SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ANITA BUSCH, Plaintiff, vs. ANTHONY PELLICANO; ALEXANDER PROCTOR; MARK ARNESON; CITY OF LOS ANGELES; SBC TELECOMMUNICATIONS, INC., formerly operating as Pacific Bell Telephone Company, a corporation; CLIENT DOE; LAW FIRM DOE; and DOES 1 through 100, inclusive, Defendants.	Case No. BC 316318 RULING ON SUBMITTED MATTER

Defendant Michael Ovitz's special defense under Code of Civil Procedure, section 474, came to trial on September 24, 2013. The Court received evidence on September 24, 25, 27, and October 2, 11, 13 and 22, 2013; and heard argument on January 9, 2014.

Having taken the matter under submission on January 9, 2014, the Court now renders its decision.

I. PROCEDURAL BACKGROUND

1. On May 28, 2004, Plaintiff Anita Busch ("Plaintiff") filed a complaint against Defendant Anthony Pellicano ("Pellicano"); Alexander Proctor ("Proctor"); Mark Arneson ("Arneson"); City of Los Angeles; SBC Telecommunications, Inc.; Client DOE; Law Firm DOE; and DOES 1 through 100.

2. In the Complaint, Plaintiff alleged causes of action for: (1) intentional infliction of emotional distress; (2) assault; (3) invasion of privacy; (4) violation of statute – Penal Code §§ 632 and 637.2; (5) violation of California Business & Professions Code § 17200; (6) negligence; (7) negligence.

3. Among other assertions, Plaintiff alleged the following:

> "2. Plaintiff ANITA BUSCH . . . was a journalist, who was writing, investigating and reporting on entertainment business stories for newspapers. She worked for The New York Times until May 2002 and then started working for The Los Angeles Times thereafter.
>
> * * *
>
> "8. Defendants DOES 1 through 100, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to Plaintiff at this time. When their true names and capacities are ascertained, Plaintiff will amend this complaint by inserting their true names and capacities herein. . . .
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> * * *
>
> "17. The claims against known Defendants and the presently unknown

Defendants described herein arise out of the Defendants Pellicano, Proctor, Arneson and Does 1 through 100, intentionally and maliciously engaging in a scheme and course of conduct of threats, intimidation, harassment and invasion of privacy for the purpose of deterring, hindering, preventing and retaliating against Plaintiff for investigating and writing articles about the entertainment business.

"18. The ongoing pattern and course of conduct engaged in by Defendants and each of them, at the instigation of CLIENT DOE, LAW FIRM DOE AND DOES 1 through 31, includes the following:

(a) Wiretapping of Plaintiff's telephone lines. The date of commencement of said illegal wiretapping is not yet known; however, Plaintiff only became aware of illegal wiretapping within the past two years;

(b) On or about June 20, 2002, at Plaintiff's residence in Los Angeles, California, Plaintiff was threatened, harassed and intimidated when she discovered her car windshield had been smashed. A note taped next to the hole in the windshield contained the words "STOP;" on the cracked window was an upside down tray with a dead fish and a red rose hidden underneath;

(c) On or about June 21, 2002, Plaintiff began receiving urgent telephone messages with a male voice on the other end, who asserted that there was a plan to blow up Plaintiff's car:

(d) In July 2002, two unknown males, apparently tracking Plaintiff's whereabouts, arrived at Plaintiff's parents' home, where Plaintiff had been staying, and threatened Plaintiff by their physical appearance;

(e) In August 2002, Plaintiff discovered that her computer had

been hacked into and two months later her hard drive was destroyed by this tampering;

(f) On or about August 16, 2002, two males, driving a Mercedes with tinted windows and no license plate, drove at excessive rate of speed in an attempt to run over Plaintiff who barely escaped. The vehicle then pulled up right next to Plaintiff and one occupant then leaned out of the window and made menacing gestures in an apparent effort to assault and terrorize plaintiff.

(g) In or about March 2003, Plaintiff's car was broken into and a small hole was drilled near the driver's visor.

"19. The above conduct frightened, terrified and devastated Plaintiff. Having her telephone wiretapped, her computer hacked into and her life threatened, Plaintiff was severely impacted in her ability to fully perform as a journalist."

4. On November 6, 2006, Plaintiff filed an Amendment to Complaint, stating: "Upon the filing of the complaint, the plaintiff, being ignorant of the true name of the defendant and having designated the defendant in the complaint by the fictitious name of: Doe 4; and having discovered the true name of the defendant to be Michael S. Ovitz ("Ovitz"); amends the complaint by substituting the true name for the fictitious name wherever it appears in the complaint."

5. On October 31, 2012, Ovitz filed a motion for summary judgment, contending, among other things, that the causes of action alleged in the complaint against him are time-barred under applicable statutes of limitations because "the original complaint's designation of Ovitz as a 'Doe' was fraudulent, as Busch was not at that time ignorant of his identity." In essence, Ovitz claimed that Plaintiff's November 6, 2006 Doe Amendment did not "relate back" to the original complaint's filing date of May 28, 2004.

6. On January 25, 2013, the Court denied Ovitz's motion for summary judgment, finding that there were triable issues of fact that could not be determined in a summary judgment proceeding.

7. On May 21, 2013, Ovitz filed a motion for a separate trial on statute of limitations defenses. The specific issue proposed by Ovitz to be tried in a separate trial was: whether Ovitz was properly substituted as a "Doe" defendant under Code of Civil Procedure, section 474, such that the Doe Amendment naming Ovitz would "relate back" to the filing date of the Complaint for purposes of the running of the statute of limitations.

8. At the hearing held on June 21, 2013, the Court ruled that Plaintiff's tort claims were governed by the two year statute of limitations (Code of Civil Procedure § 335.1), with the exception of a one year statute of limitations for penalty claims under Penal Code, sections 632 and 637.2 (Code of Civil Procedure, § 340). The Court further held that the issue of the Doe Amendment was for the Court to decide, and was not a jury issue.

9. The parties thereafter entered into a stipulation that the defense issue of the Doe Amendment under Code of Civil Procedure, section 474 (i.e., statute of limitations defense) be tried separately by the Court prior to other issues of trial.

10. Trial on the issue of the Doe Amendment under Code of Civil Procedure, section 474, to wit, statute of limitations defense, commenced on September 24, 2013 and was held on September 24, 25, 27, October 2, 11, 13 and 22, 2013, and January 9, 2014.

II. EVIDENCE AT TRIAL

11. Plaintiff was an established journalist reporting on the entertainment industry. (RT 404-405)

12. In March of 2002, Jules (Julius) R. Nasso ("Nasso") filed suit against his former producing partner Steven Seagal ("Seagal"). (Exhibit 1011)

13. Plaintiff was trying to put together a "string" on a story that had to do with Nasso, Seagal, organized crime and Hollywood, after the filing of the lawsuit between Nasso and Seagal in early 2002. (RT 415-416)

14. Plaintiff was communicating with Phil Goldfine, president of Seagal's production company, for months before May 16, 2002, "and very specifically about Seagal-Nasso in the weeks prior to that date." (RT 419)

15. Between March 22, 2002 and May 7, 2002, Plaintiff authored or co-authored with Bernard Weinraub ("Weinraub") a number of articles about Ovitz for the *New York Times*. (Exhibits 1002, 1003, 1004, 1005, 1007, 1008, 1009)

16. Plaintiff's *New York Times* articles chronicled events surrounding Ovitz's career and his agency, the Artists Management Group ("AMG").

17. Plaintiff officially started working at the *Los Angeles Times* on June 3, 2002. (RT 518, 522)

18. Early in the morning on June 4, 2002, Plaintiff received a call from a source stating that Nasso was arrested along with members of the Gambino crime family. (RT 519)

19. Plaintiff's first story published at the *Los Angeles Times*, written with Paul Lieberman, appeared on June 5, 2002, and concerned the arrest and indictment of Nasso for "taking part in a plot by the Gambino crime family to extort money from" Seagal. (Exhibit 1011)

20. Follow-up articles by Plaintiff on the Seagal/Nasso dispute and its relation with organized crime appeared in the *Los Angeles Times* on June 6, June 12 and June 17, 2002. (Exhibits 1012, 1013)

21. Plaintiff's June 6, 2002 article in the *Los Angeles Times* (Ex. 1012) concerning organized crime, Seagal, Nasso and Hollywood was based on investigative work Plaintiff began in April-May 2002. (RT 427)

22. On June 20, 2002, Plaintiff discovered a hole, resembling a bullet hole, in the windshield of her car, and found on her vehicle a dead fish wrapped in tinfoil, a red rose, and a piece of paper on which was written the word "Stop." Plaintiff understood all that to mean she should stop what she was doing, that is, to stop writing about Nasso and Seagal, or she would be killed. (RT 406)

23. At a June 20, 2002 interview with the FBI, Plaintiff "stated that she does not know of anyone who may be responsible for the incident. She said that she has not been threatened in the past and that she is not aware of anyone who is angry with her. However, [she] believed that the incident is related to her investigative work for the Los Angeles Times on an as yet unpublished article on Julius Nasso and Steven Seagal. . . . [Plaintiff] did not believe that any of her other work had any correlation to the incident." (Exhibit 1015)

24. At trial, Plaintiff testified about conversations held on June 20, 2002, with Ronald Lowe, an editor of the *Los Angeles Times*, and FBI agent Stan Ornellas as follows:

> "The FBI -- I asked if they thought I had anybody that might do this to me. And I couldn't think of anything besides the -- you know, the Jules Nasso-Steven Segal stories that I was doing because I was told to stop and that's what I was doing at the time. And he said -- they asked if anybody -- if I had any enemies.

"And they said -- and I named a couple of people and Kinsey Lowe said, 'How about Mike Ovitz?' I said, 'No, he wouldn't do that.' " (RT 38)

25. Plaintiff told the FBI that Seagal's and Nasso's people were "aware of the upcoming article" on Nasso. Plaintiff also advised the FBI that Ovitz got Seagal started in the movie industry, and that Ovitz had sent her a bottle of Monosodium Glutamate (MSG) because he knew that she was allergic. Plaintiff "downplayed the incident and said that was Ovitz's idea of a joke and she took it as such." (Exhibit 1015)

26. Plaintiff described her relationship with Ovitz in or about May, June and July of 2002 as follows:

"You know, I had done stories on him prior to that. Why -- I mean he had taken me to lunch one time and did this -- made up this silly HOLLYWOOD REPORTER front page that I was -- Anita had Michael Ovitz's baby. It was joking around. He had, you know -- he had invited me to his son's bar mitzvah. He always said he wanted to hire me. He really believed, and I got an award for it, that the story of him leaving Disney was fair, and I was the only person who was really fair that listened to both sides of the story. He recommended me -- without my knowledge he recommended me for the job at THE HOLLYWOOD REPORTER." (RT 423)

27. When Plaintiff went in to work on June 21, 2002, she found multiple messages on her answering machine. The person who left the messages said that he wanted to talk to the reporter who was writing the Seagal stories. Plaintiff called the person back. (This person was later identified by law enforcement as a confidential informant.) The person told Plaintiff that he ran into a "guy" named "Alex," who was hired to blow up Plaintiff's car; it was going to happen in the

next two days and Plaintiff was to stop what she was doing. (RT 406-409)

28. In July or August, 2002, Plaintiff was assaulted outside her home by two men in a car who almost ran her over; they stopped beside her car and an occupant yelled at her to roll down her window; he gestured with fingers to his lips. Plaintiff understood that gesture to mean "Be quiet. Or die." "Or you weren't quiet so I'm going to kill you." (RT 429-431)

29. Plaintiff discovered in July or August 2002 that her computer had been hacked. She experienced problems with her computer and phone lines through November 2002, and came to believe her phones had been tapped after Pacific Bell checked her lines in November and disclosed the existence of a wiretap. (RT 25, 452)

30. In November 2002, the FBI seized files and computer data from Pellicano's office pursuant to a search warrant. (Exhibit 100)

31. After Pellicano's office was searched by the FBI in November 2002, Plaintiff learned that the investigator that hired "Alex" was Anthony Pellicano.

32. On June 12, 2003, FBI Agent Tom Ballard told Plaintiff that on May 16, 2002 her name had been run on the LAPD database by Mark Arneson. (RT 53)

33. Plaintiff wrote notes describing what happened on June 12, 2003, as follows:

> "I call the FBI and ask for Tom Ballard . . .
>
> * * *
>
> "Then he asks me, 'did Stan tell you about the date that your information was run on the police database?'
>
> " 'No.'

" 'Do you want to know?'

" 'Yeah.'

" 'May 16 [2002] . . .'

* * *

"That was before the Segal stories. That was before I even joined the L.A. TIMES. Dear God . . . it could have been only one person . . . only one person makes sense and that is Michael Ovitz. . ." (Exhibit 1045)

Plaintiff's conclusion was her first impression. (RT 46-47)

34. Plaintiff's handwritten manuscript edits for a potential book depicting June 2003 events (Exhibit 1077, p. 2) include the statement: "It could only have been Michael Ovitz. He would have been the only one interested in me at the time." (RT 168)

35. In the June 12, 2003 conversation, agent Ballard also mentioned a number of other names on the list which Arneson ran through on the LAPD database, including that of Bernard Weinraub, Plaintiff's colleague at the *New York Times*.

36. Plaintiff testified: "If Berne Weinraub is on that list [of names that Arneson ran through LAPD database] which it appears that he is, then it is definitely Ovitz." (Exhibit 1045; RT 54-55) That was Plaintiff's first impression or initial reaction. (RT 48, 55)

37. On July 27, 2003, Plaintiff learned that Ovitz had hired Pellicano three years earlier, but Ovitz's main investigator was Gavin de Becker. (RT 121)

38. Plaintiff learned in January 2004, from the sentencing memorandum (Exhibit 100) filed January 15, 2004 by the United States Attorney in the case of *United States v. Pellicano* (U.S.D.C. Case No. 02-1278) the following:

" . . . the [United States] government has collected evidence strongly indicating that defendant [Pellicano] hired a man named Alex Proctor to burn the car of Los Angeles Times contract reporter Anita Busch in order to intimidate her on behalf of one of defendant's clients. . . .

"Anita Busch woke on the morning of June 20, 2002, to find that her car, parked in front of her Los Angeles home, had been vandalized during the preceding night. A shatter mark that appeared to be a bullet hole was in the windshield; a note reading "STOP" was taped to the windshield just above the shatter mark; and a tin foil baking tray containing a dead fish and a rose was turned upside down on the windshield.

"The initial evidence of defendant's involvement in the threat against Busch stemmed from Proctor's recorded conversations with a government cooperating witness, in which he claimed responsibility for the threat and repeatedly stated that he had been hired by defendant to silence Busch's reporting. . . ." (Exhibit 100)

39. Through the sentencing memorandum, Plaintiff further learned:

a) "A file labeled 'Steven Seagal Matter,' seized from defendant's [Pellicano's] office pursuant to the execution of a search warrant on November 21, 2002, contained among other documents, copies of a June 12, 202, Los Angeles Times article about Seagal co-authored by Anita Busch, and an October 2002 Vanity Fair article about Seagal written by Ned Zeman." ;

b) "The information about Anita Busch obtained by defendant's sources

on May 16, 2002, was contained in a file found on defendant's office computer pursuant to a search warrant. That file, which was created on June 3, 2002 (approximately two weeks before the threat), contained Busch's personal information, including her descriptive data, residence address, and vehicle information relating to the vehicle on which [Alexander] Proctor left the dead fish, rose, and note." (Exhibit 100)

40. An FBI report dated June 24, 2002, attached as Exhibit A to the U.S. Attorney's sentencing memorandum filed January 15, 2004, advises of an interview with an informant reporting on a meeting with an individual named "Alex," who said "that he had been recently hired by a detective agency who had been contacted by 'some people back east to set fire to a woman's car.' The woman was a reporter who had written a series of articles concerning actor Steven Seagal. Alex said this was to serve as a warning because 'they' wanted her to stop writing the article. . . . Alex said 'The people back east are ruthless, they don't care, they'll get somebody to do it.'" (Exhibit 100)

41. Plaintiff testified that at the time of the filing of her complaint on May 28 of 2004, she did not "ever really have any evidence or facts as to who, in fact, was behind Pellicano." (RT 457)

42. On July 17, 2004, Plaintiff wrote "There is more reason for me to think that it is Michael Ovitz in conjunction with Julius Nasso than Michael Ovitz in conjunction with Steven Seagal." (Exhibit 1165; RT 79)

43. Plaintiff testified as to her relationship with Ovitz during the period 2002-2004 as follows:

"Q. Did you ever have a feeling up until in 2002, 2003, 2004 that Ovitz considered you his enemy?

"A. No.

"Q. To the contrary, what was your understanding from Ovitz how he felt about you?

"A. Well, he tried to hire me a couple times. He invited me to his son's bar mitzvah. He --without my knowledge he recommended that I be hired as the editor of the HOLLYWOOD REPORTER overseeing, like, you know, 100 people, and he told me that he always felt that I gave him a fair shake, that I was fair and listened to both sides and he appreciated it."

(RT 501-502)

44. Plaintiff testified that before 2006 she did not have any kind of information that Ovitz had been involved with Pellicano and the wiretapping. (RT 510)

45. Plaintiff testified about her vacillating thoughts as to who was behind Pellicano:

"Q. As of the time of filing your Complaint in May 28 of 2004, did you ever really have any evidence or facts as to who, in fact, was behind Pellicano?

"A. No.

"Q. Okay. Now, at times did you succumb to Moldea's notion that it was Ovitz?

"A. Sometimes.

"Q. And then what would happen?

"A. Then I'd find out that Jules was close, close, close, close friends

with Pellicano and . . .

"Q. Would you vacillate back and forth?

"A. Yes.

"Q. Why?

"A. Because I was scared.

"Q. Scared of what?

"A. Getting killed by the mob.

* * *

"Q. Why did you vacillate as between Ovitz and Nasso?

"A. There was so much information pointing to the mob and to Nasso. There was just so much.

"Q. And did Mr. Moldea as you to – when you were writing the book and editing it – to come up with any speculation you could with regard to Ovitz?

"A. It was all speculation. We didn't know. We didn't know until the government told us what was going on. Until they filed. And they filed – when they filed that thing, it says guys back East again. Then I was, like, God Almighty." (RT 457-458)

46. Plaintiff testified that the first time she had any evidence or received any information that linked Ovitz, Pellicano and her was when she saw an article from the April 14, 2006 issue of the *New York Times*, which reported:

"Michael Ovitz, a former talent agent, a Hollywood powerhouse, who served as the head of the Creative Artists Agency and was once president

of the Walt Disney Company acknowledged to the FBI that he paid Mr. Pellicano in April or May of 2002 to obtain information on 15, 20 people who were saying negative things about him. They included former business associates and Bernard Weinraub, then a reporter for THE NEW YORK TIMES who was reporting on the demise of a company Mr. Ovitz started after he left Disney and Anita Busch, a freelance reporter who wrote with Mr. Weinraub."
(RT 502-505)

III. LEGAL DISCUSSION

47. The Doe Amendment statute, Code of Civil Procedure, section 474 ("section 474") states, in relevant part, as follows:

> "When the plaintiff is *ignorant* of the name of a defendant, he must state that fact in the complaint . . . and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly …."
> (Emphasis added.)

48. The guiding legal principles applicable when considering a statute of limitations defense in the context of a section 474 Doe Amendment were discussed by the court of appeal in the case of *Woo v. Superior Court* (1999) 75 Cal.App.4th 169. The court stated at 176:

> "The general rule is that an amended complaint that adds a new defendant does not relate back to the date of filing the original complaint and the statute of limitations is applied as of the date the amended complaint is filed, not the date the original complaint is filed. [Citation.] A recognized exception to the general rule is the substitution under section 474 of a new

defendant for a fictitious Doe defendant named in the original complaint as to whom a cause of action was stated in the original complaint. [Citations.] If the requirements of section 474 are satisfied, the amended complaint substituting a new defendant for a fictitious Doe defendant filed after the statute of limitations has expired is deemed filed as of the date the original complaint was filed. . . ."

49. Thus, even after the statute of limitations has expired, if the requirements of section 474 have been met, a plaintiff may name a defendant (previously identified as a Doe), who is considered a party to the action from its commencement. (*Fuller v. Tucker* (2000) 84 Cal.App.4th 1163, 1169-1170, *Munoz v. Purdy* (1979) 91 Cal.App.3d 942, 946.) This concept is known as the relation back doctrine.

50. Ovitz asserts that Plaintiff cannot benefit from the relation back doctrine provided by Section 474 because at the time Plaintiff filed her May 28, 2004 Complaint, she was not "ignorant" of the name of defendant within the meaning of section 474. Rather, Ovitz contends Plaintiff knew facts at the time of the filing of the Complaint that would have caused a reasonable person to believe Ovitz's liability was probable.

51. The appellate courts have instructed that section 474 is to be liberally construed "to enable a plaintiff to commence suit in time to avoid the bar of limitations where he is ignorant of the identity of the defendant . . . ." (*General Motors Corp. v. Superior Court* (1996) 48 Cal.App.4th 580, 593; *see also*, *Austin v. Mass. Bonding & Ins. Co.* (1961) 56 Cal.2d 596, 502; *Dieckmann v. Superior Court* (1985) 175 Cal.App.3d 345, 355.)

52. The phrase "ignorant of the name of a defendant" as used in section 474:

"is broadly interpreted to mean not only ignorant of the defendant's

identity, but also ignorant of the facts giving rise to a cause of action against that defendant. "[E]ven though the plaintiff knows of the existence of the defendant sued by a fictitious name, and even though the plaintiff knows the defendant's actual identity (that is, his name) the plaintiff is 'ignorant' within the meaning of the statute if [plaintiff] lacks knowledge of that person's connection with the case or with [plaintiff's] injuries. [Citations.] The fact that the plaintiff had the means to obtain knowledge is irrelevant. [Citation.]" (*Fuller, supra*, 84 Cal.App.4th at 1170, quoting *General Motors, supra,* 48 Cal.App.4th at 593-594.)

53. Under section 474, when a plaintiff seeks to substitute a specifically named real defendant for one sued fictitiously, the inquiry to be made is *what facts were actually known by plaintiff at the time of the filing of the complaint*. The inquiry is not what facts the plaintiff might have discovered with use of reasonable diligence. (*Fuller, supra,* 84 Cal.App.4th at 1170.)

54. Consequently, even though the plaintiff may know of the existence of the defendant sued by a fictitious name, or even if the plaintiff knows the defendant's actual identity (i.e, his name), the plaintiff may be "ignorant" of the name of a defendant within the meaning of the statute "if he *lacks knowledge of that person's connection with the case or with his injuries*." (*General Motors, supra*, 48 Cal.App.4th at 593-594, emphasis added.)

55. "[T]he pivotal question is 'did plaintiff know *facts*?' not 'did plaintiff know or believe that she had a cause of action based on those facts?' " *Id.* at 594, italics in original, quoting *Scherer v. Mark* (1976) 64 Cal.App. 3d 834, 841.)

56. In order for a plaintiff to benefit from the "relating back" effect of a section 474 Doe Amendment, plaintiff's ignorance of defendant must be genuine and in good faith. (*Id.*, *Streicher v. Tommy's Electric Co.* (1988) 164 Cal.App.3d. 876, 882.)

57. However, a plaintiff does not lose her section 474 rights because she may have "suspicion of wrongdoing arising from one or more facts she does know." (*General Motors, supra*, 48 Cal.App.4th at 594.)

58. Furthermore, section 474 does not impose a duty upon the plaintiff to search for facts she does not actually have at the time she files her original pleading. (*Id.* at 596.)

59. The difference between knowledge of "actual facts" and "mere suspicion" was addressed by the court of appeal in *Dieckmann, supra*, 175 Cal.App.3d at 363:

> "The distinction between a suspicion that some cause could exist and a factual basis to believe a cause exists is critical in the operation of section 474. The former is one reason attorneys include general charging allegations against fictitiously named defendants; the latter requires substitution of the defendant's true name. [A late named defendant's] urging that its ostensible liability was always obvious to plaintiff confuses these two standards of knowledge and is based on hindsight."

60. Simply stated, Code of Civil Procedure, section 474 allows a plaintiff in good faith to delay naming a particular party or person as a defendant until the plaintiff "has knowledge of sufficient facts to cause a reasonable person to believe liability is probable." (*Id.* at 363.)

61. "If the identity of the Doe defendant is known but, at the time of the filing of the complaint the plaintiff did not know facts that would cause a reasonable person to believe that liability is probable, the requirements of section 474 are met." (*McOwen v. Grossman* (2007) 153 Cal.App.4th 937, 943.)

IV. CONCLUSION

62. Plaintiff alleged in her complaint and testified at trial that she was the victim of wiretapping, death threats, physical injury threats, assaults, computer hacking and other criminal conduct.

63. Plaintiff testified that as a result of the tortious, criminal conduct, she was "traumatized," in fear of her life, and scared of "getting killed." (RT 457-458)

64. Plaintiff was a highly credible witness.

65. Ovitz contends, in essence, that because Plaintiff wrote allegedly negative articles about him which were published in the *New York Times* during March-May of 2002, Plaintiff had sufficient knowledge at the time she filed her Complaint in May 2004, that Ovitz was probably liable for hiring Pellicano to wiretap her telephone and engage in other nefarious conduct in the summer of 2002.

66. Ovitz's arguments focus on Plaintiff's suspicions. Section 474, however, does not require a plaintiff to specifically name an individual as a defendant where suspicions do not rise to the level of "actual knowledge."

67. The charges leveled by Plaintiff against defendants in this case are very serious: wiretapping, physical threats, vandalism, death threats, computer hacking, assault, and invasion of privacy.

68. It is understandable that Plaintiff would hesitate to sue an individual, especially a prominent one, for serious torts until she had actual facts, rather than speculative thoughts, and based on those actual facts had concluded that liability was probable.

69. It is further understandable that someone who is experiencing fear and trauma would be "vacillating" (RT 457) between one speculation and another conjecture as to who caused her victimization.

70. Although Plaintiff had her suspicions from time to time as to who had committed the tortious conduct against her, at the time she filed the complaint on May 28, 2004 she did not know actual facts as to the identity of the perpetrator and the person's connection with the torts.

71. At the time of the filing of the Complaint in this matter, Plaintiff "did not know facts that would cause a reasonable person to believe that liability is probable" on the part of Ovitz. (*McOwen, supra,* 153 Cal.App.4th at 943.)

72. Plaintiff delayed in identifying Ovitz as a named defendant until she had "knowledge of sufficient facts to cause a reasonable person to believe liability is probable." (*Id.* at 943.)

73. A defendant seeking dismissal of a Doe Amendment under section 474 has the burden to prove the plaintiff's knowledge, at the time of filing the original complaint, of the defendant's identity and facts creating liability. (*Breceda v. Gamsby* (1968) 267 Cal.App.2d 167, 179; *see also Fuller, supra*, 84 Cal.App.4th at 1173.)

74. Based on the credibility of the witnesses and the totality of the evidence presented, the Court concludes that Ovitz has not met his burden of proof to establish that at the time Plaintiff filed her original complaint, she was not "ignorant" of Ovitz within the meaning of section 474.

75. Ovitz has not met his burden to demonstrate that, at the time of filing the original Complaint in May of 2004, Plaintiff had knowledge of actual facts to cause a reasonable person to believe that liability on the part of Ovitz for the torts alleged was probable.

76. The Court rules that the filing of the Doe Amendment naming Ovitz as Doe 4, on November 6, 2006, relates back to the filing of the Complaint on May 28, 2004. As a consequence of the relation back doctrine, Plaintiff's claims against Ovitz were timely filed, and Ovitz's statute of limitations defense is denied.

Dated: April 3, 2014

ELIHU M. BERLE

HON. ELIHU M. BERLE
JUDGE OF THE SUPERIOR COURT