

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

**DAVID ROBERTSON, and
DANIEL RODNI,**

Plaintiffs,

v.

RYAN UPCHURCH,

Defendant.

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JURY DEMAND

Case No. 3:23-cv-00770

Judge: Campbell

Magistrate: Holmes

**Plaintiffs' Response in Opposition
to Defendant's Motion to Dismiss**

Defendant's motion to dismiss should be denied in all respects. Defendant's defamatory statements of and concerning the private-figure Plaintiffs assert provably false facts conveying defamatory meanings. And while Plaintiffs, as private figures, are not required to prove actual malice in order to recover their actual damages, they nevertheless *have* adequately pleaded facts meeting that standard, as the Corrected Amended Complaint ("CAC") (ECF 9) and Exhibits plausibly assert that Defendant Upchurch was both exceedingly reckless as to the falsity of the outlandish statements he made *and* that Upchurch subjectively doubted the truth of his own reckless assertions. Accordingly, Plaintiffs' claims for presumed and punitive damages should proceed for further development.

I. Factual Background.

This lawsuit arises from the tragic death of Kiely Rodni, the daughter of Plaintiff Daniel Rodni and the granddaughter of Plaintiff David Robertson. (CAC, ¶ 4, ECF 9, PageID #: 85.) Kiely Rodni disappeared on August 6, 2022. (*Id.*, ¶ 30, PageID #: 90.) Her disappearance became international news. (*Id.*) On August 7th, a family friend of Kiely’s mother, Lindsey Nieman, created a GoFundMe page titled: “Support for the Family of Kiely Rodni”. (*Id.*, ¶ 31.) Plaintiffs David Robertson and Daniel Rodni are members of the family of Kiely Rodni. (*Id.*, ¶ 32.) Defendant Upchurch began posting about Kiely Rodni on YouTube on August 13, 2022. (*Id.*, ¶ 33, PageID #: 91.) At this time, the whereabouts of Kiely Rodni were unknown. (*Id.*, ¶ 34.) Upchurch initially theorized that a person named “Ronnie,” who was a caller to a YouTube show hosted by YouTuber “iCkEdMeL”, was a “red herring” and a “made up character.” (*Id.*, ¶ 36.) In a comment reply to this video, “Red Flag Ronnie #2,” a YouTube user posted: “DUDE!!!!!! Be careful.... You gonna get sued for slander...for real.” (*Id.*, ¶ 37.) Upchurch replied to this user: “They can slander these nuts. Lol.” (*Id.*) In a video posted on August 20, 2022, Upchurch falsely claimed that various other YouTube “true crime” would-be sleuths, including YouTube personalities “XanamayX” and “iCkEdMeL” were responsible for or somehow involved in the death Kiely Rodni. (*Id.*, ¶ 38, PageID #: 92.) Upchurch also uploaded a video wildly speculating that “Ickedmel” was a “sex trafficking [sic] code word.” (*Id.*, ¶ 40, PageID #: 93.).¹

¹ After the filing of this lawsuit, Melvin Ceden, the person behind the YouTube channel “iCkEdMeL,” filed a defamation lawsuit against Ryan Upchurch in the Middle District of Tennessee arising from these and other statements (*Ceden v. Upchurch et al.*, 3:23-CV-00876, assigned to Judge Trauger.) See *Lyons v. Stovall*, 188 F.3d 327, 333 (6th Cir. 1999) (“[I]t is well-settled that federal courts may take judicial notice of proceedings in other courts of record”).

Kiely Rodni's body was discovered on August 21, 2022. (*Id.*, ¶ 43, PageID #: 94.) That day, authorities publicly confirmed that the body was "more than likely" Kiely Rodni and that an autopsy had been ordered to confirm the identity. (*Id.*, ¶ 44.) Upchurch became aware on August 21, 2022, that Kiely Rodni's body had been recovered by the amateur dive team known as "Adventures with Purpose" ("AWP"). (*Id.*, ¶ 45.) In fact, Upchurch's discovery that Kiely Rodni's body had been found can be viewed in real-time, as he was participating in a YouTube "live" when AWP posted to Facebook that they had recovered Kiely Rodni's body. (*Id.*, ¶ 46.) In this video, Upchurch purported to offer a "prayer" for "Kiely" and "Kiely's family":

"May we pray for Kiely, Kiely's family, Kiely's friends. And I want to say that, nobody should really be doing anything about this now. There really shouldn't be anything put anywhere that's gonna make her mom even more devastated than she's already gonna be."

(*Id.*, ¶ 47, PageID #: 95.) That is, Upchurch accepted on August 21, 2022, that Kiely Rodni was real. (*Id.*, ¶ 48.) Upchurch accepted on August 21, 2022, that Kiely had died. (*Id.*, ¶ 49.) Upchurch understood as of August 21, 2022, that further online posting ("anything put anywhere") relating to Kiely Rodni could traumatize Kiely's family. (*Id.*, ¶ 50.) On August 22, the day after Kiely Rodni's body was found, Upchurch posted a video in which he appeared to express his condolences to "Kiely's mom, and Kiely's family, and Kiely's friends." (*Id.*, ¶ 57, PageID #: 100.)

Authorities confirmed the identity of Kiely Rodni on August 23, 2022. (*Id.*, ¶ 51, PageID #: 96.) The authorities posted an image of Kiely Rodni with the text: "Identity of Kiely Rodni Confirmed." (*Id.*, ¶¶ 52-53.) The same day, the Rodni family released a statement to the press, asking for privacy to grieve: "Kindly excuse us as we retreat and dance privately to life's song while we celebrate our daughter's spirit and heal our souls." (*Id.*, ¶ 56, PageID #: 99.)

On August 28, 2022, Upchurch uploaded a video in which he accused the Placer County Sheriff's Office of being a "fake police department," stated there "ain't no dead body," "ain't no Kiely Rodni," "it's bullshit," "it's fake" and said the police were involved in faking Kiely Rodni's existence and death. (*Id.*, ¶¶ 61-70, PageID #: 101-103.) On August 29, 2022, after Kiely Rodni's body had been found; authorities had confirmed Kiely's identity; and Kiely's family had released a public statement, Upchurch uploaded a video titled: "ZERO proof of Kiely Rodni situation being REAL." (*Id.*, ¶ 74, PageID #: 104.) In this video, Upchurch again claimed that the Kiely Rodni case was a "scam" to raise money through GoFundMe. (*Id.*, ¶ 76, PageID 104-105.) On September 3, 2022, Upchurch posted a video in which he stated:

"Kiely Rodni is not Kiely Rodni. Kiely Rodni is Callie Ross. Callie Ross's dad is fake Kiely Rodni's grandpa . . . So if you look at Kiely, K-I-E-L-Y, and look at her situation, and who's around her, look at the (air quotes) "grandpa", because the grandpa on Kiely, K-I-E-L-Y's page, is the dad on C-A-L-L-I-E's page."

(*Id.*, ¶ 92. PageID #: 107.) In this video, Upchurch posted photographs of Plaintiff David Robertson, with quotation marks around the phrases "Kiely Rodni's grandpa" and "Kiely's grandpa." (*Id.*, ¶ 93.) The same day, Upchurch posted a video in which he stated:

"I would not say this unless I was 100% confident. Kiely Rodni is not real. Her grandfather is not real. Her dad is not real. Her mom is not real . . . All the pictures and videos you're seeing of this Kiely Rodni person are actual pictures and videos from someone else named Callie, that are five to seven years old."

(*Id.*, ¶ 97.) In the full video clip, attached to the CAC, Upchurch continues: "**I'm about to post the proof** and show you guys." (ECF 11, 11-1, emphasis added.)² David Robertson and Daniel

² The video file, manually filed with the Court via flash drive, is named "026 9-3-22 Kiely Rodni is actually a woman named Callie Ross. Video coming in a hour.mp4." Plaintiffs incorporated all video exhibit files by explicit reference in the CAC. (ECF 9, ¶ 124, PageID #: 116.) See F.R.C.P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes"); see also *Thomas v. Publishers Clearing House, Inc.*, 29 F. App'x 319, 322 (6th Cir.

Rodni have each experienced extreme emotional distress and financial losses attributable to Upchurch's postings, compounding their already profound grief at the tragic loss of their granddaughter and daughter. (*Id.*, ¶ 21, PageID #: 88.)

II. Facts Relevant to the Choice of Law.

The CAC specifically averred that this case involves a conflict of law and that California's substantive law should apply. (*Id.*, ¶¶ 164-169, PageID #: 125.) In support of this contention, Plaintiffs pleaded that "Plaintiffs reside in California, all injuries complained occurred in California, and all treatment for such injuries occurred in California . . . The parties have no relationship with each other except through the transmission of Upchurch's YouTube videos, which Plaintiffs were made aware of and viewed in California." (*Id.*, ¶¶ 165-166.)

III. Argument

1. California has the most significant relationship to this case and its substantive law should apply.

Defendant concedes that the laws of California and Tennessee are in conflict (Def.'s Mem, ECF 23, PageID #: 167), but argues that Tennessee law should govern this action because Tennessee "provides significantly more protection" to the Defendant and imposes caps on liability. (*Id.*) But this misstatement of the applicable law amounts to little more than an argument for special treatment. As the Sixth Circuit, applying Tennessee's choice of law rules, explained: "a rule which exempts the actor from liability for harmful conduct *is entitled to the same*

2002) (noting that Fed. R. Civ. P. 10(c) "allows the incorporation of exhibits or writings attached to a pleading, and makes them an integral part of the pleadings for all purposes.")

consideration in the choice-of-law process as a rule which imposes liability.” (Montgomery v. Wyeth, 580 F.3d 455, 463 (C.A.6 (Tenn.) 2009) (emphasis added)). There is no permissible inquiry as to whether applying one state’s law over another’s results in a more favorable outcome to either party. (*See Montgomery*, at 462, noting that “the primary flaw in Montgomery’s argument is that *it focuses on the outcome of applying Tennessee’s statute of repose rather than on the significance of Tennessee’s relationship to the parties and the place of injury* as required by [*Hataway v. McKinley*, 830 S.W.2d 53, 54 (Tenn., 1992).] (Emphasis added.))

In support of its argument for special-treatment-for-the-Defendant in choice of law analysis, Defendant points the Court to the Second Circuit’s decision in *Adelson v. Harris*, 973 F.Supp.2d 467 (S.D.N.Y., 2013). (Def.’s Mem at 6, PageID #: 168.) But *Adelson* is a curious choice for this (dubious) proposition, considering that the court in that multi-state defamation case applied the law of Nevada, the plaintiff’s home state, rather than the law of the District of Columbia, where the defendants resided. (*Adelson*, at 478.) The *Adelson* court observed that there is essentially a *presumption* in multi-state defamation cases that the law of the plaintiff’s domicile controls:

Because “the locus of the tort is where the plaintiff suffered injury, often the Court can resolve the choice of law analysis [in a defamation action] simply by observing the state of plaintiff’s domicile and presuming that the publication injured him in that state.”

(*Id.*, at 476, brackets in original, citations omitted). The *Adelson* court applied this rule, and held:

Adelson is a Nevada citizen, and the Adelson business empire is based in Nevada. Nevada has an interest in protecting its citizens from tortious conduct. The District of Columbia also has an interest in this case—protecting the First Amendment rights of its citizens. While this interest is important, it is not, without more, sufficient to overcome *the presumption that the law of Plaintiff’s domicile should apply in this type of case.*

(*Id.*, emphasis added.) *Adelson* rather dramatically undermines Defendant’s position, and its adoption in this case would lead inevitably to the conclusion that California law applies. (*Id.*)

In this diversity case, Tennessee’s choice of law rules govern. (*Montgomery*, at 459.) Tennessee follows the “most significant relationship” approach of the Restatement (Second) of Conflict of Laws to choice of law questions. (*Hataway v. McKinley*, 830 S.W.2d 53, 59 (Tenn. 1992.)) Under this approach, “the law of the state where the injury occurred will be applied unless some other state has a more significant relationship to the litigation.” (*Id.* at 59.) Tennessee adopted this position “because generally the law of the state where the injury occurred will have the most significant relationship to the litigation.” (*Id.*) As stated *supra*, the state where the injury occurred is California. (ECF 9, ¶¶ 164-169, PageID #: 125.) The plaintiffs are both domiciled in California. (*Id.*) As the Eastern District of Pennsylvania observed, applying the Restatement (Second) of Conflict of Laws § 150:

The state of a plaintiff’s domicile is generally the place where most of his reputational contacts are found; therefore, “the state of plaintiff’s domicile generally has the greatest concern in vindicating plaintiff’s good name and providing compensation for harm caused by the defamatory publication.” Furthermore, in a defamation suit where the defamatory statements were published in more than one jurisdiction, the state with the significant interest is the domicile of the plaintiff.

(*Wilson v. Slatalla*, 970 F.Supp. 405, 414 (E.D. Pa., 1997) (citations omitted)). Because Plaintiffs are domiciled in California; were injured in California; received treatment for their injuries in California; and the defamatory content was published in California; California law should govern this diversity action.

2. Applicable First Amendment Standards

- a. **“Actual malice” is not required for Plaintiffs to recover their actual damages, so long as they prove fault and the falsity of the defamatory statements.**

Because this case concerns concededly private figure plaintiffs, the so-called “actual malice” standard does not apply to Plaintiffs’ claims for actual damages. (*Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 15 (U.S., 1990) (noting the Court had previously held in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (U.S., 1974) that the “*New York Times* malice standard was inappropriate for a private person attempting to prove he was defamed on matters of public interest”) (referencing *New York Times v. Sullivan*, 376 U.S. 254 (1964).) As the Supreme Court observed in *Gertz*, “private individuals are . . . more vulnerable to injury, and the state interest in protecting them is correspondingly greater.” (*Gertz*, at 344.) Further, “private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.” (*Id.*, at 345). Thus, in cases like this one, involving private figures defamed on matters of public concern, states may impose defamation liability for actual (rather than presumed or punitive) damages so long as the Plaintiffs prove some degree of fault and that the alleged statements were false. (*Milkovich*, at 16.)

California, in turn, permits defamation liability so long as it is consistent with the requirements of the United States Constitution.³ (*Brown v. Kelly Broadcasting Co.*, 48 Cal.3d at

³ Tennessee similarly recognizes that the “actual malice” standard does not apply to private figures. *Hibdon v. Grabowski*, 195 S.W.3d 48, 58 (Tenn. Ct. App., 2005) (“The ‘actual malice’ requirement does not apply to Mr. Hibdon unless it is first determined that Mr. Hibdon is a ‘public figure’.”) See also *Memphis Pub. Co. v. Nichols*, 569 S.W.2d 412, 418 (Tenn., 1978) (“It is our conclusion that the ordinary negligence standard permitted by *Gertz* for all defamation actions brought by private persons against media defendants, is the only standard of liability that achieves the desired accommodation of first amendment guarantees and the interest in protecting individual reputation.”)

pp. 740–742.) (“We see no reason to deny California citizens protection for their reputations equal to that provided in other states. We decline to diverge from the near unanimous authority that *a private person need prove only negligence (rather than malice) to recover for defamation.*”) (*Id.* at p. 742.) (Emphasis added.) In doing so, the California Supreme Court reiterated the United States Supreme Court’s observation that “the individual’s right to the protection of his own good name ‘reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.’” (*Id.* quoting *Gertz*, 418 U.S. at 341.)

Taken together, the upshot of these authorities is that the Plaintiffs in this case need establish only *negligence* on the part of Upchurch to recover for their actual damages, so long as Plaintiffs also prove that the defamatory statements were false. (*Milkovich*, at 16, citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986).)

b. The actual malice standard applies only to the extent that Plaintiffs seek *presumed* or *punitive* damages.

As the Supreme Court explained in *Milkovich*, “we held [in *Gertz*] that the States could not permit recovery of presumed or punitive damages on less than a showing of *New York Times* malice.” (*Milkovich*, at 16.) In *Herbert v. Lando*, the Supreme Court explained that “under this rule [*New York Times* malice], absent knowing falsehood, liability requires proof of reckless disregard for truth, that is, that the defendant ‘in fact entertained serious doubts as to the truth of his publication.’ Such ‘subjective awareness of probable falsity,’ may be found if ‘there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.’” (441 U.S. 153, 156–57 (U.S., 1979) (cleaned up).)

A plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence. (*Herbert*, at 172. "Permitting plaintiffs such as Herbert to prove their cases by direct as well as indirect evidence is consistent with the balance struck by our prior decisions.") "*A failure to investigate* the truthfulness of a statement and *reliance on sources known to be unreliable* or biased against the plaintiff, 'may provide circumstantial evidence of actual malice in appropriate cases.'" (*Tull v. Higgins*, 2021 WL 6116971, at *8 (N.D. Cal., 2021) (emphasis added).) And a defendant's "professions of good faith will be unlikely to prove persuasive . . . when the publisher's allegations are *so inherently improbable that only a reckless man would have put them in circulation.*" (*St. Amant v. Thompson*, 390 U.S. 727, 732 (U.S.) 1968.) (Emphasis added.) Proof of "actual malice" calls a defendant's state of mind into question, the Supreme Court noted in *Hutchinson v. Proxmire*, and "does not readily lend itself to summary disposition." (443 U.S. 111, 120 (U.S., 1979) (citing C. Wright & A. Miller, Federal Practice and Procedure § 2730, pp. 590–592 (1973)).)

In *Philadelphia v. Hepps*, the Supreme Court further noted that "any analysis must also take into account the 'legitimate state interest underlying the law of libel [in] the compensation of individuals for the harm inflicted on them by defamatory falsehood.'" (475 U.S. 767, 773 (U.S., 1986), citing *Gertz*, at 341.) This is because "false statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (U.S., 1988). Finally, "given the required proof . . . damages liability for defamation abridges neither freedom of speech nor freedom of the press." (*Herbert*, at 160.)

c. There is no categorical First Amendment protection of “opinions.”

Writing for the majority in *Masson v. New Yorker Magazine Inc.*, Justice Kennedy explained that First Amendment protections for speech do not turn on a neat dichotomy between “fact” and “opinion”:

In *Milkovich v. Lorain Journal Co.*, we refused “to create a wholesale defamation exemption for anything that might be labeled ‘opinion.’” We recognized that “expressions of ‘opinion’ may often imply an assertion of objective fact.” We allowed the defamation action to go forward in that case, holding that a reasonable trier of fact could find that the so-called expressions of opinion could be interpreted as including false assertions as to factual matters.

(501 U.S. 496, 516 (1991), cleaned up.) In *Milkovich*, the Supreme Court explicitly rejected categorical First Amendment protection for “opinion” speech, holding: “we are not persuaded that . . . an additional separate constitutional privilege for ‘opinion’ is required to ensure the freedom of expression guaranteed by the First Amendment.” (*Milkovich*, at 21.) Instead, “the analysis under the First Amendment is not simply the characterization of statements as fact or opinion, *but whether the statements reasonably imply false and defamatory facts.*” (*SPX Corp. v. Doe*, 253 F.Supp.2d 974, 979 (N.D. Ohio, 2003) (emphasis added).) The Sixth Circuit has “interpreted *Milkovich* to stand for the proposition that ‘a viable defamation claim exists . . . where a reasonable factfinder could conclude that the challenged statement *connotes actual, objectively verifiable facts.*’” (*Sandmann v. New York Times Company*, 78 F.4th 319, 332 (C.A.6 (Ky.), 2023 (citations omitted) (emphasis added).)

The Sixth Circuit⁴ has defined four factors that a court should consider in determining whether a statement can carry a defamatory meaning. (*Jolliff v. N.L.R.B.*, 513 F.3d 600, 611–12 (C.A.6, 2008).) These factors are:

- (1) The common usage or meaning of the allegedly defamatory words themselves, whether they are commonly understood to be loose, figurative, or hyperbolic words;
- (2) The degree to which the statements are verifiable, whether the statement is objectively capable of proof or disproof;
- (3) The immediate context in which the statement occurs; and
- (4) The broader social context into which the statement fit.

(*Id.*) Measured against these four-factors, Upchurch’s defamatory statements fail the test, as set forth below.

3. Upchurch’s defamatory statements may be proven false by objective evidence and fail the *Milkovich* test.

Take Upchurch’s statement that:

I would not say this unless I was 100% confident. Kiely Rodni is not real. Her grandfather is not real. Her dad is not real. Her mom is not real . . . All the pictures and videos you’re seeing of this Kiely Rodni person are actual pictures and videos from someone else named Callie, that are five to seven years old . . . **I’m about to post the proof and show you guys.**

(ECF 9, ¶ 97, PageID #: 109; ECF 11, PageID #:128, emphasis added.) Upchurch’s statements here are expressed in terms of absolute certainty and complete confidence. There is no qualifying language. He expresses the false factual assertion that the Plaintiffs are not real people—that is, that they are not who they claim to be—and he does so with no caution whatsoever. (*See B.*

⁴ Questions of federal law in this matter are to be decided in accordance with the law of the Sixth Circuit. (*See Lampo Group, LLC v. Paffrath*, 2019 WL 3305143, at *2 (M.D. Tenn., 2019), in which Judge Richardson rejected the Ninth Circuit’s interpretation of California law and applied Sixth Circuit law.)

Sanford, Libel and Privacy: The Prevention and Defense of Litigation 145 (1987) (explaining that many courts have found that words like “apparent” reveal “that the assertion is qualified or speculative and is not to be understood as a declaration of fact”); *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 784 (CA9 1980) (explaining that a statement phrased in language of apparency “is less likely to be understood as a statement of fact rather than as a statement of opinion”); *Gregory v. McDonnell Douglas Corp.*, 17 Cal.3d 596, 603 (1976) (finding a letter “cautiously phrased in terms of apparency” did not imply factual assertions).) Here, Upchurch’s professed total confidence (“I would not say this unless I was 100% confident”) stands in stark contrast to the type of cautious phrasing that might otherwise save a defamation defendant from liability.

Upchurch did not merely accuse the Plaintiffs of not being real in the literal sense of non-existence—he further asserted, falsely, that the Plaintiffs were relatives of a woman named Callie Ross: “Kiely Rodni is not Kiely Rodni. Kiely Rodni is Callie Ross. Callie Ross’s dad is fake Kiely Rodni’s grandpa.” (ECF 9, ¶92, PageID #: 107.) Worse, Upchurch asserted that the death of Kiely Rodni was “fake” and that the Placer County Sheriff’s Office was “a fake police department.” (*Id.*, at ¶ 66, PageID #: 102.) Upchurch asserted, again falsely, that the police had faked the death of Kiely Rodni: “How can you fake a death? Well, fuck, dude, if you’re the police.” (*Id.*, ¶ 65.) The tragic death of Kiely Rodni, in Upchurch’s telling, was a “scam” to “catfish ⁵ fake a death.” (*Id.*,

⁵ *Catfish* in this sense means: “to deceive (someone) by creating a false personal profile online.” MERRIAM-WEBSTER, available online at: [https://www.merriam-webster.com/dictionary/catfish#:~:text=transitive%20%3A%20to%20deceive%20\(someone\),that%20they%20were%20in%20love.%22](https://www.merriam-webster.com/dictionary/catfish#:~:text=transitive%20%3A%20to%20deceive%20(someone),that%20they%20were%20in%20love.%22), last visited November 2, 2023.

at ¶ 76, PageID #: 104.) The purpose of this “scam,” according to Upchurch, was to “be a millionaire” by raising money on GoFundMe, a crowdfunding website:

Do you realize that you can be a millionaire on GoFundMe by catfishing people with internet deaths? You could do it fast as fuck. *Look at the Kiely Rodni GoFundMe*. It’s made \$63,000 in the past seven days. That’s one GoFundMe for Kiely Rodni.

(*Id.*, emphasis added.) Upchurch thus implied that the “Kiely Rodni GoFundMe” was part of a “catfishing” scheme—that the profile was fake and those who stood to benefit from it were perpetrating a hoax and financial fraud. Taken together, Upchurch’s false statements of fact here implied that the Plaintiffs were in fact relatives of Callie Ross (provably false) and that the death of Kiely Rodni was fake (provably false) as part of scheme or cover-up involving a fake police department (provably false) to become a millionaire on GoFundMe (provably false). Finally, Upchurch’s own words concede that these statements contain allegations of fact, as he states that he intends to “**post the proof** and show you guys.” Measured against *Milkovich*, these defamatory statements assert false statements of fact and are actionable under defamation law.

4. The false assertions of fact that Plaintiffs were involved in a cover-up or scheme to fake the death of Kiely Rodni as part of a “scam” defamed Plaintiffs.

Accusing the surviving family members of a deceased loved one of participating in a cover-up, scheme, or conspiracy involving law enforcement, as Upchurch did here to Plaintiffs, is not without legal precedent in recent memory. In *Jones v. Pozner*, the parents of Noah Pozner, a child who was killed in the Sandy Hook Elementary School shooting in December 2012, sued media personality Alex Jones for “defamation and defamation per se based on statements made in three broadcasts that disputed whether the shooting that took their son’s life actually occurred and

whether, if the children were killed, they were shot as part of a staged event.” (2019 WL 5700903, at *1 (Tex. App., 2019).) The “gist of the broadcast” was that “the shooting at Sandy Hook was staged and, by implication, that the parents were complicit.” (*Id.*, at *6.)

The trial court denied Jones’s motion to dismiss, and Jones appealed. (*Id.*, at *1.) In affirming the denial of the motion to dismiss, the Texas Court of Appeals observed:

Because of the broadcast’s overall impression that the shooting at Sandy Hook was faked, a reasonable viewer could conclude that the broadcast mischaracterizes the parents’ role, suggesting that they participated in an abhorrent hoax. *See Means v. ABCABCO, Inc.*, 315 S.W.3d 209, 214 (Tex. App.—Austin 2010, no pet.) (“A statement is defamatory if it tends to injure the person’s reputation, exposing the person to public hatred, contempt, ridicule, or financial injury, or if it tends to impeach that person’s honesty, integrity, or virtue.”).

(*Id.*, at *7.) Thus, Jones’s mischaracterization of “the parents’ role” and suggestion that they had “participated in an abhorrent hoax” sufficed to state a claim for defamation. (*Id.*) Here, Upchurch’s behavior is very nearly on all fours with that of Alex Jones.⁶ He similarly mischaracterizes the roles of Kiely Rodni’s parent and grandparent, claiming they are “not real” people who are in fact related to some other person; that law enforcement (a “fake police department”) faked the death of Kiely Rodni as a conspiracy or scheme to make a million dollars on GoFundMe. (ECF 9, PageID #: 101-110.) A reasonable viewer could thus conclude that Upchurch accused the Plaintiffs of “participating in an abhorrent hoax.” (*Jones*, at *7.) These (again provably false) outlandish allegations, *if true*, would certainly subject the Plaintiffs “to public hatred, contempt, ridicule, or financial injury” and tend “to impeach [their] honesty, integrity, or virtue.” (*Id.*)

⁶ Recall that Upchurch’s YouTube platform had approximately 3,140,000 subscribers as of the date of the filing of the CAC. (ECF 9, ¶ 3, PageID #: 85.)

The Middle District of Tennessee has held that the word *scam* can imply a defamatory meaning. In *Hudik v. Fox News Network, LLC*, the Court considered a FOXNEWS.COM headline that read: “Daryle Singletary’s new single is a scam, not benefiting his widow and kids, business partner says.” (512 F.Supp.3d 816, 834 (M.D. Tenn., 2021).) The gist of the libelous sting, like Upchurch’s “GoFundMe” line of attack here, was that the plaintiff had fraudulently set up an online donation website for a deceased person. (*Id.*) In holding this headline stated a claim for defamation under Tennessee law, Judge Richardson held:

The Court finds that the headline and its use of the word “scam” could be found by a jury to convey a defamatory meaning as to Plaintiff. Given the connotations of the word “scam” as defined above, Plaintiff indeed could be held up to public hatred, contempt, or ridicule for perpetrating a “scam,” especially one that involves . . . *collecting donations purportedly on behalf of a grieving family.*

(*Id.*, emphasis added.) In accord with the Middle District of Tennessee, the Supreme Court of Illinois has similarly concluded that:

The word “scamming” could be found to be defamatory per se because it imputed a lack of integrity in the discharge of employment duties and prejudiced the plaintiff in his business by implying that he was lying and trying to deceive the defendants and the public at large.

(*Schivarelli v. CBS, Inc.*, 776 N.E.2d 693, 700 (Ill. App. 2002) (citing *Kolegas v. Heftel Broadcasting Corp.*, 607 N.E.2d 201, 207 (Ill., 1992).) Upchurch’s false statements of fact implying that Plaintiffs participated in a GoFundMe scam are similarly defamatory.

5. Upchurch’s GoFundMe “scam” comments refer to the Plaintiffs by implication.

Upchurch’s comments attacking the “Kiely Rodni GoFundMe” as a “scam” can be reasonably understood as impugning the reputation of Plaintiffs. First, the CAC alleges that “a family friend of Kiely’s mother, Lindsey Nieman, created a GoFundMe page titled: ‘Support for *the Family of*

Kiely Rodni.” (ECF 9, ¶ 31, PageID #: 90, emphasis added.) Next, the CAC alleges “Plaintiffs David Robertson and Daniel Rodni are members of *the family of Kiely Rodni.*” (*Id.*, emphasis added.) Upchurch’s comments specifically instruct his ~3.1 million viewers to “Look at the Kiely Rodni GoFundMe” in his screed baselessly claiming:

You can be a millionaire on GoFundMe by catfishing people with internet deaths . . .
You could do it fast as fuck. *Look at the Kiely Rodni GoFundMe.* It’s made
\$63,000 in the past seven days. *That’s one GoFundMe for Kiely Rodni.*

(*Id.*, ¶ 76, PageID #: 104, emphasis added.) Upchurch’s comments plausibly attack Plaintiffs, as immediate family members of Kiley Rodni.⁷ First, statements may defame an individual even without explicitly⁸ naming that individual:

Under California law, “[t]here is no requirement that the person defamed be mentioned by name ... It is sufficient if from the evidence the jury can infer that the defamatory statement applies to the plaintiff ... [or] if the publication points to the plaintiff by description or circumstances tending to identify him.

(*Yow v. National Enquirer, Inc.*, 550 F.Supp.2d 1179, 1184 (E.D. Cal., 2008) (citations omitted).)

Further, California recognizes the general rule that defamatory statements directed towards a discrete group of people—here, the family of Kiely Rodni as beneficiaries of the GoFundMe fundraiser for Kiely Rodni—may state a claim for defamation where that group is sufficiently small. (*Mullins v. Brando*, 91 Cal. Rptr. 796, 805 (Cal. App. 1970).) One of the classic

⁷ See, e.g., 34 USCA § 60911 (“the term ‘immediate family member’ means a parent, parent-in-law, grandparent, grandparent-in-law, sibling, spouse, child, or step-child of a murder victim.”) See also 26 U.S.C.A. § 9035 (“the term ‘immediate family’ means a candidate’s spouse, and any child, parent, grandparent, brother, half-brother, sister, or half-sister of the candidate, and the spouses of such persons.”)

⁸ Of course, Upchurch *does* specifically name or refer to both Plaintiffs at other times, as outlined in the CAC, especially when he claims Plaintiffs are “not real” (¶ 97); and posts images of them (¶ 93) and videos purporting to show their home addresses (¶¶ 85-93). (ECF 9, PageID #: 106-109.)

illustrations of a sufficiently small group is a family. (*Id.*) The California Court of Appeals cited PROSSER ON TORTS with approval for this proposition:

The rule has been applied quite uniformly to comparatively large groups or classes of a definite number, exceeding, say twenty-five persons. **When the group becomes smaller than that, as in the case of a jury, a family, an election board, or the four officers of an association, the courts have been willing to permit the conclusion that the finger of defamation is pointed at each individual.**

(*Id.*, n. 13, citing PROSSER, 3rd ed. 1964, ch. 21, s 106, pp. 767—768, emphasis added.) In accord with this rule, the Supreme Court of Utah has acknowledged:

One who publishes matter concerning a family in its collective capacity assumes the risk of its being libelous as to any member thereof; and such matter concerns a class of which any member can maintain an action for defamation of himself personally, because the libel applies to each individual member, through the class, by the use, without discrimination, of the collective appellation.

(*Fenstermaker v. Tribune Pub. Co.*, 13 Utah 532 (1896).) Or to take a more recent example, the Wisconsin Court of Appeals considered a defamation claim against a newspaper that published an article concerning a suicide victim that stated: “Bruce might have fared better if his family had not abandoned him.” *Ogren v. Employers Reinsurance Corp.*, 350 N.W.2d 725, 727, 119 Wis.2d 379, 381 (Wis. App., 1984). The court held the article could “be reasonably understood to refer to Bruce’s mother and sister, and the judgment dismissing their complaint must be reversed.” (*Id.*)

Upchurch’s comments attacking the “Kiely Rodni GoFundMe,” which was established for “the family of Kiely Rodni,” concern the family of Kiely Rodni “in its collective capacity.” (*Fenstermaker*, at 352.) Accordingly, the Court should “permit the conclusion that the finger of defamation is pointed at each individual,” including Kiely Rodni’s father and grandfather—the Plaintiffs here. (*Yow*, at 1184, n. 13.)

6. The context of Upchurch's statements does not relieve him of liability for his defamatory statements of false facts.

Upchurch stresses that “context” matters, and that he should be relieved from defamation liability because he elected to publish his defamatory statements to “the YouTube world,” where an audience can expect “fiery rhetoric.” (Def.’s Mem, ECF 23, PageID #: 179.) But the law does not provide immunity for defamation simply because the defendant has an internet connection and a web camera and chooses to post injurious falsehoods in the internet’s dark corners:

While courts have recognized that online posters often “play fast and loose with facts,” this should not be taken to mean online commentators are immune from defamation liability.

(*Sanders v. Walsh*, 162 Cal. Rptr. 3d 188 (Cal. App., 2013) (citations omitted).) And legal scholars have recognized that defamatory statements published on the internet can reach an audience much wider than traditional print media:

Although Internet communications may have the ephemeral qualities of gossip with regard to accuracy, *they are communicated through a medium more pervasive than print, and for this reason they have tremendous power to harm reputation.*

(*Silencing John Doe: Defamation & Discourse In Cyberspace*, 49 DUKE L.J. 855, 863 (February 2000) (emphasis added).) In *Sanders v. Walsh*, the California Court of Appeals considered a case in which the defamation defendants made essentially the same argument Upchurch now makes—that “[defendants’] internet postings . . . were not actionable defamation because the statements lacked specificity and were posted on an internet review site where most readers expect to see strongly worded opinions rather than facts.”) (*Sanders*, at 195.) In rejecting this argument, the court observed: “we are not confronted with vague implications of fact, *but with specific factual claims.*” (*Id.*, at 196, emphasis added.) That is, the “fast and loose” context of the internet, or

even specific internet websites, will not immunize defamatory statements that make “*specific factual claims*.” (*Id.*, emphasis added.)

Along the same lines, recall that in *Milkovich*, the leading Supreme Court case on the issue of actionable defamatory “opinions,” the defendant published defamatory material in an opinion column in the sports page of a newspaper. (*Milkovich*, at 9.) The Ohio Supreme Court accepted a version of the argument Upchurch now makes—that the “context” of the opinion page suggested the defamatory statements were published in a medium that was “a traditional haven for cajoling, invective, and hyperbole” and thus were protected opinion speech. (*Id.*) But the Supreme Court in *Milkovich* in fact *reversed* this holding, emphasizing that:

If a speaker says, “In my opinion John Jones is a liar,” he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, “In my opinion Jones is a liar,” can cause as much damage to reputation as the statement, “Jones is a liar.”

(*Id.*, at 18-19.) Justice Rehnquist, for the *Milkovich* majority, further relied on Shakespeare’s *Othello*, quoting Iago’s lines to Othello: “he that filches from me my good name / Robs me of that which not enriches him, / And makes me poor indeed.” (*Id.*, at 12.) Because Upchurch levied false statements of fact attacking the Plaintiffs’ good names—claims he professed that he was “100% confident” in making—he may be held liable for defamation. (See *Gallagher v. Philipps*, 563 F.Supp.3d 1048, 1079 (S.D. Cal., 2021) (“The dispositive question for the court is whether a reasonable factfinder could conclude that the published statements imply a provably false factual assertion.”))

7. Upchurch acted with actual malice because “only a reckless man” would have put his defamatory falsehoods on the internet, and the CAC alleges that Upchurch himself was subjectively aware that his statements were false.

As an initial matter, Plaintiffs observe that Upchurch’s brief devotes a single paragraph, devoid of any citation to any case law, to his argument that: “Plaintiffs’ Amended Complaint does not rise to the heightened pleading standard for actual malice.” (Def.s’ Mem., ECF 23, PageID #: 187.) Rather than pointing the court to such case law, Upchurch references Plaintiffs’ allegations in the CAC. (*Id.*) But the CAC supports a finding of actual malice, as the CAC alleges that Upchurch was *subjectively aware* that Kiely Rodni was a real person and so was “her family,” before he then falsely asserted that she was a “fake” person and her family members, including Plaintiffs, were “not real.” (CAC ¶¶ 43-49, ECF 9, PageID #: 44.) (*See Herbert v. Lando* (“‘subjective awareness of probable falsity,’ may be found if ‘there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.’” (441 U.S. 153, 156–57 (U.S., 1979).) Upchurch’s bizarre factual claims that the family of Kiely Rodni was involved in a conspiracy with the Placer County Sheriff’s Department to fake the death of Kiely Rodni to raise money on GoFundMe rise to the level of allegations “*so inherently improbable that only a reckless man would have put them in circulation.*” (*St. Amant v. Thompson*, 390 U.S. 727, 732 (U.S. 1968) (emphasis added); *see also Tull v. Higgins*, 2021 WL 6116971, at *8 (N.D. Cal., 2021) (“*reliance on sources known to be unreliable* or biased against the plaintiff, ‘may provide circumstantial evidence of actual malice in appropriate cases’”).) (Emphasis added.) Further, Upchurch’s reckless state of mind can be inferred from his blatant disregard for the accuracy of his fanciful claims regarding Youtuber “ickedmel”, and his reply to a warning to “be careful” because he might “get sued for slander.” Brazenly dismissing the prospect of a libel suit, Upchurch replied: “**They**

can slander these nuts. Lol.” (CAC, at ¶ 37, PageID #: 91) (emphasis added) (*See Herbert* at 164 n. 12 (“any competent evidence, either direct or circumstantial, can be resorted to [to establish common law malice], and all the relevant circumstances surrounding the transaction may be shown, provided they are not too remote, *including* threats, [and] *prior* or subsequent *defamations* . . .”) (emphasis added).)

Put simply, the CAC adequately pleads facts supporting the reasonable inference that Upchurch acted with reckless disregard for the falsity of his defamatory statements, and Plaintiffs have satisfied their burden at the Rule 12 stage.

8. Plaintiffs’ claims for infliction of emotional distress center on the totality of Upchurch’s actions and are not “redundant” of his other claims.

Upchurch moves to dismiss Plaintiffs’ claims for false light invasion of privacy and negligent and intentional infliction of emotional distress under California law⁹ on the basis that such claims are “redundant.” But this conclusion misstates California law. In *Jackson v. Mayweather*, 217 Cal.Rptr.3d 234, 257–58 (Cal. App., 2017), the California Court of Appeals considered claims brought by Shantel Jackson, the ex-girlfriend of Floyd Mayweather, a professional boxer. (*Id.*) Jackson alleged various claims against Mayweather, including defamation, false light invasion of privacy, and intentional and negligent infliction of emotional

⁹ Upchurch does not separately move to dismiss Plaintiffs’ claims for negligent infliction of emotional distress (“NIED”) and intentional infliction of emotional distress (“IIED”) under Tennessee law, except to the extent that he asserts “the entirety” of Plaintiffs’ actions should be dismissed as “constitutionally protected speech.” (Def.’s Mem at 6, ECF 23, PageID #: 168.) That is, Upchurch’s argument with respect to Plaintiff’s NIED and IIED claims under Tennessee law rests entirely on the success of his arguments that his speech is protected by the First Amendment. (*Id.*) Upchurch does not separately brief or make any argument specific to NIED and IIED under Tennessee law or the unique elements of those claims. (*Id.*)

distress. (*Id.*) Regarding the false light claim, the court did not dismiss the claim as “redundant” to the defamation claim, but instead held that the false light claim *failed* on the merits for the *same reasons* her defamation claims failed: “those claims suffer from the same fatal defects as Jackson’s defamation claim: Mayweather’s allegedly false explanation for the couple’s breakup did not expose Jackson to ‘hatred, contempt, ridicule, or obloquy.’” (*Id.*, at 256.) The court observed that California law *allows* for false light claims to be brought in tandem with defamation claims, noting “*when a false light claim is coupled with a defamation claim*, the false light claim is essentially superfluous, and *stands or falls on whether it meets the same requirements as the defamation cause of action.*” (*Id.*, citing *Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1385, fn. 13) (emphasis added.) Thus, California law allows false light claims to be paired with defamation claims, even though the false light claim could be “superfluous,” and such claims will proceed (“stands or falls”) in lockstep with each other. (*Id.*)

Jackson is further instructive in that one of the allegations Jackson made against Mayweather was that he had “posted her Los Angeles address on his social media pages and falsely suggested he lived there. Jackson alleged she became concerned for her safety when Mayweather’s fans came to the address and then were disappointed to learn he was not there.” (*Jackson*, at 241.) In this case, Upchurch posted the home address of Plaintiff Daniel Rodni in a YouTube video titled “Found another picture of Kiely’s CRV on google earth” on September 2, 2022. (CAC ¶¶ 85-89, ECF 9, PageID #:106.) This video implied, falsely, that Kiely Rodni’s vehicle was at the home of Daniel Rodni. (*Id.*) As a result of this video and the ensuing negative attention he received, Daniel Rodni essentially went into hiding, and made substantial investments in home security and surveillance. (*Id.*)

The *Jackson* court permitted Jackson’s IIED claim to proceed, observing that this claim was “based upon the entire range of Mayweather’s conduct toward Ms. Jackson” and that “evidence of [Mayweather’s] postings and comments may properly be considered by a jury (or in connection with a motion for summary judgment) when evaluating the merits of this claim [for IIED].” (*Jackson*, at 258.) Notably, the court did so even though it found that Jackson had *failed* to state a claim for defamation. (*Id.*) Here, Plaintiffs have adequately pleaded their defamation claims, and their ancillary claims may proceed for further development.

CONCLUSION

The First Amendment poses no obstacle in holding the Defendant accountable for his reckless misconduct in widely disseminating false statements of fact. Upchurch accused the Plaintiffs, the father and grandfather of Kiely Rodni, who tragically died in a motor vehicle accident, of concealing their identities and participating in an utterly implausible conspiracy to “fake the death” of Kiely, with the aid of law enforcement (“a fake police department”). Upchurch also implied that Plaintiffs participated in a financial fraud and abhorrent hoax to “become a millionaire” through the entire tragic episode. Upchurch’s statements are provably false, and thus he cannot raise the shield of “opinion” to insulate himself from liability for his conduct. Plaintiffs’ claims should be proceed for further development in accordance with the law of California, where Plaintiffs are domiciled, as California has the most significant relationship to the issues to be decided in this multi-state defamation case.

For these reasons, Upchurch’s motion should be denied in all respects.

Respectfully submitted,

/s/ Christopher Smith

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent via the Court's ECF system to the following parties on November 7, 2023, to:

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