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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DR. BUZZ ALDRIN and)	Case No. CV 10-09939 DDP (FMOx)
STARBUZZ, LLC, a California)	
limited liability company,)	
)	ORDER GRANTING SPECIAL MOTION TO
Plaintiffs,)	STRIKE COMPLAINT
)	
v.)	
)	
TOPPS COMPANY, INC., a)	[Motion filed on 3/4/11]
Delaware corporation,)	
)	
Defendant.)	
)	
_____)	

Presently before the court is Defendant Topps Company, Inc. ("Topps")'s Special Motion to Strike Plaintiffs' Complaint. Having reviewed the parties' moving papers and heard oral argument, the court grants the motion and adopts the following order.

I. Background

In 2009, Topps released a trading card set entitled "Topps American Heritage: American Heroes Edition" (the "set of cards"). The set of cards includes hundreds of images of well-known American politicians, actors, athletes, scientists, organizations,

1 artifacts, and events. The cards also display, on the reverse
2 face of the cards, historical information related to the image
3 displayed on the front of the cards.

4 The set of cards features several themes, including "Heroes
5 of Sport," "Medal of Honor," and "Heroes of Spaceflight." The
6 "Heroes of Spaceflight" theme includes several types of cards.
7 Twenty-eight of these cards depict various National Aeronautics and
8 Space Administration ("NASA") missions. These cards depict images
9 of NASA vehicles and mission patches. Many of the mission patches
10 include the surnames of the respective mission's crew members.
11 The reverse faces of the cards describe the various NASA missions.
12 The Gemini XII card, for example, lists the Gemini XII mission
13 dates, crew, and launch site. The card also gives the following
14 historical description:

15 Astronauts had operated outside the spacecraft before,
16 but astronaut Buzz Aldrin's smooth, multi-tasking 140-
17 minute space walk outside of Gemini XII was what
18 finally confirmed NASA's highest hopes for extra-
vehicular astronaut activity. Gemini XII's flawless,
computer-guided re-entry marked the end of Project
Gemini; America was ready to shoot for the moon.

19 Other themed cards depict NASA mission fabric patches, various
20 spacecraft, and rare "Heroes of Spaceflight Relics" and "Heroes of
21 Spaceflight Cut Signatures," which contain original astronaut
22 signatures cut from other documents.

23 The set of cards is packaged in cardboard boxes bearing three
24 images: an image of Abraham Lincoln (captioned "Abraham Lincoln"),
25 an image of Mickey Mantle (captioned "Mickey Mantle," and an image
26 of "arguably the world's most famous space-related photo", the
27 "Visor Shot" (captioned "Moon Landing Apollo 11"). The "Visor
28 Shot" is an image of an astronaut in a white space suit. The

1 astronaut's helmet visor obscures the astronaut's face, and
2 reflects an image of another astronaut alongside a lunar landing
3 module. Close inspection of the image reveals that the spacesuit
4 bears the name "E.Aldrin." The parties agree that the image is
5 NASA's "Visor Shot" photograph of Buzz Aldrin, taken by Neil
6 Armstrong during the Apollo 11 moon landing.

7 On December 27, 2010, Plaintiffs (hereinafter "Aldrin")
8 filed suit in this court alleging violations of their common law
9 and statutory rights to publicity, unfair business practices under
10 California Business and Professions Code § 7200, and unjust
11 enrichment. The complaint alleges improper uses of Aldrin's name,
12 image, and likeness with respect to the "Visor Shot" image on the
13 cardboard box, the Gemini XII card (described above), and the Buzz
14 Aldrin "cut signature" card (collectively, "the images"). Topps
15 now specially moves to strike Aldrin's complaint under California
16 Code of Civil Procedure § 425.16.

17 **II. Legal Standard**

18 Under California's anti-SLAPP (Strategic Lawsuits Against
19 Public Participation) statute, "[a] cause of action against a
20 person arising from any act of that person in furtherance of the
21 person's right of petition or free speech . . . in connection with
22 a public issue shall be subject to a special motion to strike
23 unless the court determines that the plaintiff has established
24 that there is a probability that the plaintiff will prevail on the
25 claim." Cal. Cod. Civ. Pro. § 426.16(b)(1). In examining a
26 special motion to strike, courts must first determine "whether the
27 defendant has made a threshold showing that the challenged cause
28 of action is one arising from protected activity." Navellier v.

1 Sletten, 29 Cal.4th 82, 88 (2002). The court must then, crediting
2 the plaintiff's evidence, determine whether plaintiff has
3 demonstrated a probability of success. Id. at 89. If the cause
4 of action does arise from protected activity, and the plaintiff
5 cannot show that a complaint is 1) legally sufficient and 2)
6 supported by a prima facie showing of facts, the cause of action
7 is properly stricken under the anti-SLAPP statute. Id.

8 **III. Discussion**

9 Topps bears the burden of making a threshold showing that
10 its use of the images arise from protected activity. Id. at 88.
11 Topps argues that its use of the images is an exercise of its
12 right to free speech on an issue of public interest. (Mot. at
13 10). Aldrin contends that Topps use of the images is unprotected
14 commercial speech. The court agrees with Topps that its activity
15 is protected.

16 The incorporation of a prominent person's name or likeness in
17 a commercial product can constitute protected expression.
18 Guqliemi v. Spelling-Goldberg Prods., 25 Cal. #d 860, 875 n.21
19 (1979). "An expressive activity does not lose its constitutional
20 protection because it is undertaken for profit." Comedy III
21 Prods., Inc. v. Gary Saderup, Inc., 25 Cal.4th 387, 396 (2001)
22 (alterations and quotation marks omitted). As the Ninth Circuit
23 has noted, "the core notion of commercial speech is that it does
24 no more than propose a commercial transaction," and simply
25 advertises something for business purposes. Hilton v. Hallmark
26 Cards, 599 F.3d 894, 905 n.7 (9th Cir. 2010) (quotations omitted).
27 The mere fact that a product is sold for a profit does not render
28 the product commercial speech. Id.

1 Aldrin points to several examples of commercial speech. In
2 Yeager v. Cingular Wireless LLC, for example, the defendant
3 advertised that "Nearly 60 years ago, the legendary test pilot
4 Chuck Yeager broke the sound barrier and achieved Mach 1. Today,
5 Cingular is breaking another kind of barrier with our MACH 1 and
6 MACH 2 mobile command centers." Yeager v. Cingular Wireles LLC,
7 673 F.Supp.2d. 1089, 1095 (E.D. Cal. 2009). The court found that
8 the statement constituted commercial speech because it had no
9 informative purpose other than to create positive associations
10 with a brand and used Chuck Yeager's identity to promote an
11 unrelated product. Id. at 1098-99. Similarly, in Abdul Jabbar v.
12 General Motors Corp., the Ninth Circuit found that a defendant
13 engaged in unprotected commercial speech where it used a
14 basketball star's name and accomplishments, without permission, to
15 promote a car. Abdul Jabbar v. General Motors Corp., 85 F.3d
16 407, 413, 416 (9th Cir. 1996).

17 Contrary to Aldrin's assertions, Topps' use of the images is
18 not analogous to the commercial speech in Yeager and Abdul Jabbar.
19 In those cases, the names of the individuals were linked to
20 products that bore no relationship to those individuals or their
21 activities, and conveyed no message other than information about
22 the unrelated products. Here, in contrast, the cards use Aldrin's
23 name in the course of conveying information about his historically
24 significant achievements. Furthermore, the cards propose no
25 commercial transaction, and are not advertisements for any
26 product, let alone an unrelated product. Rather, as in Hilton,
27 the speech is the product, and is protected. See Hilton, 599 F.3d
28 905 n.7 (noting that a greeting card bearing a celebrity's

1 likeness was a product rather than an advertisement, and was
2 protected). To the extent that the "Visor Shot" image on the
3 cards' cardboard packaging constitutes an advertisement, it is a
4 "mere adjunct" to the cards themselves, and is also protected.
5 See Guglielmi, 25 Cal.3d at 862-3 ("It would be illogical to allow
6 respondents to [engage in protected activity] but effectively
7 preclude any advance discussion or promotion of their lawful
8 enterprise."); See also William O'Neil & Co., Inc. v. Validea.com
9 Inc., 202 F.Supp.2d 1113, 1119 (C.D. Cal. 2002) (holding book
10 cover to be "mere adjunct" of protected book and listing cases).¹

11 Because Topps has met its burden to demonstrate that Aldrin's
12 claim arises out of protected speech related to a public issue,
13 the burden now shifts to Aldrin to show a likelihood of success.
14 Navellier, 29 Cal.4th at 89. Aldrin has not met this burden. His
15 arguments regarding the legal sufficiency of his claim are
16 premised on the contention that Topps's use of the images
17 constitutes unprotected commercial speech. (Mot. at 19). As
18 discussed above, the images are not commercial speech, and have
19 been utilized in furtherance of Topps' First Amendment rights.
20 Accordingly, Aldrin has not shown that his complaint has merit.

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27 ¹ Aldrin appears to contest the "public issue" element of the
28 anti-SLAPP statute only with respect to the "Visor Shot." (Mot. at
15:25-6.) As discussed above, however, the "Visor Shot" is a mere
adjunct to the protected cards themselves.

1 **IV. Conclusion**

2 For the reasons stated above, Defendant's Special Motion to
3 Strike is GRANTED. Plaintiff's Motion for a Preliminary
4 Injunction is DENIED as moot. In addition, the Scheduling
5 Conference set for December 1, 2011 is vacated.

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7 IS SO ORDERED.

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10 Dated: September 27, 2011

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DEAN D. PREGERSON
United States District Judge