

1 Before the Court is a special motion to strike (the “Motion”) pursuant to
2 C.C.P. § 425.16 filed by Defendants Lions Gate Films Inc., Lions Gate
3 Entertainment Inc., and Starz Entertainment, LLC (“Defendants”). [Dkt. 25].
4 Defendants move to strike Plaintiff Marc Elliot’s (“Plaintiff”) First Amended
5 Complaint (“FAC”) [Dkt. 11] in its entirety and ask that the Court enter an
6 award of attorneys’ fees and costs pursuant to C.C.P § 425.16(c).

7 In connection with their motion, Defendants have filed a request for
8 judicial notice of several exhibits. [Dkt. 26 at 2]. Plaintiff did not file any
9 opposition. Defendants have also moved to strike Plaintiff’s Exhibit A in
10 support of his brief in opposition to Defendant’s Motion. [Dkt. 32].

11 The Motion is fully briefed. [Dkt. 25, 29, 31]. On October 28, 2022, the
12 Court held a hearing on this matter with both parties’ counsel present. [Dkt.
13 48]. For the reasons set forth below, the Motion is **GRANTED** and the FAC is
14 **DISMISSED** without leave to amend.

15 I. BACKGROUND

16 Defendants are the producers and distributors of a four-part documentary
17 series entitled *Seduced: Inside the NXIVM Cult* (the “Series”). The titular
18 NXIVM was a “personal development” and “self-improvement” company
19 founded in 1998 by Keith Raniere and Nancy Salzman. [Dkt. 11 at ¶ 20]. In
20 2018, NXIVM closed its operations following an FBI investigation into
21 allegations of sex trafficking and other serious crimes perpetrated by its senior
22 leadership against NXIVM members. Several of those investigated have since
23 been convicted; Raniere is currently serving a 120-year sentence in federal
24 prison. [See Dkt. 26-3 (Exh. 2)]. The Series uses the personal experiences of
25 former NXIVM member India Oxenberg as a “vehicle to...criticize the inner
26 workings” and alleged “nefarious dealings” of NXIVM. [Dkt. 25 at 31].

27 Over the course of four episodes, it interweaves first-person accounts,
28 commentary by “cult experts,” footage from NXIVM trainings and events, and

1 other materials to develop an “unabashedly critical” narrative of NXIVM and its
2 leadership. The Series culminates with the criminal prosecutions of Raniere and
3 others. [*Id.* at 31].

4 Plaintiff is a former NXIVM member and is portrayed only briefly in
5 Defendants’ Series.¹ Plaintiff first encountered NXIVM’s Executive Success
6 Program (“ESP”) in 2009 and began taking ESP courses. Plaintiff represents
7 that ESP enabled him to overcome his lifelong, previously debilitating
8 Tourette’s Syndrome. Thereafter, Plaintiff’s involvement with NXIVM grew.
9 He became a full-time ESP instructor and salesperson, participated in other
10 NXIVM courses and programs, and worked closely with Raniere and Salzman
11 to publicize the impact NXIVM’s trainings had on his life. [Dkt. 11 at ¶ 20-32].

12 After NXIVM closed in 2018, Plaintiff planned to offer a presentation
13 “explor[ing] his journey of overcoming Tourette’s through ESP training and the
14 negative press against him and NXIVM.” He cancelled the presentation only
15 after a federal prosecutor threatened to indict him for perceived recruitment on
16 behalf of an organization which was, by that time, under intense legal scrutiny.
17 [*Id.* at ¶ 33-37]. Plaintiff has never been accused of or faced prosecution for any
18 offense related to his involvement with NXIVM. [Dkt. 25 at 12].

19 Plaintiff alleges that the scenes in which he appears, and the Series
20 overall, portray him in a false, defamatory light. On this basis, Plaintiff brings
21 five causes of action for (1) defamation per se, (2) defamation by implication,
22 (3) appropriation of name or likeness, (4) false light, and (5) intentional
23 infliction of emotional distress. [Dkt. 11 at ¶ 70-129].

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27 ¹ Specifically, Plaintiff appears in Episode 1 shortly after the 10-minute mark,
28 Episode 2 at approximately the 20- and 40-minute marks, and Episode 4 at
approximately the 1 hour and 18 minute-mark. Plaintiff does not appear at all in
Episode 3. [Dkt. 26-1 at ¶ 2 (Decl. of Meghan Fenzel)].

II. EVIDENTIARY ISSUES

A. Defendants' Request for Judicial Notice

Defendants request that this Court take judicial notice of: (1) lodged video files of each episode of the Series [(Exh. 1), *see* Dkt. 27]; (2) official court records from *United States v. Ranieri* (No. 1:18-cr-00204-NGG-VMS) in the Eastern District of New York [Dkt. 26-3 (Exh. 2)]; (3) the fact that there has been “significant news media coverage of NXIVM and Keith Ranieri” [Dkt. 26-4 (Exh. 3), 26-5 (Exh. 4), and 26-6 (Exh. 5)]; and (4) official New York State Department of Health’s Office of Professional Misconduct and Physician Discipline Record for Brandon Porter [Dkt. 26-7 (Exh. 6)].

Generally, a district court may not consider any material beyond the pleadings when ruling on a motion to dismiss. Fed. R. Civ. P. 12(b)(6); *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). This rule is subject to two exceptions. First, under the “incorporation-by-reference” doctrine, the court may notice materials “properly submitted as part of the complaint.” *Lee*, 250 F.3d at 688. This encompasses exhibits cited in and attached to the complaint as well as any other materials on which the plaintiff’s complaint “necessarily relies,” so long as their “authenticity ... is not contested.” *Id.*

Second, a court may consider documents or facts that are judicially noticeable pursuant to Federal Rule of Evidence 201. Fed. R. Evidence 201(d) (“The court may take judicial notice at any stage of the proceeding”); *Khoja v. Orexigen Therapeutics Inc.*, 899 F. 3d 988, 998 (9th Cir. 2018). The Federal Rules provide for judicial notice of any fact “not subject to reasonable dispute” because it is either “generally known within the trial court’s territorial jurisdiction” or “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evidence 201(b).

1 **i. Lodged Video Files of the Series (Exh. 1)**

2 All of Plaintiff’s claims pertain to Defendants’ portrayal of him in the
3 Series. For this reason, his FAC refers to the Series extensively, and includes
4 detailed descriptions of the scenes that give rise to Plaintiff’s allegations. The
5 Court therefore finds that the video files of the Series constitute materials upon
6 which the FAC “necessarily relies,” and may be considered under the
7 incorporation-by-reference doctrine. Defendants’ lodged Exhibit 1 is judicially
8 noticed as evidence of the content of Defendants’ Series, although not for the
9 truth of the statements made therein.

10 **ii. Court Records in United States v. Raniere (Exh. 2)**

11 Defendants seek judicial notice of the docket report and filings in *United*
12 *States v. Raniere*. Although they do not specify the purpose for which they
13 believe these materials should be noticed, they indicate that they are relevant
14 because Raniere’s prosecution is the focus of the Series’ fourth episode and
15 because they reflect Plaintiff’s relevance to those proceedings.

16 A court’s official records are considered reliable public records not
17 subject to reasonable dispute under the Federal Rules of Evidence. They may
18 be noticed for facts concerning what took place *during* or in connection with the
19 court proceedings only. This means that a court may notice another court’s
20 records for information regarding how a case progressed, what was argued by
21 the parties, and on what basis the court ruled on a motion. *Mendez v. Optio*
22 *Solutions, LLC*, 219 F. Supp. 3d 1012, 1014-15 (S.D. Cal. 2016) (internal
23 citations omitted); *see also Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d
24 741, 746 n.6 (9th Cir. 2006) (taking judicial notice of Plaintiff’s briefs in prior
25 litigation to determine what had been “actually litigated” in that case in order to
26 address issue preclusion questions). It may not, however, take judicial notice of
27 another court's opinions, orders, or records “for the truth of the facts recited
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1 therein.” *Mendez v. Optio Solutions, LLC*, 219 F. Supp. 3d 1012, 1014-15 (S.D.
2 Cal. 2016) (internal citations omitted).

3 The Court therefore takes judicial notice of Defendants’ Exhibit 2 for the
4 fact that Raniere has been convicted of and sentenced to prison for crimes
5 including sex trafficking, forced labor, and racketeering in connection with
6 NXIVM [Dkt. 26-3 at 26-29].

7 **iii. Media Coverage of Raniere, NXIVM, and Plaintiff (Exh. 3, 4,
8 and 5)**

9 Defendants request judicial notice of the materials in their Exhibits 3, 4,
10 and 5. Exhibit 3 contains local and national news stories published about
11 Raniere and NXIVM over the course of several years prior to any criminal
12 investigation. Exhibit 4 contains media coverage from 2017 and throughout the
13 criminal investigation and trial. Finally, Exhibit 5 contains two published
14 images of Plaintiff speaking to the press after Raniere’s sentencing, both with
15 captions identifying Plaintiff as one of Raniere’s “supporters.” Defendants
16 contend that these materials are noticeable for “the fact that NXIVM and
17 Raniere have been the subject of extensive media coverage,” and are relevant
18 because they help to demonstrate both the public’s “interest” in NXIVM and
19 Raniere and Plaintiff’s own “role as a public figure in the NXIVM scandal.”
20 [Dkt. 26 at 4-6].

21 In defamation cases, courts commonly take judicial notice of relevant
22 publications to illustrate what “was in the public realm at the time, [although]
23 not whether the contents of those articles were in fact true.” *Makaeff v. Trump
24 Univ., LLC*, 715 F.3d 254, 259 (9th Cir. 2013) (quoting *Von Saher v. Norton
25 Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010)). The
26 Court therefore takes judicial notice of the media coverage reflected in
27 Defendants’ exhibits, and considers the weight of this evidence under the
28 “public issue” prong of the anti-SLAPP analysis (*see* Part IV-A, below).

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iv. New York State Department of Health Records (Exh. 6)

Finally, Defendants request that the Court take judicial notice of the official New York State Department of Health’s Office of Professional Misconduct and Physician Discipline record for Brandon Porter [Dkt. 26-7 (Exh. 6)]. This request is denied because the Court finds these materials not relevant to the resolution of Defendants’ Motion. *See Meador v. Pleasant Valley State Prison*, 312 F. App’x 954, 956 (9th Cir. 2009).

B. Defendants’ Objections to Plaintiff’s Exhibit A

In support of his opposition to Defendant’s Motion, Plaintiff has lodged an exhibit containing seven video clips (Exh. A). These clips portray various NXIVM training and events at which Plaintiff was present, either as an attendee or as a presenter. [Dkt. 29 at 21-24 (Decl. of Marc Elliot)]. The allegedly defamatory portions of Defendants’ Series incorporate partial and/or edited versions of the materials in Plaintiff’s exhibit.

Plaintiff indicates that the original footage he has provided, when compared to the contested portions of Defendant’s Series, demonstrate that Defendants “deceptively manipulated” their source material to convey “false” messages about Plaintiff. [*Id.* at 13, 14]. Defendants object to Plaintiff’s Exhibit, citing multiple provisions of the Federal Rules of Evidence. [Dkt. 32].

As set forth below, the Court finds that Plaintiff’s claims are subject to dismissal regardless of whether Defendants in fact ‘manipulated’ their source footage. As such, the Court therefore concludes that Plaintiff’s Exhibit A is irrelevant. *See* Fed. R. Evid. 402 (only relevant evidence is admissible); Fed. R. Evid. 401 (evidence is relevant only if it pertains to a “fact that is of consequence to the determination of the action”).

1 **III. LEGAL STANDARD**

2 Defendants bring their Motion to Strike pursuant to pursuant to C.C.P. §
3 425.16 (California’s “anti-SLAPP” statute).² The statute provides that:

4 A cause of action against a person arising from any act of that person
5 in furtherance of the person's right of petition or free speech under the
6 United States Constitution or the California Constitution in connection
7 with a public issue shall be subject to a special motion to strike, unless
8 the court determines that the plaintiff has established that there is a
9 probability that the plaintiff will prevail on the claim. C.C.P. §
10 425.16(b)(1).

11 To succeed on an anti-SLAPP motion to strike, the defendant must make
12 a “prima facie showing” that the plaintiff's suit arises from an act both (a) “in
13 furtherance of the defendant's constitutional right to free speech,” *Herring*
14 *Networks*, 8 F.4th 1148, 1155 (9th Cir. 2021), citing *Makaeff v. Trump Univ.,*
15 *LLC*, 715 F.3d 254, 261 (9th Cir. 2013), and (b) “in connection with a public
16 issue,” *Hilton v. Hallmark Cards*, 599 F.3d 894, 903-08 (9th Cir. 2010).

17 If the defendant satisfies this requirement, “[t]he burden then shifts to the
18 plaintiff ... to establish a reasonable probability that it will prevail on its claim in
19 order for that claim to survive dismissal.” *Herring Networks*, 8 F.4th at 1155.
20 To harmonize California’s anti-SLAPP statute with the Federal Rules of Civil
21 Procedure, the Ninth Circuit has instructed California district courts to apply
22 one of two different standards in reviewing plaintiff’s claims depending on the
23 basis for defendant’s motion. *Planned Parenthood, Inc. v. Center for Medical*

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27 ² The statute applies to state law claims whether brought in state or federal
28 court. *Piping Rock Partners, Inc. v. David Lerner Associates, Inc.*, 946 F. Supp.
2d 957, 966-67 (N.D. Cal. 2013), citing *United States ex rel. Newsham v.*
Lockheed Missiles & Space Co., 190 F.3d 963, 971-73 (9th Cir. 1999).

1 *Progress*, 890 F.3d 828, 834 (9th Cir. 2018). Where defendant’s motion asserts
2 only legal deficiencies in plaintiff’s complaint, a court is to conduct its analysis
3 under a Rule 12(b)(6) standard. *Planned Parenthood*, 890 F.3d at 833; *Herring*
4 *Networks*, 8 F.4th at 1156. When a defendant’s motion challenges the factual
5 adequacy of plaintiff’s allegations, then a Rule 56 standard controls and the
6 parties will be entitled to conduct discovery before the court rules on the
7 motion.

8 Defendants state explicitly in their Motion that the FAC “fail[s] as a
9 matter of law.” [Dkt. 25 at 1, 2]. Their arguments address only the legal
10 sufficiency of the FAC, and the Court has considered extrinsic materials only to
11 the extent that they are judicially noticeable. *See* Part II-A above; *United States*
12 *v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003) (a court may consider
13 “documents...incorporated by reference in the complaint, or matters of judicial
14 notice...without converting the motion to dismiss into a motion for summary
15 judgment”).

16 Rule 12 standards therefore govern the Court’s second-step anti-SLAPP
17 analysis. Plaintiff is not entitled to conduct discovery in connection with this
18 Motion.³ [*See* Dkt. 29 at 18].

19 IV. DISCUSSION

20 A. Step One: Defendants’ Conduct in Furtherance of First 21 Amendment Rights and about a Public Issue

22 First, a defendant moving to strike pursuant to California’s anti-SLAPP
23 statute must establish that the activity the plaintiff challenges was undertaken
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27 ³ As set forth in the next section, Plaintiff’s claims are foreclosed by the content
28 and nature of the Series itself. Even if the Court were to allow discovery, it
would not be necessary or helpful to its analysis of Plaintiff’s claims.

1 “in furtherance” of defendant’s free speech rights. For this purpose, it will
2 suffice if the activity is “communicative,” or evinces “[a]n intent to convey a
3 particularized message...and in the surrounding circumstances the likelihood
4 was great that the message would be understood by those who viewed it.”
5 *Hilton v. Hallmark Cards*, 599 F.3d 894, 903-04 (9th Cir. 2010) (internal
6 citations omitted). Documentaries like Defendants’ Series readily meet this
7 standard. See, e.g., *Doe v. Gangland Productions, Inc.*, 730 F.3d 946, 952-53
8 (9th Cir. 2013); *Jackson v. Netflix, Inc.*, 506 F.Supp.3d 1007 (C.D. Cal. 2020).
9 The fact that Defendants also intended to make money from the Series does not
10 affect this analysis. *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 906 (9th
11 Cir. 2002) (a work that is simultaneously expressive *and* commercial, so that it
12 does something “more than propose a commercial transaction,” is “entitled to
13 full First Amendment protection”).

14 Second, the defendant must demonstrate that its challenged speech act is
15 “in connection with” a “public issue or an issue of public interest.” Cal. Civ.
16 Proc. Code § 425.16(e)(4). California state courts, as well as federal courts
17 applying California law, have found this requirement met where the expressive
18 work concerned a “person or entity in the public eye,” “conduct that could
19 directly affect a large number of people beyond the direct participants,” or
20 “topic of widespread, public interest.” *Hilton*, 599 F.3d at 906-07 (collecting
21 California state court decisions); see also *FilmOn.com Inc. v. DoubleVerify Inc.*,
22 7 Cal. 5th 133, 145 (2019). Speech addressing some “ongoing controversy,
23 dispute or discussion” also qualifies. *Cross v. Cooper*, 197 Cal. App. 4th 357,
24 383 (2011). Matters of concern only to the speaker and a “small, specific
25 audience,” however, do not. *Hilton*, 599 F.3d at 906-07. Nor can a defendant
26 “turn otherwise private information into a matter of public interest simply by
27 communicating it to a large number of people.” *Id.*, citing *Weinberg v. Feisel*,
28 110 Cal. App. 4th 1122, 1131-33 (2003).

1 Here, Defendants contend that the Series falls within the scope of anti-
2 SLAPP’s protections because (1) NXIVM and the criminal prosecutions of its
3 leadership are topics of “ongoing controversy” and substantial public interest,
4 (2) Plaintiff Marc Elliot is a limited purpose public figure and therefore a matter
5 of public interest in his own right, and (3) Plaintiff’s involvement in NXIVM
6 and ongoing support for Ranieri are themselves matters of public interest. [Dkt.
7 29 at 18-22].

8 The Court agrees that the Series pertains to matters of public interest and
9 discussion. As the judicially noticeable materials submitted by Defendant
10 demonstrate, major media outlets devoted substantial attention to NXIVM, its
11 leadership, and the experiences of its members for many years before the Series
12 was released. *See Church of Scientology v. Wollersheim*, 42 Cal. App. 4th 628
13 (1996) (relying on the fact of widespread media coverage to conclude that the
14 Church of Scientology and associated controversies were public issues for anti-
15 SLAPP purposes).

16 Furthermore, the Court finds that Plaintiff himself is connected to the
17 public interest and controversy surrounding NXIVM. Plaintiff has consistently
18 and voluntarily made himself part of the NXIVM story. Plaintiff worked for
19 many years as a NXIVM instructor and salesperson. [Dkt. 11 at ¶ 32]. He
20 served as an “assistant producer” and “prominent subject” in a purportedly
21 award-winning 2017 film documenting his use of NXIVM’s ESP techniques to
22 manage his Tourette’s syndrome. [*Id.* at ¶ 30]. And as Defendants’ Exh. 5
23 shows, Plaintiff has continued to support Ranieri even after NXIVM disbanded.

24 Plaintiff maintains that Defendants cannot satisfy the “public issue” prong
25 because the scenes to which he objects include footage of NXIVM sessions that
26 were “never intended to be seen by the public.” [Dkt. 29 at 12]. Here, Plaintiff
27 misconstrues the applicable law. The cases Plaintiff cites stand only for the
28 proposition that a defendant cannot *transform* a private issue into a public one

1 simply by publishing and circulating information about it. However, a
2 defendant's publication of private communications between private individuals
3 will fall under anti-SLAPP so long as the public's interest predates defendant's
4 publication. *FilmOn*, 7 Cal. 5th at 146. And clearly, Defendants did not
5 manufacture public interest in NXIVM or in Plaintiff by publishing the video at
6 issue.

7 **B. Step Two: Legal Sufficiency of Plaintiff's Allegations**

8 Because Defendants have satisfied step one, the burden shifts to Plaintiff
9 to demonstrate that his causes of action could survive a motion to dismiss under
10 a Rule 12 standard.

11 To assess the legal sufficiency of the complaint, the court must look to
12 each of the plaintiff's claims to determine whether he has alleged both a
13 cognizable legal theory as to defendant's liability and sufficient "factual
14 content" to allow the court to "draw the reasonable inference that the defendant
15 is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 663
16 (2009). 678 (internal quotation marks omitted).

17 In accordance with the Federal Rules' liberal pleadings standards, a
18 plaintiff should be granted leave to amend his complaint following a successful
19 motion to strike unless the Court finds "undue delay, bad faith or dilatory
20 motive on the part of the [plaintiff], repeated failure to cure deficiencies by
21 amendments previously allowed, undue prejudice to the opposing party by
22 virtue of allowance of the amendment, [or] futility of amendment." *Sharkey v.*
23 *O'Neal*, 778 F.3d 767, 774 (9th Cir. 2015), citing *Foman v. Davis*, 371 U.S.
24 178, 182 (1962).

25 An amendment would be futile if there is no set of facts that can be
26 proved which would constitute a valid claim. *Miller v. Rykoff-Sexton, Inc.*, 845
27 F.2d 209, 214 (9th Cir. 1988). Futility alone is sufficient to justify denial of
28 leave to amend. *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995).

1 All of Plaintiff’s claims arise from his portrayal in the Series, which is
2 limited to four brief scenes. In the first scene in the Series involving Plaintiff
3 (“Scene 1,” in Episode 1), a still image of Plaintiff speaking into a microphone
4 appears briefly. There is no voice-over. On-screen text states Plaintiff’s name
5 and identifies him as a “NXIVM Recruiter.”

6 The second scene (“Scene 2,” in Episode 2), begins with footage of an
7 unidentified event space. This image is accompanied by audio of Raniere, who
8 makes a series of vulgar, violent comments about women and men’s attitudes
9 towards the opposite sex. Next, the scene shifts to a clip of Plaintiff speaking
10 directly into the camera in a talking-head interview format. He is identified in
11 the caption as a “NXIVM Proctor.” Plaintiff states that “no one has ever taught
12 us how to relate to women...this is, in my opinion, the Harvard of trying to
13 relate to women.”

14 The third scene (“Scene 3,” also in Episode 2) includes Raniere on stage,
15 stating that “you can understand killing when you feel it is necessary...” The
16 scene cuts to an image of Plaintiff holding a microphone and nodding, then
17 returns to Raniere, then moves to footage of the siege at Waco, then to footage
18 of Jim Jones and the Jonestown massacre.

19 The fourth and final scene in which Plaintiff appears (“Scene 4,” Episode 4)
20 includes text that reads: “NXIVM Loyalists still practice ‘readiness’ drills. In
21 July 2020, a group of loyalists started dancing beneath the window of Keith
22 Raniere’s prison cell in Brooklyn.” Alongside the text, there is a brief clip of
23 Plaintiff dancing in front of what appears to be a prison.

24 **i. First Cause of Action (Defamation Per Se)**

25 In his First Cause of Action for defamation per se, Plaintiff asserts that
26 Defendants, “through the use of edited video and audio clips, voice-overs,
27 written content, and statements taken out of context,” “communicated” to the
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1 Series' audience that "Plaintiff is dangerous, has been trained to kill, is capable
2 of killing himself if told to, and condones sexual violence against women."
3 [Dkt. 11 at ¶ 70].

4 To state a claim for defamation per se, the plaintiff must identify a false
5 statement, made by defendant, "of and concerning" the plaintiff, that is
6 defamatory "on its face." *Yow v. National Inquirer, Inc.*, 550 F.Supp.2d 1179,
7 1183 (E.D. Cal. 2008). A statement is defamatory on its face if there is no
8 "need for extrinsic evidence to explain the statement's defamatory nature." *Id.*;
9 *see also Washburn v. Wright*, 261 Cal.App.2d 789, 797 (Cal. Ct. App. 1968)
10 ("Material libelous *per se* is a false and unprivileged publication by writing
11 which exposes any person to hatred, contempt, ridicule, or obloquy, or which
12 causes him to be shunned or avoided, or which has a tendency to injure him in
13 his occupation.").

14 The only explicit statements made about Plaintiff in any of the four
15 scenes – or indeed, anywhere in the Series – assert that he was a NXIVM
16 recruiter and instructor. These cannot be defamatory because they are true.
17 Plaintiff's First Cause of Action is therefore **STRUCK** for failure to state a
18 claim. Leave to amend this claim is **DENIED** as futile.

19 **ii. Second Cause of Action (Defamation by Implication)**

20 To state a claim for defamation by implication, the plaintiff must allege
21 that defendant's "published material is reasonably susceptible of an
22 interpretation which implies a provably false [and otherwise defamatory]
23 assertion of fact." *Metabolife Intern., Inc. v. Wornick*, 264 F.3d 832 (9th Cir.
24 2001). This requires that plaintiff's interpretation of defendant's work is
25 *reasonable*; that the alleged implications convey *objective facts* rather than
26 opinions, *Partington v. Bugliosi*, 56 F.3d 1147, 1153 (9th Cir. 1995); and that
27 the challenged implications are not "substantially true," *Summit Bank v. Rogers*,
28 206 Cal. App. 4th 669, 697, 142 Cal. Rptr. 3d 40 (2012).

1 Plaintiff identifies four defamatory assertions he believes are implied by
2 the Defendants’ portrayal of him in the Series.

3 First, Plaintiff claims that the Series suggests that he was a “recruiter and
4 member of a purported sex cult.” [Dkt. 11 at ¶ 40]. Plaintiff does not contest
5 that he participated in, instructed, and encouraged others to join various NXIVM
6 programs. [Dkt. 11 at ¶ 32]. However, he maintains that the Series improperly
7 associates him with NXIVM’s purported “sex cult,” and that this implication is
8 defamatory as he did not participate in the specific secret society within
9 NXIVM (known as “DOS”) where much of the alleged sexual abuse occurred.

10 These allegations do not amount to a defamation claim. A “plaintiff may
11 not construct an actionable statement by reading whatever implication it wishes
12 into” defendant’s work. *Metabolife*, 264 F.3d at 854. A reasonable viewer
13 would not understand the Series to suggest that Plaintiff participated in or was
14 involved in any abuse himself. It does imply that Plaintiff was a devoted
15 member of an organization whose leader has been implicated in a range of
16 serious sexual crimes, but this assertion – however unflattering – is substantially
17 true. “Substantial truth” is a defense to defamation under California law, and a
18 statement is substantially true so long as its “substance...gist...[or] sting... can
19 be justified.” *D.A.R.E. America v. Rolling Stone Magazine*, 101 F.Supp.2d
20 1270, 1287-88 (C.D. Cal. 2000); *see also Masson v. New Yorker Magazine, Inc.*,
21 501 U.S. 496, 516-17 (1991) (“[T]he statement is not considered false unless it
22 would have a different effect on the mind of the reader from that which the
23 pleaded truth would have produced.”).

24 Second, Plaintiff argues that the Series suggests that he “supported and
25 encouraged violence and misconduct against women.” [Dkt. 11 at ¶ 45]. He
26 specifically contends that this implication arises from Scene 2, which includes a
27 long and vulgar comment, condoning men sexually “conquering” women, made
28 by Ranieri during a meeting of the NXIVM men’s group “Society of

1 Protectors” (SOP), followed by a testimonial Plaintiff stating that “[n]o one has
2 ever taught us how to relate to women, nowhere, in all the education of my
3 whole life” and extolling JNESS as the “Harvard of trying to relate to women.”
4 Plaintiff alleges that “a viewer would reasonably assume that Plaintiff’s glowing
5 review [of JNESS] referred to Ranieri’s statement [at SOP]” and, therefore, that
6 Plaintiff “supported and encouraged” the kind of sexual violence Ranieri had
7 espoused. [*Id.* at ¶ 44, 45].

8 To determine whether a communication carries a defamatory meaning,
9 “context...must be considered.” *Balzaga v. Fox News Network, LLC*, 173 Cal.
10 App. 4th 1325, 1338 (2009) (internal citations omitted, cleaned up). The
11 “publication in question must be considered in its entirety” to “understand... the
12 effect which it was calculated to have on the [viewer].” *Id.* A court should not
13 treat “each portion” of the work as a “separate unit.” *Id.*

14 While Scene 2 might, if viewed in isolation, be understood to suggest that
15 Plaintiff was offering a direct endorsement of Ranieri’s preceding comments,
16 the larger context of Episode 2 demonstrates otherwise. The two scenes
17 Plaintiff juxtaposes are part of a broader exploration of Ranieri’s attitudes
18 towards women. This segment incorporates Ranieri’s comments, and NXIVM
19 members’ reactions to them, in a variety of different settings. A reasonable
20 viewer might interpret Scene 2 to suggest Plaintiff agreed with Ranieri’s
21 teachings generally, but not that Plaintiff’s testimonial was a direct endorsement
22 of the message that preceded it.

23 Third, Plaintiff argues that the Series suggests that he, as a member of
24 NXIVM, has been “weaponized” like a follower of “ISIS [or] Al-Qaeda” might
25 be. [Dkt. 11 at ¶ 50]. He indicates that this implication arises from scenes,
26 including Scene 3, in which ‘cult experts’ draw parallels between NXIVM and
27 infamous organizations including ISIS, Al-Qaeda, the People’s Temple
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1 (infamous for the massacre at Jonestown), and Branch Davidians (associated
2 with the siege at Waco).

3 As an initial matter, it is hardly clear that a reasonable viewer would
4 interpret these segments in the ways Plaintiff suggests. The “cult experts”
5 featured in the Series refer to only broad similarities between NXIVM and the
6 other organizations named, and largely suggest that NXIVM *might* have
7 escalated in analogous ways had it not been disbanded.

8 But even assuming these segments carry the implication Plaintiff
9 identifies, such an implication cannot be defamatory because it does not
10 constitute an assertion of fact. In making this determination, a court should
11 consider whether the “general tenor” of the work negates the impression that
12 defendants were asserting objective facts, whether Defendants used hyperbolic
13 language, and whether the challenged implication could be proven either true or
14 false. *Partington v. Bugliosi*, 56 F.3d 1147, 1153 (9th Cir. 1995); *see also*
15 *Thomas v. Los Angeles Times Communication LLC*, 189 F. Supp. 2d 1005 (C.D.
16 Cal. 2002). An assertion that someone has been “weaponized” cannot be
17 proven true or false. And in the context of the series, any comparisons between
18 NXIVM and violent terrorist organizations are readily understood as speculative
19 and exaggerated.

20 Lastly, Plaintiff argues that the Series indicates that he has “been trained
21 to kill and is capable of killing himself or others if so instructed.” [*Id.* at ¶ 84;
22 *see also* Dkt. 29 at 8-9]. Plaintiff alleges that this implication arises primarily in
23 Scene 3. [Dkt. 11 ¶ 55-59]. As previously noted, the reasonable viewer is
24 unlikely to draw any provably false assertions of fact about NXIVM from this
25 scene. Moreover, Plaintiff’s appearance in this segment is so brief that it seems
26 unlikely that a viewer would understand Defendants to be conveying any
27 message about Plaintiff at all.
28

1 Because Plaintiff has failed to allege any defamatory implications that
2 may be reasonably drawn from the Series, his Second Cause of Action is
3 **STRUCK**. The Court has reviewed the Series in its entirety and finds that it
4 conveys no potentially defamatory statements or implications about Plaintiff.
5 On this basis, it concludes that there is no set of facts Plaintiff could allege to
6 state a claim for defamation based upon Defendants' work. Leave to amend the
7 Second Cause of Action is **DENIED** as futile.

8 **iii. Third Cause of Action (Appropriation of Name or Likeness)**

9 To state a claim for common law misappropriation, the plaintiff must
10 allege that the defendant used his identity (name or likeness), to defendant's
11 advantage (commercially or otherwise), without plaintiff's consent, causing
12 plaintiff injury.⁴ *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1001 (9th Cir.
13 2001).

14 Under both the common law cause of action and the statutory cause of
15 action "no cause of action will lie for the publication of matters in the public
16 interest, which rests on the right of the public to know and the freedom of the
17 press to tell it." *Id.*, citing *Montana v. San Jose Mercury News, Inc.*, 34
18 Cal.App.4th 790, 793 (1995). NXIVM is, as previously discussed, a matter of
19 public interest. And as California's courts have held, even private individuals
20 cannot state a claim for misappropriation for their portrayal in a publication
21 concerning a public matter. *See Dora v. Frontline Video, Inc.*, 15 Cal.App.4th
22 _____

23
24
25 ⁴ In California, a plaintiff may allege misappropriation of his name or likeness
26 under common law and/or pursuant to California Civil Code § 3344. Plaintiff
27 does not specify which kind(s) of misappropriation claims he intended to bring
28 here. However, the statutory cause of action requires the plaintiff to first "prove
all the elements of the common law cause of action." *Downing v. Abercrombie
& Fitch*, 265 F.3d 994, 1001 (9th Cir. 2001). Because the Court finds Plaintiff
has not stated a common law claim, it necessarily concludes he cannot have
stated a statutory claim either.

1 536, 543 (1993) (rejecting a non-celebrity surfer’s claim arising from
2 defendants’ unauthorized inclusion of footage of him in their surfing
3 documentary, reasoning that while “any one of [the surfers] as individuals may
4 not have had a particular influence on our time, as a group they had great
5 impact.”).

6 As such, Plaintiff’s Third Cause of Action is **STRUCK**. Leave to amend
7 is **DENIED as futile**.

8 **iv. Fourth and Fifth Causes of Action (False Light and Intentional**
9 **Infliction of Emotional Distress)**

10 The “collapse” of a plaintiff’s defamation claim “spells the demise of all
11 other causes of action” arising from the allegedly defamatory work. *Gilbert v.*
12 *Sykes*, 147 Cal. App. 4th 13, 34 (2007). Here, Plaintiff’s false light and
13 intentional infliction of emotional distress claims are based entirely upon his
14 portrayal in the Series, equal to his defamation claims. Because this Court has
15 struck Plaintiff’s First and Second Causes of Action for defamation, Plaintiff’s
16 Fourth and Fifth Causes of Action are also **STRUCK**. Leave to amend is
17 **DENIED as futile**.

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V. CONCLUSION

For the foregoing reasons, Plaintiff’s FAC and all causes of action alleged are **DISMISSED WITH PREJUDICE**. Defendants are hereby **ORDERED** to file their application for attorneys’ fees and costs no later than December 2, 2022.⁵

IT IS SO ORDERED.

Dated: November 8, 2022



SUNSHINE S. SYKES
United States District Judge

⁵ If a defendant’s special motion to strike under anti-SLAPP succeeds, that defendant is entitled to attorney’s fees and costs. *CoreCivic, Inc. v. Candide Group, LLC*, 46 F.4th 1136, 1140 (9th Cir. 2022), citing Cal. Civ. Pro. Code § 425.16(c).