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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

WPENGINE, INC., a Delaware corporation,

Plaintiff,

vs.

AUTOMATTIC INC., a Delaware
corporation; and MATTHEW CHARLES
MULLENWEG, an individual,

Defendants.

Case No. 3:24-cv-06917-AMO

**DEFENDANTS AUTOMATTIC INC. AND
MATTHEW CHARLES MULLENWEG'S
NOTICE OF MOTION AND MOTION TO
STRIKE PURSUANT TO C.C.P. 425.16;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Judge: Hon. Araceli Martinez-Olguin
Courtroom: 10
Hearing Date: March 6, 2025
Hearing Time: 2:00 p.m.

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NOTICE OF MOTION & MOTION

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on Thursday, March 6, 2025, at 2:00 p.m. Pacific time, or as soon as the matter may be heard, in Courtroom 10, 19th Floor, 450 Golden Gate Avenue, before the Honorable Araceli Martinez-Olguin, Defendants Automattic Inc. (“**Automattic**”) and Matthew Charles Mullenweg (“**Matt**” and, collectively with Automattic, “**Defendants**”) will and hereby do move this Court for an Order striking without leave to amend the following portions of Plaintiff WP Engine, Inc.’s (“**WP Engine**” or “**Plaintiff**”) Complaint, pursuant to California’s anti-SLAPP law, Cal. Civ. Proc. Code § 425.16(b)(1), and Rule 12(f) of the Federal Rules of Civil Procedure (“**FRCP**”); awarding them legal fees and costs incurred in connection with this motion pursuant to Cal. Civ. Proc. Code § 425.16(c), in an amount to be determined by future motion, and providing such other and further relief as the Court deems appropriate. The specific portions of the Complaint that Defendants move to strike are as follows: (1) Paragraphs 179-187 in their entirety (comprising Cause of Action Nine of the Complaint); (2) Paragraphs 188-196 in their entirety (comprising Cause of Action Ten of the Complaint); (3) Paragraphs 197-208 in their entirety (comprising Cause of Action Eleven of the Complaint); and (4) Paragraphs 8 and 9 of the “Prayer for Relief.”

This Motion is based on this Notice of Motion; the following Memorandum of Points and Authorities in support thereof; the Declaration of Matthew Mullenweg in Support of Defendants’ Motion to Strike and in Opposition to the Motion for Preliminary Injunction (“**Mullenweg Decl.**”), and the exhibits thereto (referred to herein as “**Mullenweg Ex.**”); the Court’s record in this action; all matters of which the Court may take judicial notice; and such documentary and oral evidence as may be presented at or before the hearing on this motion.

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF ISSUES TO BE DECIDED

Defendants request that the Court grant its anti-SLAPP motion because (a) WP Engine’s Causes of Action 9-11 arise out of Matt’s exercise of his constitutional right of free speech in connection with a public issue; and (b) WP Engine cannot show a probability of prevailing on any of those causes of action. Accordingly, Defendants request an order striking Causes of Action Nine,

1 Ten and Eleven of WP Engine’s Complaint, and awarding Defendants their attorneys’ fees and other
 2 defense costs incurred under California Code of Civil Procedure §425.16(c).

3 INTRODUCTION

4 WP Engine’s Complaint largely complains about Defendants’ actions. This motion concerns
 5 the portions of the Complaint that focus on Matt’s words: WP Engine’s causes of action for libel,
 6 trade libel, and slander (Causes of Action 9-11). Those claims fail as a matter of law and must be
 7 struck under California’s anti-SLAPP law because they improperly seek to impose liability for
 8 commentary and debate on an issue of public interest—namely, WP Engine’s commitment (or lack
 9 thereof) to the WordPress community—without any valid basis. WP Engine’s attempt to stifle
 10 public discussion of those issues via these claims violates California law and should be stopped
 11 here.

12 WP Engine premises its defamation claims on five statements made by Matt over the course
 13 of a week in several different public forums. Two were made at the final session of 2024 WordCamp
 14 US on September 20, a major WordPress community live event in Portland, Oregon attended by
 15 thousands of website hosts, developers, and other interested parties. Two others were made in blog
 16 posts. The last was made during a live tech-focused Twitch streaming show on September 26
 17 dedicated to discussing and critiquing those prior statements. All of the statements in question
 18 concerned WP Engine’s offerings, their failings, and how those failings tended to diminish the
 19 broader WordPress community. Because those public statements are plainly on matters of public
 20 interest—among other things, the health and success of the WordPress software platform on which
 21 over 43 percent of all websites are based—WP Engine’s claims can only survive this motion if WP
 22 Engine demonstrates a probability of success on the merits. *See, e.g., Sarver v. Chartier*, 813 F.3d
 23 891, 901 (9th Cir. 2016) (outlining the legal standard applied by California’s anti-SLAPP statute).
 24 WP Engine cannot do so for numerous reasons.

25 Initially, the statements in question are all protected by the First Amendment and California
 26 law as opinion. They include protected opinions based on disclosed facts, such as Matt’s views
 27 about the quality of WP Engine’s offerings based on their acknowledged modifications to
 28 WordPress’s default settings, or his opinions about WP Engine’s lack of dedication to the WordPress

1 community based on its low level of contributions to the development and maintenance of
2 WordPress. They also include epithets, rhetorical hyperbole, and other non-literal assertions—for
3 example, Matt’s opinion that WP Engine is “parasitic” to the WordPress community—which cannot
4 be proven true or false and are not actionable.

5 Emblematic are WP Engine’s claims based on Matt’s statement during a live streaming
6 interview that despite being a “half-billion dollar business,” WP Engine had not “given anything
7 back.” No reasonable listener would parse this statement, as WP Engine wrongfully attempts to do,
8 as a factual assertion that WP Engine had given literally *nothing* back to the WordPress community.
9 That is because, as the Complaint concedes, Matt immediately went on to reference the “40 hours
10 per week” WP Engine had contributed to the “Five for the Future” program dedicated to maintaining
11 WordPress (discussed more below) and the roughly “100 grand per year” at which he valued those
12 hours. The plain meaning of Matt’s commentary, then, based on the entire context of the statements
13 in question, was that WP Engine’s contributions were *insufficient*. Reasonable people can disagree
14 as to whether WP Engine’s contributions were or were not sufficient, and WP Engine is not obliged
15 to agree with Matt’s views. But WP Engine has no basis under the law for seeking to stifle those
16 opinions via litigation.

17 Nor has WP Engine adequately alleged (much less shown) that the statements in question
18 are substantially false, as is its burden. And even if its defamation claims were cognizable, WP
19 Engine cannot show the requisite level of fault. WP Engine, which claims to host more than 1.5
20 million websites and to be “the most trusted platform for WordPress,” is a public figure or at least
21 a limited purpose public figure in the WordPress community, which WP Engine claims to have
22 reached out to target with tens of millions of dollars in marketing and related expenditures tied to
23 its commitment to the WordPress community—the very subject of the statements in question. As a
24 public figure (and in all events for its trade libel claim), WP Engine must plead and prove that the
25 statements in question were made with knowing falsity or reckless disregard for the truth, which it
26 cannot do.

27 The claims against Automattic fail for the additional reason that none of the statements are
28 attributable to the company. The Complaint acknowledges Matt’s various “roles” with respect to

WordPress. For all the statements at issue—none of which were published by Automattic—Matt was speaking and writing in his individual capacity as WordPress’s co-founder, and not as CEO of Automattic. There is no basis to impute his statements to the company. For these and other reasons, WP Engine’s ninth, tenth, and eleventh causes of action should be stricken.

FACTUAL BACKGROUND

WordPress and Automattic. Matt is a co-founder of the open source software WordPress, which today, powers over 43% of the web. Compl. ¶ 29. Matt and his co-founder released the first version of his program in 2003. *Id.* ¶ 29. Since then, fifty major versions of the software have been released, and it is continuously enriched by the worldwide ecosystem and community that support it. *Id.* ¶ 21.

In 2005, Matt founded Automattic, which offers managed WordPress hosting services. *Id.* ¶ 30. Matt is Automattic’s CEO and President. *Id.* ¶ 10. Separate from the WordPress software and Automattic, there is a website that Matt supports called WordPress.org (the “**Website**”). Mullenweg Decl. ¶ 5. Matt created the Website to support the WordPress community and software, and the Website hosts a blog where Matt shares his thoughts on various issues affecting the WordPress community. *Id.* ¶¶ 5, 9.

Matt is also responsible for introducing the Five for the Future initiative in 2014. That program calls on companies benefiting from WordPress to sign a “pledge” to contribute their time and efforts to core development, translation, and training (among other things), with the overarching goal of supporting the sustained growth of the WordPress project. Mullenweg Ex. 5; Request for Judicial Notice (“**RJN**”, Dkt. 37), Ex. 8. Participating organizations sponsor individual employees or teams to contribute a dedicated number of hours per week to supporting and maintaining and developing WordPress. Mullenweg Ex. 5. The contributions called for by Five for the Future are definitionally distinct from self-promotional marketing efforts, such as advertising or WordCamp sponsorship. Since its launch, hundreds of companies have signed the Five for the Future pledge, Mullenweg Decl. ¶ 15, and WP Engine signed in 2020. RJN Ex. 8; Compl. ¶ 25.

WP Engine. WP Engine is a website hosting service built on the back of WordPress software and has been controlled by private equity firm Silver Lake since 2018. Compl. ¶ 8; RJN Exs. 12,

1 13. In the years following Silver Lake’s control of WP Engine, WP Engine’s priorities seemingly
 2 shifted towards maximizing profits. For example, to decrease its hosting costs, WP Engine
 3 substantially modified its WordPress offering, disabling a core WordPress feature: revisions.
 4 Mullenweg Ex. 7.

5 WP Engine has spent significant sums to market itself to the WordPress community,
 6 including through sponsored content and sponsoring WordPress events. *See* Compl. ¶¶ 21, 24-26,
 7 62. One of those events is WordCamp US, the largest annual gathering of the WordPress community
 8 in the Americas. Mullenweg Decl. ¶ 11, Ex. 1; Compl. ¶¶ 21, 24.

9 **WordCamp 2024.** On September 20, 2024, Matt led a Q&A session at WordCamp US,
 10 where he spoke in his individual capacity as a WordPress co-founder. Compl. ¶ 50; Mullenweg
 11 Decl. ¶ 13, Ex. 3. A video recording of the session was later posted on WordPress’s YouTube
 12 channel. Mullenweg Ex. 4. During the Q&A session, Matt spoke about current issues affecting
 13 WordPress and open source, including, among other topics, the Five for the Future initiative, the
 14 ways in which for-profit companies can donate resources back to WordPress, and the role of private
 15 equity in the open source community. *Id.*

16 Following 2024 WordCamp US, Matt continued his commentary on those topics, via two
 17 blog posts for the Website on September 21 and September 25. Mullenweg Exs. 7, 9. In those posts,
 18 Matt highlighted WP Engine’s decision to disable revisions (that is, the feature that allows
 19 WordPress website creators to track changes, akin to an audit trail) by default, only allowing
 20 revisions to be enabled when users contact WP Engine’s support. Mullenweg Exs. 7, 9. Matt
 21 understood this modification to be unique to WP Engine, and an example of the ways in which
 22 private equity’s profit interests can interfere with WordPress’s core promises and functions.
 23 Mullenweg Decl. ¶ 24, Ex. 7.

24 On September 26, Matt learned that his ongoing debate with WP Engine, including his posts
 25 and comments over the prior days, were being discussed on a tech-focused Twitch livestream show
 26 hosted by Michael B. Paulson, the creator of the “ThePrimeTime” YouTube channel. Mullenweg
 27 Decl. ¶ 30. Matt joined the livestream to discuss the ongoing debate. *Id.* Portions of the livestream
 28 were later posted to the ThePrimeTime YouTube channel. *Id.* ¶¶ 30-31, Ex. 10; RJN Ex. 30.

1 them arises “from any act . . . in furtherance of the person’s right of petition or free speech . . . in
 2 connection with a public issue[.]” *Id.* § 425.16(b)(1). The anti-SLAPP statute applies in federal
 3 question cases with pendent state law claims, like this one. *See In re Bah*, 321 B.R. 41, 46 (B.A.P.
 4 9th Cir. 2005). The anti-SLAPP statute mandates that a prevailing defendant “shall” recover
 5 attorney’s fees and costs incurred in bringing the motion to strike. Cal. Civ. Proc. Code § 425.16(c);
 6 *accord Verizon Delaware, Inc. v. Covad Commc’ns Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004)
 7 (“[D]efendants . . . are entitled to attorneys’ fees and costs when they prevail.”).

8 A court considering an anti-SLAPP motion proceeds in two steps. First, a defendant must
 9 “make a prima facie showing that the plaintiff’s suit arises from an act by the defendant made in
 10 connection with a public issue in furtherance of the defendant’s right to free speech under the United
 11 States or California Constitution.” *Sarver v. Chartier*, 813 F.3d 891, 901 (9th Cir. 2016) (citation
 12 omitted). Once a court finds that such a showing has been made, the burden shifts to the plaintiff to
 13 demonstrate “a reasonable probability [of] prevail[ing]” on the claims in question. *Id.* (citation
 14 omitted).

15 Where an anti-SLAPP motion is based on a complaint’s facial legal deficiencies, the motion
 16 is “treated in the same manner as a motion under Rule 12(b)(6).” *Planned Parenthood Fed’n of Am.,*
 17 *Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 834 (9th Cir. 2018). For those purposes, the Court can
 18 take into account the full context of the Statements under the incorporation-by-reference doctrine.
 19 *See, e.g., Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). The Court can also take into account
 20 matters subject to judicial notice, like press articles. *See Von Saher v. Norton Simon Museum of Art*
 21 *at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010). However, the Court also can consider evidence in
 22 ruling on an anti-SLAPP motion where defendants attack the factual basis for bringing a claim. *See*
 23 *Iglesia Ni Cristo v. Cayabyab*, No. 18-cv-00561-BLF, 2019 WL 3997474, at *3 (N.D. Cal. Aug. 23,
 24 2019). When evaluating the factual sufficiency of a claim, the Rule 56 standard applies. *Id.*; *Planned*
 25 *Parenthood*, 890 F.3d at 833-834.

26 ARGUMENT

27 I. Causes of Action Nine Through Eleven Are Subject to an Anti-SLAPP Motion.

28 A. WP Engine’s Claims Arise from Defendants’ Protected Activity.

1 WP Engine’s defamation claims arise from acts of free speech, triggering application of the
 2 anti-SLAPP law, because the Statements—the basis for Causes of Action 9-11, *see supra* at pp. 5-
 3 6—were made in public forums about issues of public interest.

4 A defendant meets its burden of showing that a suit arises from its act of free speech by
 5 showing that the plaintiff’s claims arise from “any written or oral statement or writing made in a
 6 place open to the public or a public forum in connection with an issue of public interest,” or “any
 7 other conduct in furtherance of the exercise of . . . the constitutional right of free speech in
 8 connection with a public issue or an issue of public interest.” Cal. Civ. Proc. Code § 425.16(b)(1),
 9 (e)(2), (e)(4). The defendant’s burden “is not a particularly demanding one,” *Todd v. Lovecraft*, No.
 10 19-cv-01751-DMR, 2020 WL 60199, at *11 (N.D. Cal. Jan. 6, 2020) (citation omitted), particularly
 11 in light of the statutory directive that the anti-SLAPP law be “construed broadly.” *Vess v. Ciba-*
 12 *Geigy Corp. USA*, 317 F.3d 1097, 1109 (9th Cir. 2003) (citation omitted). The Statements here
 13 clearly qualify for multiple reasons.

14 **Public forum.** For purposes of the anti-SLAPP law, “public forums” include publicly
 15 accessible websites. *See Peak Health Ctr. v. Dorfman*, No. 19-CV-04145-VKD, 2020 WL 887935,
 16 at *10 (N.D. Cal. Feb. 24, 2020); *Ampex Corp. v. Cargle*, 128 Cal. App. 4th 1569, 1576 (2005)
 17 (Yahoo! message board). Here, WP Engine’s libel and trade libel claims arise out of statements
 18 made on the Website, which is widely accessible and open to the public. *Supra* at pp. 4, 6. WP
 19 Engine’s slander claim arises out of statements made at WordCamp US, itself a public event (Compl.
 20 ¶ 198; Mullenweg Decl. ¶ 11; *see also* Declaration of Heather Brunner (“**Brunner Decl.**,” Dkt. 21),
 21 ¶ 29)), and interviews posted on Twitch and YouTube, also public websites.

22 **Issue of Public Interest.** Courts interpret “public issue” and “public interest” broadly to
 23 include “any issue in which the public is interested,” *Nygaard Inc. v. Uusi-Kerttula*, 159 Cal. App.
 24 4th 1027, 1042 (2008), or a “topic of widespread, public interest.” *Doe v. Gangland Prods., Inc.*,
 25 730 F.3d 946, 955 (9th Cir. 2013) (quoting *Rivero v. Am. Fed’n of State, Cty., & Mun. Emps., AFL-*
 26 *CIO*, 105 Cal. App. 4th 913, 924 (2003)). Statements on issues of public interest made to a limited
 27 but definable portion of the public are considered public issues. *See, e.g., Ruiz v. Harbor View Cmty.*
 28 *Ass’n*, 134 Cal. App. 4th 1456, 1468-69 (2005) (letters written in the context of a dispute over

1 approval of building plans were an issue of public interest to the 523 residents in the community).

2 Each of the Statements undoubtedly concern a matter of considerable general public interest:
 3 the health and future success of WordPress, the software on which over 43 percent of all websites
 4 run. Compl. ¶ 29. Additionally, the quality and efficacy of WP Engine’s offerings, which are
 5 marketed and sold to the public, is a matter of public concern. *See Id.* ¶ 20 (“[WP Engine] . . . is
 6 used on more than 1.5 million websites, including by businesses, individuals, charities, schools, and
 7 governmental agencies that rely on WP Engine to keep their websites up and running”); *see also*
 8 *Dorfman*, 2020 WL 887935, at *10 (“quality and contents of consumer goods are matters of public
 9 interest” (citing *Nygard*, 159 Cal. App. 4th at 1042)); *Oumere LLC v. Zarpas*, No. 8:21-CV-00224-
 10 DOC(JDEx), 2021 WL 2894643, at *2 (C.D. Cal. June 29, 2021) (Reddit post reviewing experience
 11 with plaintiff’s products and cautioning readers about their effectiveness was an issue of public
 12 interest).

13 These Statements were not only made to the broader public, but primarily to interested
 14 members of the WordPress community, which includes among others website content managers,
 15 agencies and hosts, and other members of the public who are interested in open-source issues and
 16 supportive of the open web. Compl. ¶ 21. By way of example only, WordCamp US attracts
 17 thousands of attendees each year, and Matt’s recorded Q&A session published on YouTube has
 18 received more than 14,000 views from the general public since it was posted on September 21, 2024.
 19 Mullenweg Decl. ¶ 14. The video-recording posted on ThePrimeTime’s YouTube channel of Matt’s
 20 appearance on Mr. Paulson’s show, has generated more than 203,000 views. *Id.* ¶ 31. These
 21 viewership numbers alone clearly demonstrate that Matt’s Statements concerned a topic of
 22 widespread, public interest, not least to the WordPress community.

23 Because Defendants have met their burden of showing that the relevant claims arise from
 24 acts of free speech, the burden shifts to WP Engine to show its probability of success on those
 25 claims.

26 **B. WP Engine Cannot Demonstrate a Likelihood of Prevailing on Its Claims.**

27 WP Engine cannot show “a probability of prevailing on [its] claims,” as is required to
 28 overcome an anti-SLAPP motion. *Harkonen v. Fleming*, 880 F. Supp. 2d 1071, 1078 (N.D. Cal.

2012) (citation omitted). WP Engine has brought three claims subject to the anti-SLAPP statute: libel, trade libel, and slander. The elements of a libel or slander claim include “(1) ‘the intentional publication’ of (2) ‘a statement of fact’ that (3) is ‘false’ (4) ‘unprivileged,’ and (5) ‘has a natural tendency to injure or which causes special damage.’” *Id.* (citation omitted). WP Engine’s trade libel claim requires: “(1) a publication, (2) which induces others not to deal with plaintiff, and (3) special damages.” *Art of Living Found. v. Does*, No. 10-CV-05022-LHK, 2011 WL 2441898, at *9 (N.D. Cal. June 15, 2011).

WP Engine cannot meet its burden of showing a probability of success on these claims, for the reasons set out below: (1) the Statements consist of protected opinion; (2) the Statements involved matters of public concern, and as such, WP Engine must also plead and prove falsity, which it has failed to do; (3) WP Engine’s status as a limited purpose public figure requires it to plausibly allege and show actual malice, which WP Engine has not done and cannot do; and (4) with respect to the trade libel claim specifically, WP Engine has failed to plausibly plead or produce evidence of direct financial harm resulting from Matt’s Statements made on the Website. Moreover, there is no basis for holding Automattic liable for any of the Statements because they were not made within the scope of Matt’s employment and are not otherwise attributable to Automattic.

II. Matt’s Statements Are Non-Actionable Opinion.

WP Engine’s claims fail because each of the Statements are opinion. Matt expressly disclosed the facts on which his Statements were based, and WP Engine does not allege (and will not be able to show) that any of those underlying facts are false. To the extent the Statements are not based on disclosed facts, they are rhetorical hyperbole, cannot otherwise be understood as stating actual facts, and are not actionable.

A. Opinions Are Protected by the First Amendment and California Law.

“Although statements of fact may be actionable as libel, statements of opinion are constitutionally protected.” *Summit Bank v. Rogers*, 206 Cal. App. 4th 669, 695-696 (2012) (citation omitted). “California defamation law requires that the offending statement ‘expressly or impliedly assert a fact that is susceptible to being proved false,’ and must be able reasonably to be ‘interpreted as stating actual facts.’” *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 730

1 (9th Cir. 1999) (quoting *Weller v. Am. Broad. Cos.*, 232 Cal. App. 3d 991, 1001 (1991)).

2 “Statements are less likely to be expressions of fact where—as here—the speaker fully
3 discloses all relevant facts.” *Herring Networks, Inc. v. Maddow*, 8 F.4th 1148, 1159 (9th Cir. 2021);
4 *see also Partington v. Bugliosi*, 56 F.3d 1147, 1156-57 (9th Cir. 1995) (“[W]hen an author outlines
5 the facts available to him, thus making it clear that the challenged statements represent his own
6 interpretation of those facts and leaving the reader free to draw his own conclusions, those
7 statements are generally protected by the First Amendment.”).

8 Additionally, “‘rhetorical hyperbole,’ ‘vigorous epithet[s],’ ‘lusty and imaginative
9 expression[s] of . . . contempt,’ and language used ‘in a loose, figurative sense’” are
10 not defamatory as a matter of law. *Ferlauto v. Hamsher*, 74 Cal. App. 4th 1394, 1401 (1999)
11 (citation omitted); *see also Holden v. Target Corp.*, No. 16-cv-02217-JST, 2016 WL 3938950, at
12 *5 (N.D. Cal. July 21, 2016) (“[S]atirical, hyperbolic, imaginative, or figurative statements are
13 protected because the context and tenor of the statements negate the impression that the author
14 seriously is maintaining an assertion of actual fact.” (citation omitted)). For example, courts have
15 found disparaging comments to be statements of opinion where they “were part of an on-going, free-
16 wheeling and highly animated exchange about [a] company and were full of hyperbole, invective,
17 short-hand phrases and language not generally found in fact-based documents, such as corporate
18 press releases or SEC filings.” *ComputerXpress, Inc. v. Jackson*, 93 Cal. App. 4th 993, 1011-12
19 (2001) (internal quotation marks omitted).

20 “Whether an allegedly defamatory statement is one of opinion or fact is a question of law.”
21 *Gardner v. Martino*, 563 F.3d 981, 986 (9th Cir. 2009). In answering this question, courts consider
22 all the facts and circumstances, including the language used, the statement’s full context, the nature
23 and full content of the communication, and the knowledge and understanding of the audience to
24 whom it was directed. *Seelig v. Infinity Broad. Corp.*, 97 Cal. App. 4th 798, 809-810 (2002);
25 *Bartholomew v. YouTube, LLC.*, 17 Cal. App. 5th 1217, 1227-28 (2017) (“[T]he publication . . . may
26 not be divided into segments and each portion treated as a separate unit” (citation omitted)).
27 “Context can be determinative that a statement is opinion and not fact, for the context of a statement
28 may control whether words were *understood in a defamatory sense*.” *Koch v. Goldway*, 817 F.2d

507, 509 (9th Cir. 1987) (emphasis added); *Partington*, 56 F.3d at 1154 (stressing the need to provide “room for expressions of opinion by commentators, experts in a field, figures closely involved in a public controversy, or others whose perspectives might be of interest to the public”).

B. All of the Statements in Question Are Non-Actionable Opinion.

Statements One and Two. WP Engine objects to Matt’s views about “parasitic entities” “feed[ing] off” of WordPress, and how “squeez[ing] every last bit out of the business” can be “fatal” for “open source communities.” Compl. ¶ 199. During the Q&A session in which those Statements were made, Matt disclosed the underlying facts on which his Statements were based: namely, WP Engine is controlled by Silver Lake, a private equity firm; his understanding of the fate of other companies Silver Lake has acquired; and his broader understanding of how private equity operates. As just a few examples, Matt stated:

- “WP Engine has good people, . . . but the company is controlled by Silver Lake, a private equity firm with \$102 billion in assets under management.”
- “[Silver Lake] bought WP Engine in 2018.”
- “I’m going to tell you all about this firm called Silver Lake now. They’re the ones with \$102 billion under management, and I’m going to call this portion of the talk how private equity can hollow out and destroy open source communities. We’re not the first one they’re doing this to – there’s actually a company called Talend. In 2010, Silver Lake bought 25% of Talend, leading to an aggressive monetization of the open source users; prioritizing commercial conversions over community health. They cycled through four CEOs in seven years and they generated a 20x return for Silver Lake, but the open source community is completely gone.”
- “One thing private equity likes to do is like squeeze out the profits, squeeze out the free cash flow.”

Mullenweg Ex. 4. WP Engine does not allege that any of these underlying statements are false, and Matt does not imply that any undisclosed fact formed the basis of his comments. Matt’s views about WP Engine—positive or negative, hurtful or otherwise—are classic opinions. *See Standing Comm. on Discipline of U.S. Dist. Court for Cent. Dist. of Cal. v. Yagman*, 55 F.3d 1430, 1439 (9th Cir.

1 1995) (statement is protected where it “appears to disclose all facts on which it is based, and does
2 not imply that there are other, unstated facts supporting the belief”).

3 Additionally, Matt’s use of the figurative and hyperbolic phrases “parasitic entity” and
4 “squeeze every bit out” to convey his opinion of private equity’s presence in open source
5 communities and companies that benefit from WordPress without contributing sufficient time or
6 resources to support its sustained growth, negates any impression that Statements One and Two are
7 communicating actual facts as opposed to opinions. Whether an entity is or is not “parasitic” or how
8 and whether every “bit” has been “squeezed” from a business are “vague and subjective,” and not
9 “specific and measurable claim[s], capable of being proved false.” *Coastal Abstract*, 173 F.3d at
10 731. And the specific and general contexts in which these Statements were made also negate any
11 impression that Matt was conveying specific facts as opposed to opinions. Matt’s opinions about
12 WP Engine’s “parasitic” behavior were offered during an exploration of the tragedy-of-the-
13 commons theory, and why it made contributions under the Five for the Future initiative—that is,
14 genuine, long-term, and material support from WordPress community members—so important.
15 Mullenweg Ex. 4. Indeed, Statements One and Two were made in the broader context of the 2024
16 WordCamp US, a setting in which Matt “was invited to impart his opinion of and expertise” on
17 WordPress as one of its co-founders. *Wynn v. Chanos*, 75 F. Supp. 3d 1228, 1238 (N.D. Cal. 2014).
18 As one of many speakers at the event, and in the context of a live question and answer session with
19 audience members (who themselves are members of the WordPress community), his “contributions
20 were intended to be cast in light of, and potentially in contrast to” the opinions of others in the
21 community. *Id.* “In this context, the audience was likely to understand [Matt’s] comments as
22 opinions rather than as factual assertions.” *Id.*

23 **Statements Three and Four.** In his blog posts, Matt disclosed his specific basis for stating
24 that WP Engine’s product was “not WordPress,” but a “cheap knock-off” and “hacked up,
25 bastardized simulacra”: namely, that WP Engine disables revisions by default, such that website
26 hosts have to pay to store revisions; the revisions feature is “at the core of the user promise of
27 protecting your data”; and of all the recommended hosts on the Website that Matt tested, WP Engine
28 was the only one he found that disabled revisions by default. Mullenweg Exs. 7, 9. Again, WP

1 Engine doesn't challenge any of this. Nor can it, as the fact that WP Engine "has WordPress
 2 revisions *disabled* by default" is clearly stated on WP Engine's own website, to which Matt provided
 3 a screenshot and a link. Mullenweg Ex. 7 (emphasis in original). Accordingly, Matt's statement
 4 about the nature of WP Engine's use of the GPL code and other WordPress features cannot be the
 5 basis for a defamation claim, because Matt offered an opinion supported by the factual bases for
 6 that opinion, and left the audience free to form its own conclusion based upon the stated facts. *See*
 7 *Maddow*, 8 F.4th at 1159 (statement not considered to be an assertion of fact where defendant
 8 "report[ed] the undisputed facts and then transition[ed] into providing 'colorfully expressed'
 9 commentary"); *Stossel v. Meta Platforms, Inc.*, 634 F. Supp. 3d 743, 758 (N.D. Cal. 2022) (granting
 10 motion to dismiss and strike defamation claim where statement "reflect[ed] a subjective
 11 interpretation of the contents of the [plaintiff's] video and the [defendant's] assessment of the
 12 video's message based on fully disclosed facts").

13 Matt's use of the colorful and expressive phrases "chopped up, hacked, butchered" and
 14 "cheap knock-off" to describe WP Engine's offering in light of its decision to disable revisions by
 15 default, which he stated was contrary to the WordPress ethos and a product of private equity interests
 16 creeping into open source, is also too broad and figurative to be objectively verifiable. *See, e.g.,*
 17 *Ferlauto*, 74 Cal. App. 4th at 1403 ("imaginative phrase 'Kmart Johnnie Cochran' . . . is a lusty and
 18 creative expression of contempt, too loose and figurative to be susceptible of being proved true or
 19 false"); *Resolute Forest Prods., Inc. v. Greenpeace Int'l*, 302 F. Supp. 3d 1005, 1020 (N.D. Cal.
 20 2017) (rejecting plaintiff's suggested "overly literal" construction of "destroy" to mean "eliminate
 21 completely"; finding audience would have understood the word to be used as hyperbole).
 22 Additionally, deeming WP Engine's offering "cheap" and a "knock-off" is inherently subjective, as
 23 it is full of assumptions about the criteria by which products are assessed and how competing
 24 products compare in terms of subjective, qualitative measures. *See, e.g., Coastal Abstract*, 173 F.3d
 25 at 731 ("[D]efendants' assertion that Coastal was too small to handle Shearson's business was vague
 26 and subjective. It was not a specific and measurable claim, capable of being proved false . . .").

27 Context confirms that that Statements Three and Four were, and would be understood as,
 28 offering opinions and not actual facts. They were both made on the Website, which "lack[s] the

1 characteristics of [a] typical fact-based document[.]” *ComputerXpress, Inc.*, 93 Cal. App. 4th at
 2 1012-13 (“disparaging” statements made on internet message board were opinion and not fact,
 3 including that plaintiff’s computer product “was of inferior quality” and that plaintiff was “merely
 4 a stock ‘scam’”). Further, the posts were made after Matt spoke at 2024 WordCamp US, which he
 5 references in the second paragraph of the post in which Statement Three appears (“I spoke yesterday
 6 at WordCamp about how Lee Wittlinger at Silver Lake, a private equity firm with \$102B assets
 7 undermanagement, can hollow out an open source community”), and was thus made in the context
 8 of the very public and ongoing debate between Matt and WP Engine. Mullenweg Ex. 7. Readers,
 9 familiar with that debate, were more likely to understand Statement Three as an expression of Matt’s
 10 subjective assessment of WP Engine’s use of WordPress features, and not a statement of fact. *See*
 11 *Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1106 (N.D. Cal. 1999) (“[I]n the context of the heated
 12 debate on the Internet, readers are more likely to understand accusations of lying as figurative,
 13 hyperbolic expressions.”); *Art of Living Found.*, 2011 WL 2441898, at *7 (statements made on
 14 “obviously critical blogs” in the context of “heated discussion and criticism” were less likely to be
 15 viewed as statements of fact by readers).

16 **Statement Five.** WP Engine complains about Matt’s comment during a streaming Twitch
 17 show that WP Engine has “given nothing back to WordPress.” Compl. ¶ 200. However, as WP
 18 Engine concedes, Matt immediately proceeded to reference the “40 hours per week” WP Engine
 19 had pledged to the Five for the Future program, and the roughly “100 grand per year” that those
 20 contributions represented. *Id.* Matt therefore disclosed a fact (WP Engine’s time commitment to the
 21 Five for the Future program, as self-reported by WP Engine), and then offered his opinion based on
 22 that fact. WP Engine does not claim that the 40-hour-per-week pledge figure is inaccurate. Matt
 23 further provided the source for the figure both during the WordCamp 2024 discussion (in which he
 24 references the “Five for the Future page[] from . . . WP Engine” and notes “these pledges are just a
 25 proxy and aren’t perfectly accurate”), and in his September 21 blog post (linking directly to WP
 26 Engine’s Five for the Future pledge page). Mullenweg Exs. 4, 7. Again, this is protected opinion.
 27 *See, e.g., Resolute Forest Prods.*, 302 F. Supp. 3d at 1020.

28 Statement Five was also made during an appearance on a tech-focused internet streaming

1 show dedicated to discussing the ongoing debate between Matt and WP Engine, and indeed
 2 assessing Matt’s comments and posts over the prior days. Prior to Matt joining the stream, Mr.
 3 Paulson discussed the “wild” “WordPress situation” for nearly an hour with his audience, during
 4 which he displayed WP Engine’s Five for the Future pledge page and discussed Matt’s prior
 5 comments about the sufficiency of WP Engine’s contributions. RJN Ex. 30. In this context, the
 6 audience, familiar with the previous days’ dispute, would have understood Matt’s comment that WP
 7 Engine has “given nothing back to WordPress” (Compl. ¶ 200) as non-literal hyperbole, used to
 8 convey his opinion that WP Engine’s contributions were *insufficient*, rather than take the Statements
 9 as a factual assertion that WP Engine had literally given *nothing* back to the community. *See Art of*
 10 *Living Found.*, 2011 WL 2441898, at *7 (recognizing “the reality that exaggeration and non-literal
 11 commentary have become an integral part of social discourse”); *Maddow*, 8 F.4th at 1159. Other
 12 comments Matt made on the show also support this understanding, including his comment that
 13 “other hosts give back way *more* than” WP Engine (recognizing it does make *some* contribution).

14 * * *

15 Accordingly, Matt’s Statements are non-actionable opinion. WP Engine may not like Matt’s
 16 opinions about private equity in open source or the sufficiency of WP Engine’s contributions to the
 17 WordPress community, or the language he used to express them, but it has no basis for asking this
 18 Court to punish Matt for expressing those opinions.

19 **III. WP Engine Has Not Pleaded or Demonstrated Material Falsity.**

20 WP Engine’s claims also fail because the “disputed statements involve matters of public
 21 concern,” and WP Engine cannot meet its “burden of showing the statements [Matt] made were
 22 false.” *Sonoma Media Invs., LLC v. Superior Ct.*, 34 Cal. App. 5th 24, 37, 43 (2019), *as modified*
 23 (Apr. 8, 2019) (citation omitted); *see also Zuru, Inc. v. Glassdoor, Inc.*, 614 F. Supp. 3d 697, 704
 24 n.2 (N.D. Cal. 2022). WP Engine’s burden to plead and prove falsity cannot be satisfied, as a matter
 25 of law, if it cannot show that the challenged Statements are not substantially true, that is, if “the
 26 substance, the gist, the sting, of the libelous charge [is] justified.” *Masson v. New Yorker Magazine,*
 27 *Inc.*, 501 U.S. 496, 517 (1991) (citation omitted); *see also Vogel v. Felice*, 127 Cal. App. 4th 1006,
 28 1021 (2005) (“The plaintiff cannot be said to have carried this burden so long as the statement

1 appears *substantially* true.”). Whether the plaintiff has satisfied this requirement is for the court to
 2 decide as a matter of law. *See Masson*, 501 U.S. at 517; *Vogel*, 127 Cal. App. 4th at 1021.

3 As discussed *supra* Section I.A, Matt’s Statements all involved matters of public concern—
 4 that is, the continued success of the WordPress software platform, a critical component of the
 5 internet’s infrastructure; the contributions made (or not made) by those who profit off WordPress;
 6 and the role of private equity in open source communities. Each of these topics relates not only to
 7 the larger WordPress community, but the internet as a whole. For this reason, WP Engine must show
 8 the material falsity of Matt’s Statements. It cannot, as a matter of law.

9 As discussed above, the Statements are not capable of being proven false in the requisite
 10 sense. But even if the Statements were considered factual, they are not actionable because has not
 11 alleged, and cannot show, they are materially false. With respect to Statements One and Two, it is
 12 commonly known, and was Matt’s understanding at the time he made the Statements, that private
 13 equity firms operate by using investor funding to take over target companies, then driving the
 14 company to meet KPIs and derive the maximum profit. Mullenweg Decl. ¶ 20; RJN Ex. 18. As
 15 discussed *supra* p. 12, WP Engine does not allege that Matt’s underlying statements about Silver
 16 Lake’s involvement with WP Engine are false. Nor do they contend that Matt has an incorrect
 17 understanding of private equity’s typical motives and operation.

18 WP Engine asserts that Statements Three and Four, which concern WP Engine’s choice to
 19 disable revisions by default, are false because (1) WP Engine’s WordPress installations are identical
 20 to the Website ZIP file that defines WordPress, and (2) WP Engine’s services use the identical
 21 WordPress GPL code. Compl. ¶ 182; *see also id.* ¶¶ 66-67. WP Engine’s claims, however, miss the
 22 mark. As set forth, *supra* pp. 13-14, WP Engine acknowledges that it disables WordPress revisions
 23 by default. Further, the Complaint does not gainsay Matt’s assertions regarding how revisions
 24 operate, the vital function they play in managing and protecting content, the costs website hosts
 25 incur to store the history of changes, or that WP Engine minimized those costs via disabling
 26 revisions by default. *See* Mullenweg Exs. 7, 9. WP Engine’s claims about identical WordPress
 27 installations or GPL code are not responsive to Matt’s actual Statements, and do not plausibly allege
 28 or show that his Statements are materially false.

1 With respect to Statement Five, WP Engine does not allege that the “75 grand” figure Matt
 2 cited for WP Engine’s sponsorship of 2024 WordPress US, or his description of WP Engine’s
 3 contribution to the Five for the Future program (roughly 40 hours per week), or the estimated
 4 monetary value of that contribution (\$100,000), was inaccurate. Instead, WP Engine argues that the
 5 statement “that [WP Engine] was *only* contributing ‘40 hours per week’ and ‘75 grand’ was false”
 6 because “[i]n reality, [WP Engine’s] contributions back to WordPress far exceed this,” citing its
 7 alleged “community involvement” through “events” and “sponsorships” including “sponsorship of
 8 WordCamps worldwide.” Compl. ¶ 201 (emphasis added). However, Matt never stated that WP
 9 Engine’s *only* contribution to WordPress was “‘40 hours per week’ and ‘75 grand’”, as WP Engine
 10 attempts to claim. Rather, he made a specific reference to WP Engine’s 40-hour-per-week pledged
 11 “contribution” to the Five for the Future initiative. Mullenweg Ex. 10. WP Engine’s references to
 12 its alleged *other* “contributions” to WordPress (which are self-promotional marketing) are irrelevant
 13 and do not show that Matt’s Statements are materially false. *See Sonoma Media Invs., LLC*, 34 Cal.
 14 App. 5th at 38 (no prima facie showing of falsity where plaintiffs failed to unambiguously deny
 15 precise alleged defamatory assertion); *Indus. Waste & Debris Box Serv., Inc. v. Murphy*, 4 Cal. App.
 16 5th 1135, 1163 (2016) (plaintiff “miss[ed] the boat” by criticizing defendant for not using certain
 17 information to calculate plaintiff’s diversion rates, which plaintiff claimed defendant falsely
 18 reported, where defendant did not purport to present that specific information in his figures, and
 19 where plaintiff failed to state what its actual diversion rates were); *see also* Mullenweg Ex. 10 (Mr.
 20 Paulson stating that “sponsorships don’t count because you get – it’s you’re buying marketing. . . .
 21 that’s not considered giving, at least I personally don’t consider . . . sponsoring a conference giving
 22 back to the community.”); RJN Ex. 30.

23 Because WP Engine has failed to show that Matt’s Statements are materially false even if
 24 viewed as factual, WP Engine’s claims must be struck.

25 **IV. WP Engine is a Limited Purpose Public Figure and Cannot Show a Probability of**
 26 **Prevailing in Establishing Actual Malice.**

27 By among other things signing the Five for the Future pledge and entering the public debate
 28 regarding how for-profit companies contribute to open source communities, WP Engine became a

1 limited purpose public figure. To recover, WP Engine must therefore allege and establish facts that
2 clearly and convincingly show Matt made each Statement with actual malice. It cannot do so.

3 Courts recognize two types of public figures: the “all purpose” public figure, who has
4 “achiev[ed] such pervasive fame or notoriety that he becomes a public figure for all purposes and
5 in all contexts,” and the “limited purpose” public figure, who “voluntarily injects himself or is drawn
6 into a particular public controversy and thereby becomes a public figure for a limited range of
7 issues.” *Reader’s Dig. Ass’n v. Superior Ct.*, 37 Cal. 3d 244, 253 (1984). A limited purpose public
8 figure is found where there is (1) “a public controversy, which means the issue was debated publicly
9 and had foreseeable and substantial ramifications for nonparticipants”; (2) the plaintiff “undert[ook]
10 some voluntary act through which he or she sought to influence resolution of the public issue” which
11 is met where “the plaintiff attempts to thrust him or herself into the public eye”; and (3) the alleged
12 defamation is “germane to the plaintiff’s participation in the controversy.” *Harkonen*, 880 F. Supp.
13 2d at 1080 (citation omitted).

14 The “voluntariness requirement has been interpreted broadly” such that it can “be satisfied
15 by a showing that a person or entity engaged in a course of conduct that foreseeably put themselves
16 at risk of public scrutiny with respect to a limited range of issues.” *Planet Aid, Inc. v. Reveal*, 44
17 F.4th 918, 926 (9th Cir. 2022). In *Planet Aid*, for example, the defendant published a series of
18 articles and podcasts reporting on the plaintiffs’ misuse of charitable funds. Affirming the grant of
19 the defendant’s anti-SLAPP motion, the Ninth Circuit found that the plaintiffs had voluntarily
20 injected themselves into a public controversy regarding the plaintiffs’ general misuse of charitable
21 funds by publicizing their charitable efforts and engaging in “attention-generating activities,”
22 including “seeking attention from the press, promoting themselves through social media, employing
23 public relations staff, and soliciting donations and grants.” *Id.* at 927-928.

24 A public-figure plaintiff must show that the defendant made the statement with actual
25 malice, that is, the defendant “either knew his statement was false or subjectively entertained serious
26 doubt his statement was truthful,” *i.e.*, “reckless disregard.” *Wynn*, 75 F. Supp. 3d at 1234 (citations
27 omitted); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). To survive a motion to strike, even at
28 the pleading stage, a plaintiff must prove actual malice by clear and convincing evidence. *Wynn*, 75

1 F. Supp. 3d at 1234; *McGarry v. Univ. of San Diego*, 154 Cal. App. 4th 97, 114 (2007). And WP
2 Engine is at least a limited-purpose public figure.

3 **Public controversy.** There were numerous pre-existing public controversies here. To start,
4 the long-term health of open source software communities like WordPress has long been a subject
5 of public concern and debate. *See, e.g.*, RJN Ex. 21-25. That is, “[t]he world runs on open source
6 technology, but open source communities notoriously face challenges ranging from resource
7 constraints, governance issues, and a dependence on volunteerism, which itself is dependent upon
8 individual passions and constrained time commitments.” RJN Ex. 14. Commentators have noted the
9 “tragedy of the commons” problem with open source communities and debated how it can be solved.
10 *See* RJN Ex. 15 (private equity company’s 2022 podcast) (discussing for open source communities
11 “this idea that in order to have a well-managed commons, you do need to draw boundaries around
12 membership,” and that “[i]t needs to be clear who is allowed to appropriate from the commons and
13 who isn’t”); *see also* RJN Ex. 20 (discussing “[h]ow open source projects reveal technology’s free
14 rider problem”).

15 So too with the interplay between open source communities and their investors, as “[t]he
16 corporate world’s entry into free and open source online communities has caused some serious
17 concerns and friction.” RJN Ex. 16. Private equity’s entry in particular has also been subjected to
18 scrutiny. *See* RJN Ex. 17. More broadly, private equity’s role in the American economy—in
19 particular, on the health of the business it purchases—has attracted widespread public attention and
20 debate. RJN Ex. 18, 19. All of these controversies predated the Statements.

21 **Public figure.** WP Engine is a limited-purpose public figure because it has actively sought
22 attention about these very topics. As discussed, *supra* p. 4, WP Engine signed the Five for the Future
23 pledge in 2020, through which it “pledged” to contribute time or sponsor resources to supporting
24 the sustained growth of the WordPress project. Compl. ¶ 25; RJN Ex. 8. When WP Engine signed
25 the pledge, it thereby entered the public debate regarding how participants in the WordPress
26 community (and for-profit companies in particular) can donate resources back to WordPress (on
27 which it based its entire business model). After signing the pledge, WP Engine immediately began
28 publicizing its participation, first through its public press release announcing its pledge, and then by

1 heavily advertising itself to the WordPress community. *See, e.g.*, RJN Exs. 8, 26.

2 WP Engine has also spent significant sums trying to market itself to the WordPress
3 community through self-promotional activities, including through sponsored content and sponsoring
4 WordPress events. *See, e.g.*, RJN Exs. 26-29. For example, WP Engine sponsors WordPress
5 community events such as WordCamp conferences and educational events to achieve greater name-
6 recognition amongst the open source community. *See* Compl. ¶¶ 21, 24-26, 62; *see also* Brunner
7 Decl. ¶ 5. WP Engine also hosts the annual DE{CODE} conference, which it advertises on its
8 website as “the industry’s largest annual WordPress developer event.” RJN Exs. 6, 7; Compl. ¶ 26.
9 In the words of WP Engine’s CEO Heather Brunner, WP Engine engages in marketing efforts
10 (distinct from the type of contributions contemplated in the Five for the Future initiative, *supra* at
11 p. 4) to promote itself to the WordPress community “through content like the WordPress Roundup
12 and our Building WordPress series” and “webinars, podcasts, and tutorials on how to get the best
13 out of WordPress supported by [WP Engine’s] Developer Relations team.” Brunner Decl. ¶ 5.

14 Accordingly, WP Engine has met the voluntariness requirement by consistently inserting
15 itself into the public debate regarding the viability and growth of the open source ecosystem through
16 its extensive “attention-generating activities.” *Planet Aid, Inc.*, 44 F.4th 918 at 927-928; *see also*
17 *Ampex Corp.*, 128 Cal. App. 4th at 1578 (corporation and its chairman were limited purpose public
18 figures based on issuance of press release and posting of letters on company web site). And each of
19 Matt’s Statements were “related to” these public debates. *Planet Aid, Inc.*, 44 F.4th 918 at 927-928.
20 They all addressed whether WP Engine, a private-equity backed company, was contributing enough
21 in various senses to the open source WordPress community, in view of its massive profits generated
22 off the free labor provided by WordPress users to the WordPress code forming the basis of WP
23 Engine’s services. *Supra* at p. 4.

24 **Actual malice.** Because WP Engine is a limited-purpose public figure, it must prove that
25 Matt’s Statements were made with either knowledge of their falsity or a reckless disregard for the
26 truth. *See, e.g.*, *Wynn*, 75 F. Supp. 3d at 1234. WP Engine cannot do so, because Matt’s Statements
27 were protected opinion and not factual, or alternatively, WP Engine has failed to show they were
28 materially false, as discussed *supra* Sections II and III. WP Engine also fails to plead facts that

1 would make their otherwise conclusory allegations of actual malice plausible (Compl. ¶¶ 184, 203-
 2 205), much less facts that would satisfy the “clear and convincing” evidence standard applicable in
 3 a defamation action brought by a public figure. *See, e.g., Resolute Forest Prods.*, 302 F. Supp. 3d at
 4 1018; *Nicosia*, 72 F. Supp. 2d at 1109 (“conclusory statements that [a defamation defendant] should
 5 have known the truth does not satisfy the heightened pleading standard” of actual malice; granting
 6 motion to dismiss).

7 Because WP Engine has not met its burden to plausibly plead actual malice, and cannot
 8 prove it, its Causes of Action 9-11 should be stricken.

9 **V. WP Engine Cannot Demonstrate the Direct Financial Harm Required for a Trade**
 10 **Libel Claim.**

11 In addition to failing on the grounds described above, WP Engine’s trade libel claim fails to
 12 plausibly allege another required element: WP Engine has not identified any specific third party
 13 who was deterred from conducting business with WP Engine as a result of Matt’s Statements.

14 In all trade libel cases, the plaintiff bears the burden of proving that the defamatory
 15 publication “has played a material and substantial part in inducing others not to deal with [the
 16 plaintiff], and that as a result [the plaintiff] has suffered special damages.” *Muddy Waters, LLC v.*
 17 *Superior Ct.*, 62 Cal. App. 5th 905, 925 (2021) (citation omitted). “Thus, unlike a claim for
 18 defamation, trade libel requires as an essential element that the plaintiff suffered direct financial
 19 harm because someone else acted in reliance on the defendant’s statement.” *Id.* To establish this
 20 element, it “is not enough to show a general decline in [the plaintiff’s] business resulting from the
 21 falsehood, even where no other cause for it is apparent, . . . it is only the loss of specific sales that
 22 can be recovered. This means, in the usual case, that the plaintiff must identify the particular
 23 purchasers who have refrained from dealing with him, and specify the transactions of which he
 24 claims to have been deprived.” *Id.* (citation omitted); *see Mann v. Quality Old Time Serv., Inc.*, 139
 25 Cal. App. 4th 328, 335-336 (2006) (plaintiff failed to establish probability of prevailing on trade
 26 libel claim where it “did not present any evidence showing it had suffered a specific pecuniary loss
 27 as a result of the defendant’s communications”) (citing *Mann v. Quality Old Time Serv., Inc.*, 120
 28 Cal. App. 4th 90, 109 (2004), *disapproved of on other grounds by Baral v. Schnitt*, 1 Cal. 5th 376,

376 (2016)); *see also First Advantage Background Servs. Corp. v. Priv. Eyes, Inc.*, 569 F. Supp. 2d 929, 938 (N.D. Cal. 2008) (dismissing trade libel claim for failing to plead specific damages).

Here, WP Engine has failed to plausibly allege, let alone produce evidence to show, that Matt's Statements deterred any specific third party from conducting business with WP Engine. The Complaint's conclusory allegations that the Statements "played a material and substantial part in inducing" unspecified "existing [WP Engine] customers to stop purchasing [WP Engine's] platform for WordPress websites," including unnamed purported "[WP Engine] customers that otherwise would have purchased [WP Engine's] platform not to do so" (Compl. ¶ 194), are wholly insufficient.

Nor can WP Engine's trade libel claim survive based on a single September 22, 2024 post on X.com, made by an unidentified poster, which states "Following the blog [post] by @photomatt, we've decided to remove @wpengine from our hosting lists on @select_wp for now, and we'll add it again after a thorough check. We'll also check if any other hosting is also doing the same." Compl. ¶ 100. The post links to Matt's blog post discussing WP Engine's admitted practice of disabling revisions by default. In doing so, and combined with the poster's statement about checking if "any other hosting is also doing the same," it is clear that the poster's decision to "remove @wpengine from [their] hosting lists" is the result of WP Engine's open and notorious default disabling of revisions. In any event, WP Engine's Complaint fails to establish that any business was actually lost in relation to this post on X.

It is telling that WP Engine's preliminary injunction motion includes arguments that, as a result of Matt's actions (and not his words), it has lost customers, but WP Engine does not include any non-conclusory allegations or evidence to support its claim of lost customers and business as a result of Matt's Statements. *See, e.g., Mem. ISO PI at 14; see also First Advantage Background Servs. Corp.*, 569 F. Supp. 2d at 938 (company did not adequately plead special damages where it was "impossible to determine what, if any, damage to its relationship with [third party] [company] claims to have suffered just as a result of the libelous statements" as opposed to company's other alleged claims).

Because WP Engine has failed to identify any specific customers or transactions it actually lost as a result of Matt's Statements, its trade libel claim fails.

1 **VI. Vicarious Liability Does Not Attach to Automattic.**

2 WP Engine’s claims against Automattic fail for the additional reason that there is no basis
 3 for holding it vicariously liable for Matt’s commentary made on the Website’s blog and during
 4 appearances in his individual capacity as co-founder of WordPress. In defamation cases, *respondeat*
 5 *superior* liability is only triggered if the employee’s defamation occurred within the scope of his or
 6 her employment. *See McGarry*, 154 Cal. App. 4th at 124 n.19. “California law is clear that
 7 employers are not strictly or automatically liable for the intentional torts of their employees.”
 8 *Westhoff Vertriebsges mbH v. Berg*, No. 22-cv-0938-BAS-SBC, 2023 WL 5811843, at *15 (S.D.
 9 Cal. Sept. 6, 2023) (refusing to hold company liable for statements made by its CEO, where
 10 counterclaimant failed to “allege any facts that track with a cognizable theory that would permit
 11 liability for defamation to extend from [the company’s] CEO to [the company] itself.”).

12 WP Engine rests its defamation claims against Automattic on the conclusory allegations that
 13 Matt made the contested Statements “on behalf of Automattic.” Compl. ¶¶ 180-181, 189-190, 198,
 14 200. However, the Complaint is devoid of any factual support for WP Engine’s claim. Among other
 15 things, the Complaint does not allege that any of the Statements were published by Automattic
 16 (which they were not). WP Engine’s conclusory allegations are insufficient to establish that Matt
 17 made the Statements as part of or incident to his duties as Automattic’s CEO and President. *See*,
 18 *e.g., McGarry*, 154 Cal. App. 4th at 118, 123-124 (conclusory allegations insufficient to support
 19 *respondeat superior* liability for University for statements contained in an article).

20 In fact, the allegations in the Complaint negate any inference of imputation. The Complaint
 21 acknowledges Matt’s various “roles” with respect to WordPress. Compl. ¶ 59. WP Engine also
 22 concedes that Matt’s relationship to WordPress predates Automattic by at least two years, *id.* ¶¶ 29-
 23 30, 41, and alleges that the Website is “control[led]” by Matt, not Automattic. *Id.* ¶ 38.

24 Further, Matt’s posts and appearances themselves demonstrate that he was not acting within
 25 the scope of his employment at Automattic. Matt’s written Statements were posted on the Website,
 26 where he shares his thoughts on various issues affecting the WordPress community. Mullenweg
 27 Decl. ¶ 9. Matt also emphasized throughout the posts that he was sharing his personal opinion by
 28 using the singular first-person pronoun “I.” Matt appeared at 2024 WordCamp US in his individual

1 capacity as co-founder of WordPress. Mullenweg Decl. ¶¶ 12-13. The www.WordCamp.org website
 2 describes the Q&A session that Matt hosted as one with “Matt Mullenweg, co-founder of
 3 WordPress.” Mullenweg Decl. ¶ 13, Ex. 3. Matt’s appearance on Mr. Paulson’s livestream was also
 4 in his individual capacity; Matt, was introduced as “Matt,” with visuals pointing to his individual X
 5 profile, @photomatt. Mullenweg Decl. ¶ 31, Ex. 10.

6 Because Matt’s Statements were made in his personal capacity as a WordPress co-founder,
 7 and not as CEO of Automattic, WP Engine’s claims against Automattic must fail.

8 CONCLUSION

9 For all of the above reasons, Defendants’ motion should be granted, Causes of Action
 10 Nine, Ten and Eleven of WP Engine’s Complaint should be stricken, and Defendants should be
 11 granted their attorneys’ fees and other defense costs incurred.

12 Dated: October 30, 2024

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