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14 UNITED STATES DISTRICT COURT
 15 CENTRAL DISTRICT OF CALIFORNIA
 16 WESTERN DIVISION

18 YUGA LABS, INC.,
 19 Plaintiff,
 20 v.
 21 RYDER RIPPS, JEREMY CAHEN, and
 DOES 1-10,
 22 Defendants.

Case No.: 2:22-cv-04355-JFW-JEM
**YUGA LABS, INC.’S OPPOSITION
 TO DEFENDANTS’ MOTION TO
 STRIKE AND DISMISS**

Date: Nov. 7, 2022
 Time: 1:30 p.m.
 Dept: Courtroom 7A
 Judge: Honorable John F. Walter

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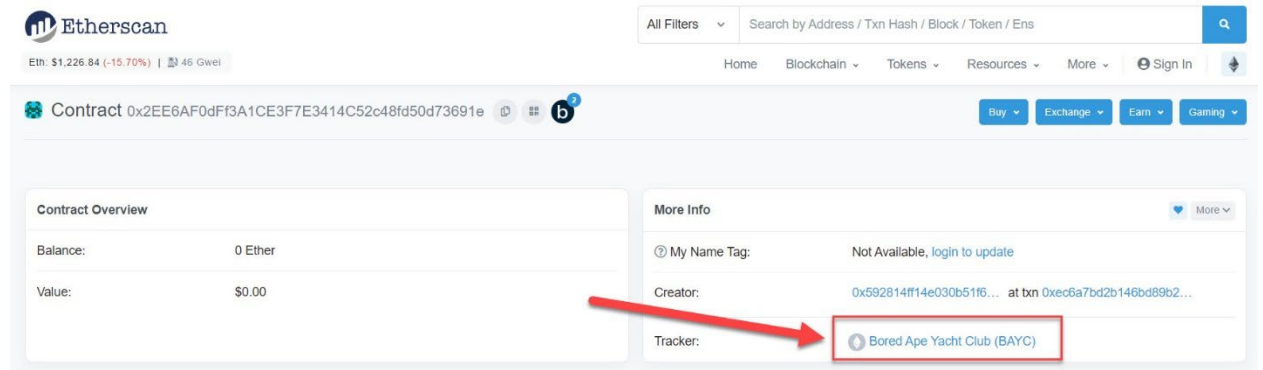
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1 **I. INTRODUCTION**

2 Defendants’ scam has explicitly misled consumers into thinking that their NFTs
 3 (“non-fungible tokens” or “tokens”) are affiliated, sponsored, or associated with Yuga
 4 Labs. Worse still: they intentionally cultivated and relished in the harm they caused
 5 by this confusion. Defendants do not dispute that they are using Yuga Labs’ BAYC
 6 Marks to sell identical NFT products on the same marketplaces Yuga Labs sells its
 7 NFTs. This is textbook trademark infringement and explicitly misleading use of these
 8 marks. See [Gordon v. Drape Creative, Inc., 909 F.3d 257, 269-271 \(9th Cir. 2018\)](#).
 9 Facing the Complaint’s undisputed allegations of trademark infringement,
 10 Defendants cower behind their argument that their willful infringement is protected
 11 “art.” But the First Amendment does not protect scams designed to mislead
 12 consumers. And, Defendants’ actions are pure commerce, not protected speech. They
 13 are using Yuga Labs’ trademarks to sell their own competing products, trading off of
 14 Yuga Labs’ goodwill, and misleading consumers about the source and features of
 15 their products. If Defendants’ motion is not denied, it would “turn trademark law on
 16 its head” (*id.* at 270) and allow anyone to rebut trademark infringement claims with
 17 the flimsy and false claim that the infringement is “art.”

18 In just one example of Defendants’ intentional and explicitly misleading
 19 trademark infringement, they marked their NFT’s token tracker—which is used to
 20 help consumers verify the source of an NFT—with Yuga Labs’ trademarks: “Bored
 21 Ape Yacht Club (BAYC).” Compl. ¶ 39.



28 There is no commentary on this page. There is no art. There is not even a reference

1 to Defendants. Yuga Labs' trademark is the **only** trademark that consumers see to
2 identify the source of Defendants' competing product.

3 Defendants' trademark infringement has caused, and continues to cause, actual
4 confusion. Yuga Labs states a claim for trademark infringement, and Defendants'
5 purported defenses provide no escape.

6 Along with its trademark infringement claims, Yuga Labs sufficiently pled its
7 cybersquatting, false advertising, unfair competition, conversion, tortious
8 interference, and unjust enrichment claims. Defendants registered and use, in bad
9 faith, Yuga Labs' trademarks in the rrbayc.com and apemarket.com domains.
10 Defendants falsely advertised that their infringing products were equivalent to Yuga
11 Labs' authentic products to further scam consumers into buying their copycat NFTs.
12 And Defendants interfered with Yuga Labs' actual and prospective economic
13 advantage through trademark infringement, unfair competition, false advertising, and
14 offering fake Yuga Labs NFTs.

15 With their motion, Defendants shirk from their infringing conduct by hiding
16 behind the same false claims against Yuga Labs' founders that they peddle on social
17 media. The Court is not a sounding board for their bogus claims; this is not a
18 defamation lawsuit, and Defendants' offensive and false accusations against Yuga
19 Labs' founders are not the basis for any claim in this lawsuit. Yuga Labs' founders
20 will personally continue to respond to those actions in the public forum. In this Court,
21 Yuga Labs seeks relief from Defendants' explicit misleading of consumers through
22 their infringement of BAYC Marks.

23 **II. FACTUAL BACKGROUND**

24 **A. Yuga Labs' Allegations Accepted as True**

25 Defendants have scammed consumers into buying RR/BAYC NFTs by
26 misusing Yuga Labs' trademarks. Compl. ¶ 2. The RR/BAYC NFTs are merely a
27 re-packaging of the exact same images underlying Yuga Labs' authentic BAYC
28 NFTs. *Id.* Brazenly, Defendants promote and sell these RR/BAYC NFTs using the

1 very same trademarks that Yuga Labs uses to promote authentic Bored Ape NFTs in
 2 the exact same marketplaces where Bored Ape NFTs are sold. *Id.* ¶¶ 2, 33. Even
 3 worse, Defendants market these copycats as falsely equivalent to authentic Bored Ape
 4 NFTs. *Id.* ¶ 2.

5 **1. Yuga Labs Alleges a Likelihood of Consumer Confusion.**

6 Defendants’ motion admittedly does not challenge that Yuga Labs adequately
 7 alleges a likelihood of confusion from their use of BAYC Marks. Decl. of Louis
 8 Tompros (Dkt. 36) (“Tompros Decl.”) ¶ 6. Yuga Labs’ “slam-dunk evidence of a
 9 conceptually strong mark together with the use of identical marks on identical goods”
 10 proves likelihood of confusion and infringement. [*Stone Creek, Inc. v. Omnia Italian*](#)
 11 [*Design, Inc.*, 875 F.3d 426, 436 \(9th Cir. 2017\)](#) (abrogated on other grounds).

12 Defendants do not deny “the strength of the mark[s],” nor that Yuga Labs has
 13 the exclusive right to use them. Compl. ¶¶ 23-32. As for the “relatedness of the
 14 goods,” Defendants concede that they are selling the same type of product (NFTs)
 15 with the identical underlying Bored Ape images. Mot. at 6 (“The RR/BAYC project
 16 is a collection of NFTs that point to the same online digital images as the BAYC
 17 collection[.]”); *see also* Compl. ¶ 33. This is especially misleading to consumers who
 18 see what appears to be a Yuga Labs NFT displaying BAYC Marks. *Id.* ¶ 2. The
 19 “similarity of the marks” is indisputable, and Defendants concede that they used
 20 BAYC Marks, without modification in most instances, to sell RR/BAYC NFTs. Mot.
 21 at 18 (“Mr. Ripps’s [sic] used BAYC’s marks”); *see generally*, Compl. ¶¶ 33-
 22 47. Ripps himself “gloated that it is consumers’ own fault for being confused by his
 23 fake NFTs, even though Ripps’ actions lay bare that he welcomes the confusion.” *Id.*
 24 ¶ 40. Defendants concede they sold their copycat NFTs using the same “marketing
 25 channels” as Yuga Labs. Mot. at 15-16; Compl. ¶ 33. RR/BAYC NFTs were even
 26 repeatedly removed from OpenSea, Foundation, and other marketplaces, as those
 27 marketplaces sought to protect their users from Defendants’ explicitly misleading
 28 activities. *See id.* ¶¶ 33 n.1, 35-37, 54. Finally, Defendants concede that their intent

1 in using Yuga Labs’ marks was to identify the BAYC collection—even though they
 2 were not selling genuine Yuga Labs products. Mot. at 18; *see also* Compl. ¶ 52.

3 **2. Yuga Labs Pleads Multiple Examples of Explicitly**
 4 **Misleading Activity Leading to Actual Confusion.**

5 Beyond creating a likelihood of confusion, Defendants’ use of BAYC Marks is
 6 explicitly misleading. Defendants “do not distinguish their use of Yuga Labs’ BAYC
 7 Marks from the identical look, sound, and commercial impression of” BAYC Marks
 8 and “promote[] and sell[] these RR/BAYC NFTs using *the very same trademarks* that
 9 Yuga Labs uses to promote and sell authentic Bored Ape Yacht Club NFTs.” Compl.
 10 ¶¶ 2, 47. This explicitly misleading conduct exacerbates Defendants’ other uses of
 11 BAYC Marks “to trade on Yuga Labs’ goodwill and confuse consumers” (*id.* ¶ 42),
 12 such as their misleading uses of BAYC Marks to promote RR/BAYC NFTs on Twitter
 13 (*id.* ¶¶ 42-46), their Ape Market NFT marketplace (*id.* ¶ 46), and the rrbayc.com
 14 website (*id.* ¶ 34), among others.

15 More specifically, Defendants “use[] every opportunity to make these
 16 RR/BAYC NFTs resemble the authentic Bored Ape NFTs as closely as possible to
 17 confuse consumers into buying them.” *Id.* ¶ 52. As Defendants admit, the images
 18 underlying the RR/BAYC NFTs are purposefully *identical* to those used in Yuga
 19 Labs’ BAYC NFTs, and contain BAYC Marks within the images. *Id.* ¶ 34; Decl. of
 20 Ryder Ripps (Dkt. 48-1) (“Ripps Decl.”) ¶ 8. RR/BAYC #362 is one such copycat
 21 example; it uses the BAYC, BA YC Logo, and Ape Skull Logo marks. Compl. ¶ 34.
 22 Relatedly, Defendants’ use of Yuga Labs’ “unique number[ing]” to identify and sell
 23 their RR/BAYC NFTs reflects Defendants’ intentional effort to make their knockoff
 24 NFTs resemble Bored Ape NFTs in every possible way. *Id.* ¶ 52. Further evidencing
 25 Defendants’ efforts to explicitly mislead consumers, Defendants marked the token
 26 tracker of their product with Yuga Labs’ trademarks: “Bored Ape Yacht Club
 27 (BAYC).” *Id.* ¶ 39. Token trackers are “important for validating the authenticity of
 28 an NFT.” *Id.* ¶¶ 39, 40. So, Defendants made their competing product look identical

1 to Yuga Labs’, and in the place where a consumer could authenticate and check who
2 created the NFT, (the token tracker), Defendants used Yuga Labs’ trademarks to
3 ensure the consumer was explicitly misled.

4 Defendants also sell these RR/BAYC NFTs on the same NFT marketplaces that
5 Bored Ape NFTs are sold and under the same marks. *Id.* ¶ 33. For example,
6 Defendants’ “Foundation page was also deliberately misleading and confusing to
7 consumers and used Yuga Labs’ BAYC marks in an attempt to trick community
8 members into buying their NFTs instead of the official BAYC NFTs.” *Id.* ¶ 37. On
9 this page, Defendants “prominently and confusingly used Yuga Labs’ BORED APE
10 YACHT CLUB trademark as the title of the page” and “used Yuga Labs’ BAYC
11 trademark in an unauthorized hyperlink labeled ‘BAYC’ and in the URL of the page.”
12 *Id.* “[E]ven the top result in a Google search for ‘BAYC Foundation.app’ or ‘Bored
13 Ape Yacht Club Foundation.app’ was a misleading link titled ‘Bored Ape Yacht Club
14 – Foundation.app’ that redirected to the fake RR/BAYC NFT collection.” *Id.* When
15 users hovered over the NFTs on this Foundation page, “the page displayed a miniature
16 version of their warped BA YC BORED APE YACHT CLUB Logo mark. At such a
17 small size, it is difficult for a consumer to tell the difference” between this knockoff
18 and the real thing. *Id.* ¶ 38. Defendants’ OpenSea pages, and other marketplaces,
19 were also explicitly misleading by using “Yuga Labs’ BAYC trademark in the title of
20 the page, in the cover photo of the page, and in the page URL[.]” *Id.* ¶¶ 35-36, 41.
21 Defendants even falsely claim that they own a trademark registration for RR/BAYC
22 to explicitly mislead consumers about the legitimacy of their NFTs. *See id.* ¶ 46.

23 Defendants’ intentional and explicitly misleading activities detailed in the
24 Complaint were part of their efforts to profit from using Yuga Labs’ exact marks to
25 sell NFTs that ordinary consumers could have—and indeed have—mistaken for
26 genuine BAYC NFTs.

27 **III. LEGAL STANDARD**

28 “Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks

1 a cognizable legal theory or sufficient facts to support a cognizable legal theory.”
 2 Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008). In
 3 reviewing the plausibility of a complaint, courts “accept factual allegations in the
 4 complaint as true and construe the pleadings in the light most favorable to the
 5 nonmoving party.” Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025,
 6 1031 (9th Cir. 2008). “As a general rule, ‘a district court may not consider any
 7 material beyond the pleadings in ruling on a Rule 12(b)(6) motion.’” Lee v. City of
 8 Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001) (cleaned up).

9 California’s anti-SLAPP statute, Cal. Code Civ. Proc. § 425.16, “does not apply
 10 to federal law causes of action.” Hilton v. Hallmark Cards, 599 F.3d 894, 901 (9th
 11 Cir. 2010). The threshold issue on an anti-SLAPP motion to strike state-law claims
 12 is whether Defendants made “a prima facie showing that the lawsuit arises from an
 13 act in furtherance of its First Amendment right to free speech.” Nat’l Abortion Fed’n
 14 v. Ctr. for Med. Progress, No. 15-cv-03522, 2015 WL 5071977, at *3 (N.D. Cal. Aug.
 15 27, 2015). However, “[a]llegations of protected activity that merely provide context,
 16 without supporting a claim for recovery, cannot be stricken under the anti-SLAPP
 17 statute.” Bonni v. St. Joseph Health Sys., 11 Cal. 5th 995, 1012 (2021). If the movant
 18 clears this first hurdle, then the plaintiff must “show a reasonable probability that it
 19 will prevail on its claim.” Wisk Aero LLC v. Archer Aviation Inc., No. 21-cv-02450,
 20 2021 WL 4932734, at *4-5 (N.D. Cal. Sept. 14, 2021). Where, as here, Defendants
 21 contend that the claims are legally deficient, the court applies a Rule 12(b)(6) standard
 22 of review. Planned Parenthood Fed’n of Am., Inc. v. Ctr. for Med. Progress, 890
 23 F.3d 828, 834 (9th Cir. 2018), *amended*, 897 F.3d 1224 (9th Cir. 2018). And where,
 24 as here, Yuga Labs’ complaint clearly states a claim, the anti-SLAPP motion fails.¹

25 _____
 26 ¹ Judges on the Ninth Circuit have at times called on the court to reconsider whether
 27 federal courts apply the anti-SLAPP statute. *See, e.g., Makaeff v. Trump Univ., LLC*,
 28 715 F.3d 254, 275 (9th Cir. 2013) (Kozinski, J., concurring). And the Second, Fifth,
 and Eleventh Circuits have rejected the application of anti-SLAPP statutes in federal
 court. Yuga Labs reserves its argument that the anti-SLAPP statute is inapplicable in
 federal court.

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IV. ARGUMENT

A. Defendants’ Infringing NFTs Are Not Protected Speech.

Defendants may not use BAYC Marks to sell NFTs that admittedly use Yuga Labs’ images (with no expressive content or transformation) in the sale of the same goods (NFTs) and on the same marketplaces where Yuga Labs’ NFTs are sold. This is true notwithstanding that Defendant Ripps is a claimed artist intent on publicizing falsehoods about Yuga Labs’ founders, and it is undeniably true as to Defendant Cahen who makes no claim to creating any art. If the Court accepts Defendants’ argument that the trademark infringement *is* the art, it would create a gaping loophole in trademark law, as any street corner counterfeiter, and even direct business competitors, could sell knockoff products by claiming their sale is performance and appropriation art. But just like common counterfeiters, Defendants’ sale of RR/BAYC NFTs is a purely commercial enterprise which they use to profit off of Yuga Labs’ goodwill. This is commercial infringement; not art.

Defendants argue for an exemption for their infringement because some who bought an RR/BAYC NFT supposedly knew it was fake. Mot. at 7-8. This is a factual issue the Court cannot resolve on a motion to dismiss. Regardless, even if someone knows they are buying a knockoff, **the sale still infringes**. See [Chanel, Inc. v. Hsiao Yin Fu, No. 16-cv-02259, 2017 WL 1079544, at *4 \(N.D. Cal. Mar. 22, 2017\)](#) (finding infringement even if purchasers of counterfeit Chanel handbags “know that they are [] purchasing nongenuine goods”). Thus, even if some purchasers knew the RR/BAYC NFTs were fake, Defendants’ use of BAYC Marks infringed Yuga Labs’ rights because Defendants traded on Yuga Labs’ goodwill and explicitly misled other consumers through both initial interest and post-sale confusion. See [Brookfield Comm’ns, Inc. v. W. Coast Ent. Corp., 174 F.3d 1036, 1062 \(9th Cir. 1999\)](#); [ACI Int’l. Inc. v. Adidas-Salomon AG, 359 F. Supp. 2d 918, 921 \(C.D. Cal. 2005\)](#).

1 **1. Defendants’ Infringing NFTs Are Not “Expressive Works”**
 2 **and Do Not Warrant Application of the *Rogers* Test.**

3 The Ninth Circuit only applies the *Rogers v. Grimaldi* analysis when “artistic
 4 expression is at issue,” requiring defendants to make a “threshold legal showing that
 5 its allegedly infringing use is part of an expressive work protected by the First
 6 Amendment.” [Gordon, 909 F.3d at 264](#); *see also* [Rogers v. Grimaldi, 875 F.2d 994,](#)
 7 [999 \(2d Cir. 1989\)](#). Defendants’ sale of a “collection of NFTs that point to the same
 8 online digital images as the BAYC collection, but use verifiably unique entries on the
 9 blockchain” (Mot. at 6) is not an expressive work protected by the First Amendment,
 10 and applying *Rogers* is improper.

11 In particular, the RR/BAYC NFTs do not express an idea or point of view.
 12 They are merely tokens that “point to the same online digital images associated with
 13 the BAYC collection.” Mot. at 18-19. Even Defendants’ token tracker uses an exact
 14 copy of Yuga Labs’ mark—**with no expressive content**. Compl. ¶¶ 39-40. Likewise,
 15 Defendants’ NFT marketplace sales, copycat Twitter accounts, and Ape Market
 16 contain no “artistic expression or critical commentary.” *Id.* ¶¶ 33, 37, 42-45, 46. For
 17 example, the title of their Foundation sales page was simply “Bored Ape Yacht Club”
 18 (*id.* ¶ 37), and googling “BAYC Foundation.app” resulted in a misleading link entitled
 19 “Bored Ape Yacht Club – Foundation.app” that redirected to Defendants’ Foundation
 20 sales page. *Id.* The Ape Market website used a skull logo identical to Yuga Labs’
 21 skull logo and was established “solely to sell their RR/BAYC NFTs alongside
 22 authentic Yuga Labs NFTs.” *Id.* ¶ 46, 55. These are all commercial activities to sell
 23 infringing products. Defendants even concede that Ape Market contained no speech
 24 because it “never had any content.” Mot. at 17.

25 The only claimed expression Defendants point to comes from material beyond
 26 the Complaint. Indeed, Defendants filed two improper declarations and thirty-six
 27 exhibits to try to connect their defamation of Yuga Labs’ founders to their unfair
 28 competition with Yuga Labs because the Complaint itself does not put those matters

1 at issue. Defendant Ripps’ so-called criticism is not the subject of the Complaint and
 2 is readily separated from the sales and marketing of RR/BAYC NFTs. For instance,
 3 although Defendant Ripps’ improper declaration cites his false assertions about Yuga
 4 Labs’ founders, that same declaration separates those assertions from his creation of
 5 the infringement of Yuga Labs’ marks. *See* Ripps Decl. ¶¶ 5-9.²

6 Defendants’ sale and promotion of the RR/BAYC NFTs is merely a business
 7 venture to trade on Yuga Labs’ brand value, resulting in a massive windfall for
 8 Defendants. Their sale of RR/BAYC NFTs is no more artistic than the sale of a
 9 counterfeit handbag, making the *Rogers* test inapplicable. *See, e.g., Tommy Hilfiger*
 10 *Licensing, Inc. v. Nature Labs, LLC*, 221 F. Supp. 2d 410, 415 (S.D.N.Y. 2002)
 11 (holding *Rogers* test inapplicable when trademark was “being used at least in part to
 12 promote a somewhat non-expressive, commercial product”).

13 2. Defendants’ Sale of Infringing RR/BAYC NFTs Are Not 14 “Protected Activity” Under California’s Anti-SLAPP Law.

15 For similar reasons, Defendants’ sale of infringing NFTs is not “protected
 16 activity” under the anti-SLAPP statute because Defendants fail to show that Yuga
 17 Labs’ lawsuit arises from an act in furtherance of Defendants’ “First Amendment right
 18 to free speech.” *Nat’l Abortion Fed’n*, 2015 WL 5071977, at *3. It is not enough for
 19 an anti-SLAPP movant to identify the existence of allegedly protected activity; the
 20 protected activity must at least partially form the basis of the claim. *See Jordan-Benel*
 21 *v. Universal City Studios, Inc.*, 859 F.3d 1184, 1190, 1193 (9th Cir. 2017) (“[E]ven if
 22 a defendant engages in free speech activity that is relevant to a claim, that does not
 23 necessarily mean such activity is the basis for the claim.”).

24 Here, Defendants’ so-called “speech” is separate from the infringing NFT sales.
 25 *See* Ripps Decl. ¶¶ 5-9; *see also supra* § IV.A.1. More importantly, the lawsuit does
 26

27 ² If the Court considers Defendants’ improper evidence of their attacks against Yuga
 28 Labs’ founders, this factual dispute about how to define their commercial activity
 warrants denial of their motion to allow for discovery and expert testimony.

1 not arise out of Defendants’ speech; it arises out of their garden-variety trademark
 2 infringement. Indeed, the Complaint does not seek to enjoin Defendants’ defamatory
 3 speech. The anti-SLAPP motion fails at the outset for this reason. Additionally, the
 4 motion is deficient on several other grounds.

5 **First**, Defendants offer no argument that Cahen’s activities were in furtherance
 6 of any expression. *See, e.g.*, Mot. at 1 (“Yuga sued Mr. Ripps not for defamation, but
 7 for trademark infringement.”). Therefore, the motion must fail as to him.

8 **Second**, Defendants have not shown that the *sale and marketing* of thousands
 9 of infringing NFTs is protected activity. Any speech involved in the sale and
 10 promotion of NFTs is *commercial* speech not protected by the anti-SLAPP statute.
 11 Indeed, the anti-SLAPP statute contains an explicit exemption for causes of action
 12 based on “comparative advertising.” [FilmOn.com Inc. v. DoubleVerify Inc.](#), 7 Cal.
 13 [5th 133, 147 \(2019\)](#). And here, Yuga Labs’ claims are exempt because Defendants’
 14 allegedly protected speech was (1) made when Defendants were selling their NFTs
 15 and (2) targeted to potential or actual buyers of BAYC NFTs. *Compare* Cal. Code
 16 Civ. Proc. § 425.17(c) (stating that § 425.16 does not apply to certain causes of action
 17 against businesses that make statements about the goods, services, or business
 18 operations of their competitors) *with* Compl. ¶ 33 (“Defendants . . . use *the very same*
 19 *marks* to promote their RR/BAYC NFT collection.”) and *id.* ¶¶ 144-145 (Defendants
 20 “intentionally sought to . . . appropriat[e] Yuga Labs’ trademarks . . . [resulting in]
 21 [a]ctual interference with the relationship between Yuga Labs and individuals who
 22 have purchased or might purchase Bored Ape NFTs . . .”). But even if not explicitly
 23 exempted by § 425.17(c), the heavily commercial nature of Defendants’ conduct
 24 weighs strongly in favor of finding that any speech associated with the sale is not the
 25 kind of public participation contemplated by the anti-SLAPP statute. [FilmOn.com](#)
 26 [Inc.](#), 7 Cal. 5th at 148 (“[T]he very contextual cues revealing a statement to be
 27 ‘commercial’ in nature—whether it was private or public, to whom it was said, and
 28 for what purpose—can bear on whether it was made in furtherance of free speech in

1 connection with a public issue.”). Defendants’ argument posits that *their* trademark
 2 infringement is a distinct, protected form of trademark infringement because they are
 3 critical of Yuga Labs’ founders. But their NFTs contain no commentary at all. The
 4 act of infringement itself is not free speech—even if it is motivated by some criticism
 5 of Yuga Labs’ founders—it is an infringing scheme to profit from the popularity of
 6 Bored Ape NFTs.

7 **Third**, even if Ripps engaged in *some* protected activity (Defendants make no
 8 argument that Cahen did), that activity is merely incidental to infringement.
 9 Defendants “must identify the acts alleged in the complaint that [they] assert[] are
 10 protected and what claims for relief are predicated on them.” [Bonni](#), 11 Cal. 5th at
 11 1010. “[C]ollateral or incidental allusions to protected activity will not trigger
 12 application of the anti-SLAPP statute.” [Hylton v. Frank E. Rogozienski, Inc.](#), 177 Cal.
 13 App. 4th 1264, 1272 (2009); see also [DTS, Inc. v. Nero AG](#), No. 14-cv-9791, 2015
 14 WL 12811268, at *3 (C.D. Cal. Dec. 3, 2015) (“The mere fact that a claim was
 15 triggered by protected activity or filed after protected activity took place does not
 16 mean that the claim arose from that activity for purposes of the anti-SLAPP statute.”)
 17 (cleaned up). Defendants base their motion not on any claim in the Complaint, but
 18 on a theory that this trademark case is pretextual or retaliatory. Yet despite months
 19 of peddling his false claims, Yuga Labs only sued Ripps (among others) when he and
 20 others sold thousands of RR/BAYC NFTs using BAYC Marks. As Defendants
 21 acknowledge, “Yuga sued Mr. Ripps not for defamation, but for *trademark*
 22 infringement.” Mot. at 1. “The anti-SLAPP statute cannot be read to mean that any
 23 claim asserted in an action which arguably was filed in retaliation for the exercise of
 24 speech or petition rights falls under section 425.16, whether or not the claim is *based*
 25 *on* conduct in exercise of those rights.” [City of Cotati v. Cashman](#), 29 Cal. 4th 69, 77
 26 (2002) (cleaned up).

27 **Fourth**, this trademark case is not appropriate for anti-SLAPP because there is
 28 no risk that this lawsuit will chill constitutional rights. Even when a defendant points

1 to allegations in the Complaint that involve protected activity, an anti-SLAPP motion
 2 should not be entertained where the allegations about protected activity “are largely
 3 superfluous to [the plaintiff’s] primary allegations” and the claims do not risk chilling
 4 constitutional rights. [United Tactical Sys., LLC v. Real Action Paintball, Inc.](#), 143 F.
 5 [Supp. 3d 982, 1022 \(N.D. Cal. 2015\)](#). Where such allegations “merely provide
 6 context,” an anti-SLAPP motion cannot prevail. [Bonni](#), 11 Cal. 5th at 1012. Here,
 7 Yuga Labs’ primary allegations of trademark infringement do not seek to stifle
 8 Defendants’ speech. And indeed, Defendants’ continued false attacks on Yuga Labs’
 9 founders demonstrates that they are not stifled.

10 Defendants’ motion to strike Yuga Labs’ state-law claims under California’s
 11 anti-SLAPP statute has no merit from the outset and should be denied.

12 **B. Yuga Labs Plausibly Alleges Trademark Infringement.**

13 Defendants do not contend that the Complaint fails to sufficiently allege
 14 trademark infringement or deny Yuga Labs’ ownership and priority of the BAYC
 15 Marks. By using BAYC Marks to sell identical products to the same consumers on
 16 the same markets that Yuga Labs uses, Defendants created confusion that was
 17 “explicitly misleading.” *Supra* § II.A.2; [Gordon](#), 909 F.3d at 270-71.

18 Defendants’ conduct led to actual confusion, initial interest confusion, and
 19 post-purchase confusion. See [Ironhawk Techs., Inc. v. Dropbox, Inc.](#), 2 F.4th 1150,
 20 [1165 \(9th Cir. 2021\)](#) (“Evidence of actual confusion by consumers is strong evidence
 21 of likelihood of confusion.”); [Brookfield Commc’ns, Inc.](#), 174 F.3d at 1062 (Initial
 22 interest confusion occurs when the defendant uses the plaintiff’s trademark “in a
 23 manner calculated to capture initial consumer attention, even though no actual sale is
 24 finally completed as a result of the confusion.”) (cleaned up); [ACI Int’l. Inc.](#), 359 F.
 25 [Supp. 2d at 921](#) (“The law in the Ninth Circuit is clear that ‘post-purchase confusion,’
 26 i.e., confusion on the part of someone other than the purchaser who, for example,
 27 simply sees the item after it has been purchased, can establish the required likelihood
 28 of confusion under the Lanham Act.”).

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1 Defendants cannot debate the wealth of allegations highlighting their
2 misleading activity establishing a likelihood of confusion and thus Yuga Labs
3 sufficiently pled its trademark infringement claims. *See, e.g., supra* § II.A.

4 **1. Defendants’ Use of BAYC Marks Is Not Artistically**
5 **Relevant.**

6 Knowing that they cannot dispute that they have confused consumers,
7 Defendants grasp at the *Rogers* defense. But even if the *Rogers* defense applies,
8 Defendants’ use of BAYC Marks is not artistically relevant to Ripps’ so-called “art”
9 under the first prong of the *Rogers* test. While there is a low bar for artistic relevance,
10 it is not infinitely low. For example, in [*Twentieth Century Fox Television v. Empire*](#)
11 [*Distribution, Inc.*, 875 F.3d 1192, 1196-97 \(9th Cir. 2017\)](#), the court found that using
12 the “Empire” mark in the title of a TV show was artistically relevant, but contemplated
13 that it would *not* be artistically relevant for a “pretextual expressive work meant only
14 to disguise a business profiting from another’s trademark” *Id.* That is exactly
15 the situation here: Defendants saw a chance to make money by ripping off NFTs and
16 calling their scam “performance art.” Defendants claim that Yuga Labs “has
17 conceded” artistic relevance by making oblique references to one of Defendant Ripps’
18 social media posts and the rrbayc.com website in the Complaint. Mot. at 14. Not so.
19 At most, they show Ripps’ weak attempts to justify his infringements while
20 commercially promoting them. This factual dispute may be resolved only after the
21 Defendants’ motion is denied.

22 **2. Defendants’ Use of BAYC Marks Is Explicitly Misleading.**

23 Yuga Labs sufficiently pled that Defendants’ use of its trademarks is explicitly
24 misleading under the *Rogers* test. The two considerations relevant to whether a mark
25 is explicitly misleading are (1) “the degree to which the junior user uses the mark in
26 the same way as the senior user” and (2) “the extent to which the junior user has added
27 his or her own expressive content to the work beyond the mark itself.” [*Gordon*, 909](#)
28 [*F.3d at 270-71*](#). In *Gordon*, the Court analyzed these factors and found that

1 defendant’s use of plaintiff’s trademarked phrase in greeting cards involved minimal
2 artistic expression, and using it in the same way that plaintiff was using it created a
3 triable issue of fact on this point. *Id.* at 271. As shown above (*supra* § II.A.2),
4 Defendants admit they added *zero* expression to BAYC Marks and used them in
5 *exactly* the same way that Yuga Labs is using them. Ripps Decl. ¶ 8.

6 *Gordon* noted that in prior *Rogers* cases finding that use of a mark was not
7 explicitly misleading, the junior user employed the mark in different contexts and
8 markets than the senior users. 909 F.3d at 270. For example, *Gordon* explained that
9 in *Twentieth Century Fox* the mark of a record label was used in a television show,
10 but if it had been used in the same way as the senior user, such as naming the television
11 show after a preexisting one, “such identical usage could reflect the type of ‘explicitly
12 misleading description’ of source that *Rogers* condemns.” *Id.* *Gordon* concluded that
13 “the potential for explicitly misleading usage is especially strong when the senior user
14 and the junior user both use the mark in similar artistic expressions.” *Id.* This is
15 exactly what Defendants have done with their NFTs. They used Yuga Labs’ *exact*
16 *same* marks on the *exact same* marketplaces to identify and sell NFTs bearing the
17 *exact same* images underlying Yuga Labs’ NFTs. *See, e.g.,* Compl. ¶ 33; *supra*
18 § II.A.2. Allowing Defendants to use BAYC Marks to market their infringements
19 would (as the Ninth Circuit observed) “turn trademark law on its head.” *Gordon, 909*
20 *F.3d at 270*. Indeed, “[i]f an artist pastes Disney’s trademark at the bottom corner of
21 a painting that depicts Mickey Mouse, the use of Disney’s mark, while arguably
22 relevant to the subject of the painting, could explicitly mislead consumers that Disney
23 created or authorized the painting, even if those words do not appear alongside the
24 mark itself.” *Id.* The same is true here with Defendants’ infringement.

25 *Gordon* also observed that use of a mark is explicitly misleading when the mark
26 is used “as the centerpiece of an expressive work itself, unadorned with any artistic
27 contribution by the junior user, which may reflect nothing more than an effort to
28 induce the sale of goods or services by confusion or lessen the distinctiveness and

1 thus the commercial value of a competitor’s mark.” [Id. at 271](#) (cleaned up). Here,
 2 Defendants concede they are using BAYC Marks as the centerpiece of their tokens,
 3 including using “Bored Ape Yacht Club (BAYC)” to identify tokens with the exact
 4 same images Yuga Labs’ Bored Ape Yacht Club uses. Mot. at 6. There is no artistic
 5 contribution on their part, and for the most part, the only embellishment they
 6 occasionally add is an “RR” or “Ryder Ripps” in front of BAYC Marks. *See, e.g.*,
 7 Compl. ¶¶ 33-36, 42-43. This spotlight on Yuga Labs’ marks solely serves to “induce
 8 the sale of goods or services by confusion.” [Gordon, 909 F.3d at 271](#).

9 Faced with similar issues in an ongoing, first of its kind, NFT trademark case,
 10 the judge in *Hermes International v. Rothschild* denied defendants’ motion to dismiss
 11 Hermes’ trademark infringement lawsuit alleging that defendant’s “Metabirkins”
 12 NFTs infringed on Hermes’ “Birkins” mark. [No. 22-cv-384, 2022 WL 1564597 at *1](#)
 13 [\(S.D.N.Y. May 18, 2022\)](#). After a thorough *Rogers* analysis, the Court determined
 14 that even though defendant altered the name of the mark (from Birkins to Metabirkins)
 15 and the appearance of the NFT images was different from the real bags, Hermes
 16 alleged sufficient facts of explicit misleadingness to survive a motion to dismiss. [Id.](#)
 17 [at *7](#). In particular, Hermes alleged the strength of its own mark, evidence of actual
 18 confusion, and the junior user’s bad faith in adopting the mark. [Id. at *6](#). The
 19 allegations of Defendants’ explicitly misleading conduct here is even stronger than in
 20 *Hermes*. Defendants did not even change the mark in many instances, the underlying
 21 images went unaltered, and they advertised the RR/BAYC NFTs, using BAYC Marks
 22 (often without any reference to “RR”), as equivalent to the official BAYC NFTs.
 23 These facts are enough to survive Defendants’ motion to dismiss. But Yuga Labs
 24 alleges even more.

25 **First**, the Complaint alleges that Defendants’ “fuck off” Tweets highlight that
 26 Defendants wanted to lure people into their knockoff products by using BAYC Marks
 27 and goodwill into purchasing what they falsely claim is an equivalent product.
 28 Compl. ¶¶ 53, 72, 116. That’s false advertising and intentional infringement. For

1 purposes of the motion to dismiss, Yuga Labs’ interpretation must control here, and
 2 any factual disputes over what these Tweets meant cannot be decided at the motion
 3 to dismiss stage. Even so, the sales pages themselves did not contain criticism, and a
 4 reasonably prudent consumer was likely to be confused, as Defendants intended.

5 **Second**, the existence of a disclaimer on the rrbayc.com reservation site does
 6 not negate the confusion Defendants caused on other websites or other uses of BAYC
 7 Marks where Defendants marketed or sold the infringing NFTs without the
 8 disclaimer. *See, e.g.*, Compl. ¶¶ 35-39. The fact that Defendants felt the need to
 9 include a disclaimer (however ineffectual) demonstrates their awareness that their use
 10 of BAYC Marks was confusing. Even more, sales on NFT marketplaces cause initial
 11 interest confusion, for example, when purchasers who thought they were following
 12 links on Google to official BAYC sales pages were actually going to RR/BAYC sales
 13 pages. Compl. ¶ 37; *see Brookfield Commc’ns, Inc., 174 F.3d at 1062*. Defendants
 14 likewise caused post-sale confusion when they and other RR/BAYC token holders
 15 displayed them on Twitter and elsewhere as if they were real BAYC NFTs. Compl.
 16 ¶ 53; *see Givenchy S.A. v. BCBG Max Azria Grp., Inc., No. CV 10-8394, 2012 WL*
 17 *3072327, at *6 n.8 (C.D. Cal. Apr. 25, 2012)* (even if some consumers were not
 18 confused, post-sale confusion could damage handbag manufacturer where
 19 “consumers can acquire the prestige value of the [handbag] product by buying the
 20 copier’s cheaper imitation.”) (citation omitted).

21 **Third**, Defendants make much of minor changes to the marks including by
 22 *only sometimes* tacking on “RR” before “BAYC.” Mot. at 15-16. But making only a
 23 slight, and occasional, change to a mark is still likely to result in confusion. *See J.*
 24 *Thomas McCarthy, McCarthy on Trademarks & Unfair Competition § 23:20 (5th ed.*
 25 *2018)* (“To find trademark infringement only by exact identity and not where the
 26 junior user makes some slight modification would ‘be in effect to reward the cunning
 27 infringer and punish only the bumbling one.’”); *Hard Rock Cafe Licensing Corp. v.*
 28 *Pac. Graphics, Inc., 776 F. Supp. 1454, 1462 (W.D. Wash. 1991)* (changing the “Hard

1 Rock Cafe” mark to “Hard Rain Cafe” appropriated most of the mark, resulting in
 2 confusion.). And consumers do not necessarily know what “RR” means and could
 3 reasonably assume it is a new product or co-branding. *See [Rousselot B.V. v. St. Paul](#)*
 4 *[Brands, Inc., No. CV190458, 2019 WL 6825763, at *12 \(C.D. Cal. July 24, 2019\)](#)*
 5 (denying motion to dismiss on trademark claims and finding that use of plaintiff’s
 6 trademark “implies that they are part of [plaintiff’s] co-branding program, even
 7 though they are not.”). For example, Yuga Labs has another NFT collection
 8 abbreviated “MAYC” and has marketed with brands like MTV.

9 Likewise, Defendants emphasize Ryder Ripps’ account name on their
 10 Foundation NFT sales page, but it was far overshadowed by the massive text and logo
 11 bearing BAYC Marks.³ Mot. at 16; Compl. ¶ 37. Indeed, Defendants had to blow up
 12 the size of this text in their motion to even show it was there. *Id.* Like Ripps’ initials,
 13 the existence of the name does not conclusively prove that the NFTs came from
 14 another source, and reasonable consumers could assume it is co-branding.

15 Defendants also ignore the many other instances where they used BAYC Marks
 16 with no changes. For example, their Foundation sales page directly co-opted BAYC
 17 Marks in several places. Compl. ¶¶37-38. As the Court in *Kiedis v. Showtime*
 18 *Networks* found, “certainly the potential for [] confusing similarity exists when the
 19 titles are exactly the same” *No. CV078185, 2008 WL 11173143, at *4 (C.D.*
 20 *Cal. Feb. 19, 2008)* (alteration omitted).

21 **Finally**, to the extent there remains any uncertainty about how to interpret
 22 Defendants’ actions, the Court should deny the motion to dismiss because these are
 23 “factual issue[s] not appropriate for resolution without examining the evidence.” *Id.*
 24 *at *5* (denying motion to dismiss trademark claims about confusing similarity
 25

26 ³ Contrary to Defendants’ improper screenshots, the RR/BAYC contract did *not* show
 27 Ripps’ name as the “contract creator” when he sold thousands of the infringing NFTs.
 28 *See* Compl. ¶ 39; Mot. at 16. Defendants’ newly manufactured image in the Motion
 appears to be an attempt to mislead the Court as to what the NFT contract looked like
 when Defendants explicitly misled consumers.

1 between song and television show named “Californication.”).

2 **3. Defendants’ Use of BAYC Marks Is Not A Fair Use.**

3 Defendants argue that their use of BAYC Marks is nominative fair use. But
 4 nominative fair use does *not* apply when a defendant uses a mark to “refer[] to
 5 something other than the plaintiff’s product[.]” [New Kids on the Block v. News Am.
 6 Pub., Inc., 971 F.2d 302, 308 \(9th Cir. 1992\)](#). Similarly, nominative fair use only
 7 allows for “truthful use of a mark,” for example a Lexus dealer who sells Lexus
 8 vehicles at [lexusbroker.com](#). [Toyota Motor Sales, U.S.A., Inc. v. Tabari, 610 F.3d
 9 1171, 1177 \(9th Cir. 2010\)](#). Defendants’ use of BAYC Marks is not “truthful” or
 10 referential because Defendants are *not* selling Yuga Labs’ BAYC NFTs. Instead,
 11 Defendants use BAYC Marks to market and sell their own competing knockoff NFTs.
 12 Nor can they claim nominative fair use for their nonidentical modified versions of
 13 BAYC Marks. See [E.S.S. Entm’t 2000, Inc. v. Rock Star Videos, Inc., 547 F.3d 1095,
 14 1099 \(9th Cir. 2008\)](#) (nominative fair use defense did not apply when mark was “not
 15 identical to the plaintiff’s” mark). Defendants also improperly raise the nominative
 16 fair use affirmative defense at the motion to dismiss stage, which is “more
 17 appropriately resolved on a motion for summary judgment.” See [Perry v. Brown, No.
 18 CV 18-9543, 2019 WL 1452911, at *12 \(C.D. Cal. Mar. 13, 2019\)](#) (Walter, J.), *aff’d*
 19 *and remanded*, [791 F.App’x 643 \(9th Cir. 2019\)](#) (denying motion to dismiss).

20 Even so, Defendants do not establish each element of the defense. [Dr. Seuss
 21 Enters., L.P. v. ComicMix LLC, 300 F. Supp. 3d 1073, 1091 \(S.D. Cal. 2017\)](#)
 22 (defendant’s failure to satisfy all *New Kids* factors warranted denial of their motion to
 23 dismiss). As to the first *New Kids* factor, BAYC has become well-known in the NFT
 24 community and beyond (Compl. ¶¶ 19-22), and contrary to Defendants’ contention,
 25 is readily identifiable without the use of BAYC Marks. For example, the cover of
 26 *Rolling Stone* featured an article with Bored Ape images, titled “*How Four NFT*
 27 *Novices Created a Billion-Dollar Ecosystem of Cartoon Apes*” that evoked the brand
 28 without infringing BAYC Marks. *Id.* ¶ 19.

1 Second, Defendants did not use BAYC Marks only to the extent reasonably
 2 necessary. Instead, they frequently used the entirety of each mark without
 3 modification to confuse consumers and trade on Yuga Labs’ goodwill. In *Toyota*
 4 *Motor Sales*, the court found that defendants’ use of not just the Lexus word mark,
 5 but the “stylized Lexus mark and ‘Lexus L’ logo was more use of the mark than
 6 necessary,” where they could “adequately communicate their message without using
 7 the visual trappings of the Lexus brand.” [610 F.3d at 1181](#); *see also Summit Ent.,*
 8 *LLC v. B.B. Dakota, Inc.*, No. CV-10-04328, 2011 WL 13216987, at *9 (C.D. Cal.
 9 [Nov. 21, 2011](#)) (“extensive use” of film franchise’s marks and images were not
 10 reasonably necessary to inform consumers jacket was worn in film). Likewise, here,
 11 Defendants used direct copies of Yuga Labs’ BAYC Marks. Compl. ¶¶ 34, 36, 38,
 12 42-44, 46. And Defendants typically used BAYC Marks with Yuga Labs’ NFT
 13 images and even mimicked Yuga Labs’ social media posts to sell the RR/BAYC
 14 NFTs, further adding to the confusion. *Id.* ¶¶ 33-47. Their infringement was
 15 widespread across numerous social media accounts, NFT marketplaces, and NFT
 16 verification websites. *Id.* This excessive use of “the visual trappings of the [BAYC]
 17 brand” is more than necessary to identify Yuga Labs’ NFTs. [Toyota Motor Sales, 610](#)
 18 [F.3d at 1181](#).

19 Finally, Defendants used BAYC Marks “prominently and boldly,” to market
 20 the RR/BAYC NFTs, thus “suggesting sponsorship.” [Brother Recs., Inc. v. Jardine,](#)
 21 [318 F.3d 900, 908 \(9th Cir. 2003\)](#); *see supra* § IV.B.2. That Defendants in only some
 22 places criticized Yuga Labs and provided an ineffectual disclaimer does not prove
 23 that a “reasonably prudent consumer” could not be confused, especially where
 24 Defendants’ use of BAYC Marks pervaded the stream of commerce. *Supra* § IV.B.

25 C. Yuga Labs Has Pled Its Additional Federal and State Law Claims.

26 1. Yuga Labs Plausibly Alleges Cybersquatting and Unfair 27 Competition.

28 Defendants’ only argument is that Yuga Labs’ cybersquatting claim is

1 precluded by *Rogers* and nominative fair use. Mot. at 13, 18. But they cite no case
 2 applying the *Rogers* test to cybersquatting, and the case they do cite is inapposite.
 3 *Calista Enterprises Ltd. v. Tenza Trading Ltd.* merely requires a likelihood of
 4 confusion, which Yuga Labs has sufficiently pled and which Defendants concede. [43](#)
 5 [F. Supp. 3d 1099, 1031 \(9th Cir. 2014\)](#); Compl. ¶¶ 81-82 (Defendants’ domain names
 6 are “confusingly similar to Yuga Labs’ BAYC and APE marks.”); Tompros Decl. ¶ 6.
 7 Likewise, Defendants’ citation to *BMW of North America v. Mini Works, LLC* did not
 8 “apply[] nominative fair use to cybersquatting.” Mot. at 18. That court only opined
 9 on the bad faith and safe harbor aspects of plaintiff’s cybersquatting claim. [463 Fed.](#)
 10 [App’x. 689, 690 \(Fed. Cir. 2011\)](#). In any event, as shown above, these doctrines do
 11 not excuse Defendants’ actions. *See supra* § IV.B. The Complaint has adequately
 12 pled cybersquatting. *See* Compl. ¶¶ 77-85.

13 Similarly, Defendants’ only argument to dismiss Yuga Labs’ unfair
 14 competition claim is that it is precluded by *Rogers* and nominative fair use. Mot. at
 15 13, 18. Because those defenses cannot be decided in Defendants’ favor on their
 16 motion, the unfair competition claim must proceed. Even still, Yuga Labs has
 17 sufficiently alleged unfair competition under common law and Cal. Bus. & Prof. Code
 18 § 17200. [Celebrity Chefs Tour, LLC v. Macy’s, Inc., 16 F. Supp. 3d 1123, 1138 \(S.D.](#)
 19 [Cal. 2014\)](#) (“The decisive test of common law unfair competition is whether the
 20 public is likely to be deceived about the source of goods or services by the defendant’s
 21 conduct.”). Defendants’ scam deceives consumers. *See* Compl. ¶¶ 99-112; *supra*
 22 § IV.B.

23 2. Yuga Labs Plausibly Alleges False Advertising.

24 Here too, Defendants contend that Yuga Labs’ false advertising claim fails due
 25 to “deficiencies under the *Rogers* test and nominative fair use.” Again, these
 26 inapplicable defenses do not preclude Yuga Labs’ claims. *See supra* § IV.B.
 27 Defendants also claim Yuga Labs has not plausibly alleged a misleading
 28 representation of fact in support of its false advertising claim. To the contrary, the

1 Complaint alleges that Defendants “advertised their copycat ‘Ryder Ripps Bored Ape
2 Yacht Club’ as equivalent to the authentic Bored Ape Yacht Club” and stated, “[y]ou
3 reserve an ape which you can choose.” Compl. ¶ 72. Defendants’ claims are false.
4 And these false equivalences could make reasonable consumers “likely to believe that
5 if they hold one of the RR/BAYC NFTs they will have access to the authentic Bored
6 Ape Yacht Club (they will not), that they own rights to the underlying art (they do
7 not), or that they will have access to exclusive launches by Yuga Labs for holders of
8 authentic Bored Ape NFTs (they will not).” *Id.* ¶ 73. The “fuck off” Tweets do not
9 “distinguish[]” RR/BAYC NFTs from the official Bored Ape NFTs (Mot. at 21), but
10 rather falsely advertise their NFTs as a product equivalent to Yuga Labs’ NFTs. Even
11 Defendants’ incorrect claim that they own a registered trademark for RR/BAYC is
12 false advertising because it suggests a false equivalence and explicitly misleads
13 consumers about legitimacy that they simply do not have. *See* Compl. ¶ 46.

14 3. Yuga Labs Plausibly Alleges Conversion.

15 Yuga Labs’ conversion claim is legally sufficient because (1) Yuga Labs has
16 plausibly alleged wrongful disposition of property and (2) courts recognize that
17 plaintiffs may state a claim for conversion of their trademarks.

18 First, to state a claim for conversion, a plaintiff must allege “right to possession
19 of property” and “wrongful disposition of the property right[.]” [Kremen v. Cohen,](#)
20 [337 F.3d 1024, 1029 \(9th Cir. 2003\).](#) Defendants do not deny the validity or Yuga
21 Labs’ right to possession of its BAYC trademarks. Yuga Labs alleges that Defendants
22 “substantially interfered with Yuga Labs’ ownership and rights in [the BAYC] marks
23 by knowingly or intentionally using them to promote their own [infringing]
24 RR/BAYC NFTs.” Compl. ¶ 133. This is supported by substantial evidence of
25 infringement. *See id.* ¶¶ 33-47. Yuga Labs sufficiently pled wrongful disposition.

26 Second, courts in this judicial district recognize claims for conversion of
27 trademarks. *See* [Jaeyoung Nam v. Alpha Floors, No. 16-cv-6810, 2017 WL](#)
28 [11635994, at *8 \(C.D. Cal. Jan. 4, 2017\)](#) (rejecting *Meeker* and concluding that “a

1 plaintiff may state a claim for conversion of a trademark.”). Contrary to Defendants’
 2 misleading citations, the Northern District of California also recognizes claims for
 3 conversion of trademarks. *See Eng. & Sons, Inc. v. Straw Hat Rests., Inc.*, 176 F.
 4 Supp. 3d 904, 923 (N.D. Cal. 2016) (rejecting *Meeker*). Yuga Labs’ trademark
 5 conversion claim is adequately pled.

6 **4. Yuga Labs Plausibly Alleges Intentional Interference.**

7 Yuga Labs’ intentional interference claim is sufficient because it has plausibly
 8 alleged an independently wrongful act and provided examples of actual disruption to
 9 an economic relationship.

10 First, Yuga Labs sufficiently alleges trademark infringement and thus an
 11 independently wrongful act. *See, supra* §§ II.A, IV.B. But aside from trademark
 12 infringement, Yuga Labs also alleges three *additional* independently wrongful acts:
 13 “(b) engaging in unfair competition, (c) engaging in false advertising, and/or
 14 (d) offering a competing fake product to devalue Yuga Labs’ authentic Bored Ape
 15 NFTs and the goodwill associated with them.” Compl. ¶ 144. Each of these
 16 independent acts was wrongful and well-pled. *See, supra* §§ IV.B, IV.C.1-2.

17 Second, the Complaint sufficiently alleges a business relationship with Bored
 18 Ape holders. Contrary to Defendants’ contention, California law does not prohibit
 19 alleging loss of customers for intentional interference claims. Rather, the standard
 20 involves use of “improper methods of disrupting or diverting the business relationship
 21 of another *which fall outside the boundaries of fair competition.*” *Settimo Assocs. v.*
 22 *Environ Sys., Inc.*, 14 Cal. App. 4th 842, 845 (1993) (emphasis added). Yuga Labs
 23 sufficiently alleges Defendants disrupted their business relationships through unfair
 24 competition. *See supra* §§ IV.B, IV.C.1; Compl. ¶¶ 139-149. Defendants unfairly
 25 competed and infringed by using BAYC Marks to sell copycat NFTs. Compl. ¶ 145.

26 In any event, Yuga Labs also sufficiently alleges actual disruption to economic
 27 relationships with Bored Ape holders. *See id.* ¶¶ 141, 145. These allegations are
 28 based on specific examples and are far from the “conclusory” statement at issue in

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1 *Sybersound*. [Sybersound Records, Inc. v. UAV Corp.](#), 517 F.3d 1137, 1151 (9th Cir.
2 [2008](#)). Yuga Labs can also readily amend to add even more examples.

3 **5. Yuga Labs Plausibly Alleges Negligent Interference.**

4 Yuga Labs sufficiently alleges unreasonable conduct through trademark
5 infringement and other causes of action, and has demonstrated disruption of existing
6 business relationships with Bored Ape holders. *See supra* § IV.B.

7 Yuga Labs has also sufficiently pled a special relationship with Defendants.
8 Specifically, Defendants had a duty not to infringe on Yuga Labs’ intellectual
9 property. Their intentional actions support the existence of a duty. *See Panavision*
10 [Int’l, L.P. v. Toeppen](#), 1996 WL 768036, at *3 (C.D. Cal. Nov. 27, 1996) (denying
11 motion to dismiss negligent interference claim, taking into account Defendant’s intent
12 to infringe on plaintiff’s marks). That Defendants are competitors is distinguishable
13 from the duty analysis. “Whether a duty is owed is simply a shorthand way of
14 phrasing what is ‘the essential question—whether the plaintiff’s interests are entitled
15 to legal protection against the defendant’s conduct.’” *J’Aire Corp. v. Gregory*, 24
16 [Cal. 3d 799, 803 \(1979\)](#) (quoting *Dillon v. Legg*, 68 Cal.2d 728, 734 (1968)). Here,
17 Yuga Labs’ trademark interests are legally protected from Defendants’ infringement.
18 Notably too, whether the parties are competitors is not one of the criteria under
19 California law to determine the existence of a duty. *Id.* And caselaw in this district
20 does not recognize it as one. *See, e.g., Vera Mona, LLC v. Dynasty Grp. USA LLC*,
21 [No. CV202615, 2021 WL 3623297, at *4 \(C.D. Cal. Apr. 15, 2021\)](#) (finding
22 competitor who infringed plaintiff’s trademark had special relationship sufficient to
23 support plaintiff’s negligent interference claim, and denying motion to dismiss).

24 **6. Yuga Labs’ Unjust Enrichment Claim Should Not Be**
25 **Stricken by the Anti-SLAPP Statute.**

26 This claim arises from equity and is unrelated to Defendants’ purported speech.
27 [Fed. Deposit Ins. Corp. v. Dintino](#), 167 Cal. App. 4th 333, 346 (2008). It is a claim
28 for profits Defendants made by trading on Yuga Labs’ goodwill; the basis for the

1 claim is not Defendants’ speech. Moreover, Yuga Labs plausibly alleges trademark
 2 infringement (*supra* § IV.B), and has thus shown unjust retention of a benefit.
 3 [Lectrodryer v. SeoulBank](#), 77 Cal. App. 4th 723, 726 (2000). Yet, given the split of
 4 authority in California about whether unjust enrichment is a cause of action, and the
 5 Court’s prior rulings on this issue, Yuga Labs withdraws this claim but continues to
 6 seek unjust enrichment as a remedy. [Tae Hee Lee v. Toyota Motor Sales, U.S.A., Inc.](#),
 7 [992 F. Supp. 2d 962, 981 \(C.D. Cal. Jan. 9, 2014\)](#) (Walter, J).

8 **D. None of Yuga Labs’ Claims May Be Stricken Under California’s**
 9 **Anti-SLAPP Law.**

10 Defendants have not established that they are being sued for protected activity,
 11 and thus the anti-SLAPP statute does not apply and the motion fails. *Supra* § IV.A.
 12 The anti-SLAPP motion also fails because Yuga Labs states a claim for each state-
 13 law cause of action. Thus, even if Defendants can establish that their sale of
 14 RR/BAYC NFTs is somehow a First Amendment protected activity (which it is not),
 15 Yuga Labs’ claims easily possess the “minimal merit” needed to survive an anti-
 16 SLAPP motion. *See Hilton*, 599 F.3d at 908.

17 Defendants are also not entitled to fees. None of Yuga Labs’ claims target
 18 Defendants’ protected activity—the remedies sought are classic trademark
 19 infringement remedies. Any conceivable protected activity is so incidental to these
 20 claims as to make application of anti-SLAPP unreasonable. [Episcopal Church Cases](#),
 21 [45 Cal. 4th 467, 478 \(2009\)](#) (“The additional fact that protected activity may lurk in
 22 the background—and may explain why the rift between the parties arose in the first
 23 place—does not transform a property dispute into a SLAPP suit.”); *see also Hilton*,
 24 [599 F.3d at 901-02](#) (“an anti-SLAPP motion requires the court to ask, first, whether
 25 the suit arises from the defendant’s protected conduct and, second, whether the
 26 plaintiff has shown a probability of success on the merits. If the first question is
 27 answered in the negative, then the motion must fail, even if the plaintiff stated no
 28 cognizable claim.”). Additionally, if any state-law claims are dismissed, the partial

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1 dismissal will be “so insignificant that [Defendants] did not achieve any practical
2 benefit from bringing the motion,” and such “technical victories” do not entitle
3 Defendants to fees under the statute. Brown v. Elec. Arts, Inc., 722 F. Supp. 2d 1148,
4 1155 (C.D. Cal. 2010). Here, all of Yuga Labs’ federal claims for Defendant’s
5 trademark infringement, which are the core claims at issue, are unaffected by
6 Defendants’ motion to strike.

7 On the other hand, “[i]f the court finds that a special motion to strike is frivolous
8 or is solely intended to cause unnecessary delay, the court shall award costs and
9 reasonable attorney’s fees to a plaintiff prevailing on the motion” Cal. Civ. Proc.
10 Code § 425.16(c)(1). An award of fees for Yuga Labs is particularly warranted here,
11 where Defendants abused the anti-SLAPP statute to air their false assertions against
12 Yuga Labs’ founders and distract from infringing actions they took against Yuga Labs
13 that are the subject of this lawsuit. Indeed, their two declarations with 36 improper
14 and objectionable exhibits reinforces a fee award. *See* Yuga Labs’ Objections to
15 Evidence. Defendants concede their motion is targeted at a non-existent defamation
16 claim; this is a trademark dispute in which the anti-SLAPP statute has no business.

17 **V. CONCLUSION**

18 Defendants’ motion presents no argument requiring the Court to strike or
19 dismiss Yuga Labs’ claims, and it should be denied. If the Court, though, determines
20 that any aspect of Yuga Labs’ Complaint is insufficient, Yuga Labs requests the
21 opportunity to amend its Complaint. Under Rule 15, “court[s] should freely give
22 leave [to amend] when justice so requires.” Fed. R. Civ. P. 15(a)(2).

23 Dated: October 17, 2022

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