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17 **UNITED STATES DISTRICT COURT**
 18 **NORTHERN DISTRICT OF CALIFORNIA**
SAN FRANCISCO DIVISION

19 SARAH ANDERSEN, et al.,
 20 Individual and Representative Plaintiffs,
 21 v.
 22 STABILITY AI LTD., et al.,
 23 Defendants.

Case No. 3:23-cv-00201-WHO

PLAINTIFFS’ OPPOSITION TO
DEFENDANT DEVIANTART’S SPECIAL
MOTION TO STRIKE UNDER
CALIFORNIA CODE OF CIVIL
PROCEDURE § 425.16

Date: July 19, 2023
 Time: 2:00 pm
 Location: Courtroom 2 — 17th Floor
 Before: Hon. William H. Orrick

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1 **I. INTRODUCTION**

2 Through their anti-SLAPP motion, Defendants attempt to avail themselves of a state law
3 special motion to dismiss procedure, California Code of Civil Procedure section 425.16, known as
4 the anti-SLAPP statute.¹ The California legislature created this procedure for opposite purposes
5 than those present here. It did so to combat meritless lawsuits brought against persons for
6 exercising their constitutional rights of petition and freedom of speech. SLAPPs (or “Strategic
7 Lawsuits Against Public Participation”) are generally meritless suits brought by large private
8 interests to deter common citizens from exercising their political or legal rights or to punish them
9 for doing so. It does so by making it easier to dismiss defamation suits at an early stage of the
10 litigation.

11 The cynical appropriation of the anti-SLAPP statute by the very corporate interests it was
12 intended to regulate motivated the California Legislature to further enact section 425.17, which
13 states, “[t]he Legislature finds and declares that there has been a disturbing abuse of Section
14 425.16, the California Anti-SLAPP Law, which has undermined the exercise of the constitutional
15 rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and
16 intent of Section 425.16.” Plaintiffs here are artists who seek to vindicate their legal rights against
17 companies who are, among other things, misappropriating and profiting off of their art and names
18 with their AI Image Products. An artist suing a corporation for copyright infringement and
19 unauthorized misuse of their name is simply not a SLAPP in any way.

20 Defendants’ motion does not pass muster under sections 425.16 and 425.17. First,
21 Defendants argue that their conduct, the sale of AI-Image Product, constitutes protected speech
22 under section 425.16. This is false. Defendants’ conduct is paradigmatic commercial speech,
23 which is afforded less protection than noncommercial speech. Moreover, Defendants’ computer-
24 generated speech is misleading and false commercial speech, which is afforded *no* protection.
25 Defendants’ anti-SLAPP thus fails at the first prong.

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¹ Defendants Midjourney and Stability join Defendant DeviantArt’s anti-SLAPP motion. ECF
Nos. 54 & 57.

1 Second, Defendants assert that Plaintiffs have not demonstrated a possibility of prevailing
 2 on the merits. But here too, Defendants are wrong. The bar is low to survive an anti-SLAPP—
 3 Plaintiffs need only demonstrate a mere possibility of success. And Plaintiffs have easily met that
 4 bar. Plaintiffs have alleged the requisite elements of both common law and statutory rights of
 5 publicity in their well-pleaded Complaint. Defendants’ argument that Plaintiffs’ claims are
 6 preempted by the Copyright Act is based on a misreading of Plaintiffs’ Complaint. Plaintiffs’ right
 7 of publicity claim is based on how Defendants’ AI Imaging Products incorporate and utilize
 8 Plaintiffs’ *names*, not in their particular styles, as Defendants assert. And the Ninth Circuit has
 9 made clear that such claims are *not* preempted.

10 Defendants’ last-ditch effort to dodge Plaintiffs’ right of publicity claim is based on the
 11 argument that their conduct is excused because what their AI Image Product produces is
 12 supposedly “transformative” and thus protected by the First Amendment. But whether a use is
 13 “transformative” is an affirmative defense, and Defendants forget that they bear that burden—a
 14 burden they do not even attempt to meet.

15 II. FACTUAL BACKGROUND

16 Defendants are in the business of developing generative artificial-intelligence-based image
 17 generation products (“AI Image Products”). ¶¶ 33-35.² AI Image Products rely entirely on
 18 training images (which are images or images paired with a descriptive text captions or metadata)
 19 that is included for the machine-learning process. ¶ 25. Training images are typically gathered
 20 through web scraping, the process by which images are harvested, copied or extracted from
 21 websites using automated tools such as bots or web crawlers. ¶¶ 26, 55-59, 101-04. Defendants’
 22 AI Image Products rely on billions of training images, almost all of which are copied without the
 23 artists’ permission and without compensation. ¶¶ 2-3, 57-58.

24 In August 2022, Stability AI released Stable Diffusion, which is an AI Image Product that
 25 produces images in response to text prompts, under an open-source license, i.e., users may
 26 download and use Stable Diffusion’s software and associated machine-learning models according

27 ² “¶ ___” and “Ex. ___” citations are to the Class Action Complaint, Case No. 23-cv-00201 (N.D.
 28 Cal. Jan. 13, 2023), ECF No. 1 unless otherwise indicated.

1 to the terms of the open-source license. ¶¶ 52-54. Stability scraped (i.e., copied) over five billion
2 images from websites, including possibly millions from DeviantArt, as training images for Stable
3 Diffusion without the consent of the creators or the websites that hosted those images.³ ¶¶ 57, 63,
4 116. Once prompted to produce images by its users, Stable Diffusion uses the training images and
5 associate terms and names to produce output images through a mathematical software process
6 that interpolates the data from latent copies of art, themselves generated from copying and
7 compressing source images. ¶¶ 4, 68-95. These output images, though seemingly new, are based
8 entirely on the training images and are derivative works of Stable Diffusion’s training images. ¶¶
9 94-97.

10 All three Defendants incorporate Stable Diffusion into their respective commercial, for-
11 profit AI Image Product. Stability offers DreamStudio, which relies on Stable Diffusion to
12 generate images from text prompts and is sold for profit. ¶¶ 55-56. Midjourney offers its
13 Midjourney Product which is based on Stable Diffusion and sold for commercial profit. ¶¶ 34, 65,
14 137. DeviantArt offers DreamUp, which is based on Stable Diffusion and is sold for commercial
15 profit. ¶¶ 115, 129.

16 Defendants designed their software to prioritize the inclusion of specific artists’ Works
17 when a user types in an artist’s name to create an output image in the specific and unique style of
18 that artist. ¶¶ 202-08. Defendants misappropriated artists’ names to advertise and promote their
19 AI Image Products and their ability to output images in the unique style of a specific artist.
20 ¶¶ 202-03, 205-07, 220-22. Plaintiffs have no control over images associated with either their
21 identities or convincingly being passed off as created by them, currently being created by third
22 parties utilizing their names in Defendants’ AI Imaging Products.

23 While Plaintiffs have already sustained economic loss and other injuries from the harmful
24 effects of this copying, Defendants have profited richly and benefitted commercially. ¶¶ 7-8, 60;

25
26 ³ Many of these images came from datasets released by LAION (acronym for “Large-Scale
27 Artificial Intelligence Open Network”), a nonprofit organization paid by Stability AI to help
28 compile Training Images for their AI Image Products. ¶¶ 100-07. DeviantArt is the source of a
significant portion of LAION images, and there are likely 3.3 million images from Deviant Art in
LAION. ¶ 110.

1 *see also* ¶¶ 130 (DeviantArt altered its terms of service to explicitly permit scraping for training AI
 2 after artist community’s revolt); 152 (Midjourney CEO David Holz commenting that “we’re
 3 already profitable”). For instance, Defendants tell their users that they can enter an artist’s name
 4 into Defendants’ AI Image Products and generate images that appear to be created by that artist,
 5 thanks to Stability AI’s use of Training Images. ¶ 171. Imposters have purchased Defendants’
 6 output images and resold them as counterfeit originals, to Plaintiffs’ detriment. ¶ 173.

7 **III. ARGUMENT**

8 California’s “anti-SLAPP law was enacted ‘to protect nonprofit corporations and common
 9 citizens ‘from large corporate entities and trade associations’ in petitioning government.’”
 10 *FilmOn.com Inc. v. DoubleVerify Inc.*, 7 Cal.5th 133, 143 (2019). As relevant here, protected acts
 11 include statements or conduct made “in connection with a public issue or an issue of public
 12 interest.” Cal. Code Civ. Proc. § 425.16(e)(4). Section 425.16 does not completely insulate a
 13 defendant’s speech, however. It only provides a mechanism “for weeding out, at an early stage,
 14 *meritless* claims arising from protected activity.” *Baral v. Schnitt*, 1 Cal.5th 376, 384 (2016).
 15 Defendants’ cynical attempt to utilize anti-SLAPP law meant to protect consumer commercial
 16 speech from this very type of corporate legal bullying must be rejected.⁴

17 “In ruling on an anti-SLAPP motion, courts are to use a two-step process.” *Langer v.*
 18 *Kiser*, 57 F.4th 1085, 1105 (9th Cir 2023). First, the court must determine “whether the defendant
 19 has made a threshold showing that the challenged cause of action is one arising from protected
 20 activity” under the statute, such as “protected speech or petitioning.” *USA Waste of California,*

21 _____
 22 ⁴ It is an unsettled question of law whether state anti-SLAPP statutes conflict with Rules 8, 12
 23 and 56 of the Federal Rules of Civil Procedure after the Supreme Court’s decision in *Shady Grove*
 24 *Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010). Indeed, the federal circuit courts
 25 are divided on the question after *Shady Grove*. Compare *La Liberte v. Reid*, 966 F.3d 79, 86-88 (2d
 26 Cir. 2020) (finding section 425.16 conflicts with the Federal Rules) with *CoreCivic, Inc. v. Candide*
 27 *Grp., LLC*, 46 F.4th 1136 (9th Cir. 2022) (finding no conflict between section 425.16 and the
 28 Federal Rules); *cf also Klocke v. Watson*, 936 F.3d 240, 244-49 (5th Cir. 2019); *Carbone v. Cable*
News Network, Inc., 910 F.3d 1345, 1349-57 (11th Cir. 2018); *Abbas v. Foreign Pol’y Grp., LLC*, 783
 F.3d 1328, 1333-37 (D.C. Cir. 2015); *Godin v. Schencks*, 629 F.3d 79, 83 (1st Cir. 2010). It is
 Plaintiffs’ position that the Court here should not apply section 425.16 to Plaintiffs’ detriment
 because it is a state procedure which conflicts with the Federal Rules, promulgated under the
 Rules Enabling Act and that the motion to strike under section 425.16 should be denied.

1 *Inc. v. City of Irwindale*, 184 Cal. App. 4th 53, 61, (2010) (citations omitted); *accord Langer*, 57
 2 F.4th at 1105. “[C]ourts should analyze each claim for relief—each act or set of acts supplying a
 3 basis for relief, of which there may be several in a single pleaded cause of action—to determine
 4 whether the acts are protected” *Bonni v. St. Joseph Health Sys.*, 11 Cal.5th 995, 1010 (2021).
 5 If the court finds defendant meets this threshold, it moves to the second part of the analysis,
 6 which is to “determine whether the *plaintiff* has demonstrated a probability of prevailing on the
 7 claim.” *Commonwealth Energy Corp. v. Inv. Data Exch., Inc.*, 110 Cal. App. 4th 26, 31 (2003)
 8 (citations omitted). “Dismissal is proper only where there is no cognizable legal theory or an
 9 absence of sufficient facts alleged to support a cognizable legal theory.” *Navarro v. Block*, 250 F.3d
 10 729, 732 (9th Cir. 2001).⁵

11 “Although the anti-SLAPP statute ‘places on the plaintiff the burden of substantiating its
 12 claims, a defendant that advances an affirmative defense to such claims properly bears the burden
 13 of proof on the defense.’” *Davis v. Elec. Arts, Inc.*, 775 F.3d 1172, 1177 (9th Cir. 2015) (citing
 14 *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP*, 133 Cal. App. 4th 658, 767
 15 (2005)). “[Defendants] ha[ve] the burden of establishing the transformative use defense as a
 16 matter of law.” *Id.* (citing *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d
 17 1268, 1274 (9th Cir. 2013)); *see also, id.* (“On its other affirmative defenses, EA has the burden of
 18 establishing ‘a probability of prevailing’”).

19 Defendants’ anti-SLAPP motion, which only attacks Plaintiffs’ right of publicity claims,
 20 should be denied for two reasons. **First**, Defendants fail to make the required threshold showing
 21 that their misconduct qualifies for the protection of the statute. **Second**, Plaintiffs have pleaded
 22 sufficient allegations demonstrating a probability of prevailing on their right of publicity claims

24 ⁵ In the Ninth Circuit, “[i]f a defendant makes an anti-SLAPP motion to strike founded on purely
 25 legal arguments, then the analysis is made under Fed. R. Civ. P. 8 and 12 standards; if it is a
 26 factual challenge, then the motion must be treated as though it were a motion for summary
 27 judgment and discovery must be permitted.” *Planned Parenthood Fed’n of Am., Inc. v. Ctr. for*
 28 *Med. Progress*, 890 F.3d 828, 833 (9th Cir. 2018) (quoting *Z.F. v. Ripon Unified Sch. Dist.*, 482 Fed.
 App’x 239, 240 (9th Cir. 2012)); *see also U.S. ex rel. v. Lockheed Missiles & Space Co.*, 190 F.3d 963,
 971 (9th Cir. 1999) (describing a motion to strike under section 425.16 as “akin to a motion to
 dismiss”).

1 and that those claims are not preempted. Furthermore, the First Amendment does not bar
 2 Plaintiffs' right of publicity claims because they advance a substantial government interest in
 3 protecting citizens from unconsented commercial exploitation, dilution, or unwanted association
 4 of their names and identities with AI-generated images.⁶

5 **A. Defendants Have Failed to Show That Plaintiffs' Right of Publicity Claims**
 6 **Arise from Protected Action.**

7 Defendants only rely on the so-called "catchall provision" that covers conduct "in
 8 connection with a public issue or an issue of public interest." ECF No. 50 at 9 (citing Cal. Code
 9 Civ. Proc. § 425.16(e)(4)). In articulating what constitutes a matter of public interest, courts
 10 consider such topics as whether: (1) the activity precipitating the claim "was a person or entity in
 11 the public eye"; (2) the activity "could affect large numbers of people beyond the direct
 12 participants"; and (3) the activity "involved a topic of widespread public interest."

13 *Commonwealth Energy Corp.*, 110 Cal. App. 4th at 33; see *FilmOn.com Inc.*, 7 Cal.5th at 145-46.
 14 "Allegations of protected activity that merely provide context, without supporting a claim for
 15 recovery, cannot be stricken under the anti-SLAPP statute." *Baral*, 1 Cal.5th at 394. "[T]o the
 16 extent any acts are unprotected, the claims based on those acts will survive." *Bonni*, 11 Cal.5th at
 17 1012.

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 20
 21 ⁶ Section 425.17 makes it clear that section 425.16 cannot be turned on its head and invoked by
 22 corporate interests where: (1) "[t]he plaintiff does not seek any relief greater than or different
 23 from the relief sought for ... a class of which the plaintiff is a member . . ."; (2) "the action, if
 24 successful, would enforce an important right affecting the public interest . . ."; and (3) "[p]rivate
 25 enforcement is necessary and places a disproportionate financial burden on the plaintiff in
 26 relation to the plaintiff's stake in the matter." Cal. Code Civ. Proc. § 425.17(b)(1)-(3). Moreover
 27 section 425.17 states that section 426.16 "does not apply to any cause of action brought against a
 28 person primarily engaged in the business of selling or leasing goods or services" where the
 "statement or conduct consists of representations of fact about a person's business operations,
 goods or services that is made for the purpose of . . . promoting, or securing sale . . . or
 commercial transaction in, the person's goods or services" and where the "intended audience" is
 an actual or potential customer or person likely to influence an actual or potential customer. Cal.
 Code Civ. Proc. § 425.17(c)(1)-(2). All these conditions are met here.

1 **1. Defendants Have Failed to Demonstrate Closeness to the Asserted**
2 **Public Interest**

3 For right of publicity claims in particular, courts require “some degree of closeness
4 between the challenged statements and the asserted public interest.” *Penrose Hill, Ltd. v. Mabrey*,
5 479 F. Supp. 3d 840, 848 (N.D. Cal. 2020); *see also FilmOn.com Inc.*, 7 Cal.5th at 150 (“the
6 catchall provision demands ‘some degree of closeness’ between the challenged statements and
7 the asserted public interest”). Furthermore, “a mere finding of ‘public interest’ alone does not
8 automatically exempt a defendant on a right of publicity claim.” *Browne v. McCain*, 611 F. Supp.
9 2d 1062, 1071 (C.D. Cal. 2009).

10 Defendants’ motion does not identify how Defendants and their computer-generated AI
11 images that rely on unauthorized use of individual artists and their identities, relate to public
12 conversations about issues in the art world, or to public conversations about matters of public
13 interest, let alone demonstrate a close connection or contribution to public interest conversations.
14 *See Glob. Plasma Sols., Inc. v. IEE Indoor Env’t. Eng’g*, 600 F. Supp. 3d 1082, 1089 (N.D. Cal.
15 2021) (“In order to prevail on an anti-SLAPP motion, the movant must first make a *prima facie*
16 showing, through the pleadings themselves and supporting affidavits, that the statement or
17 conduct underlying the legal claims against it qualifies for protection under the anti-SLAPP
18 statute.”). Computer-generated AI images created from unauthorized copies of copyrighted work
19 are not the type of unfettered free speech that needs special protection here. Defendants have not
20 shown, for example, why they selected the artists named in their databases or how those choices
21 relate to matters of public interest. *See Browne*, 611 F. Supp.2d at 1071 (“RNC has not shown how
22 its use of the Composition *itself* is a matter of public interest”) (emphasis in original). Defendants
23 have also failed to show their output image sales to their customers made any comment that
24 contributed to public discussion of current art trends outside of those that paid or went out of
25 their way to see it. *See Penrose Hill, Limited.*, 479 F. Supp. 3d at 854 (“‘it is not enough that the
26 statement refer to a subject of widespread public interest the statement must in some manner
27 itself contribute to the public debate’”) (quoting *FilmOn.com Inc.*, 7 Cal.5th at 150); *see also, id.* at
28 855 (finding blogger’s “generic reference to transparency in the wine industry is exactly the kind
of ‘broad and amorphous public interest’ that courts have found not sufficiently connected to the

1 specific statements at issue”); *cf. also Global Plasma Solutions, Inc.*, 600 F. Supp. 3d at 1093
 2 (finding speech that “was not confidential or accessible only to paying clients” leaned towards
 3 contributing to the public interest).⁷

4 2. Defendants’ Speech Is Unprotected Commercial Speech

5 Defendants’ “speech” is unprotected for another reason. If it is speech at all, it is
 6 unprotected commercial speech. It is well established that the anti-SLAPP statute does not
 7 protect promotional commercial speech. Cal. Code Civ. Proc. § 425.17(c)(1) (“Section 425.16
 8 does not apply to any cause of action brought against a person primarily engaged in the business
 9 of selling or leasing goods or services.”); *L.A. Taxi Coop, Inc. v. Indep. Taxi Owners Assn of L.A.*,
 10 239 Cal. App. 4th 918, 927 (2015) (“[C]ommercial speech that does nothing but promote a
 11 commercial product or service is not speech protected under the anti-SLAPP statute.”). As
 12 explained by the Supreme Court, speech in and about private business transactions merits less
 13 protection than other kinds of speech, because “like advertising, is hardy and unlikely to be
 14 deterred by incidental state regulation.” *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472
 15 U.S. 749, 762 (1985).⁸ “[T]he United States Supreme Court has indicated that economic
 16 motivation is relevant but not conclusive and perhaps not even necessary” to determine whether
 17 speech is commercial. *Kasky v. Nike, Inc.*, 27 Cal.4th 939, 968 (2002) (citing *Bolger v. Youngs Drug*
 18 *Prods. Corp.*, 463 U.S. 60, 67 & n.14 (1983)); *see also id.* (“The high court has never held that
 19 commercial speech must have as its *only* purpose the advancement of an economic
 20 transaction[.]”).

21
 22 ⁷ Defendants may argue the Complaint alleges that thousands of Class Members may be affected
 23 by Defendants’ acquisition of their images, names and likenesses, ¶ 42. Accordingly, the attention
 24 focused on Defendants comes from the art world and the Defendants’ investors, does not make
 25 this a matter of public interest for the purposes of this motion. Despite their vague assurances,
 26 Defendants have not pointed to any discussions about the development of art, let alone the kinds
 27 of core issues that freedom of speech most protects. Defendants’ motion fails to connect any
 28 specific statements to the vague topics to which they tenuously claim to contribute.

⁸ In *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977), the Supreme Court “considered
 the balance between the right to publicity and the First Amendment.” *Bosley*, 310 F. Supp.2d at
 926-27. On that occasion the Court “indicated that the right to publicity was constitutional and
 did comport with the First Amendment.” *Id.* at 927.

1 The inquiry of whether speech is commercial or noncommercial is “fact-driven” and tries
 2 to “give effect to a common-sense distinction between commercial speech and other varieties of
 3 speech.” *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1115 (9th Cir. 2021) (internal quotation
 4 marks and citations omitted). The Supreme Court has set forth three factors for determining
 5 whether speech is commercial: (1) whether the speech is an advertisement, (2) whether the
 6 speech refers to a specific product or service, and (3) whether the speaker has an economic
 7 motivation for the speech. *Bolger*, 463 U.S. at 66-67; *accord Kasky*, 27 Cal.4th at 939; *see also*
 8 *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1017 (3d Cir. 2008)

9 Here, Defendants’ conduct of selling and advertising their AI Image Products to their
 10 customers is commercial speech that does not qualify for protection. Defendants’ activities are
 11 focused on promoting and selling their AI Image Products and the output images created by those
 12 products. Defendants have not shown that their activities will affect people other than their
 13 customers, their investors, and the artists whose images they have unlawfully acquired, i.e.,
 14 Defendants have not set forth a noneconomic motive. *Stewart v. Rolling Stone LLC*, 181 Cal. App.
 15 4th 664, 684 (2010) (“‘In typical commercial speech cases, the *speaker* is likely to be someone
 16 engaged in commerce—that is, generally, the production, distribution, or sale of goods or
 17 services—or someone acting on behalf of a person so engaged, and the *intended audience* is likely
 18 to be actual or potential buyers or customers *of the speaker’s goods or services . . .*’”) (quoting
 19 *Kasky*, 27 Cal.4th at 960; alterations in original). Further, the speech at issue refers to a specific
 20 product, an output image in the manner of a named artist. Defendants have substantial economic
 21 motivations for making these offers, since they charge for the output files. *See, e.g.*, ¶ 7
 22 (Defendants profit from transactions); ¶¶ 55-56 (users pay for ability to generate images); ¶ 115
 23 (sales and subscriptions). Defendants’ misconduct is therefore not entitled to full protection
 24 accorded to noncommercial speech.

25 **a. Defendants’ Commercial Speech is Misleading or False**

26 Further, commercial speech that is misleading or based on falsehoods is afforded *no*
 27 protection. *See Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1089 (9th Cir. 2002) (discussing California
 28 Civil Code § 3344(d) and commenting that “the newsworthiness privileges do not apply where a

1 defendant uses a plaintiff’s name and likeness in a knowingly false manner to increase sales of the
 2 publication.”); *see also Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S.
 3 557, 563 (1980) (“Consequently, there can be no constitutional objection to the suppression of
 4 commercial messages that do not accurately inform the public about lawful activity.”); *Solano*,
 5 292 F.3d at 1089 (“The First Amendment does not protect knowingly false speech.”). Further,
 6 speech that misappropriates peoples’ names or likenesses carries an “underlying deception,”
 7 which is “the myth that an individual actually endorses or supports a product when, in fact, she
 8 does not.” *Bosley v. Wildwett.com*, 310 F. Supp. 2d 914, 926 (N.D. Ohio 2004). To the extent
 9 Defendants’ conduct can be considered speech, which it is not, it induces users to believe that
 10 artists have falsely endorsed Defendants’ products, and is not subject to protection.⁹ *E.g.*, ¶¶ 206-
 11 09. Protection should be denied based on these misstatements alone.

12 **b. Defendants’ Commercial Speech Warrants No Protection**

13 Even if Defendants’ arguments are not rejected based on their misleading nature, their
 14 speech still warrants no protection: “Commercial speech that is not false or deceptive and does
 15 not concern” illegal activities may still be restricted “in the service of a substantial governmental
 16 interest” regulated “through means that directly advance that interest.” *Camacho v. Control Grp.*
 17 *Media Co., LLC*, No. 21-CV-1954-MMA (MDD), 2022 WL 3093306, at *20 (S.D. Cal. July 18,
 18 2022). The Supreme Court enunciated a four-part test for regulating commercial speech:

19 At the outset, we must determine whether the expression is
 20 protected by the First Amendment. For commercial speech to
 21 come within that provision, it at least must concern lawful activity
 22 and not be misleading. Next, we ask whether the asserted
 governmental interest is substantial. If both inquiries yield positive

23 ⁹ For DeviantArt in particular, it has held itself since its founding out as “an online community
 24 friendly to artists,” and still calls itself “the world’s largest art community.” ¶ 114. DeviantArt
 25 further tells customers and prospective customers “that DreamUp ‘lets you create AI art
 26 knowing that creators and their work are treated fairly.’” ¶ 117. But DeviantArt has not attempted
 27 to negotiate licenses for its Training Images, nor has it shared DreamUp revenue with the artists
 28 or rightsholders. ¶ 119. This turncoat betrayal of the artistic community intensifies the underlying
 deception of Defendant’s misappropriation of artists’ names for its transactional commercial
 speech, which already misleadingly suggests that the artists condone the AI Image Products. *See*
 ¶¶ 114, 116, 112-13, 117, 119.

1 answers, we must determine whether the regulation directly
 2 advances the governmental interest asserted, and whether it is not
 more extensive than is necessary to serve that interest.”

3 *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566. Each of these factors is met here.¹⁰

4 ***Lawful and not Misleading.*** As discussed above, even if considered to be speech,
 5 Defendants’ misappropriation of names is commercial speech because it advertises sales of a
 6 specific product or service (AI Image Products’ output images) for which Defendants have
 7 substantial large-scale economic incentives, but it should not be protected because it is
 8 misleading. *See Camacho*, 2022 WL 3093306 at *20 (“[I]t is seemingly questionable whether the
 9 commercial speech that is the subject of this action is even entitled to any protection at all given
 10 that the profiles could ‘misappropriate’ Plaintiffs’ personas and possibly cause the public to be
 11 misled.”).

12 ***Substantial Government Interest.*** There is a substantial governmental interest in
 13 regulating Defendants’ commercial speech that violates rights of publicity. *Camacho*, 2022 WL
 14 3093306 at *20 (“the states’ interest in protecting its citizens from non-consensual commercial
 15 exploitation of their personas is substantial”); *Knapke v. PeopleConnect Inc.*, 553 F. Supp. 3d 865,
 16 880 (W.D. Wash. 2021), *rev’d on other grounds*, 38 F.4th 824 (9th Cir. 2022).

17 ***Directly Advances Government Interest.*** Allowing right of publicity claims to proceed
 18 directly advances the above governmental interests. *Camacho*, 2022 WL 3093306 at *20 (“states’
 19 statutes advance substantial state interests”).

20 ***Not Overly Regulated.*** Finally, right of publicity claims are reasonably tailored to protect
 21 citizens from commercial exploitation without overly extensive regulation of speech. *Camacho*,
 22 2022 WL 3093306 at *21 (state’s interest “is substantial and not overbroad so as to prohibit
 23 commercial speech”). Particularly where “the relief sought is damages, the plaintiff’s property
 24
 25

26 ¹⁰ Claiming computerized, commercial AI output amounts to speech worthy of protection in the
 27 public’s interest is at best inconsistent, and at worst, hypocritical, when the leaders of the AI
 28 industry, including Stability AI’s CEO, recently signed an open letter claiming AI output presents
 an “risk of extinction” to humanity. See <https://www.safe.ai/statement-on-ai-risk#open-letter>.

1 rights can be protected at minimal risk to free expression.” *Michaels v. Internet Ent. Grp. Inc.*, 5 F.
2 Supp. 2d 823, 839 (C.D. Cal. 1998)(citing *Zacchini*, 433 U.S. at 562).

3 **B. Plaintiffs Have a Probability of Success on their Right of Publicity Claims**

4 As the second step in weighing an anti-SLAPP motion, the Court must “determine
5 whether the *plaintiff* has demonstrated a probability of prevailing on the claim.” *Commonwealth*
6 *Energy Corp.*, 110 Cal. App. 4th at 31; *accord Langer*, 57 F.4th at 1105. “Only a cause of action that
7 satisfies both prongs of the anti-SLAPP statute—i.e., that arises from protected speech or
8 petitioning and lacks even minimal merit—is a SLAPP, subject to being stricken under the
9 statute.” *USA Waste of California, Inc.*, 184 Cal. App. 4th at 62 (citation omitted). This requires a
10 showing that “the complaint is both legally sufficient and supported by a sufficient prima facie
11 showing of facts to sustain a favorable judgment.” *Hilton v. Hallmark Cards*, 599 F.3d 894, 903
12 (9th Cir. 2010) (citation and internal quotation marks omitted). Notably, the burden is low—
13 Plaintiffs need show only “a mere possibility of success” to survive an anti-SLAPP motion.
14 *Browne v. McCain*, 611 F. Supp. 2d 1062, 1069 (C.D. Cal. 2009); *see also Mindys Cosms., Inc. v.*
15 *Dakar*, 611 F.3d 590, 598 (9th Cir. 2010) (“‘Reasonable probability’ in the anti-SLAPP statute has
16 a specialized meaning. The statute requires only a minimum level of legal sufficiency and
17 triability.’”) (quoting *Linder v. Thrifty Oil Co.*, 23 Cal.4th 429, 438 n.5 (2000)). “Indeed, the
18 second step of the anti-SLAPP inquiry is often called the ‘minimal merit’ prong.” *Mindys*
19 *Cosmetics, Inc.*, 611 F.3d at 598; *see also Navellier v. Sletten*, 29 Cal.4th 82, 93 (2002) (“[T]he
20 statute poses no obstacle to suits that possess minimal merit.”). And here, Plaintiffs have easily
21 made that showing.

22 California common law “has long recognized a common law right of privacy for protection
23 of a person’s name and likeness against appropriation by others for their advantage.” *Downing v.*
24 *Abercrombie & Fitch*, 265 F.3d 994, 1001 (9th Cir. 2001). A common law cause of action for right of
25 publicity has four elements: (1) the defendant’s use of the plaintiff’s identity; (2) the
26 appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or
27 otherwise; (3) lack of consent; and (4) resulting injury. *Id.* at 1001. The statutory right of
28 publicity, as set forth in California Civil Code § 3344 (e), requires that the plaintiff also “allege a

1 knowing use by the defendant as well as a direct connection between the alleged use and the
2 commercial purpose in addition to proving the elements of the common law cause of action.”
3 *Yeager v. Cingular Wireless LLC*, 673 F. Supp. 2d 1089, 1095 (E.D. Cal. 2009) (citation omitted);
4 *see also Downing*, 265 F.3d at 1001. Plaintiffs have pled all the factual elements necessary to set
5 forth both their statutory and common law right of publicity claims under California precedent.
6 ¶¶ 201-22.

7 ***Defendants’ Use of Plaintiffs’ Identity.*** First, the Complaint alleges Defendants used
8 Plaintiffs’ names and identities to attract customers and gain a commercial advantage. *E.g.*, ¶ 202
9 (“Defendants knowingly used Plaintiffs’ names in Defendants’ AI Image Products.”); ¶ 205
10 (“Defendants used Plaintiffs’ names and advertised their AI’s ability to copy or generate work in
11 the artistic style that Plaintiffs popularized in order to sell Defendants’ products and services”;
12 ¶ 217 (Defendants knowingly used names and identities to own advantage to advertise, sell, and
13 solicit purchases); *see also id.* ¶¶ 5, 203, 208, 215, 218, 221. Through permitting prompts based on
14 the use of the prompt “in the style of,” Defendants intentionally programmed their AI Imaging
15 Products to cue users to insert an artist’s name and produce images forever associated with that
16 name over which that artist has no control.

17 ***Appropriation of Plaintiffs’ Name of Likeness.*** Second, Defendants knowingly used
18 Plaintiffs’ names and identities to Defendants’ commercial advantage. The right of publicity is
19 rooted in the recognition “that a celebrity’s identity can be valuable” in promoting products.
20 *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1398 (9th Cir. 1992). Similarly, here Defendants
21 trade on their customers’ interest in artists to sell their output images. ¶¶202-12, 214-22. The
22 Complaint states Defendants “appropriated Plaintiffs’ names to Defendants’ advantage,
23 including for the purposes of advertising, selling, and soliciting purchases through Defendants’
24 AI Image Products.” ¶ 203; *see also id.* ¶ 217 (to same effect). It is because Defendants’ AI output
25 is similar enough that people familiar with Plaintiffs’ art could believe Plaintiffs had created it,
26 which makes Defendants’ products valuable. *See Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1101 (9th
27 Cir. 1992) (“For the defendants to be liable for voice misappropriation . . . the imitation had to be
28

1 so good that ‘people who were familiar with plaintiff’s voice who heard the commercial *believed*
2 *plaintiff performed it.*’) (emphasis in original).

3 ***Lack of Consent.*** Plaintiffs did not consent to Defendants’ use of Plaintiffs’ names and
4 identities. ¶ 202 (“At no time did Plaintiffs consent to Defendants’ use of their names in this
5 capacity.”); ¶ 216 (“Plaintiffs did not consent to Defendants’ use of their names or identities.”).

6 ***Resulting Injury.*** Plaintiffs have alleged they were injured by Defendants’ use of
7 Plaintiffs’ names and identities. *See Fraley v. Facebook Inc.*, 830 F. Supp. 2d 785, 807 (N.D. Cal.
8 2011) (“[C]ourts have long recognized that a person’s ‘name, likeness, or other attribute of
9 identity can have commercial value,’ even if the individual is relatively obscure.”). Defendants’
10 conduct injured plaintiffs by proliferating art in Plaintiffs’ artistic styles and diluting the economic
11 value of Plaintiffs’ names for their art, harming Plaintiffs’ economic goodwill. An allegation that
12 the defendant exploited the plaintiff’s name and identity “for commercial gain” denotes the
13 “commercial value” of that name. *Batis v. Dun & Bradstreet Holdings, Inc.*, No. 22-CV-01924-
14 MMC, 2023 WL 1870057, at *3 (N.D. Cal. Feb. 9, 2023). Further, Defendants’ actions force
15 Plaintiffs to compete with knock-off images “generated from Plaintiffs’ work and associated with
16 Plaintiffs’ names.” ¶¶ 212, 222; *see also* ¶¶ 8 & 173 (knock-off images).

17 Plaintiffs were also injured because they should have been compensated for Defendants’
18 use of Plaintiffs’ names. “If a defendant uses a plaintiff’s name and/or likeness to advertise, then
19 it can reasonably be inferred that the name and/or likeness has some economic value, even if
20 small.” *Callahan v. PeopleConnect, Inc.*, No. 20-CV-09203-EMC, 2021 WL 5050079 at *14-15
21 (N.D. Cal. Nov. 1, 2021) (finding inference sufficient to defeat motion to dismiss).¹¹ Defendants’
22 used Plaintiffs’ names to link and associate its output images with Plaintiffs, which “contributed
23 value to Defendants’ platform[s] and services” and “uniquely enhanced the marketability of
24 Defendants’ AI art-generating services to consumers and the public.” ¶¶ 206 & 207.

25 ***Knowing Use.*** For purposes of the statutory claim, Plaintiffs have alleged that Defendants’
26 misuse of Plaintiffs’ names and identities was knowing. Defendants specifically designed their

27 ¹¹ As *Peoplesoft* noted, § 3344 claims “can be brought even by noncelebrities,” *id.* at *14, so injury
28 can regularly be inferred from such use.

1 software to prioritize the inclusion of specific artists' works by invoking the artist's name to
 2 create output images like the artist's. ¶¶ 202-08.

3 As the Complaint explains:

4 Defendants' use of Plaintiffs' names was not incidental. Rather,
 5 Defendants specifically and knowingly used Plaintiffs' names because these
 6 names were uniquely related to specific artistic styles, and Defendants
 7 generated valuable business from their ability to sell artworks "in the
 8 style" that Plaintiffs popularized. Thus, the use of Plaintiffs' names
 9 contributed value to Defendants' platforms and services.

9 ¶ 206. Indeed, it was because of the value of Plaintiffs' names that Defendants used them. ¶ 217
 10 ("Defendants knowingly used Plaintiffs' names and identities to further Defendants' commercial
 11 advantage, including for the purposes of advertising, selling, and soliciting purchases through
 12 Defendants' AI art-generating system[s]."); *see also* ¶ 202 (use of Plaintiffs' names). Stability and
 13 DeviantArt were especially aware of this use because Stability developed Stable Diffusion to
 14 include the functionality to generate output images using specific artist's names, and DeviantArt
 15 was the source of many of the training images. ¶¶ 57, 63, 109-10, 116; *see also* ¶ 130.

16 **C. The Right of Publicity Claims Are Not Preempted**

17 The Copyright Act, 17 U.S.C. §§ 101 *et seq.*, does not preempt Plaintiffs' right of publicity
 18 claims because their claims are based on Defendants' use of Plaintiffs' names, rather than on
 19 Defendants' misappropriation of Plaintiffs' art. The rights involved are separate and distinct, and
 20 not subject to preemption. The Copyright Act's preemption section states that nothing in title 17
 21 on copyrights "limits any rights or remedies under the common law or statutes of any State"
 22 regarding:

23 (1) subject matter that does not come within the subject matter of
 24 copyright as specified by sections 102 and 103, including works of
 25 authorship not fixed in any tangible medium of expression; or

26 * * *

27 (3) activities violating legal or equitable rights that are not
 28 equivalent to any of the exclusive rights within the general scope of
 copyright as specified by section 106;

1 17 U.S.C. § 301(b). The Ninth Circuit’s two-part test for the Copyright Act to preempt a state
2 claim is consistent with those provisions:

3 First, the content of the protected right must fall within the subject
4 matter of copyright as described in 17 U.S.C. §§ 102 and 103. [and]

5 Second, the right asserted under state law must be equivalent to the
6 exclusive rights contained in section 106 of the Copyright Act.

7 *Downing*, 265 F.3d at 1003; *Laws v. Sony Music Ent., Inc.*, 448 F.3d 1134, 1139 (9th Cir. 2006).

8 In contradiction to what Defendants may claim, this case is not just about the creation of
9 works in Plaintiffs’ style, but the misappropriation of *Plaintiffs’ names*. As to the first part of the
10 test, the Ninth Circuit has held that “[a] person’s name or likeness is not a work of authorship
11 within the meaning of 17 U.S.C. § 102.” *Downing*, 265 F.3d at 1004. In *Downing*, that was “true
12 notwithstanding the fact that [the plaintiffs’] names and likenesses [were] embodied in a
13 copyrightable photograph.” *Id.* *Downing* added that 17 U.S.C. § 103 embodied that concept by
14 providing “that the copyright in derivative works extends only to the material contributed by the
15 author as distinguished from preexisting material employed in the work.” *Id.* at 1004-05. The
16 inquiry should stop there—Plaintiffs’ claims are not preempted.

17 Nonetheless, Plaintiffs’ right of publicity claims survive under the second element too.
18 “The second requirement for copyright preemption as noted above is that the right asserted
19 under state law must be equivalent to the exclusive rights contained in §106 of the Copyright
20 Act.” *Id.* at 1005. Again, the Ninth Circuit has explained that when “the subject matter” of the
21 plaintiffs’ right of publicity claims was “their names and likenesses,” which were “not
22 copyrightable,” those claims were “not equivalent to the exclusive rights contained in § 106.” *Id.*
23 Here the alleged damage to Plaintiffs goes far beyond just intellectual property interests with
24 respect to how Defendants’ AI Imaging Products allow third parties to utilize artists’ names.
25 Since names are not equivalent to § 106 rights, claims based on names are not preempted.

1 **D. Defendant’s Commercial Speech (Including False Statements) Using**
 2 **Plaintiffs’ Identities to Sell Derivative Works Does Not Support First**
 3 **Amendment Protection.**

4 Defendants’ final gambit is to claim that their use of Plaintiffs’ name is transformative and
 5 protected by the First Amendment. Defendants’ defense fails for at least two reasons.

6 **First**, whether Defendants’ use is “transformative” it is an affirmative defense for which
 7 Defendants bear the burden of proof. *Davis*, 775 F.3d at 1177; *see also Comedy III Productions., Inc.*
 8 *v. Gary Saderup, Inc.*, 25 Cal.4th 387, 407 (2001) (“[W]hen an artist is faced with a right of
 9 publicity challenge to his or her work, he or she may raise **as [an] affirmative defense** that the
 10 work is protected by the First Amendment inasmuch as it contains significant transformative
 11 elements or that the value of the work does not derive primarily from the celebrity’s fame.”)
 12 (emphasis added); *see Browne*, 611 F. Supp. 2d at 1071 (“A defendant that challenges a plaintiff’s
 13 claim on an Anti-SLAPP motion by raising affirmative defenses bears the burden of proof on
 14 those defenses.”). Plaintiffs have offered facts demonstrating why Defendants’ conduct is not
 15 “transformative.” *E.g.*, ¶¶ 86-90, 94-98, 210, 221. Indeed, Plaintiffs allege that the appropriation
 16 of Plaintiffs’ names and the ability to query the AI Image Products by Plaintiffs’ names provides
 17 value to Defendants’ products here. *See Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 168 (3d Cir. 2013)
 18 (“even avatars with superficial modifications to their appearance can count as a suitable proxy or
 19 market ‘substitute’ for the original”). Defendants have not identified facts within the four corners
 20 of the Complaint sufficient to satisfy their burden here.

21 **Second**, as the Ninth Circuit has explained, “[o]nly if [a defendant] is entitled to the
 22 [transformative] defense *as a matter of law* can it prevail on its motion to strike,’ because the
 23 California Supreme Court ‘envisioned the application of the defense as a question of fact.’” *In re*
 24 *NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d at 1274 (internal brackets
 25 omitted) (quoting *Hilton v. Hallmark Cards*, 599 F.3d 894, 910 (9th Cir. 2010)). “Thus,
 26 [Defendants] [are] only entitled to the defense as a matter of law if no trier of fact could
 27 reasonably conclude that the [work] was not transformative.” *Hilton*, 599 F.3d at 910. And there
 28 are questions of fact here—Plaintiffs have alleged, for example, facts that Defendants have
 29 capitalized on Plaintiffs’ names to attract users to their AI Image Products. ¶¶ 202-09. There is a

1 genuine question of fact as to whether the users of Defendants' AI Image Products were
2 motivated by obtaining a reproduction of Plaintiffs' work or the AI's work. *See In re NCAA*
3 *Student Athlete Name & Likeness Licensing Litig.*, 724 F.3d at 1274 (noting that *Comedy III*
4 *Productions, Inc.*, 25 Cal.4th 387's factors "require an examination of whether a likely purchaser's
5 primary motivation is to buy a reproduction of the celebrity, or to buy the expressive work of the
6 artist.") (citing J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 8:72 (2d ed. 2012)).
7 Plaintiffs have also alleged that Defendants have scraped, i.e., directly copied, without
8 permission, countless images for use as training images for their AI Image Products. ¶¶ 57-58, 63,
9 89, 109. To what extent the output is changed is a question of fact that precludes a motion to
10 strike here. *See Comedy III Productions, Inc.*, 25 Cal.4th at 407 ("The [transformative use] inquiry
11 is in a sense more quantitative than qualitative, asking whether the literal and imitative or the
12 creative elements predominate in the work.").

13 **Third**, Defendants' arguments are rooted in a misunderstanding Plaintiffs' right of
14 publicity claims. Plaintiffs' claims focus on Defendants' misappropriation of Plaintiffs' **names**
15 and **use of those names** to market and enhance sales of their products, rather than Defendants'
16 purportedly artistic creation of output images. *See Comedy III Productions, Inc.*, 25 Cal.4th at 409-
17 10 (finding no protection where artist contributed nothing other than trivial variations that
18 transformed drawings at issue from literal likenesses of the Three Stooges). Referring to a
19 Plaintiffs by name to promote a product is not transformative; to rule otherwise "would vitiate
20 California's well-established right of publicity." *Est. of Fuller v. Maxfield & Oberton Holdings,*
21 *LLC*, 906 F. Supp. 2d 997, 1007 (N.D. Cal. 2012).

22 **IV. CONCLUSION**

23 Defendants' anti-SLAPP Motion to Strike should be denied. Alternately, Plaintiffs request
24 leave to replead their Complaint if the Court finds aspects that need repleading. Granting
25 repleading is supported by the Federal Rules of Civil Procedure, for example, any "collision" with
26 "Fed. R. Civ. P. 15(a)'s policy favoring liberal amendment," *Verizon Delaware, Inc. v Covad*
27 *Commcs Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004); Fed. R. Civ. P. 56(d).

1 Dated: June 2, 2023

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