

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

GENERAL CHARLES E. "CHUCK"  
YEAGER,

Plaintiff,

No. CIV S-07- 2517 KJM GGH

vs.

ORDER

AT&T MOBILITY, LLC,

Defendant.

\_\_\_\_\_ /

On June 4, 2012, the present action went to trial on two claims: plaintiff General Charles Yeager's claim that defendant AT&T Mobility, LLC violated his common law right to publicity and plaintiff's related right to publicity claim based on California Civil Code section 3344. (ECF 208.) On June 8, 2012, the jury returned a verdict in favor of plaintiff on the California statutory claim and in favor of defendant AT&T Mobility, LLC on the common law claim. (ECF 222.) Defendant now moves for judgment as a matter of law on the California statutory claim under Federal Rule of Civil Procedure ("Rule") 50. (ECF 242.) For the reasons set forth herein, the court denies defendant's motion.

////

////

////

1 I. BACKGROUND

2 In the wake of Hurricanes Katrina, Rita and Wilma, large portions of the  
3 southeastern United States were affected by cell phone outages. This was a source of frustration  
4 to cell phone users who were anxiously attempting to locate relatives and loved ones. In response  
5 to coverage failures during the 2005 hurricane season, defendant updated its emergency  
6 preparedness plans. One new addition was a mobile unit that transmits a cell signal and is  
7 capable of housing repair-persons. Defendant named this unit a mobile access command  
8 headquarters, otherwise known as “M.A.C.H.” In announcing its preparation for the upcoming  
9 hurricane season through a press release on PRNewswire.com, defendant used the name of  
10 plaintiff Charles Yeager because his singular achievement of breaking the sound barrier and  
11 achieving “Mach 1” dovetailed with the acronym used to describe the mobile units. In its fifth  
12 paragraph, the press release stated:

13 Nearly 60 years ago, the legendary test pilot Chuck Yeager broke  
14 the sound barrier and achieved Mach 1. Today, Cingular is  
15 breaking another kind of barrier with our MACH 1 and MACH 2  
mobile command centers, which will enable us to respond rapidly  
to hurricanes and minimize their impact on our customers.

16 Upon learning that defendant used his name without his permission, plaintiff initiated the present  
17 suit.

18 II. JUDGMENT AS A MATTER OF LAW

19 Federal Rule of Civil Procedure 50(b) governs renewed motions for judgment as a  
20 matter of law, following a motion made during trial under Rule 50(a), and provides that the court  
21 may: “(1) allow judgment on the verdict, if the jury returned a verdict; (2) order a new trial; or  
22 (3) direct the entry of judgment as a matter of law.” In rendering its decision on a Rule 50  
23 motion, the court views the evidence in the light most favorable to the non-moving party and  
24 draws all reasonable inferences in favor of the non-moving party. *Lakeside–Scott v. Multnomah*  
25 *County*, 556 F.3d 797, 802 (9th Cir. 2009); *Josephs v. Pacific Bell*, 443 F.3d 1050, 1062 (9th Cir.  
26 2006). “The test applied is whether the evidence permits only one reasonable conclusion, and

1 that conclusion is contrary to the jury's verdict.” *Josephs*, 443 F.3d at 1062. “The verdict will be  
2 upheld if it is supported by substantial evidence, ‘even if it is also possible to draw a contrary  
3 conclusion.’” *First Nat. Mortg. Co. v. Federal Realty Inv. Trust*, 631 F.3d 1058, 1067 (9th Cir.  
4 2011) (quoting *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002)). In reviewing the complete  
5 record, the court should disregard evidence favorable to the moving party that the jury was free  
6 to disbelieve. *Id.* However, judgment as a matter of law “is appropriate when the jury could  
7 have relied only on speculation to reach its verdict.” *Lakeside-Scott*, 556 F.3d at 803. This  
8 court’s limited role is to determine whether sufficient evidence was elicited at trial to support the  
9 claim on which plaintiff prevailed.

10 III. ANALYSIS

11 The jury returned a verdict in plaintiff’s favor on his claim based on California  
12 Civil Code § 3344. Section 3344 provides in pertinent part:

13 Any person who knowingly uses another's . . . likeness, in any  
14 manner, on or in products, merchandise, or goods, or for purposes  
15 of advertising or selling, or soliciting purchases of, products,  
16 merchandise, goods or services, without such person's prior  
or persons injured as a result thereof.

17 CAL. CIV. CODE § 3344(a). “To sustain a claim for violation of California Civil Code section  
18 3344, a plaintiff must prove: (1) the defendant's knowing use of the plaintiff's identity; (2) the  
19 appropriation of plaintiff's name or likeness to defendant's advantage; (3) lack of consent;  
20 (4) resulting injury and (5) a direct connection between the alleged use and the commercial  
21 purpose.” *Palermo v. Underground Solutions, Inc.*, No. 12cv1223 WQH (BLM), 2012 WL  
22 3134255, at \*5 (S.D. Cal. August 1, 2012) (alterations and quotation omitted); *see also*

23 ////

24 ////

25 ////

26 ////

1 *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 413-15 (9th Cir. 1996). At trial, the court  
2 instructed the jury as follows:

3 Plaintiff claims that defendant violated his statutory right to  
4 publicity under Civil Code 3344. To establish this claim, plaintiff  
must prove all of the following:

5 (1) That defendant knowingly used plaintiff's name to advertise its  
6 products or services;

7 (2) That the use did not occur in connection with a news, public  
8 affairs, or sports broadcast or account, or with a political  
9 campaign;

10 (3) That defendant did not have plaintiff's consent;

11 (4) That defendant's use of plaintiff's name was directly connected  
12 to defendant's commercial purpose;

13 (5) That plaintiff was harmed; and

14 (6) That defendant's conduct was a substantial factor in causing his  
15 harm.

16 (ECF 219 at 18.) Defendant argues that (1) the press release cannot be characterized as an  
17 advertisement under the statute, (2) that AT&T did not knowingly use plaintiff's name for  
18 advertising purposes, (3) that plaintiff's name was connected to news or public affairs, and  
19 (4) that the press release is shielded by the First Amendment.<sup>1</sup>

20 First, defendant argues that section 3344 only applies to traditional, paid  
21 advertising. The statutory language itself rebuts this argument, because it applies to any use "for  
22 purposes of advertising *or selling, or soliciting purchases of*, products, merchandise, goods or  
23 services, without such person's prior consent . . ." CAL. CIV. CODE § 3344(a) (emphasis added).  
24 This expansive definition accords with the statute's proscription of the use of someone's name to  
25 promote commercial interests without duly compensating that person. The jury had before it the

---

26 <sup>1</sup> Defendant also argues unpersuasively that plaintiff failed to prove ownership of his  
name. Plaintiff testified that he owned the interest in his name and defendant did not attempt to  
rebut that assertion during trial.

1 press release and defendant's witnesses' testimony regarding the drafting of the release and the  
2 reasons for its contents, including use of plaintiff's name. (*See, e.g.*, ECF 236 at 65-189; ECF  
3 237 at 9-55). There is sufficient evidence in the record to support the jury's determination that  
4 the release was not an advertisement.

5           Second, defendant argues that section 3344 requires proof of "knowing" use, that  
6 the evidence at trial showed defendant did not consider its press release to be an "advertisement"  
7 and therefore, it could not knowingly use plaintiff's name for advertising purposes. Plaintiff  
8 argues in response that "knowing" as relevant to the statute merely applies to use of the  
9 plaintiff's identity. The parties' dispute is mooted by the fact that the jury had to find both types  
10 of knowledge under the first element in the instruction. There was ample evidence admitted at  
11 trial supporting these findings, in the form of testimony by the drafter, who admitted that his task  
12 was to procure favorable press treatment, that one purpose of the press release "was to create  
13 positive association in consumers' minds" and that third party coverage in the press is more  
14 valuable than traditional advertising (ECF 236 at 163, 171-172), that defendant's primary  
15 competitors made similar announcements (*id.* at 187-188), that a "hook" typically leads a press  
16 release and that the opening statement of a "B-roll" video designed to accompany the press  
17 release mentions plaintiff (ECF 237 at 27-28), that the press release included non-newsworthy  
18 self-promotional statements (*id.* at 38-39), and that the press release aimed to "let people know  
19 we were very focused on improving our ability to respond to natural disasters and get service up  
20 as quickly as possible" (*id.* at 42). There also was testimony by defendant's emergency  
21 preparedness coordinator that the press release overstated the amount of money spent on  
22 hurricane preparedness (ECF 236 at 98-99), that all of the elements of program announced had  
23 existed previously (*id.* at 115), that she was unsure why or when the acronym changed to MACH  
24 prior to the press release (*id.* at 106-108, 111-112), that the promotional B-roll video leading  
25 with mention of plaintiff was withheld during discovery (*id.* at 96-97), that the presentation from  
26 which the press release was drawn mentioned the positive public relations benefits of

1 emphasizing the work of the emergency program (*id.* at 154), and that defendant hurried to get  
2 the press release out a few days before the hurricane season began even though all components  
3 were not confirmed to be in place (*id.* at 156).<sup>2</sup>

4           Moreover, defendant’s parsing of the word “advertisement” is repetitive of its  
5 first argument addressed above. As noted, the jury considered the written product issued by  
6 defendant, plaintiff’s name in the document describing a new service enhancement and the  
7 manner in which defendant released the statement. The jury’s conclusion is not inconsistent  
8 with the evidence admitted at trial.

9           Third, defendant argues the release was related to news and public affairs. For  
10 the reasons addressed above, the jury’s finding that the press release was not related to public  
11 affairs was supported by substantial evidence.

12           Finally, defendant reasserts its First Amendment defense, which the court  
13 addressed prior to trial. *See Yeager v. Cingular Wireless LLC*, 673 F. Supp. 2d 1089 (E.D. Cal.  
14 2009). The record established at trial does not disturb the previously-assigned district judge’s

---

15  
16           <sup>2</sup> Even if the court construed defendant’s argument as a mistake of law defense,  
17 defendant failed to request such an instruction and thereby waived it as a defense. As the case  
18 law repeatedly notes, the word “knowing” was added to section 3344 in order to preserve the  
19 mistake or inadvertence defenses that are unavailable in response to a common law claim for  
20 right of publicity. *See, e.g., Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 346 n.6 (1983)  
21 (“Section 3344, subdivision (a) requires a knowing use whereas under case law, mistake and  
22 inadvertence are not a defense against commercial appropriation.”). Understood in this context,  
23 and given the statute’s roots in the tort of invasion of privacy, the paradigm case for mistake is  
24 where a name is used without knowing its real life owner will be affected by the use. *See, e.g.,*  
25 *Kerby v. Hal Roach Studios*, 53 Cal. App.2d 207 (1942) (amorous mailing signed in plaintiff’s  
26 name and sent to 1000 men actionable as libel notwithstanding defendant’s belief the name was  
fictional); *Taylor v. Hearst*, 107 Cal. 262, 270 (1895) (plaintiff’s name was mistakenly published  
in defamatory article when the publisher meant an individual with a different middle initial;  
“One who has published a libel on another cannot successfully resist the latter’s action for  
redress by showing he did not intend to publish it, and that its publication was due to  
carelessness, inadvertence, or mistake. Hence it is not a sufficient defense that the publication of  
a libel resulted from an error in setting type.” (citing *McAllister v. Detroit Free Press Co.*, 76  
Mich. 338 (1889)); 5 Witkin, Summary of Cal. Law, Torts § 626, p. 932 (10th ed. 2005) (“Thus,  
where the defendant or the defendant’s employees through an honest and reasonable mistake  
defame the *wrong person*, the defendant is liable.” (emphasis in original)). Therefore, it is  
doubtful that the mistake or inadvertence defense embedded in the knowing requirement of  
section 3344 extends to mistakes of law as well as fact.

1 analysis. Given the nature of the press release as at least minimally promotional, and the use of  
2 plaintiff's name and accomplishment as a framing device for defendant's newly developed  
3 service enhancement, which it was announcing in a competitive environment in the hope of  
4 obtaining free media coverage, the press release here qualifies as commercial speech.

5 Accordingly, defendant's motion for judgment as a matter of law is denied.

6 IT IS SO ORDERED.

7 DATED: August 30, 2012.

8  
9   
10 UNITED STATES DISTRICT JUDGE  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26