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6 Attorneys for defendant Twin Galaxies, LLC

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF LOS ANGELES

11 WILLIAM JAMES MITCHELL,

12 Plaintiff,

13 v.

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

15 Defendants.

Case No. 19STCV12592

Assigned to: Hon. Wendy Chang  
[Dept. 36]

**DECLARATION OF DAVID A.  
TASHROUDIAN**

*[Filed concurrently with: (1) Opposition to  
Fees Motion; and, (2) Objections to Evidence]*

**Hearing**

Date: April 5, 2022

Time: 8:30 a.m.

Place: Department 36

Action Filed: 4/11/2019

**DECLARATION OF DAVID A. TASHROUDIAN**

I, David A. Tashroudian, declare that:

1. I am the attorney of record for defendant and cross-complainant Twin Galaxies, LLC (“Twin Galaxies”) and I make this declaration in support of Twin Galaxies’ opposition to the motion for attorney’s fees of plaintiff and cross-defendant William James Mitchell (“Billy Mitchell”). I am the attorney who prepared and filed the special motion to strike, the subsequent appeal, and the petition for review with the California Supreme Court. I make this declaration based on facts known to me personally to be true, and if called as a witness to testify to them, I could and would do so.

2. Judge Sam Ohta of the Los Angeles Superior Court, sitting by assignment in the Second Appellate District, authored a comprehensive published opinion on the anti-SLAPP appeal dated October 12, 2021. A true and correct copy of the published opinion in Mitchell v. Twin Galaxies, LLC (2021) 70 Cal. App. 5th 207 is attached to this declaration as **Exhibit A**.

3. Twin Galaxies filed its special motion to strike the amended complaint on March 30, 2020. A true and correct copy of Twin Galaxies’ March 30, 2020 special motion to strike is attached to this declaration as **Exhibit B**.

4. Twin Galaxies filed a reply in support of its special motion to strike on June 26, 2020. A true and correct copy of Twin Galaxies’ June 26, 2020 special motion to strike is attached to this declaration as **Exhibit C**.

5. Judge Gregory Alarcon in Department 36 of the Los Angeles Superior Court issued a ruling on Twin Galaxies’ special motion to strike, and motion for undertaking on October 26, 2020. A true and correct copy of Judge Alarcon’s October 26, 2020 order on Twin Galaxies’ special motion to strike and motion for undertaking is attached to this declaration as **Exhibit D**.

6. Twin Galaxies filed its opening appellate brief on May 4, 2021. A true and correct copy of Twin Galaxies’ opening appellate brief is attached to this declaration as **Exhibit E**.

7. Twin Galaxies filed a petition for review of the appellate decision with the California Supreme Court on November 19, 2021. On December 30, 2021, the California Supreme Court extended the time to consider the petition *sua sponte*. A true and correct copy of Twin

1 Galaxies' November 19, 2021 petition for review with the California Supreme Court is attached  
2 to this declaration as **Exhibit F**.

3 8. On July 30, 2021, Judge Alarcon denied Mitchell's *ex parte* application for an order  
4 striking allegedly new evidence filed in support of Twin Galaxies' reply. A true and correct copy  
5 of Judge Alarcon's July 30, 2021 minute order is attached to this declaration as **Exhibit G**.

6 9. A true and correct copy of Twin Galaxies' first extension request of 30 days to file  
7 its opening appellate brief is attached to this declaration as **Exhibit H**.

8 10. A true and correct copy of Twin Galaxies' second extension request of 7 days to  
9 file its opening appellate brief is attached to this declaration as **Exhibit I**.

10 DECLARATION REGARDING ATTORNEY'S FEES

11 11. Judge Alarcon set my hourly rate for legal services in this matter at \$525.00 per  
12 hour on page 22 of the order granting the undertaking motion dated October 26, 2020, a copy of  
13 which is attached as Exhibit D to Paragraph 5 of this declaration.

14 12. I spent **26.0** hours opposing this fees motion. Multiplying the hourly rate of  
15 \$525.00 by 26 hours, the total attorney's fees amount is **\$13,650.00**. The hours I spent opposing  
16 Mitchell's fees motion are as follows:

17 (a) I spent **4.5 hour(s)** researching the law on a successful plaintiff's right to attorney's  
18 fees on anti-SLAPP. I researched CCP 128.5, as well as the anti-SLAPP statute by  
19 reviewing the statutes, reviewing relevant caselaw (a lot of it), and reviewing  
20 practice treatises in advance of drafting the opposition brief. I spent this time  
21 outlining the argument as well.

22 (b) I spent **1.0 hour(s)** reviewing the file and drafting the facts & procedural history  
23 section of the opposition brief.

24 (c) I spent **10.0 hour(s)** drafting the argument section of the opposition brief. This  
25 time included research and drafting the section on legal standards and bad faith  
26 [1.0]; researching and drafting the section on frivolousness [3.0]; researching and  
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drafting the section on delay [3.0]; and researching and drafting the section on attorney's fees [3.0].

- (d) I spent **3.5 hour(s)** revising my argument, proofreading, editing, formatting, and filing the opposition brief.
- (e) I spent **3.0 hour(s)** drafting, revising, formatting, compiling documents, and filing my declaration.
- (f) I spent **1.5 hours(s)** researching, drafting, revising, formatting, and filing Twin Galaxies' objections to Mitchell's evidence supporting the fees motion.
- (g) I anticipate I will spend an additional **2.5 hour(s)** reviewing Mitchell's reply, preparing for and attending the hearing.

I swear, under penalty of perjury of the laws of the State of California, that the foregoing is true and correct. Executed this 22<sup>nd</sup> day of March 2022 at Los Angeles, California.

/s/ David A. Tashroudian

# **EXHIBIT A**

FILED

Oct 12, 2021

DANIEL P. POTTER, Clerk

mfigueroa Deputy Clerk

Filed 10/12/21

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

WILLIAM JAMES MITCHELL,

Plaintiff and Respondent,

v.

TWIN GALAXIES, LLC,

Defendant and Appellant.

B308889

(Los Angeles County  
Super. Ct. No. 19STCV12592)

APPEAL from an order of the Superior Court of Los Angeles County. Gregory N. Alarcon, Judge. Affirmed.

Tashroudian Law Group and David A. Tashroudian for Defendant and Appellant.

Manning & Kass, Ellrod, Ramirez, Trester, James E. Gibbons, Steven J. Renick and Anthony J. Ellrod for Plaintiff and Respondent.

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William “Billy” Mitchell brought suit against Twin Galaxies, LLC for defamation and false light after Twin Galaxies issued a statement asserting Mitchell’s world record scores in the Donkey Kong arcade game were not achieved on original unmodified hardware as required under its rules. As a result, it removed all of Mitchell’s world record scores and banned him from participating in its leaderboards. The trial court denied Twin Galaxies’ special motion to strike under the strategic lawsuits against public participation statute (anti-SLAPP motion). (Code Civ. Proc., § 425.16.) Because Mitchell showed a probability of prevailing on his claims, the trial court properly denied the anti-SLAPP motion. We affirm the order.

### **FACTS**

Mitchell holds world records in several video games, including Donkey Kong and Pac-Man. In 1999, Mitchell achieved the first perfect score in the Pac-Man arcade game and was recognized as the “Video Game Player of the Century” by NAMCO, the maker of Pac-Man.

At issue in this case are three of Mitchell’s world record scores for the arcade game Donkey Kong. For ease of reference, we refer to them as the “King of Kong score” in which he scored 1,047,200 points on December 28, 2004, the “Mortgage Brokers score” in which he scored 1,050,200 points on July 14, 2007, and the “Boomers score” in which he scored 1,062,800 points on July 31, 2010. Mitchell has appeared in several documentaries on competitive gaming, including a film titled *The King of Kong: A Fistful of Quarters* about an opponent’s journey to the world record score for Donkey Kong.

Twin Galaxies was founded by Walter Day in 1982. Day partnered with videogame adjudicators, such as the International Video Game Hall of Fame and Guinness World Records, to facilitate and organize videogame competitions. From 1982 to 2014, Twin Galaxies adjudicated world records through on-site referees or by video. Video adjudication was introduced in the 1990s so players could participate from their homes remotely.

In 2014, Day sold Twin Galaxies to Jason “Jace” Hall. Hall is also a well-known figure in the video game industry with experience in video game design, function, and hardware. Twin Galaxies operates a website at [www.twingalaxies.com](http://www.twingalaxies.com), where, among other things, competitive video game rules are set, player performances are measured, and records may be viewed and challenged. The Twin Galaxies website also provides a forum for members to discuss all things related to video games.

Twin Galaxies publishes leaderboards on its website for thousands of video game titles across dozens of video game platforms, including arcade machines, game consoles, and emulation platforms such as Multiple Arcade Machine Emulator or M.A.M.E. The leaderboards recognize achievements for high score or fastest time, and they rank players in those, and other, categories. Records and rankings appearing on the Twin Galaxies leaderboards have been used by Guinness World Records in several Guinness World Records Gamer’s Edition books and continue to be recognized as world records by the Guinness organization and others.

Twin Galaxies provides a process to dispute a score appearing on a leaderboard. Once a score dispute claim is submitted, it is placed into a public dispute voting forum where the gaming community will publicly discuss, debate, and vote on



the veracity of the claim and present evidence to support or refute the score.

*The Dispute Claim*

Jeremy Young, who was registered through the Twin Galaxies website under the name “Xelnia,” disputed Mitchell’s King of Kong score, Mortgage Brokers score and Boomers score (the Disputed Scores). Young claimed the Disputed Scores were not achieved on original Donkey Kong arcade hardware as required under the rules. Instead, the Disputed Scores were achieved on an emulation platform such as the M.A.M.E. system. Young examined video tapes of the Disputed Scores and found certain images and anomalies which he asserted could not be produced by the original Donkey Kong arcade hardware. He believed those images could only be produced through the use of a M.A.M.E. system.

Young presented evidence that original Donkey Kong arcade printed circuit board (PCB) hardware draws the Donkey Kong levels frame-by-frame with the first frame drawing 1/2 portions of five girders, and the rest of the frames filling in those girders. Young presented evidence that the Donkey Kong game on emulation software – that is the game loaded on a computer other than a PCB – similarly draws the game’s levels frame-by-frame, but with the first frame drawing three girders, with one girder having a protruding line which has been nicknamed the “girder finger.”

Young posted screenshots from video footage of the Disputed Scores which showed Donkey Kong levels with three girders in the first frame, with one being the girder finger. There were other unexplained anomalies and artifacts in the footage

which led him to believe the games played in the videos were inconsistent with original Donkey Kong arcade games.

Twin Galaxies posted digital copies of the video footage on its website, inviting its community members to investigate and comment on the dispute claim. It also conducted its own investigation of Young's dispute. On April 12, 2018, Twin Galaxies published the following statement:

“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.

We have notified Guinness World Records of our decision.

On 02-02-2018 Twin Galaxies member Jeremey Young (@xelnia) filed a dispute claim assertion against the validity of Billy Mitchell's historical and current original arcade Donkey Kong score performances of 1,047,200 (the King of Kong “tape”), 1,050,200 (the Mortgage Brokers score), and 1,062,800 (the Boomers score) on the technical basis of a demonstrated impossibility of original unmodified Donkey Kong arcade hardware to produce specific board transition images shown in the videotaped recordings of those adjudicated performances.

[¶] . . . [¶]

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.

In addition to Twin Galaxies' own investigation into the dispute case assertions, at least two different 3rd parties

conducted their own explorations and came to identical conclusions.

Most notable was the 3rd party (Carlos Pineiro) that Billy Mitchell engaged to help examine the dispute case claims on his behalf, utilizing whatever original equipment Billy could provide, whose final finding was consistent with Twin Galaxies investigation and others.

[¶]

**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.

[¶] . . . [¶]

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.**

[¶]

Twin Galaxies has also investigated this matter as comprehensively as reasonably possible to make sure that its findings are as informed as possible.

[¶] . . . [¶]

**With this ruling Twin Galaxies can no longer recognize Billy Mitchell as the 1st million point Donkey Kong record holder.”**

The statement was distributed to the public through Twin Galaxies’ website and social media platforms, where it garnered media attention from mainstream news outlets such as The New York Times, The Washington Post, and Variety. The media reported Twin Galaxies removed Mitchell’s world records and banned him because he cheated. Mitchell twice demanded a retraction, which Twin Galaxies denied. After initially stripping Mitchell of his world records, Guinness World Records reinstated them on June 18, 2020, after it conducted its own investigation.

*The Lawsuit*

Mitchell brought suit against Twin Galaxies for defamation and false light, alleging Twin Galaxies implied he cheated to achieve his scores. Mitchell further alleged special damages arose from the defamation because he uses the notoriety associated with his professional gaming reputation to promote his hot sauce company, Rickeys’ Hot Sauce.

*Twin Galaxies’ anti-SLAPP motion*

Twin Galaxies filed an anti-SLAPP motion, contending its statement arose from protected activity and Mitchell could not establish a probability of success on each of his causes of action. In support of its anti-SLAPP motion, Twin Galaxies submitted a declaration from Hall detailing the company’s investigation of the

dispute claim. Hall stated he obtained two sets of copies of the video tapes for the King of Kong score and the Mortgage Brokers score from two separate sources previously affiliated with Twin Galaxies. After he confirmed they were identical, he posted digital copies of the video tapes to the Twin Galaxies website for analysis and comment.

A team from Twin Galaxies, including Hall, conducted its own analysis of the video tapes. The team's analysis of the tapes showed the levels drawn in the first frame contained three girders—and the infamous girder finger. According to Hall, they tested extensively and could not avoid finding the girder finger in the two tapes. They also extensively tested gameplay that was captured directly from an unmodified Donkey Kong arcade PCB and were never able to capture the levels containing three girders or the girder finger. From this technical analysis, Twin Galaxies concluded Young's dispute claim was valid and issued its statement.

#### *Mitchell's Opposition*

Mitchell opposed the anti-SLAPP motion and submitted his own evidence to counter Twin Galaxies'. Mitchell accused Twin Galaxies of fabricating a dispute to draw attention to the website and increase revenue. Mitchell stated in a declaration he urged Hall to interview a number of witnesses, including Walter Day, the founder of Twin Galaxies, as well as the referees and others who witnessed his live performances for the Disputed Scores. He recounted that Hall repeatedly refused to do so and told Mitchell and Day that he "didn't care" about any eyewitnesses.

Mitchell described the rules established by Day for the Mortgage Broker score game. Twin Galaxies assigned two referees to adjudicate Mitchell's game in July 2007 at a

convention hosted by the Florida Association of Mortgage Brokers. Day worked with the Senior Engineer at Nintendo to verify the Donkey Kong hardware was unmodified. After his examination of the hardware, the Nintendo engineer sent it directly to the organizers of the convention, who put it into the Donkey Kong machine and locked it in a hotel room. Mitchell affirmed he did not have access to the hardware before or after his performance.

Mitchell achieved the new Donkey Kong record on July 14, 2007. The Twin Galaxies referees documented the score and confirmed it. The convention organizers then returned the hardware to the Nintendo Senior Engineer for re-verification. After he confirmed the hardware remained legitimate, he mailed it to Mitchell via UPS. Mitchell submitted declarations from the referees, the organizers, and eyewitnesses at the convention to attest to these facts.

In 2010, Mitchell attempted the Donkey Kong record once more at Boomers Arcade in Florida. An original Donkey Kong arcade machine was provided to Boomers Arcade by a local arcade machine vendor. Mitchell submitted a declaration from the vendor attesting to the condition of the machine and that it contained original unmodified hardware for the world record attempt. Mitchell further submitted declarations from the Twin Galaxies referees assigned to adjudicate the Boomers score. Declarations from the manager of Boomers Arcade and the vendor's employee who delivered the Donkey Kong machine confirmed the machine contained the proper hardware and settings.

Mitchell also challenged the chain of custody of the video tapes provided to Twin Galaxies. In particular, he asserted one of the individuals who purportedly held possession of the tapes for ten years and sent it to Hall indicated in emails he had a “master plan” to “take [Mitchell] down.” Mitchell also alleged the video tapes may have been altered because the version of M.A.M.E. which displays the controversial finger girder was not available in 2004, when he achieved the King of Kong score.<sup>1</sup> Mitchell further questioned the veracity of the video tapes, noting they did not contain his image or his voice as the video of his perfect Pac-Man score did.

*Twin Galaxies’ Reply*

In reply, Twin Galaxies submitted further declarations to dispute Mitchell’s assertions regarding the chain of custody issue and Twin Galaxies’ failure to consider eyewitness evidence of the Disputed Scores.

Twin Galaxies submitted declarations by the individuals who provided it with the tapes attesting to the authenticity of the video tapes and that they were not altered in any way. Hall explained in a second declaration that Twin Galaxies chose not to solicit any eyewitness evidence because: (1) the King of Kong score was adjudicated by videotape and there was no evidence of a live performance; (2) Mitchell never asked Hall to interview anyone specifically; (3) no one posted any evidence on the Twin Galaxies website regarding a live performance prior to the

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<sup>1</sup> Twin Galaxies objected to this evidence below on the grounds it lacks foundation and is unreliable. It contends the trial court erroneously overruled these objections. Twin Galaxies, however, fails to provide factual or legal support for its contention of error. We therefore consider the issue waived. (*In re Marriage of McLaughlin* (2000) 82 Cal.App.4th 327, 337.)

April 12, 2018 statement; and (4) evidence of the live performances was irrelevant to the dispute because the dispute related solely to whether the gameplay captured on the videotapes was from an original unmodified Donkey Kong PCB. Additional exhibits and declarations were also submitted to address other factual issues raised in Mitchell's opposition.<sup>2</sup>

*Mitchell's Sur-reply*

The trial court granted Mitchell's request to submit a sur-reply to address the new evidence. Mitchell argued Twin Galaxies' new evidence was irrelevant and immaterial to the anti-SLAPP motion. He also disputed the factual assertions contained in Twin Galaxies' reply declarations. In particular, he submitted declarations contradicting evidence that the video tapes relied on by Twin Galaxies originated from Mitchell, Todd Rogers (one of the referees for the Mortgage Broker score and the Boomers score), and Walter Day.

*The Trial Court's Order*

In addition to the anti-SLAPP motion, Twin Galaxies moved for an order requiring Mitchell to post an undertaking pursuant to Code of Civil Procedure section 1030, subdivision (a) because he is an out-of-state litigant and there is a reasonable possibility Twin Galaxies will obtain judgment in the action or special proceeding. (Civ. Proc. Code, § 1030.) The trial court denied the anti-SLAPP motion but granted the motion for

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<sup>2</sup> The parties submitted extensive evidence in connection with the anti-SLAPP proceedings. We set forth the evidence which we feel is necessary to our determination of this appeal. We exclude the remainder of the evidence relied on by the parties because it only serves to underscore our observation that there exist many factual disputes in this case which may not be resolved on review of an anti-SLAPP ruling.



undertaking, ordering Mitchell to post a bond in the amount of \$81,225. Twin Galaxies appealed.

### **DISCUSSION**

The parties agree, as do we, that Mitchell’s claims for defamation and false light arise from protected activity and meet the first prong of the anti-SLAPP analysis. We therefore focus on the second prong: whether Mitchell has shown a probability of prevailing on his claims. Twin Galaxies contends Mitchell has not provided sufficient evidence to show the challenged statement was false or it made the statement with actual malice. We are compelled by the standard of review, however, to conclude Mitchell has demonstrated the requisite “minimal merit” to his claims to defeat Twin Galaxies’ anti-SLAPP motion. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291 (*Soukup*).)

#### **A. The Anti-SLAPP Statute**

The Legislature enacted the anti-SLAPP statute to address the societal ills caused by meritless lawsuits filed to chill the exercise of First Amendment rights. (Code of Civ. Proc., § 425.16, subd. (a).) The statute accomplishes this by providing a special procedure for striking meritless, chilling claims at an early stage of litigation. (See Code of Civ. Proc., § 425.16, subd. (b)(1); *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055–1056.)

The anti-SLAPP statute establishes a two-step procedure to determine whether a claim should be stricken. In the first step, the court decides whether the movant has made a threshold showing that a challenged claim arises from statutorily defined protected activity. (*Rusheen v. Cohen, supra*, 37 Cal.4th at p. 1056.) Once the threshold showing has been made, the burden shifts to the plaintiff to demonstrate a probability of prevailing on

his claims. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) To show a probability of prevailing, the opposing party must demonstrate the claim is legally sufficient and supported by a sufficient prima facie showing of evidence to sustain a favorable judgment if the evidence it has submitted is credited. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.)

“ ‘In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant ([Code Civ. Proc.], § 425.16, subd. (b)(2)); though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant’s evidence supporting the motion defeats the plaintiff’s attempt to establish evidentiary support for the claim. [Citation.]’ [Citations.]” (*Taus v. Loftus* (2007) 40 Cal.4th 683, 714 (*Taus*)). We accept as true the evidence favorable to the plaintiff. A plaintiff must establish only that the challenged claims have minimal merit to defeat an anti-SLAPP motion. (*Soukup, supra*, 39 Cal.4th at p. 291.)

We review the denial of an anti-SLAPP motion de novo. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067.)

## **B. Defamation and False Light**

“Defamation is the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or that causes special damage.” (*Grenier v. Taylor* (2015) 234 Cal.App.4th 471, 486.) If the person defamed is a public figure, he must show, by clear and convincing evidence, that the defamatory statement was made with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false. (*Reader’s Digest Assn. v. Superior Court*

(1984) 37 Cal.3d 244, 256 (*Reader's Digest*); *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 285–286.) Mitchell concedes he is a “limited” public figure for purposes of the anti-SLAPP proceedings who is required to show actual malice to prevail.

In evaluating whether a plaintiff has made a prima facie showing of actual malice, “we bear in mind the higher clear and convincing standard of proof.” (*Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 358.) By contrast, the law does not require a plaintiff to prove the element of falsity by clear and convincing evidence, only by a preponderance of the evidence. (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 76 (*Alnor*).

“‘False light is a species of invasion of privacy, based on publicity that places a plaintiff before the public in a false light that would be highly offensive to a reasonable person, and where the defendant knew or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed.’” (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1264.) “To establish a false light claim based on a defamatory publication, a plaintiff ‘must meet the same requirements’ as for a defamation claim.” (*Balla v. Hall* (2021) 59 Cal.App.5th 652, 687.)

### **C. Mitchell Made a Prima Facie Showing of Falsity**

Twin Galaxies contends Mitchell failed to demonstrate its statement was false and therefore cannot show a probability of prevailing. To meet his burden, Mitchell relies on his own declaration and others’ declarations attesting to the equipment used. We conclude Mitchell has met his burden.

As to the King of Kong score, Mitchell stated he achieved the score on a machine at the showroom of Arcade Game Sales. Robert Childs, the owner of Arcade Game Sales, affirmed only original unmodified hardware was used in its Donkey Kong machines. He stated, “There is no possibility that [Mitchell’s] 1,047,200 score (the King of Kong ‘tape’) occurred on anything but original unmodified hardware . . . .” Mitchell further submitted evidence that the M.A.M.E. version that produces the girder finger found by Twin Galaxies and others on the videotape was not available until 2007, three years after the King of Kong score was achieved. This evidence would support a finding the videotape may have been altered and may be unreliable.

As to the Mortgage Brokers score, Mitchell provided a detailed description (see *ante*) of the procedure established by Day to ensure the hardware was unmodified and Mitchell did not have access to it, including that the Senior Engineer at Nintendo verified the hardware both before and after the record was achieved. In support, Mitchell submitted declarations from Day, the referees, the organizers, and other eyewitnesses at the convention.

As to the Boomers score, Mitchell submitted a declaration from the vendor of the machine he used attesting to the condition of the machine and that it contained original unmodified hardware. Declarations from the Twin Galaxies referees, the manager of Boomers Arcade, and the vendor’s employee also attested to the machine’s original unmodified hardware.

Twin Galaxies disputes the relevance of the evidence provided by Mitchell, asserting it focuses on the live performances rather than the videotapes on which Twin Galaxies' analysis is based. Twin Galaxies contends Mitchell misconstrues its paragraphs-long statement removing all of Mitchell's scores from its leaderboards and banning him from participating in them in the future. It argues its statement is limited to a finding that the videotape recordings of the King of Kong score and the Mortgage Broker score performances "that [are] historically used by Appellant to substantiate the score and place it in the score database was not produced by the direct feed output of an original unmodified arcade PCB." In short, Twin Galaxies confines its investigation and its statement to whether the video tapes for those two scores show anomalies, including the infamous finger girder, that cannot be produced from original Donkey Kong arcade hardware. It contends Mitchell failed to prove the falsity of that narrowly interpreted statement because Mitchell's evidence relates to the live performances only and he provides no evidence to show the gameplay recorded on the video tapes was from an original unmodified machine.

We do not agree that Twin Galaxies' statement is limited to a finding that the video recordings of the Mortgage Brokers score and the King of Kong score show they were not achieved on original unmodified Donkey Kong hardware. If Twin Galaxies' findings were limited to only those two scores, it would not have removed all of Mitchell's scores from its leaderboards, including the Boomers score, about which it did not make a definitive determination, and all other scores which were not subject to investigation. We interpret Twin Galaxies' statement as the media and Mitchell did: it accused Mitchell of cheating to achieve

his world record scores. Accordingly, Mitchell was not limited to the video tape evidence for those two scores.

In any case, the video tapes and the live performances purportedly reflect the same gameplay and the same games. Twin Galaxies' argument rests on an assumption the video tape recordings of the Disputed Scores override any eyewitness declarations or other evidence. It essentially seeks to have us judge the probative value of competing evidence. We decline to do so because we do not weigh the credibility or comparative probative strength of competing evidence at this stage of the proceedings. (*Taus, supra*, 40 Cal.4th at p. 714.) Given the standard of review, we conclude Mitchell has met his burden to set forth prima facie evidence of falsity.

Even if we narrowly construe the challenged statement in the manner suggested by Twin Galaxies, its argument ignores Mitchell's chain of custody evidence that raises the possibility that the video tapes do not accurately portray his gameplay for the two scores, including that the video tapes are not originals, that they do not show his face or voice, that one of the individuals who provided the videos to Hall expressed bias against Mitchell and had a motive to alter the tapes, and that the version of M.A.M.E. that produces the finger girder was not available until 2004, after the King of Kong score was achieved. Again, we may not weigh the credibility or comparative probative strength of competing evidence; we must accept as true the evidence favorable to Mitchell. (*Soukup, supra*, 39 Cal.4th at p. 291.) Twin Galaxies' evidence does not prove the truth of its statement as a matter of law such that it negates Mitchell's evidence.

## **D. Mitchell Made a Prima Facie Showing of Actual Malice**

Twin Galaxies also argues Mitchell failed to present sufficient evidence that it made the challenged statement with actual malice, bearing in mind the higher clear and convincing standard of proof. (*Conroy v. Spitzer* (1999) 70 Cal.App.4th 1446, 1451–1452.) We conclude Mitchell has made the requisite showing.<sup>3</sup>

### **1. Legal Principles**

The existence of actual malice turns on the defendant’s subjective belief as to the truthfulness of the allegedly false statement. (*Reader’s Digest, supra*, 37 Cal.3d at p. 257; *Alnor, supra*, 148 Cal.App.4th at pp. 84–85.) Actual malice may be proved by direct or circumstantial evidence. Factors such as failure to investigate, anger and hostility, and reliance on sources known to be unreliable or biased “may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication.” (*Reader’s Digest, supra*, 37 Cal.3d at pp. 257–258.) However, any one of these factors, standing alone, may be insufficient to prove actual malice or raise a triable issue of fact. (*Id.* at p. 258.)

In *Antonovich v. Superior Court* (1991) 234 Cal.App.3d 1041, 1052–1053 (*Antonovich*), the defendant won an election to the county board of supervisors. In a later election, he accused his opponent, who had been the incumbent in the first election, of

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<sup>3</sup> In its reply brief, Twin Galaxies contends the common interest privilege applies in this case. Not so. Civil Code section 47, subdivision (c), expressly states that the common interest privilege applies to communications made “without malice.” Here, Mitchell made a prima facie showing of actual malice.

shredding and destroying files prior to the transfer of office because the cabinets were empty when he arrived at the office. He continued to make this accusation even after the opponent offered proof that the files existed and their respective staff members had met prior to the transition to discuss the organization of the files. There was no evidence the defendant took any steps to inquire into the truth of his opponent's statements even though the opponent offered to submit his proof for the defendant's inspection. (*Id.* at p. 1053.) The Court of Appeal found the trier of fact was entitled to conclude the defendant's " 'inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [the subject] charges,' which amounts to a 'purposeful avoidance of the truth' " so as to support a finding of actual malice. (*Ibid.*)

## **2. Analysis**

As in *Antonovich*, there is prima facie evidence of a similar decision to avoid facts that might confirm the probable falsity of the challenged statement. The record contains evidence that Hall failed to investigate facts tending to show the Disputed Scores were legitimately achieved on unmodified hardware despite Day's and Mitchell's attempts to convince him to do so.

On March 13, 2018, Day encouraged Hall to interview eyewitnesses and investigate the conclusion reached by the Senior Engineer from Nintendo. Hall refused. Instead, Hall asked, "How will you feel when I announce that Billy cheated?" Because this call occurred during the time Twin Galaxies was reportedly conducting its investigation, Day believed Hall had predetermined Mitchell's culpability.



Mitchell also unsuccessfully attempted to convince Hall to conduct further investigation from February to April 2018. During a February 24, 2018 telephone conversation, he urged Hall to interview Twin Galaxies personnel and eyewitnesses but Hall refused, saying he “doesn’t care what anybody says.” Hall again stated he “didn’t care” after Mitchell described the verification of the hardware with Nintendo’s Senior Engineer and that Mitchell lacked access to the hardware before and after the Mortgage Brokers score. Hall repeatedly refused to interview witnesses suggested by Mitchell in phone calls and texts in March and April 2018, stating “it doesn’t matter” and he “didn’t care.” Hall’s own statements that he “didn’t care” about evidence relevant to the hardware used by Mitchell may support a finding of a “‘purposeful avoidance of the truth.’” (*Antonovich, supra*, 234 Cal.App.3d at p. 1053.)

Even when Twin Galaxies contacted one of the referees to the Mortgage Brokers and Boomers scores,<sup>4</sup> the questions asked did not appear to be intended to elicit the truth. The referee was asked, in a text, whether there were “any shenanigans around any of Billy Mitchell’s scores?” The referee responded, “Perhaps . . . [I] mean anything is possible . . . but thats exactly why [I] called him out on things . . . just to make him prove right in front of me that there would be no questions.” Hall then continued to press the referee, asking whether any of Mitchell’s submitted scores were not achieved. Again, the referee equivocated, “I cannot say . . . simply because [I’ve] seen him play . . .” Hall further asked whether Day would have been

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<sup>4</sup> The other referee confirmed Twin Galaxies did not contact her regarding her adjudication of the Mortgage Brokers score or Boomers score.

aware of “shenanigans.” The referee responded that Day “sometimes is oblivious” but would have spoken up and not defended Mitchell if he knew the scores were invalid. Hall’s pointed questions do not suggest an attempt to determine the truth but an effort to direct the answer. This referee later attested to the accuracy of the Disputed Scores in his declaration in support of Mitchell’s opposition to the anti-SLAPP motion.

For purposes of an anti-SLAPP motion, we accept this evidence as true. (*Soukup, supra*, 39 Cal.4th at p. 291.) Just as in *Antonovich*, Twin Galaxies failed to take any steps to inquire into the truth of Mitchell’s statements even after he was provided the names of witnesses and Day confirmed the procedures under which the Disputed Scores were achieved.

The record also shows Twin Galaxies may have relied on biased sources to reach its conclusion. For example, the individual who provided Hall with copies of the videotapes for the King of Kong score and the Mortgage Brokers score indicated he had a “master plan” to “take [Mitchell] down.” Mitchell also attested to the animosity of the third party investigator working on behalf of Twin Galaxies, including his publicly expressed conclusion that Mitchell was guilty before the investigation began. An inference of actual malice may be made from Twin Galaxies’ failure to investigate and reliance on biased sources. (*Alnor, supra*, 148 Cal.App.4th at pp. 84–85.)

Twin Galaxies argues the evidence shows it held a good faith belief in the truth of its statement and thus did not publish with actual malice, citing to its extensive testing of the original hardware and the actual converter board used to record the Disputed Scores. Twin Galaxies further argues it held a good faith belief in the truth of its statement because three other

groups reached the same conclusion as it did, including Young, Chris Gleed, and Carlos Pineros.<sup>5</sup> According to Twin Galaxies, the fact that it and others could not avoid the girder finger during testing was dispositive and could only lead to the conclusion reached in its statement—that the King of Kong and the Mortgage Brokers scores “**were not produced by the direct feed output of an original unmodified Donkey Kong Arcade PCB.** [Emphasis in original.]”

As a result, Twin Galaxies excuses its failure to investigate Mitchell’s evidence on the ground the witnesses to the live performance have no bearing on the technical nature of Young’s dispute claim. According to Twin Galaxies, the only issue in dispute is whether the videotape recordings of the King of Kong score and the Mortgage Brokers score could have come from original unmodified Donkey Kong hardware. Neither the eyewitness testimony nor the Senior Engineer’s verification was relevant to that precise issue.

We reject this narrow interpretation of the challenged statement for the same reasons discussed above. Again, Twin Galaxies relies on competing evidence to argue a lack of actual malice. Again, we conclude we may not weigh the credibility or comparative probative strength of competing evidence. (*Taus, supra*, 40 Cal.4th at p. 714.) Even bearing in mind the higher clear and convincing standard of proof for actual malice, our review is limited to whether Twin Galaxies’ evidence

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<sup>5</sup> The parties dispute whether Chris Gleed worked on behalf of Twin Galaxies and whether Carlos Pineros worked on behalf of Mitchell. This factual dispute does not affect our analysis because we do “‘not weigh the credibility or comparative probative strength of competing evidence . . . .’” (*Taus, supra*, 40 Cal.4th at p. 714.)

demonstrates Mitchell cannot prevail as a matter of law. (*Alnor, supra*, 148 Cal.App.4th at p. 84.) We conclude the motion was properly denied because Twin Galaxies’ evidence does not defeat as a matter of law Mitchell’s prima facie evidence in support of his claims.

Neither are we persuaded by the cases cited by Twin Galaxies—*Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146 (*Annette F.*) and *Rosenaur v. Scherer* (2001) 88 Cal.App.4th 260 (*Rosenaur*). In both cases, the defendants were not alerted to any potential falsity in their statements prior to publication. In *Annette F.*, the plaintiff introduced no evidence to contradict the defendant’s declaration that she held a good faith belief in the truthfulness of her statement. (*Annette F.*, at p. 1169.) In *Rosenaur*, the defendants relied in good faith on public records to make their statement and were not aware of any information that could contradict what was contained in the public records. (*Rosenaur*, at pp. 272, 276.) Here, there is ample evidence that Twin Galaxies was alerted to potential contradictory facts.

Because we conclude Mitchell’s defamation claim survives the anti-SLAPP motion, his false light claim stands as well. (*Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1385, fn. 13 [false light claim “stands or falls on whether it meets the same requirements as the defamation cause of action.”].)

**DISPOSITION**

The order denying Twin Galaxies' anti-SLAPP motion is affirmed. Mitchell is awarded his costs on appeal.

**CERTIFIED FOR PUBLICATION**

OHTA, J.\*

We Concur:

GRIMES, Acting P. J.

STRATTON, J.

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

# **EXHIBIT B**

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7  
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF LOS ANGELES

11 WILLIAM JAMES MITCHELL,

12 Plaintiff,

13 v.

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

15 Defendants.

Case No. 19STCV12592

Assigned to: Hon. Gregory W. Alarcon  
[Dept. 36]

**NOTICE OF MOTION AND SPECIAL  
MOTION TO STRIKE OF DEFENDANT  
TWIN GALAXIES, LLC [CCP § 425.16];  
MEMORANDUM OF POINTS &  
AUTHORITIES IN SUPPORT**

*[Filed concurrently with: (1) Declaration of  
Jason Hall; (2) Declaration of David A.  
Tashroudian; (3) Request for Judicial Notice;  
and (4)[Proposed] Order]*

**Hearing**

Date: July 6, 2020

Time: 8:30 a.m.

Place: Department 36

RESERVATION ID: 095658146502

Action Filed: 4/11/2019

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**NOTICE OF MOTION AND MOTION**

**TO THE HONORABLE COURT, AND TO ALL ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE** that on July 6, 2020 at 8:30 a.m., or as soon thereafter as the matter may be heard in Department 36 of the above entitled court, located at 111 N. Hill Street, Los Angeles, California 90012, defendant Twin Galaxies, LLC ( "Defendant") will and hereby does move, pursuant to the provisions of the California *Code of Civil Procedure* 425.16 providing for a special motion to strike strategic lawsuits against public participation, for an order striking the defamation complaint of plaintiff William James Mitchell ("Plaintiff").

Defendant makes this motion on the ground that its alleged defamatory statements are protected activity, and on the ground that Plaintiff cannot show a reasonable probability of prevailing at trial on his defamation or false light claims. This motion will be based upon this notice of motion; the attached memorandum of points and authorities in support; the declarations of David Tashroudian and Jason Hall; the matters which the Court may take judicial notice of; the pleadings and other records in this action; and any further evidence or argument that the Court may receive at or before the hearing.

Respectfully submitted,

Dated: March 30, 2020

TASHROUDIAN LAW GROUP, APC

By:           /s/ David Tashroudian, Esq.  
David Tashroudian, Esq.  
Mona Tashroudian, Esq.  
Attorneys for Defendant Twin Galaxies,  
LLC



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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendant Twin Galaxies, LLC (“Twin Galaxies”) files this special motion to strike under  
4 California’s laws prohibiting strategic lawsuits against public participation on the grounds that the  
5 defamation suit of plaintiff William James Mitchell (“Billy Mitchell”) seeks to chill the expression  
6 of free speech. Mr. Mitchell alleges that the decision of Twin Galaxies to remove his Donkey  
7 Kong video game records from its website’s records leaderboards is defamatory, but it is not.

8 Twin Galaxies issued a statement on April 12, 2018 opining that Billy Mitchell’s  
9 previously recorded high scores in the Donkey Kong video game on the Arcade platform were not  
10 achieved on original unmodified equipment, and therefore they were ineligible for inclusion on  
11 the game’s leaderboard. The statement is not defamatory on its face, and was issued only after  
12 extensive public debate, and independent technical investigation by the Twin Galaxies staff. The  
13 decision to remove the scores and the subsequent statement about the removal were not made with  
14 the heightened form of constitutional malice as required when a public figure like Mr. Mitchell is  
15 the subject of the defamation. Rather, the statement was made in response to a request by the  
16 public for adjudication of Mr. Mitchell’s score and it was made in accordance with Twin Galaxies’  
17 score dispute procedure.

18 But Mr. Mitchell was not happy with the outcome of the investigation and decision to  
19 remove his scores. Even though he had an opportunity to submit evidence in support of his score  
20 performances, and to engage in the lively public debate about the scores, he chose not to do so.  
21 Instead of settling his grievance then, he waited until the adjudication process had come to end  
22 and brought suit in court to prove the veracity of his Donkey Kong score performances. But the  
23 judicial process is not the forum for him to get revenge.

24 Allowing Mr. Mitchell to use the courts to reinstate his scores, or to recover for defamation  
25 on this record, would have chilling effects on the freedom of speech. Should his suit be allowed  
26 to go forward, this Court would set a precedent for others to challenge the public debate about  
27 video game scores in court. That would lead to an unnecessary waste of the courts’ precious  
28 resources, and it would have the practical effect of discouraging Twin Galaxies and others from

1 debating video game scores in a public forum.

2 For these reasons, as set forth in greater detail below, Twin Galaxies respectfully requests  
3 that this anti-SLAPP motion be granted to ensure the spirited public debate surrounding the  
4 recording and veracity video game high scores continues on.

5 **II. FACTS**

6 A. Billy Mitchell admits he is recognized world-wide for his video game records, and  
7 has appeared in documentaries about competitive gaming.

8 Billy Mitchell pleads at paragraph one of his First Amended Complaint that he is  
9 “[r]ecognized world-wide for his records in a number of video games, including Donkey Kong,  
10 Pac-Man, and others.” [See First Amended Complaint (“FAC”), ¶ 1.] In 1999, he was named the  
11 “Video Game Player of the Century” by Namco, the manufacturer of the video game Pac-Man.  
12 [Id. at ¶ 2.] He was selected by MTV as one of “The 10 Most Influential Video Games of All  
13 Time” in 2006. [Id. at ¶¶ 3-4.] That same year, he was described by David Ramsey as “probably  
14 the greatest Arcade video game player of all time.” [Id. at ¶ 4.] Billy Mitchell made similar claims  
15 of world-wide a notoriety for his video game scores and achievements in another attempt to quell  
16 free speech in his complaint against The Cartoon Network in the United States District Court for  
17 the district of New Jersey in 2015 (the “Federal Matter”). [See Request for Judicial Notice  
18 (“RJN”), ¶ 1, Exh. A (Federal Complaint at ¶¶ 17A-17SS).]

19 Billy Mitchell also admits he has appeared in “several documentaries on competitive  
20 gaming...” [FAC at ¶ 5.] One of the documentary movies Mitchell appeared in is *The King of*  
21 *Kong: A Fistful of Quarters*. [Id.; see also Declaration of David A. Tashroudian (“Tashroudian  
22 Decl.”), ¶ 2, Exh. A (DVD copy of *The King of Kong: A Fistful of Quarters*).] United States  
23 District Judge Anne E. Thompson considered Mitchell’s role in the documentary when ruling on  
24 The Cartoon Network’s motion to dismiss in the Federal Matter. [See RJN , ¶ 2, Exh. B (Opinion  
25 re Motion to Dismiss, p. 2.)] In her Opinion, she noted that Billy Mitchell is “perhaps most widely  
26 known for his role as the antagonist in the documentary *The King of Kong: A Fistful of Quarters*,  
27 which chronicles another gamer’s attempt to surpass [Billy Mitchell’s] world record for the game  
28 Donkey Kong.” [Id.] She found that, in the film, Billy Mitchell “is portrayed as successful but

1 arrogant, beloved by fans, and at times, willing to do whatever it takes to maintain his world  
2 record.” [Id.] According to Judge Thompson, “the film shows [Billy Mitchell] attempting to  
3 maintain his world record by questioning his opponent’s equipment and the authenticity of his  
4 opponent’s submission of a filmed high score.” [Id.]

5 B. Twin Galaxies is a website that provides the public with a forum to discuss all  
6 matters involving video gaming, including scores and records.

7 Twin Galaxies operates the website www.twingalaxies.com (the “Twin Galaxies  
8 Website”). The Twin Galaxies Website provides a forum for members of the public to discuss all  
9 topics related to video games, including video game industry news, and video game scores and  
10 records. Any user can start a new “thread” in a forum related to a variety of video game related  
11 topics. All threads and forums are available for the general public to view. That is, anyone with  
12 access to the Internet and who navigates to the Twin Galaxies Website can view all forums and  
13 threads on the site. The general public is encouraged to join the discussion on the forums and  
14 threads by registering as a user and posting their comments. [See Declaration of Jason Hall (“Hall  
15 Decl.”), ¶¶ 3-4.]

16 The Twin Galaxies Website publishes score records on leaderboards for thousands of video  
17 game titles across dozens of video game platforms. The leaderboards recognize video game  
18 records and achievements for various aspects of video game performance such as high score, or  
19 fastest time, and ranks players according to their verified achievements in those categories. [Hall  
20 Decl., ¶¶ 5-6.]

21 The records and rankings of video game achievement that appear on the Twin Galaxies  
22 Website leaderboards for a particular game have been historically recognized world-wide as the  
23 official records of achievement in that video games. The records and rankings appearing and  
24 recognized on the Twin Galaxies Website leaderboards have been used by Guinness World  
25 Records in the Guinness World Records Gamer's Edition books, and are recognized as world  
26 records by the Guinness organization. [Hall Decl., ¶ 7.]

27 C. Billy Mitchell’s Donkey Kong score is disputed by a member of the public.

28 The Twin Galaxies Website provides a mechanism for the public to submit a video game

1 performance for adjudication and inclusion on a video game record leaderboard. [Hall Decl., ¶¶  
2 8-10.] The mechanism is driven by a system of peer-review and public comment. [Id.] Similarly,  
3 the Twin Galaxies Website provides a mechanism for the public to dispute existing score claims  
4 that appear on a game’s leaderboard. The dispute claim process is a public process whereby the  
5 dispute claim is placed in a public forum for comment, review, evidentiary submission, and debate.  
6 [Hall Decl., ¶¶ 11-19.]

7 On, or about, August 28, 2017, the Twin Galaxies Website registered user Jeremy Young,  
8 under the pseudonym Xelnia, submitted a dispute claim whereby he disputed Billy Mitchell’s  
9 1,047,200 (the King of Kong “tape”), 1,050,200 (the Mortgage Brokers score), and 1,062,800 (the  
10 Boomers score) scores (the “Disputed Score Performances”) which had previously appeared on  
11 the Donkey Kong video game points (with hammer allowed) leaderboard for the Arcade platform  
12 on the Twin Galaxies Website. [Hall Decl., ¶ 20-21.] On August 28, 2017, the dispute claim was  
13 published on a public forum on the Twin Galaxies Website accessible to anyone for comment and  
14 debate, to vote on, and to provide evidentiary support for or against (the “Mitchell Score Dispute  
15 Claim Thread”). [Id. at ¶ 22, Exh. A.] As of March 14, 2020: (1) the Mitchell Score Dispute  
16 Claim Thread was viewed on the Twin Galaxies Website 2,394,329 times; (2) there were 170  
17 unique contributors who commented or provided evidentiary support in the Mitchell Score Dispute  
18 Claim Thread; (3) there were 211 users who voted to adjudicate the score dispute (198 agreeing  
19 with the dispute, and 13 disagreeing); and, (4) there were 3,770 content entries in the evidentiary  
20 record which comprises the entirety of the Mitchell Score Dispute Claim Thread. [Id. at ¶ 23.]

21 The substance of the dispute claim made by Jeremy Young is that the Disputed Score  
22 Performances were not created on an original Donkey Kong Arcade platform system and printed  
23 circuit board (PCB) as required by the rules, but that it was instead created on a M.A.M.E.  
24 (Multiple Arcade Machine Emulator) platform system, and it was therefore ineligible for inclusion  
25 on the Donkey Kong video game points (with hammer allowed) leaderboard for the Arcade  
26 platform. Jeremy Young contended that the performances that were recorded on video tape and  
27 submitted to Twin Galaxies as evidentiary proof of Billy Mitchell’s Donkey Kong score  
28 accomplishments, could not have been produced by an unmodified original Donkey Kong Arcade

1 system because the images and other artifacts that were recorded and displayed in the video tapes  
2 that Twin Galaxies referees used to verify and authenticate Billy Mitchell's score performances  
3 simply cannot ever come out of an unmodified original Donkey Kong Arcade system. [Id. at ¶¶  
4 24-25.]

5 D. Twin Galaxies engaged in a thorough investigation to determine the merits of the  
6 dispute; and ultimately validated the dispute.

7 Upon receiving the dispute claim, and all of the technical and scientific evidence provided  
8 along with it in the Mitchell Score Dispute Claim Thread, Twin Galaxies independently embarked  
9 to verify and duplicate the science and claims that Jeremy Young provided and thus started the  
10 process of investigating his dispute claim. The process of verifying Young's specific technical  
11 claims took more than two months. [Id. at ¶¶ 28-34, & 36.] Twin Galaxies spent thousands of  
12 dollars on equipment and labor to verify Young's claims, and made its finding public in the  
13 Mitchell Score Dispute Claim Thread as the findings were determined. [Id. at ¶ 35.] Mitchell was  
14 invited to provided evidence to support his score and to discredit Jeremy Young's dispute claim,  
15 but Mitchell chose not to do so. [Id. at ¶ 41.]

16 After Twin Galaxies' investigation and testing process concluded, and in light of the  
17 public's comments and investigation as set forth in the Mitchell Score Dispute Claim Thread, and  
18 because neither Twin Galaxies nor any third parties could replicate the images and artifacts  
19 appearing in the Disputed Score Performances using an original, unmodified, Donkey Kong  
20 Arcade system, Twin Galaxies determined that Jeremy Young's dispute claim was valid. [Id. at ¶  
21 37.]

22 Based on the determination that Jeremy Young's dispute claim was valid, on April 12,  
23 2018, Twin galaxies posted in the Mitchell Score Dispute Claim Thread its ultimate findings of  
24 the dispute claim and made the alleged defamatory statement that: "[w]e now believe [Billy  
25 Mitchell's Donkey Kong scores leaderboard scores] are not from an original unmodified DK  
26 Arcade PCB, and so our investigation of the tape content ends with that conclusion and assertion."  
27 [Id. at ¶ 38, Exh. B.] Billy Mitchell's records of achievement was erased from the Donkey Kong  
28 score leaderboard accordingly. [Id.]



1 **III. ARGUMENT**

2 A. The anti-SLAPP motion analytical framework.

3 A cause of action arising from an act in furtherance of the right of petition for free speech  
4 in connection with a public issue shall be subject to a special motion to strike. (Cal. Code Civ.  
5 Proc., § 425.16(b)(1).) The Court must engage in a two-step process when determining whether  
6 a plaintiff's claim is susceptible to a special motion to strike. First, the defendant has the burden  
7 of making a threshold showing that the plaintiff's claim arises out of defendant's protected activity.  
8 (*See Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 463  
9 (setting forth the two-step anti-SLAPP analysis, and recognizing that defamation is the very first  
10 of the favored causes of action in SLAPP suits).)

11 Once the court finds defendant's burden has been met, the burden shifts to plaintiff to  
12 demonstrate, by admissible and competent evidence, a probability of prevailing on the merits at  
13 trial. (*Id.*; *see also Zamos v. Stroud* (2004) 32 Cal.4th 958, 965 (acknowledging the burden  
14 shifting aspect the anti-SLAPP analysis); *see also HMS Capital, Inc. v. Lawyers Title Co.* (2004)  
15 118 Cal. App. 4th 204, 211 (similarly acknowledging the burden shifting aspect of the statute, and  
16 requiring admissible evidence in opposition to the motion).)

17 B. Plaintiff's defamation and false light claims arise from protected activity.

18 The anti-SLAPP statute protects "any written or oral statement or writing made in a place  
19 open to the public or a public forum in connection with an issue of public interest." Cal. Code Civ.  
20 Proc., § 425.16(e)(3).) Similarly, California *Code of Civil Procedure* section 425.16(e)(4) protects  
21 conduct "in furtherance of the exercise of the constitutional right of petition or the constitutional  
22 right of free speech in connection with a public issue or an issue of public interest," but has no  
23 "public forum" requirement.

24 Postings on websites accessible to the public qualify as public forums for purposes of the  
25 anti-SLAPP statute. (*See Chaker v. Mateo* (2012) 209 Cal. App. 4th 1138, 1144 (statements were  
26 made in a public forum when posted on Internet website and social networking website which  
27 provided open forum for members of the public to comment on a variety of subjects); *see also*  
28 *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal. App. 4th 993, 1006 (websites qualified as public

1 forums); *see also* Barrett v. Rosenthal (2006) 40 Cal.4th 33, 41 at n.4 (“Websites accessible to the  
2 public, like the ‘newsgroups’ where Rosenthal posted Bolen's statement, are ‘public forums’ for  
3 purposes of the anti-SLAPP statute. [Citations.]”.)

4 The anti-SLAPP statute does not define “an issue of public interest,” but the statute has  
5 been applied broadly to where an issue is of interest to a “definable portion of the public (a private  
6 group, organization, or community).” (Du Charme v. International Brotherhood of Electrical  
7 Workers (2003) 110 Cal. App. 4th 107, 119; *see also* Weinberg v. Feisel (2003) 110 Cal. App. 4th  
8 1122, 1132 (holding there should be “some degree of closeness between the challenged statements  
9 and the asserted public interest”); *see also* Hecimovich, *supra*, 203 Cal. App. 4th at p. 463 (“[ the  
10 question whether something is an issue of public interest must be construed broadly. [Internal  
11 quotations and citations omitted].”)

12 Courts have held that the public interest requirement “means that in many cases [triggering  
13 the anti-SLAPP statute], the statement or conduct will be a part of a public debate and the public  
14 therefore will be exposed to varying viewpoints on the issue.” (Wilbanks v. Wolk (2004) 121 Cal.  
15 App. 4th 883, 898.) “The most commonly articulated definitions of ‘statements made in  
16 connection with a public issue’ focus on whether (1) the subject of the statement or activity  
17 precipitating the claim was a person or entity in the public eye; (2) the statement or activity  
18 precipitating the claim involved conduct that could affect large numbers of people beyond the  
19 direct participants; and (3) whether the statement or activity precipitating the claim involved a  
20 topic of widespread public interest. [Citations.]” (*Id.*; *see also* FilmOn.com Inc. v. DoubleVerify  
21 Inc. (2019) 7 Cal.5th 133, 143-146 (citing Wilbanks with approval).)

22 Here Plaintiff’s claims arise from protected activity because the alleged defamatory  
23 statements were made in a public forum, and involve an issue of public interest such that the first  
24 prong of the anti-SLAPP statute is satisfied.

25 i. The alleged defamatory statements were made in a public forum.

26 There is no question that the Twin Galaxies Website constitutes a public forum. The  
27 established case law is clear and unequivocal that publicly accessible websites are considered  
28 public forums for purposes of the anti-SLAPP law. Here, the Twin Galaxies Website is the

1 quintessential public forum because it allows the public a place to comment and debate issues of  
2 interest, such as the issue of video game high scores.

3 Particularly, the Mitchell Score Dispute Claim Thread where the allegedly defamatory  
4 statements were published is accessible to the public and was a place where the public engaged in  
5 a vigorous debate about the veracity of Mitchell's claimed Donkey Kong scores and achievements.  
6 There were nearly two and a half million views of the forum through the drafting of this motion,  
7 and there were almost 3,800 posts on the forum as well by members of the general public. There  
8 were 211 people who voted in connection with the controversy, and 198 people found the dispute  
9 valid. In light of these facts, there is no question that the alleged defamatory statements were made  
10 in a public forum, and this element of the statute is easily met.

11 ii. The alleged defamatory statements involve an issue of public interest.

12 The alleged defamatory statements relate to Billy Mitchells' Donkey Kong score records  
13 which is an issue of public interest. Mr. Mitchell admits that he is recognized world-wide for,  
14 among other things, his Donkey Kong scores. And it was Mr. Mitchell that thrust himself into the  
15 public debate by appearing in the *The King of Kong: A Fistful of Quarters* documentary where his  
16 Donkey Kong score, and his attempt to discredit any challenge to his score, was the central theme  
17 of the film.

18 Moreover, the sheer number people who of viewed, and participated in, the Mitchell Score  
19 Dispute Claim Thread shows that the veracity of Mitchell's Donkey Kong score is an issue of  
20 interest to at least a definable portion of the public – here the community of video gamers who are  
21 interested in video game high scores. And there is a high degree of closeness between the alleged  
22 defamatory statement – which relates to Mitchell's Donkey Kong score – and the public interest  
23 in video game high scores. Additionally, and as the submissions in the Mitchell Score Dispute  
24 Claim Thread show, the alleged defamatory statement is part of the public debate and is the product  
25 of the consideration of varying viewpoints on the issue.

26 And finally, with respect to the Wilbanks test and the first prong, Billy Mitchell, the subject  
27 of the statement, is a person in the public eye because of his Donkey Kong scores and by his own  
28 admission. With respect to the second prong, the statement involved conduct that affects a large

1 number of people – that is the entire public that has the ability to submit a score for inclusion on  
2 the Donkey Kong game leaderboard. And as to the third prong, the allegedly defamatory  
3 statements involve, as set forth above, a topic of widespread interest. For these reasons, the second  
4 prong of the anti-SLAPP analytical framework is satisfied.

5 C. Plaintiff cannot establish a probability of success on the merits of his defamation  
6 claim.

7 A claim for defamation requires proof of a false and unprivileged publication that exposes  
8 the plaintiff “to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or  
9 avoided, or which has a tendency to injure him in his occupation.” (Cal. Civ. Code, § 45.)  
10 Statements that contain such a charge directly, and without the need for explanatory matter, are  
11 libelous *per se*. (Cal. Civ. Code, § 45a.) However, if the listener would not recognize the  
12 defamatory meaning without “knowledge of specific facts and circumstances, extrinsic to the  
13 publication, which are not matters of common knowledge rationally attributable to all reasonable  
14 persons,” the matter is deemed defamatory *per quod* and requires pleading and proof of special  
15 damages. (Barnes–Hind v. Superior Court (1986) 181 Cal. App. 3d 377, 387.)

16 A threshold determination in a defamation action is whether the plaintiff is a public figure.  
17 The courts have defined two classes of public figures. The first is the “all purpose” public figure  
18 who has “achiev[ed] such pervasive fame or notoriety that he becomes a public figure for all  
19 purposes and in all contexts.” (Reader’s Digest Assn. v. Superior Court (1984) 37 Cal.3d 244,  
20 253 (citing Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 351).) The second category is that  
21 of the “limited purpose” or “vortex” public figure, an individual who “voluntarily injects himself  
22 or is drawn into a particular public controversy and thereby becomes a public figure for a limited  
23 range of issues.” (Id.) Unlike the ‘all purpose’ public figure, the ‘limited purpose’ public figure  
24 loses certain protection for his [or her] reputation only to the extent that the allegedly defamatory  
25 communication relates to his role [or her] in a public controversy.” (Id. at p. 254.) When the  
26 plaintiff is a public figure, he or she may not recover defamation damages merely by showing the  
27 defamatory statement was false. Instead, the plaintiff must also show the speaker made the  
28 objectionable statement with malice in its constitutional sense “that is, with knowledge that it was

1 false or with reckless disregard of whether it was false or not.” (Id. at p. 256.)

2 Billy Mitchell’s defamation claim fails because the alleged defamatory statement does not  
3 have a tendency to injure his reputation, and is not defamatory as a matter of law. Even if the  
4 Court finds that the statement can be perceived as defamatory by those with specific knowledge  
5 of facts not commonly known, the defamation is *per quod* and Billy Mitchell must prove special  
6 damages. Moreover, since Plaintiff is by his own admission a public figure, his claim fails because  
7 he cannot prove constitutional malice. And finally, the the alleged defamatory statements are  
8 privileged under the common-interest privilege and therefore are not actionable.

9 i. The alleged defamatory statements do not have a tendency to injure  
10 Plaintiff’s reputation because they are non-actionable opinion.

11 “The *sine qua non* of recovery for defamation ... is the existence of falsehood.” (Letter  
12 Carriers v. Austin (1974) 418 U.S. 264, 283.) Because the statement must contain a provable  
13 falsehood, courts distinguish between statements of fact and statements of opinion for purposes of  
14 defamation liability. Although statements of fact may be actionable as libel, statements of opinion  
15 are constitutionally protected. (Baker v. Los Angeles Herald Examiner (1986) 42 Cal.3d 254,  
16 260.) “The critical determination of whether the allegedly defamatory statement constitutes fact  
17 or opinion is a question of law. [Citations.]” (Gregory v. McDonnell Douglas Corp. (1976) 17  
18 Cal.3d 596, 601.) In determining whether an opinion is actionable, the Court must look at the  
19 totality of the circumstances which gave rise to the statements and in particular the context in  
20 which the statements were made. (Franklin v. Dynamic Details, Inc. (2004) 116 Cal. App. 4th  
21 375, 389 (Franklin).) “This contextual analysis demands that the courts look at the nature and full  
22 content of the audience to whom the publication was directed.” (Id.) In determining statements  
23 are nonactionable opinions, a number of cases have relied heavily on the fact that statements were  
24 made in Internet forums. (*See e.g.*, Summit Bank v. Rogers (2012) 206 Cal. App. 4th 696, 701;  
25 Krinsky v. Doe 6 (2008) 159 Cal. App. 4th 1154, 1162.)

26 The allegedly defamatory statements, as set forth and highlighted in Paragraph 18 of Mr.  
27 Mitchell’s First Amended Complaint, are nothing more than the opinion of Twin Galaxies. The  
28 language of the statement shows that it is opinion in the way it is couched. The statement is

1 premised with the words “[w]e now believe...” which indicates that what follows is the opinion  
2 of Twin Galaxies. Looking at totality of the circumstances and the context also indicates that the  
3 statement is opinion.

4 The totality of the circumstances and context show that Twin Galaxies was called upon by  
5 the community and public to validate Billy Mitchell’s Donkey Kong score performances. The  
6 community provided evidence for and against the scores. Twin Galaxies considered that evidence,  
7 and undertook an expensive and time-consuming public investigation to determine the merits of  
8 Jeremy Young’s dispute claim. It is not as if Twin Galaxies made the statement on its own volition  
9 without being prompted. Instead, it was asked by the community as the final adjudicator of video  
10 game scores appearing on its website to consider evidence and render its opinion. The fact the  
11 statement was made to the community in direct response to a demand for adjudication by the  
12 community militates in favor of a finding that the statement is non-actionable opinion.

13 When the words used, the totality of circumstances, the context, and the audience to whom  
14 the statements were made are considered as a whole, it is clear that the allegedly defamatory  
15 statements are non-actionable. To find otherwise would condone the filing of lawsuits to chill the  
16 free expression of speech and public debate. Allowing Mitchell to challenge the opinion as  
17 defamation is akin to allowing him to challenge the opinion of a jurist on an evidentiary matter as  
18 defamatory. This Court cannot allow such a perverse outcome.

19 ii. The alleged defamatory statements are libelous *per quod* at best, and  
20 Plaintiff cannot show special damages.

21 The alleged defamatory statement that Billy Mitchell’s Donkey Kong scores were not from  
22 an original unmodified Donkey Kong Arcade system and PCB is not defamatory on its face and  
23 cannot be libelous *per se*. For there to be any defamatory connotation attached to the statement,  
24 there needs to be some extrinsic and explanatory matter. Indeed, Billy Mitchell sets forth the  
25 extrinsic explanatory matter in five paragraphs of his First Amended Complaint. [See FAC. ¶¶  
26 18-22.] These pleaded facts and explanatory matter are the same sort of allegations of “innuendo”  
27 required to state claim for defamation *per quod* which is the only claim of defamation Mr. Mitchell  
28 can plead. (Smith v. Maldonado (1999) 72 Cal. App. 4th 637, 645 (“Where the words or other

1 matters which are the subject of a defamation action are of ambiguous meaning, or innocent on  
2 their face and defamatory only in the light of extrinsic circumstances, the plaintiff must plead and  
3 prove that as used, the words had a particular meaning, or ‘innuendo,’ which makes them  
4 defamatory.”.)

5 Because Mr. Mitchell’s defamation complaint is limited to *liber per quod*, he is required  
6 to plead and prove special damages. Special damages are defined in the California *Civil Code* in  
7 actions for libel against a newspaper or slander by radio broadcast as “all damages that plaintiff  
8 alleges and proves that he or she has suffered in respect to his or her property, business, trade,  
9 profession, or occupation, including the amounts of money the plaintiff alleges and proves he or  
10 she has expended as a result of the alleged libel, and no other.” (Cal. Civ. Code, § 48a.)

11 With respect to special damages, Mr. Mitchell has only pleaded the ultimate fact that the  
12 alleged defamatory statements have lessened his income. [FAC, ¶ 36.] But in order to survive  
13 this special motion to strike, Mr. Mitchell will have to prove he has in-fact suffered a loss of  
14 income as a result of the alleged defamatory statement. Because he has not plead evidentiary facts  
15 showing a loss of income directly attributable to the alleged defamatory statement, it is likely that  
16 he will be unable to prove this element of his defamation claim.

17 iii. Billy Mitchell is a public figure.

18 With respect to the second prong of the anti-SLAPP statute (showing a probability of  
19 prevailing on the merits), the statute operates like a motion for summary judgment in reverse. (*See*  
20 College Hospital, Inc. v. Superior Court (1994) 8 Cal.4th 704, 719; *see also* Yu v. Signet  
21 Bank/Virginia (2002) 103 Cal. App. 4th 298, 317 (“[] plaintiff’s burden as to the second prong of  
22 the anti-SLAPP test is akin to that of a party opposing a motion for summary judgment.”); *see also*  
23 Tichinin v. City of Morgan Hill (2009) 177 Cal. App. 4th 1049, 1062 (comparing the standard to  
24 that employed in determining nonsuit, directed verdict or summary judgment motions).) “A  
25 defendant moving for summary judgment may rely on the allegations contained in the plaintiff’s  
26 complaint, which constitute judicial admissions. As such they are conclusive concessions of the  
27 truth of a matter and have the effect of removing it from the issues.” (Uram v. Abex Corp. (1990)  
28 217 Cal. App. 3d 1425, 1433.) According to these principles, the judicial admissions of fact made

1 in Billy Mitchell’s First Amended Complaint are binding.

2 Billy Mitchell makes the judicial admission in this First Amended Complaint that he is  
3 recognized world-wide. [FAC, ¶ 1.] Being recognized world-wide is certainly the type pervasive  
4 fame and notoriety for Billy Mitchell to be an all-purpose public figure as defined in the Reader’s  
5 Digest Assn. case. Even if this Court does not find that Billy Mitchell is an all-purpose public  
6 figure, he certainly is a limited public figure that has injected himself into the particular public  
7 controversy regarding his Donkey Kong score performances.

8 The California Supreme Court stated in Reader’s Digest Assn. that “when called upon to  
9 make a determination of public figure status, courts should look for evidence of affirmative actions  
10 by which purported ‘public figures’ have thrust themselves into the forefront of particular public  
11 controversies.” (Reader’s Digest Assn., *supra*, 37 Cal.3d at pp. 254-255.) The Reader’s Digest  
12 Assn. court found the plaintiffs there to be public figures because they thrust themselves into the  
13 public eye by: (1) being the subject of a full-length movie; (2) being in four books; and, (3) being  
14 the subject of *Life* and *Time* magazine articles. (*Id.* at p. 255.)

15 Billy Mitchell has done the same thing here. He has cast himself into the public eye in the  
16 context of his Donkey Kong score performances by starring as the antagonist in the *The King of*  
17 *Kong: A Fistful of Quarters* movie, where, in an ironic twist of fate, he was the one questioning  
18 another player’s Donkey Kong score and the hardware used to achieve that score. And like the  
19 plaintiffs in Reader’s Digest Assn., he has been the subject of numerous magazine articles,  
20 including a *Life Magazine* article, about his video game score performances. [See FAC, ¶¶ 1-5;  
21 see also RJN, ¶ 1, Exh. A (Federal Complaint at ¶¶ 17A-17SS).] Based on these facts, there is no  
22 escaping the conclusion that at least as it relates to the controversy concerning Donkey Kong score  
23 performances, Billy Mitchell is a public figure.

24 iv. As a public figure Billy Mitchell must, but cannot, prove the alleged  
25 defamatory statements were made with actual malice.

26 In a defamation action where the plaintiff is a public figure, to demonstrate a *prima facie*  
27 case, the plaintiff must demonstrate by “clear and convincing evidence” that the challenged  
28 statements were made with “actual malice.” Conroy v. Spitzer (1990) 70 Cal. App. 4th 1446, 1451



1 (in addressing whether the plaintiff has demonstrated the existence of a prima facie case, “we bear  
2 in mind the higher clear and convincing standard of proof”); *see also* Beilenson v. Superior Court  
3 (1996) 44 Cal. App. 4th 944, 950 (“The clear and convincing standard requires that the evidence  
4 be such as to command the unhesitating assent of every reasonable mind. [citation omitted.]”) To  
5 show actual malice, Billy Mitchell must demonstrate that Twin Galaxies either knew the alleged  
6 defamatory statements were false or subjectively entertained serious doubt the statements were  
7 truthful. (Bose Corp. v. Consumers Union of U.S., Inc. (1984) 466 U.S. 485, 511.) The question  
8 is not “whether a reasonably prudent man would have published, or would have investigated before  
9 publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact  
10 entertained serious doubts as to the truth of his publication. Publishing with such doubts shows  
11 reckless disregard for truth or falsity and demonstrates actual malice.” (Reader's Digest Assn.,  
12 *supra*, 37 Cal.3d at pp. 256-257.)

13 Billy Mitchell cannot prove by clear and convincing evidence that Twin Galaxies  
14 subjectively entertained serious doubts about the allegedly defamatory statements – there is no  
15 evidence that Twin Galaxies had any doubt that his Donkey Kong score performances at issue  
16 were not from an original unmodified Donkey Kong Arcade system and PCB. Jason Hall, who  
17 headed the investigation for Twin Galaxies, declares in connection with this motion that he had  
18 no doubts about the fact that the score performance at issue were not from an original Donkey  
19 Kong Arcade system. [Hall Decl., ¶ 46.] He spent time and money investigating the claim, and  
20 even went so far as to build the setup Billy Mitchell used in the performance to determine if he  
21 could replicate the telling images and artifacts that Jeremy Young claimed in his dispute prove  
22 that the score was not from an original Arcade machine. [*Id.*] He could not recreate those images  
23 and artifacts and for that reason he did not have subjective doubt that the score performances were  
24 nonconforming. [*Id.*] What is more is that Hall testifies to an absence of malice. He testifies that  
25 he harbors no animosity or ill will towards Mitchell. [*Id.* at ¶¶ 39-46.] This is enough to defeat  
26 Billy Mitchell’s defamation claim. (Hecimovich, *supra*, 203 Cal. App. 4th at p. 472.)

27 ///

28 ///

1 v. The alleged defamatory statement is privileged under the Common Interest  
2 Privilege.

3 Under the California *Civil Code*, there is a conditional privilege for communications made  
4 “without malice, to a person interested therein, (1) by one who is also interested, or (2) by one  
5 who stands in such a relation to the person interested as to afford a reasonable ground for supposing  
6 the motive for the communication to be innocent, or (3) who is requested by the person interested  
7 to give the information.” (See Cal. Civ. Code, § 47(c).) This conditional privilege is known as  
8 the “common-interest privilege.” The California Supreme Court has held that a defamatory  
9 statement made without malice by a psychology professor “at a professional conference attended  
10 by other mental health professionals and that was related to the subject of the conference—falls  
11 within the reach of this statutory common-interest privilege.” (Taus v. Loftus (2007) 40 Cal.4th  
12 683, 721.)

13 By analogy, the alleged defamatory statement made by Twin Galaxies should be afforded  
14 the same common-interest privilege protection. Jason Hall, on behalf of Twin Galaxies, made the  
15 statement regarding Billy Mitchell’s Donkey Kong score performances in the Mitchell Score  
16 Dispute Claim Thread to a group of people who were interested in ensuring the validity of scores  
17 appearing in the leaderboards. The subject of the statement was related to the reason why the  
18 group of people had virtually gathered – to debate and discuss the veracity of the Mitchell scores.  
19 Twin Galaxies and the rest of the audience share a common-interest in this respect. For this reason,  
20 coupled with the fact that the statement was made without malice, the qualified privilege applies,  
21 and the defamation claim fails.

22 D. Plaintiff cannot establish a probability of success on the merits of his false light  
23 claim.

24 Billy Mitchell’s false light claim should also be stricken. (See Kapellas v. Kofman (1969)  
25 1 Cal.3d 20, 35, fn. 16 (a false light claim “is in substance equivalent to the [plaintiff’s] libel claim,  
26 and should meet the same requirements of the libel claim on all aspects.”); see also Gilbert v.  
27 Sykes (2007) 147 Cal. App. 4th 13, 34 (holding that the collapse of the defamation claim spells  
28 the demise of all other causes of action in the same complaint which allegedly arise from the same

1 publication); *see also* Tamkin v. CBS Broadcasting, Inc. (2011) 193 Cal. App. 4th 133, 149  
2 (same).)

3 **IV. CONCLUSION**

4 There is no question that both prongs of the anti-SLAPP statute are met, and there is  
5 similarly no questions that Billy Mitchell will be unable to prove his defamation claim at trial.  
6 Twin Galaxies respectfully requests that, based on the foregoing, this special motion to strike  
7 should be granted, and Billy Mitchell’s complaint should be dismissed in full accordingly.

8 Respectfully submitted,  
9 Dated: March 30, 2020 TASHROUDIAN LAW GROUP, APC

10  
11 By:           /s/ David Tashroudian, Esq.            
12 David Tashroudian, Esq.  
13 Mona Tashroudian, Esq.  
14 Attorneys for Defendant Twin Galaxies,  
15 LLC

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**PROOF OF SERVICE**  
Case No. 19STCV12592

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is **TASHROUDIAN LAW GROUP, APC**, located 5900 Canoga Ave, Suite 250, Woodland Hills, CA 91367-5017. On March 30, 2020, I served the herein described document(s):

**NOTICE OF MOTION AND SPECIAL MOTION TO STRIKE OF DEFENDANT TWIN GALAXIES, LLC [CCP § 425.16]; MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT**

by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Woodland Hills, California addressed as set forth below.

X E-File - by electronically transmitting the document(s) listed above to jeg@manningllp.com pursuant to an agreement of the parties.

by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

by overnight courier of the document(s) listed above to the person(s) at the address(es) set forth below.

James E. Gibbons (State Bar No. 130631)  
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Attorneys for Plaintiff  
WILLIAM JAMES MITCHELL

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on March 30, 2020 at Woodland Hills, California.



\_\_\_\_\_  
Mona Tashroudian



## Make a Reservation

**WILLIAM JAMES MITCHELL vs TWIN GALEXIES, LLC**

Case Number: 19STCV12592 Case Type: Civil Unlimited Category: Defamation (slander/libel)

Date Filed: 2019-04-11 Location: Stanley Mosk Courthouse - Department 36

### Reservation

Case Name: WILLIAM JAMES MITCHELL vs TWIN GALEXIES, LLC	Case Number: 19STCV12592
Type: Special Motion to Strike under CCP Section 425.16 (Anti-SLAPP motion)	Status: RESERVED
Filing Party: Twin Galaxies, LLC (Defendant)	Location: Stanley Mosk Courthouse - Department 36
Date/Time: 07/06/2020 8:30 AM	Number of Motions: 1
Reservation ID: 095658146502	Confirmation Code: CR-O6X6R99OXYOVSKPGH

### Fees

Description	Fee	Qty	Amount
First Paper Fees (Unlimited Civil)	435.00	1	435.00
Credit Card Percentage Fee (2.75%)	11.96	1	11.96
<b>TOTAL</b>			<b>\$446.96</b>

### Payment

Amount: \$446.96	Type: Visa
Account Number: XXXX7361	Authorization: 030844

[Print Receipt](#)

[+ Reserve Another Hearing](#)

# **EXHIBIT C**

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6 Attorneys for defendant Twin Galaxies, LLC

7  
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF LOS ANGELES  
10

11 WILLIAM JAMES MITCHELL,

12 Plaintiff,

13 v.

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

15 Defendants.  
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Case No. 19STCV12592

Assigned to: Hon. Gregory W. Alarcon  
[Dept. 36]

**REPLY ISO SPECIAL MOTION TO  
STRIKE OF DEFENDANT TWIN  
GALAXIES, LLC [CCP § 425.16]**

*[Filed concurrently with: (1) Declaration of  
Steven Kleisath; (2) Declaration Chris Glead;  
(3) Declaration of Carlos Pineiro; (4)  
Declaration of Robert Mruczek; (5)  
Declaration of Jason Hall; (6) Declaration of  
Dwayne Richard; and (7) Objections to  
Evidence]*

**Hearing**

Date: July 6, 2020

Time: 9:00 a.m.

Place: Department 36

RESERVATION ID: 095658146502

Action Filed: 4/11/2019

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I. INTRODUCTION..... 1

II. ADDITIONAL FACTS ON REPLY ..... 1

    A. Twin Galaxies sources unaltered copies of the videotapes used to evidence the Mitchell score performances at issue..... 1

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Opposition of plaintiff Billy Mitchell cannot support an order in his favor. Plaintiff does  
4 not appreciate that the alleged defamatory statements at issue relate to two specific videotape  
5 recordings of his Donkey Kong high score performances and tries to muddle this issue with  
6 irrelevant, inadmissible, and incompetent evidence about other live performances not at issue. The  
7 dispute claim is that two performances on videotape and used to historically justify Billy Mitchell’s  
8 records were not captured and recorded from original hardware.

9 And the public has discovered and confirmed that the videotape recordings used to  
10 substantiate Billy Mitchell’s records could not have been created from original Donkey Kong  
11 hardware and have challenged the records. Twin Galaxies and a technical team directed by Billy  
12 Mitchell himself both endeavored to determine the validity of the challenge by engaging in extensive  
13 investigations. Both came to the same conclusion. The conclusion is that the challenge is valid –  
14 the videotapes at issue were not created with original unmodified hardware. Twin Galaxies  
15 published the results of its investigation and is now being sued for defamation.

16 The facts are that Twin Galaxies did not act with the requisite constitutional malice. It acted  
17 in good faith at all times and made the statement to an audience with common interest only after an  
18 appropriate and thorough investigation.

19 The evidence is in favor of Twin Galaxies, and the Motion should be granted as a result.  
20 Plaintiff’s evidence, on the other hand is replete with hearsay, lacks foundation, and is mostly  
21 conjecture. Billy Mitchell has not carried his burden to adduce clear and convincing evidence on  
22 this record.

23 **II. ADDITIONAL FACTS ON REPLY**

24 A. Twin Galaxies sources unaltered copies of the videotapes used to evidence the  
25 Mitchell score performances at issue.

26 Billy Mitchell’s 1,047,200 (the King of Kong "tape") score performance was entered into  
27 the Twin Galaxies leaderboard database by Robert Mruzec in 2006. [Declaration of Robert  
28 Mruzec (“Mruzec Decl.”), ¶ 3.] Mruzec was a Twin Galaxies referee and he adjudicated this

1 performance from videotape. [Id.] Billy Mitchell’s 1,050,200 (the Mortgage Brokers score) score  
2 performance was evidenced at Twin Galaxies by a videotape recording of the performance. [*See*  
3 Reply Declaration of Jason Hall (“Hall Reply Decl.”), ¶ 11.]

4 Twin Galaxies sourced unaltered copies of the videotape recordings of Mr. Mitchell’s  
5 1,047,200 (the King of Kong "tape"), and 1,050,200 (the Mortgage Brokers score) score  
6 performances from Dwayne Richard in Canada. [Declaration of Dwayne Richard (“Richard Decl.”),  
7 ¶¶ 3-5.] Twin Galaxies also obtained a second digital copy of both performances and cross-  
8 referenced the two for fidelity. [Hall Reply Decl. ¶¶ 13-14.] Jason Hall confirmed that the two sets  
9 of tapes were identical and posted them into the Mitchell Score Dispute Claim Thread for the  
10 community to perform its own analysis. [Id.] Additionally, Robert Mruzek confirmed that the  
11 1,047,200 (the King of Kong "tape") performance tape posted in the thread is the same one he  
12 adjudicated. [Mruzek Decl., ¶¶ 4-5.]

13 B. The investigation of Jeremy Young’s dispute claim, and findings.

14 On February 2, 2018, Jeremy Young, a member of the Twin Galaxies community, posted a  
15 claim in the Mitchell Score Dispute Claim Thread alleging that the videotaped recordings of Mr.  
16 Mitchell’s 1,047,200 (the King of Kong "tape"), 1,050,200 (the Mortgage Brokers score), and  
17 1,062,800 (the Boomers score) score performances could not have been captured from an original  
18 unmodified Donkey Kong arcade printed circuit board (PCB). [*see* Hall Reply Decl., ¶¶ 8-10; *see*  
19 *also* Declaration of Carlos Pineiro (“Pineiro Decl.”), ¶¶ 10-12.] One of the more notable assertions  
20 in Jeremy Young’s dispute claim is that Mitchell’s videotaped performances do not draw the  
21 Donkey Kong levels the way in which an original arcade system would do so, by drawing ½ portions  
22 of five (5) girders in the first frame. [Id.] Instead, Mitchell’s videotaped score performances show  
23 the Donkey Kong levels drawn with three (3) girders in the first frame, with the bottom girder having  
24 a protrusion that has since come to be known as the “Girder Finger” which original arcade hardware  
25 cannot draw. [Id.]

26 Twin Galaxies embarked on an extensive investigation to determine the validity of Jeremy  
27 Young’s dispute claim. [*See* Declaration of Jason Hall dated 3/30/2020 (“Hall 3/30/2020 Decl.”),  
28 ¶¶ 28-36; *see also* Hall Reply Decl., ¶¶ 15-23.] The Twin Galaxies investigation revealed that two

1 of Mr. Mitchell’s videotaped recordings for the 1,047,200 (the King of Kong "tape"), and the  
2 1,050,200 (the Mortgage Brokers score) score performance drew the levels with three (3) girders,  
3 and with the Girder Finger. [Hall Reply Decl., ¶ 17.] Twin Galaxies’ investigation also confirmed  
4 that an original Donkey Kong arcade PCB cannot draw the Donkey Kong levels with three girders  
5 and the Girder Finger. [Id. at ¶ 18.] Based on these findings, Twin Galaxies determined that the  
6 videotaped recordings at issue could not have come from an unmodified Donkey Kong arcade PCB  
7 thereby validating Jeremy Young’s dispute claim. [Id. at ¶ 20.] Twin Galaxies did not have enough  
8 evidence to pass judgment on the 1,062,800 (the Boomers score) score performance. [Id.]

9 Mr. Mitchell had his own technical team working to debunk Jeremy Young’s claim  
10 beginning in February 2018. [See Declaration of Steven Kleisath (“Kleisath Decl.”), ¶¶ 6-17, Exhs.  
11 A & B; see also Pineiro Decl., ¶¶ 6-9, 13-18, 26-28, Exhs. A-C.] But Mitchell’s technical team  
12 came to the same conclusion as Jeremy Young, and Twin Galaxies. Mitchell’s technical team found  
13 that the videotaped recordings of the 1,047,200 (the King of Kong "tape"), and the 1,050,200 (the  
14 Mortgage Brokers score) score performances showed the levels draw with three girders, and the  
15 Girder finger. [Pineiro Decl., ¶ 16.] Mitchell’s team also found that an original Donkey Kong  
16 arcade PCB does not draw three girders or the Girder Finger. [Id. at ¶¶ 17-18.] Based on these  
17 findings, Mitchell’s team posted in the Mitchell Dispute Claim Thread that the videotaped  
18 recordings of the 1,047,200 (the King of Kong "tape"), and the 1,050,200 (the Mortgage Brokers  
19 score) score performances were not generated from an unmodified Donkey Kong arcade PCB, and  
20 validated Jeremy Young’s dispute claim. [Id. at ¶ 19.]

21 C. The alleged defamatory statements relate only to videotaped recordings of two  
22 Donkey Kong score performances.

23 After its investigation, on April 12, 2018, Twin Galaxies’ posted a statement on the Twin  
24 Galaxies website with its finding. The language of the statement is clear that the “*taped* Donkey  
25 Kong score performances of 1,047,200 (the King of Kong "tape"), and 1,050,200 (the Mortgage  
26 Brokers score) that were historically used by Twin Galaxies to substantiate those scores and place  
27 them in the database were not produced by the direct feed output of an original unmodified arcade  
28 PCB [emphasis added].” [See Hall 3/30/2020 Decl., ¶ 38, Exh. B at p. 000002.] Twin Galaxies

1 purposely limited its statement to refer only to the taped recordings of these performances that have  
2 been used historically to admit the records onto the leaderboards because that was the scope of the  
3 Jeremy Young dispute. [Hall Reply Decl., ¶ 21.] Twin Galaxies found that there was insufficient  
4 evidence to validate Jeremy Young’s dispute with respect to the third score at issue, Billy Mitchell’s  
5 1,062,800 (the Boomers score) score and so its statement recited this fact. [Id.]

6 **III. ARGUMENT**

7 A. Billy Mitchell has not met his burden to prove falsity.

8 Mitchell does not dispute the fact that the alleged defamatory statements were made in a  
9 public forum about a matter of public interest. [See Opposition, p. 9, lns. 8-10.] Mitchell also  
10 admits that he is a public figure. [Id. at p. 12, lns. 18-20.] As a matter of law, in cases involving  
11 public figures and matters of public concern, the burden is on the plaintiff to prove falsity in a  
12 defamation action. (See City of Costa Mesa v. D'Alessio Investments, LLC (2013) 214 Cal. App.  
13 4th 358, 378 (“In a defamation action ... by a private person suing over statements of public concern,  
14 however, the First Amendment places the burden of proving falsity on the plaintiff.”).) The plaintiff  
15 must make its proof with competent and admissible evidence. (See Hecimovich v. Encinal School  
16 Parent Teacher Organization (2012) 203 Cal. App. 4th 450, 469.)

17 i. Mitchell fails to provide competent and admissible evidence of falsity.

18 The alleged defamation can be broken down into two discrete statements. One statement is:  
19 the videotape recording of Billy Mitchell’s 1,047,200 (the King of Kong "tape") that was historically  
20 used by Twin Galaxies to substantiate the score and place it in the score database was not produced  
21 by the direct feed output of an original unmodified arcade PCB. The other statement is: the  
22 videotape recording of Billy Mitchell’s 1,050,200 (the Mortgage Brokers score) that was historically  
23 used by Twin Galaxies to substantiate the score and place it in the score database was not produced  
24 by the direct feed output of an original unmodified arcade PCB. It is important to note that these  
25 statements refer to the videotape recordings of the performances – and not live performance.  
26 Accordingly, to prove falsity, Mitchell must show that the videotape recordings of the performances  
27 were from an original unmodified Donkey Kong PCB. He provides no evidence in this respect.

28

1 Taking the videotape recording of the 1,047,200 (the King of Kong "tape") score  
2 performance first, Mitchell provides absolutely no evidence that the tape recording of this score was  
3 created from gameplay on an unmodified original Donkey Kong PCB. Mitchell's 40 page  
4 declaration, and his 200+ pages of "evidence" do not address the simple question of whether the  
5 videotape of this performance contains gameplay recorded from an original unmodified machine.  
6 Mitchell dances around that question by claiming that he achieved a high-score of 1,047,200 at  
7 Arcade Game Sales on December 28, 2004. [See Declaration of William "Billy" Mitchell ("Mitchell  
8 Decl."), ¶ 9.] But the fact that he achieved that score on that date at that venue does not prove that  
9 the gameplay on the videotape in question was from an unmodified machine because he does not  
10 even allege that his December 28, 2004 performance was recorded. There just is no evidence in the  
11 record to prove Twin Galaxies' statement is false.

12 Similarly, with respect to the videotape recording of the 1,050,200 (the Mortgage Brokers  
13 score) score performance, Mitchell again does not provide any competent or admissible evidence  
14 that the videotape recording at issue contains gameplay from an original unmodified Donkey Kong  
15 arcade PCB. What he does offer is a handful of vague declarations from people swearing that they  
16 saw him playing Donkey Kong at a convention of mortgage brokers in 2007. None of these  
17 eyewitnesses testify to whether the performance recorded on the videotape in question is the  
18 performance they witnessed at the convention. In fact, none of the eyewitnesses even testify that  
19 they have seen what is on the tape. Without that evidence, Mitchell cannot prove falsity.

20 And the purported "expert testimony" of Robbie Lakeman does not change the fact that  
21 Mitchell cannot prove falsity. As an initial matter, Lakeman's declaration attached as Exhibit 21 to  
22 the Mitchell Declaration is inadmissible under California *Evidence Code* section 720 because he  
23 has not laid a foundation that he is an expert in video game programming or hardware interface.  
24 Even if the Court accepts his testimony, it is irrelevant and unhelpful. Lakeman testifies that he  
25 "studied the tapes for several hours one day" and he can "honestly say that this is legitimate  
26 gameplay" of "Billy playing." This is hardly the kind of expert analysis that is helpful, and it has  
27 no tendency to prove or disprove that the videotapes were generated from an original Donkey Kong  
28 PCB – Lakeman does not even testify to that fact which is really the only thing at issue.

1 Similarly, the fact Guinness World Records (“GWR”) reversed its decision to strip Mitchell  
2 of his records is immaterial to whether the tapes at issue contain gameplay for an unmodified  
3 machine. There is no analysis or statement from GWR showing that it has affirmatively determined  
4 that the content on the tapes at issue was created on an unmodified Donkey Kong arcade PCB. What  
5 happened is that GWR capitulated and reinstated Mitchell’s scores to avoid being sued after it was  
6 issued a demand letter by Mitchell’s attorney. [See Mitchell Decl., Exh. 35.] This evidence does  
7 not help Mitchell because it is inadmissible, and because it is not probative of the issues.

8 ii. Twin Galaxies can prove the truth of its statement.

9 Conversely, Twin Galaxies can prove that the videotape recordings of Billy Mitchell’s  
10 1,047,200 (the King of Kong "tape"), and the 1,050,200 (the Mortgage Brokers score) score  
11 performances were not generated from an unmodified Donkey Kong arcade PCB. Proof that the  
12 alleged defamatory statement is true is enough to defeat Mitchell’s claim. (See Campanelli  
13 v. Regents of Univ. of Cal. (1996) 44 Cal. App. 4th 572, 581-582 (“Truth, of course, is an absolute  
14 defense to any libel action”).)

15 First, Twin Galaxies proffers the expert testimony of Jason Hall, its Head Custodian of  
16 Records to prove the truth of its statement. [See Hall Reply Decl., ¶¶ 2-7.] As set forth in his  
17 declaration, Mr. Hall is an expert in the field of computer video game programming and hardware  
18 interface. [Id. at ¶¶ 3 & 7.] Without belaboring the point, Mr. Hall and his team at Twin Galaxies  
19 engaged in an unprecedented investigation that involved detailed hardware and software testing to  
20 determine whether the videotaped performances at issue were created on original Donkey Kong  
21 PCB hardware or not. The result of his investigation and testing is that the videotape recordings of  
22 Mitchell’s 1,047,200 (the King of Kong "tape"), and 1,050,200 (the Mortgage Brokers score) score  
23 performances cannot have come from an unmodified Donkey Kong arcade PCB.

24 Second, and more importantly, Twin Galaxies proffers the expert testimony of Carlos  
25 Pineiro to prove the truth of its statement. [Pineiro Decl., ¶¶ 2-3.] Pineiro was originally part of a  
26 technical team assembled by Billy Mitchell to disprove Jeremy Young’s dispute claim. [Id. at ¶¶ 6-  
27 9, 20, 26-28, Exhs. A-C.] However, after he performed his analysis and testing of the videotape  
28 recordings at issue, Pineiro realized that neither of them were from an original unmodified arcade

1 PCB. [Id. at ¶¶ 13-20.] His expert testimony ultimately is that “that Billy Mitchell’s 1,047,200 (the  
2 King of Kong "tape"), and 1,050,200 (the Mortgage Brokers score) score performances as recorded  
3 on videotape were not generated from a genuine Nintendo Donkey Kong PCB.” [Pineiro Decl., ¶  
4 19.]

5 The evidence is irrefutable that the alleged defamatory statements are true. Since truth is an  
6 absolute defense, Mitchell has no probability of success on the merits, and the instant motion should  
7 be granted accordingly.

8 B. Billy Mitchell cannot prove actual malice.

9 i. The legal standard.

10 Plaintiff carries a heavy burden to prove actual malice by clear and convincing evidence.  
11 (Christian Research Institute v. Alnor (2007) 148 Cal. App. 4th 71, 84 (where the court found  
12 plaintiff failed to meet the heavy burden of proving actual malice).) “The burden of proof by clear  
13 and convincing evidence requires a finding of high probability. The evidence must be so clear as to  
14 leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of  
15 every reasonable mind. [internal quotations and citation omitted.]” (Id.)

16 Billy Mitchell must demonstrate Twin Galaxies either knew its statement was false or  
17 subjectively entertained serious doubt the statement was truthful. (Bose Corp. v. Consumers Union  
18 of U.S., Inc. (1984) 466 U.S. 485, 511.) The question is not “whether a reasonably prudent man  
19 would have published, or would have investigated before publishing. There must be sufficient  
20 evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth  
21 of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and  
22 demonstrates actual malice.” (Reader’s Digest Assn. v. Superior Court (1984) 37 Cal.3d 244, 256-  
23 257; *see also* McCoy v. Hearst Corp. (1986) 42 Cal.3d 835, 860.) Thus “mere failure to investigate  
24 the truthfulness of a statement, even when a reasonably prudent person would have done so, is  
25 insufficient” to demonstrate actual malice. (Christian Research, supra, 148 Cal. App. 4th 71, 90.)

26 ii. Twin Galaxies’ facts show Mitchell cannot meet the high bar of clear and  
27 convincing evidence of actual malice.

28



1 Billy Mitchell cannot show by clear and convincing evidence that Twin Galaxies knew the  
2 alleged defamatory statement was false or that it had reckless disregard for the truth because it and  
3 other experts confirmed the statement. The Twin Galaxies' investigation headed by Jason Hall -- a  
4 software and video expert with 35 years of technical experience -- came to the same conclusion as  
5 Jeremy Young. In accord, the investigation lead by Carlos Pineiro, the head of Billy Mitchell's  
6 technical team, also came to the same conclusion as Jeremy Young.

7 These are three independent investigations carried out in fine technical detail by verifiable  
8 experts. They had access to original hardware, and their work carried on for months. The  
9 investigations took countless hour and they all discovered the same truth: the videotape recordings  
10 of Billy Mitchell's score performances were not created from an original unmodified Donkey Kong  
11 arcade PCB. Twin Galaxies publishing the statement in the face of such overwhelming evidence of  
12 truth does not rise to the level of actual malice under the clear and convincing standard.

13 Billy Mitchell attempts to distance himself from this truth by incredulously declaring that  
14 Pineiro was not working on his behalf. [*See Mitchell Decl.*, ¶¶ 72, 116, 118, and 120.] His  
15 declaration flirts with perjury.

- 16 ▪ Mitchell declares that the never engaged Carlos Pineiro to help examine the dispute  
17 claim. [*Mitchell Decl.*, ¶ 72.] But there are almost 200 text messages between  
18 Mitchell and Pineiro, and approximately a dozen email communications between the  
19 two from February 2018 through April 12, 2018 discussing details and strategies  
20 about the investigation into the Jeremy Young Dispute claim. [*Pineiro Decl.*, ¶ 27,  
21 Exh. B.] Mitchell even states in a text message to Hall that Pineiro heads up the  
22 technical end of his debunking effort. [*Id.*, ¶ 28, Exh. C, p. 1.]
- 23 ▪ Mitchell declares that he did not provide Pineiro equipment. [*Mitchell Decl.*, ¶ 72.]  
24 But on April 4, 2018, Mitchell sends Pineiro a picture of a pink television saying, "I  
25 got a tube TV..." to which Pineiro responds, "Looks funny but it's PERFECT FOR  
26 our testing." [*Pineiro Decl.*, ¶ 27, Exh. B, p. 15.] Mitchell also provided Pineiro all  
27 of the original hardware he claims to have used to achieve the scores for Pineiro to  
28

1 run his tests – including the hardware claimed to be certified by a Nintendo Senior  
2 Engineer as original. [*Id.* at ¶ 13; *see also* Kleisath Decl., ¶14]

- 3 ■ Mitchell declares that he “explicitly denied to Hall” that others spoke on his behalf.  
4 [*Mitchell Decl.*, ¶ 120.] But on April 5, 2018, Mitchell writes to Hall and Pineiro  
5 saying that “Joel has the authority to speak form me and request things as he is the  
6 coordinator of my effort. The technical end is headed up by Carlos.” [*Pineiro Decl.*,  
7 ¶ 28, Exh. C; *see also* Hall Reply Decl. ¶ 24, Exh. B.]

8 In light of these facts, how could there be any doubt in Jason Hall’s mind when the man who  
9 Billy Mitchell told him is heading up the technical debunking effort actually finds that the  
10 videotaped performances at issue do not show original hardware gameplay? No reasonable mind  
11 could hesitate to find that Jason Hall had any doubt about the truth considering Pineiro’s findings  
12 and apparent authority.

13 Other acts by Twin Galaxies show that Twin Galaxies acted in good faith without actual  
14 malice. For example, Twin Galaxies gave extra time for Mitchell and his team to complete their  
15 investigation. [*See* Hall Reply Decl. ¶ 25; Pineiro Decl., ¶ 21; Kleisath Decl., ¶ 10.] The fact that  
16 Twin Galaxies did not rush to judge the Boomers score performance shows that investigation was  
17 thoughtful, precise, and deliberate not reckless. [Hall Reply Decl. ¶ 20.] Lastly, Jason Hall was in  
18 direct contact by telephone and text message with Billy Mitchell explaining to him the scope of the  
19 investigation, and asking Mitchell to instruct his technical lead Pineiro to resolve issue that would  
20 help exonerate Mitchell if resolved. [*Id.* at ¶ 26; Exh. C., pp. 19-20 & 22-24.] At all times Hall was  
21 seeking the truth.

22 iii. Billy Mitchell’s facts do not show actual malice.

23 As an initial matter, Plaintiff’s reliance on, Widener v. Pacific Gas & Elec. Co. (1977) 75  
24 Cal. App. 3d 415, is misplaced. There, the PG&E executives failed to investigate the truthfulness  
25 of their employee’s statement when a cursory review of would have showed the statement to be  
26 false. [*Id.* at p. 435]. Here Twin Galaxies’ investigation was more than cursory, it was thorough  
27 and thoughtful. The facts are not the same for the holding to apply.

1 Plaintiff claims that Twin Galaxies' should have interviewed the eyewitnesses to Billy  
2 Mitchell's score performances and because it did not, it has recklessly disregarded the truth. But  
3 the failure to do so does not indicate malice. As an initial matter, there is no evidence that there was  
4 any eyewitness to the Billy Mitchell's 1,047,200 (the King of Kong "tape") so there cannot be a  
5 failure to investigate that allegedly defamatory statement. Next, the eyewitness testimony relating  
6 to the live performance of the 1,050,200 (the Mortgage Brokers score) score performance has no  
7 bearing on the specific question of the whether the *videotape* records of the score performances  
8 show artifacts like the Girder Finger that do not show up on original PCB hardware. Neither the  
9 testimony of the TG referee who witnessed the performance in 2007, nor that of the mortgage broker  
10 who was in the other room when Mitchell hit the "target score," is helpful in determining the  
11 technical aspects of Jeremy Young's dispute. [See Hall Reply Decl., ¶¶ 22-23.] And interviewing  
12 the Boomer's Arcade manager does not indicate actual malice because Twin Galaxies ultimately  
13 did not pass judgment over the 1,062,800 (the Boomers score) score performance. Twin Galaxies  
14 respectfully submits that the failure to interview these people is not indicative of the actual  
15 constitutional malice required to take free speech about a video game score outside the loving arms  
16 of First Amendment protection.

17 It is important to note that Twin Galaxies could not unilaterally interview witnesses as part  
18 of its investigation regardless because the rules of the dispute claim process bar it from doing so.  
19 The dispute claim rules dictate that "Only evidence that is specifically provided and documented  
20 within the public dispute claim discussion thread will be considered toward any decision." [See Hall  
21 Reply Decl., ¶ 23.] Accordingly, even accepting Mitchell's dubious claim that Jason Hall was told  
22 the names of eyewitnesses as true, refusing to accepting that evidence privately outside the public  
23 thread is not a departure from the rules and Mitchell was being treated fairly thereby negating any  
24 inference of actual malice.

25 Twin Galaxies' ultimate validation of the Jeremy Young's dispute despite a Senior  
26 Engineer's 2007 certification of the hardware used to achieve the 1,050,200 (the Mortgage Brokers)  
27 score does not show actual malice. Carlos Pineiro used that exact same Nintendo certified board  
28

1 (PCB) to perform his tests, yet he still found the videotape recording at issue was not created on  
2 original hardware. [Pineiro Decl., ¶13.]

3 Billy Mitchell seems to argue that Twin Galaxies was reckless in its investigation because  
4 its statements were based solely on an analysis of two videotapes of Mitchell’s gameplay when it  
5 did not have the original performance videotapes. [See Opposition, p. 6:24-7:1.] But the truth is  
6 that Twin Galaxies sourced unaltered copies of the videotapes from Canada to perform its  
7 investigation. [Richard Decl., ¶¶ 3-5.] Twin Galaxies also obtained a second digital copy of both  
8 performances and cross-referenced the two for fidelity. [Hall Reply Decl. ¶¶ 13-14.] These facts  
9 show a more than adequate investigation to defeat an actual malice charge.

10 Billy Mitchell also makes the unsubstantiated claim that Twin Galaxies hired a biased “third-  
11 party investigator” Chris Gleed and this is indicia of actual malice. But Chris Gleed declares that  
12 he was not working as an investigator for Twin Galaxies, but he was instead investigating Jeremy  
13 Young’s claim for himself because the issue is so fascinating, and because he felt obliged to do it  
14 for the community as a whole. [See Declaration of Chris Gleed, ¶¶ 1-8.]

15 Billy Mitchell then goes on to make trivial allegations in Section 1(A)(6)(f) of his Opposition  
16 brief that are not indicia of malice because the allegations are unsupported by competent or  
17 admissible evidence. [See Objections to Evidence, *filed concurrently herewith.*] This last grasp at  
18 straws also fails.

19 Finally, Plaintiff cites to a 1968 decision from Minnesota that the failure to retract a  
20 defamatory statement is indicative of actual malice. But the decision is not binding. And applying  
21 Minnesota law to punish Twin Galaxies for not retracting its statement on matters of public interest  
22 about a public figure with the indicia of truth as we have here will have a chilling effect free speech  
23 in California.

24 C. Billy Mitchell cannot prove special damages.

25 Billy Mitchell has not provided competent or admissible evidence to support the claim that  
26 he has suffered special damages. [See Objections to Evidence, *filed concurrently herewith.*] The  
27 so-called evidence set forth in his Declaration at Paragraphs 123-129 is replete with hearsay, lacks  
28

1 foundation, and is speculative. The Court should find that this element of Plaintiff's claim is not  
2 met.

3 D. The Common Interest Privilege does apply.

4 Plaintiff's reliance on Brown v. Kelly Broadcasting Co. (1989) 48 Cal.3d 711, is misplaced.  
5 In Brown, the court decided the narrow issue of whether the news media can assert the Common  
6 Interest Privilege where the challenged statement is about a *private* citizen. [Id. at 719.] The  
7 California Supreme Court noted the important distinction between private citizens and public figures  
8 for the application of the Common Interest Privilege in coming to its decision. [Id. at 731.] Nowhere  
9 does the court extend its decisions to public figures, and Mr. Mitchell admits he is a public figure.  
10 The Brown holding is therefore inapposite to the facts here.

11 E. There is good cause to excuse the page limit of California Rules of Court 3.1113(d).

12 Twin Galaxies respectfully submits that there is good cause to excuse the page limit of  
13 California Rules of Court 3.1113(d) for reply briefs, because Twin Galaxies cannot respond to the  
14 enormity of information set forth in Billy Mitchell's Opposition in 10 pages. The issues are complex  
15 and the facts are numerous. A few more pages is all that is needed.

16 **IV. CONCLUSION**

17 For these reasons, and for those set forth in its special motion, Twin Galaxies respectfully  
18 submits that the complaint of Billy Mitchell should be stricken and freedom of speech should  
19 prevail.

20 Respectfully submitted,

21 Dated: June 26, 2020

TASHROUDIAN LAW GROUP, APC

23 By:         /s/ David Tashroudian, Esq.        

24 David Tashroudian, Esq.

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26 Attorneys for Defendant Twin Galaxies,  
27 LLC

1 **PROOF OF SERVICE**  
2 Case No. 19STCV12592

3 I am a resident of the State of California, over the age of eighteen years, and not a party to  
4 the within action. My business address is **TASHROUDIAN LAW GROUP, APC**, located 5900  
5 Canoga Ave, Suite 250, Woodland Hills, CA 91367-5017. On June 26, 2020, I served the herein  
6 described document(s):

7 **REPLY IN SUPPORT OF SPECIAL MOTION TO STRIKE [CCP § 425.16]**

8 by transmitting via facsimile the document(s) listed above to the fax number(s)  
9 set forth below on this date before 5:00 p.m.

10 by placing the document(s) listed above in a sealed envelope with postage  
11 thereon fully prepaid, in the United States mail at Woodland Hills, California  
12 addressed as set forth below.

13 X E-File - by electronically transmitting the document(s) listed above to  
14 [jeg@manningllp.com](mailto:jeg@manningllp.com) pursuant to an agreement of the parties.

15 by personally delivering the document(s) listed above to the person(s) at the  
16 address(es) set forth below.

17 by overnight courier of the document(s) listed above to the person(s) at the  
18 address(es) set forth below.

19 James E. Gibbons (State Bar No. 130631)  
20 [jeg@manningllp.com](mailto:jeg@manningllp.com)  
21 **MANNING & KASS**  
22 **ELLROD, RAMIREZ, TRESTER LLP**  
23 801 S. Figueroa St, 15<sup>th</sup> Floor  
24 Los Angeles, California 90017-3012  
25 Telephone: (213) 624-6900  
26 Facsimile: (213) 624-6999

Attorneys for Plaintiff  
WILLIAM JAMES MITCHELL

27 I am readily familiar with the firm's practice of collection and processing correspondence  
28 for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day  
with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of  
the party served, service is presumed invalid if postal cancellation date or postage meter date is more  
than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is  
true and correct. Executed on June 26, 2020 at Woodland Hills, California.



\_\_\_\_\_  
Mona Tashroudian

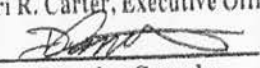
# **EXHIBIT D**

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*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  
~~SENTENCE~~ **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



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

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

9 [Mitchell's] taped Donkey Kong score performances of 1,047,200 (the King of  
10 Kong "tape"), 1,050,200 (the Mortgage Brokers score) that were historically used  
11 by Twin Galaxies to substantiate those scores and place them in the database were  
12 not produced by the direct feed output of an original unmodified Donkey Kong  
Arcade PCB. . . .

13 From a Twin Galaxies viewpoint, the only important thing to know is whether or  
14 not the score performances are from an unmodified original DK arcade PCB as  
15 per the competitive rules. We now believe that they are not from an original  
16 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.

17 (FAC, ¶ 18.)

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

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

1 Defendant Twin Galaxies also has filed a Motion for Undertaking, on grounds that  
2 Plaintiff resides out-of-state, and that there is a reasonable possibility that Defendant will obtain  
3 judgment in the matter, which largely mirrors the grounds for its Special Motion to Strike.  
4 Plaintiff has opposed. Defendant has filed a reply.  
5

6 **I. Special Motion to Strike (anti-SLAPP)**

7  
8 1. Evidentiary Objections

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

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

13 Plaintiff's request is denied. The objection is overruled. This court has not issued a ruling  
14 that it would not consider an objection to evidence submitted with Plaintiff's sur-reply, such that  
15 the objections constitute a pleading "not drawn or filed in conformity with . . . an order of the  
16 court." (CCP § 436.) The court considers the objections.  
17

18 *Defendant's Objections to Sur-Reply Evidence*

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

22 Defendant objects to Plaintiff's entire declaration filed on September 25, 2020 on  
23 grounds that the declaration is unsigned. Plaintiff re-submitted a signed declaration on October 1,  
24 2020. The general rule is new evidence is not permitted within reply papers while the court has  
25 discretion to admit these forms of reply papers. (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522,  
26 1537–38.) A trial court has discretion whether to accept new evidence in reply papers. (*Alliant*  
27 *Ins. Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1308.) The inclusion of additional  
28 evidentiary matter with the reply is only allowed in "the exceptional case" and, if permitted, the

1 other party should be given the opportunity to respond. (*Jay v. Mahaffey*, 218 Cal.App.4th at  
2 1538.)

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

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

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

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

10  
11 *Defendant's Objections to Opposition Evidence*

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

14 Mitchell Declaration and Exhibits:

15 OVERRULED: 1, 2, 6-10, 12-14, 18, 26-28, 30-33, 36, 37, 40-44, 46-49, 51, 53-  
16 55, 57, 61, 63-65, 70-72, 75, 79, 86-91, 93-96, 101-103, 115-131, 134, 137, 138, 140, 141, 143,  
17 145, 147, 148, 153, 154, 157, 158-168, 171, 173.

18 SUSTAINED: 11, 15, 16, 17, 19-25, 29, 34, 35, 38, 39, 45, 50, 56, 58, 60, 62, 66,  
19 67, 73, 74, 76-78, 80-85, 98-100, 104-114, 132, 133, 135, 136, 139, 142, 144, 145, 146, 149,  
20 150-152, 155, 156, 169, 170, 172.

21 SUSTAINED IN PART: 3 ("As a result . . . as a professional gamer."); 4 ("Twin  
22 Galaxies personally coordinated . . . before locking the machine entirely."); 5 ("and Shirk  
23 confirmed . . . throughout the performance."); 52 ("In summary, the . . . allegation of cheating.");  
24 59 ("As stated previously . . . in allegations of fact"); 68 ("I learned about this . . . in a class-  
25 action lawsuit." "It never contacted . . . contact from Hall."); 69 ("The refusal of two . . . contact  
26 from Hall."); 92 ("Therefore, the defamation . . . per quod determination."); 97 ("and there is no  
27 argument . . . these special damages.").

1 *Plaintiff's Objections to Defendant's Moving Evidence*

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

4  
5 2. Moving Defendant's Requests for Judicial Notice

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

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

16  
17 3. Timely Filing under CCP § 425.16

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

23  
24 4. Legal Standard

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



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

- 9 (1) any written or oral statement or writing made before a legislative, executive, or  
10 judicial proceeding, or any other official proceeding authorized by law, [¶]
- 11 (2) any written or oral statement or writing made in connection with an issue under  
12 consideration or review by a legislative, executive, or judicial body, or any other official  
13 proceeding authorized by law, [¶]
- 14 (3) any written or oral statement or writing made in a place open to the public or a public  
15 forum in connection with an issue of public interest, or [¶]
- 16 (4) any other conduct in furtherance of the exercise of the constitutional right of petition  
17 or the constitutional right of free speech in connection with a public issue or an issue of  
18 public interest.

19 If the defendant meets this initial burden, the burden shifts to the plaintiff to establish a  
20 probability of prevailing on the claim by presenting facts which would, if proved at trial, support  
21 a judgment in the plaintiff's favor. (*Shekhter*, 89 Cal.App.4th at 150-51.) In making its  
22 determination on this prong, the trial court is required to consider the pleadings and the  
23 supporting and opposing affidavits stating the facts upon which the liability or defense is based.  
24 (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 646.) The plaintiff's proof  
25 must be made upon competent admissible evidence. (*Sweetwater Union High School Dist. v.*  
26 *Gilbane Building Co.* (2019) 6 Cal.5th 931, 940.) The court "does not weigh evidence or resolve  
27 conflicting factual claims." (*Id.*) The court's inquiry "is limited to whether the plaintiff has stated  
28 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.]

1 '[C]laims with the requisite minimal merit may proceed.'" (*Id.*; see also *Navellier v. Sletten*  
2 (2002) 29 Cal.4th 82, 89.)

3  
4 5. Discussion

5  
6 *Prong One: Protected Activity*

7 The court first decides whether the moving party has met the threshold burden of  
8 showing the plaintiff's cause of action arises from the moving party's constitutional rights of free  
9 speech or petition for redress of grievances. (*Shekhter v. Financial Indemnity Co.* (2001) 89  
10 Cal.App.4th 141, 150.) The moving defendant must identify "all allegations of protected  
11 activity" and show that the challenged claim arises from that activity. (*Bel Air Internet, LLC v.*  
12 *Morales* (2018) 20 Cal.App.5th 924, 934.) The statutory phrase "'arising from' means the  
13 defendant's act underlying the plaintiff's cause of action must *itself* have been an act in  
14 furtherance of the right of petition or free speech." (*City of Cotati v. Cashman* (2002) 29 Cal.4th  
15 69, 78 (emphasis in original).)

16 Moving Defendant asserts Plaintiff's causes of action arise from Twin Galaxies'  
17 protected activities as a "written or oral statement or writing made in a place open to the public  
18 or a public forum in connection with an issue of public interest" under Code of Civil Procedure,  
19 Section 425.16(e)(3), or alternatively, as conduct "in furtherance of the exercise of the  
20 constitutional right of petition or the constitutional right of free speech in connection with a  
21 public issue or an issue of public interest" under Code of Civil Procedure, Section 425.16(e)(4).  
22 (Mot. at p. 6.)

23  
24 (1) *Public Forum*

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

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

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

2 The statements were made by Twin Galaxies on its website forums, which are accessible  
3 to the public, and where members of the public exchange conversation on video game topics.  
4 (Hall Decl., ¶¶ 21, 38.) The thread questioning Plaintiff’s scores was initiated by a Twin  
5 Galaxies website registered user in a forum provided for users to dispute the veracity of a Twin  
6 Galaxies verified score appearing on a leaderboard. (Hall Decl., ¶¶ 11, 20.) As of March 14,  
7 2020, there were 170 unique contributors who commented in the thread, 211 users who voted,  
8 and 3,770 content entries. (Hall Decl., ¶ 23.) The forums for disputing scores are open to any  
9 registered user of the website. (Hall Decl. ¶ 12.) Defendant’s statements were made in in that  
10 thread. (Hall Decl., ¶ 38.)

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

12  
13 (2) *Issue of Public Interest*

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

16  
17 In articulating what constitutes a matter of public interest, courts look to certain  
18 specific considerations, such as whether the subject of the speech or activity “was  
19 a person or entity in the public eye” or “could affect large numbers of people  
20 beyond the direct participants” [Citation.]; and whether the activity “occur[red] in  
21 the context of an ongoing controversy, dispute or discussion” [Citation.], or  
22 “affect[ed] a community in a manner similar to that of a governmental entity”  
23 [Citation.].

24 ((2019) 7 Cal.5th 133, 145–46.)

25 First, Plaintiff as the subject of Defendant’s statements is a person “in the public eye.”  
26 (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 898.) As stated in Plaintiff’s Complaint, Plaintiff  
27 “rose to national prominence in the 1980’s when Life magazine included him in a photo spread  
28 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

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

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

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



1 that Twin Galaxies attempted to replicate with four staff members and published as post number  
2 2387 (Hall Decl. ¶¶ 32-33). Twin Galaxies held a four-plus hour live public discussion stream,  
3 reviewing the performances. (Hall Decl. ¶ 34.)

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

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

15  
16 Prong Two: Probability of Prevailing on the Merits

17 The burden shifts to Plaintiff Mitchell to establish a probability of prevailing on the claim  
18 by presenting facts which would, if proved at trial, support a judgment in Plaintiff’s favor.  
19 (*Shekhter*, 89 Cal.App.4th at 150-51.) Plaintiff’s proof must be made upon competent admissible  
20 evidence. (*Sweetwater Union High School Dist. v. Gilbane Building Co.* (2019) 6 Cal.5th 931,  
21 940 (*Sweetwater*)). The court “does not weigh evidence or resolve conflicting factual claims.”  
22 (*Id.*) The court’s inquiry “is limited to whether the plaintiff has stated a legally sufficient claim  
23 and made prima facie factual showing sufficient to sustain a favorable judgment” accepting the  
24 plaintiff’s evidence as true. (*Id.*) “The court evaluates Defendant’s showing only to determine if  
25 it defeats Plaintiff’s claim as a matter of law. [Citation.] ‘[C]laims with the requisite minimal  
26 merit may proceed.’” (*Id.*; see also *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

27  
28 (1) Defamation

1 Defamation constitutes an injury to reputation. (*Shively v. Bozanich* (2003) 31 Cal.4th  
2 1230, 1242, *as modified* (Dec. 22, 2003).) It may occur by means of libel, which is “a false and  
3 unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the  
4 eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to  
5 be shunned or avoided, or which has a tendency to injure him in his occupation.” (Civ. Code, §  
6 45; *see Shively*, 31 Cal.4th at 1242.)

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

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

19  
20 *i. Statement of Fact*

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

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

27 [A] a false statement of fact, whether expressly stated or implied from an  
28 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

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

10 ((2007) 151 Cal.App.4th 688, 701 (*Overstock*).

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

16 Twin Galaxies’ statement reads in pertinent part:

17 **Summary Decision:**

18 Based on the complete body of evidence presented in this official dispute thread,  
19 Twin Galaxies administrative staff has unanimously decided to remove all of  
20 Billy Mitchell’s’ scores as well as ban him from participating in our competitive  
21 leaderboards. . . .

22 The rules for submitting scores for the original arcade Donkey Kong competitive  
23 leaderboards requires the use of original arcade hardware only. The use of  
24 MAME or any other emulation software for submission to these leaderboards is  
25 strictly forbidden. . . .

26 Twin Galaxies has meticulously tested and investigated the dispute case assertions  
27 as well as a number of relevant contingent factors, such as the veracity of the  
28 actual video performances that the dispute claim assertions rely upon. . . .

29 **Here are our specific findings:**

30 - The taped Donkey Kong score performances of 1,047,200 (the King of Kong  
31 "tape"), 1,050,200 (the Mortgage Brokers score) that were historically used by  
32 Twin Galaxies to substantiate those scores and place them in the database were  
33 not produced by the direct feed output of an original unmodified Donkey Kong  
34 Arcade PCB.

35 - The 1,062,800 (the Boomers score) Donkey Kong performance does not have  
36 enough of a body of direct evidence for Twin Galaxies to feel comfortable to  
37 make a definitive determination on at this time. . . .

38 - 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

1 entered into the database and for Twin Galaxies to attribute those specific  
2 accomplishments to Billy Mitchell. We have several different and unique sources  
3 of these performances and access to private historical Twin Galaxies referee e-  
4 mail distribution records showing where these sources acquired their copies and  
5 what the purpose was. . . .

6 From a Twin Galaxies viewpoint, the only important thing to know is whether or  
7 not the score performances are from an unmodified original DK arcade PCB as  
8 per the competitive rules. **We now believe that they are not from an original  
9 unmodified DK arcade PCB, and so our investigation of the tape content  
10 ends with that conclusion and assertion. . . .**

11 **With this ruling Twin Galaxies can no longer recognize Billy Mitchell as the  
12 1st million point Donkey Kong record holder. . . .**

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

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

24 Twin Galaxies' "conclusion" includes the language "We now believe that [the score  
25 performances] are not from an original unmodified [Donkey Kong] arcade PCB . . . ." Twin  
26 Galaxies also makes the "specific finding": "The taped Donkey Kong score performances of  
27 1,047,200 (the King of Kong "tape"), 1,050,200 (the Mortgage Brokers score) that were  
28 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



1 *time.*” (*Id.*)

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

13  
14         *ii. Falsity*

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

19         To support his burden to prove falsity, first, Plaintiff attests that the King of Kong “tape”  
20 was made on an original unmodified PCB. (Mitchell Decl. ¶ 9.) Plaintiff cites to evidence, for the  
21 Mortgage Brokers score, that there was on-site referee adjudication and that the hardware was  
22 verified by the Senior Engineer at Nintendo. Walter Day, the founder and former owner of Twin  
23 Galaxies, attests to the on-site referee adjudication, and Plaintiff has submitted declarations by  
24 the referees Todd Rogers and Kimberly Mahoney. (Mitchell Decl. Exh. 1, ¶ 5 (Day Decl.); Exhs.  
25 9, 10 (Rogers and Mahoney Decls.)) The referees attest to the integrity of the arcade machine,  
26 and that the machine was an original Donkey Kong Arcade machine with original unmodified  
27 hardware. (*See* Rogers Decl. ¶ 6; Mahoney Decl. ¶¶ 3, 4.) Next, Plaintiff attests to having  
28 complied with Mr. Day’s requirement to verify hardware with the Senior Engineer at Nintendo,

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

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

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

23  
24 *iii. Actual Malice*

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

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

3 To demonstrate actual malice, a plaintiff may rely on inferences drawn from  
4 circumstantial evidence. (*Id.* at 84.) Such inferences may be drawn from circumstantial evidence  
5 of a failure to investigate; anger and hostility towards the plaintiff; or reliance on sources known  
6 to be unreliable or known to be biased against the plaintiff. (*Reader’s Digest, supra*, at 258.) The  
7 evidence is relevant only to the extent that it reflects on the subjective attitude of the publisher.  
8 (*Id.*) The failure to conduct a thorough and objective investigation, standing alone, does not  
9 prove actual malice; and mere proof of ill will alone may likewise be insufficient. (*Id.*) “the  
10 failure to investigate must fairly be characterized as demonstrating the speaker purposefully  
11 avoided the truth or deliberately decided not to acquire knowledge of facts that might confirm  
12 the probable falsity of charges.” (*McGarry v. University of San Diego* (2007) 154 Cal.App.4th  
13 97, 114.)

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

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

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

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

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

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

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

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

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

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

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

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

1  
2           *iv. Special Damages*

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

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

15           Even if the statement is one of libel *per quod*, Plaintiff has offered adequate evidence in  
16 support of special damages. Plaintiff provides evidence that his public persona as established in  
17 “The King of Kong: A Fistful of Quarters” is linked to the Rickey’s hot sauce business, through  
18 publicity materials linking by appearance Plaintiff’s person, the film, and the hot sauce brand.  
19 (See, e.g., Mitchell Decl. ¶¶ 125-127, Exhs. 51-54.) Plaintiff next has brought evidence that in  
20 2018 through 2019 revenue for Rickey’s hot sauce sales went down, from an average of  
21 \$800,216 from 2013-2017 and actual sales of \$796,068 in 2017, to \$410,267 in 2018 and  
22 \$431,632.98 in 2019. (Mitchell Decl. ¶¶ 127-28, Exhs. 55-57.)

23  
24           *v. Common Interest Privilege*

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

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

7  
8 *vi. Conclusion*

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

11  
12 (2) *False Light*

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

18  
19 **II. Motion for Undertaking (CCP § 1030)**

20  
21 1. Evidentiary Objections

22  
23 *Plaintiff's Objection to Defendant's Evidence on Reply*

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

25 The general rule of motion practice is that new evidence is not permitted within reply  
26 papers and the court has discretion to admit these forms of reply papers. (*Jay v. Mahaffey* (2013)  
27 218 Cal.App.4th 1522, 1537-38.) A trial court has discretion whether to accept new evidence in  
28 reply papers. (*Alliant Ins. Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1308.) The

1 inclusion of additional evidentiary matter with the reply is only allowed in “the exceptional case”  
2 and, if permitted, the other party should be given the opportunity to respond. (*Jay v. Mahaffey*,  
3 218 Cal.App.4th at 1538.)

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

10  
11 2. Timely Filing

12 Defendant filed its motion for an undertaking on September 22, 2020, for the hearing date  
13 of October 15, 2020. The proof of service indicates timely electronic service on September 22,  
14 2020. (CCP § 1005(b).) Plaintiff timely opposed on October 1, 2020. (*Id.*) Defendant timely  
15 replied on October 7, 2020. (*Id.*)

16  
17 3. Legal Standard

18 When the plaintiff in an action resides out of the state, the defendant may, at any time,  
19 apply to the court by noticed motion for an order requiring the plaintiff to file an undertaking to  
20 secure an award of costs and attorney's fees which may be awarded in the action. (CCP §  
21 1030(a); *Shannon v. Sims Service Center, Inc.* (1985) 164 Cal.App.3d 907, 913.) The motion  
22 must be made on the grounds that the plaintiff resides out of the state and that there is a  
23 reasonable possibility that the moving defendant will obtain judgment in the action. (CCP  
24 § 1030(b); *Shannon, supra*, 164 Cal.App.3d at 913.) The motion must be accompanied by an  
25 affidavit in support of the grounds for the motion that sets forth the nature and amount of the  
26 costs and attorney’s fees the defendant has incurred and expects to incur by the conclusion of the  
27 action. (*Id.*)

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

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

3  
4 4. Discussion

5  
6 *(1) Declaration*

7 Defendant has provided the declaration of David Tashroudian, counsel for Defendant.  
8 Mr. Tashroudian attests that the Defendant anticipates Defendant will incur \$81,225.00 in this  
9 action. The amount consists of \$7,875 in connection with a Code of Civil Procedure section  
10 2033.420(a) motion, which Defendant expects to incur approximately 15 hours at counsel’s fee  
11 rate of \$525/hour; and \$73,350.00 which primarily comprises the costs for 21 expected  
12 depositions and filing fees of \$1,350.00. (Tashroudian Decl. ¶ 6.) Defendant’s declaration  
13 supports the statutory requirements of section 1030.

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

16  
17 *(2) Out-of-State Residence*

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

21  
22 *(3) Reasonable Possibility of Defendant Obtaining Judgment*

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



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

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

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

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

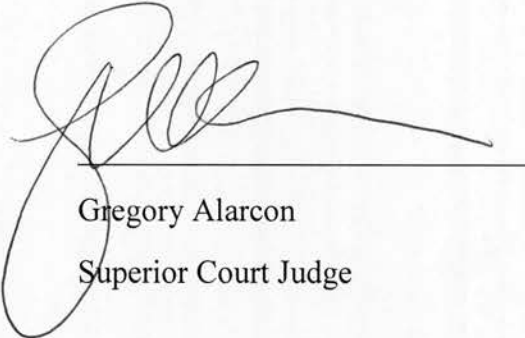
27 The same evidence goes toward Defendant's affirmative defense of the truth of the  
28 statement, which forms a complete defense to defamation, and provides support of a reasonable

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

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

10  
11  
12  
13  
14 Dated:

**OCT 26 2020**

  
\_\_\_\_\_  
Gregory Alarcon  
Superior Court Judge

10/27/2020

# **EXHIBIT E**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION 8

WILLIAM JAMES MITCHELL,  
  
Plaintiff and Respondent,  
  
v.  
  
TWIN GALAXIES, LLC,  
  
Defendant and Appellant.

Court of Appeal No. B308889

Superior Court No. 19STCV12592

Los Angeles County Superior Court No. 19STCV12592  
Honorable Gregory Alarcon

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**APPELLANT TWIN GALAXIES, LLC'S OPENING BRIEF**

---

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Attorneys for Appellant  
TWIN GALAXIES, LLC

**CERTIFICATE OF INTERESTED PARTIES**

Pursuant to Rule 8.208 of the *California Rules of Court*, the following entities have an ownership interest of 10 percent or more in appellant Twin Galaxies, LLC:

- HD Films Holding, LLC
- TGAL Holdings, LLC
- Vision Esports, LP

Respectfully submitted,

Dated: May 3, 2021

TASHROUDIAN LAW GROUP, APC



---

David A. Tashroudian, Esq.  
Attorney for Appellant  
Twin Galaxies, LLC

Document received by the CA 2nd District Court of Appeal.

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ARGUMENT.....25

A. The anti-SLAPP motion analytical framework. ....25

B. Appellant has satisfied step-one of the anti-SLAPP framework to show that Respondent’s claims arise from Appellant’s protected activity. ....26

1. The alleged defamatory statements were made in a public forum.....28

2. The alleged defamatory statements involve an issue of public interest.....29

C. Respondent cannot satisfy step-two of the anti-SLAPP framework to show a probability of success on the merits of his defamation claim. ....31

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2. Respondent has not shown with clear and convincing evidence that Appellant acted with actual malice.....34

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b. Appellant did interview the Twin Galaxies referee that witnessed the Mortgage Brokers Score performance. ....38

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## STATEMENT OF THE CASE

Defendant and appellant Twin Galaxies, LLC (“Appellant” or “Twin Galaxies”) appeals from an order denying its special motion to strike the First Amended Complaint for defamation and false light of plaintiff and respondent William James Mitchell (“Respondent”). Appellant respectfully submits that Respondent has not adduced clear and convincing evidence that Appellant made the allegedly defamatory statement at issue with the requisite constitutional malice.

Appellant has been the authority on video game world records since the 1980s, and Respondent has been recognized by Appellant as a video game world record holder since that same time. In 2017, a member of the video game community challenged the veracity of Respondent’s *Donkey Kong* videogame scores via a world record dispute claim facilitated by Appellant’s website [www.twingalaxies.com](http://www.twingalaxies.com). The dispute claim regarding Respondent’s score performances captivated the classic video game community for months.

The dispute claim levied against Respondent stems from the allegation that the videotaped recordings of Respondent’s *Donkey Kong* score performances that were historically used to substantiate Respondent’s world records were not created with original unmodified arcade hardware. Appellant was charged with determining the merits of the dispute claim.



Appellant conducted an investigation into the claim that took several months, and cost thousands of dollars. Respondent also conducted an investigation of his own, headed by an arcade video game expert named Carlos Pineiro.

At the end of his investigation, Mr. Pineiro concluded that Respondent's videotaped *Donkey Kong* score performances **were not created from original unmodified hardware**, and thereby validated the dispute claim. Appellant came to the same conclusion days later and issued a statement to the public similarly validating the dispute claim, and proclaiming that the videotaped recordings of Respondent's score performances were not from unmodified arcade hardware as required by the rules.

Respondent has not shown with clear and convincing evidence that Appellant made the statement with actual malice. The evidence supports that Appellant did not harbor doubt that the videotape recordings of the score performances were not from original hardware. Respondent's circumstantial evidence of actual malice, on the other hand, is insufficient to command the unhesitating assent of every reasonable mind to the contrary.

Based on the fact that Respondent has not made a *prima facie* case showing that Appellant acted with actual malice, and also based on the fact that Respondent has not met his burden to prove falsity, Appellant begs this Court to reverse the trial court's ruling denying its special motion to strike.

## STATEMENT OF APPEALABILITY

The order denying Appellant's special motion to strike is appealable pursuant California *Code of Civil Procedure* sections 425.16(i), and 904.1(a)(13).

## STANDARD OF REVIEW

An order granting or denying an anti-SLAPP motion is reviewed *de novo*. (Raining Data Corp. v. Barrenechea (2009) 175 Cal. App. 4th 1363, 1367.)

## STATEMENT FACTS

### A. Procedural History.

Respondent filed his first amended complaint on March 12, 2020, alleging claims for defamation and false light against Appellant. [1AA 0008.] Appellant moved to strike Respondent's first amended complaint as a strategic lawsuit against public participation on March 30, 2020. [1AA 0019–0101.] Respondent opposed on June 22, 2020 [1AA 0105 – 2AA 0175]; and Appellant replied on June 26, 2020. [2AA 0396–0645.] Respondent was granted permission to file a sur-reply and did so on September 25, 2020. [4AA 0935 – 5AA 0955.]

On September 22, 2020, Appellant moved for an order requiring Respondent as an out-of-state litigant to post an

undertaking pursuant to California *Code of Civil Procedure* section 1030(a). [4AA 0710–0932.] Respondent opposed on October 1, 2020 [5AA 1033 – 7AA 1336]; and Appellant replied on October 7, 2020. [7AA 1440–1535.]

Appellant’s special motion to strike was heard on October 15, 2020 at 1:30 p.m. by Hon. Gregory A. Alarcon, Department 36 of the Los Angeles Superior Court. [8AA 1630.] Appellant’s motion for undertaking was heard on the same day and at the same time as its special motion to strike. [Id.] The trial court issued a single ruling on both the special motion to strike, and the motion for undertaking on October 26, 2020. [8AA 1557.] The trial court denied Appellant’s motion to strike, but granted its motion for undertaking. [Id.] Appellant gave notice of the ruling on October 30, 2020. [8AA 1581.] Appellant promptly appealed from the order denying its special motion to strike on November 13, 2020. [8AA 1610.]

B. Respondent is recognized world-wide for his video game records.

Respondent pleads at paragraph one of his First Amended Complaint that he is “[r]ecognized world-wide for his records in a number of video games, including *Donkey Kong*, *Pac-Man*, and others.” [1AA 0010.] In 1999, he was allegedly named the “Video

Game Player of the Century” by Namco, the manufacturer of the video game *Pac-Man*. [Id.] He was selected by MTV as one of “The 10 Most Influential Video Game Players of All Time” in 2006. [Id.] That same year, he was described as “probably the greatest Arcade video game player of all time.” [Id.] Respondent has also appeared in “several documentaries on competitive gaming...” [1AA 0010.] One of the documentary movies Respondent appeared in is *The King of Kong: A Fistful of Quarters*. [Id.]

Respondent made similar claims of world-wide notoriety for his video game scores and achievements in another attempt to quell free speech in a complaint against The Cartoon Network in the United States District Court for the district of New Jersey in 2015 (the “Federal Matter”). [1AA 0050–0051.] United States District Judge Anne E. Thompson considered Respondent’s role in *The King of Kong: A Fistful of Quarters* when ruling on The Cartoon Network’s motion to dismiss in the Federal Matter. [1AA 0061.)] In her Opinion, she noted that Respondent is: “perhaps most widely known for his role as the antagonist in the documentary *The King of Kong: A Fistful of Quarters*, which chronicles another gamer’s attempt to surpass [Respondent’s] world record for the game *Donkey Kong*.” [Id.] She found that, in the film, Respondent “is portrayed as successful but arrogant, beloved by fans, and at times, willing to do whatever it takes to

maintain his world record.” [Id.] According to Judge Thompson, “the film shows [Respondent] attempting to maintain his world record by questioning his opponent’s equipment and the authenticity of his opponent’s submission of a filmed high score.” [Id.]

C. The Twin Galaxies Website is a forum to discuss all matters involving video gaming, including scores, records, and record disputes.

Appellant operates the website [www.twingalaxies.com](http://www.twingalaxies.com) (the “Twin Galaxies Website”). The Twin Galaxies Website provides a forum for members of the public to discuss all topics related to video games, including video game industry news, and video game scores and records. Any user can start a new “thread” in a forum related to a variety of video game related topics. All threads and forums are available for the general public to view. That is, anyone with access to the Internet and who navigates to the Twin Galaxies Website can view all forums and threads on the site. The general public is encouraged to join the discussion on the forums and threads by registering as a user and posting their comments. [1AA 0075–0076.]

The Twin Galaxies Website publishes score records on leaderboards for thousands of video game titles across dozens of

video game platforms. The leaderboards recognize video game records and achievements for various aspects of video game performance such as high score, or fastest time, and ranks players according to their verified achievements in those categories. [1AA 0076.]

The records and rankings of video game achievement that appear on the Twin Galaxies Website leaderboards for a particular game have been historically recognized world-wide as the official record of achievement in that video game. The records and rankings appearing and recognized on the Twin Galaxies Website leaderboards have been used by Guinness World Records in the *Guinness World Records Gamer's Edition* books, and are recognized as world records by the Guinness organization. [1AA 0076.]

The Twin Galaxies Website provides a mechanism for the public to submit a video game performance for adjudication and inclusion on a video game record leaderboard. [1AA 0076–1AA 0077.] The mechanism is driven by a system of peer-review and public comment. [Id.]

Similarly, the Twin Galaxies Website provides a mechanism for the public to dispute existing score claims that appear on a game's leaderboard. The dispute claim process is a public process whereby the dispute claim is placed in a public forum for comment, review, evidentiary submission, and debate.

[1AA 0077–0079.]

D. Respondent’s *Donkey Kong* scores are disputed by a member of the public.

On August 28, 2017, the Twin Galaxies Website registered user Jeremy Young, under the pseudonym Xelnia, submitted a dispute claim whereby he disputed Respondent’s 1,047,200 point, his 1,050,200 point, and his 1,062,800 point score performances which had previously appeared on the *Donkey Kong* video game points (with hammer allowed) leaderboard for the Arcade platform on the Twin Galaxies Website. [1AA 0079.] The 1,047,200 point score performance shall be referred to as the “King of Kong Score”; the 1,050,200 point score performance shall be the “Mortgage Brokers Score”; and, the 1,062,800 point score performance shall be the “Boomers Score.” All three scores are the “Disputed Score Performances.”

The dispute claim was published on the Twin Galaxies Website accessible to anyone for comment and debate, to vote on, and to provide evidentiary support for or against (the “Dispute Thread”). [1AA 0079–0080.] As of March 14, 2020: (1) the Dispute Thread was viewed on the Twin Galaxies Website 2,394,329 times; (2) there were 170 unique contributors who commented or provided evidentiary support; (3) there were 211 users who voted to adjudicate the score dispute (198 agreeing

with the dispute, and 13 disagreeing); and, (4) there were 3,770 content entries in the Dispute Thread. [1AA 0080.]

E. The specifics of the dispute claim regarding the Disputed Score Performances.

Mr. Young's dispute claim is that the videotaped recordings historically used to justify the Disputed Score Performances were not created on an original *Donkey Kong* Arcade platform system and printed circuit board (PCB) as required by the competitive rules, but that they were instead created on M.A.M.E. emulation software in violation of the rules. Mr. Young contended the performances recorded on videotape and submitted to Twin Galaxies as proof of Respondent's *Donkey Kong* score accomplishments, could not have been produced by an unmodified original *Donkey Kong* Arcade system because of images and other artifacts appearing in the tapes, but not on arcade. [AA 0080–0081; 3AA 0423.]

As part of his dispute claim, on February 2, 2018, Mr. Young posted extensive technical research and analysis of the videotape recordings of the Disputed Score Performances in the Dispute Thread. [3AA 0423–0424.] Mr. Young's research showed that unmodified original *Donkey Kong* arcade PCB hardware draws *Donkey Kong* levels frame-by-frame with the first frame drawing ½ portions of five (5) girders, and the rest of the frames



filling in those girders as shown in Figure 1 below. Mr. Young’s research also showed that the *Donkey Kong* game on emulation software such as M.A.M.E. similarly draws the game’s levels frame-by-frame, but with the first frame drawing three (3) girders, with the last girder having a protruding member which has been nick-named the “Girder Finger,” as shown in Figures 2 and 3 below. [3AA 00424; 3AA 0557.]



Figure 1 – ½ of 5 Girders



Figure 2 – 3 Girders w/Finger

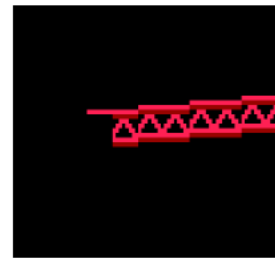


Figure 3 – “Girder Finger” (magnified)

Mr. Young’s analysis of the videotape recordings of Respondent’s King of Kong Score, and the Mortgage Brokers Score performances showed that the *Donkey Kong* levels did not draw-in with the first frame showing ½ portions of five (5) girders as would be expected if the videotapes were of gameplay from an original *Donkey Kong* arcade PCB. Rather, he discovered instances in the King of Kong Score, and Mortgage Brokers Score recordings showing the levels drawing three (3) girders in the first frame, with one being the Girder Finger as shown in Figures 4 and 5 below. Form this evidence – coupled with other unexplained anomalies and artifacts in the footage – he claimed the videotape recordings are inconsistent with original *Donkey*

*Kong* arcade gameplay and thus cannot support scores on the *Donkey Kong* arcade leaderboard. [3AA 0424; 3AA 0558.]



Figure 4 – 1,047,200 (the King of Kong "tape")

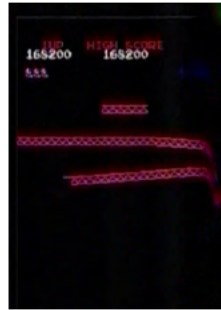


Figure 5 – 1,050,200 (the Mortgage Brokers score)

F. Appellant sources videotape copies of two of Respondent's score performances and makes them available to the public.

Respondent's King of Kong Score performance was entered into the Twin Galaxies leaderboard database by Robert Mruczek in 2006. [3AA 0642.] Mruczek was then a Twin Galaxies referee and he adjudicated this performance from videotape. [Id.] Respondent's Mortgage Brokers Score performance was evidenced by a videotape recording as well. [1AA 0424.]

Twin Galaxies sourced unaltered copies of the videotape recordings of Respondent's King of Kong Score, and Mortgage Brokers Score performances from Canada. [3AA 0633.] Appellant also obtained a second digital copy of both performances and cross-referenced the two for fidelity. [3AA 0425.] Jason Hall, Appellant's Head Custodian of Records,

confirmed that the two sets of videotapes were identical and posted them in the Dispute Thread for the community to perform its own analysis of Mr. Young's claim. [Id.]

G. Respondent retains Carlos Pineiro and Steven Kleisath to investigate Mr. Young's dispute claim, and they ultimately validate the dispute claim.

In February 2018, Respondent assembled a technical team composed of, among others, Carlos Pineiro and Steven Kleisath to debunk Mr. Young's dispute claim. [1AA, 0085; 3AA 0556–0557; 3AA 0558–0560; 3AA 0561–0562; 3AA 0622–0624.] **Respondent specifically told Mr. Hall that Mr. Pineiro was the head of his technical investigation team.** [AA 0428.]

Respondent provided material assistance to Pineiro and Kleisath by giving them access to the original parts Respondent used to record the Disputed Score Performances – including the original printed circuit board (PCB) used for the Mortgage Brokers Score performance, and the original recording equipment. [3AA 0558.] Respondent also played the *Donkey Kong* video game for the technical team to record gameplay, in an attempt to recreate the anomalies that Mr. Young identified in the Disputed Score Performances. [3AA 0556; 3AA 0623.]

Respondent's technical team worked at Robert Childs' arcade shop from February 2018 to April 2018 on disproving Mr.

Young's dispute claim. [3AA 0556; 3AA 0622–0623.]

Respondent's technical team, with Respondent's knowledge, used copies of the King of Kong Score, and Mortgage Brokers Score performances that were posted by Mr. Hall to the Dispute Thread in their investigation. [3AA 0558.] Respondent's technical team was in regular contact with Appellant during the investigation process. [3AA 0428; 3AA 0560, 3AA 0624.] At one point, Respondent's team asked Mr. Hall for more time to perform their investigation, and Mr. Hall granted the request. [Id.]

Respondent's technical team ultimately found that the videotaped recordings of the King of Kong Score, and the Mortgage Brokers Score performances showed the levels draw with three girders, and the Girder Finger as identified in Mr. Young's dispute claim. [3AA 0559.] Respondent's technical team also found that an original *Donkey Kong* arcade PCB does not draw three girders or the Girder Finger. [Id.] Based on these findings, on April 9, 2018, Respondent's team posted in the Dispute Thread that the videotaped recordings of the King of Kong Score, and the Mortgage Brokers Score performances were not generated from an unmodified *Donkey Kong* arcade PCB, thereby validating Mr. Young's dispute claim. [3AA 0560; 3AA 0623.]

H. Appellant investigated the merits of Mr. Young's dispute claim, interviewed witnesses, and ultimately issued an opinion on the dispute.

Upon receiving the dispute claim, and all of the technical and scientific evidence provided along with it in the Dispute Thread, Appellant independently embarked to verify and duplicate the science and claims that Mr. Young made in the dispute claim. The investigation into Mr. Young's technical claims took many months, involved several staff, and required the procurement of expensive specialty equipment. [1AA 0082–0083; 3AA 0425–0428.]

Appellant spent thousands of dollars on equipment and labor to verify Mr. Young's claims, and made the rolling findings public in the Dispute Thread as the findings came to light. [1AA 0083–0084.] Mr. Hall also moderated a live four-hour question and answer session regarding the investigation which was publicly broadcast on the social media network Facebook. [1AA 0083; 3AA 0426.]

As part of Appellant's investigation, Mr. Hall interviewed witnesses with knowledge of Respondent's Disputed Score Performances. On, or about, August 29, 2017, the day after Mr. Young published his dispute claim, Mr. Hall interviewed Todd Rogers, a former Twin Galaxies referee who Respondent claims

witnessed the Mortgage Brokers Score Performance. [4AA 0726–0727.] Mr. Hall also interviewed Walter Day, the founder of Twin Galaxies in March 2018 about the Disputed Score Performances. [2AA 0180–0181.] And finally, Mr. Hall interviewed Respondent himself extensively throughout the course of the investigation. [3AA 0429.]

Respondent was invited to provide evidence to support his scores and to discredit Mr. Young’s dispute claim, but he chose not to do so. [1AA 0085.] Respondent’s associate, Robert Childs, however, did make a detailed post in the Dispute Thread on February 11, 2018 explaining exactly what he did to record the Disputed Score Performances. [1AA 0082.] Respondent’s technical team also made posts in the Dispute Thread about the status of their investigation into the claim on a rolling basis. [3AA 0560; 3AA 0623.]

After Appellant’s investigation and testing process concluded, Appellant determined that Mr. Young’s dispute claim was valid. Appellant came to this conclusion based on: (1) the public’s comments and investigation in the Dispute Thread [1AA 0084]; (2) Appellant’s and third-parties’ inability to replicate the images and artifacts appearing in Respondent’s submitted videotaped score performances on an original, unmodified, *Donkey Kong* Arcade system and PCB [3AA 0425 – 3AA 0427]; and (3) Respondent’s technical team’s findings. [3AA 0427.]

Based on the determination that Mr. Young's dispute claim was valid, and in consideration of the fact that Respondent's technical team also found the dispute claim to be valid on April 9, 2018, Appellant posted in the Dispute Thread on April 12, 2018, its ultimate findings on the dispute claim. [1AA 0084; 3AA 0427.] The statement reads, in pertinent part, as follows:

**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.

[¶]

On 02-02-2018 Twin Galaxies member Jeremey Young (@xelnia) filed a dispute claim assertion against the validity of Billy Mitchell's historical and current original arcade *Donkey Kong* score performances of 1,047,200 (the King of Kong "tape"), 1,050,200 (the Mortgage Brokers score), and 1,062,800 (the Boomers score) on the technical basis of a demonstrated impossibility of original unmodified *Donkey Kong* arcade hardware to produce specific board transition images shown in the videotaped recordings of those adjudicated performance.

[¶]

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.

In addition to Twin Galaxies' own investigation

into the dispute case assertions, at least two different 3rd parties conducted their own explorations and came to identical conclusions.

Most notable was the 3rd party (Carlos Pineiro) that Billy Mitchell engaged to help examine the dispute case claims on his behalf, utilizing whatever original equipment Billy could provide, whose final finding was consistent with Twin Galaxies investigation and others.

[¶]

**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.

[¶]

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.**

[1AA 0090–0093 (emphasis in original).



## ARGUMENT

### A. The anti-SLAPP motion analytical framework.

A cause of action arising from an act in furtherance of the right of petition for free speech in connection with a public issue shall be subject to a special motion to strike. (Cal. Code Civ. Proc., § 425.16(b)(1).) The court must engage in a two-step process when determining whether a plaintiff's claim is susceptible to a special motion to strike. First, the defendant has the burden of making a threshold showing that the plaintiff's claim arises out of defendant's protected activity. (See Hecimovich v. Encinal School Parent Teacher Organization (2012) 203 Cal. App. 4th 450, 463 (setting forth the two-step anti-SLAPP analysis, and recognizing that defamation is the very first of the favored causes of action in SLAPP suits).)

Once the court finds defendant's burden has been met, the burden shifts to plaintiff to demonstrate, by admissible and competent evidence, a probability of prevailing on the merits at trial. (Id.; see also Zamos v. Stroud (2004) 32 Cal.4th 958, 965 (acknowledging the burden shifting aspect the anti-SLAPP analysis); see also HMS Capital, Inc. v. Lawyers Title Co. (2004) 118 Cal. App. 4th 204, 211 (similarly acknowledging the burden shifting aspect of the statute, and requiring admissible evidence in opposition to the motion).)

B. Appellant has satisfied step-one of the anti-SLAPP framework to show that Respondent’s claims arise from Appellant’s protected activity.

In his opposition to Appellant’s special motion to strike, Respondent concedes that his defamation and false light claims arise out of Appellant’s protected activities. Specifically, Respondent admits that “Here, Twin Galaxies claims that it has satisfied the first step showing that its statements about [Respondent] were made in a public forum and were a matter of public interest. For purposes of this motion, [Respondent] does not dispute those assertions.” [1AA 0117.] Appellant submits that Respondent’s concession is binding on appeal.

Even without the concession, it is clear that Respondent’s defamation and false light claims arise from Appellant’s protected activity. The anti-SLAPP statute protects “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.” (Cal. Code Civ. Proc., § 425.16(e)(3).) Similarly, California *Code of Civil Procedure* section 425.16(e)(4) protects 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,” but has no “public forum” requirement.

Postings on websites accessible to the public qualify as public forums for purposes of the anti-SLAPP statute. (*See Chaker v. Mateo* (2012) 209 Cal. App. 4th 1138, 1144 (statements were made in a public forum when posted on Internet website and social networking website which provided open forum for members of the public to comment on a variety of subjects); *see also ComputerXpress, Inc. v. Jackson* (2001) 93 Cal. App. 4th 993, 1006 (websites qualified as public forums); *see also Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 41 at n.4 (“Websites accessible to the public, like the ‘newsgroups’ where Rosenthal posted Bolen's statement, are ‘public forums’ for purposes of the anti-SLAPP statute. [Citations.]”))

The anti-SLAPP statute does not define “an issue of public interest,” but the statute has been applied broadly to where an issue is of interest to a “definable portion of the public (a private group, organization, or community).” (*Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal. App. 4th 107, 119; *see also Weinberg v. Feisel* (2003) 110 Cal. App. 4th 1122, 1132 (holding there should be “some degree of closeness between the challenged statements and the asserted public interest”); *see also Hecimovich, supra*, 203 Cal. App. 4th at p. 463 (“[ ] the question whether something is an issue of public interest must be construed broadly. [internal quotations and citations omitted]”))

Courts have held that the public interest requirement “means that in many cases [triggering the anti-SLAPP statute], the statement or conduct will be a part of a public debate and the public therefore will be exposed to varying viewpoints on the issue.” (Wilbanks v. Wolk (2004) 121 Cal. App. 4th 883, 898.) “The most commonly articulated definitions of ‘statements made in connection with a public issue’ focus on whether (1) the subject of the statement or activity precipitating the claim was a person or entity in the public eye; (2) the statement or activity precipitating the claim involved conduct that could affect large numbers of people beyond the direct participants; and (3) whether the statement or activity precipitating the claim involved a topic of widespread public interest. [Citations.]” (Id.; *see also* FilmOn.com Inc. v. DoubleVerify Inc. (2019) 7 Cal.5th 133, 143-146 (citing Wilbanks with approval).)

Here Respondent’s claims arise from protected activity because the alleged defamatory statement was made in a public forum, and involves an issue of public interest such that the first prong of the anti-SLAPP statute is satisfied.

1. The alleged defamatory statements were made in a public forum.

There is no question that the Twin Galaxies Website constitutes a public forum. The established case law is clear and

unequivocal that publicly accessible websites are considered public forums for purposes of the anti-SLAPP law. Here, the Twin Galaxies Website is the quintessential public forum because it allows the public a place to comment and debate issues of interest, such as the issue of video game high scores.

Particularly, the Dispute Thread where the allegedly defamatory statement was published is accessible to the public and was a place where the public engaged in a vigorous debate about the veracity of Respondent's claimed *Donkey Kong* scores and achievements. There were nearly two and a half million views of the forum through the drafting of Appellant's special motion to strike, and there were almost 3,800 posts on the forum as well by members of the general public. There were 211 people who voted in connection with the controversy, and 198 people found the dispute valid. In light of these facts, there is no question that the alleged defamatory statement was made in a public forum, and this element of the statute is easily met.

2. The alleged defamatory statements involve an issue of public interest.

The alleged defamatory statement relates to Respondent's *Donkey Kong* score records which are an issue of public interest. Respondent admits that he is recognized world-wide for, among other things, his *Donkey Kong* scores. And it was Respondent

that thrust himself into the public debate by appearing in the *The King of Kong: A Fistful of Quarters* documentary where his *Donkey Kong* score, and his attempt to discredit any challenge to his score, was the central theme of the film.

Moreover, the sheer number people who viewed, and participated in, the Dispute Thread shows that the veracity of Respondent's *Donkey Kong* scores is an issue of interest to at least a definable portion of the public – here the community of video gamers who are interested in video game high scores. And there is a high degree of closeness between the alleged defamatory statement – which relates to Respondent's *Donkey Kong* scores – and the public interest in video game high scores. Additionally, and as the submissions in the Dispute Thread show, the alleged defamatory statement is part of the public debate and is the product of the consideration of varying viewpoints on the issue.

And finally, with respect to the Wilbanks test and the first prong, Respondent, the subject of the statement, is a person in the public eye because of his *Donkey Kong* scores and by his own admission. With respect to the second prong, the statement involved conduct that affects a large number of people – that is the entire public that has the ability to submit a score for inclusion on the *Donkey Kong* game leaderboard. And as to the

third prong, the allegedly defamatory statement involves, as set forth above, a topic of widespread interest.

For these reasons, step one of the anti-SLAPP analytical framework is satisfied.

C. Respondent cannot satisfy step-two of the anti-SLAPP framework to show a probability of success on the merits of his defamation claim.

A claim for defamation requires proof of a false and unprivileged publication that exposes the plaintiff “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.” (Cal. Civ. Code, § 45.) Respondent is a public figure, and must adduce clear and convincing evidence that Appellant made the allegedly defamatory statement with actual malice. As a public figure, Respondent also shoulders the burden of proof to show that the allegedly defamatory statement is false. The evidence in the trial court was insufficient for Respondent to make a *prima facie* case for his defamation claim.

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1. Respondent is a public figure.

A threshold determination in a defamation action is whether the plaintiff is a public figure. When the plaintiff is a public figure, he or she may not recover defamation damages merely by showing the defamatory statement was false. Instead, a public figure must also show the speaker made the objectionable statement with malice in its constitutional sense “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.)

The courts have defined two classes of public figures. The first is the “all purpose” public figure who has “achiev[ed] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts.” (Id. at p. 253 (citing Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 351).) The second category is that of the “limited purpose” or “vortex” public figure, an individual who “voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.” (Id.) Unlike the “all purpose” public figure, the “limited purpose” public figure loses certain protections only to the extent that the defamatory relates relates to his role in a public controversy. (Id. at p. 254.)



Respondent makes the judicial admission in this First Amended Complaint that he is recognized world-wide. [AA 0010.] Being recognized world-wide is certainly the type pervasive fame and notoriety for Respondent to be an all-purpose public figure as defined in the Reader's Digest Assn. case. Even if this Court does not find that Respondent is an all-purpose public figure, he is a limited public figure that has injected himself into the particular public controversy regarding his *Donkey Kong* score performances.

The California Supreme Court stated in Reader's Digest Assn. that “when called upon to make a determination of public figure status, courts should look for evidence of affirmative actions by which purported ‘public figures’ have thrust themselves into the forefront of particular public controversies.” (Reader's Digest Assn., *supra*, 37 Cal.3d at pp. 254-255.) The Reader's Digest Assn. court found the plaintiffs there to be public figures because they thrust themselves into the public eye by: (1) being the subject of a full-length movie; (2) being in four books; and, (3) being the subject of *Life* and *Time* magazine articles. (*Id.* at p. 255.)

Respondent has done the same here. He has cast himself into the public eye in the context of his *Donkey Kong* score performances by starring as the antagonist in the *The King of Kong: A Fistful of Quarters* movie, where, in an ironic twist of

fate, he was the one questioning another player's *Donkey Kong* score and the hardware used to achieve that score. And like the plaintiffs in Reader's Digest Assn., Respondent has been the subject of numerous magazine articles, including a *Life Magazine* article, about his video game score performances. [1AA 0010; 1AA 0050–0054.] Based on these facts, there is no escaping the conclusion that at least as it relates to the controversy concerning *Donkey Kong* score performances, Respondent is a public figure.

2. Respondent has not shown with clear and convincing evidence that Appellant acted with actual malice.

In a defamation action where the plaintiff is a public figure, to demonstrate a *prima facie* case, the plaintiff must show by “clear and convincing evidence” that the challenged statements were made with “actual malice.” (Conroy v. Spitzer (1990) 70 Cal. App. 4th 1446, 1451 (in addressing whether the plaintiff has demonstrated the existence of a *prima facie* case, “we bear in mind the higher clear and convincing standard of proof”); *see also* Beilenson v. Superior Court (1996) 44 Cal. App. 4th 944, 950 (“The clear and convincing standard requires that the evidence be such as to command the unhesitating assent of every reasonable mind. [citation omitted]”).)

Respondent carries a heavy burden to prove actual malice by clear and convincing evidence. (Christian Research Institute v. Alnor (2007) 148 Cal. App. 4th 71, 84 (where the court found plaintiff failed to meet the heavy burden of proving actual malice).) “The burden of proof by clear and convincing evidence requires a finding of high probability. The evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of every reasonable mind. [internal quotations and citation omitted.]” (Id.) The California Supreme Court has recognized that on appeal, “when reviewing a finding that a fact has been proved by clear and convincing evidence, the question before the appellate court is whether the record as a whole contains substantial evidence from which a reasonable factfinder could have found it highly probable that the fact was true.” (Conservatorship of O.B. (2020) 9 Cal.5th 989, 1011.) The high bar of clear and convincing evidence continues to be the standard on appeal.

To show actual malice, Respondent must demonstrate Appellant either knew its statement was, false or subjectively entertained serious doubt the statement was truthful. (Bose Corp. v. Consumers Union of U.S., Inc. (1984) 466 U.S. 485, 511.) The question is not “whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that

the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.” (Reader’s Digest Assn., *supra*, 37 Cal.3d at pp. 256-257; *see also McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 860.) Thus “mere failure to investigate the truthfulness of a statement, even when a reasonably prudent person would have done so, is insufficient” to demonstrate actual malice. (Christian Research, *supra*, 148 Cal. App. 4th 71, 90.) “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.)

The trial court considered five pieces of Respondent’s evidence in its actual malice analysis: “(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.” [8AA 1572.] Contrary to the trial court’s

findings, and with all due respect to the trial court, these pieces of evidence do not support a finding that Appellant acted with actual malice.

- a. Mr. Hall's statement to Mr. Day is not clear and convincing evidence of actual malice.

Mr. Hall's statement to Mr. Day that Mr. Hall "didn't care" about referees who could verify the hardware that was used in achieving the Disputed Score Performances does not show that Appellant deliberately decided not to acquire knowledge of facts that might confirm the probable falsity of the charges.

The charge in the allegedly defamatory statement is that the videotape recordings of the King of Kong Score and the Mortgage Brokers Score performances cannot be from an original unmodified *Donkey Kong* arcade PCB because the level transition frames in those recordings show artifacts and anomalies such as the "Girder Finger." [1AA 0090–0093.] The evidence that came out during Appellant's investigation was that an unmodified *Donkey Kong* PCB never draws levels with the anomalies (such as the Girder Finger) that are found in the videotape recordings of the King of Kong Score and the Mortgage Brokers Score performances. [3AA 0426.] No referee statement verifying the hardware used by Respondent can change the fact

that the artifacts in the videotape recordings of Respondent's score performances simply cannot come from an original unmodified *Donkey Kong* PCB. In this respect, Mr. Hall was right not to care about a referee's verification because the verification would not have any bearing on the falsity of the statement. There is no malice on this record, much less actual malice.

- b. Appellant did interview the Twin Galaxies referee that witnessed the Mortgage Brokers Score performance.

Mr. Hall testified in the trial court that eyewitness testimony concerning the Respondent's physical performances underlying the videotaped recordings of the King of Kong Score, and the Mortgage Brokers Score has no bearing on the technical nature of Mr. Young's dispute claim. [3AA 0427–0428.] For this reason, no eyewitness testimony (except for Todd Rogers) was solicited by Appellant in its investigation. [*Id.*] Appellant did not avoid the truth by not soliciting eyewitness testimony because eyewitness testimony does not have a tendency to prove or disprove the charge that the videotape recordings of Respondent's score performance could not have come from an original unmodified *Donkey Kong* PCB.

Regardless of the fact that eyewitness testimony is irrelevant to the determination of the dispute, Appellant did in fact interview Respondent's key witnesses. Before the trial court at the time of the ruling on the anti-SLAPP motion was Mr. Hall's declaration dated September 22, 2020. [4AA 0724.] In that declaration, Mr. Hall testified to the fact that he did interview Twin Galaxies referee Todd Rogers – Respondent's witness to the Mortgage Brokers Score performance.. [4AA 0726–0727.] During interview, conducted after Mr. Young made his dispute claim, Mr. Rogers indicated that perhaps there were some “shenanigans” around Respondent's *Donkey Kong* scores, particularly the King of Kong Score. [4AA 731.]

Since evidence of Mr. Hall interviewing the Twin Galaxies referee that witnessed the Mortgage Brokers Score performance is in the record, and such evidence was before the trial court at the hearing on the anti-SLAPP motion, this Court should consider it to determine if there is clear and convincing evidence of actual malice. (Conservatorship of O.B., *supra*, 9 Cal.5th at p. 1011 (appeal court to review the *whole record* when determining if there is clear and convincing evidence of a fact).) Mr. Hall's interview of Todd Rogers is determinative that Mr. Hall did not purposefully avoid the truth. Respondent therefore cannot rely on the alleged failure to interview Todd Rogers to support a charge of actual malice.

- c. Appellant’s disregard of the verification of hardware by a Senior Engineer of Nintendo does not indicate actual malice.

On February 11, 2018, Robert Childs – the person who assisted Respondent in recording the Disputed Score Performances – made a post in the Dispute Thread describing exactly how he recorded the performances. [1AA 0082.] Mr. Childs indicated that the performances were recorded to VCR tape through a converter board that was connected to an original *Donkey Kong* PCB. [Id.] Appellant, during its investigation, obtained the exact converter board used by Mr. Childs, and it also obtained an original *Donkey Kong* arcade system with an original PCB. [1AA 0082.] Appellant replicated Respondent’s claimed hardware recording setup in an attempt to recreate on an original system the signature images (like the Girder Finger) seen in the Disputed Score Performances, but could not do so. [1AA 0083.]

The fact that Respondent allegedly used hardware verified by Nintendo is not helpful information because Appellant used that same original hardware – that is an original *Donkey Kong* PCB – in its testing and could not replicate the anomalies appearing in the videotape recordings of the Disputed Score Performances. Original hardware cannot create, for example, the



Girder Finger that appears in the recordings of the Disputed Score Performances. Consideration of the verification is not probative when Appellant tested the exact same original PCB in its investigation.

It is clear that original hardware was not used to create the Disputed Score Performances, and no verification from a Nintendo engineer can change that fact. Disregard of the alleged verification does not show a purposeful avoidance of the truth to support a charge of actual malice.

- d. Appellant did not use biased third-party investigators.

To be clear, the evidence is that Appellant conducted its own, extensive investigation into Mr. Young's dispute claim. [1AA 0082–0084; 3AA 0425–0428.] Respondent argued in the trial court that Appellant selected a biased third-party – Chris Gleed – to investigate the dispute claim. [1AA 0115–0116.] But the fact is that Mr. Gleed conducted his own investigation that concluded the Disputed Score Performances could not have come from an original *Donkey Kong* PCB. [3AA 0637.] He testified that he was not hired by Appellant nor was he working on Appellant's behalf. [*Id.*] Respondent cannot use Mr. Gleed's investigation to show that Appellant made its statement with

actual malice since Mr. Gleed was not engaged by Appellant to investigate the dispute claim.

- e. Appellant contacted sources outside of its rules to determine the truth and to verify Mr. Young’s dispute claim.

Appellant could did not unilaterally interview witnesses as part of its investigation because the rules of the dispute claim process bar it from doing so. The dispute claim rules dictate that “Only evidence that is specifically provided and documented within the public dispute claim discussion thread will be considered toward any decision.” [3AA 0428.] Appellant invited Respondent on numerous occasions to include information he wanted considered as part of the investigation into the Dispute Thread, but Respondent refused to do so. [3AA 0429.]

Despite its rule to only consider information within the Dispute Thread in its investigation of Mr. Young’s dispute claim, Appellant contacted sources outside of its rules to determine the truth. Most notably is that Appellant contacted Dwayne Richard and Riche Knucklez to obtain copies of the King of Kong Score and the Mortgage Brokers Score performances. [AA 0424–0425.] Appellant obtained two different copies of these videotaped performances, and cross-referenced the two for fidelity to ensure they were in fact the videotaped recordings historically used to justify the score performances. [Id.] Appellant’s act of contacting

sources outside of its rules to ensure its investigation is of the actual videotapes of the performances does not go to actual malice, but instead goes to the fact that Appellant had no subjective doubt about truth of the allegedly defamatory statement.

3. The facts in the trial court support the conclusion that Appellant did not make the statement with actual malice.

The factual record developed in the trial court shows that Appellant had no subjective doubt as to the truth of its statement that the **videotaped** recordings of Respondent's King of Kong Score, and Mortgage Brokers Score Performances were **not** from original unmodified *Donkey Kong* hardware.

- a. Appellant conducted a thorough investigation that left no subjective doubt that the videotaped recordings of the Disputed Score Performances were not from original hardware.

Mr. Hall testified in the trial court that the scope of Mr. Young's dispute claim was that the videotape recordings of

Respondent's Disputed Score Performances could not have been created from original *Donkey Kong* hardware. [3AA 0423–0424.]

The scope of the Appellant's statement after its investigation was limited to the scope of the dispute claim. The statement was clear, unambiguous, and related only to the videotaped recordings of the score performances. The statement is that “[...] the taped *Donkey Kong* score performances of King of Kong Score, 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 (emphasis in original.)” [1AA 0091.] The facts are that Appellant had no subjective doubt that the statement was true.

To determine the truth of the statement, Appellant obtained multiple copies of videotaped recordings of the Disputed Score Performances to ensure what was being investigated is what was historically used to justify Respondent's scores, and posted those recordings in the Dispute thread. [3AA 0424–0425; 3AA 0633; 3AA 0642.] Appellant conducted an extensive investigation into the dispute claim using the authenticated videotapes.

Appellant's investigation took place over the course of several months where it undertook the task of verifying and duplicating the scientific analysis set forth in Mr. Young's

dispute claim. [1AA 0082.] To do so, Appellant replicated the exact recording setup Robert Childs claimed he used to record the Disputed Score Performances [1AA 0082–0083.] Appellant purchased the hardware that Mr. Childs claimed he used, including an original unmodified *Donkey Kong* arcade system and PCB, and the converter board used to capture the recordings. [Id.] Appellant dedicated four staff members to the investigation. [1AA 0083.] And in the middle of the investigation, Mr. Hall held a four-plus hour interactive town-hall style public discussion about the investigation. [Id.] Appellant also considered the investigation of others that posted their own results in the Dispute Thread over the course of seven (7) months before making its final decision on the dispute claim. [1AA 0084.] All said, Appellant spent thousands of dollars investigating Mr. Young’s dispute claim.

And in sum, the investigation lead to only one conclusion – the King of Kong Score and the Mortgage Brokers Score performance could not have come from an original unmodified *Donkey Kong* arcade PCB. [1AA 0084.] After all the testing had run its course, Appellant determined that the artifacts and images in the King of Kong Score and the Mortgage Brokers score performances – including but not limited to the “Girder Finger” – simply cannot be produced by original unmodified arcade hardware. The allegedly defamatory statement is a reflection of

this truth, and thus there cannot be subjective doubt as to the truth of the statement because the investigation results bear this fact out.

Respondent cannot point to any evidence that Appellant had subjective doubt about the truthfulness of the statement. That is, there is no evidence that Appellant had any doubt about whether the King of Kong Score or the Mortgage Brokers Score performance were from an unmodified *Donkey Kong* arcade PCB.

At best, Respondent has adduced weak circumstantial evidence that he claims shows Appellant avoided the truth. But that evidence, as set forth above, is far from clear and convincing. This Court should find that there was no actual malice on review.

- b. Appellant's statement was made after consideration of the findings of Respondent's technical team.

Equally important is the fact that Respondent's own technical team found the King of Kong Score, and the Mortgage Brokers were not created on original *Donkey Kong* hardware. Respondent put together a team to disprove Mr. Young's dispute claim and the team was composed of Carlos Pineiro and Steven Kleisath. [1AA, 0085; 3AA 0556–0557; 3AA 0558–0560; 3AA 0561–0562; 3AA 0622–0624.] Respondent told Mr. Hall that Mr. Pineiro was head of his technical team. [AA 0428.]

Respondent's technical team had direct access to all of the original equipment that Respondent used to record the Disputed Score Performances, and they had access to Respondent himself. [3AA 0558; 3AA 0556; 3AA 0623.] Mr. Pineiro conducted the team's investigation from February 2018 through April 2018 at Robert Childs' arcade shop. [3AA 0556; 3AA 0622–0623.] Mr. Pineiro ultimately found that neither the King of Kong Score, nor the Mortgage Brokers Score performances were created on an original, unmodified *Donkey Kong* arcade PCB, and Respondent's technical technical team's finding were posted in the Dispute Thread on April 9, 2018. [3AA 0560; 3AA 0623.]

Appellant made the alleged defamatory statement only three days later on April 12, 2018. Appellant cited Mr. Pineiro by name in its statement – acknowledging that Mr. Pineiro used Respondent's original equipment and still came to the same conclusion that the King of Kong Score and the Mortgage Brokers score were not from original unmodified hardware. [1AA 0091.] The fact that Appellant cited Respondent's technical team's findings in its statement is conclusive evidence that it harbored no subjective doubt about the truth of the statement.

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- c. Other acts by Appellant show that it acted without actual malice.

Other acts by Appellant show that it acted in good faith without actual malice. For example, Appellant granted requests made by Respondent and his team for extra time to complete their investigation. [3AA 0428; 3AA 0560; 3AA 0623.] The fact that Appellant found there was insufficient evidence to judge the third score challenged by Mr. Young – the Boomers Score – shows that the investigation was thoughtful, precise, and deliberate not reckless. [3AA 0427.] Lastly, Mr. Hall was in direct contact by telephone and text message with Respondent explaining to him the scope of the investigation, and asking Respondent to instruct his technical lead Mr. Pineiro to investigate issues that would help exonerate Respondent if resolved. [3AA 0429.] At all times Appellant was seeking the truth and acted without malice.

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4. Other California court have found a lack of actual malice on similar facts.

Decisions in other reported cases support the contention that Respondent's evidence is insufficient to meet the clear and convincing standard.

a. Annette F. v. Sharon S.

In Annette F. v. Sharon S., the court was tasked with determining whether plaintiff showed with clear and convincing evidence that defendant made the defamatory statement with actual malice. (Annette F. v. Sharon S. (2004) 119 Cal. App 4th 1146, 1166.) In its analysis, the court found that the plaintiff introduced no evidence in the trial court to contradict defendant's declaration as to her belief in the truthfulness of the defamatory statement. (Id. at p. 1169.) The court noted that although defendant's profession of good faith is not necessarily determinative, the plaintiff bore the burden of making a *prima facie* showing on the issue of actual malice. [Id.]

Plaintiff's circumstantial evidence in Annette F. was insufficient to make the showing. In considering the circumstantial evidence, the court opined that the significance of circumstantial evidence "will vary depending on the extent to which they reflect on the defendant's subjective state of mind."

(Annette F., 119 Cal. App. 4th at p. 1169.) “In our view, a critical consideration in determining the weight to be given [to circumstantial evidence] is the extent to which the allegedly defamatory statements deviates from the truth.” (Id. at pp. 1169-1170.)

Respondent’s showing of circumstantial evidence is similarly insufficient to meet the clear and convincing bar. With respect to Appellant, Mr. Hall’s subjective state of mind at the time he made the statement was that he believed the statement to be true – he believed Respondent’s Disputed Score Performances were not created on original unmodified hardware. His state of mind was informed by his own investigation, and the fact that Mr. Pineiro working on behalf a Respondent confirmed that the Disputed Score Performances were not from original hardware.

Respondent’s circumstantial evidence in the trial court does not reflect that Mr. Hall had subjective doubt about the truthfulness of the statement. On hardware verification – the first, second and third pieces of evidence the trial court considered – even if Appellant did avoid information from Twin Galaxies referees that verified the hardware, that fact does not show that Appellant subjectively doubted the truth of the statement. The truth does not depend on what a referee claims he verified. Instead, the truth of the statement is determinable

by resort to technical video and hardware analysis. Mr. Hall conducted the analysis and determined that the Disputed Score Performances were not from unmodified hardware. He knew at the time that Mr. Young, Mr. Gleed, and Mr. Pineiro came to the same conclusion. The statement from a referee about a live performance has no bearing on the subjective state of mind regarding what was on the videotapes in light of the investigations. Similarly, the fact that the hardware was verified by Nintendo as original does not change state of mind because the same original hardware was used by Mr. Hall in his testing. These three pieces of circumstantial evidence are insufficient to meet the clear and convincing standard.

The other two pieces of circumstantial evidence regarding biased investigators, and Appellant contacting outside sources in violation of its rules have no relevance to Mr. Hall's subjective state of mind. The determination of allegedly biased investigator Chris Gleed was consistent with Mr. Pinero's findings, and Mr. Young's dispute claim, and Appellant's investigation. Mr. Gleed's investigation was superfluous in this sense, and unnecessary to determine Mr. Hall's subjective belief in the truth of the statement when Mr. Hall's findings and Pineiro's findings were in accord. And contacting Messrs. Richard and Knucklez for authentic copies of the performances just cannot show subjective doubt.

Indeed, the trial court acknowledged that the evidence showed Appellant did not harbor doubt about the truth of the challenged statement. In its ruling on Appellant’s undertaking motion – which is in the same document as the ruling on the special motion to strike – the trial court noted that **“[Appellant’s] evidence in support of the anti-SLAPP motion, as discussed above, supports that [Appellant] did not harbor doubt as to the truth of its statement, as its statement was made after [Appellant’s] lengthy investigation of the dispute.”** [8AA 1579.] Respondent’s circumstantial evidence is not enough to show that Mr. Hall had any doubt, much less a subjective doubt, about the truthfulness of the statement.

b. Rosenaur v. Scherer

In Rosenaur v. Scherer, the plaintiff sued his political adversary and the campaign for defamation arising out of statements the defendant made in campaign literature that plaintiff was in partnership with speculators in Los Angeles. (Rosenaur v. Scherer (2001) 88 Cal. App. 4th 260, 265.) The defendants reviewed old public records to discover that at some time in the past, the plaintiff was in a partnership with entities and people based in Los Angeles, and published that information

in a campaign flyer. (Id. at pp. 267-268.) The plaintiff showed at the time of the campaign, the plaintiff was not in partnership with anyone from Los Angeles when the statement was made, and thus the statement by defendant was false and publication of the false information injured him. (Id. at p. 275.)

Despite the fact that the statement by defendants was false, the court found the plaintiff did not show actual malice with clear and convincing evidence that the defendants knew the statement was false or, that they acted in reckless disregard of the truth. (Rosenaur, 88 Cal. App. 4th at pp. 275-276.) The court found that defendants were not reckless even though they failed to contact the partner they discovered lived in Los Angeles. (Id. at P. 276.) The court noted that to support a finding of actual malice, the failure to investigate must be fairly characterized as the purposeful avoidance of the truth, or a decision not to acquire facts. (Id. at p. 277.) The court ultimately found that defendants' reliance on old public records was sufficient such that defendants needn't contact the partner in Los Angeles to determine the truth of its statement because there was no evidence that defendants harbored subjective doubt that the old public record was accurate. (Id. at pp. 277-288.)

Here, Appellant relied on the statement of Carlos Pineiro that the Disputed Score Performances were not from original equipment and Mr. Hall said so in the statement itself. Mr.

Hall's reliance on Mr. Pineiro is akin to the defendant in Rosenaaur relying on old public records because both are presumed true – that is there is no reason to believe a finding from Respondent's technical team to be untrue like there is no reason to believe a public record to be untrue. Considering Appellant's state of mind, the failure to contact witnesses is not avoidance of the truth because there is no evidence that Appellant entertained any doubt about the accuracy of Mr. Pineiro's findings. The same analysis carried the day in Rosenaaur where the court found that nothing suggested that the defendants entertained any doubt about the accuracy of the old public records. (Rosenaaur, 88 Cal. App. 4th at p. 278.) The Court should find that Respondent has not shown actual malice with clear and convincing evidence based on this analysis as well.

5. Respondent has failed to meet his burden to prove falsity of Appellant's statement.

As a matter of law, in defamation actions involving matters of public concern, the burden is on the plaintiff to prove falsity. (See City of Costa Mesa v. D'Alessio Investments, LLC (2013) 214 Cal. App. 4th 358, 378 (“In a defamation action ... by a private person suing over statements of public concern, however, the First Amendment places the burden of proving falsity on the plaintiff.”).) Falsity must be established by a preponderance of

evidence. (Christian Research Institute, *supra*, 148 Cal. App. 4th at p. 81.)

The alleged defamatory statement can be broken down into two discrete statements. One statement is: the videotape recording of Respondent's King of Kong Score performance that was historically used by Appellant to substantiate the score and place it in the score database was not produced by the direct feed output of an original unmodified arcade PCB. The other statement is: the videotape recording of Respondent's Mortgage Brokers Score performance that was historically used by Appellant to substantiate the score and place it in the score database was not produced by the direct feed output of an original unmodified arcade PCB. It is important to note that these statements refer to the videotape recordings of the performances – and not live performance. Accordingly, to prove falsity, Respondent must show that the videotape recordings of the performances were from an original unmodified *Donkey Kong* PCB. He provides no evidence in this respect.

Taking the videotape recording of the King of Kong Score performance first, Respondent provides absolutely no evidence that the tape recording of this score was created from gameplay on an unmodified original Donkey Kong PCB. None of Respondent's evidence addresses the simple question of whether the videotape recording of this performances at issues contains

gameplay recorded from an original unmodified machine. Respondent dances around that question by claiming that he achieved a high-score of 1,047,200 at Arcade Game Sales on December 28, 2004. [1AA 0129.] But the fact that he achieved that score on that date at that venue does not prove that the gameplay on the videotape in question was from an unmodified machine because he does not even allege that his December 28, 2004 performance was recorded. There just is no evidence in the record to prove Appellant's statement is false.

Similarly, with respect to the videotape recording of the Mortgage Brokers Score performance, Respondent again does not provide any competent or admissible evidence that the videotape recording at issue contains gameplay from an original unmodified *Donkey Kong* arcade PCB. What he does offer is a handful of vague declarations from people swearing that they saw him playing *Donkey Kong* at a convention of mortgage brokers in 2007. [2AA 0223; 2AA 0225; 2AA 0228.] None of these eyewitnesses testify to whether the performance recorded on the videotape in question is the performance they witnessed at the convention. In fact, none of the eyewitnesses even testify that they have seen what is on the tape. Without that evidence, Respondent cannot prove falsity.

Respondent's evidence that he played *Donkey Kong* live and achieved certain scores does not help him. This evidence



presented by Respondent does not go to prove falsity of the statement. That Respondent achieved the scores live does not prove that what is on the videotaped recordings – the subject matter of the defamatory statement – came from an original unmodified machine. To meet his burden, Respondent must show that the videotaped recordings, and the anomalies contained therein like the “Girder finger” can be created on an unmodified *Donkey Kong* arcade PCB – but he has not done so, and he thus has failed to meet his burden.

6. Appellant has proven the truth of its statement.

Appellant can prove that the videotape recordings of Respondent’s King of Kong Score, and the Mortgage Brokers Score performances were not generated from an unmodified Donkey Kong arcade PCB. Proof that the alleged defamatory statement is true is enough to defeat Respondent’s claim. (*See Campanelli v. Regents of Univ. of Cal.* (1996) 44 Cal. App. 4th 572, 581-582 (“Truth, of course, is an absolute defense to any libel action”).)

First, Appellant proffers the expert testimony of Mr. Hall to prove the truth of its statement. [3AA 0422–0423.] As set forth in his declaration, Mr. Hall is an expert in the field of computer video game programming and hardware interface. [*Id.*] Without

belaboring the point, Mr. Hall and his team engaged in an unprecedented investigation that involved detailed hardware and software testing to determine whether the videotaped performances at issue were created on original *Donkey Kong* PCB hardware or not. The result of his investigation and testing is that the videotape recordings of the King of Kong Score, and the Mortgage Brokers Score performances cannot have come from an unmodified Donkey Kong arcade PCB.

Second, and more importantly, Appellant in the trial court proffered the expert testimony of Carlos Pineiro to prove the truth of its statement. [3AA 0555.] Mr. Pineiro lead the technical team assembled by Respondent to disprove Mr. Young's dispute claim. [3AA 0556; 3AA 0560; 3AA 0561–0562.] However, after he performed his analysis and testing of the videotape recordings at issue, Pineiro realized that neither of the recordings could have originated from an original unmodified *Donkey Kong Donkey Kong* arcade PCB. [3AA 0558–3AA 0560.] His expert testimony ultimately is “that Billy Mitchell’s 1,047,200 (the King of Kong "tape"), and 1,050,200 (the Mortgage Brokers score) score performances as recorded on videotape were not generated from a genuine Nintendo Donkey Kong PCB.” [3AA 0560.]

These two experts both reviewed the videotaped recordings of the King of Kong Score, and the Mortgage Brokers Score performances and agree that they are not from original

hardware. Their testimony establishes the truth of the challenged statement and Respondent therefore cannot satisfy prong-two of the anti-SLAPP framework because he has provided no countervailing evidence.

7. Respondent's false light claim fails with its defamation claim.

If the trial court's order is reversed, Respondent's false light claim should also be stricken. (See Kapellas v. Kofman (1969) 1 Cal.3d 20, 35, fn. 16 (a false light claim "is in substance equivalent to the [plaintiff's] libel claim, and should meet the same requirements of the libel claim on all aspects."); *see also* Gilbert v. Sykes (2007) 147 Cal. App. 4th 13, 34 (holding that the collapse of the defamation claim spells the demise of all other causes of action in the same complaint which allegedly arise from the same publication); *see also* Tamkin v. CBS Broadcasting, Inc. (2011) 193 Cal. App. 4th 133, 149 (same).)

8. Appellant is entitled to its attorney's fees and costs on appeal.

If Appellant prevails on its appeal, and the order denying its special motion to strike is reversed, it will be entitled to its

attorney's fees and costs pursuant to California *Code of Civil Procedure* section 425.16(c)(1). Appellant is also entitled to its reasonable attorney's fees and costs on appeal and hereby requests that it be awarded those costs and fees as determined by the trial court upon remand. (See Dowling v. Zimmerman (2001) 85 Cal. App. 4th 1400, 1426.)

### CONCLUSION

Appellant respectfully submits that Respondent has not shown the requisite constitutional malice with clear and convincing evidence, nor has he shown falsity of the challenged statement. Based thereon, the trial court's order denying Appellant's special motion to strike should be reversed.

Respectfully submitted,

Dated: May 3, 2021

TASHROUDIAN LAW GROUP, APC



---

David A. Tashroudian, Esq.  
Attorney for Appellant  
Twin Galaxies, LLC

**CERTIFICATE OF COMPLIANCE**

Pursuant to rule 8.204(c) of the California *Rules of Court*, I hereby certify that this brief contains 10,778 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Respectfully submitted,

Dated: May 3, 2021

TASHROUDIAN LAW GROUP, APC



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David A. Tashroudian, Esq.  
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Document received by the CA 2nd District Court of Appeal.

**PROOF OF SERVICE**  
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am over the age of 18 and not a party to this action. I am employed in the county where the service occurred; my business address is 12400 Ventura Blvd., Suite 300, Studio City, CA 91604.

On the undersigned date, I caused to be served the following documents:

**Twin Galaxies, LLC's Opening Brief**

I caused the documents to be served on the interested parties:

James E. Gibbons, Esq.  
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I emailed the documents to the interested parties. My electronic service address is david@tashlawgroup.com. I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct. Executed this 4th day of May, 2021 at Los Angeles, California.



---

David A. Tashroudian

# **EXHIBIT F**

**S271894**

Case No. S \_\_\_\_\_

**IN THE SUPREME COURT OF CALIFORNIA**

WILLIAM JAMES MITCHELL,

Plaintiff and Respondent,

v.

TWIN GALAXIES, LLC,

Defendant, Appellant, and Petitioner.

Court of Appeal No. B308889

Superior Court No. 19STCV12592

After a Decision of the Court of Appeal  
Second Appellate District, Division Eight Case No. B308889

Los Angeles County Superior Court Case No. 19STCV12592  
Honorable Gregory Alarcon

---

**APPELLANT TWIN GALAXIES, LLC'S PETITION FOR REVIEW**

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## ISSUE PRESENTED

May actual malice be shown with circumstantial evidence that does not relate to the subject of the defamatory statement?

## INTRODUCTION

This case presents the Court with an opportunity to uphold the uniform application of the law by ensuring that actual malice in the anti-SLAPP context is proved by circumstantial evidence of the declarant's subjective belief of the truth of the allegedly defamatory statement; and not by circumstantial evidence of reckless disregard of facts unrelated to the statement.

The facts in the instant controversy were set forth in great detail in the parties' appellate brief, and they were recited in the Court of Appeal's opinion. In sum, defendant and appellant Twin Galaxies, LLC ("Twin Galaxies") made the alleged defamatory statement that certain video tape recordings of the Donkey Kong video game world record score performances of plaintiff and respondent William James Mitchell ("Mitchell") were not produced from original, unmodified arcade hardware. The alleged defamatory statement was made only after a member of the public disputed the veracity of the video tape recordings of Mitchell's world record score performances which triggered Twin

Galaxies' obligation – as the world's foremost authority on video game world records – to determine the merits of the dispute. Twin Galaxies extensively investigated the technical nature of the dispute, and after its investigation, validated the dispute. The alleged defamatory statement followed the investigation.

Mitchell asserts that Twin Galaxies recklessly disregarded facts that would prove the falsity of the statement that his score performances were not achieved on original, unmodified hardware. Mitchell adduced circumstantial evidence of Twin Galaxies' purported reckless disregard of the truth. The circumstantial evidence, however, relates only to Mitchell's supposed live performance of the world record scores at issue, but the evidence does not relate the video tape evidence of those scores. And since the video tape recording of the scores was the subject of the original dispute and the alleged defamatory statement, evidence of the live performances has no bearing on Twin Galaxies subjective belief in the truth of the statement.

The law is clear and has been espoused by this Court, and the State's lower appellate courts, that circumstantial evidence of actual malice must reflect on the Defendant's state of mind with respect to the truthfulness of the statement. In the matter at hand, this principle required evidence – clear and convincing evidence – that Twin Galaxies recklessly disregarded facts that would have proved that the video tape recordings of the disputed

scores were created from original, unmodified hardware. The Court of Appeal in the instant matter, however, relied on evidence relating to Mitchell's live performance of the disputed scores, and Twin Galaxies' failure to investigate the live performances. But facts relating to the live performances have no bearing on the truth or falsity of the allegedly defamatory statement which pertains only to the video tape recording historically used to substantiate Mitchell's world records. By relying on circumstantial evidence that Twin Galaxies failed to investigate claims of Mitchell's live performances of the Disputed Scores, the Court of Appeal deviated from the well-established principle that circumstantial evidence must bear on the speaker's subjective belief of the truth of the actual statement made.

Twin Galaxies calls on this Court to secure the uniformity of decisions across the State by reviewing the Court of Appeal's use of circumstantial evidence relating to Mitchell's live performance of the disputed scores to determine the recklessness of Twin Galaxies in publishing a statement relating to video tape recordings of those scores. Such institutional review by this Court is necessary to ensure uniform application of the law, particularly considering that the opinion subject to this petition for review is certified for publication. (See Mitchell v. Twin Galaxies, LLC (2021) 70 Cal. App. 5th 207.) No petition for rehearing was filed in the Court of Appeal.

## STATEMENT OF FACTS

Mitchell holds world records in several video games, including Donkey Kong. (Mitchell, *supra*, 70 Cal App. 5th at p. 214.) He is a public figure, and has achieved notoriety for his world record video game score achievements. (Id.) At issue in this matter are three of Mitchell’s Donkey Kong video game score performances: the “King of Kong score” in which he scored 1,047,200 points on December 28, 2004, the “Mortgage Brokers score” in which he scored 1,050,200 points on July 14, 2007, and the “Boomers score” in which he scored 1,062,800 points on July 31, 2010 (collectively, the “Disputed Scores”). (Id.)

Twin Galaxies operates a websites at [www.twingalaxies.com](http://www.twingalaxies.com) where it publishes leaderboards for video game achievements. (Id. at p. 215.) Records and rankings on the Twin Galaxies leaderboards are recognized as a world records by Guinness World Records and others. (Id.) Twin Galaxies also provides a mechanism for the public to dispute scores appearing on its leaderboards. (Id.) The score dispute process involves public discussion, and debate on the veracity of scores appearing on the leaderboards. (Id.)

In 2018, Jeremy Young, under the Twin Galaxies user name “Xelnia,” disputed the veracity of Mitchell’s Disputed Scores through Twin Galaxies’ dispute process. (Id.) Young, in

his dispute claim, presented technical evidence scientifically showing that the video tape recordings historically used to substantiate the Disputed Scores could not be achieved on original hardware. (Mitchell, *supra*, 70 Cal App. 5th at p. 14.) Twin Galaxies investigated Young's dispute claim, and ultimately validated the dispute claim by issuing the flowing finding which reads, in relevant part:

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.

[¶]...[¶]

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.

In addition to Twin Galaxies' own investigation into the dispute case assertions, at least two different 3rd parties conducted their own explorations and came to identical conclusions.

Most notable was the 3rd party (Carlos Pineiro) that Billy Mitchell engaged to help examine the dispute case claims on his behalf, utilizing whatever original equipment Billy could provide, whose final finding

was consistent with Twin Galaxies investigation and others.

[¶]...[¶]

**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.

[¶]...[¶]

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.**

(Mitchell, *supra*, 70 Cal App. 5th at p. 216 (emphasis in original).)

Mitchell sued Twin Galaxies for defamation and false light based on the statement issued after deciding Young’s dispute claim. (Id. at p. 217.) Twin Galaxies filed a special motion to strike the suit as a strategic lawsuit against public participation. (Id.) The trial court denied the special motion to strike. (Id. at p. 219.) Twin Galaxies appealed.



On appeal, Twin Galaxies argued, among other things, that Mitchell could not state a *prima facie* case for defamation because he could not adduce clear and convincing evidence of actual malice at trial. (Mitchell, *supra*, 70 Cal App. 5th at p. 222.) The Court of Appeal disagreed. Relying on circumstantial evidence, the Court of Appeal found that Twin Galaxies’ failure to investigate claims by Mitchell that his scores were achieved live on original hardware was sufficient for Mitchell to state a *prima facie* case for actual malice. (Id. at pp. 222-225.)

## LEGAL DISCUSSION

- A. Legal Standard: circumstantial evidence of actual malice must relate to the defendant’s subjective state of mind of the truthfulness of the statement made.

The actual malice standard of New York Times v. Sullivan requires a showing that the allegedly false statement was made “with knowledge that it was false or with reckless disregard of whether it was false or not.” (New York Times Co. v. Sullivan (1964) 376 U.S. 254, 279-280.) The reckless disregard standard requires a high degree of awareness of probable falsity. (*See* Garrison v. Louisiana (1964) 379 U.S. 64, 74, 85.) “There must be sufficient evidence to permit the conclusion that the defendant in

fact entertained serious doubts as to the truth of his publication.” (St. Amant v. Thompson (1968) 390 U.S. 727, 731.) Gross or even extreme negligence will not suffice to establish actual malice; the defendant must have made the statement with knowledge that the statement was false or with “actual doubt concerning the truth of the publication.” (Reader's Digest Assn. v. Superior Court (1984) 37 Cal.3d 244, 259, fn. 11.)

The existence of actual malice turns on the defendant's subjective belief as to the truthfulness of the allegedly false statement at the time the statement was made. (Annette F. v. Sharon S. (2004) 119 Cal. App. 4th 1146, 1167; *see also* Reader's Digest, supra, 37 Cal.3d at p. 257; *see also* Bose Corp. v. Consumers Union of U.S., Inc. (1984) 466 U.S. 485, 512 (noting that actual malice must exist at time of publication); *see also* Sutter Health v. UNITE HERE (2010) 186 Cal.App.4th 1193, 1210 (“The standard of actual malice is a daunting one’...that focuses solely on the defendant's subjective state of mind at the time of publication.”).)

“Actual malice may be proved by direct or circumstantial evidence.” (Annette F., *supra*, 119 Cal. App. 4th at p. 1167.) “Factors such as failure to investigate, anger and hostility, and reliance on sources known to be unreliable or biased may in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication.” (Id. (internal

quotation omitted).) “However, any one of these factors, standing alone, may be insufficient to prove actual malice or even raise a triable issue of fact” (Annette F., *supra*, 119 Cal. App. 4th at p. 1167.) Similarly, “[a]lthough these factors may provide circumstantial evidence of actual malice in appropriate cases, their significance will vary depending on the extent to which they reflect on the defendant's subjective state of mind.” (Id., at p. 1169 *citing Reader's Digest*, *supra*, 37 Cal.3d at p. 258).

B. The Court of Appeal considered circumstantial evidence of facts that do not have any bearing on the truth of the allegedly defamatory statement thereby deviating from established law.

The rule, as set forth above, is that there must be sufficient evidence – clear and convincing evidence in this case where Mitchell is a public figure – that Twin Galaxies subjectively doubted the truth of its statement. To make this determination, it is important to focus on the statement itself.

The statement at issue was made in response to Young’s dispute claim that the video tape recordings of Mitchell’s Disputed Scores could not have been created from original, unmodified Donkey Kong arcade hardware. With this backdrop, it is clear that the statement was limited to Twin Galaxies’

investigation of video tapes. The words of the statement support this limitation as they too relate only to the video tape evidence of the Disputed Scores. Indeed, the gist and sting of the statement is contained in the words where Twin Galaxies gives its final opinion on Young's dispute claim and writes "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." This is the defamatory statement complained of, and it relates solely to the "taped" aspect of the performances. There is no mention of Mitchell's live performance at all.

Accordingly, the test for actual malice is whether Twin Galaxies had subjective doubt about the truth of the actual statement it published. That is, the relevant inquiry for the Court of Appeal on anti-SLAPP should have been whether Twin Galaxies had any subjective doubt that the video tape evidence of Mitchell's Disputed Scores could have originated from unmodified hardware.

But the Court of Appeal eschewed the well-recognized standard of focusing on the actual statement made by Twin Galaxies, and instead broadened the statement to encompass Mitchell's live performances of the Disputed Score *where the*

*statement in no way mentioned the live performances.* At best, the statement implied that Mitchell did not achieve the scores live, even that interpretation is a stretch considering the call to action for Twin Galaxies to adjudicate Young's dispute claim which related to the video tape footage of the scores. By broadening the scope of the statement, the Court of Appeal allowed evidence of Twin Galaxies failure to investigate Mitchell's claims that he achieved the Disputed Scores live to establish subjective doubt as to the truthfulness of the statement that was actually printed.

Herein lies the opportunity for this Court to exercise its institutional review power to ensure the uniform application of the law. Ever since the United States Supreme Court decided the New York Times case and required the showing of actual malice where appropriate, the rule in California and other states has been that actual malice must relate to the statement at issue. The Court of Appeal in the matter at hand has ignored that rule and instead substituted its own. The Court of Appeal's rule – which now enjoys *stare decisis* precedent status – is that the declarant's state of mind in a defamation matter is no longer determined by the subjective belief in the truth of the statement printed, but may instead be determined by the declarant's subjective belief of facts that are outside of the statement. This is not the law, and the decision should be reviewed for this reason

## CONCLUSION

Twin Galaxies respectfully requests that the Court use its institutional power to ensure uniformity in the application of the law and grant the instant petition for review. Review is necessary to uphold the important Constitutional right to freedom of speech.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "D. Tashroudian". The signature is stylized with a large "D" and a long, sweeping flourish.

---

David A. Tashroudian, Esq.  
Attorney for Appellant  
Twin Galaxies, LLC

## CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.504(d)(1) of the California *Rules of Court*, I hereby certify that this petition for review contains 2438 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the petition.

A handwritten signature in black ink, appearing to read "D. Tashroudian", written over a horizontal line.

David A. Tashroudian, Esq.

**EXHIBIT A -- COURT OF APPEAL OPINION**

Mitchell v. Twin Galaxies  
(2021) 70 Cal. App. 5th 207



Filed 10/12/21

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

WILLIAM JAMES MITCHELL,

Plaintiff and Respondent,

v.

TWIN GALAXIES, LLC,

Defendant and Appellant.

B308889

(Los Angeles County  
Super. Ct. No. 19STCV12592)

APPEAL from an order of the Superior Court of Los Angeles County. Gregory N. Alarcon, Judge. Affirmed.

Tashroudian Law Group and David A. Tashroudian for Defendant and Appellant.

Manning & Kass, Ellrod, Ramirez, Trester, James E. Gibbons, Steven J. Renick and Anthony J. Ellrod for Plaintiff and Respondent.

William “Billy” Mitchell brought suit against Twin Galaxies, LLC for defamation and false light after Twin Galaxies issued a statement asserting Mitchell’s world record scores in the Donkey Kong arcade game were not achieved on original unmodified hardware as required under its rules. As a result, it removed all of Mitchell’s world record scores and banned him from participating in its leaderboards. The trial court denied Twin Galaxies’ special motion to strike under the strategic lawsuits against public participation statute (anti-SLAPP motion). (Code Civ. Proc., § 425.16.) Because Mitchell showed a probability of prevailing on his claims, the trial court properly denied the anti-SLAPP motion. We affirm the order.

### **FACTS**

Mitchell holds world records in several video games, including Donkey Kong and Pac-Man. In 1999, Mitchell achieved the first perfect score in the Pac-Man arcade game and was recognized as the “Video Game Player of the Century” by NAMCO, the maker of Pac-Man.

At issue in this case are three of Mitchell’s world record scores for the arcade game Donkey Kong. For ease of reference, we refer to them as the “King of Kong score” in which he scored 1,047,200 points on December 28, 2004, the “Mortgage Brokers score” in which he scored 1,050,200 points on July 14, 2007, and the “Boomers score” in which he scored 1,062,800 points on July 31, 2010. Mitchell has appeared in several documentaries on competitive gaming, including a film titled *The King of Kong: A Fistful of Quarters* about an opponent’s journey to the world record score for Donkey Kong.

Twin Galaxies was founded by Walter Day in 1982. Day partnered with videogame adjudicators, such as the International Video Game Hall of Fame and Guinness World Records, to facilitate and organize videogame competitions. From 1982 to 2014, Twin Galaxies adjudicated world records through on-site referees or by video. Video adjudication was introduced in the 1990s so players could participate from their homes remotely.

In 2014, Day sold Twin Galaxies to Jason “Jace” Hall. Hall is also a well-known figure in the video game industry with experience in video game design, function, and hardware. Twin Galaxies operates a website at [www.twingalaxies.com](http://www.twingalaxies.com), where, among other things, competitive video game rules are set, player performances are measured, and records may be viewed and challenged. The Twin Galaxies website also provides a forum for members to discuss all things related to video games.

Twin Galaxies publishes leaderboards on its website for thousands of video game titles across dozens of video game platforms, including arcade machines, game consoles, and emulation platforms such as Multiple Arcade Machine Emulator or M.A.M.E. The leaderboards recognize achievements for high score or fastest time, and they rank players in those, and other, categories. Records and rankings appearing on the Twin Galaxies leaderboards have been used by Guinness World Records in several Guinness World Records Gamer’s Edition books and continue to be recognized as world records by the Guinness organization and others.

Twin Galaxies provides a process to dispute a score appearing on a leaderboard. Once a score dispute claim is submitted, it is placed into a public dispute voting forum where the gaming community will publicly discuss, debate, and vote on

the veracity of the claim and present evidence to support or refute the score.

*The Dispute Claim*

Jeremy Young, who was registered through the Twin Galaxies website under the name “Xelnia,” disputed Mitchell’s King of Kong score, Mortgage Brokers score and Boomers score (the Disputed Scores). Young claimed the Disputed Scores were not achieved on original Donkey Kong arcade hardware as required under the rules. Instead, the Disputed Scores were achieved on an emulation platform such as the M.A.M.E. system. Young examined video tapes of the Disputed Scores and found certain images and anomalies which he asserted could not be produced by the original Donkey Kong arcade hardware. He believed those images could only be produced through the use of a M.A.M.E. system.

Young presented evidence that original Donkey Kong arcade printed circuit board (PCB) hardware draws the Donkey Kong levels frame-by-frame with the first frame drawing 1/2 portions of five girders, and the rest of the frames filling in those girders. Young presented evidence that the Donkey Kong game on emulation software – that is the game loaded on a computer other than a PCB – similarly draws the game’s levels frame-by-frame, but with the first frame drawing three girders, with one girder having a protruding line which has been nicknamed the “girder finger.”

Young posted screenshots from video footage of the Disputed Scores which showed Donkey Kong levels with three girders in the first frame, with one being the girder finger. There were other unexplained anomalies and artifacts in the footage

which led him to believe the games played in the videos were inconsistent with original Donkey Kong arcade games.

Twin Galaxies posted digital copies of the video footage on its website, inviting its community members to investigate and comment on the dispute claim. It also conducted its own investigation of Young's dispute. On April 12, 2018, Twin Galaxies published the following statement:

“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.

We have notified Guinness World Records of our decision.

On 02-02-2018 Twin Galaxies member Jeremey Young (@xelnia) filed a dispute claim assertion against the validity of Billy Mitchell's historical and current original arcade Donkey Kong score performances of 1,047,200 (the King of Kong “tape”), 1,050,200 (the Mortgage Brokers score), and 1,062,800 (the Boomers score) on the technical basis of a demonstrated impossibility of original unmodified Donkey Kong arcade hardware to produce specific board transition images shown in the videotaped recordings of those adjudicated performances.

[¶] . . . [¶]

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.

In addition to Twin Galaxies' own investigation into the dispute case assertions, at least two different 3rd parties

conducted their own explorations and came to identical conclusions.

Most notable was the 3rd party (Carlos Pineiro) that Billy Mitchell engaged to help examine the dispute case claims on his behalf, utilizing whatever original equipment Billy could provide, whose final finding was consistent with Twin Galaxies investigation and others.

[¶]

**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.

[¶] . . . [¶]

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.**

[¶]

Twin Galaxies has also investigated this matter as comprehensively as reasonably possible to make sure that its findings are as informed as possible.

[¶] . . . [¶]

**With this ruling Twin Galaxies can no longer recognize Billy Mitchell as the 1st million point Donkey Kong record holder.”**

The statement was distributed to the public through Twin Galaxies’ website and social media platforms, where it garnered media attention from mainstream news outlets such as The New York Times, The Washington Post, and Variety. The media reported Twin Galaxies removed Mitchell’s world records and banned him because he cheated. Mitchell twice demanded a retraction, which Twin Galaxies denied. After initially stripping Mitchell of his world records, Guinness World Records reinstated them on June 18, 2020, after it conducted its own investigation.

*The Lawsuit*

Mitchell brought suit against Twin Galaxies for defamation and false light, alleging Twin Galaxies implied he cheated to achieve his scores. Mitchell further alleged special damages arose from the defamation because he uses the notoriety associated with his professional gaming reputation to promote his hot sauce company, Rickeys’ Hot Sauce.

*Twin Galaxies’ anti-SLAPP motion*

Twin Galaxies filed an anti-SLAPP motion, contending its statement arose from protected activity and Mitchell could not establish a probability of success on each of his causes of action. In support of its anti-SLAPP motion, Twin Galaxies submitted a declaration from Hall detailing the company’s investigation of the

dispute claim. Hall stated he obtained two sets of copies of the video tapes for the King of Kong score and the Mortgage Brokers score from two separate sources previously affiliated with Twin Galaxies. After he confirmed they were identical, he posted digital copies of the video tapes to the Twin Galaxies website for analysis and comment.

A team from Twin Galaxies, including Hall, conducted its own analysis of the video tapes. The team's analysis of the tapes showed the levels drawn in the first frame contained three girders—and the infamous girder finger. According to Hall, they tested extensively and could not avoid finding the girder finger in the two tapes. They also extensively tested gameplay that was captured directly from an unmodified Donkey Kong arcade PCB and were never able to capture the levels containing three girders or the girder finger. From this technical analysis, Twin Galaxies concluded Young's dispute claim was valid and issued its statement.

#### *Mitchell's Opposition*

Mitchell opposed the anti-SLAPP motion and submitted his own evidence to counter Twin Galaxies'. Mitchell accused Twin Galaxies of fabricating a dispute to draw attention to the website and increase revenue. Mitchell stated in a declaration he urged Hall to interview a number of witnesses, including Walter Day, the founder of Twin Galaxies, as well as the referees and others who witnessed his live performances for the Disputed Scores. He recounted that Hall repeatedly refused to do so and told Mitchell and Day that he "didn't care" about any eyewitnesses.

Mitchell described the rules established by Day for the Mortgage Broker score game. Twin Galaxies assigned two referees to adjudicate Mitchell's game in July 2007 at a



convention hosted by the Florida Association of Mortgage Brokers. Day worked with the Senior Engineer at Nintendo to verify the Donkey Kong hardware was unmodified. After his examination of the hardware, the Nintendo engineer sent it directly to the organizers of the convention, who put it into the Donkey Kong machine and locked it in a hotel room. Mitchell affirmed he did not have access to the hardware before or after his performance.

Mitchell achieved the new Donkey Kong record on July 14, 2007. The Twin Galaxies referees documented the score and confirmed it. The convention organizers then returned the hardware to the Nintendo Senior Engineer for re-verification. After he confirmed the hardware remained legitimate, he mailed it to Mitchell via UPS. Mitchell submitted declarations from the referees, the organizers, and eyewitnesses at the convention to attest to these facts.

In 2010, Mitchell attempted the Donkey Kong record once more at Boomers Arcade in Florida. An original Donkey Kong arcade machine was provided to Boomers Arcade by a local arcade machine vendor. Mitchell submitted a declaration from the vendor attesting to the condition of the machine and that it contained original unmodified hardware for the world record attempt. Mitchell further submitted declarations from the Twin Galaxies referees assigned to adjudicate the Boomers score. Declarations from the manager of Boomers Arcade and the vendor's employee who delivered the Donkey Kong machine confirmed the machine contained the proper hardware and settings.

Mitchell also challenged the chain of custody of the video tapes provided to Twin Galaxies. In particular, he asserted one of the individuals who purportedly held possession of the tapes for ten years and sent it to Hall indicated in emails he had a “master plan” to “take [Mitchell] down.” Mitchell also alleged the video tapes may have been altered because the version of M.A.M.E. which displays the controversial finger girder was not available in 2004, when he achieved the King of Kong score.<sup>1</sup> Mitchell further questioned the veracity of the video tapes, noting they did not contain his image or his voice as the video of his perfect Pac-Man score did.

*Twin Galaxies’ Reply*

In reply, Twin Galaxies submitted further declarations to dispute Mitchell’s assertions regarding the chain of custody issue and Twin Galaxies’ failure to consider eyewitness evidence of the Disputed Scores.

Twin Galaxies submitted declarations by the individuals who provided it with the tapes attesting to the authenticity of the video tapes and that they were not altered in any way. Hall explained in a second declaration that Twin Galaxies chose not to solicit any eyewitness evidence because: (1) the King of Kong score was adjudicated by videotape and there was no evidence of a live performance; (2) Mitchell never asked Hall to interview anyone specifically; (3) no one posted any evidence on the Twin Galaxies website regarding a live performance prior to the

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<sup>1</sup> Twin Galaxies objected to this evidence below on the grounds it lacks foundation and is unreliable. It contends the trial court erroneously overruled these objections. Twin Galaxies, however, fails to provide factual or legal support for its contention of error. We therefore consider the issue waived. (*In re Marriage of McLaughlin* (2000) 82 Cal.App.4th 327, 337.)

April 12, 2018 statement; and (4) evidence of the live performances was irrelevant to the dispute because the dispute related solely to whether the gameplay captured on the videotapes was from an original unmodified Donkey Kong PCB. Additional exhibits and declarations were also submitted to address other factual issues raised in Mitchell's opposition.<sup>2</sup>

*Mitchell's Sur-reply*

The trial court granted Mitchell's request to submit a sur-reply to address the new evidence. Mitchell argued Twin Galaxies' new evidence was irrelevant and immaterial to the anti-SLAPP motion. He also disputed the factual assertions contained in Twin Galaxies' reply declarations. In particular, he submitted declarations contradicting evidence that the video tapes relied on by Twin Galaxies originated from Mitchell, Todd Rogers (one of the referees for the Mortgage Broker score and the Boomers score), and Walter Day.

*The Trial Court's Order*

In addition to the anti-SLAPP motion, Twin Galaxies moved for an order requiring Mitchell to post an undertaking pursuant to Code of Civil Procedure section 1030, subdivision (a) because he is an out-of-state litigant and there is a reasonable possibility Twin Galaxies will obtain judgment in the action or special proceeding. (Civ. Proc. Code, § 1030.) The trial court denied the anti-SLAPP motion but granted the motion for

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<sup>2</sup> The parties submitted extensive evidence in connection with the anti-SLAPP proceedings. We set forth the evidence which we feel is necessary to our determination of this appeal. We exclude the remainder of the evidence relied on by the parties because it only serves to underscore our observation that there exist many factual disputes in this case which may not be resolved on review of an anti-SLAPP ruling.

undertaking, ordering Mitchell to post a bond in the amount of \$81,225. Twin Galaxies appealed.

### **DISCUSSION**

The parties agree, as do we, that Mitchell’s claims for defamation and false light arise from protected activity and meet the first prong of the anti-SLAPP analysis. We therefore focus on the second prong: whether Mitchell has shown a probability of prevailing on his claims. Twin Galaxies contends Mitchell has not provided sufficient evidence to show the challenged statement was false or it made the statement with actual malice. We are compelled by the standard of review, however, to conclude Mitchell has demonstrated the requisite “minimal merit” to his claims to defeat Twin Galaxies’ anti-SLAPP motion. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291 (*Soukup*).)

#### **A. The Anti-SLAPP Statute**

The Legislature enacted the anti-SLAPP statute to address the societal ills caused by meritless lawsuits filed to chill the exercise of First Amendment rights. (Code of Civ. Proc., § 425.16, subd. (a).) The statute accomplishes this by providing a special procedure for striking meritless, chilling claims at an early stage of litigation. (See Code of Civ. Proc., § 425.16, subd. (b)(1); *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055–1056.)

The anti-SLAPP statute establishes a two-step procedure to determine whether a claim should be stricken. In the first step, the court decides whether the movant has made a threshold showing that a challenged claim arises from statutorily defined protected activity. (*Rusheen v. Cohen, supra*, 37 Cal.4th at p. 1056.) Once the threshold showing has been made, the burden shifts to the plaintiff to demonstrate a probability of prevailing on

his claims. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) To show a probability of prevailing, the opposing party must demonstrate the claim is legally sufficient and supported by a sufficient prima facie showing of evidence to sustain a favorable judgment if the evidence it has submitted is credited. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.)

“ ‘In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant ([Code Civ. Proc.], § 425.16, subd. (b)(2)); though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant’s evidence supporting the motion defeats the plaintiff’s attempt to establish evidentiary support for the claim. [Citation.]’ [Citations.]” (*Taus v. Loftus* (2007) 40 Cal.4th 683, 714 (*Taus*)). We accept as true the evidence favorable to the plaintiff. A plaintiff must establish only that the challenged claims have minimal merit to defeat an anti-SLAPP motion. (*Soukup, supra*, 39 Cal.4th at p. 291.)

We review the denial of an anti-SLAPP motion de novo. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067.)

## **B. Defamation and False Light**

“Defamation is the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or that causes special damage.” (*Grenier v. Taylor* (2015) 234 Cal.App.4th 471, 486.) If the person defamed is a public figure, he must show, by clear and convincing evidence, that the defamatory statement was made with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false. (*Reader’s Digest Assn. v. Superior Court*

(1984) 37 Cal.3d 244, 256 (*Reader's Digest*); *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 285–286.) Mitchell concedes he is a “limited” public figure for purposes of the anti-SLAPP proceedings who is required to show actual malice to prevail.

In evaluating whether a plaintiff has made a prima facie showing of actual malice, “we bear in mind the higher clear and convincing standard of proof.” (*Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 358.) By contrast, the law does not require a plaintiff to prove the element of falsity by clear and convincing evidence, only by a preponderance of the evidence. (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 76 (*Alnor*).

“‘False light is a species of invasion of privacy, based on publicity that places a plaintiff before the public in a false light that would be highly offensive to a reasonable person, and where the defendant knew or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed.’” (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1264.) “To establish a false light claim based on a defamatory publication, a plaintiff ‘must meet the same requirements’ as for a defamation claim.” (*Balla v. Hall* (2021) 59 Cal.App.5th 652, 687.)

### **C. Mitchell Made a Prima Facie Showing of Falsity**

Twin Galaxies contends Mitchell failed to demonstrate its statement was false and therefore cannot show a probability of prevailing. To meet his burden, Mitchell relies on his own declaration and others’ declarations attesting to the equipment used. We conclude Mitchell has met his burden.

As to the King of Kong score, Mitchell stated he achieved the score on a machine at the showroom of Arcade Game Sales. Robert Childs, the owner of Arcade Game Sales, affirmed only original unmodified hardware was used in its Donkey Kong machines. He stated, “There is no possibility that [Mitchell’s] 1,047,200 score (the King of Kong ‘tape’) occurred on anything but original unmodified hardware . . . .” Mitchell further submitted evidence that the M.A.M.E. version that produces the girder finger found by Twin Galaxies and others on the videotape was not available until 2007, three years after the King of Kong score was achieved. This evidence would support a finding the videotape may have been altered and may be unreliable.

As to the Mortgage Brokers score, Mitchell provided a detailed description (see *ante*) of the procedure established by Day to ensure the hardware was unmodified and Mitchell did not have access to it, including that the Senior Engineer at Nintendo verified the hardware both before and after the record was achieved. In support, Mitchell submitted declarations from Day, the referees, the organizers, and other eyewitnesses at the convention.

As to the Boomers score, Mitchell submitted a declaration from the vendor of the machine he used attesting to the condition of the machine and that it contained original unmodified hardware. Declarations from the Twin Galaxies referees, the manager of Boomers Arcade, and the vendor’s employee also attested to the machine’s original unmodified hardware.

Twin Galaxies disputes the relevance of the evidence provided by Mitchell, asserting it focuses on the live performances rather than the videotapes on which Twin Galaxies' analysis is based. Twin Galaxies contends Mitchell misconstrues its paragraphs-long statement removing all of Mitchell's scores from its leaderboards and banning him from participating in them in the future. It argues its statement is limited to a finding that the videotape recordings of the King of Kong score and the Mortgage Broker score performances "that [are] historically used by Appellant to substantiate the score and place it in the score database was not produced by the direct feed output of an original unmodified arcade PCB." In short, Twin Galaxies confines its investigation and its statement to whether the video tapes for those two scores show anomalies, including the infamous finger girder, that cannot be produced from original Donkey Kong arcade hardware. It contends Mitchell failed to prove the falsity of that narrowly interpreted statement because Mitchell's evidence relates to the live performances only and he provides no evidence to show the gameplay recorded on the video tapes was from an original unmodified machine.

We do not agree that Twin Galaxies' statement is limited to a finding that the video recordings of the Mortgage Brokers score and the King of Kong score show they were not achieved on original unmodified Donkey Kong hardware. If Twin Galaxies' findings were limited to only those two scores, it would not have removed all of Mitchell's scores from its leaderboards, including the Boomers score, about which it did not make a definitive determination, and all other scores which were not subject to investigation. We interpret Twin Galaxies' statement as the media and Mitchell did: it accused Mitchell of cheating to achieve



his world record scores. Accordingly, Mitchell was not limited to the video tape evidence for those two scores.

In any case, the video tapes and the live performances purportedly reflect the same gameplay and the same games. Twin Galaxies' argument rests on an assumption the video tape recordings of the Disputed Scores override any eyewitness declarations or other evidence. It essentially seeks to have us judge the probative value of competing evidence. We decline to do so because we do not weigh the credibility or comparative probative strength of competing evidence at this stage of the proceedings. (*Taus, supra*, 40 Cal.4th at p. 714.) Given the standard of review, we conclude Mitchell has met his burden to set forth prima facie evidence of falsity.

Even if we narrowly construe the challenged statement in the manner suggested by Twin Galaxies, its argument ignores Mitchell's chain of custody evidence that raises the possibility that the video tapes do not accurately portray his gameplay for the two scores, including that the video tapes are not originals, that they do not show his face or voice, that one of the individuals who provided the videos to Hall expressed bias against Mitchell and had a motive to alter the tapes, and that the version of M.A.M.E. that produces the finger girder was not available until 2004, after the King of Kong score was achieved. Again, we may not weigh the credibility or comparative probative strength of competing evidence; we must accept as true the evidence favorable to Mitchell. (*Soukup, supra*, 39 Cal.4th at p. 291.) Twin Galaxies' evidence does not prove the truth of its statement as a matter of law such that it negates Mitchell's evidence.

## **D. Mitchell Made a Prima Facie Showing of Actual Malice**

Twin Galaxies also argues Mitchell failed to present sufficient evidence that it made the challenged statement with actual malice, bearing in mind the higher clear and convincing standard of proof. (*Conroy v. Spitzer* (1999) 70 Cal.App.4th 1446, 1451–1452.) We conclude Mitchell has made the requisite showing.<sup>3</sup>

### **1. Legal Principles**

The existence of actual malice turns on the defendant’s subjective belief as to the truthfulness of the allegedly false statement. (*Reader’s Digest, supra*, 37 Cal.3d at p. 257; *Alnor, supra*, 148 Cal.App.4th at pp. 84–85.) Actual malice may be proved by direct or circumstantial evidence. Factors such as failure to investigate, anger and hostility, and reliance on sources known to be unreliable or biased “may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication.” (*Reader’s Digest, supra*, 37 Cal.3d at pp. 257–258.) However, any one of these factors, standing alone, may be insufficient to prove actual malice or raise a triable issue of fact. (*Id.* at p. 258.)

In *Antonovich v. Superior Court* (1991) 234 Cal.App.3d 1041, 1052–1053 (*Antonovich*), the defendant won an election to the county board of supervisors. In a later election, he accused his opponent, who had been the incumbent in the first election, of

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<sup>3</sup> In its reply brief, Twin Galaxies contends the common interest privilege applies in this case. Not so. Civil Code section 47, subdivision (c), expressly states that the common interest privilege applies to communications made “without malice.” Here, Mitchell made a prima facie showing of actual malice.

shredding and destroying files prior to the transfer of office because the cabinets were empty when he arrived at the office. He continued to make this accusation even after the opponent offered proof that the files existed and their respective staff members had met prior to the transition to discuss the organization of the files. There was no evidence the defendant took any steps to inquire into the truth of his opponent's statements even though the opponent offered to submit his proof for the defendant's inspection. (*Id.* at p. 1053.) The Court of Appeal found the trier of fact was entitled to conclude the defendant's " 'inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [the subject] charges,' which amounts to a 'purposeful avoidance of the truth' " so as to support a finding of actual malice. (*Ibid.*)

## **2. Analysis**

As in *Antonovich*, there is prima facie evidence of a similar decision to avoid facts that might confirm the probable falsity of the challenged statement. The record contains evidence that Hall failed to investigate facts tending to show the Disputed Scores were legitimately achieved on unmodified hardware despite Day's and Mitchell's attempts to convince him to do so.

On March 13, 2018, Day encouraged Hall to interview eyewitnesses and investigate the conclusion reached by the Senior Engineer from Nintendo. Hall refused. Instead, Hall asked, "How will you feel when I announce that Billy cheated?" Because this call occurred during the time Twin Galaxies was reportedly conducting its investigation, Day believed Hall had predetermined Mitchell's culpability.

Mitchell also unsuccessfully attempted to convince Hall to conduct further investigation from February to April 2018. During a February 24, 2018 telephone conversation, he urged Hall to interview Twin Galaxies personnel and eyewitnesses but Hall refused, saying he “doesn’t care what anybody says.” Hall again stated he “didn’t care” after Mitchell described the verification of the hardware with Nintendo’s Senior Engineer and that Mitchell lacked access to the hardware before and after the Mortgage Brokers score. Hall repeatedly refused to interview witnesses suggested by Mitchell in phone calls and texts in March and April 2018, stating “it doesn’t matter” and he “didn’t care.” Hall’s own statements that he “didn’t care” about evidence relevant to the hardware used by Mitchell may support a finding of a “‘purposeful avoidance of the truth.’” (*Antonovich, supra*, 234 Cal.App.3d at p. 1053.)

Even when Twin Galaxies contacted one of the referees to the Mortgage Brokers and Boomers scores,<sup>4</sup> the questions asked did not appear to be intended to elicit the truth. The referee was asked, in a text, whether there were “any shenanigans around any of Billy Mitchell’s scores?” The referee responded, “Perhaps . . . [I] mean anything is possible . . . but thats exactly why [I] called him out on things . . . just to make him prove right in front of me that there would be no questions.” Hall then continued to press the referee, asking whether any of Mitchell’s submitted scores were not achieved. Again, the referee equivocated, “I cannot say . . . simply because [I’ve] seen him play . . .” Hall further asked whether Day would have been

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<sup>4</sup> The other referee confirmed Twin Galaxies did not contact her regarding her adjudication of the Mortgage Brokers score or Boomers score.

aware of “shenanigans.” The referee responded that Day “sometimes is oblivious” but would have spoken up and not defended Mitchell if he knew the scores were invalid. Hall’s pointed questions do not suggest an attempt to determine the truth but an effort to direct the answer. This referee later attested to the accuracy of the Disputed Scores in his declaration in support of Mitchell’s opposition to the anti-SLAPP motion.

For purposes of an anti-SLAPP motion, we accept this evidence as true. (*Soukup, supra*, 39 Cal.4th at p. 291.) Just as in *Antonovich*, Twin Galaxies failed to take any steps to inquire into the truth of Mitchell’s statements even after he was provided the names of witnesses and Day confirmed the procedures under which the Disputed Scores were achieved.

The record also shows Twin Galaxies may have relied on biased sources to reach its conclusion. For example, the individual who provided Hall with copies of the videotapes for the King of Kong score and the Mortgage Brokers score indicated he had a “master plan” to “take [Mitchell] down.” Mitchell also attested to the animosity of the third party investigator working on behalf of Twin Galaxies, including his publicly expressed conclusion that Mitchell was guilty before the investigation began. An inference of actual malice may be made from Twin Galaxies’ failure to investigate and reliance on biased sources. (*Alnor, supra*, 148 Cal.App.4th at pp. 84–85.)

Twin Galaxies argues the evidence shows it held a good faith belief in the truth of its statement and thus did not publish with actual malice, citing to its extensive testing of the original hardware and the actual converter board used to record the Disputed Scores. Twin Galaxies further argues it held a good faith belief in the truth of its statement because three other

groups reached the same conclusion as it did, including Young, Chris Gleed, and Carlos Pineros.<sup>5</sup> According to Twin Galaxies, the fact that it and others could not avoid the girder finger during testing was dispositive and could only lead to the conclusion reached in its statement—that the King of Kong and the Mortgage Brokers scores “**were not produced by the direct feed output of an original unmodified Donkey Kong Arcade PCB.** [Emphasis in original.]”

As a result, Twin Galaxies excuses its failure to investigate Mitchell’s evidence on the ground the witnesses to the live performance have no bearing on the technical nature of Young’s dispute claim. According to Twin Galaxies, the only issue in dispute is whether the videotape recordings of the King of Kong score and the Mortgage Brokers score could have come from original unmodified Donkey Kong hardware. Neither the eyewitness testimony nor the Senior Engineer’s verification was relevant to that precise issue.

We reject this narrow interpretation of the challenged statement for the same reasons discussed above. Again, Twin Galaxies relies on competing evidence to argue a lack of actual malice. Again, we conclude we may not weigh the credibility or comparative probative strength of competing evidence. (*Taus, supra*, 40 Cal.4th at p. 714.) Even bearing in mind the higher clear and convincing standard of proof for actual malice, our review is limited to whether Twin Galaxies’ evidence

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<sup>5</sup> The parties dispute whether Chris Gleed worked on behalf of Twin Galaxies and whether Carlos Pineros worked on behalf of Mitchell. This factual dispute does not affect our analysis because we do “‘not weigh the credibility or comparative probative strength of competing evidence . . . .’” (*Taus, supra*, 40 Cal.4th at p. 714.)

demonstrates Mitchell cannot prevail as a matter of law. (*Alnor, supra*, 148 Cal.App.4th at p. 84.) We conclude the motion was properly denied because Twin Galaxies’ evidence does not defeat as a matter of law Mitchell’s prima facie evidence in support of his claims.

Neither are we persuaded by the cases cited by Twin Galaxies—*Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146 (*Annette F.*) and *Rosenaaur v. Scherer* (2001) 88 Cal.App.4th 260 (*Rosenaaur*). In both cases, the defendants were not alerted to any potential falsity in their statements prior to publication. In *Annette F.*, the plaintiff introduced no evidence to contradict the defendant’s declaration that she held a good faith belief in the truthfulness of her statement. (*Annette F.*, at p. 1169.) In *Rosenaaur*, the defendants relied in good faith on public records to make their statement and were not aware of any information that could contradict what was contained in the public records. (*Rosenaaur*, at pp. 272, 276.) Here, there is ample evidence that Twin Galaxies was alerted to potential contradictory facts.

Because we conclude Mitchell’s defamation claim survives the anti-SLAPP motion, his false light claim stands as well. (*Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1385, fn. 13 [false light claim “stands or falls on whether it meets the same requirements as the defamation cause of action.”].)

**DISPOSITION**

The order denying Twin Galaxies' anti-SLAPP motion is affirmed. Mitchell is awarded his costs on appeal.

**CERTIFIED FOR PUBLICATION**

OHTA, J.\*

We Concur:

GRIMES, Acting P. J.

STRATTON, J.

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.



**PROOF OF SERVICE**

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am over the age of 18 and not a party to this action. I am employed in the county where the service occurred; my business address is 12400 Ventura Blvd., Suite 300, Studio City, CA 91604. On the undersigned date, I caused to be served the following documents:

**APPELLANT TWIN GALAXES, LLC'S  
PETITION FOR REVIEW**

I caused the documents to be served on the following:

Anthony Ellrod  
Manning & Kass  
Ellrod, Ramirez, Trester LLP  
801 S. Figueroa Street, 15th  
Floor  
Los Angeles, CA 90017  
Email: [aje@manningllp.com](mailto:aje@manningllp.com)  
*Counsel for Respondent*

Hon. Gregory Alarcon  
c/o Superior Court Clerk  
Judge of the Superior Court  
111 N. Hill Street, Dept. 36  
Los Angeles, CA 90012

I emailed the documents to Mr. Ellrod. My electronic service address is [david@tashlawgroup.com](mailto:david@tashlawgroup.com). I mailed the documents by USPS to Judge Alarcon of the Superior Court c/o the Superior Court Clerk pursuant to my firm's regular practice. Electronic filing of this Petition shall constitute service on clerk/executive officer of the Court of Appeal. (Cal. R. Crt., 8.500(f)(1).)

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct. Executed this 19th day of November, 2021 at Los Angeles, California.



\_\_\_\_\_  
David A. Tashroudian

# **EXHIBIT G**

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES**

**Civil Division**

Central District, Stanley Mosk Courthouse, Department 36

**19STCV12592**

**WILLIAM JAMES MITCHELL vs TWIN GALEXIES, LLC**

July 30, 2020

8:30 AM

Judge: Honorable Gregory W. Alarcon

CSR: None

Judicial Assistant: C. Mason

ERM: None

Courtroom Assistant: A. Aguilar

Deputy Sheriff: None

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**APPEARANCES:**

For Plaintiff(s): James Edwin Gibbons

For Defendant(s): David Ali Tashroudian (Telephonic)

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**NATURE OF PROCEEDINGS:** Ex-Parte Proceedings TO STRIKE NEW EVIDENCE IN  
REPLY

Matter is called for hearing.

Ex parte to strike new evidence is denied. Plaintiff to file and serve a sur-reply only on the  
alleged new material in the reply by 09/25/20.

Notice waived.

# **EXHIBIT H**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION Eight

William James Mitchell

*Plaintiff and Respondent*

v.

Twin Galaxies, LLC

*Defendant and Appellant*

Appeal No. B308889

Super. Ct. No. 19STCV12592

APPLICATION FOR EXTENSION OF TIME

1. To file Apellant's Opening Brief to Mar 31, 2021 Total days: ( 30 )  
(Document Name) (Date)

2. I need more time for the following reason(s) (specify):  
Please see attached declaration of David Tashroudian on form APP-031A.

For attorneys filing application on behalf of client, I certify that I have delivered a copy of this application to my client (Cal. Rules of Court, rule 8.60).

I declare under penalty of perjury that the foregoing is true and correct. Executed at Los Angeles, California, on Feb 24, 2021.

David Tashroudian, Esq.  
(TYPE OR PRINT NAME)

  
(SIGNATURE)

Bar No.: 266718

Phone No.: (818) 561-7381

	Vol./Pgs.	RT:	Vol./Pgs.	RT:	Date Filed
Record Size:					<u>NOT FILED</u>
Appendix/CT:					
Augmentation					
Briefs Filed:					
			AOB		
			RB		
Number of Previous Extension Requests	<u>1</u>	To	<u>03/01/2021</u>		<u>( 30 )</u>

Were any previous extension grants marked "no further"? (Yes or No) NO

EXTENSION OF TIME IS:

Granted to APRIL 01, 2021  
 Denied

Date: Feb 25, 2021

**BIGELOW, P.J.**

(SIGNATURE OF PRESIDING JUSTICE)

APPELLANT:	Twin Galaxies, LLC	COURT OF APPEAL CASE NUMBER: B308889
RESPONDENT:	William James Mitchell	SUPERIOR COURT CASE NUMBER: 19STCV12592

**ATTACHED DECLARATION (COURT OF APPEAL)**

*(This form must be attached to another form or court paper before it can be filed in court.)*

I do not believe Respondent would be prejudiced by the brief extension requested herein. There is no exigency to have the appeal heard, nor is there any exigency to have the brief filed before the requested extension. This matter involves the appeal of an order denying an anti-SLAPP motion implicating Appellant's right to free speech. The issues are circumscribed to the alleged defamation of the Respondent which took place in April 2018. Respondent filed the civil case in April 2019 right before the statute of limitations ran, and he served the summons and complaint in this matter on January 31, 2020. There has been no urgency on Respondent's part to file, or serve his claim, and therefore there should not be any prejudice if Appellant's opening brief is filed after a brief 30 day extension. [CRC 8.63(b)(1).]

I have asked counsel for Respondent to stipulate, and he has refused. [CRC 8.63(b)(2).]

The record contains 2484 pages, and 83 exhibits. According to the Rules of Court, the size of the record requires nine (9) separate 300-page volumes. The record, in the form of an appendix, has not yet been filed. The time to review and analyze the record to prepare a cogent brief is great. [CRC 8.63(b)(3).]

The issues are complex in that they have to do with Appellant's right to free speech in the media with respect to a public figure, and implicate Constitutional issues relating to the sufficiency of evidence to prove actual malice. The relevant authority to support Appellant's argument on appeal is spread among the law on special motions to strike, the law on defamation, the law on burdens of proof (regarding actual malice), and the law on the Constitutional right to free speech. The jurisprudence on these areas of law are well-developed, and there is a huge volume of material to review in order to present well-reasoned arguments to the Court. [CRC 8.63(b)(4).]

Finally, I have a trial starting on March 5, 2021 in the Riverside Superior Court (Case No. MCC1800534) and preparing for trial has created a time-limited commitment that has prevented me from timely filing Appellant's opening brief. I am lead trial counsel for six defendants. The time limits are mainly imposed by the fact that the Riverside Superior Court's Local Rules require the preparation of pre-trial documents -- such as exhibit lists, witness lists, motions in limine, and statements of uncontested facts -- to be prepared and exchanged in advance of trial. The date for exchange in this case is February 26, 2021. The local rules also require a meeting of counsel before trial, which in this case is scheduled for March 1, 2021. Preparation for trial, and all that goes along with it, has prevented me from filing the opening brief without impairing its quality. [CRC 8.63(b)(9).]

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

Date: February 24, 2021

David Tashroudian, Esq.

(TYPE OR PRINT NAME)



(SIGNATURE OF DECLARANT)

Attorney for     Appellant     Respondent  
 Other (specify):

<b>PROOF OF SERVICE (Court of Appeal)</b> <b>Mail, Electronic Service or Personal Service</b>	
Case Name:	Mitchell v. Twin Galaxies, LLC
Court of Appeal Case Number:	B308889
Superior Court Case Number:	19STCV12592

1. At the time of service I was at least 18 years of age and **not a party to this legal action.**
2. My  residence  business address is (*specify*): 12400 Ventura Blvd., Suite 300  
Studio City, CA 91604
- My electronic service address is: david@tashlawgroup.com
3. I mailed, electronically served or personally delivered a copy of the **Application for Extension of Time** as indicated below (*complete either a, b or c*):
- a.  **Mail.** I mailed a copy of the document identified above as follows:
- b.  **Electronic service.** I electronically served a copy of the document identified above as follows:
- c.  **Personal delivery.** I personally delivered a copy of the document identified above as follows:

Date mailed, electronically served or personally served: Feb 24, 2021

(1) Name of Person served: James E. Gibbons

On behalf of (*name or names of parties represented, if person served is an attorney*):

Respondent William James Mitchell

(a) Address:

801 S. Figueroa Street, 15th Floor, Los Angeles, CA 90017

(b) E-Mail Address: JEG@manningllp.com

(2) Name of Person served:

On behalf of (*name or names of parties represented, if person served is an attorney*):

(a) Address:

(b) E-Mail Address:

(3) Name of Person served:

On behalf of (*name or names of parties represented, if person served is an attorney*):

(a) Address:

(b) E-Mail Address:

4. I am a resident of or employed in the county where the mailing occurred. The document was served from (*city and state*): Los Angeles, California

Additional persons served are listed on the attached page (*See page 3*).

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

Date: Feb 24, 2021

David Tashroudian

(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)



(SIGNATURE OF PERSON COMPLETING THIS FORM)



<b>STATE OF CALIFORNIA</b> California Court of Appeal, Second Appellate District	<b><i>PROOF OF SERVICE</i></b>  <b>STATE OF CALIFORNIA</b> California Court of Appeal, Second Appellate District
Case Name: <b>Mitchell v. Twin Galaxies, LLC</b> Case Number: <b>B308889</b> Lower Court Case Number: <b>19STCV12592</b>	

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **david@tashlawgroup.com**
3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
REQUEST - REQUEST FOR EXTENSION OF TIME (FEE PREVIOUSLY PAID)	2021.02.24 - Application re Extension of Time [Twin Galaxies]

Service Recipients:

Person Served	Email Address	Type	Date / Time
James Gibbons Manning & Kass, Ellrod, Ramirez, Trester 130631	jeg@manningllp.com	e-Serve	2/24/2021 9:11:41 PM
David Tashroudian Tashroudian Law Group, APC 266718	david@tashlawgroup.com	e-Serve	2/24/2021 9:11:41 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

2/24/2021

Date

/s/David Tashroudian

Signature



Tashroudian, David (266718)

---

Last Name, First Name (PNum)

Tashroudian Law Group, APC

---

Law Firm

# **EXHIBIT I**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION Eight

William James Mitchell

*Plaintiff and Respondent*

v.

Twin Galaxies, LLC

*Defendant and Appellant*

Appeal No. B308889

Super. Ct. No. 19STCV12592

APPLICATION FOR EXTENSION OF TIME

1. To file Apellant's Opening Brief to Apr 8, 2021 Total days: ( 7 )  
(Document Name) (Date)

2. I need more time for the following reason(s) (specify):  
Please see attached declaration of David Tashroudian on form APP-031A.

For attorneys filing application on behalf of client, I certify that I have delivered a copy of this application to my client (Cal. Rules of Court, rule 8.60).

I declare under penalty of perjury that the foregoing is true and correct. Executed at Los Angeles California, on Mar 31, 2021.

David Tashroudian, Esq.  
(TYPE OR PRINT NAME)

  
(SIGNATURE)

Bar No.: 266718

Phone No.: (818) 561-7381

	Vol./Pgs.	Vol./Pgs.	Date Filed
Record Size:			<u>NOT FILED</u>
Appendix/CT:	_____ RT: _____	_____ RT: _____	_____
Augmentation	CT: _____ RT: _____	_____ RT: _____	_____
Briefs Filed:		AOB	_____
		RB	_____
Number of Previous Extension Requests	<u>2</u> To <u>04/01/2021</u>		<u>( 60 )</u>

Were any previous extension grants marked "no further"? (Yes or No) NO

EXTENSION OF TIME IS:

Granted to APRIL 08, 2021  
 Denied

Date: Apr 01, 2021

BIGELOW, P.J.  
(SIGNATURE OF PRESIDING JUSTICE)

APPELLANT:	Twin Galaxies, LLC	COURT OF APPEAL CASE NUMBER: B308889
RESPONDENT:	William James Mitchell	SUPERIOR COURT CASE NUMBER: 19STCV12592

**ATTACHED DECLARATION (COURT OF APPEAL)**

*(This form must be attached to another form or court paper before it can be filed in court.)*

I was recently vaccinated against COVID19, and as of the drafting of this declaration on March 31, 2021 I am experiencing the side effects of headache, fatigue, muscle aches and nausea. I am hopeful they will subside in the next few days, but it will be difficult for me to finalize the appellate brief today and tomorrow for filing, and thus my condition will impair the quality of the brief. I request only a seven (7) day extension of time to allow the side effects to subside.  
[CRC 8.63(b)(10).]

I do not believe Respondent would be prejudiced by the brief extension requested herein. There is no exigency to have the appeal heard, nor is there any exigency to have the brief filed before the requested extension. This matter involves the appeal of an order denying an anti-SLAPP motion implicating Appellant's right to free speech. The issues are circumscribed to the alleged defamation of the Respondent which took place in April 2018. Respondent filed the civil case in April 2019 right before the statute of limitations ran, and he served the summons and complaint in this matter on January 31, 2020. There has been no urgency on Respondent's part to file, or serve his claim, and therefore there should not be any prejudice if Appellant's opening brief is filed after a brief 30 day extension.  
[CRC 8.63(b)(1).]

I have asked counsel for Respondent to stipulate, and he has refused.  
[CRC 8.63(b)(2).]

The record contains 2484 pages, and 83 exhibits. According to the Rules of Court, the size of the record requires nine (9) separate 300-page volumes. The record, in the form of an appendix, has not yet been filed. The time to review and analyze the record to prepare a cogent brief is great.  
[CRC 8.63(b)(3).]


The issues are complex in that they have to do with Appellant's right to free speech in the media with respect to a public figure, and implicate Constitutional issues relating to the sufficiency of evidence to prove actual malice. The relevant authority to support Appellant's argument on appeal is spread among the law on special motions to strike, the law on defamation, the law on burdens of proof (regarding actual malice), and the law on the Constitutional right to free speech. The jurisprudence on these areas of law are well-developed, and there is a huge volume of material to review in order to present well-reasoned arguments to the Court.  
[CRC 8.63(b)(4).]

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

Date: March 31, 2021

David Tashroudian, Esq.

(TYPE OR PRINT NAME)



(SIGNATURE OF DECLARANT)

- Attorney for
- Appellant
- Respondent
- Other (specify):

**PROOF OF SERVICE (Court of Appeal)**  
**Mail, Electronic Service or Personal Service**

Case Name: **Mitchell v. Twin Galaxies, LLC**  
 Court of Appeal Case Number: **B308889**  
 Superior Court Case Number: **19STCV12592**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My  residence  business address is (specify): **12400 Ventura Blvd., Suite 300  
 Studio City, CA 91604**
- My electronic service address is: **david@tashlawgroup.com**
3. I mailed, electronically served or personally delivered a copy of the **Application for Extension of Time** as indicated below (complete either a, b or c):
- a.  **Mail.** I mailed a copy of the document identified above as follows:
- b.  **Electronic service.** I electronically served a copy of the document identified above as follows:
- c.  **Personal delivery.** I personally delivered a copy of the document identified above as follows:

Date mailed, electronically served or personally served: **Mar 31, 2021**

- (1) Name of Person served: **James E. Gibbons**

On behalf of (name or names of parties represented, if person served is an attorney):

**Respondent William James Mitchell**

(a) Address:

**801 S. Figueroa Street, 15th Floor, Los Angeles, CA 90017**

(b) E-Mail Address: **JEG@manningllp.com**

- (2) Name of Person served:

On behalf of (name or names of parties represented, if person served is an attorney):

(a) Address:

(b) E-Mail Address:

- (3) Name of Person served:

On behalf of (name or names of parties represented, if person served is an attorney):

(a) Address:

(b) E-Mail Address:

4. I am a resident of or employed in the county where the mailing occurred. The document was served from (city and state): **Los Angeles, California**

Additional persons served are listed on the attached page (See page 3).

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

Date: **Mar 31, 2021**

**David Tashroudian**

(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)



(SIGNATURE OF PERSON COMPLETING THIS FORM)



<b>STATE OF CALIFORNIA</b> California Court of Appeal, Second Appellate District	<b><i>PROOF OF SERVICE</i></b>  <b>STATE OF CALIFORNIA</b> California Court of Appeal, Second Appellate District
Case Name: <b>Mitchell v. Twin Galaxies, LLC</b> Case Number: <b>B308889</b> Lower Court Case Number: <b>19STCV12592</b>	

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **david@tashlawgroup.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
REQUEST - REQUEST FOR EXTENSION OF TIME (FEE PREVIOUSLY PAID)	2021.03.31 - Application re Extension of Time (For Filing) [Twin Galaxies]

Service Recipients:

Person Served	Email Address	Type	Date / Time
James Gibbons Manning & Kass, Ellrod, Ramirez, Trester 130631	jeg@manningllp.com	e-Serve	3/31/2021 2:32:30 PM
David Tashroudian Tashroudian Law Group, APC 266718	david@tashlawgroup.com	e-Serve	3/31/2021 2:32:30 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

3/31/2021

Date

/s/David Tashroudian

Signature

Tashroudian, David (266718)

---

Last Name, First Name (PNum)

Tashroudian Law Group, APC

---

Law Firm

**PROOF OF SERVICE**  
Case No. 19STCV12592

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is **TASHROUDIAN LAW GROUP, APC**, located 12400 Ventura Blvd., No. 300, Studio City, CA 91604. On March 22, 2022, I served the herein described document(s):

**DECLARATION OF DAVID A. TASHROUDIAN**

by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Woodland Hills, California addressed as set forth below.

X E-File - by electronically transmitting the document(s) listed above to [aje@manningllp.com](mailto:aje@manningllp.com) pursuant to an agreement of the parties.

by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

by overnight courier of the document(s) listed above to the person(s) at the address(es) set forth below.

Anthony J. Ellrod  
*aje@manningllp.com*  
**MANNING & KASS**  
**ELLROD, RAMIREZ, TRESTER LLP**  
801 S. Figueroa St, 15<sup>th</sup> Floor  
Los Angeles, California 90017-3012  
Telephone: (213) 624-6900  
Facsimile: (213) 624-6999

Attorneys for Plaintiff  
WILLIAM JAMES MITCHELL

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on March 22, 2022 at Woodland Hills, California.



---

Mona Tashroudian