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

11 WILLIAM JAMES MITCHELL,

12 Plaintiff,

13 v.

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

15 Defendants.

Case No. 19STCV12592

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

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

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

Hearing

Date: July 6, 2020

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Place: Department 36

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NOTICE OF MOTION AND MOTION

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

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

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

Respectfully submitted,

Dated: March 30, 2020

TASHROUDIAN LAW GROUP, APC

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

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

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

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

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

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

1 debating video game scores in a public forum.

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

5 **II. FACTS**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 **III. ARGUMENT**

2 A. The anti-SLAPP motion analytical framework.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 iii. Billy Mitchell is a public figure.

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

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

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

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

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

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

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

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

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

27 ///

28 ///

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

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

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

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

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

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

3 **IV. CONCLUSION**

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

8 Respectfully submitted,

9 Dated: March 30, 2020

TASHROUDIAN LAW GROUP, APC

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

PROOF OF SERVICE
Case No. 19STCV12592

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

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

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

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

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

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

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

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

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

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



Mona Tashroudian



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WILLIAM JAMES MITCHELL vs TWIN GALEXIES, LLC

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

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

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Case Name: WILLIAM JAMES MITCHELL vs TWIN GALEXIES, LLC	Case Number: 19STCV12592
Type: Special Motion to Strike under CCP Section 425.16 (Anti-SLAPP motion)	Status: RESERVED
Filing Party: Twin Galaxies, LLC (Defendant)	Location: Stanley Mosk Courthouse - Department 36
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