

1 James E. Gibbons (State Bar No. 130631)  
2 [jeg@manningllp.com](mailto:jeg@manningllp.com)  
3 Chelsea M. Clayton (State Bar No. 318301)  
4 **MANNING & KASS**  
5 **ELLROD, RAMIREZ, TRESTER LLP**  
6 801 S. Figueroa St, 15<sup>th</sup> Floor  
7 Los Angeles, California 90017-3012  
8 Telephone: (213) 624-6900  
9 Facsimile: (213) 624-6999  
10 Attorneys for Plaintiff WILLIAM JAMES MITCHELL

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
**COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

11 WILLIAM JAMES MITCHELL,  
12  
13 Plaintiff,  
14  
15 v.  
16 TWIN GALAXIES, LLC,  
17  
18 Defendant.

Case No. 19STCV12592  
[The Hon. GREGORY W. ALARCON DEPT.  
36]

**PLAINTIFF'S OPPOSITION TO  
DEFENDANT'S ANTI-SLAPP MOTION;  
DECLARATIONS OF BILLY MITCHELL  
AND WALTER DAY**

**DATE: July 6, 2020**  
**TIME: 9:00 a.m.**  
**PLACE: Dept. 36**

Action Filed: 4/11/2019

**MANNING & KASS**  
**ELLROD, RAMIREZ, TRESTER LLP**  
ATTORNEYS AT LAW

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**

**Page**

I. INTRODUCTION..... 1

    A. The Lawsuit..... 1

        1. Mitchell's Status as a Video Game World-Record Holder..... 1

        2. Twin Galaxies Calls Mitchell a Cheater and Strips his Records..... 2

        3. Guinness' World Records' Deletion of Mitchell's Records. .... 4

        4. The Retraction Demands..... 4

        5. GWR's Reinstatement of Mitchell's Records..... 4

        6. Twin Galaxies' Biased Investigation and Refusal to Investigate  
            Evidence Favorable to Mitchell. .... 5

II. THE anti-SLAPP FRAMEWORK..... 8

III. MITCHELL CAN SHOW PROBABILITY OF SUCCESS ON THE MERITS ..... 9

    A. Mitchell Can Prove Falsity..... 9

    B. Mitchell Can Prove Constitutional Malice..... 12

IV. THE COMMON INTEREST PRIVILEGE DOES NOT APPLY ..... 15

V. CONCLUSION ..... 16

**TABLE OF AUTHORITIES**

**Cases**

*Baral v. Schnitt* (2016) 1 Cal.5<sup>th</sup> 376, 385..... 9

*Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 382..... 11

*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 725..... 15

*Fellows v. Nat'l Enquirer* (1986) 42 Cal.3d 234, 235, fn. 2..... 12

*Harte-Hanks Communications v. Connaughton* (1989) 491 U.S. 657, 667..... 12

*Mahnke v. Northwest Publications, Inc.* (Minn. 1968) 160 NW 2d 1, 11 ..... 15

*Masson v. New Yorker Magazine, Inc.* (9th Cir. 1992) 960 F.2d 896, 901..... 13

*Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 18 ..... 10

*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 285-286..... 12

*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 253..... 12

*Ringler Associates Inc. v. Maryland Casualty Co.* (2000) 80 Cal.App.4th 1165, 1181 ..... 10

*Widener v. Pacific Gas & Elec. Co.* (1977) 75 Cal.App.3d 415..... 14

**Statutes**

Civ. Code § 425.16, subd. (b)(1)..... 9

Civil Code section 47(c)(3)..... 15

**Treatises**

Levy, 4 *California Torts*, § 45.13 (2020)..... 13

**MEMORANDUM OF POINTS AND AUTHORITIES**

1  
2 Plaintiff William Mitchell submits the following Memorandum of Points and Authorities  
3 in Opposition to Defendant Twin Galaxies' Motion to Strike under section 425.16 of the California  
4 Code of Civil Procedure. As set out below, the Court should deny the motion, because even if the  
5 defamatory statements consist of protected activity, Mitchell has nonetheless produced admissible  
6 evidence – which must be accepted as true for purposes of ruling on the anti-SLAPP motion – that  
7 shows a probability of prevailing on his defamation and false light claims. Specifically, Mitchell  
8 can show that the charge that he cheated to obtain his records was false through scores of  
9 eyewitness testimonials and expert analysis, evidence which is so overwhelming that the Guinness  
10 Book of World Records, which had also invalidated Mitchell's scores, issued a public statement  
11 reinstating them.

12 Mitchell can also establish by clear and convincing evidence that the cheating allegations  
13 were made with constitutional malice – i.e., a reckless disregard for whether the statements were  
14 true or false – by showing that Twin Galaxies' principal refused repeatedly on numerous occasions  
15 to contact eyewitnesses to Mitchell's scores and to investigate other evidence, repeatedly saying  
16 "he didn't care" (although he relied on eyewitness testimony unfavorable to Mitchell); by refusing  
17 to fact check information; by relying on a clearly-biased "third party expert" to evaluate the  
18 scores; by refusing to provide equal access to evidence to individuals who supported Mitchell; and  
19 by refusing to retract the statements when shown incontrovertible proof they were false.

20 **I. INTRODUCTION**

21 **A. The Lawsuit.** On April 11, 2019, Mitchell filed this lawsuit against Twin Galaxies  
22 and filed a First Amended Complaint on March 12, 2020, set out in two causes of action: i)  
23 Defamation and ii) False Light. The lawsuit stemmed from Twin Galaxies' public statements on  
24 April 12, 2018, that Mitchell had achieved his long-standing world record video game scores by  
25 cheating. It stripped him of those records and banned him for life from submitting further records  
26 as punishment. To understand the devastation these false statements wreaked on him, it is  
27 necessary to briefly examine Mitchell's background.

28 **1. Mitchell's Status as a Video Game World-Record Holder.** In the early 1980's,

1 Mitchell rose to national prominence as video gaming's most recognizable figure, due in part to a  
2 photo spread in Life magazine. In 1999, Mitchell achieved the first perfect score on the original  
3 Pac-Man. As a result, Pac-Man's manufacturer, NAMCO, brought Mitchell to Japan for the Tokyo  
4 Game Show, naming him the "Video Game Player of the Century." In the 2000's, Mitchell went  
5 on to achieve additional record-breaking scores, including 1 million-plus scores on the original  
6 Donkey Kong Arcade game, including scores of 1,047,200 points (the King of Kong "tape"),  
7 1,050,200 points (the Mortgage Brokers score), and 1,062,800 points (the Boomers score).  
8 Mitchell Decl., ¶¶3-6.

9           Based on these and other scores, MTV selected Mitchell in 2006 as one of "The 10 Most  
10 Influential Video Gamers of All Time." *Id.*, ¶ 7. Mitchell also appeared in several documentaries  
11 on competitive gaming, most notably in *The King of Kong: A Fistful of Quarters* (2007). *Id.*, ¶¶ 4,  
12 10. Based on his video-gaming fame, Mitchell launched an entrepreneurial career, creating  
13 "Rickeys' Hot Sauce." *Id.*, ¶ 4. The business' success and continued success – prior to Twin  
14 Galaxies' defamation – depended and depends on his status as a video record holder, with the  
15 business' marketing prominently featuring references to Mitchell's video gaming fame. *Id.* ¶ 4,  
16 125-127.

17           Twin Galaxies' predecessor, Twin Galaxies Incorporated, was founded in 1981 by Walter  
18 Day, the "godfather" of video-game scorekeeping. In 1983, Day became the official supplier of  
19 verified video game scores to Guinness World Records. In 2012, Day stepped down from Twin  
20 Galaxies, selling it to Jace Hall in 2014. Declaration of W. Day, ¶ 2. Prior to 2018, Twin Galaxies  
21 had recognized Mitchell as the holder of several records on classic games, including Donkey  
22 Kong.

23           **2. Twin Galaxies Calls Mitchell a Cheater and Strips his Records.** At 1:00 a.m. on  
24 April 12th, 2018, Twin Galaxies issued a press release, claiming that Mitchell had cheated to  
25 achieve his Donkey Kong scores by not using original, unmodified hardware. Mitchell Decl., ¶ 2.  
26 Twin Galaxies' statement read, in relevant part and with emphasis in the original:

27           . . . Twin Galaxies administrative staff has unanimously decided to remove all of  
28 Billy Mitchell's scores as well as ban him from participating in our competitive  
leaderboards.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

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

\* \* \*  
**With this ruling Twin Galaxies can no longer recognize Billy Mitchell as the 1st million point Donkey Kong record holder.**<sup>1</sup>

Given Mitchell's legendary status as a world record video gamer, the statement was libelous on its face. Twin Galaxies asserted that Mitchell did not achieve his record scores legitimately -- i.e., through "the competitive rules" applicable to all players. Instead, Twin Galaxies claimed, Mitchell had achieved his scores only by impermissibly shortcutting those rules by playing the games not in public arcades with witnesses watching, but by using a modified game machine, so that he could manipulate the play and achieve a higher score than he could have otherwise. In short, Twin Galaxies charged, he cheated according to the Webster's dictionary's definition: to "violate rules dishonestly." That Twin Galaxies accused Mitchell of cheating was also reinforced by the punishment imposed, not only stripping him of his Donkey Kong records, but also in other arcade games, such as Pac-Man, and banning him from ever submitting scores in the future to Twin Galaxies. Twin Galaxies' own rulebook associates this punishment with, "Deliberate cheating" See: [https://www.twingalaxies.com/wiki\\_index.php?title=Policy:Activities-That-Can-Get-You-Banned-For-Life](https://www.twingalaxies.com/wiki_index.php?title=Policy:Activities-That-Can-Get-You-Banned-For-Life). Mitchell Decl., ¶ 67.

It took no "insider" understanding of the video-gaming world to recognize that Twin Galaxies had accused Mitchell of cheating, as the news commentary showed. *Variety*, for instance, pulled no punches in describing Twin Galaxies' decision (with emphasis added): "Famed high-

---

<sup>1</sup> The statement was also published on Twin Galaxies' website, and distributed to the public through its Facebook and Twitter platforms, where it garnered millions of impressions and resulted in articles from news outlets such as *The New York Times*, *The Washington Post*, *Variety*, and other mainstream media outlets. Mitchell Decl., ¶ 2.

1 score gamer Billy Mitchell, . . . was officially stripped of his “Donkey Kong” and other video  
2 game high scores and banned from submitting scores to the world’s largest tracker of video game  
3 world records *following a decision that he cheated*," Twin Galaxies announced today. See  
4 <https://variety.com/2018/gaming/news/king-of-kong-stripped-of-title-1202751358>. Mitchell Decl.,  
5 ¶ 70. Similarly, on-line magazine *Ars Technica's* article was titled: "Cheater! Billy Mitchell  
6 stripped of Scores, Banned from Premiere Scoreboard." See  
7 [https://arstechnica.com/gaming/2018/04/premiere-game-scoreboard-bans-billy-mitchell-in-](https://arstechnica.com/gaming/2018/04/premiere-game-scoreboard-bans-billy-mitchell-in-donkey-kong-cheating-scandal/)  
8 [donkey-kong-cheating-scandal/](https://arstechnica.com/gaming/2018/04/premiere-game-scoreboard-bans-billy-mitchell-in-donkey-kong-cheating-scandal/). *Id.* ¶ 71. In short, the statement was clearly libelous,  
9 unambiguously accusing Mitchell of cheating to achieve his fame.

10 **3. Guinness' World Records' Deletion of Mitchell's Records.** Based on Twin  
11 Galaxies' statement, Guinness World Records ("GWR") issued its own statement, declaring that in  
12 light of Twin Galaxies' statements, Mitchell's records were to be stripped from its record book as  
13 well. Mitchell Decl., ¶ 23.

14 **4. The Retraction Demands.** On September 9, 2019, Mitchell submitted a retraction  
15 demand to both Twin Galaxies and GWR, accompanied by over 20 sworn statements from  
16 eyewitnesses declaring that they had seen Mitchell achieve the scores in public venues, along with  
17 gameplay analysis and other evidence disproving Twin Galaxies' claims. Mitchell Decl., ¶ 74.

18 **5. GWR's Reinstatement of Mitchell's Records.** On June 18, 2020, after reviewing  
19 Mitchell's additional evidence, GWR issued a full reinstatement of his records. Mitchell Decl., ¶¶  
20 78-79, Exh. 18. The statement reads:

21 In the light of compelling new evidence received by Guinness World Records, the  
22 Records Management Team has unanimously decided to reverse decisions made  
23 in April 2018 in regards to videogame high scores achieved by Billy Mitchell  
24 between 1982 and 2010.

24 As of 10 June 2020, the following historical records for the arcade platform have  
25 been reinstated: [¶] 3 July 1999 - First Perfect Score on PAC-Man – 3,333,360  
26 Points [¶] 7 November 1982 – Highest score on Donkey Kong – 874,300 Points  
27 [¶] 4 June 2005 – Highest score on Donkey Kong – 1,047,200 Points [¶] 14 July  
28 2007 – Highest score on Donkey Kong – 1,050,200 Points [¶] 31 July 2010 –  
Highest score on Donkey Kong – 1,062,800 Points [¶] This reinstatement also re-  
cognizes Mr Mitchell as the first gamer to reach the kill screen on Donkey Kong  
(7 November 1982) and first gamer to score 1 million points on Donkey Kong (4  
June 2005).

1 Guinness World Records is always open to accepting new evidence for historical  
2 achievements, and to reviewing new and existing evidence for disputed titles. [¶]  
3 In this case, a re-examination of the records in question and the emergence of key  
4 eyewitness and expert testimonials led to a reversal of earlier disqualifications and  
5 the reinstating of Mr Mitchell's original records. The records archive has been  
6 updated accordingly to reflect this.

7 In contrast, although Mitchell provided the exact same "compelling new evidence" to Twin  
8 Galaxies that he did to GWR, Twin Galaxies refused to retract its defamatory statements. *Id.*, 80.

9 **6. Twin Galaxies' Biased Investigation and Refusal to Investigate Evidence**

10 **Favorable to Mitchell.** Prior to issuing its defamatory statements, Twin Galaxies ignored  
11 evidence indicating the cheating allegations were untrue, including eyewitnesses testimony to  
12 Mitchell's scores; refused to investigate facts which incontrovertibly disproved the allegations,  
13 saying it "does not care"; relied on biased experts; refused to share evidence supporting Mitchell;  
14 and refused to retract the libel in the face of overwhelming evidence that it was false (evidence it  
15 could have obtained initially). The evidence is discussed below.

16 *a. Willful Refusal to Interview Witnesses.* The most cursory, unbiased investigation  
17 would have revealed beyond doubt that the record-breaking Donkey Kong scores were *not* played  
18 on non-arcade hardware. Why? Because they were actually played on verified arcade hardware *in*  
19 *front of hundreds of people* who saw Mitchell achieve the scores. More than 20 of these witnesses  
20 have signed sworn affidavits testifying to their observation of Mitchell achieving his scores  
21 (Mitchell Decl., Exhs. 2-5, 9-17), and these witnesses include Twin Galaxies' own referees for the  
22 Mortgage Brokers' Convention (Mitchell Decl., Exhs. 9-10), and the Convention Chairs of that  
23 convention, Valerie Sanders and Sheila Kiniry, as well as another witness, R. Million. *Id.*, Exhs.  
24 11-13. Yet – incredibly -- Twin Galaxies and its principal, Jace Hall, refused to talk to these  
25 witnesses or consider their sworn testimony. With regard to the former referees, the refusal to  
26 contact them is inexcusable – they were the very people Twin Galaxies hired to verify the scores  
27 in the first place. Mitchell Decl., ¶ 84.

28 Before Twin Galaxies made its statement, Mitchell literally begged Hall many times to talk  
to Twin Galaxies' referees and the other eyewitnesses. Each time, Hall responded that he "doesn't  
care what anybody says." Mitchell Decl., ¶¶ 44, 45, 60. Mitchell also told Hall that Nintendo's



1 senior engineer had verified that the Mortgage Brokers' score had been played on original  
2 hardware, and the evidence indisputably proved it. Hall's response was again that he "didn't care."  
3 On March 23, 2018, Hall again told Mitchell that he did not care whether Mitchell could prove  
4 that he had achieved the Mortgage Broker's score on unmodified hardware. Mitchell Decl., ¶ 45,  
5 89. On March 31, 2018, Hall again told Mitchell that he did not care that the Nintendo engineer  
6 verified that the score was achieved on original hardware or what other eyewitnesses had to say.  
7 *Id.*, ¶ 60. Hall repeated that he did not care about eyewitnesses in telephone conversations on April  
8 3, 8, and 11. *Id.*, ¶ 61. *Hall refused to speak to any of the eyewitnesses who would vouch for*  
9 *Mitchell.* He refused to contact the former manager of Boomers Arcade where the 1,062,800 point  
10 record was achieved, even though his own Twin Galaxies dispute thread itself had located him.  
11 *Id.*, ¶¶ 53, 85. Yet, when it came time to interview witnesses who had adverse things to say about  
12 Mitchell, Hall eagerly spoke to them. *Id.*, ¶ 76. In short, if a witness had something that  
13 contradicted Twin Galaxies' cheating narrative, Hall ignored him or her. If a witness had  
14 something that corroborated that narrative, Hall was all ears.

15       **b. Disregard of Evidence in Mitchell's Favor.** As noted (Mitchell Decl., Exh. 19),  
16 Twin Galaxies itself verified Mitchell's hardware with the Senior Engineer at Nintendo, Wayne  
17 Shirk; Former Twin Galaxies owner, Walter Day; and the Florida Association of Mortgage  
18 Brokers. *See* Mitchell Exhs. 1, 11 and 12. To this day, Mitchell possesses the UPS box that Shirk  
19 used to return the hardware to Mitchell (Exh. 14). But despite Mitchell's entreaties, Hall  
20 disregarded the evidence entirely. In fact, on March 23, 2018, Hall publicly stated that “[Twin  
21 Galaxies] does not care about [verified hardware], or any other nonrelevant item to the dispute  
22 claim.” This refusal was baffling, since Hall was ignoring evidence that *Twin Galaxies’ own*  
23 *personnel* had verified.

24       Although Twin Galaxies' statements were based solely on an analysis of two videotapes of  
25 Mitchell's gameplay, the extraordinary fact is that Twin Galaxies not only does not have the  
26 original videotapes – it also does not have the original chain of custody documents relating to the  
27 videotapes nor the chain of custody over the associated documentation, such as the Twin Galaxies  
28 referees' submission forms and eyewitness declarations (which Hall admits). Mitchell Decl., ¶ 32,

1 Exh. 20; ¶¶ 60, 61, 89, 115.

2 c. *Refusal of Retraction Demands.* On September 9, 2019, Mitchell sent a retraction  
3 demand to both Twin Galaxies and GWR. The demand was accompanied by more than 20 sworn  
4 eye-witnesses declarations, expert technical analysis refusing Twin Galaxies' analysis, and other  
5 irrefutable proof that his records had been achieved on arcade hardware.

6 But rather than reviewing the material in good faith, Hall began exploring options to sue  
7 Mitchell in a class action lawsuit. Mitchell Decl., Exh. 36 [email from R. Mruzec to Hall,  
8 volunteering to join in Hall's proposed class action suit against Mitchell]. On September 28, 2019,  
9 Twin Galaxies denied the retraction demand, having never contacted the witnesses who provided  
10 sworn eyewitness declarations of Mitchell's records. Mitchell knows this, because the witnesses  
11 told him that Hall never contacted them. Mitchell Decl., ¶ 91.

12 In stark contrast, GWR in good faith reviewed the documentation and on June 18, 2020, it  
13 posted its official statement, reinstating Mitchell's records. Mitchell Decl., Exh. 18. After GWR's  
14 announcement, Mitchell sent a second retraction demand to Twin Galaxies, providing a final  
15 opportunity to tell the truth. It denied this retraction demand as well.

16 d. *Pre-Ordained Conclusion.* Hall's declaration specifically states that his failure to  
17 replicate the "images and artifacts" on the lost chain of custody videotapes led to his conclusion  
18 that Mitchell had not used an "unmodified Donkey Kong Arcade system." Hall Decl., ¶ 46. But  
19 significantly, Hall came to this conclusion *before* he tried to replicate those "images and artifacts."  
20 An examination of events shows this. On or about March 13, 2018, Hall called Walter Day to ask,  
21 "How will you feel when I announce that Billy cheated?" Day Decl., ¶. 8. But Hall had only  
22 ordered the equipment to test his allegations on Saturday, March 10. See Hall Decl., Exh. A (Page  
23 663, published on March 10, 2018, 15:55 Hours). If Hall had ordered the equipment on March 10,  
24 2018, he could not have received the equipment and performed all of his tests by March 13, 2018,  
25 because the company could not have shipped the equipment to Hall on a weekend. Furthermore,  
26 the testing required substantial work which could not have occurred prior to his phone call with  
27 Day. Day Decl., ¶ 9.

28 e. *Selection of an Openly Biased Third-Party Investigator.* Twin Galaxies selected

1 Chris Gleed, a long-time member of the accusatory group, Jeremy Young’s Donkey Kong Forum,  
2 to act as a “third-party” investigator. But Gleed had already made up his mind that Mitchell was  
3 guilty. On February 2, 2018, when allegations by an obscure individual named Jeremy Young that  
4 Mitchell had cheated were made on the Donkey Kong Forum, Gleed posted to the same forum,  
5 stating “Great work [Jeremy!]... I wholeheartedly agree with the resulting decisions.” Mitchell  
6 Decl., ¶36, Exh. 22. Yet Twin Galaxies then engaged Gleed as a neutral "third party investigator"  
7 on February 14, 2018. *Id.*, ¶ 36; Hall Decl., Exh. A, p. 435. In other words, Twin Galaxies hired as  
8 its neutral investigator an individual who already concluded that Mitchell had cheated. On March  
9 21, 2018, mid-investigation Gleed posted again to the same forum, speculating on how Mitchell  
10 must feel with his cheating about to be exposed (Mitchell Decl., Mitchell Decl., ¶ 52, Exh. 31.  
11 And on March 31, 2018, mid-investigation, Gleed uploaded a YouTube video where he asked  
12 Mitchell to simply confess to cheating. Mitchell Decl., ¶ 59.

13 *f. Other Indicia of Malice.* During the investigation, an individual named Wes  
14 Copeland (who had posted a hostile comment about Mitchell seven months earlier [Mitchell Decl.,  
15 Exh. 25]), provided Twin Galaxies a mathematical analysis which alleged that Mitchell edited the  
16 videotape of the records with “save-states” – a method of gameplay manipulation, because –  
17 according to Copeland's math – Mitchell could not have been so "lucky" to achieve the scores.  
18 Mitchell Decl., Exh. 43. Twin Galaxies made ZERO effort to fact-check these allegations, and the  
19 analysis was later proved entirely false by Robert Lakeman, an eight-time Donkey Kong World  
20 Record holder. Lakeman concluded that Mitchell played on legitimate arcade hardware. Mitchell  
21 Decl., ¶ 107, Exh. 21. In addition, just after Twin Galaxies' investigation, another observer, David  
22 Race, asked Hall to mail him the alleged Donkey Kong videotapes, so that he could examine them  
23 himself. Hall refused Race's pleas for the equal evidentiary access, telling Race that “We have  
24 come to our own determination for our own purposes.” Mitchell Decl., ¶ 109; Exh. 45.

25 **II. THE anti-SLAPP FRAMEWORK.**

26 Under Code of Civil Procedure section 425.16, a "cause of action against a person arising  
27 from any act of that person in furtherance of the person's right of petition or free speech . . . shall  
28 be subject to a special motion to strike, unless the court determines that . . . that there is a

1 probability that the plaintiff will prevail on the claim." Civ. Code § 425.16, subd. (b)(1).

2 Resolving an anti-SLAPP Motion involves two steps. First, the defendant must establish  
3 that the challenged cause of action arises from protected activity. If so, the burden then shifts to  
4 the plaintiff to show a reasonable probability of prevailing. *Baral v. Schnitt* (2016) 1 Cal.5<sup>th</sup> 376,  
5 385. "The court does not weigh evidence or resolve conflicting factual claims. . . . It accepts the  
6 plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats  
7 the plaintiff's claim as a matter of law." *Bard v. Schnitt, supra*, 1 Cal.5<sup>th</sup> at 384-85.

8 Here, Twin Galaxies claims that it has satisfied the first step by showing that its statements  
9 about Mitchell were made in a public forum and were a matter of public interest. For purposes of  
10 this motion, Mitchell does not dispute those assertions. But, as set out below, Twin Galaxies  
11 cannot meet the second step, because Mitchell's evidence, which must be accepted as true,  
12 establishes the probability of success on the merits on both the libel and false light claims.

13 **III. MITCHELL CAN SHOW PROBABILITY OF SUCCESS ON THE MERITS**

14 As set out below, Mitchell can show a probability of prevailing on his defamation and false  
15 lights claims, because he can show both falsity and actual malice.

16 **A. Mitchell Can Prove Falsity.** The gist of Twin Galaxies' claim that Mitchell  
17 cheated in achieving his scores was that he did not achieve them on an arcade machine. The *sole*  
18 basis for this statement is an analysis of non-original copies of videotapes for which no chain of  
19 custody exists, purportedly "proving" that he did not achieve the scores on arcade hardware.

20 The first problem with the claim is that *scores* of eyewitnesses to Mitchell's achievements  
21 have come forward and submitted sworn declarations that they were present when he achieved his  
22 scores. Among these eyewitnesses are the very referees that Twin Galaxies hired to validate the  
23 scores in the first place, as well as the legendary founder of Twin Galaxies, Walter Day. In  
24 addition, other expert analysis (Robbie Lakeman) has come forward to demonstrate that Twin  
25 Galaxies' analysis was itself flawed.

26 Compelling evidence of the falsity is that GWR has acknowledged that Mitchell's records  
27 are legitimate and reinstated his records. Mitchell Decl., Exh. 18. Given the undisputed,  
28 longstanding leadership of GWR in the gaming community and the sterling reputation it holds

1 worldwide, this retraction demonstrates that Mitchell has a likelihood of prevailing on the merits.  
2 In fact, to prove its claim that Mitchell cheated, Twin Galaxies at trial will have to impeach *each*  
3 *and every* witness that swore under oath that they saw Mitchell achieve the scores. To date, Twin  
4 Galaxies has shown no indication that it will be able to do so. In fact, Twin Galaxies has not  
5 contacted any of the witnesses, and its motion does not attempt to discredit those witnesses'  
6 testimony. Thus, Twin Galaxies' case essentially rests on a conspiracy nearly as broad (and  
7 untenable) as the Kennedy assassination: scores of people around the country with seemingly no  
8 connection to each other have agreed to lie and fabricate evidence that Mitchell achieved his  
9 records on arcade software. The cheating claim is ludicrous.

10 Faced with this problem, Twin Galaxies argues that the statements are simply "opinion"  
11 and, therefore, can be neither "true" nor "false." But of course, simply couching a false assertion as  
12 an "opinion" does not insulate a defendant from liability. As the U.S. Supreme Court held in  
13 *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 18:

14 If a speaker says, 'In my opinion John Jones is a liar,' he implies a  
15 knowledge of facts which lead to the conclusion that Jones told an untruth.  
16 Even if the speaker states the facts upon which he bases his opinion, if  
17 those facts are either incorrect or incomplete, or if his assessment of them  
18 is erroneous, the statement may still imply a false assertion of fact.

19 Similarly, the California Supreme Court has held that "a statement of opinion may be  
20 actionable if it implies the allegation of undisclosed defamatory facts as the basis for the opinion."  
21 *Ringler Associates Inc. v. Maryland Casualty Co.* (2000) 80 Cal.App.4th 1165, 1181 [internal  
22 punctuation omitted]. As such, "there is no wholesale defamation exemption for anything that  
23 might be labeled an opinion. If a statement of opinion implies a knowledge of facts which may  
24 lead to a defamatory conclusion, the implied facts must themselves be true." *Ringler Associates,*  
25 *supra*, 80 Cal.App.4<sup>th</sup> at 1181

26 In any event, the cheating charge was not an "opinion." Twin Galaxies argues that it was,  
27 because it was prefaced by the phrase "we now believe . . . ," and so any following conclusions  
28 must be opinion. Mtn., at 11. A cursory review of the statement itself shows the allegations are  
statements of fact based not on whim or personal preference, but on – in Twin Galaxies' own  
words – an investigation performed by Twin Galaxies itself.

1 In full, the statement reads (with emphasis added): "We now believe that [the scores] are  
2 not from an original unmodified DK arcade PCB, and *so our investigation of the tape content ends*  
3 *with that conclusion and assertion.*" The statement thus makes clear it is based on an  
4 "investigation," and the "conclusion" is based on that investigation. In addition, the statement  
5 boasts that it was "[b]ased on the complete body of evidence presented"; that "Twin Galaxies has  
6 meticulously tested and investigated the dispute case assertions as well as a number of relevant  
7 contingent factors"; and only then did Twin Galaxies set out its "specific findings . . . as part of a  
8 comprehensive process and in its position of authority."  
9 [https://www.twingalaxies.com/feed\\_details.php/1047/billy-mitchells-donkey-kong-and-all-other-](https://www.twingalaxies.com/feed_details.php/1047/billy-mitchells-donkey-kong-and-all-other-records-r)  
10 [records-r](https://www.twingalaxies.com/feed_details.php/1047/billy-mitchells-donkey-kong-and-all-other-records-r). And as part of its "specific findings," the statement said (with emphasis added): "*While*  
11 *we know for certain* that an unmodified original DK arcade PCB did not output the display seen in  
12 the videotaped score performances, we cannot definitely conclude that what is on the tapes is  
13 MAME."

14 The statement itself rebuts Twin Galaxies' argument that this was merely opinion or  
15 passing on its members' comments. To the contrary, Twin Galaxies positioned itself as *the* arbiter.  
16 "Our public documentation of our processes and conclusions are intended to satisfy scrutiny for  
17 the long term, so in instances where warranted our comprehensiveness must go above and beyond  
18 what would normally satisfy."<sup>2</sup>

19 Twin Galaxies next argues that, even if the statements are libelous, they are only libelous  
20 *per quod* and that Mitchell cannot show special damages. As discussed above, a statement that  
21 someone is a cheater – particularly someone whose reputation is as the world record holder for a  
22 number of video games – is clearly libel *per se*, i.e., a "libel which is defamatory of the plaintiff  
23 without the necessity of explanatory matter[.]" *Barnes-Hind, Inc. v. Superior Court* (1986) 181  
24 Cal.App.3d 377, 382. The resulting news headlines reporting that Twin Galaxies characterized

---

26 <sup>2</sup> Twin Galaxies positions itself as a high-minded, selfless actor acting in the general public's interest, not  
27 making the statements "on its own volition without being prompted," but only doing so reluctantly because  
28 "it was asked by the community." Motion, p. 11. Even if true that would not insulate Twin Galaxies from  
liability for defamatory statements, and it offers no authority for the claim.



1 Mitchell as a cheater without need for detailed explanation prove this fact.

2 But even if the statements were libel *per quod*, Mitchell can prove special damages. Civil  
3 Code Section 48a(b) defines special damages as "all damages which plaintiff alleges and proves  
4 that he has suffered in respect to his property, business, trade, profession or occupation[.]" *Fellows*  
5 *v. Nat'l Enquirer* (1986) 42 Cal.3d 234, 235, fn. 2. As his declaration shows, Mitchell has  
6 unquestionably suffered enormous damages as a result of the defamation. His hot sauce business –  
7 which was always joined in the public's eye with his gaming prowess – depends greatly on his  
8 status as a video game record holder. Twin Galaxies' statements devastated that business with  
9 Mitchell having lost nearly \$1 million due to the defamation. Mitchell Decl., ¶¶ 123-129. Special  
10 damages are easily shown.

11 **B. Mitchell Can Prove Constitutional Malice.** Twin Galaxies argues that Mitchell,  
12 as a public figure, must prove by clear and convincing evidence that the allegations of cheating  
13 were made with actual malice, i.e., that Twin Galaxies made them with knowledge of their falsity  
14 or with reckless disregard for their truth. *New York Times Co. v. Sullivan* (1964) 376 U.S. 254,  
15 285-286. Actual malice can be shown where the defendant had a "high degree of awareness of . . .  
16 probable falsity," or must have "entertained serious doubts as to the truth of his publication[.]" *See*  
17 *Harte-Hanks Communications v. Connaughton* (1989) 491 U.S. 657, 667 [citations omitted].  
18 Mitchell assumes, for this motion, that he is a limited purpose or "vortex" public figure with  
19 respect to video game playing. *See Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244,  
20 253.

21 Twin Galaxies disingenuously argues that "there is no evidence that Twin Galaxies had  
22 any doubt that his Donkey Kong performances at issue were not from an original Donkey Kong  
23 Arcade system." But the only evidence for this statement is Hall's own declaration. The court is  
24 not of course, required to accept defendant's self-serving statement. A "defendant cannot  
25 'automatically ensure a favorable verdict by testifying that he published with a belief that the  
26 statements were true. The finder of fact must determine whether the publication was indeed made  
27 in good faith. . . . Likewise, recklessness may be found where there are obvious reasons to doubt  
28 the veracity of the informant or the accuracy of his report." *Reader's Digest Assn. v. Superior*

1 *Court, supra*, 37 Cal.3d at 257. Moreover, the plaintiff is "entitled to prove the defendant's state of  
2 mind through circumstantial evidence[.] *Harte-Hanks Communications v. Connaughton, supra*,  
3 491 U.S. at 668.

4       The record contains an overwhelming amount of direct and circumstantial evidence that  
5 Twin Galaxies and its principal, Hall, entertained doubts about the accuracy of the statements and  
6 willfully failed to investigate matters they knew would cast doubt on the cheating allegations. As  
7 noted, the key claim supporting the allegations was that Mitchell had achieved his scores not on  
8 arcade machines but through some other technology. The extraordinary thing about the claim is  
9 that it discredits scores achieved *in public settings*: the "Mortgage Brokers Convention" score and  
10 the "Boomers Arcade" score. Thus, an obvious source to evaluate the accuracy of the charge that  
11 the games were not played on arcade machines would have been to *talk to the people who were*  
12 *there*. These individuals were not unknown or unreachable to Twin Galaxies -- some of them were  
13 Twin Galaxies' own referees. Mitchell knew other eyewitnesses as well – he ultimately obtained  
14 their statements under oath. Although he pleaded with Hall to speak to them Hall refused. Even  
15 worse, he said that he "didn't care." Similarly, Walter Day reached out to Hall to verify Mitchell's  
16 scores, and Hall said he “didn't care.” Clearly, Hall learned of facts – the numerous eyewitness  
17 testimonies, Day's entreaties, the Nintendo engineer's verifications – all casting doubt on the claim  
18 that Mitchell did not achieve his scores on arcade machines. He ignored these facts and published  
19 the statements anyway.

20       Reckless disregard can be found where a "publisher undertook an investigation of the  
21 accuracy of a story and learned of facts casting doubt on the information contained in the story,  
22 but ignored those doubts and published the story anyway." Levy, 4 *California Torts*, § 45.13  
23 (2020). An example is *Masson v. New Yorker Magazine, Inc.* (9th Cir. 1992) 960 F.2d 896, 901,  
24 where the court found that "[e]ven if it finds that The New Yorker's editors did not make a  
25 conscious decision to let Malcolm alter Masson's statements, the jury could nevertheless conclude  
26 that The New Yorker had developed 'obvious reasons to doubt' the accuracy of the quotations but,  
27 in an effort to 'purposefully avoid[] . . . the truth,' failed to conduct a reasonable investigation of  
28 Masson's claims of inaccuracy." As the *Masson* court held: "where the publisher undertakes to



1 investigate the accuracy of a story and learns facts casting doubt on the information contained  
2 therein, it may not ignore those doubts, even though it had no duty to conduct the investigation in  
3 the first place." *Masson v. New Yorker*, *supra*, 960 F.2d at 901; *see also Harte-Hanks*  
4 *Communications v. Connaughton*, *supra*, 491 U.S. at 692 [malice found where publisher made no  
5 effort to contact key witness, because "[a]lthough failure to investigate will not alone support a  
6 finding of actual malice, the purposeful avoidance of the truth is in a different category"].

7 *Widener v. Pacific Gas & Elec. Co.* (1977) 75 Cal.App.3d 415, is instructive. In that case,  
8 a PG&E employee claimed that he had been surreptitiously videotaped during an interview with a  
9 documentary film producer, who then spliced his off-the-record comments into the film,  
10 embarrassing the employee. The employee wrote a letter to the producer, approved by PG&E  
11 superiors, accusing him and copying the letter to outsiders. In the resulting defamation lawsuit by  
12 the producer against PG&E, the employee conceded that his allegations were untrue, and experts  
13 testified of the career-ending damage the producer suffered. Nonetheless, the trial court granted  
14 judgment notwithstanding the verdict on the ground that the producer had not shown actual malice  
15 on PG&E's part. The appellate court reversed, finding ample evidence of malice. Of significance  
16 to the court was that the statements did not involve an element of "hot news," and there was no  
17 need to rush to publish. As the court said (75 Cal.App.3d at 434):

18 Where the defamatory statements made by the defendant do not involve an  
19 element of "hot news" and the need for expeditious release is not present,  
20 reckless disregard for the truth may be evidenced in part by failure to  
21 investigate thoroughly and verify the facts. This is particularly true where  
22 the substance of the defamatory statements, which the defendant was  
23 publishing, were such that substantial danger to reputation was apparent.

24 The court also found that the PG&E executives had serious cause to question the veracity  
25 of the claims. Each of the executives "was aware of the extreme gravity of the charge of  
26 surreptitious tampering[.]" *Id.* Yet none had actually seen the film, which showed that the  
27 employee was looking directly at the camera with no indication that any footage had been spliced  
28 in. The court said: "Respondent PG&E was very much aware of the possible resulting harm; the  
seriousness of the charge it was making called for a thorough investigation, but the record reveals  
that little or no investigation was conducted." *Widener v. Pacific Gas & Electric Co.*, *supra*, 75

1 Cal.App.3d 415, 435, disapproved on other grounds, *McCoy v. Hearst Corp.* (1986) 42 Cal.3d  
2 835, 846, n. 9.

3 Here, Twin Galaxies and its principal relied solely on a "technical" analysis of non-original  
4 videos of Mitchell's Mortgage Brokers and King of Kong scores to accuse him of cheating. Hall  
5 and Twin Galaxies were obviously aware of the tremendous damage to Mitchell's reputation that  
6 would and did result from the cheating claim. Yet Hall refused to contact any eyewitnesses to the  
7 publicly-achieved scores; he ignored the entreaties of the legendary Walter Day; he refused to  
8 consider that a Nintendo engineer had validated the machine Mitchell used to achieve the  
9 Mortgage Brokers' score; and he hired as an outside investigator someone who had already  
10 publicly disclosed that he believed Mitchell had cheated. There was no "hot news" to Twin  
11 Galaxies' statement, and only one reason why Twin Galaxies and Hall did not follow up on the  
12 proffered evidence: they knew that it would counter the narrative that Mitchell cheated.

13 Lastly, Twin Galaxies has refused to retract, and courts consider the failure to retract as  
14 evidence of malice. In *Mahnke v. Northwest Publications, Inc.* (Minn. 1968) 160 NW 2d 1, 11, the  
15 Minnesota Supreme Court held that a jury may properly consider a defendant's failure to retract  
16 defamatory statements as evidence of recklessness, saying: "We think that the failure to retract the  
17 defamatory statements underscored defendant's reckless attitude as to the consequences of what  
18 had been published and that the jury was entitled to take that fact into consideration."<sup>3</sup>

#### 19 **IV. THE COMMON INTEREST PRIVILEGE DOES NOT APPLY**

20 Twin Galaxies' last argument is that the common interest privilege under Civil Code  
21 section 47(c)(3) applies to its defamatory statements. They were made, Twin Galaxies contends,  
22 between and among people with a common interest – i.e., both Twin Galaxies and the public are  
23 interested in the accuracy of video game scores. The California Supreme Court has rejected the  
24 argument under virtually identical circumstances. *See Brown v. Kelly Broadcasting Co.* (1989) 48  
25 Cal.3d 711, 725 [common interest privilege does not apply to new outlets, because "the practical

26 \_\_\_\_\_  
27 <sup>3</sup> See also *Zerangue v. TSP Newspapers, Inc.* (5th Cir. 1987) 814 F.2d 1066, 1071 [refusal to retract  
28 supports malice finding]; and *Golden Bear Distributing Systems of Texas, Inc. v. Chase Revel, Inc.* (5th Cir.  
1983) 708 F.2d 944, 950 [same].

1 result sought by the news media would be that nearly everything they publish and broadcast would  
2 be privileged." ] The common interest privilege does not apply.

3 **V. CONCLUSION**

4 For the foregoing reasons, William Mitchell respectfully requests that the Court deny  
5 Defendant's Motion.

6 DATED: June 22, 2020

**MANNING & KASS  
ELLROD, RAMIREZ, TRESTER LLP**



By: \_\_\_\_\_

James E. Gibbons  
Attorneys for Plaintiff WILLIAM JAMES  
MITCHELL

**MANNING & KASS**  
**ELLROD, RAMIREZ, TRESTER LLP**  
ATTORNEYS AT LAW

28

**PROOF OF SERVICE**

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

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

On June 22, 2020, I served true copies of the following document(s) described as **PLAINTIFF'S OPPOSITION TO DEFENDANT'S ANTI-SLAPP MOTION; DECLARATIONS OF BILLY MITCHELL AND WALTER DAY** on the interested parties in this action as follows:

David A. Tashroudian, Esq. Mona Tashroudian, Esq. TASHROUDIAN LAW GROUP, APC 5900 Canoga Ave., Suite 250 Woodland Hills, California 91367 Telephone: (818) 561-7381 Facsimile: (818) 561-7381 Email: david@tashlawgroup.com Email: mona@tashlawgroup.com	Attorney for Defendants Twin Galaxies
--	--

**BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s) to be sent from e-mail address [mma@manningllp.com](mailto:mma@manningllp.com) to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

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

Executed on June 22, 2020, at Los Angeles, California.

/s/ Martha Alfaro  
\_\_\_\_\_  
Martha Alfaro