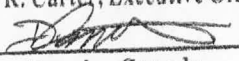


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*Superior Court of California*  
*County of Los Angeles*  
*Department 36*

**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  
~~SENTATIVE~~ **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](http://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

10/27/2020

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 from 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

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

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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.

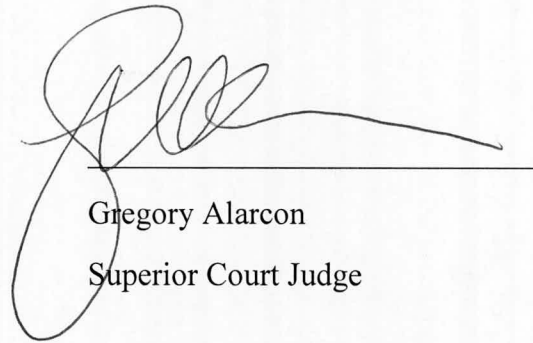
27 The same evidence goes toward Defendant's affirmative defense of the truth of the  
28 statement, which forms a complete defense to defamation, and provides support of a reasonable

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