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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Avid Telecom LLC, et al.,

10 Plaintiffs,

11 v.

12 David Frankel, et al.,

13 Defendants.
14

No. CV-22-00558-TUC-JCH

ORDER

15 In this case, Plaintiff Avid Telecom¹ alleges Defendant David Frankel² defamed
16 Avid to telecom business groups, the public, and to multiple states attorneys general. Doc.
17 49 ("SAC") at 7, 9–11. On June 9, 2023, Avid filed its second amended complaint, asserting
18 six claims for relief. *Id.* at 13–24. On June 29, Frankel answered. Doc. 53.

19 Before the Court is Frankel's "Second Motion to Dismiss Case Under Arizona's
20 Anti-SLAPP Statute A.R.S. § 12-751," filed August 8. Doc. 66 ("MTD"). Following Ninth
21 Circuit guidance, the Court ordered a response under Rule 56. Doc. 69. Avid responded
22 primarily under Rule 12. *See* Doc. 77. Frankel replied, disavowing a Rule 12 challenge.
23 *See* Doc. 80 at 7. The Court ordered a sur-reply focusing Avid on Rule 56. Docs. 81. Avid
24 complied, Doc. 84, and the Court heard oral argument on November 8, 2023. Doc. 98
25 ("Hr'g Tr.").

26
27 ¹ Michael D. Lansky, L.L.C. dba Avid Telecom and Michael Lansky, individually. For
convenience, the Court will use "Avid Telecom" or "Avid" to mean both Plaintiffs.

28 ² Together with ZipDX LLC, whose sole member is Frankel. The Court will use "Frankel"
in the singular to mean both Defendants.

1 **I. Background**

2 Avid Telecom is a common-carrier provider of long-distance telecommunications
3 services. SAC ¶ 1. These services include transiting robocalls, which are pre-recorded
4 messages delivered by computerized auto-dialer. *Id.* ¶ 11. Most robocalls are legal. *Id.* For
5 example, calls delivered by computerized auto-dialer are legal if they are not pre-recorded,
6 and vice versa. *Id.* ¶ 12. And pre-recorded messages delivered by computerized auto-dialer
7 are legal if the caller is exempted by statute, such as political campaigns, or by the receiver's
8 consent to these calls, such as pharmacy order updates. *Id.* ¶ 13.

9 Frankel is the highest-profile national advocate against illegal robocalling. SAC
10 ¶ 46. Frankel developed a software system that purports to identify illegal robocalls and
11 their source. MTD at 4. Frankel's software monitors thousands of telephone numbers
12 Frankel purchased and placed on the National Do Not Call Registry. *Id.* The software
13 interacts with any caller to these phone numbers while recording caller-ID information and
14 the nature of the call. *Id.* Frankel markets this software as a way to identify suspect or
15 illegal robocalls, and who is responsible for creating them. *See id.*

16 Avid alleges Frankel made false and misleading representations about Avid during
17 a presentation to telecom industry leaders, and to the Ohio and Indiana attorneys general.
18 SAC ¶¶ 48, 51. Specifically, Avid alleges Frankel showed a slide at a telecom industry
19 summit essentially stating falsely that Avid was transiting illegal robocalls. *Id.* ¶¶ 51(a),
20 54. Avid also alleges Frankel falsely told telecom industry leaders that Avid was "the top
21 offender" for illegal robocalls. *Id.* ¶¶ 51(b), 60. Avid also alleges Frankel made similar
22 statements to at least the Ohio and Indiana attorneys general. *Id.* ¶¶ 40, 48, 63.

23 Avid alleges that, as a direct result of these statements, the Ohio and Indiana
24 attorneys general issued onerous "Civil Investigative Demands" to Avid, two of Avid's
25 customers withdrew their business, and one cancelled an anticipated contract. *Id.* ¶¶ 48,
26 118–19, 133–34, 152. Avid states six claims arising from these allegations: (1) defamation,
27 (2) false light invasion of Avid principal Michael Lansky's privacy, (3–4) tortious
28 interference with two business relationships, and (5–6) tortious interference with

1 prospective economic advantage from those relationships. *Id.* at 13–23.

2 Frankel moves to dismiss under A.R.S. § 12-751. MTD at 1. Section 12-751
3 concerns "strategic lawsuits against public participation" ("SLAPP"). *See* A.R.S. § 12-751
4 (2022). SLAPP suits seek to use the threat or cost of litigation to deter constitutional
5 activity. Arizona's anti-SLAPP statute was substantially revised on September 24, 2022.
6 *Compare* A.R.S. § 12-751 (2022), *with* A.R.S. §§ 12-751, 752 (2006). The extent of the
7 revision is best illustrated visually. The Court provides the first four sections only:

8 Showing differences between versions effective April 28, 2006 to September 23, 2022 and September 24, 2022 [current]

9 Key: ~~deleted text~~ added text

10 20 deletions · 32 additions

A.R.S. § 12-~~752~~ 751

Formerly cited as AZ ST § 12-752

11 § 12-~~752~~ 751. Strategic lawsuits actions against public participation; motion to dismiss or quash; definitions

12 A. In any legal action that involves a party's person's lawful exercise of the right of petition, the ~~defending party may file~~
13 ~~a motion to dismiss the action under this section. When possible, the court shall give calendar preference to an action that is~~
14 ~~brought under this subsection and shall conduct an expedited hearing after the motion is filed with the court and notice of the~~
15 ~~motion has been served as provided by court rule~~ right of speech, the freedom of the press, the right to freely associate
16 ~~or the right to peaceably assemble pursuant to the United States Constitution or Arizona constitution, the person other~~
17 ~~than a state actor or an intervenor may file a motion to dismiss or quash the action under this section .~~

18 B. A person who files a motion pursuant to subsection A of this section has the burden of establishing prima facie proof
19 that the legal action was substantially motivated by a desire to deter, retaliate against or prevent the lawful exercise of a
20 constitutional right. The moving person may submit evidence based on the record, a sworn affidavit or other evidence
21 that is submitted with the motion to dismiss or quash. A party is not required to file a response to a motion filed pursuant
22 to subsection A of this section unless and until the court finds that the moving party has established the prima facie
23 proof and orders the party to file a response. The court shall grant the motion unless one of the following applies:

24 1. If the responding party is a state actor, the responding party shows that the legal action on which the motion is based
25 is justified by clearly established law and that the responding party did not act in order to deter, prevent or retaliate
26 against the moving party's exercise of constitutional rights. A state actor may satisfy the requirements of this paragraph
27 by doing any of the following:

28 (a) Establishing that the person who initiated and conducted an investigation that resulted in the legal action and that
made the decision to pursue the legal action was unaware of the movant's lawful exercise of the constitutional right.

(b) Establishing that the state actor has a consistent practice of pursuing similar legal actions against similarly situated
persons who did not lawfully exercise constitutional rights.

(c) Producing any other evidence that the court finds sufficient.

2. If the responding party is not a state actor, the responding party shows that the legal action on which the motion is
based is justified by existing law or supported by a reasonable argument for extending or modifying existing law.

~~B C. The court shall grant the motion unless the party against whom the motion is made shows that the moving party's~~
exercise of the right of petition did not contain any reasonable factual support or any arguable basis in law and that the moving
party's acts caused actual compensable injury to the responding party. In making its determination, the court shall **conduct**
an evidentiary hearing or consider the pleadings and supporting and opposing affidavits stating facts on which the liability,
defense or defense action is based. ~~At the request of the moving party, the court shall make findings whether the lawsuit~~
was brought to deter or prevent the moving party from exercising constitutional rights and is thereby brought for an improper
purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation. If the court finds that

1 the lawsuit was brought to deter or prevent the exercise of constitutional rights or otherwise brought for an improper purpose,
2 the moving party is encouraged to pursue additional sanctions as provided by court rule.

3 **E. D.** The motion to dismiss **or quash** may be filed within ~~ninety~~ **sixty** days after the service of the complaint or **other**
4 **document on which the motion is based or** , in the court's discretion, at any later time on terms that the court deems proper ,
5 **including a later time after there is actual notice of a party's misconduct. If the court finds that prima facie proof has**
6 **been established as prescribed in subsection B of this section, the court, if possible, shall conduct an expedited hearing**
7 **on the motion** .

8 **E.** Unless a court rule specifically provides otherwise, all discovery proceedings in the action shall be stayed on a finding
9 of prima facie proof as prescribed in subsection B of this section. The stay of discovery shall remain in effect until notice
10 of entry of the order ruling on the motion. Notwithstanding this subsection, the court, on noticed motion and for good
11 cause shown, may order that specified discovery be conducted.

12 Westlaw, <https://westlaw.com/> (search "A.R.S. § 12-751"; then choose "History,"
13 "Versions," "Add to compare," "§ 12-751 (Effective September 24, 2022)," "§ 12-752
14 (Effective April 28, 2006 to September 23, 2022)"; then "Compare"). These revisions have
15 not yet been applied in state or federal court.

16 Several changes stand out. Section 12-751 (2006) no longer exists, replaced by the
17 revised § 12-752 (2006), which was then renumbered § 12-751 (2022). Formerly, § 12-751
18 provided a statement of the legislature's purpose in enacting an anti-SLAPP framework and
19 a statutory definition of the protected activity. *See* §§ 12-751(1), Sec. 2(A) (2006). The
20 amendment also broadens the statute's protections beyond the "right to petition" (narrowly
21 defined by § 12-751(1) (2006)). The amendment now extends to the "right to petition" in
22 any context as well as the "right of speech, ... the press, [and] ... to freely associate or ...
23 peaceably assemble" (defined as "pursuant to the United States Constitution or Arizona
24 constitution"). A.R.S. § 12-751(A) (2022).

25 The amendment also adds a dramatically different *ex parte* burden-shifting
26 framework. The moving party's initial burden is an *ex parte* showing of "prima facie proof"
27 that the action is "substantially motivated by a desire to deter, retaliate against or prevent
28 the lawful exercise of a constitutional right." A.R.S. § 12-751(B) (2022). The statute does
not define "prima facie proof" or explain how it differs from the more commonly used
terms "prima facie evidence" or "prima facie showing." The nonmovant is not required to
respond to a motion until the court finds "prima facie proof."

The Court has no occasion to interpret the changes to Arizona's statute because state
anti-SLAPP statutes are treated differently in federal court.

1 **II. Legal Standard**

2 A federal court sitting in diversity jurisdiction applies federal procedural law and
3 state substantive law. *Hanna v. Plumer*, 380 U.S. 460, 465 (1965) (citing *Erie R.R. Co. v.*
4 *Tompkins*, 304 U.S. 64, 78 (1938)). Given a direct conflict between federal procedural rules
5 and state law, the federal rules govern in federal court. *Shady Grove Orthopedic Assocs.,*
6 *P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010) (citations omitted). The Ninth Circuit
7 interprets these precedents and others to permit some state anti-SLAPP defenses in federal
8 court. *See, e.g., CoreCivic, Inc. v. Candide Grp., LLC*, 46 F.4th 1136 (9th Cir. 2022);
9 *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832 (9th Cir. 2001); *U.S. ex rel. Newsham v.*
10 *Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999).

11 The Ninth Circuit employs a two-step process to evaluate anti-SLAPP motions.
12 First, the court determines whether the actions at issue involve an exercise of protected
13 rights. *See, e.g., Tennenbaum v. Arizona City Sanitary Dist.*, 799 F. Supp. 2d 1083, 1086
14 (D. Ariz. 2011) (interpreting A.R.S. § 12-752 (2006)). Second, the court analyzes whether
15 the anti-SLAPP motion raises a legal or a factual challenge. *See Planned Parenthood Fed'n*
16 *of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 834–35 (9th Cir. 2018). When the
17 anti-SLAPP motion "challenges the legal sufficiency of a claim, a district court should
18 apply the Federal Rule of Civil Procedure 12(b)(6) standard and consider whether a claim
19 is properly stated." *Id.* at 834. By contrast, when the anti-SLAPP motion "challenges the
20 factual sufficiency of a claim, ... the Federal Rule of Civil Procedure 56 standard will
21 apply." *Id.*

22 **III. Analysis**

23 **A. The Court declines to decide which parts of § 12-751 are compatible with Rule**
24 **56 because discovery is required in any event.**

25 Frankel first argues the Court must still use aspects of Arizona's anti-SLAPP statute
26 while applying a Rule 56 standard. MTD at 5–6. In Frankel's view, at least the burden-
27 shifting and attorneys' fees aspects of Section 12-751 are compatible with the federal rules.
28 *Id.* at 6 (citing *Gunn v. Drage*, 65 F.4th 1109, 1118 (9th Cir. 2023) (burden-shifting);
Planned Parenthood, 890 F.3d at 833–34 (attorneys' fees)); Hr'g Tr. at 4:21–5:7. Frankel

1 asserts the Arizona statute is compatible with Rule 56 because both require nonmovants to
2 "present sufficient evidence ... to establish each element of their asserted claims." MTD at
3 6. That Rule 56 burden, says Frankel, is the same as § 12-751(B)(2), which requires
4 nonmovants to "show that their lawsuit is justified by existing law." *Id.*

5 Frankel was previously skeptical about the Court's approach to Arizona's anti-
6 SLAPP statute. *See* 5/17/23 Hearing Transcript at 35:8–37:22. The Court disagreed then
7 that Arizona's legislature used "prima facie proof" to mean "prima facie evidence" because
8 it would tend to ignore a potentially meaningful difference. Doc. 44 at 6 (citing *Nicaise v.*
9 *Sundaram*, 432 P.3d 925, 927 (Ariz. 2019) ("A cardinal principle of statutory interpretation
10 is to give meaning, if possible, to every word and provision so that no word or provision is
11 rendered superfluous.") (citation omitted)). The Court also noted that Arizona's new anti-
12 SLAPP statute is substantially different from others. *See id.* For example, California,
13 Oregon, and Arizona's own former statute all define their terms and require briefing from
14 both parties. *See* Cal. Civ. Proc. Code §§ 425.16(b)(2), (f); Or. Rev. Stat. Ann. § 31.150(3);
15 A.R.S. § 12-752(A), (B) (2006). And some of Arizona's revisions appear to conflict with
16 the federal rules. *Compare, e.g.,* A.R.S. § 12-751(E) (2022), *with Metabolife*, 264 F.3d at
17 846. The Court also found its ruling, based on Rules 12 and 56, likely would be the same
18 under Arizona's statute. Doc. 44 at 7.

19 Here, it's déjà vu all over again. The Court continues to see the difference between
20 "prima facie proof" and "prima facie evidence" as potentially meaningful. Frankel was
21 unable to identify any Arizona cases for the proposition that they are synonymous. Hr'g Tr.
22 at 6:20–21. The Court also found none. Arizona's new statute remains different in
23 potentially meaningful ways from other states' anti-SLAPP statutes. Some of Arizona's
24 revisions appear to conflict with the federal rules—not only the discovery stay but also the
25 initial *ex parte* posture. And, again, the Court's ruling today under Rule 56(d) likely has the
26 same result as a ruling under Arizona's statute. Even assuming Frankel could shift the
27 burden to Avid to show its claims were "justified by existing law," the sufficiency of Avid's
28 complaint is not at issue, Hr'g Tr. at 4:10–11, and Avid seeks discovery that appears

1 essential to defend its case. *See infra* § II.D. To decide differently would deprive Avid of
2 the safeguards required by the Federal Rules of Civil Procedure.

3 **B. As a threshold matter only, Frankel's actions involved protected rights.**

4 The Court first determines that Frankel's actions were exercises of a protected right
5 under Arizona's § 12-751. Section 12-751 provides:

6 In any legal action that involves a person's lawful exercise of the right of
7 petition, the right of speech, the freedom of the press, the right to freely
8 associate or the right to peaceably assemble pursuant to the United States
9 Constitution or Arizona constitution, the person other than a state actor or an
10 intervenor may file a motion to dismiss or quash the action under this section.

11 A.R.S. § 12-751(A).

12 Frankel specifically invokes only the U.S. Constitution, alleging Avid's lawsuit is
13 directed at Frankel's "relevant rights pursuant to the United States Constitution," including
14 "at least his rights of speech and petition, and to freely assemble." MTD at 1, 7. The First
15 Amendment in part prohibits Congress from "abridging the freedom of speech ... or the
16 right of the people to petition the Government for a redress of grievances." U.S. Const.
17 amend. I. The right to free speech "on matters of public concern is at the heart of the First
18 Amendment's protection." *Snyder v. Phelps*, 562 U.S. 443, 451 (2011) (citations and
19 internal quotations omitted). Matters of public concern are those "fairly considered as
20 relating to any matter of political, social, or other concern to the community[.]" *Id.*
21 (citations omitted). Similarly, the right to freely petition the Government for a redress of
22 grievances includes the right to solicit enforcement of the law. *See E. R. R. Presidents Conf.*
v. Noerr Motor Freight, Inc., 365 U.S. 127, 137–38 (1961).

23 The Court finds—as a threshold matter only—this case involves "rights ... pursuant
24 to the United States Constitution." The parties agree Frankel is a leading advocate
25 concerning illegal robocalling, and that illegal robocalling is a topic of nationwide
26 importance. *See* SAC ¶¶ 18, 46; MTD at 3–5. The parties also agree Frankel's statements
27 about Avid were made to gathered industry leaders and to law enforcement in a context
28 related to illegal robocalling. *See* SAC ¶ 45; MTD at 7–9. That is sufficient to bring them
within the Constitution's ambit for a threshold determination. Illegal robocalling is a matter

1 of social concern. And soliciting attorneys general to enforce the robocalling laws exercises
2 the right to petition. Frankel's actions were thus "pursuant to the United States
3 Constitution," and Arizona's anti-SLAPP statute is available to him.

4 **C. Frankel's anti-SLAPP Motion contains primarily a factual challenge, so the**
5 **Court will analyze it under Rule 56.**

6 The Court construed Frankel's Motion under Rule 56 because it found that Frankel
7 explicitly attacked only the factual sufficiency of Avid's complaint. Doc. 69 at 3 (citing
8 MTD at 7 ("each claim fails under the Rule 56 standard [and] applying the Rule 56
9 standard ... the Court should grant this Motion to Dismiss"), 14 ("the defamation claim is
10 not justified by existing law as it fails under the Rule 56 standard"), 17 ("these claims do
11 not survive a Rule 56 analysis")). When Avid replied primarily under Rule 12, Frankel
12 responded that Avid's Rule 12 arguments were "irrelevant" because "Defendants do not
13 raise legal challenges for Rule 12 analysis." Doc. 80 at 7. Frankel reiterated that "there are
14 only factual challenges in the Motion." *Id.* (cleaned up) (citation omitted). And at oral
15 argument, Frankel stated that the SAC survives scrutiny under Rule 12. Hr'g Tr. at 4:10–
16 11. Thus, the Court will analyze Frankel's Motion under Rule 56 because it raises primarily
17 factual challenges and because Frankel intended it only to raise factual challenges. *Cf.*
18 *Gunn*, 65 F.4th at 1120 (citation omitted) ("The defendant determines which motions she
19 files, not the plaintiff.").

20 If an anti-SLAPP motion challenges the factual sufficiency of a claim, "discovery
21 must be allowed ... before any decision is made by the court." *Planned Parenthood*, 890
22 F.3d at 833. Courts must allow discovery because "[r]equiring a presentation of evidence
23 without accompanying discovery would improperly transform ... the anti-SLAPP [motion]
24 into a motion for summary judgment without providing any of the procedural safeguards
25 that have been firmly established by the Federal Rules of Civil Procedure." *Id.* at 833–34.
26 One of these safeguards is to require discovery when "a nonmovant shows by affidavit or
27 declaration that, for specified reasons, it cannot present facts essential to justify its
28 opposition." Fed. R. Civ. P. 56(d).

Rule 56(d) provides "a device for litigants to avoid summary judgment when they

1 have not had sufficient time to develop affirmative evidence." *Stevens v. Corelogic, Inc.*,
2 899 F.3d 666, 678 (9th Cir. 2018) (citation omitted). A party seeking additional discovery
3 under Rule 56(d) must "explain what further discovery would reveal that is essential to
4 justify its opposition to the motion for summary judgment." *Id.* (cleaned up) (citations
5 omitted). "[T]he evidence sought must be more than the object of pure speculation." *Id.*
6 (citation omitted). The party seeking more discovery under Rule 56(d) "must state what
7 other specific evidence it hopes to discover and the relevance of that evidence to its claims.
8 *Id.* (cleaned up) (citation omitted). "In particular, the requesting party must show that: (1) it
9 has set forth in affidavit form the specific facts it hopes to elicit from further discovery; (2)
10 the facts sought exist; and (3) the sought-after facts are essential to oppose summary
11 judgment." *Id.* (cleaned up) (citation omitted).

12 **D. Despite some shortcomings, the Court construes Avid's statements as a Rule**
13 **56(d) motion.**

14 Avid's Response and Sur-Reply are somewhat ambivalent regarding Rule 56(d).
15 Avid's Response appears to seek more discovery. Avid states that the Court "must allow
16 additional discovery on each issue" before considering summary judgment. *See* Doc. 77 at
17 17. The Response does not provide the facts it hoped further discovery would elicit. *See*
18 *generally id.* Noting that and other shortcomings under Rule 56, the Court ordered a sur-
19 reply. Doc. 81. Avid's Sur-Reply is less adamant about discovery than its Response. Avid
20 states "[i]f *the Court* requires information regarding the technological basis for [Avid's]
21 allegations, [Avid] respectfully request[s] the opportunity to depose Frankel ... and his sole
22 employee[.]" Doc. 84 at 6 n. 8 (emphasis added). Similarly, Avid seeks more discovery "to
23 the extent that *the Court* believes that additional facts need to be developed to address open
24 issues under Rule 56(d)[.]" *Id.* at 7 (emphasis added). But Avid also "believes it would be
25 most appropriate that [Frankel's anti-SLAPP] Motion simply be dismissed in its entirety at
26 this point[.]" *Id.* The Court appreciates that some of Avid's ambiguity is due to argument
27 in the alternative. Avid seeks first to argue that its evidence demonstrates a genuine dispute,
28 but alternatively to argue that Avid needs more discovery to demonstrate a genuine dispute.

At oral argument, Avid clarified that it was in fact moving for more discovery under

1 Rule 56(d). *See* Hr'g Tr. at 32:11–21. Avid acknowledged that it did not file a Rule 56(d)
2 declaration in response to the second anti-SLAPP motion, emphasizing that it had done so
3 previously. *See id.*; Doc. 35-1 at 89–91. Avid asked the Court to accept its previous
4 declaration as if it were filed in response to the second anti-SLAPP motion. *See* Hr'g Tr. at
5 34:2–6, 34:22–35:4. As in its previous declaration, Avid specifically avows the need to
6 depose Defendant Frankel and his associate Graves. *Compare id.*, with Doc. 35-1 at 90.
7 Avid also avows the need to depose Rebecca Barkhuizen, who allegedly told Avid about
8 the contents of the SOMOS call or the STIR/SHAKEN presentation, or both, as well as
9 "one or two other depositions." *See* Hr'g Tr. at 34:22–35:4. Finally, Avid previously stated
10 that "[f]urther evidence of [the connection between Frankel's statements to the attorneys
11 general] will, as necessary, be adduced at the depositions of Mr. Frankel and
12 representati[ves] of Ohio and Indiana." Doc. 77 at 16 n. 16. Avid could not say what
13 discovery it would seek with respect to the attorneys general but said it had not abandoned
14 that aspect of its complaint. Hr'g Tr. at 45:5–23. The Court agrees Avid's depositions are
15 essential to oppose summary judgment. Many of Avid's claims revolve around what
16 Frankel knew and said. Frankel's, Graves's, and Barkhuizen's depositions will elicit facts
17 bearing on Frankel's knowledge and statements. That knowledge could extend to Frankel's
18 interactions with the state attorney generals. Further discovery is therefore warranted.³

19 Accordingly, the Court will construe Avid's statements as a Rule 56(d) motion and
20 accept Avid's previously filed declaration, Doc. 35-1 at 89–91, for that purpose. So
21 construed, the Court will grant Avid's Rule 56(d) motion and deny Frankel's motion to
22 dismiss under Arizona's anti-SLAPP statute. Because the Court denies Frankel's motion,
23 Frankel's request for attorneys' fees is denied. Avid's request for attorneys' fees is also
24 denied—Avid has not shown that Frankel's motion was frivolous or intended solely to
25 delay the proceedings. The Court notes in closing that Rule 11 attorneys' fees may become

26
27 ³ Fact discovery is nearly closed. Previously the deadline was December 15, 2023, and the
28 Court extended the deadline by stipulation to January 31, 2024. That should give the parties
ample time to finish up. The Court expects not to extend fact discovery again and will not
absent extremely good cause.

1 relevant again at summary judgment. If, as Frankel has consistently urged, Avid's lawsuit
2 turns out to have been improperly motivated or frivolous, an award of attorneys' fees could
3 be appropriate. The Court will consider those issues when the evidence is in.

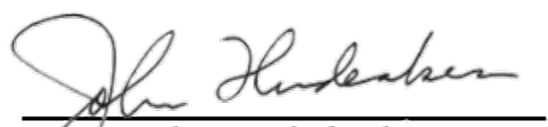
4 **IV. Order**

5 Accordingly,

6 **IT IS ORDERED DENYING** Frankel's Motion to Dismiss (Doc. 66).

7 Dated this 28th day of November, 2023.

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John C. Hinderaker
United States District Judge