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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

WILLIAM JAMES MITCHELL,

Plaintiff,

v.

TWIN GALAXIES, LLC,

Defendant.

19STCV12592
[The Hon. WENDY CHANG DEPT. 36]

DECLRATION OF ANTHONY J. ELLROD IN SUPPORT OF PLAINTIFF WILLIAM JAMES MITCHELL MOTION FOR COSTS AND ATTORNEY'S FEES JOINTLY AND SEVERALLY AGAINST DEFENDANTS AND THEIR COUNSEL

DATE: **April 5, 2022**
TIME: 8:30 a.m.
PLACE: Department 36

Reservation Number: 930998964344

Action Filed: 4/11/2019
Trial Date: Not set yet

DECLARATION OF ANTHONY J. ELLROD

1. I, ANTHONY J. ELLROD, am an attorney duly authorized to practice law before all courts in the State of California. I am a Senior Partner with the law firm of Manning & Kass, Ellrod, Ramirez, Trester LLP ("Manning & Kass"), counsel of record for PLAINTIFF WILLIAM JAMES MITCHELL. The facts stated herein are based on my own personal knowledge, unless otherwise stated on information and belief. If called as a witness

I could and would competently testify thereto.

2. On or about October 26, 2020, this Court issued a minute order denying defendant Twin Galaxies, LLP's Special Motion to Strike under CCP Section 425.16. A true and correct copy of the court's ruling is attached as **Exhibit A**.

3. The work on this successful anti-SLAPP motion was handled by four attorneys with the Manning & Kass law firm. To date they have billed a total of 356.5 billable hours to this matter:

A. Senior partner **Anthony J. Ellrod** (23.2 hours)

B. Partner **James Gibbons** (225.3 hours)

C. Partner **Steven Renick** (48.4 hours)

D. Of Counsel **Trisha Newman** (27.7 hours – this includes an additional 10 hours for review of opposition to this motion and reply)

E. Associate **Natalya Vasyuk** (.8 hours)

F. Associate **Chelsea Clayton** (19.8 hours)

G. Paralegal **Elaine Berman** (11.3 hours)

The work done on this case was not duplicative. Initially, James Gibbons was the supervising partner, handling the majority of the work on the initial anti-SLAPP opposition and surreply, but he has since left the firm and the case was handed over to Anthony J. Ellrod to supervise and manage. Steve Renick is the law and motion specialist who researched and assisted on the appeal and answer to the petition for review in the California Supreme Court. Associate Chelsea Clayton assisted with review and response to the anti-SLAPP motion, Natalya Vasyuk assisted on reviewing aspects of the petition for review to assist on analysis of an answer, Of Counsel Trisha Newman has prepared the motion for attorney's fees, and paralegal Elaine Berman has assisted with preparing documents throughout the anti-SLAPP motion proceedings.

4. The fees in this case were higher than they might have been because Defendant's counsel chose to include over one thousand pages of documentary evidence in their initial special motion, and over 100 pages of new evidence in reply. The Order granting

the motion was approximately 20 pages long (not including the ruling for the motion for undertaking which was included in the court's ruling). Clearly the motion involved complex issues. Plaintiff's counsel had to interview their clients, gather evidence, review the pleadings in this action, request leave to file a sur-reply, draft, and file that sur-reply brief, prepare a respondent's brief and an answer to a petition for review, as well as the present attorney's fees motion. Defendant and their counsel have no one to blame but themselves if the plaintiff's costs are high. Defendant filed a frivolous motion and elected to continue seeking relief through further review. Even after the anti-SLAPP motion was denied, defendants did not offer to release the undertaking while they sought their further review.

5. I am a partner at Manning & Kass and I am familiar with the firm's billing policies and procedures. Attorneys are instructed to bill actual time worked on a task in 6 minute increments, rounding up. They are instructed to input their time contemporaneously into our billing software program identifying the matter by an internal firm number assigned to the matter. This information and data is kept in the ordinary course of our business. The billing program can produce reports showing all attorney and paralegal time inputted on a given matter. It can also produce reports showing all costs billed to a particular matter. I have reviewed reports from our billing program for all time and costs billed to this matter, including work in progress (WIP), and I have segregated out those items that pertain to the anti-SLAPP motion, the appeal, and/or this motion for attorneys' fees and costs. The hours reflected above represent attorney and paralegal time, and costs pertaining to this matter and pertaining to the anti-SLAPP motion, appeal, and/or this motion for attorneys' fees and costs.

6. I anticipate spending an additional **10.0 hours** at least to review the Opposition, research and draft the Reply brief, and prepare for and appear at oral argument on this motion.

7. Plaintiff therefore request reimbursement for hours at the reasonable blended market rate of **$600.00** an hour for attorneys and $250 for a paralegal, for a total lodestar amount of **$226,014.96** in fees.

8. Plaintiff incurred costs of **$598.96**, consisting of filing and appearance fees related to the anti-SLAPP motion.

9. The billable hours and costs set forth above are reasonable and consist of time spent evaluating the pleadings and facts of the case, researching the anti-SLAPP statute, preparing the moving papers for the Special Motion to Strike, reviewing the Opposition, preparing the Reply papers, attending the hearing on the Special Motion to Strike, and reviewing the evidence and case file. Many of the documents that counsel reviewed were never submitted to the Court in support of the opposition to defendant's anti-SLAPP motion, but counsel was required to review them to understand the history of the case, to determine the documents' relevance to the case, and to determine whether they might support the anti-SLAPP motion.

10. My firm, partners Anthony J. Ellrod and Steven Renick, Ms. Natalya Vasyuk, and Trisha E. Newman are familiar with the reasonable value of legal services rendered in this matter. Based on our background and experience as attorneys, the reasonable market value of our legal services should be reimbursed at the reasonable blended market rate of **$600** an hour, which is a reasonable rate for large firms in the Los Angles downtown market, working on anti-SLAPP motions in legal malpractice and professional responsibility cases.

11. Plaintiff is entitled to a lodestar amount of $203,945 in fees, plus a .50 multiplier of $21,480 for fees incurred on the hours worked by Anthony J. Ellrod and Steven J. Renick, plus $598.96 in costs, for a total award and judgment of $226,014.96

12. **JAMES GIBBONS** was a partner at Manning & Kass, Ellrod, Ramirez, Trester, LLP. He graduated from Boston University School of Law in 1987. He has experience in Commercial Litigation and Insurance and Reinsurance coverage. He was at Manning & Kass for approximately 20 years and has extensive experience in practicing law.

13. **ANTHONY J. ELLROD** is a founding partner of Manning & Kass, Ellrod, Ramirez, Trester LLP. He holds an AV Preeminent rating from Martindale-Hubbell, and is an Associate of the American Board of Trial Advocates (ABOTA). He was named a 2012-2019 Top Business Litigation Attorney by Pasadena Magazine, as well as a 2005-2010,

2016-2021 Super Lawyer, and a 2009-2010 Super Lawyer – Business Addition.

14. Mr. Ellrod presently heads the firm's Business Litigation; Corporate and Commercial Transactions; Intellectual Property; and Sports, Recreation, and Attractions Law Teams. His practice includes a significant amount of business litigation and commercial transactions. He has conducted numerous successful jury trials, in both state and federal court, on matters including breach of contract, officers and directors liability, and intellectual property. Mr. Ellrod authored the Lexis Practice Advisor section on Settlement Agreements and Releases, a practice guide for attorneys as part of the Lexis legal research program by Matthew Bender & Company. He also authored the section on an Insurer's Duty to Defend and Indemnify in California as well as Contract Basics for Litigators for Thomson Reuter's Practical Law, a practice guide for attorneys by West Publishing.

15. Mr. Ellrod has been a member of the Association of Southern California Defense Counsel, the Association of Business Trial Lawyers, the Defense Research Institute (DRI), the Professional Liability Underwriting Society (PLUS) and the International Health, Racquet & SportsClub Association. He is admitted to practice law before all California state courts, the United States District Courts for the Northern, Central, Eastern and Southern Districts of California, the 9th Circuit U.S. Court of Appeal, and the Supreme Court of the United States.

16. Mr. Ellrod graduated from Pepperdine University School of Law (JD 1988) and the University of South Florida (BA 1983), where he majored in business administration. At Pepperdine, he was the Business Editor of the Pepperdine Law Review, and published a comment on the California Supreme Court decision in *Ingersoll v. Palmer*. A recipient of the American Jurisprudence award in Civil Procedure, he was awarded the Pepperdine and National Dean's Honor Lists.

17. **STEVEN J. RENICK** is a partner with Manning & Kass, and a senior member of the Strategy, Writs and Appeals Team. Mr. Renick has served as a Judge Pro Tem in the West Orange County Municipal Court and was a member of the Appellate Law

Committee of the Orange County Bar Association. Mr. Renick joined Manning & Kass in December 1995 and currently leads the firm's four person Supreme Court specialty focus within the Strategy, Writs, and Appeals Team.

18. Mr. Renick has been certified as an appellate law specialist by the Board of Legal Specialization of the State Bar of California since August, 2000. He has served on the Appellate Law Advisory Commission to the Board of Legal Specialization, and currently serves on the State Bar's Committee of Bar Examiners. He has also been named a 2009–2017 Super Lawyer. In addition to countless arguments before state and federal courts of appeal, he has argued before both the California Supreme Court and the United States Supreme Court.

19. **Trisha E. Newman** is of Counsel at the firm of Manning & Kass, previously Senior Counsel on the Strategy, Writs, and Appeals Team. Ms. Newman earned her bachelor's degree in philosophy from the University of California, Los Angeles and Juris Doctor from Southwestern University School of Law in 2004. Ms. Newman has extensive experience in law & motion and appellate matters, having prepared and argued numerous motions in both state and federal courts at both the trial and appellate level, in both civil and criminal matters. Ms. Newman serves as General Counsel to several small businesses with a focus on sports and recreation, transactions, investment, and risk management, including technology and privacy issues.

20. **Natalya Vasyuk** is an associate with the firm. Ms. Vasyuk graduated with honors from the University of Edinburgh, receiving a Bachelor of Laws (LLB) in 2013, and a Master of Laws from the University of California Los Angeles (LLM) in Entertainment, Media and Intellectual Property Law and Policy in 2014. She was admitted to practice law in California in 2015 and has been with Manning & Kass since April of 2017, where she has focused on intellectual property and complex business litigation.

21. **Chelsea Clayton** was an associate of the firm. She received her Juris Doctor from University of California, Los Angeles in 2017, where she was on UCLA Law Review as an Articles Editor.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 6th day of February, 2022 at Los Angeles, California.

Anthony J. Ellrod, Declarant

EXHIBIT "A"

Superior Court of California

County of Los Angeles

Department 36

FILED
Superior Court of California
County of Los Angeles
OCT 26 2020
Sherri R. Carter, Executive Officer/Clerk
By _____, Deputy
Douglas Canada

WILLIAM JAMES MITCHELL,

Plaintiff,

v.

TWIN GALAXIES, LLC; and Does 1-10, inclusive,

Defendants.

Case No.: 19STCV12592

Hearing Date: 10/15/2020

[redacted] **RULING RE: Defendant's Special Motion to Strike (anti-SLAPP); Defendant's Motion for Undertaking**

Defendant's Special Motion to Strike (anti-SLAPP) is denied.

Defendant's Motion for Undertaking is granted. Plaintiff is to post a bond in the amount of $81,225.00 within 30 days of this order. (CCP § 1030(d).)

Background

This case arises out of allegedly defamatory statements made by Twin Galaxies, LLC ("Twin Galaxies"), which operates the website www.twingalaxies.com that publishes score records on leaderboards for video games and provides forums for discussion on video games. (*See* Hall Decl., ¶¶ 3-5.) Twin Galaxies' leaderboards' records and rankings have been historically recognized as official records of achievement in video games and have been used by Guinness World Records. (*Id.* ¶ 7.)

Plaintiff William James ("Billy") Mitchell is a well-known figure in the video game community for his records in several video games including Donkey Kong, Pac-Man, and others. (FAC, ¶ 1.) Plaintiff first became prominent in the 1980s, when he was included in a photo spread of game champions in Life Magazine. (FAC, ¶ 1.) In 1999, Plaintiff achieved the first

perfect score on the original Pac-Man. (FAC, ¶ 2.) In the 2000s, Plaintiff set record scores of 1,047,200 on Donkey Kong (the "King of Kong 'tape'") and 1,050,200 on Mortgage Brokers (the "Mortgage Brokers score"). (FAC, ¶ 3.) Plaintiff has appeared in several documentaries on competitive gaming, including *The King of Kong: A Fistful of Quarters* (2007) and is owner of "Rickeys' Hot Sauce." (FAC, ¶¶ 5-6.)

On April 12, 2018, Twin Galaxies published a statement that it would remove Plaintiff's scores from its leaderboards and ban Plaintiff from participation in the leaderboards. Twin Galaxies stated:

> [Mitchell's] taped Donkey Kong score performances of 1,047,200 (the King of Kong "tape"), 1,050,200 (the Mortgage Brokers score) that were historically used by Twin Galaxies to substantiate those scores and place them in the database were not produced by the direct feed output of an original unmodified Donkey Kong Arcade PCB. . . .
> From a Twin Galaxies viewpoint, the only important thing to know is whether or not the score performances are from an unmodified original DK arcade PCB as per the competitive rules. We now believe that they are not from an original unmodified DK arcade PCB, and so our investigation of the tape content ends with that conclusion and assertion. . . .
> With this ruling Twin Galaxies can no longer recognize Billy Mitchell as the 1st million point Donkey Kong record holder.

(FAC, ¶ 18.)

Plaintiff asserts this statement is defamatory and false because it claims Plaintiff did not achieve his record scores legitimately through the competitive rules, *i.e.*, by cheating. (FAC, ¶ 19.) Plaintiff counters that his scores were made on certified arcade boards in front of hundreds of people, and, that an investigation preceding this statement made by Twin Galaxies was biased as under Twin Galaxies' new ownership by Jason ("Jace") Hall. (FAC, ¶¶ 23-25.)

Defendant Twin Galaxies has filed a Special Motion to Strike, asserting that Twin Galaxies' statement was made at the request of forum members after a technical investigation; and that allowing Plaintiff to use the courts to recover for defamation would have chilling effects on the freedom of speech, setting a precedent for others to challenge the public debate on video game scores in courts. (*See* Mot. at pp. 1-2.) Plaintiff has opposed. Defendant has filed a reply. Plaintiff has filed a sur-reply.

Defendant Twin Galaxies also has filed a Motion for Undertaking, on grounds that Plaintiff resides out-of-state, and that there is a reasonable possibility that Defendant will obtain judgment in the matter, which largely mirrors the grounds for its Special Motion to Strike. Plaintiff has opposed. Defendant has filed a reply.

I. Special Motion to Strike (anti-SLAPP)

1. Evidentiary Objections

Plaintiff's Request to Strike Defendant's Evidentiary Objections to Sur-Reply

Plaintiff on October 7, 2020, filed an objection and request the court strike Defendant's evidentiary objections filed on September 28, 2020, to Plaintiff's declaration filed with a sur-reply brief.

Plaintiff's request is denied. The objection is overruled. This court has not issued a ruling that it would not consider an objection to evidence submitted with Plaintiff's sur-reply, such that the objections constitute a pleading "not drawn or filed in conformity with . . . an order of the court." (CCP § 436.) The court considers the objections.

Defendant's Objections to Sur-Reply Evidence

Defendant on September 28, 2020 filed objections to Plaintiff's supplemental declaration filed on September 25, 2020, and the Declaration of Walter Day attached as Exhibit 1 to the same declaration.

Defendant objects to Plaintiff's entire declaration filed on September 25, 2020 on grounds that the declaration is unsigned. Plaintiff re-submitted a signed declaration on October 1, 2020. The general rule is new evidence is not permitted within reply papers while the court has discretion to admit these forms of reply papers. (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537–38.) A trial court has discretion whether to accept new evidence in reply papers. (*Alliant Ins. Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1308.) The inclusion of additional evidentiary matter with the reply is only allowed in "the exceptional case" and, if permitted, the

other party should be given the opportunity to respond. (*Jay v. Mahaffey*, 218 Cal.App.4th at 1538.)

Considering the foregoing, the court considers Plaintiff's re-submitted declaration filed October 1, 2020. Objection 174 is OVERRULED.

The remaining objections to the supplemental evidence submitted with Plaintiff's sur-reply are ruled on as follows:

Mitchell Declaration: OVERRULED: 175, 177, 178, 179, 180, 182-185, 187-192. SUSTAINED: 176, 181, 186.

Day Declaration: OVERRULED: 194, 196, 197. SUSTAINED: 193, 195, 198.

Defendant's Objections to Opposition Evidence

The court rules as follows on Plaintiff's declaration filed on June 22, 2020, and the declaration of Walter Day attached as Exhibit 1 to the same declaration:

Mitchell Declaration and Exhibits:

OVERRULED: 1, 2, 6-10, 12-14, 18, 26-28, 30-33, 36, 37, 40-44, 46-49, 51, 53-55, 57, 61, 63-65, 70-72, 75, 79, 86-91, 93-96, 101-103, 115-131, 134, 137, 138, 140, 141, 143, 145, 147, 148, 153, 154, 157, 158-168, 171, 173.

SUSTAINED: 11, 15, 16, 17, 19-25, 29, 34, 35, 38, 39, 45, 50, 56, 58, 60, 62, 66, 67, 73, 74, 76-78, 80-85, 98-100, 104-114, 132, 133, 135, 136, 139, 142, 144, 145, 146, 149, 150-152, 155, 156, 169, 170, 172.

SUSTAINED IN PART: 3 ("As a result . . . as a professional gamer."); 4 ("Twin Galaxies personally coordinated . . . before locking the machine entirely."); 5 ("and Shirk confirmed . . . throughout the performance."); 52 ("In summary, the . . . allegation of cheating."); 59 ("As stated previously . . . in allegations of fact"); 68 ("I learned about this . . . in a class-action lawsuit." "It never contacted . . . contact from Hall."); 69 ("The refusal of two . . . contact from Hall."); 92 ("Therefore, the defamation . . per quod determination."); 97 ("and there is no argument . . . these special damages.").

Plaintiff's Objections to Defendant's Moving Evidence

The court rules as follows on Plaintiff's objection to the declaration of Jason Hall submitted March 30, 2020: OVERRULED: 1, 2. SUSTAINED: 3, 4.

2. Moving Defendant's Requests for Judicial Notice

Moving Defendant requests judicial notice of the Complaint in the action *Mitchell v. The Cartoon Network, Inc., et al.* (D.N.J., Nov. 20, 2015), Case No. 3:15-cv-05668-AET-LHG; and the Opinion of Hon. Judge Anne E. Thompson of November 20, 2015 in the same action.

Judicial notice is granted of each request. (CEC § 452(d).) The court notes that it may take judicial notice of the existence of a factual finding in another proceeding but not the truth of that finding. (*Steed v. Department of Consumer Affairs* (2012) 204 Cal.App.4th 112, 120; see *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1564-65.) "A court may take judicial notice of [another] court's action, *but may not use it to prove the truth of the facts found and recited.* [Citations.]" (*Steed*, 204 Cal.App.4th at 120 (quoting *O'Neill v. Novartis Consumer Health, Inc.* (2007) 147 Cal.App.4th 1388, 1405) (emphasis in original).)

3. Timely Filing under CCP § 425.16

A special motion to strike "may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper." (CCP § 425.16(f).) Moving Defendant filed this motion on March 30, 2020, in relation to the First Amended Complaint served by mail on March 12, 2020. (FAC, Proof of Service.) The motion is thus timely.

4. Legal Standard

A special motion to strike "may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper." (CCP § 425.16(f).)
In determining whether to grant or deny a Code of Civil Procedure section 425.16 special motion to strike, the court engages in a two-step process. (*Shekhter v. Financial Indemnity Co.* (2001) 89

Cal.App.4th 141, 150.) First, the court must decide whether the moving party has met the threshold burden of showing that the plaintiff's cause of action arises from the moving party's constitutional rights of free speech or petition for redress of grievances. (*Id.*) This burden does not require a defendant to prove subjective intent to chill the defendant's exercise of constitutional speech or petition rights. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 58.) This burden may be met by showing the act which forms the basis for the plaintiff's cause of action was an act that falls within one of the four categories of conduct set forth in Code of Civil Procedure Section 425.16, subdivision (e):

> (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, [¶]
> (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, [¶]
> (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or [¶]
> (4) 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.

If the defendant meets this initial burden, the burden shifts to the plaintiff to establish a probability of prevailing on the claim by presenting facts which would, if proved at trial, support a judgment in the plaintiff's favor. (*Shekhter*, 89 Cal.App.4th at 150-51.) In making its determination on this prong, the trial court is required to consider the pleadings and the supporting and opposing affidavits stating the facts upon which the liability or defense is based. (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 646.) The plaintiff's proof must be made upon competent admissible evidence. (*Sweetwater Union High School Dist. v. Gilbane Building Co.* (2019) 6 Cal.5th 931, 940.) The court "does not weigh evidence or resolve conflicting factual claims." (*Id.*) The court's inquiry "is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment" accepting the plaintiff's evidence as true. (*Id.*) "The court evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law. [Citation.]

'[C]laims with the requisite minimal merit may proceed.'" (*Id.*; *see also Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

5. Discussion

Prong One: Protected Activity

The court first decides whether the moving party has met the threshold burden of showing the plaintiff's cause of action arises from the moving party's constitutional rights of free speech or petition for redress of grievances. (*Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.App.4th 141, 150.) The moving defendant must identify "all allegations of protected activity" and show that the challenged claim arises from that activity. (*Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924, 934.) The statutory phrase "'arising from' means the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 (emphasis in original).)

Moving Defendant asserts Plaintiff's causes of action arise from Twin Galaxies' protected activities as a "written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest" under Code of Civil Procedure, Section 425.16(e)(3), or alternatively, as 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" under Code of Civil Procedure, Section 425.16(e)(4). (Mot. at p. 6.)

(1) Public Forum

The court agrees that Twin Galaxies' statements were made in a public forum.

Websites accessible to the public such as newsgroups are "public forums" for purposes of the anti-SLAPP statute. (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 41, at fn. 4.) A court may consider whether the website is "a place that is open to the public where information is freely

exchanged." (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1007.)

The statements were made by Twin Galaxies on its website forums, which are accessible to the public, and where members of the public exchange conversation on video game topics. (Hall Decl., ¶¶ 21, 38.) The thread questioning Plaintiff's scores was initiated by a Twin Galaxies website registered user in a forum provided for users to dispute the veracity of a Twin Galaxies verified score appearing on a leaderboard. (Hall Decl., ¶¶ 11, 20.) As of March 14, 2020, there were 170 unique contributors who commented in the thread, 211 users who voted, and 3,770 content entries. (Hall Decl., ¶ 23.) The forums for disputing scores are open to any registered user of the website. (Hall Decl. ¶ 12.) Defendant's statements were made in in that thread. (Hall Decl., ¶ 38.)

Plaintiff on opposition does not dispute that the statements were made in a public forum.

(2) Issue of Public Interest

The court also agrees that Twin Galaxies' statements involved an issue of public interest. As stated by the Supreme Court in *FilmOn.com Inc. v. DoubleVerify Inc.*:

> In articulating what constitutes a matter of public interest, courts look to certain specific considerations, such as whether the subject of the speech or activity "was a person or entity in the public eye" or "could affect large numbers of people beyond the direct participants" [Citation.]; and whether the activity "occur[red] in the context of an ongoing controversy, dispute or discussion" [Citation.], or "affect[ed] a community in a manner similar to that of a governmental entity" [Citation.].

((2019) 7 Cal.5th 133, 145–46.)

First, Plaintiff as the subject of Defendant's statements is a person "in the public eye." (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 898.) As stated in Plaintiff's Complaint, Plaintiff "rose to national prominence in the 1980's when Life magazine included him in a photo spread of game champions." (FAC, ¶ 1.) Plaintiff achieved the first perfect score on the original Pac-Man in 1999, causing Namco to bring him to Japan for the Tokyo Game Show and named him the "Video Game Player of the Century." (FAC, ¶ 2.) Plaintiff achieved record-breaking scores

on Donkey Kong in the 2000s. (FAC, ¶ 3.) In 2006, MTV selected Plaintiff as one of "The 10 Most Influential Video Gamers of All Time" and Oxford American published an article by David Ramsay describing Plaintiff as "probably the greatest arcade video game player of all time." (FAC, ¶ 4.) Plaintiff has appeared in several documentaries on competitive gaming. (FAC, ¶ 5.) Plaintiff is also the owner of a hot sauce company, built in part on Plaintiff's fame as a video game record-holder. (FAC, ¶ 6.)

Second, when an issue "is not of interest to the public at large, but rather to a limited, but definable portion of the public (a private group, organization, or community), the constitutionally protected activity must, at a minimum, occur in the context of an ongoing controversy, dispute or discussion, such that it warrants protection by a statute that embodies the public policy of encouraging *participation* in matters of public significance." (*Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107, 119.)

Defendant establishes that the issue of Plaintiff's video games scores are of interest to the video gaming community, and that its statements occurred in the context of an ongoing controversy, dispute or discussion, to warrant protection under the anti-SLAPP statute's public policy of encouraging participation in matters of public significance. As noted above, Defendant's statements were in a thread on its publicly-viewable website where members of the video game community exchange conversation on video game topics. (Hall Decl. ¶¶ 21, 38.) In the forum thread on Plaintiff's scores, as of March 14, 2020, there were 170 unique contributors who commented, 211 users who voted, and 3,770 content entries. (Hall Decl., ¶ 23.) The thread had been viewed 2,394,329 times on Twin Galaxies' website as of the same date. (Id.) Defendant has also provided information on Twin Galaxies' engagement with the video gaming community in the process of investigating the dispute and publishing its conclusion. Among other contributors, after initiating the thread, the Twin Galaxies user Jeremy Young, under the pseudonym Xelnia (Hall Decl. ¶ 20) in posts number 186 and 187 made a presentation in support of the dispute. (Hall Decl. ¶ 25.) Twin Galaxies announced it would take up the dispute claim. (Hall Decl. ¶ 27.) Contributions to the discussion were made by, among others, Robert Childs, who assisted Plaintiff in the original recording of his score performances (Hall Decl. ¶¶ 29-31)

that Twin Galaxies attempted to replicate with four staff members and published as post number 2387 (Hall Decl. ¶¶ 32-33). Twin Galaxies held a four-plus hour live public discussion stream, reviewing the performances. (Hall Decl. ¶ 34.)

The foregoing differs from the circumstances in *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133 (*FilmOn.com*). There, reports made by DoubleVerify Inc., a for-profit company that offers online tracking, verification, and "brand safety" services to internet advertisers, which generated confidential reports for profit and exchanged them confidentially without being part of an attempt to participate in a larger public discussion, did not qualify for anti-SLAPP protection, despite the topic itself being one of public interest. (*FilmOn.com*, 7 Cal.5th at 140.)

Plaintiff in the opposition does not dispute the statement was one that involved an issue of public interest. Accordingly, Defendants meets the burden to show that Plaintiff's claims arose from statements in connection with an issue in the public interest. The burden thus shifts to Plaintiff to establish a probability of prevailing on his claims. (CCP § 425.16(b)(1).)

Prong Two: Probability of Prevailing on the Merits

The burden shifts to Plaintiff Mitchell to establish a probability of prevailing on the claim by presenting facts which would, if proved at trial, support a judgment in Plaintiff's favor. (*Shekhter*, 89 Cal.App.4th at 150-51.) Plaintiff's proof must be made upon competent admissible evidence. (*Sweetwater Union High School Dist. v. Gilbane Building Co.* (2019) 6 Cal.5th 931, 940 (*Sweetwater*).) The court "does not weigh evidence or resolve conflicting factual claims." (*Id.*) The court's inquiry "is limited to whether the plaintiff has stated a legally sufficient claim and made prima facie factual showing sufficient to sustain a favorable judgment" accepting the plaintiff's evidence as true. (*Id.*) "The court evaluates Defendant's showing only to determine if it defeats Plaintiff's claim as a matter of law. [Citation.] '[C]laims with the requisite minimal merit may proceed.'" (*Id.*; *see also Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

(1) Defamation

Defamation constitutes an injury to reputation. (*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1242, *as modified (Dec. 22, 2003).*) It may occur by means of libel, which is "a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." (Civ. Code, § 45; *see Shively*, 31 Cal.4th at 1242.)

A threshold issue is whether the plaintiff is a public figure. The Plaintiff has stated he assumes for purposes of the instant motion that he is at least a limited purpose public figure with respect to video game playing, which is the subject of the instant controversy. (Opp. at p. 12.) In light of the Plaintiff's public and longstanding career in the video game industry as alleged in the FAC and Plaintiff's declaration, the court accepts this acknowledgement. (*See, e.g.*, Decl. ¶¶ 2-5.)

As such, here Plaintiff is subject to the additional requirement to recover for defamation "unless he proves, by clear and convincing evidence [Citation], that the libelous statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 256 (*Reader's Digest*) (quoting *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 280 (*New York Times Co.*)).)

i. Statement of Fact

Defendant asserts that Plaintiff cannot establish falsehood in the statement made by Defendant, because the statement made is one of opinion, not fact. Whether a statement is one of fact or opinion is a question of law to be decided by the court. (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260.)

The court in *Overstock.com, Inc. v. Gradient Analytics, Inc.* summarized the court's analysis:

> [A] a false statement of fact, whether expressly stated or implied from an expression of opinion, is actionable. [Citation.] The key is not parsing whether a published statement is fact or opinion, but "whether a reasonable fact finder could

> conclude the published statement declares or implies a provably false assertion of fact." [Citation.] And, when deciding whether a statement communicates or implies a provably false assertion of fact, we use a totality of the circumstances test. [Citation.] This entails examining the language of the statement. " 'For words to be defamatory, they must be understood in a defamatory sense.... [¶] Next, the context in which the statement was made must be considered.' " [Citation.] The contextual analysis requires that courts examine the nature and full content of the particular communication, as well as the knowledge and understanding of the audience targeted by the publication. [Citation.]

((2007) 151 Cal.App.4th 688, 701 (*Overstock*).)

"[T]he relative anonymity afforded by the Internet forum promotes a looser, more relaxed communication style." (*Krinsky v. Doe 6* (2008) 159 Cal.App.4th 1154, 1162.) However, "the mere fact speech is broadcast across the Internet by an anonymous speaker does not ipso facto make it nonactionable opinion and immune from defamation law." (*Bently Reserve LP v. Papaliolios* (2013) 218 Cal.App.4th 418, 429.)

Twin Galaxies' statement reads in pertinent part:

> **Summary Decision:**
> Based on the complete body of evidence presented in this official dispute thread, Twin Galaxies administrative staff has unanimously decided to remove all of Billy Mitchell's' scores as well as ban him from participating in our competitive leaderboards. . . .
> The rules for submitting scores for the original arcade Donkey Kong competitive leaderboards requires the use of original arcade hardware only. The use of MAME or any other emulation software for submission to these leaderboards is strictly forbidden. . . .
> Twin Galaxies has meticulously tested and investigated the dispute case assertions as well as a number of relevant contingent factors, such as the veracity of the actual video performances that the dispute claim assertions rely upon. . . .
> **Here are our specific findings:**
> - The taped Donkey Kong score performances of 1,047,200 (the King of Kong "tape"), 1,050,200 (the Mortgage Brokers score) that were historically used by Twin Galaxies to substantiate those scores and place them in the database *were not produced by the direct feed output of an original unmodified Donkey Kong Arcade PCB.*
> - The 1,062,800 (the Boomers score) Donkey Kong performance does not have enough of a body of direct evidence for Twin Galaxies to feel comfortable to make *a definitive determination on at this time.* . . .
> - The 1047 and 1050 score performance videos we have in our possession (and are basing our determinations on) are in fact the performances that were used by previous Twin Galaxies administration as justification for those scores to be

> entered into the database and for Twin Galaxies to attribute those specific accomplishments to Billy Mitchell. We have several different and unique sources of these performances and access to private historical Twin Galaxies referee e-mail distribution records showing where these sources acquired their copies and what the purpose was. . . .
> From a Twin Galaxies viewpoint, the only important thing to know is whether or not the score performances are from an unmodified original DK arcade PCB as per the competitive rules. **We now believe that they are not from an original unmodified DK arcade PCB, and so our investigation of the tape content ends with that conclusion and assertion.** . . .
> **With this ruling Twin Galaxies can no longer recognize Billy Mitchell as the 1st million point Donkey Kong record holder.** . . .

(Hall Decl., Exh. B (formatting in original).)

Contextually, the statement is presented as Twin Galaxies' "conclusion" after the investigation it undertook into the claims made by a member of its website forum. As discussed above, Twin Galaxies provides a forum for public dispute on video game scores, in which members may participate. After a dispute claim and dispute process, a Twin Galaxies administrator decides to remove or not remove the contested score from its leaderboards. (Hall Decl. ¶¶ 13-15.) In this case, the dispute was extensive and resulted in a determination by Twin Galaxies staff, based upon public comment and investigation, and Twin Galaxies' own inability, and all known third party public investigation's inability, to reproduce images and artifacts in Plaintiff's score performances. (*See* Hall Decl. ¶¶ 37-38.) Twin Galaxies then posted these "ultimate findings" in the claim thread. (*See id.* ¶ 38.)

Twin Galaxies' "conclusion" includes the language "We now believe that [the score performances] are not from an original unmodified [Donkey Kong] arcade PCB . . . ." Twin Galaxies also makes the "specific finding": "The taped Donkey Kong score performances of 1,047,200 (the King of Kong "tape"), 1,050,200 (the Mortgage Brokers score) that were historically used by Twin Galaxies to substantiate those scores and place them in the database *were not produced by the direct feed output of an original unmodified Donkey Kong Arcade PCB.*" (Hall Decl., Exh. B.) A third "specific finding" as to another Donkey Kong ("Boomers score") performance was that Twin Galaxies did "not have enough of a body of direct evidence for Twin Galaxies to feel comfortable to make *a definitive determination on at this*

time." (*Id.*)

Considering the foregoing, a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact, in particular, that Plaintiff's King of Kong "tape" and Mortgage Brokers score were not produced by the direct feed output of an original, unmodified Donkey Kong Arcade PCB. In addition, a reasonable fact finder could find implied within this facts that actions were taken to make such circumstances occur. There is support as well in that the third finding appears to imply that Twin Galaxies would only makes "definitive determination[s]" based on sufficient direct evidence. That the statement is then made with qualifying language ("We now believe …") does not under the circumstances, considering Twin Galaxies holding itself out as an arbiter of sorts of fact, necessarily make the statement into one where a reasonable factfinder would not understand it as fact. (*See Overstock*, 151 Cal.App.4th at 703.)

ii. Falsity

As a public figure for purposes of the instant dispute, plaintiff has the burden to prove not only the falsity of the challenged statement, but also that defendant acted with "actual malice." (*New York Times Co., supra*, at 279-280.) Falsity must be established by a preponderance of the evidence. (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 81 (*Alnor*).)

To support his burden to prove falsity, first, Plaintiff attests that the King of Kong "tape" was made on an original unmodified PCB. (Mitchell Decl. ¶ 9.) Plaintiff cites to evidence, for the Mortgage Brokers score, that there was on-site referee adjudication and that the hardware was verified by the Senior Engineer at Nintendo. Walter Day, the founder and former owner of Twin Galaxies, attests to the on-site referee adjudication, and Plaintiff has submitted declarations by the referees Todd Rogers and Kimberly Mahoney. (Mitchell Decl. Exh. 1, ¶ 5 (Day Decl.); Exhs. 9, 10 (Rogers and Mahoney Decls.).) The referees attest to the integrity of the arcade machine, and that the machine was an original Donkey Kong Arcade machine with original unmodified hardware. (*See* Rogers Decl. ¶ 6; Mahoney Decl. ¶¶ 3, 4.) Next, Plaintiff attests to having complied with Mr. Day's requirement to verify hardware with the Senior Engineer at Nintendo,

Wayne Shirk; and attests that he never accessed hardware before or after the performance. (Mitchell Decl. ¶ 25.) Plaintiff also provides evidence in support of the Donkey Kong "tape" showing that the score could be achieved; this evidence, however, supports that the scores were achievable, rather than going to the integrity of the hardware itself. (*See* Mitchell Decl. Exh. 21 (Lakeman Decl.).) Last, Plaintiff provides testimony that the possibility of Plaintiff using MAME emulation for the scores is unlikely or impossible because the specific version of MAME alleged was not created until after the King of Kong "tape". (Mitchell Decl. ¶ 49.)

Defendant asserts that it can prove the truth of the statements. Defendant offers evidence in support that the scores could not have been made on an original unmodified PCB in the declarations of Jason Hall and Carlos Pineiro. Mr. Hall attests that Twin Galaxies tested the scores by attempting to reproduce certain artifacts on the girders drawn in the game, including a "Girder Finger" that appeared in the King of Kong "tape" and the Mortgage Brokers score, and was not able to capture the same artifacts in its testing. (*See* Supp'l Hall Decl. ¶¶ 17-18.) Mr. Pineiro attests that the person who started the dispute claim also demonstrated that the Girder Finger could not be reproduced form an unmodified original PCB. (*See* Pineiro Decl. ¶¶ 10-12.) Mr. Pineiro was also unable to reproduce the same artifacts. (*See id.* ¶¶ 16, 18.)

There is therefore a dispute in the evidence as to the truth or falsity of the statement. However, the court's inquiry on an anti-SLAPP motion "is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment" accepting the plaintiff's evidence as true, and not weighing the evidence or resolving factual disputes. (*Sweetwater, supra*, at 940.) The court does not find Plaintiff's claim of falsity has been defeated as a matter of law. (*Id.*)

iii. Actual Malice

As a public figure for purposes of the instant dispute, plaintiff has the burden to prove that defendant acted with "actual malice." (*New York Times Co., supra*, at 279-280.) Plaintiff has the burden to prove actual malice by clear and convincing evidence, requiring Plaintiff to demonstrate by "a finding of high probability" that Twin Galaxies "either knew [the] statement

was false or subjectively entertained serious doubt [the] statement was truthful." (*Alnor,* 148 Cal.App.4th at 84.)

To demonstrate actual malice, a plaintiff may rely on inferences drawn from circumstantial evidence. (*Id.* at 84.) Such inferences may be drawn from circumstantial evidence of a failure to investigate; anger and hostility towards the plaintiff; or reliance on sources known to be unreliable or known to be biased against the plaintiff. (*Reader's Digest, supra*, at 258.) The evidence is relevant only to the extent that it reflects on the subjective attitude of the publisher. (*Id.*) The failure to conduct a thorough and objective investigation, standing alone, does not prove actual malice; and mere proof of ill will alone may likewise be insufficient. (*Id.*) "the failure to investigate must fairly be characterized as demonstrating the speaker purposefully avoided the truth or deliberately decided not to acquire knowledge of facts that might confirm the probable falsity of charges." (*McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 114.)

Plaintiff asserts that Plaintiff's evidence shows that statements made, sources not interviewed, and acts taken during the dispute claim investigation indicate subjective doubt as to the accuracy of the statements; and that Defendant's statements were made with reckless disregard for the truth, in particular that statements made by Defendant's principal Mr. Hall indicate the dispute claim investigation was decided before completion of Twin Galaxies' investigation; and that the evidence supports a purposeful avoidance of the truth.

In support, Plaintiff offers evidence that (1) Mr. Hall, before the completion of the dispute claim investigation, told Mr. Day that Mr. Hall "didn't care" about referees who could verify the hardware; (2) Twin Galaxies did not contact these referees; (3) Twin Galaxies disregarded verification of the hardware by a Senior Engineer of Nintendo; (4) Twin Galaxies used biased investigators; and (5) Twin Galaxies, despite its defense that it followed its internal rules on its methods of contacting sources who could verify the scores, in fact contacted other sources outside of those rules. Plaintiff asserts that foregoing shows actual malice, in particular because there was no need to rush to publish the statement. (*See Widener v. Pacific Gas & Electric Co.* (1977) 75 Cal.App.3d 415, 434, *disapproved of on other grounds by McCoy v.*

Hearst Corp. (1986) 42 Cal.3d 835.)

Plaintiff's evidence supports that on a phone call to Mr. Hall on February 24, 2018, Plaintiff urged Hall to interview Twin Galaxies personnel and eyewitnesses to Plaintiff's scores, and that Mr. Hall refused and stated he "doesn't care what anybody says." (Mitchell Decl. ¶ 44.) Plaintiff's evidence supports that Mr. Hall made a website post stating that, because Twin Galaxies' dispute concerned whether the performances were made by MAME recordings and not original arcade gameplay, it "[d]oes not matter one bit what someone knew or didn't know. TG does not care about certified boards, or any other non-relevant item to the dispute claim. What matters is the actual content on the tape(s) as it stands. . . . Either the performances on the tapes were produced by original DK hardware, or they were not." (Mitchell Decl. ¶ 45, Exh. 27.) Plaintiff attests that Mr. Hall in phone conversations in April 2018 again refused to interview Plaintiff's proposed witnesses and documentation, stating that "it doesn't matter" and that Mr. Hall "didn't care." (Mitchell Decl. ¶ 61.)

Plaintiff provides evidence that Mr. Hall telephoned Mr. Day on March 13, 2018, roughly one month prior to Twin Galaxies' statement, during which Mr. Hall asked, "How will you feel when I announce that Billy [Mitchell] cheated?" (Mitchell Decl., Exh. 1 ¶ 8 (Day Decl.).) Plaintiff alleges this shows that Twin Galaxies' decision had already been made prior to completion of Twin Galaxies' investigation, and prior to a Facebook broadcast reviewing videotapes of Plaintiff's scores. (*See id.* ¶ 54.) Plaintiff provides evidence that Twin Galaxies did not contact referees of the Mortgage Brokers score who attest to the hardware's integrity. (*See* Mitchell Decl. ¶ 84; Exh. 9; Exh. 10, ¶ 6.)

Defendant asserts that it defeats Plaintiff's claim of actual malice as a matter of law. Defendant relies on its investigation process and the rules of its dispute claim process.

Mr. Hall attests Twin Galaxies did not interview eyewitnesses because there was no evidence that the King of Kong "tape" was live, such that eyewitness testimony would provide relevant information; because Plaintiff did not identify witnesses by name; because Plaintiff did not post evidence in the dispute claim thread relating to a live performance prior to the statement; and because evidence of live performances is irrelevant to the dispute. (Hall Decl. ¶ 22.) It

appears Defendant through Mr. Hall considered the relevant dispute to be whether or not the performances on videotape performances were in fact captured from an unmodified original PCB; and that as a result, the only relevant evidence was that relating to the video recordings, and not to the machines. (*See, e.g.*, Supp'l Hall Decl. ¶ 8.)

The court is not persuaded that such limitation defeats Plaintiff's claim as a matter of law; in particular, how an interview of referees to at least the Mortgage Brokers live performance would not have been relevant to the integrity of the machines that the referees watched, when Defendant's statement concludes that the taped performances could not have been made on original unmodified hardware. Plaintiff has provided support of having requested referees be interviewed prior to the release of the statement. (*See, e.g.*, Mitchell Decl. ¶ 44.) In addition, the status of the PCB hardware as original and/or unmodified appears to be at least supportable by Nintendo's Senior Engineer by verification; and Defendant has not provided a reason for failure to investigate this information after Plaintiff requested. The failure sounds rather in avoidance of information, rather than a failure to investigate, considering Mr. Hall's affirmative refusals and Plaintiff's requests.

Next, the court does not follow the logic that Defendant's internal rules, providing that only evidence submitted in the dispute claim thread would be considered, provides Defendant a legal defense to the tort of defamation. (*See* Supp'l Hall Decl. ¶ 16.) Defendant has not provided authority as to how its internal processes have legal effect.

The court last considers the allegation that Defendant did not harbor doubt as its statement was made on Twin Galaxies' investigation in the dispute claim thread and based on Mr. Pineiro's conclusion as well that the performances could not have been made on an original unmodified PCB. Again, however, such facts are offered in support that the Defendant did not harbor doubt but is insufficient to defeat Plaintiff's claim as a matter of law, where the court cannot not weigh conflicting evidence on the anti-SLAPP motion.

Based on the foregoing, Plaintiff satisfies the burden on the anti-SLAPP motion of a prima facie case supporting actual malice, sufficient to overcome the burden of "minimal merit." (*Sweetwater, supra*, at 940.)

iv. Special Damages

"A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof." (Civ. Code, § 45a.) "'Special damages' means all damages that plaintiff alleges and proves that he or she has suffered in respect to his or her property, business, trade, profession, or occupation, including the amounts of money the plaintiff alleges and proves he or she has expended as a result of the alleged libel, and no other." (Civ. Code, § 48a(d)(2).)

Defendant argues that Plaintiff has not pled special damages with respect to Defendant's statement, which Plaintiff must do as the statement is libel *per quod*. Plaintiff asserts the statement is rather libel *per se*, and that regardless Plaintiff has suffered direct damages in loss of sales in Plaintiff's hot sauce business.

Even if the statement is one of libel *per quod*, Plaintiff has offered adequate evidence in support of special damages. Plaintiff provides evidence that his public persona as established in "The King of Kong: A Fistful of Quarters" is linked to the Rickey's hot sauce business, through publicity materials linking by appearance Plaintiff's person, the film, and the hot sauce brand. (*See, e.g.*, Mitchell Decl. ¶¶ 125-127, Exhs. 51-54.) Plaintiff next has brought evidence that in 2018 through 2019 revenue for Rickey's hot sauce sales went down, from an average of $800,216 from 2013-2017 and actual sales of $796,068 in 2017, to $410,267 in 2018 and $431,632.98 in 2019. (Mitchell Decl. ¶¶ 127-28, Exhs. 55-57.)

v. Common Interest Privilege

"In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information." (Civ. Code, § 47(c).)

Defendant asserts Twin Galaxies' statement is privileged under the common interest privilege. Plaintiff asserts that because the statement was made to the public at large, it is analogous to one made by a news outlet, and thus does not fall under the common interest privilege. In light that the statement was made available to the public in general, the court agrees with Plaintiff; a closer relationship between the publisher of information and the receivers of it. (*See Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 752.)

vi. Conclusion

Based on the foregoing, Defendant Twin Galaxies' special motion to strike Plaintiff's defamation cause of action is DENIED.

(2) False Light

For the same reasons, Defendant's motion to the extent that it is alleged against Plaintiff's False Light cause of action is DENIED. The cause of action arises out of the same publication on Defendant's website and is alleged on the same substantive grounds. (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 34 (collapse of defamation claim also defeats causes of action arising from same publications on website).)

II. Motion for Undertaking (CCP § 1030)

1. Evidentiary Objections

Plaintiff's Objection to Defendant's Evidence on Reply

Plaintiff objects to Defendant's supplemental evidence submitted with its reply brief.

The general rule of motion practice is that new evidence is not permitted within reply papers and the court has discretion to admit these forms of reply papers. (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537–38.) A trial court has discretion whether to accept new evidence in reply papers. (*Alliant Ins. Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1308.) The

inclusion of additional evidentiary matter with the reply is only allowed in "the exceptional case" and, if permitted, the other party should be given the opportunity to respond. (*Jay v. Mahaffey*, 218 Cal.App.4th at 1538.)

Defendant's motion for an undertaking was filed on September 22, 2020 after Defendant had obtained permission for the court to consider Defendant's supplemental evidence submitted in support of its anti-SLAPP motion. In light that the grounds for Defendant's motion primarily rely on evidence already before the court, and that the motion largely mirrors Defendant's anti-SLAPP motion, the court does not consider the new evidence in declarations submitted with Defendant's reply brief.

2. Timely Filing

Defendant filed its motion for an undertaking on September 22, 2020, for the hearing date of October 15, 2020. The proof of service indicates timely electronic service on September 22, 2020. (CCP § 1005(b).) Plaintiff timely opposed on October 1, 2020. (*Id.*) Defendant timely replied on October 7, 2020. (*Id.*)

3. Legal Standard

When the plaintiff in an action resides out of the state, the defendant may, at any time, apply to the court by noticed motion for an order requiring the plaintiff to file an undertaking to secure an award of costs and attorney's fees which may be awarded in the action. (CCP § 1030(a); *Shannon v. Sims Service Center, Inc.* (1985) 164 Cal.App.3d 907, 913.) The motion must be made on the grounds that the plaintiff resides out of the state and that there is a reasonable possibility that the moving defendant will obtain judgment in the action. (CCP § 1030(b); *Shannon*, *supra*, 164 Cal.App.3d at 913.) The motion must be accompanied by an affidavit in support of the grounds for the motion that sets forth the nature and amount of the costs and attorney's fees the defendant has incurred and expects to incur by the conclusion of the action. (*Id.*)

"The determinations of the court under this section have no effect on the determination of

any issues on the merits of the action or special proceeding and may not be given in evidence nor referred to in the trial of the action or proceeding." (CCP § 1030(f).)

4. Discussion

(1) Declaration

Defendant has provided the declaration of David Tashroudian, counsel for Defendant. Mr. Tashroudian attests that the Defendant anticipates Defendant will incur $81,225.00 in this action. The amount consists of $7,875 in connection with a Code of Civil Procedure section 2033.420(a) motion, which Defendant expects to incur approximately 15 hours at counsel's fee rate of $525/hour; and $73,350.00 which primarily comprises the costs for 21 expected depositions and filing fees of $1,350.00. (Tashroudian Decl. ¶ 6.) Defendant's declaration supports the statutory requirements of section 1030.

Plaintiff does not challenge the amount of the costs and fees requested by the Defendant, and the court thus accepts the amount requested as reasonable.

(2) Out-of-State Residence

Defendant alleges Plaintiff lives out-of-state. (Mot. p. 7.) There is no dispute on this point; and Plaintiff has alleged in the First Amended Complaint that Plaintiff's state of residence is Florida. (FAC ¶ 18; *see generally Opp.*)

(3) Reasonable Possibility of Defendant Obtaining Judgment

Defendant Twin Galaxies asserts it has a reasonable possibility of prevailing against Plaintiff, because Plaintiff is unable to show that Defendant acted with the requisite constitutional malice with respect to Defendant's alleged defamatory statement. Defendant also asserts there is a reasonable possibility that a factfinder will determine that the statement is true, an affirmative defense to defamation. Plaintiff opposes on grounds that Plaintiff has a substantial likelihood of prevailing and that Twin Galaxies thus cannot establish a reasonable possibility of

prevailing; and that Defendant's motion is prematurely brought at the start of litigation.

A motion requiring the plaintiff to post a security can be brought by a defendant "at any time." (CCP § 1030(a).) The court does not find persuasive Plaintiff's argument that the motion is prematurely brought at this stage in the litigation; evidence has been brought to the court's attention by means of declarations at this stage in the litigation.

The court's analysis on a motion for an undertaking is to determine only whether the Defendant shows a "reasonable possibility" of prevailing; the moving defendant is not required to show there is no possibility that the opposing party could win at trial. (*Baltayan v. Estate of Getemyan* (2001) 90 Cal.App.4th 1427, 1432.) An opposition on the merits thus must allege that the moving defendant fails to make an adequate prima facie showing of a reasonable possibility of success in the action.

Considering the evidence on this motion, the court finds that Defendant has satisfied the low burden to show a reasonable possibility of prevailing in this action. Defendant has supported that its statement does not show actual malice, and on the instant motion the court is not restricted in its consideration thereof. Defendant's evidence in support of Defendant's anti-SLAPP motion, as discussed above, supports that Twin Galaxies did not harbor doubt as to the truth of its statement, as its statement was made after Twin Galaxies' lengthy investigation on the dispute. (*See* Hall Decl. ¶¶ 28-36 (detailing process of dispute investigation); ¶¶ 37-38 (conclusion based on investigation).) The testimony of Mr. Hall's belief that eyewitness evidence was unnecessary may reasonably go in the Defendant's favor on this point, undermining Plaintiff's claim that Defendant acted with reckless disregard of the truth. Defendant has also provided the declaration of Mr. Pineiro, which concludes that Plaintiff's performances could not have been made on an original unmodified PCB based on Mr. Pineiro's analysis. (Supp'l Pineiro Decl. ¶¶ 17-19.) Next, Plaintiff's showing that Plaintiff can show actual malice, discussed *supra*, does not establish that Defendant cannot show a prima facie claim of a reasonable possibility of prevailing on the issue of malice with the evidence weighed.

The same evidence goes toward Defendant's affirmative defense of the truth of the statement, which forms a complete defense to defamation, and provides support of a reasonable

possibility of prevailing on this affirmative defense. (*See Campanelli v. Regents of University of California* (1996) 44 Cal.App.4th 572, 581.) Defendant has additionally provided the declaration of David Race, who attests to having worked with Mr. Pineiros and having tested the hardware, and an inability to reproduce the artifacts discussed above, supporting that the videotapes could not have come from an original unmodified Donkey Kong PCB. (*See* Race Decl. ¶¶ 19-20.)

In sum, Defendant Twin Galaxies meets its burden to demonstrate that Plaintiff is not a California resident and that Defendant has a reasonable possibility of success in this action. The court thus GRANTS Defendant's motion for an undertaking. Plaintiff is to post a bond in the amount of $81,225.00 within 30 days of this order. (CCP § 1030(d).)

Dated: OCT 26 2020

Gregory Alarcon
Superior Court Judge

ROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 801 S. Figueroa St, 15th Floor, Los Angeles, CA 90017-3012.

On February 8, 2022, I served true copies of the following document(s) described as **DECLRATION OF ANTHONY J. ELLROD IN SUPPORT OF PLAINTIFF WILLIAM JAMES MITCHELL MOTION FOR COSTS AND ATTORNEY'S FEES JOINTLY AND SEVERALLY AGAINST DEFENDANTS AND THEIR COUNSEL** on the interested parties in this action as follows:

David Tashroudian, Esq. Mona Tashroudian, Esq. TASHROUDIAN LAW GROUP, APC 12400 Ventura Blvd. Suite 300 Studio City, CA 91604 Telephone: (818) 561-7381 Facsimile: (818) 561-7381 Email: david@tashlawgroup.com Email: mona@tashlawgroup.com	Attorney for Defendants Twin Galaxies

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Manning & Kass, Ellrod, Ramirez, Trester LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Los Angeles, California.

ONLY BY ELECTRONIC TRANSMISSION: Only by emailing the document(s) to the persons at the e-mail address(es). This is necessitated during the declared National Emergency due to the Coronavirus (COVID-19) pandemic because this office will be working remotely, not able to send physical mail as usual, and is therefore using only electronic mail. No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission. We will provide a physical copy, upon request only, when we return to the office at the conclusion of the National Emergency.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 8, 2022, at Los Angeles, California.

Angela Thompson

Journal Technologies Court Portal

Court Reservation Receipt

Reservation

Reservation ID: 930998964344	Status: RESERVED
Reservation Type: Motion for Attorney Fees	Number of Motions: 1
Case Number: 19STCV12592	Case Title: WILLIAM JAMES MITCHELL vs TWIN GALEXIES, LLC
Filing Party: William James Mitchell (Plaintiff)	Location: Stanley Mosk Courthouse - Department 36
Date/Time: April 5th 2022, 8:30AM	Confirmation Code: CR-UM59S8WIYFWVDJRMT

Fees

Description	Fee	Qty	Amount
Motion for Attorney Fees	60.00	1	60.00
Credit Card Percentage Fee (2.75%)	1.65	1	1.65
TOTAL			$61.65

Payment

Amount: $61.65	Type: MasterCard
Account Number: XXXX6677	Authorization: 017843

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