

1 Louis W. Tompros (*pro hac vice*)
 2 louis.tompros@wilmerhale.com
 3 Monica Grewal (*pro hac vice*)
 4 monica.grewal@wilmerhale.com
 5 Scott W. Bertulli (*pro hac vice*)
 6 scott.bertulli@wilmerhale.com
WILMER CUTLER PICKERING
HALE AND DORR LLP
 60 State Street
 Boston, MA 02109
 Telephone: (617) 526-6000
 Fax: (617) 526-5000

8 Derek Gosma (SBN 274515)
 derek.gosma@wilmerhale.com
 9 Henry Nikogosyan (SBN 326277)
 henry.nikogosyan@wilmerhale.com
 10 **WILMER CUTLER PICKERING**
HALE AND DORR LLP
 11 350 South Grand Ave., Suite 2400
 Los Angeles, CA 90071
 Telephone: (213) 443-5300
 Fax: (213) 443-5400

13 Attorneys for Defendants and Counter-
 14 Plaintiffs *Ryder Ripps and Jeremy Cahen*

15
 16 UNITED STATES DISTRICT COURT
 17 CENTRAL DISTRICT OF CALIFORNIA
 18 WESTERN DIVISION
 19

20 Yuga Labs, Inc.,
 21 Plaintiff and Counterclaim
 Defendant,
 22 v.
 23 Ryder Ripps, Jeremy Cahen,
 24 Defendants and Counterclaim
 25 Plaintiffs.
 26

Case No.: 2:22-cv-4355-JFW-JEM

**MR. RIPPS AND MR. CAHEN'S
 OPPOSITION TO YUGA LABS,
 INC.'S MOTION TO DISMISS**

Honorable John F. Walter
 Hearing: February 27, 2023 at 1:30 pm

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- I. INTRODUCTION** 1
- II. BACKGROUND**..... 1
- III. LEGAL STANDARD**..... 6
- IV. ARGUMENT** 6
 - A. YUGA’S MOTION MUST BE DENIED IN ITS ENTIRETY AS UNTIMELY**..... 6
 - B. COUNTER-PLAINTIFFS HAVE STANDING TO ASSERT THEIR 512(F) CLAIM**..... 7
 - C. COUNTER-PLAINTIFFS’ 512(F) CLAIM IS PLED WITH PARTICULARITY** 10
 - D. COUNTER-PLAINTIFFS’ 512(F) CLAIM IS OTHERWISE ADEQUATELY PLEAD**..... 14
 - E. DECLARATORY JUDGMENT IS PROPER FOR THE COPYRIGHT CLAIMS**..... 14
 - F. COUNTER-PLAINTIFFS ALLEGED EXTREME AND OUTRAGEOUS CONDUCT** 16
 - G. COUNTER-PLAINTIFFS PLAUSIBLY ALLEGE SEVERE EMOTIONAL DISTRESS**..... 18
 - H. YUGA OWED A DUTY OF CARE TO COUNTER-PLAINTIFFS**..... 20
 - I. DECLARATORY JUDGMENT OF NO DEFAMATION**..... 21
 - J. YUGA’S MOTION TO STRIKE SHOULD BE DENIED** 21
- V. CONCLUSION** 23

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

Federal Cases

Bass v. Facebook, Inc.,
394 F. Supp. 3d 1024 (N.D. Cal. 2019)..... 9

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) 6

Bly-Magee v. California,
236 F.3d 1014 (9th Cir. 2001)..... 11

Cal. Furniture Collection, Inc. v. Harris Adamson Home,
LLC, No.19-cv-06254, 2019 WL 7882081 (C.D. Cal. 2019)..... 16

California Sea Urchin Commission v. Bean,
883 F.3d 1173 (9th Cir. 2018)..... 8

United States v. Corinthian Colleges,
655 F.3d 984 (9th Cir. 2011)..... 23

Hilton v. Hallmark Cards,
599 F.3d 894 (9th Cir. 2010)..... 21, 22

Hung v. City of Los Angeles,
601 F. Supp. 2d 1158 (C.D. Cal. 2009)..... 9

IP Global Invs. America, Inc. v. Body Glove Ip Holdings, LP,
2:17-cv-06189-ODW-AGRE, 2019 WL 121191 (C.D. Cal. Jan. 7,
2019)..... 21

Lenz v. Universal Music Studios,
815 F.3d 1145 (9th Cir. 2016)..... 10

U.S. v. Lockheed Missiles & Space Co., Inc.,
171 F.3d 1208 (9th Cir. 1999)..... 23

Moonbug Entertainment Ltd. v. Babybus (Fujian) Network Technology
Co., Ltd.,
No. 21-cv-06536-EMC, 2022 WL 580788 (N.D. Cal. 2022) 14

1 *Principal Life Ins. Co. v. Robinson*,
 394 F.3d 665 (9th Cir. 2005)..... 14

2

3 *Public Service Commission v. Wycoff Co.*,
 344 U.S. 237 (1952) 14

4

5 *Rhoades v. Avon Prods.*,
 504 F.3d 1151 (9th Cir. 2007)..... 14

6

7 *Robins v. Spokeo, Inc.*,
 867 F.3d 1108 (9th Cir. 2017)..... 10

8

9 *Rossi v. Motion Picture Ass’n of America, Inc.*,
 391 F.3d 1000 (9th Cir. 2004)..... 14

10 *Sky Billiards, Inc., v. WolVol, Inc.*,
 No. 5:15-cv-02182, 2016 WL 7479428 (C.D. Cal. 2016) 16

11

12 *Spokeo, Inc. v. Robins*,
 578 U.S. 330 (2016) 9

13

14 *Summit Technology, Inc. v. High-Line Medical Instruments Co., Inc.*,
 922 F. Supp. 299 (C.D. Cal. 1996)..... 6

15

16 *Swartz v. KPMG LLP*,
 476 F.3d 756 (9th Cir. 2007)..... 11

17

18 *Van v. LLR, Inc.*,
 962 F.3d 1160 (9th Cir. 2020)..... 9, 10

19

20 *Wells Fargo & Co. v. Wells Fargo Express Co.*,
 556 F.2d 406 (9th Cir. 1977)..... 8

21

22 *White v. City of Sparks*,
 500 F.3d 953 (9th Cir. 2007)..... 9

23

24 *Wylter Summit Partnership v. Turner Broadcasting System, Inc.*,
 135 F.3d 658 (9th Cir. 1998)..... 6

25 **State Cases**

26 *Cabral v. Ralphs Grocery Co.*,
 248 P.3d 1170 (Cal. 2011)..... 20

27

28

1 *City of Cotati v. Cashman*,
 29 Cal.4th 69 (2002)..... 22

2

3 *Fletcher v. Western National Life Ins. Co.*
 10 Cal.App.3d 376 (1970)..... 18

4

5 *Hughes v. Pair*,
 46 Cal.4th 1035 (2009)..... 19

6

7 *Ismail v. Montchak*,
 B284163, 2019 WL 2949863 (Cal. Ct. App. 2019)..... 19

8

9 *Jackson v. Mayweather*,
 10 Cal.App.5th 1240 (2017)..... 18

10

11 *Kisecky v. Carpenters’ Trust for So. California*,
 144 Cal.App.3d 222 (1983)..... 17

12

13 *McConnell v. Innovative Artists & Literary Agency, Inc.*,
 175 Cal.App.4th 169 (2009)..... 22

14

15 *Plotnik v. Meihaus*,
 208 Cal.App.4th 1590 (2012)..... 19

16

17 *Potter v. Firestone Tire & Rubber Co.*,
 6 Cal. 4th 965 (1993)..... 17, 20

18

19 *Silk v. Feldman*,
 208 Cal.App.4th 547 (2012)..... 22

20

21 *Wang v. Wal-Mart Real Estate Business Trust*,
 153 Cal.App.4th 790 (2007)..... 22

22

23 **Federal Statutes**

24 17 U.S.C. 512(f).....*passim*

25 DMCA*passim*

26

27 **State Statutes**

28 California Civil Code § 1714(a)..... 20

California Code of Civil Procedure § 527.6..... 20

1 California Penal Code § 646.9.....20, 21
2 **Other Authorities**
3 Federal Rules of Civil Procedure Rule 12(b)(6)..... 6
4 <https://www.copyright.gov/help/faq/faq-special.html>..... 16
5 L.R. 7-3 11
6 Fderal Rules of Civil Procedure Rule 9(b) 12
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **I. INTRODUCTION**

2 Counter-Plaintiffs Ryder Ripps and Jeremy Cahen called out Yuga Labs, Inc.
3 (“Yuga”) for the racist and alt-right messages embedded in the Bored Ape Yacht
4 Club (“BAYC”) NFT collection, and Yuga has done everything it can to try to
5 silence them in response. That is why Yuga brought this trademark case (against
6 Ripps and Cahen only, not against any of the dozens of other NFT collections that
7 actually do try to profit by using Yuga’s asserted trademarks), that is why Yuga
8 deployed its employees to harass Mr. Ripps, Mr. Cahen, and their families, and that
9 is why Yuga launched fraudulent takedown notices under the Digital Millennium
10 Copyright Act.

11 Yuga’s out-of-court actions are what give rise to the well-pled counterclaims
12 that Mr. Ripps and Mr. Cahen have asserted to put an end to Yuga’s campaign of
13 harassment. For the reasons discussed in detail below, those counterclaims should
14 not be dismissed or struck.

15 But even before reaching the merits, the Court must deny Yuga’s motion as
16 untimely. Counter-Plaintiffs filed and served their counterclaims on December 27,
17 2022—but Yuga’s motion was not filed until January 18, 2023. Under Rule
18 12(a)(1)(B), Yuga’s motion was untimely, and, as a matter of law, because Yuga
19 has not timely answered Counter-Plaintiffs’ allegations and has not made (and
20 cannot make) a motion for an extension for excusable neglect under Rule
21 6(b)(1)(B), Yuga’s motion must be denied.

22 **II. BACKGROUND**

23 Counter-Plaintiffs Ryder Ripps and Jeremy Cahen pointed out that Yuga’s
24 BAYC NFT collection was rife with dog whistles appealing to the online alt-right
25 community. In response, Yuga and its agents engaged in a more than year-long
26 campaign in an to attempt to shut them up. In several instances, Yuga’s campaign
27 crossed the line into actionable conduct.
28

1 **A. Ryder Ripps**

2 Ryder Ripps is a well-known artist. Mr. Ripps’s work has appeared in major
3 galleries including the Postmasters Gallery in New York City. Publications
4 including the *New York Times* and *Forbes* have written about his work. *See*
5 Counter-Compl. [Dkt. 65] ¶ 9. His work often critiques modern internet culture.
6 Mr. Ripps also has partnerships with well-known artists and brands including Nike,
7 Tame Impala, and Pusha T. *Id.* at ¶ 11. Jeremy Cahen is the co-creator of the
8 RR/BAYC project.

9 **B. Counter-Plaintiffs’ Criticism of Yuga**

10 Yuga is a major player in the NFT market. They rode the crypto wave of
11 2021 to become a \$4 billion company. *See* Counter-Compl. [Dkt 65] ¶ 1. One of
12 Yuga’s major offerings is the Bored Ape Yacht Club NFT collection (“BAYC”).
13 BAYC is a 10,000-piece NFT collection pointing to pictures of apes. *Id.* at ¶ 24.

14 Contrary to common misconceptions, an NFT is not a digital image; rather, it
15 is a “token” (computer code) in a digital ledger called a blockchain. Counter-
16 Compl. [Dkt. 65] at ¶¶ 14-17. The code operates as a unique entry in the ledger and
17 can reference other content online, such as images. *Id.* NFTs by their nature
18 cannot be copied.¹ *Id.* at ¶¶ 16, 61.

19 Mr. Ripps noticed that Yuga and BAYC appeared to pay homage to the far-
20 right and neo-Nazism. For example, he realized that the company name “Yuga”
21 corresponds with the alt-right/Neo-Nazi catchphrase “Surf the Kali Yuga.” *See*
22 Counter-Compl. [Dkt. 65] ¶¶ 35-36. Mr. Ripps also noticed the use of
23 simianization (depicting members of specific races as monkeys), racist traits in
24 BAYC images, and pseudonyms for the co-founders that reference racial slurs and
25 pedophilia. *See id.* at ¶¶ 37-38.

26 Mr. Ripps wanted to publicize his findings to call out Yuga. Beginning in

27 _____
28 ¹ Beyond that, the BAYC NFT collection was computer generated and the
underlying images are not copyright eligible.

1 December 2021, he took his message to social media sites including Twitter and
2 Instagram. In January 2022, he created the website gordongoner.com to publicize
3 his findings. *See* Counter-Compl. [Dkt. 65] ¶39. In May 2022, Mr. Ripps and Mr.
4 Cahen created the RR/BAYC NFT protest art collection. This protest collection
5 was a series of verifiably unique entries in the Ethereum blockchain that include the
6 same links to metadata which in turn include the same links Yuga used to link to
7 its BAYC images. *Id.* at ¶¶ 42-43. The RR/BAYC NFTs expressed that an NFT is
8 not a digital image, which is artistic commentary that is possible only by
9 referencing the same BAYC images that Yuga’s NFTs reference. The RR/BAYC
10 NFTs also recontextualized the BAYC images, acting as a mirror and forcing
11 viewers to contemplate the racist messaging and imagery associated with BAYC
12 NFTs. *Id.* at ¶ 44.

13 As explained on Mr. Ripps’s Twitter account and rrbayc.com (where the
14 majority of RR/BAYC NFTs were sold), the point of the protest art collection was
15 to raise awareness of the hateful imagery in Yuga’s NFT collection and shed light
16 on what it really means to own an NFT. *Id.* at ¶ 48.

17 **C. Yuga’s Harassment Campaign**

18 Shortly after Mr. Ripps and Mr. Cahen began criticizing Yuga’s use of racist
19 messages and imagery, Yuga commenced a targeted campaign aimed at silencing
20 Mr. Ripps and Mr. Cahen.

21 When Mr. Ripps spoke out, Guy Oseary, a partner at Yuga, called Mr. Ripps
22 to make threats including, “I can be a nice guy or I can be a not nice guy.”
23 Counter-Compl. [Dkt. 65] at ¶ 58. Mr. Oseary then attacked Mr. Ripps’s
24 livelihood. He contacted Mr. Ripps’s client, Tame Impala, to pressure Tame
25 Impala to fire Mr. Ripps as punishment for his activism. Counter-Compl. [Dkt. 65]
26 ¶ 59.

27 Mr. Oseary also launched threats against Mr. Cahen and his family. Despite
28

1 being able to contact Mr. Cahen directly, Mr. Oseary used an agent to contact Mr.
2 Cahen’s youngest sister who had just given birth. Counter Compl. [Dkt. 65] ¶ 60.
3 Mr. Oseary’s agent told Mr. Cahen’s sister that Mr. Oseary would “come down
4 hard” on Mr. Cahen. *See id.*

5 **D. Yuga’s Copyright Takedown Notices**

6 Yuga’s misconduct also involved a calculated effort to purge the internet of
7 the RR/BAYC artwork. Yuga understood the nature of NFTs as unique entries in a
8 ledger which cannot be copied. Counter-Compl. [Dkt. 65] ¶61. Yuga also
9 understood that it lacked actionable copyright in the underlying images of the NFT.
10 *Id.* at ¶ 62; *see also* Yuga’s Mot. [Dkt. 89] at 23 (“Yuga Labs does not have a
11 registered copyright”); Ball Decl. [Dkt. 89-3] ¶ 23 (“Yuga Labs does not possess
12 any copyright registrations, including any for the Bored Ape images”). Despite
13 that, Yuga filed multiple Digital Millennium *Copyright* Act takedown notices with
14 various NFT marketplaces, including the Foundation marketplace. Counter-Compl.
15 at ¶ 62. Mr. Ripps and Mr. Cahen had to expend time, energy, and resources to
16 fight off these fraudulent takedown requests. These requests also resulted in the
17 RR/BAYC collection being delisted, resulting in lost money and time in the market.
18 *Id.* at ¶ 77.

19 **E. Yuga’s Public Lies**

20 Yuga also engaged in a campaign to distract the public from its racist
21 messaging and imagery by disparaging Mr. Ripps and Mr. Cahen. Yuga’s apparent
22 goal was to falsely portray Mr. Ripps and Mr. Cahen as scammers, liars, racists,
23 and criminals, in an effort to discredit their message calling out Yuga’s misconduct.
24 Counter-Compl. [Dkt. 65] ¶ 63. Some of these accusations include that Mr. Ripps
25 and Mr. Cahen regularly use the n-word, engage in blackmail, and exploit sex
26 workers. *Id.* None of those allegations is true, and Yuga, which expended
27 resources on researching Mr. Ripps and Mr. Cahen, had to know they were false
28

1 when they made them. *Id.*

2 **F. Yuga’s Community and Partnership Lead Spreads Offensive Lies**

3 Ray Illya Fraser, Yuga’s Community and Partnerships lead also used his
4 well-followed Twitter account to falsely accuse Mr. Cahen of owning and operating
5 the ENS (Ethereum Name Service) domain n*gger.eth [redacted]². Counter-
6 Compl. [Dkt. 65] ¶ 67. The owner and creator of this address is publicly available,
7 and is not Mr. Cahen. *Id.* Mr. Cahen publicly denied this slanderous accusation,
8 but Fraser persisted with the goal of distracting from Yuga’s own racist content.

9 **G. Death Threats**

10 On October 20, 2022, another Yuga employee, Brand Lead Noah Davis,
11 called Mr. Ripps’s father, Rodney Ripps. Counter-Compl. [Dkt. 65] ¶ 69. On the
12 call, Davis said, “You and your fucked up son are going to die,” and “You guys are
13 fucking pieces of shit.” *Id.* Rodney Ripps, in fear for his life, contacted the police
14 regarding this Davis’ threat. *Id.*

15 Yuga states that Noah Davis made this call in response to “highly insulting
16 statements of Davis’ later father.” Yuga’s Mot. [Dkt. 89] at 10. But as Yuga’s own
17 motion notes, this supposed “highly insulting statement” was “Father, Mac was a
18 cool singer. RIP.” Ex. 19 to Yuga’s Mot. [Dkt. 89-22] at 2.

19 **H. Effects of Yuga’s Campaign**

20 Yuga’s campaign had devastating, long-lasting effects on Mr. Ripps and Mr.
21 Cahen. Both Counter-Plaintiffs experienced extreme fear for their safety and their
22 livelihoods. Counter-Compl. [Dkt. 65] ¶¶ 89, 95. They have been in a perpetual
23 state of anxiety and stress *for longer than a year*, which has undermined their
24 ability to function on a day-to-day basis including their ability to sleep and maintain
25 social relations.

26

27 _____
28 ² Due to the offensive nature of the domain name, we have elected to censor it in
this filing.

1 III. LEGAL STANDARD

2 “A party must serve an answer to a counterclaim or crossclaim within 21
3 days after being served with the pleading that states the counterclaim or
4 crossclaim.” Fed. R. Civ. P. 12(a)(1)(B). “When an act may or must be done
5 within a specified time, the court may, for good cause, extend the time: (A) with or
6 without motion or notice if the court acts, or if a request is made, before the original
7 time or its extension expires; or (B) on motion made after the time has expired if
8 the party failed to act because of excusable neglect.” Fed. R. Civ. P. 6(b)(1).

9 In deciding a motion to dismiss, a court must accept as true the allegations in
10 the complaint and interpret those allegations in the light most favorable to the non-
11 moving party. See [Wylar Summit Partnership v. Turner Broadcasting System, Inc.](#),
12 [135 F.3d 658, 661 \(9th Cir. 1998\)](#). A dismissal under Rule 12(b)(6) is only proper
13 where there is either a “lack of a cognizable legal theory” or “the absence of
14 sufficient facts alleged under a cognizable legal theory.” [Summit Technology, Inc. v.](#)
15 [High-Line Medical Instruments Co., Inc.](#), 922 F. Supp. 299, 304 (C.D. Cal. 1996)
16 (quoting [Balistreri v. Pacifica Police Dept.](#), 901 F.2d 696, 699 (9th Cir. 1988)). A
17 complaint does not need to provide detailed factual allegations to survive a motion
18 to dismiss. [Bell Atlantic Corp. v. Twombly](#), 550 U.S. 544, 555 (2007). Factual
19 allegations must simply be “enough to raise a right to relief above the speculative
20 level.” *Id.*

21 IV. ARGUMENT

22 A. Yuga’s Motion Must Be Denied in Its Entirety as Untimely

23 Yuga’s motion seeks to dismiss or strike counterclaims that Counter-
24 Plaintiffs brought on December 27, 2022. Counter-Compl. [Dkt. 65] at 53. But
25 Yuga’s motion was filed on January 18, 2023—twenty-two days after the
26 counterclaims were filed. Yuga’s Mot. [Dkt. 89] at 25. Because Yuga did not
27 answer within the twenty-one day window of Rule 12(a)(1)(B), its motion is
28

1 untimely and must be denied in full.

2 Of course, Yuga had every opportunity to seek an extension of time, but
3 elected not to do so. Notably, less than four hours after Yuga filed its untimely
4 motion (January 18, 2023), counsel for Counter-Plaintiffs emailed all counsel of
5 record for Yuga alerting Yuga to the untimeliness of the motion and asking for an
6 explanation for why it was not untimely. *See* Ex. 2 [January 18, 2023 Email to
7 Counsel for Yuga]. Counsel for Yuga did not respond and, to this day, has never
8 responded or sought any extension.

9 Under Rule 6(b)(1)(B), the Court may only extend Yuga’s time to respond
10 “on motion made after the time has expired if the party failed to act because of
11 excusable neglect.” Here, Yuga made no such motion seeking an extension; it
12 simply filed its untimely motion without even asking the Court’s permission. And
13 even if Yuga were to make a motion under Rule 6(b)(1)(B) now, it could not show
14 excusable neglect where it failed to seek any extension for nearly three weeks after
15 counsel for Counter-Plaintiffs notified Yuga of its missed deadline. Accordingly,
16 Yuga’s motion should be denied in its entirety.³

17 **B. Counter-Plaintiffs Have Standing To Assert Their 512(f) Claim**

18 “In order to have standing, [plaintiffs] must show (1) [they have] suffered an
19 injury in fact that is (a) concrete and particularized and (b) actual or imminent, not
20 conjectural or hypothetical; (2) that the injury is fairly traceable to the challenged
21 action of the defendant; and (3) it is likely, as opposed to merely speculative, that
22

23 ³ Yuga also violated paragraph 5(a) of the Court’s Standing Order [Dkt. 14] by
24 noticing its motion for hearing on February 27, 2023. Yuga’s motion was filed and
25 served on January 18, and the Court’s order explains that “No motion shall be
26 noticed for hearing for more than 35 calendar days after service of the motion
27 unless otherwise ordered by the Court.” Standing Order [Dkt. 14] at 8. February
28 27, 2023 is **40 days** after the January 18, 2023 filing date. Once again, Yuga failed
even to ask the Court’s permission (or even Counter-Plaintiffs’ consent) before
noticing this out-of-time hearing date.

1 the injury will be redressed by a favorable decision.” [*California Sea Urchin*](#)
2 [*Commission v. Bean*, 883 F.3d 1173, 1180 \(9th Cir. 2018\)](#) quoting [*Friends of the*](#)
3 [*Earth, Inc. v. Laidlaw Environmental Services Inc.*, 528 U.S. 167, 180-81 \(2000\)](#).

4 Yuga argues that Counter-Plaintiffs have not alleged an injury in fact. But the
5 allegations in the complaint are more than sufficient.⁴

6 As an initial matter, Yuga asks the Court to only look at *one* of the instances
7 in which (Yuga concedes) it filed a fraudulent copyright takedown request. But the
8 counterclaims make clear that there were *multiple* such requests. *See, e.g.*,
9 Counter-Compl. [Dkt. 65] ¶ 61 (“Yuga also *repeatedly* filed fraudulent DMCA
10 takedown notices to attempt to purge the internet of the RR/BAYC artworks.”
11 (emphases added)). This Court cannot credit—contrary to the allegations—Yuga’s
12 assertion that only one takedown request was made pursuant to the DMCA.

13 Nor can or should the Court credit Yuga’s bald assertion—again contrary to
14 the allegations in the Counter-Complaint—that “Yuga Labs’ takedowns of the
15 RR/BAYC NFTs were made . . . on the basis of trademark infringement or non-IP
16 issues.” Yuga Mot. [Dkt. 89] at 19. Defendants have specifically alleged (and the
17 evidence will show conclusively) that the requests say “DMCA”—“Digital
18 Millennium *Copyright* Act” on their very face. The “C” in DMCA is for
19 “copyright.” Where a party like Yuga attempts to improperly leverage the power of
20 the DMCA for non-copyright claims, its attestations under Section 512(f) of the
21 _____

22 ⁴ Yuga contends that the burden has shifted to Counter-Plaintiffs to “present
23 affidavits or other evidence necessary to satisfy their burden of establishing subject
24 matter jurisdiction.” But the burden only shifts if the evidence presented by Yuga
25 actually demonstrates there is no standing. Instead, even accepting Yuga’s
26 affidavits as true, standing still exists. But to the extent the Court were to conclude
27 that the burden has shifted, discovery is necessary, including from third parties who
28 were unable to obtain RR/BAYC NFTs because of Yuga’s improper takedown
29 notices, so that Counter-Plaintiffs can demonstrate the requisite jurisdictional facts.
30 *See Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n.24 (9th
31 Cir. 1977) (allowing discovery to establish jurisdictional facts).

1 **Copyright** Act (that it is asserting copyright infringement in its takedown) are
2 necessarily false.

3 The injury in fact requirement requires plaintiffs to show only that they have
4 suffered “an invasion of a legally protected interest that is concrete and
5 particularized, and actual or imminent, not conjectural or hypothetical. [Spokeo, Inc.
6 v. Robins, 578 U.S. 330, 339 \(2016\)](#) (internal quotations omitted). For an injury to
7 be particularized, it must affect the plaintiff in some personal way. *Id.* An injury is
8 “concrete” if it exists and is not merely an abstract harm. *Id.* at 340. Concreteness
9 is not equivalent with tangibility. *Id.* Here, it is beyond dispute that the injury
10 alleged by Counter-Plaintiffs is particularized: the Counter-Complaint fully
11 identifies the injury as happening to Counter-Plaintiffs. They allege they were
12 personally harmed when their protest art collection was removed from various
13 websites based on numerous DMCA complaints. Yuga does not challenge that this
14 alleged harm is particularized.

15 Counter-Plaintiffs allege a real, concrete injury beyond a procedural error.
16 The complaint lays out several different injuries suffered by Counter-Plaintiffs
17 because of Yuga’s fraudulent DMCA takedown requests including, (1) silenced
18 artistic expression; (2) loss of time associated with dealing in Yuga’s fraudulent
19 takedown notices; (3) reputational harm; and (4) financial harm. *See* Counter-
20 Compl. (Dkt. 65) at 47. These are all recognized concrete harms. *See* [White v. City
21 of Sparks, 500 F.3d 953 \(9th Cir. 2007\)](#) (deciding case where city barred artist from
22 selling paintings); [Hung v. City of Los Angeles, 601 F. Supp. 2d 1158 \(C.D. Cal.
23 2009\)](#) (finding standing to challenge law disrupting expressive activity); [Van v.
24 LLR, Inc., 962 F.3d 1160, 1162 \(9th Cir. 2020\)](#) (holding that \$3.76 in lost money is
25 sufficient for Article III standing because “a loss of even a small amount of money
26 is an injury”), [Bass v. Facebook, Inc., 394 F. Supp. 3d 1024, 1035 \(N.D. Cal. 2019\)](#)
27 (loss of time, even if less than an hour is sufficient to plead standing); [Robins v.](#)
28

1 [Spokeo, Inc., 867 F.3d 1108, 1115 \(9th Cir. 2017\)](#) (reputational harm). These
2 harms are expressly pled in the Counter-Complaint.⁵

3 Even if Yuga were right that the Counter-Complaint had asserted only one
4 DMCA takedown, Counter-Plaintiffs adequately allege an injury-in-fact. Yuga's
5 argument against the single request as being adequate for standing stems from an
6 unfounded belief that only large injuries are cognizable. *But see Van, 962 F.3d at*
7 [1162](#) (insignificant amount of money sufficient for standing). Yuga concedes that
8 Counter-Plaintiffs were unable to sell their collection for multiple hours. This
9 delay directly implicates at least two injuries (1) money and (2) time. Therefore,
10 even assuming Yuga's misreading of the Counter-Complaint were accurate,
11 Counter-Plaintiffs would still have standing.

12 Further, in statutory causes of action, concrete harm may be shown by a
13 violation that causes the plaintiff to suffer the type of harm Congress sought to
14 prevent. [Robins v. Spokeo, Inc., 867 F.3d 1108, 1113 \(9th Cir. 2017\)](#). Section
15 512(f) belongs in the family of intentional torts that Congress has recognized as
16 being cognizable because the plaintiff suffered harm. *See Lenz v. Universal Music*
17 [Studios, 815 F.3d 1145, 1157 \(9th Cir. 2016\)](#). As a result, courts interpreting the
18 DMCA allow claims for even *nominal* damages. *Id.* Yuga effectively concedes
19 that Counter-Plaintiffs have at least suffered this harm when they acknowledge that
20 the RR/BAYC collection was taken off the internet for (at least) hours as a result of
21 the DMCA notices that it concedes was improper. Thus, Counter-Plaintiffs have
22 sufficiently alleged an injury-in-fact.

23 C. Counter-Plaintiffs' 512(f) Claim Is Pled with Particularity

24 Yuga's argument that Counter-Plaintiffs failed to plead their 512(f) claims
25 with sufficient particularity should likewise be rejected. As a preliminary matter,

26 ⁵ Yuga claims that Mr. Ripps somehow invited this injury by quoting his tweets out
27 of context. *See* Yuga Mot. [Dkt. 89] at 20. But, public statements of bravado do
28 not render the well-pled harm caused by Yuga non-existent as a matter of law.

1 Yuga did not raise pleading with particularity during the parties' Local Rule 7-3
2 conference of counsel, as the parties' subsequent Joint Statement confirms. *See*
3 Joint Statement [Dkt. 78] (making no mention of contention that pleading was
4 insufficiently particular). Had Yuga done so, counsel for Counter-Plaintiffs would
5 have had an opportunity to ask what specific facts Yuga thought were missing, to
6 determine whether any amendment was appropriate. Because Yuga failed to do so
7 in violation of Section 5(b) of this Court's Standing Order, Yuga's argument should
8 be rejected.

9 In any event, Counter-Plaintiffs made sufficiently particular allegations of
10 their 512(f) claim. For a claim to be pled with particularity under Rule 9, the
11 allegations must include the "time, place, and specific content of the false
12 representations as well as the identities of the parties to the misrepresentation."
13 [*Swartz v. KPMG LLP*, 476 F.3d 756, 764 \(9th Cir. 2007\)](#). This requirement is met
14 if the allegations of fraud are "specific enough to give defendants notice of the
15 particular misconduct which is alleged to constitute the fraud charged so they can
16 defend against the charge and not just deny that they have done anything wrong."
17 [*Bly-Magee v. California*, 236 F.3d 1014, 1019 \(9th Cir. 2001\)](#).

18 Counter-Plaintiffs have clearly identified the alleged fraud such that Yuga
19 Labs can defend against them with specificity. *See* Counter-Compl. [Dkt. 65] ¶ 62.
20 They allege that Yuga filed numerous Digital Millennium **Copyright** Act takedown
21 notices with marketplaces including Foundation and OpenSea, despite knowing it
22 did not own an actionable copyright. *Id.* This identifies specifically the type of lie
23 Yuga told, as Rule 9 requires. Subjectively, Yuga was also obviously on notice of
24 the particular fraud allegations because, in response to this complaint, they concede
25 that they sent at least one such fraudulent DMCA takedown notice. *See* [Dkt. 86] at
26 22. Yuga has thus demonstrated the ability to answer beyond simply denying
27 wrongdoing because they are already attacking the underlying facts of the
28

1 complaint. This is only possible because their fraud, claiming copyright when they
2 know none exists, was pled with sufficient particularity.⁶

3 To the extent that the Court finds that Counter-Plaintiffs have failed to plead
4 with sufficient particularity, they should at minimum be granted leave to file the
5 draft Amended Counter-Complaint attached to this opposition brief, which includes
6 the following additional allegations:

- 7
- 8 • For example, on or about May 17, 2022, Appdetex, which was acting on
9 Yuga’s behalf, submitted a DMCA takedown notice to Foundation.app. In
10 that notice, Yuga accused the RR/BAYC artworks as content that “uses
11 copyrighted materials ... produced by Yuga Labs without authorization.”
 - 12 • Yuga also filed fraudulent DMCA takedown notices through its agent
13 Appdetex by co-opting the DMCA takedown process and making attestations
14 under §512(f) of the Copyright Act to assert that the RR/BAYC project used
15 Yuga’s trademarks. For example, on or about June 22, 2022, Appdetex sent
16 a DMCA notice to Foundation.app in which it accused the RR/BAYC project
17 of infringing Yuga’s trademarks while at the same time acknowledging that
18 the takedown was being made under the Copyright Act and attesting at “the
19 Infringing Content in the manner described above is not authorized by the
20 copyright owner, Yuga Labs, or its agents, nor is such permitted by law.”
21 Appdetex further attested that “[a]s applicable under 17 U.S.C. 512(f), we
22 acknowledge that we may be subject to liability for damages if we knowingly
23 materially misrepresent that material or activity is infringing.”
- 24

25 ⁶ Yuga also conceded that the allegations as to at least one of its false DMCA
26 notices was pleaded with particularity. *Id.* at 22 (“As to the one DMCA takedown
27 they do allege...”). Although Counter-Plaintiffs have adequately pled more than
28 that one DMCA takedown, Yuga has effectively conceded that Counter-Plaintiffs
have met the Rule 9(b) requirements for at least the DMCA takedown that Yuga
concedes is identified, which alone requires denial of Yuga’s motion.

- 1 • On June 22, 2022, Yuga also used its agent, Appdetex, to fraudulently co-opt
2 the DMCA process to take down the webpage rrbayc.com, which was the
3 website that sold the RR/BAYC artwork. The June 22 notice was titled
4 “Yuga Labs, Inc. Notice under DMCA/rrbayc.com” and sent to
5 namecheap.com. Yuga attested in the notice that it was making the DMCA
6 notice under the Copyright Act by acknowledging that “the Infringing
7 Content in the manner described above is not authorized by the copyright
8 owner, Yuga Labs, or its agents, nor is such use permitted by law.” Yuga
9 further attested that “As applicable under 17 U.S.C. 512(f), we acknowledge
10 that we may be subject to liability for damages if we knowingly materially
11 misrepresent that material or activity is infringing.” Despite all this, Yuga
12 did not assert that “rrbayc.com” was infringing Yuga’s copyright but instead
13 alleged trademark infringement.
- 14 • On or about June 22, 2022, Yuga also sent a fraudulent DMCA takedown
15 notice to X2Y2. On information and belief, this was another takedown
16 notice that improperly asserted trademark infringement under the Copyright
17 Act (with a 512(f) attestation) and its corresponding DMCA process.
- 18 • On June 28, 2022, Yuga once again used its agent, Appdetex, to fraudulently
19 co-opt the DMCA process to take down the webpage rrbayc.com, which was
20 the website that sold the RR/BAYC artwork. The June 22 notice was titled
21 “Yuga Labs, Inc. Notice under DMCA/rrbayc.com.” Appdetex further
22 attested in the notice that it was making the DMCA notice under the
23 Copyright Act by acknowledging, “As applicable under 17 U.S.C. 512(f), we
24 acknowledge that we may be subject to liability for damages if we knowingly
25 materially misrepresent that material or activity is infringing.” Despite all
26 this, Yuga did not assert that “rrbayc.com” was infringing Yuga’s copyright
27 but instead alleged trademark infringement.
28

1 **D. Counter-Plaintiffs’ 512(f) Claim Is Otherwise Adequately Plead**

2 The general elements for a cause of action under Section 512(f) are that the
3 defendant (1) made a material misrepresentation in a takedown notice that led to a
4 takedown, and (2) that the takedown notice was submitted in bad faith. [Moonbug
5 Entertainment Ltd. v. Babybus \(Fujian\) Network Technology Co., Ltd., No. 21-cv-
6 06536-EMC, 2022 WL 580788 at *7 \(N.D. Cal. 2022\)](#). The bad faith element is
7 satisfied if the defendant acts with “actual knowledge” of the material
8 misrepresentation. [Rossi v. Motion Picture Ass’n of America, Inc., 391 F.3d 1000,
9 1005 \(9th Cir. 2004\)](#). Yuga argues the bad faith element is not adequately pled
10 because the Counter-Complaint lacks allegations of Yuga’s actual knowledge of a
11 material misrepresentation. This is incorrect, as the face of the Counter-Complaint
12 makes clear. First, the Counter-Complaint states that Yuga materially
13 misrepresented that it had actionable copyright. *See* Counter-Compl. [Dkt. 65] ¶¶
14 46-47. Second, the Counter-Complaint alleges that Yuga submitted DMCA
15 requests despite knowing that it lacked any actionable copyrights. *Id.* at ¶ 46.
16 Yuga’s remaining arguments raise factual disputes, which are not amenable to a
17 motion to dismiss.

18 **E. Declaratory Judgment is Proper for the Copyright Claims**

19 A declaratory judgment action is proper when “some useful purpose” is
20 achieved by deciding the legal issue presented. *See Public Service Commission v.
21 Wycoff Co., 344 U.S. 237, 244 (1952)*. The action must also present an Article III
22 case or controversy. *See Principal Life Ins. Co. v. Robinson, 394 F.3d 665, 669 (9th
23 Cir. 2005)*. This requires a “real and reasonable apprehension” that the declaratory
24 judgment plaintiff will be subject to liability. In the infringement context, this
25 requires that the plaintiff have a “real and reasonable apprehension that he will be
26 subject to liability if he continues to manufacture his product.” *See Rhoades v.
27 Avon Prods., 504 F.3d 1151, 1157 (9th Cir. 2007)*.

28

1 This declaratory judgment action serves a useful purpose because Yuga has
2 pursued a pattern and practice of using the Digital Millennium Copyright Act
3 offensively against Counter-Plaintiffs. Counter-Plaintiffs have good reason to
4 believe this will continue unless a court definitively settles their right to any
5 copyright. The Central District of California case, [*Tine Bak LLC v. Selkatz, Inc.*,
6 no. 20-cv-5065-DSF\(SK\), 2020 WL 9074806 \(C.D. Cal. 2020\)](#) is instructive. Like
7 Yuga, the defendant in *Tine Bak* argued that DMCA complaints fail to provide an
8 immediate and real controversy to resolve. *See id.* at *4. The Court disagreed and
9 held that a declaratory action was proper because the DMCA complaints called into
10 question the defendant's underlying copyright, and that the complaints could
11 prevent the plaintiff from conducting its business. Similarly, in *Beyond Blond
12 Productions, LLC v. Heldman*, the Central District also held that DMCA complaints
13 sufficiently led to a live controversy between the parties. *See Beyond Blond
14 Productions, LLC v. Heldman, no. 20-cv-5581-DSF-GJSx, 2021 WL 9315215 at
15 *5-6 (C.D. Cal. 2021)*. Yuga's blanket assertion that a DMCA complaint cannot
16 form a live controversy directly contradicts the established law in this district.

17 In this case, given Yuga's pattern and practice of using the DMCA to take
18 down Counter-Plaintiffs' NFT collection, resolving the underlying copyright
19 dispute will go a long way in minimizing future disputes between the parties. For
20 example, if the court were to declare that Yuga lacked copyright in the Bored Ape
21 Yacht Club NFTs, then Yuga would not be able to prevent Counter-Plaintiffs from
22 exhibiting their NFT collection on OpenSea, Foundation, or any other NFT
23 marketplace based on copyright takedown requests. It would resolve the propriety
24 of Yuga using DMCA as a tool against Counter-Plaintiffs even though, as they
25 admit, they lack actionable copyrights.

26 Yuga also improperly argues that Counter-Plaintiffs lack any apprehension of
27 being sued pursuant to the Copyright Act because any copyrights that Yuga has are
28

1 unregistered. *See* Yuga’s Mot. [Dkt. 87] at 23. But having an unregistered
 2 copyright is not an obstacle to suit because it takes **only five working days** to
 3 register a copyright through the Copyright Office’s special handling process.⁷
 4 Moreover, Yuga grossly misrepresents the holdings in *Cal. Furniture Collection*
 5 and *Sky Billiards*. These cases did not deny standing due to lack of copyright
 6 **registration** but instead denied standing because the defendants **did not own**
 7 **copyrights at all**. *Cal. Furniture Collection, Inc. v. Harris Adamson Home, LLC,*
 8 *No.19-cv-06254, 2019 WL 7882081, at *2 (C.D. Cal. 2019)* (“Defendant cannot
 9 sue for infringement of a copyright it does not own.”); *Sky Billiards, Inc., v.*
 10 *WolVol, Inc., No. 5:15-cv-02182, 2016 WL 7479428, at *4 (C.D. Cal. 2016)*
 11 (“WolVol cannot sue for infringement of a copyright it does not own....”). Here,
 12 whether Yuga owns copyrights at all is precisely the dispute: in fact, even after
 13 filling its motion to dismiss, Yuga has gone out of its way to state publicly that it
 14 **does** own the disputed copyrights. *See* Ex. 3, Kyle Barr, “Yuga Labs Claims Its
 15 Bored Apes Have Copyright, Even if It Never Filed for Protection,” *Gizmodo*,
 16 available at <https://gizmodo.com/yuga-labs-nfts-bored-apes-copyright-1850042639>
 17 (“Eric Ball, Partner at Fenwick & West LLP and Counsel to Yuga Labs, said:
 18 ‘Yuga Labs owns its copyrights. . . . Copyright registration with the Federal
 19 government is also voluntary and not required.’”). Thus, Yuga fails to provide
 20 valid grounds for dismissing Counter-Plaintiffs’ claims for a declaratory judgment
 21 of no copyright.

22 **F. Counter-Plaintiffs Alleged Extreme and Outrageous Conduct**

23 A cause of action for intentional infliction of emotional distress exists when
 24 there is “(1) extreme and outrageous conduct by the defendant with the intention of
 25 causing, or reckless disregard of the probability of causing, emotional distress; (2)
 26 the plaintiff’s suffering severe or extreme emotional distress; and (3) actual and
 27

28 ⁷ *See* <https://www.copyright.gov/help/faq/faq-special.html>.

1 proximate causation of the emotional distress by the defendant’s outrageous
2 conduct.” Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965, 1001 (1993).
3 Conduct is deemed “outrageous” if it is “so extreme as to exceed all bounds of that
4 usually tolerated in a civilized community.” *Id.*

5 Here, Yuga’s campaign of retaliation against Counter-Plaintiffs easily
6 satisfies that definition. For more than a year, Yuga’s employees and agents
7 targeted Counter-Plaintiffs in hopes of punishing and harming them for calling
8 Yuga out on its racist imagery and fraudulent activity. Not only have Yuga
9 employees deliberately and systematically spread falsehoods about Counter-
10 Plaintiffs on a podcast with millions of viewers and other public platforms, Yuga’s
11 agents threatened the safety of Counter-Plaintiffs and their families. Counter-
12 Compl. [Dkt. 65] ¶¶ 64, 69. On October 20, 2022, one of Yuga’s employees—Noah
13 Davis—contacted Rodney Ripps (Counter-Plaintiff’s father) and told him “you and
14 your fucked up son are going to die.” *Id.* at ¶ 69. The California Court of Appeal
15 has held that explicit threats of this nature amount to outrageous conduct. Kisecky
16 v. Carpenters’ Trust for So. California, 144 Cal.App.3d 222, 229 (1983).

17 In addition to physical threats, Yuga’s employees and agents have tried to
18 sabotage Mr. Ripps’s career. Yuga contacted Tame Impala, one of Mr. Ripps’s
19 business partners, and encouraged the band to stop all business with Mr. Ripps.
20 Counter-Compl. [Dkt. 65] ¶ 61. Yuga and its agents also made false disparaging
21 statements describing Mr. Ripps and Mr. Cahen as criminals, conspiracy theorists,
22 racists, and sex offenders. *Id.* at ¶¶ 63, 65.

23 Yuga attempts to minimize its unlawful conduct and its impact on Counter-
24 Plaintiffs. First, Yuga equates Counter-Plaintiffs’ tweets criticizing Yuga’s use of
25 racist imagery—or tweets criticizing Yuga’s legal strategies—to the death threats.
26 Death threats are not “garden-variety litigation-related activities, public relations
27 activities, and a handful of other communications incidental to this public dispute
28

1 between the parties.” Yuga Mot. [Dkt. 89] at 5. Likewise, Yuga’s attempts to
2 damage Mr. Ripps’s business partnerships with Tame Impala, and others, are far
3 from ordinary business activities. Yuga is a \$4 billion company attacking two
4 individuals. The behavior of the two parties in this matter is not remotely
5 equivalent.

6 Second, Yuga takes individual instances of its harassment of Counter-
7 Plaintiffs and argues that those individual acts each does not arise to “outrageous
8 conduct.” Preliminarily, death threats alone are sufficient. But in any event,
9 individual instances of Yuga’s harassment do not capture the scope and length of
10 their retaliation campaign against the defendants. Yuga has targeted Counter-
11 Plaintiffs for over a year, in a variety of ways, and this full scope of its conduct is
12 what is outrageous. *See Jackson v. Mayweather*, 10 Cal.App.5th 1240, 1266 (2017),
13 [as modified \(Apr. 19, 2017\)](#) (requiring courts to consider the full scope of conduct
14 when assessing an IIED claim).

15 **G. Counter-Plaintiffs Plausibly Allege Severe Emotional Distress.**

16 Yuga incorrectly exaggerates the relevant standard for severe emotional
17 distress. California courts have recognized that “the requisite emotional distress
18 [for an IIED claim] may consist of any highly unpleasant mental reaction[.]”
19 *Fletcher v. Western National Life Ins. Co.* 10 Cal.App.3d 376, 397 (1970).
20 Examples of mental states sufficient to recover on an IIED claim include “fright,
21 grief, shame, humiliation, embarrassment, anger, chagrin, disappointment or
22 worry.” *Id.*

23 Counter-Plaintiffs have alleged emotional distress that goes well above the
24 standard set forth in *Fletcher*. Both Mr. Ripps and Mr. Cahen have experienced
25 extreme fear and anxiety regarding their personal safety and the safety of their
26 families. Counter-Compl. [Dkt. 86] ¶ 95. Moreover, their state of severe suffering
27 has been lasting for longer than a year, forcing both into a state of chronic
28

1 depression and stress. *Id.* Counter-Plaintiffs have difficulty with routine tasks like
2 sleeping and have been forced to endure this prolonged suffering without knowing
3 how Yuga’s next threat or harassment is going to impact their lives and their
4 families. *Id.* Counter-Plaintiffs’ chronic experiences of depression, anxiety, and
5 fear satisfy the definition of “severe emotional distress.” [*Hughes v. Pair*, 46 Cal.4th](#)
6 [1035, 1051 \(2009\)](#). (“Severe emotional distress means ‘emotional distress of such
7 substantial quality or enduring quality that no reasonable [person] in civilized
8 society should be expected to endure it.’”)

9 California Courts have repeatedly allowed IIED claims to stand based on
10 emotional distress much less severe than what Counter-Plaintiffs have alleged. For
11 example, in *Plotnik*, a jury verdict finding emotional distress was affirmed because
12 the plaintiff “became scared and began shaking” after the defendant had made
13 various insults and threats. [*Plotnik v. Meihaus*, 208 Cal.App.4th 1590, 1598 \(2012\)](#).
14 And in *Ismail*, the court held that a plaintiff that is “distraught, depressed, anxious,
15 worried, and frantic” along with “loss of work, focus, sleep, and appetite” was
16 enough to survive a special motion to strike. [*Ismail v. Montchak*, B284163, 2019](#)
17 [WL 2949863, at *6 \(Cal. Ct. App. 2019\)](#).

18 Further, as discovery progresses, more information is being revealed
19 regarding Counter-Plaintiffs’ severe emotional distress. Both Counter-Plaintiffs
20 were recently deposed, and their severe emotional distress was on full display as
21 they discussed how Yuga’s campaign of retaliation has impacted their lives. To the
22 extent the Court requires more detailed allegations of emotional distress, Counter-
23 Plaintiffs at minimum should be allowed leave to file the Amended Counter-
24 Complaint attached to this opposition brief, which provides further details
25 regarding Mr. Ripps and Mr. Cahen’s prolonged and chronic state of extreme stress,
26 anxiety, and fear.

1 **H. Yuga Owed a Duty of Care to Counter-Plaintiffs**

2 Counter-Plaintiffs have plausibly alleged that Yuga owed them a duty of
3 care. The California Supreme Court has clarified that duties of care can be
4 imposed by law. [*Potter v. Firestone Tire & Rubber Co.*, 6 Cal.4th 965, 985 \(1993\)](#)
5 (“The tort is negligence, a cause of action in which a duty to the plaintiff is an
6 essential element. That duty may be imposed by law, be assumed by the defendant,
7 or exist by virtue of a special relationship.”). There are multiple applicable laws
8 that impose a duty on Yuga.

9 **First**, California Code of Civil Procedure § 527.6 creates a duty to not
10 engage in “unlawful violence, a credible threat of violence, or a knowing and
11 willful course of conduct directed at a specific person that seriously alarms, annoys,
12 or harasses the person, and that serves no legitimate purpose.” Yuga’s intimidation
13 campaign has regularly harassed Counter-Plaintiffs violating their legally imposed
14 duty of care.

15 **Second**, “California Law establishes the general duty of each person to
16 exercise, in his or her activities, reasonable care for the safety of others.” [*Cabral v.*](#)
17 [*Ralphs Grocery Co.*, 248 P.3d 1170, 1172 \(Cal. 2011\)](#). This duty is imposed by
18 California Civil Code § 1714(a), which provides that “[e]very one is responsible,
19 not only for the result of his or her willful acts, but also for an injury occasioned to
20 another by his want or ordinary care or skill in the management of his property or
21 person, except so far as the later has, willfully or by want or ordinary care, brought
22 the injury upon himself.” Moreover, the circumstances of this case do not justify
23 creating a new exception to the well-established general duty rule because doing so
24 would excuse corporations from taking reasonable steps to prevent their employees
25 and agents from engaging in unlawful acts such as making death threats and
26 publicly spreading highly offensive lies to millions of people.

27 **Third**, California Penal Code § 646.9 criminalizes willfully and maliciously
28

1 harassing another and making “a credible threat with the intent to place that person
2 in reasonable fear for his or her safety.” This section defines harassment as a
3 “knowing and willful course of conduct directed at a specific person that seriously
4 alarms, annoys, torments, or terrorizes the person, and that serves no legitimate
5 purpose.” Cal. Penal Code § 646.9.

6 Thus, both California’s civil and criminal law recognize an interest in being
7 free from threats and harassment. Together they imposed a duty on Yuga to
8 restrain from the pattern of threatening conduct in which it engaged.

9 **I. Declaratory Judgment of No Defamation**

10 Counter-Plaintiffs acknowledge that there is a split in authority on whether a
11 declaratory judgment claim of no defamation is actionable. *See IP Global Invs.*
12 *America, Inc. v. Body Glove Ip Holdings, LP, 2:17-cv-06189-ODW-AGRE, 2019*
13 *WL 121191, at *2 (C.D. Cal. Jan. 7, 2019).* Yuga, in its motion to dismiss, has
14 conceded that, while it considers Counter-Defendants’ public statements “vile,” it
15 “has not brought a defamation claim.” Yuga Mot. [Dkt. 89] at 16. Given the split
16 in authority and Yuga’s concession, to simplify the issues, Counter-Plaintiffs agree
17 to withdraw their declaratory judgment of no defamation claim, following the same
18 procedure that Yuga used in withdrawing its unjust enrichment claim due to a
19 similar split in authority. *See Yuga Opp.* [Dkt. 53] at 24. Counter-Plaintiffs
20 accordingly withdraw their declaratory judgment claim to allow this matter to be
21 more efficiently adjudicated.

22 **J. Yuga’s Motion To Strike Should Be Denied**

23 A motion to strike made pursuant to California’s anti-SLAPP statute only
24 applies to state law causes of action. *Hilton v. Hallmark Cards, 599 F.3d 894, 901*
25 *(9th Cir. 2010).* In this case, only the emotional distress claims are disputed state
26 law causes of action. A court determines anti-SLAPP motions using a two-step
27 method. In the first step, the court determines whether the suit arises from
28

1 protected expressive activity. [City of Cotati v. Cashman, 29 Cal.4th 69, 77 \(2002\)](#).
2 In the second step, the court analyzes the complaint asking whether there is any
3 probability of success on the merits crediting the truth of facts pled in the plaintiff's
4 complaint. See [Hilton, 599 F.3d at 902](#). As explained above, Counter-Plaintiffs'
5 emotional distress claims are sufficiently pled, and Yuga therefore fails to satisfy
6 the second prong. However, the Court can and should reject Yuga's anti-SLAPP
7 motion on the additional basis that Counter-Defendants emotional distress claims
8 do not involve protected speech activity.

9 Yuga is wrong to rely on the litigation privilege. The litigation privilege only
10 applies to statements (1) made in a judicial proceeding, (2) by litigants or other
11 authorized participants, (3) aim to achieve the litigation's objects, and (4) have
12 some logical connection or relation to the proceeding. [Silk v. Feldman, 208](#)
13 [Cal.App.4th 547, 555 \(2012\)](#). The case does not rely on any covered statements.

14 To arise from protected litigation expression, the alleged expressive activity
15 must be "related to the substantive issues in the litigation" and "be directed to some
16 persons having an interest in the litigation." [McConnell v. Innovative Artists &](#)
17 [Literary Agency, Inc., 175 Cal.App.4th 169, 179 \(2009\)](#). In making this
18 comparison, courts look at "defendants' allegedly wrongful acts" and compare it
19 with "evidence that the plaintiff will need to prove such misconduct." [Wang v.](#)
20 [Wal-Mart Real Estate Business Trust, 153 Cal.App.4th 790, 806 \(2007\)](#). In short, if
21 a plaintiff can state their case without alleging litigation, then the claims do not
22 arise out of expressive litigation activity.

23 Counter-Plaintiffs' emotional distress claims are not "based on . . . Yuga
24 Labs' filing of this lawsuit and making public statements about it" as Yuga argues.
25 Yuga Mot. [Dkt. 89] at 2. Rather, the claims rely solely on Yuga "lying about Mr.
26 Ripps and Mr. Cahen on digital media platforms and to the media, and . . . Yuga's
27 employees intimidating and threatening Mr. Ripps, Mr. Cahen, and their families."
28

1 Counter-Compl. [Dkt. 65] ¶¶ 87, 92. No aspect of Mr. Ripps’s and Mr. Cahen’s
2 emotional distress claims is based on Yuga’s filing of this (or any) lawsuit or
3 making statements about this (or any) lawsuit. To the extent that the Counter-
4 Complaint’s background statements about this litigation could somehow be misread
5 as being an aspect of the emotional distress claims, Counter-Plaintiffs should at
6 minimum be granted leave to file the draft Amended Counter-Complaint attached to
7 this opposition brief, which removes those background allegations and alleges
8 specifically that the claims for emotional distress are “not based on communications
9 or speech made in course of this legal proceeding.”

10 Accordingly, this Court should deny Yuga’s motion to strike and award
11 Counter-Plaintiff their attorney’s fees. See *U.S. v. Lockheed Missiles & Space Co.,*
12 *Inc.*, 171 F.3d 1208, 1217 n. 11 (9th Cir. 1999) (“If the court finds that a special
13 motion to strike is frivolous or is solely intended to cause unnecessary delay, the
14 court shall award costs and reasonable attorney’s fees to a plaintiff prevailing on the
15 motion.”).

16 **V. CONCLUSION**

17 Counter-Plaintiffs respectfully request that the Court deny Yuga’s motion in
18 its entirety and award them their attorneys’ fees for responding to the motion. To
19 the extent that the motion is granted in any part, Counter-Plaintiffs request leave to
20 file the attached Amended Counter-Complaint. *United States v. Corinthian*
21 *Colleges*, 655 F.3d 984, 995 (9th Cir. 2011) (“The standard for granting leave to
22 amend is generous.”).

23
24
25
26
27
28

Dated: February 6, 2023

By: /s/ Louis W. Tompros
Louis W. Tompros (*pro hac vice*)
louis.tompros@wilmerhale.com
Monica Grewal (*pro hac vice*)
monica.grewal@wilmerhale.com
Scott W. Bertulli (*pro hac vice*)
scott.bertulli@wilmerhale.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**WILMER CUTLER PICKERING
HALE AND DORR LLP**
60 State Street
Boston, MA 02109
Telephone: (617) 526-6000
Fax: (617) 526-5000

Derek Gosma (SBN 274515)
derek.gosma@wilmerhale.com
Henry Nikogosyan (SBN 326277)
henry.nikogosyan@wilmerhale.com

**WILMER CUTLER PICKERING
HALE AND DORR LLP**
350 South Grand Ave., Suite 2400
Los Angeles, CA 90071
Telephone: (213) 443-5300
Fax: (213) 443-5400

Attorneys for Defendants and Counter-
Plaintiffs *Ryder Ripps and Jeremy
Cahen*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served via electronic mail on February 6, 2023, on counsel of record for Yuga Labs, Inc. I certify under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated: February 6, 2023

/s/ Louis Tompros
Louis W. Tompros (pro hac vice)

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Jeremy Cahen and Ryder Ripps, certifies that this opposition to the motion to dismiss contains 23 pages complying with the page limit set by court order dated June 30, 2022.

Dated: February 6, 2023

By: /s/ Louis W. Tompros
Louis W. Tompros (pro hac vice)