected by section 230, is defined as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” (§ 230(f)(3).)

Paragraph (2) of section 230(c) states that “[n]o provider or user of an interactive computer service shall be held liable on account of—[¶] (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or [¶] (B) any action taken to enable or make available to information content providers or

others the technical means to restrict access to material described in paragraph (1).” Elsewhere, section 230 provides that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” (§ 230(e)(3).)

The parties agree Rosenthal acted as the “user of an interactive computer service” within the meaning of the statute, as did the trial court, and we are not called upon to address that question. Appellants acknowledge that a user is entitled to the same protection available under the statute to providers.

Appellants concede that section 230 bars treatment of providers or users of interactive computer services as primary publishers subject to strict liability, but maintain it does not bar treating them as distributors and subjecting them to knowledge-based liability. Appellants argue that the trial court’s interpretation of section 230 protects Internet intermediaries who *intentionally* distribute injurious third party content, and that this is contrary to the very purpose of the statute.<sup>6</sup> If the trial court’s interpretation is upheld, appellants maintain, “a ‘clever libeler’ could easily escape liability by having some other Internet user who is not subject to the jurisdiction of the Court, or who is anonymous, or who is judgment proof, publish libelous statements which another ‘Internet user’ is free to republish.” In appellants’ view, such an interpretation would convert an act designed to promote “decency” into a shield for “indecency,” which Congress could not have intended.

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<sup>6</sup> Relying on the federal district court opinion in *Batzel v. Smith* (C.D.Cal., Jun. 5, 2001, No. CV 00-9590 SVW(AJWX)) 2001 WL 1893843, appellants also argue that a provider or user who, like Rosenthal, *intentionally* republishes libelous third party content is in part responsible for the creation and development of that information, and is therefore an “information content provider.” (§ 230(f)(3).) Since section 230 only restricts the liability of intermediaries, appellants maintain that Rosenthal’s conduct is unprotected. Though we are aware the Ninth Circuit has rejected this theory (*Batzel v. Smith, supra*, 333 F.3d 1018, 1031-1032), we decline to address the issue. Not only did appellants raise it for the first time in a reply brief, but resolution of the issue is unnecessary to the disposition of this appeal. (*Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 65.)

We agree with appellants that the statute cannot be deemed to abrogate the common law principle that one who republishes defamatory matter originated by a third person is subject to liability *if he or she knows or has reason to know of its defamatory character*. (Rest. 2d Torts, § 581(1).) By construing section 230 as conferring an absolute immunity, the trial court erred.

1.

Like Rosenthal, the trial court relied heavily on *Zeran v. America Online, Inc.* (4th Cir. 1997) 129 F.3d 327, cert. den. (1998) 524 U.S. 937 (*Zeran*), which is now the leading case interpreting and applying section 230(c)(1). In *Zeran*, an unidentified person maliciously posted messages on an America Online (AOL) bulletin board advertising t-shirts featuring offensive slogans relating to the 1995 bombing of the Murrah Federal Building in Oklahoma City. Persons interested in purchasing the shirts were instructed to call “Ken” at Zeran’s home phone number in Seattle. As a result, Zeran received a high volume of angry calls, including death threats. Zeran immediately contacted AOL and informed a company representative of his predicament. The next day an unknown person posted a similar message, again identifying Zeran as the purveyor of the tasteless shirts and providing his home phone number. Over the next four days similar messages were posted on the bulletin board relating to other items bearing still more offensive slogans. During this five-day period Zeran was receiving an abusive phone call every two minutes. After the messages were described on an Oklahoma City radio station by an announcer who urged listeners to phone Zeran, he was inundated with death threats. When Zeran filed suit against AOL, it interposed section 230 as an affirmative defense and moved for summary relief. The trial court granted AOL’s motion for judgment on the pleadings, holding that the statutory immunity shielded AOL from suits based on both publisher and distributor liability. (*Zeran v. America Online, Inc.* (E.D.Va. 1997) 958 F.Supp. 1124.)

Affirming the ruling, the Fourth Circuit stated as follows: “Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the

communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum. In specific statutory findings, Congress recognized the Internet and interactive computer services as offering ‘a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.’ *Id.* § 230(a)(3). It also found that the Internet and interactive computer services ‘have flourished, to the benefit of all Americans, *with a minimum of government regulation.*’ *Id.* § 230(a)(4) (emphasis added). Congress further stated that it is ‘the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*’ *Id.* § 230(b)(2) (emphasis added). [¶] None of this means, of course, that the original culpable party who posts defamatory messages would escape accountability. While Congress acted to keep government regulation of the Internet to a minimum, it also found it to be the policy of the United States ‘to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.’ *Id.* § 230(b)(5). Congress made a policy choice, however, not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages.” (*Zeran, supra*, 129 F.3d at pp. 330-331; see also *Ben Ezra, Weinstein, & Co. v. America Online Inc.* (10th Cir. N.M. 2000) 206 F.3d 980, 984-985; *Blumenthal v. Drudge* (D.D.C. 1998) 992 F.Supp. 44, 49; *Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 828-829; *Kathleen R. v. City of Livermore* (2001) 87 Cal.App.4th 684, 692.) As will be seen, we believe this characterization of section 230 is misleading insofar as it suggests that section 230 reflects a superseding congressional “desire to promote unfettered speech on the Internet.” (*Zeran, supra*, 129 F.3d at p. 334.)

The most consequential aspect of the Fourth Circuit’s opinion in *Zeran* is its conclusion that section 230 immunized providers and users of interactive computer

services from liability not only as *primary publishers* but also as *distributors*. Focusing solely on section 577 of the Restatement (Second) of Torts [“Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed”], the court ignored the complementary common law rule described in section 581(1) of the Restatement, which is that “one who . . . transmits defamatory matter published by a third person is subject to liability *if, but only if*, he knows or has reason to know of its defamatory character.” (Rest. 2d Torts, § 581(1), italics added; see *Zeran, supra*, 129 F.3d at p. 332.)

The effect of *Zeran* is to confer on providers and users of interactive computer services complete immunity from liability for transmitting the defamation of a third party. The protection is available despite the fact that the provider or user knowingly distributes defamatory materials, even if the provider or user profits from such conduct. (See, e.g., *Blumenthal v. Drudge, supra*, 992 F.Supp. 44.) Since the decision in *Zeran*, no court has subjected a provider or user of an interactive computer service to notice liability for disseminating third-party defamatory statements over the Internet, though a three-judge minority of the Florida Supreme Court would have done so (*Doe v. America Online, Inc.* (Fla. 2001) 783 So.2d 1010, 1018, dis. opn. of Lewis, J.), and at least one trial judge has gagged on the unfairness that resulted from application of such a broad immunity.<sup>7</sup>

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<sup>7</sup> In *Blumenthal v. Drudge, supra*, 992 F.Supp. 44, the “Drudge Report,” an Internet gossip column maintained by AOL, falsely reported that Sidney Blumenthal, then a White House aide, had a history of spousal abuse. Blumenthal sued AOL, which moved for summary judgment on the ground of section 230 immunity. Federal District Judge Paul L. Friedman granted the motion though not without questioning the result he felt compelled to reach: “If it were writing on a clean slate, this Court would agree with plaintiffs. AOL has certain editorial rights with respect to the content provided by Drudge and disseminated by AOL, including the right to require changes in content and to remove it; and it has affirmatively promoted Drudge as a new source of unverified instant gossip on AOL. Yet it takes no responsibility for any damage he may cause. AOL is not a passive conduit like the telephone company, a common carrier with no control and therefore no responsibility for what is said over the telephone wires. Because it has the right to exercise editorial control over those with whom it contracts and whose



The view of most scholars who have addressed the issue is that *Zeran*'s analysis of section 230 is flawed, in that the court ascribed to Congress an intent to create a far broader immunity than that body actually had in mind or is necessary to achieve its purposes.<sup>8</sup> We share that view. Cognizant that, "while federal circuit court precedence

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words it disseminates, it would seem only fair to hold AOL to the liability standards applied to a publisher or, at least, like a book store owner or library, to the liability standards applied to a distributor. But Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content provided by others. In some sort of tacit *quid pro quo* arrangement with the service provider community, Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or not even attempted." (*Id.* at pp. 51-52.)

<sup>8</sup> See, e.g., Patel, *Immunizing Internet Service Providers From Third-Party Internet Defamation Claims: How Far Should Courts Go?* (2002) 55 Vand. L.Rev. 647, 679-689; Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation* (2001) 14 Harv. J.L.& Tech. 569, 594-596 (hereafter *Intermediary Liability for Defamation*); McManus, *Rethinking Defamation Liability for Internet Service Providers* (2001) 35 Suffolk U. L.Rev. 647; Goldstein, *Service Provider Liability for Acts Committed by Users: What You Don't Know Can Hurt You* (2000) 18 J. Marshall J.Computer & Info.L. 591, 634-635; Spencer, *Defamatory Email and Employer Liability: Why Razing *Zeran v. America Online* is a Good Thing* (2000) 6 Rich. J.L.&Tech. 25; Davidson et al, *The Law of Cyberspace Liability of Information Service Providers* (2000) 574 Prac.L.Inst. 143; Cordero, *Damnum Absque Injuria: *Zeran v. AOL* and Cyberspace Defamation Law* (1999) 9 Fordham Intell.Prop.Media & Ent.L.J. 775, 778; Pantazis, **Zeran v. America Online, Inc.: Insulating Internet Service Providers From Defamation Liability** (1999) 34 Wake Forest L.Rev. 531, 547-550 (1999); Kane, *Internet Service Providers' Liability: *Blumenthal v. Drudge** (1999) 14 Berk. Tech.L.J. 437,452-453; Wiener, *Negligent Publication of Statements Posted on Electronic Bulletin Boards: Is There Any Liability Left After *Zeran*?* (1999) 39 Santa Clara L.Rev. 905; Ballon, **Zeran v. AOL: Why the Fourth Circuit is Wrong** (1998) J.Internet L.; Sheridan, **Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet** (1997) 61 Alb. L.Rev. 147, 169-170 (hereafter **Zeran v. AOL and the Effect of Section 230**); Langdon, *The Communications Decency Act § 230: Makes Sense? Or Nonsense?—A Private Person's Inability to Recover if Defamed in Cyberspace* (1999) 73 St. John's L.Rev. 829, 852-853; Wiener, *Publication of Statements Posted on Electronic Bulletin Boards: Is There Any Liability left After *Zeran*?* (1999) 39 Santa Clara L.Rev. 905 (but see Schruers, *The History and Economics of ISP Liability for Third Party Content* (2002)

on issues of federal law is certainly entitled to substantial deference, it is not binding” (*Yee v. City of Escondido* (1990) 224 Cal.App.3d 1349, 1351, affd. (1992) 503 U.S. 519; accord, 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 942, p. 983), we decline to accept *Zeran*’s construction of the statute.<sup>9</sup>

*Zeran* states that section 230 has “dual purposes”: *First*, “not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages” in order “to maintain the robust nature of Internet communication” (*Zeran, supra*, 129 F.3d at pp. 330-331) and, *second*, “to encourage service providers to self-regulate the dissemination of offensive material over their services.” (*Id.* at p. 331.) According to the *Zeran* court, leaving distributor liability in effect “would defeat the two primary purposes of the statute and would certainly ‘lessen the scope plainly intended’ by Congress’ use of the term ‘publisher.’ ” (*Id.* at p. 334, relying on *Isbrandtsen Co. v. Johnson* (1952) 343 U.S. 779, 783.) We believe the *Zeran* court conferred a much more expansive immunity than is necessary to achieve the first purpose and thereby completely defeated the second.

*Zeran* is posited on two critical determinations: first, that the word “publisher” in section 230(c)(1) refers not just to primary or original publishers of a third-party defamation but also to distributors and, second, that confining the immunity to primary publishers would not accomplish the policies section 230 was designed to effectuate. We believe neither determination is justified.

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88 Va. L.Rev. 205 and Friedman & Buono, *Limiting Tort Liability for Online Third-Party Content Under Section 230 of the Communications Act* (1999-2000) 52 Fed.Comm. L.J. 647.)

<sup>9</sup> We do not believe this conflicts with the reliance on *Zeran* by another division of our District in *Kathleen R. v. City of Livermore, supra*, 87 Cal.App.4th 684, 692 and by a panel of the Fourth District in *Gentry v. eBay, supra*, 99 Cal.App.4th 816, 830. Neither of those opinions needed to address, and neither addresses, the question whether the immunity accorded under section 230 applies to distributor, as well as primary publisher, liability. Under the common law, the defendants in those cases would not have been liable as distributors.

2.

The plaintiff in *Zeran* argued that section 230 should be construed so as to suspend only those aspects of the common law of defamation whose application would genuinely conflict with the purpose of the statutory immunity, the maintenance of robust Internet communications and the encouragement of self-regulation. The plaintiff conceded the common law liability of a primary publisher of a third party's defamatory statements was incompatible with those purposes, but maintained distributor liability was not, or at least that Congress never indicated it thought so. In making this argument, the plaintiff relied on the settled principle "that 'statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.' [Citations.] In such cases, Congress does not write upon a clean slate. [Citation.] In order to abrogate a common-law principle, *the statute must 'speak directly' to the question addressed by the common law.* [Citations.]" (*United States v. Texas* (1993) 507 U.S. 529, 534, italics added; accord, *Theodor v. Superior Court* (1972) 8 Cal.3d 77, 92 ["it should not 'be presumed that the Legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication' "].)

The *Zeran* court concluded that in section 230 "Congress has indeed spoken directly to the issue by employing the legally significant term 'publisher,' which has traditionally encompassed distributors and original publishers alike." (*Zeran, supra*, 129 F.3d at p. 334.) According to *Zeran*, the theory of distributor liability "is merely a subset, or a species, of publisher liability" (*id.* at p. 332) and therefore the use of the word "publisher" in section 230(c)(1) ["No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider"] makes clear that the statute forecloses intermediate or notice liability, not just the stricter level of liability applicable to primary publishers. (*Ibid.*) On this reasoning the *Zeran* court maintained that foreclosure of distributor

liability was not merely implicit in the structure and purpose of the statute, but was “explicitly stated” therein. (*Id.* at p. 334.) We cannot agree.

It is true that defamation requires a publication, and that every repetition is a publication, whether it is effectuated by a primary publisher or by a distributor; this is why distributors are sometimes referred to as “secondary publishers.” However, as earlier explained, the common law subjects the two types of publishers to distinctly different standards of liability for the transmission of the defamation of a third person. Because primary publishers ordinarily exercise control over content, they have a duty to monitor content; distributors, who have no such control, therefore have no such duty. It is entirely reasonable to assume Congress was aware of this significant and very well-established distinction, and that if it intended section 230 to immunize providers and users not merely from primary publisher liability but also from distributor liability it would have made this clear, as, for example, by adding the word “distributor,” and not merely barring liability “as the publisher or speaker” of information provided by another. Section 230 does not explicitly absolve providers or users from all liability. The statement that they “shall not incur liability *as publishers or speakers* of information provided by other content providers” (§ 230(c)(1), italics added) does not expressly or even by necessary implication foreclose the possibility of holding them liable as distributors. “Indeed, one could argue from the enumeration of publisher and speaker in § 230(c)(1) that distributor was deliberately omitted.” (Sheridan, *Zeran v. AOL and the Effect of Section 230*, *supra*, 61 Alb. L.Rev. 147, 162.)<sup>10</sup>

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<sup>10</sup> The statement in *Zeran* that distributor liability conflicts with the “explicitly stated” command of Congress (129 F.3d at p. 334) rests not only on the idea that distributor liability is merely a subset of publisher liability but also the statement in section 230(e)(3) that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” This language cannot be deemed an explicit statement that Congress abrogated distributor liability under the common law because it begs the question whether survival of distributor liability *is* inconsistent with section 230.

The constitutional implications of granting publishers an absolute immunity or privilege as a disincentive to excessive self-censorship has for decades been the subject of an intense debate, barely alluded to in *Zeran*. As the United States Supreme Court has stated, “[t]he need to avoid self-censorship by the news media is . . . not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and infeasible immunity from liability for defamation. [Citations.] Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation. [¶] The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose, for, as Mr. Justice Stewart has reminded us, the individual’s right to the protection of his own good name ‘reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.’” (*Rosenblatt v. Baer* (1966) 383 U.S. 75, 92 (conc. opn.).” (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 341 (*Gertz*)).) *Zeran*’s analysis flies in the face of this admonition.

Legislative use of the legally uncertain word “publisher” is simply too flimsy a basis upon which to grant providers and users of interactive computer services what amounts to an “absolute protection” requiring the “total sacrifice of the competing value served by the law of defamation” and the subordination of “a concept at the root of any decent system of ordered liberty.” (*Gertz, supra*, 418 U.S. at p. 341.) When distinguishing the liability of publishers and distributors, eminent law professors writing scholarly articles in learned journals commonly use the word “publisher” to refer only to a primary publisher, even when their subject is the transmission of speech in cyberspace.

(See, e.g., Sunstein, *The First Amendment in Cyberspace* (1995) 104 Yale L.J. 1757, 1801; and other articles cited in Sheridan, *Zeran v. AOL and the Effect of Section 230*, *supra*, 61 Alb. L.Rev. 147, 168, fn. 143.) So too do courts commonly use the word “publisher” to refer only to an original or primary publisher. For example, in *Stratton Oakmont, Inc. v. Prodigy Services Co.* (N.Y.Sup.Ct. May 25, 1995) 1995 WL 323710, 23 Media L.Rep. 1794 (*Stratton Oakmont*)—a well known pre-CDA libel case that, as we later discuss (*post*, at pp. 24-28), was of particular interest to Congress during debate on the measure that became section 230—the court observed that “[a] finding that Prodigy is a *publisher* is the first hurdle for Plaintiffs to overcome in pursuit of their defamation claims, because one who repeats or otherwise republishes a libel *is subject to liability as if he had originally published it.*” (*Id.* at p. 1796, italics added.) It is impossible to say with confidence that Congress did not also use the word “publisher” in this conventional manner. In any case, in law and as it appears in section 230, the word “publisher” is at least capable of two reasonable constructions and therefore ambiguous, which is enough to justify application of the interpretive canon favoring retention of common law principles. “Where there is a limitation by statute which is capable of more than one construction the statute must be given that construction which is consistent with common law.” (Singer, *Statutes and Statutory Construction* (6th ed. 2000) § 50.01, pp. 137-139, fn. omitted.)

Resting on the use of the ambiguous word “publisher” in section 230(c)(1), the *Zeran* court felt it unnecessary to examine anything else in the text of the statute to determine whether it “speaks directly” to the question addressed by the common law principle of distributor liability. But the rest of the text deserves examination, for it sheds light on the breadth of the immunity Congress intended to create.

The findings and declarations set forth in section 230 applaud the “true diversity of political discourse,” the “opportunities for cultural development,” and the “myriad avenues for intellectual activity” provided by “the vibrant and competitive free market that presently exists for the Internet and other interactive computer services” (§ 230(a) & (b)), but nowhere in the findings and declarations is there any indication that Congress

considered online speech in need of protection. Nor is a general concern for the promotion of speech evident in section 230(c), entitled “Protection for ‘Good Samaritan’ blocking and screening of offensive material,” which we think particularly revealing. Section 230(c)(2) immunizes providers and users against liability on account of action “to restrict access to or availability of material that the provider or user considers to be . . . objectionable, whether or not such material is constitutionally protected,” or to provide others “the technical means to restrict access to [such] material . . . .” (§ 230(c)(2)(A) & (B), italics added.)

If, as *Zeran* says, Congress’s use of the word “publisher” covers distributors as well as original publishers, and therefore reflects an intent to create an absolute immunity, it would not have been necessary for Congress to specifically protect providers and users who monitor content; section 230(c)(2) would be mere surplusage.

The only thing unambiguously communicated by the entire text of section 230 is a prohibition on the imposition of primary publisher liability on providers and users who act to restrict access to offensive or injurious materials.<sup>11</sup> Because the statute does not clearly indicate an intention to abrogate the common law principle of distributor liability, it is appropriate to inquire whether the legislative history demonstrates such an intention. (*People v. Broussard* (1993) 5 Cal.4th 1067, 1075; *American Tobacco Co. v. Superior*

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<sup>11</sup> Section 230’s lack of clarity as to the boundary of the immunity it creates contrasts with the specificity of the immunity granted under the Digital Millennium Copyright Act (17 U.S.C. § 512) (DMCA). Like the CDA, the DMCA protects Internet service providers from liability for content provided by third parties. The DMCA immunizes providers who transmit material that infringes the rights of the holder of a copyright if the provider did not originate the infringing content, has no editorial control over the material, does not know the material is infringing or have reason to know, acts expeditiously to remove the material after learning of the infringement, and receives no financial benefit from the infringing activity. (17 U.S.C. § 512(a)-(d).) While the level of intermediary liability allowed under the DMCA is similar to distributor liability under the common law and may therefore indicate Congress does not feel this level of liability will unduly chill Internet communication, the greater significance of the DMCA for our purposes is its particularity as to the conditions and limits of the immunity it creates. Unlike the CDA, the DMCA “speaks directly” to this issue.

*Court* (1989) 208 Cal.App.3d 480, 487-488; *Lewis v. Ryan* (1976) 64 Cal.App.3d 330, 333.)

3.

The measure that eventually became section 230 was originally presented by Congressmen Cox and Wyden as a direct amendment to the Telecommunications Act of 1996 (P.L. No. 104-104, § 509 (Feb. 8, 1996) 110 Stats. 56; see 141 Cong. Rec. H8468 (daily ed. Aug. 4, 1995)). The CDA was also offered as an amendment to the Telecommunications Act, by Senators Exon and Coats. After the Cox-Wyden measure and the CDA both passed, the former was incorporated into the latter. The incorporation made sense. The overarching purpose of the CDA was to protect minors from harmful material on the Internet. One of the main ways in which Congress sought to achieve this goal was to criminalize “the ‘knowing’ transmission of ‘obscene or indecent’ messages to any recipient under 18 years of age.” (*Reno v. American Civil Liberties Union, supra*, 521 U.S. 844.)<sup>12</sup> The Cox-Wyden measure, now section 230, was germane because it immunizes providers or users who take action to restrict access to such material. Immunizing providers or users from primary publisher liability advances this shared purpose because such liability would punish providers or users who tried to identify and remove offensive material but failed. But immunizing them as well from distributor liability would be inconsistent with that purpose, because it would protect providers or users who not only made no independent effort to identify and remove offensive material, but who failed or refused to remove it even when placed on notice of the injurious character of the third-party content they were distributing.

As *Zeran* acknowledges (129 F.3d at p. 331), the committee report pertaining to section 230 indicates only that the statute was designed to overrule *Stratton Oakmont, supra*, 1995 WL 323710, 23 Media L.Rep. 1794. (H.R. Conf. Rep. No. 104-458 at 194

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<sup>12</sup> *Reno v. American Civil Liberties Union, supra*, 521 U.S. 844 held that the provisions of the CDA calculated to achieve that purpose (47 U.S.C. § 223(a) & (d)), were content-based restrictions on speech and facially overbroad in violation of the First Amendment.



(1996).) “There, the plaintiffs sued Prodigy—an interactive computer service like AOL—for defamatory comments made by an unidentified party on one of Prodigy’s bulletin boards. The court held Prodigy to the strict liability standard normally applied to original publishers of defamatory statements, rejecting Prodigy’s claims that it should be held only to the lower ‘knowledge’ standard usually reserved for distributors. The court reasoned that Prodigy acted more like an original publisher than a distributor both because it advertised its practice of controlling content on its service and because it actively screened and edited messages posted on its bulletin boards.” (*Zeran, supra*, 129 F.3d 327, 331.)

Congress overruled *Stratton Oakmont* because it wanted “to remove the disincentives to selfregulation” created by the decision. (*Zeran, supra*, 129 F.3d. at p. 331.) Under *Stratton Oakmont*, “computer service providers who regulated the dissemination of offensive material on their services risked subjecting themselves to liability, because such regulation cast the service provider in the role of a publisher. Fearing that the specter of liability would therefore deter service providers from blocking and screening offensive material, Congress enacted § 230’s broad immunity ‘to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material.’ 47 U.S.C. § 230(b)(4). In line with this purpose, § 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.” (*Ibid.*)

It is noteworthy that in holding Prodigy to be a primary publisher the *Stratton Oakmont* court distinguished *Cubby, Inc. v. CompuServe, Inc.* (S.D.N.Y. 1991) 776 F.Supp. 135, which was then the leading authority on the liability of Internet service providers for third-party defamation. In *Cubby*, the defendant service provider was held to the standard of liability applicable to a *distributor*, not a primary publisher.<sup>13</sup> The

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<sup>13</sup> In *Cubby*, a journalist claimed he was defamed by material posted on a CompuServe newsgroup for journalists. CompuServe had contracted with CCI requiring the latter to “manage, review, create, delete, edit, and otherwise control the contents” of

authors of section 230 knew this and did not object, as they did to the different and higher standard of liability imposed in *Stratton Oakmont*. “Representative Cox, one of two sponsors of the immunity provision, characterized the imposition of distributor liability in *Cubby* as holding that CompuServe ‘was not the publisher or editor’ of the material. He clearly used the term ‘publisher’ to *exclude* parties held to the distributor liability standard applied to CompuServe in that case. 141 Cong. Rec. H8469 (daily ed. Aug. 4, 1995) (statement of Rep. Cox). The provision’s sponsors summarized both the *Cubby* and *Stratton* decisions, and then repeatedly discussed the need to overrule *Stratton*, without again mentioning *Cubby*. . . .” (Freiwald, *Intermediary Liability for Defamation*, *supra*, 14 Harv. J. L. & Tech. at p. 632, fn. 259 (italics in original); see also Cannon, *The Legislative History of Senator Exon’s Communications Decency Act: Regulating Barbarians on the Information Superhighway* (1996-1997) 49 Fed. Comm. L.J. 51, 61-63.)

The expressed desire to overrule *Stratton Oakmont*, the absence of any apparent intent to disturb the effect of the decision in *Cubby*, and the statements of Representative Cox, the author of section 230, are consistent with exclusion of distributor liability from the statutory immunity.

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the newsgroup. Another company, DFA, which had no direct relationship with CompuServe, agreed in a contract with CCI to provide part of the content, a publication called “Rumorville.” In an issue of Rumorville posted on the CompuServe newsgroup site, DFA allegedly made defamatory comments about the plaintiff’s competing newsgroup. Before the action was filed, CompuServe received no complaints about the Rumorville publication or about DFA. The *Cubby* court found that CompuServe “has no more editorial control over such a publication than does a public library, bookstore or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so.” (*Cubby, Inc. v. CompuServe, Inc.*, *supra*, 776 F.Supp. at p. 140.) Determining that CompuServe was in effect a distributor, and that the appropriate standard of liability was “whether it knew or had reason to know of the allegedly defamatory Rumorville statements,” the court held that liability was barred by the absence of notice. (*Id.* at p. 141.)

Survival of distributor liability is also consistent with the views expressed by Senator Coats, one of the two chief authors of the CDA. During the legislative debate, Senator Coats made it clear that the intention was to prevent Internet intermediaries, which try to keep offensive material off the Internet, “from being held liable as a publisher for defamatory materials for which they would not otherwise have been liable.” (141 Cong. Rec. S8345 (daily ed. Jun. 14, 1995).) According to Senator Coats, “we don’t intend that a court could hold that this is assertion of editorial content control, such that a company must be treated under the *high standard of a publisher* for the purposes of offenses such as libel.” (*Ibid.*, italics added.) This statement indicates that, because they do *not* exercise “editorial content control,” distributors are *not* subjected by the statute to the “high standard” of liability applicable to publishers, but rather remain subject to the *intermediate* standard applicable to distributors under the common law.

In short, as one commentator sums up, “both the text of the CDA and its meager legislative history support the conclusion that when Congress said ‘publisher,’ it meant ‘publisher,’ and not distributor. The publisher and distributor terminology have been used in cases and commentary on the subject of defamation in interactive networks. It would be reasonable to surmise that Congress would say ‘distributor’ in addition to ‘publisher’ if it meant ‘distributor’ in addition to ‘publisher.’ The statement in the Conference Report that § 230 is intended to overrule *Stratton Oakmont* supports this conclusion. . . . Since *Stratton Oakmont* did not impose distributor liability, it was not necessary for Congress to obviate distributor liability in order to overrule the case.” (Sheridan, *Zeran v. AOL and the Effect of Section 230*, *supra*, 61 Alb. L.Rev. 147, 168-169.)

“The stated policy objectives in the plain language and the legislative history of the CDA actually compel the conclusion that Congress intended for ISPs to remain subject to distributor liability in certain contexts. Section 230(b) states that “[i]t is the policy of the United States’ to: (1) ‘encourage the development of technologies that maximize user control over what information is received’ over the Internet, and (2) ‘remove disincentives [for ISPs to] develop[] and utiliz[e] . . . blocking and filtering

technologies’ in order to facilitate the screening of ‘objectionable’ material displayed over the Internet. In other words, in enacting the CDA, Congress intended to create incentives for ISPs to screen and edit the content of information displayed over the Internet. If ISPs were immune from both publisher and distributor liability in third-party defamation claims, they would essentially be given blanket immunity from liability. This interpretation of the ‘Good Samaritan’ immunity, which is advocated in *Zeran*, would frustrate, rather than follow, the purpose of the CDA. Congress intended to encourage ISPs to monitor the content on the Internet, but if ISPs are granted absolute immunity for disseminating third-party defamatory material, then ISPs will not bother to screen their content at all because they will never be subject to liability. If, on the other hand, ISPs could be held liable as a distributor for neglecting to monitor information or failing to remove objectionable content that is brought to their knowledge, then ISPs would have a greater incentive to screen content. Common sense dictates that an ISP will not waste its time and money monitoring content over the Internet when it will suffer no repercussions from failing to do so. Thus, immunizing ISPs from distributor liability would frustrate Congress’s objectives under the CDA much more than would subjecting ISPs to distributor liability.” (Patel, *Immunizing Internet Service Providers From Third-Party Internet Defamation Claims: How Far Should Courts Go?*, *supra*, 55 Vand. L.Rev. at p. 684, fns. omitted; see also Erlich, *Communications Decency Act § 230* (2002) 17 Berk. Tech. L.J. 401, 411 [“Congress tried to take the middle road between full liability, a disincentive to filter, and zero liability, a lack of incentive to filter. Courts, on the other hand, have dismissed this balance and clearly favor the latter”].) Ironically, *Zeran* has had precisely the same effect as *Stratton Oakmont*, the decision section 230 was designed to overrule: “[n]either decision creates any incentive for ISPs to prevent the dissemination of defamatory content.” (McManus, *Rethinking Defamation Liability for Internet Service Providers*, *supra*, 35 Suffolk U. L.Rev. at p. 668.)

4.

Although *Zeran*’s conclusion that Congress “explicitly” commanded the abrogation of distributor liability (129 F.3d at p. 334) rendered it unnecessary to inquire

whether the command was implied by the statute, the court went on to find that immunity from distributor liability was also mandated by “the practical implications of notice liability in the interactive computer service context.” (*Id.* at p. 333) Maintaining that “it would be impossible for service providers to screen each of their millions of postings for possible problems” (*id.* at p. 331), the *Zeran* court concluded that “[l]ike the strict liability imposed by the *Stratton Oakmont* court, liability upon notice [would] reinforce[] service providers’ incentives to restrict speech and abstain from self-regulation” (*id.* at p. 333), which the court felt inconsistent with one of the chief purposes of section 230.

In essence, *Zeran* concludes that section 230 was designed “to promote unfettered speech on the Internet” (129 F.3d at p. 334) and notice liability would negate that purpose because, “like strict liability, liability upon notice has a chilling effect on speech.” (*Id.* at p. 333.) We question whether a statute that encourages the restriction of certain types of online material “whether or not such material is constitutionally protected” (§ 230(c)(2)(A)) can fairly be said to reflect a desire “to promote unfettered speech.” But that issue aside we also think it debatable whether notice liability would actually have an unduly chilling effect on cyberspeech. Neither the record before us nor any other information brought to our attention provides an answer to that question. Moreover, the speculative conclusion of the *Zeran* court that exposing Internet intermediaries to knowledge-based liability would significantly chill online speech is disputed by the speculations of other authorities.<sup>14</sup> We set forth the views of some of the commentators

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<sup>14</sup> And at least one commentator who agrees that intermediary liability may chill online speech does not believe an absolute immunity is the appropriate response, because such a complete protection not only “ignores the power that the Internet gives irresponsible speakers to damage the reputations of their targets,” but also “underestimates the benefits that defamation law may bring to Internet discourse.” (Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace* (2000) 49 Duke L.J. 855, 865.) Emphasizing that defamation law exerts a “civilizing influence” that makes meaningful public discourse possible (*id.* at p. 886, citing Post, *The Social Foundations of Defamation Law: Reputation and the Constitution* (1986) 74 Cal. L.Rev. 691, 713 and Post, *Constitutional Domains* (1995)), Professor Lidsky maintains that completely protecting Internet intermediaries who disseminate injurious speech deters citizens fearful of injury from engaging in Internet discourse and exacerbates “the largest

who disagree with *Zeran* on this point solely to illustrate the nature of the ongoing debate.

To begin with, *Zeran*'s critics emphasize that market forces exert enormous influence on the character of information transmitted over the Internet, and the excessive removal of Internet postings, or a type of postings, without any inquiry as to whether they are actually defamatory would not likely be tolerated by the market. "[N]ews travels fast over interactive computer services, and a service that removes members' postings without any investigation is likely to get a bad reputation in a community whose first value is the free flow of information." (Sheridan, *Zeran v. AOL and the Effect of Section 230*, *supra*, 61 Alb. L.Rev. 147, 176; accord, Freiwald, *Intermediary Liability for Defamation*, *supra*, 14 Harv. J.L. & Tech. 569, 622; Butler, *Plotting the Return of an Ancient Tort to Cyberspace: Towards a New Federal Standard of Responsibility for Defamation for Internet Service Providers* (1999-2000) 6 Mich. Telecomm. & Tech. L.Rev. 247, 264.)

It is also asserted that by ignoring how difficult it is for a plaintiff to prevail on a defamation claim or receive significant money damages, the *Zeran* court overstated the danger such claims present to Internet intermediaries, and therefore also exaggerated the danger they would engage in excessive self-censorship. In fact, the critics maintain, "[i]t is not at all clear that being exposed to distributor liability would be a disaster for online services." (Sheridan, *Zeran v. AOL and the Effect of Section 230*, *supra*, 61 Alb. L.Rev. 147, 173.) First of all, it must be shown that an alleged defamation is not an opinion or satire or mere hyperbole but an assertion of actual fact, and even then knowledge and the requisite degree of fault must be shown. Furthermore, if the defamation relates to a public official or public figure, as will often be the case, the intermediary would also have to be shown to have acted with "actual malice," which is usually extremely difficult.

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single threat to meaningful discourse in cyberspace: incoherence." (*Id.* at p. 886) In her view, the better judicial approach would be to remedy the defects in defamation jurisprudence through a nuanced and more rigorous application of the constitutional privilege for nonfactual expression; that is, by adapting the "opinion privilege" to "the unique social context of cyberspace." (*Id.* at pp. 919-946.)

(*Id.* at p. 174.) Even if the defamation relates to a private figure it ordinarily would not be actionable without proof of special damage (Civ. Code, § 45a), and the defendant might have the advantage of one or more of the many common law privileges for types of speech deemed worthy of extra protection. For these and other reasons, as empirical studies confirm, it is very hard—indeed, “almost impossible”—for plaintiffs to succeed in defamation actions. (Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, *supra*, 49 Duke L.J. 855, 875, citing Bezanson et al., *Libel Law and the Press* (1987).) Finally, in California and other jurisdictions that have an anti-SLAPP statute such as ours, defendants in unmeritorious defamation actions need not even answer the complaint and can obtain quick dismissal and their attorney fees. The foregoing factors explain why “[t]he researcher of California libel law is struck by the paucity of cases holding distributors liable for the distribution of defamatory material.” (*Lewis v. Time, Inc.* (E.D.Cal. 1979) 83 F.R.D. 455, 463.)

*Zeran* is also criticized for suggesting that distributor liability would require service providers to screen “each of their millions of postings for possible problems.” (129 F.3d at p. 331.) Distributor liability would not require a service provider to review communications in advance of posting them (see, e.g., *Auvil v. CBS “60 Minutes”* (E.D. Wash. 1992) 800 F.Supp. 928, 931-932) but only to act reasonably after being placed on notice that the communication is defamatory.<sup>15</sup> It is said that Internet intermediaries would not likely learn of the defamatory character of the message at issue until some time after it was posted. “Since the service would be liable only for damages caused by its tortious conduct, and since most of the damages would occur before the service committed a tort, even a service that was found liable would not face a large damage award.” (Sheridan, *Zeran v. AOL and the Effect of Section 230*, *supra*, 61 Alb. L.Rev. at p. 173.)

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<sup>15</sup> A distributor is obliged to review messages from a particular source in advance of posting only when informed that a specified source is likely to communicate actionable messages. (*Spence v. Flynt* (D.Wyo. 1986) 647 F.Supp. 1266, 1273.)

*Zeran's* indifference to the many different ways in which defamation may be transmitted over the Internet, and the different levels of control over injurious communications an intermediary may possess, is also criticized. (See, e.g., McManus, *Rethinking Defamation Liability for Internet Service Providers*, *supra*, 35 Suffolk U. L.Rev. 647, 661) In some contexts—such as e-mail—service providers are not only unaware of the nature of the information they distribute but, as a practical matter, cannot control transmissions. But in other contexts—newsgroups and bulletin boards, for example—providers and users can and do control the messages they distribute.<sup>16</sup> (*Lunney v. Prodigy Services Co.*, *supra*, 94 N.Y.2d 242, 249-250.) It is one thing to grant an Internet intermediary immunity on the basis of a factual analysis of the degree of control, if any, it exerts over content (see, e.g., *Religious Technology Center v. Netcom*

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<sup>16</sup> “A person who wants to publish a message on an electronic bulletin board logs onto the bulletin board on his computer. The bulletin board or forum is actually a server accessible to persons logging on. The connection between the computers may be by direct telephone link, through a proprietary network, or through the Internet. The user either composes the message while he is connected to the service or uploads a previously composed message. The message may be immediately posted, i.e., made available on the server to persons with access to the bulletin board, or it may be delayed briefly to prevent the bulletin board from becoming a chat room, or it may be edited or refused publication. Nothing in the technology prevents the operator of an electronic bulletin board from reading every message before it is posted on the board; in fact in a moderated USENET newsgroup or listserv this is what happens.” (Sheridan, *Zeran v. AOL and the Effect of Section 230*, *supra*, 61 Alb.L.Rev. at pp. 152-153, fns. omitted; see also Luftman, *Defamation Liability for On-Line Services* (1997) 65 Geo. Wash. L.Rev. 1071, 1075-1083; *Reno v. American Civil Liberties Union*, *supra*, 929 F.Supp. at pp. 833-835.)

Due to such control, one commentator has opined that “the sysop [system operator] of a BBS [bulletin board system] could be held liable for torts committed within the BBS itself. If a defamatory message is posted thorough USENET to the much wider Internet newsgroup audience, the sysop could be liable for that as well. [¶] One of the important differences between commercial on-line services and BBSs is that the activity on the BBSs is often moderated by the sysop, who receives the messages and decides which ones to post to a given newsgroup. The sysop screens off messages that are not topical or otherwise unacceptable. This distinction is crucial, since the amount of editorial control exercised by the sysop becomes the key factor in ascertaining the sysop’s liability for users’ torts.” (Bovenzi, *Liabilities of System Operators on the Internet* (1996) 11 Berk. Tech. L.J. 93, 99, fns. omitted.)



*On-Line Communication Services, Inc.*, *supra*, 907 F.Supp. 1361, 1372 [“No purpose would be served by holding liable those who have no ability to control the information to which their subscribers have access”]), but quite another to grant immunity without regard to that critical factor.

The overarching theme of *Zeran*’s critics is that the court’s analysis is unbalanced. “Grounding arguments for complete intermediary immunity in First Amendment concerns does not make them any more persuasive. Rather, advocates of a rule that would accord little or no weight to defamation victims’ interest should bear a heavy burden of persuasion. Claims that cyberspace technologies create unique opportunities for free social discourse must be balanced against the reality that those technologies can also encourage defamation, exacerbate its harm, and insulate its original author from suit.” (Freiwald, *Intermediary Liability for Defamation*, *supra*, 14 Harv. J. L. & Tech. 569, 618, fn. omitted) “In sum, a distributor liability rule that encouraged some response by intermediaries would be socially efficient: the benefits from reduced defamation injury would likely greatly exceed the cost of response by intermediaries. Such liability seems particularly critical in online defamation cases, given those factors of cyberspace communication that both encourage production of serious defamation and limit a victim’s ability to bring original authors to account. Not surprisingly, many commentators have agreed that an intermediate form of liability for intermediaries would make the most sense. In fact, almost all of those who commented on *Cubby* viewed its imposition of distributor liability as the correct legal rule choice.” (*Id.* at p. 620, fns. omitted; see also Butler, *Plotting the Return of an Ancient Tort to Cyberspace*, *supra*, 6 Mich. Telecomm. & Tech. L.Rev. 247, 272 [explaining why exposure to distributor liability “would do the least harm to the forum for free speech over the Internet”]; Bovenzi, *Liability of Systems Operators on the Internet*, *supra*, 11 Berk. Tech. L.J. 93, 139 [knowledge-based liability “would preserve freedom of expression on computer networks”].)

We reemphasize that we take no position on whether distributor liability would unduly chill online speech. Like our Supreme Court, which has also felt it appropriate to acknowledge the views of informed “academic writers” as to the application of law to

evolving Internet technologies, we discuss the debate whether exposing Internet intermediaries to distributor liability would chill online speech “only to note its existence and contours, not to attempt its resolution.” (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1363.) Resolution of the controversy requires information this court (which, like the *Zeran* court, is asked to review a pretrial ruling) does not now possess: whether a provider or user of an interactive computer service could, at relatively low expense, determine whether challenged material is defamatory and remove it, or whether, on the contrary, the imposition of notice liability would place a burden on providers and users they could not sustain without automatically removing all material claimed to be defamatory, thereby eliminating some and perhaps much information that is constitutionally protected. The answer to this question depends on the state of Internet technology, a matter never addressed by the parties in this case or by the trial court. “Given the extraordinarily rapid growth of this technology and its developments, it is plainly unwise to lurch prematurely into emerging issues, given a record that does not at all lend itself to their determination.” (*Lunney v. Prodigy Services Co.*, *supra*, 94 N.Y.2d 242, 252; accord, Lessig, *The Path of Cyberlaw* (1995) 104 Yale L.J. 1743, 1752 [urging courts to “follow the meandering development of the common law” before “venturing too boldly” into the regulation of cyberspace]; Hadley, *The Gertz Doctrine and Internet Defamation* (1998) 84 Va. L.Rev. 477, 507 [“while the Internet is in its infancy, fundamentally altering the balance in favor of shielding defamatory statements against private persons is both premature and dangerous”].)

American courts, and above all the Supreme Court, have struggled to define the proper accommodation between the common law of defamation and the constitutional freedom of speech. Under the present regime, the burdens that must be borne by a plaintiff claiming defamation depend upon whether he or she is a public official or public figure and whether the speech at issue relates to a matter of private or public concern. Where the libel is claimed by a private figure, the burdens the plaintiff must bear are largely those of the common law. At the other extreme, where defamation is claimed by a public official or public figure, the constitution places on the plaintiff the burden of

showing both falsity and fault, which are forbidding requirements. (See *Philadelphia Newspapers, Inc. v. Hepps* (1986) 475 U.S. 767, 775.) In short, as to defamation, our jurisprudence establishes a nuanced legal regime: “[L]ibel can claim no talismanic immunity from constitutional limitations.” (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 269.) Proposals to create an unfettered right to libel, as by the creation of a categorical immunity or privilege, have been controversial and strongly contested.<sup>17</sup> Thus, resisting an effort to create a “special immunity” different from the one at issue here, the California Supreme Court recently expressed its unwillingness to hold “that messages transmitted through the Internet are exempt from the ordinary rules of tort liability.” (*Intel Corp. v. Hamidi, supra*, 30 Cal.4th 1342, 1347.)

“ [R]epeals by implication are not favored, and . . . a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is *imperatively* required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; *in other words, render its provisions nugatory.*’ ” (*Sierra Pac. Power Co. v. Federal Power Commission* (D.C.Cir. 1955) 223 F.2d 605,

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<sup>17</sup> For example, proposals to give the press a privilege to repeat defamatory remarks, even when the publisher or broadcaster suspects or is convinced of their falsity (see, e.g., Soble, *Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report* (1979) 54 N.Y.U. L.Rev. 469), have been resisted on the ground of the immense potential for abuse of such a doctrine: “The pretexts for its exercise are bound to be trivialized. The occasion for its first judicial endorsement [in *Edwards v. National Audubon Society* (2d Cir. 1977) 556 F.2d 113, which, in dicta, suggested a ‘right of neutral reportage’] was itself questionable. Should such a privilege to republish known or suspected falsehoods be generally recognized, the limitations on its exercise that initially served to justify it can be expected to be progressively eroded, as false exposes of only slightly different degrees of irresponsibility become increasingly difficult to be distinguished from each other. The ultimate contribution of such a privilege to the encouragement of yellow journalism is very likely to outweigh its contribution to democratic liberty. In the absence of a compelling need for it, the adoption of such a general privilege should be considered only with the utmost caution.” (2 Harper et al., *The Law of Torts* (2d ed. 1986) § 5.18, pp. 153-155, fns. omitted.)

607, quoting *Texas & P. Ry. Co. v. Abilene Cotton Oil Co.* (1907) 204 U.S. 426, 437 (italics added), opn. amended, 237 F.2d 756, cert. granted, 349 U.S. 937, and ordered affd., 350 U.S. 348.) Survival of knowledge-based liability under the common law would not render section 230 nugatory. Moreover, without suggesting that the statute was designed to promote unfettered online speech or that we need to decide the question, we do not think it can now be confidently determined by a court of law whether intermediary liability would have a more chilling effect on online speech than it does on other forms of speech.

In these circumstances courts should not “take it upon themselves to set out novel rules for the protection of speech that deviate sharply and consciously from common law rules . . . .” (Epstein, *Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism* (2000) 52 Stan. L.Rev. 1003, 1047.) Whether Internet intermediaries should be absolutely immune for the transmission of defamatory materials online is a matter we think best left to the Legislature, which has yet to squarely address the issue.

## 5.

Because section 230 does not “ ‘speak directly’ to the question addressed by the common law” (*United States v. Texas, supra*, 507 U.S. 529, 534), and is capable of more than one construction, we conclude that the statute should not be interpreted as having abrogated the common law principle of distributor or knowledge-based liability.

Rosenthal has not alleged any fact that would prevent her from being subjected to distributor liability under the common law. Appellants allege they notified her that Bolen’s statement contained false and defamatory information and asked that the statement be removed from the newsgroups on which Rosenthal posted it, that she refused these requests and thereafter repeatedly reposted the allegedly defamatory statements on Internet newsgroups. Rosenthal’s answer denies the statements were false but admits all of the other allegations. However, her special motion to strike under the anti-SLAPP statute was not based on the truth of the statements that Polevoy engaged in criminal conduct nor did it deny she knew or had reason to know of the defamatory

character of these statements. The motion was based solely on the grounds of the federal immunity, appellants' inability to show "actual malice," and their failure to plead special damages. Furthermore, Rosenthal has never asserted that, due to the technology or for any other reason, she could not easily have withdrawn and/or corrected the allegedly defamatory materials she posted.

Because section 230 does not restrict distributor liability under the common law and at this preliminary stage of the litigation no reason appears why Rosenthal cannot be subjected to such liability, the trial court erred in finding that appellant Polevoy's defamation claim was barred by the statute.

B.\*

*The Trial Court Erred in Concluding There is no Probability Appellant Polevoy Will Prevail on the Merits of His Claim Because He Cannot Show Malice*

Appellants concede that, because they voluntarily "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved" (*Gertz, supra*, 418 U.S. 323, 345), they are limited purpose public figures. They therefore accept the burden of proving by clear and convincing evidence that Rosenthal reposted Bolen's statements about appellant Polevoy with "actual malice"; that is, with knowledge of their falsity or with reckless disregard of their truth or falsity. (*New York Times Co. v. Sullivan, supra*, 376 U.S. 254.)

Our responsibility is to independently review all the evidence presented on the issue of "actual malice"; we may not restrict ourselves to evidence favorable to the ruling below. (*McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 845.) Because it is "constitutionally inadequate" to review only those portions of the record that support the trial court's finding, reviewing courts must "step beyond the usual confines of appellate review. Normal principles of substantial evidence review do not apply to the appellate court's independent review of an 'actual malice' determination in a First Amendment libel case." (*Id.* at pp. 845-846.)

Liability under *New York Times Co. v. Sullivan, supra*, 376 U.S. at pages 285-286—which applies to public figures as well as public officials (*Curtis Pub. Co. v. Butts*

(1967) 388 U.S. 130)—requires clear and convincing proof of a knowing falsehood or of reckless disregard for the truth. Recovery by such officials or figures in defamation actions “is constitutionally barred unless evidence is produced ‘of either deliberate falsification or reckless publication “despite the publisher’s awareness of probable falsity” . . . .’ [Citation.]” (*McCoy v. Hearst Corp.*, *supra*, 42 Cal.3d at p. 860.)

“Reckless disregard for the truth ‘is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.’ [Citation.] Lack of due care is not the measure of liability, nor is gross or even extreme negligence. [Citation.] [¶] . . . ‘The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher’s allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.’” (*McCoy v. Hearst Corp.*, *supra*, 42 Cal.3d at p. 860.)

The trial court concluded that appellants failed to produce sufficient evidence of malice for three reasons: first, the “hyperbole, invective, and animated descriptive passages” that characterized Rosenthal’s statements “establishes them as non-defamatory expressions of opinion—not provably false assertions of fact that were demonstrably false at the time they were made;” second, “there is no requirement that one first ‘learn the truth’ before making statements concerning a public figure;” and, third, Rosenthal’s statement that she “despises” appellants was made after they commenced this litigation and therefore “provides no evidence of her subjective intent at the [point] in time critical to the actual malice analysis . . . .”

Preliminarily, we note that the finding that Rosenthal’s statements were non-defamatory expressions of opinion clearly does not apply to her republications of Bolen’s

statements about Polevoy, which are the only alleged defamations still at issue. Bolen's communications consist in part of expressions of opinion, or "broad unfocused and wholly subjective comment" (*Fletcher v. San Jose Mercury News* (1989) 216 Cal.App.3d 172, 191), but they also include a provably false statement of fact; namely, that Polevoy was guilty of criminal conduct. Indeed, Bolen characterizes the evidence he offers in support of this claim as "THE FACTS." Bolen asserts that Polevoy's criminal stalking of McPhee and other women is confirmed by "police reports" and provides the names and addresses of numerous government officials and agencies to whom these "facts" should be sent. Bolen admonishes his readers to "make sure you use the word 'stalking,' " to point out that stalking "violates Canadian law," to "mention the fact that you heard there were 'others' (and there are) he followed (but you don't know their names)." The form letters differ in certain respects, but most end with the exhortation that the addressee "use your influence to see that a criminal investigation of 'Canadian Quackwatch' [which the letters earlier described as the alter ego of 'an MD named Terry Polevoy'] subversive activities begins immediately."

The police officer who investigated Polevoy's alleged stalking never reported that Polevoy was found to have stalked McPhee or other women, as Bolen claimed; on the contrary, the police report concludes that the investigating officer found "no evidence of a criminal offence by Dr. Polevoy." Rosenthal has not disputed the authenticity or accuracy of that report nor has she produced any other police report pertaining to Polevoy or offered any other evidence that he has stalked women or engaged in any other criminal conduct.

The trial court's statement that "there is no requirement that one first 'learn the truth' before making statements regarding a public figure" is correct. As we have said, "failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." (*Harte-Hanks Communications v. Connaughton* (1989) 491 U.S. 657, 688.) The plaintiff must be able to show "the purposeful avoidance of truth" (*id.* at p. 692), as where the defendant published or republished false statements with a "high degree of awareness of their

probable falsity” (*Garrison v. Louisiana* (1964) 379 U.S. 64, 74), or at least “entertained serious doubts as to the truth” of the statements. (*St. Amant v. Thompson* (1968) 390 U.S. 727, 731; *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 511, fn. 30.) However, the necessary state of mind can be established through circumstantial evidence (*Harte-Hanks Communications, supra*, 491 U.S. at p. 668), “and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry.” (*Ibid.*) In short, the absence of a requirement to learn the truth does not mean that the failure to seek the truth is *always* irrelevant. Where “ ‘there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports’ ” (*McCoy v. Hearst Corp.*, *supra*, 42 Cal.3d at p. 860), the failure to seek the truth from a readily available reliable source may be very relevant to the question of “actual malice.”

Polevoy relies heavily on the opinion in *Reader’s Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, which states that, “in an appropriate case,” the factors that may be used to show that “the publisher himself had serious doubts regarding the truth of his publication” include such factors as “[a] failure to investigate [citation], anger and hostility toward the plaintiff [citation], [and] reliance upon sources known to be unreliable [citation], or known to be biased against the plaintiff [citations].” (*Id.* at p. 258, fn. omitted; *Copp v. Paxton* (1996) 45 Cal.App.4th 829, 847.) Polevoy maintains that all of the considerations identified in *Reader’s Digest* come into play in this case and collectively demonstrate that Rosenthal acted in bad faith.

Like Bolen and McPhee, Rosenthal was hostile to Polevoy’s critical view of “alternative medicine.” Though this antipathy does not alone prove “actual malice,” it may be relevant to show a purposeful avoidance of the truth if coupled with evidence of a notable departure from standard investigative techniques. (*Church of Scientology Intern. v. Behar* (2d Cir. 2001) 238 F.3d 168, 174.) After she was warned that the statements she republished were false, but apparently before she completed all of her many republications of Bolen’s statements, Rosenthal apparently felt it necessary to establish the truth of the accusation that Polevoy engaged in criminal conduct. However, instead of consulting the police—who could easily and most authoritatively confirm or contest



Bolen's statements—she consulted only McPhee. Rosenthal was confident McPhee would confirm Bolen's false statements, not only because of McPhee's known hostility to Polevoy, who she felt was responsible for the removal of her radio program from the air, but also because McPhee could not question Bolen's account of the facts without casting doubt on her own veracity. Thus, Polevoy maintains, the very manner of Rosenthal's "investigation" suggests an attempt to purposefully avoid discovering the truth of the matter. According to Polevoy, neither Rosenthal nor Bolen ever undertook any genuine investigation of the "facts" Bolen related. Indeed, Polevoy alleges that Rosenthal, Bolen, and all of the other named and Doe defendants (perhaps including McPhee), were engaged in a conspiracy to libel him in order to further their "commercial interests" in "alternative medicine," which is assertedly a reason Rosenthal failed to investigate and to consult reliable unbiased sources.<sup>18</sup>

Polevoy has not had an opportunity to develop evidence to support his conspiracy claim, but Bolen is clearly central to his conspiracy theory. Rosenthal admits she knew Bolen for "years" and participated with him in "expos and fairs" featuring programs on "alternative medicine." According to Polevoy, Bolen and his wife are engaged in the business of assisting " 'alternative medicine' practitioners faced with regulatory action, criminal prosecution, or other matters that threaten their financial well-being and/or license to practice." Bolen's "clients," who include not just McPhee but also codefendant Hulda Clark, "an unlicensed naturopath" who had been charged with the unlawful practice of medicine, were among Polevoy's targets. Bolen attributed Polevoy's success to the credibility he enjoyed as a licensed physician. For example, Bolen's communications—which he apparently sent only to those, like Rosenthal, he knew to be commercially threatened by or otherwise hostile to Polevoy's views—included the following statement: "To the trained ear (health professionals) Polevoy sounds, and is,

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<sup>18</sup> Though "financial motive cannot, by itself, prove actual malice, it nonetheless is a relevant factor bearing on the actual malice inquiry. See *Harte-Hanks [Communications, supra]*, 491 U.S. at [p.] 668 . . ." (*Suzuki Motor Corp. v. Consumers Union of U.S.* (9th Cir. 2003) 330 F.3d 1110, 1136.)

ludicrous. But it isn't the trained ear Polevoy is addressing. He is pure fraud—addressing those that are unaware, shoving in their face his MD license, as though that were some sort of special God-issued certificate, justifying lies, misrepresentations, and bad behavior.” To deprive Polevoy of this undeserved credibility, Bolen urged readers to call Polevoy’s “criminal conduct” to the attention of, among others, the Ontario College of Physicians and Surgeons and point out that it “may be in violation of several subsections of clause 51(1)(c) of the Health Professions Procedural Code,” which assertedly proscribes “[c]onduct unbecoming a physician.” According to the form letter Bolen provided, Polevoy’s “current mental state is a danger to the Canadian community” and it therefore “might be prudent to suspend his license pending [the] outcome of the investigation.”

In arguing that “actual malice” may be inferred from the collusive attempt of Bolen, Rosenthal and others to discredit him through the publication of information they knew or strongly suspected was false, Polevoy relies on *Fisher v. Larsen* (1982) 138 Cal.App.3d 627. There, the Court of Appeal reversed a trial court grant of summary judgment in favor of defendants who accused the plaintiff, a defeated candidate for reelection to a school board, of committing “blackmail,” because the word “blackmail” could reasonably be interpreted as charging the crime of attempted extortion, and the defendants knew that the source of their information was biased against the plaintiff. The court concluded that the defendants failed to undertake any reasonable effort to confirm the accuracy of the criminal accusation: “The Larsens [defendants] claim they acted reasonably in their belief in the truth of the statements, basing their belief on a chronological history kept by superintendent Goodman [whom the plaintiff allegedly sought to ‘blackmail’] and provided to them before preparing the speech. However, the Larsens knew of the past strained relations between Fisher [the plaintiff] and Goodman (they acknowledge awareness of Fisher’s charges made earlier against Goodman which resulted in litigation and law enforcement investigation) and they reviewed the chronology knowing it was prepared by one of only two parties at the meeting in which the bribe was purportedly offered and the blackmail threats allegedly made.” (*Id.* at

pp. 638-639, fn. omitted.) One of the defendants asserted that she “ ‘had no reason whatsoever to question the veracity or integrity of the superintendent’s report of the meeting with [Fisher], or the reports in the newspapers, . . . or the statements of the president of the Board of Education in regard to same.’ ” (*Id.* at p. 639.) The Court of Appeal concluded that in light of the plaintiff’s “repeated and emphatic denials” she ever made threats or promises in her confrontation with Goodman, as he reported, and because the defendants “made no effort to check the truthfulness of the chronology as prepared by Superintendent Goodman,” there was at least a triable issue of material fact in defendants’ defense of truth or as to whether the accusations of criminal conduct were made with “actual malice.” (*Id.* at pp. 639-640.) As stated by the court, “ ‘actual malice’ may be inferred when the investigation was grossly inadequate under the circumstances.” (*Id.* at p. 640, citing *Vandenburg v. Newsweek, Inc.* (5th Cir. 1975) 507 F.2d 1024, 1026.)

The evidence Polevoy rests on to show “actual malice” is considerably more conjectural than that produced by the plaintiff in *Fisher v. Larsen, supra*, 138 Cal.App.3d 627. However, unlike the plaintiff in that case, Polevoy was denied any opportunity to obtain discovery of evidence of recklessness from those who are the best and perhaps the only source of such evidence. To obtain support for his central contention that Rosenthal’s purposeful avoidance of the truth was an aspect of her participation in a concerted effort to discredit him with information known to be false, which may have been motivated by commercial considerations, Polevoy sought permission to take the depositions of Rosenthal, Bolen, and McPhee. The request was denied. As a result, the evidence supporting the finding that Polevoy “cannot show malice” consisted of little more than the declarations of the parties. However, Rosenthal’s declaration that she believed Bolen’s statements were trustworthy because of the corroboration she obtained from McPhee does not, in the circumstances, justify the granting of the motion to strike. (See *Widener v. Pacific Gas & Electric Co.* (1977) 75 Cal.App.3d 415, 435, disapproved on another ground in *McCoy v. Hearst Corp., supra*, 42 Cal.3d at p. 846, fn. 9 [“The mere profession of a defendant that he believed in good faith that his statements were true does not automatically entitle him to a verdict in his favor”].)

We find that the denial of Polevoy’s discovery request was an abuse of judicial discretion. The reasons are set forth in *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, which also involved a special motion to strike pursuant to the anti-SLAPP statute by the defendant in a libel action. The court affirmed an order granting the motion and dismissing the case because (unlike this case) the truth of the allegedly libelous statements had been established by the defendant, which was a complete defense. However, in the course of its opinion, the court addressed the question whether the provision of the statute authorizing the stay of discovery denied due process by arbitrarily curtailing the plaintiff’s ability to obtain essential evidence. The court observed that the provision authorizing such a stay (§ 425.16, subd. (g)) “also states that the ‘court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.’ ” (*Lafayette Morehouse, Inc., supra*, at p. 867.) The opportunity for discovery is “of prime import in a libel suit against a media defendant who will generally be the principal, if not the only, source of evidence concerning such matters as whether that defendant knew the statement published was false, or published the statement in reckless disregard of whether the matter was false and defamatory. Motions under section 425.16 commonly will be filed early in the proceedings, before the plaintiff has the opportunity to conduct (or complete) significant and necessary discovery. If the plaintiff makes a timely and proper showing in response to the motion to strike, that a defendant or witness possesses evidence needed by plaintiff to establish a prima facie case, the plaintiff must be given the reasonable opportunity to obtain that evidence through discovery before the motion to strike is adjudicated. *The trial court, therefore, must liberally exercise its discretion by authorizing reasonable and specified discovery timely petitioned for by a plaintiff in a case such as this, when evidence to establish a prima facie case is reasonably shown to be held, or known, by defendant or its agents or employees.* Furthermore, while the statute says the motion to strike ‘shall be noticed for hearing not more than 30 days after service’ [citation], nothing therein prevents *the court* from continuing the hearing to a later date so that the discovery

it authorized can be completed where a reasonable exercise of judicial discretion dictates the necessity therefore.” (*Id.* at p. 868, initial italics added.)

Similarly, in *Metabolife Intern., Inc. v. Wornick* (S.D. Cal. 1999) 72 F.Supp.2d 1160 (affd. in part & revd. in part (9th Cir. 2001) 264 F.3d 832), the court agreed that a trial court “should not scrutinize Plaintiff’s evidence of facts uniquely within the Defendants’ control before ordering discovery to enable Plaintiff to meet its burden of opposing Defendants’ anti-SLAPP motions.” (*Id.* at p. 1166.) The court emphasized that evidence that a defendant “ ‘entertained serious doubts as to the truth of his statement’ ” is so difficult for the plaintiff to obtain that it “generally should not be tested at this early stage of the litigation.” (*Ibid.*)<sup>19</sup>

Evidence of the nature of the relationships between Rosenthal, Bolen and McPhee and the motivation of their conduct relating to Polevoy is not readily available from any other sources (see *Schroeder v. Irvine City Council* (2002) 97 Cal.App.4th 174, 190-191), and Polevoy made a timely and proper showing that he needed such evidence in order to successfully oppose Rosenthal’s motion to strike. If the deposition testimony of one or more of these individuals suggests that Rosenthal and other defendants engaged in a collusive effort to avoid the truth—and there is no reason to exclude that possibility—

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<sup>19</sup> The district court had stayed discovery pending the determination of the defendants’ motion to dismiss. Although concluding that generally discovery should be granted on the actual malice issue before ruling on summary judgment, the district court did not determine whether the plaintiff’s evidence had established a prima facie case of actual malice. (*Metabolife Intern., Inc. v. Wornick, supra*, 72 F.Supp.2d at p. 1166.) Rather, it granted the defendants’ anti-SLAPP motions to strike on the grounds that the plaintiff had not established a prima facie case of falsity. (*Id.* at p. 1176.) On appeal, the Ninth Circuit Court of Appeals affirmed in part and reversed in part, holding that the district court had adopted the right analysis, but had “failed to implement it properly” in denying discovery on the falsity issues. (*Metabolife Intern., Inc., supra*, 264 F.3d at pp. 846, 850.) The Ninth Circuit concluded that the discovery-limiting aspects of section 425.16, subdivisions (f) and (g), “cannot apply in federal court” because they “ ‘directly collide’ ” with Federal Rule of Civil Procedure 56, requiring discovery “ ‘where the nonmoving party has not had the opportunity to discover information that is essential to its opposition.’ ” *Anderson v. Liberty Lobby, Inc.* [1986] 477 U.S. 242, 250 n. 5 . . .” (*Metabolife Intern., Inc., supra*, 264 F.3d at p. 846.)

Polevoy would be able to establish not just a prima facie case that Rosenthal acted with “actual malice,” but as well a prima facie case of conspiracy to libel.<sup>20</sup>

As the denial of discovery was an abuse of judicial discretion, the finding that Polevoy cannot establish “actual malice” must be vacated and the matter remanded to the superior court for further proceedings. After remand, and prior to any ruling on Rosenthal’s special motion to strike (unless she has then established the truth of the statements she republished), the trial court shall grant a renewed motion for the discovery previously sought by Polevoy and shall exercise its discretion to authorize appropriate additional discovery if Polevoy is able to show that evidence to establish a prima facie case of “actual malice” is held, or known, by any other defendant or witness.

C.\*

*The Trial Court Erred in Concluding There is No Probability Appellant Polevoy Will Prevail on the Merits of His Claim Because of the Lack of Evidence of Monetary Loss*

The trial court found appellants’ claims fatally defective because they “submitted no evidence that they suffered any actual monetary damage as a result of Defendants’ publications.” Citing *Gertz, supra*, 418 U.S. at page 350, the trial court stated that “a public figure plaintiff must produce ‘competent evidence of actual injury’ to state a constitutional claim for defamation.”

It has long been established in California, that “[w]here the statement is defamatory *on its face*, it is said to be libelous per se, and actionable without proof of special damage. But if it is *covert* defamation, i.e., if the defamatory character is not

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<sup>20</sup> Because a special motion to strike comes relatively early in the life of a case, the quantum of evidence a plaintiff must adduce in order to satisfy the burden of proving a likelihood of prevailing on the merits is less than that needed to succeed at trial; rather, it is akin to the prima facie showing required to survive a motion for summary judgment, or a motion for nonsuit or directed verdict. (*Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 809; *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1496 & fn. 1; *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 823-825, disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 68, fn. 5.) The causes of action need only be shown to have “minimal merit.” (*Navellier v. Sletten, supra*, 29 Cal.4th at p. 89.)

apparent on its face and requires an explanation of the surrounding circumstances (the ‘innuendo’) to make its meaning clear, it is not libelous per se, and *is not actionable without pleading and proof of special damages.*”<sup>21</sup> (5 Witkin, Summary of Cal. Law (9th ed.) Torts, § 481, pp. 565-566, and cases there cited.) The principle is codified in Civil Code section 45a, which states in relevant part that “[a] libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language *not libelous on its face* is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof.” (Civ. Code, § 45a, italics added; *Varian Medical Systems, Inc. v. Delfino* (2003) 113 Cal.App.4th 273, 290 [“a libel per se is actionable without proof of special damages”].)

The alleged defamation of Polevoy consisted of statements that his stalking of Christine McPhee was “criminal” and that he was otherwise engaged in a “criminal conspiracy.” “The charge of commission of some kind of crime is obviously libel per se.” (5 Witkin, Summary of Cal. Law, *supra*, Torts, § 482, pp. 566-567, citing generally, 50 Am.Jur.2d, Libel and Slander § 27 et seq.; *Edwards v. San Jose Printing & Publishing Soc.* (1893) 99 Cal. 431; *Boyich v. Howell* (1963) 221 Cal.App.2d 801.) The fact that a plaintiff cannot be punished for a crime charged is no defense. “It is not in modern times the fear or inconvenience to an innocent person arising from prosecution, but the harm to his reputation from false charges of criminal conduct that constitutes the basis of the rule.” (2 Harper et al., *The Law of Torts, supra*, § 5.10, pp. 93-94.)

Neither *Gertz* nor *Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, the only cases relied upon by the trial court, suspend application of this principle to cases involving public officials or public figures able to show that the defendant acted with

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<sup>21</sup> “ ‘Special damage’ means that the loss sustained by the plaintiff must be a particular loss, of a material nature, supported by specific evidence. Thus, ‘special damage’ is to be contrasted with the ‘general damage’ that was traditionally presumed from the publication of a libel or any of the imputations that come within the rules of slander per se.” (2 Harper et al., *The Law of Torts, supra*, § 5.14, p. 114.)

“actual malice”; indeed, neither case involved a plaintiff who was a public official or public figure. *Gertz* states that in defamation suits by private individuals, which are not subject to the demanding showing required by *New York Times Co. v. Sullivan*, *supra*, 376 U.S. 254, “the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.” (*Gertz*, *supra*, 418 U.S. at p. 349, italics added.) The *Gertz* opinion later restates the proposition thusly: “It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury.” (*Ibid.*, italics added.) *Gertz* does not alter the principle that “[the] actual injury requirement does not apply to ‘public officials’ or ‘public figures,’ who must prove ‘knowledge of falsity or reckless disregard for the truth.’ ” (2 Harper et al., *The Law of Torts*, *supra*, § 5.9, p. 76.)

*Averill v. Superior Court*, *supra*, 42 Cal.App.4th 1170 held that allegedly slanderous statements arose in the context of a public issue, within the meaning of the anti-SLAPP statute, even though made in the course of a private conversation. After explaining that the statements of the defendant were protected by the statute, the court determined that “[t]he action is meritless since [defendant’s] comments had no effect on her employer” (*id.* at p. 1176), which continued to make charitable gifts to the plaintiff’s project despite the defendant’s alleged slander. Counsel for the plaintiff admitted there was no evidence of damages, but hoped to obtain it in the course of discovery, which the Court of Appeal found the trial court properly refused to allow. *Averill* involved no consideration whether the alleged slander was slanderous per se (Civ. Code, § 46, subds. 1-4), and certainly does not suggest a public figure plaintiff who can show “actual malice” must also produce evidence of actual damages. We are unaware of any authority holding such a plaintiff must allege special damage.<sup>22</sup>

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<sup>22</sup> The only case appellants offer is *Global Telemedia Intern., Inc. v. Doe 1* (C.D.Cal. 2001) 132 F.Supp.2d 1261. In that case, a public company brought an action for trade libel, libel per se and other claims against individuals who posted statements critical of the company on an Internet chat room. The defendants moved to strike



Because, as we have explained, the federal immunity does not apply in this case, and it has not yet been shown that Polevoy will be unable to show malice, and he is not required to plead special damages, the trial court's conclusion that there was no probability appellant Polevoy could prevail on his defamation claim was error. The court's conclusion that appellant Barrett could not prevail on his defamation claim was correct, as the statements respondent Rosenthal published that relate to him are not demonstrably false statements of fact.

#### IV.\*

##### *The Rulings Against Appellants' Counsel Were Neither in Excess of the Court's Jurisdiction Nor an Abuse of Discretion*

As noted at the outset, appellants' attorney at trial and on this appeal, Christopher E. Grell, was also originally a named plaintiff, asserting in the complaint that, as an attorney, he "has a special interest in cases involving health fraud or harm caused by herbal products." At the hearing on May 30, 2001, the trial judge emphasized the serious nature of Rosenthal's motion to strike to Grell personally, "because if you lose, the next motion is one for fees. And . . . they are going to be seeking 20 or 30 or 50,000 [dollars] or God knows how much against you. *Not only your clients but you personally, because you're a plaintiff.* [¶] Which raises a very fundamental question to you." (Italics added.) At that point the following brief colloquy took place:

"THE COURT: What is the claim that you have on the merits?"

"Mr. GRELL: As against Ms. Rosenthal?"

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pursuant to the anti-SLAPP statute and the district court held that the statements relating to the company involved "matters of public significance" within the meaning of the statute and that the plaintiff company failed to establish a probability of success on the merits. With respect to the latter holding, the court observed that even if the defendants' statements were actionable statements of facts rather than opinions, which was not the case, plaintiffs would have to show that they were damaged by the defendants' postings "because the postings caused the stock to lose value," which they could not show. (*Id.* at p. 1270.) *Global Telemedia* did not involve defamations that were even libelous, let alone libelous per se, and therefore hardly requires a plaintiff who has alleged libel per se, and can show actual malice, to additionally show actual damages.

“THE COURT: Yes.

“MR. GRELL: I don’t believe I have a claim against Ms. Rosenthal.

“THE COURT: Then why did you sue her?

“MR. GRELL: I don’t believe that my allegations go directly to Ilena Rosenthal. I think it [*sic*] goes to Mr. Bolen.”

Later in the hearing the court indicated it was likely to grant Rosenthal’s motion to strike and the motion for fees it expected would later be made. The court deferred an actual ruling only to provide Grell an opportunity to persuade it to allow further discovery before ruling on the merits of the motion to strike.

The next day Grell moved to dismiss his action against Rosenthal only, and this dismissal was entered on June 4, 2001. Grell remained a party plaintiff as to all remaining defendants. The order granting Rosenthal’s motion to strike, which was filed on July 25, 2001, was not only against appellants Barrett and Polevoy but also explicitly against Grell as a coplaintiff. “Initially, the Court notes that plaintiff Grell’s claim fails the publication requirement, that is, an affirmative showing by him that the statements at issue were directed at or concerned him in some way. Notably, Grell is not mentioned in any publication that Rosenthal is alleged to have made and presented no evidence to show that any reader reasonably understood the publications to refer to him. Indeed, at the hearing plaintiff Grell as much as conceded the motion as against him.”

Appellants first claim that the granting of the motion to strike as against Grell was in excess of the court’s jurisdiction. A trilogy of cases compel the opposite conclusion.

In *Coltrain v. Shewalter* (1998) 66 Cal.App.4th 94, the plaintiffs voluntarily dismissed their lawsuit after the defendants filed a motion to strike under section 425.16. The defendants then moved for an award of attorney fees, and fees were awarded under subdivision (c). The plaintiffs appealed, arguing that the defendants were not entitled to fees because they were not “prevailing defendant[s]” within the meaning of the statute. The appellate court disagreed: “where the plaintiff voluntarily dismisses an alleged SLAPP suit while a special motion to strike is pending, the trial court has discretion to determine whether the defendant is the prevailing party for purposes of attorney’s

fees . . . .” (*Id.* at p. 107.) “In making that determination, the critical issue is which party realized its objectives in the litigation. Since the defendant’s goal is to make the plaintiff go away with its tail between its legs, ordinarily the prevailing party will be the defendant. The plaintiff, however, may try to show it actually dismissed because it had substantially achieved its goals through a settlement or other means, because the defendant was insolvent, or for other reasons unrelated to the probability of success on the merits.” (*Ibid.*)

In *Liu v. Moore* (1999) 69 Cal.App.4th 745, the respondents had dismissed their cross-complaint prior to the hearing on the appellant’s section 425.16 motion to strike. For this reason the trial court concluded that the motion to strike was moot, and appellant could not be entitled to an award of fees as the prevailing party. The Court of Appeal reversed, holding that the trial court’s ruling “constitutes a nullification of an important part of California’s anti-SLAPP legislation. If indeed respondents’ cross-complaint against appellant is a SLAPP suit, then the court’s decision to not hear the merits of appellant’s motion to strike deprives appellant of the monetary relief which the Legislature intended to give her, while at the same time it relieves respondents of the punishment which section 425.16 imposes on persons who use the courts to chill others’ exercise of their constitutional rights.” (*Id.* at p. 748.) The court further held that “a defendant who is voluntarily dismissed, with or without prejudice, after filing a section 425.16 motion to strike, is nevertheless entitled to have the merits of such motion heard as a predicate to a determination of the defendant’s motion for attorney’s fees and costs under subdivision (c) of that section.” (*Id.* at p. 751.)

As pointed out in *Pfeiffer Venice Properties v. Bernard* (2002) 101 Cal.App.4th 211, the most recent case bearing upon the issue, “*Liu* disagreed with *Coltrain* on the extent to which a plaintiff’s reasons for voluntarily dismissing the action bear on the issue of attorney fees. The *Liu* court pointed out that, because the purpose of a SLAPP suit is not to succeed on the merits but to silence the defendants, settlement of such an action would, in some instances, merely mean that the plaintiff had succeeded in chilling the exercise of constitutional rights. [Citation.] *Liu* nevertheless agreed that ‘a plaintiff’s

voluntary dismissal of a suit, after a section 425.16 motion to strike has been filed, neither automatically precludes a court from awarding a defendant attorney's fees and costs under that section, nor automatically requires such an award.' [Citation.] Under *Liu*, 'the trial court's adjudication of the merits of a defendant's motion to strike is an essential predicate to ruling on the defendant's request for an award of fees and costs. An award of these expenses under section 425.16 is only justified when a defendant demonstrates that plaintiff's action falls within the provisions of subdivision (b) and the plaintiff is unable to establish a reasonable probability of success.' [Citation.]" (*Id.* at p. 218.)

The court in *Pfeiffer Venice Properties* read *Liu* as meaning that, "because a defendant who has been sued in violation of his or her free speech rights is entitled to an award of attorney fees, the trial court must, upon defendant's motion for a fee award, rule on the merits of the SLAPP motion even if the matter has been dismissed prior to the hearing on that motion. That conclusion is equally compelling when, as here, the suit is dismissed sua sponte by the trial court as when it is voluntarily dismissed by the plaintiff." (101 Cal.App.4th at p. 218.)

Grell did not move to dismiss his claims against Rosenthal prior to her motion to strike, and his dismissal after the hearing on that motion would not have eliminated the need for the court to rule even if there were no remaining plaintiffs, because a ruling on that motion was "an essential predicate" to Rosenthal's right to an award of attorney fees and costs under the statute. (§ 425.16, subd. (c).) Grell could not remove himself from the purview of either the motion to strike or the request for fees by belatedly dismissing his claim against Rosenthal because the damage caused by the SLAPP suit, for which Rosenthal was entitled to be reimbursed, had occurred prior to his dismissal. The court did not act in excess of its jurisdiction.

Appellants alternatively claim that the trial court's refusal to exempt Grell from its ruling requiring appellants to pay Rosenthal her attorney fees and costs was an abuse of discretion. We disagree.

Preliminarily, appellants conceded below that the trial court had discretion to compel Grell to participate in the payment of fees awarded Rosenthal. Their opposition to Rosenthal's motion for fees ends with the request "that the Court exercise its discretion and not sanction Grell on the grounds that Grell never intended to pursue a claim against Rosenthal." In a declaration submitted in support of the opposition to the request for fees, Grell took the position that the court should exercise its discretion in his favor because when the matter was raised by the court he promptly admitted "that I had no specific claim against Ilena Rosenthal and that a mistake was made by overly broad pleading." Grell also pointed out that "[a]t no time did Defense counsel contact me and ask what the basis of my claim against Ilena Rosenthal was" and that "I do not make it a habit of suing people." The trial court was obviously unpersuaded.

Rosenthal was entitled to an attorney fee award from Barrett because, as the trial court correctly concluded, his unjustified defamation claim sought to chill her exercise of constitutional rights. The court could well conclude that, because he was an attorney, Grell engaged in the chilling of constitutional rights more knowingly and was therefore more responsible than Barrett. It was small solace to Rosenthal that, after she filed her motion to strike, and the trial judge made clear the likelihood it would be granted, Grell finally admitted his mistake. As we have said, the damage had already been done. Our decision to vacate the grant of Rosenthal's motion to strike the complaint as it relates to Polevoy does not diminish the effect of the ruling as to the remaining appellants, Barrett and Grell, which we affirm. There was no abuse of discretion.

#### V.\*

*The Trial Court Shall on Remand Recalculate the Amount of Fees Respondent's Counsel is Entitled to Receive for Work Performed at the Trial Court Level and Calculate the Amount of Attorney Fees He is Entitled to Recover for Work Performed on This Appeal*

Respondent has asked this court to award her reasonable attorney fees and costs on this appeal. " 'A statute authorizing an attorney fee award at the trial court level includes appellate attorney fees unless the statute specifically provides otherwise.' (*Evans v. Unkow, supra*, 38 Cal.App.4th at p. 1499.) Since section 425.16, subdivision (c)

provides for an award of attorney fees and costs to a prevailing defendant on a special motion to strike [but not a prevailing plaintiff], and does not preclude recovery of appellate attorney fees by a prevailing defendant-respondent, those fees are recoverable. (38 Cal.App.4th at p. 1500.)” (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 785; *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 659, disapproved on another ground in *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 68.)

The attorney fee provision of section 425.16 “authorizes the court to make an award of reasonable attorney fees to a prevailing defendant, which will adequately compensate the defendant for the expense of responding to a baseless lawsuit.” (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, *supra*, 47 Cal.App.4th at p. 785, citing *Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 362.) The question is whether Rosenthal can be deemed a “prevailing party” after our vacation of the order granting her special motion to strike insofar as it relates to the claims of appellant Polevoy, but affirming the order as it applies to the two remaining appellants.

This question was addressed in *ComputerXpress, Inc. v. Jackson*, *supra*, 93 Cal.App.4th 993. In that case a company brought an action against the owners of businesses, alleging numerous causes of actions that fell within two separate groups. The first group alleged that the defendants falsely represented the profitability of their business and disparaged the plaintiff to a customer that later cancelled a sales contract with the plaintiff; the second group arose from allegations that the defendants posted messages on the Internet defaming the plaintiff, filed a complaint against the plaintiff with the Securities and Exchange Commission, and then posted that complaint on the Internet. The trial court denied the defendants’ motion to strike under the anti-SLAPP statute. The court of appeal affirmed the order denying the motion to strike the first group of causes of action, but reversed the order as to the second group and remanded for the trial court’s determination of an award of attorney fees and costs in connection with their SLAPP motion. Turning to the question whether the defendants were prevailing parties entitled to attorney fees, the court drew an analogy between a defendant making a

motion to strike under the anti-SLAPP statute and plaintiffs in actions under section 1988 of Title 42 of the United States Code, California Code of Civil Procedure section 1021.5, and section 6259, subdivision (d) of the California Public Records Act (Gov. Code, § 6259, subd. (d)), because those three statutes also give only certain parties (plaintiffs under the latter statutes) a preference for attorney fees if they are successful. Analyzing the case law pertaining to the analogous statutes, the *ComputerXpress* court concluded “that defendants in this case should be considered prevailing parties, and therefore recover attorney fees and costs, notwithstanding their partial success on their SLAPP motion. As with the federal civil rights statutes and the California Public Records Act, the differential standard awarding fees reflects a preference for compensating parties who further the public policies underlying the SLAPP statute through their litigation efforts. The approach adopted in the cases applying those analogous statutes, under which partial success reduces but does not eliminate the entitlement to attorney fees, therefore should be applied here.” (*ComputerXpress, Inc. v. Jackson, supra*, 93 Cal.App.4th at p. 1020.) The court did, however, acknowledge the difficulty of employing this approach “where the successful and unsuccessful claims are legally or factually related,” as in *Hensley v. Eckerhart* (1983) 461 U.S. 424. The *Hensley* court “stated that, for purposes of the threshold determination of whether the plaintiff has prevailed at all, ‘plaintiffs may be considered ‘prevailing parties’ for attorney’s fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.’” (*Hensley, supra*, 461 U.S. at p. 433.) However, where the plaintiff in one lawsuit presents ‘distinctly different claims for relief that are based on different facts and legal theories,’ he or she cannot recover fees incurred in pursuing an unsuccessful claim. (*Id.* at pp. 434-435.) On the other hand, if the plaintiff’s successful and unsuccessful claims involve a common core of facts or related legal theories, the court should determine ‘the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.’ (*Id.* at p. 435.) ‘A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of

the litigation as a whole.’ (*Id.* at p 440.)” (*ComputerXpress, Inc. v. Jackson, supra*, 93 Cal.App.4th at p. 1019.)

The attorney fee award of \$33,576 (together with costs in the amount of \$231.74) was designed to fully compensate Rosenthal for all legal expenses she incurred in connection with her motion to strike. Neither the court nor counsel ever suggested, however, that any particular portion of this amount could be attributed to any particular claim or legal theory and, as we have seen, the relevant facts differ as between the parties.

Rosenthal’s special motion to strike presented but one legal theory; namely, that the complaint appellants jointly filed in this action arises from Rosenthal’s acts in furtherance of her constitutional rights of petition and speech and that appellants cannot establish a probability of prevailing on the merits of their claims. On the other hand, she prevailed on her claims against Barrett and Grell but not against Polevoy, because the facts as to Barrett and Grell, who were not defamed, were different from those pertinent to Polevoy, who may have been defamed. The determinations that Barrett and Grell were not defamed were dispositive as to Rosenthal’s claims against them. The determination that Polevoy may have been defamed was not dispositive, however, as it necessitated further inquiry into the issues whether Rosenthal was protected by the federal immunity, whether the sufficiency of the evidence her defamation of Polevoy was animated by “actual malice,” and whether Polevoy was required to allege and show special damages. These distinctive issues, which were the central focus of the litigation, related only to Rosenthal’s claims against Polevoy.

Because the relief Rosenthal secured is, in our view, limited in comparison to the scope of the litigation as a whole, we conclude she is entitled only to a reduced fee award. That is, she may not recover fees incurred in pursuing the issues that related only to her claim for relief against Polevoy, as to which, at least at this point, she has not succeeded.

Accordingly, upon an appropriate application, the trial court shall determine what portion of the legal expenses Rosenthal reasonably incurred—both at trial and on



appeal—were related to her claims against Barrett and Grell, and what portion she incurred only in connection with the different legal issues pertinent to her claim against Polevoy. The court shall award Rosenthal only such expenses as she reasonably incurred in connection with her claims against Barrett and Grell.

Although Polevoy is in fact also a prevailing party, the anti-SLAPP statute only authorizes the recovery of attorney fees and costs by a “prevailing defendant.” (§ 425.16, subd. (c).) A defendant who prevails against other plaintiffs cannot, of course, recover attorney fees and costs from a plaintiff, such as Polevoy, against whom he or she does not prevail.

#### DISPOSITION

The order granting the special motion to strike pursuant to section 425.16 is vacated insofar as it applies to appellant Polevoy; in all other respects the order is affirmed. The matter is remanded to the trial court for further proceedings consistent with this opinion.

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Kline, P.J.

We concur:

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Lambden, J.

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Ruvolo, J.

Trial Court: Alameda Superior Court

Trial Judge: Honorable James Richman

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