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7

8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN FRANCISCO DIVISION**
11

12 SARAH ANDERSEN, an individual;
13 KELLY MCKERNAN, an individual;
KARLA ORTIZ, an individual,

14 Individual and Representative Plaintiffs,

15 v.

16 STABILITY AI LTD., a UK corporation;
STABILITY AI, INC., a Delaware corporation;
17 MIDJOURNEY, INC., a Delaware corporation;
DEVIANTART, INC., a Delaware corporation,
18

19 Defendants.
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CASE NO. 3:23-cv-00201-WHO

**DEFENDANT DEVIANTART, INC.'S
REPLY IN SUPPORT OF ITS SPECIAL
MOTION TO STRIKE UNDER
CALIFORNIA CODE OF CIVIL
PROCEDURE § 425.16**

Date: July 19, 2023
Time: 2:00 p.m.
Place: Courtroom 2 - 17th Floor
Before: Hon. William H. Orrick

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1 **I. INTRODUCTION**

2 Plaintiffs’ opposition to Defendant DeviantArt’s anti-SLAPP motion consists primarily of
3 arguments that are irrelevant to any issue presented in the motion, obviously incorrect, or both.
4 For example, the brief’s lengthy discussion of the constitutional test “for determining whether
5 speech is commercial” and related topics, Dkt. No. 69 (“Opp.”) at 9–12, simply has no application
6 to any question before the Court. And the brief’s characterization of the right-of-publicity claims
7 that are the subject of the motion—more precisely, the suggestion that those claims are “based on
8 Defendants’ use of Plaintiffs’ names, rather than on Defendants’ misappropriation of Plaintiffs’
9 art,” Opp. at 15—bears essentially no relationship to the factual allegations in the Complaint itself.
10 The opposition, in short, fails to address a number of the central arguments in the opening brief,
11 and on those it does engage with, seems to respond largely with a series of non sequiturs.

12 Cutting through the confusion, the proper disposition of this motion is straightforward:

- 13 • Plaintiffs’ right-of-publicity claims arise from “protected activity” under California’s
14 anti-SLAPP law because they allege liability that arises from actions by DeviantArt in
15 furtherance of the constitutional right of free speech in connection with an issue of
16 public interest: to wit, offering a tool that allows the public to generate new works of
17 art in the style of allegedly well-known artists.
- 18 • Plaintiffs’ right-of-publicity claims have no “probability of prevailing” because,
19 applying the Rule 12(b)(6) standard, the Complaint fails to state a claim three times
20 over: first because copyright law preempts these claims; second because the conduct
21 alleged is not a right-of-publicity violation; and third because the First Amendment
22 would bar liability on the theory asserted, even if those claims were otherwise valid
23 (which they are not).

24 It does not matter that Defendant DeviantArt is a “corporate interest” (though it is certainly
25 surprising to see the company described as “large”). Opp. at 1. It does not matter that section
26 425.17 of the California Code of Civil Procedure carves out several categories of claims from the
27 coverage of the anti-SLAPP statute in section 425.16, because on their face none of those narrow
28 exemptions applies here. *See generally Simpson Strong-Tie Co., Inc. v. Gore*, 49 Cal. 4th 12, 22

1 (2010) (explaining that the “commercial speech” provisions of section 425.17, which are a
2 “statutory exception” to section 425.16 and not a free-ranging constitutional inquiry into what
3 constitutes “commercial speech,” “should be narrowly construed” (citation omitted)).

4 All that matters is that the liability alleged plainly arises from “protected activity,” and the
5 claims asserting the liability are legally defective. Nothing in the opposition undermines those
6 conclusions. The Court, accordingly, should grant DeviantArt’s motion to strike under California
7 Code of Civil Procedure section 425.16.

8 **II. ARGUMENT**

9 **A. The Right-Of-Publicity Claims Arise From Protected Activity**

10 Plaintiffs fail to meaningfully engage with DeviantArt’s arguments regarding the first anti-
11 SLAPP prong, which addresses whether the conduct alleged to give rise to liability in the targeted
12 cause of action falls within the ambit of California Code of Civil Procedure section 425.16(e)(4),
13 namely, “conduct in furtherance of the exercise of . . . the constitutional right of free speech in
14 connection with . . . an issue of public interest.” Instead, the opposition rests on a conception of
15 the law’s scope that has no basis in statutory text or case law and is foreclosed by California
16 Supreme Court precedent. Indeed, Plaintiffs’ argument that “commercial” speech is categorically
17 excluded from anti-SLAPP protection ignores numerous cases that directly contradict it. And
18 Plaintiffs’ assertion (and misquotation) of the law’s false-advertising exemption is baseless.

19 **1. Plaintiffs Concede That DeviantArt Has Engaged In Speech In** 20 **Connection With An Issue Of Public Interest**

21 Nothing in Plaintiffs’ opposition contests, much less disproves, that artistic styles can be
22 issues of “public interest” if they have been “popularized,” Dkt. No. 1 (“Compl.”) ¶ 205, just like
23 a celebrity’s lifestyle becomes an issue of public interest after that person has engaged in activities
24 that draw public attention, *see* Dkt. No. 50 (“Mot.”) at 9. Plaintiffs also do not deny that creating
25 a new artistic work that implements and builds upon a “popular[.]” artistic style can constitute
26 “speech . . . in connection with . . . [that] issue of public interest.” Cal. Code Civ. Proc.
27 § 425.16(e)(4); *see* Mot. at 10–11. Nor do Plaintiffs contest that providing a creative tool—like
28 DreamUp—to “assist[.]” that speech qualifies as “conduct in furtherance of . . .” that speech. Mot.

1 at 9; *Tamkin v. CBS Broad., Inc.*, 193 Cal. App. 4th 133, 143 (2012). Plaintiffs “concede[] these
2 arguments by failing to address them in [their] opposition.” *Tyler v. Travelers Com. Ins. Co.*, 499
3 F. Supp. 3d 693, 701 (N.D. Cal. 2020).¹ On the plain text of the statute, then, the liability alleged
4 from the provision of a tool that allows users to create works in the style of recognized artists is
5 squarely encompassed by the statute’s definition of protected activity.

6 **2. Plaintiffs Misunderstand The Scope Of The Anti-SLAPP Law**

7 Rather than confront that analysis head-on, Plaintiffs advance a *de novo* reimagination of
8 the anti-SLAPP law. They posit that conduct is only “in connection with . . . [an] issue of public
9 interest” in this context if it is speech consisting of hard-hitting criticism on, e.g., “current art
10 trends” or “the art world” as a whole. Opp. at 7. And they argue that the anti-SLAPP law does
11 not apply here because DeviantArt has not pointed to its participation in “public conversations
12 about issues in the art world” or other “comment[ary].” *Id.*

13 The premise of Plaintiffs’ argument is simply incorrect. Time and again, the California
14 Supreme Court has ruled that “protected activity” within the meaning of the anti-SLAPP law
15 consists of conduct that satisfies the definition of the statutory categories—nothing more, nothing
16 less. *See, e.g., Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 60–61 (2002) (“The fact
17 the Legislature expressed a concern in the Statute’s preamble with lawsuits brought ‘primarily’ to
18 chill First Amendment rights does not mean that a court may add this concept as a separate
19 requirement in the operative sections of the statute.” (citation omitted)); *Navellier v. Sletten*, 29

20
21 ¹ Plaintiffs cite *FilmOn.com Inc. v. DoubleVerify Inc.* for the proposition that the statute demands
22 “closeness” between the speech and the asserted public interest. 7 Cal. 5th 133, 150 (2019); *see*
23 Opp. at 7. But that case involved statements disseminated “privately” that were never “intended”
24 to “enter[] the public sphere”—and thus the court held they lacked a sufficient nexus to the asserted
25 public issues. *Id.* at 153–54. No similar facts exist here. *See also Global Plasma Solutions, Inc.*
26 *v. IEE Indoor Env’t Eng’g*, 600 F. Supp. 3d 1082, 1093–94 (N.D. Cal. 2021) (finding *FilmOn*
27 inapposite where the “statements at issue” were not “confidential” but rather “published on
28 [defendant]’s website”). Plaintiffs also cite *Penrose Hill, Limited v. Mabray*, which concerned a
Tweet referring to the “new era of companies . . . in the wine industry” and suggesting some were
“fakers.” 479 F. Supp. 3d 840, 847 (N.D. Cal. 2020). The court assumed that “the topic of
nontraditional business models for selling wine is a matter of public interest,” but held that the
Tweet lacked “the requisite closeness to that issue” because it did not elaborate on or provide an
“explanation of [the] terms” it used—like “fakers”—rendering it a mere “generic reference.” *Id.*
at 855. That case has no relevance here, where the speech—new works of art created by DreamUp
users—is not a “generic” or fleeting reference to an issue of public interest, *id.*, but rather a specific
reference to the Plaintiffs’ unprotectable “artistic styles.” Compl. ¶ 205.

1 Cal. 4th 82, 90 (2002) (holding that the inquiry under the first prong of the anti-SLAPP statute is
2 whether the conduct alleged to give rise to liability is encompassed by the “plain language” of the
3 statutory definition, irrespective of the label appended to the claim or other considerations).

4 The plain text of the operative statutory definitions squarely encompasses a vastly broader
5 range of qualifying conduct than just the type of express criticism to which Plaintiffs suggest it is
6 limited. The statutory language in section 425.16(e)(4) covers *any* conduct in furtherance of free
7 speech rights in connection with an issue of public interest. And the twin provision in section
8 425.17—affording limited exemptions from that sweeping scope of coverage in section 425.16—
9 presupposes that “protected activity” includes not only “literary” or “political” works like
10 “article[s] published in [] newspaper[s] or magazine[s],” but also “musical” and “artistic work[s].”
11 Cal. Code Civ. Proc. § 425.17(d)(2). Those references would make no sense if the only viable
12 anti-SLAPP motions were those that attacked claims targeting debate or other prose expression.

13 Courts have faithfully applied the expansive scope of the statutory definition of “protected
14 activity,” read in light of the statute as a whole, to a wide range of conduct that falls outside the
15 cramped conception of the law Plaintiffs advocate. *No Doubt v. Activision Publishing, Inc.*, 192
16 Cal. App. 4th 1018 (2011), is instructive. In that case, a famous rock band sued a company that
17 made a video game that would allow consumers to play music using digital avatars of the band
18 members. *Id.* at 1024. That was the extent of the conduct allegedly giving rise to right-of-publicity
19 and related legal violations. *Id.* at 1024–25. The court, in turn, ruled that the alleged liability arose
20 from protected activity within the meaning of section 425.16(e)(4). “Video games generally are
21 considered ‘expressive works’ subject to First Amendment protections,” the court explained. *Id.*
22 at 1027. And the video game maker’s use of the band’s likeness addressed “a matter of public
23 interest because of the widespread fame [the band] has achieved.” *Id.* Nothing more was required.
24 The suit fell within the scope of the first prong of the anti-SLAPP law even though it was, at
25 bottom, a right-of-publicity claim over the provision of an entertainment product, and not any kind
26 of comment or criticism on anything.

27 Many other cases have applied similar reasoning to reach the same result in lawsuits that
28 have nothing to do with commentary or criticism. *See, e.g., Symmonds v. Mahoney*, 31 Cal. App.

1 5th 1096, 1105–10 (2019) (holding that “[a] singer’s selection of the musicians that play with him
2 . . . is an act in furtherance of his exercise of the right of free speech” and that such act was “in
3 connection with . . . and issue of public interest” where the singer “perform[ed] at concerts across
4 the country, indicating that [his] music and performances were of interest to the public”); *Tamkin*
5 *v. CBS Broad., Inc.*, 193 Cal. App. 4th 133, 143–44 (2011) (holding that “the creation, casting,
6 and broadcasting of an episode of a popular television show” (*CSI*) was “in furtherance of the right
7 of free speech,” and that such acts were connected to “an issue of public interest because the public
8 was demonstrably interested in the creation and broadcasting of that episode”).

9 Thousands of painters have made invaluable, First-Amendment-protected contributions to
10 the development of contemporary art through the visual medium, using and building on pre-
11 existing styles to express complex and subtle ideas about the subject depicted as well as the artistic
12 genres themselves. *See* Mot. at 10 n.6. There is no material difference, for purposes of the first
13 prong of the anti-SLAPP law, between those painters and the DeviantArt users who use DreamUp
14 to create new works that participate in discourse on “issue[s] of public interest” by emulating the
15 “artistic style[s]” the Plaintiffs chose to “popularize[.]” Compl. ¶ 205. DeviantArt’s provision of
16 this tool is “conduct in furtherance of the exercise of . . . free speech in connection with . . . an
17 issue of public interest,” Cal. Code Civ. Proc. § 425.16(e), and Plaintiffs do not offer any serious
18 argument to the contrary.²

19 **3. Whether The Speech Is “Commercial” Is Irrelevant Here**

20 Plaintiffs claim that “Defendants’ [alleged] conduct of selling and advertising their AI
21 Image Products” is “unprotected commercial speech” under the First Amendment and therefore
22 falls outside the anti-SLAPP law’s protection. Opp. at 7–12. But the case that Plaintiffs rely on
23 for this proposition expressly states that “[c]ommercial speech . . . may be protected by the anti-

24 ² Plaintiffs also cite *Brown v. McCain*, a right-of-publicity case regarding the use of the plaintiff’s
25 song in a campaign commercial for Senator John McCain. 611 F. Supp. 2d 1062, 1065 (C.D. Cal.
26 2009). The court held that the defendants had “met their burden of showing that [the] claim arises
27 from protected activity,” *id.* at 1069, and went on to discuss California’s common law “news
28 reporting” or “public interest” privilege, which protects a defendant’s right to use a plaintiff’s
name or likeness to report or comment on “matters related to the plaintiff,” *id.* at 1071 (declining
to apply the privilege because the campaign ad “did not comment on nor target the [song] nor [its
performer]”). It is that part of the opinion—discussing a common law privilege that none of the
Defendants in this case assert—that Plaintiffs misleadingly quote in their brief. Opp. at 7.

1 SLAPP statute” if it was “made in connection with a matter of public interest.” *L.A. Taxi Coop.,*
2 *Inc. v. Indep. Taxi Owners Ass’n of L.A.*, 239 Cal. App. 4th 918, 928 (2015). Indeed, California
3 courts have uniformly rejected the argument that “commercial speech is categorically excluded
4 from the protection of the anti-SLAPP law.” *Dean v. Friends of Pine Meadow*, 21 Cal. App. 5th
5 91, 104 (2018); *see, e.g., FilmOn.com Inc. v. DoubleVerify Inc.*, 7 Cal. 5th 133, 148 (2019) (“We
6 do not . . . sort statements categorically into commercial or noncommercial baskets in analyzing
7 whether they are covered by the catchall provision [of Cal. Code Civ. Proc. section 425.16].”).

8 The California Supreme Court has explicitly instructed “courts determining whether
9 conduct is protected under the anti-SLAPP statute [to] look not to First Amendment law, but to
10 the statutory definitions in” the anti-SLAPP statute itself. *City of Montebello v. Vasquez*, 1 Cal.
11 5th 409, 421–22 (2016) (explaining that the anti-SLAPP law’s scope “extend[s] beyond the
12 contours of the [First Amendment]”). So when determining whether conduct is protected under
13 California’s anti-SLAPP law, courts need not “wrestle with difficult questions of constitutional
14 law,” like whether speech qualifies for “federal [or] state protection of free expression,” *id.* at 422,
15 or whether speech is “commercial,” *Dean*, 21 Cal. App. 5th at 104–05. It is thus irrelevant whether
16 the conduct at issue here meets the definition of “commercial speech” laid out in the First
17 Amendment cases Plaintiffs discuss.³ *Opp.* at 9–12 (extensively discussing First Amendment); *cf.*
18 *Navellier*, 29 Cal. 4th at 94 (warning against “confus[ing] the threshold question of whether the

19 ³ Most cases Plaintiffs cite have nothing to do with anti-SLAPP. *See Dun & Bradstreet, Inc. v.*
20 *Greenmoss Builders, Inc.*, 472 U.S. 749, 751 (1985) (First Amendment limit on libel damages);
21 *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 61–62 (1983) (challenge to statute regarding
22 contraception advertising); *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S.
23 557, 558 (1980) (challenge to “ban[.]” on “promotional advertising by an electrical utility”); *Kasky*
24 *v. Nike, Inc.*, 27 Cal. 4th 939, 945–46 (2002) (First Amendment limits state laws “barring false
25 and misleading commercial messages”); *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1115
26 (9th Cir. 2021) (First Amendment limits Lanham Act liability); *Solano v. Playgirl, Inc.*, 292 F.3d
27 1078, 1089 (9th Cir. 2002) (“newsworthiness” defense to right-of-publicity claim); *Knapke v.*
28 *PeopleConnect Inc.*, 553 F. Supp. 3d 865, 878–80 (W.D. Wash. 2021) (First Amendment defense
to right-of-publicity claim); *Bosley v. Wildwett.com*, 310 F. Supp. 2d 914, 925 (N.D. Ohio 2004)
(same); *Michaels v. Internet Ent. Grp., Inc.*, 5 F. Supp. 2d 823, 838–39 (C.D. Cal. 1998) (same).

The anti-SLAPP cases Plaintiffs do cite address the First Amendment as a defense to a claim—not
in the context of addressing the statute’s first prong. *See Stewart v. Rolling Stone LLC*, 181 Cal.
App. 4th 664, 674–79 (2010) (right-of-publicity claims against magazine arise from “protected
activity” under anti-SLAPP law); *id.* at 680–92 (separately discussing “First Amendment . . . as a
defense to plaintiffs’ complaint”); *Camacho v. Control Grp. Media Co.*, No. 21-cv-1954, 2022
WL 3093306, at *20 (S.D. Cal. July 18, 2022) (discussing whether right-of-publicity claims are
barred by the First Amendment); *id.* at *33 (separately discussing anti-SLAPP).

1 SLAPP statute [] applies” with the “secondary inquiry” on the merits (alterations omitted)).⁴

2 **4. The Section 425.17(c) Exemption Does Not Apply**

3 In support of their argument that “the anti-SLAPP statute does not protect promotional
4 commercial speech,” Plaintiffs quote section 425.17(c) of the anti-SLAPP statute, Opp. at 8, which
5 is a limited exception that applies to “cause[s] of action brought against a person primarily engaged
6 in the business of selling or leasing goods or services.” Cal. Code Civ. Proc. § 425.17(c). But
7 Plaintiffs fail to disclose that the exception applies only to “causes of action arising
8 from . . . representations of fact about [a defendant’s] or a competitor’s ‘business operations,
9 goods, or services.’” *Simpson*, 49 Cal. 4th at 17 (quoting Cal. Code Civ. Proc. § 425.17(c)(1)).
10 That is a “narrow commercial speech exemption,” *Dean*, 21 Cal. App. 5th at 105, “aimed squarely
11 at false advertising claims” where “the speech at issue is *about* the speaker’s product or service or
12 *about* a competitor’s product or service,” *JAMS, Inc. v. Superior Ct.*, 1 Cal. App. 5th 984, 994–95
13 (2016) (emphasis added). It has no application here, and Plaintiffs do not explain otherwise.
14 *Simpson*, 49 Cal. 4th at 26 (plaintiff carries burden of proof to establish exemption); *see infra* at
15 10–11 (explaining Plaintiffs’ failure to allege use of their names to advertise or promote
16 Defendants’ products). Nor do Plaintiffs anywhere grapple with section 425.17’s next subsection,
17 which clarifies that section 425.17(c) “do[es] not apply to . . . [a]ny action against any person or
18 entity based upon the creation, dissemination, exhibition, advertisement, or other similar
19 promotion of any dramatic, literary, musical, political, or artistic work.” Cal. Code Civ. Proc.
20 § 425.17(d). Plaintiffs’ suit is indisputably “based upon the creation . . . [of] artistic work[s].” *Id.*⁵

21 _____
22 ⁴ Plaintiffs urge this Court to conduct a means-ends balancing analysis to determine if the conduct
23 at issue here “warrants [] protection” under the anti-SLAPP statute. Opp. at 10–11. But “section
24 425.16 does not provide for any balancing test to determine if the defendant’s actions were in
25 furtherance of the freedom of speech . . . in connection with a public issue.” *Schaffer v. City &*
Cnty. of S.F., 168 Cal. App. 4th 992, 1004 n.6 (2008). Plaintiffs also argue that “Defendants’ anti-
26 SLAPP [claim] fails” because the speech is “misleading and false.” Opp. at 9–10. But a “plaintiff
27 cannot show that a cause of action does not arise from protected activity simply by characterizing
28 the defendant’s alleged conduct as tortious.” *Sivero v. Twentieth Century Fox Film Corp.*,
No. B266469, 2018 WL 833696, at *5 (Cal. Ct. App. Feb. 13, 2018) (unpublished).

⁵ Plaintiffs also make a passing reference to section 425.17(b) of the statute. Opp. at 6 n.6. But
they make no attempt to explain how this provision is relevant here, *cf. Simpson*, 49 Cal. 4th at
24–25 (plaintiff “bears the burden to establish the exception”), nor do they acknowledge that
section 425.17(d) explicitly states that “[s]ubdivision[] (b) . . . do[es] not apply to . . . [a]ny action .
. . . based upon the creation, dissemination . . . or other similar promotion of any . . . artistic work.”

1 **B. Plaintiffs’ Right-Of-Publicity Claims Fail On The Merits**

2 **1. The Claims Are Preempted By The Copyright Act**

3 The gravamen of Plaintiffs’ right-of-publicity claims is the fact that Defendants’ models
4 are able to “generate work in the artistic style[s] that Plaintiffs popularized.” Compl. ¶ 205. In
5 fact, the only concrete publicity-related harm that Plaintiffs identify arises from the use of
6 Plaintiffs’ “artistic styles” in new visual works that Plaintiffs do not want to “compete” with. Opp.
7 at 14; *see also* Mot. at 13 n.9 (harm is a required element of right-of-publicity claims). As
8 DeviantArt explained, however, it is well-established that artistic styles are not only unprotected
9 by copyright law, but are “ideas” and “concepts” that state law *cannot* protect due to Copyright
10 Act preemption, which “prevent[s] states from giving special protection” to subject matter that
11 Congress “has decided should be in the public domain.” *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447,
12 1453 (7th Cir. 1996) (Easterbrook, J.); *see also* Mot. at 11–14. That artists must “compete” with
13 others who implement and build upon their “artistic styles,” Compl. ¶ 212; *see* Opp. at 14, is not a
14 legally redressable wrong, but rather the direct and intended result of Copyright Act preemption.

15 Plaintiffs contest none of this. *See* Opp. at 15–16 (addressing preemption). Plaintiffs make
16 no effort to distinguish the numerous cases in which courts have held that the Copyright Act
17 preempts right-of-publicity claims when the “crux of [the] case” is the plaintiff’s attempt to control
18 subject matter within the Copyright Act’s preemptive scope. Mot. at 14 & n.14 (quoting *Ray v.*
19 *ESPN, Inc.*, 783 F.3d 1140, 1142–44 (8th Cir. 2015)). Instead, Plaintiffs’ opposition abandoned
20 the “artistic style” aspect of their right-of-publicity claims altogether, and narrowed those claims
21 to focus solely on “Defendants’ [alleged] use of Plaintiffs’ names.” Opp. at 15; *see also id.* at 2
22 (claims are “based on how Defendants[] . . . utilize Plaintiffs’ names, not [] their particular
23 styles”); *id.* at 17 (same). The thinking behind the gambit seems to be: If federal law precludes
24 Plaintiffs from asserting exclusive rights in their “artistic styles,” perhaps Plaintiffs can achieve
25 the same result—and redress the same alleged injury—by precluding members of the public from
26 *referring* to those styles by reference to Plaintiffs’ personal names.⁶

27 _____
28 ⁶ Plaintiffs also claim Defendants’ used their names in a different way: “for the purposes of
advertising, selling, and soliciting” their products. Opp. at 15 (quoting Compl. ¶ 217). As

1 But the Copyright Act preempts Plaintiffs’ right-of-publicity claims no matter how they
2 are framed or narrowed. As mentioned, Plaintiffs ignore the many cases dismissing, as preempted,
3 right-of-publicity claims—including claims of name-appropriation—on the grounds that the
4 claims, examined as a whole, (1) concerned material within the “subject matter of copyright,” and
5 (2) asserted rights “equivalent” to those granted by the Copyright Act. 17 U.S.C. 301(a); Mot. 13–
6 14 & n.14 (collecting cases).⁷ Plaintiffs’ tactic suggests that any of the plaintiffs in these cases
7 could have survived preemption by strategically dropping all aspects of their right-of-publicity
8 claims other than those relating to their personal names. That would create a loophole that would
9 turn preemption doctrine—and the operative line of case law—on its head.

10 At least one court has rejected a name-appropriation claim—framed as part of a broader
11 right-of-publicity claim—on implied or “conflict” preemption grounds. *In re Jackson*, 972 F.3d
12 25, 54–55 (2d Cir. 2020). There, the Second Circuit considered a right-of-publicity claim based
13 on the use of a plaintiff’s stage name to “accurately name [him] as the performer,” and observed:
14 “Even assuming that the use of an artist’s name[] for the sole purpose of identifying his association
15 with a work” could support a prima facie claim, such a claim would “impermissibly interfere[]
16 with the federal copyright framework.” *Id.* For that reason, the Court held that a name-based
17 “right of publicity claim [that] seeks to control the use of a copyrighted work by prohibiting
18 accurate descriptions of that work” is “barred by implied preemption.” *Id.* So too here: Because
19 Plaintiffs’ claim attempts to prohibit the creation of works that reference “artistic styles” by
20 “prohibiting” the use of their names as “accurate descriptions” of those styles, *id.*; *supra* at 8, those
21 claims are irreconcilable with the federal policy that such styles are free for all to use and beyond
22 the reach of state law, *see* Mot. at 11–15; 2 J. Thomas McCarthy & Roger E. Schechter, *Rights of*
23 *Publicity & Privacy* § 11:49 (May 2023 update) (conflict preemption of right-of-publicity claims).

24 explained in *DeviantArt’s* Motion and below, the Court should not credit these conclusory
25 statements, which lack any supporting factual allegations. *See infra* at 10–11.

26 ⁷ *See, e.g., Laws v. Sony Music Ent.*, 448 F.3d 1134, 1136 (9th Cir. 2006) (claim based, in part, on
27 inclusion of plaintiff’s name “in the booklet accompanying the [defendant’s] compact disk”); *id.*
28 at 1146 (claim “preempted by the Copyright Act”); *Ray*, 783 F.3d at 1141–42 (claim based, in part,
on “misappropriation of [plaintiff’s] name” in connection with rebroadcast “films of his wrestling
matches”); *id.* at 1144–45 (claim preempted); *Maloney v. T3Media, Inc.*, 853 F.3d 1004, 1007–08
(9th Cir. 2017) (claim based, in part, on use of plaintiffs’ “names” in connection with “photographs
chronicling . . . NCAA sports history”); *id.* at 1020 (claim preempted).

1 In sum, Plaintiffs have abandoned their style-based claims, and they cannot prevail on their
2 remaining *name-based* right-of-publicity claims, which constitute attempts to exert rights
3 “equivalent” to those protected by copyright, *see* Mot. at 14 & n.10, over artistic styles that
4 (Plaintiffs tacitly concede) fall within copyright’s “subject matter,” *id.* at 11–13. Plaintiffs cannot
5 plead around this issue, so Counts IV and V must be struck.⁸

6 **2. Plaintiffs Fail To State A Right-Of-Publicity Claim**

7 Plaintiffs have also failed to state a right-of-publicity claim, preemption aside.

8 **a. Plaintiffs’ Conclusory Allegations Should Be Disregarded**

9 DeviantArt explained in its Motion that Plaintiffs’ right-of-publicity claims depend, in part,
10 on a series of conclusory allegations that parrot the language of California’s right-of-publicity
11 statute and claim that the “Defendants” actually used Plaintiffs’ names—*i.e.*, Sarah Andersen,
12 Kelly McKernan, and Karla Ortiz—on their “apps, website[s], and social media posts,” to
13 “advertise art” and “solicit purchases.” Mot. at 15–16 (quoting Compl. ¶¶ 203, 205–06, 217, 219).
14 There are no specific factual allegations at all in the Complaint regarding any DreamUp
15 advertisements that include Plaintiffs’ names. Mot. at 16. And this is not some minor technical
16 foul: Defendant DeviantArt genuinely has no idea what conduct Plaintiffs are seeking to target
17 with this claim, as it is simply untrue that DeviantArt has ever appended any of the Plaintiffs’
18 names to any advertisement. If DeviantArt had done so, the advertisement would be public and
19 presumably easy for Plaintiffs to locate and bring to the Court’s attention.

20 Plaintiffs cannot maintain a right-of-publicity claim against DeviantArt without alleging
21 facts about what DeviantArt actually did that constitutes an impermissible use of their names.
22 Plaintiffs cannot avoid this basic obligation by relying on the kind of vague and conclusory
23 accusations which, as a matter of law, a court “is not required to accept” on a motion to dismiss.

24 ⁸ Plaintiffs’ discussion of *Downing v. Abercrombie & Fitch*, 265 F.3d 994 (9th Cir. 2001), is
25 misguided. Plaintiffs overlook the Ninth Circuit’s extensive discussion of *Downing* in *Laws*, *see*
26 448 F.3d at 1141, in which the Court explained that the name-and-likeness claim in *Downing*
27 survived preemption not because “[a] person’s name or likeness is not a work of authorship,” *cf.*
28 *Opp.* at 16, but because defendants “had suggested that the [plaintiffs] endorsed [defendant’s
products],” 448 F.3d at 1141; *see also Jackson*, 972 F.3d at 46–47 (same). As discussed below
and in DeviantArt’s other briefing, *see, e.g.*, Mot. at 15–16, Plaintiffs have pleaded only entirely
conclusory allegations that DeviantArt ever used their names in any DeviantArt advertisements—
and there is no claim that DeviantArt ever suggested that Plaintiffs’ *endorsed* its products.

1 *In re QuantumScope Sec. Class Action Litig.*, 580 F. Supp. 3d 714, 729 (N.D. Cal. 2022) (quoting
2 *In re Gilead Scis. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008)); *see Paulson v. Carter*, 230 F. App'x
3 645, 645 (9th Cir. 2007) (rejecting “conclusory allegations . . . unsupported by specific facts”).

4 Plaintiffs altogether ignore this issue in their opposition. They do not even seek the Court’s
5 leave to amend their Complaint to identify any references to Plaintiffs’ names—no doubt because
6 there are no such references.⁹ Instead, Plaintiffs double-down by insisting—again, without any
7 details—that “Defendants used Plaintiffs’ names . . . to attract customers” and to “advertise and
8 promote their AI Image Products.” Opp. at 3, 13; *see also* Dkt. 65 (“MTD Opp.”) at 19
9 (“Defendants[] use [] Plaintiffs name[s] in advertising and marketing.”). Like the allegations in
10 the Complaint, these “[t]hreadbare recitals of the elements of a cause of action, supported by mere
11 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

12 **b. The Complaint Does Not State A Right-Of-Publicity Claim**

13 Once these conclusory statements are set aside—and in light of Plaintiffs’ abandonment of
14 their claims based on the use of their “particular styles,” Opp. at 2—Plaintiffs’ remaining right-of-
15 publicity theory is that DeviantArt violated their rights by offering a tool that can *process* users’
16 references to Plaintiffs’ names in text prompts, *see id.* at 13 (arguing that Defendants’ applications
17 “cue users to insert an artist’s name”). This theory fails for two independent reasons.

18 ***The Right Of Publicity Does Not Grant Absolute Control Over A Name.*** First, providing
19 a service capable of processing references to an artist’s name does not violate the right of publicity.
20 Mot. at. 17–19. “The value of the plaintiff’s name is not appropriated by mere mention of it, or
21 by reference to it in connection with legitimate mention of his public activities.” Restatement
22 (Second) of Torts § 652C cmt. d (1977). Using a personal name to refer to a person’s work or
23 accomplishments—like referring to specific musicians in order to describe a musical genre—does

24 _____
25 ⁹ In another right-of-publicity case before this Court, the plaintiffs included in their Complaint
26 screenshots of advertisements that used their personal names and information. *See* Complaint
27 ¶ 45, *Kellman v. Spokeo, Inc.*, No. 21-cv-08976 (N.D. Cal. filed Nov. 19, 2021), ECF No. 1.
28 Because these examples illustrated that the defendant’s “business model depends on using
[plaintiffs’] names, information, and likenesses” to “entice others to subscribe,” this Court held
that the claims were adequately stated. 599 F. Supp. 3d 877, 895 (N.D. Cal. 2022) (Orrick, J.).
Here, however, Plaintiffs make no attempt to illustrate—through screenshots, concrete allegations,
or otherwise—how their names are “use[d] . . . in advertising and marketing.” MTD Opp. at 19.

1 not “appropriate to [one’s] own use or benefit the reputation, prestige, social or commercial
2 standing, public interest, or other values of [that person’s] name.” *Id.* § 652C cmt. c. That use
3 falls far outside the domain of the right of publicity, which is violated only when a defendant *trades*
4 *on* a person’s name—to advertise a product, or to attract attention to merchandise, or otherwise.
5 Restatement (Third) of Unfair Competition § 47.¹⁰ Public dialogue depends on the freedom to use
6 names to “communicat[e] information,” *id.* § 47 cmt. c, and any “interpretation [of a right of
7 publicity] statute [that] absolutely bars the use of an individual’s name without consent . . . would
8 raise grave questions as to constitutionality,” *Valentine v. CBS, Inc.*, 698 F.2d 430, 433 (11th Cir.
9 1983); *see Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 869 (1979) (Bird, C.J.,
10 concurring). Because there is nothing unlawful about the use of an artist’s name for the sole
11 purpose of referring to her prior work or “artistic style,” there is nothing unlawful about designing
12 an application, like DreamUp, capable of processing such references.

13 Again, Plaintiffs make no attempt to address these issues, all while insisting that
14 “[r]eferring to a Plaintiff[] by name” is a sufficient basis for their right-of-publicity claims. Opp.
15 at 18. Plaintiffs do not cite a single case that supports their novel theory because no court has
16 expanded the right-of-publicity in this way. Doing so would create an entirely new avenue for
17 lawsuits against legitimate businesses like internet search engines (which produce results about a
18 person in response to a search query using a personal name), credit agencies (which produce credit
19 reports based on a requester’s provision of a personal name), online directories (which produce
20 information about, e.g., film industry professionals who users search for by name), and any other
21 services capable of processing user queries that include personal names.¹¹

22 ***Plaintiffs Do Not Allege Use By DeviantArt.*** Second, Plaintiffs fail to allege use. To
23 infringe the right of publicity in a name, the defendant must actually use a plaintiff’s name in a
24 way that is perceptible to an audience by, e.g., displaying that name as part of an online
25 advertisement. *See Perfect 10, Inc. v. Google, Inc.*, No. 04-cv-9484, 2010 WL 9479060, at *13

26 ¹⁰ *See Maloney*, 853 F.3d at 1018 (relying on Restatement (Third) of Unfair Competition to analyze
27 California right-of-publicity claims).

28 ¹¹ *Cf. Obado v. Magedson*, No. 13-cv-2382, 2014 WL 3778261, at *7 (D.N.J. July 31, 2014) (“The
mere appearance of Plaintiff’s name or image as part of the search results displayed in response to
a user-generated query does not mean that the [defendant violated any publicity rights].”).

1 (C.D. Cal. July 30, 2010) (citation omitted); *supra* note 9 (discussing the allegations in *Kellman*).¹²
2 Nothing in the Complaint suggests that DeviantArt did so, either by training a model, Opp. at 15
3 (admitting that “*Stability* developed . . . the functionality to generate output images using specific
4 artist’s names” (emphasis added)), or by using Plaintiffs’ names to create DreamUp images, *see*
5 Compl. ¶ 171 (alleging that “*Individuals* have used AI Image Products to create works using the
6 names of Plaintiffs” (emphasis added)). And while Plaintiffs previously suggested that their rights
7 are violated when DeviantArt’s users type their names into DreamUp, *id.*; *but see* Mot. at 19
8 (rebutting this), they now disclaim that theory as well, *see* MTD Opp. at 19 (“The fact users can
9 and do use Plaintiffs’ names in prompts is . . . not a basis of [Plaintiffs’ right-of-publicity]
10 claims.”). Neither the Complaint nor the opposition makes any attempt to explain how DeviantArt
11 allegedly “used” their names, which alone is sufficient reason to grant the Motion. *Edjer v. DHI*
12 *Mortg. Co.*, No. 09-cv-1302, 2009 WL 1684714, at *6 (N.D. Cal. June 12, 2009) (dismissal
13 warranted where allegations were “vague and largely incoherent”).

14 3. The Claims Conflict With The First Amendment

15 California courts generally balance right of publicity claims against First Amendment
16 interests using a “Transformative Use” test that insulates expressive works from right-of-publicity
17 claims as long as the plaintiff’s likeness is merely “one of the ‘raw materials’ from which [the
18 secondary work] is synthesized.” *Kirby v. Sega of Am., Inc.*, 144 Cal. App. 4th 47, 58 (2006).¹³
19 Plaintiffs do not contest that DreamUp’s outputs are not visually similar to the originals, reflect a
20 combination of data gleaned from billions of other images, and can communicate an infinite
21

22
23 ¹² This well-established requirement is no doubt why Plaintiffs bend over backwards to suggest
24 that DeviantArt “use[d] [] Plaintiffs’ names . . . throughout Defendants’ apps, website, and social
25 media posts,” Compl. ¶ 219, even though they were unable to cite any specific facts to support it.

26 ¹³ To the extent Plaintiffs’ opposition can be interpreted as arguing that the First Amendment
27 defense does not apply to “Commercial” or “False” speech, Opp. at 17 (suggesting this in a section
28 heading), that argument fails because (1) commercial speech also receives First Amendment
protection, *see, e.g., Va. Pharmacy Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748, 762
(1976), and (2) Plaintiffs have failed to allege that the speech at issue “does no more than propose
a commercial transaction,” *e.g., United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001)
(defining “commercial speech”). And while Plaintiffs now claim that Defendants’ “speech” is
“false” because it “induces users to believe that artists have [] endorsed Defendants’ products,” the
Complaint paragraphs they cite in support do not address false endorsement. Opp. at 10.

1 number of ideas, messages, or concepts supplied by DeviantArt’s users. Mot. at 20.¹⁴ These facts
2 establish transformative use as a matter of law. *See, e.g., Sarver v. Hurt Locker LLC*, No. 10-cv-
3 09034, 2011 WL 11574477, at *6–7 (C.D. Cal. Oct. 13, 2011) (granting section 425.16 motion to
4 strike right-of-publicity claims on transformative use grounds because “[d]efendants
5 unquestionably contributed significant distinctive and expressive content”).¹⁵

6 Rather than contest that point, Plaintiffs instead abandon their “style”-based claim and
7 argue that, because DeviantArt has used their “names to market and enhance sales of their
8 products,” its use is not transformative. Opp. at 18. But Plaintiffs have failed to plausibly allege
9 any such use. *See supra* at 10–11. And the only use Plaintiffs *have* plausibly alleged (and not
10 now abandoned)—that DeviantArt created a program that can *recognize* Plaintiffs’ names—*does*
11 implicate serious First Amendment problems. As noted, any attempt to use the right of publicity
12 to preclude using a personal name to accurately refer to that person’s work would “raise grave
13 questions as to constitutionality,” *Valentine*, 698 F.2d at 433, and “meaningfully reduce[]” the
14 “range of free expression,” *Gugliemi*, 25 Cal. 3d at 869 (Bird, C.J., concurring).

15 Courts have acknowledged as much in discussing the analogous nominative-fair-use
16 defense to trademark infringement claims, which shields defendants who use trademarks to “refer
17 to a particular product” as a “point of reference.” *New Kids on the Block v. News Am. Pub., Inc.*,
18 971 F.2d 302, 306 (9th Cir. 1992); *see id.* at 307 (“Much useful social and commercial discourse
19 would be all but impossible if speakers were under threat of an infringement lawsuit every time
20 they made reference to a person, company or product.”); *Toyota Motor Sales, U.S.A., Inc. v.*
21 *Tabari*, 610 F.3d 1171, 1176 (9th Cir. 2010) (trademark claims “can raise serious First Amendment
22 concerns” in cases of nominative fair use by “interfer[ing] with truthful communication . . . in the

23 ¹⁴ Plaintiffs do claim that they have “offered facts demonstrating why Defendants’ conduct is not
24 transformative.” Opp. at 17. But in support, they only cite (without explanation) seemingly
25 random paragraphs from their pleadings, Compl. ¶¶ 86–90, 94–98, and two paragraphs arguing
that “[b]ecause Defendants advertise the ability of their systems to generate artwork,” the use is
“not transformative,” *id.* ¶¶ 210, 221. None weigh against a finding of transformative use.

26 ¹⁵ Plaintiffs also address transformative use in their opposition to DeviantArt’s motion to dismiss,
27 MTD Opp. at 20–21, in which they attempt to distinguish *Ross v. Roberts*, 222 Cal. App. 4th 677
28 (2013), on the grounds that here, Defendants’ use was “intended to denote the actual artists who
created certain works,” MTD Opp. at 21. But the Court’s holding in *Ross* was based on the fact
the defendant “created original artistic works” using the plaintiff’s name and therefore “clearly
added new expression.” 222 Cal. App. 4th at 687–88. The same logic applies here.

1 marketplace”). That principle applies with full force to the right-of-publicity context. For that
2 reason, this Court should either decline Plaintiffs’ invitation to expand the right of publicity to
3 prohibit “truthful communication” through the use of a plaintiff’s name, *Toyota*, 610 F.3d at 1176;
4 *see supra* at 11,¹⁶ or hold that the First Amendment affirmatively bars the use of state right-of-
5 publicity law for this purpose, *see Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387,
6 391, 397–98 (2001) (“formulat[ing] . . . a balancing test” to resolve the “tension between the right
7 of publicity and the First Amendment”).¹⁷

8 III. CONCLUSION

9 For the foregoing reasons, and those detailed in DeviantArt’s Motion, the Court should
10 grant DeviantArt’s anti-SLAPP motion under California Code of Civil Procedure section 425.16
11 and strike Plaintiffs’ right-of-publicity claims against DeviantArt. *See* Compl. ¶¶ 201–22.
12 Because any attempt to re-plead those claims would be futile, *see* MTD at 24–25, and because
13 Plaintiffs do not explain otherwise or propose any ways in which they could cure any of their
14 defective claims, the Court should deny leave to amend.

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20 ¹⁶ *See also Edward J. DeBartolo Corp. v. Fla. Gulf Coast Building & Constr. Trades Council*, 485
U.S. 568, 575–76, 588 (1988) (applying constitutional avoidance doctrine to reject “construction
of [a] statute . . . [that] poses serious questions . . . under the First Amendment”).

21 ¹⁷ Courts have a variety of tests for evaluating First Amendment defenses to right-of-publicity
22 claims. One is the “transformative use” test, which may not make sense where the claim is based
23 exclusively on the use of a personal name. *See Est. of Fuller v. Maxfield & Oberton Holdings,*
24 *LLC*, 906 F. Supp. 2d 997, 1006–07 (N.D. Cal. 2012) (observing that “a transformative use
[analysis] would be illogical” in the event of a name-only claim because “a name cannot be
25 transformed while remaining recognizable in the way that an image can”). Other frameworks for
26 evaluating a First Amendment defense may provide a better fit. *See, e.g., C.B.C. Distrib. & Mktg.,*
27 *Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 823–24 (8th Cir. 2007)
28 (seeking to “balance[]” the “rights of publicity . . . against first amendment considerations” by
asking whether the facts “implicate the interests that states typically intend to vindicate by
providing rights of publicity to individuals”); *id.* at 824 (concluding that the First Amendment
“supersede[s] the [plaintiffs’] rights of publicity” in part because there was no “false
impression . . . [or] endors[ment]” and because “it would be strange law that a person would not
have a first amendment right to use information that is available to everyone”). But the Court need
not reach this issue because California’s rights of publicity do not apply here. *Supra* at 11–13.

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Respectfully submitted,

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