

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
CIVIL MINUTES - GENERAL**

Case No.	CV 21-04848 PA (KSx)	Date	September 8, 2021
Title	Shawn Carter v. Jonathan Mannion, et al.		

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Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE
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Kamilla Sali-Suleyman	Not Reported	N/A
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

**Proceedings:** IN CHAMBERS - COURT ORDER

Before the Court is a Motion to Dismiss and Anti-SLAPP Motion to Strike filed by defendants Jonathan Mannion (“Mannion”) and Jonathan Mannion Photography LLC (collectively “Defendants”) (Docket Nos. 24 & 26). Defendants challenge the sufficiency of the First Amended Complaint (“1st AC”) filed by plaintiff Shawn Carter, who is known professionally as “Jay-Z.” Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument. The hearing calendared for September 13, 2021, is vacated, and the matter taken off calendar.

### I. Factual and Procedural Background

Jay-Z, alleging that this Court possesses diversity jurisdiction over his claims against Defendants, commenced this action on June 15, 2021. The Court dismissed the original Complaint with leave to amend because it failed to sufficiently allege a basis for the Court’s subject matter jurisdiction. Jay-Z then filed the 1st AC, which alleges a claim for violation of California’s statutory right of publicity pursuant to California Civil Code section 3344 and a claim for violation of the common law right of publicity. Jay-Z, has, according to the 1st AC, “attained an extraordinary level of popularity and fame in the United States and around the world” as a recording artist and entrepreneur and is “highly sought after to endorse commercial products and services using his name, likeness, identity, and persona.” (1st AC ¶ 11.)

The 1st AC alleges that Jay-Z hired Mannion, a full-time photographer, to take photographs of Jay-Z and “to realize Jay-Z’s vision of himself as a rap artist, particularly for use on Jay-Z’s first album, Reasonable Doubt.” (*Id.* ¶ 20.) According to Jay-Z, beginning in 1996, “Mannion began taking hundreds of photographs of Jay-Z. Jay-Z and his record company used some of the photographs for his album covers and paid Mannion tens of thousands of dollars for those uses. But Jay-Z never gave Mannion permission to resell any of the images. Nor did Jay-Z authorize Mannion to use his name, likeness, identity, or persona for any purpose. Jay-Z was careful to never give Mannion permission to exploit Jay-Z’s image in the photographs that

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Mannion took of Jay-Z.” (*Id.* ¶ 21.) Jay-Z claims, despite never having authorized Defendants to use his image, that Mannion “has developed a business for himself by selling copies of photographs of Jay-Z on Mannion’s website and store, and by licensing Jay-Z’s image to others. Mannion is also turning a profit on Jay-Z’s celebrity with other products, such as shirts that display Jay-Z’s name and slipmats (the circular piece of slippery cloth or synthetic material disk jockeys place on a turntable platter) which use Jay-Z’s image.” (*Id.* ¶ 23.) Some of the prints of the photographs sell for “thousands of dollars per copy” and the t-shirts Mannion sells “display Jay-Z’s name at the top of Mannion’s ‘Fame Wall,’ above other well-known artists that Mannion has photographed.” (*Id.* ¶¶ 22 & 25.)

In their Motion to Dismiss and Anti-SLAPP Motion to Strike, Defendants contend that Jay-Z’s statutory and common law publicity claims fail as a matter of law and are subject to being stricken under California’s anti-SLAPP procedure because, according to Defendants, Jay-Z’s claims are preempted by the Copyright Act and imposing liability on Defendants would impermissibly intrude on Defendants’ free speech rights.

## **II. Legal Standard**

### **A. Motion to Dismiss**

Generally, plaintiffs in federal court are required to give only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a). While the Federal Rules allow a court to dismiss a cause of action for “failure to state a claim upon which relief can be granted,” they also require all pleadings to be “construed so as to do justice.” Fed. R. Civ. P. 12(b)(6), 8(e). The purpose of Rule 8(a)(2) is to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80 (1957)).

However, in *Twombly*, the Supreme Court rejected the notion that “a wholly conclusory statement of a claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery.” *Twombly*, 550 U.S. at 561, 127 S. Ct. at 1968 (internal quotation omitted). Instead, the Court adopted a “plausibility standard,” in which the complaint must “raise a reasonable expectation that discovery will reveal evidence of [the alleged infraction].” *Id.* at 556, 127 S. Ct. at 1965. For a complaint to meet this standard, the “[f]actual allegations must be enough to raise a right to relief above the speculative level.” *Id.* at 555, 127 S. Ct. at 1965 (citing 5 C. Wright & A. Miller, *Federal Practice and Procedure* §1216, pp. 235-36 (3d ed. 2004) (“[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion

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[of] a legally cognizable right of action") (alteration in original)); Daniel v. County of Santa Barbara, 288 F.3d 375, 380 (9th Cir. 2002) ("All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party.") (quoting Burgert v. Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9th Cir. 2000)). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555, 127 S. Ct. at 1964-65 (internal quotations omitted). In construing the Twombly standard, the Supreme Court has advised that "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, 556 U.S. 662, 679, 664 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009).

#### **B. Anti-SLAPP Motion**

"The anti-SLAPP [Strategic Lawsuits against Public Participation] statute was enacted to allow early dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation." Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 839 (9th Cir. 2001). According to California's anti-SLAPP statute, "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." Cal. Code Civ. Proc. 425.16(b)(1).

Although it is a state procedural rule, the Ninth Circuit has held that section 425.16(b)'s procedures may be used to dismiss state law claims pending in federal court. United States ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 973 (9th Cir. 1999). In an effort to construe California's anti-SLAPP procedure in a manner "consistent with" the Federal Rules of Civil Procedure, the Ninth Circuit has held:

[W]hen an anti-SLAPP motion to strike challenges only the legal sufficiency of a claim, a district court should apply the Federal Rule of Civil Procedure 12(b)(6) standard and consider whether a claim is properly stated. And, on the other hand, when an anti-SLAPP motion to strike challenges the factual sufficiency of a claim, then the Federal Rule of Civil Procedure 56 standard will apply. But in

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such a case, discovery must be allowed, with opportunities to supplement evidence based on the factual challenges, before any decision is made by the court.

Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress, 890 F.3d 828, 833 & 834 (9th Cir. 2018).

As the California Supreme Court has explained, a court tasked with resolving an anti-SLAPP motion employs a two-step process:

First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken "in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue," as defined in the statute. If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.

Equilon Enters., LLC v. Consumer Cause, Inc., 29 Cal. 4th 53, 67, 124 Cal. Rptr. 2d 507, 518 (2002) (citation omitted); see also Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1110 (9th Cir. 2003) ("A court considering a motion to strike under the anti-SLAPP statute must engage in a two-part inquiry."). "Only a cause of action that satisfies both prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning and lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." Navellier v. Sletten, 29 Cal. 4th 82, 89, 124 Cal. Rptr. 2d 530, 536 (2002) (emphasis in original).

For purposes of Defendants' anti-SLAPP Motion, the definition of "an act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes "(3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." Cal. Civ. Proc. Code § 425.16(e). Courts interpreting the anti-SLAPP statute have concluded that issues of "public interest" include (1) statements 'concerning a person or entity in the public eye'; (2) 'conduct that could directly affect a large number of people beyond the direct participants'; (3) 'or a topic of widespread public interest.'" Hilton v. Hallmark Cards, 599 F.3d 894, 906 (9th Cir. 2010) (quoting Rivero v. Am. Fed'n of State, County, & Mun. Emps., 105

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Cal. App. 4th 913, 924, 130 Cal. Rptr. 2d 81, 89 (2003)); see also id. at 907 (holding that “[t]here is no dispute that [celebrity Paris] Hilton is a person ‘in the public eye’ and ‘a topic of widespread, public interest,’” and that a greeting card depicting her was therefore speech “in connection with a public issue or an issue of public interest” satisfying the first step in the anti-SLAPP procedure’s two-step analysis); see also Maloney v. T3Media, Inc., 853 F.3d 1004, 1009 n.3 (9th Cir. 2017) (finding that posting photographs on websites accessible to the public are statements made in a public forum for purposes of California Code of Civil Procedure 425.16(e)(3) (quoting Barrett v. Rosenthal, 40 Cal. 4th 33, 41 n.4, 51 Cal. Rptr. 3d 55, 59 n.4 (2006)).

### **III. Analysis**

Jay-Z, by pursuing his claims for violations of the common law and statutory rights to publicity, seeks to prevent Defendants from profiting from his name and image. “California has long recognized a common law right of privacy for protection of a person’s name and likeness against appropriation by others for their advantage.” Downing v. Abercrombie & Fitch, 265 F.3d 994, 1001 (9th Cir. 2001). To sustain a common law cause of action for commercial misappropriation, a plaintiff must prove: “(1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.” Eastwood v. Superior Court, 149 Cal. App.3d 409, 417, 198 Cal. Rptr. 342, 347 (1983). A statutory right to publicity claim adds as an element to the common law claim the knowing use of the plaintiff’s name, photograph, or likeness for purposes of “advertising or selling, or soliciting purchases of, products, merchandise, goods or services.” Cal. Civ. Code § 3344(a); see also Maloney, 853 F.3d at 1008 n.2.

Defendants contend that Jay-Z’s claims fail as a matter of law, and that Jay-Z therefore cannot establish the necessary probability of success at the second step of the anti-SLAPP analysis, because Defendants are entitled to an affirmative defense that their work is protected by the First Amendment and Jay-Z’s claims are preempted by the Copyright Act.

#### **A. First Amendment Transformative Use**

Claims for misappropriation of publicity rights are subject to a First Amendment defense. In situations where a celebrity’s right to control his or her image conflicts with another’s right to free expression, courts apply a balancing test “based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.” Comedy III Prods., Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387, 391, 106 Cal. Rptr. 2d 126, 129 (2001); see also id. at 405, 106 Cal. Rptr. 2d at 140 (“When artistic

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expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist.”).

In assessing whether a work is “significantly transformative” such that it qualifies for First Amendment protection:

[C]ourts may find useful a subsidiary inquiry, particularly in close cases: does the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted? If this question is answered in the negative, then there would generally be no actionable right of publicity. When the value of the work comes principally from some source other than the fame of the celebrity—from the creativity, skill, and reputation of the artist—it may be presumed that sufficient transformative elements are present to warrant First Amendment protection. If the question is answered in the affirmative, however, it does not necessarily follow that the work is without First Amendment protection—it may still be a transformative work.

In sum, when an artist is faced with a right of publicity challenge to his or her work, he or she may raise as affirmative defense that the work is protected by the First Amendment inasmuch as it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity’s fame.

Id. at 407, 106 Cal. Rptr. 2d at 142; see also id. at 406, 106 Cal. Rptr. 2d at 142 (“Another way of stating the inquiry is whether the celebrity likeness is one of the ‘raw materials’ from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sub and substance of the work in question. We ask, in other words, whether a product containing a celebrity’s likeness is so transformed that it has become primarily the defendant’s own expression rather than the celebrity’s likeness. And when we use the word ‘expression,’ we mean expression of something other than the likeness of the celebrity.”).

As the Ninth Circuit has explained, the California Supreme Court “envisioned the application of the [transformative use] defense as a question of fact.” Hilton, 599 F.3d at 910. The Ninth Circuit has “conceptualize[d] the inquiry into two parts: whether the transformative use defense is available at all and whether, if it is, no trier of fact could reasonably conclude that

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the [item] was not transformative.” *Id.* n.14. It is, however, “clear that merely merchandising a celebrity’s image [or name] without that person’s consent, the prevention of which is the core of the right of publicity, does not amount to transformative use.” *Id.* at 910.

Here, the Court need not determine if the photos of Jay-Z that Defendants sell for “thousands of dollars” derive their “marketability and economic value” “primarily from the fame” of Jay-Z or the photographic skill of Mannion to conclude that Jay-Z has alleged sufficient facts in the 1st AC such that the Court is unable to determine at this stage of the proceedings that Defendants are entitled to a transformative use defense as a matter of law. *Comedy III Prods.*, 25 Cal. 4th at 407, 106 Cal. Rptr. 2d at 142. Indeed, based on the allegations in the 1st AC, the Court is unable to make that determination at this stage as a matter of law. Additionally, separate from the sale of the photographs themselves, the 1st AC alleges that Defendants sell t-shirts with Jay-Z’s name on them and slipmats with his image. The allegations concerning this “merchandise” are alone sufficient to undermine Defendants’ contention that they are entitled to a transformative use defense as a matter of law at this stage of the proceedings. Instead, the Court concludes that Jay-Z has alleged sufficient facts to state plausible claims for relief notwithstanding Defendants’ assertion of a transformative use defense for purposes of Federal Rule of Civil Procedure 12(b)(6) and a sufficient “probability of prevailing” on his claims at the second step of California’s anti-SLAPP procedure.

#### **B. Copyright Preemption**

“The Copyright Act affords copyright owners the ‘exclusive rights’ to display, perform, reproduce, or distribute copies of a copyrighted work, to authorize others to do those things, and to prepare derivative works based upon the copyrighted work.” *Maloney*, 853 F.3d at 1010 (citing 17 U.S.C. § 106). Section 301 of the Copyright Act preempts state law claims that are “equivalent” to the exclusive rights provided under the Copyright Act. *See Laws v. Sony Music Entm’t, Inc.*, 448 F.3d 1134, 1137 (9th Cir. 2006); *see also* 17 U.S.C. § 301. The Ninth Circuit has adopted a two-part test to determine whether a state law claim is preempted by the Copyright Act:

First, we decide “whether the ‘subject matter’ of the state law claim falls within the subject matter of copyright as described in 17 U.S.C. §§ 102 and 103.” Second, assuming it does, we determine “whether the rights asserted under state law are equivalent to the rights contained in 17 U.S.C. § 106, which articulates the exclusive rights of copyright holders.”

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Maloney, 853 F.3d at 1010 (quoting Laws, 448 F.3d at 1137). In Maloney, the Ninth Circuit concluded:

[A] publicity-right claim is not preempted when it targets non-consensual use of one's name or likeness on merchandise or in advertising. But when a likeness has been captured in a copyrighted artistic visual work and the work itself is being distributed for personal use, a publicity-right claim interferes with the exclusive rights of the copyright holder, and is preempted by section 301 of the Copyright Act.

Id. at 1011.

In his Opposition, Jay-Z relies to a significant degree on Downing v. Abercrombie & Fitch, 265 F.3d 994 (9th Cir. 2001), where the Ninth Circuit concluded that right of publicity claims were not preempted by the Copyright Act “[b]ecause the subject matter of the [plaintiffs’] statutory and common law right of publicity claims is their names and likenesses, which are not copyrightable, the claims are not equivalent to the exclusive rights contained in § 106.” Id. at 1005; see also id. at 1004 (“[B]ecause a human likeness is not copyrightable, even if captured in a copyrighted photograph, the model’s section 3344 claims against the unauthorized publisher of their photographs are not the equivalent of a copyright claim and are not preempted by federal copyright law.”) (quoting KNB Enterprises v. Matthews, 78 Cal. App. 4th 362, 365, 92 Cal. Rptr. 2d 713, 715 (2000)). But as the Ninth Circuit explained in Maloney, distinguishing Downing:

[I]t was “not the publication of the photograph itself, as a creative work of authorship,” that formed the basis of the publicity-right claim. Instead, it was the unauthorized “use of the [plaintiffs’] likenesses” to advertise Abercrombie products, and the creation of “t-shirts, exactly like those worn by the [plaintiffs] in the photograph, for sale” in Abercrombie’s catalog. The plaintiffs sustained injury to their individual “personas” because their likenesses were exploited commercially without their consent. The plaintiffs were not seeking to use the right of publicity simply to prevent “publication” of an artistic, visual work.

Maloney, 853 F.3d at 1013 (quoting Downing, 265 F.3d at 1003). In Maloney, the Ninth Circuit clarified:

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[A] publicity-right claim may proceed when a likeness is used non-consensually on merchandise or in advertising. But where a likeness has been captured in a copyrighted artistic visual work and the work itself is being distributed for personal use, a publicity-right claim is little more than a thinly disguised copyright claim because it seeks to hold a copyright holder liable for exercising his exclusive rights under the Copyright Act.

Id. at 1016; see also id. at 1019 (“We believe that our holding strikes the right balance by permitting athletes to control the use of their names or likenesses on merchandise or in advertising, while permitting photographers, the visual content licensing industry, art print services, the media, and the public, to use these culturally important images for expressive purposes. Plaintiffs’ position, by contrast, would give the subject of every photograph a de facto veto over the artist’s rights under the Copyright Act, and destroy the exclusivity of rights that Congress sought to protect by enacting the Copyright Act.”). “The fact that the non-exclusive licenses were sold for a profit and their price does not alter our analysis. . . . T3Media’s decision to license expressive works for a fee does not change the fact that the publicity-right claims target the display and distribution of copyrighted photographs for personal use. Moreover, copyright holders are allowed to commercially exploit their copyrights by exercising their exclusive rights under the Copyright Act.” Id. n.9.

Here, even if the Court were to eventually determine that Jay-Z’s allegations related to Defendants’ sale of photographs with Jay-Z’s image are preempted by the Copyright Act—a determination the Court declines to make at this stage—the 1st AC also alleges that Defendants are selling t-shirts and slipmats with Jay-Z’s name and image. These allegations are sufficient, at this stage of the proceedings, to state plausible claims for violations of Jay-Z’s common law and statutory rights of publicity that are not preempted by the Copyright Act for purposes of Defendants’ Motion to Dismiss. The Court similarly concludes that Jay-Z has satisfied his burden at the second step of the anti-SLAPP analysis to establish a probability that he will prevail.<sup>1/</sup>

**Conclusion**

For all of the foregoing reasons, the Court concludes that, at this stage of the proceedings, Defendants’ First Amendment transformative use defense and copyright preemption arguments

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<sup>1/</sup> Because the Court has relied solely on the allegations contained in the 1st AC to reach this conclusion, the Court has not considered the additional facts contained in the Declaration submitted by Jay-Z in support of his Opposition. The Court therefore denies as moot Defendants’ Objections to Jay-Z’s Declaration.

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do not, as a matter of law, prevent Jay-Z from alleging sufficient facts to state plausible claims for relief or establishing a sufficient probability that he will prevail on his claims. The Court therefore denies Defendants' Motion to Dismiss and Anti-SLAPP Motion to Strike. Defendants shall file their Answer to the 1st AC by no later than September 22, 2021.

IT IS SO ORDERED.