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County of Los Angeles

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David W. Slayton, Executive Officer/Clerk of Court
By: Victoria Yonker, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES - WEST DISTRICT

P. KEVIN MORRIS, an individual, Plaintiff(s), vs. GARRETT ZIEGLER, an individual; ICU, LLC, a Wyoming limited liability company, doing business as MarcoPoloUSA; and DOES 1-10, Defendant(s).	CASE NO.: 23SMCV01418 ORDER(S) REGARDING DEFENDANTS GARRETT ZIEGLER AND ICU, LLC'S SPECIAL MOTION TO STRIKE THE COMPLAINT AND PLAINTIFF P. KEVIN MORRIS' MOTION FOR A PRELIMINARY INJUNCTION Dept.: I

I. Facts and Relevant Procedural History[1]

Plaintiff P. Kevin Morris ("plaintiff") filed this harassment action against defendants Garrett Ziegler and ICU, LLC (collectively "defendants"). According to the operative complaint, defendant Ziegler was a political aide and former member of the White House staff in former President Donald Trump's administration. (Compl., ¶13.) Plaintiff contends that Ziegler has recently been focusing on exposing information he claims was on a laptop purportedly owned by Hunter Biden ("Biden"). (*Id.* at ¶17.) Ziegler allegedly posts his information on his website

[1] Normally at this early stage of the case, the "facts" are taken from the allegations in the complaint. That's not unusual. What is unusual is that this order addresses two motions, both of which require the court to rely on evidence, not allegations. The court recites from the complaint in this section, then, not to set forth the evidence in support of and opposition to the motions, but rather to frame the case. And the allegations are not unimportant. As discussed below, they form an important basis in analyzing part of the Special Motion to Strike and they also cabin what issues are fairly presented in the case.

marcopolousa.com ("Marco Polo"). (*Id.* at ¶2.) Ziegler also purportedly published a report on Marco Polo about information claimed to be from the laptop ("Marco Polo Report"). (*Id.* at ¶17.)

Plaintiff states he is an entertainment attorney who met Hunter Biden[2] in or around 2019 and began to represent Biden soon thereafter. (Compl., ¶21.) In May 2022, news articles were published describing plaintiff as Biden's friend and someone who was helping Biden financially. (*Id.* at ¶22.) Plaintiff asserts that soon after the publication of that article, defendants began to harass him. (*Id.* at ¶23.) As an example, plaintiff details Ziegler's alleged impersonation of John Cooper, a well-known Democratic fundraiser, on or about May 19, 2022, through text messages to get plaintiff to disclose information about Biden to Ziegler. (*Ibid.*) (Ziegler denies that he was the person impersonating Cooper.) Around May 29, 2022, Morris claims that Ziegler revealed to him that Ziegler was the person impersonating Cooper and plaintiff responded by threatening Ziegler with legal action. (*Id.* at ¶24.)

Plaintiff contends that after that Ziegler continued his harassment efforts by posting pictures of plaintiff and his family on the website and making derogatory comments about both, as well as by photoshopping an image of plaintiff holding a book to make it appear like plaintiff was holding the Marco Polo Report. (Compl., ¶25; Exhs. B-C.) Ziegler allegedly posted cherry-picked portions of his text messages with plaintiff on his website and claimed that plaintiff was threatening him. (*Id.* at ¶26.) Plaintiff asserts, on information and belief, that Ziegler did this to increase the anger of right-wing extremists, resulting in more aggressive action against plaintiff and increased donations to defendants. (*Id.* at ¶27.) Ziegler purportedly engaged in conversations with right-wing extremists who commented about violence, calling plaintiff's cellphone, and driving by his property. (*Id.* at ¶28.) Plaintiff asserts these things soon came to pass; he states he has been harassed via phone calls by multiple people and believes people have been stalking him and driving past his homes as a result of Ziegler's conduct. (*Id.* at ¶29.)

Currently before the court are two motions: a special motion to strike ("SMS") filed by defendants and a motion for a preliminary injunction filed by plaintiff. Each party opposes the motion filed by the other side.

[2] "Biden" refers in this decision to Hunter Biden, not President Biden.

The court first heard arguments on these matters on July 13. After a continued hearing for further oral argument to July 17, the court requested certain additional briefing by the parties. The parties then submitted a stipulation on issues to address and the briefing schedule. Their supplemental briefs are now in, and the matter is ripe for resolution. The court thanks the attorneys again for their professionalism and civility, as well as the quality of their legal briefing and oral argument.[3]

These motions, and this case, are intimately intertwined with perhaps the most enduring principle of our democracy, the First Amendment and the right to free speech, which is necessary to freedom of thought. Defendants' speech and the resulting consequences are at issue. As such, the court is guided by long-enunciated principles that our Constitutions (federal and state) do not support a restrictive view of speech or the marketplace of ideas. Thus, although it goes without saying, the court will say it anyway (which is usually what comes next after someone says "it goes without saying"). At bench is speech; what is not at bench is the court's views of that speech—either favorable or unfavorable. The outcome of these two motions cannot depend on the court's own views of the worth of any speech; that is not the court's function and if it were, the court and the judiciary would become a danger to our democracy, not a bulwark of it.

Because our belief in free speech runs as deep as any principle in our Constitutions, the exceptions to allowing free speech are narrow. As the United States Supreme Court put it: "Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, *Chaplinsky v. New Hampshire*, *supra*, 315 U.S. at pages 571—572, at page 769, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear

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[3] The court cannot resist saying that the level of professionalism came as somewhat of a pleasant surprise. This case is rife with political overtones and certainly the issues are that way. Further, the briefing deals with hot button topics. Nonetheless, throughout the argument both counsel were nothing but professional and to the point. Without in the least sacrificing zealous advocacy for their respective clients, both brought forth cogent thoughts, positions, and well-reasoned arguments. The court very much appreciates that.

and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. See *Bridges v. California*, 314 U.S. 252, 262, *Craig v. Harney*, 331 U.S. 367, 373. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups." (*Terminiello v. City of Chicago* (1949) 337 U.S. 1, 4-5, parallel citations omitted.) "[D]ebate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 270.)

Oddly, both motions are directly appealable. Plaintiff's request for a preliminary injunction can be appealed whether the motion is granted or denied. And an appeal can be taken from the grant or denial of an SMS. Thus, this court is well aware that it is but the first stop on the journey. Yet every journey must begin with a first step, and so it is here. In light of the above framework, and with the hope that this court's analysis will well frame the issues as the case works its way through the appellate process, the court turns to the motions and their respective merits.

II. Special Motion to Strike

A. Evidentiary Matters

Defendants filed a request for judicial notice with their moving papers. The request is GRANTED. (See Evid. Code, § 452, subds. (c), (h).) Plaintiff's request in opposition is GRANTED as to the existence of the news articles and tweets in Request Nos. 1-27 and 29, not the truth of the matters stated therein. (*Id.* at subd. (h).) The request is GRANTED as to Request No. 28. (*Id.* at subd. (c).)

After the continued July 17 hearing, defendants submitted a supplemental declaration by Ziegler related to a Telegram post he made. (7/17/23 Suppl. Ziegler Decl.) This was done in response to the court's comments on the context of a specific post regarding that repeated the lyrics "Woke up this morning, got myself a gun" from the Sopranos opening credits theme song. Plaintiff's evidence made it seem like the Sopranos post came directly after a post alluding to plaintiff. (See Staropoli Decl., Exh. G.) That implied that the Sopranos post, with the attendant

1 gun-related song lyric, was focused on plaintiff. The court wanted to be careful and requested
2 clarification on whether the two posts came one after another, or if there were interim posts
3 between the two.[4] Ziegler's supplemental declaration indicates that plaintiff's representation was
4 accurate. (7/17/23 Suppl. Ziegler Decl., Exh. TT, Bates Nos. Ziegler-000000016-000000017.)

5 **B. Legal Standards**

6 The California Legislature has authorized a special motion to strike in lawsuits that seek
7 to "chill the valid exercise of the constitutional rights of freedom of speech and petition for the
8 redress of grievances." (Code Civ. Proc., § 425.16, subd. (a).) Code of Civil Procedure section
9 425.16, subdivision (b)(1) provides: "A cause of action against a person arising from any act of
10 that person in furtherance of the person's right of petition or free speech under the United States
11 Constitution or the California Constitution in connection with a public issue shall be subject to a
12 special motion to strike, unless the court determines that the plaintiff has established that there is
13 a probability that the plaintiff will prevail on the claim."

14 Accordingly, section 425.16 requires a two-step process for determining whether a SMS
15 should be granted. First, the court decides whether the defendant has made a threshold showing
16 that the challenged claims or causes of action arise from a protected activity. (See Code Civ.
17 Proc., § 425.16, subd. (b)(1).) "A defendant meets this burden by demonstrating that the act
18 underlying the plaintiff's cause fits one of the categories spelled out in [section 425.16,]
19 subdivision (e)." (*Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1043.) Our
20 Supreme Court has summarized the analysis as follows: "At that stage, we said, the moving
21 defendant must identify the acts alleged in the complaint that it asserts are protected and what
22 claims for relief are predicated on them. In turn, a court should examine whether those acts are
23 protected and supply the basis for any claims. It does not matter that other unprotected acts may
24 also have been alleged within what has been labeled a single cause of action; these are
25 'disregarded at this stage.' (*Baral*, *supra*, 1 Cal.5th at p. 396.) So long as a 'court determines
26 that relief is sought based on allegations arising from activity protected by the statute, the second
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28 [4] This is not meant to imply that the court had doubts about the veracity of plaintiff's representations. It simply wanted to be careful where the asserted implication is of targeted violence.

step is reached' with respect to these claims. (*Ibid.*)" (*Bonni v. St. Joseph Health System* (2021) 11 Cal.5th 995, 1010, parallel citations omitted.)

If the defendant makes that threshold showing, the burden shifts to the plaintiff to establish a likelihood of prevailing on the complaint, which has sometimes been referred to as "minimal merit." In this, the law is clear, but a bit strangely so. The statute's actual language suggests that the opposing party's burden is to show, through admissible evidence, "a *probability of success* on the claim." To the uninitiated, this sounds like the court ought to weigh the relative strength of each party's evidentiary showing and decide preliminarily whether it is more likely than not that plaintiff will prevail. But such is not the test. Cognizant of a plaintiff's due process rights, the phrase has been authoritatively interpreted such that plaintiff need not shoulder so heavy a burden. Rather, plaintiff need only make the same showing as would be necessary to defeat a summary judgment motion: the plaintiff must submit admissible evidence showing that, if plaintiff's evidence is believed, it can prevail. The court does not weigh the evidence or determine issues of credibility, nor does the court resolve any factual disputes. If plaintiff can make out a *prima facie* case, it matters not how strong the defendant's factual showing might be. Rather, as in a summary judgment motion, if the plaintiff can put forward evidence that, if true, would establish its claim in light of all reasonable favorable inferences, then the SMS must be denied.

C. Court's Analysis and Ruling

1. Acts in Furtherance of the Right of Petition or Free Speech

To invoke Code of Civil Procedure section 425.16, a defendant need only demonstrate that a suit arises from the defendant's exercise of free speech or petition rights. (See Code Civ. Proc., § 425.16, subd. (b); *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) "In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech." (*Id.*, at p. 78, emphasis in original.) "In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (Code Civ. Proc., § 425.16, subd. (b)(2).)

Defendants argue that the complaint is predicated on protected activity under subdivisions (e)(3) and (e)(4) of section 425.16. The former protects statements "made in a place open to the public or a public forum in connection with an issue of public interest[]" and the latter protects "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." (Code Civ. Proc., § 425.16, subds. (e)(3)-(4).) What constitutes a statement made in connection with an issue of public interest is the same under subdivisions (e)(3) and (4). (*Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107, 115-119.) There is another two-step test to determine this issue. "First, we ask what 'public issue or [ ] issue of public interest' the speech in question implicates—a question we answer by looking to the content of the speech. (§ 425.16, subd. (e)(4).) Second, we ask what functional relationship exists between the speech and the public conversation about some matter of public interest." (*FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 149–150.)

Defendants insist the purported impersonation of Cooper, publication of plaintiff's information, and certain other allegations implicate a public issue, namely Hunter Biden, his laptop, and plaintiff's involvement with Biden. They add that plaintiff is a person in the public eye, as well. "Here, the Court of Appeal properly identified three nonexclusive and sometimes overlapping categories of statements within the ambit of subdivision (e)(4). (See *Rand Resources, supra*, 247 Cal.App.4th at pp. 1091–1092.) The first is when the statement or conduct concerns 'a person or entity in the public eye'; the second, when it involves 'conduct that could directly affect a large number of people beyond the direct participants'; and the third, when it involves 'a topic of widespread, public interest.' (*Rivero v. American Federation of State, County, and Municipal Employees, AFL–CIO* (2003) 105 Cal.App.4th 913, 919; see *id.* at pp. 919–924.)" (*Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 621, parallel citations omitted.)

The court agrees that the statements and conduct at issue concern a public issue. "In *Nygård,* this court held that ' "an issue of public interest" . . . is *any issue in which the public is interested.* In other words, the issue need not be "significant" to be protected by the anti-SLAPP statute—it is enough that it is one in which the public takes an interest.' (*Id.* at p. 1042.)" (*Tamkin*

v. CBS Broadcasting, Inc. (2011) 193 Cal.App.4th 133, 143, emphasis by *Nygård* Court.) Defendants correctly point out that Biden, his laptop, and plaintiff are topics of widespread public interest. (Defs. RJN, Exhs. 1-23.) The Biden laptop was discussed during a presidential debate and multiple news articles were published regarding plaintiff's relationship with Biden. (*Ibid.*) The speech and conduct in question concerned the laptop and the relationship between Biden and plaintiff, both of which are in the public eye. Plaintiff may not be a famous person recognized by everyone on the street, but his connection to Biden involved him in this matter of public interest. (See *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1347 ["The public's fascination with Brando and widespread public interest in his personal life made Brando's decisions concerning the distribution of his assets a public issue or an issue of public interest. Although Hall was a private person and may not have voluntarily sought publicity or to comment publicly on Brando's will, she nevertheless became involved in an issue of public interest by virtue of being named in Brando's will"].)

The real issue is whether the conduct in question had a functional relationship to the issue of public interest. The second step requires a consideration of "whether a defendant—through public or private speech or conduct—participated in, or furthered, the discourse that makes an issue one of public interest." (*FilmOn, supra,* 7 Cal.5th at p. 151.) "[W]e reject the proposition that any connection at all—however fleeting or tangential—between the challenged conduct and an issue of public interest would suffice to satisfy the requirements of section 425.16, subdivision (e)(4). . . At a sufficiently high level of generalization, any conduct can appear rationally related to a broader issue of public importance. What a court scrutinizing the nature of speech in the anti-SLAPP context must focus on is the speech at hand, rather than the prospects that such speech may conceivably have indirect consequences for an issue of public concern." (*Rand, supra,* 6 Cal.5th at p. 625.)

On the impersonation of Cooper, Ziegler first claims he did no such thing. (Ziegler Decl., ¶18.) Whether that is so is not at issue on the first prong. Defendants' better argument is that the impersonation, whether by Ziegler or a whistleblower, constitutes newsgathering.

> It is beyond dispute that reporting the news is an exercise of free speech. (See, e.g. *Philadelphia Newspapers v. Hepps* (1986) 475

> U.S. 767, 775-776 [newspaper articles equated with free speech]; *Joseph Burstyn. v. Wilson* (1952) 343 U.S. 495, 501) [newspapers characterized as a form of 'expression']; (*Lieberman, supra,* 110 Cal.App.4th at p. 165 [reporting the news qualifies as free speech].) California courts have also held prereporting and postreporting conduct, such as investigating, newsgathering, writing, and interviewing is conduct in furtherance of free speech. (See, *Tamkin v. CBS Broadcasting, Inc.* (2011) 193 Cal.App.4th 133, 143 ['An act is in furtherance of the right of free speech if the act helps to advance that right or assists in the exercise of that right;' holding writer's use of the plaintiffs' names in a television show's draft script qualified as protected conduct because it 'helped to advance or assist in the creation, casting, and broadcasting of an episode of a popular television show']; *Hunter v. CBS Broadcasting, Inc.* (2013) 221 Cal.App.4th 1510, 1521 [Network's selections of weather anchors, essentially casting decisions, helped advance or assist freedom of speech and were thus protected conduct].) As in *Lieberman*, courts have held defendants may satisfy the showing they were engaged in conduct in furtherance of free speech under section 426.15, even when their conduct was allegedly unlawful. (See *Taus v. Loftus* (2007) 40 Cal.4th 683, 713, 727-732 [holding that defendants' investigation, including an interview that was allegedly fraudulently obtained, constituted protected activity]; *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1342, 1347 [same].)

(*Simmons v. Bauer Media Group USA, LLC* (2020) 50 Cal.App.5th 1037, 1044, parallel citations omitted.)

Defendants have been very involved with reporting and publishing reports related to the Biden laptop, as demonstrated by the Marco Polo Report, and are now known for their investigations and reporting.[5] (Ziegler Decl., ¶12; Def. Exhs., Exh. OO.) The text messages with plaintiff are about the laptop, chain of custody, and manipulation of evidence. (See Compl., Exh. A.) Ziegler attests that the whistleblower reached out to him and stated he had evidence of wrongdoing related to the Biden laptop, which Ziegler then funneled to a news organization. "In late May 2022, a whistleblower emerged who claimed to me to have been communicating with Morris and possessed information demonstrating wrongdoing. Specifically, the whistleblower claimed to me that he had evidence tending to show that Morris had willfully offered money in exchange for producing fabricated evidence to undermine information arising from the Biden

[5] As discussed on the preliminary injunction, the court views defendants as members of the press for constitutional analysis purposes.

Laptop investigation. [¶] I then passed on the information from the whistleblower to a writer from the New York Post. The New York Post subsequently published an article entitled 'New bid to spin Hunter Biden's laptop,' on May 29, 2022. (See RJN at ¶ 19 & Exhibit S)." (Ziegler Decl., ¶¶19-20.) Ziegler presents evidence that the information he obtained was considered newsworthy, to the point where he directed it to a news organization that would publish the story. The court has to say that going "undercover" (to the extent it is Ziegler who did so) to get a story is something that journalists have been doing for well over a century as part of the newsgathering function. It is protected.

Defendants assert the internet posts regarding the purportedly manipulated text messages and plaintiff's information are protected as well. "Here, it is undisputed that the two reports published by Muddy Waters were posted to an Internet website available to the public. This court has previously concluded that Internet postings on websites that ' "are open and free to anyone who wants to read the messages" ' and 'accessible free of charge to any member of the public' satisfies the public forum requirement of section 425.16. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1007.)" (*Muddy Waters, LLC v. Superior Court* (2021) 62 Cal.App.5th 905, 917, collecting cases.) At the first hearing, the court specifically questioned what functional relationship the posting of plaintiff's personal information bore to the public interest. As an example, the court stated it was not sure how plaintiff's vacation to Hawaii had any such relationship.[6]

In their supplemental brief, defendants assert that the purported personal nature of this information or perceived lack of social utility does not preclude the newsgathering value of this information. Upon further review, the court agrees. As our Supreme Court stated: "But the catchall provision demands 'some degree of closeness' between the challenged statements and the asserted public interest. (*Weinberg*, *supra*, 110 Cal.App.4th at p. 1132.) So even if adult content on the Internet and FilmOn's particular streaming model are in fact issues of public interest, we agree with the court in *Wilbanks* that 'it is not enough that the statement refer to a

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[6] This refers to defendants' tracking of plaintiff's jet's tail number on a public website to ascertain where plaintiff (or at least those on his plane) were going.

subject of widespread public interest; the statement must in some manner itself contribute to the public debate.' (*Wilbanks*, *supra*, 121 Cal.App.4th at p. 898; see also *Dyer v. Childress* (2007) 147 Cal.App.4th 1273, 1280 ['[t]he fact that "a broad and amorphous public interest" can be connected to a specific dispute' is not enough].) [¶] What it means to 'contribute to the public debate' (*Wilbanks*, *supra*, 121 Cal.App.4th at p. 898) will perhaps differ based on the state of public discourse at a given time, and the topic of contention. But ultimately, our inquiry does not turn on a normative evaluation of the substance of the speech. We are not concerned with the social utility of the speech at issue, or the degree to which it propelled the conversation in any particular direction; rather, we examine whether a defendant—through public or private speech or conduct—participated in, or furthered, the discourse that makes an issue one of public interest. (See *All One*, *supra*, 183 Cal.App.4th at pp. 1203–1204 [finding the 'OASIS Organic seal' did not 'contribute to a broader debate on the meaning of the term "organic" ']; *Cross v. Cooper* (2011) 197 Cal.App.4th 357, 375 [finding the defendant's conduct 'directly related' to an issue of public interest because it 'served th[e] interests' of preventing child abuse and protecting children].)" (*FilmOn, supra,* 7 Cal.5th at pp. 150–151, parallel citations omitted.)

The posts at bench relate to the issues of Biden, his laptop, and plaintiff's relationship with Biden. For example, the supposedly out of context text messages that imply plaintiff was threatening Ziegler are posted online with a link to a New York Post story regarding Biden's laptop, followed by Ziegler's statement that he "[j]ust got threatened by Hunter Biden's attorney and fixer, Kevin Morris. More to come." (Compl., Exh. D.) The personal information posts concerned plaintiff himself and some of them are used by websites to question whether plaintiff was flying to meet Biden. (Pltf. RJN, Exhs. J-K.) That is in the public eye.

The only argument plaintiff really makes in response is that the speech is not protected because it is harassment. The court does not agree for prong one purposes. While it could well be that the speech has that effect, the case law is far from plaintiff-friendly on this point. The case to which plaintiff principally adverts, as do most people making this argument, is that the speech is unprotected under *Flatley v. Mauro* (2006) 39 Cal.4th 299. There, our Supreme Court held that illegal activity is not protected activity where the defendant admits to the illegal act or

uncontroverted evidence establishes as much. (*Id.* at p. 317; see also, *Lefebvre v. Lefebvre* (2011) 199 Cal.App.4th 696, 703.) That case, though, carves out only a very narrow exception. Where the speech is *indisputably* unprotected, then it fails to satisfy the first prong. But where there is a debate about it, the prevailing law is that prong one is satisfied. "Unlawful or criminal activities do not qualify as protected speech or petition activities under the anti-SLAPP statute. . . An activity may be deemed unlawful as a matter of law when the defendant does not dispute that the activity was unlawful, or uncontroverted evidence conclusively shows the activity was unlawful." (*Dwight R. v. Christy B.* (2013) 212 Cal.App.4th 697, 711-712, citing *Flatley*, *supra*, 39 Cal.4th at p. 317 and *Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 446.)

That is an important distinction. Our courts have shied away from unleashing *Flatley* so as to exclude things that constitute protected activity under the easy-to-assert claim that they are illegal or defamatory. As later case law made clear, it was the undisputed and clear nature of the *Flatley* violation that took it outside the protected speech realm. Where there is doubt, the doubt is (at this stage) resolved in favor of finding constitutional protection.

Plaintiff argues that harassment is not protected and that the speech here is undisputedly harassment. And, of course, at some level of generality he is correct that harassment is not protected speech. But the devil (as always) is in the detail. Labeling speech as harassment is not enough. The court must conduct a meaningful examination of the speech to determine whether it can be so labeled for purposes of the first prong of an SMS motion. Plaintiff cites a series of cases in an effort to make the argument that the speech here is simply unprotected for purposes of this motion, but none really get him over the goal line. The *Novartis* case is not helpful to plaintiff because there the evidence *conclusively* established the illegality of the acts and the defendant admitted as much. As the court explained: "Here, the evidence conclusively establishes that the activities described at length in the complaint, and about which there is no dispute, are illegal as a matter of law. Indeed, SHAC USA has conceded that the attacks on Chiron employees were unlawful." (*Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2006) 143 Cal.App.4th 1284, 1296.) The *Novartis* court also had ample evidence that defendant conspired with the demonstrators who attached Chiron employees. "SHAC USA

through postings on its websites, gave its members essential information for carrying out attacks on the homes of Chiron employees. It named the dates and gathering places, and even supplied its members with the addresses of the targeted Chiron employees. And after these attacks occurred, SHAC USA essentially ratified them by praising them in statements it posted on its website. [¶] It is simply not the case, as SHAC USA argues, that its statements in furtherance of this conspiracy are protected under the anti-SLAPP statute. The First Amendment offers no protection for such communications. (*Giboney v. Empire Storage and Ice Co.* (1949) 336 U.S. 490, 498.)" (*Id.*, at pp. 1296-1297.)

In *McCollum v. CBS, Inc.* (1988) 202 Cal.App.3d 989, 999–1000, the court held that 'the freedom of speech guaranteed by the First Amendment is not absolute. There are certain limited classes of speech which may be prevented or punished by the state consistent with the principles of the First Amendment: . . . solicitation of crime, complicity of encouragement, conspiracy, and the like. . . .' In short, statements in furtherance of a conspiracy are not the sort of speech section 425.16 was designed to protect." (*Id.* at pp. 1296–1297, parallel citations omitted.) That much is true as far as it goes, but it does not demonstrate that the speech at issue here is within that narrow band.

Unlike the private employees in *Novartis*, plaintiff himself alleges facts indicating that he is a limited public figure. Ziegler also attests in paragraph 26 of his declaration that plaintiff's personal information is available online; plaintiff does not make any such statement to the contrary. And in *Novartis*, SHAC USA was a vital component to the terrifying campaign of harassment and vandalism on the employees' homes, having supplied the demonstrators with the employees' information. (*Id.* at pp. 1289-1291.)

Here, Ziegler's posts may have been the reason third parties found plaintiff's residence information, but it is not altogether clear. Plaintiff is a semi-public figure whose information is already publicly available. (Ziegler Decl., ¶¶13, 26-27.) Plaintiff presents no authority indicating that the republication of publicly available personal information of a semi-public person in relation to an issue of public interest constitutes harassment. The evidence here does not

conclusively establish illegal harassment—civil or criminal—and defendants have not conceded as much either.[7]

Plaintiff's reliance on Penal Code section 653.2 fails as well. Even if defendants' posted plaintiff's information online, plaintiff is missing conclusive and unrebutted evidence that defendants did so "with intent to place another person in reasonable fear for his or her safety" and did so knowing that the posting "would be likely to incite or produce that unlawful action." (Pen. Code, § 653.2, subd. (a).) For purposes of the first prong analysis, plaintiff's evidence is insufficient to establish illegality as a matter of law. Defendants have met their burden on the first prong.

Before turning to the second prong, the court takes just a moment to note the policies undergirding this thumb on the free speech scale. Our Constitutions, both federal and state, enshrine freedom of speech. The nation was founded on the notion of the marketplace of ideas and the need to have free and robust discussions, debates, and even arguments. That means that speech that is unpopular is protected, perhaps even more than popular speech because it needs more protection. Moreover, the ever-present fear that people will self-censor if they can too easily be prosecuted or sued leads us to err on the side of protecting speech when the issue is close. The logic undergirding that policy is that the United States is made up of well-minded people who, upon being able to discuss things for themselves, will ultimately reach the right conclusion. On occasion, some have questioned that premise, and no doubt the body politic has erred from time to time. But it is still our lodestar. One can, these days, easily bemoan the fact that our speech has turned less civil, and discourse has sometimes devolved into diatribe rather than debate. That criticism has its place, and it is not without empirical support. But our strongly held policy

[7] Plaintiff's reliance on *Huntingdon* and *McLaughlin* fails as well. The defendants in *Huntingdon* did not pass the first prong on their acts of vandalism (it is unclear if defendants admitted it was vandalism or the evidence was conclusive), but that was not the only activity the complaint was based on. The defendants otherwise passed the first prong as to SHAC USA's encouragement of demonstrations. On that issue, the defendants did not concede that their actions were illegal and the evidence did not establish as much either. (*Huntingdon, supra,* 129 Cal.App.4th at pp. 1245-1247.) That is not the case here. *McLaughlin* is not an SMS case and is not relevant to the court's analysis on the first prong. (See *Doe v. McLaughlin* (2022) 83 Cal.App.5th 640, 643 [request for attorneys' fees based on a motion to quash a subpoena issued by an Illinois court].)

remains that eventually knee-jerk reactions will yield to sound reason and fact-based argument. Where the government—either through penal laws or the civil courts—is the arbiter of what can and cannot be said, the risk becomes too great that the public will simply cede its own right to decide to those in power. Arguments might be advanced that such would be the better form of government, but that is a decision that would require a fundamental change in our core principles. This court will not go there.

2. Likelihood of Success

If the defendant makes a threshold showing that the challenged cause of action is one arising from protected activity, the burden shifts to the plaintiff to establish a likelihood of prevailing on the complaint. (See Code Civ. Proc., § 425.16, subd. (b)(1).) "[T]he 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.' (*Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548.)" (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821, parallel citation omitted.) A trial court does not weigh the evidence or its comparative strength. (*Ibid.*) However, a trial court "should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim." (*Ibid.*)

The causes of action here fall into a couple of buckets. The first bucket relates to causes of action where defendants contend there is no private right of action at all: the first and second causes of action. For those, if defendants are correct, no factual showing can possibly suffice because the cause of action does not exist. The second bucket relates to causes of action that do exist and the issue is whether plaintiff can make out enough of a factual showing to carry his burden and defeat the motion.

First and Second Causes of Action

Defendants argue that there is no private right of action for violation of Penal Code section 653.2 and there is no such cause of action for civil harassment. On the former, defendants assert there is no language in the statute providing for a private right of action, nor does the legislative history indicate as much. (Defs. RJN, Exhs. X-NN.) "A violation of a state statute does not

necessarily give rise to a private cause of action. (*Vikco Ins. Services, Inc. v. Ohio Indemnity Co.* (1999) 70 Cal.App.4th 55, 62.) Instead, whether a party has a right to sue depends on whether the Legislature has 'manifested an intent to create such a private cause of action' under the statute. (*Moradi–Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 305.)" (*Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592, 596, parallel and additional citations omitted.) "If, however, a statute does not contain such obvious language, resort to its legislative history is next in order. (*Moradi–Shalal, supra,* 46 Cal.3d at pp. 300–301; see *Crusader, supra,* 54 Cal.App.4th at pp. 133–134, 136 [relying on principles of general statutory interpretation].)" (*Id.* at p. 597, parallel citations omitted.) But if neither the statute's words or history indicate an intent to create a private right of action, then there is no private right of action.

Defendants are correct as to the first cause of action. Nothing in the statute or legislative history indicates the existence of a private right of action for the violation of Penal Code section 653.2. Plaintiff argues that the courts could or should recognize such a claim. But that is not the way it works. Creating causes of action beyond the common law is the Legislature's job, not the court's. In California, if there is no intent one way or the other, then there is no private right of action.[8] "If we determine the Legislature expressed no intent on the matter either way, directly or impliedly, there is no private right of action (*Moradi–Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 305), with the possible exception that compelling reasons of public policy might require judicial recognition of such a right. (See *id.* at pp. 304–305; see also *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 317 [considerations for judicial recognition of private right of action for constitutional violations].)" (*Animal Legal Defense Fund v. Mendes* (2008) 160 Cal.App.4th 136, 142, parallel citations and internal footnote omitted.)

Plaintiff notes that the Legislature discussed civil sanctions of a related statute when discussing section 653.2. Unfortunately for plaintiff, though, the discussion in the legislative

[8] As an irrelevant aside, federal law used to be quite different. The federal test (assuming not discernable direct legislative intent) was to determine whether or not establishing a private right of action would further the general legislative purpose underlying the statute. In the seminal *J. I. Case Co. v. Borak* (1964) 377 U.S. 427, case, the United States Supreme Court articulated that it would look to see whether private enforcement might provide a necessary supplement to further a statute's (or regulation's) purpose. Over time, though, the court re-thought that approach. The federal approach is now similar to California's approach. Courts look to see whether Congress actually intended to create a private right of action. No intent one way or the other means no cause of action.

history indicates that the Legislature felt criminal sanctions were, in some respects, superior, not that the penal statute ought to give rise to a civil private action. Specifically, the pertinent discussion in the legislative history states: "Last year legislation was enacted to provide civil sanctions for the same conduct which this bill addresses, with respect only to providers of reproductive health services, their employees, volunteers, and patients . . . This raised two policy issues, is there any logical reason why this protection should extend only to reproductive health workers and their patients? Additionally, would civil sanctions be more effective or less effective in curbing this type of behavior? There are practical limitations to civil litigation as a means of addressing this sort of behavior. Locating the perpetrator may require a substantial amount of investigation and computer expertise. Criminal penalties would bring the resources and skills of law enforcement agencies to the task. Also, many victims may not have the resources to hire an attorney to investigate and file a lawsuit. And, while the threat of a civil judgment might deter some who would engage in this sort of behavior, civil sanctions may not deter a harasser who has little to lose financially." (Pltf. RJN, Exh. BB.) Thus, it seems as though the Legislature specifically chose criminal sanctions only. Of course, the already-existing civil statute remained, and suit could be brought thereunder, reinforcing the notion that the criminal statute was not meant to extend into civil law.

At the close of argument, the court asked the parties to brief two issues concerning on this cause of action to address the issue. The first was what effect there was on the SMS where injunctive relief was a remedy, but not money damages. The parties both seem to agree (as does the court) that the remedy does not control; the nature of the activity does. Absent authority to the contrary, that answers the question. The court must look to the cause of action, not the remedy sought.

The other question about which the court inquired was whether there is a civil analog to this Penal Code violation. Plaintiff identifies a couple statutes as civil analogs but, as defendants assert in their supplemental brief, none work. Civil Code section 1708 states that "Every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his or her rights." This is a generic tort principle and does not really move the ball

forward to create or imply a civil cause of action for doxing, which is at issue in the first cause of action. Plaintiff also cites no authority indicating that this somewhat generic statute is a catch-all placeholder for unnamed torts. In the context of constitutional rights, which are admittedly not at issue here (meaning that the right to be free from doxing is not of constitutional dimension), our Supreme Court rejected application of this statute as a placeholder. "As Justice Kaufman observed in his concurring and dissenting opinion in *Laguna Publishing,* however, Civil Code 'section 3333 is not a substantive statute; it merely prescribes the general measure of damages in tort cases. Civil Code section 1708[,] which provides that every person is bound to abstain from injuring the person or property of another or infringing any of his rights, states a general principle of law, but it hardly provides support for the adoption of the novel legal proposition that a violation of subdivision (a) of section 2 of article I of the California Constitution gives rise to a direct cause of action for damages outside the parameters of recognized tort law. . . .' (*Laguna Publishing, supra,* 131 Cal.App.3d 816, 859 (conc. & dis. opn. of Kaufman, J.).) We reject plaintiff's contention that a damages action to remedy an asserted violation of his due process liberty interest is contemplated by tort law as codified by Civil Code sections 1708 and 3333." (*Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 327–328, parallel citations omitted.)

Civil Code section 1708.7 provides tort liability for stalking. But there is nothing in the first cause of action implicating stalking. The substance of this claim is too different from the doxing claim currently pled. And further, plaintiff has not presented evidence on the demand element, which requires that "the plaintiff must have, on at least one occasion, clearly and definitively demanded that the defendant cease and abate his or her pattern of conduct and the defendant persisted in his or her pattern of conduct unless exigent circumstances make the plaintiff's communication of the demand impractical or unsafe." (Civ. Code, § 1708.7, subd. (a)(3)(A).) There is no allegation, let alone evidence, indicating that plaintiff ever made this demand. Plaintiff contends in footnote 2 of his supplemental brief that such a demand would have been impractical, as is clear from defendants' conduct. The court cannot make such an inference on this motion. There needs to be evidence from plaintiff to that effect. There is none.

1 But as discussed above, even if there were, this statute does not provide the basis for the alleged
2 private right of action.

3 Next, plaintiff suggests Code of Civil Procedure section 527.6 as an analogous claim. But
4 plaintiff already alleges a civil harassment claim that incorporates the activities alleged here.
5 There does not need to be a second one duplicating the same allegations and the court cannot
6 conclude that by passing the penal code provision, the Legislature meant to make a duplicate of
7 CCP section 527.6.

8 Plaintiff also suggests a violation of Civil Code section 1708.8. That statute creates tort
9 liability for the physical or constructive invasion of privacy, as well as any actions that direct,
10 solicit, actually induce, or actually cause a third person to invade someone's privacy. There is no
11 physical invasion of privacy alleged in this cause of action, which requires the person to enter
12 into the land or airspace of a person without permission to obtain an image or recording of that
13 person. (Civ. Code, § 1708.8, subd. (a).) Nor do defendants' acts qualify as constructive invasion
14 of privacy. "A person is liable for constructive invasion of privacy when the person attempts to
15 capture, in a manner that is offensive to a reasonable person, any type of visual image, sound
16 recording, or other physical impression of the plaintiff engaging in a private, personal, or familial
17 activity, through the use of any device, regardless of whether there is a physical trespass, if this
18 image, sound recording, or other physical impression could not have been achieved without a
19 trespass unless the device was used." (*Id.* at subd. (b).) While it is true that plaintiff claims that
20 third parties have driven by plaintiff's home and honked horns, that is not enough. Nor do the
21 phone calls plaintiff recounts satisfy this statute's requirements. The motion is therefore
22 GRANTED to the first cause of action.

23 On the second cause of action, which is assertedly for civil harassment, defendants argue
24 there is no such cause of action. Plaintiff disagrees, citing Code of Civil Procedure section 527.6.
25 Here, the court agrees with plaintiff. There is some indication that the Legislature intended for
26 plaintiffs to be able to pursue civil harassment claims under this statute even if certain of the
27 procedural strictures concerning obtaining a restraining order were not followed. First, the
28 Legislature made the temporary restraining order procedure optional. "A person who has suffered

harassment as defined in subdivision (b) *may* seek a temporary restraining order and an order after hearing prohibiting harassment as provided in this section." (Code Civ. Proc., § 527.6, subd. (a)(1), emphasis added.) Second, the statute explicitly recognizes other civil remedies. "This section does not apply to any action or proceeding covered by Title 1.6C (commencing with Section 1788) of Part 4 of Division 3 of the Civil Code or by Division 10 (commencing with Section 6200) of the Family Code. *This section does not preclude a petitioner from using other existing civil remedies.*" (Code Civ. Proc., § 527.6, subd. (w), emphasis added.) Further, at least one court has discussed a civil harassment claim in the context of a civil action predicated on section 527.6. (Cf. *Huntingdon, supra,* 129 Cal.App.4th at pp. 1249-1259.) Thus, while section 527.6 sets forth a quick procedure for obtaining a civil harassment order, the court does not read it as precluding a civil claim.[9] Indeed, such a construction would be odd. Having recognized the importance of providing a speedy tool to combat civil harassment, it cannot be that the Legislature required that a litigant proceed only in the injunctive fashion. The court believes that the legislative intent was broader than that. If a defendant's conduct falls within the statute's prohibitions, a civil remedy will lie. Accordingly, as to this cause of action, defendants' claim that there is no cause of action at all fails. If plaintiff can make the requisite factual showing, the motion will be denied.

Factual Showing—Remaining Causes of Action

The question on plaintiff's factual showing has (again) two components. The first is whether the alleged misconduct is immune such that even if plaintiff's allegations are true, there is no liability. The second is just factual: has plaintiff put forth enough evidence to create a triable issue of fact.

Defendants argue they cannot be held liable for the acts alleged even assuming that the allegations are true. The argument is made primarily with regard to the false light claim.

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[9] As the court reads the statute, the use of the Judicial Council forms is mandatory where the petitioner is pursuing the expedited injunction procedure. "The Judicial Council shall develop forms, instructions, and rules relating to matters governed by this section. The petition and response forms shall be simple and concise, and their use by parties in actions brought pursuant to this section is mandatory." (Code Civ. Proc., § 527.6, subd. (x)(1).) The statute does not preclude any other remedy for the listed conduct.

" ' "False light is a species of invasion of privacy, based on publicity that places a plaintiff before the public in a false light that would be highly offensive to a reasonable person, and where the defendant knew or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed." ' (*Jackson, supra*, 10 Cal.App.5th at p. 1264.)" (*De Havilland v. FX Networks, LLC* (2018) 21 Cal.App.5th 845, 865, parallel citations omitted.) "To defeat FX's anti-SLAPP motion on her false light claim, de Havilland, a public figure, must demonstrate a reasonable probability she can prove FX broadcast statements that are (1) assertions of fact, (2) actually false or create a false impression about her, (3) highly offensive to a reasonable person or defamatory, and (4) made with actual malice." (*Ibid.*)

Thus, the false light within which the plaintiff is placed must be highly offensive to the reasonable person and requires proof of malice. (*De Havilland, supra,* 21 Cal.App.5th at p. 865.) The level of malice that plaintiff must prove depends on whether he is a public figure or not. (*Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1577.) "The limited purpose public figure is an individual who voluntarily injects him or herself or is drawn into a specific public controversy, thereby becoming a public figure on a limited range of issues. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 351; *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 253.)" (*Ibid.*) To be a limited public figure, the following three elements are required: (1) "there must be a public controversy, which means the issue was debated publicly and had foreseeable and substantial ramifications for nonparticipants"; (2) "the plaintiff must have undertaken some voluntary act through which he or she sought to influence resolution of the public issue"; and (3) "the alleged defamation must be germane to the plaintiff's participation in the controversy." (*Ibid.*)

Defendants argue, and plaintiff does not really dispute, that he is a limited public figure for these purposes and that the matter at hand is a matter of public interest. Plaintiff provides sufficient evidence on this cause of action in relation to the out-of-context text messages that purportedly make it seem like plaintiff is threatening Ziegler. Those text messages contain assertions of fact that created the false impression that plaintiff was making violent threats to Ziegler for no reason. (Morris Decl., ¶8; Staropoli Decl., Exh. B.) As for actual malice, plaintiff

argues it can be inferred from defendants' failure to post the full and complete text message chain and the reaction of defendants' followers who began to call and stalk him. (Morris Decl., ¶¶8, 10-11.) "If a plaintiff claiming defamation is a 'public figure,' the plaintiff additionally 'must show, by clear and convincing evidence, that the defamatory statement was made with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false.' (*Mitchell v. Twin Galaxies, LLC* (2021) 70 Cal.App.5th 207, 218.)" (*Sanchez v. Bezos* (2022) 80 Cal.App.5th 750, 763, fn. 4, parallel citations omitted.)

Plaintiff's evidence at least suggests that defendants acted with reckless disregard. Posting a small portion of a large text message chain necessarily takes the conversation out of context. Ziegler then posted that small portion to his followers and stated, without context and without revealing the context, that plaintiff was threatening him. (Staropoli Decl., Exh. B.) That is, at minimum, reckless disregard and, at least at this stage, this is sufficient to provide proof of actual malice for purposes of an SMS.[10] The rules of summary judgment apply here and the court must make all reasonable inferences in plaintiff's favor. In doing that here, plaintiff has shown a triable issue of material fact on this cause of action. The motion is DENIED as to this cause of action.[11]

Plaintiff satisfies his burden on the remaining causes of action as well. The harassment cause of action is supported by evidence of Ziegler's postings of plaintiff's private information online, misrepresentations of plaintiff's communications, and use of violent and debasing imagery in connection with plaintiff. (Morris Decl., ¶¶5-16.) Plaintiff then received threatening phone calls because of defendants' actions. (*Id.* at ¶16.) On the criminal impersonation claim, there is a dispute as to whether Ziegler himself impersonated Cooper. Ziegler says it was not him. (Ziegler Decl., ¶18.) But plaintiff points out that the person did not correct plaintiff when he called the whistleblower "Garrett." (Morris Decl., Exh. A, p. 25.) Instead, the person responded

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[10] The court reiterates that while plaintiff's evidence does not conclusively establish a crime for purposes of the *Flatley* exception, there is otherwise evidence of defendants' wrongful acts to pass the second prong of a SMS.

[11] Of course, the court is not suggesting that every time someone posts an excerpt it will or could be grounds for liability. Plaintiff's theory is not that defendant did not post the entire thread; it is that by selecting particular parts of the exchange to quote and to quote them out of context, it made plaintiff appear to be making threats—and serious ones—against defendant for no reason. That is the alleged false light.

with what plaintiff claims is Ziegler's typical caveman insult. (*Ibid.*) Further, Ziegler himself posted four lines of the text message chain, claiming that plaintiff was threatening him. (Compare Staropoli Decl., Exh. B [reposted texts by Ziegler where he claims plaintiff threatened him] with Morris Decl., Exh. A, p. 26 [same text messages with person impersonating Cooper].) That is an odd thing to claim if the text messages were actually with a third person. This is a reasonable argument and would support an inference that Ziegler was the person impersonating Cooper.

Defendants assert that plaintiff still must prove an additional act for the criminal impersonation claim. Penal Code section 529 "makes it a crime for a person to falsely impersonate another and in that assumed identity do any 'act whereby, if done by the person falsely personated, he might, in any event, become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture, or penalty, or whereby any benefit might accrue to the party personating, or to any other person.' (Pen.Code, § 529, subd. (a)(3).) A person therefore must commit two acts to violate Penal Code section 529. He or she first must falsely impersonate another person and, while doing so, commit an additional act that ' "is something beyond, or compounding, the initial false personation." ' (*Casarez, supra,* 203 Cal.App.4th at p. 1179.)" (*Collier v. Harris* (2015) 240 Cal.App.4th 41, 55–56.) As plaintiff argues in opposition, though, it was not just the impersonation of Cooper that took place but also the solicitation of information where it would not have been provided but for the impersonation. That is the additional act. Plaintiff therefore satisfies his burden on the criminal impersonation claim. The motion is DENIED.

Finally, that brings the court to the IIED claim. Plaintiff has met his burden. He has established, for purposes of this motion, that defendants' actions were outrageous. (See *Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 533.) Publicly posting plaintiff's personal information that results in threatening voicemails, posting out-of-context text messages, and impersonating another person for information are all so extreme so as to exceed all bounds usually tolerated in a civilized society. " 'In order to meet the first requirement of the tort, the alleged conduct " '. . . must be so extreme as to exceed all bounds of that usually tolerated in a civilized community.' [Citation.] Generally, conduct will be found to be actionable where the 'recitation of the facts to

an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!" ' (Rest.2d Torts, § 46, com. d.)" [Citation.]' (*Ibid.*) [¶] Whether a defendant's conduct can reasonably be found to be outrageous is a question of law that must initially be determined by the court; if reasonable persons may differ, it is for the jury to determine whether the conduct was, in fact, outrageous. (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 499.)" (*Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 533–534, citing *Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 494 in part.) The fact that plaintiff is a public figure does not create absolute immunity. And plaintiff has presented some evidence that defendants' comments precipitated the phone calls and drives by his house. Further, defendants' posting of the Sopranos lyrics could be viewed potentially either as a threat or a call to others to take action. While the court believes that reasonable minds could easily differ on whether this conduct would suffice, that is enough at this stage. The court also notes that its view as to whether the matter can be resolved as a question of law may very well change in light of whatever the record will become later in the case (for example, at the summary judgment stage).

As for the severity of plaintiff's emotional distress, the evidence supports the inference of paranoia and more: "Any time a car drives past my house that I don't know, I am worried that someone will shoot at me or my house. Whenever my family is traveling, I worry excessively. Since the beginning of this, I have suffered from insomnia, headaches, and constant anxiety. All of this is exasperated every time Defendants post about me on the internet. It is like a call to their followers to harass me or threaten me. I am even more disturbed by Ziegler's discussions about killing and use of violent imagery. It is like a message to take violent action against me." (Morris Decl., ¶16.) In reply, defendants contend that there is no evidence on the length or severity of the emotional distress. But there is here. The cited evidence supports a reasonable inference that this distress has continued over a span of time. The motion is DENIED as to the IIED claim.

The court emphasizes that plaintiff's burden here is relatively slight. Notwithstanding what the statutory language might suggest as a matter of plain meaning, case authority is clear that plaintiff need not prove his case at this point, nor may the court weigh the evidence to determine the probable victor. Plaintiff's burden is merely to show "minimal merit" to his case

by presenting enough evidence such that a motion for summary judgment would be denied. Nothing more. The court is viewing the case through that lens and that lens only. The court has found plaintiff has carried his burden sufficiently here, but that is far from any sort of a finding on the merits—in either direction.

Before turning to plaintiff's motion for a preliminary injunction, a word on *Counterman v. Colorado* (U.S., June 27, 2023, No. 22-138) 2023 WL 4187751 is in order. Actually, *Counterman* applies to both motions so perhaps a discussion here—at the end of the analysis of the first motion and right before the analysis of the second—it appropriate. It is relevant to the SMS because one cannot impose tort liability for that which the Constitution protects. And by the exact same token, one cannot enjoin activity that the Constitution permits. Ziegler's reply focuses heavily on the opinion, which was issued only a week after defendants filed their SMS. The court finds *Counterman* very instructive and on point, at least generally, although ultimately it does not control the motions' outcome. Justice Kagan's thoughtful majority opinion addresses several items at issue here.

In *Counterman*, the defendant was charged with making threats to the victim. (*Id.* Slip Op. at pp. 2-3.) It was a "true threats" case, meaning that the state was arguing that defendant's comments were indeed threats as opposed to hyperbole. (*Id.* at p. 3.) The Court differentiated this from incitement cases, where the speech goes not to a threat ("I will kill your family") but rather to inciting others to commit crimes ("You should attack the police"). (*Id.* at pp. 4-5.) Counterman's speech was in the nature of a true threat, not incitement. He was speaking directly to the victim, not to third parties whom he was trying to convince to take unlawful action.

In the "true threats" context, the Court ruled that the threat had to pass muster both objectively and subjectively to be unprotected. (*Counterman*, *supra*, 2023 WL 4187751, at p. 4.) That meant that Counterman's conviction was overturned, as the state there (Colorado) required only an objective showing. (*Id.* at p. 8.) In other words, the Court found, it was not enough that the victim reasonably felt threatened; rather the state also had to prove that the defendant had culpable intent. "The same reasoning counsels in favor of requiring a subjective element in a true-threats case. This Court again must consider the prospect of chilling non-threatening

expression, given the ordinary citizen's predictable tendency to steer 'wide[ ] of the unlawful zone.' *Speiser*, 357 U.S. at 526. The speaker's fear of mistaking whether a statement is a threat; his fear of the legal system getting that judgment wrong; his fear, in any event, of incurring legal costs—all those may lead him to swallow words that are in fact not true threats. Some 50 years ago, Justice Marshall made the point when reviewing a true-threats prosecution arguably involving only political hyperbole. See *Rogers v. United States*, 422 U.S. 35 (1975). The Court in *Rogers* reversed the conviction on other grounds, but Justice Marshall focused on the danger of deterring non-threatening speech. An objective standard, turning only on how reasonable observers would construe a statement in context, would make people give threats 'a wide berth.' *Id.*, at 47 (concurring opinion). And so use of that standard would discourage the 'uninhibited, robust, and wide-open debate that the First Amendment is intended to protect.' *Id.*, at 48 (quoting *Sullivan*, 376 U.S. at 270)." (*Id.* at p. 6.) The dissent differed and concluded that an objective showing was sufficient. (*Id.* at p. 20 (dis. opn. of Barrett, J.).)

Justice Kagan then addressed the level of *mens rea* that was required. (*Counterman*, *supra*, 2023 WL 4187751, at p. 6.) The Court concluded that only recklessness was required. (*Id.* at p. 7 ["Among those standards, recklessness offers the right path forward"].) That is, the defendant did not have to intend that the victim feel threatened, or even know that the victim would in fact feel threatened. Rather, it was sufficient if the defendant knew that there was a significant risk that the words would be taken as threatening and chose to ignore that risk. "A person acts recklessly, in the most common formulation, when he 'consciously disregard[s] a substantial [and unjustifiable] risk that the conduct will cause harm to another.' *Voisine v. United States*, 579 U.S. 686, 691 (2016) (internal quotation marks omitted). That standard involves insufficient concern with risk, rather than awareness of impending harm. See *Borden* v. *United States*, 593 U. S. ——, ——, 141 S.Ct. 1817, 1823–1824 (2021) (plurality opinion). But still, recklessness is morally culpable conduct, involving a 'deliberate decision to endanger another.' *Voisine*, 579 U.S. at 694. In the threats context, it means that a speaker is aware 'that others could regard his statements as' threatening violence and 'delivers them anyway.' *Elonis*, 575 U.S. at 746 (ALITO, J., concurring in part and dissenting in part)." (*Id.* at p. 6.) The majority noted that

this was similar to the standard in *New York Times Co. v. Sullivan* (1964) 376 U.S. 254. (*Id.* at p. 7.) The concurring opinion felt that this standard was too low and argued for a *mens rea* of purpose or knowledge, like incitement cases. (*Id.* at pp. 14-16 (conc. opn. of Sotomayor, J.).)

The Court reached its conclusion by agreeing that threatening speech was unprotected speech. (*Counterman*, *supra*, 2023 WL 4187751 at p. 4.) " 'True threats' of violence is another historically unprotected category of communications. *Virginia v. Black*, 538 U.S. 343, 359 (2003); see *United States v. Alvarez*, 567 U.S. 709, 717–718 (2012) (plurality opinion). . . True threats are 'serious expression[s]' conveying that a speaker means to 'commit an act of unlawful violence.' *Black*, 538 U.S. at 359." (*Ibid.*, parallel citations omitted.) The Court's concern, however, was the potential chilling effect that the lack of a *mens rea* element would cause. A speaker, not sure which side of the line the speech might be seen to fall after the fact, might self-censor and decide not to speak even though in fact the speech did not sink to the level of a true threat. (*Ibid.*) It was to guard against that risk that the Court imposed the *mens rea* requirement. (*Ibid.*) "[A]n important tool to prevent that outcome—to stop people from steering 'wide[ ] of the unlawful zone'—is to condition liability on the State's showing of a culpable mental state. *Speiser v. Randall*, 357 U.S. 513, 526 (1958). Such a requirement comes at a cost: It will shield some otherwise proscribable (here, threatening) speech because the State cannot prove what the defendant thought. But the added element reduces the prospect of chilling fully protected expression. As this Court has noted, the requirement lessens 'the hazard of self-censorship' by 'compensat[ing]' for the law's uncertainties. *Mishkin v. New York*, 383 U.S. 502, 511 (1966). Or said a bit differently: '[B]y reducing an honest speaker's fear that he may accidentally [or erroneously] incur liability,' a *mens rea* requirement 'provide[s] "breathing room" for more valuable speech.' *Alvarez*, 567 U.S. at 733 (BREYER, J., concurring in judgment)." (*Ibid.*, parallel citations omitted.) The *mens rea* requirement was not meant to protect speech that was unprotected; it was meant to protect speech that was protected because it was *not* a true threat, but which would not be spoken due to fear of liability or prosecution.

In making its ruling, the Court was acutely aware, as is this court, of the tradeoff. (*Counterman*, *supra*, 2023 WL 4187751 at p. 5.) By imposing a *mens rea* requirement, speech

that did constitute a true threat but that was only negligently made would escape liability—civil or criminal. (*Id.* at p. 7.) That was the harm. Balanced against that harm was that the robustness of speech that was not a true threat would continue to be spoken without self-censorship. There was a similar balance discussed in the incitement context. (*Ibid.*) There, the *mens rea* element is higher—the speaker must intend or at least know that the speech would incite a violation of law. That means that unprotected speech would be even harder to prosecute. That cost was deemed appropriate, though, because incitement is only a "hair's breadth" away from legal political or advocacy speech at the heart of the First Amendment. (*Id.* at p. 7.)

Turning to the present case, it is not clear whether this is an incitement case or a true threats case. Other than the Sopranos reference, there does not appear to be a "true threat" made by defendants, and even that is not really in the nature of a threat as opposed to incitement. (Staropoli Decl., Exh. G.) Rather, it seems more like an incitement case: defendants are accused of saying things that would cause third parties to break the law. Under these circumstances, defendants do not really want to rely on *Counterman*, which has a lower standard. The real problem, though, is that intent is almost always going to be a question of fact, whether measured as recklessness or actual purpose.

As the *Counterman* Court stated, it is the rare case where there is direct evidence of intent. (*Counterman*, *supra*, 2023 WL 4187751 at p. 7.) Usually, intent is inferred. And once we are going to infer, we are almost always going to have a question of fact. Here, there is no direct evidence that defendants intended to incite unlawful activity. But such an intent is not an unreasonable inference from the statements and the target audience. Ziegler posted plaintiff's personal information online (even if reposted) and his followers posted photos of the house. (Staropoli Decl., Exh. C.) Plaintiff's phone number is also posted in the out-of-context text messages and plaintiff received threatening voicemails thereafter. (Morris Decl., Exh. B.) Additionally, at least one commentator states, "Kevin didnt [sic] pick up this morning, will try again later." (Staropoli Decl., Exh. D.) More concerning is another commentator who said, "The best defense is a good offense. I'd love to see about 10k patriots show up on your behalf. Of course exercising their 2A rights. [¶] A well regulated militia." (*Ibid.*) Ziegler is a participant in

some of these posts and text messages. When viewed in full, a jury could infer that Ziegler's actual subjective intent was to incite his audience. A contrary inference would also be reasonable—the comments were robust discussion and unfiltered, but no true purpose or knowledge existed. However, choosing which inference to draw is for the jury, not the court on a SMS. For these reasons, the court does not find defendants' reply arguments related to *Counterman* and plaintiff's claims to be persuasive at this juncture.

For all of the foregoing reasons, the SMS is GRANTED only as to the first cause of action and DENIED as to the remainder.

D. Sanctions

"[A] prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." (Code Civ. Proc., § 425.16, subd. (c)(1).) Where a defendant is partially successful, he or she is generally considered the prevailing party "unless the results of the motion were so insignificant that the party did not achieve any practical benefit from bringing the motion." (*Mann v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 340.) Defendants were successful on one cause of action, which technically entitles them to fees. They state they will file a motion for fees. If they do, they should address *Mann* and other similar cases.

Plaintiff requests fees in opposition, arguing the SMS was frivolous. "If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5." (Code Civ. Proc., § 425.16, subd. (c)(1).) "Thus, the imposition of sanctions for a frivolous anti-SLAPP motion is mandatory. (See *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131 [under § 425.16, subd. (c), any SLAPP defendant who brings a successful motion to strike is entitled to 'mandatory attorney fees'].) . . . [¶] A determination of frivolousness requires a finding the anti-SLAPP 'motion is "totally and completely without merit" (§ 128.5, subd. (b)(2)), that is, "*any reasonable attorney would agree such motion is totally devoid of merit.*" [Citation.]' (*Decker, supra,* at p. 1392, italics added.)" (*Moore v. Shaw* (2004) 116 Cal.App.4th 182, 198–199, parallel citations omitted, emphasis by *Moore* court.)

The court does not find the SMS meets the test for sanctions per section 128.5. The SMS was meritorious and passed the first prong. Further, it was granted as to one cause of action. Therefore, plaintiff's request for sanctions is DENIED.

Defendants partially prevailed and may bring a separate motion for fees. Where a defendant is partially successful, he or she is generally considered the prevailing party "unless the results of the motion were so insignificant that the party did not achieve any practical benefit from bringing the motion." (*Mann v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 340.) Defendants should be sure to address the practical benefit of the ruling. Additionally, the court expects fees to be parsed out in terms of the successful argument. "As the Court of Appeal held in *ComputerXpress, supra,* 93 Cal.App.4th at page 1020, even if the special motion to strike is granted only as to some claims, the partially successful defendant is entitled to attorney fees. The lack of success on other claims is relevant to the amount of, but not the right to, fees. (*Mann v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 345.)" (*Jackson v. Yarbray* (2009) 179 Cal.App.4th 75, 92, parallel citations omitted.)

III. Preliminary Injunction

A. Evidentiary Matters

Plaintiff filed a request for judicial notice in connection with his motion for a preliminary injunction. The request is GRANTED as the existence of these documents but not to the truth of the matters stated therein. Defendants' request for judicial notice is GRANTED for the same reasons articulated on the SMS.

Defendants also filed evidentiary objections in opposition. The objections to plaintiff's requests for judicial notice are DISREGARDED. The court only notices the existence of the documents. Objection Nos. 1-4 are OVERRULED. Plaintiff is testifying to things he experienced, his opinion, or his thought process. Objection Nos. 5 and 8-9 are OVERRULED as a hearsay exception of a statement by a party opponent. Objection No. 6 is OVERRULED because Staropoli explains why he believes Ziegler misconstrues the conversation. Objection No. 7 is OVERRULED as well. Plaintiff is not offering the posts for the truth of the matter asserted. Objection Nos. 10 and 12 are OVERRULED; Staropoli attests as to how he obtained the

1 screenshots. Objection No. 11 is OVERRULED. The court disfavors such objections. If the
2 proffered evidence is irrelevant then it will have no part in the court's analysis. On the other
3 hand, if the evidence is relevant then the objection is not well taken. This is not to say that the
4 evidence in question is in fact relevant and material to the court's analysis. It is only to say that
5 if it is discussed below, then by definition, the court finds that it is relevant. If it is not discussed
6 below, then it forms no dispositive part of the court's reasoning, and the objection is moot.

7 Plaintiff filed additional evidence in reply. The court typically disregards new evidence
8 in reply unless there is good cause to consider it. (See *Jay v. Mahaffey* (2013) 218 Cal.App.4th
9 1522, 1537 ["The general rule of motion practice, which applies here, is that new evidence is not
10 permitted with reply papers"].) Here, the evidence consists of statements by Ziegler after the
11 motion was filed. The court has considered the evidence, though it does not change the outcome.

12 **B. Legal Standards**

13 "A superior court must evaluate two interrelated factors when ruling on a request for a
14 preliminary injunction: (1) the likelihood that the plaintiff will prevail on the merits at trial and
15 (2) the interim harm that the plaintiff would be likely to sustain if the injunction were denied as
16 compared to the harm the defendant would be likely to suffer if the preliminary injunction were
17 issued. (*Cohen v. Board of Supervisors*, *supra*, 40 Cal.3d at p. 286.) Weighing these factors lies
18 within the broad discretion of the superior court. (*Ibid.*; see pt. VI., post, for discussion of *Butt v.*
19 *State of California* (1992) 4 Cal.4th 668.)" (*Smith v. Adventist Health System/West* (2010) 182
20 Cal.App.4th 729, 749, parallel citations omitted.) "The trial court's determination must be guided
21 by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's showing on
22 one, the less must be shown on the other to support an injunction. (*King v. Meese* (1987) 43
23 Cal.3d 1217, 1227–1228.)" (*Butt v. State of California* (1992) 4 Cal.4th 668, 678.)

24 **C. Court's Analysis and Ruling**

25 Plaintiff moves for a preliminary injunction enjoining defendants from "(i) being within
26 100 yards of Morris or his family members; (ii) directly or indirectly contacting Morris or his
27 family members via any medium; (iv) [sic] posting or mentioning Morris or Morris' family in
28 any public media or medium, including social media sites or the internet; and (v) [sic] precluding

Defendants from directly or indirectly posting any information about the movements, location, address, other contact information of Morris or Morris' family." (Notice, p. 2:8-12.)

As an initial matter, the motion is DENIED as to the request that defendants stay at least 100 years away from Morris or his family. As far as the court can tell, there is no cause of action predicated on defendants' proximity to plaintiff and his family. "Typically, [an injunction] is not, in itself, a cause of action (*MaJor v. Miraverde Homeowners Assn.* (1992) 7 Cal.App.4th 618, 623); thus, ordinarily, a preliminary injunction may be sought only when the underlying cause of action on which the provisional remedy rests is presented for decision through the pleadings (*Moreno Mut. Irr. Co. v. Beaumont Irr. Dist.* (1949) 94 Cal.App.2d 766, 778 ['A preliminary injunction is warranted only if there is on file a complaint which states a sufficient cause of action for injunctive relief of the character embraced in the preliminary injunction.']; see generally Moore & Thomas, Cal. Civ. Practice (2020) Procedure, § 16:119)." (*Department of Fair Employment and Housing v. Superior Court of Kern County* (2020) 54 Cal.App.5th 356, 384–385, parallel citations omitted.)

In any event, as defendants argue in opposition, the motion must be denied as a prior restraint.[12] "The use of prior restraint to prohibit speech is particularly disfavored. 'A prior restraint is an administrative or judicial order that forbids certain speech in advance of the time the communication is to occur. [Citation.]' (*San Jose Mercury News, Inc. v. Criminal Grand Jury* (2004) 122 Cal.App.4th 410, 416.) '[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.' (*Nebraska Press Ass'n v. Stuart* (1976) 427 U.S. 539, 559.)" (*People v. Salvador* (2022) 83 Cal.App.5th 57, 66, parallel citations omitted.) "Prior restraints are disfavored and presumptively invalid. Circumstances more urgent than these have been adjudged insufficient to justify the imposition of a prior restraint. As noted by the California Supreme Court, even the publication of the purloined Pentagon Papers concerning matters of national security could not be restrained: 'A recent case declined to restrain publication of the so-called "Pentagon Papers" despite the urging of the

[12] Many of the facts germane to the motion for a preliminary injunction are the same as those discussed above. The court will not repeat that discussion here.

government that the publication would result in a serious breach of national security (*New York Times Co. v. United States* (1971) 403 U.S. 713[]), and an attempt to restrain distribution of a pamphlet criticizing a real estate broker for his selling practices has likewise been held improper (*Organization for a Better Austin v. Keefe* (1971) 402 U.S. 415.)' (*Wilson v. Superior Court* (1975) 13 Cal.3d 652, 657–658.)" (*Gilbert v. National Enquirer, Inc.* (1996) 43 Cal.App.4th 1135, 1144, parallel citations omitted.)

Plaintiff here seeks to stop defendants from speaking. That means defendants will be harmed in the *constitutional* sense. In opposition, defendants make the argument that they are well known for their reports on corruption in relation to the Biden laptop and have been recognized for as much. (Ziegler Decl., ¶¶11-12.) That implies that they are a news organization, at least for these purposes. Prior restraints on journalists are dangerous. "For more than 100 years, federal and state courts have refused to allow the subjects of potential news reports to stop journalists from publishing reports about them. (*Providence Journal, supra,* 820 F.2d at pp. 1348-1349 ['In its nearly two centuries of existence, the Supreme Court has never upheld a prior restraint on pure speech'; the Supreme Court has never upheld a prior restraint on the publication of news].) If and when the Times publishes any article that constitutes actionable libel or invasion of privacy about any individual deputy, that deputy remains free to file any lawsuit he or she can plead and prove in good faith. (*Id.* at pp. 1345, 1349 [that publication would infringe privacy rights is insufficient basis for issuing prior restraint; remedy is subsequent action for damages].)" (*Association for Los Angeles Deputy Sheriffs v. Los Angeles Times Communications LLC* (2015) 239 Cal.App.4th 808, 824.)

The court requested supplemental briefing on the legal definition of the "press." After reading the parties' arguments, the court is convinced that defendants qualify. Plaintiff seems to concede as much, citing *Lovell v. City of Griffin, Ga.* (1938) 303 U.S. 444. "The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and

opinion. What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty from every sort of infringement need not be repeated. *Near v. Minnesota, supra*; *Grosjean v. American Press Company, supra*; *De Jonge v. Oregon, supra*." (*Id.* at p. 452.) Defendants' citation to *Near v. State of Minnesota ex rel. Olson* (1931) 283 U.S. 697 is also persuasive, given that Near was a single publisher like Ziegler here.

But even if defendants are not a media organization, ordering a person or organization not to speak presents serious concerns. For example, plaintiff seeks to prohibit defendants from discussing plaintiff or his family in any way. But plaintiff is a public figure (and his family members, none of whom are children, are not parties to this action). (Morris Decl., ¶¶2-4.) "Public figures, however, must tolerate some criticism as the price of living in a free society. 'Justice Frankfurter put it succinctly in *Baumgartner v. United States,* 322 U.S. 665, 673–674 (1944), when he said that "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures." Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to "vehement, caustic, and sometimes unpleasantly sharp attacks," *New York Times* [*v. Sullivan* (1964)] 376 U.S. [254,] 270, . . . "[T]he candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent or an industrious reporter attempts to demonstrate the contrary." *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 274 (1971).' (*Hustler Magazine v. Falwell* (1988) 485 U.S. 46, 51–52.)" (*Gilbert, supra,* 43 Cal.App.4th at p. 1147, parallel citations omitted.)

Second, the proposed injunction covers information that is (or appears to be) publicly available. (Ziegler Decl., ¶¶39-42.) Plaintiff presents no authority indicating that the republication of public information is a sufficient basis for the issuance of a prior restraint. He strenuously argues that the fact the information is publicly available is irrelevant to the issuance of a preliminary injunction and the non-public nature of the information is not a requirement for proving a claim under the various statutes. Additionally, he argues that an injunction preventing the future posting of that information is proper. Plaintiff insists that the publication of his information, even if public, is illegal harassment, violates multiple statutes, and is therefore

outside the bounds of the First Amendment.[13] Plaintiff's evidence is insufficient to establish either true threats or incitement in a manner strong enough to warrant preliminary injunctive relief. *Novartis* and *Huntingdon* are distinguishable. *Huntingdon* concerned threats of violence against a specific private individual and credible threats of violence; the court held these were "true threats." (*Huntingdon, supra,* 129 Cal.App.4th at p. 1258.) The evidence on this front was overwhelming and strongly established that SHAC was aware that violence could result. (*Id.* at pp. 1252-1253.) *Novartis* was the same. (*Novartis, supra,* 143 Cal.App.4th at p. 1301 ["However, the *Huntingdon* court concluded that defendant's SHAC's activities were, in fact, likely to incite or produce imminent lawless action. We agree, on very similar facts, with our colleagues' reasoning and reach the same result here"].) Plaintiff is a public figure and the evidence, at this juncture, does not implicate either true threats or incitement.

Further, under *Counterman*, the court needs some strong evidence of Ziegler's recklessness or specific intent. Plaintiff has none that would justify the issuance of a prior restraint. What plaintiff does is make inferences. Although the court can draw such inferences in plaintiff's favor on a SMS—where the court must view the evidence in the light most favorable to plaintiff—such inferences are improper where the plaintiff seeks a prior restraint, which is presumptively unconstitutional. The standards on the two motions are very different. "In deciding whether to grant preliminary injunction, the trial court not only assesses 'the likelihood that the plaintiff will prevail at trial,' but 'the interim harm that the plaintiff will likely sustain if the injunction were denied.' (*Pro–Family Advocates v. Gomez, supra,* 46 Cal.App.4th at pp. 1680–1681.) Trial courts must balance the respective equities, and in any event the decision is tested under an abuse of discretion standard. (*Id.* at p. 1680.) [¶] By contrast, in passing on anti-SLAPP suit motions, the trial court faces a much more binary task, more akin to a summary judgment motion: Has the plaintiff made a prima facie showing of facts which, if proved at trial, support a favorable judgment? (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 823.) [¶] The present case illustrates how the plaintiff's ability to obtain a preliminary injunction cannot be

[13] The *Huntingdon* court's analysis implies that harassment under section 527.6 is not protected if it constitutes true threats or incitement. (*Huntingdon, supra,* 129 Cal.App.4th at pp. 1250-1251.)

equated with a 'probability' the plaintiff will prevail on the claim (the statutory standard for anti-SLAPP suit motions; see § 425.16, subd. (b))." (*Lam v. Ngo* (2001) 91 Cal.App.4th 832, 843, parallel citations omitted.)

Plaintiff's supplemental briefing fails to grapple with the constitutional dimension of defendants' harm. As the court noted on the SMS, the evidence submitted supports multiple inferences, some in plaintiff's favor, some not. On an SMS, plaintiff only needed to present evidence with a reasonable inference in his favor, which he did. But on a preliminary injunction, he needs to do more, especially with a prior restraint at issue.

With the state of the evidence here and the requested injunction here, plaintiff has not been able to establish that he would suffer greater interim harm than defendants where he seeks a prior restraint or that his case is so strong that he need not make a more significant balance of harm showing. "While Brinkman may be held responsible for abusing his right to speak freely in a subsequent tort action, he has the initial right to speak freely without censorship. (*In re Marriage of Candiotti* (1995) 34 Cal.App.4th 718, 724–725; *Dailey v. Superior Court* (1896) 112 Cal. 94, 97.)" (*Gilbert, supra,* 43 Cal.App.4th at p. 1145–1146.) The motion for a preliminary injunction is DENIED. That is not to say, of course, that plaintiff will lose the case. Plaintiff might well be able to make a sufficient showing for a permanent injunction after all the evidence is in. Or plaintiff may be able to make the lesser showing necessary to prevail in damages. It is only to say that plaintiff has not made the showing necessary to obtain injunctive relief at present.

IV. Conclusion

The court well recognizes the seeming tension in its rulings. On the one hand, the court will not throw the case out on a Special Motion to Strike. On the other hand, the court will issue no preliminary injunction to stop the conduct of which plaintiff complains. The answer to this apparent conflict lies in our nation's commitment to free speech. It is one thing to punish speech that, after a full merits hearing with all of the due process attendant thereto, is determined to be improper. It is another to stop speech entirely for fear of what might follow. By stopping one from speaking, the court runs the risk of choking the flow of free ideas and communication. Worse, because individual judges must make the determination, the situation is ripe with the fear

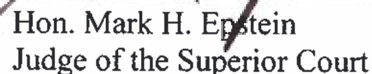
that a judge will allow her or his own biases to guide what is permissible and what is not. That is an intolerable risk in a democratic society such as ours. But that said, punishing improper speech after the fact is not a complete answer. While sometimes a damages award will cure any harm that the speech caused, too often it will not. If the speech is not stopped and it turns out that, in hindsight, it did incite someone to undertake a violent or illegal act, it is cold comfort to give the victim a monetary judgment that might or might not be collectable and will never undo the non-monetary harm suffered.

But we have, long ago, chosen our path. Our founders concluded that we were a hardy enough society to endure the dangers of speech in favor of the benefits of free thought and expression. And over the centuries, by and large, that faith has proven well-founded. Simply put, this court will follow the lead of experience over the last two and a half centuries and err on the side of allowing speech but with the ability of a jury to hold the speaker to account if the speech in fact causes harm.

All of that said, if plaintiff garners more evidence and the threat becomes more palpable, the court will stand ready to act. While the right of free speech is one of our foundational pillars, as Justice Goldberg famously said, adverting to Justice Jackson's famous dissent, "While the Constitution protects against invasions of individual rights, it is not a suicide pact." (*Kennedy v. Mendoza-Martinez* (1963) 372 U.S. 144, 159-160, referring without reference to *Terminiello v. City of Chicago* (1949)337 U.S. 1, 37 (Jackson, J., dissenting).)

In light of the foregoing, defendants' SMS is GRANTED as to the first cause of action and DENIED as to the remainder. Defendants may file a separate motion for their fees. Plaintiff's motion for a preliminary injunction is DENIED. Clerk to provide notice.

DATED: October 13, 2023



Hon. Mark H. Epstein
Judge of the Superior Court