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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CORCEPT THERAPEUTICS, INC.;
JOSEPH K. BELANOFF, an individual;
ALAN F. SCHATZBERG, an individual,

Plaintiffs - Appellees,

v.

ANTHONY ROTHSCHILD, an
individual,

Defendant - Appellant.

No. 08-15967

D.C. No. 5:07-cv-03795-JW

MEMORANDUM *

Appeal from the United States District Court
for the Northern District of California
James Ware, District Judge, Presiding

Argued and Submitted June 8, 2009
San Francisco, California

Before: SCHROEDER, TASHIMA and BEA, Circuit Judges.

Plaintiffs Corcept Therapeutics and its founders, Alan Schatzberg and
Joseph Belanoff, brought suit in 2005 in California state court for defamation,

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

intentional infliction of emotional distress, and interference with prospective business relations. Defendant Anthony Rothschild removed the suit to federal court and filed a special motion to strike the plaintiffs' complaint pursuant to California's anti-SLAPP (Strategic Lawsuits Against Public Participation) statute, which provides defendants in California with protection against meritless suits brought in order to chill their First Amendment rights. Cal. Civ. Proc. Code § 425.16. This is an appeal from the district court's denial of Rothschild's anti-SLAPP motion. All the issues before us arise under California law.

The defamation portion of the plaintiffs' complaint alleged that Rothschild made defamatory postings on Yahoo message boards regarding Corcept, its founders, and its principal product, a drug named Corlux. The plaintiffs' remaining claims arose from the Yahoo postings as well as a series of harassing phone calls allegedly made by Rothschild. We conclude that the district court correctly denied Rothschild's anti-SLAPP motion and affirm with respect to all claims.

The district court's denial of Rothschild's anti-SLAPP motion is immediately appealable. Zamani v. Carnes, 491 F.3d 990, 994 (9th Cir. 2007); Batzel v. Smith, 333 F.3d 1018, 1024 (9th Cir. 2003). We review the denial of the

motion de novo. Zamani, 491 F.3d at 994; see also Plumley v. Mockett, 79 Cal. Rptr. 3d 822, 834 (Cal. Ct. App. 2008).

As a preliminary matter, the record contains a great deal of investigative material establishing the link between Rothschild and the Yahoo postings criticizing Corcept's corporate operations and the efficacy of its drug Corlux. Before Rothschild filed his anti-SLAPP motion, the plaintiffs obtained substantial discovery materials, including Rothschild's telephone records and travel schedules, and were able to conduct an extensive IP address analysis connecting Rothschild to the locations from which each of the postings were made.

To prevail on an anti-SLAPP motion, Rothschild must make a threshold showing that the plaintiffs' cause of action arises from Rothschild's "protected activity." Vargas v. City of Salinas, 46 Cal. 4th 1, 14 (2009). If Rothschild makes the threshold showing that his statements were protected under the anti-SLAPP statute, then the burden shifts to the plaintiffs to make a prima facie showing they are likely to prevail on their claims. Id.

Rothschild met his burden of showing that the plaintiffs' suit, in part, arises from his protected activity. See Cal. Civ. Proc. Code § 425.16(e)(3). The plaintiffs do not dispute that Rothschild's Yahoo postings were made in a public forum. Although the district court did not clearly rule on the question of whether

the postings pertained to an issue of public interest, the record makes it apparent that they did.

Because Schatzberg and Belanoff are public figures, for the plaintiffs to show a probability of prevailing on their defamation claim, the plaintiffs must demonstrate that Rothschild made the Yahoo postings with actual malice.

Reader's Digest Ass'n v. Superior Court, 690 P.2d 610, 615 (Cal. 1984). We agree with the district court that the plaintiffs have shown a probability they will be able to prove at trial that several of the statements in Rothschild's Yahoo postings were made with knowledge of or a reckless disregard for the falsity of the statements. An example is the October 28, 2005 posting, where Rothschild suggested that several deaths were related to the drug Corlux and that a rival drug was better. Plaintiffs assert that Rothschild himself ran the clinical trial at which the deaths occurred, and therefore knew that none of the deaths resulted directly from ingestion of Corlux.

The district court's denial of Rothschild's anti-SLAPP motion is **AFFIRMED** and the case **REMANDED** to the district court for further proceedings.