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13  
 14 **IN THE UNITED STATES DISTRICT COURT**  
 15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

16 WPENGINE, INC., a Delaware corporation,

17 Plaintiff,

18 vs.

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

20 Defendants.

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

**PLAINTIFF’S OPPOSITION TO  
 DEFENDANTS’ MOTION TO DISMISS  
 AND STRIKE PLAINTIFF’S AMENDED  
 COMPLAINT**

Judge: Honorable Araceli Martínez-Olguín

Courtroom: 10

Hearing Date: June 5, 2025

Hearing Time: 2:00 p.m.

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1 PRELIMINARY STATEMENT

2 Defendants’ motion to dismiss and strike (Dkt. 68, “Mot.”) is a thinly disguised effort to  
3 improperly litigate the merits of claims at the pleadings stage. The First Amended Complaint (Dkt.  
4 51, “FAC”) extensively details how Defendants Automattic Inc. and its CEO Matthew Charles  
5 Mullenweg have gravely harmed both competition and Plaintiff WPEngine, Inc. (“WPE”).  
6 Defendants have done so through a self-proclaimed “nuclear war” of blatant bad acts, including  
7 deceiving the market through false promises WordPress would be free and open to everyone forever;  
8 threatening WPE, its customers, and other market participants; attempting to extort WPE; disparaging  
9 and defaming WPE; interfering with WPE’s business and its contracts, customers, and personnel;  
10 misusing purported trademark “rights”; infringing WPE’s trademarks; and hijacking WPE’s ACF  
11 plugin, even installing malicious software code on WPE customers’ computer systems to do so. These  
12 wrongful acts are meticulously documented in WPE’s well-pled, 144-page complaint. They give rise  
13 to myriad claims against both Automattic and Mullenweg, and appropriately seek to hold Defendants  
14 accountable for the massive damage they have caused, including through compensatory damages for  
15 the severe harm Defendants *admit* they have inflicted upon WPE, treble damages under the Sherman  
16 Act, and punitive damages for Defendants’ malicious conduct. Actions have consequences, and  
17 Defendants must be held accountable for their blatant and intentional misconduct.

18 Seeking to evade those consequences, Defendants now move to dismiss most of WPE’s  
19 claims. But nothing in Defendants’ motion undermines them. The motion does not challenge four  
20 claims: WPE’s declaratory judgment claims against Automattic for trademark non-infringement and  
21 non-dilution (Counts 7–8), and its Lanham Act claims against Mullenweg for unfair competition and  
22 false advertising (Counts 17–18). For the claims Defendants do move against, they identify no fatal  
23 deficiencies in WPE’s allegations. Instead, Defendants misconstrue or ignore those allegations,  
24 misstate the law, and invoke “facts” outside of the pleadings to attempt to dispute the merits of WPE’s  
25 allegations, which is impermissible on a Rule 12(b)(6) motion. WPE’s counts are grounded in well-  
26 pled factual allegations that state valid claims to relief. Defendants’ core arguments to the contrary,  
27 that the FAC is “unsubstantiated” and lacks any “actionable conduct,” are frivolous. *See, e.g.*, Dkt.  
28 64 (12/10/24 Preliminary Injunction Order). Defendants’ motion should be denied in its entirety.

**ARGUMENT**

**I. WPE STATES MULTIPLE VALID ANTITRUST CLAIMS (COUNTS 12–15)**

Defendants seek dismissal of WPE’s antitrust claims for supposed failure to sufficiently allege market definition, market power, anticompetitive conduct, and tying. Defendants’ arguments all fail.

**A. WPE Adequately Defines Multiple Relevant Product Markets**

WPE defines four relevant antitrust product markets: a “foremarket” of multiple brands of web content management systems (“WCMS”) (of which WordPress is one), and three derivative aftermarkets (each within the WordPress ecosystem) for market participants who have selected WordPress as their WCMS: (1) web hosting services, (2) custom field plugins, and (3) plugin distribution. FAC ¶¶ 29–33, 191–252. Defendants do not contest that the FAC defines the WCMS foremarket; instead, they contend the FAC does not define the three aftermarkets. Mot. at 3.

Defendants’ arguments rest on four factors articulated in *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946 (9th Cir. 2023). But the *Epic* factors need not be satisfied here, because *Epic* did not address pleading requirements; it was a post-trial merits decision. *Id.* And it recognizes that defining a market is *not* required in all rule-of-reason cases, such as where a plaintiff shows market power by *direct* evidence of increased prices, reduced quality, and the like (as WPE does here, *infra* at Section I.B.) rather than just through *indirect* evidence (which involves defining a market and calculating a defendant’s market share within it). 67 F.4th at 974, 983. Additionally, the *Epic* factors “do not apply” to the FAC’s aftermarket allegations because the factors “derive from concerns about a lack of market power in the foremarket,” and where the defendant has power in the foremarket, consumers “have minimal ability to discipline the company’s conduct in aftermarkets, regardless of” the factors. *Lambrix v. Tesla, Inc.*, 2024 WL 3403777, at \*7–11 (N.D. Cal. June 17, 2024). WPE alleges Defendants *do* have market power in the foremarket (FAC ¶ 204), rendering the factors inapplicable here. Even if they were to apply—and they do not—WPE meets them, as explained below.

**Lack of Knowledge.** WPE satisfies the first *Epic* factor: “the challenged aftermarket restrictions are ‘not generally known’ when consumers make their foremarket purchase[.]” *Epic*, 67 F.4th at 977. Defendants’ only argument is that it is “generally known” plugins and features from one WCMS are inoperable with those from others. Mot. at 3. But inoperability is *not* the challenged

1 aftermarket restriction. This alone defeats Defendants’ strawman argument and distinguishes their  
2 sole case, *Coronavirus Rep. v. Apple, Inc.*, 85 F.4th 948, 956 (9th Cir. 2023). The pertinent unknown  
3 restrictions are Defendants reserving the ability to charge fees (particularly extortionate ones) and  
4 block access to wordpress.org, and Mullenweg’s claimed control of source code and trademarks.  
5 FAC ¶¶ 28, 248–51. Market participants were unaware of and could not learn of these practices when  
6 they selected WordPress over other WCMSs since Defendants deceived them about these restrictions,  
7 as confirmed by their surprise when these facts just came to light. FAC ¶¶ 52–59, 70–82, 248–51.  
8 Defendants ignore these allegations, which satisfy this factor. *Lambrix*, 2024 WL 3403777, at \*9  
9 (factor met based on allegations practices were “unexpected” and defendant “misleads” about them).

10 **Information Costs and Life-Cycle Pricing.** WPE satisfies the second factor: “‘significant’  
11 information costs prevent accurate life-cycle pricing[.]” *Epic*, 67 F.4th at 977. Defendants assert WPE  
12 makes no such allegations, Mot. at 4, but the FAC does. *E.g.*, FAC ¶ 252 (“Significant Information  
13 Costs Impede Life-Cycle Pricing”). Likewise, Defendants’ argument that an inability to predict  
14 pricing must be borne by “consumers—not other market participants” like WPE (Mot. at 4) ignores  
15 WPE’s consumer allegations, which address both individual consumers, *id.* ¶ 252, **and** the web hosts,  
16 agencies, and developers, who also constitute “consumers”—all of whom were unable to predict  
17 pricing. *Id.* ¶¶ 29–36, 73–75, 248–57. Defendants’ argument that “consumers can get information”  
18 (Mot. 4) does not even respond to, and at best improperly attempts to contradict, the FAC’s allegation  
19 that when these consumers chose WordPress, they could not uncover that Defendants lied about  
20 ownership and control of wordpress.org or would demand excessive fees and block access. FAC ¶¶  
21 29–36, 73–75, 248–57. Consumers could not learn the truth so as to predict prices since Defendants  
22 deceived about this information, which, by its nature, is in Defendants’ near-exclusive control. These  
23 allegations satisfy this factor. *Lambrix*, 2024 WL 3403777, at \*10 (factor met based on allegations  
24 that information necessary for consumers to accurately predict lifecycle costs of product “difficult to  
25 determine” and defendant’s “public misstatements distort[ed] the lifecycle costs” for product).

26 Defendants dispute this factor, relying on WPE not paying the ransom. Mot. at 4. But whether  
27 WPE paid is irrelevant. Others have paid (FAC ¶¶ 214, 236, 255), confirming prices to some  
28 customers have gone up unpredictably. Further, even putting aside the fee demand, Defendants

1 created chaos, loss of functionality, downtime, instability, and fear, causing customers beyond WPE  
2 to incur unpredicted, added costs. *Id.* ¶¶ 125, 164–75, 252, 256. All of that is part of life-cycle pricing,  
3 which Defendants ignore. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 473 (1992).

4 **Switching Costs.** Defendants’ only argument as to the third factor is “WPE alleges no facts”  
5 as to switching costs. Mot. at 3, 4. Not so. WPE alleges facts establishing switching costs, *e.g.*, the  
6 substantial time, money, *and* effort required for customers, web hosts, developers, and other market  
7 participants to move to a new WCMS once they have picked WordPress. *E.g.*, FAC ¶¶ 244–48, 251.

8 **Market Definition Principles.** Defendants claim “WPE alleges no facts” as to the final factor:  
9 market-definition principles do not undermine the aftermarkets. Mot. at 3, 4. But they admit markets  
10 can be defined based on interchangeability. *Id.* at 4. WPE does that, explaining what services are in  
11 each aftermarket, why others are *not* interchangeable, and how market participants recognize all of  
12 this. FAC ¶¶ 205–11, 216–21, 225–234. That suffices. *Datel Holdings Ltd. v. Microsoft Corp.*, 712  
13 F. Supp. 2d 974, 980, 986–87, 996–97 (N.D. Cal. 2010) (motion to dismiss Xbox aftermarket denied).

14 **B. WPE Adequately Alleges Defendants’ Market Power**

15 Defendants dwell (Mot. at 5) on showing market power through indirect evidence, which  
16 generally requires market shares of more than 50% for monopolization (Count 12) and more than  
17 30% for attempted monopolization (Count 13) and tying (Counts 14 & 15). *Rebel Oil Co. v. Atl.*  
18 *Richfield Co.*, 51 F.3d 1421, 1438 & n.10 (9th Cir. 1995); *Entri, LLC v. GoDaddy.com, LLC*, 2024  
19 WL 4468488, at \*7 (E.D. Va. Oct. 10, 2024). Defendants incorrectly assert WPE does not allege  
20 their share in any market. Mot. 5. In fact, in the WordPress Plugin Distribution Market, “*substantially*  
21 *all*” WordPress plugins are published or distributed through wordpress.org (FAC ¶ 235); Defendants’  
22 share is thus near-100%. As to the WCMS Market, 64% of websites known to be built using a WCMS  
23 used WordPress, and 43% of all websites on the internet use WordPress, which Defendants claim to  
24 control (*id.* ¶¶ 52, 57–66, 204)—it is thus appropriate to attribute those shares to Defendants.

25 Further, WPE alleges market power through direct evidence, such as increased prices, reduced  
26 output, decreased quality, *or* actual exclusion of competitors, which does not require defined markets  
27 or market shares. *F.T.C. v. Indiana Fed’n of Dentists*, 476 U.S. 447, 460–61 (1986); *PLS.Com, LLC*  
28 *v. Nat’l Ass’n of Realtors*, 32 F.4th 824, 834 (9th Cir. 2022); *Kodak*, 504 U.S. at 477. WPE alleges

1 that in all four markets, Defendants: (1) raised prices (through ransom demands, which others have  
2 already paid); (2) increased other costs (service disruptions); (3) reduced quality (interfering with  
3 functionality, creating chaos, and inhibiting choice); *and* (4) excluded competition (blocking WPE  
4 from wordpress.org and seizing its ACF plugin). FAC ¶¶ 204, 212–15, 224, 236, 253–59.

5 Unable to dispute these outcomes, Defendants argue trademarks cannot themselves confer  
6 market power. Mot. at 5. But WPE does not contend that Defendants have power *because of* their  
7 self-claimed trademark “rights”; rather, it is Defendants’ market power that allows them to use those  
8 illusory “rights” to demand extortionate fees (FAC ¶ 26). In other words, Defendants are using the  
9 trademarks as an *instrumentality* (not the *source*) of their separately-derived market power.

10 Defendants also argue that the demanded payment is “not a price” (Mot. at 5), but this ignores  
11 WPE’s allegations Defendants’ royalty demands *are* an effective price increase because they: (a) are  
12 a bounty recipients must pay to access wordpress.org (and some *have* paid); and (b) have increased  
13 costs to even those that did not receive/pay them (*e.g.*, through service disruptions and losses caused  
14 by Defendants’ “nuclear war”). FAC ¶¶ 27–28, 98–100, 117, 165–67, 181, 184–86, 190, 204, 214,  
15 224, 236, 255–56. In any event, direct evidence of market power can be shown “even absent proof”  
16 of “higher prices,” *Dentists*, 476 U.S. at 461–62, including raised costs, reduced quality, and excluded  
17 competition, which WPE alleges, *see supra*, and Defendants do not address.

18 **C. WPE Adequately Alleges Defendants Engaged in Anticompetitive Conduct**

19 Defendants try to dismember their course of conduct into pieces to avoid liability (Mot. at 5–  
20 8), but “it is not proper to focus on specific individual acts of an accused monopolist while refusing  
21 to consider their overall combined effect,” and otherwise lawful acts “are unlawful . . . if done by a  
22 monopolist.” *Free FreeHand Corp. v. Adobe Sys. Inc.*, 852 F. Supp. 2d 1171, 1180 (N.D. Cal. 2012)  
23 (Koh, J.). But even separately construed, WPE’s anticompetitive conduct theories are cognizable.

24 **Deception of the Market.** Defendants deceived the market by attracting and locking in  
25 market participants through false promises that WordPress was not owned by anyone and would be  
26 “free and open,” “for everyone,” forever. *E.g.*, FAC ¶¶ 58–60, 71, 248–51, 254, 383, 391. Defendants  
27 contend this theory fails under the six-part test stated in *Harcourt Brace*. Mot. at 6. But Defendants  
28 conflate their market deception with their later disparagement of WPE. The six-part test does not



1 apply to a defendant’s deception of the market to adopt its technology. *Broadcom Corp. v. Qualcomm*  
2 *Inc.*, 501 F.3d 297, 314 (3d Cir. 2007) (not applying test to fraud in standard setting organization);  
3 *Hynix Semiconductor Inc. v. Rambus, Inc.*, 527 F. Supp. 2d 1084, 1098 (N.D. Cal. 2007) (same);  
4 *Arista Networks, Inc. v. Cisco Sys. Inc.*, 2018 WL 11230167, at \*12–13 (N.D. Cal. May 21, 2018)  
5 (six-part test applied to disparagement, not “open early, closed late” deceptive scheme like one here).

6 Even if the six-part test did apply, WPE meets it. WPE alleges statements that were: (1) clearly  
7 false—Defendants misrepresented their purported lack of control over WordPress and that WordPress  
8 would be free and open for everyone forever, FAC ¶¶ 2, 52–55, 57–59, 69–70, 83–88, 248–49, 251,  
9 254; (2) clearly material—the misstatements were key to market participants selecting WordPress  
10 over other WCMS products, *id.* ¶¶ 52, 60, 70, 73, 185, 190, 251, 254; (3) clearly likely to induce  
11 reasonable reliance—Defendants intended market participants to rely on the misstatements  
12 (particularly given Mullenweg’s status in the WordPress community) and many did so and picked  
13 WordPress *because of* the misstatements, *id.* ¶¶ 4, 48, 56, 60, 71, 74, 101; (4 & 6) made to buyers  
14 without knowledge and could not be reasonably offset—Defendants specifically deceived regarding  
15 control of, and supposed trademarks in, WordPress and the terms on which WordPress would be  
16 available, and given their deception on these subjects, only Defendants (not the market, including  
17 customers and WPE) knew the truth, *id.* ¶¶ 33, 52–60, 70–82, 249–250; and (5) continued for  
18 prolonged periods—the deception goes back to at least 2010 and continued through late 2024, *id.*, ¶¶  
19 2–3, 52, 55, 58–59, 62–63, 68–70, 250. Defendants refer to disparaging WPE, Mot. at 6, but do not  
20 meaningfully address the market deception allegations under the six-part test, so their arguments fail.

21 **Disparagement.** WPE validly alleges anticompetitive conduct by way of Defendants’  
22 disparagement of WPE and its products, contributions to the WordPress community, and purported  
23 use of Defendants’ supposed “trademark” rights. FAC ¶¶ 383, 391. As an initial matter, some courts  
24 have held the six-part test does not apply where, as here, disparagement is one piece of a larger  
25 anticompetitive scheme. *Caldera, Inc. v. Microsoft Corp.*, 87 F. Supp. 2d 1244, 1249 (D. Utah 1999).  
26 To the extent that test does apply, WPE meets it. Defendants made clearly false statements about  
27 WPE. FAC ¶¶ 22–28, 101–111, 329–331, 335–336, 339, 344–47, 351–52, 355, 361, 365–68, 372,  
28 375. They were clearly material to customers: *thousands* of customers have left WPE (as Defendants



1 themselves boast), with some specifically confirming they are *not* using WPE *because of* Defendants’  
2 misstatements. *Id.* ¶¶ 111, 169–70, 183, 340, 356, 377–78. They were also clearly likely to induce  
3 reliance: they were made by the influential Mullenweg, to WPE’s actual and potential customers (an  
4 audience with demonstrated interest in WPE), to get them to forego WPE, and many did so and left  
5 WPE because of the misstatements (confirming their reliance). *Id.* ¶¶ 337, 341, 353, 364, 369–72.  
6 On these elements, Defendants incorporate their arguments on the defamation and promissory  
7 estoppel claims, but as discussed *infra* at Sections VI & VII, those arguments are unavailing.

8 Defendants claim that their disparagement was not prolonged because it “only” occurred in  
9 September 2024. Mot. at 6. That ignores the disparagement persisted *through* the November 2024  
10 FAC and is still *ongoing* months later. FAC ¶¶ 7, 98, 110, 387, 397; compare *In re Apple iPod iTunes*  
11 *Antitrust Litig.*, 796 F. Supp. 2d 1137, 1146 (N.D. Cal. 2011) (Defendants’ sole case, no  
12 disparagement claim based on “single event”). In any case, WPE is not required to wait until more  
13 disparagement occurs so that Defendants’ “scheme succeeds” and WPE is “driven out of business.”  
14 *Washington Alder LLC v. Weyerhaeuser Co.*, 2004 WL 1068791, at \*2 (D. Or. May 7, 2004).

15 The disparagement also was not susceptible to offset and was made to buyers without  
16 knowledge of the misstatements’ subject matter. While Defendants’ arguments on these factors focus  
17 on the disparagement of WPE’s *quality*, Mot. at 6, those arguments do not address—and thus do not  
18 apply to—WPE’s antitrust claims based on Defendants’ disparagement involving WPE’s  
19 contributions to the WordPress community and Defendants’ “trademark” rights. FAC ¶¶ 23, 101–  
20 10, 383, 391. Even as to quality, many customers are *not* technically sophisticated and hire WPE for  
21 that reason (*id.* ¶¶ 33–35), and it would take time, knowhow, and money for customers to try other  
22 services and then compare them to WPE to determine whether the disparagement was false. That is  
23 a far cry from Defendants’ cited cases, where a plaintiff could neutralize the disparagement by  
24 demonstrating it actually did offer particular products (*Emulex Corp. v. Broadcom Corp.*, 2010 WL  
25 11595718, at \*7–8 (C.D. Cal. June 7, 2010)), or the audience was “sophisticated” buyers of gasoline  
26 conversion technology (*Tate v. Pac. Gas & Elec. Co.*, 230 F. Supp. 2d 1072, 1075–76, 1080 (N.D.  
27 Cal. 2002)). That Defendants’ disparagement worked—many customers left WPE—confirms  
28 customers were tricked by Defendants and the disparagement was not susceptible to neutralization.

1            **Interference with WPE’s operations, customers, and personnel.** Defendants argue their  
2 interference with WPE is only actionable through “business torts,” not antitrust. Mot. at 6. That is  
3 wrong: “merely because” a practice is actionable in tort “does not preclude” an antitrust claim based  
4 on the same practice. *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 784 (6th Cir. 2002).

5            Defendants argue their interference is a permissible “refusal to deal” with WPE. Mot. at 7–8.  
6 But WPE does not challenge Defendants’ mere denial of access to WPE to a website (wordpress.org),  
7 as in the *hiQ*, *Power Ventures*, and *CoStar* cases Defendants cite; rather, WPE challenges Defendants’  
8 deception, pretextually blocking of access of WPE and its employees **and** customers after years,  
9 blocking WPE employees’ wordpress.org credentials and commandeering WPE’s ACF plugin (akin  
10 to hacking), and use of the disruption they created to interfere with WPE’s customers. FAC ¶¶ 383,  
11 391. That states an antitrust claim. *Dial Corp. v. News Corp.*, 165 F. Supp. 3d 25, 37 (S.D.N.Y. 2016)  
12 (defendant “hack[ing] into” computers and using “defaced” products of competitor to seek customers  
13 was anticompetitive); *Kickflip, Inc. v. Facebook, Inc.*, 999 F. Supp. 2d 677, 685–86 (D. Del. 2013)  
14 (pretextually banning plaintiff from site to maintain monopoly was not permissible refusal to deal).

15            Defendants incorrectly contend that their “soliciting” of WPE customers and personnel is  
16 “competitive.” Mot. at 7–8. As to customers, the Court already found Defendants engaged in  
17 **improper** interference. Dkt. 64 at 27–31, 36, 41. Further, Defendants did **not** compete on the merits;  
18 instead, they fomented chaos among customers and encouraged those customers to break their WPE  
19 contracts. FAC ¶¶ 120–125, 180, 183, 383, 391. That states an antitrust claim. *Orwell Nat. Gas Co.*  
20 *v. Dominion Res., Inc.*, 2009 WL 112566, at \*1–2 (N.D. Ohio Jan. 16, 2009) (defendants’ inducing  
21 breach of plaintiff’s contract was anticompetitive); *SC Innovations, Inc. v. Uber Techs., Inc.*, 2020  
22 WL 2097611, at \*10–11 (N.D. Cal. May 1, 2020) (defendant’s conduct vis-à-vis plaintiff rival that  
23 created “delays” for plaintiff’s customers was anticompetitive); *compare Gen. Commc’ns Eng’g, Inc.*  
24 *v. Motorola Commc’ns & Elecs., Inc.*, 421 F. Supp. 274, 287–88 (N.D. Cal. 1976) (Defendants’ cited  
25 case, only “legitimate competitive” conduct). As to WPE’s personnel, Defendants did not engage in  
26 legitimate competition; as part of their overall “nuclear war” with WPE, Defendants started a bad-  
27 faith campaign of mass solicitation of “hundreds of WPE employees” to get them to turn against WPE  
28 **and** leave for Automattic, **and** they harassed WPE’s CEO (through threatening texts and publishing

1 her private cell phone number). FAC ¶¶ 92–97, 133, 134, 141. That states an antitrust claim. *Dooley*  
 2 *v. Crab Boat Owners Ass’n*, 2004 WL 902361, at \*1–2, 6, 11 (N.D. Cal. Apr. 26, 2004) (threats and  
 3 tortious acts to plaintiff’s employees was anticompetitive); *Universal Analytics, Inc. v. MacNeal-*  
 4 *Schwendler Corp.*, 914 F.2d 1256, 1258 (9th Cir. 1990) (“predatory hiring” anticompetitive where  
 5 done with “predatory intent”); *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 109–10  
 6 (3d Cir. 2010) (“predatory hiring” of plaintiff’s employees to harm plaintiff was anticompetitive).

7 **D. WPE Adequately Alleges Defendants Committed Unlawful “Negative” Tying**

8 WPE asserts tying claims based on Defendants’ conditioning access to WordPress plugin  
 9 distribution (the “tying” product) on customers *not* using WordPress web hosting or custom field  
 10 plugins (the “tied” products) from WPE. FAC ¶¶ 400–24. Defendants’ tying arguments all fail.

11 *First*, Defendants’ argument these claims fail for lack of market power (Mot. at 8) is without  
 12 merit. As discussed above, the FAC sufficiently establishes Defendants’ power. *See* Section I.B.

13 *Second*, Defendants misconstrue the tie by arguing WPE must allege “customers must  
 14 purchase the ‘tied’ products of Web Hosting Services or Custom Field Plugins from Defendants . . .  
 15 to access the ‘tying’ product of Plugin Distribution.” Mot. at 8. That confuses *positive* and *negative*  
 16 tying, and is an element of the former but not the latter. Defendants’ own cited case, *Aerotec Int’l,*  
 17 *Inc. v. Honeywell Int’l, Inc.*, recognizes the distinction: a “positive” tie occurs where “sale of the  
 18 desired (‘tying’) product is conditioned on purchase of another (‘tied’) product,” while a “negative  
 19 tie . . . occurs when the customer promises not to take the tied product from the defendant’s  
 20 competitor[.]” 836 F.3d 1171, 1178 (9th Cir. 2016). WPE asserts *negative* tying: Defendants coerced  
 21 customers into *not* using WPE’s web hosting or custom field plugins by: (a) blocking access to  
 22 wordpress.org from the administrative panel of customers’ websites if they used WPE’s web hosting;  
 23 and (b) implementing a loyalty “checkbox” (which Defendants do not mention). FAC ¶¶ 117, 149–  
 24 50, 402–04, 414–16. Defendants’ coercion was successful—they caused many customers to leave  
 25 WPE. *Id.* ¶¶ 7, 165–77, 215, 405, 417. That suffices. *Entri*, 2024 WL 4468488, at \*4–8 & n.5 (motion  
 26 to dismiss denied where customers agreed not to use competitors’ products, citing defendant’s terms  
 27 of use and “scare tactic” and plaintiff’s lost customers, collecting cases stating negative tying claim).

28 Defendants claim that despite their misconduct, customers could access web hosting services,

1 custom field plugins, or plugin distribution through other means. Mot. at 8–9. WPE alleges those  
2 other “means” are practically ineffective (*e.g.*, FAC ¶¶ 230, 403–04), and indeed the Court already  
3 rejected Defendants’ arguments that WPE and its customers were “not cut-off from WordPress.” Dkt.  
4 64 at 33–34. At best, Defendants’ argument is a dispute of WPE’s factual allegations that Defendants  
5 effectively coerced others, which is not resolvable at this stage. In any case, whether customers were  
6 “free to access” WPE in other ways does not negate that Defendants caused customers to forego WPE  
7 (when they otherwise would not have), thus impeding competition and constituting tying. Phillip E.  
8 Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1752 (2022 ed.) (tying shown “with the practical effect  
9 of preventing *some purchases* from the defendant’s rivals that might otherwise have been made”).

10 **Finally**, Defendants’ claim the tie is a mere “refusal to deal” is wrong. Mot. at 8–9. A refusal-  
11 to-deal is defendant’s **unilateral** conduct vis-a-vis competitors; tying, as here, is **multilateral** conduct:  
12 “the use by the seller of its ‘leverage’ to force a purchaser to do something that he would not do.”  
13 *Tucker v. Apple Computer, Inc.*, 493 F. Supp. 2d 1090, 1097 (N.D. Cal. 2006). Courts reject efforts  
14 like Defendants’ to conflate the two. *Kodak*, 504 U.S. at 463 n.8; *Entri*, 2024 WL 4468488, at \*6–7.

## 15 **II. WPE IS ENTITLED TO DECLARATORY JUDGMENT ON DEFENDANTS’ 16 TRADEMARK MISUSE (COUNT 16)**

17 Defendants’ motion to dismiss WPE’s claim for a declaration of trademark misuse should be  
18 denied. Defendants concede the existence of trademark misuse as an affirmative defense as they  
19 must, given established precedent. Mot. at 9; *see also* 15 U.S.C. § 1115(b)(7) (use of mark “to violate  
20 the antitrust laws” is one of the “defenses or defects” for alleged infringement of even “incontestable”  
21 trademarks ). Defendants simply contest WPE’s ability to present trademark misuse as a declaratory  
22 claim rather than solely as an affirmative defense. Mot. 9. This argument fails for three reasons.

23 **First**, Defendants cite no authority (Mot. at 9) precluding a standalone declaratory judgment  
24 claim for trademark misuse. *Cf. James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts,*  
25 *Inc.*, 2013 WL 655314, at \*12 (C.D. Cal. Feb. 12, 2013) (dismissing counterclaim for trademark  
26 misuse alleging damages); *King v. Am. Fish Attractor*, 2016 WL 4699707, at \*3 (W.D. Ark. Sept. 7,  
27 2016) (relying on patent misuse precedent to reject that defense could be “converted to an affirmative  
28 claim for damages”); *Loblaw Companies Ltd. v. Azimi*, 2001 WL 36028016, at \*16 (N.D. Cal. Oct.  
17, 2001) (dismissing counterclaim for “reverse domain name hijacking”).

1           **Second**, courts permit other trademark defenses to proceed as affirmative declaratory  
2 judgment claims. *E.g.*, *Stone Brewing Co., LLC v. MillerCoors LLC*, 2019 WL 1383273, at \*10–12  
3 (S.D. Cal. Mar. 26, 2019) (denying motion to dismiss claim for declarations of trademark  
4 noninfringement and laches); *LOEC, Inc. v. ZippMark, Inc.*, 2015 WL 12752553, at \*2–4 (C.D. Cal.  
5 Apr. 2, 2015) (same). Defendants offer no compelling reason to treat trademark misuse differently.

6           **Third**, judicial economy favors allowing WPE’s declaratory claim to proceed. Given its  
7 pending antitrust claims, requiring WPE to replead its misuse allegations later as an affirmative  
8 defense would needlessly duplicate effort, contravening the mandate of the Federal Rules of Civil  
9 Procedure for “just, speedy, and inexpensive determination” of proceedings. Fed. R. Civ. P. 1.

10           Unlike in *VMG Enterprises*, which “merely restated general principles of antitrust law without  
11 specifically showing how the plaintiff has used the trademark for improper antitrust purposes,” *VMG*  
12 *Enterprises, Inc. v. F. Quesada & Franco, Inc.*, 788 F. Supp. 648, 657 (D.P.R. 1992), WPE has  
13 specifically alleged how Defendants weaponized their purported trademark rights for anticompetitive  
14 purposes (including to demand exorbitant ransoms after more than a decade of inaction, and to block  
15 access unless the ransoms were paid). *See* FAC ¶¶ 40-47, 104-105, 204, 212–214. Just as WPE’s  
16 claims for declarations of noninfringement and laches are properly pled, so too is Count 16.

### 17 **III. WPE STATES A VALID CLAIM FOR ATTEMPTED EXTORTION (COUNT 4)**

#### 18 **A. California Recognizes A Right to Relief Even If The Extortion Was Rebuffed**

19           California law provides a civil remedy to victims of attempted extortion—even when they  
20 refuse to capitulate to demands—so long as they plead some form of damages. Defendants’  
21 contention that victims must pay the ransom before seeking relief is both legally incorrect and defies  
22 sound public policy. Defendants’ narrow focus on Penal Code § 524 ignores common law principles  
23 that recognize attempted extortion as an actionable tort, where the victim has suffered harm.

24           The California Supreme Court’s decision in *Flatley v. Mauro* crystallizes this principle.  
25 There, despite the victim’s refusal to pay an extortionate demand, the victim’s “extortion” claim  
26 survived a motion to strike, because “[t]he sending of a threatening letter with intent to extort money  
27 is ‘punishable in the same manner as if such money ... were actually obtained.’” *Flatley v. Mauro*,  
28 39 Cal. 4th 299, 311, 326–33 (2006) (citing Pen. Code § 523). Indeed, as noted in *Cohen v. Brown*,

1 173 Cal. App. 4th 302, 318 (2009), “[t]he threat made by an extortionist does not have to succeed in  
2 producing an exchange of money in order to constitute extortion.” Federal courts have similarly  
3 found a right to relief, so long as the plaintiff alleges cognizable harm. *See Monex Deposit Co. v.*  
4 *Gilliam*, 666 F. Supp. 2d 1135, 1137 (C.D. Cal. Sept. 4, 2009) (that plaintiff did not pay attempted  
5 extortionist not fatal to tort claim, where plaintiff was harmed as a result of the scheme in other ways).  
6 Indeed, courts in this District have permitted attempted extortion claims to go forward in similar  
7 circumstances to those presented here. *See TaiMed Biologics, Inc. v. Numada Corp.*, 2011 WL  
8 1630041, at \*5 (N.D. Cal. Apr. 29, 2011) (Beeler, J.) (amendment to add “attempted extortion” claim  
9 permitted); *S&C Electric Co. v. Contreras*, 2011 WL 673740, at \*2 (N.D. Cal. Feb. 17, 2011) (Alsup,  
10 J.) (granting preliminary injunction on plaintiff’s “attempted civil extortion” claim).

11 Ignoring this, Defendants argue California law has changed, citing an unpublished Court of  
12 Appeals decision, *Tran v. Eat Club, Inc.*, 2020 WL 4812634 (Cal. App. Aug. 18, 2020). Mot. 10. It  
13 has not, and even that decision confirms WPE’s position. The plaintiff in *Eat Club* failed to allege  
14 harm in any way *other than* receiving ransom demands. 2020 WL 4812634 at \*15. This distinguished  
15 the *Eat Club* claim from *Monex*, where the claim survived because it alleged other harm. 666 F.  
16 Supp. 2d at 1137. The law remains that a civil claim for attempted extortion exists if the victim  
17 suffered cognizable harm, even if the ransom was rebuffed. Defendants’ other cited cases do not  
18 conclude otherwise—*Evans Hotels, LLC v. United Here! Local 30* merely held Penal Code § 524 did  
19 not create a private cause of action (not reaching common law claim) and that the plaintiff’s  
20 “conclusory” and “contradictory” attempted extortion claim failed for numerous reasons (WPE’s  
21 allegations suffer no such defects). 2021 WL 10310815 \*28-30 (S.D. Cal. Aug. 26, 2021). Similarly,  
22 the claim in *Intermarketing Media, LLC v. Barlow* failed, including due to “damages [alleged] in only  
23 the most conclusory of terms” unlike here. 2021 WL 5990190, at \*12–14 (C.D. Cal. May 4, 2021).

24 **B. WPE Has Properly Pleaded That Defendants’ Threats Were Wrongful**

25 Defendants further argue WPE fails to allege Defendants’ threats were wrongful, and thus  
26 extortionate, under the Ninth Circuit’s standard whereby a litigant must demonstrate that it (a) had a  
27 pre-existing right to be free from the threatened harm, *or that* (b) the defendant had no right to seek  
28 payment for the service offered. Mot. 10 (citing *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1133 (9<sup>th</sup> Cir.



1 2014)). While either prong suffices to defeat Defendants’ Motion, WPE has properly pled *both*.

2 *First*, WPE unquestionably had a right to be free from its competitor launching a “nuclear  
3 war” against it. FAC ¶93. As the Ninth Circuit has observed, “what you may do in a certain event  
4 you may threaten to do, that is, give warning of your intention to do in that event, and thus allow the  
5 other person the chance of avoiding the consequences.” *Levitt*, 765 F.3d at 1132 (emphasis added).  
6 Nuclear wars designed to annihilate a competitor do not qualify. Defendants urge that “access to the  
7 Website” could be revoked for “guideline violations.” Mot. 11. But as alleged, Defendants’ own  
8 admissions confirm WPE did not lose access due to “guideline violations,” but rather due to  
9 Defendants’ intentional, improper acts—and this Court already rejected arguments Defendants “had  
10 a right to take” the complained-of actions. Dkt. 64 at 30; Section VII *infra*. Defendants’ assertion  
11 WPE had no right to be free of public criticisms (Mot. 11) also falls flat as extortionate threats are not  
12 protected speech. *See Flatley*, 39 Cal. 4th at 328. WPE also had a right to be free of Defendants’  
13 intentional interference with WPE’s customers, as the Court already has found. Dkt. 64 at 29-31.

14 *Second*, Defendants had no right to demand the extortionate payment they did, as WPE has  
15 alleged. FAC ¶ 294. Their insistence that this was routine trademark enforcement is belied by the  
16 allegations that Defendants approved of WPE’s trademark use for more than a decade without seeking  
17 a license, never objected to other community members using the trademark, and Mullenweg’s  
18 admission that he set the purported 8% “license fee” based on how much money WPE has (*i.e.*, free  
19 cash flow) rather than tying it to any claimed value for the trademark use. *Id.* ¶¶ 27, 40–46, 214, 312.  
20 The “trademark” assertion is and always was a sham, as WPE has alleged. *Id.* ¶¶ 91, 429. Defendants’  
21 factual disagreement with WPE’s allegations is not a basis for dismissal under Rule 12.

22 **C. WPE Has Properly Pleaded Harm Proximately Caused by the Scheme**

23 Contrary to Defendants’ argument, the FAC alleges that WPE suffered harm proximately  
24 caused by Defendants’ scheme. Because WPE did not pay the ransom, Defendants carried through  
25 on their threat to destroy WPE. As alleged, this resulted in losses of customers and harm to WPE’s  
26 goodwill and market reputation, forcing WPE to invest in defensive measures such as workarounds  
27 and increased staff support to address customer inquiries related to Defendants’ wrongful actions.  
28 FAC ¶¶ 164–84; *see also* Dkt. 64 at 34 (finding “ample evidence” of harm in multiple categories).

1 Defendants baldly assert that the “allegations are insufficient to establish the requisite  
 2 causation,” Mot. 12. But the Court has already rejected arguments that WPE “failed to tie the alleged  
 3 harm to Defendants’ actions.” Dkt. 64 at 34; *see also* FAC ¶¶164–184, 295. The claimants in the  
 4 three cases Defendants cite (Mot. at 12) all fell short of the basic pleading requirements, unlike WPE’s  
 5 well-pled harm allegations here. *See Intermarketing Media*, 2021 WL 5990190, at \*13–14 (damages  
 6 alleged in “conclusory terms”); *Am. Shooting Center v. Secfor Int’l*, 2015 WL 1914924, at \*4 (S.D.  
 7 Cal. Apr. 27, 2015) (defendant had only made a “vague statement” that “hardly rises to the level of a  
 8 wrongful threat”); *Raiser v. Ventura College of Law*, 2009 WL 10692058, at \*3 (C.D. Cal. Sept. 1,  
 9 2009) (failure to allege “nominal” damages, where student who refused compromise on discipline).

10 **D. WPE Is Not Bringing an Attempted Extortion Claim “Based on Fraud”**

11 Defendants’ effort to recast this as a fraud claim misses the mark. Mot. 12–13. The elements  
 12 of attempted extortion are established under California law, and do not include fraud requirements.

13 **IV. WPE STATES A VALID CLAIM THAT DEFENDANTS HAVE VIOLATED THE**  
 14 **COMPUTER FRAUD AND ABUSE ACT (COUNT 3 & 19)**

15 **A. WPE Sufficiently Alleges A Violation of Section 1030(a)(7)**

16 The FAC alleges that Defendants, intending to extort, (1) threatened damage to protected  
 17 computers, or (2) demanded payment in relation to such damage. 18 U.S.C. § 1030(a)(7)(A), (C);  
 18 FAC ¶¶ 280–289. Defendants argue their actions are not extortionate because they did not use  
 19 “wrongful” methods, but that is wrong for the same reasons described above as to the attempted  
 20 extortion claim. Defendants further assert that the CFAA does not apply to “modifications to its *own*  
 21 systems in a way that denies third parties access to services they have no enforceable right to receive.”  
 22 Mot. 16. But WPE alleges damages to *WPE’s own* systems and computers as well as the computers  
 23 of its plugin users. FAC ¶¶ 113–119 (blocked access to wordpress.org resources), 155-163 (forcible  
 24 hijacking of ACF plugin). Moreover, the CFAA imposes no such limitation on the ownership of a  
 25 “protected computer.” 18 U.S.C. § 1030(e)(2)(B); *see Workgroup Tech. Partners, Inc. v. Anthem,*  
 26 *Inc.*, 2016 WL 424960, at \*23 (D. Me. Feb. 3, 2016) (CFAA says “simply ‘a protected computer,’  
 27 ‘any computer,’ and ‘a computer’—not ‘a computer not owned by the [perpetrator].”) The Ninth  
 28 Circuit has affirmatively held that “[a]ny person”—not just owners of a “protected computer”—“may



1 be proximately harmed by [violation of the CFAA], particularly if they have rights to data stored on  
2 it.” *Theofel v. Farey-Jones*, 359 F.3d 1066, 1078 (9th Cir. 2004); *see also SkyHop Techs., Inc. v.*  
3 *Narra*, 58 F.4th 1211, 1225–27 (11th Cir. 2023) (finding § 1030(a)(7) violation by diminishing access  
4 to a third-party server owned by Amazon because it meets the definition of a “protected computer”).

5 **B. WPE Sufficiently Alleges A Violation of Section 1030(a)(5)**

6 WPE validly alleges a violation of Section 1030(a)(5) of the CFAA. To state a claim under  
7 this subsection, a plaintiff must allege that a defendant either (A) “knowingly cause[d] the  
8 transmission of a program, information, code, or command, and as a result of such conduct,  
9 intentionally cause[d] damage without authorization to a protected computer”; (B) “intentionally  
10 accesse[d] a protected computer without authorization” and “recklessly cause[d] damage” due to such  
11 access; or (C) “intentionally accesse[d] a protected computer without authorization” and caused  
12 “damage and loss.” 18 U.S.C. § 1030(a)(5). Defendants make two arguments for dismissal: one  
13 premised on the “intent” requirement of subsections (A) and (B), and one premised on the  
14 “access...without authorization” requirement of subsections (B) and (C). Mot. 14–16. Both fail.

15 **“Intentionally” or “recklessly” caused damage.** Defendants claim that WPE fails to allege  
16 damage to the protected computers was caused: (1) “intentionally” under subsection (A), and (2)  
17 “recklessly” under subsection (B). Not true: the FAC alleges both. Defendants *admitted* their  
18 expropriation of the ACF plugin was an intentional act to retaliate for WPE’s lawsuit and intended to  
19 strip WPE of its “access to the plugin directory listing,” thereby “jeopardizing the security of WPE’s  
20 customers and the availability and integrity of WPE’s ACF plugin.” FAC ¶¶ 159, 162 (@WordPress  
21 tweet stating that if WPE “dropped its lawsuits, apologized, and got in good standing with its  
22 trademark use, you are welcome to have access to the plugin directory listing”). Likewise, Defendants  
23 acknowledged that WPE’s and its users’ access to wordpress.org resources was intentionally blocked  
24 as retaliation for WPE bringing legal claims. FAC ¶ 115. The FAC also alleges that Defendants  
25 “recklessly caus[ed] damage” to protected computers with conscious disregard of the aforementioned  
26 risks, as Defendants carried out the expropriation to retaliate for WPE’s lawsuit. FAC ¶ 452. These  
27 allegations make this case readily distinguishable from *Margolis v. Apple Inc.* cited by Defendants,  
28 where the plaintiff alleged no facts to support its “bare bones” allegation that Apple intentionally

1 caused damages to their iPhone devices, and the pleaded facts showed that it was “equally plausible  
2 that Apple concluded...that the benefit of [software update] outweighed any possible loss of  
3 performance.” 2024 WL 3755364, at \*5 (N.D. Cal. Aug. 6, 2024).

4 ***Access “without authorization.”*** With respect to subsections (B) and (C), the FAC alleges  
5 Defendants had no valid authorization to access the protected computers behind the ACF plugin, as  
6 any purported consent would have been vitiated by Defendants’ alleged deceit. Notably, Defendants  
7 do not dispute that their access was “without authorization” under subsection (A), meaning that WPE  
8 has pleaded at least one § 1030(a)(5) claim under that subsection not contested by Defendants.

9 The FAC properly alleges Defendants accessed protected computers “without authorization”  
10 by obfuscating the origin of the SCF plugin and improperly substituting it for WPE’s own ACF  
11 plugin. FAC ¶ 155 (“the ‘update now’ prompt was listed below the author of the plugin ‘WP  
12 Engine’”). And with respect to the users who opted in to automatic plugin updates, the FAC alleges  
13 that SCF was installed based on the false pretense that it was an “update” of the pre-existing ACF  
14 plugin. FAC ¶¶ 153–157. In either case, the FAC properly alleges that no consent was obtained from  
15 either WPE or ACF users and customers of wordpress.org to overwrite existing plugins developed  
16 and maintained by WPE with entirely new plugins developed and maintained by Defendants, and  
17 Defendants thus lacked authorization. FAC ¶ 159. As Defendants’ cited cases illustrate, unlike access  
18 based on valid, voluntary and adequately informed consent, “ill-gotten consent,” such as one obtained  
19 through the perpetrator’s “pos[ing] as someone else or blatantly misdescrib[ing] the nature of [the  
20 software] updates in order to gain access,” is sufficient to satisfy the “access...without authorization”  
21 element of §1030(a)(5). *In re Apple Inc. Device Performance Litig.*, 347 F. Supp. 3d 434, 452-453  
22 (N.D. Cal. 2018), on reconsideration in part, 386 F. Supp. 3d 1155 (N.D. Cal. 2019). *See also Bui-*  
23 *Ford v. Tesla, Inc.*, 2024 WL 694485, at \*4 (N.D. Cal. Feb. 20, 2024) (critically missing are  
24 allegations that Tesla “posed as a different entity or misdescribed the nature of the software updates”).

25 Indeed, the FAC alleges that Defendants posed as WPE and installed SCF under the guise of  
26 an “update” of WPE’s ACF plugin. FAC ¶¶ 153–159. The Ninth Circuit has observed that  
27 “[a]llowing consent procured by known mistake to serve as a defense would seriously impair” the  
28 operation of the CFAA, as “Congress surely did not intend to exempt such intrusions” where a

1 perpetrator could “use someone else’s password to break into a mail server and then claim the server  
2 ‘authorized’ his access.” *Theofel*, 359 F.3d at 1073-74. Following this same approach, other courts  
3 have found that a defendant accesses a computer “without authorization” under the CFAA by falsely  
4 posing as someone else to defraud in order to gain access—exactly what the FAC alleges Defendants  
5 did here. *Yoder & Frey Auctioneers, Inc. v. EquipmentFacts, LLC*, 774 F.3d 1065, 1069 (6th Cir.  
6 2014) (defendant violated CFAA “by posing as one of [plaintiff’s] customers” in order to gain  
7 “unauthorized access” to plaintiff’s online platform); *United States v. Willis*, 476 F.3d 1121, 1123  
8 (10th Cir. 2007) (affirming conviction under CFAA where defendant aided and abetted accessing  
9 without authorization of a protected computer through identity theft); *Bowen v. Porsche Cars, N.A.,*  
10 *Inc.*, 561 F. Supp. 3d 1362, 1370 (N.D. Ga. 2021) (vehicle owner’s tacit consent to receive satellite  
11 radio signals did not imply consent to modify a vehicle’s software); Restatement (Second) of Torts §  
12 892B (1979) (consent induced by misrepresentation “is not effective for the unexpected invasion”).  
13 Defendants’ cited cases are thus distinguishable because they either involved access to publicly  
14 available information or misuse of information after it was obtained through authorized access in the  
15 first place. *hiQ Labs, Inc. v. LinkedIn Corp.*, 31 F.4th 1180, 1199 (9th Cir. 2022) (scraping data  
16 publicly available on LinkedIn sites was not access without authorization); *LVRC Holdings LLC v.*  
17 *Brekka*, 581 F.3d 1127, 1135 (9th Cir. 2009) (employee “accessed documents or information to which  
18 he was entitled by virtue of his employment”). Any purported consent or access here would have  
19 been vitiated by Defendants’ misrepresentation about the source and nature of the SCF plugin. And  
20 the observation that “the ACF plugin itself was open source,” Mot. 16, does not convey any rights to  
21 Defendants to change the open source owners’ distribution of the software without permission and is  
22 irrelevant to whether a violation of the CFAA has been properly pled. At a minimum, the FAC’s  
23 allegation that Defendants’ forcible take-over of ACF was accomplished with a masked “update”  
24 “without the customers’ consent or even knowledge” must be “accept[ed]...as true and  
25 construe[d]...in the light most favorable to the nonmoving party.” *Michelle K. v. Cnty. of Sonoma*,  
26 No. 22-CV-01202-AMO, 2024 WL 4336618, at \*4 (N.D. Cal. Sept. 27, 2024); FAC ¶ 159.

27 **V. WPE STATES A VALID UNFAIR COMPETITION LAW CLAIM (COUNT 5)**

28 WPE properly alleges a UCL claim under both the “unlawful” and “unfair” prongs, either of

1 which independently suffices. FAC ¶¶ 296–303. Defendants’ UCL arguments are all unavailing.

2 **Unlawful prong.** Defendants argue WPE’s unlawful prong claim fails because its extortion,  
3 CFAA, and antitrust claims fail and thus cannot serve as predicate “unlawful” acts. Mot. at 17. But  
4 Defendants are wrong, as WPE adequately alleges those claims. Sections I, III, IV, *supra*. Moreover,  
5 Defendants’ assertion ignores the additional claims that are predicate unlawful acts. FAC ¶ 296  
6 (incorporating WPE’s other claims by reference pursuant to Fed. R. Civ. P. 10(c)). This includes  
7 WPE’s Lanham Act claims (Counts 17–18, FAC ¶¶ 435–49) that Mullenweg did not move to dismiss.

8 **Unfair prong.** Defendants argue WPE’s “unfair” prong claim fails because the FAC does not  
9 allege “*competition* has been impacted.” Mot. at 18. Wrong again. Defendants ignore the FAC’s  
10 factual allegations explaining how Defendants’ conduct harmed *competition*, including by, *e.g.*,  
11 disadvantaging rival WCMSs (competitors to WordPress in the foremarket) and allowing Defendants  
12 to raise prices, increase costs, reduce quality, and exclude competitors in the aftermarkets—affecting  
13 more than WPE itself. *E.g.*, FAC ¶¶ 253–59. Defendants’ cited cases, Mot. at 17–18, are inapt. *See*  
14 *Snapkeys, Ltd. v. Google LLC*, 2020 WL 6381354, at \*3 (N.D. Cal. Oct. 30, 2020) (“only conclusory  
15 allegations” of “harm to the market as a whole,” and no “specific facts” as to harm to others beyond  
16 plaintiff); *CoStar Grp., Inc. v. Com. Real Est. Exch. Inc.*, 2023 WL 2468742, at \*2, \*7 (C.D. Cal.  
17 Feb. 23, 2023) (citing legal standard but not dismissing UCL claim on this basis).

18 Defendants argue a failure to state an antitrust claim “necessarily precludes” an unfair prong  
19 claim based on the same conduct. Mot. at 18. That argument is misguided for several reasons. For  
20 one, WPE does state multiple antitrust claims as described above. In addition, the Ninth Circuit has  
21 *rejected* Defendants’ argument “as foreclosed by California law” as it would “collaps[e] the ‘unfair  
22 and ‘unlawful’ prongs into each other.” *Epic*, 67 F.4th at 1001. A “*proof deficiency*” in an antitrust  
23 claim does not foreclose an unfair prong claim; only “a *categorical legal bar*” that acts as a safe  
24 harbor to an antitrust claim does. *Id.* (emphases in original). At most, Defendants raise supposed  
25 pleading defects, not any “safe harbor” (and to the extent Defendants suggest “refusal-to-deal” as a  
26 categorial bar, WPE’s claims do not rely on any mere refusal-to-deal here). *See* Section I, *supra*.

27 Defendants’ unfair prong arguments are all based on the “competitor” test. They ignore the  
28 separate “balancing” test, which also applies to WPE’s unfair prong claim. Where the plaintiff is a

1 “consumer” of the defendant’s services, a business practice is also unfair, as determined by  
2 “weigh[ing] the utility of the defendant’s conduct against the gravity of the harm to the alleged  
3 victim.” *Epic*, 67 F. 4th at 1000. The balancing test is “fact intensive” and “not conducive to  
4 resolution at the motion to dismiss phase.” *In re MacBook Keyboard Litig.*, 2019 WL 1765817, at \*9  
5 (N.D. Cal. Apr. 22, 2019). These two tests “are not mutually exclusive,” and a plaintiff may be both  
6 a competitor and a consumer (as was the case in *Epic*). *Epic*, 67 F. 4th at 1000–01.

7 Here, WPE alleges it is both a competitor and a consumer of Defendants’ services. Through  
8 its web hosting services, WPE competes with Defendants. FAC ¶ 205. As a developer that uses and  
9 distributes plugins on wordpress.org, WPE is also a consumer. *Id.* ¶¶ 37, 86, 151, 225. That  
10 separately triggers the balancing test, which WPE more than meets by alleging unnecessary, grave  
11 harm from Defendants’ conduct (which the Court already found, Dkt. 64 at 31–35). Indeed, the harm  
12 from Defendants’ conduct is *not* outweighed by any pro-competitive purpose. FAC ¶¶ 384, 394, 407,  
13 419. Defendants do not even try to ascribe *any utility* to their actions, Mot. at 17–18, and they do not  
14 even address the balancing test (which separately sustains WPE’s unfair prong claim as alleged).

15 **VI. THE ANTI-SLAPP STATUTE DOES NOT APPLY BECAUSE WPE’S**  
16 **DEFAMATION CLAIMS ARE BASED ON COMMERCIAL SPEECH**

17 Defendants move to strike WPE’s defamation claims under California’s anti-SLAPP statute,  
18 arguing they arise from protected speech. Mot at 18–19. Where, as here, an anti-SLAPP motion is  
19 brought before sufficient discovery, the “district court should apply the [Rule] 12(b)(6) standard and  
20 consider whether a claim is properly stated.” *Planned Parenthood Fed’n of Am., Inc. v. Ctr. for Med.*  
21 *Progress*, 890 F.3d 828, 834 (9th Cir. 2018). Defendants’ arguments fail under this standard.

22 As a threshold matter, Defendants’ arguments fail because WPE’s defamation claims are  
23 exempted from the anti-SLAPP statute by § 425.17(c)’s commercial speech exemption. Mot. 18.  
24 Section 425.17(c) exempts any cause of action when: “(1) the cause of action is against a person  
25 primarily engaged in the business of selling or leasing goods or services; (2) the cause of action arises  
26 from a statement or conduct by that person consisting of representations of fact about that person’s  
27 or a business competitor’s business operations, goods, or services; (3) the statement or conduct was  
28 made either for the purpose of ... promoting, or securing sales or leases of, or commercial transactions

1 in, the person’s goods or services ...; and (4) the intended audience for the statement [is an actual or  
 2 potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an  
 3 actual or potential buyer or customer].” *Neurelis, Inc. v. Aquestive Therapeutics, Inc.*, 71 Cal. App.  
 4 5th 769, 785–86 (2021) (citing § 425.17(c)(2)). The FAC adequately alleges each element of this  
 5 exemption, thus precluding application of the anti-SLAPP statute entirely.

6 **First**, Defendants are in the business of selling goods and services: namely, WordPress  
 7 hosting services. FAC ¶¶ 334, 350, 360; *see id.* ¶¶ 10, 12. **Second**, WPE’s defamation claims arise  
 8 from Defendants’ “representations of fact about [WPE’s] business operations, goods, or services.”  
 9 FAC ¶¶ 329–30, 365–66; *see id.* ¶¶ 335–36, 370–71; *Weiland Sliding Doors & Windows, Inc. v.*  
 10 *Panda Windows & Doors, LLC*, 814 F. Supp. 2d 1033, 1038 (S.D. Cal. 2011). **Third**, Defendants’  
 11 statements were made for the purpose of “promoting, or securing sales or leases of, or commercial  
 12 transactions in, [Defendants’] goods or services” because each statement was meant to “cause WPE’s  
 13 customers to switch from WPE’s hosting services to Defendants’ hosting services.” *Id.* at 1037; FAC  
 14 ¶¶ 334, 369, 371. They were made: (1) at a WordCamp keynote speech where Defendants encouraged  
 15 the audience to purchase Automattic’s services over WPE’s (FAC ¶ 370); (2) during an interview  
 16 where Defendants were promoting Automattic’s services and encouraging customers to leave WPE’s  
 17 hosting products for Defendants’ (*id.* ¶¶ 371–72); and (3) in articles on wordpress.org, a website  
 18 advertising Defendants’ hosting services, with each article showcasing a link that, “when clicked,  
 19 lead[] directly to [a] . . . page recommending Defendants’ hosting products,” *id.* ¶¶ 335–363; *see id.*  
 20 ¶¶ 329–330, 332. Indeed, Defendants told “WPE customers that Pressable will pay for the costs of  
 21 breaching their current contracts with WPE” if they switched to Pressable (*id.* ¶ 122), and offering  
 22 WPE customers “one year free of any [wordpress.com] plan” (*id.* ¶ 123). **Fourth**, Defendants’  
 23 intended audience was “actual or potential buyer[s] or customer[s], or [people] likely to repeat the  
 24 statement to, or otherwise influence” the purchasing of hosting services for their WordPress websites.  
 25 *Id.* ¶¶ 107, 109, 111, 337, 361, 364, 366–67. Because Defendants’ defamatory comments meet each  
 26 requirement for §425.17(c)’s commercial speech exemption, the anti-SLAPP statute is inapplicable.

27 **A. WPE’S Claims Are Not Subject to the Anti-SLAPP Statute Because the**  
 28 **Statements Are Not a Matter of Public Interest**



1 Defendants’ anti-SLAPP motion fails for a further, independent reason. Defendants have not  
2 met *their* burden of establishing their statements (1) involve “a public issue or an issue of public  
3 interest” and (2) maintain more than an attenuated connection to that issue. *Wilson v. Cable News*  
4 *Network, Inc.*, 7 Cal. 5th 871, 884, 902-03 (2019). Defendants only argue that “[t]he public is plainly  
5 interested in the health and future of WordPress—the software on which over 43 percent of all  
6 websites run, FAC ¶ 48, and quality and efficacy of WPE’s offerings, which are marketed and sold  
7 to the public.” Mot. 19. This cursory argument is insufficient.

8 Courts first identify “what ‘public issue or [ ] issue of public interest’ the speech in question  
9 implicates” and then examine what “functional relationship exists between the speech and the public  
10 conversation” about that issue and whether the speech “in some manner itself contribute[s] to the  
11 public debate.” *FilmOn.com Inc. v. DoubleVerify Inc.*, 7 Cal. 5th 133, 149-50 (2019).

12 Statements implicating a public interest generally “concern[] a person or entity in the public  
13 eye[,] ... conduct that could directly affect a large number of people beyond the direct participants[,]  
14 ... or a topic of widespread, public interest.” *Rivero v. Am. Fed’n of State, Cnty., & Mun. Employees,*  
15 *AFL-CIO*, 105 Cal. App. 4th 913, 924 (2003). A product or service’s prevalence alone does not  
16 transform statements about it into “an issue of public interest.” *GOLO, LLC v. Higher Health*  
17 *Network, LLC*, 2019 U.S. Dist. LEXIS 18506, at \*40–41 (S.D. Cal. Feb. 5, 2019) (“[J]ust because  
18 GOLO is a ‘leading weight loss and wellness program,’ that does not necessarily mean that  
19 Defendants’ speech about GOLO is an issue of public interest.”); *Scott v. Metabolife Int’l, Inc.*, 115  
20 Cal. App. 4th 404, 423 (2004) (issue of public interest not created “simply because a lawsuit affects  
21 a large number of consumers and involves a life-threatening illness”). In addition, “commercial  
22 speech about a specific product or service is not a matter of public interest within the meaning of the  
23 anti-SLAPP statute, even if the product category . . . is a subject of public interest.” *L.A. Taxi Coop.,*  
24 *Inc. v. The Indep. Taxi Owners Assn. of Los Angeles*, 239 Cal. App. 4th 918, 928 (2015) (speech not  
25 “in connection with a matter of public interest” when “the commercial speech at issue was not about  
26 taxicab companies in general, but about a specific taxicab company.”); *Scott*, 115 Cal. App. 4th at  
27 423 (a “cause of action for false advertising . . . based on advertising by a manufacturer . . . about the  
28 safety and efficacy of its specific weight loss product . . . for the profit-generating purpose of selling

1 that product to the consuming public” did not concern a public interest.) Here, the FAC alleges  
2 Defendants’ statements are about a specific service (web hosting) from a specific company (WPE),  
3 and Defendants have not established that any “issue of public interest is implicated” by them. *Wilson*,  
4 7 Cal. 5th at 884 (stating it is defendants’ burden to establish an issue of public interest is implicated).

5 Moreover, Defendants do not show how the connection between their defamation and their  
6 purported “issues of public interest” is more than attenuated. *Xu v. Huang*, 73 Cal. App. 5th 802, 817  
7 (2021) (“[A]n attenuated connection is not enough to establish protected activity.”). As the California  
8 Supreme Court has recognized, “it is not enough that the statement refer to a subject of widespread  
9 public interest, the statement must in some manner contribute to the public debate.” *FilmOn*, 7 Cal.  
10 5th at 150–51. Defendants offer no explanation as to how their disparagement about a competitor’s  
11 services contributed to the public debate about the health and future of WordPress. Nor should they  
12 be permitted to offer one in reply since “[a]rguments raised for the first time in a reply brief are  
13 waived.” *Autotel v. Nevada Bell Tel. Co.*, 697 F.3d 846, 852 n.3 (9th Cir. 2012) (citation omitted).

14 **B. In Any Event, WPE’S Defamation Claims Are Well-Pled, Requiring Denial of**  
15 **Defendants’ Anti-SLAPP and Motion to Dismiss**

16 Even if WPE’s defamation claims are subject to the anti-SLAPP statute (they are not),  
17 Defendants’ motion still fails because WPE’s claims are well-pled.

18 1. Defendants’ Statements Were Not Opinion or Based on Fully Disclosed Facts

19 Defendants argue that their statements are nonactionable because they are opinion and based  
20 on fully disclosed facts. Mot. 19–23. These arguments are without merit. Courts apply a three-part  
21 test to determine whether an allegedly defamatory statement is an assertion of fact or an opinion: “(1)  
22 whether the general tenor of the entire work negates the impression that the defendant [is] asserting  
23 an objective fact, (2) whether the defendant used figurative or hyperbolic language that negates that  
24 impression, and (3) whether the statement in question is susceptible of being proved true or false.”  
25 *Glob. Plasma Sols., Inc. v. Iee Indoor Env’t Eng’g*, 600 F. Supp. 3d 1082, 1096 (N.D. Cal. 2021)  
26 (citation omitted). Where a “reasonable factfinder could disagree” whether a statement “is properly  
27 interpreted as an assertion of opinion rather than fact,” then that question must be determined by the  
28 jury. *Manufactured Home Communities, Inc. v. Cnty. Of San Diego*, 544 F.3d 959, 964 (9th Cir.



1 2008); accord *Wisk Aero LLC v. Archer Aviation Inc.*, 2023 WL 3919469, at \*7–9 (N.D. Cal. June 9,  
2 2023).

3 (a) Defendants’ Statements That WPE Offers a “Cheap Knock Off”  
4 Product Are Actionable Statements of Purported Fact

5 Defendants attempt to justify their statements that WPE offers a “‘chopped up, hacked,  
6 butchered’ and ‘cheap knock-off’” of WordPress by arguing these statements would be understood  
7 as opinion. Mot. at 18, 21. This argument strains credulity. The “general tenor” of these statements  
8 does nothing to negate the impression that they were factual. First, they were written by Mullenweg,  
9 who is considered to be an expert on WordPress. FAC ¶ 48; *Wilbanks v. Wolk*, 121 Cal. App. 4th  
10 883, 904 (2004) (“An accusation that, if made by a layperson, might constitute opinion may be  
11 understood as being based on fact if made by someone with specialized knowledge of the industry.”).  
12 Second, they were posted on the “News” section of wordpress.org, FAC ¶¶ 329–330, which  
13 Defendants led the public to believe was “the central website for the WordPress community,” and the  
14 “News” section generally consists of factual posts. FAC ¶¶ 332–33. It is not a “blog” as Defendants  
15 suggest. Mot. 22. Third, the titles Defendants gave their articles—“WP Engine is not WordPress”  
16 and “WP Engine is banned from WordPress.org”—indicated they were factual in nature. *Glob.*  
17 *Plasma Sols., Inc.*, 600 F. Supp. 3d at 1088, 1097 (“an article titled Beware: The COVID-19 Snake  
18 Oil Salesman Are Here” posted on a defendant’s website indicated it would contain statements of  
19 fact).

20 Defendants’ argument—that the articles use “hyperbolic language,” such as “‘chopped up,  
21 hacked, butchered’ and ‘cheap knock-off,’” which is not provably false—is meritless. Mot. 21.  
22 WPE’s offering is the *exact same* GPL code offered by others. Courts routinely find false statements  
23 accusing products of being “knock offs” actionable as statements of fact, not opinion. *Luxpro Corp.*  
24 *v. Apple Inc.*, 2011 U.S. Dist. LEXIS 89933, at \*15 (N.D. Cal. Aug. 12, 2011) (finding an actionable  
25 statement of fact when “the crux of Luxpro’s claims is that Apple has stated that Luxpro’s products  
26 are ‘knockoffs,’ albeit cheap ones,’ and ‘illegal copies.’”); *Eros Tours & Travel, Inc. v. Infinitywaves,*  
27 *LLC*, 2014 WL 12591919, at \*6 (C.D. Cal. Dec. 9, 2014) (statements that a website was a “complete  
28 knockoff” and that “just about everything on [it] is a stolen copy of [plaintiff’s] site” were actionable

1 statements of fact); *Gerald Peters Gallery, Inc. v. Stremmel*, 815 F. App'x 138, 139–41 (9th Cir.  
2 2020) (competing art gallery accusing another of selling a fake painting). Because WPE offers the  
3 same WordPress GPL code as others, FAC ¶¶ 107, 331, 346, these statements are provably false.

4 Finally, Defendants' argument that these comments were based on the "fully disclosed facts"  
5 that "WP Engine disables revisions by default" and "the revisions feature is 'at the core of the user  
6 promise of protecting your data'" (the "Revisions Statements") is meritless. Mot. 21. "[W]hen the  
7 facts underlying a statement of opinion are disclosed, readers will understand they are getting the  
8 author's interpretation of the facts presented..." *Overhill Farms, Inc. v. Lopez*, 190 Cal. App. 4th  
9 1248, 1263 (2010). This defense does not apply when defendants do not "'mak[e] it clear that the  
10 challenged statements represent [their] own interpretation' of [the disclosed] express facts."  
11 *Manufactured Home Communities*, 544 F.3d at 965. Nor does it apply when defendants "reveal[]  
12 only very selected facts in support of their claims," thus only partially disclosing the bases for their  
13 statements. *Overhill Farms, Inc.*, 190 Cal. App. 4th at 1264. And, when "a reasonable listener could  
14 conclude that [defendants] 'impl[ie]d there are other, unstated facts supporting'" their statements (*i.e.*,  
15 facts other than those they disclosed), the "fully disclosed facts" defense must be decided by the jury.  
16 *Manufactured Home Communities*, 544 F.3d at 965 (jury must decide the "fully disclosed facts" issue  
17 where a defendant's "statements were not clearly attached to such an outline of fact, nor did she  
18 explicitly link her statements to an express factual basis"). The Revisions Statements are absent from  
19 one of the articles, and the other does not even attempt to connect the "knock off" statements to the  
20 Revisions Statements. Dkt. 69-9, 69-8. Worse, "disabling revisions is a built-in feature of  
21 WordPress" and is offered as one of many configurable options; "the feature has been officially  
22 documented by WordPress and personally approved by Mullenweg"; it is consistent with the  
23 permitted uses of WordPress; "limiting revisions is also a feature touted by Automattic's own product,  
24 JetPack and used by Defendants' hosting product wordpress.com"; and "WooCommerce similarly  
25 disables revisions by default." FAC ¶ 107. No reasonable reader would have understood Defendants'  
26 "knock off" statements to be based on a feature of Defendants' own products.

27 (b) Defendants' Slanderous Statements in Their Keynote Speech and  
28 Interview Were Also Actionable Statements of Fact

1 Similarly, Defendants’ slanderous statements in their keynote speech (that WPE “just want[s]  
2 to feed off” WordPress “without giving anything back”) and interview (that WPE has “given nothing  
3 back to WordPress,” other than “40 hours per week” and sponsoring “WordCamp for 75 grand”) are  
4 actionable (false) facts, not opinions. FAC ¶¶ 365–66. The “general tenor” of Defendants’ statements  
5 in their keynote speech do not “negate[] the impression” they were factual, *Glob. Plasma Sols., Inc.*,  
6 600 F. Supp. 3d at 1096, because Mullenweg (an expert on WordPress) made them during a keynote  
7 speech and in direct comparison to Defendants’ contributions, highlighting the factual nature of the  
8 statements, FAC ¶¶ 48, 370; *Slaughter v. Friedman*, 32 Cal. 3d 149, 152–55 (1982). This is a far cry  
9 from Defendants’ cited case, *Wynn v. Chanos*, 75 F. Supp. 3d 1228 (N.D. Cal. 2014), which involved  
10 an “academic symposium” where statements “cautiously phrased in terms of apparency” were clearly  
11 opinion. *Id.* at. 1234, 1238. Although Defendants claim they disclosed WPE contributes “40 hours  
12 per week” and “100 grand per year,” these disclosed facts are misleading and grossly incomplete. As  
13 the FAC alleges, WPE has, among other things, “contributed tens of millions of dollars in ongoing  
14 support for the broader [WordPress] community,” and WPE has given back by “betting [its] billion  
15 dollar business entirely on WordPress.” FAC ¶ 375; *Overhill Farms, Inc.*, 190 Cal. App. 4th at 1264  
16 (statement not protected opinion when defendants’ disclosure “was materially incomplete and  
17 misleading, making their ‘racist firing’ claim sound far more credible than it actually is”). Thus,  
18 Defendants’ incomplete statements about the extent WPE has given back to the community “asserted  
19 the precise factual nature of [Defendants’] accusation[s]” and “went well beyond generalized  
20 accusations, subjective comments, or other ‘classic rhetorical hyperbole.’” *Rodriguez v. Panayiotou*,  
21 314 F.3d 979, 987 (9th Cir. 2002). As such, these statements are reasonably perceived as factual. *Id.*

22 Defendants also argue their statements are based on fully disclosed facts because they  
23 disclosed that (1) WPE is “controlled by Silver Lake, a private equity firm” and (2) seven years ago  
24 Silver Lake purchased another company called Talend, whose “open source community” is now  
25 purportedly “completely gone.” Mot. 20. This argument fails for several reasons. First, as discussed  
26 above, Defendants failed to disclose WPE’s sizable contributions to the WordPress community.  
27 Second, even if Defendants’ purported facts about Silver Lake—but one of WPE’s investors—were  
28 true, they could not form the basis for Defendants’ statements about WPE, an entirely different entity.

1 Third, Defendants’ explanation that private equity investment induces companies to “just want to feed  
2 off” WordPress “without giving anything back” makes no sense given that Automattic, which  
3 Defendants compared with WPE in the same keynote speech and “contributes back 3,915 hours a  
4 week,” is similarly owned in part by multiple private equity firms. FAC ¶¶ 10, 335.

5 2. WPE Has Alleged Financial Harm and Actual Malice for Its Trade Libel Claim

6 Defendants argue WPE’s trade libel claim fails because it “failed to plausibly allege a  
7 particular loss resulting from Matt’s Statements made on the Website.” Mot. 24. However, the FAC  
8 alleges the defamatory statements in Defendants’ articles played a material and substantial role in  
9 inducing (a) “specific existing WPE customers to stop purchasing WPE’s platform for WordPress  
10 websites” and (b) “specific WPE customers that otherwise would have purchased WPE’s platform  
11 not to do so.” FAC ¶ 356; *see id.* ¶¶ 168–71. The FAC also provides a specific example of an X user  
12 that, due to Defendants’ September 21 article stating WPE gives its customers “a cheap knock-off”  
13 of WordPress, “decided to remove WPE from his company’s hosting lists.” FAC ¶ 169.

14 Defendants argue the FAC does not allege they made Defamatory Statements 1 and 2 (*i.e.*,  
15 that WPE gives its customers “a cheap knock-off” of WordPress and a “hacked up, bastardized  
16 simulacra of WordPress’s GPL code”) with “actual malice.” Mot. 24. Contrary to this contention,  
17 the FAC alleges Defendants made these statements while knowing they were false because they  
18 “knew that (i) WPE’s WordPress installations are identical to the wordpress.org ZIP file which  
19 defines WordPress and (ii) WPE’s services use the identical WordPress GPL code that everyone else  
20 does.” FAC ¶ 339; *Manzari v. Associated Newspapers Ltd.*, 830 F.3d 881, 891 (9th Cir. 2016) (Courts  
21 find actual malice when a defendant makes statements (a) while knowing they are false or (b) while  
22 “entertain[ing] serious doubts as to the[ir] truth.”). Thus, the FAC properly alleges malice.

23 **VII. WPE STATES A VALID CLAIM FOR PROMISSORY ESTOPPEL (COUNT 6)**

24 Defendants argue WPE does not allege any “promise of access” to wordpress.org and its  
25 related resources (*e.g.*, the plugin and theme directories). Mot. at 25. That is false. The FAC alleges  
26 numerous promises, including: “*WordPress will forever be an open platform that encourages third-*  
27 *party developers to build WordPress plugins and themes to enhance the functionality of*  
28 *WordPress*” (FAC ¶ 306); “[e]veryone is welcome” in the WordPress community (*id.* ¶ 84);

1 “*wordpress.org offers free hosting to anyone who wishes to develop a plugin in [its] directory*” (*id.*  
2 ¶ 86); and anyone is entitled to run, change, modify, and redistribute WordPress software (*id.* ¶ 84).  
3 Defendants’ naked assertion that WPE “does not even purport to have relied on these statements,”  
4 much less, that the FAC does not contain a “single . . . promise” about “the resources available on  
5 wordpress.org,” Mot. at 25, ignores the allegations. WPE has built a substantial business over the  
6 last decade, servicing tens of thousands of customers and investing tens of millions of dollars  
7 developing its software on WordPress, in reliance on Defendants’ promises that WordPress was and  
8 would always remain open and accessible to all. FAC ¶ 307.

9 Defendants’ argument that the promises Defendants made are not sufficiently “clear and  
10 unambiguous” to form the basis of a promissory estoppel claim, Mot. at 26–27, is wishful thinking.  
11 There is nothing unclear or ambiguous about statements on wordpress.org that “everyone is  
12 welcome”; “free hosting to anyone”; a promise that if you meet certain criteria, “your plugin will be  
13 approved,” or Mullenweg’s proclamation that he created the WordPress Foundation to ensure “there  
14 is something that holds the *WordPress code and trademark* for the *free access for the world.*” FAC  
15 ¶¶ 84, 86–88. Such specific and unqualified statements routinely form the basis for sustained  
16 promissory estoppel claims. *See, e.g., Sateriale v. R.J. Reynolds Tobacco Co.*, 697 F.3d 777, 792 (9th  
17 Cir. 2012) (promise that if consumers “saved C–Notes and redeemed them for rewards merchandise  
18 in accordance with the catalog, RJR would provide the merchandise”); *Thompson v. Oracle Corp.*,  
19 574 F. Supp. 3d 738, 744 (N.D. Cal. 2021) (“language promising lifetime benefits”). Defendants fail  
20 to explain why any purported “conditions” on their promises make them ambiguous or otherwise  
21 unenforceable. *See* Mot. at 26–27; *Williams v. Chase Bank/JP Morgan, N.A.*, 2015 WL 1843951, at  
22 \*8 (N.D. Cal. Apr. 8, 2015) (conditional promise sufficiently definite to support a promissory estoppel  
23 claim); *Sateriale*, 697 F.3d at 791–92 (vacating dismissal of promissory estoppel claim where the  
24 complaint did not allege defendant “reserved an *unrestricted* right to terminate its duty to perform”).

25 The cases cited by Defendants miss the mark. For example, an alleged promise from an  
26 employee hiring manual that only one job criteria would be considered for hiring employees, when  
27 the manual expressly listed many other criteria that would be considered by the employer, was not  
28 unambiguous. *Aguilar v. Int’l Longshoremen’s Union Loc. No. 10*, 966 F.2d 443, 446 (9th Cir. 1992).

1 A promise in a student manual of a “fair, thorough, neutral and impartial” disciplinary proceeding  
2 used adjectives too imprecise to enforce a promise. *Dixon v. Univ. of S. Cal.*, 2021 WL 6496737, at  
3 \*6 (C.D. Cal. Oct. 20, 2021). A promise to “improve and aggressively [] market” was not sufficient  
4 sustain a claim for promissory estoppel. *Glen Holly Ent., Inc. v. Tektronix Inc.*, 343 F.3d 1000, 1005  
5 (9th Cir. 2003). And a statement from a loan officer that he would “work with” the plaintiff to modify  
6 the terms of the loan agreement was insufficient to enforce the promise. *Thanh Nguyen v. PennyMac*  
7 *Loan Servs., LLC*, 2012 WL 6062742, at \*7 (C.D. Cal. Dec. 5, 2012). All of these “promises” stand  
8 in direct contrast to the clear and unambiguous promises of access to wordpress.org alleged in the  
9 FAC that support WPE’s estoppel claim. Further, whether a promise is “clear and unambiguous” is  
10 better assessed after a full discovery record, not on a motion to dismiss. *California Spine &*  
11 *Neurosurgery Inst. v. Oxford Health Ins. Inc.*, 2019 WL 6171040, at \*3 (N.D. Cal. Nov. 20, 2019).

#### 12 **VIII. WPE STATES VALID INTERFERENCE CLAIMS (COUNTS 1–2)**

13 Defendants acknowledge the FAC properly pleads a claim for intentional interference with  
14 prospective relationships, provided that it alleges an independent “wrongful” act by Defendants. Mot.  
15 27-28. As Defendants admit, the wrongful act requirement is a modest threshold—it is satisfied by  
16 plausibly pleading any violation of a “constitutional, statutory, regulatory, common law, or other  
17 determinable legal standard.” *Id.* Defendants’ only argument is that dismissal of WPE’s other claims  
18 would necessarily defeat this claim. *Id.* By this same logic, if any of WPE’s other claims survive,  
19 this claim must proceed too. As demonstrated herein, WPE properly alleges multiple viable claims  
20 that independently satisfy the wrongful act requirement, thereby sustaining this cause of action.

21 As for the related, but distinct, tort of interference with contractual relationships, the Court  
22 already found WPE likely to succeed on all five elements. Dkt. 64 at 28. Defendants concede those  
23 elements are adequately pled, but assert WPE also must show independent wrongfulness for “at will”  
24 contracts. Mot. 28. Defendants fail to identify any binding authority that this is a pleading  
25 requirement, but even if it was, WPE alleges the contracts contain “definite terms,” are “legally  
26 binding,” and “formally cemented economic relationships”—placing them outside the “at will”  
27 framework contemplated by *Ixchel Pharma LLC v. Biogen Inc.*, 9 Cal. 5th 1130, 1145 (2020). Indeed,  
28 Defendants understand these contracts are not at will: (1) Mullenweg recognized contracts have a



1 renewal period in his keynote speech (FAC ¶¶ 101, 121); (2) Defendants offered to pay the early  
 2 termination fees of customers cancelling their WPE contracts early (*id.* ¶ 122); and (3) Defendants  
 3 offered a “contract buy-out” if WPE customers switch to Defendants’ companies (*id.* ¶ 125). These  
 4 terms are inconsistent with at-will relationships (which permit termination at any time without  
 5 consequence). *Ixchel Pharma, LLC v. Biogen, Inc.*, 9 Cal. 5th at 1147. To the extent there is any  
 6 ambiguity, WPE requests leave to amend its complaint to specify the contracts are not at-will.

7 **IX. WPE STATES A VALID CLAIM FOR UNJUST ENRICHMENT (COUNT 20)**

8 To state a claim for unjust enrichment, a plaintiff must allege “the defendant received and  
 9 unjustly retained a benefit at the plaintiff’s expense.” *ESG Cap. Partners, LP v. Stratos*, 828 F.3d  
 10 1023, 1038 (9th Cir. 2016); *Kay v. Copper Cane, LLC*, 549 F. Supp. 3d 1014, 1025 (N.D. Cal. 2021)  
 11 (unjust enrichment claim stated where benefits conferred by “mistake, fraud, coercion or request”).  
 12 Specifically, at Defendants’ request, WPE invested thousands of engineering hours and millions of  
 13 dollars into developing WordPress plugins and themes for the benefit of Defendants, and Defendants  
 14 unjustly retained these benefits. FAC ¶¶ 459–60; *see also id.* ¶¶ 34, 36–39, 83–87, 151–63.

15 Defendants do not contest receipt of a benefit. Mot. at 28–29. Instead, they argue the unjust  
 16 enrichment claim “rises and falls” with the promissory estoppel, CFAA, and antitrust claims. *Id.* at  
 17 29. But those claims survive dismissal (Sections I, IV, VII, *supra*), and even if they did not,  
 18 Defendants still unjustly retained a benefit at WPE’s expense. *Hirsch v. Bank of Am.*, 107 Cal. App.  
 19 4th 708, 722 (2003) (unjust enrichment claim stated regardless of whether practices otherwise illegal).

20 **X. WPE HAS PROPERLY PLED AUTOMATTIC’S LIABILITY UNDER COUNTS 3, 5,  
 21 9–11, 14–15, & 17–20**

22 Automattic throws its CEO Mullenweg under the proverbial bus, arguing that Automattic  
 23 cannot be liable for “Counts 3, 5, 14-15, and 17-19” because they “rest solely on actions and activity  
 24 on [Mullenweg’s personal website,] WordPress.org.” Mot. at 29. This borders on the absurd.  
 25 Automattic, as Mullenweg’s employer, “is vicariously liable for the torts [he] committed within the  
 26 scope of [his] employment.” *Stephens v. UPS*, 2024 WL 4906074, at \*3 (N.D. Cal. Nov. 27, 2024)  
 27 (required nexus is only “that the tort be engendered by or arise from the work.”) Here, the FAC  
 28 alleges that Mullenweg’s actions, *e.g.*, FAC ¶¶ 113 (the block), 149 (the checkbox), 151 (ACF

1 expropriation), all arose from his duties as Automattic’s CEO, which included “planning and carrying  
2 out business strategies for dealing with ... WPE; and creating and implementing strategies on how to  
3 leverage Automattic’s purported ... trademark rights.” FAC ¶ 12. The actions identified by  
4 Defendants all benefited Automattic and were integral to Defendants’ extortionate scheme in which  
5 “Mullenweg demand[ed], as Automattic’s CEO, that WPE sign a purported trademark license  
6 agreement with Automattic.” *Id.* This alone defeats Defendants’ argument.

7 For the same reasons, Automattic is also liable for Mullenweg’s defamatory statements as  
8 they: (1) followed his texts to WPE offering to call off his assault if WPE agreed to pay Automattic,  
9 FAC ¶¶ 92–97; (2) were part of publications promoting Automattic’s products while simultaneously  
10 defaming WPE’s, *e.g.*, *id.* ¶¶ 370–72; and (3) were intended “to cause WPE’s customers to switch  
11 from WPE’s hosting services to” Defendants’, *id.* ¶¶ 334, 369. Unquestionably, WPE has alleged  
12 that Mullenweg’s acts “ar[o]se from” his work at Automattic. *Stephens*, 2024 WL 4906074, at \*3.  
13 Separately, Automattic is liable for Mullenweg’s acts because it participated in and authorized them.  
14 *Karsant Family Ltd. P’ship v. Allstate Ins. Co.*, 2009 WL 188036, at \*9 (N.D. Cal. Jan. 27, 2009); *id.*  
15 ¶¶ 91 (Automattic’s CFO sent threats directly to WPE and stated Defendants’ payment demands were  
16 ostensibly for a trademark license with Automattic); 146 (ACF takeover originated with email from  
17 Automattic); 13, 120-25, 129-35 (Automattic capitalized on Mullenweg’s conduct).

18 Defendants also argue Automattic cannot be liable for unjust enrichment because it neither  
19 knowingly accepted nor unjustly retained benefits from WPE. Mot. at 30. But the FAC alleges  
20 WPE’s contributions to wordpress.org benefited a website *Automattic* knowingly capitalized on to  
21 further its own interests. FAC ¶¶ 6, 459–60. And Defendants unjustly retained WPE’s contributions,  
22 which were induced by promises by Automattic *and* its CEO Mullenweg (*id.* ¶ 459), as they concede.  
23 Mot. at 27 (discussing “*Defendants*’ statements regarding free and open access”) (emphasis added);  
24 *id.* at 29–30 (tellingly not moving to dismiss promissory estoppel claim as to Automattic).

### 25 CONCLUSION

26 Defendants’ motion to dismiss should be denied in its entirety. To the extent the Court  
27 determines that any claims are subject to dismissal, WPE respectfully requests leave to amend.

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Dated: January 22, 2025

Respectfully submitted,  
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