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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CRAIG CHAQUICO,
Plaintiff,

v.

DAVID FREIBERG, et al.,
Defendants.

Case No. [17-cv-02423-MEJ](#)

ORDER RE: MOTION TO STRIKE

Re: Dkt. No. 47

INTRODUCTION

Plaintiff and Counterdefendant Craig Chaquico moves to strike Defendants and Counterclaimants’¹ counterclaim for tortious interference pursuant to California’s anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16. Mot., Dkt. No. 47. Defendants filed an Opposition (Dkt. No. 67), and Plaintiff filed a Reply (Dkt. No. 85). The Court finds this matter suitable for disposition without oral argument. *See* Fed. R. Civ. P. 78(b); Civ. L.R. 7-1(b). Having considered the parties’ positions, the relevant legal authority, and the record in this case, the Court **DENIES** Chaquico’s motion for the following reasons.

BACKGROUND

A. Factual Background

In 1970, Paul Kantner formed the band Jefferson Airplane. First Am. Countercl. (“FACC”) ¶¶ 2, 25, Dkt. No. 44.² Freiberg joined Jefferson Airplane in 1972. *Id.* In 1974,

¹ Defendants and Counterclaimants are David Freiberg, Donny Baldwin, Chris Smith, Jude Gold, and Catherine Richardson.

² The FACC contains two paragraphs numbered “2.” This citation refers to the first paragraph 2.

1 Kantner and Freiberg formed the band Jefferson Starship with, among others, Chaquico. *Id.* This
2 iteration of Jefferson Starship’s membership changed over the years, but Kantner and Freiberg
3 toured, performed, and recorded throughout this band’s tenure. *Id.* Baldwin joined the band in
4 1982. *Id.* Kantner, Freiberg, and Baldwin continued with Jefferson Starship through the
5 remainder of this incarnation of the band. *Id.*

6 Between 1974 and 1978, Jefferson Starship was incorporated in the state of California as
7 Jefferson Starship, Inc. *Id.* ¶¶ 2, 26.³ In 1978, Jefferson Starship, Inc. obtained a federal
8 registration for the mark “JEFFERSON STARSHIP,” Registration No. 1,093,429. *Id.* ¶¶ 3, 27.

9 Kantner left Jefferson Starship in 1984. *Id.* ¶¶ 4, 28. In March 1985, Kantner and
10 Jefferson Starship, Inc. entered into an agreement regarding Kantner’s separation from the band
11 (the “1985 Agreement”). *Id.* Shortly thereafter, Jefferson Starship, Inc. renamed itself Starship,
12 Inc. *Id.*

13 Freiberg, Baldwin, Chaquico, and other former Jefferson Starship members then formed
14 the band Starship. *Id.* ¶¶ 5, 29. Freiberg left that band shortly after its formation. *Id.* Baldwin
15 left in 1989, and Chaquico left in 1990. *Id.* In 1991, Chaquico reached an agreement with
16 Starship, Inc. regarding his departure from Starship (the “1991 Agreement”). *Id.* ¶¶ 7, 31. Under
17 the terms of the 1991 Agreement, Chaquico agreed to release all claims against Starship, Inc. and
18 its future licensees. *Id.*

19 In 1990, Kantner reformed Jefferson Starship and began performing under that name. *Id.*
20 ¶¶ 6, 30.

21 Between 1991 and 2008, Starship, Inc. re-assumed the name Jefferson Starship, Inc. *Id.* ¶¶
22 8, 32. In 2008, Jefferson Starship, Inc. granted Kantner a lifetime exclusive license for the use of
23 the mark JEFFERSON STARSHIP in connection with live musical performances and
24 merchandising from Jefferson Starship, Inc. and Grace Slick, one of the founding members of
25 Jefferson Starship. *Id.* ¶¶ 9, 33; *see id.* ¶ 2.

26 In 2009, Jefferson Starship, Inc.’s registration for the ’3429 mark was cancelled for failure
27

28 ³ This citation refers to the second paragraph 2.

1 to renew. *Id.* ¶¶ 10, 34.

2 In late 2013 or early 2014, Chaquico formed a band called Jefferson Stateship. *Id.* ¶¶ 11,
3 35. Chaquico advertised Jefferson Stateship using historical images of Jefferson Starship, which
4 included Freiberg. *Id.*; *see id.* ¶ 36 (examples of Chaquico’s use of Freiberg’s image). Chaquico
5 also uses images with Baldwin’s likeness to promote Chaquico and his own live music
6 performances. *Id.* ¶ 42.

7 Kantner passed away in 2016. *Id.* ¶¶ 13, 37. At an unspecified time, Freiberg, Baldwin,
8 and Richardson obtained a lifetime exclusive license for the JEFFERSON STARSHIP mark from
9 Slick and Jefferson Starship, Inc. for musical performances and merchandise. *Id.* Jefferson
10 Starship, Inc. reapplied for a federal registration in 2017, Serial Nos. 87,561,135; 87,575,600; and
11 87,575,603. *Id.* Counterclaimants continue to tour and perform as Jefferson Starship. *Id.*
12 Freiberg is the only living original Jefferson Starship member to have performed on every
13 Jefferson Starship album, including the 2008 album *Jefferson’s Tree of Liberty*. *Id.*

14 In 2017, Chaquico contacted members of the current Jefferson Starship to arrange some
15 live performances with Chaquico and Jefferson Starship. *Id.* ¶¶ 14, 38. When negotiations failed,
16 Chaquico threatened to sue and “began his Fake Band campaign” on his website. *Id.* This
17 campaign attacked the former and current Jefferson Starship iterations. *Id.* Chaquico posted
18 images and comments stating the current Jefferson Starship is a “Fake Band,” notwithstanding the
19 fact that this Jefferson Starship includes original member Baldwin and is licensed to use the
20 Jefferson Starship name. *Id.* For instance, Chaquico writes

21 Fans should BEWARE OF MISLEADING MARKETING AND
22 LICENSING! Beware of any fake bands, any fraudulent misleading
23 marketing or FAKE recordings and false advertising of the original
24 hits being done by lesser cover bands. This confuses the true legacy
25 of the original world famous Jefferson Starship and Starship with
other less artists who are using the same name, that are clearly trying
to recreate the hit-making songs and styles of both the original
Jefferson Starship and Starship. . . .

26 *Id.* ¶ 39.

27 Chaquico intentionally and willfully conducted the “Fake Band campaign” to disrupt
28 Counterclaimants’ business and discourage Jefferson Starship’s fan base from attending the band’s

1 live performances. *Id.* ¶¶ 14, 38. Indeed, venues and promoters have cancelled Counterclaimants’
2 concerts and/or harmfully altered the terms of their agreements with Counterclaimants. *Id.* ¶ 41.
3 For instance, as a result of Chaquico’s interference, in June 2017, a Berkeley, California venue
4 forced Counterclaimants to renegotiate a live performance agreement. *Id.* The new agreement
5 was substantially less financially advantageous to Counterclaimants and cost them over \$10,000.
6 *Id.*

7 **B. Procedural Background**

8 Chaquico initiated this lawsuit on April 27, 2017. *See* Compl., Dkt. No. 1. He brings
9 claims against Counterclaimants for breach of contract and under the Lanham Act based on
10 Counterclaimants’ use of the Jefferson Starship name. *See* Sec. Am. Compl., Dkt. No. 29.

11 Counterclaimants assert three counterclaims against Chaquico: a claim for intentional
12 interference with prospective economic advantage and two Lanham Act claims based on the use of
13 the Jefferson Starship mark and the use of Freiberg’s and Baldwin’s images. FACC ¶¶ 43-58.
14 Chaquico now moves for an order striking Counterclaimants’ intentional interference with
15 prospective economic advantage claim.

16 **LEGAL STANDARD**

17 California Code of Civil Procedure section 425.16 provides a procedure for a court “to
18 dismiss at an early stage nonmeritorious litigation meant to chill the valid exercise of the
19 constitutional rights of freedom of speech and petition in connection with a public issue.” *Sipple*
20 *v. Found. for Nat’l Progress*, 71 Cal. App. 4th 226, 235 (1999) (citation and footnote omitted).
21 This type of nonmeritorious litigation is referred to under the acronym “SLAPP,” or “Strategic
22 Lawsuit Against Public Participation.” *Id.* The archetypal SLAPP complaint is a “generally
23 meritless suit[] brought by large private interests to deter common citizens from exercising their
24 political or legal rights or to punish them for doing so.” *Wilcox v. Sup. Ct.*, 27 Cal. App. 4th 809,
25 816 (1994) (disapproved on other grounds) (citation omitted). The anti-SLAPP statute provides:

26 A cause of action against a person arising from any act of that
27 person in furtherance of the person’s right of petition or free speech
28 under the United States Constitution or the California Constitution
in connection with a public issue shall be subject to a special motion
to strike, unless the court determines that there is a probability that

1 the plaintiff will prevail on the claim.

2 Cal. Civ. Proc. Code § 425.16(b)(1). Section 425.16 thus “allows a court to strike any cause of
3 action that arises from the defendant’s exercise of his or her constitutionally protected free speech
4 rights or petition for redress of grievances.” *Flatley v. Mauro*, 39 Cal. 4th 299, 311-12 (2006).

5 California’s anti-SLAPP statute is available to litigants in federal court. *In re NCAA*
6 *Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1272 (9th Cir. 2013), *cert.*
7 *dismissed sub nom. Elec. Arts Inc. v. Keller*, 135 S. Ct. 42 (2014); *see also Batzel v. Smith*, 333
8 F.3d 1018, 1025-26 (9th Cir. 2003). While section 425.16 “does not apply to federal law causes
9 of action,” it does apply to “state law claims that federal courts hear pursuant to their diversity
10 jurisdiction[.]” *Hilton v. Hallmark Cards*, 599 F.3d 894, 900 n.2, 901 (9th Cir. 2010).

11 In ruling on a motion to strike brought under section 425.16, the trial court must engage in
12 a two-step process that involves shifting burdens. *Kearney v. Foley & Lardner LLP*, 590 F.3d
13 638, 648 (9th Cir. 2009). First, the defendant must make an initial prima facie showing that the
14 plaintiff’s challenged cause of action “arises from” an act in furtherance of the defendant’s rights
15 of petition or free speech. *Rusheen v. Cohen*, 37 Cal. 4th 1048, 1056 (2006). “A cause of action
16 ‘arising from’ [a party’s] litigation activity may appropriately be the subject of an [anti-SLAPP
17 motion to strike].” *Id.* (citation omitted). Such activity “includes communicative conduct such as
18 the filing, funding, and prosecution of a civil action.” *Id.* (citation omitted).

19 Second, “[i]f the court determines that the defendant has met this burden, it must then
20 determine whether the plaintiff has demonstrated a probability of prevailing on the merits.”
21 *Kearney*, 590 F.3d at 648 (citation omitted); *Jarrow Formulas, Inc. v. LaMarche*, 31 Cal. 4th 728,
22 733 (2003). “‘Reasonable probability’ in the anti-SLAPP statute has a specialized meaning” and
23 “requires only a ‘minimum level of legal sufficiency and triability.’” *Mindys Cosmetics, Inc. v.*
24 *Dakar*, 611 F.3d 590, 598 (9th Cir. 2010) (quoting *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 438
25 n.5 (2000)). “Indeed, the second step of the anti-SLAPP inquiry is often called the ‘minimal
26 merit’ prong.” *Id.* (citations omitted). “‘Put another way, the plaintiff must demonstrate that the
27 complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to
28 sustain a favorable judgment if the evidence submitted by the plaintiff is credited.’” *Id.* at 599

1 (quoting *Wilson v. Parker, Covert & Chidester*, 28 Cal. 4th 811, 821 (2002)); *see also Navellier v.*
2 *Sletten*, 29 Cal. 4th 82, 93 (2002) (the statute “subjects to potential dismissal only those actions in
3 which the plaintiff cannot state and substantiate a legally sufficient claim.”). “[A] reviewing court
4 ‘should grant the motion if, *as a matter of law*, the defendant’s evidence supporting the motion
5 defeats the plaintiff’s attempt to establish evidentiary support for the claim.” *Makaeff v. Trump*
6 *Univ., LLC*, 736 F.3d 1180, 1183 (9th Cir. 2013) (Wardlaw, J. and Callahan J. concurring in the
7 denial of rehearing en banc) (emphasis in original) (quoting *Vargas v. City of Salinas*, 46 Cal. 4th
8 1, 20 (2009)). “Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e.,
9 that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP,
10 subject to being stricken under the statute.” *Navellier*, 29 Cal. 4th at 89 (emphasis in original).

11 **DISCUSSION**

12 In their First Cause of Action for Intentional Interference with Prospective Economic
13 Advantage, Counterclaimants allege an “[e]conomic relationships exist between Counterclaimants
14 and their fan base and promoters, and because of these economic relationships, Counterclaimants
15 receive an economic benefit.” FACCC ¶ 44. They maintain that Chaquico, “having been a
16 professional musician, knows of these economic relationships and intentionally and wrongfully
17 interfered with and disrupted those economic relationships.” *Id.* ¶ 45. They allege Chaquico
18 “posted numerous inciting images and comments stating that the current Jefferson Starship is a
19 Fake Band, despite the fact that Jefferson Starship includes founding member Freiberg and
20 original member Baldwin and is properly licensed to use the Jefferson Starship name.” *Id.* ¶ 38.
21 As a result of Chaquico’s conduct, Counterclaimants allege “actual disruption and interference has
22 occurred between Counterclaimants and their fans and promoters.” *Id.* ¶ 46.

23 In moving to strike their counterclaim, Chaquico argues Counterclaimants’ sole purpose in
24 bringing it is to retaliate against him “for exercising his free speech rights” and that it is “based
25 solely on Chaquico’s statement of opinion regarding [Counterclaimants’] music and concerts on
26 his public website.” Mot. at 1.

27 **A. Prima Facie Showing**

28 Chaquico argues his conduct is protected under section 425.16(e)(3), which recognizes

1 “any written or oral statement or writing made in a place open to the public or a public forum in
2 connection with an issue of public interest” as a protected activity. Cal. Civ. Proc. Code §
3 425.16(e)(3). The Court agrees. First, the public forum requirement is satisfied as
4 Counterclaimants’ cause of action is based on Chaquico’s comments on his publicly-accessible
5 website. “It is settled that Web sites accessible to the public . . . are public forums for purposes of
6 the anti-SLAPP statute.” *Wong v. Tai Jing*, 189 Cal. App. 4th 1354, 1366 (2010); *see also Cole v.*
7 *Patricia A. Meyer & Assocs., APC*, 206 Cal. App. 4th 1095, 1121 (2012) (“An Internet Web site
8 that is accessible to the general public is a public forum”); *Nygaard, Inc. v. Uusi-Kerttula*, 159 Cal.
9 App. 4th 1027, 1039 (2008) (“Web sites accessible to the public . . . are ‘public forums’ for
10 purposes of the anti-SLAPP statute.”) (internal quotations and citations omitted).

11 Second, “‘an issue of public interest’ within the meaning of section 425.16, subdivision
12 (e)(3) is *any issue in which the public is interested.*” *Nygaard*, 159 Cal. App. 4th at 1042 (emphasis
13 in original). “In other words, the issue need not be ‘significant’ to be protected by the anti-SLAPP
14 statute—it is enough that it is one in which the public takes an interest.” *Id.* “Like the SLAPP
15 statute itself, the question whether something is an issue of public interest must be ‘construed
16 broadly.’” *Hecimovich v. Encinal Sch. Parent Teacher Org.*, 203 Cal. App. 4th 450, 464 (2012).
17 California courts interpreting the anti-SLAPP statute have identified three categories of
18 information that fall within the term’s ambit: (1) “[t]he subject of the statement or activity
19 precipitating the claim was a person or entity in the public eye; (2) “[t]he statement or activity
20 precipitating the claim involved conduct that could affect large numbers of people beyond the
21 direct participants”; or (3) “[t]he statement or activity precipitating the claim involved a topic of
22 widespread public interest.” *Commonwealth Energy Corp. v. Investor Data Exch., Inc.*, 110 Cal.
23 App. 4th 26, 33 (2003). Here, there is no dispute that Jefferson Starship falls within the first
24 category as it is in the public eye; thus Chaquico’s comments regarding Jefferson Starship being a
25 “fake band” were made in connection with an issue of public interest. *See Stewart v. Rolling*
26 *Stone LLC*, 181 Cal. App. 4th 664, 677-78 (2010) (noting that commentary on musical bands and
27 popular music is an issue of “public interest” under Section 425.16(e)). Accordingly, Chaquico
28 can make a prima facie showing that the anti-SLAPP statute protects his statements.

1 Counterclaimants do not appear to disagree with this interpretation but instead oppose
 2 Chaquico’s motion on the ground that his comments fall under the “commercial speech”
 3 exemption codified under California Civil Procedure Code section 425.17. Opp’n at 12. The
 4 California Legislature created certain exemptions from the protections afforded under the anti-
 5 SLAPP statute because of a “disturbing abuse” of the statute “contrary to the [statute’s] purpose
 6 and intent.” Cal. Civ. Proc. Code § 425.17(a). One such exemption is for “commercial speech.”
 7 *Id.* § 425.17(c). California courts have interpreted the exemption as applying to “disputes that are
 8 purely commercial[,]” such as suits arising from comparative advertising. *Taheri Law Grp. v.*
 9 *Evans*, 160 Cal. App. 4th 482, 491 (2008). “The commercial speech exemption . . . is a statutory
 10 exception to section 425.16 and should be narrowly construed.” *Simpson Strong-Tie Co., Inc. v.*
 11 *Gore*, 49 Cal.4th 12, 22 (2010) (citations and internal quotation marks omitted). And not only
 12 must the exemption be narrowly construed, but the statute explicitly provides a carve-out for
 13 “[a]ny action against any person or entity based upon the creation, dissemination, exhibition,
 14 advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic
 15 work, including, but not limited to, a motion picture or television program.” Cal. Code Civ. P §
 16 425.17(d)(2). “As to such actions, the statute continues to apply.” *Forsyth v. Motion Picture*
 17 *Ass’n of Am., Inc.*, 2016 WL 6650059, at *4 (N.D. Cal. Nov. 10, 2016). Because Chaquico’s
 18 comments were made in the course of advertising and promoting his musical work, the Court finds
 19 that they fall within the meaning of section 425.17(d)(2), and section 425.17(c)(1) therefore does
 20 not operate to exclude the protection accorded Chaquico’s speech. Accordingly, Chaquico has
 21 successfully met his burden of making a prima facie showing that the comments on his website
 22 arise from an act in furtherance of his rights of petition or free speech.

23 **B. Probability of Prevailing on the Merits**

24 Next, the Court must determine whether Counterclaimants have demonstrated a probability
 25 of prevailing on the merits. Under the anti-SLAPP statute, the standard for evaluating the
 26 strength of a case is a lenient one, with Counterclaimants only have to “show a reasonable
 27 probability of prevailing on [their] claims.” *Mindys Cosmetics*, 611 F.3d at 598. “Reasonable
 28 probability” in this context means “only a minimum level of legal sufficiency and triability.” *Id.*

1 (quotation omitted). Significantly, “the trial court does not weigh the evidence or determine
2 questions of credibility; instead the court accepts as true all of the evidence favorable to the
3 plaintiff.” *Nagel v. Twin Labs., Inc.*, 109 Cal. App. 4th 39 (2003); *see also* Cal. Civ. P. Code §
4 425.16(b)(2).

5 To state a claim for intentional interference with prospective economic advantage, a
6 plaintiff must plead: “(1) an economic relationship between the plaintiff and some third party, with
7 the probability of future economic benefit to the plaintiff; (2) the defendant’s knowledge of the
8 relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship;
9 (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused
10 by the acts of the defendant.” *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134,
11 1153 (2003) (citation omitted); *CRST Van Expedited v. Werner Enter., Inc.*, 479 F.3d 1099, 1108
12 (9th Cir. 2007).

13 Under the lenient standard at this stage in the proceedings, Counterclaimants have
14 established that their claim has the necessary “minimal merit” to survive a motion to strike.
15 *Navellier*, 29 Cal. 4th at 95. First, Counterclaimants have submitted evidence establishing a
16 relationship between them and the band’s fan base, venues, and promoters with the probability of
17 future economic benefit. Richardson Decl. ¶ 8, Dkt. No. 67-1 (“[A]ny touring musician
18 understands that he or she is paid as the result of the band contracting with venues and promoters,
19 who sell tickets to fans, revenues from which are paid to the band in accordance with those
20 contracts.”).

21 Second, based on Counterclaimants’ evidence, the Court finds that Chaquico had
22 knowledge about the relationship between Counterclaimants and their fan base, venues, and
23 promoters. Chaquico himself alleges “[t]his dispute arises out of two of Chaquico’s former
24 bandmates, along with others, making unauthorized use of the Jefferson Starship name in
25 connection with their live performances and on merchandise, as well as their unauthorized use of
26 Chaquico’s image in order to advertise and promote the sale of tickets to their live performances
27 by explicitly misleading consumers to believe that Chaquico participates in, or otherwise sponsors
28 and endorses such performances.” Sec. Am. Compl. ¶ 2, Dkt. No. 29. Chaquico also states he is

1 aware that Counterclaimants are currently touring. Chaquico Decl. ¶ 4, Dkt. No. 47-1. Although
2 Chaquico disputes having knowledge about Counterclaimants’ tour schedule or “specific
3 knowledge of any contracts between [Counterclaimants] and any specific venue,” *id.*, he need not
4 have known about a specific agreement with a particular venue. At this stage in the proceedings,
5 general awareness that his actions would interfere with Counterclaimant’s economic relationships
6 is sufficient. *Sebastian Int’l, Inc. v. Russolillo*, 128 F. Supp. 2d 630, 637 (C.D. Cal. 2001)
7 (awareness that plaintiff would lose unidentified “customers” for its hair care products sufficient
8 to plead intentional interference with prospective economic advantage).

9 Third, Counterclaimants have provided evidence that Chaquico intended to disrupt the
10 economic relationship between Counterclaimants and their fan base, including posts on his
11 website accusing Counterclaimants of being a “Fake Band”, creating “FAKE recordings”, being a
12 “lesser cover band”, and consisting of “lesser artists.” FACCC ¶¶ 38-39. Chaquico himself states
13 that he issued “a warning to fans” on his website to “beware” of Counterclaimants. Chaquico
14 Decl. ¶ 6.

15 Finally, Counterclaimants have submitted evidence that they suffered economic harm as a
16 result of Chaquico’s actions. Specifically, Jim Lenz, Counterclaimants’ booking agent who has
17 worked with the band for over twenty years, states that he was forced to renegotiate a contracted
18 show due to Chaquico’s website postings. Lenz Decl. ¶¶ 5-7, Dkt. No. 67-2. They claim that, as a
19 direct result of Chaquico’s actions, the band lost half its original guaranteed fee. *Id.*

20 As Counterclaimants can establish all five elements of their intentional interference with
21 prospective economic advantage claim with the minimal merit necessary to survive a motion to
22 strike, the Court must deny Chaquico’s motion.

23 **CONCLUSION**

24 Based on the analysis above, the Court **DENIES** Plaintiff and Counterdefendant Craig
25 Chaquico’s motion to strike Defendants and Counterclaimants’ counterclaim for tortious
26 interference. Because Chaquico did not prevail on his motion, his request for attorney’s fees and
27 costs is also **DENIED**.

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The parties shall appear for a Case Management Conference on August 9, 2018 at 10:00 a.m. in Courtroom B, 15th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102. This conference shall be attended by lead trial counsel No later than August 2, 2018, the parties shall file an updated Joint Case Management Statement containing the information in the Standing Order for All Judges in the Northern District of California, available at: <http://cand.uscourts.gov/mejorders>. The parties shall also state whether they wish to attend a further settlement conference with Magistrate Judge Laurel Beeler or with another magistrate judge. No chambers copy of the case management statement is required.

IT IS SO ORDERED.

Dated: July 10, 2018



MARIA-ELENA JAMES
United States Magistrate Judge