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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 REPLY IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

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

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I. INTRODUCTION

Mesika's Opposition, like his SAC, fails to meaningfully engage with the deficiencies that previously led this Court to dismiss his claims. Nothing in the volume of his allegations changes the substance: Yigal Mesika has a decades old reputation in the magic community for aggressively bullying competitors with questionable legal claims. Craig Petty, an independent party, published a video documenting the experiences of some in the magic community. Erik Tait, an employee of Penguin, interviewed Petty about his video on a podcast. Tait did not republish Petty's statements as his own, but he did offer his own personal experience with Mesika from years earlier. There is no cognizable theory under which these statements—Petty's documentary or Tait's anecdote—are attributable to Penguin.

Moreover, none of the challenged statements are actionable because they are substantially true or at least not provably false. The SAC tries to pick at specific details in Petty's description of Mesika's efforts to patent magic tricks that those in the magic community believe have long existed, but the gist of Petty's criticism is true: Mesika does not presently have a patent on the specific trick he was trying to prevent others from using. To the extent reasonable minds can disagree about nuances of the circumstances, Petty laid out all the information for the audience to consider and to form its own opinions against which to judge his conclusions. Whether Mesika ultimately deserves a particular patent or is a "patent troll" or a "litigious bully" are the kind of generalized epithets and lay opinions that are regularly held to be nonactionable.

The statements are also not actionable because Mesika is a limited-purpose public figure—in his own words, "internationally known" with a "strong reputation in the magic community"—and he cannot plead Petty or Tait were acting with actual malice. There is nothing in the SAC that would suggest either subjectively entertained serious doubts that the experiences they were recounting were false. To

the contrary, the videos themselves show an effort to thoroughly present the bases of an ongoing controversy in the magic community so that its members can draw their own conclusions.

The alleged defamation is Mesika's real dispute, but the SAC levies several more counts in an effort to avoid outright dismissal. These claims each have further defects that independently require their dismissal, and Mesika largely does not defend them. Rather, he repeats in his Opposition the same conclusory allegations from the SAC, which do not materially differ from those of the FAC, which the Court already held were insufficient.

All of this reveals Mesika's complaint for what it is: a strategic lawsuit against public participation. Mesika has a reputation in the magic community as a litigious bully, and he filed this lawsuit to bully those who dared speak about it publicly. It is exactly the kind of case that calls for application of the Anti-SLAPP statute. Defending lawsuits is expensive—Petty's opposition states he has already spent tens of thousands of dollars; Penguin has spent even more. Mesika knows this. It is why he threatens members of the magic community with legal process, and it is why so many back down rather than face financial ruin. California enacted a law to restore at least a little bit of balance. If a party brings a meritless lawsuit against protected activity, the defendant is entitled to its fees when it successfully knocks the lawsuit out. This lawsuit is such a case, and the Court should reach the anti-SLAPP question and award Penguin its fees.

II. ARGUMENT

A. The SAC Still Fails to Attribute Any Actionable Statement to Penguin

The Court dismissed the FAC because the pleadings did not establish Penguin's liability for Petty's and Tait's statements. The SAC's added allegations do not cure this defect.

1. Tait's Decades-Old Personal Anecdote Is Outside the Scope of His Employment

The Court itself flagged the question of when is "a podcast host [] speaking for himself as opposed to speaking on behalf of his employer," noting that the "parties ha[d] not briefed the issue," but directing them to the leading authorities *Rivera v. National Railroad Passenger Corp.*, 331 F.3d 1074 (9th Cir. 2003), and *Mary M. v. City of Los Angeles*, 54 Cal. 3d 202 (1991). *See* Order at 7-9; *see also* Renewed Motion at 4-6 (addressing these authorities). Mesika fails to cite—let alone engage—either case in his opposition, and the silence is telling.

Under California respondeat superior law, the inquiry "should be whether the [action taken] was one that may fairly be regarded as typical of or broadly incidental to the enterprise undertaken by the employer." *Rivera*, 331 F.3d at 1080. The companion test from *Mary M.* asks whether the conduct is "so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business." 54 Cal. 3d at 209 (internal quotation marks omitted).

The specific Tait statement Mesika challenges is a four-page transcript of Tait recalling a personal commercial grievance with Mesika from "15 [or] 20 years ago"—a time when Tait was, in his own words, "a 25-year-old college graduate" writing ad copy and trying to collect payment. SAC ¶ 73. This is a private, decades-old, pre-employment dispute between Tait personally and Mesika personally.

Penguin's enterprise is the sale of magic products. As the SAC alleges, Tait's role at Penguin: "primary product producer, marketer, and public face," vetting products, and hosting the Penguin Magic Podcast as a "structured, branded media product." SAC ¶¶ 35–38, 60. These functions concern current products from current producers, not the recounting of personal grievances that predate his Penguin employment. Recounting a fifteen-to-twenty-year-old personal payment dispute is

not "typical of or broadly incidental" to Penguin's enterprise; it is so "unusual or startling" relative to that enterprise that an employer cannot fairly be held to internalize the loss.

Mesika's response is nothing more than bare legal conclusions: paragraph 63 of the SAC alleges that the personal anecdote was "not a deviation from his duties, but a fulfillment of his role"; the Opposition repeats the same conclusion at Opposition at 14. These are the kind of allegations that are not entitled to the assumption of truth. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009). With the Opposition declining to engage either *Rivera* or *Mary M.*, the SAC offers nothing more than the same conclusory recital the Court already rejected.

2. Petty's Trade-Show Booth Work Did Not Confer Editorial Control Over His Personal YouTube Channel

The SAC has not disturbed the Court's prior finding that Mesika fails to state a claim against Penguin based on Petty's statements. The FAC alleged Petty's role through references to "announc[ing] commercial activities in the magic industry in cooperation" with Penguin, including participating in magic trade shows, and selling his goods on the Penguin website, (FAC ¶ 4), and the Court held the "allegations are insufficient to define the relationship between the parties with any specificity." Order at 5.

The SAC's new agency facts do not cure that defect. *See* SAC ¶¶ 15-19, 26-29, 142-144. All of these allegations concern *trade-show booth* activities: paragraph 15 alleges Petty "represent[ed] Penguin Magic on the Penguin booth" at FISM 2025; paragraph 18 identifies Petty as Penguin's "Creator of the Year" 2022–2024; paragraph 19 alleges Petty was "always at their beck and call" for booth work at trade shows; paragraph 26 alleges joint FISM and Blackpool booth presence with Tait; paragraph 142 alleges a "Penguin Magic official t-shirt"; paragraph 144 alleges joint operation of the Penguin booth at Blackpool 2026.

None of those facts is an allegation that Penguin commissioned, paid for, edited, reviewed, or pre-approved the "Desolation of Yigal Mesika" video, which was published on Petty's *personal* YouTube channel—"Craig Petty's Magic TV." SAC ¶¶ 4, 45–46, 52–54. Nor is there any allegation that Penguin coordinated the video's release or entered any agreement extending Petty's trade-show role into editorial responsibility for his personal channel. The SAC pleads scope of consent only for trade-show activity.

Even assuming Penguin's relationship with Petty extends beyond trade-show booth work to a broader principal-agent relationship, the same scope test controls here as for Tait: whether the alleged conduct was "typical of or broadly incidental ***to the enterprise undertaken by the employer***." *Rivera*, 331 F.3d at 1080 (emphasis original); *see also Mary M.*, 54 Cal. 3d at 214 (conduct "so unusual or startling" falls outside the scope). Petty's publication of a three-hour documentary about Penguin's competitor on his personal YouTube channel meets neither test. Penguin's manifested scope of consent—booth work, product demonstrations, support at trade shows, award recognition—does not extend to Petty's personal YouTube content.

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. Mesika's cumulative-agency theory—that trade-show booth work plus branding plus monetization plus award recognition adds up to editorial authority—misreads the legal test. The question is not the totality of the commercial relationship; it is the scope of the consent the principal manifested. Mesika pleads scope of consent only for trade-show activity. He does not—and cannot—plead that Penguin manifested consent to Petty publishing the Desolation video on his personal channel.

3. The "Ratification" Theory Is the Same Hosting-as-Adopting Theory the Court Already Rejected

In its Order, the Court distinguished *Jackson v. Paramount Pictures Corp.*, 68 Cal. App. 4th 10 (1998), holding: "[T]he *Jackson* holding concerned liability for a reporter who repeated potentially slanderous statements—it does not stand for the proposition that a person or entity who hosts someone who repeats slanderous statements may be liable for that person's statements." Order at 6. Mesika's only response is to make the bare conclusory allegation that Penguin "ratified" the statements. *See* SAC ¶ 5; Opposition at 8 (citing the same paragraph). The SAC's "ratification" relabeling does not change the substance of what is pleaded.

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." *Dickinson v. Cosby*, 37 Cal. App. 5th 1138, 1158 (2019) (quoting *Rakestraw v. Rodrigues*, 8 Cal. 3d 67, 73 (1972)). It requires an affirmative election to adopt. The SAC pleads no facts showing such an election. Paragraphs 42, 45, 52, 61, and 64–66 plead hosting, branding, monetization, and linking—the very conduct the Court already characterized as "merely hosting." Order at 6. Hosting plus branding plus monetization does not equal ratification under *Jackson* because the republisher rule applies to parties who *utter* charges themselves (even when repeating another's words). The reporter uttered the charges personally on television; that is why Paramount and the reporter were proper defendants. *Jackson*, 68 Cal. App. 4th at 26–27. Penguin did not itself adopt Petty's charges as Penguin's own. Rather, the SAC alleges hosting, linking, branding, monetization, and a guest interview—the same hosting-as-publication theory the Court already rejected. *E.g.*, SAC ¶ 45.

B. Even If Attributed, the Challenged Statements Are Not Actionable

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

A statement is not actionable unless it can "reasonably be interpreted as stating actual facts about an individual"—*i.e.*, unless it is "provably false." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19–20 (1990). The Supreme Court has long protected the use of "rhetorical hyperbole, a vigorous epithet" as falling outside the realm of defamation. *Id.* at 16–17 (quoting *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 13–14 (1970)). The Ninth Circuit applies a three-part totality-of-circumstances test asking (1) the general tenor of the speech, (2) its figurative or hyperbolic language, and (3) whether the statement is susceptible of being proved true or false. *Partington v. Bugliosi*, 56 F.3d 1147, 1153 (9th Cir. 1995); *see also Franklin v. Dynamic Details, Inc.*, 116 Cal. App. 4th 375, 386–89 (2004) (applying California totality-of-circumstances test).

The labels Mesika challenges—"patent troll," "magic terrorist," "litigious bully"—map cleanly onto the precedent that holds analogous epithets nonactionable. "Patent troll" specifically has been so characterized in this district. *Kajeet, Inc. v. Qustodio, LLC*, No. SACV 18-1519, 2019 U.S. Dist. LEXIS 241699, at *28–30 (C.D. Cal. Mar. 4, 2019). Generalized character epithets fall within Greenbelt's "vigorous epithet" line. *Greenbelt*, 398 U.S. at 13–14. Comparable name-calling has been held nonactionable across analogous cases: "biggest crooks on the planet" was not actionable in *Troy Group, Inc. v. Tilson*, 364 F. Supp. 2d 1149, 1156 (C.D. Cal. 2005); "worst teacher" was not actionable in M*oyer v. Amador Valley Joint Union High School District*, 225 Cal. App. 3d 720, 725–26 (1990); and "Asshole of the Month" was not actionable in *Leidholdt v. L.F.P., Inc.*, 860 F.2d 890, 894 (9th Cir. 1988). Mesika's own Exhibit N concedes the labels are "generally defamatory"—a

concession that the labels are generalized characterizations rather than specific factual charges.

The patent commentary fares no better. "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 Service, Inc. v. First American Title Insurance Co.*, 173 F.3d 725, 731 (9th Cir. 1999). Patent claim scope is a quintessentially legal and technical question, beyond a magician-commentator's expertise. Petty is a magician describing what he saw in Mesika's patent application; he is not adjudicating claim construction. *Coastal Abstract* controls.

Even if some statements are interpreted as having more factual content—for example, "he moved a hole onto the side and tried to patent it"—they are accusations of conduct that the audience can independently evaluate from the disclosed factual basis. "[A]ccusations of criminal activity, like other statements, are not actionable if the underlying facts are disclosed." *Franklin*, 116 Cal. App. 4th at 388 (quoting *Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1103 (N.D. Cal. 1999)); *see also id.* at 386–87 (citing *Standing Committee on Discipline v. Yagman*, 55 F.3d 1430, 1439 (9th Cir. 1995)). Petty disclosed his basis on camera—the patent application, the prior art, the timeline. The audience could evaluate the basis and reach its own conclusions. That is the definition of protected commentary.

In his Opposition at 25, Mesika cites *Bently Reserve LP v. Papaliolios*, 218 Cal. App. 4th 418 (2013) and *Dickinson v. Cosby*, 37 Cal. App. 5th 1138 (2019), but the cases do not help him. In *Bently Reserve*, a former tenant published a fabrication-laden Yelp review containing falsifiable allegations—identified tenants whose deaths the review misattributed to the landlord's conduct and invented eviction proceedings—devoid of the factual bases for independent audience judgment. *Bently*, 218 Cal. App. 4th at 422–24, 428. In *Dickinson*, the lawyer for a man accused

of rape issued press releases denying the accusation and calling it a lie, the context of which the court found implied undisclosed, provably false facts. *Dickinson*, 37 Cal. App. 5th at 1163–65. Petty's commentary is unlike either: industry-wide criticism of patent-enforcement practices in a niche public-affairs sphere, with the underlying basis (the application, the prior art, the timeline) disclosed for the audience's independent assessment.

2. The "Gist or Sting" Is Substantially True on the SAC's Own Admissions

Substantial truth is a complete defense. "[T]he 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) (quoting *Ringler Associates Inc. v. Maryland Casualty Co.*, 80 Cal. App. 4th 1165, 1181–82 (2000)). "[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." *Manufactured Home Communities, Inc. v. County of San Diego*, 655 F.3d 1171, 1178 (9th Cir. 2011) (quoting *Gilbert v. Sykes*, 147 Cal. App. 4th 13, 28 (2007)).

The gist of Petty's commentary on Mesika's IP enforcement and patent application is substantially true on the SAC's own concessions. The SAC expressly admits that Mesika's patent application is "presently pending" before the USPTO. SAC ¶ 89. Petty's statement that Mesika "doesn't have a patent" approved is substantially true: an application is not an issued patent. The SAC lists fifteen-plus issued patents at paragraph 47—but the challenged statement was about a *specific pending application*, which the SAC itself concedes has not issued. The minor variations between Petty's framing and the SAC's framing concern details that "do not change the complexion of the affair." *Manufactured Home*, 655 F.3d at 1178.

Petty's "and he never will" statement is a *prediction* about a still-pending application's future approval, which cannot be "provably false" at the time of utterance and therefore falls outside actionable defamation. *Milkovich*, 497 U.S. at 19–20 ("a statement on matters of public concern must be provable as false before there can be liability under state defamation law").

Mesika's prior-art argument is a non sequitur. The challenged "credit" statement concerns public credit to creators in the tutorial/product presentation; Mesika answers with a patent application's prior-art paragraph and IDS materials supplied through declarations. Patent disclosure is not public creator credit, and declaration materials cannot amend the SAC. In any event, disclosure of some prior art does not make false the gist that Mesika's asserted IP position and enforcement conduct were disputed. *Manufactured Home*, 655 F.3d at 1178.

The text message exchange does not appear in the SAC. It lives only in the Mesika Declaration filed alongside the Opposition. ECF 54-2 (Mesika Decl.) ¶¶ 29–38, Ex. 1. The Court warned Mesika to plead all his facts in the SAC, (Order at 13 (warning there would "be no Third" amended complaint)), and it previously cautioned that declaration-borne supplementation of facts are unavailing. Order at 10 ("the threshold defect … is that [Mesika's argument] appears nowhere in the FAC."). A complaint under Rule 12(b)(6) is judged on its four corners, plus documents incorporated by reference and materials judicially noticeable, and here the declaration allegations are outside the SAC. The same Rule 12 problem applies to the Douglas Declaration and IDS materials; they may not be used to rewrite the SAC after the Court's express warning that any cure had to be pleaded.

Even taking the text-message exchange at face value, Mesika's statement that he had not "threatened litigation" does not refute the challenged gist. Plaintiffs' own description shows Mesika sought a per-unit payment and discontinuation of future sales—*i.e.*, IP enforcement pressure. ECF 54-2 at 10. That is the conduct Petty's

commentary addressed. Far from "contradicting" Petty's opinion that Mesika is a litigious bully or a patent terrorist, the exchange appears to confirm it.

Mesika's remaining examples do not change the analysis. Statements about "most" applications, "dozens" of filings, timing of release versus filing, "fake patents," and a "documented history" are imprecise characterizations drawn from disclosed patent/enforcement materials. Any alleged detail-level inaccuracies do not alter the sting: Mesika's IP assertions were disputed and his enforcement tactics criticized. Tait's payment anecdote likewise remains a personal recollection outside Penguin's employment scope, and the SAC pleads no fact showing Tait knew it was false.

3. Mesika Is a Limited-Purpose Public Figure Who Has Failed to Plead Actual Malice

a. Mesika Is a Limited-Purpose Public Figure

Mesika's own Opposition impeaches his public-figure denial. The Opposition opens by describing Mesika as "an inventor internationally known for innovations such as LOOPS." Opposition at 6, 11. Pages later, he claims he is "a private individual, well-known in the niche magic industry, but not a general-purpose public figure, nor even a limited-purpose public figure." Opposition at 16. Mesika cannot have it both ways.

The SAC's allegations reinforce Mesika's limited-purpose status. Paragraph 82 alleges Mesika's "fine reputation and goodwill at substantial expense"; paragraph 84 alleges his "strong reputation in the magic community"; paragraph 12 catalogs Mesika's presence at FISM, the Academy of Magical Arts, Magic Live, the Magic Café, and Genii. In his Opposition at 16, Mesika similarly concedes that his "reputation is tied to the commercial sale of his inventions within a niche community," which defeats his attempt to disclaim limited-purpose status. *Stolz v. KSFM 102 FM*, 30 Cal. App. 4th 195, 202–03 (1994) (limited-purpose plaintiffs

include those who "thrust [themselves] to the forefront of particular public controversies in order to influence the resolution of the issues involved" (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974))).

Mesika's own authorities confirm the framework applies. *Mosesian v. McClatchy Newspapers*, 233 Cal. App. 3d 1685, 1700–01 (1991), holds that limited-purpose status applies to a businessperson who voluntarily injects himself into a regulated-industry licensing dispute—Mesika has done so in the magic-industry IP-enforcement controversy he himself has driven for decades. *Celle v. Filipino Reporter Enterprises Inc.*, 209 F.3d 163, 176–77 (2d Cir. 2000), confirms that niche-community-known plaintiffs are public figures and that the ill-will-alone theory is foreclosed.

Mesika's efforts to distinguish—through *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979), and *Varian Medical Systems, Inc. v. Delfino*, 113 Cal. App. 4th 273 (2003)—fail. *Wolston* turned on the plaintiff's *involuntariness*—he had been subpoenaed before a federal grand jury. 443 U.S. 166–67. Mesika's decades of voluntary IP-enforcement engagement is the opposite. *Varian* was vacated on other grounds (35 Cal. 4th 180 (2005)), and the proposition for which Mesika cites it (twice) concerns whether the plaintiffs were all-purpose public figures. Opposition at 7, 16. But the question is not whether Mesika is an ***all-purpose*** public figure, but a ***limited-purpose*** public figure. Renewed Motion at 12.

b. Mesika Has Not Plausibly Pleaded Actual Malice

The SAC fails to plausibly plead actual malice. The standard requires 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 SAC offers nothing more than formulaic recitations of the standard's elements. SAC ¶ 147 ("in fact entertained serious doubts as to the truth"); SAC ¶ 148 ("high degree of awareness of the probable falsity"); SAC ¶ 149 ("with knowledge that the statements were false or

with reckless disregard"). These are precisely the conclusory parrotings *Iqbal* requires courts to disregard. 556 U.S. at 678–79; *see also Resolute Forest Products, Inc. v. Greenpeace International*, 302 F. Supp. 3d 1005, 1018–19 (N.D. Cal. 2017) (dismissing actual-malice claims supported by identical formulaic allegations). Tellingly, Mesika identifies no well-pleaded SAC fact showing either speaker's subjective doubt.

Instead, in an apparent concession that California law does not support his claims, Mesika turns to two Delaware Superior Court decisions: *US Dominion, Inc. v. Fox News Network, LLC*, 293 A.3d 1002 (Del. Super. Ct. 2023) and *Newsom v. Fox News Network, LLC*, No. N25C-06-251 SPL (Del. Super. Ct. Apr. 30, 2026), which quotes *Dominion*'s framework. Both are Delaware Superior Court trial-court decisions. Neither has been adopted by the Ninth Circuit or any California court.

As Mesika concedes, neither decision was evaluating the sufficiency of allegations under the federal pleading standard. Opposition at 28 n.90 ("The Delaware Court evaluated the complaint under Delaware's highly permissive 'conceivability' standard while in the instant federal litigation, the stricter 'plausibility' standard applies under *Twombly* and *Iqbal*."). Moreover, the *Dominion* framework was applied at summary judgment, not at the Rule 12(b)(6) stage. 293 A.3d at 1043.

Mesika nonetheless asks this Court to adopt the Delaware trial courts' "accumulation" theory by which malice can supposedly be shown through circumstantial factors. Even accepting circumstantial proof in principle, Mesika pleads no circumstance showing subjective doubt. Rivalry, profit motive, ill will, a supposed "preconceived narrative," and failure to investigate are not actual malice. Unlike *Dominion* or *Newsom*, the SAC alleges no internal admission, contradictory source material, or contemporaneous communication showing that Penguin, Tait, or Petty believed the challenged statements were false. Malice is a subjective question,

and the SAC does not include factual allegations—circumstantial or otherwise—that demonstrate a subjective belief by Petty or Tait that their statements were false. Indeed, all Mesika points to are allegations that his patent application discloses some prior art. Opposition at 27-28 (citing SAC ¶¶ 68-70). But that does not refute that Mesika failed to disclose all prior art or the broader gist of Petty's criticism that Mesika attempts to obtain and enforce patents in unfair and legally questionable ways. Thus, the SAC does no more than echo the legal standard for malice, and under the federal *Twombly* / *Iqbal* standard that governs this Court's review, the SAC's recitations fail.

C. Each Count Independently Fails

1. Count 2 (Trade Libel) Independently Fails

Trade libel requires statements that "(1) specifically refer to the plaintiff's product or business and (2) clearly derogate that product or business." *Hartford Casualty Insurance Co. v. Swift Distribution, Inc.*, 59 Cal. 4th 277, 284, 297–98 (2014). The challenged statements describe Mesika's *conduct*—alleged IP enforcement, alleged copying of designs—not the quality, performance, or value of LOOPS or any other Mesika product. SAC ¶¶ 86, 90. Even the "copied" allegation does not say that LOOPS does not work, is poorly made, or is otherwise inferior. The statements attack Mesika's character (as a copier), not LOOPS's merit.

Special damages must be tied to specific lost transactions. *Muddy Waters, LLC v. Superior Court*, 62 Cal. App. 5th 905, 925–26 (2021) (quoting *Erlich v. Etner*, 224 Cal. App. 2d 69, 73 (1964)); *Thimes Solutions, Inc. v. TP-Link USA Corp.*, No. 22-56176, 2024 WL 1328194, *2 (9th Cir. Mar. 28, 2024). The SAC's reference to "particular purchasers lost" being "recorded in the comments sections" of YouTube videos (SAC ¶ 160) is the opposite of particularization. And SAC paragraph 129 affirmatively attributes the Fun Inc. and Magic Apple cancellations to "the 'Desolation of Yigal Mesika' video and the reaction in the magic

community"—not to any specific actionable statement by Penguin. The causation chain stops short.

The Opposition does not engage *Hartford*, *Muddy Waters*, or *Thimes Solutions* on trade-libel doctrine, effectively conceding these points.

2. Counts 3 and 4 (Misappropriation) Independently Fail

Section 3344(d) exempts uses "in connection with any news, public affairs, or sports broadcast or account." Cal. Civ. Code § 3344(d). The exception is not limited to credentialed journalists or traditional news outlets. Commentary directed to a definable public audience—even within a niche industry—is in the public interest. *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 793–96 (1995); *Dora v. Frontline Video, Inc.*, 15 Cal. App. 4th 536, 542 (1993); *Daly v. Viacom, Inc.*, 238 F. Supp. 2d 1118, 1122–23 (N.D. Cal. 2002); *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400, 415–17 (2001). Petty's videos discuss Mesika's IP-enforcement conduct and patent disputes—they are commentary on an industry controversy, not stand-alone advertising for Penguin's TIES.

Section 3344 additionally requires that the use be "exclusively" for commercial gain. *Leidholdt*, 860 F.2d at 895. Petty's videos discuss Mesika's conduct alongside any commercial elements but they are not exclusively for commercial purposes. Mesika's authority—*Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1001 & n.2 (9th Cir. 2001)—is distinguishable. *Downing* involved surfers' photographs used in a clothing catalog with no editorial commentary. The use was pure commercial appropriation of likeness. Petty's videos discuss a controversy. Penguin distinguished *Downing* in its prior reply (ECF 29), and Mesika's latest Opposition offers nothing new, so the same reasoning applies here.

3. Count 5 (False Light) Independently Fails

Count 5 (false light) is derivative of Count 1 (defamation) and is governed by the same elements. *McCloskey v. Humboldt Cnty. Sheriff's Department*, No. 23-cv-

1699, 2023 WL 7597215, at *7 (N.D. Cal. Nov. 14, 2023). "When a false light claim is coupled with a defamation claim, the false light claim is essentially superfluous, and stands or falls on whether it meets the same requirements as the defamation cause of action." *Id.* Because the challenged speech is non-actionable opinion, hyperbole, and lay patent assessment; substantially true on the SAC's own admissions; and unsupported by plausibly pled actual malice as to a limited-purpose public figure, Count 5 fails for the same reasons.

4. Counts 6–8 (UCL and § 17500) Independently Fail

On Counts 6–8 (UCL and § 17500), Mesika offers a single sentence that, on its face, is a response to ***Petty's*** motion to dismiss, misfiled into the Penguin Opposition ("SAC alleges Counts 8-10 against Penguin Magic, but not Craig Petty"). Opposition at 29.

As Penguin explained in its renewed motion, the UCL claims fail on all three prongs. The "unlawful" prong requires a predicate violation, and if the defamation, trade-libel, and Lanham claims fail, there is no predicate. *Daly*, 238 F. Supp. 2d at 1126. The "unfair" prong in competitor cases requires conduct "tethered to" a legislatively declared policy or its supporting antitrust rationale. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 180, 186–87 (1999). Mesika pleads no antitrust injury. The "fraudulent" prong requires conduct likely to deceive the public. *Morgan v. AT&T Wireless Services, Inc.*, 177 Cal. App. 4th 1235, 1254–55 (2009); *Painters & Allied Trades District Council 82 Health Care Fund v. Takeda Pharmaceuticals Co. Ltd.*, 674 F. Supp. 3d 799, 838 (C.D. Cal. 2023). The Court has already rejected the Dynamo endorsement theory. Order at 10 ("[T]here are no allegations that the Dynamo review on the TIES product page is false. . . . Nor do Plaintiffs allege that consumers were deceived."). A UCL claim premised on defamation falls with the defamation claim. *Medical Marijuana, Inc. v. ProjectCBD.com*, 46 Cal. App. 5th 869, 895–96 (2020).

Section 17500 separately fails as to private damages. "The applicable statutes do not authorize recovery of damages by private individuals. Private relief is limited to the filing of actions for an injunction (id., § 17535); and civil penalties are recoverable only by specified public officers." *Chern v. Bank of America*, 15 Cal. 3d 866, 875 (1976); *see also Brown v. Allstate Insurance Co.*, 17 F. Supp. 2d 1134, 1140 (S.D. Cal. 1998) (dismissing claim because the statute confers no private right of action for damages). The SAC's prayer for relief seeks damages on Count 7 and therefore it fails as a matter of law.

As Mesika failed to respond to any of these arguments, the claims are effectively conceded.

5. Count 9 (Lanham Act § 43(a)) Independently Fails

The Court told Mesika what the Lanham Act claim required: "false statements made on the LOOPS product page about that product." Order at 11. The SAC instead targets the ***TIES*** product page. SAC ¶¶ 102–103, 204 (allegations of false statements "about Penguin Magic's TIES product"). The SAC targets the wrong page.

Mesika devotes one sentence to this count, arguing that Penguin's videos and product pages constitute "commercial advertising or promotion" and citing *Coastal Abstract*, 173 F.3d at 734–35. This does not address the wrong-product-page point. *Coastal Abstract* concerns whether speech is commercial advertising; it does not save a Lanham claim that targets the wrong product page. The Court's prior guidance was unambiguous, and Mesika has repeatedly ignored it.

6. Count 10 (Intentional Interference) Independently Fails

Count 10 fails on three independent grounds. First, there is no independently wrongful act. The acts underlying Count 10 are the same speech acts that fail as defamation; protected speech cannot serve as the predicate wrongful act. *Copp v. Paxton*, 45 Cal. App. 4th 829, 848 (1996) ("claims for invasion of privacy . . . and interference with prospective economic advantage . . . may not be based on speech

that is entitled to constitutional protection."). If the underlying speech is not actionable, it cannot become tortious by relabeling. Mesika does not engage *Copp*.

Second, the SAC does not plead a specific economic relationship plus probability of future benefit. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1158 (2003); *Westside Center Associates v. Safeway Stores 23, Inc.*, 42 Cal. App. 4th 507, 521–22 (1996). The framework requires "an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff." *Marsh v. Anesthesia Services Medical Group, Inc.*, 200 Cal. App. 4th 480, 504 (2011).

Third, the SAC pleads itself out of causation by attributing the alleged cancellations to the Desolation video and the reaction of the magic community and not to Penguin or any statement by Penguin. SAC ¶ 130. The Court already held that *Westside*'s "speculative expectancy" rule cuts against Plaintiffs on this very theory. Order at 11–12. The SAC does not cure that defect.

7. Count 11 (Declaratory Relief) Independently Fails

Declaratory relief is a remedy, not a stand-alone cause of action. *Vargas v. Wells Fargo Bank, N.A.*, No. C 12-02008, 2012 WL 2931220, at *6 (N.D. Cal. July 18, 2012); *Fradis v. Savebig.com, Inc.*, No. CV 11-07275, 2011 WL 7637785, at *7–8 (C.D. Cal. Dec. 2, 2011). It falls with the underlying claims. Mesika again offers no engagement with this count in the Opposition. *See also* Order at 12.

D. The Anti-SLAPP Statute Applies and Penguin Is Entitled to Fees

The California anti-SLAPP statute applies in federal court. *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972–73 (9th Cir. 1999). "[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 . . . ." *Planned Parenthood Federation of America, Inc. v. Center for*

Medical Progress, 890 F.3d 828, 834 (9th Cir. 2018). Penguin's motion challenges only legal sufficiency. Rule 12(b)(6) plausibility governs.

Mesika misreads the controlling standard to invoke *Metabolife International, Inc. v. Wornick*, 264 F.3d 832 (9th Cir. 2001) for the proposition that "no summary-judgment evidence without discovery" is the rule. Opposition at 11, 13. *Metabolife* applies to anti-SLAPP motions challenging ***evidentiary sufficiency***; *Planned Parenthood* governs anti-SLAPP motions challenging ***legal sufficiency***. 890 F.3d at 834. Penguin's motion is the latter. And while Mesika repeatedly cites *Roberts v. McAfee, Inc*., 660 F.3d 1156, 1163 (9th Cir. 2011), for the proposition that claims should be evaluated for "potential merit," that court in fact found the claims in question to have no merit and reversed the denial of an anti-SLAPP motion. 660 F.3d at 1169.

1. Penguin Satisfies Prongs One and Two

The first prong asks what public issue the speech implicates and what functional relationship the speech has to the public conversation about that issue. *FilmOn.com Inc. v. DoubleVerify Inc.*, 7 Cal. 5th 133, 149–50 (2019). The inquiry is objective; a matter may be a public issue "even if it also implicates a private dispute." *Geiser v. Kuhns*, 13 Cal. 5th 1238, 1251–54 (2022).

The challenged videos address IP enforcement, patent validity, and product authenticity within the magic-consumer community. Those are community-interest matters. Community-interest analogs from the Petty motion confirm the point: a 3,000-member homeowners-association controversy qualifies, *Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468 (2000); a 500-to-1,000-member church-organization controversy qualifies, *Grenier v. Taylor*, 234 Cal. App. 4th 471 (2015); a youth-sports-safety controversy qualifies, *Hecimovich v. Encinal School Parent Teacher Organization*, 203 Cal. App. 4th 450 (2012). The SAC's own community-reach allegations confirm community interest here: SAC ¶ 85 (26,000-view videos);

SAC ¶ 100 (community boycott); SAC ¶¶ 129–131 (retailer reactions). Mesika himself concedes the community-interest nature of the controversy. Opposition at 16 ("Mesika's reputation is tied to the commercial sale of his inventions within a niche community.").

Mesika's reliance on *Hecimovich* and the *Coastal Abstract* commercial-advertising definition is misplaced. Opposition at 13. *Hecimovich* expressly held that (1) defamation is protected activity and (2) youth-sports-safety counts as a public interest. *Hecimovich*, 203 Cal. App. 4th at 464–466. Both holdings cut Penguin's way. And *Coastal Abstract* is a Lanham Act commercial-advertising case, not an anti-SLAPP authority at all. 173 F.3d at 734–35. The "commercial advertising" framing does not displace the *FilmOn.com* / *Geiser* public-issue inquiry. Nor can Mesika defeat prong one by bundling protected speech with labels such as marketplace manipulation, search suppression, and product copying. Allegations arising from protected activity must be isolated and unprotected labels do not immunize claims whose alleged injury-producing conduct is publication of the challenged videos.

Penguin therefore satisfies prong one. On prong two, the Court applies the same Rule 12(b)(6) plausibility standard already applied to the underlying claims. For all the reasons set forth above, Mesika cannot establish any "probability of prevailing on the merits."

2. The Commercial-Speech Exemption Does Not Apply

The California Supreme Court has set out the four-element test for the commercial-speech exemption to the anti-SLAPP statute:

> [W]e interpret section 425.17(c) to exempt from the anti-SLAPP law a cause of action arising from commercial speech when (1) the cause of action is against a person primarily engaged in the business of selling or leasing goods or services; (2) 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***; (3) the statement or conduct was made either for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services or in the course of delivering the person's goods or services; and (4) the intended audience for the statement or conduct meets the definition set forth in section 425.17(c)(2).

Simpson Strong-Tie Co. v. Gore, 49 Cal. 4th 12, 30 (2010) (emphasis added).

The Opposition lists the four elements but glosses over their application, arguing that Mesika sells products and the videos disparage his products and reputation. Opposition at 12. The statements at issue here are not comparative advertising or sales representations about product quality (element 2) and they are not made to promote or secure sales or in the course of delivering Penguin's goods or services (element 3). Mesika's claims arise from commentary on an IP dispute and Mesika's enforcement practices, not from any product claim by Penguin, and the statements are not framed or used as sales pitches. Elements 2 and 3 are not met.

Simpson Strong-Tie's analysis is reinforced by its endorsed analogs. The Court favorably cited *Troy Group, Inc. v. Tilson*, 364 F. Supp. 2d 1149, 1155 (C.D. Cal. 2005) (statements about plaintiff, not defendant's business, do not satisfy element 2). The legislative history reinforces the narrow reach: section 425.17(c) was enacted "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) (emphasis added).

3. Fees Are Mandatory Upon Prevailing

Section 425.16(c)(1) makes attorneys' fees mandatory upon prevailing on an anti-SLAPP motion. Cal. Civ. Proc. Code § 425.16(c)(1); *Ketchum v. Moses*, 24 Cal. 4th 1122, 1131–32 (2001). Penguin will, upon prevailing, file a separate noticed motion supported by appropriate records.

III. CONCLUSION

The Court previously dismissed Mesika's FAC and provided clear guideposts for how to cure the deficiencies in his claims, if he could. Mesika has now had three opportunities to plead facts establishing Penguin's liability, and he has not. The SAC should be dismissed, Penguin's anti-SLAPP motion should be granted with fees, and Mesika should not be granted any further leave to replead. The traditional considerations governing leave to amend confirm the result. *See Foman v. Davis*, 371 U.S. 178, 182 (1962). Mesika has had repeated opportunities; the central defects remain uncured; further amendment would be futile.

Penguin therefore prays the motion to dismiss be granted, with prejudice, the special motion to strike should be granted, with mandatory fees and costs to follow on a separate noticed motion, and for all other relief the Court finds appropriate.

Dated: May 27, 2026

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Penguin Magic, Inc., certifies that this brief contains 6617 words, which complies with the word limit of L.R. 11-6.1.

Dated: May 27, 2026

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of May, 2026, a copy of this Reply 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 27, 2026

By: */s/Jasmine Han*
Jasmine Han