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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, CENTRAL DIVISION

PROPER MEDIA, LLC, a California limited liability company, CHRISTOPHER RICHMOND, an individual, and DREW SCHOENTRUP, an individual,

Plaintiffs,

v.

BARDAV INC, a California corporation; and DAVID MIKKELSON, an individual, VINCENT GREEN, an individual; RYAN MILLER, an individual; and TYLER DUNN, an individual,

Defendants,

AND RELATED CROSS-ACTIONS

Case No. 37-2017-00016311-CU-BC-CTL
(consolidated with Case No. 37-2018-00004335-CU-MC-CTL)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT/CROSS-COMPLAINANT SNOPES MEDIA GROUP, INC.'S SPECIAL MOTION TO STRIKE PLAINTIFFS' THIRD AMENDED COMPLAINT PURSUANT TO CODE CIV. PROC. § 425.16

Date: August 9, 2019
Time: 10:30 a.m.
Dept.: C-68
Judge: Hon. Richard S. Whitney

Complaint Filed: May 4, 2017
Trial Date: October 4, 2019

IMAGED FILE

Defendant/Cross-Complainant SNOPES MEDIA GROUP, INC., formerly known and having appeared as BARDAV INC ("Snopes"), respectfully submits this Memorandum of Points and Authorities in support of its Special Motion to Strike the Third Amended Complaint ("TAC") filed by Plaintiffs PROPER MEDIA, LLC ("Proper Media"), DREW SCHOENTRUP ("Schoentrup"), and CHRISTOPHER RICHMOND ("Richmond") (collectively, "Plaintiffs").

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I. INTRODUCTION

As the Court knows, when this action was first filed, Proper Media and its owners were unlawfully holding the Snopes.com website hostage and had seized control of *all* of Snopes advertising revenues generated by its famous fact-checking website. By cutting off Snopes' primary source of revenue and stymying its ability to pay legal fees, Plaintiffs hoped they could bring Snopes to its knees.

Snopes and its management team did not succumb to the financial pressure improperly imposed by Plaintiffs. Instead, Snopes demonstrated backbone and resourcefulness and found help in two very different places: (1) this Court and (2) the vast Snopes.com readership. Both efforts were successful in helping Snopes survive and to continue fending off the never-ending tactics that Plaintiffs have employed throughout this dispute.

This honorable Court helped greatly when it entered a TRO and, thereafter, issued a preliminary injunction that ultimately caused the release of more than $1 million of stolen advertising revenue and led to Snopes regaining control of its website. While those early court battles were being fought, the Snopes.com readership and other members of the public who value Snopes as an important fact-checking resource also helped. In response to a GoFundMe campaign, which is ongoing, the public has donated hundreds of thousands of dollars to support Snopes. However, to avoid reaching the merits of Snopes' claims, Plaintiffs have continued their strategy of browbeating Snopes and its employees with baseless claims and scorched-earth litigation tactics.

Snopes should be applauded for its resiliency and resourcefulness. Unsurprisingly, Plaintiffs are not clapping. Instead, they have added claims and allegations that are designed to chill Snopes efforts to speak publicly about this case, stop Snopes from raising money to support itself and otherwise cut off funding for Snopes and its employees. Plaintiffs' claims are exactly what California's anti-SLAPP statute is designed to prevent.

This motion is proper because the challenged claims are a calculated effort by Plaintiffs to obtain an economic advantage over Snopes by expanding the scope of litigation, driving up legal costs, and chilling Snopes' fundraising efforts. (*See Wilcox v. Superior Court* (1994) 27 Cal. App.4th 809, 815-16 (*Wilcox*) [aim of SLAPP suit is to "drive up the cost of litigation to the point

where the plaintiff/cross-defendant will abandon its case or have less resources available to prosecute its action"], overruled in part on other grounds in *Equilon Enter's v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.)

Plaintiffs' newly-filed TAC with eighteen causes of action asserts meritless claims based Snopes' litigation funding decisions and truthful public statements made in connection with its fundraising efforts. Snopes' litigation funding decisions and fundraising postings fall squarely within the ambit of activities protected under California's Anti-SLAPP law, which was passed to bring about the speedy termination of claims that seek to punish defendants for exercising their right to free speech. (Code Civ. Proc. 425.16(a).) Snopes therefore respectfully moves to strike the TAC pursuant to California Code of Civil Procedure section 425.16.

II. PERTINENT FACTUAL BACKGROUND

A. Plaintiffs Have Repeatedly Blocked Snopes' Ability to Litigate the Action by Driving up Litigation Costs and Denying Snopes Access to its Own Revenues

From August 2015 until early 2017, Plaintiff Proper Media (an entity controlled by Schoentrup and Richmond) provided certain Internet advertising services to Snopes pursuant to a General Service Agreement ("GSA"). (*Id.* at ¶¶ 42, 104.) After Snopes notified Proper Media it was exercising its right to terminate the GSA, Plaintiffs unlawfully held Snopes' website hostage and refused to relinquish control of its website or its email accounts. Worse, Plaintiffs also improperly withheld *all* advertising revenues from Snopes—effectively cutting off Snopes' primary source of income and inflicting severe financial distress on the company. (*Ibid.*) Plaintiffs also erroneously contended Proper Media was a beneficial owner of 50% of Snopes and that Schoentrup was a director of Snopes, despite never having been appointed to the position, in their unlawful efforts to exert control over Snopes and oust its founder, Defendant/Cross-Complainant DAVID MIKKELSON ("Mikkelson").

The case against Plaintiffs' unlawful action is clear. Accordingly, Plaintiffs primary litigation strategy has been to drive up the cost of litigation and undermine the ability of Snopes and its employees to litigate this case. At the outset, Plaintiffs tried to exert pressure on Snopes by cutting off Snopes' primary source of revenue and improperly withholding funds. Snopes was

forced to incur significant legal fees to obtain a TRO and a preliminary injunction against Plaintiffs to release funds and other property unlawfully withheld. (*See* ROA 45, 99, 123.) Even after obtaining an injunction against Plaintiffs, Snopes had to go back to Court to seek help enforcing the injunction, and this Court issued an order to show cause re contempt. (ROA 372.)

B. Plaintiffs Continue to Drive up Litigation Costs while Trying to Cut Off Legal Representation to Snopes and its Employees

From the start and continuing throughout this litigation, Plaintiffs have tried time and time again to interfere with Snopes corporate governance, create deadlocks, and to deny rights to its directors and shareholders. Snopes has persevered, but at no small cost, and Plaintiffs' deleterious conduct will not stop. Earlier this year, despite being the very cause of Snopes' financial harm, Plaintiffs requested an injunction to block Snopes' ability to advance attorney fees on the unfounded grounds that Snopes' would suffer imminent financial harm and the advancement of fees was improper. The Court properly denied the request, although Snopes was forced to incur more fees opposing yet another frivolous motion. Plaintiffs' TAC now asserts the same claims challenging Snopes' litigation funding decisions; namely, Snopes' decision to advance attorney fees for its own employees—the very employees Plaintiffs are suing in this action. It is well settled that Snopes' decision to advance attorney fees for this litigation is an activity protected under California's anti-Strategic Lawsuit Against Public Participation statute (the "anti-SLAPP statute" or "Section 425.16"). Moreover, Snopes' decision to advance fees was properly authorized and expressly permitted under Corporations Code section 317(f). For these and the other reasons set forth below, Plaintiffs' litigation funding claims and allegations must be stricken from the TAC.

In parallel to its efforts to obtain relief from the Court, Snopes sought help from the public via a GoFundMe campaign. The GoFundMe campaign helped raise money for the Snopes' general operations, including its legal expenses, which became necessary after Plaintiffs stole Snopes' entire revenue stream, held its revenue-producing assets hostage, and caused Snopes to incur significant fees obtaining relief to address that harm. Per Plaintiffs' own allegations, the GoFundMe campaign has raised more than $850,000 to date from nearly 30,000 donors, demonstrating the public value of the Snopes.com website as a truth-seeking resource. (*See* TAC,

¶ 331.) Now, in an effort to chill Snopes fundraising efforts and drive up litigation costs, Plaintiffs assert defamation-based claims against Snopes and its CEO based on truthful statements made on the GoFundMe page. Like Snopes' litigation funding decisions, it is clear that these claims are based on a protected activity and there is no probability Plaintiffs will prevail. Accordingly, the defamation-based claims and allegations must also be stricken from the TAC.

III. LEGAL STANDARD

California's anti-SLAPP statute provides that "cause[s] of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (Section 425.16(b)(l).) Acts in furtherance of free speech include "(3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Section 425.16(e).)

Anti-SLAPP protections "are to be construed broadly," and apply regardless of the cause of action asserted by the plaintiff. (*Beach v. Harco Nat'l Ins. Co.* (2003) 110 Cal. App. 4th 82, 90, citing Code Civ. Proc. § 425.16(a); *Equilon Enters. v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 60.) Anti-SLAPP motions are not limited attacks on entire claims, but may also "attack parts of a count, including specific allegations amounting to a claim." (*Newport Harbor Offices & Marina, LLC v. Morris Cerullo World Evangelism* (2018) 23 Cal.App.5th 28, 43 (*Newport Harbor*), citing *Baral v. Schnitt* (2016) 1 Cal.5th 376, 382, 392-93 (*Baral*).) When a court finds an anti-SLAPP motion meritorious, it must grant the motion without leave to amend. (*Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1073-74.) Except as to specific statutory causes of action not asserted here, a prevailing defendant on a special motion to strike is entitled to recover attorneys' fees and costs. (Code Civ. Proc. § 425.16(c).)

A. Burden-Shifting Under the Anti-SLAPP Statute

In ruling on a special motion to strike, courts engage in a two-part test. "First, the defendant must establish that the challenged claim arises from activity protected by section 425.16." (*Newport Harbor* 23 Cal.App.5th at 42.) "If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success. We have described this second step as a 'summary-judgment-like procedure.'" (*Id.*)

Showing a probability of prevailing is similar to a summary judgment in "reverse" because the plaintiff must produce prima facie evidence showing its ability to prove each element of its claim. (*Direct Shopping Network, LLC v. James* (2012) 206 Cal.App.4th 1551, 1558, n.4.) To meet this burden, a plaintiff opposing an anti-SLAPP motion cannot rely on allegations in the complaint, but must set forth evidence that would be admissible at trial. (*Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 699.) The plaintiff's evidence must be sufficient to support a judgment in its favor if proved at trial. (*Anderson v. Geist* (2015) 236 Cal.App.4th 79, 85.)

IV. CLAIMS BASED ON PROTECTED ACTIVITY IN THE TAC

As set forth in the Notice and Motion, Snopes brings this special motion to strike as to:

1) The fourteenth count for defamation—and related claims and allegations—which are based on true fundraising campaign postings that were published on the Internet over a year ago.
2) The seventeenth and eighteenth counts for rescission and declaratory relief—and related claims and allegations—which are based on Snopes' litigation funding decisions.

A. The Postings on the GoFundMe Campaign are Acts in Furtherance of Plaintiffs' Free Speech

Plaintiffs' fourteenth count for defamation (TAC, ¶¶ 296-301) and related claims against Snopes and Mr. Mikkelson are all premised upon true fundraising campaign postings published on the Internet between July 2017 and March 2018. (TAC, ¶ 296(a)-(e) [referring to fundraising campaign webpages on gofundme.com and savesnopes.com, which links to gofundme.com; *see* gofundme.com/how-it-works ["GoFundMe is the best place to fundraise, whether you are an individual, group, or organization."].) Websites accessible to the public are "public forums" for

purposes of the anti-SLAPP statute. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1366; *Chaker v. Mateo* (2012) 209 Cal.App.4th 1138, 1146.)

There can be no dispute that these fundraising campaign postings are acts in furtherance of free speech rights subject to protection under Section 425.16. (*See Village of Schaumburg v. Citizens for a Better Environment* (1980) 444 U.S. 620, 632 [finding that charitable appeals for funds are within the protection of the First Amendment].) The alleged fundraising activities are therefore "conduct in furtherance of the exercise of the constitutional right of . . . free speech." (Section 425.16(e)(4).)

The same postings are further protected as "written statement[s] made in . . . a public forum in connection with an issue of public interest." (Section 425.16(e)(3).) Rather than belabor this obvious point, Snopes need only point to Plaintiffs' own allegations, which repeatedly concede that the GoFundMe fundraising campaign "has raised over $850,000 from nearly 30,000 donors." (*See* TAC, ¶¶ 331, 137, 314, 321.)[1]

A cause of action "arises from" conduct that it is "based on." *Copenbarger v. Morris Cerullo World Evangelism* (2013) 215 Cal.App.4th 1237, 1244. Accordingly, a court must determine what activities form the basis for each cause of action and then determine whether those activities are "protected activity," bringing the cause of action within the scope of the anti-SLAPP statute. (*Finton Constr., Inc. v. Bidna & Keys* (2015) 238 Cal.App.4th 200, 209; *Midland Pacific Bldg. Corp. v. King* (2007) 157 Cal.App.4th 264, 272 ["the focus of the statute is not the form of plaintiff's cause of action, but the defendant's activity that gives rise to the asserted liability"].) The plain allegations of the TAC confirm Plaintiffs' defamation-related claims are based upon the contents of fundraising campaign postings made on the Internet.

Accordingly, the alleged defamatory statements easily fall within Section 425.16(e)(3) and Section 425.16(e)(4), and the burden is on Plaintiffs to demonstrate a probability of prevailing on the merits.

[1] In any event, the fundraising campaign postings regard Plaintiffs' fraudulent and deceiptive business practices, yet another matter of public interest. (*Makaeff v. Trump University, LLC* (9th Cir. 2013) 715 F.3d 254, 262 ["Under California law, statements warning consumers of fraudulent or deceptive business practices constitute a topic of widespread public interest, so long as they are provided in the context of information helpful to consumers."].)

V. SNOPES' LITIGATION FUNDING DECISIONS CONSTITUTE PROTECTED ACTIVITY

It is well-settled that litigation funding decisions constitute protected speech activity. *(Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257, 271; *Sheley v. Harrop* (2017) 9 Cal. App. 5th 1147 (*Sheley*). "As our California Supreme Court has explained, because a cause of action arising from *any act* in furtherance of the right of petition is subject to the anti-SLAPP motion (S 425.16, subd. (b)(1), italics added), [a] cause of action 'arising from' [a] defendant's litigation activity may appropriately be the subject of a section 425.16 motion to strike. 'Any act' includes communicative conduct such as the filing, **funding**, and prosecution of a civil action." (*Takhar v. People ex Rel. Feather River Air Quality Management Dist.* (2018) 27 Cal.App.5th 15, citing *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056 (*Rusheen*), internal citations and quotation marks omitted, emphasis added.)

Plaintiffs' claims challenge the authorization of Snopes' Board of Directors (the "Board") to advance attorneys' fees for its employees—employees Plaintiffs sued in this action. (TAC, ¶ 130.) This "act" falls squarely within the parameters of Snopes' litigation funding decisions. Moreover, the decision to advance legal fees is also protected as an act in furtherance of Snopes' prosecution of this civil action. (*See Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056.)

Indeed, Plaintiffs' incentive for bringing these claims illustrate why the courts have so broadly protected litigation funding decisions. (*See Wilcox*, 27 Cal.App.4th at 826 ["If the defendants financing of a lawsuit is constitutionally protected it follows that speech exhorting others to do the same is also protected."].) As the Court in *Wilcox* explained:

> In *Pacific Gas & Electric Co.* v. *Bear Stearns & Co.*, [(1990) 50 Cal.3d 1118], our Supreme Court made clear the tort defense based on the right to petition applies not only to litigants but to those who **induce, encourage and support a lawsuit involving a "colorable claim."** (50 Cal.3d at p. 1136.) In *Pacific Gas & Electric*, plaintiff brought an action against defendant, an investment brokerage firm, for various business torts alleging the firm had encouraged and financed a local water agency's suit for declaratory relief as to whether the agency could terminate its contract with plaintiff. **In holding the petition privilege applicable to a defendant who finances litigation the court stated: "It is important to remember what PG&E is trying to achieve through this lawsuit. It seeks to enjoin Bear Stearns from further participation in the lawsuit in order to avert what it considers to be the irreparable harm of an adverse judgment. It is essentially seeking to abort**

> **the lawsuit by starving the litigant of funds.** In *Sierra Club* v. *Butz*, [*supra*], too, there were, doubtless, persons who induced the representatives of the club to bring the action, and who provided financial assistance in support of the lawsuit, but were not named parties. Yet it would defeat the purpose of assuring free access to the courts, and cause a flood of oppressive derivative litigation, to assess tort liability for their activities." (*Ibid.*)

(*Ibid*., emphasis added.)

As detailed in these moving papers, Plaintiffs' chief strategy throughout this litigation has been to starve defendants of funds to litigate their claims against Plaintiffs. When this Court intervened, Plaintiffs began browbeating defendants with frivolous claims, motions, and discovery to drive up the cost of litigation. Then, after Plaintiffs' scorched-earth tactics failed—albiet at great cost to Snopes—Plaintiffs sought leave to file these SLAPP claims to chill Snopes' fundraising efforts and starve Snopes' employees of funds to litigate the case. In furtherance of this scheme, Plaintiffs contemporaneously requested a continuance of the already-continued trial date, which was previously scheduled for April 2019. Thus, Plaintiffs' claims in the TAC exemplify *why* Snopes' litigation funding decisions are so broadly protected under the anti-SLAPP statute. Thus, the burden is on Plaintiffs to demonstrate a probability of prevailing on the merits.

VI. PLAINTIFFS CAN'T MEET THEIR BURDEN TO ESTABLISH A PROBABILITY OF SUCCESS ON THE MERITS FOR THEIR DEFAMATION-BASED CLAIMS

Under the single publication rule, Plaintiffs' defamation-based claims all merge into Plaintiffs' claim for defamation. Plaintiffs' claims for defamation cannot succeed because the comments on which they are based are substantially—if not entirely—true and/or are non-actionable opinion. In addition, defamation has a one-year statute of limitations, and it is evident from the face of the TAC that all of the allegedly defamatory statements were made more than a year before the TAC was filed, and more than a year before Plaintiffs even sought leave to file the TAC in 2019. For these reasons, Plaintiffs are unable to establish a probability of success on the merits of their claims.

A. The Single Publication Rule Limits Plaintiffs GoFundMe Allegations to a Claim For Defamation

Each of Plaintiffs' defamation-based claims is premised on the same conduct—the purported publication of allegedly defamatory statements on the GoFundMe website. Accordingly, the single publication rule limits Plaintiffs to a claim for defamation.

The single publication rule provides that "[n]o person shall have more than one cause of action for damages for libel or slander or invasion of privacy *or any other tort* founded upon any single publication or exhibition or utterance, such as any one issue of a newspaper or book . . . ." Code of Civ. Proc. § 3425.3 (emphasis added); *see Hebrew Academy of San Francisco v. Goldman* (2007) 42 Cal.4th 883, 890 ("Under the 'single-publication rule,' for any single edition of a newspaper or book there is but a single potential action for a defamatory statement contained in the newspaper or book, no matter how many copies of the newspaper or book were distributed.") (quoting *Shively v. Bozanich*, 31 Cal.4th 1230, 1245 (2003)). The rule applies to statements published on websites. *Traditional Cat Ass'n, Inc. v. Gilbreath* (2004) 118 Cal.App.4th 392, 404 (*Traditional Cat*); *Sundance Image Tech., Inc. v. Cone Editions Press, Ltd.* (S.D.Cal. 2007) 2007 WL 935703 at 7 [any argument that the single publication rule does not apply to statements made on the Internet "is foreclosed by *Traditional Cat*"].)

B. Plaintiffs' Claims For Defamation Fail Because The Allegedly Defamatory Comments Are Substantially True And/Or Are Nonactionable Opinion

There is no probability that Plaintiffs will succeed on their defamation-based claims because the allegedly defamatory statements are substantially true and/or nonactionable opinion. "Defamation consists of, among other things, a false and unprivileged publication, which has a tendency to injure a party in its occupation." (*Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, 695–96, citations omitted.) Statements of opinion are protected and are non-actionable. (*McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 112.) When determining whether a statement is based on fact or opinion, the court applies "a totality of the circumstances test" pursuant to which "both the language of the statement itself and the context in which it is made" is considered. (*Summit Bank v. Rogers*, 206 Cal.App.4th at 696.) Further, "where potentially

defamatory statements are published in a . . . setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion." (*Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 601.) "To decide whether a statement is fact or opinion, a court must put itself in the place of an average reader and determine the natural and probable effect of the statement, considering both the language and the context." (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1011.)

As the Court explains in *Balzaga v. Fox News Network, LLC* (2009) 173 Cal.App.4th 1325, 1338, "[d]efamation actions cannot be based on snippets taken out of context." Yet, this is precisely what Plaintiffs' attempt to do in their TAC. Plaintiffs cherry pick statements from postings in 2017 and early 2018—which were undisputedly true when published—and argue that these statements are no longer true. As Plaintiffs' are no doubt aware, a statement that is true when published is no less true—and no less historically accurate, for that matter—simply because new events may have transpired.

Thus, to the extent the allegedly defamatory comments are statements of fact rather than opinion, they are substantially true, and therefore will not support a claim for defamation. Truth is "an absolute defense to any libel action." (*Campanelli v. Regents of University of California* (1996) 44 Cal.App.4th 572, 581.) To establish this defense, the defendant "need not prove the literal truth of all the allegedly libelous accusations, so long as the imputation is substantially true so as to justify the 'gist' or 'sting' of the remark." (*Id.* at 581-82; *see also Gantry Const. Co. v. American Pipe & Const. Co.* (1975) 49 Cal.App.3d 186, 194 ["The concept that it is the gist or sting of the alleged defamatory statements that must be false rather than the specific details of the charge is deeply rooted in our common law."]; *Masson v. New Yorker Magazine* (1991) 501 U.S. 496, 516-17 ["As in other jurisdictions, California law permits the defense of substantial truth and would absolve a defendant even if she cannot justify every word of the alleged defamatory matter; it is sufficient if the substance of the charge be proved true, irrespective of slight inaccuracy in the details."].)

Here, not only is the gist of the postings substantially true, each and every detail is indisputably accurate. Plaintiffs' TAC claims the postings on the GoFundMe page are false because 1) Proper Media is "no longer" withholding any of Snopes' advertising revenue, 2) Proper Media is "no longer" holding the Snopes.com site hostage, and 3) Plaintiff Chris Richmond has *subsequently* become a member of Snopes' board. However, Plaintiffs allege these statements were posted around July 2017, when Proper Media was withholding hundreds of thousands of dollars of Snopes' advertising revenues, Proper Media was holding the Snopes.com website hostage, and Plaintiff Chris Richmond was not a director of Snopes. The alleged postings are undisputed statements of facts on and around July 2017. Although not at all required, the website postings are even dated to avoid confusion. Plaintiffs know this full well, but are apparently willing to consume substantial court resources with frivolous claims, so long as it provides them a strategic advantage in this litigation.

Indeed, in their snippet from the March 2018 posting—the only alleged posting that arguably is not time-barred—Plaintiffs once again challenge a statement that refers to the July 2017 posting but deliberately omit the updates that follow in the same posting. For instance, the March 2018 states—in bold font—that "**[o]n 18 October 2017,** we successfully migrated Snopes.com to a new hosting provider and regained control of our advertising revenue stream." Thus, the March 2018 posting provides the very update about which Plaintiffs' complain in their TAC, even though it is clear that such an update is not even required.

There is no legal requirement to hide the above truthful statements simply because new events later transpire, and for good reason. These postings provide true, undisputed facts when the posting was made in July 2017. Indeed, although not required by law, the postings are even dated so as to prevent the confusion Plaintiffs now attempt to sow. The history of this case is of import to the parties, the public, and this Court, and that history is accurately reflected in the protected fundraising campaign postings. As shown by this very motion, Plaintiffs continue to mislead this Court with misinformation, which Snopes must correct time and time again. Because all of the allegedly defamatory statements are substantially true or non-actionable opinion, Plaintiffs' defamation claims therefore will not succeed.

C. The Allegedly Defamatory Statements are Barred By The Statute Of Limitations

The statute of limitations for defamation is one year. (Code of Civ. Proc. § 340(c).) The statute begins to run when the allegedly defamatory statements are first "published" to the public. (*Hebrew Academy of San Francisco*, 42 Cal. 4th at 893 ["Under the single-publication rule, with respect to the statute of limitations for defamation, the publication of material contained in a newspaper or book generally occurs on the first general distribution of the publication to the public."], citation and internal quotation marks omitted.)

The TAC concedes four of the five purportedly "false" statements were published around July 2017 and were not "materially updated or otherwise changed." (TAC, ¶297(a)-(d).) Plaintiffs' did not even propose amending and filing a third amended complaint to add these baseless allegations and defamation-based claims until 2019—long after the statute of limitations had run. The March 2018 posting merely refers to—and actually provides and updates for—the statements at issue in the July 2017 posting. It is therefore not probable that Plaintiffs' defamation-based claims will succeed.

VII. PLAINTIFFS CAN'T MEET THEIR BURDEN TO ESTABLISH A PROBABILITY OF SUCCESS ON THE MERITS FOR THEIR LITIGATION FUNDING CLAIMS

Plaintiffs' convoluted claims regarding Snopes' decision to advance its employee's attorney fees are flawed and do not demonstrate any wrongdoing. As noted above and on the face of the TAC, the decision to advance fees was made pursuant to and in accordance with Section 317(f), *not 310*. Section 317(f) provides that "expenses incurred in defending *any proceeding may be advanced* by the corporation prior to the final disposition of the proceeding *upon receipt of an undertaking* by or on behalf of the agent to repay the amount if it shall be determined ultimately that the agent is not entitled to be indemnified as authorized in this section." (Empahsis added.)

Section 317(f) is notably different from, and more streamlined than, Section 317(e) (regarding indemnification) and wholly separate from Section 310. As explained at length by Marsh's California Corporation Law, the simplified process for approving advances pursuant to Section 317(f) is by design:

> Such advancement of expenses [pursuant to Section 317(f)] may be made by the board and is not subject to the requirements of subdivision (e) of the section relating to the authority required to approve the final indemnification. **In other words, even though the board may not finally vote to authorize indemnification because there is not a quorum consisting of directors who are not parties to the proceeding**, and therefore any ultimate question of indemnification will have to be determined by the shareholders, independent counsel or the court, **the board may nevertheless approve the advancement of expenses upon receiving the undertaking required by this subdivision**. It will then be incumbent upon the defendant whose expenses are thus paid by the corporation to see that indemnification is not disapproved in accordance with the section or the defendant will be liable in an action by the corporation to reimburse it for all of his or her expenses thus advanced.
>
> The theory of this subdivision [Section 317(f)] is that it is very easy to bring actions against corporations and their directors, frivolous or otherwise, and very easy to name all of the directors as defendants, whether or not the plaintiff at the time of the institution of the action has any basis for alleging that all of the directors were implicated. If the requirements for authorization of final indemnification of final were applied to the advancement of expenses, the board might be disqualified from voting on such advancement and, without this provision, it might be necessary to call a special shareholders meeting to make that authorization. However, expenses must be incurred immediately, And in some cases in very large amounts, which the individual defendants as a practical matter simply cannot afford.

(Marsh, et al., Marsh's Cal. Corp. Law (2018 Supp.) § 11.22(I) ["Advancement of Expenses"].)

The propriety of Snopes' advancement of fees with respect to Mr. Mikkelson is underscored by the fact that the Court has awarded judgment in favor of Mr. Mikkelson as to, among other things, Proper Media's claims against him. The entry of judgment in his favor requires indemnification by the company in accordance with Corporations Code section 317(d).[2]

Snopes' fee advancement complies with Section 317(f). Convoluted arguments about other inapplicable statutes cannot invalidate the Board's lawful exercise of discretion.

A. <u>Plaintiffs Fail to Plead Facts Establishing the Requisite Board Demand or Futility for Their Litigation Funding Claims</u>

Another reason Plaintiffs' cannot show a probability of prevailing is that the litigation funding claims are derivative in nature. As a precondition for bringing any derivative suit on a corporation's behalf, a plaintiff <u>must</u> establish with particularly either that he made a demand on

[2] Corporations Code § 317(d): "To the extent that an agent of a corporation has been successful on the merits in defense of any proceeding referred to in subdivision (b) or (c) or in defense of any claim, issue, or matter therein, the agent shall be indemnified against expenses actually and reasonably incurred by the agent in connection therewith."

the board of directors to act on the corporation's behalf or that such a demand would have been futile. (Corp. Code § 800(b).) Failure to comply with this demand requirement deprives the plaintiff of standing to pursue his claims. (*Shields v. Singleton* (1993) 15 Cal.App.4th 1611, 1618.)

A demand on the board is futile only if a majority of the directors are implicated in the underlying alleged wrongful conduct. Under those circumstances, a demand would in effect be a request to the directors to sue themselves, and it is assumed under the law that such a request would be futile. (*See Reed v. Norman* (1957) 152 Cal.App.2d 892, 898.) Put another way, a demand on the board is excused as futile only if a majority of the directors are either interested or not independent (i.e., under the alleged wrongdoer's control). (*Smith v. Dorn* (1892) 96 Cal. 73.)

It is undisputed under the allegations of the TAC that neither Westbrook nor Richmond are alleged to have engaged in any of the conduct forming the basis of the derivative causes of action. (See TAC at ¶¶ 201-210, 226-239, 302-310, 336-349.) Preliminarily, Plaintiffs concede Westbrook is disinterested and independent. (*See* TAC at ¶ 240(f).) Plaintiffs nevertheless go on to allege Richmond is "not disinterested and independent" simply because "he is both a Plaintiff and Defendant in this lawsuit[.]" (See, e.g., TAC at ¶ 240(e).) This conclusory statement is unsupported by the appropriate assessment for determining demand futility. Richmond is not alleged to have engaged in the purported wrongdoing, nor is he alleged to be under Mikkelson's control. As Richmond and Westbrook constitute a majority of disinterested directors at Snopes, Plaintiffs cannot plead futility as a matter of law, and thus Plaintiffs cannot show a probability of prevailing on their litigation funding claims, which are derivative in nature.

B. <u>The Litigation Funding Claims also Fail under the Business Judgment Rule</u>

Even if Plaintiffs were capable of asserting derivative claims, Plaintiffs still cannot show a probability of prevailing on their litigation funding claims because they cannot overcome the business judgment rule. The business judgment rule is "a judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions." (*Lee v. Interinsurance Exchange* (1996) 50 Cal.App.4th 694, 711 [internal quotes, citations omitted].) "The rule is based on the premise that those to whom the management of a business organization has been entrusted, and not the courts, are best able to judge whether a

particular act or transaction is helpful to the conduct of the organization's affairs or expedient for the attainment of its purposes." (*Ibid*.) Here, each decision to advance fees for an individual Defendant was made by unanimous consent of the Snopes Board, including non-party independent director Mr. Westbrook. Accordingly, the three challenged decisions (i.e., the separate decisions to advance fees and costs to each of the individual defendants) are afforded deference under the business judgment rule, which is yet another reason Plaintiffs cannot show a probability of prevailing on their litigation funding claims.

VIII. ADDITIONAL ALLEGATIONS IN THE CROSS-COMPLAINT MUST BE STRICKEN

"Allegations of protected activity supporting stricken claims are to be eliminated from the complaint, unless they also support a distinct claim on which the plaintiff has shown a probability of prevailing." (*Sheley*, 9 Cal.App.5th at 1175, citing *Baral*, Cal.5th at 396.) Thus, the Court must also strike "all other allegations of protected activity which support the claims struck" from the causes of action. (*Ibid.*)

IX. CONCLUSION

For all of the foregoing reasons, Snopes' special motion to strike pursuant to California Code of Civil Procedure 425.16 should be granted.

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