Mark T. Deming (admitted *Pro Hac Vice*)
mdeming@polsinelli.com
Polsinelli PC
150 N. Riverside Plaza, Suite 3000
Chicago, IL 60606
T: 312-819-1900

Adam Peter Daniels (SBN 296466)
Adaniels@polsinelli.com
Polsinelli LLP
2049 Century Park East Suite 2900
Los Angeles, CA 90067
T: 310-556-1801

Attorneys for Defendant
Penguin Magic, Inc.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MESIKA MAGIC, a California Corporation, YIGAL MESIKA, an individual,

Plaintiffs,

v.

PENGUIN MAGIC, INC., a Nevada corporation, CRAIG PETTY, a resident of the United Kingdom, DOES 1-10, inclusive,

Defendants.

Case No. 2:25-cv-07943-MWF-MBK

DEFENDANT PENGUIN MAGIC, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES

Hearing Date: June 10, 2026
Hearing Time: 10:00 a.m.
Courtroom: 5A, 5th Floor

TO THE COURT, ALL PARTIES HEREIN, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on Wednesday, June 10, 2026 at 10:00 a.m., or as soon thereafter as counsel may be heard, in Courtroom 5A before the Honorable Michael W. Fitzgerald, located in the United States District Court, Central District

of California, located at 350 West 1st Street, Los Angeles, CA 90012, Defendant Penguin Magic, Inc. ("Penguin") will and hereby does move the Court for an order dismissing Plaintiffs Mesika Magic and Yigal Mesika's (collectively "Mesika") Second Amended Complaint ("SAC") (ECF No. 43) for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

In addition, Penguin requests that the Court award attorneys' fees and costs incurred in bringing this motion. Section 425.16(c) mandates that a prevailing defendant "shall be entitled to recover" its attorneys' fees and costs. If the Court grants the dismissal of claims protected by the anti-SLAPP statute, Penguin will file a noticed motion to recover its attorneys' fees and costs.

This motion seeks the dismissal of Plaintiff's SAC in its entirety. This Motion is based upon this Notice, the concurrently filed Memorandum of Points and Authorities, all other pleadings, papers, records, and documentary materials on file or deemed to be on file in this action, those matters of which this Court may take judicial notice, and any oral arguments of counsel made at the hearing on this Motion.

STATEMENT OF LOCAL RULE 7-3 COMPLIANCE

Penguin makes this Motion following a meet-and-confer conference of counsel held pursuant to Local Rule 7-3 that took place on April 17, 2026. Mesika stated it opposes the Motion. Penguin hereby certifies that it has met and conferred in good faith in an effort to resolve the present dispute without need for judicial intervention.

Dated: May 1, 2026

Respectfully Submitted,

/s/Adam Daniels

By:

Adam Daniels

Attorney for Defendant
Penguin Magic, Inc.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is Mesika's last chance. When this Court dismissed the FAC, it was clear: "there will be no Third [Amended Complaint]. Any successful future motion to dismiss shall be granted without leave to amend." (Dkt. 42, "Order" at 13). Mesika responded by filing a Second Amended Complaint that quadrupled in length—from 35 pre-count paragraphs to 144—and added nineteen new exhibits. But volume is not sufficiency. The SAC suffers from the same fundamental defects that doomed the FAC.

First, attribution still fails. The Court's prior order held that "the allegedly defamatory statements have not been adequately attributed to Penguin." (Order at 1). The SAC adds color about Erik Tait's job duties and Craig Petty's trade-show work, but neither cures the dispositive defects. Tait's only personal statement on the podcast—a fifteen-to-twenty-year-old grievance about unpaid advertising copy—falls outside the scope of his employment under *Rivera* and *Mary M.*. Petty's "Desolation of Yigal Mesika" video was published on his own YouTube channel, not Penguin's; an alleged affiliation for trade-show booth work does not extend to independent media production. And the SAC's "ratification" theory amounts to another version of the hosting theory this Court already rejected. None of the SAC's attribution allegations survives scrutiny.

Second, the statements are constitutionally protected. Mesika's own falsity table—Exhibit N—identifies five allegedly false statements from a three-hour video. Those statements are rhetorical hyperbole ("patent troll," "magic terrorist"), subjective characterizations ("biggest litigious bully"), and lay assessments of patent validity ("moved a hole … and tried to patent it"; "doesn't have a patent approved and he never will"). The First Amendment and the well-developed opinion doctrine under the likes of *Milkovich* and *Partington* protect such statements. And the SAC's

actual-malice allegations—chiefly that Petty "doubled down" by re-asserting his views after being served with the FAC—cannot be attributed to Penguin and further confuse post-publication conduct with the pre-publication, subjective state-of-mind that *St. Amant* requires.

Third, the non-speech claims remain conclusory. The misappropriation counts fall within § 3344(d)'s public-affairs exemption. The false-light count is derivative of defamation and fails for the same reasons. The trade-libel count relates to attacks on Mesika's character, not his products' quality, and pleads no special damages with particularity. The UCL counts piggyback on the failed defamation predicates. The Lanham Act count targets the wrong product page. The interference count cannot rest on constitutionally protected speech as its independently wrongful act. The declaratory-relief count is a remedy, not a claim. Each fails under its own per-claim defects.

The Court has already warned that no further amendment will be permitted. Dismissal with prejudice is appropriate. In addition, while the Court previously dismissed the FAC before reaching the applicability of California's anti-SLAPP statute, the Court should respectfully do so now. The videos and podcast addressed an ongoing controversy of widespread interest within the magic-consumer community; Mesika cannot meet his minimal-merit burden. Because the claims fail under Rule 12(b)(6), they likewise fail under the anti-SLAPP framework, and under § 425.16(c)(1), Penguin is entitled to mandatory attorneys' fees.

II. LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court must disregard allegations that are legal conclusions, even when disguised as facts. *See Iqbal*, 556 U.S. at 681. "Although 'a well-pleaded complaint

may proceed even if it strikes a savvy judge that actual proof is improbable,' plaintiffs must include sufficient 'factual enhancement' to cross 'the line between possibility and plausibility.'" *Eclectic Properties E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 995 (9th Cir. 2014).

The Court must then determine whether, based on the remaining allegations and all reasonable inferences that may be drawn therefrom, the complaint alleges a plausible claim for relief. *See Iqbal*, 556 U.S. at 679; *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 (9th Cir. 2011). "Determining whether a complaint states a plausible claim for relief is 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Ebner v. Fresh, Inc.*, 838 F.3d 958, 963 (9th Cir. 2016) (quoting *Iqbal*, 556 U.S. at 679).

California's anti-SLAPP statute applies in federal court and "shall be construed broadly." Cal. Code Civ. Proc. § 425.16(a); *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999). Anti-SLAPP motions are evaluated in two steps. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one 'arising from' protected activity." *Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811, 819 (2011) (internal quotation marks and citation omitted). "If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim." *Id.* at 819-820. "[W]hen an anti-SLAPP motion to strike challenges only the legal sufficiency of a claim, a district court should apply the Federal Rule of Civil Procedure 12(b)(6) standard and consider whether a claim is properly stated." *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 834 (9th Cir. 2018), *amended by* 897 F.3d 1224 (9th Cir. 2019).

III. ARGUMENT

A. The SAC Cannot Attribute Any Actionable Statement to Penguin

Attribution is the gatekeeper for every speech-based count. Counts 1

(defamation), 2 (trade libel), 3 and 4 (misappropriation), 5 (false light), 10 (intentional interference), and 11 (declaratory relief) each depend on the SAC's ability to treat Tait's podcast statements or Petty's YouTube video as Penguin's. So do the speech-based predicates within Counts 6–8 (UCL and § 17500). If those statements cannot be attributed to Penguin, as the Court held when dismissing the FAC (Order at 1), those claims fail as to Penguin without ever reaching their substantive elements.

The SAC advances three theories of attribution: (1) Tait's statements on the Podcast were within the scope of his employment; (2) Petty acted as Penguin's agent when he published the "Desolation of Yigal Mesika" video on his own YouTube channel; and (3) Penguin "directed, controlled, and ratified" both speakers' statements after the fact. Once the SAC's conclusory allegations of agency, scope, and ratification are set aside, these theories no more support attribution to Penguin than the FAC did. The Court should dismiss, this time with prejudice.

1. Tait's Personal Anecdote About a Decades-Old Dispute Falls Outside Any Reasonable Definition of His Employment Scope

In the Order, the Court observed: "When a podcast host is speaking for himself as opposed to speaking on behalf of his employer does not seem an obvious question, and again, the parties have not briefed the issue." (Order at 8). Under the controlling caselaw, *Rivera v. National R.R. Passenger Corp.*, 331 F.3d 1074 (9th Cir. 2003) and *Mary M. v. City of Los Angeles*, 54 Cal. 3d 202 (1991), the answer is straightforward: a fifteen-to-twenty-year-old personal grievance about unpaid advertising-copy work—voiced by Tait on the podcast as his own personal recollection—is not within the scope of any conceivable employment-based agency.

Under California's respondeat-superior doctrine, an employer is liable for an employee's statement only when the act "may fairly be regarded as typical of or broadly incidental to the enterprise undertaken by the employer." *Rivera*, 331 F.3d

at 1080 (quotation omitted); *see also Mary M.*, 54 Cal.3d at 209 (an action is within the scope of employment "when in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business").

The SAC pleads that Tait is a "primary product producer, marketer, and public face" of Penguin, that his job duties include "vetting competitor products," and that he hosts the Penguin Magic Podcast as a "structured, branded media product." (SAC ¶¶ 35-38, 59-65). For purposes of this motion, those allegations may be accepted as true, but the question is not whether Tait was Penguin's employee; it is whether the ***specific challenged speech*** fell within his employment.

The only Tait statement the SAC challenges is a personal anecdote: fifteen-to-twenty years before the podcast aired, Mesika stiffed Tait on payment for advertising copy. (SAC ¶ 73). Tait recounted this story as his own experience. By no measure is the airing of a decades-old personal dispute "typical of or broadly incidental to" the work of "vetting competitor products" or hosting a magic-industry podcast. *Rivera*, 331 F.3d at 1080. To the contrary, the act is precisely the sort of personal deviation that *Mary M.* identifies as falling outside the scope: it is unrelated to Penguin's enterprise—selling magic products and producing magic content—"that it would seem unfair to include the loss resulting from it among other costs of the employer's business." *Mary M.*, 54 Cal.3d at 209.

The SAC asserts that Tait's comment "was not a deviation from his duties, but a fulfillment of his role." (SAC ¶ 63). That is the precise sort of legal conclusion *Iqbal* directs courts to disregard. 556 U.S. at 678-679. Stripped of the conclusion, the well-pled facts show only that an employee aired a personal grievance about an unrelated decades-old dispute on his employer's podcast. An employer is not liable for everything an employee says into a microphone that the employer provides. The relevant question is whether the speech itself is part of the employee's job. Tait was

hired to evaluate magic tricks and to host content about magic; nothing in the SAC connects a personal dispute to either function. (*See* SAC ¶¶ 35-38). Tait's anecdote falls outside the scope of his employment, and Penguin is not vicariously liable for it.

2. Petty's Independent YouTube Video Was Not Within the Scope of Any Agency Penguin Conferred

This Court previously held that the FAC's allegations regarding Penguin's relationship with Petty were "insufficient to define the relationship between the parties with any specificity." (Order at 5). The SAC adds volume, but none of the new allegations supplies what the Court found missing: plausible allegations that Penguin directed or controlled the speech at issue.

The SAC pleads that Petty worked Penguin's trade-show booth at FISM and Magic Live for three years, was "always at their beck and call" for booth work, received Penguin-branded apparel, jointly operated the Penguin booth at the 2026 Blackpool Magic Convention with Tait, and was named Penguin's Creator of the Year three consecutive years. (SAC ¶¶ 15-19, 26-27, 142-144). The question is not whether ***some*** relationship exists, but whether that relationship extends to the specific speech the SAC challenges.

The core of the SAC's allegations is the "Desolation of Yigal Mesika" video, published on "Craig Petty's Magic TV," which is Petty's personal YouTube channel. (*See* SAC ¶¶ 4-5, 45-46, 52-54). The video was Petty's content, on Petty's personal channel, distributed to Petty's subscribers, under Petty's creative control. Nothing in the SAC alleges that Penguin directed Petty to make the video, pre-approved the script, reviewed the recording before publication, or even knew about the video before it went live.

An agent's authority to bind a principal is limited to the principal's manifestation of consent. The Restatement defines actual authority as "the power of

the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent." *See, e.g., Unihan Corp. v. Max Group Corp.*, No. 09-07921, 2011 WL 6814044, at *8 (C.D. Cal. Dec. 28, 2011). The SAC describes the scope of consent that Penguin allegedly manifested to Petty: trade-show booth work, product demonstrations, sales support, and award recognition. (SAC ¶¶ 15-19, 26-27, 142-144). Nothing in those allegations describes Penguin giving its consent for Petty to act as Penguin's spokesperson on Petty's own YouTube channel and discuss Penguin's competitor's products and litigation history.

A magician who works a vendor's booth at a convention is not thereby authorized by the vendor to publish a three-hour documentary about the vendor's competitor on the magician's personal YouTube channel. The SAC alleges no facts to bridge the gap. There is no allegation that Penguin commissioned the video, paid for the video, edited the video, reviewed the video before publication, or coordinated its publication. There is no allegation that Penguin and Petty entered any agreement that would extend Petty's trade-show role into editorial responsibility for Petty's personal YouTube channel. At most, the SAC alleges trade-show agency for a convention; not YouTube-content agency. The Court's prior holding controls. (Order at 5).

3. The Ratification Theory Fails—Hosting Is Not Adopting

The SAC's third attribution theory is ratification. It alleges that Penguin "directed, controlled, and ratified" Petty's content rather than merely "hosting" it. (SAC ¶ 5; *see also id.* ¶¶ 42, 52, 61, 64-66). This Court has already rejected the contention that hosting alone creates publisher liability, and the SAC's added allegations—once stripped of conclusions—supply only more hosting.

Mesika's theory is foreclosed by *Jackson v. Paramount Pictures Corp.*, 68 Cal. App. 4th 10 (1998), which, "concerned liability of a reporter who repeated

statements, not of a host entity." (Order at 6). The contention that Penguin "directed, controlled, and ratified" Petty's content and did not merely host it are bare legal conclusions. Stripped to the factual allegations, the SAC describes only that Penguin hosted the podcast on Penguin's YouTube channel; the channel displayed Penguin's branding; the videos linked to Penguin's retail website and product pages; Penguin monetized the videos. (*See, e.g.*, SAC ¶¶ 5, 64, 92-93). That is precisely the conduct this Court already characterized as "merely hosting." (Order at 6).

"Ratification is the voluntary election by a person to adopt in some manner as his own an act which was purportedly done on his behalf by another person, the effect of which … is to treat the act as if originally authorized by him." *Dickinson v. Cosby*, 37 Cal.App.5th 1138, 1158 (2019) (quoting *Rakestraw v. Rodrigues*, 8 Cal.3d 67, 73 (1972)). The SAC alleges no facts showing that anyone at Penguin reviewed Petty's video before its publication or made an affirmative decision to adopt Petty's characterizations of Mesika as Penguin's own statements. Without those facts, there is no voluntary election, and no ratification.

The SAC's allegations that Penguin embedded commercial links and monetized the videos (*e.g.*, SAC ¶¶ 64, 93) do not support ratification. As *Jackson* held, "[i]ll will toward the plaintiff, or bad motives, are not elements of the *New York Times* standard." 68 Cal.App.4th at 32 (quoting *Letter Carriers v. Austin*, 418 U.S. 264, 281 (1974)); *see also Reader's Digest Ass'n v. Superior Court*, 37 Cal.3d 244, 258 (1984) ("mere proof of ill will on the part of the publisher may likewise be insufficient"). The same principle applies to ratification: a host entity that hosts a guest's content for commercial reasons has not, by virtue of those reasons, voluntarily adopted the content as its own.

B. Even if Attributed, the Challenged Statements Are Not Actionable For Counts 1 (Libel), 2 (Trade Libel), or 5 (False Light).

The speech counts each additionally fail because the statements on which they

depend are not actionable; rather they are opinion, rhetorical hyperbole, and lay assessments of patent validity that cannot give rise to defamation, trade libel, or false light liability. In addition, the SAC fails to plead actual malice with anything beyond conclusory allegations and post-publication doubling-down.

1. The Challenged Statements Are Nonactionable Opinion, Hyperbole, and Lay Patent Assessment

The First Amendment protects statements that cannot reasonably be interpreted as stating provably false facts. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-20 (1990). "[A] statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." *Id.* The Ninth Circuit applies a three-part test: "(1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact, (2) whether the defendant used figurative or hyperbolic language that negates that impression, and (3) whether the statement in question is susceptible of being proved true or false." *Partington v. Bugliosi*, 56 F.3d 1147, 1153 (9th Cir. 1995).

Mesika's own Exhibit N—the SAC's curated table of allegedly false statements—confirms how thin the substantive case is. From a three-hour video, Mesika identifies only five statements. (SAC ¶ 75 & Ex. N). Those statements fall into three protected categories: rhetorical hyperbole, subjective characterizations, and lay assessments of patent validity.

Calling Mesika a "patent troll," "magic terrorist," or "bully" is exactly the kind of "vigorous epithet" the First Amendment protects. *Milkovich*, 497 U.S. at 14 (quoting *Greenbelt Cooperative Pub. Ass'n v. Bresler*, 398 U.S. 6, 13-14 (1970)) ("[E]ven the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet …."). California and Ninth Circuit courts have applied that rule to more strident language:

- a "worst teacher" label, *Moyer v. Amador Valley J. Union High Sch. Dist.*, 225 Cal. App. 3d 720, 725-26 (1990) (calling someone the "worst teacher" is "an expression of subjective judgment by the speaker" with "no verifiable facts" and "clearly protected under the First Amendment"; "even if the descriptive term 'terrorize' is an exaggeration of the actual event, it nonetheless falls within the protectible category of rhetorical hyperbole");
- a "biggest crooks on the planet" label, *Troy Group, Inc. v. Tilson*, 364 F. Supp. 2d 1149, 1156 (C.D. Cal. 2005) ("[T]he email, with its colloquial, exaggerated and non-literal language, simply could not be interpreted as actually accusing the Troy Parties of a crime or even dishonesty."); and
- an "Asshole of the Month" column, *Leidholdt v. L.F.P., Inc.*, 860 F.2d 890, 894 (9th Cir. 1988) ("Even apparent facts must be allowed as opinion 'when the surrounding circumstances of a statement are those of a heated political debate, where certain remarks are necessarily understood as ridicule or vituperation, or both, but not as descriptive of factual matters.'" (quoting *Koch v. Goldway*, 817 F.2d 507, 509 (9th Cir. 1987))).

If "biggest crooks on the planet," "Asshole of the Month," and "worst teacher" are constitutionally protected, "patent troll" and "magic terrorist"—applied to a magician with a patent-enforcement reputation in a niche industry—cannot be actionable. Exhibit N confirms the point: it characterizes these labels as "generally defamatory," conceding they are generalized epithets rather than specific factual charges.

Similarly, whether someone is the "biggest" litigious bully across decades of magic-industry IP disputes is precisely the kind of "broad, unfocused, wholly subjective comment" that *Partington* categorizes as protected opinion. 56 F.3d at 1158. No court or factfinder could verify the proposition. It is opinion, not fact.

Finally, Petty's commentary about Mesika's patent application is a layperson's interpretation of patent claim scope and validity. "Absent a clear and unambiguous ruling from a court or agency of competent jurisdiction, statements by laypersons that purport to interpret the meaning of a statute or regulation are opinion statements, and not statements of fact." *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 731 (9th Cir. 1999). Patent claim scope is a quintessentially legal/technical question, beyond a magician-commentator's expertise. A YouTube layperson's paraphrase of patent novelty—about an application that the SAC concedes is still pending before the USPTO (SAC ¶ 89)—is opinion, not fact. *Coastal Abstract*, 173 F.3d at 732 ("An opinion that does not convey a false factual implication is not defamatory under California law.").

2. The "Gist or Sting" is Substantially True.

Even if Petty's statements could be characterized as factual, their "gist" or "sting" is substantially true. "[I]t is not the literal truth or falsity of each word or detail used in a statement which determines whether or not it is defamatory; rather, the determinative question is whether the 'gist or sting' of the statement is true or false, benign or defamatory, in substance." *Issa v. Applegate*, 31 Cal. App. 5th 689, 702 (2019); *accord Manufactured Home Communities, Inc. v. County of San Diego*, 655 F.3d 1171, 1178 (9th Cir. 2011) ("[A] 'slight inaccuracy in the details will not prevent a judgment for the defendant, if the inaccuracy does not change the complexion of the affair so as to affect the reader of the article differently.'"). The gist is that Mesika leverages pending patent applications and aggressive enforcement tactics to pressure competitors. The SAC concedes that the referenced application is "presently pending." (SAC ¶ 89). Whatever inaccuracies exist in Petty's specific characterizations, the underlying gist—Mesika is aggressively litigious and bullies competitors—is substantially true on the SAC's own facts.

Moreover, where the speaker discloses the factual basis for the opinion, the audience is "free to accept or reject the author's opinion based on their own independent evaluation of the facts." *Franklin v. Dynamic Details, Inc.*, 116 Cal. App. 4th 375, 387 (2004) (quoting *Standing Committee v. Yagman*, 55 F.3d 1430, 1439 (9th Cir. 1995)). Petty disclosed his basis: he reviewed publicly available patent applications, demonstrated the products at issue, and walked through the claim language for his audience. (See SAC ¶¶ 74, 89 & Exs. A, B). The audience can independently evaluate the underlying record. That defeats actionability under *Franklin*. 116 Cal. App. 4th at 387-88 ("Accusations of criminal activity, like other statements, are not actionable if the underlying facts are disclosed." (quoting *Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1103 (N.D. Cal. 1999)). Indeed, *Franklin* itself addressed labels analogous to the statements complained about in the SAC. 116 Cal. App. 4th at 389 (holding that statements accusing a competitor of having "stol[en]" copyrighted material and "plagiariz[ed]" data "appear in context as rhetorical hyperbole" and were nonactionable).

3. Mesika Does Not Adequately Plead Actual Malice

Counts 1-2, 5-8, and 10 also independently fail because Mesika is at least a limited-purpose public figure and has not pleaded the requisite actual malice.

A limited-purpose public figure is one who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Stolz v. KSFM 102 FM*, 30 Cal. App. 4th 195, 203 (1994) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974)). The SAC's own allegations establish that Mesika has been an active participant in magic-industry IP enforcement, has publicly asserted patent and trade-dress claims against multiple competitors over an extended period, and has positioned his products and his enforcement practices at the center of an ongoing community controversy. (See SAC

¶¶ 10-12, 39, 79-84). That is the textbook "vortex" of a limited-purpose public figure. *Stolz*, 30 Cal. App. 4th at 203.

To plead actual malice, there must be sufficient allegations "to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). The standard is subjective. *Id.*; *see also Reader's Digest*, 37 Cal. 3d at 256-57 ("The quoted language establishes a subjective test"). The SAC's actual-malice allegations consist of nothing more than (i) conclusory allegations that parrot the legal standard (*e.g.*, SAC ¶¶ 147-149, 184), and (ii) that defendants "doubled down" by continuing to publish after Mesika put them on notice (*e.g.*, SAC ¶¶ 20-25, 135-141). Neither suffices.

"Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. The SAC's allegations that Penguin "had a high degree of awareness of the probable falsity" of the statements (SAC ¶ 148) and that defendants "made the false statements with knowledge that the statements were false or with reckless disregard" (SAC ¶ 149; *see also id.* ¶¶ 147, 184) are formulaic recitations of the *St. Amant* element—bare legal conclusions with no factual content describing what Tait or Petty supposedly knew, when they knew it, or what they actually doubted at the time of publication. Stripped of those conclusions, the SAC pleads no fact from which the Court could plausibly infer that either speaker subjectively "entertained serious doubts as to the truth." *St. Amant*, 390 U.S. at 731; *see also Resolute Forest Products, Inc. v. Greenpeace Int'l*, 302 F. Supp. 3d 1005, 1018-19 (N.D. Cal. 2017) (dismissing claim where actual-malice allegations consisted of a "formulaic recitation" that defendants acted "with knowledge of their falsity or reckless disregard for [the] truth").

Nor can Mesika rely on post-publication conduct. The SAC alleges that, after being served with the FAC, Petty published the "Sued For Speaking Out" video stating "I stand by that opinion. He's a patent troll. He uses the courts to bully people

into submission." (SAC ¶¶ 20-25, Ex. F). Actual malice is measured at the time of publication, not afterward. *Eastwood v. Nat'l Enquirer, Inc.*, 123 F.3d 1249, 1251 n.3 (9th Cir. 1997) (approving of jury instruction that said the subject injury "focus[ed] on defendant's state of mind *at the time of publication*" (emphasis added)). Petty's post-FAC reaction has no bearing on his subjective state of mind months earlier when the original videos were published. Post-publication doubling-down in the face of litigation reflects a commitment to one's stated position, not a confession of pre-publication doubt. If anything, Petty's willingness to repeat his statements under the threat of suit suggests he sincerely believed them.

C. Count 2 (Trade Libel) Independently Fails

In addition to failing for the reasons stated, *supra* at 4-14, Count 2 also fails because Mesika does not allege disparagement of his product or business and does not plead special damages with particularity.

1. Mesika Does Not Allege Product or Business Disparagement

Trade libel requires "a false or misleading statement that (1) specifically refers to the plaintiff's product or business and (2) clearly derogates that product or business." *Hartford Cas. Ins. Co. v. Swift Distrib., Inc.*, 59 Cal. 4th 277, 284 (2014). The specificity gatekeeper distinguishes "direct criticism of a competitor's product or business from other statements extolling the virtues or superiority of the defendant's product or business." *Id.* at 291.

The challenged statements describe Mesika's ***IP-enforcement conduct***. (SAC ¶¶ 86, 91). These are character attacks on the producer, not derogations of the producer's products. Even the closest-to-product statements—that Mesika's products are "copied from others," "exactly" or "nearly identical to Rinkey Dinky," and that Mesika "stole" the idea—are statements about ***Mesika's conduct***, not about the quality, performance, or value of LOOPS or any other Mesika product. (SAC ¶¶ 86, 90). None of the challenged statements asserts or implies that LOOPS does not

work, is poorly made, or is otherwise inferior in quality or value. *Hartford*, 59 Cal. 4th at 297-98 ("[A] false or misleading statement that causes consumer confusion, but does not expressly assert or clearly imply the inferiority of the underlying plaintiff's product, does not constitute disparagement.").

2. Mesika Does Not Allege Special Damages

Trade libel also requires a causal linkage to particular lost transactions. *Muddy Waters, LLC v. Superior Court*, 277 Cal. Rptr. 3d 204, 221-22 (2021) (holding that a plaintiff must connect special damages to specific transactions of which it was deprived due to someone's reliance on the alleged libel). Speculation that lost sales are attributable to defendant's statements is insufficient. *Thimes Solutions Inc. v. TP-Link USA Corp.*, No. 22-56176, 2024 WL 1328194, at *2 (9th Cir. 2024).

The SAC alleges only that "[p]articular purchasers lost are recorded in the comments sections of Defendants' video publications." (SAC ¶ 160). The aggregate sales-decline data incorporated by reference (SAC ¶¶ 85, 96-99) does not isolate causation. The SAC itself attributes the decline to many factors: multiple videos by multiple speakers, viral magic-community boycotts, retailer reactions like Fun Incorporated and The Magic Apple, online comment-thread mobilization, and the litigation itself. (*See* SAC ¶¶ 85-100, 129-131, 135-141). The SAC does not plead specific sales lost because consumers relied on specific allegedly trade-libelous statement (as opposed to some other speaker's commentary, the litigation noise, or retailer reactions).

D. Counts 3 and 4 (misappropriation) Independently Fail

Counts 3 and 4 also fail because the challenged use of likeness relates to a matter of legitimate public interest. *See Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 793 (1995) ("No cause of action will lie for the publication of matters in the public interest"); Cal. Civ. Code § 3344(d) (exempting uses of name

and likeness "in connection with any news, public affairs, or sports broadcast or account, or any political campaign.").

Commentary directed to a definable public audience, even within a niche industry or subculture, constitutes speech "in the public interest" for purposes of misappropriation claims. *See Dora v. Frontline Video, Inc.*, 15 Cal. App. 4th 536, 542 (1993); *see also Daly v. Viacom, Inc.*, 238 F. Supp. 2d 1118, 1122 (N.D. Cal. 2002) (dismissing misappropriation of likeness claims because a defense under the First Amendment is provided where the publication or dissemination of matters is "in the public interest"); *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400, 415–417 (2001) (use of player statistics and images in historical materials protected by § 3344(d)).

The claims also fail because § 3344 requires that the plaintiff's identity be used "exclusively" for commercial gain. *Leidholdt*, 860 F.2d at 895 (finding that the plaintiff failed to state a claim under Cal. Civ. Code § 3344 because the plaintiff did not demonstrate that challenged use was exclusively for commercial gain). The SAC contains no allegation that Penguin used Mesika's image to advertise or promote any product. Instead, the use appears only within commentary about the industry dispute. That is not commercial use under § 3344.

E. Counts 6–8 (UCL / § 17500) Independently Fail

Counts 6, 7, and 8 allege violations of the UCL and § 17500. (SAC ¶¶ 186-201). Each fails on multiple grounds.

Counts 6 and 8 invoke the UCL, which prohibits conduct that is "unlawful, unfair or fraudulent." Cal. Bus. & Prof. Code § 17200. The unlawful prong borrows violations of other laws and treats them as independently actionable. *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999). The unfair prong, in competitor suits, requires conduct "tethered to" antitrust or other regulatory policy. *Id.* at 186-87. The "fraudulent" prong proscribes business practices "in which

members of the public are likely to be deceived." *Morgan v. AT&T Wireless Servs., Inc.*, 177 Cal. App. 4th 1235, 1254 (2009).

Here, the predicates fail, and therefore so does the UCL claim itself. *Daly v. Viacom, Inc.*, 238 F. Supp. 2d 1118, 1126 (N.D. Cal. 2002). There is no underlying defamation or trade-libel, *supra* at 4-17, and Mesika has not pleaded facts sufficient to show any injury, much less an anti-trust injury. Cal. Bus. & Prof. Code § 16720(a); *see also Marsh v. Anesthesia Servs. Med. Grp., Inc.*, 200 Cal. App. 4th 480, 493 (2011) (describing necessary elements of a Cartwright Act violation); *Kolling v. Dow Jones & Co.*, 137 Cal. App. 3d 709, 723 (1982) (requiring the plaintiff to show that an antitrust violation was the proximate cause of his injuries); *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1003 (9th Cir. 2008) ("An injury will not qualify as an antitrust injury unless it is attributable to an anti-competitive aspect of the practice under scrutiny").

Count 7 invokes section 17500, which "prohibits the dissemination of any advertising 'which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.'" *Painters & Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharm. Co. Ltd.*, 674 F. Supp. 3d 799, 838 (C.D. Cal. 2023). The claim fails for multiple reasons. First, the alleged statements were not commercial speech made in advertising. They were part of commentary and opinion on an industry dispute. Second, there is no false statement of fact, only critiques of Mesika's claimed intellectual property rights and his interactions with others in the magic community. Opinions, value judgments, and characterizations are not statements of fact about a product's qualities or performance. Third, there is no nonconclusory allegation that Penguin knew or should have known the content of the statements was false. To the contrary, the *statements* reflect a genuine effort to report accurately about an industry dispute.

Mesika now attempts to support these claims with discussion of an alleged false endorsement of a competing product. (*See* Order at 10 (discussing the contentions regarding "Dynamo" endorsements that "appear[ed] nowhere in the FAC")). But the claims nonetheless fail because the allegations about the endorsements do not support an inference of falsity. The LOOPS endorsement reads, "The ultimate secret power… I never leave home without it." (SAC ¶ 102 & Ex. Q). The TIES endorsement reads, "When you first showed me these, I was blown away by the quality. Now I never leave home without them!" (SAC ¶ 103 & Ex. R). The quotes are textually different—different words, different syntax. As the Court already recognized, there are insufficient allegations that the review is false, as opposed to just one reviewer using similar phrases to describe similar products, and there are no allegations that consumers themselves were deceived. (Order at 10).

F. Count 9 (Lanham Act) Fails

Count 9 alleges false designation of origin under Lanham Act § 43(a). (SAC ¶¶ 202-210). This Court previously guided Mesika that he needed to plead "false statements made on the LOOPS product page about that product." (Order at 11). The SAC instead targets the ***TIES*** product page (the Dynamo endorsement on the TIES listing)—not the LOOPS product page itself. (SAC ¶¶ 102-103, 204). As discussed, the LOOPS and TIES endorsements use textually different language. There is no plausible allegation that Dynamo did not endorse both products. There is no specific allegation that consumers were deceived. The Dynamo theory therefore fails.

The SAC further alleges that Penguin sold a DVD with "inferior counterfeit" LOOPS products and used the LOOPS trademark at specific timestamps. (SAC ¶¶ 110-112). But the SAC alleges no specific facts establishing that the LOOPS products actually used on the DVD are "inferior counterfeit[s]", no specific allegation of consumer confusion, and no specific allegation of false designation of origin.

G. Count 10 (Intentional Interference) Fails

Count 10 alleges intentional interference with prospective economic advantage. (SAC ¶¶ 211-215). To state such a claim, a plaintiff must allege: (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant. *Marsh*, 200 Cal. App. 4th at 504.

Although Mesika now attempts to allege relationships with specific third parties, the SAC still fails to satisfy the requisite elements. Most fundamentally, Count 10 fails to plead an independently wrongful act. *See Westside Ctr. Assocs. v. Safeway Stores 23, Inc.*, 42 Cal. App. 4th 507, 521-22 (1996) (interference tort requires "intentional acts on the part of the defendant designed to disrupt the relationship" and "actual disruption of the relationship" caused by the defendant's wrongful acts); *see also Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1158 (2003) ("To establish a claim for interference with prospective economic advantage, therefore, a plaintiff must plead that the defendant engaged in an independently wrongful act"). The acts on which Mesika relies for Count 10 are the same acts underlying the speech claims. If those statements are not actionable, they cannot serve as the predicate *independently* wrongful act for the interference tort. *Copp v. Paxton*, 45 Cal. App. 4th 829, 848 (1996) ("It is now established that claims for invasion of privacy … and interference with prospective economic advantage … may not be based on speech that is entitled to constitutional protection.").

Additionally, the SAC fails to allege facts sufficient to link the statements with the alleged injury. The SAC alleges that Fun Incorporated and The Magic Apple "cancelled" their orders or "publicly announced refusal" to sell Mesika's products,

but the SAC does not plead that ***Penguin***—as opposed to Petty individually, the broader magic-community boycott, or the litigation itself—caused those decisions. Moreover, if attribution to Penguin fails, *supra* at 4-9, so does causation (*See* SAC ¶ 130 (alleging the third-party reactions are attributed to "the 'Desolation of Yigal Mesika' video and the reaction in the magic community," neither of which Penguin directed)).

H. Count 11 (Declaratory Judgment) Is a Remedy, Not a Claim

Count 11 should be dismissed because declaratory relief is a remedy, not a cause of action. *Vargas v. Wells Fargo Bank, N.A.*, No 12-02008, 2012 WL 2931220, at *6 (N.D. Cal. July 18, 2012) (noting that declaratory relief is a remedy, not a claim); *Fradis v. Savebig.com*, No. 11-07275, 2011 WL 7637785, at *7-8 (C.D. Cal. Dec. 2, 2011) (dismissing claims for injunctive and declaratory relief as "duplicative of [the] substantive causes of action"). The request for declaratory relief has no independent basis and is instead based on Mesika's other causes of action, none of which have any merit.

I. The Court Should Reach the Anti-SLAPP Statute

Mesika's claims based on protected speech—Counts 1 through 8—should be struck under California Code of Civil Procedure § 425.16. The anti-SLAPP statute applies in federal court. *Newsham*, 190 F.3d at 972 (§ 425.16(b) and (c) "can exist side by side" with Rules 8, 12, and 56 because there is "no 'direct collision'"). Where, as here, the special motion to strike challenges only the legal sufficiency of the claims, the Court applies Rule 12(b)(6). *Planned Parenthood*, 890 F.3d at 834 ("[W]hen an anti-SLAPP motion to strike challenges only the legal sufficiency of a claim, a district court should apply the Federal Rule of Civil Procedure 12(b)(6) standard and consider whether a claim is properly stated.").

The statute protects "any act … in furtherance of the [defendant's] right of petition or free speech under the United States Constitution or the California

Constitution in connection with a public issue." Cal. Code Civ. Proc. § 425.16(b)(1). The catchall provision protects "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." *Id.* § 425.16(e)(4). The statute "shall be construed broadly." *Id.* § 425.16(a).

The analysis is a two-step process. "First, we ask what 'public issue or [ ] issue of public interest' the speech in question implicates—a question we answer by looking to the content of the speech. Second, we ask what functional relationship exists between the speech and the public conversation about some matter of public interest." *FilmOn.com Inc. v. DoubleVerify Inc.*, 7 Cal. 5th 133, 149-50 (2019).

1. Both Anti-SLAPP Prongs Are Satisfied Here

The challenged speech here implicates issues of public interest within the magic-consumer community: IP-enforcement practices, patent validity, product authenticity, and the conduct of an industry figure who has actively asserted patent claims against competitors. Mesika's litigation history, his patent-application practices, and his alleged enforcement tactics are documented topics of ongoing controversy. The SAC itself confirms the public-interest character of the controversy: it pleads that the videos have been viewed tens of thousands of times, that the magic community has reacted in public comment threads, and that retailers have publicly announced positions in response. (SAC ¶¶ 33, 85, 100, 129-131).

The videos also clearly contribute to that public conversation. They are public YouTube postings, addressed to the magic-consumer community, that present arguments, evidence, and commentary on Mesika's IP practices. Unlike the confidential reports at issue in *FilmOn*—which did not qualify because they were "exchanged confidentially, without being part of any attempt to participate in a larger public discussion"—the videos here entered the public sphere and reached tens of thousands of viewers, prompting documented community reaction. *FilmOn*,

7 Cal. 5th at 140; *see* SAC ¶¶ 33, 85, 100. That is precisely the "contribut[ion] to the public debate" *FilmOn* requires. 7 Cal. 5th at 150.

2. The Commercial Speech Exception Does Not Apply

"The commercial speech exemption, like the public interest exemption, 'is a statutory exception to section 425.16' and 'should be narrowly construed.'" *Simpson Strong-Tie Co. v. Gore*, 49 Cal. 4th 12, 22 (2010). "[T]he Legislature appears to have enacted section 425.17, subdivision (c), for the purpose of exempting from the reach of the anti-SLAPP statute cases involving comparative advertising by businesses." *Mendoza v. ADP Screening & Selection Services, Inc.*, 182 Cal.App.4th 1644, 1652 (2010). The statements here are not comparative advertising. They are commentary on Mesika's IP-enforcement conduct, character, and litigation history—exactly the kind of expressive speech the anti-SLAPP statute was enacted to protect, not the kind of side-by-side product comparison the Legislature sought to carve out. Section 425.17(c) applies only when all four statutory elements are met, including that "the cause of action arises from a statement or conduct by that person consisting of representations of fact about that person's or a business competitor's business operations, goods, or services." *Simpson Strong-Tie*, 49 Cal. 4th at 30. The challenged statements are hyperbolic and opinion-based commentary on Mesika's ***conduct***—his litigation practices, his patent-enforcement reputation, and the decades-long history of his IP disputes. They are not "representations of fact about … business operations, goods, or services."

3. Penguin Is Entitled to Attorneys' Fees Under § 425.16(c)(1)

Section 425.16(c)(1) provides that "a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." The award is mandatory. *Ketchum v. Moses*, 24 Cal. 4th 1122, 1131-32 (2001). Penguin will, upon prevailing, submit a separate fee motion supported by detailed time records.

IV. CONCLUSION

Therefore, Mesika's claims should be dismissed with prejudice and Penguin awarded its fees and costs.

Dated: May 1, 2026

Respectfully submitted,

Polsinelli LLP
By: */s/Adam P. Daniels*
Adam P. Daniels

Polsinelli PC
Mark T. Deming

Attorneys for Defendant Penguin Magic, Inc.

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Penguin Magic, Inc., certifies that this brief contains 6961 words, which complies with the word limit of L.R. 11-6.1.

Dated: May 1, 2026

Polsinelli LLP

By: */s/Adam P. Daniels*
Adam P. Daniels

Attorneys for Defendant
PENGUIN MAGIC, INC.

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of May, 2026, a copy of this Motion was filed electronically, and is available for viewing and downloading through the Court's CM/ECF System. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system.

Dated: May 1, 2026

By: */s/Jasmine Han*
Jasmine Han