From: Boss Partner
To: Valued Legal Analyst
Date: 04/17/YR01
Re: Smith v. Johnson

I guess you heard by now that we lost the motion to dismiss. Your help was invaluable in preparing our motion and its accompanying papers. Unfortunately, the case was assigned to that creep, Judge Haas. He cemented his reputation as a creep who hates our law firm by ruling against us in spite of our superior arguments.

Now, obviously, we hope to win this case at trial or at least to get a favorable settlement. However, we have to face the realistic possibility that we may lose a trial. Therefore, even now I want to start working on our appeal, just in case that becomes necessary.

For the time being, I want you to start working on the jurisdictional issue. I really think it's unfair for the California courts to assert personal jurisdiction over Jane, who had never even been to California prior to this case and doesn't intentionally transact any business in California.

Please read the section on jurisdiction in Judge Haas' opinion. I want you to prepare an appellate argument that we can use in our appellate brief on the jurisdiction issue. I am not asking you to prepare a full appellate brief (with tables of cases and issue statements and all that stuff) and I am not asking you at this time to address any part of the decision other than the issue of jurisdiction.

So, please prepare an appellate argument to Judge Haas' ruling, explaining why Haas has no idea what he's talking about and that the case against Jane should have been dismissed. Please make sure to address whatever arguments he made, and, if possible, distinguish his cases and counteract them with appropriate case law of our own.

Thanks again!

B. Partner

Defendant's argument is misplaced. California courts have applied newsworthiness as a defense when the Plaintiff himself is a newsworthy figure, not necessarily when the story is of public interest.

For the foregoing reasons, I deny the defendant's motion to dismiss the cause of action of invasion of privacy for misappropriation of name and likeness.

Cause of Action 4: Intentional Infliction of Emotional Distress

To maintain an action for intentional infliction of emotional distress, a plaintiff must show that (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. Melorich Builders v. Superior Court, 160 Cal. App. 3d 931, 935 (Cal. App. 4th Dist. 1984).

Defendant argues that posting a video taken in a public place with a name and some publicly available information on the internet cannot constitute "extreme and outrageous conduct."

However, it is not the province of this court to determine what constitutes extreme and outrageous conduct. That is a question of fact to be decided by a jury. I will therefore not address that issue at this stage of the proceeding.

Conclusion

For the foregoing reasons, defendant's motion for judgment on the pleadings is denied with regard to Plaintiff's complaint and all counts therein.

products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent." Cal Civ Code § 3344.

Defendant argues that Plaintiff is not a noteworthy person and that Defendant did not benefit economically from the use of Defendant's name specifically. Defendant also argues that the video was "newsworthy" because a tirade by an angry consumer is a matter of public interest and curiosity.

To Defendant's first claim, I respond that California courts have not required that plaintiffs in misappropriation cases be famous or special notability. On the contrary, appropriation of names of ordinary people with no special notoriety has been held to be actionable for misappropriation. Stilson v. Reader's Digest Assn., 28 Cal. App. 3d 270 (Cal. App. 1st Dist. 1972). Likewise "the appearance of an "indorsement" is not the *sine qua non* of a claim for commercial appropriation." Eastwood v. Superior Court, 149 Cal. App. 3d 409, 419 (Cal. App. 2d Dist. 1983). The fact that Defendant did not rely on Plaintiff's specific reputation or persona does not preclude an action for misappropriation.

Defendant next claims the "newsworthiness" defense against an allegation of misappropriation. Defendant relies on various California cases that have ruled that publicizing one's own media outlet by using names and information of public celebrities is not considered invasion of privacy. *See* Montana v. San Jose Mercury News, Inc., 34 Cal. App. 4th 790 (Cal. App. 6th Dist. 1995) (Newspaper had a constitutional right to promote itself by reproducing its originally protected articles or photographs of Joe Montana). *See also* Abdul-Jabbar v. GMC, 85 F.3d 407, 416 (9th Cir. Cal. 1996). Defendant argues that the public has an interest in watching videos of private individuals involved in unusual situations and that, therefore, the incident in the videotaped confrontation are newsworthy.

652B. This has been adopted as the California law on the subject. *See* Shulman v. Group W Productions, Inc., 18 Cal. 4Th 200, 230-231 (Cal. 1998).

However, I do not find that it is required that there be a physical invasion of privacy or that specific secret information be disclosed. Rather, the cause of action for invasion of privacy "recognizes a measure of personal control over the individual's autonomy, dignity, and serenity." Hernandez v. Hillsides, Inc., 47 Cal. 4th 272, 286 (Cal. 2009). A cause of action may be sustained as long as the defendant "penetrated some zone of physical or sensory privacy ... or obtained unwanted access to data by electronic or other covert means, in violation of the law or social norms." Id, q*uoting* Shulman v. Group W Productions, Inc., 18 Cal. 4th 200 (Cal. 1998).

Although it is conceded that defendant made no information public that is not publicly accessible, plaintiff's argument can still be sustained if plaintiff can show that the information released in this case was done in "violation of... social norms." I believe that a reasonable jury could conclude that a producer releasing the name and address of a consumer violates social norms. Therefore, it is possible for this cause of action to be sustained by a reasonable jury. Therefore, the motion to dismiss this count is denied.

Cause of Action 3: Misappropriation

Plaintiff next alleges that the use of her name and her likeness (on the video) constitutes invasion of privacy for misappropriation of name and likeness. Plaintiff maintains that this misappropriation constitutes common law invasion of privacy as well as a tort under California statute.

Under the common law, a person is liable for invasion of privacy for "appropriation of plaintiff's name or likeness for commercial purposes." Johnson v. Harcourt, Brace, Jovanovich, Inc., 43 Cal. App. 3d 880, 887 (Cal. App. 2d Dist. 1974). California has codified this common law rule, making it a tort to knowingly use "another's name, voice, signature, photograph, or likeness, in any manner, on or in

Smith alleges that James' statements about him that were posted to the website contained false information. As a threshold matter, to be defamatory statement must be false. Unelko Corp. v. Rooney, 912 F.2d 1049, 1056 (9th Cir. Ariz. 1990). The general rule in a defamation action is that the defendant has the burden to prove truth unless the subject matter is a matter of public concern. Milkovich v. Lorain Journal Co., 497 U.S. 1 (U.S. 1990). Whether a statement is a matter of public concern is a triable issue for jury to determine. Because it is unclear who will have the burden to prove truth or falsity in this case, I must assume falsity for the purpose of a motion to dismiss.

The issues of whether the statements are true, whether they are defamatory and the extent of the fault of the party providing the forum are issues of facts to be tried by the jury. See Knievel v. ESPN, 393 F.3d 1068 (9th Cir. 2005). Therefore, there is a triable issue of fact and the motion to dismiss this count must be denied.

Cause of Action 2: Excessive Publication of Private Facts

The plaintiff's second cause of action alleges invasion of privacy for intrusion on seclusion. Plaintiff alleges that the defendant's allowing information such as his name and address and the video of his interaction to be posted on her website constitutes disclosure of private information that intruded upon his solitude.

Defendant argues that even if the plaintiff's allegations are true, the information released was not "private" insofar as that names and addresses are publicly available information and the video was taken in a place in which the plaintiff had no expectation of privacy. Therefore, defendant argues that there has been no intrusion.

According to the Restatement of Torts, a person is liable for invasion of privacy for intrusion upon seclusion if he "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns... if the intrusion would be highly offensive to a reasonable person." Restatement 2d of Torts, Section

"AOL did not solicit the harassing content, did not encourage others to post it, and had nothing to do with its creation other than through AOL's role as the provider of a generic message board for general discussions." Id. at p. 1172, fn. 33 (emphasis supplied).

In this case, there is no factual dispute that defendant required as a precondition to posting that users to provide the website with information about, *inter alia*, whether they possessed any audiovisual content to post, and then actively encouraged users to post that content regardless of privacy violations. As a case in point, a very unflattering video of Plaintiff, taken without his knowledge, and which may well have been a violation of his privacy rights, was placed on the website by an unhappy repair shop owner. Defendant then reaped the reward of thousands of dollars in advertising revenue as the result of its users' controversial and unfiltered postings.

As in Roommates, Pissedproducers.com was designed to solicit content with no regard for unlawfulness, and involved Defendant's active encouragement and help in posting such unlawful information or images. Defendant's actions thus materially contributed to the illegality of the content and the privacy invasions suffered by the plaintiff and other victims, taking her outside the scope of CDA immunity. See People v. Bollaert, 248 Cal.App.4th 699 (Cal. App. 4th Dist. 2016) (finding that defendant, operating website through which users posted private, intimate photographs of others along with that person's name, location and social media profile links, was an "information content provider" with respect to the information at issue, and thus was not entitled to interactive-computer-service immunity under CDA; defendant's website required users to answer a series of questions regarding victims' personal information in order to create an account and post photographs, and website was thereby designed to solicit content that was unlawful).

Cause of Action 1: Defamation

However, contrary to Johnson's contentions, a provider of an interactive computer service may claim CDA immunity only with respect to "information provided by another *information content provider.*" 47 U.S.C. § 230(c)(1) (emphasis supplied). Thus, an interactive computer service that is also an "information content provider" of certain content is not immune from liability arising from publication of that content. As used in § 230(f)(3), a service provider is responsible for the creation or development of information, and thus becomes an information content provider as to that information, if the service provider in some way contributes to the development of what is offensive about the content.

In Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1162 (9th Cir. 2008), the Ninth Circuit gave a broad reading of the CDA 230(f)(3)'s term "development," and found that a website operator forfeited any immunity provided under the CDA by "requiring subscribers to provide information as a condition of accessing it services" and because it "both elicits the allegedly illegal content and makes aggressive use of it in conducting its business." Id. at p. 1167.

> We believe that both the immunity for passive conduits and the exception for co-developers must be given their proper scope and, to that end, we interpret the term 'development' as referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness. In other words, a Web site helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct.

Id. at pp. 1167–1168.The Ninth Circuit distinguished its earlier decision in Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003), by noting that "[t]he allegedly libelous content there . . . was created and developed entirely by the malevolent user, without prompting or help from the website operator...," and because it "did absolutely nothing to encourage the posting of defamatory content...." It also distinguished Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir.1997) (emphasis supplied), by noting that

Therefore, I find that California may constitutionally exercise personal jurisdiction over the defendants in this case.

Motion to Dismiss Under Rule 12(b)(6)

I now turn to the components of defendant's motion to dismiss that alleges that plaintiff's causes of action should be dismissed for failure to state a claim upon which relief can be granted.

I note at the outset that this stage of the proceeding is not for finding facts or determining issues that are in dispute between the parties. In considering a motion to dismiss, I must review the facts in the light most favorable to the nonmoving party. *See* Oltarzewski v. Ruggiero, 830 F.2d 136 (9th Cir. 1987). I may only dismiss the cause of action if I rule that there is no "genuine issue for trial." Valandingham v. Bojorquez, 866 F.2d 1135, 1137 (9th Cir. 1989).

Communications Decency Act Defense

Johnson argues that she is immunized from all tort causes of action under the Communications Decency Act, 47 U.S.C.A. § 230 ("CDA"). The provisions of the CDA have been held to confer broad immunity against defamation and other tort liability for those who use the Internet to publish information originating from another source. See, e.g., Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc); Batzel v. Smith 333 F.3d 1018, 1026 (9th Cir.2003). CDA's Section 230(c)(1) provides that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider. An Information content provider is defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." Id. 230(f)(3).

California to exercise jurisdiction over a Japanese automobile part manufacturer who's part, after having been built into a Taiwanese motorcycle, had caused injury in California. The plurality opinion in Asahi had ruled that Asahi had failed to "purposefully direct" activities towards the state of California, and could therefore not be subject to personal jurisdiction in that state.

While defendant relies on Asahi, I think Asahi is distinguishable. In Asahi, the defendant had not specifically been made aware that its parts would end up in California and certainly did not have any specific interest in availing itself in the privileges and immunities of the state of California. *See id.* at 102. It had no specific knowledge of its products being in California and did not intentionally direct any activity towards California.

In our case, Johnson was specifically apprised of the review targeting a California resident. I think that our case is more analogous to cases in which jurisdiction has been allowed. In Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (U.S. 1985), the Supreme Court allowed the Florida courts to exercise personal jurisdiction over a defendant when the defendant "had established a substantial and continuing relationship with" a resident of Florida. The Supreme Court also allowed personal jurisdiction to the state of California when "the suit was based on a contract that had substantial connection with California." McGee v. International Life Ins. Co., 355 U.S. 220 (U.S. 1957).

The Ninth Circuit Court of Appeals also ruled that a website that offered readings of medical care providers in Washington state on its website "purposefully interjected" itself into Washington state and was therefore subject to jurisdiction in Washington. Northwest Healthcare Alliance, Inc. v. Healthgrades.com, Inc., 50 Fed. Appx. 339, 341 (9th Cir. Wash. 2002). Based on the holding in the Northwest Healthcare Alliance case, I find that a website that allows reviews of businesses in a particular state subject itself to personal jurisdiction in that state.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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DOUGLAS SMITH,

Plaintiff

Against

DECISION
ON MOTION FOR
JUDGMENT ON
THE PLEADINGS

JANE JOHNSON,
PISSEDPRODUCER.COM, INC,

Defendants

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Haas, J.,

Defendant Jane Johnson ("Johnson") lives in Portland, Oregon, and operates defendant corporation, pissedproducer.com (the "website"). The website is devoted to allowing service providers to complain about actions of consumers. According to the website's terms, business owners or service providers are allowed to post feedback about consumers "that other producers should be wary of." The website also allows aggrieved producers to publish the names, addresses and other personal information about consumers, along with audio and video files that relate to the transaction.

On June 12, YR-01, Brenda James ("James") posted a story regarding plaintiff, Douglas Smith ("Smith") in which she accused him of, *inter alia*, lying about his conversations with her, behaving antagonistically towards her and unjustifiably complaining about her business. She also posted information about Smith's name, address and license plate number and a video that showed a confrontation between her and Smith.

Johnson knowingly allowed this information to remain on her site in spite of Smith's protest.

Smith brought the present action against Johnson and the corporation that holds the website alleging defamation, invasion of privacy for intrusion upon seclusion, invasion of privacy for misappropriation of name and likeness and intentional infliction of emotional distress against all three defendants.

Subject matter jurisdiction is established under 28 U.S.C. § 1332 (diversity jurisdiction) because plaintiff is a resident of California and defendants are residents of Oregon and the amount in controversy is more than $75,000. This is undisputed.

Johnson and the website have moved to dismiss the complaint based on FRCP Rule 12(b)(2), alleging that this court does not have personal jurisdiction over her and under FRCP Rule 12(b)(6) for failure to state a claim upon which relief can be granted with respect to each of the four counts of the complaint.

For the reasons set forth below, I deny the defendant's motion to dismiss with respect to each count.

Personal Jurisdiction

Defendant argues that this court lacks personal jurisdiction over Johnson and the website because they operate exclusively in the state of Oregon and have insufficient contacts with California to subject them to personal jurisdiction in the state of California.

Under the due process clause of the 14th amendment to the United States Constitution, a state may exercise long arm jurisdiction over an out-of-state defendant only if the defendant has "certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (U.S. 1945).

In Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 109 (U.S. 1987), a case relied on by defendant, the Supreme Court refused to allow the state of