United States Court of Appeals

for the

Ninth Circuit

Docket No. 02-55343

MICHEL THOMAS,

Plaintiff-Appellant,

— against —

LOS ANGELES TIMES COMMUNICATIONS, LLC, A Delaware Limited Liability Company, ROY RIVENBURG, An Individual, TRIBUNE COMPANY, A Delaware Corporation,

Defendants-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 01-8684 ABC (MANx)
Honorable Audrey B. Collins, United States District Judge

APPELLANT'S OPENING BRIEF

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I.

JURISDICTIONAL STATEMENT

Plaintiff and Appellant Michel Thomas ("Thomas"), a citizen of the state of New York, filed this defamation action against Defendants and Appellees Los Angeles Times Communications LLC, a Delaware limited liability company ("LA Times"); Roy Rivenburg, a citizen and resident of the state of California ("Rivenburg"); and Tribune Company, a Delaware corporation ("Tribune") (collectively referred to herein as the "Times Defendants") in the United States District Court for the Central District of California pursuant to 28 U.S.C. § 1332(a) and 28 U.S.C. § 1391.

This is an appeal from the District Court's grant of the Times Defendants' Special Motion to Strike Pursuant to California Code of Civil Procedure § 425.16 and dismissal of Thomas' Complaint. As such, this is an appeal from a final decision of the District Court that disposes of all parties' claims in this action. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

The District Court rendered its decision granting the Times Defendants' Special Motion to Strike on February 4, 2002 and the decision was entered on February 5, 2002. Thomas timely filed a Notice of Appeal on February 15, 2002 pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A).

II.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Did the District Court err in finding that Thomas did not show a probability of prevailing on his defamation claim because he failed to show that the Times Defendants' purported constitutional defenses are not applicable to the case as a matter of law or by a prima facie showing of facts which, if accepted by the trier of fact, would negate such defenses?

III.

STATEMENT OF THE CASE

On Sunday, April 15, 2001, emblazoned across the front page of the Living Section of the Los Angeles Times were the words "**Larger Than Life**." Under that banner headline was a picture of Michel Thomas and an article that began with the words, "If everything he says is true . . ." (hereinafter, the "Article") (Article, ER: 16-19)[1]. Surprisingly, however, instead of reporting on the remarkable achievements of Thomas' life, including his service with the United States Army Counter Intelligence Corps ("CIC"), his presence at the liberation of Dachau, his interrogation by Klaus Barbie, his discovery and protection of a huge cache of Nazi government documents and his development of language schools and teaching methods, which teach students to speak foreign languages in a remarkably short time, the Article sought to, and did, imply that Thomas had lied and

[1] ER refers to the Excerpt of Record.

fabricated each and every outstanding accomplishment of his life. The sole message conveyed by the Article was that Thomas is a liar and a fraud.

Beginning **Error! No table of authorities entries found.**with the words, "If everything he says is true . . ." and continuing for 88 paragraphs, the Article was riddled with phrases such as: "He was the sole survivor of not one but three concentration camps" and "'Ask me how I can prove it.' Easier said than done."; "Many of his claims are impossible to prove"; "But it wasn't the language system that grabbed Robbins' attention, it was the wild tales." (Article, ER: 16-17) (Emphasis added.) These carefully chosen words and phrases were included to persuade readers that Thomas' statements lack credibility -- they worked to reinforce the doubt created by the Article's opening line. While the Article purported to trace the major accomplishments of Thomas' life, in each instance, whether by willful omission of critical information, misquotation of sources, or the clever use of literary and editorial devices, the Article told readers that Thomas did not participate in these events and that he was, at his core, a liar and a fraud.

A review of the Article, and the circumstances surrounding its publication, reveals that the defamatory implications raised in the Article were not the result of sloppy writing or colorful phrasing. In fact, the false implications were carefully conceived and cleverly constructed. To many of those who were interviewed prior to publication, Rivenburg appeared ill-disposed towards Thomas, and anxious to

"bring him down." Despite these interviewees' efforts to provide Rivenburg with the truth, the Article did not accurately reflect their conversations with him: it either ignored them completely, or misstated the substance of their statements.

In instances where individuals provided Rivenburg with information which would undermine or contradict Rivenburg's pre-determined conclusion that Thomas had not done what he claimed to have done, or was not where he said he was, when he said he was, Rivenburg hid the information from his readers or misquoted his sources so that the [false] statements could be attacked by other sources. Not only the words used, but their positioning, reinforced the Times Defendants' intended defamatory implications.

When Thomas read the Article, he was both personally and professionally devastated. Now 88 years old, he was confronted with false implications which, if believed by readers as they were so intended, would cause him irreparable reputational harm and emotional distress. To address this injustice, Thomas sought judicial relief by filing a defamation action in federal district court.

Thomas' complaint alleged that Defendants defamed him by publishing false and defamatory implications about him which implied that he did not serve with the United States Counter Intelligence Corps during WWII; that he was not present at the liberation of Dachau; that he was not interrogated by and did not escape from Klaus Barbie during WWII; that he did not discover and secure a huge cache of

Nazi government documents and Nazi Party membership cards; that he has lied about, fabricated, and exaggerated events of his past; and that his language teaching method is a sham and is not worth the fee charged. (Complaint, ER: 1-26).

Thomas' complaint was met by the Times Defendants' Special Motion to Strike which asserted, alternatively, that Thomas was barred from making a claim for defamation by implication, and that even if he wasn't, the claim was constitutionally barred. (Special Motion, ER: 27-125)

Thomas opposed the Special Motion to Strike by presenting the District Court with a mountain of evidence (almost all of which was uncontradicted) from laypersons, experts and other "reasonable readers" which established that the implications alleged were understood to be in the article, that they were intended to be in the article, and that they were put there with actual malice. (Opposition, ER: 126 – 156; Declarations, ER: 157 – 396)

Despite this showing, the District Court granted Defendants' Special Motion to Strike, finding that the Times Defendants' conduct was protected by the First Amendment. (Order, ER: 447 – 485) By so holding, the District Court impermissibly weighed Thomas' evidence and ignored a body of law which holds that editorial decisions that are intentionally misleading and give rise to false and defamatory implications are actionable. By dismissing Thomas' complaint at this

early stage of litigation, the District Court not only prevented Thomas from exercising his right to protect and defend his reputation, it improperly granted the Times Defendants' permission to defame with impunity. This Court has never held that the First Amendment permits a media defendant to publish whatever it wants, in the manner it wants, without limitation. Instead, this Court has always recognized that the fair application of First Amendment doctrine leaves room for an individual to seek redress for intentional reputational harm.

IV.
STATEMENT OF FACTS

A. Thomas' Life

Michel Thomas was born in Poland. He is currently a citizen of the United States and a resident of New York. (Thomas Dec., ER: 171). He is 88 years old. During WWII, he was a stateless Polish Jew who served in the French Resistance and the United States Counter Intelligence Corps with great bravery and distinction. (Id.)

Between the years 1940 –1942, Thomas was imprisoned four times in three Vichy French concentration camps. Through various means, Thomas was able to escape from each of those camps. (Thomas Dec., ER: 160)

In September 1942, Thomas joined the French Resistance. (Thomas Dec., ER: 160 - 161). In February 1943, Thomas went to the Union Generale des Israelites de France in Lyon. Unbeknownst to Thomas, Klaus Barbie (the "Butcher

of Lyon" and head of the Gestapo there) had set a trap for German speaking Jewish refugees at that location. Thomas was interrogated by Barbie. Thomas managed to escape and survive the interrogation by pretending that he did not speak German (which he did) and pretending that he was a French painter. Thomas later testified for the prosecution at the trial of Klaus Barbie in France. (Thomas Dec., ER: 161)

In March 1945, Thomas was transferred to the U.S. Army 45th Division Counter Intelligence Corps, or CIC. (Thomas Dec., ER: 162 – 163; Kraus Dec., ER: 200). During that time, Thomas operated as an official Agent of the United States Army CIC and wore the U.S. Army collar tags worn by CIC Agents. (Thomas Dec., ER: 163; Wimer Dec., ER: 362 – 364; Kraus Dec., ER: 200) In his Opposition to the Times Defendants' Special Motion to Strike, Thomas confirmed his service as a CIC agent (not a translator or investigator) by offering the sworn declarations of two other CIC agents, his Commander Theodore Kraus ("Kraus") and Walter Wimer ("Wimer"). (Kraus Dec. at 4-6; Wimer Dec. at 3, 4) Thomas also submitted photographs depicting him wearing his CIC uniform. (Thomas Dec., ER: 197 – 198) Rivenburg interviewed Kraus and viewed Thomas' photographs before publications of the Article. (Kraus Dec., ER: 358; Thomas Dec., ER: 165).

Thomas was present at the liberation of Dachau. Thomas took a number of photographs at the time of liberation, which photographs document the horrors that

occurred there. Thomas still has many of those photographs and the negatives as well. He gave copies of the photographs to Kraus in 1946, during their service in CIC together. Kraus still has the photographs in his possession. (Thomas Dec., ER: 165; Kraus Dec., ER: 358) Thomas also has other documents, including crematorium workers' statements and a signed confession of Emil Mahl (the "Hangman of Dachau") in his possession. (Thomas Dec., ER: 166; 218 – 226; 227 – 239). Thomas showed these photographs and documents to Rivenburg before publication of the Article. (Thomas Dec., ER: 166).

In May 1945, Thomas discovered a huge cache of Nazi government documents and Nazi Party membership cards at a paper mill in Freimann, outside of Munich. The documents Thomas found later became the heart of the collection of the Berlin Document Center. Thomas still possesses a number of documents taken from the mill in May 1945. (Thomas Dec., ER: 168 – 169; 241 – 253).

Thomas now runs a language school, with offices in New York, Los Angeles and London. Pursuant to a technique created by Thomas, he and the other instructors at the school are able to teach individuals to speak certain foreign languages in a very short period of time. (Thomas Dec, ER: 171 – 172; Morris Dec., ER: 372)

B. Christopher Robbins' Book "Test of Courage"

After more than two years of research, Christopher Robbins ("Robbins"), an

investigative journalist, wrote a biography of Thomas entitled "Test of Courage – The Michel Thomas Story." The book was published by Free Press in 1999. While "Test of Courage" was an authorized biography of Thomas, Robbins was given complete editorial independence. (Robbins Dec., ER: 283) Since its initial publication, "Test of Courage" has sold less than 10,000 copies in hardback. The book was not published in paperback format, and was sparsely, although favorably, reviewed. (Robbins Dec., ER: 288) The LA Times reviewed the book on December 10, 1999. (Glassman Dec., ER: 392) There was no "media blitz" for the book occurring in 2001, as alleged in the Article. In fact, by that time the book had been out for many months. (Robbins Dec., ER: 288)

C. Rivenburg's "Research"

In February 2001, Thomas was contacted by Roy Rivenburg, who represented himself to be a reporter for the Los Angeles Times. Mr. Rivenburg indicated that the LA Times was interested in publishing an article about Thomas. Thomas was interviewed by Rivenburg twice, for approximately five hours each time. Thomas provided Rivenburg with verbal and documentary evidence of all of the accomplishments of his life, including those chronicled in "Test of Courage." (Thomas Dec., EAR: 173)

Robbins was also interviewed by Rivenburg. Robbins, like Thomas, offered Rivenburg access to all of the documentation supporting each statement in "Test of

Courage." (Robbins Dec., ER: 284) Robbins referred Rivenburg to others who had information regarding Thomas. Such referrals included Kraus, who was Thomas' Commanding Officer in the CIC. Rivenburg spoke to Kraus, but failed to mention the conversation, or any of the matters discussed with Kraus in the Article. (Robbins Dec., ER: 284 – 285; Kraus Dec., ER: 358)

Many of the persons who spoke to Rivenburg prior to publication of the Article were taken aback by Rivenburg's obvious intention of casting Thomas as a liar. (Robbins Dec., ER: 284 - 285; Thomas Dec., ER: 174 – 176; Morris Dec., ER: 371 – 372). All of these people voiced their concern to Rivenburg, and, in the case of Robbins, to Rivenburg's editor, Brett Israel. (Robbins Dec., ER: 293 – 295; 300). Notwithstanding these concerns, the LA Times published Rivenburg's Article, "Larger Than Life" on the front page of the Living Section on Sunday, April 15, 2001. (Article, ER: 16 - 19)

Thomas was devastated by the Article. Moreover, others began to distance themselves from him. (Thomas Dec., ER: 176 – 177). Through his attorneys, Thomas hand delivered a retraction letter to Defendants on May 2, 2001. (Glassman Dec., ER: 380 - 386) Five days later, on May 7, 2001, Defendants published various "Letters to the Editor" regarding the Article. (Glassman Dec., ER: 390) One of these letters, a positive comment of Rivenburg's "balanced reporting" was allegedly signed by Conrad McCormick. (Id.) In Opposition to the

Times Defendants' Special Motion to Strike, Mr. McCormick provided a sworn declaration stating that the letter was not written by him. (McCormick Dec., ER: 373) Defendants responded to Plaintiff's retraction letter on May 31, 2001 and therein refused to publish a retraction. (Glassman Dec., ER: 387 - 389) Thomas filed the instant lawsuit for defamation on October 9, 2001. (Complaint, ER: 1 – 26).

On December 4, 2001, Defendants filed a Special Motion to Strike Plaintiff's Complaint pursuant to California Code of Civil Procedure § 425.16 (the "Special Motion"). (ER: 27 – 125) Plaintiff filed his Opposition to the Special Motion on January 14, 2002 (ER: 126 – 396) and Defendants' filed their Reply on January 28, 2002. (ER: 397 – 426) The Court, the Honorable Audrey Collins presiding, heard oral arguments of counsel on the Special Motion on February 4, 2002. (Reporter's Transcript, ER: 427 – 446) The Court's Order granting Defendants' Special Motion was entered on February 5, 2002. (Order, ER: 447 – 465) This Appeal followed. (Notice, ER: 466 – 485).

V.
SUMMARY OF ARGUMENT

The District Court's decision extends the application of First Amendment protection to a new level. In essence, the District Court granted the Times Defendants absolute immunity, even though their Article was published with reckless disregard for the truth. Instead of reviewing Thomas' evidence to

determine whether he presented a prima facie showing of facts which could defeat the Times Defendants' constitutional defenses, the District Court seemingly ignored that evidence, summarily finding that the Times' Defendants' intentional manipulation of the truth was constitutionally permissible.

The District Court found and agreed with Thomas that the implication that he was a liar and a fraud arose from the Article. However the Court further found that Thomas failed to establish that the Times Defendants intended to imply that defamatory implication. Additionally, the District Court found that even if the implication was intended, the Times Defendants' statements were protected by the First Amendment.

The burden placed on Thomas by operation of California Code of Civil Procedure § 425.16 (the "anti-SLAPP statute") is to show a "reasonable probability" that he will prevail on his claim by establishing that the Times Defendants' "purported constitutional defenses are not applicable to the case as a matter of law or by a prima facie showing of facts which, if accepted by the trier of fact, would negate such defenses." Wilcox v. Superior Court, 27 Cal.App.4th 809, 823 (1994); *and see*, eCash Technologies, Inc. v. Guagliardo, 136 F. Supp. 2d 1056, 1060 (C.D. Cal. 2000). Thomas satisfied his burden by a prima facie showing of facts which negated the Times Defendants' constitutional defenses.

Thomas' evidence established that the Times Defendants intended the defamatory implications by showing that they omitted and/or misstated evidence which would have informed readers that the implications were not true. Moreover, Thomas' evidence show that the Times Defendants purposely filled the Article with words and phrases designed to lead their readers to the conclusion that Thomas is a liar and a fraud. While the Times Defendants were not obligated to present every fact uncovered in their lengthy investigation, they are not constitutionally permitted to "purposefully avoid" presenting evidence of the truth which contradicts their defamatory implications. Harte-Hanks Comm., Inc. v. Connaughton, 491 U.S. 657, 667-68, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989); Van Buskirk v. Cable News Network, Inc., et al., 2002 U.S.App. LEXIS 4389 (9th Cir. 2002).

Further, the Times Defendants' defamatory implications are not protected by the First Amendment because the implications are assertions of objective fact. The general tenor of the Article, which purports to be a "critical analysis" of historical fact, is such that a reasonable reader would expect the assertions therein to be factual. *See*, Partington v. Buglioisi, 56 F. 3d 1147, 1153-55 (1995). In addition, the context of the Article, including the specific words used, also establish that the implications are assertions of fact. Despite the Times Defendants' clever arrangement of words and phrases, liability for defamation still attaches. *See, e.g.*,

Kapellas v. Koffman, 1 Cal. 3d 20 (1969); MacLeod v. Tribune Publishing Co., 52 C. 2d 536 (1959) *and see*, Milkovich v. Lorain Journal Corp., 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990). Further, the defamatory implications are assertions of objective fact because they are capable of being proven true or false. Where, as here, the truth or falsity of the alleged implications relies on a core of objective evidence, the implications are actionable. Partington, *supra*.

Finally, the defamatory implications made by the Times Defendants are actionable because they were made with actual malice. As explained above, the Times Defendants may not avail themselves of First Amendment protection while simultaneously purposefully avoiding the truth.

Thomas presented the District Court with admissible evidence to establish that the Article at issue not only presented its readers with the false and defamatory implication that Thomas was a liar and a fraud, it cleverly and subtly forced its readers to come to that conclusion. Because the conduct of the Times Defendants, including the omission, misstatement and manipulation of evidence which, if presented to its readers would have established the falsity of their defamatory implications, crossed the line beyond that which is protected speech, the decision of the District Court granting the Times Defendants' Special Motion to Strike should be reversed and Thomas' lawsuit should go forward.

VI.

ARGUMENT

A. Standard of Review

The District Court's Order granting Defendants' Special Motion to Strike Plaintiff's Complaint is reviewed de novo. United States ex rel. Newsham v. Lockheed Missiles and Space Co., 190 F. 3d 963, 968 (9th Cir. 1999).

B. The Anti-SLAPP Statute Did Not Change The Underlying Law of Defamation.

California Code of Civil Procedure § 425.16, known colloquially as the "anti-SLAPP" statute, provides a procedural mechanism whereby meritless lawsuits filed for the purpose of chilling "the valid exercise of the constitutional rights of freedom of speech. . . .may be dismissed at an early stage of the proceedings." Code Civ. Proc. § 425.16(a); Lafayette Morehouse, Inc. v. Chronicle Publishing Co., 37 Cal.App.4th 855, 858-859 (1995), *cert. den.*, 519 U.S. 809 (1996). By providing for a "special motion to strike," the statute authorizes dismissal of a complaint involving the exercise of a defendant's right of speech or petition, unless the plaintiff can demonstrate "that there is a probability" that he will prevail on his claims. Code Civ. Proc. § 425.16(b).

The statute was not intended to affect the substantive law regarding the scope of a litigant's First Amendment or statutory rights. The statute was not

intended to expand the notion of what constitutes a "valid" exercise of those rights beyond the standards previously applied by the Courts.

> "The statute does not bar complaints which arise from a person's exercise of his or her rights of free speech or petition for redress of grievances, but only provides a mechanism through which such complaints can be evaluated at an early stage of the litigation process."

Id.; *See also*, Rogers v. Home Shopping Network, Inc., 57 F. Supp. 2d 973, 977 (C.D. Cal. 1999) ("The California courts that have addressed the issue have all agreed that §425.16 does not substantively alter any cause of action. Instead, §425.16 is "a mere rule of procedure" which "does not change the legal effect of past conduct." (Internal citations omitted).) This Circuit has held that the provisions of the anti-SLAPP statute apply to state law claims litigated in federal court. United States ex rel. Newsham v. Lockheed Missiles & Space Co., Inc. 190 F. 3d 963, 970 (9th Cir. 1999).

C. The Court May Not Weigh The Evidence

When the statute applies, as Thomas concedes it does in this case,[2] the burden shifts to Plaintiff to establish, by a "reasonable probability," that he will

[2] By so conceding, Thomas does not admit, or intend to admit, that his lawsuit is meritless, or that it was filed for the purpose of chilling the Times Defendants' rights of free speech. However, Thomas recognizes the courts' broad application of the statute and that § 425.16(e)(3) states that written statements made in a public forum " in connection with an issue of public interest" are covered by the statute. Accordingly, Thomas acknowledges that in order to proceed he must overcome the procedural hurdles imposed by C.C.P. § 425.16.

prevail on his claim and that the defendant's "'purported constitutional defenses are not applicable to the case as a matter of law or by a prima facie showing of facts which, if accepted by the trier of fact, would negate such defenses.'" C.C.P. § 425.16(b)(1); eCash Technologies, Inc. v. Guagliardo, *supra*, 136 F. Supp. 2d at 1059 (C.D. Cal. 2000); Wilcox v. Superior Court, *supra*, 27 Cal.App.4th at 824.

The court is not to substitute its own judgment for that of a jury. The law requires only that plaintiff present evidence which would be sufficient to sustain a verdict in his favor. Id. at 823. "This standard is much like that used in determining a motion for non-suit or directed verdict." Id. at 824. Importantly, "[I]n order to preserve the plaintiff's right to a jury trial the court's determination of the motion cannot involve a weighing of the evidence." Id. at 823 (emphasis added) *and see*, Lam v. Ngo, 91 Cal. App. 4th 832, 851, fn 12, 111 Cal. Rptr. 582, 597, fn 12 (2001) ("We do not address the substantive merits of each cause of action apart from the question of First Amendment protection. An anti-SLAPP suit motion is not a substitute for a demurrer or summary judgment motion"). This distinction is particularly important in a defamation action, because while the question of whether an article is reasonably susceptible of a defamatory interpretation is a question of law, "whether or not it was so understood is a question for the jury." MacLeod, *supra*, 52 C. 2d at 546.

D. Thomas Presented A Prima Facie Showing of Facts Establishing Defendants' Intent to Imply The Defamatory Implications

1. The District Court Found That The Article Implied That Thomas Was A Liar

Under California law, libel is defined as:

> "[A] false and unprivileged publication by writing . . . which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."

Cal. Civil Code § 45.

Libel may occur by the publication of direct statements, or, as in this case, by the publication of defamatory implications. Forsher v. Bugliosi, 26 Cal.3d 792, 803 (1980) ("In determining whether a statement is libelous we look to what is explicitly stated as well as what insinuation and implication can be reasonably drawn from the communication."); Weller v. American Broadcasting Companies, Inc., 232 Cal.App.3d 991, 1003 n.10 (1991) (citing, Prosser, The Law of Torts (5th ed. Supp.1988) § 116). ("'[I]f the defendant juxtaposes [a] series of facts so as to imply a defamatory connection between them, or [otherwise] creates a defamatory implication ... he may be held responsible for the defamatory implication . . . even though the particular facts are correct.'"); *see also*, Church of Scientology v. Flynn, 744 F. 2d. 694, 696 (9th Cir. 1984) ("It is well settled that the 'arrangement and phrasing of apparently nonlibelous statements' cannot hide the existence of a

defamatory meaning.")[3] The District Court correctly found that Thomas satisfied his burden in this regard, holding:

> "A reasonable reader might conclude, after reading the article and considering the various points of view presented, that Thomas had in fact lied about his past."[4]

(Order, ER: 456)

Therefore, Thomas established, as a matter of law, that the Article contained the alleged defamatory implications.[5]

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[3] In their Special Motion to Strike, Defendants' sought to persuade the court that Thomas was barred from raising a defamation by implication claim because he is a public figure. Defendants cited no California or Ninth Circuit case in support of their argument. The District Court rejected Defendants' attempt to overrule decades of precedent by finding: "[N]either the California courts nor the Ninth Circuit have ever held that a public figure cannot state a claim by defamation for implication. [sic] (Order, ER: 454).

[4] The Times Defendants' assertion that their implications that Thomas lied about his past are not defamatory was also rejected by the District Court. "The Court assumes, arguendo, that implications that Thomas has lied about his past and that his language classes are a "sham" would be defamatory." (Order, ER: 456). *And see*, Section D(3)(1), below. This finding is in accord with both state and federal precedent which holds that accusations of personal dishonesty are not protected by the First Amendment. *See, e.g.* Murray v. Bailey, 613 F. Supp. 1276, 1283 (N.D. Cal. 1985) *and see*, Milkovich v. Lorain Journal Co., 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990) (Accusation of perjury is actionable); Gregory v. McDonnell Douglas 17 Cal. 3d 596, 603 (1976) (No First Amendment protection for statements accusing an individual of personal dishonesty); Buckley v. Littel, 539 F. 2d 882 (2nd Cir. 1976) (Assertion that journalist "had lied about and implicitly libeled several people who, if they wanted to and could afford it, could take him to court for his lies" was constitutionally and statutorily defamatory because it made an assertion relating to "journalistic integrity"); Bettner v. Holt, 70 Cal. 270, 275 (1886) ("To expose one to obloquy is to expose him to censure and reproach.")

2. Thomas Presented Substantial Evidence of Defendants' Intent To Imply The Defamatory Statements.

Although the District Court agreed that a reasonable reader could find that the Article implied that Thomas was a liar, the Court went on to say that Thomas' claim fails because he did not establish that the Times Defendants intended to create those implications. "At most," the court concluded, "a reasonable juror would find that Defendants intended to raise questions about Thomas' story." (Order, ER: 456); *See*, Dodds v. American Broadcasting Co., 145 F. 3d 1053, 1064 (9th Cir. 1998) (A showing that the defamatory implication was reasonable is not enough, Plaintiff must also establish that Defendants intended to convey the defamatory implication.)

To make this finding, the District Court disregarded substantial uncontradicted evidence of the Times Defendants' decision to omit compelling relevant evidence; the Times Defendants' decision to misquote interviewees and fabricate letters to the editor; the Times Defendants' decision to position certain words and phrases in the Article in order to force a reasonable reader to their

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[5] The Times Defendants argued, and the District Court agreed that "the allegation that the article implies that Thomas has lied about his past subsumes" the other, more specific allegations. (Order, ER: 456). Although Thomas maintains that each of the alleged implications may be interpreted to be defamatory, this distinction has no bearing on the matters at issue herein. *See, e.g.*, Kapellas, *supra*, 1 Cal. 3d. at 33 ("When the basis of a claim of libel lies in an application flowing from the rhetoric of a publication, the allegedly damaging implication frequently cannot be

intended conclusion, and the Times Defendants' failure to offer any evidence of lack of intent (e.g., a declaration of the reporter) or to rebut any of Thomas' evidence of intent. Bearing in mind that Thomas' burden at this early juncture (prior to discovery) is merely to present a prima facie showing of facts which could negate the Times Defendants' constitutional defenses, the District Court's abrupt dismissal of Thomas' complaint is improper. *See, e.g.*, Herbert v. Lando, 441 U.S. 153, 160, 99 S.Ct. 1635, 1641, 61 L.Ed.2d 115 (1979) ("[P]roof of the necessary state of mind could be in the form of objective circumstances from which the ultimate fact could be inferred . . .")

a. The Times Defendants Omission Of Known Facts Is Prima Facie Evidence Of Intent

The Times Defendants' intent to imply that Thomas is a liar and a fraud is shown by their decision to omit important and compelling facts which would have led readers to conclude that Thomas is credible. For example, in it's discussion of Thomas' service as an Agent with the U.S. Army CIC, the Article states that "Although Robbins and Thomas say he was an officer in the U.S. Army at the time, the Pentagon was unable to verify his military service." (Article, ER: 18). The Article underscores its point (that Thomas is a liar) by adding that the ID card supplied by Thomas "isn't the official ID issued to full-fledged CIC agents."

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connected to any one statement, or to even a few specific statements, but rather emanates from the tone of the article as a whole.")

(Id.) (Emphasis added). Curiously, however, the Article fails to make any mention of Kraus, Thomas' Commanding Officer in CIC, who was interviewed by Rivenburg prior to publication of the Article. (Kraus Dec., ER: 358) Thomas brought this glaring omission to the attention of the District Court by submitting Kraus' sworn declaration with his Opposition to Defendants' Special Motion to Strike. (ER: 355 – 358) That declaration provides powerful prima facie evidence of the falsity of Rivenburg's implication that Thomas did not serve as a CIC Agent and establishes Rivenburg's intention to mislead his readers. Kraus' declaration unequivocally states "I worked closely with Thomas within the CIC for approximately 15 months. Thomas operated as a full-fledged CIC Special Agent, not as a civilian employee, translator or investigator." (Kraus Dec., ER: 355 - 356) (Emphasis added) Further, Kraus authenticated a letter, which he wrote in 1946 on CIC letterhead, commending Thomas' work within CIC. A copy of that letter was attached to the Kraus Declaration. (ER: 359) Kraus' declaration goes on to describe, in some detail, the CIC missions on which Thomas accompanied him. Most importantly, for purposes of establishing intent, Kraus stated, "I relayed all of this information to Mr. Rivenburg prior to the publication of the article." (Kraus Dec, ER: 358, emphasis added). Not only did The Times Defendants' omit the information supplied by Kraus, they omitted the fact that Kraus was interviewed at all. This was a telling decision, particularly in light of the fact that Kraus remains

one of the only living witnesses able to corroborate Thomas' CIC service." (Kraus Dec., ER: 358) These facts parallel those in Harte-Hanks, *supra*, 491 U.S. at 682. Affirming the appellate court's libel judgment against the defendant newspaper, the Supreme Court in that case cited a number of the decisions made by the newspaper during the investigation of the article at issue as evidence of it's "purposeful avoidance" of the truth. As to one of those decisions, the Court noted, "It is utterly bewildering in light of the fact that the Journal News committed substantial resources to investigating Thompson's claims, yet chose not to interview the one witness who was most likely to confirm Thompson's account of events." Like the Kraus interview in this case, the Court reasoned "a denial coming from [that witness] would quickly put an end to the story." At this point in the litigation, Thomas' burden is to present facts which, if believed by the trier of fact, would evidence of the Times Defendants' intent. Kraus' declaration, combined with the Times Defendants' omissions, clearly meets that burden.

Thomas submits that the Kraus declaration (which is supported by the Wimer Declaration, ER: 362 - 364), is ample evidence of the Times Defendants' intent to imply the defamatory implications for purposes of defeating a Special Motion to Strike. But, even if this Court finds that the Kraus declaration, standing alone, is insufficient, Thomas presented additional facts evidencing the Times Defendants' defamatory intent. The declarations submitted by Thomas in

opposition to the Times Defendants' Special Motion to Strike establish that Rivenburg was also shown:

- A Recommendation For Decoration recommending Thomas for the Silver Star (ER: 185 – 187);
- A letter of July 20, 1945 by Captain Rupert Guenthner praising Thomas' service in CIC (ER: 188);
- A letter of November 5, 1945 by Ernest Gearheart, CIC Special Agent in Charge also praising Thomas' "high caliber" work (ER: 280);
- A "Report of the French Forces of the Interior of December 4, 1944 signed by Captain Dax which describes Thomas' heroic work in the French Secret Army and his arrest and capture by the Gestapo in Lyon (ER: 183 – 184);
- Numerous photographs and negatives of photographs taken by Thomas at the liberation of Dachau depicting piles of stacked, emaciated corpses in the crematorium, crematorium workers, and other gruesome scenes (Thomas Dec., ER: 165 – 166; 206 – 217)
- Typed statements of four crematorium workers obtained at Dachau by Thomas regarding what their Nazi captors forced them to do; and,

- A handwritten statement from Emil Mahl, the "Hangman of Dachau," personally taken by Thomas upon his arrest of Mahl two days following the liberation of Dachau. (ER: 227 – 239)

Startlingly, the Article fails to mention any of these powerful documents all of which Thomas presented to Rivenburg during his pre-publication interviews. Notably, the evidence before the District Court was undisputed on this point.[6]

While it is true that the Times Defendants are under no legal obligation to present their readers with every bit of evidence reviewed or obtained in the course of their investigation,[7] it is also true that the editorial decisions made by the Times Defendants are admissible to establish the Times Defendants' intent. "Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact" Milkovich v. Lorain Journal Co., 497 U.S. 1, 18-19, 111 L.Ed. 2d 1, 110 S.Ct. 2695 (1990) *and see*, Herbert v. Lando, *supra*, 441 U.S. 153, fn. 5 (Finding no First Amendment impediment to discovery designed to reveal subjective editorial intent, including the editor's intentions "as

[6] Thomas' declaration submitted in Opposition to the Times Defendants' Special Motion to Strike explains that all of these documents were shown to Rivenburg prior to publication of the Article. (Thomas Dec., ER: 158 – 178) In their reply, the Times Defendants submitted no evidence rebutting those assertions.

[7] *See, e.g.*, St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed. 2d 262 (1968).

manifested by his decision to include or exclude certain material.") *and see*, Harte-Hanks, *supra*.

For these reasons, the District Court's reliance on Partington is misplaced. While Partington does stand for the proposition cited by the court ("[W]hen an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader to draw his own conclusions, those statements are generally protected by the First Amendment") (56 F. 3d at 1156-57), it is not true in this case that the author has "outlined the facts available to him." Indeed, it would be more accurate to say that the author has stated only the weakest and least compelling evidence available to him regarding Thomas' WWII military service and decided not to disclose the most powerful and compelling facts which contradicted each of the defamatory implications.[8] Where, as here, an author relays only some of the facts actually known to him, a reader is not left to draw his own conclusions, he is improperly led to the author's conclusion. "'[W]hile the author's readers implicitly were invited to draw their own conclusions from the mixed information provided, the

[8] Indeed, the Times Defendants' attack on Thomas' life was subtle and indirect, but successful in accomplishing its purpose – to destroy Thomas' reputation, belittle his lifetime achievements and to paint him as a liar and a fraud. To accomplish this goal, Rivenburg consistently relied only on the personal statements of Thomas and/or his biographer, Robbins, and contrasted these statements against those of seemingly "authoritative" sources, even though none of these "experts" had personal knowledge of Thomas or his experiences.

Milkovich readers implicitly were told that only one conclusion was possible." Partington, at 1157 *quoting* Phantom Touring, Inc. v. Affiliated Publications, et al., 953 F. 2d.724, 731 (1992), *and see*, Lakoff Dec. (E: 311):

> "By thus representing Thomas as someone unworthy of belief, the writer has chosen sides in the allegedly factual reports and counter-reports. The Article's thorough attack on Mr. Thomas encourages the most negative interpretations of all his claims, while the use of 'authority figures' on the opposing side further encourages belief in the arguments of those authorities and disbelief of Thomas'."

Unlike the cases relied on by the District Court, this case is similar to Murray v. Bailey, 613 F. Supp. 1257 (N.D. Cal. 1985). In Murray, the court denied summary judgment to Defendant F. Lee Bailey when he was accused by the Plaintiff that he had purposefully omitted facts known to him from his review of an arrest report involving Plaintiff. Although the Court agreed with Defendant Bailey, "that he had 'no duty to investigate beyond his review of the arrest report . . .'" the court held that Bailey's partial reliance could render him liable. Since Bailey had seen the actual report, the Court distinguished cases involving a failure to investigate. Instead, the Court recognized that "None of the cases Bailey cites involves an instance where the alleged defamer had actually seen 'hard evidence' that rebutted his allegations." Id., 613 F. Supp. at 1285. On that basis, the court denied Bailey's motion for summary judgment finding that such evidence "might well allow the jury to find by clear and convincing evidence that actual malice

existed." Id. Like the defendant in Murray, the Times Defendants' decision to ignore 'hard evidence' that rebutted their defamatory implications is admissible evidence of their intent. *See also*, Harte-Hanks, *supra*, 491 U.S. at 692 ("Although failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category." (Internal citation omitted.)) Thomas has therefore met his burden.

3. In Addition To The Times Defendants' Intentional Omission of Material Facts, The Times Defendants Intentionally Misstated, Misquoted and Fabricated Facts To Support Their Defamatory Implications.

Even though the omissions described above are sufficient to overcome the District Court's finding of lack of intent, the additional evidence supplied by Thomas discloses that the Article also included numerous intentional misstatements and misquotations. Further, in a last ditch effort to recast the Article in a positive light, The Times Defendants fabricated a letter to the editor praising Rivenburg for his "balanced" presentation after receiving Thomas' retraction request. This conduct confirms the Times Defendants' intent to mislead its readers and defame Thomas.

To begin with, Thomas' Declaration cites a number of statements which Rivenburg attributed to him that he did not make. (Thomas Dec., ER: 167, 172 - 173). For example, Rivenburg wrote:

> "On the day Dachau fell, Thomas says he was a U.S. Counter Intelligence Corps officer who temporarily joined two columns of tanks and infantry rolling through the German town to the camp."

(Article, ER: 18) Thomas denies having made that statement, but explains that a passage in "Test of Courage"(written by Robbins and not quoting Thomas) described "two columns of infantry, riding on tanks and armored bulldozers, mov[ing] through the eerily silent town [of Dachau] toward the camp itself."

In an effort to persuade readers that Thomas' recollection of his presence at the liberation of Dachau was fabricated, Rivenburg quotes Lt. Col. Hugh F. Foster whose statement, "there were no tanks because the bridges between the town of Dachau and the military camp across the river had been blown up," seems to contradict the prior statement that Rivenburg falsely attributed to Thomas. (Article, ER: 18). In fact, neither Thomas or the text of "Test of Courage" ever stated that there were tanks in the camps. It is, therefore, reasonable to conclude that Rivenburg's decision to fabricate Thomas' alleged statement was designed to provoke a contradictory response from Lt. Col. Foster.[9] Rivenburg's reliance on statements that he knew to be either false or fabricated is further evidence of his intent to create the alleged implications. "Repetition of another's words does not release one of responsibility if the repeater knows that the words are false or

[9] Absent the conflict, Rivenburg has no story. *See*, Harte-Hanks, *supra*, 491 U.S. at 682.

inherently improbable, or there are obvious reasons to doubt the veracity of the person quoted or the accuracy of his reports." Goldwater v. Ginzburg, 414 F. 2d. 324, 337 (2nd Cir. 1969); *and see*, Masson v. New Yorker Magazine, Inc. 501 U.S. 496, 515, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991) (Deliberate alteration of plaintiff's words may equate with knowledge of falsity if the alteration results in a material change in the meaning conveyed by the statement.) *See also*, Nader v. DeToledano, et al., 408 A. 2d 31, 64 (D.C. App. 1979) *quoting* Edwards v. National Audubon Society, Inc. 556 F. 2d. 113, 120 (2nd Cir. 1977) ("'[A] publisher . . . who deliberately distorts [the] statements [of others] to launch a personal attack of his own on a public figure, cannot rely on a [First Amendment] privilege . . . in such instances he assumes responsibility for the underlying accusations.'")

Likewise, the Article states that Thomas' ability to recall his presence at Dachau "relies on a memory system he says he devised as a child that enables him to relive past events in his mind." (Article, ER: 18) Thomas' declaration explains that Thomas never made such a statement, but that Rivenburg combined a statement on page 5 of "Test of Courage" regarding Thomas' memory system which he devised to remember his childhood and Rivenburg's own, unfounded assumption that Thomas' relied on that system to remember Dachau. Rivenburg's statements are both false and demeaning. As Thomas makes clear in his

declaration, "no special memory system is required to remember the scenes of horror of the camps." (Thomas Dec., ER: 172 – 173, *and see* Fournier Dec., ER: 375 – 376).

While Rivenburg is not legally required to maintain 100% accuracy, he is not constitutionally permitted to proceed without limitation. "Although a reporter may have sufficient evidence of his charge to foreclose any material issue of constitutional malice for its publication, he may nonetheless make himself liable if he knowingly or recklessly misstates that evidence to make it seem more convincing or condemnatory than it is." Westmoreland v. CBS, Inc. 596 F.Supp 1170, 1174 (S.D. N.Y. 1984).

An even more flagrant example of the Times Defendants' intent to manipulate their readers is revealed by Conrad McCormick's declaration stating that the Times Defendants published a letter to the editor bearing his name that he did not write! (McCormick Dec., ER: 373 – 374). That letter to the editor, purportedly praising Rivenburg[10] for presenting a "balanced report on a difficult subject" was published in the Los Angeles Times on May 7, 2001, five days after Thomas' retraction letter was hand-delivered to the publisher of the Times

[10] Because the so-called letter to the editor was, according to McCormick, cobbled together from e-mail messages which McCormick had sent to Rivenburg, prior to publication of the Article, McCormick must have been praising Chris Robbins for writing a "balanced report" rather than Rivenburg whose Article had not even been written when the e-mails were sent.

Defendants. This objective evidence of the Times Defendants' knowing and willful misleading of the public is prima facie evidence of The Times Defendants' intent to defame Thomas. Accordingly, Thomas' claim should be allowed to proceed.

4. The District Court's Finding Ignores The Phrasing and Linguistic Devices Used By The Times Defendants

In addition to the intentional omissions and misstatements which suffice to establish prima facie evidence of intent, the Times Defendants laced the Article with phrases and embedded the Article with literary devices to persuade their readers that the defamatory implications in the Article are true. *See*, MacLeod, *supra*, 52 C. 2d at 547. ("A defendant is liable for what is insinuated as well as for what is stated explicitly.") The Times Defendants' use of these phrases and devices is further evidence of their intent to imply that Thomas is a liar and a fraud.

The phrases and devices used by the Times Defendants occur throughout the Article. The Article begins with the phrase: "If everything he says is true . . ." and continues with:

- "He was the sole survivor of not one but three concentration camps";[11]

[11] Because there is absolutely no dispute that Thomas was a prisoner in three Vichy French concentration camps, from which he escaped, the use of the belittling and skeptical phrase "not one but three concentration camps" can only have been

- "Oh, and his New York and Beverly Hills language schools . . .";
- "'Ask me how I can prove it.' Easier said than done.";
- "Many of his claims are impossible to prove";
- "But it wasn't the language system that grabbed Robbins' attention, it was the wild tales";
- " . . . said Robbins, who is splitting royalties from the biography with Thomas . . ."[12];
- "We compared several of Thomas' accounts of his role in historic events with other records and recollections."
- "'Who wasn't?' says Army archivist Mary Haynes, noting the proliferation of Dachau liberator claims in recent years."
- "(Casino officials, after consulting their archives and various experts, say the type of slot machine Thomas describes 'to our knowledge was never in Monte Carlo.')"
- "When Thomas is asked about other conflicts between his story and the one relayed by Foster, he concedes . . ."

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inserted to cast doubt even on this tragic and undisputed fact of Thomas' WWII experiences.

[12] Interestingly, although no evidence was submitted on this point, the District Court took this assertion to be factually true. (Order, ER: 448)

- "Whether his stories are believed or not, Thomas has always been a colorful character." [13]

(Article, ER: 16 – 19; Lakoff Dec., ER: 309 - 310)

By couching the alleged factual recitations between words and phrases which either directly or impliedly calls those facts into question, the Times Defendants biased their readers against Thomas. As explained by Professor Lakoff:

> "[T]he large number of these devices, all tending toward the same negative interpretation of Mr. Thomas' account of his past, and their unusualness in the editorial content of a respected newspaper (in which readers conventionally assume objectivity), lead to an almost unavoidable conclusion: that the account is not credible. . . . since the writer has departed from neutrality by setting forth a host of suggestions that depict Mr. Thomas as unreliable, the reader is invited, in fact virtually forced, to take sides against Mr. Thomas from early on, and the decision is no longer free." (Emphasis added.)

Lakoff Dec., ER: 311 – 312) (emphasis added). *See also*, Kapellas, *supra*, 1 Cal. 3d at 33 (In cases involving defamatory implications "the allegedly damaging implication frequently cannot be connected to any one statement, or to even a few specific statements, but rather emanates from the tone of the article as a whole.") While the District Court labeled the language used by the Times Defendants as "colorful" and "conversational" it is just as reasonable (if not more so) to explain

[13] While extensive, this list is not exhaustive of the examples of words and phrases

their choice of words as evidence of their intent to cast Thomas as a liar and a fraud. S*ee,* Crane v. The Arizona Republic, et al., 972 F. 2d. 1151, 1523 (9th Cir. 1992), wherein the editing of an article with regard to the placement of statements and the use of the word "however" caused this Court to conclude that the issue of intent should go to the jury. ("A reasonable jury could find that the effect of the juxtaposed denial materially altered the gist, the sting of the article.") (Internal quotations and citations omitted). Indeed, the placement of words and phrases has long been recognized to be relevant to the issue of intent. *See*, Milkovich , 497 U.S. at 19, *quoting*, Cianci v. New Times Publishing Co., 639 F. 2d. 54, 64 (2nd Cir. 1980) "'[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly the words "I think.'"

This Court recently affirmed that the juxtaposition of words and phrases in an article or broadcast may establish liability in Van Buskirk v. Cable News Network, 284 F.3d 977, 2002 U.S. App. LEXIS 4389 (9th Cir. 2002). In that case, Robert Van Buskirk filed a defamation claim against CNN and others arising from "a series of television and magazine reports stemming from Operation Tailwind." Id. Although this Court affirmed the District Court's grant of Defendants' 12(b)(6) motion on some of the claims, this Court found that "the district court failed to

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used by the Times Defendants to support their defamatory implications.

appreciate the full nature of Van Buskirk's claim" arising from CNN's assertion that Van Buskirk "had been taking medication for a nervous disorder for ten years, though he finally stopped." Id. at 18. Van Buskirk argued that it was "defamatory of CNN to not disclose that the medication he had been taking was not mind-altering and he had stopped taking it more than ten years before the date of the broadcasts." Van Buskirk asserted that "a reasonable trier of fact could find that CNN's statements indicated that Van Buskirk was mentally imbalanced and, by implication, unreliable." Id. This Court agreed, noting that:

> "It would appear that CNN, in its zeal to shift all blame for its own failure to adequately investigate the Tailwind story, sought to portray Van Buskirk as unreliable by any means available."

Id.

In addition to failing to disclose important facts known to them, CNN, like the Times Defendants here, "juxtaposed these statements with other statements in the retraction indicating that Van Buskirk was an unreliable source at the time of his interviews with CNN." Recognizing that "[S]tatements, although perhaps 'true' when viewed in isolation, may create an overall false impression when considered in context," this Court concluded that CNN's failure to fully disclose facts surrounding Van Buskirk's usage of medication was sufficient to state a libel claim. (Id. at 20).

The facts here are even more compelling than those in Van Buskirk. Here, the Times Defendants failed to disclose numerous facts which would have likely altered a reader's interpretation of the statements made, they misstated or fabricated other facts and, further, they juxtaposed words and phrases to force readers to conclude that Thomas' statements were false. Under these circumstances, the District Court's conclusion that the Article merely "raised questions" about Thomas' life experiences and that it "leaves the reader free to draw his own conclusions" do not ring true. If presented to a jury, the combination of the Times Defendants' omissions, misstatements and literary manipulations (none of which they deny) establish a prima facie case of the Times Defendants' intent to imply the alleged implications. Thomas' has therefore met his burden and his case should be allowed to proceed.[14]

E. The District Court Erred By Finding That The Alleged Implications Were Not Assertions of Objective Fact

The District Court held that even if The Times Defendants' were found to have intended the defamatory implications alleged, Thomas' action would still fail because "it [the Article] merely states 'opinion[s] on matters of public concern that do not constitute or imply a provable factual assertion.'" (Order, ER: 459). The correct standard for this determination is not whether the court interprets the

[14] Although the District Court relied on a lack of showing of intent in its decision, this issue was not raised by the Times Defendants in their Special Motion to Strike

statements in a certain way, but whether a reasonable reader could conclude that the statement at issue contains or implies an assertion of objective fact. Partington v. Bugliosi, 56 F. 3d 1147, 1153, (9th Cir. 1995) *quoting* Unelko Corp. v. Rooney, 912 F.2d 1049, 1053 (9th Cir. 1990).

To make this finding, the Court is directed to engage in a three part analysis. The court is to analyze: "[T]he statement in its broad context, includ[ing] the general tenor of the entire work, the subject of the statements, and the format of the work." Next, the Court is to consider "the specific context and content of the statements, analyzing the extent of figurative or hyperbolic language used and the reasonable expectation of the audience in that particular situation." Finally, the Court is "to consider whether the statement itself is sufficiently factual to be susceptible of being proved true or false." Underwager v. Channel 9 Australia, 69 F.3d 361, 366 (9th Cir. 1995).

1. The General Tenor of the Article Supports The Impression That The Times Defendants Were Asserting Statements of Fact

The District Court found that the broad context of the Article supported its finding of constitutional protection because "It would be obvious to the average reader that the article is intended to be commentary, rather than a hard-

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nor briefed by the parties.

hitting investigative report."[15] (Order, ER: 461) The District Court relied heavily on Partington , finding this Court's analysis in that case "to be particularly helpful." (Order, ER: 460). Despite this stated reliance, the District Court does not appear to have applied the type of analysis employed in that case.

In analyzing the "broad context" of the statements at issue in Partington, this court looked to the "purpose of the book" and to the subject matter of the book. In Partington, the court found that the purpose of the book was "to offer the personal viewpoint of the author concerning the [Palmyra] trials." The court acknowledged, "Indeed, readers presumably purchased the book not to read a dry description of the facts but to learn of Bugliosi's personal perspective about the trials . . ." This is to be expected given Bugliosi's fame as the successful prosecutor of the infamous "Manson Family" and the author of several best-selling true crime books in which he offers his own perspective and experience as a famous and experienced criminal trial lawyer.

The same cannot be said of the Article. It can safely be said that few, if any, of the Times' readers were drawn to the Article because of Rivenburg's byline or because of his experience and expertise dealing with WWII, of which he

[15] Notably, the District Court's characterization of the Article differs from Defendants' own. While the District Court was convinced that the Article was "intended as commentary", Defendants' have continually asserted that the Article provided readers with a "critical analysis" of Thomas' biography. (See, Motion to Strike, ER: 30, 39).

apparently has none. Unlike Partington, the Article is not presented to its readers as providing the author's opinion of controversial events, but is presented as a factual analysis of Thomas' life that is the product of extensive worldwide research.[16] Among others, the Article claims that Rivenburg interviewed a professor of law and philosophy at UCLA, a principal of a British School, a former justice of the Colorado Supreme Court, a French historian, a renowned Nazi hunter and an Army archivist. In this setting it is reasonable for a reader to believe that the reporter was conducting factual research, not a referendum of opinion.

Similarly, the subtitles used by The Times Defendants: "Accounts of the Day Dachau Was Liberated"; "A Cache of Nazi Party Membership Cards"; "Called as Witness Against the 'Butcher of Lyon'" all refer to actual, factual, historical events, and are not the type of phrases a reader would expect to be used to express anything other than assertions of fact.

[16] In it's written opinion, the District Court found that because the Article appeared in the "feature" section of the Los Angeles Times, an average reader would expect the article to be commentary. However, at the hearing on Defendants' Special Motion to Strike the Court stated it's decision was based, in part, on the fact that the Article appeared "on the front page of an inner section, the View section." (Reporter's Transcript, ER: 445). In fact, the Article appeared on the front page of the "Living Section." There is no factual basis to conclude that the "inner sections" of the Los Angeles Times do not contain factual articles. Just the opposite is true. (Mazingo Dec., ER: 329) (The Article "is clearly a news or news feature story and as such, must be held to the same established standards of journalism ethics as are applied to other news or news feature stories. The article "Larger Than Life" is not an editorial, opinion piece, commentary or book review."

Partington found that First Amendment protection should be afforded to an author when the author's "writing about a controversial occurrence fairly describes the general events involved and offers his personal perspective about some of its ambiguities and disputed facts." Partington did not hold that an author who omits facts, misquotes sources, manipulates text and otherwise unfairly describes the major events of a man's life can rely on the First Amendment to shield him from legal responsibility. This Court held:

> "Even in contexts in which the general tenor of the work suggests that the author is expressing personal opinion, it is possible that a particular statement of opinion may imply a false assertion of objective fact and therefore fall outside of the scope of the First Amendment's protection as limited by Milkovich. We do not intimate that the First Amendment shields from scrutiny every assertion in a book outlining a particular author's perspective on a public controversy or every statement made in a docudrama based upon such an event: indeed, Milkovich makes clear that authors of both types of publications must attempt to avoid creating the impression that they are asserting objective facts rather than merely stating subjective opinions."

(emphasis added.)

In this case, the Times Defendants went to great lengths to create the impression that they were asserting objective facts. They contacted and quoted numerous "experts", they formatted the Article by references to specific historical events. Instead of informing readers that they were expressing opinions, they presented the Article in a factual setting. Like the work in Masson, supra, 501 U.S.

at 513, the Article "purports to be nonfiction, the result of numerous interviews. At least a trier of fact could so conclude." No First Amendment protection is available or appropriate under these circumstances.

2. The Specific Context of the Implications Indicate That They Are Assertions of Fact

The District Court found that the specific context of the Article, i.e., the words used, supports a finding that the Article is constitutionally protected because the linguistic devices "create the conversational style that makes clear that the article is protected opinion." (Order, ER: 462) This finding fails to recognize a substantial line of cases which interpret the use of such words and devices as precluding a finding of First Amendment Protection. *See, e.g.*, MacLeod v. Tribune Publishing Co., 52 C. 2d 536, 551 (1959) ("A clever writer versed in the law of defamation who deliberately casts a grossly defamatory imputation in ambiguous language" cannot avoid liability for causing reputational harm.)

Further, this finding ignores the expert opinions of both Professors Lakoff and Mazingo who explain why such devices are not "conversational" or simply "imaginative expression." These declarations, which were presented to the District Court, establish that the words and phrases chosen by the Times Defendants can and do, lead reasonable readers down a predetermined path. In this setting, the use of these devices does not warrant constitutional protection.

Weller, *supra*, 232 Cal. App. 3d 991 is particularly instructive. In that case, the court analyzed various news broadcasts to determine whether such broadcasts were entitled to constitutional protection because they "merely aired conflicting information on an issue of public importance" and "merely posed open questions 'with at least two possible answers . . .'" Id. at 1003.

The Weller Court found that no constitutional protection was warranted because of the broadcasts' "persistent efforts to tie" Plaintiff to a convicted felon; the "juxtaposition" of the report in question to a report about that of a convicted felon; the use of "descriptions" of others in the piece; the "suggestion of confidence" in an alleged witness to the events; and the use of words suggesting that Plaintiff had a "guilty conscience." Id. at 1002. All of these tactics, together, created a defamatory implication. The Court recognized that "[T]he implied defamatory facts in this context may be given even more credence by the listener where, as here, the reports profess to be objective, yet subtly imply that the publisher tends to believe the sources alleging the defamatory facts." Id.[17]

[17] The District Court in this case found Weller distinguishable because the Weller Court found that the record in that case did not support a finding that the broadcasts' consistently and accurately presented both sides. The District Court found that case inapposite because here "Rivenburg did present both sides . . ." Order, ER: 457. This conclusion, made without any reference to the declarations of Professors Lakoff and Mazingo, and without acknowledgment or even recognition of the Times Defendants' omissions and misquotations or of the words and phrases used in the Article, appears to be the result of the District Court's decision summarily to disregard Thomas' proffered evidence. Such a decision is

The law requires the Court to conduct an analysis of the words and devices used to insure that a "clever writer versed in the law of defamation who deliberately casts a grossly defamatory imputation in ambiguous language" cannot avoid liability for causing reputational harm. MacLeod, *supra*, 52 C. 2d at 551; Kapellas, *supra,* 1 Cal. 3d 20. ("[F]alse inferences or implications raised by the arrangement and phrasing of apparently non-libelous statements can be as injurious as explicit epithets; we have upheld libel actions founded on such implications.")

These principles are supported in this action by the expert opinion of Professor Mazingo. She explains:

> "Yet, the overall presentation and tone of the story, specifically through the use of language, arrangement of information and inclusion of superfluous information, casts doubt on all of these facts. Michel Thomas comes off as someone who has a wild imagination, engages in Walter Mitty-like fantasies and is basically a liar."

(Mazingo Dec., ER: 325; *see also*, Lakoff Dec., ER: 311 – 312)

Further, the "linguistic" and "rhetorical" devices used by Rivenburg to create the false and defamatory implications do not, as the court asserts "take the article out of the realm of fact." (Order, ER: 462). As Professor Lakoff explains, these are the linguistic devices, along with the exclusion of evidence, that Rivenburg used to create the false implications. In the cases cited by the court,

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unauthorized in the context of a Special Motion to Strike. Wilcox, *supra,* 27 Cal. App. 4th 820.

Underwager, *supra* and Partington, *supra*, the "slanted words" or "personal ridicule," were the very words claimed to be defamatory. Because the words sued on were rhetorical expressions or loose figurative language, not objectively verifiable as true or false, they were found to be protected opinion. Here, these devices have been used throughout the article to create objectively provable false implications. See, Kapellas, *supra*, 1 Cal. 3d at 33 ("[T]he allegedly damaging implication . . . emanates from the tone of the article as a whole.") .

A review of the actual words used, and the evidence submitted by Thomas, makes clear that a reasonable reader could conclude that the words chosen by the Times Defendants were not designed to present the "balance" found by the District Court, but instead were inserted to persuade readers' that Thomas is a liar and a fraud.

3. The Implications Made By The Times Defendants Are Capable of Being Proved True or False

The District Court relies on two premises to come to its conclusion that the implications raised by the Times Defendants are not provably false. First the court finds that the events discussed are "inherently ambiguous." Second, the Court finds that the type of accusation leveled here – that Thomas is a liar and a fraud, that he has lied about the major events of his life and that he is presently involved in an enterprise which is a sham – "are the types of statements that courts

have repeatedly found not to be provably false." (Order, ER: 463). A review of the applicable law renders each of these premises incorrect.

(1) The Historical Events Discussed In The Article Are Not Inherently Ambiguous.

By definition, historical fact is not inherently ambiguous. The presence of a man in a given place at a given time is capable of being proven true or false. While some may assert that he was there and others may disagree, the truth or falsity of the statement relies on a core of objective evidence. The mere fact that there are conflicting accounts of an event does not render a fact "inherently ambiguous." As explained by the Supreme Court in Milkovich, a statement may imply a false assertion of fact, even though the statement is in the form of an opinion or a question. "Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar." Milkovich *supra*, 497 U.S. at 19.

This case is not like Partington, wherein an attorney's performance at a specific trial was being evaluated. In this case, Thomas' life accomplishments are at issue. While there is no way to objectively establish that Partington did, or did not, try his case well, there is certainly objective evidence to establish each of the implications created by Rivenburg. Each of these implications:

- Was Thomas present at the liberation of Dachau?;

- Did Thomas serve as an Agent in CIC during WWII?;
- Was Thomas interrogated by Klaus Barbie and did he escape from Barbie?;
- Did Thomas discover and secure a cache of Nazi government documents and membership cards?
- Is Thomas' language program capable of delivering its promised results?;
- Has Thomas lied about and/or fabricated the events of his past?

are questions that can readily be answered "yes" or "no" by resorting to objective proof. Accordingly, the statements are clearly capable of being proven true or false.

(2) Accusations That An Individual Lied About The Seminal Events of His Life and Is A Fraud Are Defamatory.

In Milkovich, the Supreme Court found that a statement that an individual "'lied at the hearing after . . . having given his solemn oath to tell the truth.'" was sufficiently factual to be proven true or false. 397 U.S. at 21. Conversely, in Partington, this court found that Bugliosi's assessments of Partington's performance at trial was "inherently subjective and therefore not susceptible of being proved true or false." 56 F. 3d at 1157. The lack of an

"objective standard" of analysis rendered Bugliosi's opinions constitutionally protected.

Importantly, Partington expressly did not reach the question of "whether criticisms that suggest that a lawyer has committed a serious ethical breach or that a lawyer lacks the professional qualification necessary to practice are protected by the First Amendment." The Court therefore recognized a qualitative difference "between suggesting that someone misrepresented the facts regarding a single tactical decision in a criminal trial and accusing that individual of being a "liar" or a "perjurer." (*See*, 56 F. 3d at 1158, fn15, *and see*, Id. at 1160). Indeed, Partington acknowledged that the Supreme Court in Milkovich held that the statement "Mayor Jones is a liar" is actionable defamation. *See also*, Van Buskirk (Action may proceed where alleged libel implies that Plaintiff was an "unreliable witness.") *and see*, Murray v. Bailey, *supra*, 613 F. Supp. 1276, *see also*, Gregory v. McDonnell Douglas 17 Cal. 3d 596, 603 (1976) (No First Amendment protection for statements accusing an individual of personal dishonesty); Buckley v. Littel, 539 F. 2d 882 (2nd Cir. 1976); Bettner v. Holt, 70 Cal. 270, 275 (1886) *and see*, footnote 2, infra.

It is hard to imagine a more devastating attack on one's life and reputation than accusing a person of having lied about his entire life's work and accusing him of presently working in an enterprise that is nothing more than a

sham. In Rosenblatt v. Baer, 383 U.S. 75, 86, 86 S. Ct. 669, 676, 15 L.Ed.2d 597 (1966) Justice Stewart recognized that:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty."

If a defamation action cannot stand for a man to rebut and correct an intentional but subtle attack on an extraordinary man's entire life of self sacrifice, then the right of a man to protect his reputation is rendered meaningless. Accordingly, this Court should find that the Times Defendants' implications which accuse Thomas of being a liar and a fraud are actionable.

4. Plaintiff Has Provided Prima Facie Evidence of Constitutional Malice

Although the District Court found it did not have to reach the issue of actual malice, it found that Thomas' "fell far short" of establishing that the Times Defendants acted with knowledge of falsity or with reckless disregard of the truth as required by New York Times v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964). (Order, ER: 464)

Plaintiff may establish reckless disregard by showing that Defendants had "obvious reasons to doubt the veracity' of its reporting, but engaged in 'purposeful avoidance of the truth'" Dodds, *supra* at 1061, *quoting* Eastwood v. National Enquirer, Inc., 123 F.3d 1249 (9th Cir. 1997). Moreover, Plaintiff may prove Defendants' state of mind by circumstantial evidence. Evidence concerning

motive or departure from journalistic standards is evidence of actual malice. Khawar v. Globe International, Inc.,19 Cal.4th 254, 275 (1998). ("[T]he plaintiff may rely on circumstantial evidence, including evidence of motive and failure to adhere to professional standards") *and see*, Harte-Hanks Comm., Inc. v. Connaughton, 491 U.S. 657, 667-68, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989) (Newspapers' departure from accepted journalistic standards is a factor that may be considered in determining actual malice.) *See also*, Mazingo Dec., ER: 324 ("In considering the definitions/explanations, major Codes of Ethics and the 'Code of Ethics' of the Los Angeles Times, it is my opinion that the article "Larger Than Life," fails the standards of accuracy, fairness and balance.")

In this case, Defendants' malice is evident by their reckless disregard and willful blindness of evidence establishing that their published implications were false. As explained above in Section D, the Article is rife with omissions of fact, misstatements of fact, misquotations and manipulation of words and phrases.

Indeed, Rivenburg's intent was clear even before publication. Witness after witness who spoke and/or met with him was convinced that he was not investigating, but merely compiling facts to undermine Thomas. (*See*, Decls. of Thomas, Robbins and Morris; ER: 158 – 282; 283 – 295; 371 - 372) Like the defendants in Harte-Hanks, *supra*, "[T]he newspaper's inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the

probable falsity of [Thompson's] charges." Id. While additional evidence of malice will undoubtedly arise after Plaintiff has had an opportunity to conduct discovery, the evidence produced here establishes the type of purposeful avoidance that supports a finding of actual malice.[18] Accordingly, the Times Defendants' Special Motion should have been denied.

VII.

CONCLUSION

In addition to the fact that the Constitution recognizes no inherent societal value in knowingly false utterances of fact, the rule that allows a plaintiff (even a public figure plaintiff) to recover for defamatory falsehoods is premised upon the strong societal interest in protecting the reputation and integrity of its citizens:

> "'A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few; as we have learned to our sorrow.' (Hand, The Spirit of Liberty (Dillard 1st ed. 1952) p. 190.) A reasonable degree of protection for a private individual's reputation is essential to our system of ordered liberty. 'It is of great importance in a

[18] Should this Court find that Thomas has failed to establish sufficient evidence of actual malice, Thomas requests the Court to remand the case to the District Court for further discovery. *See*, Hutchinson v. Proxmire, et al., 443 U.S. 111, 120, 99 S.Ct. 267, 61 L.Ed. 2d 411, 422 (1979) ("The proof of 'actual malice' calls a defendant's state of mind into question and does not readily lend itself to summary disposition." As an offer of proof in that regard, Thomas believes (based on conversations with some of the sources quoted by Rivenburg in the Article) that if the case is permitted to go forward, several, if not all of Rivenburg's sources will testify that if Rivenburg had told them about the information provided to him, they would not have questioned Thomas' presence at Dachau, service in CIC or his discovery of the cache of Nazi documents.

> republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part.' (The Federalist No. 51 (J. Madison) (Cooke ed. 1961) p. 351.)"

Brown v. Kelly Broadcasting Co., 48 Cal.3d 711, 742-743 (1989).

In this case, Thomas seeks the opportunity to protect his reputation which has been unlawfully damaged by the intentional conduct of the Times Defendants. For this reason and for all of the reasons set forth above, Thomas respectfully requests this Court to reverse the holding of the District Court and order the District Court to enter an order denying the Times Defendants' Special Motion to Strike, reinstating Plaintiff's Complaint and vacating the District Court's Order that attorneys' fees and costs are owed by Thomas to the Times Defendants by operation of C.C.P. section 425.16(c). Alternatively, Thomas requests the Court to remand the matter to the District Court so that further discovery may be taken on the issue of intent.

DATED: May 1, 2002

Respectfully submitted,

GLASSMAN, BROWNING & SALTSMAN, INC.

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