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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

JOSE DECASTRO, Plaintiff, v. KATHERINE PETER; DANIEL CLEMENT; MICHAEL PIERATTINI; DAVID OMO JR.; and DOES 1 TO 30, inclusive, Defendants.	Case No. 23SMCV00538 Assigned for all purposes to the Honorable H. Jay Ford, Dept. O **DEFENDANT MICHAEL PIERATTINI'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE SUMMARY ADJUDICATION** Date: May 29, 2025 Time: 8:30 A.M. Dept: O [Declaration of R. Paul Katrinak, Declaration of Michael Pierattini, Separate Statement, and Request for Judicial Notice filed concurrently] **RES ID: 516095875168**

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 29, 2025 at 8:30 A.M., or as soon thereafter as the matter may be heard in Department O of the above-entitled court, located at 1725 Main Street Santa Monica, CA 90401, Defendant Michael Pierattini ("Mr. Pierattini") will, and hereby does, move the Court, pursuant to Code of Civil Procedure § 437(c), for summary judgment or, in the alternative, summary adjudication of the eighth cause of action in Plaintiff Jose DeCastro's ("Plaintiff") First Amended Complaint on the following grounds:

1. Mr. Pierattini is entitled to summary judgment, or in the alternative summary adjudication, on Plaintiff's Eighth Cause of Action for "Right to Publicity Torts" as Plaintiff has failed to provide any evidence to support this cause of action.

The Motion is made on the grounds that (1) Civil Code Section 3344 does not apply to the facts alleged by Plaintiff, (2) for the purposes of this Motion, there are no disputed issues of material fact.

The Motion will be based on this Notice, the attached Memorandum of Points and Authorities, the concurrently-filed Separate Statement, the concurrently-filed Declaration of Michael Pierattini, Declaration of R. Paul Katrinak, the concurrently-filed Request for Judicial Notice, the files and records in this action, and any further evidence or argument that the Court may properly receive at or before the hearing.

DATED: January 22, 2025

THE LAW OFFICES OF
R. PAUL KATRINAK

By: R. Paul Katrinak
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff's Eighth Cause of Action for "Right to Publicity Torts" will not succeed because: (1) California Civil Code Section 3344 is based on the common law claim for appropriation of name or likeness where it must be used for a commercial purpose; (2) Plaintiff's claims are preempted by copyright; (3) Mr. Pierattini's actions do not constitute the appropriation of Plaintiff's name and likeness as he did not advertise or solicit purchases to third parties; (4) if it is found that Mr. Pierattini appropriated Plaintiff's name and likeness, Plaintiff's claim is barred by the Incidental Use Doctrine; and (5) Plaintiff has not produced evidence to support his claim against Defendant Michael Pierattini (hereinafter "Mr. Pierattini").

Section 3344 codifies the common law claim for appropriation of name or likeness, which results from the use of plaintiff's name or likeness to advertise defendant's business or for similar commercial purposes. For this reason, Section 3344 does not apply to various other forms of invasion of privacy recognized under the common law. Section 3344 applies to the "right of publicity" alone.

Plaintiff's claims arise exclusively from the alleged publication of his name and likeness from the copyrighted Mr. Pierattini's YouTube channel videos (hereinafter "the Videos") or derivative works from the Videos. Accordingly, Plaintiff's state law causes of action are preempted by the Copyright Act of 1976. In order to escape preemption, Plaintiff's state law claim must allege something beyond mere use of name and likeness in copyrighted works. There is no evidence that Mr. Pierattini used Plaintiff's name or likeness beyond the exploitation of the Videos themselves and the exploitation of rights reserved to the copyright holder. It is undisputed that Mr. Pierattini holds the copyright to the Videos. Therefore, Plaintiff's claims are based solely on Mr. Pierattini's exploitation of the Videos and derivative works therefrom and are within the subject matter of the Copyright Act.

Moreover, under Section 3344, appropriation occurs where a defendant uses a plaintiff's name and likeness to solicit the purchase of products from third parties. Here, Plaintiff does not make any allegation of a use to reach out to third parties. Mr. Pierattini's alleged limited use of

Plaintiff's name and likeness was not for purposes of advertising to or solicitation of third parties nor did Mr. Pierattini receive any financial gain from the alleged use. Therefore, Mr. Pierattini's acts do not constitute appropriation of Plaintiff's name and likeness.

Even if Plaintiff could show that there was appropriation of Plaintiff's name and likeness, Plaintiff's claim would fail because any such appropriation was too incidental and fleeting. Any use of Plaintiff's name and likeness was a minuscule percentage of the hundreds of thousands of other videos and content made by Mr. Pierattini. As such, there was no commercial exploitation of any individual name, Plaintiff's or otherwise, to third parties, as is required for a misappropriation claim.

Lastly, Plaintiff has not provided any evidence that would establish liability for misappropriation of name and likeness as to Mr. Pierattini. A defendant has met his or her burden on summary judgment motion by demonstrating to the court that a complainant has not produced discovery responses in support of his contentions. Here, Plaintiff has ignored the Court's order to respond to discovery and has not provided any substantive discovery responses. Thus, there is no evidence of misappropriation of Plaintiff's name and likeness by Mr. Pierattini.

As a result, and as a matter of law, Plaintiff cannot state a claim for violation of Section 3344. This Court should grant Mr. Pierattini's motion for summary adjudication.

II. FACTUAL BACKGROUND

A. Plaintiff's First Amended Complaint

Plaintiff filed this lawsuit against Mr. Pierattini and several other defendants alleging eight causes of action. The FAC, which meanders and is difficult to follow, contains vague allegations against Mr. Pierattini that are few and far between. Although nearly none of the allegations in the FAC are directed solely at Mr. Pierattini, Plaintiff claims Defendants, as a whole, "used his name, voice and photograph or likeness for unauthorized commercial use". (FAC, 2:18-19). The FAC makes factually false and incomprehensible allegations regarding misappropriation as follows:

> 73. Defendants have used my likeness to advertise most of their YouTube videos about me.
> …

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> 74. Defendants gained a commercial benefit because their following, as well as my following, were looking for content about me and used the images to find the content, which earned advertising revenue for the Defendants."
>
> …
>
> 75. I was harmed by not having that ad revenue myself, by the videos containing negative content about me, and because as a trained actor, I charge fees and have been paid for my likenessaw.

(FAC, ¶¶ 73-75.) These are the only alleged "facts" in Plaintiff's FAC as to his Eighth Cause of Action of "Right to Publicity Torts" and California Civil Code Section 3344. All of Plaintiff's speculation and conclusions arise from these "facts" which are non-actionable. None of these alleged "facts" meet the elements of the Eighth Cause of Action or California Civil Code Section 3344 asserted in Plaintiff's FAC. Additionally, there is no evidence that Plaintiff suffered any damages concerning anything Mr. Pierattini allegedly did.

B. Court Granted Summary Judgment

The Court previously granted summary judgment as to all of Plaintiff's Causes of Action except for the Eighth Cause of Action for "Right to Publicity Torts" for which this Motion is made. The Court denied summary judgment as to the Eight Cause of Action on the grounds of insufficient evidence establishing Plaintiff is a public figure.[1]

C. Plaintiff's Abuse of the Discovery Process

As the Court knows, Plaintiff has treated the discovery process with complete disdain, refusing to provide any evidence to support his frivolous claims against Mr. Pierattini. In an attempt to understand what exactly Plaintiff's claims against him actually are, Mr. Pierattini propounded commonplace discovery requests to Plaintiff. Rather than properly responding to Mr. Pierattini's discovery requests, Plaintiff chose to engage in gamesmanship and refused to provide any information or documents. Plaintiff has already been sanctioned for his conduct during discovery, with more sanctions to come.

Plaintiff has not complied with discovery and is not even paying the prior Court Orders for sanctions for his non-compliance with discovery. By the time of this motion, this discovery

[1] For purposes of this Motion, Mr. Pierattini is not arguing that Plaintiff is a public figure of newsworthiness.

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will be well over a year old and nothing, not one thing, has gotten done because it is one game after another by Plaintiff.

1. The complaint was filed by Plaintiff on February 6, 2023. Mr. Pierattini filed a demurrer on April 21, 2023; and then answered on July 31, 2023.

2. On January 25, 2024, Mr. Pierattini filed a motion to compel further responses to request for admission.

3. On January 25, 2024, Mr. Pierattini filed a motion to compel further responses to special interrogatories because there were essentially no answers.

4. On January 25, 2024, Mr. Pierattini filed a motion to compel further responses to form interrogatories because there were essentially no answers.

5. On January 25, 2024, Mr. Pierattini filed a motion to compel further responses to document requests because there was no real response and no document production.

6. On March 7, 2024, the Court granted Mr. Pierattini's Motion to Compel Form Interrogatory responses, issued sanctions in the amount of $1,635.00, ordered Plaintiff to respond within 30 days and continued the other Motions to Compel until May 2, 2024.

7. On March 15, 2024, instead of responding to the discovery, Plaintiff filed a frivolous Motion to Compel the Production of Documents against Mr. Pierattini.

8. On March 27, 2024, instead of responding to all the discovery, Plaintiff filed an ex parte motion for reconsideration of the motion sanctioning him for not complying with discovery, which was denied by the Court.

9. On April 8, 2024, instead of responding to discovery, Plaintiff filed a Motion for Reconsideration of the sanctions order on the Motion to Compel Form Interrogatories.

10. On May 2, 2024, the Court granted Mr. Pierattini's Motions to Compel Requests for Admission, Special Interrogatories, Requests for Production and Plaintiff's deposition. The written responses and production of documents was ordered to occur within 30 days. Court deferred ruling on the location of the deposition pending Plaintiff providing his address to the Court and continued the hearing on the Motion to Compel the Deposition concerning locations and sanctions.

11. On June 18, 2024, this Court denied Plaintiff's frivolous motion to compel and awarded sanctions in the amount of $4,500. In other words, instead of responding to the written discovery that was served on him in December, Plaintiff filed a frivolous motion to compel for which he was sanctioned yet again. Plaintiff did not care because he consistently ignores the Court Orders and does not pay the Court Ordered sanctions.

12. On July 30, 2024, the Court denied Plaintiff's frivolous Motion for Reconsideration, granted Mr. Pierattini's Motion to Compel the deposition of Plaintiff and issued sanctions in the amount of $4,560.00.

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13. On September 5, 2024, the Court denied Mr. Pierattini's Motion for Summary Judgment on the right of publicity claim because Mr. Pierattini did not have the discovery needed to attack the one claim for which summary judgment was denied. In fact, Plaintiff's argument was, in opposition to summary judgment, that Defendant did not have the discovery responses to show that Plaintiff had no evidence to support his case.

Everything is a delay tactic. This discovery is from December of 2023. To date, Plaintiff has not complied with one Court Order. Plaintiff is simply flouting the Court's Orders.

Plaintiff is in violation following five court orders:

- The Order on the Motion to Compel Plaintiff's Responses to Defendant's Special Interrogatories has not been complied with;
- The Order on the Motion to Compel Plaintiff's Responses to Defendant's Form Interrogatories has not been complied with;
- The Order on the Motion to Compel Plaintiff's Responses to Defendant's Requests for Production of Documents has not been complied with;
- The Order on the Motion to Compel Plaintiff's Responses to Defendant's Requests for Admission has not been complied with; and
- The Order on Plaintiff's Reconsideration of Sanctions and he has not paid the original sanctions or the sanction for that motion.

For example, this Court's Minute Order on March 7, 2024 states:

1. "Defendant Michael Pierattini's motion to compel responses to form interrogatories and request for sanctions is granted. Plaintiff Jose DeCastro's is ordered to serve the responses, without objections, and pay monetary sanctions in the amount of $1,635 within 30 days of service of the order. Pierattini is ordered to submit the proposed order in accordance with CRC Rule 3.1312."

(RJN No. 1) Also, for example, this Court's Minute Order on May 2, 2024 states:

1. "Pierattini's motion to compel further responses to the requests for admission is granted, in part. DeCastro is ordered to serve full and complete responses, without objections, to request for admission nos. 22, 23, 24, 25, 26, 27, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 54, 55, 56, 57, 58, 59, 61, 62, 63, 64, 65, 66, 67 trauma 68, 69, 70, 71 2072, 73, 74, 75, and 76 within 30 days . . . Interrogatory No. 17.1 for any request that was denied, appears to be the most precise and efficient way in this case for Pierattini to discovery the facts, witnesses and documents that support the disputed allegations drawn from of DeCastro's complaint."

2. "Pierattini's motion to compel further responses to the Special Interrogatories (set one) is GRANTED, in part. DeCastro is ordered to serve full and complete responses, without objections, to Special Interrogatory nos. 1 through 27 withing 30 days . . . ."

3. "Pierattini's motion to compel further responses to the request for production of documents (set no. one) is GRANTED, in part. DeCastro is ordered to serve full and complete responses, without objections, to request for production of documents nos. 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 18, and 19 within 30 days . . . ."

4. "Pierattini's motion to compel the deposition of DeCastro is GRANTED . . . ."

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(RJN No. 2.)

Aside from his outright refusal to engage in discovery, Plaintiff has made plain the true intentions behind this litigation, which are to make this case as expensive as possible for Mr. Pierattini by running up Mr. Pierattini's attorney's fees, for entertainment purposes in connection with his YouTube channel, and to ruin Mr. Pierattini professionally. Plaintiff has bombarded Mr. Pierattini's counsel with emails regarding meritless motions and absurd stipulation requests, has filed frivolous motions with the Court, and has screamed at Mr. Pierattini's counsel and Judge Ford in court hearings. Plaintiff even refused to provide his address until ordered to do so by the Court.

Plaintiff's harassment of Mr. Pierattini, as well as his mockery of this Court and its proceedings, must come to an end. Plainly, Plaintiff has provided no evidence to support his outlandish claims against Mr. Pierattini and continues to refuse to engage in discovery. The fact is that there is no evidence for Plaintiff's claims, and Mr. Pierattini therefore respectfully requests that the Court grant this Motion for Summary Judgment or in the alternative Summary Adjudication, and put an end to this waste of time, money, and court resources.

III. LEGAL STANDARD FOR MOTION FOR SUMMARY JUDGMENT

A defendant is entitled to summary adjudication when a complaint cannot establish an essential element of a cause of action, or where there is a complete defense to the claim. The standard for granting summary judgment against a plaintiff is set forth in Code Civ. Proc. § 437c.[2]

In *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal. 4th 826, the California Supreme Court provided further clarification regarding summary judgment law:

> The party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact.

[2] "A defendant…has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established or that there is a complete defense to that cause of action. Once the defendant…has met that burden, the burden shifts to the plaintiff…to show that a triable issue of one or more material facts exists as to that cause of action or defense thereto…" Code Civ. Proc. § 437c(p)(2).

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(*Id*. at 850.) The law no longer "require[s] a [party] moving for summary judgment to conclusively negate an element of the plaintiff's cause of action." *Id*. at 853. The party moving for summary judgment need only show that the "[plaintiff] cannot establish at least one element of the cause of action – for example, that the [complainant] cannot prove element X." *Ibid*.

Once a defendant moving for summary judgment negates an element of the cause of action or demonstrates that the plaintiff lacks significant probative evidence on an element of their causes of action, then the burden shifts to the plaintiff to demonstrate, by specific and substantial evidence, that a triable issue of material fact exists as to each cause of action. *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573; *Hunter v. Pacific Mechanical Corp.* (1995) 37 Cal.App.4th 1282, 1288. Claims and theories not supported by admissible evidence do not raise a triable issue of fact. *Rochlis v. Walt Disney Co.* (1993) 19 Cal.App.4th 201 [overruled on other grounds in *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238].

The pleadings define the issues to be considered on a motion for summary adjudication. *Benedek v. PLC Santa Monica, LLC* (2002) 104 Cal.App.4th 1352, 1355. Therefore, Plaintiff may not go beyond the four corners of his FAC in order to raise additional issues.

IV. MR. PIERATTINI IS ENTITLED TO SUMMARY ADJUDICATION AS TO PLAINTIFF'S EIGHTH CAUSE OF ACTION FOR "RIGHT TO PUBLICITY TORTS"

Plaintiff has failed to adequately describe his claims and refer to applicable statutes in his FAC, as the eighth cause of action in the FAC generally asserts "right to publicity torts" without specifying which "torts" are alleged. The elements for common law misappropriation of name and likeness (which mirror those required for a claim under Cal. Civ. Code § 3344) are: "(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." *Local TV, LLC v. Superior Court* (2016) 3 Cal.App.5th 1, 7–8.[3]

[3] Not every publication of someone's name or likeness gives rise to an appropriation action, as "[p]ublication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it, is not ordinarily actionable." (*Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 542; see also Civ. Code, § 3344(d).) Public interest attaches to people who by their actions create a "bona fide attention to their activities." (*Dora, supra,* 15 Cal.App.4th at 542.)

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Plaintiff contends that Defendants violated his rights under Section 3344. Since Section 3344 is directed at the appropriation of name or likeness for advertising to or for the solicitation of third parties (or for the placement of a name or image on a *product or good*). Specifically, Plaintiff cannot show that Mr. Pierattini used his name or likeness to advertise, sell to, or solicit the sale or purchase of goods or services from third parties. This is a necessary element of a claim under Section 3344. Thus, summary adjudication should be granted in Mr. Pierattini's favor as to Plaintiff's Section 3344 claim.

A. <u>Because Section 3344 Is Based on the Common Law Claim for "Appropriation of Name or Likeness," It Reached Only the Public Appropriation of a Name or Likeness for a Commercial Purpose</u>

Section 3344 provides, in relevant part, that:

> [a]ny person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for the purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent... shall be liable for any damages sustained by the person ... injured as a result thereof.

(Civil Code Section 3344.) Section 3344 complements the common law claim for appropriation of name or likeness, essentially codifying the common law with certain limitations. 2 (*Lugosi v. Universal Pictures* (1979) 25 Cal. 3d 813, 819 n.6; *Johnson v. Harcourt, Brace, Jovanovich, Inc.* (1974) 43 Cal. App. 3d 880, 894 [common law claim of appropriation of name or likeness "was codified in California in 1971" as Section 3344].) Under the common law, a claim of appropriation resulted from the "use of the plaintiff's name or likeness to *advertise* the defendant's business or product, or for some *similar commercial purpose.*" (Rest. 2d Torts § 652C, com. b [emphasis added].) The traditional purpose of the common law claim for appropriation of name or likeness (also known as the "right of publicity") was to protect celebrities from the unauthorized publication of their names or likeness, typically in an advertising context, for a defendant's financial gain. (*Eastwood v. Superior Court* (1983) 149 Cal. App. 3d 409, 413-416 [tabloid newspaper published an untrue "news" article regarding actor Clint Eastwood's "love triangle" with two other celebrities, prominently displaying his photograph with a caption on the front page]; *Fairfield v. American Photocopy Equipment Co.* (1955) 138 Cal. App. 2d 82, 87; *Motschenbacher v. R. J. Reynolds Tobacco Co.* (9th Cir. 1974) 498 F.2d 821 [tobacco company

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aired a TV commercial using a famous racing car driver's highly distinctive racing car as endorsing Winston cigarettes without his consent].) Critical to each of these celebrity cases was the public's reaction to the celebrity's name; this reaction imbued the name with commercial value:

> "The so-called right of publicity means in essence that the reaction of the public to name and likeness, which may be fortuitous or which may be managed or planned, endows the name and likeness of the person involved with commercially exploitable opportunities. The protection of name and likeness from unwarranted intrusion or exploitation is the heart of the law of privacy."

(*Lugosi, supra,* 25 Cal. 3d at 824.) Nevertheless, even ordinary citizens could bring common law claims for misappropriation when a defendant used their name or identity to solicit third persons. *See, e.g., Stilson v. Reader's Digest Assn* (1972) 28 Cal. App. 3d 270 [claim stated when Reader's Digest included individual's names in letters sent to third parties soliciting participation in subscription based sweepstake].

As explained in *Newcombe v. Adolf Coors Co.*(1988) 157 F.3d 686, 692:

> "... Section 3344 ... *requires* a plaintiff to establish: (1) a 'knowing' use; (2) for purposes of *advertising,* and (3) a direct connection between the use and the commercial purpose."

Because Section 3344 is based upon the common law claim for misappropriation of name or likeness for advertising purposes, it does not apply to several other forms of invasion of privacy that are recognized under the common law. Specifically, Section 3344 does not apply to claims for:

> (1) "unreasonable intrusion upon the plaintiff's seclusion or solitude;" pr
> (2) "public disclosure of true, embarrassing private facts." (*See Johnson, supra,* 43 Cal. App. 3d at 887.)3Hence, section 3344 does not apply to claims that a defendant:
> (1) intruded, "in a manner highly offensive to a reasonable person," "into a private place, conversation or matter" to observe, hear or otherwise sense what was occurring in that place, conversation or matter (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal. 4th 200, 230-231); or
> (2) made an "unwarranted publication of intimate details of one's private life which are outside the realm of legitimate public interest." (*Johnson, supra,* 43 Cal. App. 3d at 891 [defining "the crux" of the tort of public disclosure of private facts].)
>
> Section 3344 applies to the "right of publicity" and to that right alone.

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B. Plaintiff's Claims Are Preempted By Copyright

Plaintiff claims that his likeness was used in a web television series (a series of web videos on BlueBacon channel on YouTube), the Videos. Plaintiff's claims arise exclusively from the alleged publication of his name and likeness from the copyrighted Program or derivative works (i.e. photographs) from the Videos. All of Plaintiff's state law causes of action are preempted by the Copyright Act of 1976, 17 U.S.C. § 101 et seq (the "Copyright Act"). The Copyright Act expressly preempts a particular state law cause of action where: (1) the state right is "within the subject matter of copyright" as defined by the Act; and (2) the state right is "equivalent" to any exclusive rights of a federal copyright. *Fleet v. CBS, Inc.* (1996) 50 Cal. App. 4th 1911, 1919, 58 Cal. Rptr. 64; *Laws v. Sony Music Entertainment, Inc.* (9th Cir. 2006) 448 F.3d 1134, 1137-38. Both elements are satisfied here.

1. Derivative Works Within the Subject Matter of Copyright

As an initial matter, it is well settled that "derivative works" are protected by the Copyright Act. Among the enumerated rights of the copyright owner is the right to "prepare derivative works based upon the copyrighted work" and "in the case of. ... dramatic, and choreographic works... including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly." 17 U.S.C. § 106 (emphasis added); *see also Fleet*, 50 Cal. App. 4th at 1920; *Ahn v. Midway Mfg. Co.* (N.D. III. 1997) 965 F. Supp. 1134, 1137 (copyright owner has rights to "reproduction, the preparation of derivative works, and distribution").

A derivative work is defined as "a work based upon one or more pre-existing works, such as a translation, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted." 17 U.S.C. § 101 (emphasis added). The alteration or manipulation of an image from its source material is also a "derivative work." *See, e.g., Jarvis v. K2, Inc.* (9th Cir. 2007) 486 F.3d 526, 332 (defendant's use of plaintiff's photographs "did not simply compile or collect [plaintiffs] images, but rather altered them in various ways and fused them with other images and artistic elements into new works that were based on -- i.e., derivative of

- [plaintiffs] original images"); *Tiffany Design v. Reno-Tahoe Specialty* (D. Nevada 1999) 55F. Supp. 2d 1113, 1119-20 (scanning portions of copyrighted image into computer and using them in architectural design constituted derivative work).

Accordingly, in order to escape preemption, Plaintiff's state law claim must allege something beyond mere the use of his likeness in these copyrighted works. *La Resolana Architects v. Clay Realtors Angel Fire* (9th Cir. 2005) 416 F.3d 1195, 1199 n.2; *see also Murray Hill Publications, Inc. v. ABC Communications, Inc.* (6th Cir. 2001) 264 F.3d 622, 637 (conversion claim alleging that defendants took their works and reproduced them, distributed them, publicly performed and displayed them, and made derivative works from them" preempted by copyright); *Ahn*, 965 F. Supp. at 1138 (performer's right of publicity claim based on the digitization and use of that performance in a video game preempted by copyright).

Defendants submit indisputable evidence that they have not used Plaintiff's name or likeness beyond the exploitation of the Program itself and the exploitation of rights reserved to the copyright holder. Accordingly, under the Copyright Act, these images are derivative works that Mr. Pierattini was absolutely entitled to create and exploit under the Copyright Act.

2. Plaintiff's Claims Are Within The Subject Matter Of The Copyright Act

Section 102 of the Act extends copyright protection to "original works of authorship fixed in any tangible medium of expression... from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 102(a). That section defines a "work of authorship" to include "motion pictures and other audiovisual works." 17 U.S.C. § 102 (a)(6).

Any performance captured on film is "a work of authorship fixed in a tangible medium of expression" and within the subject matter of copyright. *Fleet,* 50 Cal. App. 4th at 1923 ("performances captured on film [are] copyrightable"). Thus, even a televised major league baseball game is a "work of authorship" as the *Fleet* court made clear when analyzing the Seventh Circuit's decision in *Baltimore Orioles v. Major League Baseball Players* (7th Cir. 1996) 805 F.2d 663. In the *Baltimore Orioles* case, baseball players alleged a violation of their

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right to publicity from the television broadcast of their baseball games. The Seventh Circuit held that players' performances in a baseball game filmed for television were within the subject matter of the Copyright Act. *Baltimore Orioles*, 805 F.2d at 675. The *Baltimore Orioles* court then held that any rights of publicity were preempted by copyright. *Baltimore Orioles*, 805 F.2d at 675 ("By virtue of being videotaped... the players' performances are fixed in tangible form, and any rights of publicity in their performances that are equivalent to the rights contained in the copyright of the telecast are preempted."); see also *Fleet*, 50 Cal App. 4th at 1923-24 (discussing *Baltimore Orioles* and listing other cases that reach the same result).

It is undisputed that Mr. Pierattini holds the copyright to the Program. The Program is a motion picture or other audiovisual work within the meaning of the Copyright Act. Plaintiff's claims are based entirely on Defendants' exploitation of the Program and derivative works therefrom. Accordingly, Plaintiff's claims are all within the subject matter of the Copyright Act.

3. **Plaintiff's Claims Are Equivalent To Rights Contained In The Copyright Act**

Plaintiff's claims are "equivalent" to the rights embodied by the Copyright Act because he challenges the use of his likeness and name in the Program - directly and in derivative works - through state law claims of misappropriation and unfair competition. "A state claim is equivalent to one of the rights asserted under the Copyright Act if it is violated by the exercise of any of the rights set forth in § 106." *Ahn*, 965 F. Supp. at 1137 (citing *Baltimore Orioles*, 805 F.2d at 676). In other words, "when a person's 'identity' claims are essentially claims regarding the use of a copyrighted work, then courts have found the state claims to be preempted." *Laws*, 448 F.3d at 1144; *see also Motown Record Corp. v. George A. Hormel & Co.* (C.D. Cal. 1987) 657 F. Supp. 1236, 1240-41 (statutory misappropriation claim under section 3344 claim based on use of the image of the Supremes singing a copyrighted work preempted by the copyright).

The Second District Court of Appeal's opinion in *Fleet v. CBS* is directly on point. In *Fleet*, actors in a movie alleged claims for statutory misappropriation arising from CBS' use

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of their name and likeness in that movie as well as on the "packaging and advertising materials for the motion picture." *Fleet*, 50 Cal App. 4th at 1915. While the actors voluntarily appeared in the picture, they claimed that the use of their name and likeness was unauthorized because they had not been paid. *Fleet*, 50 Cal. App. 4th at 1914. The trial court granted summary judgment against the actors on the grounds of copyright preemption, and the *Fleet* court affirmed.

In concluding that the actors' rights being asserted in that case were equivalent to right available under copyright law, the *Fleet* court held:

> Appellants deny that the rights which they are asserting under Civil Code section 3344 are equivalent to the rights available under copyright law, but their denial rings hollow. Appellants seek to protect the physical images of their performances captured on film in the subject motion picture and no others. CBS seeks to display or reproduce those images and no others. The owner of a copyright - either the "author" (actor) or his employer (the producer) - is vested with the exclusive rights to, among other things, "reproduce the copyrighted work" and "display the copyrighted work publicly." Appellants may choose to call their claims misappropriation of right to publicity, but if all they are seeking is to prevent a party from exhibiting a copyrighted work they are making a claim "equivalent to an exclusive right within the general scope of copyright."

(*Fleet*, 50 Cal. App. 4th at 1920 (emphasis added; citation and footnote omitted).6)

Thus, the *Fleet* court made clear that "a right is equivalent to rights within the exclusive province of copyright when it is infringed by the mere act of reproducing, performing, distributing, or displaying the work at issue" and that a "claim asserted to prevent nothing more than the reproduction, performance, distribution, or display of a dramatic performance captured on film is subsumed by copyright law and preempted." *Fleet*, 50 Cal. App. 4th at 1924.

Here, Plaintiff's claims for violation of the right of publicity are no different from the preempted claims in *Fleet*. Like the actors in *Fleet*, Plaintiff's appearance in the videos was fixed in a tangible medium. Like *Fleet*, Plaintiff asserts misappropriation claims based upon the distribution of the Program as well as derivative works from and advertising/promotion materials for the Program. *See Fleet*, 50 Cal App. 4th at 1915 (claims based on distribution of mobile and "packaging and advertising materials for the motion picture"). Moreover, like *Fleet*, Plaintiff claims that his consent to appear on camera in the Program depended on conditions which were not satisfied (he was not paid). *See Fleet*, 50 Cal. App. 4th at 1914

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(actors claimed that the condition to their consent to appear — payment for their services — was not satisfied). Nevertheless, the *Fleet* court held that the actors' claims were "subsumed by copyright law and preempted." *Fleet*, 50 Cal. App. 4th at 1924.

C. Mr. Pierattini's Alleged Acts Do Not Constitute the "Appropriation" of Plaintiff's Name and Likeness

There can be an "appropriation" within the confines of Section 3344 only if a defendant uses a plaintiff's name to solicit the purchase of products from *third parties*. Because Plaintiff does not make any allegation of a use to reach out to third parties, he has not alleged the factual predicate for a Section 3344 violation here.

California Civil Code Section 3344 states:

> (a) Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars ($750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney's fees and costs.
> (e) The use of a name, voice, signature, photograph, or likeness in a commercial medium shall not constitute a use for which consent is required under subdivision (a) solely because the material containing such use is commercially sponsored or contains paid advertising. Rather it shall be a question of fact whether or not the use of the person's name, voice, signature, photograph, or likeness was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for which consent is required under subdivision (a).

(Civil Code Section 3344.)

Here, Plaintiff currently maintains a YouTube channel with over 559,000 subscribers on which he has posted over 2,500 videos that have amassed over 241,783,000 views. (UDF Nos. 43-45.) A cursory scroll through Plaintiff's YouTube channel shows that his videos often garner thousands of views each, with some even garnering tens or hundreds of thousands of views. (UDF No. 46.) A YouTube channel titled "Our Nevada Judges, Inc." which posts

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recordings of court hearings in Nevada, has garnered hundreds of thousands of views by posting recordings of Plaintiff's criminal hearings. (UDF No. 47.) To say that Plaintiff's actions have created a "bona fide attention" to his activities would be an understatement.

Mr. Pierattini's analysis or commentary regarding the deluge of content Plaintiff has posted to the internet for his thousands of subscribers was not for purposes of advertising to or solicitation of third parties. Mr. Pierattini's commentary was solely for the purpose of setting the record straight and correcting Plaintiff's prior statements. Additionally, Mr. Pierattini did not receive any financial gain from the limited disclosures made.

As stated in Section 3344(e), the use of Plaintiff's name or likeness in a commercial medium such as YouTube, does not require consent solely because the material containing such use is commercially sponsored or contains paid advertising. YouTube channels are commercially sponsored and contain paid advertising regardless of the content of the videos and whose name or likeness is being used. As such, Plaintiff's name and likeness was not a factor in obtaining sponsorships or advertisements on the YouTube channel.

D. Even if There Was Appropriation of Plaintiff's Name and Likeness, Plaintiff's Claim is Barred by the Incidental Use Doctrine

Even if Plaintiff could allege that Mr. Pierattini "appropriated" Plaintiff's name within the confines of Section 3344, which he cannot, the Section 3344 claim would not lie because any such appropriation was too incidental and fleeting. *Under the "incidental use"* doctrine, "incidental use of a name or likeness does not give rise to liability for invasion of privacy by appropriation." *Aligo v. Time-Life Books* (N.D. Cal., Dec. 19, 1994) 1994 U.S. Dist. LEXIS 21559, *12 ["Defendants' four-second use of Plaintiff's photograph in their 29-minute infomercial is too fleeting and inconsequential as a matter of law to give rise to liability for misappropriation under California common law or Civil Code Section 3344."]. *See also Hill v. Nat'l Collegiate Athletic Assn.* (1994) 7 Cal. *4th 1, 26 n.6* [in appropriation claims, "mere incidental use [is] not actionable;" "appropriation of commercial or other value of name or likeness is essential...."].

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In *Avrahami,* discussed above, the court also applied the incidental use doctrine to bar plaintiff's appropriation claim based on the rental or exchange of subscription lists with third-party vendors. *Avrahami,* 1996 Va. Cir. LEXIS 518 at * 17-18. The court found that the "inclusion of a name as part of a larger mailing list -- where no relationship exists between the individual name and the exchange of the list -- is 'too fleeting and incidental' to be actionable under Virginia Code section 8.01-40." *Id.*

Hence, even if Plaintiff could state a claim under Section 3344 on the facts he alleges, such a claim would be barred by the incidental use doctrine. Any commentary or analysis made regarding Plaintiff was a fraction of the hundreds of thousands of other videos, content, and analyses made on Mr. Pierattini's channel. As the *Avrahami* court recognized, the inclusion of any one of those comments or videos on the list of thousands could not have any bearing on the decision of any third-party vendor to enter into an agreement with Mr. Pierattini. Thus, there was no commercial exploitation of any individual name, Plaintiff's or otherwise, to third parties, as is required for a misappropriation claim (*Hill, supra,* 7 Cal. 4th at 26, n.6) and there is no "direct" connection between the use of a name and a commercial purpose, as is required by Section 3344. *Eastwood, supra,* 149 Cal. App. 3d at 417. Mr. Pierattini's alleged use of Plaintiff's name here therefore was "too fleeting and incidental" to be actionable under Section 3344.

Additionally, Plaintiff has not provided any evidence that would establish liability for misappropriation of name and likeness as to Mr. Pierattini. Although Plaintiff's FAC alleges this cause of action as "Against All Defendants," the allegations therein make no reference to Mr. Pierattini or any specific conduct by him. (See FAC, ¶¶ 72-76.) The facts that form the basis of Plaintiff's claims do not evidence any tortious conduct by Mr. Pierattini. There is no evidence of misappropriation of name and likeness of any kind by Mr. Pierattini. In addition, there is no evidence of any damages or harm allegedly suffered by Plaintiff concerning his claims against Mr. Pierattini. Accordingly, Plaintiff's eighth cause of action against Mr. Pierattini fails as a matter of law. Therefore, Mr. Pierattini is entitled to Summary Adjudication on this cause of action.

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IV. PLAINTIFF HAS SUFFERED NO DAMAGES

Plaintiff has no damages legally recoverable under his right of publicity claims. "The rule is established that the plaintiff has the burden of proving, with reasonable certainty, the damages actually sustained by him as a result of the defendant's wrongful act, and the extent of such damages must be proved as a fact." *Gorman v. Tassajara Dev. Corp.*(2009) 178 Cal. App. 4th 44, 83 (quoting *Chaparkas v, Webb* (1960) 178 Cal. App.2d 257, 259).

Plaintiff has refused to answer discovery so Mr. Pierattini does not have any viable claim to go on. There are no allegations of any conduct which could have proximately caused Plaintiff damages. (See Pierattini Decl. herewith.) That resolves the issue. However, in addition, when Plaintiff tries to manufacture damages, he alleges the amounts are purely speculative.

In any case, Plaintiff needs to allege that his likeness was used to make money, which he cannot do. The traditional sense was that Plaintiff's likeness was used to sell a product. Here, Plaintiff does not allege that, and cannot allege that. Unlike defamation, or similar torts, not part of this case as this time, Plaintiff cannot allege claims for right of publicity for distributing the show with his likeness in it, because under *Fleet*, that type of claim is preempted by Copyright Infringement.

V. THERE HAS BEEN NO EVIDENCE PRODUCED TO SUPPORT PLAINTIFF'S FRIVOLOUS CLAIMS

The California Appellate Courts have directed the trial courts to shut down frivolous litigation when a party refuses to properly respond to discovery requests. A defendant has met his or her burden on a summary judgment motion by demonstrating to the court that a complainant has not produced discovery responses in support of his contentions. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 580.) In directing the trial courts to stamp out frivolous litigation, the *Union Bank* court stated:

> Now, a moving defendant may rely on factually devoid discovery responses to shift the burden of proof pursuant to section 437c, subdivision (o)(2). Once the burden shifts as a result of the factually devoid discovery responses, the plaintiff must set forth the specific facts which prove the existence of a triable issue of material fact.

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(*Id.* at 590.)[4]

Furthermore, "a moving defendant need not support his motion with affirmative evidence negating an essential element of the responding party's case. Instead, the moving defendant may (through factually vague discovery responses or otherwise) *point to the absence of evidence to support the plaintiff's case*. When that is done, the burden shifts to the plaintiff to present evidence showing there is a triable issue of material fact. If the plaintiff is unable to meet her burden of proof regarding an essential element of her case, all other facts are rendered immaterial." *Leslie G. v. Perry & Assocs.* (1996) 43 Cal.App.4th 472, 482 [citing Code Civ. Proc., § 437c, subd. (o)(2)]; see also *Collin v. CalPortland Co.* (2014) 228 Cal.App.4th 582, 589 [noting that plaintiff's factually insufficient responses to defendant's discovery requests could raise an inference that plaintiff could not prove relevant causation element of claim]. Here, Plaintiff provided nothing but factually devoid responses and objections to Mr. Pierattini's discovery requests, thus raising an inference that Plaintiff cannot prove the elements of his claims against Mr. Pierattini. (UDF No. 49.)

Mr. Pierattini has submitted evidence that Plaintiff's claims are frivolous. Separately, Plaintiff has ignored nearly all of Mr. Pierattini's discovery requests. California law does not allow Plaintiff to ignore discovery in order to place himself in a better position. The law is well settled that a party cannot benefit from its own wrong (here, refusing to respond to basic discovery). *See St. James Armenian Church of Los Angeles v. Kurkjian* (1975) 47 Cal.App.3d 547, 552.

There is no evidence of misappropriation of Plaintiff's name and likeness of any kind by Mr. Pierattini. In addition, there is no evidence of any damages or harm allegedly suffered by Plaintiff concerning his claims against Mr. Pierattini. Accordingly, Plaintiff's eighth cause of action against Mr. Pierattini fails as a matter of law. Therefore, Mr. Pierattini is entitled to Summary Adjudication on this cause of action.

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[4] See also *Certain Underwriters at Lloyd's of London v. Superior Court* (1997) 56 Cal.App.4th 952; *Department of Industrial Relations v. UI Video Stores, Inc.* (1997) 55 Cal.App.4th 1084; *Lopez v. Superior Court* (1996) 45 Cal.App.4th 705; *Villa v. McFerren* (1995) 35 Cal.App.4th 733; *Hunter v. Pacific Mechanical Corp.* (1995) 37 Cal.App.4th 1282, 1287; Code Civ. Proc. § 437c(o)(2).

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VI. CONCLUSION

For the foregoing reasons, Mr. Pierattini respectfully requests that the Court grant his Motion for Summary Judgment or in the alternative Summary Adjudication as to the Eighth Cause of Action.

DATED: January 22, 2025

THE LAW OFFICES OF
R. PAUL KATRINAK

By: R. Paul Katrinak
Attorneys for Defendant
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PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California; I am over the age of 18 and not a party to the within action; my business address is 9663 Santa Monica Boulevard, Suite 458, Beverly Hills, California 90210.

On January 22, 2025, I served the foregoing document(s) described as:

DEFENDANT MICHAEL PIERATTINI'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE SUMMARY ADJUDICATION

on the interested parties to this action addressed as follows:

Steven T. Gebelin, Esq.
LESOWITZ GEBELIN LLP
8383 Wilshire Blvd., Suite 800
Beverly Hills, CA 90211
Steven@lawbylg.com

(BY MAIL) I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid and addressed to the person above.

(BY PERSONAL SERVICE) by causing a true and correct copy of the above documents to be hand delivered in sealed envelope(s) with all fees fully paid to the person(s) at the address(es) set forth above.

X (BY EMAIL) I caused such documents to be delivered via electronic mail to the email address for counsel indicated above.

Executed January 22, 2025, at Los Angeles, California.

I declare under penalty of perjury under the laws of the United States that the above is true and correct.

R. Paul Katrinak

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JOSE DECASTRO vs KATHERINE PETER

Case Number: 23SMCV00538 Case Type: Civil Unlimited Category: Defamation (slander/libel)
Date Filed: 2023-02-06 Location: Santa Monica Courthouse - Department O

Reservation

Case Name: JOSE DECASTRO vs KATHERINE PETER	Case Number: 23SMCV00538
Type: Motion for Summary Judgment	Status: RESERVED
Filing Party: Michael Pierattini (Defendant)	Location: Santa Monica Courthouse - Department O
Date/Time: 05/29/2025 8:30 AM	Number of Motions: 1
Reservation ID: 516095875168	Confirmation Code: CR-WWDJ5CX3NGNFQDUYJ

Fees

Description	Fee	Qty	Amount
Motion for Summary Judgment	0.00	1	0.00
TOTAL			$0.00

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Amount: $0.00	Type: NOFEE
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