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TEDDY FRESH, INC., ETHAN KLEIN,
and HILA KLEIN

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

TRILLER, INC, a Delaware corporation,

Plaintiff,

v.

TED ENTERTAINMENT, INC., a California Corporation; TEDDY FRESH, INC., a California corporation; ETHAN KLEIN, an individual; HILA KLEIN, an individual; and DOES 1-500, inclusive.

Defendants

Case No.: 21SMCV01225

[Assigned for All Purposes to the Hon. Mark H. Epstein, Dept. R]

DEFENDANTS' NOTICE OF MOTION AND SPECIAL MOTION TO STRIKE PLAINTIFF'S FIRST AMENDED COMPLAINT PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 425.16; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; REQUEST FOR ATTORNEYS' FEES AND COSTS

[Concurrently filed with Declarations of Lincoln D. Bandlow, Esq. and Ethan Klein, Compendium of Exhibits and Notice of Lodging]

Complaint Filed: June 19, 2021
FAC Filed: September 7, 2021

DATE: October 13, 2021
TIME: 8:30 AM
DEPT: R
RES ID: 481474056031

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on October 13, 2021 at 8:30 a.m. at the above-entitled Court located at 1725 Main Street, Santa Monica, California 90401, in Department R, the Honorable Mark H. Epstein presiding, Defendants Ted Entertainment, Inc., Teddy Fresh, Inc., Ethan Klein and Hila Klein (collectively, the "Defendants") will and hereby do move to specially strike the First Amended Complaint ("FAC") of plaintiff Triller, Inc. ("Triller") in its entirety, without leave to amend, pursuant to California Code of Civil Procedure ("C.C.P.") Section 425.16 ("Motion").

The Motion is made upon the grounds that (a) each and every cause of action in the FAC arises from protected activity as defined by C.C.P. Section 425.16(e); and (b) Triller cannot meet its burden to demonstrate a probability of prevailing as to any cause of action in the FAC.

This Motion is based on this Notice of Motion, the attached Memorandum of Points and Authorities, Declarations of Lincoln D. Bandlow and Ethan Klein, the Compendium of Exhibits, Notice of Lodging and all other pleadings, files and records herein, and upon such oral argument as may be presented at the hearing on the Motion.

Dated: September 8, 2021

Law Offices of Lincoln Bandlow, P.C.

By 

Lincoln D. Bandlow
Rom Bar-Nissim
Attorneys for Defendants Ted Entertainment, Inc., Teddy Fresh, Inc., Ethan Klein and Hila Klein

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions

Statutes

Court Rules

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Free speech for me, but not for thee: This is the theme of the relentless campaign by plaintiff Triller, Inc. ("Triller") and its majority owner Ryan Kavanaugh ("Kavanaugh") to harass, punish and silence Defendants[1] for exercising their First Amendment rights. Triller and Kavanaugh have repeatedly abused the judicial system to silence commentary and criticism made about them on the TEI production called the H3 Podcast. This assault on Defendants' lawful criticism began by Triller and Kavanaugh causing a Triller subsidiary, Triller Fight Club II, LLC ("TFCII"), to sue Defendants for copyright infringement (the "Copyright Action") because the H3 Podcast used a short clip of *Jake Paul vs. Ben Askren* (the "Fight") for commentary and criticism. Triller and Kavanaugh are now suing Defendants for their lawful speech criticizing the Copyright Action, Triller, Triller's social media application (the "Triller App") and Kavanaugh.

The First Amended Complaint ("FAC") is both confused and confusing. It is chock-full of irrelevant allegations and Rube Goldberg-like legal theories devoid of merit to disguise its direct assault on speech protected by the First Amendment and statutes intended to promote the same. Fortunately, California Code of Civil Procedure ("C.C.P.") Section 425.16 (the "Anti-SLAPP Statute") empowers this Court to prevent Triller's and Kavanaugh's attempt to improperly use the judicial system to harass, punish and silence Defendants' lawful speech.

Prong One: Triller's causes of action arise from protected activity as defined by the Anti-SLAPP Statute. The foundation of Triller's claims are statements made on the H3 Podcast about Triller, the Triller App and Kavanaugh – all of which are matters of widespread public interest. The H3 Podcast has millions of subscribers and the episodes at issue received millions of views. The Triller App has hundreds of thousands of reviews, millions of downloads and millions of monthly users. Triller, the Triller App and Kavanaugh have also been the subject of countless media reports. Therefore, there is no question that Triller's claims arise from protected activity as defined by the Anti-SLAPP Statute.

[1] The term "Defendants" shall refer to defendants Ted Entertainment, Inc. ("TEI"), Teddy Fresh, Inc. ("Teddy Fresh"), Ethan Klein ("Ethan") and Hila Klein ("Hila").

Prong Two: Triller cannot demonstrate it has a probability of prevailing on a single cause of action. First, the FAC alleges that the H3 Podcast incited its viewers by asking them to download the Triller App and leave an honest review. Under the First Amendment, incitement is actionable only when the advocacy is intended to and directed at creating imminent lawless action. Directing viewers to leave an honest review (negative or positive) is protected speech.

Second, Triller's causes of action are defamation claims in disguise because they are predicated on Triller's allegations that the H3 Podcast made false, misleading and malicious statements. As such, Triller must overcome the First Amendment protections for defamation law, which it cannot do. Each statement identified by Triller in the FAC is either: (1) true; (2) protected opinion; (3) not "of and concerning" Triller; and/or (4) not made with actual malice.

Third, Triller seeks to impute third-party statements from the H3 Subreddit onto Defendants because they are moderators of the H3 Subreddit. Section 230 of the Communications Decency Act ("Section 230"), however, bars Triller's attempt to impose liability on Defendants for statements made on the H3 Subreddit by third-parties.

Finally, Triller fails to properly plead (and cannot prove) any facts for any of its causes of action. Indeed, one of the causes of action has been explicitly rejected under California law.

Stripped bare, it is readily apparent that Triller's FAC is an attempt to subvert the judicial system to harass, punish and silence Defendants for their First Amendment protected criticism of Triller, the Triller App and Kavanaugh. The express purpose of California's Anti-SLAPP statute is to prevent Courts from being an accessory to such perversions of justice. Therefore, for the reasons stated below, Defendants respectfully request this Court to grant their Anti-SLAPP Motion and strike the FAC in its entirety with prejudice.

II. SUMMARY OF FACTS

A. Defendants

TEI is a production company that creates online content, including the H3 Podcast which airs approximately three times week on YouTube. Declaration of Ethan Klein ("Klein Decl."), ¶ 2. The H3 Podcast channel has over three million subscribers and each episode receives millions of views. *Id.*, Ex. 1. The H3 Podcast discusses current events, YouTube, social media influencers and

pop culture. *Id.* TEI employees also serve as moderators of the H3 Subreddit. *Id.*

Teddy Fresh is a streetwear fashion company that is entirely separate from TEI and not involved with the creation and dissemination of the H3 Podcast. Klein Decl., ¶ 3. Ethan does wear Teddy Fresh products in nearly every episode of the H3 Podcast to promote Teddy Fresh.[2] *Id.*

B. Triller and Kavanaugh

Triller owns the Triller App and is the parent company of TFCII (which owns the copyright to the Fight). Klein Decl., ¶ 4. The Triller App is available on the Apple App Store and Google Play Store. *Id.*, Exs. 2-6. On the Apple App Store, the Triller App has over 160,000 reviews and a 4.6-star rating. *Id.*, Exs. 2-4. On the Google Play Store, the Triller App has received over 214,000 reviews and a 3.5-star rating. *Id.*, Exs. 5-6. Triller and the Triller App have been the subject of extensive media coverage from sources such as *The New York Times, The Washington Post, Reuters, The Associated Press, Variety* and *The Hollywood Reporter. Id.*, Exs. 7-31. The Triller App has millions downloads and millions of unique monthly users. *Id.*, Exs. 28-31.

Kavanaugh is the majority owner of Triller. Klein Decl., ¶ 5, Exs. 39-40. Kavanaugh was the former CEO of Relativity Media ("Relativity"). *Id.*, Exs. 41-48. At Relativity, Kavanaugh drove the company into bankruptcy twice. *Id.*, Exs. 41-52. During Kavanaugh's tenure, Relativity was reduced to a mere thirty million dollars in assets and with nearly six hundred million dollars in liabilities. *Id.*, Ex. 50. Despite Relativity's insolvency, Kavanaugh made Relativity pay him a two and a half million dollar "consultant" fee. *Id.*, Exs. 45-47. In an arbitration, the Honorable Terry Friedman (ret.) found that Kavanaugh fabricated a memo alleging sexual harassment against the former president of Relativity, Adam Fields. *Id.*, Exs. 53-55. In that same arbitration, Kavanaugh falsely testified under oath that the memo was authored by a former in-house counsel at Relativity. *Id.* In retaliation for exposing his false testimony, Kavanaugh sued Mr. Fields. *Id.*, Exs. 56-58.

Kavanaugh has been embroiled in several other public controversies. For example, Kavanaugh's nanny was forced to sue Kavanaugh after he refused to pay her. Klein Decl., ¶ 6, Ex. 59. In an executed verified complaint drafted by Sidley Austin, LLP and covered by the press,

[2] Ethan and Hila have also previously faced (and defeated) frivolous copyright infringement, defamation and misrepresentation claims intended to punish and silence their lawful speech. *See Hosseinzadeh v. Klein* (S.D.N.Y. 2017) 276 F.Supp.3d 34.

Kavanaugh's former business partner, Elon Spar, called Kavanaugh's new business venture, Proxima Media, a "Ponzi scheme." *Id.*, Exs. 60-62. Kavanaugh has been arrested twice and convicted once for driving under the influence. *Id.*, Exs. 63-64. These controversies have caused Hollywood to shun Kavanaugh. *Id.*, Exs. 66-68. As the CEO of Solstice Media said of him: "Every time anyone lies in Cannes, Ryan [Kavanaugh] gets a royalty." *Id.*, Ex. 68.

C. The Copyright Infringement Lawsuit

On April 17, 2021, TFCII streamed the Fight over the internet. Klein Decl., ¶ 7. TEI and its employees watched the Fight over the internet to prepare an H3 Podcast episode that would comment on and critique the Fight. *Id.* After the Fight, TEI found on YouTube a clip of the Fight's main event – the fight between Jake Paul and Ben Askren. *Id.* TEI copied the clip and uploaded it as an unlisted video (*i.e.*, a video that could only be accessed by knowing the URL for the video and not through a YouTube search or on a channel's uploads) to facilitate the commentary and criticism of the Fight on the H3 Podcast. *Id.*, Exs. 69-70 at 1:25:58-1:37:32. On April 22, 2021, the H3 Podcast lambasted the Fight by using forty-four seconds of the uploaded clip of the Fight to illustrate the cast's biting commentary and criticism. *Id.*, Ex. 70 at 1:25:58-1:37:32.

On April 23, 2021, Triller initiated the Copyright Action against multiple defendants for alleged copyright infringement of the Fight. Declaration of Lincoln D. Bandlow ("LDB Decl."), ¶ 2, Ex. 71. On April 29, 2021, Triller filed an amended complaint. *Id.*, Ex. 72. The sole additions were adding two channels owned by TEI as defendants and naming TFCII as the plaintiff. *Id.* *Sua sponte*, the Honorable Judge Percy Anderson dismissed the channels (and several other defendants) for improper joinder. *Id.*, Exs. 73-74. Judge Anderson wrote that TFCII's repeated failure to properly plead joinder "calls into question the adequacy of plaintiff's compliance with its pre-suit obligations under Federal Rule of Civil Procedure 11." *Id.*, Ex. 74.

Triller took to the media to malign the H3 Podcast to scare third parties into participating in Triller's "settlement program." Klein Decl., ¶ 8, Exs. 75-76. In the article, Triller's "head of piracy," Matt St. Claire, made false statements of fact and law about the H3 Podcast's potential legal exposure for statutory damages for copyright infringement. *Id.*, LDB Decl., ¶ 3.

On May 10, 2021, TFCII filed a new complaint solely against the H3 Podcast. LDB Decl.,

¶ 4, Ex. 77. In conferring regarding the lawsuit, TFCII's counsel repeatedly emphasized that Kavanaugh was the main force behind the lawsuit. *Id.* On May 18, 2021, TEI disclosed its identity to TFCII after an improper attempt at service. *Id.*, Ex. 78. On May 21, 2021, TFCII filed an amended complaint that named TEI and Ethan and Hila under an alter ego theory. *Id.*, Ex. 79.

On June 29, 2021, TEI, Ethan and Hila sent TFCII a detailed letter explaining why each claim set forth in the Copyright Action failed as a matter of law and how TFCII violated Federal Rule of Civil Procedure 11 because the amended complaint and TFCII's prior correspondence contained countless false assertions of fact and law. LDB Decl., ¶ 5, Exs. 80-82. TFCII ultimately agreed to drop three of the six claims, yet added Teddy Fresh as a defendant. *Id.*, Ex. 83. To avoid burdening the court with an Anti-SLAPP motion and addressing claims TFCII had conceded lacked merit, Defendants stipulated to the second amended complaint. *Id.* On September 6, 2021, Defendants filed their motion to dismiss the second amended complaint. *Id.*, Ex. 84.

D. The Podcasts

After learning of the Copyright Action, the H3 Podcast discussed Triller, the Triller App and Kavanaugh. Klein Decl., ¶ 9. On June 11, 2021, TEI released an H3 Podcast episode that discussed: (1) Kavanaugh being behind the Copyright Action; (2) a *Variety* magazine article that reported that Mr. Spar accused Kavanaugh of running a Ponzi scheme; and (3) whether Kavanaugh physically resembled Harvey Weinstein (the "6/11/21 Podcast"). *Id.*, Ex. 85 at 0:00:00-0:10:05.

On July 1, 2021, TEI released an H3 Podcast episode that discussed: (1) the same topics as the 6/11/21 Podcast; and (2) that Ethan tried the Triller App and gave it a one-star review (the "7/1/21 Podcast"). Klein Decl., ¶ 10, Ex. 86 at 1:31:15-1:43:30.

On July 2, 2021, TEI released an H3 Podcast episode that discussed: (1) the same topics 6/11/21 Podcast and 7/1/21 Podcast; (2) that Triller misrepresented Kevin Hart's presence on the Triller App; (3) the contents of Ethan's review of the Triller App; (4) a video of Noah Beck (a prominent social media influencer) in which Mr. Beck stated that the Triller App was "flipped" because the camera function was inverted; and (5) the Triller App and how viewers should download it and provide an honest review of it (the "7/2/21 Podcast"). Klein Decl., ¶ 11, Ex. 87 at

2:02:15-2:17:30.

On July 8, 2021, TEI released an H3 Podcast episode that: (1) discussed the same topics as the 6/11/21 Podcast, the 7/1/21 Podcast and the 7/2/21 Podcast; (2) chastised "troll reviews" of the Triller App; and (3) instructed viewers not to give troll reviews of the Triller App (the "7/8/21 Podcast"). Klein Decl., ¶ 12, Ex. 88 at 0:06:40-0:20:35.

The 6/11/21 Podcast received over 2,500,000 views. Klein Decl., ¶ 13, Ex. 89. The 7/1/21 Podcast received over 2,300,000 views. *Id.*, Ex. 90. The 7/2/21 Podcast received over 1,900,000 views. *Id.*, Ex. 91. The 7/8/21 Podcast received over 1,200,000 views. *Id.*, Ex. 92.

E. The Present Lawsuit

Defendants' counsel and TCFII's counsel (who also represent Triller and Kavanaugh) agreed to meet and confer on July 14, 2021, to discuss why the Copyright Action failed as a matter of law. LDB Decl., ¶ 6. On July 13, 2021, however, Kavanaugh sent Defendants a demand for retraction (the "7/13/21 Letter") which failed to identify a single alleged defamatory statement in the 6/11/21 Podcast, the 7/1/21 Podcast, the 7/2/21 Podcast or the 7/8/21 Podcast (collectively, the "Podcasts"). *Id.*, Ex. 94. Approximately thirty minutes before the parties were to meet and confer on July 14, 2021, Triller sent Defendants an initial version of the FAC in the present action. *Id.*, Ex. 95. Triller's counsel sought to hijack the meet and confer to discuss Kavanaugh's threatened defamation lawsuit and the present action, but Defendants' counsel insisted on discussing the deficiencies of the Copyright Action as well. *Id.* Triller filed a complaint on July 19, 2021, and then the FAC (changing only Triller's corporate name) on September 7, 2021. *Id.*

III. LEGAL ARGUMENT

A. Legal Standard

Under prong one of the Anti-SLAPP Statute, "the defendant must establish that the challenged claim arises from activity protected by section 425.16." *Taus v. Loftus* (2007) 40 Cal.4th 683, 712. If prong one is satisfied, under prong two "the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." *Baral v. Schnitt* (2016) 1 Cal.5th 376, 384. The Anti-SLAPP Statute is to be "construed broadly" (C.C.P. § 425.16(a)) and it is designed to encourage participation in matters of public interest by targeting

"lawsuits brought primarily to chill the valid exercise of the constitutional right of freedom of speech." *Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 59-60.

B. Prong One: Triller's Causes of Action Arise from Protected Activity as Defined by the Anti-SLAPP Statute

Under prong one of the Anti-SLAPP Statute, a "claim arises from protected activity when that activity underlies or forms the basis for the claim." *Park v. Bd. Of Trustees of Cal. State Univ.* (2017) 2 Cal.5th 1057, 1062. This requires "evaluating the context and content of the asserted activity." *Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 884-885.

Section 425.16(e)(3) defines protected activity as "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[.]" "Web sites accessible to the public", like YouTube and Reddit, "are 'public forums' for purposes of the anti-SLAPP statute." *Barret v. Rosenthal* (2006) 40 Cal.4th 33, 41 fn. 4.

Section 425.16(e)(4) defines protected activity as "any other conduct in furtherance of the exercise of … the constitutional right of free speech in connection with a public issue or an issue of public interest." There are "three nonexclusive and sometimes overlapping categories of statements within the ambit of subdivision (e)(4)": (1) "statements or conduct concern[ing] 'a person in the public eye'"; (2) "conduct that could directly affect a large number of people beyond the direct participants"; and (3) "it involves 'a topic of widespread, public interest.'" *Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 621.

Here, Triller's claims arise from statements made during the H3 Podcast and from third-parties on the H3 Subreddit about Triller, the Triller App and Kavanaugh. *See* FAC, ¶¶ 2-7, 21-27, 29-30, 33, 36, 40, 43, 47, 52, 55, 60, 63, 65.

Courts have routinely found that "acts that 'advance or assist' the creation and performance of artistic works are acts in furtherance of the right of free speech for anti-SLAPP purposes." *Symmonds v. Mahoney* (2019) 31 Cal.App.5th 1096, 1106 (*citing Tamkin v. CBS Broadcasting, Inc.* (2011) 193 Cal.App.4th 133, 143-144; *Hunter v. CBS Broadcasting, Inc.* (2013) 221 Cal.App.4th 1510, 1521). It is self-evident that the statements made in the Podcasts were part of the creation and performance of an expressive work (*i.e.*, the Podcasts).

The Podcasts implicated several matters of intense public interest, such as the H3 Podcast, Triller, the Triller App and Kavanaugh. The FAC concedes that the H3 Podcast is a matter of wide-spread public interest by admitting that the Podcasts were "recorded and published to [the Podcast's] YouTube channel and ***millions*** of subscribers." FAC ¶ 3; Klein Decl., ¶ 2, Ex. 1. Further, each of the Podcasts have received anywhere from ***1,200,000 views to 2,500,000 views***. Klein Decl., ¶ 13, Exs. 90-93. Therefore, the H3 Podcast (in general) and the Podcasts (in particular) are matters of widespread public interest.

Triller and the Triller App are also a matter of widespread public interest. Triller and the Triller App have been the subject of countless media reports. Klein Decl., ¶ 4, Exs. 7-31. The Triller App has received hundreds of thousands of reviews, millions of downloads and has millions of monthly active users. *Id.*, Exs. 2-6. Therefore, there can be no doubt that Triller and the Triller App are in the public eye and are matters of widespread public interest.

Kavanaugh is also an individual of intense public interest. Kavanaugh has been the subject of countless media reports, including his personal life, misdeeds, mismanagement of Relativity Media and majority ownership of Triller. Klein Decl., ¶¶ 5-6, Exs. 32-70. Therefore, Kavanaugh is a person in the public eye and a matter of widespread public interest.

In sum, Defendants have met their burden under prong one of the Anti-SLAPP Statute.

C. Prong Two: Triller Cannot Show a Probability of Prevailing on the Merits

Under prong two, Triller bears the burden of proof to "establish[] that there is a probability that [it] will prevail on the claim[s]." C.C.P. § 425.16(b)(1). This requires Triller to "demonstrate that the complaint is ***both*** legally sufficient ***and*** supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (emphasis added). To carry this burden, Triller "may ***not*** rely solely on its complaint, even if verified; instead, proof ***must be made upon competent admissible evidence***." *Sweetwater Union High School Dist. v. Gilbane Bldg. Co.* (2019) 6 Cal.5th 931, 940 (emphasis added). Even if Triller satisfies this burden, its claims will be dismissed if Defendants' evidence "defeats the plaintiff's claim[s] as a matter of law." *Id.*

1. Triller's Claims Fail because it Cannot Plead or Prove Incitement

Triller's FAC is premised on the allegation that the Podcasts incited unlawful activity by encouraging viewers to leave one-star reviews of the Triller App. *See* FAC ¶¶ 2-4, 6 24, 26-31, 33, 36-37, 40, 43-44, 47, 50, 55, 58, 60. These allegations fail as a matter of law because the speech at issue is fully protected by the First Amendment.

"The First Amendment protects parody, rhetorical hyperbole, and loose, figurative, or hyperbolic language." *D.C. v. R.R.* (2010) 182 Cal.App.4th 1218. The First Amendment does "not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Virginia v. Black* (2003) 538 U.S. 343, 359.

As a threshold matter, advocacy of leaving a one-star review is protected speech. *See Kimzey v.* Yelp*!* (9th Cir. 2016) 836 F.3d 1263, 1269-70 ("Even were we convinced that a one-star rating could be understood as defamatory—a premise we do not embrace"). Further, the FAC explicitly concedes Triller ***cannot*** meet the standard for incitement because the FAC admits the Podcasts contained the following statements: (1) "Yeah, but ***people should judge for themselves***. Go download the app and leave a review."; (2) Give Triller "One, or more, stars. Some amount of stars between one star and up to maybe five stars"; and (3) not to leave "troll reviews" or "brigade" Triller with "troll reviews." FAC ¶¶ 24, 26-27; Klein Decl., ¶¶ 9-12, Exs. 85-87, 89. This language clearly does not advocate for any lawless action.[3]

Therefore, Triller cannot show a probability of prevailing on its claims because the speech used in the Podcasts do not constitute incitement and is fully protected by the First Amendment.

[3] *See also NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 927-929 ("An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech."); *Lam v. Ngo* (2001) 91 Cal.App.4th 832, 837 (protest organizers "cannot be held personally liable for the acts committed by other protestors unless he or she authorized, directed or ratified specific tortious activity, incited lawless action, or gave specific instructions to carry out violent acts or threats."); *McCollum v. CBS, Inc.* (1988) 202 Cal.App.3d 989, 1001 (Ozzy Osbourne's song "Suicide Solution" did not constitute incitement because it could not be "characterized as a command to an immediate suicidal act.").

2. Triller's Claims Fail because it Cannot Meet the Constitutional Requirements for Defamation

Triller's causes of action are defamation claims in disguise because the FAC repeatedly alleges the causes of action are based on "false, misleading and malicious" statements made in the H3 Podcast. *See* FAC ¶¶ 3, 22-24, 29-31; 33, 40, 47, 55, 63. When the gravamen of a claim is an "injurious falsehood of a statement," those claims "are subject to requirements rooted in the First Amendment of the United States Constitution" for a defamation claim. *Total Call International, Inc. v. Peerless Insurance Co.* (2010) 181 Cal.App.4th 161, 170 (*quoting Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1043-45). These requirements "cannot be avoided by 'creative pleading' that 'affixes labels other than defamation to injurious falsehood claims.'" *Total Call International*, 181 Cal.App.4th at 170 (*quoting Blatty*, 42 Cal.3d at 1045). Triller cannot satisfy these First Amendment requirements, as discussed below.

"**Triller is, and Mr. Kavanaugh runs, a Ponzi Scheme**": This statement fails to meet the First Amendment requirements for defamation. Foremost, this statement was never said in the Podcasts. Klein Decl., ¶¶ 5, 9-12, Exs. 85-87, 89. Rather, examining each of the Podcasts as a whole,[4] it is apparent that the Podcasts accurately discussed the accusations Mr. Spar made in his 2019 verified complaint against Kavanaugh and Proxima Media (*i.e.*, past tense and not present). *Id.* Therefore, Triller cannot show that this statement was even made – let alone that it was false.[5]

Further, this statement is not "of and concerning" Triller; rather, it is a statement "of and concerning" Kavanaugh and Proxima Media. *See Blatty*, 42 Cal.3d at 1042 ("In defamation actions, the First Amendment also requires that the statement on which the claim is based must

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[4] *See Medical Marijuana, Inc. v. ProjectCBD.com* (2020) 46 Cal.App.5th 869, 888 ("In considering a claim for libel, a court examines the totality of the circumstances, including the context in which the statement was made" and the "publication in question may not be divided into segments and each portion treated as a separate unit; it must be read as a whole in order to understand its import and effect").

[5] *See Blatty,* 42 Cal.3d at 1042 ("For constitutional purposes, it is not enough that the traditional affirmative defense of truth, with the burden of proof on the defendant, be available to the press; rather it is the plaintiff who is required to plead and prove falsehood"); *Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 293 ("[T]ruth is a complete defense to a defamation claim."); *Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, 697 ("It is sufficient if the defendant proves true the substance of the charge, irrespective of slight inaccuracy in details, so long as the imputation is substantially true so as to justify the gist or sting of the remark").

specifically refer to, or be 'of and concerning,' the plaintiff in some way").

Finally, even assuming *arguendo* that Triller could satisfy the aforementioned requirements, Triller cannot prove the constitutional requirement of actual malice. Due to intense media scrutiny, Triller and Kavanaugh are public figures who must plead and prove actual malice. *See Ampex Corp v. Cargle* (2005) 129 Cal.App.4th 1569, 1577 ("The all purpose public figure is one who has achieved such pervasive fame or notoriety that he or she becomes a public figure for all purposes and contexts.") (*citing Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 351). As such, they "must prove by clear and convincing evidence that an allegedly defamatory statement was made with knowledge of falsity or reckless disregard for truth." *Ampex*, 128 Cal.App.4th at 1577 (*citing New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 279-280). Here, the statements in the Podcasts were based on a *Variety* article and Mr. Spar's verified complaint; there was no definitive proof Spar's allegations were false.[6] Klein Decl., ¶¶ 5, 9-12, Exs. 61-62, 85-87, 89. For these reasons, this statement is not actionable.

"Triller falsely represented that comedian Kevin Hart uses the App": This statement is true because, when the Podcasts aired, Triller's descriptions for the Triller App stated that: "Millions have made Triller videos along with huge global stars such as … Kevin Hart" despite Mr. Hart having no presence on the Triller App at the time the Podcasts were made and aired. Klein Decl., ¶¶ 4, 9-12 Exs. 2-3, 5. Indeed, Triller effectively concedes this point by removing Mr. Hart's name from the Triller App's descriptions on the Apple App Story and Google Play Store ***after*** filing this lawsuit. *Id.*, ¶ 4, Exs. 4, 6. Therefore, this statement is not actionable.

"That the App is 'flipped'": This statement was originally made by Mr. Beck – a prominent social media personality – as he was creating a video using the Triller App. Klein Decl., ¶¶ 11-12, Exs. 87-89. In the video, Mr. Beck stated: "Yo, Triller, my thing is flipped" because he was experiencing issues with the Triller App's camera function. *Id.* Therefore, insofar as this statement contains an assertion of fact, it is true and not actionable.

[6] The "retraction" by Mr. Spar published in *Variety* does not create knowledge of falsity or reckless disregard for the truth because, unlike Mr. Spar's verified complaint, the "retraction" was made after settlement and not under oath. Klein Decl., ¶ 6, Exs. 61-62. Further, this "retraction" was so immaterial that *The Hollywood Reporter* did not publish it and, instead, provided an update that only stated Mr. Spar and Kavanaugh settled. *Id.*, Ex. 60.

Further, this phrase is non-actionable opinion under the First Amendment.[7] Here, Mr. Beck expressed his opinion on the Triller App's functionality (*i.e.*, that the camera function was not working properly because it was inverted). Klein Decl., ¶¶ 11-12, Exs. 87-89.

Finally, even assuming *arguendo* this constituted a false assertion of fact, Triller cannot show actual malice because the statement was based on Mr. Beck's statement in his video without any evidence demonstrating that Defendants knew Mr. Beck was incorrect. Klein Decl., ¶¶ 11-12, Exs. 87-89. For these reasons, this statement is not actionable.

"Mr. Kavanaugh bears a physical resemblance to Harvey Weinstein": If beauty is in the eye of the beholder, the same holds true for the lack thereof. This statement constitutes non-actionable opinion because it expresses the subjective perception that Kavanaugh looks like Mr. Weinstein – to which some H3 Podcast members agreed and some disagreed. Klein Decl., ¶¶ 9-12, Exs. 85-87, 89. Further, this statement is "of and concerning" Kavanaugh and not Triller. For these reasons, this statement is not actionable.

"Mr. Kavanaugh sued Defendants": This statement is substantially true. Triller's counsel told Defendants' counsel that Kavanaugh was behind the Copyright Action and the present action. LDB Decl., ¶ 4. Further illustrating Kavanaugh's involvement are: (1) the FAC's numerous allegations of "false, misleading and malicious" statements concerning Kavanaugh and not Triller (FAC ¶¶ 3, 22-24, 30); (2) Triller's counsel sending Kavanaugh's retraction letter; and (3) that Kavanaugh is the majority owner of Triller and its subsidiary TFCII. LDB Decl., ¶¶ 4, 6, Ex. 94; Klein Decl., ¶ 5 Exs. 39-40. Further, this statement is of and concerning Kavanaugh, not Triller. Finally, even assuming *arguendo* that this statement is false, Triller cannot prove actual malice because Triller led Defendants to believe Kavanaugh was behind the Copyright Action and present action. *Id.* Therefore, this statement is not actionable.

In sum, Triller cannot show a probability of prevailing on its claims because none of statements identified in the FAC meet the First Amendment requirements for defamation.

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[7] *See Issa v. Applegate* (2019) 31 Cal.App.5th 689, 707 ("In reviewing a defamation claim, a court must ask as a threshold matter whether a reasonable factfinder could conclude that the contested statement 'implies an assertion of objective fact. If the answer is no, the claim is foreclosed by the First Amendment'").

3. Triller's Claims are Barred under Section 230

Triller's causes of action are also premised on the theory that Defendants are responsible for statements made by third parties on the H3 Subreddit because Defendants serve as moderators of the H3 Subreddit. *See* FAC ¶¶ 4-6, 29, 33, 36-37, 40, 43-44, 47, 50, 52, 55, 58, 60, 63, 65.

Section 230 explicitly states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). The plain language of Section 230 applies to "users" of a website, like Reddit, including "individuals." *See Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 58-59. Further, Courts have consistently held that Section 230 confers users of websites "broad immunity" from tort claims based on the speech of a third-party user. *See Hassell v. Bird* (2018) 5 Cal.5th 522, 538-540; *Barrett*, 40 Cal.4th at 56.

Here, Triller seeks to impute statements made by third-party users of the H3 Subreddit (*i.e.*, information content providers) onto Defendants because they are H3 Subreddit moderators (*i.e.*, users). Therefore, Triller cannot show a probability of prevailing because Section 230 bars imposing liability on Defendants for third-party statements on the H3 Subreddit.

4. Triller Fails to Properly Plead (and Cannot Prove) Any Claim

a. Triller's First Claim Fails

This claim appears to be for intentional interference with contractual relations.[8] FAC p. 14. Aside from impermissible legal conclusions,[9] Triller fails to properly plead (and cannot prove) facts demonstrating: (1) a contractual relationship between Triller and a third-party; (2) Defendants' knowledge of said contracts; (3) any intentional act by Defendants designed to induce breach or disruption to said contracts; (4) an actual breach or disruption to said contracts; or

[8] Triller labels this claim as "Intentional Interference with Existing Economic Relationship." No such claim exists under California law. Rather, it appears Triller is alleging intentional interference with contractual relations, which requires Triller to plead and prove: "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of a contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damages." *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126.

[9] *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125 (courts "do not … assume the truth of contentions, deductions, or conclusions of fact or law"); *Casey v. U.S. Bank National Association* (2005) 127 Cal.App.4th 1138, 1153 (Conclusory statements which are unsupported by factual allegations are entitled to no weight).

(5) resulting damages. *See* FAC., ¶¶ 33-39; Sections III.C.1-3, *supra.* Therefore, Triller has no probability of prevailing on this cause of action.

b. Triller's Second Claim Fails

This claim is for intentional interference with prospective economic relationships.[10] *See* FAC pp. 14-15. Aside from impermissible legal conclusions, Triller fails to properly plead (and cannot prove) facts demonstrating: (1) the existence of any stable economic relationship between Triller and a third-party that existed prior to Defendants' purported interference; (2) Defendants' knowledge of said relationships; (3) that Defendants' conduct was wrongful; (4) actual disruption to said relationships; or (5) resulting damages. *See* FAC ¶¶ 40-46; Sections III.C.1-3. Therefore, Triller has no probability of prevailing on this cause of action.

c. Triller's Third Claim Fails

This claim is labeled as "negligent interference with existing economic relationships." *See* FAC pp. 15-16. No such cause of action exists: "In California there is no cause of action for ***negligent*** interference with contractual relations. While there exists a cause of action for negligent interference with ***prospective*** economic advantage (*J'Aire Corp v. Gregory* (1979) 24 Cal.3d 799), the California Supreme Court in *Fifield Manor v. Finston* (1960) 54 Cal.2d 632, [636] has rejected a cause of action for negligent interference with contract." *Davis v. Nadrich* (2009) 174 Cal.App.4th 1, 9 (original emphasis).[11] Therefore, Triller has no probability of prevailing on this cause of action.

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[10] Triller must plead and prove: "(1) the existence, between the plaintiff and some third party, of an economic relationship that contains the probability of future economic benefit to plaintiff; (2) defendant's knowledge of the relationship; (3) intentionally wrongful acts designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm proximately cause by the defendant's action." *Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* (2017) 2 Cal.5th 505, 512. The relationship must have "existed at the time defendant's allegedly tortious acts." *Id.* at 518. Moreover, this claim only protects "stable economic relationships," not merely any potential economic relationship. *Pacific Gas & Electric*, 50 Cal.3d at 1126. Further, the interference must be "wrongful by some legal measure other than the fact of interference itself." *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393.

[11] For transparency, a recent case purports that such a claim does exist and is the same as an intentional interference claim, except that the third element requires "defendant's knowledge (actual or construed) that the relationship would be disrupted if the defendant failed to act with reasonable care." *See Nelson v. Tucker Ellis, LLP* (2020) 48 Cal.App.5th 827, 844 fn. 5. *Nelson* did not, however, address that *Fifield Manor* precludes such a claim. Even assuming *arguendo* there is such a claim, it fails for all the same reasons set forth in Sections III.C.1-4.a., *supra.*

d. Triller's Fourth Claim Fails

Triller's fourth cause of action is for negligent interference with prospective economic relationships. The elements for this cause of action are identical to a claim for intentional interference with prospective economic relations, with the exception that the third element requires "defendant's knowledge (actual or construed) that the relationship would be disrupted if defendant failed to act with reasonable care" and an additional element of "defendant's failure to act with reasonable care." *See Redfearn v. Trader Joe's Co.* (2018) 20 Cal.App.5th 989, 1005. This cause of action fails for the exact same reasons set forth in Sections III.C.1-3, 4.b., *supra*. Therefore, Triller has no probability of prevailing on this cause of action.

e. Triller's Fifth Claim Fails

Triller's fifth cause of action is for "Violation of Cal. Bus. & Prof. Code § 17200 *et seq.*" FAC pp. 17-18. The only purported wrongful conduct alleged in this cause of action is: (1) Defendants "making and/or disseminating false, misleading, and deceptive statements concerning Plaintiff to the public"; and (2) Defendants' "willful and malicious efforts to artificially lower the Appr's rating on the Apple App Story and Google Play Store." For all the reasons stated in Sections III.C.1-3, *supra*, these allegations cannot serve as a basis for a Section 17200 claim. Therefore, Triller has no probability of prevailing on this cause of action.

IV. CONCLUSION

Triller's and Kavanaugh's assault on Defendants' First Amendment rights must end. Triller and Kavanaugh have profited handsomely from the First Amendment, it is time they learn it does not benefit just them. For the reasons stated above, the Court should strike Triller's meritless FAC and award Defendants their mandatory fees and costs that will be the subject of a separately filed motion.

Dated: September 8, 2021

Law Offices of Lincoln Bandlow, P.C.

By: _____
Lincoln D. Bandlow
Rom Bar-Nissim
Attorneys for Defendants
Ted Entertainment, Inc., Teddy Fresh, Inc., Ethan Klein and Hila Klein

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 1801 Century Park East, Suite 2400, Los Angeles, California 90067.

On September 8, 2021, I served the following document described as: **DEFENDANTS' NOTICE OF MOTION AND SPECIAL MOTION TO STRIKE PLAINTIFF'S FIRST AMENDED COMPLAINT PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 425.16; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; REQUEST FOR ATTORNEYS' FEES AND COSTS** on the interested parties in this action as follows:

Farhad Novian, Esq. Michael O'Brien, Esq. Lauren Woodland, Esq. Alexander Brendon Gura, Esq. Novian & Novian, LLP 1801 Century Park East, Suite 1201 Los Angeles, California 90067 Tel: (310) 553-1222 Fax: (310) 553-0222 E-Mail: farhad@novianlaw.com; michaelo@novianlaw.com; laurenw@novianlaw.com; gura@novianlaw.com	Counsel for Plaintiff, TRILLER, INC.

[X] **(By First Legal Electronic Service)**: I caused the above-entitled document to be served through First Legal addressed to all parties appearing on the First Legal electronic service list for the above-entitled case. The "First Legal Filing Receipt" page(s) will be maintained with the original document(s) in our office.

[X] **BY EMAIL:** I attached the document(s) to an email sent to the email addresses set forth above.

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

Executed on September 8, 2021, at Encino, California.

Lincoln Bandlow

Make a Reservation

TRILLER, LLC, A DELAWARE LIMITED LIABILITY COMPANY vs TED ENTERTAINMENT, INC., A CALIFORNIA CORPORATION, et al.

Case Number: 21SMCV01225 Case Type: Civil Unlimited Category: Other Commercial/Business Tort (not fraud/ breach of contract)
Date Filed: 2021-07-19 Location: Santa Monica Courthouse - Department R

Reservation

Case Name:
TRILLER, LLC, A DELAWARE LIMITED LIABILITY COMPANY vs TED ENTERTAINMENT, INC., A CALIFORNIA CORPORATION, et al.

Case Number:
21SMCV01225

Type:
Special Motion to Strike under CCP Section 425.16 (Anti-SLAPP motion)

Status:
RESERVED

Filing Party:
Teddy Fresh, Inc., a California corporation (Defendant)

Location:
Santa Monica Courthouse - Department R

Date/Time:
10/13/2021 9:00 AM

Number of Motions:
1

Reservation ID:
481474056031

Confirmation Code:
CR-NHX9V6WJBREGYUXHZ

Fees

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

Payment

Amount:
$446.96

Type:
Visa

Account Number:
XXXX0459

Authorization:
062318

Print Receipt | + Reserve Another Hearing

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