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Attorney for Defendant, Todd Witteles

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

IN RE: Michael Postle, Plaintiff, vs. Veronica Brill, an individual; ESPN, Inc., a Delaware Corporation, Joey Ingram, an individual, Haralabos Voulgaris, an individual, Daniel Negreanu, an individual, Upswing Poker Inc., a Nevada Corporation, iBus Media Limited d/b/a "PokerNews", an Isle of Man, United Kingdom Private Limited Company Parent, Seat Open LLC, d/b/a "Crush Live Poker", a Nevada Limited Liability Company, Solve For Why Academy LLC, a Nevada Limited Liability Company, Todd Witteles, an individual, Run It Once, Inc., a Nevada Corporation, and DOES 1 through 1000, Inclusive, Defendants.	Case No. 34-2020-00286265 Assigned to the Honorable David Brown Department 53 **NOTICE OF MOTION AND SPECIAL MOTION TO STRIKE COMPLAINT PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 425.16, MEMORANDUM OF POINTS AND AUTHORITIES** **(DECLARATION OF TODD WITTELES UNDER SEPARATE COVER)** **Reservation No. 2542627** **Date: February 10, 2021** **Time: 1:30 P.M.** **Dept: 53**

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that, on February 10, 2021 at 1:30 P.M. or as soon thereafter as counsel may be heard, in Department 53 of the above entitled court, located at 720 9th St. Sacramento, California 95814, Defendant Todd Witteles ("Witteles") will move to strike (1) the Complaint, dated October 1, 2020, filed by Plaintiff Michael Postle, ("Plaintiff") in this action as to Witteles, or in the alternative (2) Plaintiff's first cause of action for Libel Per Se, second cause of action for Slander Per Se, third cause of action for Trade Libel, fourth cause of action for False Light, seventh cause of action for Intentional Infliction of Emotional Distress, and Plaintiff's requests for all damages prayed for against Witteles.

This special motion to strike is made on the grounds that:

1. Plaintiff's complaint, and each cause of action alleged therein, against Witteles arises from acts of Witteles in furtherance of his right of free speech under the United States and/or California Constitutions in connection with a public issue, as that language is defined in Code of Civil Procedure Section 425.16(e)(2), (3), and (4); and
2. Plaintiff cannot establish that there is a probability that he will prevail on his claims.

This motion is based on this notice of motion, the attached memorandum of points and authorities, the attached declaration of Todd Witteles, the exhibits submitted herein, the pleadings, papers, and records on file in this action, and upon other evidence and argument as may be submitted on or before the hearing on this motion.

After the court rules on Witteles' special motion to strike, Witteles intends to seek an award of his attorney's fees and costs, pursuant to CCP 425.16(c).

Dated December 8, 2020

/s/Eric Bensamochan
Eric Bensamochan, Esq
The Bensamochan Law Firm Inc.
Attorney for Defendant Todd Witteles

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is precisely the type of frivolous lawsuit that prompted the California Legislature to enact Code of Civil Procedure section 425.16, the "Anti-SLAPP" statute. Defendant Todd Witteles ("Witteles") is a professional poker player, World Series of Poker bracelet winner, and host of a poker-related podcast entitled "Poker Fraud Alert Radio." Witteles also operates the website www.pokerfraudalert.com, which includes a public forum in which users of the site can post information or opinions on a variety of topics. Some of those topics are introduced by Witteles, and other topics are introduced by the user community at large. That user community spans globally and is representative of several states domestically and countries outside of our borders.

Amongst those opinions were three alleged references to what was in October 2019 (and remains today) a massive, well-publicized story within the poker world and the sports world at large. That was the purported cheating by Plaintiff, who cultivated a public following as a "Poker God" and a "reality show star" in poker games "televised" via internet streaming to a large audience. These three statements allegedly made by Witteles were unquestionably about a matter of public interest (as reflected in Plaintiff's own Complaint). Furthermore, they are not actionable under California law, and Plaintiff therefore cannot meet his burden of establishing a probability of succeeding on his claims. The statements at issue are unactionable opinion, Plaintiff cannot establish they were even false, and Plaintiff cannot establish that they were made with actual malice. Accordingly, Plaintiff's claims should be dismissed under the Anti-SLAPP statute.

II. STATEMENT OF FACTS

A. Plaintiff Becomes a Popular Public Figure Within The Poker World To Entice Consumers To Visit Stones Gambling Hall

As reflected in Plaintiff's own Complaint, by September 2019 Plaintiff had become a form of "reality show star," a poker player who was well known for his "seemingly mystical abilities" to divine the cards of his fellow players. Complaint, Exs. B-C. Plaintiff and the gambling hall he

frequented, Stones Gambling Hall ("Stones") worked together to craft that public persona in order to encourage consumers to visit Stones for the opportunity to play against Plaintiff. Declaration of Todd Witteles ("Witteles Decl."), Ex. A. Plaintiff's games were live streamed to a large audience by Stones, complete with "live" commentary by other poker professionals. Complaint ¶¶ 20-21.

B. Allegations That Plaintiff Is Cheating Become A National Story

On or about September 28, 2019, defendant Veronica Brill ("Brill") purportedly accused Plaintiff of cheating in his games by gaining access through unspecified means to the "hole cards." Complaint ¶ 24. Within days, the possibility of Plaintiff cheating had become a hotly discussed and debated topic not only within the poker community, but the public at large. Plaintiff himself identifies numerous instances of public discussion regarding his alleged cheating, including Brill's YouTube channel (Complaint ¶ 39), newspaper articles (Complaint, Exs. B-C), and a nationally televised segment on ESPN's "SportsCenter with Scott Van Pelt" (Complaint ¶¶ 40-42). Speaking with one newspaper reporter, Plaintiff confirmed the intense public interest in the story by claiming that his "side" of the story would "shock … the entire world." Complaint, Ex. C.

National interest in the story remains high, with the *Sacramento Bee* covering the matter as recently as September 15, 2020 (Complaint, Ex. C) and the popular online magazine *Wired* posting a story on September 21, 2020. Witteles Decl., Ex. B.[1]

C. Plaintiff Confirms His Celebrity And Keeps The Story In The Public Eye By Appearing As A Guest On A Popular Poker Podcast

On or about October 4, 2019, at approximately the same time that many of the defendants in this case began discussing the cheating allegations, Plaintiff actually increased public interest by appearing as a guest on the podcast "The Mouthpiece with Mike Matusow."[2] Mr. Matusow is a well-

[1] This article is also available at: https://www.wired.com/story/stones-poker-cheating-scandal/

[2] Witteles Decl., Ex. A. This episode is also currently available at https://www.youtube.com/watch?v=W25kCO_doto.

known poker professional with a large following on both YouTube (which hosts the podcast) as well as on Twitter. Witteles Decl., ¶5. During this podcast, Plaintiff admits at several points that he is a form of "celebrity" and "reality show star," confirms that his public persona was crafted in part to entice consumers to come to Stones and to gamble there, and argues that the allegations against him stem from resentment over his popularity:

- "This [the allegations of cheating] started with a lot of hatred towards me for, against the whole [Stones] making me into ***some reality show star on TV***... except it was done in a live stream."
- "As far as why this [the allegations] started, this started because... this literally came about due to that hatred... well... Stones, they kind of glorified me into being Wonderboy. You have to watch this stream, ***you have to come play here, to come play with me***.... I allowed more latitude for them [Stones] to buy into that. ***We kind of sold our own narrative of... I'm the greatest player ever.... that's what I was made out to be***."

Witteles Decl., Ex. A.

D. Witteles' Alleged Opinions

Witteles is himself a well-known professional poker player. Witteles Decl. ¶ 2. After becoming a victim in a prior cheating scandal which garnered significant public attention, Witteles developed a reputation for speaking out on cheating in poker, including an appearance on the Television news program *60 Minutes* in 2008. *Id.* ¶3. In connection with his efforts, he works with the blog website "Poker Fraud Alert," which is a website that caters to reviews, opinions, topical discussion and complaints about the topic of cheating in poker, among other pertinent topics. *Id.* ¶4. The website and its posts are intended to solicit the opinions of the site's users and to offer parties an opportunity to rebut those opinions. *Id.* When posting on this website, Witteles frequently offers his own opinions concerning allegations of cheating, based on his own personal observations as well as publicly available facts and information provided by other players and media outlets. *Id.*

III. PLAINTIFF'S CLAIMS SHOULD BE STRICKEN UNDER THE ANTI-SLAPP STATUTE

In 1992, the California Legislature enacted CCP section 425.16 in response to the obvious perception that "there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." *Mattel, Inc. v Luce, Forward, Hamilton & Scripps*, 99 Cal.App.4th 1179, 1187 (2002). "Such lawsuits have earned the acronym SLAPP, which stands for 'strategic lawsuits against public participation.'" *Id.* at 1187-88.

CCP 425.16, subsection (b)(1) provides that: "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 or 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."

In determining whether to strike a cause of action pursuant to the Anti-SLAPP statute, the Court must therefore engage in a two-step process: "First, the moving party has the burden of establishing that the action challenged qualifies for treatment under section 425.16." *Mattel,* 99 Cal.App.4th at 1188. "Second, when the moving party establishes that the action qualifies for treatment under section 425.16, the burden shifts to the Plaintiff to demonstrate the 'probability that the Plaintiff will prevail on the claim.'" *Id.* (*quoting* CCP § 425.16(b)(1)).

The evidence, including Plaintiff's own allegations in his Complaint, establish that Plaintiff's claims unquestionably arise from protected activity, as defined in the Anti-SLAPP statute. Therefore, the burden shifts to the Plaintiff to establish a "probability" that he will prevail on his claims. Plaintiff cannot meet that burden.

IV. PLAINTIFF'S CLAIMS ARISE FROM PROTECTED ACTIVITY

A. Legal Standard

In determining whether a claim should be stricken under the anti-SLAPP statute, a court first decides whether the challenged cause of action is one arising from an "act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue." Acts that qualify for protection under the anti-SLAPP statute are identified in CCP § 425.16(e), and include:

1. Any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;
2. 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***;
3. Or 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.***

Here, Plaintiff's claims are clearly based on acts in furtherance of Witteles' right of free speech as defined in CCP § 425.16(e).

B. Plaintiff's Claims Against Witteles Are Limited To Three Specific Statements

Plaintiff's Complaint specifies only three, specific statements which are attributable to Witteles. Complaint, ¶¶86-88. Accordingly, Plaintiff must meet his burden to prove that these three specific statements qualify as defamation. This is particularly so with regard to Plaintiff's "libel" claims, for two reasons. First, under California law, the words constituting alleged libel must be specifically identified in the complaint. *Gilbert,* 147 Cal.App.4th at 31 (2007). Second, a claim for libel requires that the statements be in writing. Civil Code § 45. Here, the only statements alleged in the Complaint as to Witteles that are both specifically identified and in writing are those identified in Paragraphs 86-88.

C. The Statements Were Made In A Public Forum About An Issue Of Public Interest

The alleged statements posted at issue further relate to a game that is held out for public participation at a popular gaming establishment, and which is so popular that it was streamed to a large audience. Moreover, the statements at issue were about a particular incident – Plaintiff's alleged cheating – which itself attracted significant public attention, including discussion in newspapers, magazines and on national television. This type of activity unquestionably qualifies under CCP § 425.16(e)(2)&(3).

California law is now settled that the Internet is "a public forum" for purposes of CCP 425.16. *See, e.g., Computer Xpress, Inc. v. Jackson,* 93 Cal.App.4th 993, 1066-07 (2001); *Grenier v. Taylor*, 234 Cal.App.4th 471, 481 (2015) ("Statements made on a Web site are made in a public forum.") Accordingly, each of the three statements at issue in the Complaint qualify as being made in a "public forum" for purposes of CCP §425.16(e)(2).

With respect to the second prong, an "issue of public interest," "three general categories of cases have fallen under the 'connection with the public issue' prong. A public issue is implicated if the subject of the statement or activity underlying the claim (1) was a person or entity in the public eye; (2) could affect large numbers of people beyond the direct participants; or (3) involved a topic of widespread, public interest." *Jewett v. Capital One Bank*, 113 Cal. App. 4th 805, 813-14 (2003); *citing Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO,* 105 Cal.App.4th 913, 924 (2003).

The courts have thus construed the term "public interest" broadly to include numerous matters that involve consumer issues as well as even limited purpose public figures, particularly where the alleged statements or the issue they relate to attracts public attention. *See, e.g.,*, *Gilbert v Sykes*, 147 Cal.App.4th 13, 23 (2007), (online complaints about a plastic surgeon were protected because plastic surgery is a matter of public interest); *Wong v. Jing*, 189 Cal.App.4th 1354, 1366-1367 (review on Yelp! criticizing dental services and discussing use of silver amalgam raised issues of

public interest). In *Chaker v. Mateo*, 209 Cal.App.4th 1138 (2012), the court reviewed online postings on a "Ripoff Report" website claiming that plaintiff, who was operating a forensics business, was "a criminal and a deadbeat dad" and was "into illegal activities." The court nevertheless had "little difficulty finding the statements were of public interest" because they were "intended to serve as a warning to consumers about [plaintiff's] trustworthiness." *Id.* at 1146.

Courts have also repeatedly found that information about celebrities and sports figures – even relatively minor ones – qualifies as being in "public interest." *See Jackson v. Mayweather,* 10 Cal.App.5th 1240, 1254 ("'celebrity gossip' [is] properly considered, under established case law, as statements in connection with an issue of public interest."); *McGarry v. Univ. of San Diego*, 154 Cal.App.4th 97, 115 (2007) ("Numerous courts, beginning with the Supreme Court's opinion in *Curtis Publishing Co. v. Butts* (1967) 388 U.S. 130 [18 L. Ed. 2d 1094, 87 S. Ct. 1975], have concluded professional and collegiate athletes and coaches are at least limited purpose public figures." '[A] common thread in these cases is that one's voluntary decision to pursue a career in sports, whether as an athlete or a coach, "invites attention and comment" regarding his job performance and thus constitutes an assumption of the risk of negative publicity.'" (*quoting Barry v. Time, Inc.*, 584 F. Supp. 1110, 1119 (N.D. Cal. 1984)).

Here, Plaintiff, through his actions as a professional poker player and his participation in well-publicized, streamed poker games (as well as his voluntary participation in at least one podcast to discuss his play) placed himself in the public eye, and his alleged cheating was a matter of public interest. The Complaint itself makes clear that the public was widely interested in Plaintiff's alleged cheating (including articles in the *Sacramento Bee* and *Wired* magazine and a nationally televised segment on ESPN). According to Plaintiff, this public interest stemmed from steps Plaintiff himself either took or agreed with to thrust himself into the public eye as a "Wonderboy" and "reality show star," and to encourage consumers to visit his patron, Stones.

Furthermore, the allegations at issue were not merely "gossip" (though even that would qualify for protection as discussed above). Rather, the allegations related to Plaintiff's alleged cheating in games which were open to the public, and which were live streamed to many more

consumers. Those consumers relied on the assumption that the games they were participating in or watching were being played honestly, and Plaintiff's purported cheating was therefore a matter of interest to these consumers. Indeed, Plaintiff alleges that the allegations about his cheating were sufficiently concerning that they prompted investigations by the Department of Justice and the California Gaming Commission. Complaint ¶ 29. Accordingly, these allegations also qualify as a matter of public interest under the courts' well-settled precedents concerning consumer warnings. *See, e.g.,*, *Gilbert*, 147 Cal.App.4th 13; *Wong*, 189 Cal.App.4th 1354; and *Chaker*, 209 Cal.App.4th 1138.

Accordingly, each of Witteles' three alleged statements qualify for protection under Section 425.16(e)(3). The burden thus shifts to Plaintiff to establish "a probability that the plaintiff will prevail on the claim." CCP § 425.16(b)(1). Plaintiff will not be able to do so.

V. PLAINTIFF CANNOT ESTABLISH A PROBABILITY OF PREVAILING

"In order to successfully resist a special motion to strike, a Plaintiff must 'state and substantiate a legally sufficient claim.'" *Gilbert,* 147 Cal.App.4th at 31. "If the pleadings are not adequate to support a cause of action, the Plaintiff has failed to carry his burden in resisting the motion." *Id*. at 31. Plaintiff cannot carry his burden and his claims should therefore be stricken.

A. The Statements At Issue Are Protected Opinions

Witteles' three statements are not defamatory in the first instance because they are statements of opinion, not fact. To survive a First Amendment challenge, Plaintiff "must present evidence of a statement that is provably false." *Seelig v. Infinity Broadcasting Corp*,. 97 Cal.App.4th 806, 809, (2002). Whether a statement is fact or opinion is a question of law. *Ferlauto v. Hamsher,* 74 Cal.App.4th 1394, 1401 (1999). Courts look to the "totality of the circumstances," including "the nature and full content of the communication." *Baker v. Los Angeles Herald Examiner*, 42 Cal.3d 254, 261 (1986), *cert. denied,* 479 U.S. 1032 (1987). While the specific words are important, courts also look to the publication as a whole. *Good Government Group, Inc. v. Superior Court,* 22 Cal.3d

672, 680, (1978) ("Statement may constitute a fact in one context but an opinion in another, depending upon the nature and content of the communication taken as a whole.") Courts must also consider the greater social and societal context in which a statement is published. "Where potentially defamatory statements are published in a public forum, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, irony, rhetoric, or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion." *Gregory v. McDonnell Douglas Corp,* 17 Cal.3d 596, 601 (1976).

Applying these rules to Witteles' three purported statements shows that these statements were his ***opinions***, not false statements of ***fact***. More specifically, these statements each qualify as "evaluative opinions." A prime example of such "evaluative opinions" was found in *People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 111 Nev. 615, 895 P.2d 1269 (1995), in which the Nevada Supreme Court explained that a statement that an animal trainer "regularly abuses his orangutans" was merely an "evaluative opinion" which expressed "a value judgment based on true information disclosed to or known by the public." As the court explained, an evaluative opinion conveys "the publisher's judgment as to the quality of another's behavior and, as such, it is not a statement of fact." *Id*. at 624.

Though using different terminology, California law agrees, as explained in *Franklin v. Dynamic Details, Inc.,* 116 Cal.App.4th 375 (2004): "A statement of opinion based on fully disclosed facts can be punished only if stated facts are themselves false and demeaning. The rationale for this rule is that when the facts underlying a statement of opinion are disclosed, readers will understand they are getting the author's interpretation of the facts presented; they are therefore unlikely to construe the statement as insinuating the existence of additional, undisclosed facts. When the facts supporting an opinion are disclosed, readers are free to accept or reject the author's opinion based on their own independent evaluation of the facts." *Id.* at 387. The *Franklin* court reviewed emails in which the defendant stated that the plaintiff had "plagiarized data, stole copyrighted materials, and then passed them off as his own, calling these "unlawful practices." The court held that those

statements must be considered statements of ***opinion*** because the emails set forth the facts on which the defendant had drawn these conclusions. *Id.* at 386.

In the instant case, as in *Franklin* (and *PETA*), Witteles' alleged statements were based on facts which were fully disclosed to the public both through Witteles' own statements and multiple other media sources available to the public, including mathematical and statistical analyses regarding Plaintiff's play provided by numerous other prominent media personalities. Defendant's statements would therefore be understood as evaluative opinions. This is further shown because the statements were posted online to a website that caters to reviews, opinions, topical discussion and complaints, and were meant to solicit the opinions of the site's users, and offer other parties an opportunity to rebut the statements made. Again, the Courts must consider the larger societal context in which the statements were published and the medium by which they were published. Defendant's statements were part of a discussion of the overall public policy issue of cheating at poker and exposing such behavior. As such, Witteles' alleged statements appeared on the Internet in a similar context as an "op-ed" piece would traditionally appear in a newspaper. *See, e.g., Morningstar, Inc v. Superior Court,* 23 Cal.App.4th 676, 693 (1994) ("[C]olumns or articles which appear in the opinion-editorial pages of newspapers, are 'the well-recognized home of opinion and comment.'") (*internal quotations omitted*). Furthermore, the Internet is a medium in which hyperbole and robust debate are expected, and readers understand the comments of participants to be opinion rather than fact. *See, e.g. Krinsky v. Doe 6,* 159 Cal.App.4th 1154, 1175 (2008) (alleged defamatory postings on an internet finance message board, including references to the president of a public company as a "crook" were found to be opinion when considered in the context of heated debate and criticism typical of the Internet.)

Witteles is hardly the first to post his opinions on the Internet. *See Gilbert*, 147 Cal.App.4th 13; *Wong*, 189 Cal.App.4th 1354; and *Chaker*, 209 Cal.App.4th 1138. Much like the defendants in these – and numerous other -- cases, Witteles is a consumer who chose to post his opinions on the Internet. **This is constitutionally protected activity**.

B. Plaintiff Cannot Establish Falsity

Even if Witteles' statements were not protected opinion, which they are, the First Amendment requires both public and private figure plaintiffs to prove falsity if a statement relates to a matter of public concern. *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 775, (1986) (public figure); *Nizam-Aldine v. City of Oakland,* 47 Cal.App.4th 364, 373-75 (1996) (private figure – matter of public concern). Here, as discussed above, Plaintiff is both a public figure and the statements at issue relate to a matter of public concern. Plaintiff must therefore prove that Witteles' alleged statements are false. *Gallagher v. Connell,* 123 Cal.App.4th 1260, 1274 (2004) ("In defending against a SLAPP motion, Plaintiff must show a reasonable probability of proving the statement was false."). This, he cannot do. Indeed, Plaintiff has never satisfactorily explained the various indicators of cheating which led Witteles and numerous other poker professionals to express the opinion that he must be cheating.

C. Plaintiff Cannot Establish "Actual Malice"

The First Amendment requires that a plaintiff who is a public figure or a limited public figure prove by clear and convincing evidence that a defamatory statement was made by the defendant with "actual malice," that is, with knowledge that it was false or with reckless regard of whether it was false or not. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 134 (1976); *Khawar v. Globe Ina, Inc.,* 19 Cal.4h 254, 262-63 (1988). "To show actual malice, plaintiffs must demonstrate that defendant either knew his statement was false, or subjectively entertained serious doubt his statement was true." *Christian Research Institute v. Alnor,* 148 Cal.App.4th 71, 84, (2007). The courts have set forth the elements that must be present in order to characterize a plaintiff as a limited public figure as follows: "First, there must be a public controversy, which means that the issue was debated publicly and had foreseeable and substantial ramifications for nonparticipants. Second, the Plaintiff must have undertaken some voluntary act through which he or she sought to influence resolution of the public issue. In this regard, it is sufficient that the Plaintiff attempts to place himself in the public eye. And finally, the alleged defamation must be germane to the Plaintiff's participation in the

controversy." *Gilbert,* 147 Cal.App.4th at 24. Applying these elements here, Plaintiff is a limited purpose public figure.

First, as previously demonstrated (and set forth in Plaintiff's own Complaint), there is a public controversy about alleged cheating on a popular live streamed poker game, which thousands of viewers would tune in every week to watch. Plaintiff's Complaint establishes the significant public controversy, referencing the fact that this controversy was aired on national television, in newspaper articles and generally throughout the poker community. And Plaintiff himself claimed to a newspaper that his side of the story would "shock … the entire world." Complaint, Ex. C.

Second, Plaintiff has "undertaken some voluntary act through which he sought to influence resolution of the public issue." *Gilbert,* 147 Cal.App.4th at 24, 25 (holding that a plastic surgeon who "advertises his services in the local media" and took other actions touting the virtues of plastic surgery was a limited public figure on the public issue about the relative merits of plastic surgery.) Here, Plaintiff voluntarily participated in the efforts to make him into "some reality show star." "Stones, they kind of glorified me into being Wonderboy … I allowed more latitude for them [Stones] to buy into that. We kind of sold our own narrative of... I'm the greatest player ever.... that's what I was made out to be." Witteles Decl., Ex. A. Indeed, Plaintiff not only volunteered to become a public figure, but he voluntarily kept the controversy over his alleged cheating in the public eye by, amongst other things, appearing on a well-known podcast to discuss the allegations.

Third, the alleged defamatory statements are all germane to Plaintiff's participation in the controversy of live streamed poker and the allegations of cheating made therein.

As a result, it is clear that Plaintiff qualifies as at least a limited public figure. However, Plaintiff cannot carry his heavy burden of proving by clear and convincing evidence that Witteles made his statements with "actual malice." As set forth is his declaration, Witteles based his ***opinion*** statements on what he personally observed, and went through – in other words, his direct experience as an elite Poker Professional. Witteles Decl., ¶4.

D. Plaintiff Also Cannot Establish Intentional Infliction Of Emotional Distress

To prove a claim for intentional infliction of emotional distress, Plaintiff must prove: "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." *Hughes v. Pair*, 46 Cal.4th 1035, 1050 (2009) (*internal quotations omitted*).

Here, Plaintiff's Complaint fails to even adequately allege the third element, because Plaintiff's complaint fails to specify which statements, if any, attributed to Witteles (as opposed to the statements made by the twelve other defendants or the numerous other statements referenced in the Complaint) caused Plaintiff's purported "emotional distress." Rather, the Complaint simply makes blanket assertions as to "all defendants" – even though there is no allegation that the defendants acted in a coordinated manner or that the statements of one defendant could possibly be applied to another defendant.

Plaintiff also makes no effort to establish that the conduct in question (Witteles' opinions which matched those of numerous other individuals in the poker community) were "outrageous," or that Witteles acted in a manner that is either "reckless" or which was actually intended to cause emotional distress. Witteles expressed an opinion that was supported by facts and was, by that point, the unanimous opinion of most, if not all prominent poker professionals. That does not qualify as the intentional infliction of emotional distress (even if Plaintiff could link his purported distress to Witteles' statements as opposed to those of everyone else).

Accordingly, even if the Court were to blindly accept Plaintiff's allegations of "emotional distress," there is no evidence or even adequate allegations that such distress is actionable as to Witteles.

VI. CONCLUSION

It is apparent that Plaintiff filed this meritless lawsuit in an attempt to better his own public image, with full disregard for the rights of Witteles. This is the exact situation the Anti-SLAPP legislation was designed for. The Court should grant this special motion to strike based on Witteles' well-founded right to free speech, and in the interests of equity and justice.

Dated December 8, 2020

/s/Eric Bensamochan
Eric Bensamochan, Esq
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