COURT OF APPEAL, SECOND APPELLATE DISTRICT
DIVISION FIVE
STATE OF CALIFORNIA

BRIAN WARNER pka MARILYN MANSON, Plaintiff and Appellant, v. EVAN RACHEL WOOD, and ASHLEY GORE aka ILLMA GORE, Defendants and Respondents.	Court of Appeal No. B331079 (Superior Court No. 22STCV07568)

Superior Court, County of Los Angeles, No. 22STCV07568
Hon. Teresa A. Beaudet, Judge

APPELLANT'S OPENING BRIEF

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CERTIFICATE OF INTERESTED PARTIES

There are no interested parties or persons that must be listed in this certificate under rule 8.208.

DATED: August 27, 2024

Respectfully submitted,

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I. INTRODUCTION

This is an appeal of an order granting two anti-SLAPP motions, in which the trial court rubber-stamped Defendants' assertions of "protected activity" before weighing and disregarding evidence to conclude that Plaintiff Brian Warner could never prevail on the challenged claims.

Defendants Evan Rachel Wood and Illma Gore engaged in a malicious campaign to harm Wood's ex-fiancée Warner. They recruited, pressured, and coached others to make heinous, untrue accusations against Warner; forged a fake letter from a real FBI agent to create the false appearance that Warner was under FBI investigation and his "victims" were in danger; spread convenient falsehoods to shore up their bogus narrative; solicited personal information from Warner's former employees; hacked his accounts; manufactured fictitious e-mails; and "swatted" Warner at his home to draw more attention to the falsehoods they conspired to have made against him.

In March 2022, Warner filed suit, alleging claims for intentional infliction of emotional distress and defamation per se,

among others. Wood and Gore responded with special motions to strike under the anti-SLAPP statute, Code of Civil Procedure Section 425.16. Wood sought to strike the claims arising from the fake FBI letter, her role in causing people to make false accusations, and defamatory statements Gore made about a 25-year-old film by Warner. Gore moved to strike just the latter two. After largely denying Warner's request to take limited discovery—and denying outright his request to supplement the record months before the anti-SLAPP hearing with new testimony from a false accuser who days earlier came clean about lying at Wood and Gore's insistence—the trial court granted the motions and ordered the challenged claims stricken.

The order should be reversed.

First, forging a letter from an FBI agent is not "protected activity" and is not shielded by the "litigation privilege." Neither the trial court nor Wood tried to show that *this* conduct triggers the anti-SLAPP statute. Instead, they relied on Warner's allegation that Wood filed the letter in an unrelated family court

case against a third party—an allegation that at most "provide[s] context" but does not supply any claim element. *Baral v. Schnitt*, 1 Cal. 5th 376, 394 (2016). Warner's evidence, which needed to be "accept[ed] as true," showed that Gore was using the letter outside of the parentage proceeding. *Comstock v. Aber*, 212 Cal. App. 4th 931, 947 (2012). It was error to rely solely on Wood's self-serving declaration that *she* did not forge the letter or use it outside of the family court case. Neither Wood nor Gore explained or disclaimed Gore's involvement.

Second, Gore never moved to strike the FBI letter claim against her, so it was error for the trial court to do so. Because the court never considered or made findings about "any act of" Gore, the anti-SLAPP statute was never triggered as to Gore. Code Civ. Proc. § 425.16(b)(1). Similarly, the "litigation privilege" could not have been a basis to bar the claim against Gore because there was no evidence she had a role in Wood's parentage proceeding. The trial court declined to correct these issues before

adopting its tentative order, stating "I'm not clarifying anymore. I have already spent so much time on this."

Third, the trial court abused its discretion by overruling Warner's objections to Wood's foundationless hearsay assertion that the false accusers she communicated with were "other victims," on which the trial court then relied to conclude that recruiting, organizing, and pressuring these people was protected activity and could never be "outrageous." Contrary to the trial court's interpretation of the caselaw, not every statement about "domestic violence" is a protected activity under the anti-SLAPP statute. The trial court also disregarded Warner's evidence—including by sustaining blunderbuss objections to damning materials found on Gore's iPad, without explanation—and agreed with Wood and Gore's mischaracterizations of other evidence, to conclude that Warner could never show that the alleged conduct was "outrageous." The court's role, defined by countless appellate decisions, should have been to credit Warner's evidence and

determine whether anything offered by Wood or Gore negated that evidence as a matter of law. The court here did not do that.

Fourth, the trial court abused its discretion to not even consider a bombshell third-party declaration—in which Ashley Smithline recanted her false allegations of abuse and detailed how she succumbed to pressure by Wood and Gore—because the declaration was not "obtained sooner." With months left before the anti-SLAPP hearing, and the opportunity for Defendants to object and respond, there was no prejudice to them. The trial court prioritized convenience over the core function of the anti-SLAPP statute, which is to dispose of truly meritless suits before discovery.

Fifth, the trial court erred by striking multiple claims arising from Gore's objectively false statement that Warner's never-released, 25-year-old film, "Groupie," was "child pornography." There was no basis to conclude that Gore was "protect[ing]" children from abuse—unlike in the single case cited by the court, in which a prospective homebuyer was alerted of a

registered sex offender nearby. And with declarations from Pola Weiss (the actress) and Warner (the filmmaker), the court had no basis to conclude that he could never prove falsity—just the opposite, he already had.

Sixth, the trial court misapplied the law on "actual malice," and violated its directive to "not make credibility determinations or compare the weight of the evidence" at this stage. *Belen v. Ryan Seacrest Prods., LLC*, 65 Cal. App. 5th 1145, 1156 (2021). Several categories of circumstantial evidence can be combined to show actual malice. Warner presented evidence on at least three—"failure to investigate," "anger and hostility," and "reliance on sources known to be unreliable or biased." He made at least the prima facie showing required by the caselaw, and was not required to "demonstrate" actual malice by clear and convincing evidence at this stage as the trial court erroneously stated. The court improperly ruled on disputed issues of fact in Gore's favor.

Thus, reversal on each of the challenged claims is warranted.

II. STATEMENT OF APPEALABILITY

Warner appeals from the trial court's order of May 9, 2023 granting Wood's and Gore's anti-SLAPP motions. 8AA2006. The trial court's ruling is immediately appealable. Code Civ. Proc. §§ 425.16(i), 904.1(a)(13). Warner filed a timely notice of appeal on June 21, 2023. 8AA2049.

III. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Wood and Gore commit many wrongful acts in furtherance of a conspiracy to have false accusations made against Warner.

Wood and Warner were partners over 13 years ago, when Warner was known for his shock-rocker persona and rock-and-roll lifestyle, and Wood, an actress, was known for being Warner's "wild" partner who, despite having a "healthy, loving" relationship with Warner, "crav[ed] danger and excitement." 1AA0025; 4AA1043. Wood has since attempted to rebrand her persona and distance herself from Warner. *See, e.g.*, 1AA0025,

0028, 0030. To that end, Wood and Gore—Wood's on-again-off again romantic partner—conspired to recruit and wrongfully cause women to make false public accusations of abuse against him. *See, e.g.*, 1AA0026, 0030-33. They weaponized Wood's fame and influence, lies about Warner, and threats of a fictitious FBI investigation to lure in would-be accusers, while engaging in outrageous and illegal acts to implant, secure, distribute, and amplify coordinated falsehoods. *See, e.g.*, 1AA0026, 0029-33, 0035-40; 4AA1043. While many refused to engage (*see, e.g.*, 5AA1113), others did not—some even admitted gaining "new memories" of abuse after meeting with Wood and Gore (*see, e.g.*, 2AA0189 (¶ 108), 0191 (¶ 127), 0237 (¶ 44), 238 (¶ 48); 1AA0032 (¶ 30)).

B. Warner files suit.

On March 2, 2022, Warner filed a Complaint against Wood and Gore alleging claims for intentional infliction of emotional distress (or "IIED"), defamation per se, violation of the Comprehensive Data and Access Fraud Act (Penal Code Sections 502(c) & (e)(1)), and impersonation over the internet (Penal Code

Sections 528.5(a) & (e)). 1AA0041-44. The Complaint alleged that as part of the campaign to enlist false accusers, Wood and Gore forged a fictitious letter from a real FBI agent in November 2020 to create the false appearance that Warner's alleged "victims" and their families were in danger and that he was already being investigated; solicited personal information from his former employees; hacked his computers, phones, email accounts and/or social media; fabricated illicit emails; falsely asserted that a never-released short film that Warner created in the 1990s, called "Groupie," was "child pornography"; and "swatted" Warner at his home in Los Angeles days after the first salvo of coordinated public accusations in February 2021. *See generally* 1AA0024; 4AA1042.

C. Wood and Gore file anti-SLAPP motions seeking to strike some but not all of the Warner's claims.

On April 28, 2022, Wood filed an anti-SLAPP motion seeking to strike (i) the portion of the IIED claim arising out of the fake FBI letter, (ii) the portion of the IIED claim arising out of conduct to recruit, organize, and pressure false accusers, and

(iii) the defamation claim and portion of the IIED claim arising out of the false statements about Warner's film "Groupie." 1AA0052. With the motion, Wood submitted a declaration in which she said that she "did not fabricate or forge the FBI letter," and "never pressured anyone to make false accusations." 1AA0077, 0082.

On May 24, 2022, Gore filed an anti-SLAPP motion seeking to strike (i) the portion of the IIED claim arising out of conduct to recruit, organize, and pressure false accusers, and (ii) the defamation claim and portion of the IIED claim arising out of the false statement about Warner's film "Groupie." 2AA0283; 2AA0288. Notably, Gore did *not* move to strike the fake FBI letter claim and did not submit her own declaration, or the declaration of any percipient witness.

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No one disputed that the letter was, in fact, fake. Nor could they. *See, e.g.*, 5AA1098; 5AA1072; 5AA1138; *see also* 4AA0881-0882.[1]

D. Warner moves for limited discovery, almost all of which the trial court denies.

On July 25, 2022, Warner sought leave from the automatic discovery stay under Code of Civil Procedure Section 425.16(g) to take limited discovery on certain facts that were necessary to rebut the special motions to strike. 3AA0431. Because "good cause" requires a prima facie showing on all elements of the challenged claims except for where requested discovery was needed, Warner's submission included eight declarations and dozens of exhibits. *See* 3AA0456-577. The declarations included testimony not only from Warner (3AA0521), but also from Pola Weiss, who explained that she was 21 years old and not abused when she starred in "Groupie" (3AA0545); Bryton Gore, who

[1] This holds regardless of the trial court's rulings on evidentiary objections or Warner's notice to withdraw certain evidence. *See* 7AA1819.

witnessed her sister (Illma) and Wood fabricate the FBI letter and found other shocking evidence on an iPad given to her by Illma (3AA0526); Blair Berk, who was Warner's criminal lawyer and spoke to the real FBI agent whose identify was stolen by Wood and Gore (3AA0548); Dominic Scaia, who received Instagram messages from one of Warner's false accusers (Ashley Smithline) in which she stated that she was pressured to "lie and act" and be a "patsy" (3AA0568); Jayden Elworthy, who confirmed that the Smithline Instagram account was real (3AA576); and Emese Balog, a former romantic partner of Warner who Gore tried to recruit and whose story was falsely portrayed during the coordinated February 2021 attack (3AA0561). Wood and Gore opposed Warner's Motion. 3AA0578; 4AA0656; *see also* 4AA0749 (reply); 4AA0766 (reply).

On September 27, 2022, the trial court denied the vast majority of Warner's request, but allowed a narrow deposition of Gore on topics related to "state of mind" and "actual malice" regarding her statements about "Groupie." 4AA0821; *see also*

3AA0455; RT324:21-28 (Judge Beaudet: "[I]t would be surprising if it was more than a half-day [deposition."]).

At her deposition, Gore testified that she did little if anything to confirm whether "Groupie" was the illicit material she said it was, and instead just relied on what an unnamed, never-identified, self-proclaimed "relative" of a person who was not in the film said about it. 7AA1725-726 (citing 6AA1296-322).[2] Gore then spread the falsehood to multiple people, including Michele Meyer, a woman whose phone number Gore then used on the fake FBI letter. 5AA1140-45; 6AA1247 (citing 6AA1300). The lie about "Groupie" fit the false narrative that Gore was building, *i.e.*, that Warner was a human trafficker and child abuser—which she used to recruit accusers. 7AA1726 (citing

[2] Volume 6 of Appellant's Appendix contains unredacted documents that cite or refer to materials the trial court ordered sealed, namely certain passages from (i) Gore's deposition and (ii) the Meyer Declaration. 8AA2040. Public versions are also included in Appellant's Appendix. Appellant cites to the unredacted version of Gore's deposition transcript for ease of reference; however, this Brief does not need redactions because it does not rely on sealed information. *See also* 8AA2059 (public version of deposition).

4AA935-39, 6AA1332-33, 4AA1006-09, 5AA1140; 5AA1114-19; 5AA1084-85).

In November 2022, Warner opposed both special motions to strike (6AA1240; 6AA1262; 7AA1719; 7AA1741), and Wood and Gore filed replies (7AA1703, 7AA1495). Following two months of additional delay caused by excessive evidentiary objections asserted by Defendants (*see* 7AA1699; 7AA1645), the briefing was completed on January 19, 2023 (*see* 7AA1764).

E. Warner seeks to supplement the record months before the anti-SLAPP hearing with a late-breaking third-party declaration, which the trial court rejects for not being "obtained sooner."

On February 19, 2023, Ashley Smithline recanted her allegations of abuse and executed a declaration. 7AA1856. Under penalty of perjury, she detailed how she "succumbed to pressure from Evan Rachel Wood and her associates to make accusations of rape and assault against Warner that were not true," and the reasons she felt "manipulated" by Wood, Gore, and others to "spread publicly false accusations of abuse against Mr. Warner"—including in her now-dismissed federal court

complaint, which she says "contained untrue statements about Mr. Warner, including that there was violence and non-consensual sexual activity." 7AA1857-59.

Four days later, Warner sought leave from the trial court to supplement the record. 7AA1844; 7AA1852. Warner stipulated that Wood and Gore could respond and object before the anti-SLAPP hearing, which was set for April (and would later be reset for May). 7AA1848-49; 8AA2000.

The trial court denied the request. 8AA1996; 8AA1995. It said that the declaration should have been "obtained sooner," even though Warner had no control over this third party (who had sued him), there was an automatic discovery stay, and the court did not let Warner take *any* third-party depositions. RT[2/28/2023 Hrg. Tr.]2:27-3:2, 5:14-15.[3]

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[3] The Court granted Appellant's motion to augment the record with this transcript. The reporter delivered a certified copy but did not mark it as a new volume.

F. The trial court strikes all the challenged claims.

On May 9, 2023, the court granted Wood's and Gore's motions and struck all the challenged claims. *See* 8AA2006.

The trial court first addressed the IIED claim based in part on the fake FBI letter. 8AA2012. The court agreed with Wood that the claim arose from "protected activity" because Wood later filed the letter in a parentage proceeding and, according to the court, there was no evidence that the letter was used outside of that proceeding. 8AA2012-14. Based solely on Wood's declaration denying that she forged the letter, the trial court rejected Warner's argument that the alleged conduct constituted unprotected illegal act. 8AA2013-14. On the merits, the trial court disregarded Warner's evidence and concluded that the claim was barred by the litigation privilege, because Wood alleged that she did not distribute the letter outside of the parentage proceeding. 8AA2015-16.

Next, the trial court addressed the IIED claim arising out of recruiting, organizing, and pressuring false accusers.

8AA2016, 2028. The claim arose from protected activity according to the trial court because Wood said her communications were with "other victims"—even though there was no admissible evidence that anyone with whom Wood (or Gore) spoke was a "victim." 8AA2028-29. (The only admissible evidence was that they were not "victims." 4AA1043:11-18.) On the merits, the trial court weighed and disregarded evidence to conclude that Warner could not show a probability of prevailing on the factual issue of whether there had been "outrageous" conduct. 8AA2021, 2028-29

Last, the trial court addressed the IIED and defamation claims arising from Gore's false statements about "Groupie." 8AA2022, 2029. Although the film was never released, was 25 years old, and starred an adult actress, the trial court still found that Gore's false statements were protected activity, because they were made to prevent child abuse and protect children from abusers. 8AA2022-23, 2030. The trial court found that Warner could not prove that Gore's statements were false, even though

Warner's evidence showed falsity regardless of whether Gore thought the actress was Pola Weiss or someone named Jeanette Polard—Weiss was over 21 and Polard was not in the film. 8AA2032, 2035; *see also* 5AA1094-95; 4AA1043-44. The trial court declined to change its tentative order at the hearing. RT915:5-916:15. As to "actual malice," a term of art meaning reckless disregard for the falsity of one's utterances, the trial court weighed the evidence and misapplied the relevant legal standards in concluding that Warner could never show that "Gore entertained serious doubts about the truth of her statements," because the court found that she believed (albeit incorrectly) that the actress was Polard and not Weiss. 8AA2032-37.

Warner timely appealed the trial court's order granting Wood's and Gore's motions. 8AA2049.

IV. LEGAL DISCUSSION

This Court reviews the Superior Court's Anti-SLAPP analysis de novo. *Park v. Bd. of Trustees of California State Univ.*, 2 Cal. 5th 1057, 1067 (2017) ("We review de novo the grant

or denial of an anti-SLAPP motion."); *Collins v. Waters*, 92 Cal. App. 5th 70, 80 (2023) ("Appellate review is independent.").

The anti-SLAPP analysis is a "two-step process." *Grenier v. Taylor*, 234 Cal. App. 4th 471, 480 (2015) (citing Code Civ. Proc. § 425.16(b)(1)). The first step is to determine whether the defendant has shown that the statute even applies. Code Civ. Proc. § 425.16(b)(1). "[S]ection 425.16 requires every defendant seeking its protection to demonstrate" that "the defendant's conduct by which plaintiff claims to have been injured falls within one of the four categories described in subdivision (e)." *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 66 (2002). "[C]ourts do more than simply rubber stamp such assertions before moving on to the second step." *Flatley v. Mauro*, 39 Cal. 4th 299, 317 (2006). If the defendant "fail[s] to make a threshold showing that the causes of action arose from protected activity," there is "no need to address the second step of the anti-SLAPP inquiry"—the motion is denied. *Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811, 819 (2011).

Only if the defendant satisfies the first prong does a court determine whether the plaintiff can demonstrate a "probability" of success. Code Civ. Proc. § 425.16(b)(1). And then, "all that a plaintiff must do to defeat an anti-SLAPP motion is to establish the claim has minimal merit." *Grenier*, 234 Cal. App. 4th at 486. This burden is "not high." *Grewal v. Jammu*, 191 Cal. App. 4th 977, 989 (2011); *see also Sweetwater Union High Sch. Dist. v. Gilbane Bldg. Co.,* 6 Cal. 5th 931, 949 (2019) (statute was "'intended to end meritless SLAPP suits early' . . . *not* to abort potentially meritorious claims due to a lack of discovery") (emphasis in original).[4] To that end, courts must "accept as true all evidence favorable to the plaintiff and assess the defendant's evidence only to determine if it defeats the plaintiff's submission as a matter of law." *Comstock*, 212 Cal. App. 4th at 947. Courts may "not weigh the credibility or comparative probative strength of competing evidence," *Gruber v. Gruber*, 48 Cal. App. 5th 529, 537 (2020), and are "required to 'draw every legitimate favorable

[4] All emphasis is added unless otherwise noted.

inference from the plaintiff's evidence,'" *Kinsella v. Kinsella*, 45 Cal. App. 5th 442, 462 (2020). "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." *Navellier v. Sletten*, 29 Cal. 4th 82, 89 (2002) (emphasis in original).

Here, the trial court's flawed analysis on both steps requires reversal. The lower court erred in holding that the anti-SLAPP statute even applied. Only by focusing on conduct that was not the bases of Warner's claims was the trial court able to conclude that Warner sought liability for protected activity. And even if the lower court correctly determined that Section 425.16 applied, it still erred by concluding that Warner's claims lacked even "a 'minimum level of legal sufficiency and triability.'" *Grewal*, 191 Cal. App. 4th at 989. The trial court disregarded evidence without explanation to find that the litigation privilege applied; made incorrect findings that Warner had not presented

evidence of certain facts; and improperly weighed the evidence rather than determine whether Warner's evidence and inferences, taken as true, could support his claims, which they do.

A. The trial court erred in striking the IIED claim arising from the fake FBI letter pleaded against both Wood and Gore.

1. Forging and distributing the fake FBI letter was not protected activity.

The trial court concluded that "Plaintiff's IIED claim based on the FBI Letter arises out of protected activity" under Section 425.16(e)(1) and (2) because, it found, Wood filed the letter in a family court case against her son's father, Jamie Bell, and "court filings are an example of protected activity." 8AA2012:21-2013:5, 2014:24-27. This was incorrect as a matter of fact and law because (i) Warner's claim is not based on filing the letter in court but the "forging and distributing" of the *undisputedly* fake letter outside court (1AA0026, 0033-35, 0041); and (ii) Wood did not and could not show that the actual basis of Warner's claim falls within the ambit of the anti-SLAPP statute,

including because alleged conduct that is illegal is not protected activity.

(a) The trial court relied on the wrong conduct.

Under subsections (e)(1) and (2) of Section 425, "statement[s] or writing[s] made before a . . . judicial proceeding" or "in connection with an issue under consideration or review by a . . . judicial body" are protected activity. The trial court's holding that Warner's FBI letter claim arose from protected activity relied on the false premise urged by Wood that the claim is "based on a declaration filed in a parentage action." 1AA0059:9-10, 0063:19-20; *see* 8AA2012:21, 2013:20-21.

Defendants like Wood cannot trigger the statute's protections by misidentifying the acts on which a challenged claim is based. *See Ratcliff v. The Roman Cath. Archbishop of Los Angeles*, 79 Cal. App. 5th 982, 1008-09 (2022) (defendant "ignore[d] allegations in its effort to squeeze plaintiffs' negligence cause of action into something fitting its preferred contention regarding protected speech"); *see also Golden Gate Land Holdings*

LLC v. Direct Action Everywhere, 81 Cal. App. 5th 82, 90 (2022) (holding that defendant whose characterization of the claim was not a "fair reading of the complaint" fails to satisfy its burden on step one).

Although there is no dispute that Wood submitted the forgery to a court in March 2021 (1AA034; 1AA0081-82), the challenged portion of Warner's First Cause of Action does not arise from *that* act. *Park*, 2 Cal. 5th at 1063 ("[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute.") (quotation omitted); *see also Baral*, 1 Cal. 5th at 394 ("Allegations of protected activity that merely provide context, without supporting a claim for recovery, cannot be stricken under the anti-SLAPP statute."). Rather, the First Cause of Action arises from "forging and distributing [the] fictitious letter" outside of the custody case months earlier. 1AA0026; *see also* 1AA0041.

The Complaint unmistakably drew this distinction. For example, paragraphs 32-35 discussed how and when the fake letter was created, and then paragraph 36 stated that "*[i]n addition to the crimes detailed above*, Wood submitted the forged letter in a California custody proceeding." 1AA0033-34. Then, Warner's recitation of the claim elements in paragraph 63 stated that the "outrageous" conduct complained of was "falsifying correspondence from a fictitious federal agent." 1AA0041. He also alleged that this conduct was a substantial factor in causing damages because "the forged letter would be used to recruit, encourage, and convince people to claim that they were abused by Warner, because they were being led to believe that Warner was a threat to their safety and under federal investigation." 1AA0035. It makes no difference how he became "aware of" the letter per se. 7AA1709. "Put another way, the complaint's allegations [regarding Wood's custody case] were essentially extraneous to the claims." *Golden Gate*, 81 Cal. App. 5th at 92; *see also Park*, 2 Cal. 5th at 1063 ("[C]ourts should consider the

elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability.").

In agreeing with Wood that the forged letter "never saw the light of day" outside of the custody proceeding (and thus Warner's claim must have been based on (e)(1) or (e)(2) activity), the trial court disregarded or discounted evidence (and inferences) supporting Warner's actual allegations of misconduct. 8AA2013:17-2014:2; *see also* RT906:24-26 (calling Warner's evidence "just speculation"). Neither Wood nor Gore dispute the letter is, in fact, a fake. Warner provided evidence that Wood told third parties that the letter was important to her work *against Warner*—a statement that only makes sense outside the custody case, to which Warner was not a party. 5AA1077. He also provided evidence that Gore was involved with drafting the letter with Wood (5AA1073, 1074-75, 1078-79), that a copy of the letter was found on Gore's iPad (5AA1075-76, 1080-82), and that Gore held herself out to third parties as being involved with the

letter (5AA1143, 1165-67). Neither Wood nor Gore provided any evidence that Gore had any role in the family court proceeding between Wood and Bell. Just the opposite, the evidence showed that Gore (and Wood) drafted language for letter in November 2020 (5AA1073, 1074-75, 1078-79), around the time that Gore was using reference to a fictitious FBI investigation of Warner as a tool to recruit potential accusers (*see, e.g.*, 4AA935-39; 4AA1012-15[5]; 5AA1140), and four months before Wood also used it in connection with an *ex parte* proceeding (1AA0082 (¶ 22)). The trial court was not entitled to ignore or discount this evidence. *See Gruber*, 48 Cal. App. at 537; *Kinsella*, 45 Cal. App. 5th at 462; *see also* Code Civ. Proc. § 425.16(b)(2) ("[T]he court shall consider the pleadings, and supporting *and opposing affidavits* stating the facts upon which the liability or defense is based.").

[5] The trial court abused its discretion in sustaining an objection to this evidence. *See infra*, § IV.B.1.

Nor was the trial court entitled to rely exclusively on Wood's self-serving declaration, which stated that *she* did not forge or distribute the letter, as conclusive proof that the letter was not ever used outside the family court proceeding. 8AA2013:17-21; 7AA1708:14-15 (citing 1AA1082 (¶ 22) by cross-reference). Wood's declaration said nothing about Gore, and Gore did not submit any evidence about her involvement with the fake letter. Wood's declaration also said nothing about why the letter was created—just that, at some point in time, Wood "received a copy." 1AA1082 (¶ 22). Thus, the undisputed evidence of Gore's possession of and involvement with the letter alone refute Wood's suggestion and the trial court's conclusion.

Putting aside the trial court's focus on Wood's family court filings, neither Wood nor the trial court attempted to show that the conduct on which Warner's claim is based—forging and distributing the fake letter—"falls within one of the four categories described in subdivision (e)." *Equilon*, 29 Cal. 4th at

66; *see also Grenier*, 234 Cal. App. 4th at 480; 1AA0064:18-0065:23.

More fundamentally, Wood's step-one argument and evidence—that she did not engage in the conduct alleged—"presents a curious use of the anti-SLAPP statute" that "does not achieve [its] purpose." *Ralphs Grocery Co. v. Victory Consultants, Inc.*, 17 Cal. App. 5th 245, 266 n.8 (2017). As the Fourth District explained in *Ralphs*:

> Respondents' primary argument is that they have not and do not engage in the protected activity at issue in the operative complaint. Thus, the anti-SLAPP motion in the instant matter is not guarding Respondents as they engage in constitutionally protected contact. In this sense, it appears their motion is more appropriately brought as a motion for summary judgment.

Id.

Thus, the finding of protected activity was erroneous and the motion to strike this portion of the claim should have been denied without proceeding to step two. *Oasis,* 51 Cal. 4th at 819.

(b) Undisputedly illegal activity like forging a letter from an FBI agent is not protected activity.

It was also error to move past step one because "[t]o the extent [Warner] alleges criminal conduct, there is no protected activity as defined by the anti-SLAPP statute." *Gerbosi v. Gaims, Weil, W. & Epstein, LLP*, 193 Cal. App. 4th 435, 445 (2011); *Lefebvre v. Lefebvre*, 199 Cal. App. 4th 696, 706 (2011) ("illegal activity" is "not a constitutionally protected exercise of the right of petition or free speech"). The trial court incorrectly concluded that because Wood said that she "did not fabricate or forge the FBI Letter," the alleged act of forgery was not illegal. 8AA2014:19-27.

The Supreme Court's decision in *Flatley v. Mauro*, 39 Cal. 4th 299 (2006) discusses illegality in this context:

> [W]here a defendant brings a motion to strike . . . based on a claim that the plaintiff's action arises from activity by the defendant in furtherance of the defendant's exercise of protected speech or petition rights, but either the defendant concedes, or the evidence conclusively establishes, that ***the assertedly protected speech or petition activity***

> was illegal as a matter of law, the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff's action.

Flatley, 39 Cal. 4th at 320.

Thus, as later appellate decisions have explained, the critical question on step one is whether Warner's claim "is based on alleged criminal activity," not whether Wood agrees she engaged in that activity. *Gerbosi*, 193 Cal. App. 4th at 445. "[M]erits based arguments have no place in [the] threshold analysis of whether plaintiffs' causes of action arise from protected activity." *Sprengel v. Zbylut*, 241 Cal. App. 4th 140, 156 (2015); *Gerbosi*, 193 Cal. App. 4th at 447 (while a plaintiff may have "winning defenses to [the] causes of action alleging criminal activity . . . those defenses must be established by a procedural tool other than the anti-SLAPP motion procedure").

Gerbosi is directly on point and illustrates the trial court's error. There, the plaintiff sued a law firm for various claims arising out of the firm's alleged wiretapping. 193 Cal. App. 4th at 445. Like Wood did here, the firm argued that "it satisfied the

first step of the anti-SLAPP procedure" because "its evidence showed it did not do the acts that [plaintiff] alleges it did," and thus the conduct was not "conclusively" illegal. *Id.* at 446. The Second District disagreed. *Id.* "***A showing that a defendant did not do an alleged activity is not a showing that the alleged activity is a protected activity."*** *Id.* Rather, the focus must be on whether the conduct alleged is illegal, lest a defendant accused of even undisputedly illegal activity could simply "deny[] [the] allegation," thereby "eviscerat[ing] the first step of the two-step inquiry." *Id.* If anything, Wood's assertion that she did not "fabricate or forge the FBI letter" and "believed it to be authentic" (1AA0082), "is more suited to the second step of a[n] anti-SLAPP motion," not the first. *Gerbosi*, 193 Cal. App. 4th at 446.[6]

[6] The trial court did not cite, distinguish, or otherwise acknowledge *Gerbosi* in its order. Warner's counsel raised it again at the hearing, but the trial court stated, "As you can tell, I looked at the papers here, so I think I'm pretty much aware of everything that you have identified." RT907:14-20.

Focusing on the conduct alleged, forgery and impersonation of a federal agent—like wiretapping—is "conclusively" illegal under multiple criminal statutes. *Flatley*, 39 Cal. 4th at 320. It is a federal crime to "falsely assume[] or pretend[] to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof," regardless of the claimed purpose. 18 U.S.C. § 912; *United States v. Wade*, 962 F.3d 1004, 1011 (7th Cir. 2020) ("[A]n intent to defraud or deceive is not a separate element of § 912."). The only *mens rea* required by Section 912 is "the defendant's knowledge that [s]he is not truly an officer or employee of the United States," which Wood did not and could not dispute. *Wade*, 962 F.3d at 1011; *see also* 7AA1709:3-6. "False personation" and "forgery" are also crimes under California law. *See* Penal Code §§ 529, 470. Thus, Wood's assertion that she did not "fabricate or forge the FBI letter" and "believed it to be authentic" (1AA0082), is non-responsive to the question at hand. *Gerbosi*, 193 Cal. App. 4th at 446.

But even assuming the court below correctly applied the law to *Wood's* denial, it still committed error because neither defendant provided any evidence denying *Gore*'s role in forging the letter. While this should have stopped the anti-SLAPP analysis in its tracks as to both defendants, at the very least, it precluded the court from striking the claim against Gore. RT914:1-2.[7] Warner's First Cause of Action was against Wood *and Gore*, and the Complaint stated in several places that it was based on "Wood's *and Gore's* wrongful conduct," which included that "*[t]hey* impersonated an actual agent of the Federal Bureau of Investigation by forging and distributing a fictitious letter from the agent . . . ." 1AA0026; *see also* 1AA0041 ("Gore's and Wood's conduct . . . included . . . falsifying correspondence"). Thus, applying the trial court's interpretation of *Flatley*, it was

[7] To the extent the trial court did not strike the claim against Gore, it failed to make that clear, despite Warner's counsel arguing that the order did not strike the claim against Gore, and Wood's and Gore's counsel arguing that it did. RT910:25-911:27; 912:5-914:26. Rather, the trial court said, "I'm not clarifying anymore. I have already spent so much time on this. . . [We]'ve covered as much as we are going to cover." RT913:28-914:26.

"concede[d] . . . that the assertedly protected speech or petition activity was illegal as a matter of law" because no evidence denied (or even questioned) *Gore's* involvement. 39 Cal. 4th at 320.

2. The litigation privilege does not immunize the fake FBI letter merely because it was also filed in a court proceeding.

On the second step of the anti-SLAPP analysis, the trial court concluded that Warner's claim was barred by the "litigation privilege," Civil Code Section 47(b), which precludes liability for certain "'communication[s] . . . made in judicial or quasi judicial proceedings.'" 8AA2015:6-9 (quoting *Rohde v. Wolf*, 145 Cal. App. 4th 38, 37 (2007)). According to the trial court, the privilege barred Warner's claim because he alleged that "'Wood submitted the forged letter in a California custody proceeding,'" but did "not allege knowledge of the FBI Letter being used with anyone outside of the custody dispute." 8AA2015:1-5, 2015:15-16. This was error for at least four reasons.

First, as discussed above, the trial court was incorrect on the facts. Warner's allegations and evidence show that the letter

was used outside the family court case—at the very least with Gore. *Supra*, § IV.A.1(a). Neither Wood nor Gore presented any evidence to the trial court of Gore's role (if any) with the "custody dispute" between Wood and Bell. Gore therefore was "outside of the custody dispute." The trial court was not entitled to disregard Warner's allegations and evidence. *See Comstock,* 212 Cal. App. 4th at 947 (courts must "accept as true all evidence favorable to the plaintiff and assess the defendant's evidence only to determine if it defeats the plaintiff's submission as a matter of law"); *Ralphs,* 17 Cal App. 5th at 265 n.7 (defendant's evidence must "negate" plaintiff's evidence "as a matter of law").

Second, the trial court erred by relying on Wood's declaration, in which she denied forging or distributing the letter, to the exclusion of Warner's evidence. *See* 8AA2015:10-16 (cross-referencing discussion in order addressing step one). Trial courts analyzing the record under the second step may not weigh the evidence or resolve conflicting factual claims. *Gruber*, 48 Cal. App. 5th at 537. Nor are they permitted to treat a defendant's

denial of a plaintiff's allegations as conclusive. As the Second District recently explained:

> A defendant's declaration denying that he or she engaged in the conduct alleged in the complaint does not foreclose the possibility that a fact finder could later find that he or she did in fact engage in that conduct. Foreclosing an anti-SLAPP motion based upon one version of the facts would irrationally and unfairly disregard this possibility.

Belen, 65 Cal. App. 5th at 1160; *see also Ralphs,* 17 Cal App. 5th at 266 n.7; *Billauer v. Escobar-Eck*, 88 Cal. App. 5th 953, 977 (2023) (declaration denying that defendant made the allegedly defamatory Facebook post "does not defeat [the] claim as a matter of law" but rather "creates a question of fact for the fact finder to resolve.").

Third, Warner's cause of action was not based on a "communication . . . made in a judicial . . . proceeding," and the alleged conduct outside the court proceeding was not privileged merely because the fake letter was also used in court. 8AA2015:6-9. Said differently, Wood's later filing of the fake letter in her case with Bell did not automatically immunize all

liability arising separately from forging and distributing the letter. *See Moten v. Transworld Sys. Inc.*, 98 Cal. App. 5th 691, 705-07 (2023) (where allegedly fraudulent attachments to complaint violated debt-collection statute, claim was not barred by litigation privilege because plaintiff "alleged more than just the filing of the lawsuit" as the basis for her claim); *Chen v. Berenjian,* 33 Cal. App. 5th 811, 821 (2019) (privilege did not apply where "the agreement to defraud," not "filing the sham complaint," was "the gravamen of [the] fraudulent transfer cause of action").

If the court's reasoning were correct, then any forger could easily insulate herself from liability for the forgery by later attaching it as an exhibit to a lawsuit. The discussion in *Pettit v. Levy*, 28 Cal. App. 3d 484 (1972) is instructive. The Fifth District explained that under Section 47(b), the filing of a forged document in a judicial proceeding does not shield the forgery where (like here) it is alleged that the forgery was used "other than in connection with the proceeding" or that "damage resulted

other than by" the result of the proceeding. *Pettit*, 28 Cal. App. 3d at 491. There, defendants altered plaintiffs' building permits and submitted them to the City of Fresno so the City would deny plaintiffs' requested zoning variance. *Id*. at 487-88. For purposes of Section 47(b), the Court did not separate the act of forgery from the harm caused by the City's denial of the variance, but only because the "*only acts alleged* to have been done pursuant to the conspiracy are the preparation and submission of a false or forged building permit to the City":

> [The] complaint herein does not allege, nor have appellants contended at any stage of this case, that there was any publication or use of the false or forged permit other than in connection with the proceedings before the Fresno City Planning Commission and City Council. Nor do they allege that any damage resulted other than by the denial of a zoning variance to them by reason of its use before those bodies. Our decision herein is necessarily limited to those alleged facts.

Pettit, 28 Cal. App. 3d at 487-88.

The cases cited by Wood and the trial court are in accord, and in each instance, the forgeries or false statements (unlike

here) were created for or arose out of a judicial proceeding. 8AA2015:22-2016:10; 1AA0066:22-0067:5. The decision in *Carden v. Getzoff*, 190 Cal. App. 3d 907 (1987), involved claims against an expert witness who prepared an allegedly false business valuation "to be used in the negotiation of a settlement agreement" of a dissolution action, and which "forced [the appellant] to settle." *Id.* at 909. Likewise, the decision in *Pollock v. Univ. of S. Cal.*, 112 Cal. App. 4th 1416 (2003), involved an abuse of process claim arising from an allegedly false declaration filed in a prior litigation and an attached email that was "generated in response to" that litigation. *Id.* at 1439-40. And the decision cited by the court below, *Kenne v. Stenis*, 230 Cal. App. 4th 953 (2014), involved an allegedly false police report that was "directly related to plaintiff's attempt to serve civil process on defendants during the course of plaintiff's lawsuit." *Id.* at 971. To the contrary, Warner's Complaint alleged that the FBI letter existed, and was used, outside of the custody proceeding. *See, e.g.*, 1AA0026, 0035; *see also* 1AA0030, 31. Wood offered no

evidence about Gore's role or why the letter was created months earlier—just that Wood "received" it and filed it in court.

Fourth, even to the extent Wood's filing of the fake letter in her custody case triggered the litigation privilege, the trial court could only strike the claim against Wood, not also against Gore. "Non-participants and non-litigants to judicial proceedings are never protected from liability under Section 47(b)." *Wise v. Thrifty Payless, Inc.*, 83 Cal. App. 4th 1296, 1304 (2000).

Here, it is undisputed that Gore was neither a participant nor a litigant in Wood's family court case. She was not a party to Wood's parentage action with Bell. *See, e.g.*, 3AA0462. And none of the trial court, Wood, or Gore identified any "communication . . . made in a judicial . . . proceeding" *by Gore* or any role that Gore played in Wood's parentage action. Wood's declaration does not mention Gore, and Gore did not file a declaration discussing the fake FBI letter or Wood's custody case. Wood's counsel conceded at the anti-SLAPP hearing that striking the claim

against Gore was based on *Wood's* "petitioning activity" and "court filing," not anything Gore did. *See* RT912:13-20.

Because the trial court "only considered the litigation privilege in considering the probability that [Wood] would prevail on her claims," and that conclusion was erroneous, "[r]emand is necessary in order for the trial court to consider whether, without applying the litigation privilege, and considering the evidence presented, [Warner] would prevail on [his] claim." *Moten*, 98 Cal. App. 5th at 707.

3. Because Gore did not move to strike the claim against her, it was error for the trial court to do so.

At the anti-SLAPP hearing, the trial court declined to confirm that by granting Wood's motion, it was *not* striking the cause of action against Gore, who did not move to strike it or join in Wood's motion. RT910:25-911:27; 912:5-914:26; *see also* 8AA2016:11-12. Instead of providing clarification on this critical issue, the trial court heard from Wood's and Gore's counsel—who strenuously argued that granting Wood's motion also excised Gore—and then stated, "I'm not clarifying anymore. I have

already spent so much time on this." RT910:25-911:27; 912:5-914:26. The trial court did not have the authority to do what Wood and Gore urged it to do.

The anti-SLAPP statute authorizes trial courts to strike certain causes of action under specific circumstances:

> A cause of action *against a person* arising from *any act of that person* in furtherance of *the person's right of petition or free speech* under the United States Constitution or the California Constitution in connection with a public issue *shall be subject to a special motion to strike*, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

Code Civ. Proc. § 425.16(b)(1).

None of these requirements are present with respect to the cause action against Gore based on Gore's conduct. *See* 1AA0041 (alleging that "Gore's and Wood's conduct was outrageous"). The only "special motion to strike" concerning the fake FBI letter was filed by Wood. *Compare* 1AA0052, *with* 2AA0288 & 0328. Wood's motion and declaration did not discuss "any act of" Gore. And, in granting Wood's motion, the trial court did not discuss

"any act of" Gore much less make any finding that "any act of" Gore was "in furtherance of [Gore's] right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." 8AA2015:1-2016:12. Rather, Wood's motion and the trial court's order only concerned alleged "act[s] of" Wood. *Id.* Indeed, her counsel conceded at oral argument that Wood's motion was based only on Wood's own conduct. *See* RT912:13-20.

Wood and Gore's argument, if credited, would rewrite the statute and render the words "a person" and "that person" meaningless. *See San Diego Police Officers' Assn. v. City of San Diego Civ. Serv. Com.*, 104 Cal. App. 4th 275, 284 (2002) (courts are "required to give independent meaning and significance to each word, phrase, and sentence in a statute and to avoid an interpretation that makes any part of a statute meaningless").

Accordingly, the anti-SLAPP statute was never triggered for the "cause of action against [Gore] arising from any act of" Gore—the fundamental condition of the statute. Code Civ. Proc.

§ 425.16(a)-(b)(1). The burden never shifted to Warner to show a probability of prevailing as it concerned the cause of action against Gore, and therefore the trial court's conclusion on step two, that litigation privilege barred recovery, never applied to Gore.

In sum, to the extent the trial court struck the claim against Gore, that ruling was in error and should be reversed; the claim for liability arising from the fake FBI letter must proceed against Gore without any further analysis of the merits at this stage.

B. The trial court erred in striking the IIED cause of action arising from recruiting, coordinating, and pressuring people to make false accusations of abuse.

1. The trial court made evidentiary rulings that were an abuse of its discretion.

The trial court made at least two erroneous rulings on evidentiary objections that were an abuse of discretion and should be reversed. *Twenty-Nine Palms Enterprises Corp. v. Bardos*, 210 Cal. App. 4th 1435, 1447 (2012).

First, the trial court should have sustained Warner's Objection No. 1 to paragraph 14 of Wood's declaration, which stated that she met with "some of the other victims of Mr. Warner." 7AA1765. The trial court provided no basis for its ruling. 8AA2008. While there is no dispute that Wood could have stated that she attended a meeting and identified who she met with, her assertion that these people were "victims of Mr. Warner" lacked personal knowledge, Evid. C. § 403, and is based entirely on hearsay, Evid. C. § 1200. Wood offered no declarations from any of these "victims" stating that they had "similar experiences" as Wood claims she had with Warner. *See Sanchez v. Bezos*, 80 Cal. App. 5th 750, 765 (2022) ("purported out-of-court statements recounted in [party's] declaration are hearsay"). She did not identify any hearsay exception and conceded that her characterization was based on those unidentified people's out of court statements. 7AA1766:17-18. Yet, Wood relied on the supposed fact that they were "other victims" in her anti-SLAPP motion (*see, e.g.*, 1AA0071:2-7)—as

did the trial court in agreeing to strike Warner's claims (*see, e.g.*, 8AA2018:18-20 (meeting with "other victims" was "protected activity").

Second, the trial court should have overruled Defendants' Objection No. 7. This "objection" was simultaneously made to fourteen exhibits on at least four grounds. 7AA1782:2-11 (Exhibits J, K, L, M, N, Q, R, S, T, U, W, X, Y, and Z to the Supplemental King Declaration). The court abused its discretion when it summarily "sustained" the objection (1AA2008:13), and excluded all fourteen exhibits, without providing any basis or explanation for its ruling. *Twenty-Nine Palms*, 210 Cal. App. 4th at 1447. In any event, the requisite foundation, personal knowledge, and authenticity were established: The exhibits are electronic files extracted from an iPad that Gore gave to her sister, Bryton Gore. 5AA1074; 5AA1124; 4AA0949-50. Bryton then gave the iPad to a forensic e-discovery specialist, who used industry-standard methods to extract the files from the device. 5AA1124. Those files were then provided to Warner's counsel

who attached them to his declaration. *Id.*; 4AA0949-50. Defendants did not dispute this. 8AA2024:21-24. Rather, Defendants contended that no one (except presumably Gore) could "testify as to what each file is, who created it, when, why, and for what purpose." 8AA2025:1-3. None of that, however, is required under the evidence code or applicable law, and it would be absurd to require that of a party opposing an anti-SLAPP motion under the circumstances, including because of the automatic discovery stay under Code Civ. Proc. 425.16(g). *See* 8AA2026:28-26:1. (Regardless, the trial court denied Warner's request to take limited discovery on these very topics, *see* 4AA0443:16-25, 4AA0452-55, which separately requires reversal, *infra*, § IV.D.) The exhibits are not hearsay either, because they either (i) were not offered for the truth of any matter asserted or (ii) were Defendants' own words. Evid. C. §§ 1200, 1240. Thus, Defendants did not and could not show that these exhibits "could *never* be introduced at trial," the applicable standard, and thus it was erroneous to exclude them from consideration of Warner's

oppositions. *Sweetwater*, 6 Cal. 5th at, 947; *see also Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles*, 117 Cal. App. 4th 1138, 1145 (2004) (declining to exclude videotape, for purposes of anti-SLAPP analysis, "which is only excludable on the ground it lacks proper authentication").

2. Recruiting, coordinating, and pressuring people to make false accusations of abuse is not protected activity.

The trial court's holding that Wood and Gore satisfied their step-one burden was incorrect on both the facts and the law. 8AA2019:10-14, 2029:3-7.

First, the trial court erroneously "agree[d] with Wood" that because "the IIED claim [was] based on Wood's communications with *other victims*" it "involves a matter of public interest" and "arises from protected activity" under subsections (e)(3) and (e)(4). 8AA2016:19-23, 2018:18-20. Although the trial court needed to "consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based," none of these could have led to its conclusion. Code Civ. Proc. § 425.16(b)(2). As alleged in the Complaint, the premise of

the claim—and the suit generally—is that the people with whom Wood communicated were *not* victims but were coaxed into making "*false* accusations against Warner." 1AA0041; *see also* 1AA0026 ("This action arises from . . . a conspiracy . . . to publicly cast Plaintiff . . . as a rapist and abuser—a malicious falsehood[.]"). Nor was there any admissible evidence from which the trial court could conclude that Wood (or Gore) spoke to "other victim[s]." 8AA2029:8-11; 7AA1765:9-1766:11; *supra*, § IV.B.1. The May 9 Order cites none, and neither Wood nor Gore offered evidence from any supposed "other victim." The only "evidence" offered by either defendant was Wood's declaration, in which she stated that she "met with some *other victims* of Mr. Warner" in 2020 who "had similar experiences" as Wood claims she had. 1AA0080 (¶ 14). But her assertions about what may have happened to others were based not on personal knowledge but hearsay. Evid. C. §§ 403, 1200; *supra*, § IV.B.1. The only

admissible evidence submitted by any party was that these people were *not* victims. *See* 6AA1287-88.[8]

Second, the trial court also tried to justify a finding of "protected activity" by relying on acts of third parties. 8AA2028:12-15; *see also* 8AA2017:16-25. But the eventual false accusations of abuse by third parties are not the basis for Warner's claim against Wood and Gore, and thus whether *those* acts are protected activity is immaterial to Wood's and Gore's motion concerning their own conduct. *Park*, 2 Cal. 5th at 1061 (protected activity must "itself [be] the wrong complained of"); *see also* Code Civ. Proc. § 425.16(b)(1) (only "[a] cause of action against *a person* arising from any act of *that person* in furtherance of *the person's* right of petition or free speech . . . shall be subject to" the anti-SLAPP statute).

Third, the trial court incorrectly concluded that Wood's and Gore's communications were protected activity because "domestic

[8] One of these supposed "victims" provided sworn testimony that she "succumbed to pressure" to allege abuse falsely, which the trial court erroneously declined to consider. 7AA1856; 8AA1996.

violence" is "an extremely important public issue in our society." *See, e.g.*, 8AA2028:7-2029:6. Under this view, *any* statement about domestic violence would be protected activity. But that is not the law. *See, e.g. Weinberg v. Feisel*, 110 Cal. App. 4th 1122, 1134 (2003) (rejecting argument that "statements accused plaintiff of criminal activity and that criminal activity is always a matter of public interest"). Defendants may not merely "connec[t] their speech to an abstract issue of public interest." *FilmOn.com Inc. v. DoubleVerify Inc.,* 7 Cal. 5th 133, 150 (2019) ("[I]t is not enough that the statement refer to a subject of widespread public interest."). The trial court relied on one case, *Sipple v. Found. For Nat. Progress*, 71 Cal. App. 4th 226 (1999), in which a magazine article containing allegations of domestic abuse against a prominent political strategist was held to be protected activity. *Id.* at 238. However, as later cases have explained, the key fact in *Sipple* was that the plaintiff "injected himself" into the public discourse about domestic violence in society by "devis[ing] media stragetg[ies]" for candidates "based

on morality issues" and "against domestic violence," thereby "capitaliz[ing] on domestic violence issues in order to further his career." *Id.* at 238-39; *see also Albanese v. Menounos*, 218 Cal. App. 4th 923, 936 (2013) (distinguishing *Sipple* because "[t]here was no similar evidence in this case that [plaintiff], for example, by publicly promoting her own moral superiority had invited public comment"); *Weinberg*, 110 Cal. App. 4th at 1133 (describing *Sipple* as "involv[ing] allegations of domestic violence against a nationally known political consultant who successfully had used the domestic violence issue in a number of political campaigns").[9]

There are no similar facts here. Contrary to the trial court's suggestions, Warner's occupation in the entertainment business does not mean that all aspects of his personal life over ten years ago automatically become an issue of public interest.

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[9] *Sipple* also concerned protected activity under Code of Civil Procedure Section 425.16(e)(3). The statements at issue were published in a magazine article, and thus, unlike like the alleged conduct here, met the requirement in (e)(3) of a statement "made in a place open to the public of a public forum."

Albanese, 218 Cal. App. 4th at 936 (rejecting argument that "any statement about a person in the public eye is a matter of public interest"). Similarly,"a person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people," and thus, the trial court's reliance on publicity that Wood and Gore's wrongful conduct caused (8AA2018:24-14:9) is misplaced. *Weinberg*, 110 Cal. App. 4th at 1133.

In sum, the trial court's analysis should not have proceeded to step two; this Court should reverse.

3. The trial court made multiple errors in concluding that the alleged conduct could never be considered "outrageous."

A claim for intentional infliction of emotional distress requires, among other things, a showing that "the defendant engaged in extreme and outrageous conduct." *Ross v. Creel Printing & Publ'g Co.*, 100 Cal. App. 4th 736, 744-45 (2002). False accusations of abuse are outrageous, *see Siam v. Kizilbash,* 130 Cal. App. 4th 1563, 1582 (2005), and a jury could easily find that recruiting, pressuring, and organizing people to make false

accusations of abuse is similarly outrageous. Nevertheless, the trial court took that question away from the jury by concluding—before discovery was allowed—that Warner's claim had no merit because that it "d[id] not find that [he] has demonstrated 'outrageous conduct.'" 8AA2029:13-18; *see also* 8AA2022:1-4. This was wrong for at least three reasons.

First, the trial court applied the wrong standard. It was not Warner's burden to "demonstrat[e] 'outrageous conduct,'" but rather, to make a prima facie showing of outrageous conduct. *See Siam,* 130 Cal. App. 4th at 1582; *Grenier*, 234 Cal. App. 4th at 486-87. Wood and Gore do not deny they accused Warner of "vile and depraved activities." *Grenier*, 234 Cal. App. 4th at 486-87; *see also Siam,* 130 Cal. App. 4th at 1582 (allegations of abuse). Yet, the only admissible evidence is that Warner did *not* commit the alleged abuse. 4AA1043. He also presented evidence of communications in which Gore sought to enlist accusers on behalf of Wood, as well as court filings in which people who met with Wood stated that they gained "new memories" of abuse

thereafter. *See* 3AA0561; 4AA935-39; 2AA0189, 0191, 0237-38. Warner presented declarations from people Gore contacted, who refused to participate. *See* 3AA0561. Warner also presented undisputed evidence stating that the public, simultaneous accusations of abuse made for the first time ten years after the alleged abuse occurred, and only after meeting with Wood and/or Gore, were unequivocally false. 4AA1043. And Warner presented checklists and scripts, found on Gore's iPad, that matched the overlapping allegations of the false accusers who simultaneously emerged in February 2021. 5AA1084-88. On step two of the anti-SLAPP analysis, Warner was entitled to have his evidence—and the reasonable inferences to be drawn therefrom—credited, unless Wood or Gore presented evidence that negated Warner's proffer as a matter of law. Just the opposite, the trial court parsed individual pieces of evidence, and agreed with Wood's and Gore's *characterizations* that each did not itself "demonstrate outrageous conduct." 8AA2020:21-2021:26.

Second, and relatedly, the trial court violated the rule that "disputed issue[s] of fact . . . cannot be resolved on an anti-SLAPP motion." *Crossroads Invs., L.P. v. Fed. Nat'l Mortg. Assn.*, 13 Cal. App. 5th 757, 788 (2017). Whether Warner's evidence (and inferences), showed conduct that, as a whole, could be considered "outrageous" was, at worst, a disputed question of fact. *See Plotnik v. Meihaus*, 208 Cal. App. 4th 1590, 1613-14 (2012). Whether the people Gore and Wood communicated with were actual "victims" was also, at worst, a disputed issue of fact. *See* 4AA1043. Yet, the trial court relied on the unsupported premise that Warner's claim against Wood was based on "her communications with other victims." 8AA2020:9-10. As discussed above, there was no admissible evidence demonstrating that Wood met with any "other victims"—just her own foundationless hearsay testimony. *Supra*, § IV.B.1. Whether the people Gore and Wood communicated with were in fact "pressured" was no worse than a disputed question of fact, regardless of Wood's declaration saying that she "never pressured

anyone." *Belen*, 65 Cal. App. 5th at 1160; *see also Ralphs,* 17 Cal App. 5th at 265 n.7.[10] Thus, it was wrong to grant the motions on these grounds. *Billauer*, 88 Cal. App. 5th at 965 ("If there is a conflict in the evidence (the existence of a disputed material fact), the anti-SLAPP motion should be denied.").

Third, the trial court abused its discretion to allow material, supplemental evidence by disregarding the declaration of a third-party who finally decided to recant her false accusations of abuse against Warner and detail how she was pressured by Wood, Gore, and their associates to make those false accusations. 8AA1996; 7AA1844; 7AA1856. Even though the anti-SLAPP hearing was still months away, and Warner promptly sought leave, the trial court's sole reason for disregarding this critical evidence was that the declaration was "not obtained sooner." RT[2/28/2023 Hrg. Tr.]2:27-3:2, 5:14-15.

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[10] Notably, Gore provided no declaration regarding this issue, but instead used counsel as a mouthpiece to argue disputed interpretations of evidence (from her own iPad)—which the trial court ultimately adopted. 7AA1496:9-17, 1499:2-10; *see also* 7AA1601.

But claims with "even minimal merit" must not be stricken at the anti-SLAPP stage. *Navellier*, 29 Cal. 4th at 124 (only causes of action "lack[ing] even minimal merit" may be stricken). Although Warner knew the third party's accusations were false—and submitted his own timely declarations to that effect (*e.g.*, 4AA1043 (¶ 3))—he had no control over the timing of Smithline's decision to recant and provide sworn testimony. Indeed, she was still suing him in federal court. *See* 2AA131:3-7. Nor could have Warner taken her deposition given that there was a discovery stay in place under Code of Civil Procedure Section 425.16(g). *See Wilson v. Cable News Network, Inc.*, 7 Cal. 5th 871, 891 (2019) (admonishing trial courts "'not to abort potentially meritorious claims due to a lack of discovery'").[11] And there

[11] The trial court tried to justify its ruling on the grounds that Warner had not taken or requested to take Smithline's deposition. *See, e.g.*, RT[2/28/2023 Hrg. Tr.]2:27-3:2. But there was a discovery stay, and all the depositions he did request were denied—except for a narrow deposition on Gore's state of mind—because the court already concluded the alleged conduct was not "outrageous" and thus there was not good cause. 8AA2014:25-2016:5. In fact, in making this finding, the trial court excluded Instagram messages *from Smithline*, in which she admitted to a

would have been no prejudice to Defendants in supplementing the record, including because the anti-SLAPP hearing (which had been continued multiple times) was still months away, and Warner stipulated that Defendants could respond and object to the declaration. *See Cornerstone Realty Advisors, LLC v. Summit Healthcare Reit, Inc.*, 56 Cal. App. 5th 771, 804 (2020) (trial court had authority to "receive supplemental or additional declarations for the court's guidance and decision" especially where opposing party "had a full and fair opportunity to respond"). As explained in Warner's request for leave to supplement the record before the trial court, the declaration showed outrageous conduct and would have been directly responsive to Defendants' contention that there was no "admissible evidence substantiating his allegations that Wood [or Gore] engaged in 'extreme and outrageous' conduct by pressuring women 'to make false accusations against [Plaintiff],'" with which the trial court agreed two months later.

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third party that she was pressured to make the very same false accusations that Warner denied and she later recanted. 3AA0447:15-19; 8AA2015:20-21.

7AA1600-01; 7AA1496 ("He offers no evidence of a single woman recruited, pressured, or coerced by Gore to make accusations against him."); *Siam,* 130 Cal. App. 4th at 1582; *Grenier*, 234 Cal. App. 4th at 486-87. And it directly disputed Wood's declaration that stated Wood did not pressure anyone, which the trial court adopted as true and repeatedly cited in its decision granting the anti-SLAPP motions. *See, e.g.*, 8AA2020 15:18-20. The trial court was not powerless to accept this evidence—it had the authority to receive "supplemental or additional declarations" but chose not to and to rule instead that Warner could not show even a probability of prevailing on the "outrageous conduct" element. *Cornerstone*, 56 Cal. App. 5th at 804 ("A trial court has inherent power to exercise its discretion to control the proceedings before it, and this power includes the authority to receive supplemental or additional declarations for the court's guidance and decision."); *Johnson v. Banducci*, 212 Cal. App. 2d 254, 260 (1963) ("[A] trial court has inherent power, independent of statute, to exercise its discretion and control over all proceedings relating to the

litigation before it.")). Deciding to ignore a third-party declaration that confirmed Warner's claim had at least minimal merit, solely on the grounds that it had not been "obtained sooner," was an abuse of discretion. *Accord Wilson*, 7 Cal. 5th at 891.

In sum, the trial court should not have concluded that Warner was unable to carry his burden on step two, and thus its order should be reversed.

C. The trial court erred by striking Warner's IIED and defamation claims arising from false statements about his film "Groupie."

Gore peddled falsehoods about a film that Warner made in the 1990s, including that "the girl in Groupie was underage," Warner "knew the girl was underage," and "the film was child pornography." 8AA2032:1-3 (quoting 5AA1140:17-28); *see also* 1AA040, 042-43. Warner's claims based thereon should not have been stricken.

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1. Gore's statements about "Groupie" were not protected activity.

The trial court erroneously "agree[d]" that "Gore's statements about 'Groupie'"—a 25-year-old, unreleased film—"concern a matter of public interest and are protected activity" under Code of Civil Procedure Section 425.16(e)(4).[12] 8AA2022:18-19, 2030:6-23. According to the court, Gore's statements "can be deemed to serve the interests of preventing child sexual abuse and protecting children from sexual predators." 8AA2023:11-15. But this is wrong on the law and the facts.

The trial court's sole reliance on *Cross v. Cooper*, 197 Cal. App. 4th 357 (2011) is misplaced. 8AA2022:18-2023:20. *Cross* concerned claims by a homeowner arising from a threat by her tenant to disclose to a potential homebuyer's agent that a

[12] This subdivision concerns "conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." Code Civ. Proc. § 425.16(e)(4).

"registered sex offender lived nearby." 197 Cal. App. 4th at 364. The Sixth District recognized that "preventing child sexual abuse and protecting children from sexual predators are issues of widespread public interest" and with respect to the specific "disclosure" alleged, found that it was protected activity "insofar as" it "served those interests by alerting prospective buyers of the potential risk to children posed by a registered sex offender who lived nearby." *Id.* at 375. *Cross* does not stand for the proposition that *any* statement about alleged child abuse is protected under subsection (e)(4).

Unlike the threatened disclosure in *Cross*, there is no evidence that Gore's conversations about "Groupie" with adults who Gore asserts were abused years earlier, served to "alert" anyone to the risk of child abuse. *See* 5AA1140; 6AA1300, 1304, 1306 (internal 34:2-15, 55:7-17, 67:22-24); 4AA0935-39. And also unlike in *Cross,* which involved a "registered sex offender," the 25-year-old film provided no basis to "protect[]" children from Warner, because the film's actress was not actually underage

(5AA1094:15-16; 4AA1043:22-24), and Gore admitted she did not know whether the film in fact depicted illegal activity (she had never even seen it) (6AA1306, 1316 (internal 64:13-65:2, 92:14-93:11)). The Complaint is also no help because in it Warner alleged that Gore used these statements as a tactic to encourage false accusations of abuse that fit Gore's narrative—not to warn any parents or have a conversation about the ills of society. *See, e.g.*, 1AA0040; *see also* 7AA1726:8-21.[13]

Likewise, Wood and Gore's reliance on *M.G. v. Time Warner, Inc.,* 89 Cal. App. 4th 623 (2001), which they contend stands for the proposition that any statement concerning alleged child abuse is protected activity, is also misplaced. 2AA299:15-16; 1AA0072:2-9. As the Supreme Court has explained, "the

[13] For the same reasons, *Terry v. Davis Cmty. Church,* 131 Cal. App. 4th 1534 (2005), cited by Wood, is also inapposite. 1AA0072. A report to the parents of a church youth-group members regarding allegations of abuse of a child by a youth-group leader concerned the "protection of children in church youth programs" and to that end stoked "discussion" among the parents of "how to prevent such" abuse. *Terry,* 131 Cal. App. 4th at 1548-49.

focus of [the trial court's] inquiry must be on 'the specific nature of the speech,' rather than on any 'generalities that might be abstracted from it.'" *FilmOn.com,* 7 Cal. 5th at 152. In *M.G.,* a TV show and magazine "used the 1997 team photograph of a Little League team to illustrate stories about adult coaches who sexually molest youths playing team sports." 89 Cal. App. 4th at 626. "The broad topic of the article and the program was not whether a particular child was molested but rather the general topic of child molestation in youth sports, an issue which, like domestic violence, is significant and of public interest." *Id.* at 629. Here, Gore's statements were not about "the general topic of child molestation." *Id.* Rather, like in other cases distinguishing *M.G.*, "we have the opposite; focus on the particular and not on the broader topic," namely (false) statements about *particular* conduct involving *particular* people. *See Dual Diagnosis Treatment Ctr., Inc. v. Buschel,* 6 Cal. App. 5th 1098, 1106 (2016) ("Given the focused nature of the statements at issue in this case, Buschel's reliance on *M.G.* . . . is misplaced."); *see also Gazal v.*

Echeverry, 101 Cal. App. 5th 34, 43 (2024) (anti-SLAPP statute was not triggered where complaint alleged a "narrowly focused effort to help a single family of five who were experiencing homelessness" and not a "broader discussion or public debate over homelessness, its causes or solutions").

2. The trial court improperly weighed the evidence and applied the wrong legal standards in concluding that Warner's claims lacked any merit.

(a) It was error to strike Warner's claim for defamation per se.

The conclusion that Warner could not demonstrate a probability of prevailing on his claim for defamation per se against Gore was based on the court's flawed conclusion that Warner could not establish two elements of his claim, falsity and actual malice.

(i) Falsity: The trial court disregarded Warner's evidence.

The court first found that the allegedly defamatory statements were not false. These statements included that "the girl in Groupie was underage," Warner "knew the girl was

underage," and the "film was child pornography." 8AA2032:1-3 (quoting 5AA1140:17-28). Warner presented evidence that these were all false, including (i) the declaration of the actress in "Groupie," Pola Weiss, who stated that she starred in the film and was 21-22 years old (5AA1094:15-17), and (ii) the declaration of Warner who stated that Weiss starred in his film and he understood that she was "over 21" (4AA1043:22-24). This should have ended the inquiry.

Instead, the trial court bought into Gore's argument that her statements could not be false because she believed that the film "'starred women named Jeanette Polard,'" and therefore she was speaking about Polard, not Weiss. 8AA2032:6-16. However, this distinction is immaterial because the statement is false *even if* it was about Polard—Warner's declaration unambiguously stated that Polard did *not* appear in "Groupie." 4AA1044:12 ("None of McGaffigan, Polard, or Duffy appeared in 'Groupie[.]'"). Thus, it directly contradicted the trial court's finding that Warner "d[id] not prove that Ms. Polard was not in the 'Groupie' film."

8AA2032:8-9. His evidence needed to be credited, not disregarded or weighed against selections from Gore's deposition testimony. *Collins*, 92 Cal. App. 5th at 81 ("A court cannot grant a special motion to strike if the plaintiff has presented admissible evidence that, if believed by the trier of fact, would support a cause of action against the defendant."). Warner raised this error at the anti-SLAPP hearing, but the trial court chose not to revise its tentative order. RT915:5-916:15.

(ii) Actual malice: The trial court applied the wrong legal standard and improperly weighed the evidence.

"Actual malice is a term of art in defamation law." *Collins*, 92 Cal. App. 5th at 73. "[P]eople speak with actual malice when they know their statements are false, or they recklessly disregard whether their statements might be false." *Id*. Actual malice "may be proved by direct or circumstantial evidence." *Mitchell v. Twin Galaxies, LLC*, 70 Cal. App. 5th 207, 221 (2021). Circumstantial evidence of actual malice may include a "failure to investigate," "anger and hostility," or "reliance on sources

known to be unreliable or biased," which, *in combination*, can "indicate that the publisher [herself] had serious doubts regarding the truth of [her] publication." *Id*. at 221-24 ("An inference of actual malice may be made from Twin Galaxies' failure to investigate and reliance on biased sources."). The trial court made a number of errors in concluding that Warner could never demonstrate a probability of prevailing on actual malice.

First, the trial court appears to have applied the wrong legal standard. 8AA2032:22-23. Although Warner may have to establish actual malice by "clear and convincing evidence" *at trial*, "[i]n opposing [an anti-SLAPP] motion, defamation plaintiffs need not establish malice by clear and convincing evidence[,] [but rather] must meet their minimal burden by introducing sufficient facts to establish a prima facie case of actual malice." *Collins*, 92 Cal. App. 5th at 80; *see also Edward v. Ellis*, 72 Cal. App. 5th 780, 793 (2022) (same).

Second, the trial court improperly weighed the evidence in concluding that Warner did not "demonstrat[e] that Gore

entertained serious doubts as to the truth of her statements about the 'Groupie' film" because, according to the court, Gore "believed Jeanette Polard was the actress in 'Groupie'" and was "underage." 8AA2035:14-19. As explained in *Mitchell*, "serious doubts" can be shown by a combination of indicia, and here, Warner presented evidence on at least three. 70 Cal. App. 5th at 221. The trial court's decision to prefer Gore's cited evidence over Warner's was error.

As to the first category, the record reflects "a [] decision to avoid facts that might confirm the probable falsity of the challenged statement." *Id.* at 222-23. Gore admitted that she "just supported the experience of anyone who reached out to [her] and stated" Warner was a rapist and pedophile. 6AA1299, 1296 (internal 30:25-31:20, 20:4-8). Gore never tried to identify the "relative" of Polard who claimed to be "worried" that Polard was in the film and underage—in fact, Gore did not even ask for her name. 6AA1297-98 (internal 22:13-24:11, 25:17-26:1). Nor did Gore recall ever asking Wood—who Gore knew had seen the

film—about the identity or age of the actress. 6AA1312, 1314 (internal 89:16-19, 95:25-96:11); 5AA1043. Gore saw "Dead to the World," which featured clips of "Groupie," and ignored that the credits thanked Weiss, the real actress, but did not mention Polard. 4AA998-1005 (screenshots on iPad),[14] 4AA1022-31 (credits); 5AA1095; *see also Mitchell*, 70 Cal. App. 5th at 224-25 (actual malice supported by "evidence that Twin Galaxies was alerted to potential contradictory facts"). Gore knew that the actress in the music video for "Long Hard Road Out of Hell" was the same actress as in "Groupie," but failed to probe because the truth did not support her false narrative that Warner was a child abuser. *See* 5AA1140:17-28; 4AA1010-11 (10/11/20 screenshot on iPad).[15] Further, while Gore claims to have relied on Warner's "own words" from "Dinner for Five" (*see*, *e.g.*, 7AA1508:7-13), she ignored that Warner also said the actress was only "*portraying* a

[14] As discussed above, the trial court abused its discretion when it excluded these documents obtained from the iPad that Gore gave her sister. *See supra*, § IV.B.1.

[15] *See supra* n.14.

youngster" (4AA0759:17-20, 846:2-6) and failed to ask Wood about the actress (6AA1314). Evidence on this factor, in combination with one or more of the others, is sufficient. *See also Balla v. Hall*, 59 Cal. App. 5th 652, 684 (2021) ("[A]ny investigation by [defendant] was inadequate, and with the other evidence provides further proof of actual malice.").

As to the second category, Warner offered evidence that Gore relied on biased/unreliable sources. *Mitchell,* 70 Cal. App. 5th at 221, 223. Gore admitted that it was only after an *unnamed, unidentified* "relative" reached out to Gore that she started telling people Warner used an underage actress in a sex scene in "Groupie." 6AA1297, 1300, 1305 (internal 22:13-25, 35:25-36:5, 61:6-17). Gore backed-up this falsehood with only speculation of "people generally talking on social media about who the actress in the film could be" (6AA1300 (internal 37:5-14)), and the unremarkable observation that the actress and Polard both appeared to wear a bracelet and ring (6AA1300

(internal 35:25-36:18); 4AA935-39, 4AA1002-03 (screenshots on iPad)).[16]

While evidence of the first two categories is sufficient to show actual malice, Warner also provided evidence that Gore harbored anger and hostility towards him—a third category. *See Mitchell*, 70 Cal. App. 5th at 223; *Billauer,* 88 Cal. App. 5th 953, 978-79 ("[A]lthough actual malice is not satisfied through ill will alone . . . hostility is relevant if it reflects on the publisher's attitude towards the truth of the statements."). From her verified Twitter account, Gore called Warner a "rapist pedophile motherfucker." 4AA930-31; 6AA1296, 1299 (internal 18:7-9, 18:16-21, 33:6-14). While Gore posted this tweet in 2022, she admits harboring these feelings before then (6AA1296 (internal 18:22-19:19)); that by claiming the "Groupie" actress was underage, Gore was basically conveying that Warner was a pedophile (6AA1300-01 (internal 34:2-8, 38:24-39:5; 40:8-15; 42:13-24)); and she did this to "support[] the people who were

[16] *See supra*, n.14.

around [her]," *i.e.*, Wood (6AA1296 (internal 20:4-18)). *See Billauer,* 88 Cal. App. 5th 953, 978-79 (finding threatening message that "reek[ed] of vengeance" was "compelling evidence that [defendant] was motivated by hostility and lacked regard for the truth of his publications").

And if that was not enough, Warner also presented evidence that Gore, in fact, doubted that Polard was in the film. For example, Gore testified that she reached out to a friend of Polard's to ask "if she could confirm whether or not [it was] Jeanette Polard who was in the film." 6AA1300 (internal 35:17-24). Warner was entitled to the obvious inference that could be drawn from such a question. *Kinsella*, 45 Cal. App. 5th at 462.

In light of this evidence under the applicable legal standards, the trial court erred in concluding that Warner did not "demonstrat[e] that Gore entertained serious doubts as to the truth of her statements about the 'Groupie' film." 8AA2035:14-16. He presented more than "sufficient facts to establish a prima facie case of actual malice." *Collins*, 92 Cal. App. 5th at 80. That

Gore may have also said that she "believed Jeanette Polard was the actress in 'Groupie'" and "underage" (8AA2035:16-19), does not negate Warner's evidence as a matter of law.

Third, the trial court's conclusion was based on the false premise that Warner "only provide[d] evidence that Ms. Weiss stated that she acted in 'Groupie,'" and "d[id] not provide evidence that Ms. Polard was not in the film." 8AA2035:19-21. As discussed above (§ IV.C.2(a)(i)), Warner *did* provide evidence that Polard was not in the film. 4AA1044:12.[17]

(b) It was error to strike Warner's claim for intentional infliction of emotional distress.

The trial court acknowledged weighing the evidence, which was not permitted on the second step of the anti-SLAPP analysis.

[17] The trial court relied on testimony from Gore about materials that the court otherwise did not allow to be admitted, including a purported transcript of a television show. *Compare* 8AA2031:5-8, 2031:22-25, *with* 2033:10-12, 2034:17-23. If the trial court was going to rely on Gore's inaccurate description about what these excluded transcripts contained, it should not have ignored the other parts in which Warner stated the actress was only "portraying" someone young. *E.g.*, 4AA0759, 0846.

The order stated: "The Court agrees that the deposition testimony cited by Gore . . . undermines Plaintiff's assertion that Gore had a 'reckless disregard of the probability of causing emotional distress.'" 8AA2037:18-21. The question, however, was not whether Gore's evidence "undermine[d]" Warner's evidence, but rather whether it *negated* Warner's evidence *as a matter of law*. *Ralphs,* 17 Cal App. 5th at 265 n.7 (defendant's evidence must "negate" plaintiff's evidence "as a matter of law"). The trial court did not and could not make such a finding on the record before it.

Warner provided ample evidence to make a prima facie case, some of which the trial court cited in its decision. 8AA2037:1-15. Gore admitted her accusations were "serious" and "tantamount to an accusation of pedophilia," yet she made no effort to confirm the identity of the real actress. 6AA1301 (internal 38:5-13, 38:24-35:5, 40:8-15). She admitted that she did *no* "investigation into whether [she was] incorrect in claiming that Jeanette Polard was the actress in 'Groupie.'" 6AA1303

(internal 50:2-25). She did not discuss the identity or age of the actress with Wood, even though Wood brought "Groupie" to Gore's attention, and Wood, unlike Gore, had actually seen the film and knew the actress was Weiss. 6AA1311, 1312, 1314 (internal 82:16-1, 86:15-19, 87:15-18, 89:16-19, 95:11-18, 95:25-96:4); 4AA1043. Rather, Gore relied on the suspicion of an unnamed person who, *years earlier,* contacted Gore on Twitter—a person whose identity Gore never tried to confirm—and the speculation of "people generally talking on social media" about the film. 6AA1297, 1300, 1305 (internal 22:13-23:17, 24:2-11, 25:17-26:1, 37:5-14, 59:5-8). Gore ignored inconvenient evidence right under her nose. For example, she knew the actress in "Groupie" was also in the video for "Long Hard Road Out of Hell." 5AA1140; *see also* 4AA1010 (10/11/20 Gore screenshot of "Long Hard Road Out of Hell").[18] Yet, instead of confirming this was Weiss, a paid, of-age actress, Gore peddled frivolous speculation that "the girl's name was removed from the credits for everything

[18] *See supra*, n.14.

she appeared in, such as Warner's 'Long Hard Road Out of Hell' music video, so that when she was alive, no one would be able to find her and ask her about [']Groupie[']." 5AA1140; *see also* 5AA1095. Around this time Gore also saw Warner's 1998 film "Dead to the World," which featured clips of "Groupie," but ignored that Weiss's name was featured in the credits and Polard's name was not. 4AA0998-1005 (9/25/20 Gore screenshots),[19] 4AA1022-31 (credits); *see also* 5AA1095. Instead of determining the truth, Gore "just supported the experience of anyone who reached out to [her] and stated" that Warner was a child abuser, including unidentified people who contacted her on social media. 6AA1299 (internal 30:25-31:20). Even after Gore undisputedly knew about Weiss (4AA1020 (2/9/21 image of Weiss on Gore's former iPad);[20] 6AA1302 (internal 48:24-49:8)), she never issued a retraction (6AA1303 (internal 51:20-24))—rather, she doubled-down, calling Warner a "rapist" and "pedophile" to

[19] *See supra*, n.14.

[20] *See supra*, n.14.

"support[] the people who were around [her]" (6AA1296 (internal 18:7-9, 18:16-21, 20:4-8)). No mystery why: The "Groupie" lie was one of many tactics Gore and Wood "exploited . . . for their own purposes" to further the campaign against Warner. *Belen,* 65 Cal. App. 5th at 1165. Accusing Warner of this particular instance of child abuse shored up the fabricated narrative that Warner had abused and "trafficked" underage girls—"Groupie" became part of the pitch, and "underage" Polard, part of the story. *See* 1AA040:1-26; 4AA0935-39:22-28; 4AA1043; 6AA1332-33; 4AA1006-1010 (10/11/20 Gore research on human trafficking and child pornography); 5AA1084-86 (Gore checklist with references to child abuse); 5AA1140.

D. The trial court erred in denying Warner the opportunity to conduct the limited discovery that he requested.

Even if the trial court were correct that Warner had not presented evidence to support the challenged claims (it was not), this Court must still reverse the May 9 Order. Warner sought but was denied limited discovery after making the detailed showing of good cause required by Code of Civil Procedure

Section 425.16(g). 3AA0431; 4AA0821. The trial court's refusal to permit the specific discovery denied Warner his "due process rights by placing the burden on the plaintiff to show a prima facie case without permitting the collection of evidence needed to satisfy that burden." *Schroeder v. Irvine City Council*, 97 Cal. App. 4th 174, 190-91 (2002); *see also Lafayette Morehouse, Inc. v. Chron. Publ'g Co.*, 37 Cal. App. 4th 855, 868 (1995).

V. CONCLUSION

For the foregoing reasons, this Court should reverse the Superior Court's order granting Wood and Gore's special motions to strike.

DATED: August 27, 2024

Respectfully submitted,

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VI. CERTIFICATION OF WORD COUNT

Appellant's Opening Brief is 13,933 words, inclusive of footnotes. This certification was prepared using the word-count function of the word-processing software.

DATED: August 27, 2024 Respectfully submitted,

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