No. 08-55443

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PARIS HILTON,

Plaintiff/Appellee,

v.

HALLMARK CARDS

Defendant/Appellant.

APPEAL FROM UNITED STATES DISTRICT COURT
CENTRAL DISTRICT, WESTERN DIVISION
HON. PERCY ANDERSON, JUDGE
CASE NO. CV-07818 PA (AJWX)

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

[F.R.A.P. 26.1]

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel of record for Hallmark Cards, Incorporated (erroneously sued as "Hallmark Cards") ("Hallmark") hereby states that (1) Hallmark is a privately held Missouri corporation with no parent company, and no publicly held company owns more than ten percent (10%) of Hallmark's stock; and (2) Hallmark owns no publicly traded subsidiaries; however, it does own a controlling interest, through a wholly owned subsidiary, in Crown Media Holdings, Inc., which is publicly traded.

Dated: May 13, 2008.

____
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I. INTRODUCTION

The claims in this case target speech that pokes fun at a public figure through an important medium of expression – greeting cards. Paris Hilton ("Hilton") alleges that a fictional greeting card (the "Card"), depicting Hilton as a waitress and making a play on Hilton's oft-used phrase "that's hot," violates Hilton's common law right of publicity and the Lanham Act. Hallmark Cards, Incorporated ("Hallmark") brought motions to strike and/or to dismiss these claims on the grounds that they are barred by the First Amendment.

While acknowledging that Hilton's claims aim at speech about a "celebrity and media personality," the District Court held that it could not dismiss this action "at this stage of the proceedings" without assessing facts outside of the motions. The dispositive facts, however, were before the District Court, were undisputed and should have been considered and ruled upon by the District Court. Because the District Court failed to do so, Hallmark is threatened with unnecessary, time-consuming and expensive discovery to defend against claims that fail as a matter of law. As set forth below, the District Court's ruling should be reversed.

II. JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. § 1332 (diversity) and 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338(a) (trademark). On December 17, 2007, the District Court denied Hallmark's Motion to Strike under Cal. Code

Civ. Proc. § 425.6 ("Anti-SLAPP Motion") and denied in part Hallmark's Motion to Dismiss under Fed. R. Civ. Proc. 12(b)(6) ("Motion to Dismiss") (collectively the "Motions"). Excerpts of Record ("ER") 4-11. Hallmark timely filed a Notice of Appeal on January 11, 2008. ER 1-13. *See* Fed. R. App. Proc. 4. This Court has jurisdiction over the denial of the Anti-SLAPP Motion under 28 U.S.C. § 1291 and the collateral order doctrine. *Batzel v. Smith*, 333 F.3d 1018, 1024-26 (9th Cir. 2003); *Zamani v. Carnes*, 491 F.3d 990, 994 (9th Cir. 2007).

In addition, this Court has pendent appellate jurisdiction over the denial of the Motion to Dismiss. Appellate review is not limited solely to the order appealed from; rather, "[i]f insuperable objection to maintaining the [action] clearly appears, it may be dismissed and the litigation terminated." *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287 (1940). Such plenary review "serves the salutatory purpose of saving both parties the needless expense of further prosecution of the suit where the pleadings demonstrate that the suit is hopeless." *First Medical Health Plan, Inc. v. Vega-Ramos*, 479 F.3d 46, 50 (1st Cir. 2007) (*citation omitted)*. In particular, this Court favors exercising jurisdiction over issues that are "inextricably intertwined" with issues raised in a properly filed appeal. *See, e.g., Batzel*, 333 F.3d at 1023; *Kwai Fun Wong v. U.S.*, 373 F. 3d 952, 960 (9th Cir. 2004). Thus, review of the denial of a motion to dismiss is proper "where the underlying facts are undisputed, the parties have had a fair opportunity

to brief the legal issues, and the court of appeals can resolve the case as a matter of law." *First Medical*, 479 F.3d at 50. Because the issues raised by the Anti-SLAPP Motion and the Motion to Dismiss are inextricably intertwined – indeed, the issues are largely the same – this Court should exercise pendent appellate jurisdiction and review the denial of the Motion to Dismiss as well as the Anti-SLAPP Motion.

III. ISSUES PRESENTED ON APPEAL

1. Whether Hilton's California common law right of publicity claim should be allowed to proceed despite Hallmark's showing that the Card is speech relating to matters of public concern and despite Hilton's failure to demonstrate a probability of prevailing on her claim; and

2. Whether Hilton's Lanham Act claim should be allowed to proceed despite Hallmark's showings (any one of which is sufficient to defeat Hilton's claim) that: (a) the use of Hilton's name and likeness is "artistically relevant" to the Card and not misleading as to source or origin; (b) the Card makes a nominative fair use of Hilton's name and likeness; and (c) Hilton has not alleged and cannot show, with clear and convincing evidence, actual malice.

IV. STANDARD OF REVIEW

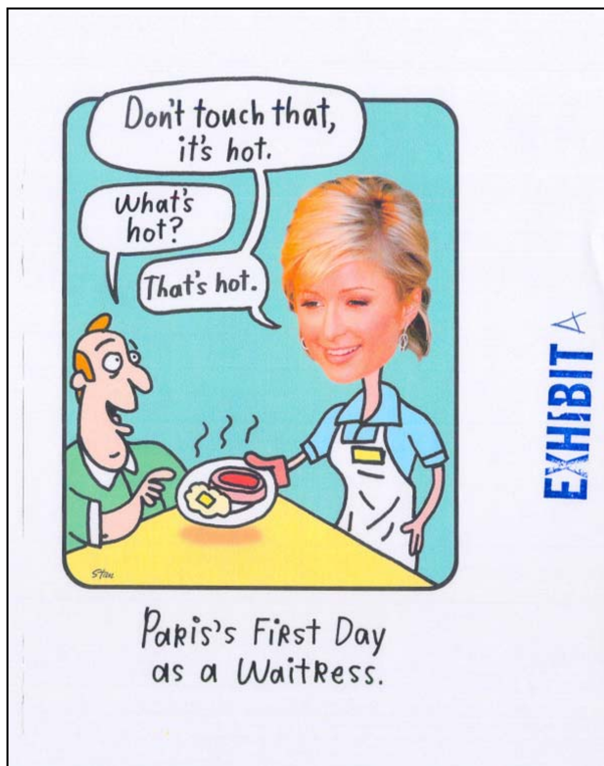
A district court's denial of a special motion to strike under California's Anti-SLAPP statute and denial of a motion to dismiss under Fed R. Civ. Proc. 12(b)(6) are reviewed *de novo*. *Zamani*, 491 F.3d at 994; *Thomas v. Fry's Electronics, Inc.*,

400 F.3d 1206 (9th Cir. 2005). Moreover, "[s]ummary disposition is particularly favored in cases … involving First Amendment rights." *Baugh v. CBS, Inc.*, 828 F. Supp. 745, 752 (N.D. Cal. 1993).

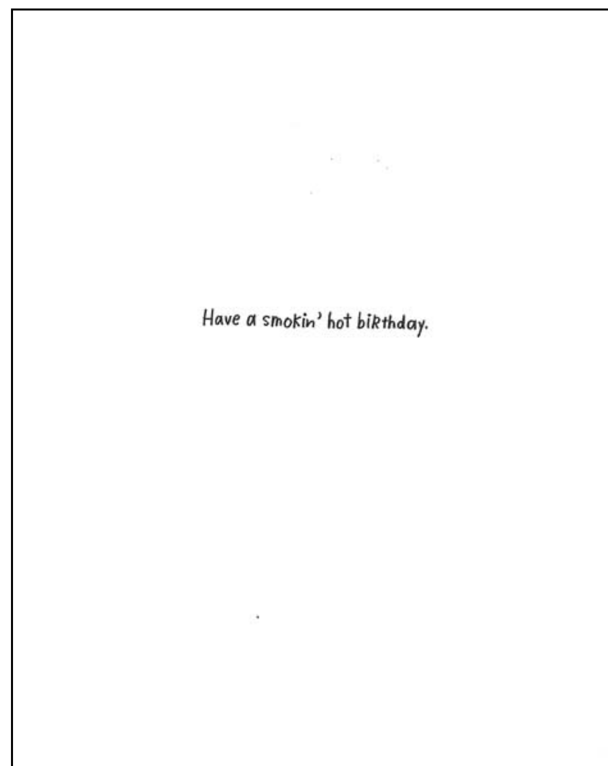
V. STATEMENT OF THE CASE

Hallmark created the Card, which depicts Hilton as a cartoon waitress serving a plate of food to a customer at a sit down restaurant. In the dialogue bubbles on the Card, Hilton states to the customer: "Don't touch that, it's hot." The customer asks: "What's hot?" Hilton responds: "That's hot." The Card is titled "Paris's First Day as a Waitress." ER 239, 357. The greeting inside the Card reads "Have a smokin' hot birthday." ER 240.

Front of the Card

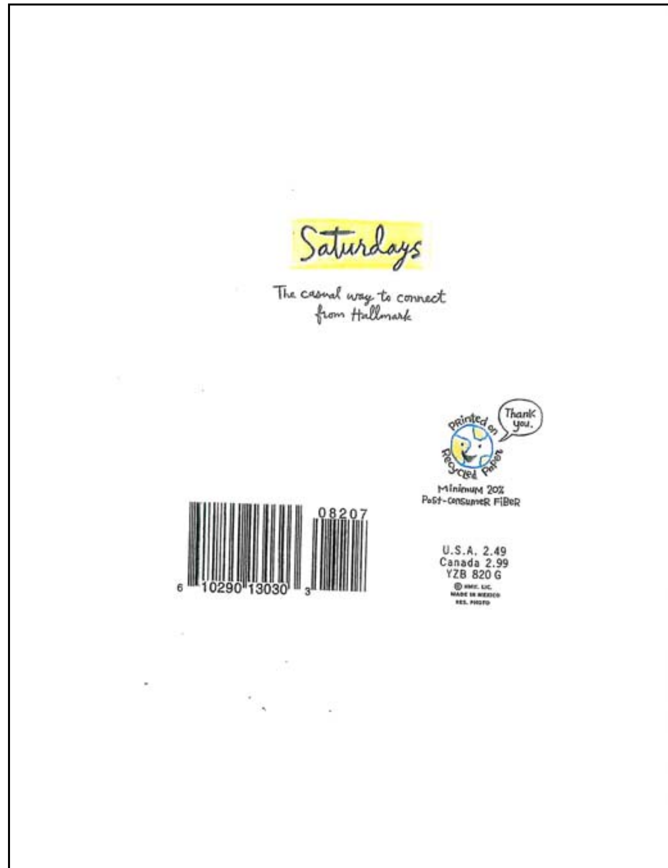


Inside of the Card



The back of the Card contains a source identification which features Hallmark's "Saturdays" brand and notes it is "[t]he casual way to connect from Hallmark." ER 239.

Back of the Card



On September 7, 2007, Plaintiff/Appellee Hilton filed an Amended Complaint asserting claims for: (1) common law misappropriation of publicity; (2) false designation of origin under the Lanham Act; and (3) infringement of a federally registered trademark in the words "that's hot." ER 349. On November 2, 2007, Defendant/Appellant Hallmark brought the Motions. ER 318, 291.

The District Court decided the Motions without oral argument on December 17, 2007, dismissing with prejudice Hilton's claim for trademark infringement regarding the words "that's hot" and denying the remainder of the Motions. ER 4-11. The District Court stated that it could not dismiss the right of publicity claim "at this stage of the proceedings" because it could not yet determine "whether the card is entitled to First Amendment protection as a parody" or whether the Card is "significantly transformative" to warrant dismissal under the First Amendment. ER 6-8. Moreover, it held that it could not dismiss the Lanham Act claim "at least at the pleading stage" because (1) "a more fact-intensive analysis" was required to determine if the Card was a protected parody and/or was protected by the nominative fair use defense; and (2) Hilton had sufficiently alleged actual malice. ER 8-10. On January 11, 2008, Hallmark timely filed this appeal.[1]

VI. STATEMENT OF FACTS

A. Paris Hilton

As aptly noted by the District Court, "Hilton is a celebrity and media personality whose public image and behavior have perhaps blurred the distinction between fame and infamy." ER 4. Hilton's conduct and "privileged upbringing[]"

[1] Hilton did not cross-appeal the dismissal of her trademark infringement claim regarding the phrase "that's hot" and has thus waived any appeal of that ruling. *Mendocino Environmental Center v. Mendocino County*, 192 F.3d 1283, 1298 (9th Cir. 1999) (Court "will not hear a challenge to a district court decision if a notice of cross-appeal is not filed").

(*Id.*) garner endless public attention and scrutiny. Indeed, Hilton concedes that she is a "well known celebrity" (ER 125) and thus is a "public figure and a subject of public interest" (ER 96) with "widespread public recognition." ER 124.

Hilton is a self styled "American businesswoman, model, actress and recording artist" (ER 351)[2] who is often referred to as being "famous for being famous." ER 138. She was once quoted saying "every decade has an iconic blonde – like Marilyn Monroe or Princess Diana – and right now, I'm that icon." ER 149. Thus, she is a woman whose "name is on everyone's lips." ER 234.

Hilton relishes this public attention, saying in her autobiography "[s]ure, it's been great having so much attention. Who wouldn't want that?" ER 233. That attention has been substantial. For example, a recent Google search of "Paris Hilton" yielded over 16,100,000 hits. ER 132. The Lycos search engine reported that "Paris Hilton" was the most frequently searched term in 2005 (ER 146) and

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[2] Her television credits include starring with fellow socialite Nicole Richie in the reality program THE SIMPLE LIFE (the "Show") which placed Hilton and Richie "into situations for which their privileged upbringings provided little preparation." ER 4. According to Hilton, the Show depicted "two wealthy young socialites" being "deprived of access to their bank accounts and Beemers" and attempting to "get a job, buy groceries and fit in with average Americans." ER 87. *See also Fox Television Stations, Inc. v. F.C.C.*, 489 F.3d 444, 468 (2007) (Show involved "two spoiled, rich young women from Beverly Hills who cope with life on a farm"). In so doing, they find that "serving the public is their private nightmare." ER 351. Throughout the Show, Hilton and Richie use the phrase "that's hot" to describe anything they find interesting. *See infra* note 21. In one segment of the Show, Hilton and Richie work at a "fast food joint." ER 351. As discussed in greater detail below [*infra* at Section VIII(B)(3)], the representation of Hilton on the Card is very different from how she appeared in the Show.

Google reported that "Paris Hilton" was the top search term of 2006, surpassing subjects such as "cancer," "Hurricane Katrina" and "autism." ER 155.[3]

Of course, with Hilton's sought-after fame has come commentary and criticism, often in the form of parody and caricature. For example, cartoonists have lampooned Hilton's jail time for probation violations after her conviction for driving with a suspended license (and the frenzy over her early release and return to jail); America's fascination with Hilton's celebrity status; the treatment of Hilton versus Scooter Libby; media coverage of Hilton's feud with Richie trumping more important stories, such as the war in Iraq; Hilton's racy Carl's Jr. commercial; and Hilton's antipathy for the "common man." ER 180-220.[4]

In addition to editorials, parodies of Hilton are ubiquitous. For example, the animated series BRATZ included the parody character "London Milton"; a music video spoofing Hilton's jail sentence was one of YouTube's most-watched videos; the 2007 film EPIC MOVIE includes a scene where a Hilton look-alike exits a store, utters "I'm so hot" and then is crushed to death by one of the film's protagonists;

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[3] The attention paid to Hilton is itself a topic of discussion and scrutiny. The Associated Press conducted an experiment in 2007 to see if it could refrain from reporting on Hilton for a whole week. ER 138-139. A 2006 Philadelphia Inquirer article stated that "fully half the reading public and 90 percent of gossip peddlers say they never want to see or hear the name Paris Hilton again." ER 155.

[4] Hilton's position in our collective consciousness is such that even courts refer to her. For example, one court compared Hilton's well-known spending to a corporate board which the court stated was free to "shop like Paris Hilton." *In re Topps Co. Shareholders Litigation*, 926 A.2d 58, 86 (Del. 2007).

and finally, in its abrasive style, the television program SOUTH PARK had an episode about Hilton titled "Stupid Spoiled Whore Video Playset." ER 139.

As the EPIC MOVIE example demonstrates, not only is Hilton the subject of endless commentary, but her constant repetition of the time-worn phrase "that's hot" and its common usage in our lexicon is also the subject of many parodies. For example an editorial cartoon about Hilton's incarceration portrays her pointing to her prison garb and saying "That's hot, but do you, like, have it in pink?" (ER 219); the National Organization for Women offers a t-shirt that comments on Hilton's status as a role model by stating "Feminism – That's Hot" (ER 167); an article about Hilton's disinheritance is gleefully titled "Paris Loses Inheritance, That's Hot!" (ER 159); and an article about Hilton being sentenced to jail time, along with President Bush being held accountable for the war in Iraq, is titled "Paris, the President, and Accountability: That's Hot!" ER 157.

In addition to these editorials, commentaries and parodies, Hilton's name and her image as a pampered, privileged and partying celebrity, have entered the political vernacular. For example an article about Congressional testimony given by General David Petraeus calls him the "Paris Hilton of Generals" (ER 160) and a *Wall Street Journal* article titled "Paris Hiltonomics" about a proposed repeal of the estate tax notes that the bill has been referred to as the "Paris Hilton Benefit Act." ER 143. Indeed, views on Hilton and her antics have been used as a litmus

test of judgment for those seeking the nation's highest office – Barack Obama was quizzed on whether he and his children believe that Hilton is a proper role model. ER 176. In short, as even Hilton readily admits, she is a quintessential public figure and matter of substantial public interest. ER 96, 124-125.

B. Hallmark And Greeting Cards

Founded in 1910, Hallmark is a Missouri company that creates and publishes greeting cards, including the Card. ER 72, 351. Hallmark employs a creative staff of approximately 800 artists, designers, writers, editors and photographers to create its greeting cards, making it the leader in the creation of "personal expression" works that help people "express their feelings and touch the lives of others." ER 72.

For decades, Hallmark's cards have addressed a wide range of topics of public interest and have served as a medium for the expression of social and political commentary, criticism, compassion, humor, parody and satire. ER 236-290, 316. Topics addressed over the years by Hallmark cards include the Depression; WWII; Prohibition; the economy; women's suffrage and liberation; Vietnam; radio; jukeboxes; computers; hula hoops; atom bombs; mini skirts; quiz shows; fireside chats; Sputnik; beatniks; Charles Lindbergh; Mussolini; rationing; hippies; hillbillies; Valley Girls; dieting, fashion and other trends; politics and politicians; and celebrities. ER 236-290, 316-317.

Sending greeting cards is one of the most accepted U.S. customs – seven billion greeting cards are given out a year. Greeting cards help reach across generational, gender and cultural communication gaps and speak to many different occasions, sentiments, ages, groups, ethnicities and special interest groups. Greeting cards help people express what they are unable to say face-to-face, or what they cannot find the words to say. ER 314-315.

In addition to helping people communicate, greeting cards are an avenue of expression for the writers and artists who create them. A greeting card marries art and editorial – a card's message is communicated through both the design and the sentiment contained in the card. The composition of a greeting card tests a writer's ability to communicate and connect with a reader on an emotional and intellectual level. A greeting card writer's words are the bridge which other people use to express happiness, humor, commentary, criticism, sympathy, pride, admiration, comfort, elation, empathy, sadness or silliness. ER 315-316.

Indeed, the communication experience embodied in a greeting card goes beyond that of traditional writing genres such as books and newspapers. In most writing, the writer writes and the reader reads – forming a two-person relationship. In contrast, greeting cards involve a three-person relationship. The writer writes the sentiment for the greeting card. When someone chooses the card, the writer's words become the sender's words. Thus, the greeting card writer's words speak *to*

the person who selects the card and *from* that same person to someone else when the card is sent. The third person, the recipient of the card, is also involved in the conversational quality of the card, receiving the words as not only an expression by the card's writer, but a communication by the card's sender as well. That third person will likely add other messages or sentiments to the card before it is sent. ER 315-316. Thus, greeting cards are a profoundly expressive and important method of communication.

C. The Card

The Card is just one of many examples of greeting cards created and published over the years that have commented upon well-known cultural icons. *See* ER 242-290. The Card shows an oversized photograph of Hilton's face attached to a cartoon body of a waitress, serving a plate of food to a patron. The Card's fictional dialogue and inside message are each a play on the phrase "that's hot" and the Card's back states that it is "from Hallmark." *See supra* pgs. 4-5.

VII. SUMMARY OF ARGUMENT

In this action, Hilton is not going after a company that slapped her name on a product label or used a song of hers in an advertisement. Rather, Hilton seeks to impose liability on a personal expression company engaging in speech – through the historically rich communication medium of a greeting card – that comments on a self-described cultural "icon" and admitted subject of public interest. The Card

caricatures Hilton by grafting an oversized photograph of her head onto a cartoon body, injecting her into an absurd situation, and creating a fictional dialogue to accompany the visual image for the purpose of commenting on her.

Indeed, Hilton herself has said that "the best thing about being an heiress is that you don't necessarily have to work. Everyone else must work, though, so it immediately sets you apart. I've never had to have a wardrobe to wear to an office, thank God." ER 230. The Card, however, depicts Hilton as a waitress (complete with standard issue waitress apron, nametag and oven mitt) and takes aim at Hilton's scorn for "everyone else who must work" by depicting her having to work in a place where she has a wardrobe to wear and customers to serve. It further comments on Hilton's broken-record use of the phrase "that's hot" by transforming it from a metaphorical barometer of style into a literal warning of the high temperature of a plate of food.

Hilton's attempt to suppress this speech is precisely what California's Anti-SLAPP statute proscribes. There is a public interest in (1) the activities of influential public figures like Hilton; (2) parody, entertainment, humor and commentary, particularly when it comments on iconic celebrities and popular culture; and (3) expression conducted through the medium of greeting cards.

Hilton did not dispute any of this in her oppositions to the Motions. Indeed, she specifically conceded that she is a "public figure and a subject of public

interest," and the District Court agreed. ER 4. Given that this action relates to Hallmark's speech about a matter of public interest, the burden squarely falls on Hilton to demonstrate a probability of success on her claim. Because Hilton did not and cannot meet that burden, the Anti-SLAPP statute mandates that her common law right of publicity claim be stricken.

Moreover, Hilton's right of publicity and Lanham Act claims are also barred as a matter of law, as demonstrated in Hallmark's Motion to Dismiss. Hilton attached and incorporated the Card in her complaint; she admits to being a public figure and "wealthy young socialite" who finds "serving the public" to be a "nightmare"; and she submitted photographs of herself in connection with the Motions. Hilton's privileged and public lifestyle, her physical appearance, her contempt for serving the public and her metaphorical use of the trite phrase "that's hot" – all facts admitted by Hilton – starkly contrast with the Card's cartoon caricature of her, set in a decidedly unprivileged and "nightmare" environment where she is "serving the public" and uttering the words "that's hot" solely for their literal connotation. Those admitted facts mandate dismissal of her claims.

A. Hilton's Right Of Publicity Claim Fails

The Card uses Hilton's name and likeness for an expressive purpose fully protected by the First Amendment and relates to a matter of public interest. As set forth by this Court in *Downing v. Abercrombie & Fitch*, 265 F.3d 994 (9th Cir.

2001) and numerous other decisions, this alone bars Hilton's right of publicity claim. In addition, her claim is barred because the use of her name and image is "transformative" under decisions by this Court [*Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001)], the California Supreme Court [*Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387 (2001) and *Winter v. DC Comics,* 30 Cal.4th 881 (2003)] and numerous other courts.

B. Hilton's Lanham Act Claim Fails

The same First Amendment protections that defeat Hilton's right of publicity claim doom her duplicative Lanham Act claim. First, under *Mattel, Inc. v. MCA Records, Inc.,* 296 F.3d 894 (9th Cir. 2002) ("*MCA*") and *Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792, 810 (9th Cir. 2003) ("*Walking Mountain*"), Hilton's Lanham Act claim fails because the use of Hilton's name and likeness is artistically relevant to the Card and is not misleading as to source or origin.

The use is also protected by the nominative fair use doctrine as set forth by this Court in *New Kids on the Block v. News America Pub., Inc.*, 971 F.2d 302 (9th Cir. 1992) and *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1153-1155 (9th Cir. 2002) because the Card used the purported "mark," *i.e.*, Hilton's name and likeness, to conjure her up for commentary and criticism.

Finally, under *Hoffman*, a public figure such as Hilton must allege and prove by clear and convincing evidence that Hallmark acted with actual malice in

creating the Card. Hilton has not and cannot do so here because no reasonable viewer of the Card would be confused into believing that Hilton endorsed a work that is a parody of her and that specifically states it is "from Hallmark."

In short, Hilton's effort to prevent Hallmark from engaging in speech that comments on her fails as a matter of law. Decisions from this Court and numerous other courts mandate that this action go no further. Accordingly, the District Court's ruling should be reversed and the action dismissed with prejudice.

VIII. ARGUMENT

A. Hilton's Common Law Right Of Publicity Claim Should Be Stricken Under California's Anti-SLAPP Statute.

California's Anti-SLAPP Statute (the "Statute") establishes a special procedure for striking claims that impinge upon a defendant's rights of free speech:

> A cause of action against a person arising from any act of that person in furtherance of the person's right of . . . free speech under the United States or California constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

C.C.P. § 425.16(b)(1).[5]

[5] Although the Statute is found in the California Code of Civil Procedure, a defendant may file an Anti-SLAPP motion against pendent state law claims asserted in a federal lawsuit. *See, e.g., U.S. ex rel Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 970-73 (9th Cir. 1999).

The Statute "encourage[s] continued participation in matters of public significance" by limiting "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech." *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 59-60 & n.3 (2002); *Batzel*, 333 F.3d at 1025 (Statute protects defendant from "having to litigate meritless cases aimed at chilling First Amendment expression"). The Statute is to be construed broadly and a court may strike "unsubstantiated causes of action arising from protected speech" without regard to proof of whether plaintiff holds a subjective "intent to chill speech." *Equilon,* 29 Cal. 4th at 60.

The Statute contains "no . . . limiting language" that would restrict its protection to certain claims. *Church of Scientology v. Wollersheim*, 42 Cal. App. 4th 628, 642 (1996). "[T]he Legislature did not limit application of the provision[,] . . . recognizing that all kinds of claims could achieve the objective of a SLAPP suit – to interfere with and burden the defendant's exercise of his or her rights." *Id*. at 652. "[T]he critical point is whether the plaintiff's cause of action itself was based on an act in furtherance of the defendant's right of petition or free speech." *City of Cotati v. Cashman*, 29 Cal. 4th 69, 78 (2002). Accordingly, the Statute is not limited to defamation claims, but applies to privacy and publicity claims arising from conduct in the exercise of free speech rights. *See, e.g., Gates v. Discovery Communications, Inc.*, 34 Cal. 4th 679, 696 (2004) (applying Statute

to right of privacy claim); *M.G. v. Time Warner, Inc.*, 89 Cal. App. 4th 623, 630 (2001) (applying Statute to "misappropriation of identity" claim).

In ruling on an Anti-SLAPP motion, the court must engage in a two-step process. *Rusheen v. Cohen,* 37 Cal. 4th 1048, 1056 (2006). First, the court decides whether the defendant has made a *prima facie* showing that the challenged claim is one arising from an "act in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue," as defined by C.C.P. § 425.16(e). *Id.*; *Slauson Partnership v. Ochoa*, 112 Cal. App. 4th 1005, 1020 (2003); *Ingels v. Westwood One Broadcasting Services, Inc.*, 129 Cal. App. 4th 1050, 1064 (2005).

Once a defendant has made its threshold showing that the plaintiff's claim arises from conduct constituting free speech on a public issue, the burden shifts to the plaintiff to demonstrate a reasonable probability of prevailing on the claim. *Rusheen*, 37 Cal. 4th at 1056; *Equilon*, 29 Cal. 4th at 67. To make such a showing, the plaintiff "must 'state[] and substantiate[] a legally sufficient claim.'" *Wilson v. Parker, Covert & Chidester*, 28 Cal. 4th 811, 821 (2002) (citations omitted); *Four Navy Seals v. Associated Press*, 413 F. Supp. 2d 1136, 1150 (S.D. Cal. 2005) (same). Thus, a motion under the Statute "establishes a procedure where the trial

court evaluates the merits of the lawsuit using a summary judgment-like procedure." *Varian Medical Systems, Inc. v. Delfino*, 35 Cal. 4th 180, 192 (2005).[6]

If the plaintiff fails to meet its burden to substantiate a legally sufficient claim, the defendant's Anti-SLAPP motion must be granted, which "results in the dismissal of a cause of action on the merits." *Id.* Moreover, "an appellate reversal of an order denying such a motion may similarly result in a dismissal." *Id.*

Here, the District Court held that Hallmark did not make a *prima facie* showing that the Card satisfies the first "prong" of the Statute, despite the fact that Hilton unequivocally admitted that she is a "public figure and a subject of public interest" and the District Court acknowledged that Hilton is a "celebrity and media personality whose public image and behavior have perhaps blurred the distinction between fame and infamy." ER 4.

As a matter of law, the Card, which contains artwork and editorial commenting about Hilton, plainly comprises "conduct in furtherance of the

[6] The Court reviews *de novo* a ruling on an anti-SLAPP motion by "conducting an independent review of the entire record" and thus the "review is conducted in the same manner as the trial court in considering an anti-SLAPP motion." *Paulus v. Bob Lynch Ford, Inc.*, 139 Cal. App. 4th 659, 672 (2006); *Simpson Strong-Tie Company, Inc. v. Gore*, --- Cal. Rptr. ---, 2008 WL 1886602 (Apr. 30, 2008) ("It is settled that an appellate court independently reviews the questions whether a cause of action rests on protected activity, and whether the plaintiff has shown a probability of prevailing"). Moreover, the Court "should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim." *Wilson*, 28 Cal. 4th at 821; *Four Navy Seals*, 413 F. Supp. 2d at 1150.

exercise of the constitutional right of . . . free speech in connection with . . . an issue of public interest." C.C.P. § 425.16(e)(4). What constitutes speech on a public issue must be "construed broadly" (C.C.P. § 425.16(a)), and includes expressive speech as embodied in the Card. As set forth herein (and as Hilton has not disputed), greeting cards are an important means of conveying a variety of messages: "greeting cards are not purchased for physical qualities such as card stock or printing quality as much as for the message and the successful delivery of that message through the visual effect." E. Skold, *Title Match: Jesse Ventura and the Right of Publicity vs. The Public and the First Amendment*, 1 Minn. Intell. Prop. Rev. 117, 139-140 (2000) ("*Skold*"). The very function of a greeting card is for one person to convey a message to another, and part of that message often consists of observations regarding situations or individuals in which the recipient is likely to be interested. In particular, greeting cards that comment upon public figures and celebrities (such as the Card) are clearly expressive:

> [G]reeting cards are traditionally designed not only to convey a message from producer to purchaser, but also from the purchaser to the recipient. This is especially true with cards employing parody, as it is a less direct form of communication and a person may receive a totally different message than the author conveyed. A consumer may purchase a card and give it to another with whom they have a personal relationship that allows for a shared message completely different from [the card creator's] original message. This message may be one of contempt, rather than fun and humor. Then [the card writer's] self-expression is transformed into social criticism.

Skold at 138, 142; *see also* B. Shank, *A Token Of My Affection: Greeting Cards And American Business Culture*, Columbia University Press (2004), book jacket (greeting cards are "an integral part of American life and culture"). Thus, it is no surprise that this Court has recognized greeting cards as a vehicle of expression, holding that they are "the embodiment of humor, praise, regret or some other message in a pictorial and literary arrangement." *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970); *see also Roulo v. Russ Berrie & Co., Inc.*, 886 F.2d 931, 940 (2d Cir. 1989) (same).

The expressive nature of greeting cards is underscored by the holding in *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996) where the court held that parody baseball cards were fully protected under the First Amendment, regardless whether the cards could be considered a "traditional medium of expression." *Id.* at 969. A greeting card is certainly as expressive, if not more so, than a trading card. *See Skold*, 1 Minn. Intell. Prop. Rev. at 139-140 ("Trading cards seem particularly analogous to greeting cards, and it is easy to imagine that greeting cards would also fall in the realm of forms of expression deserving of First Amendment protection").

Moreover, a message need not be about weighty issues of political consequence to be a matter of public interest for purposes of the Statute. An issue is "of public interest" under the Statute if it "involve[s] statements made in

connection with a topic, person or entity of widespread public interest." *Du Charme v. International Broth. of Elec. Workers, Local 45*, 110 Cal. App. 4th 107, 117 (2003). For example, in *Kronemyer v. Internet Movie Data Base, Inc.*, 150 Cal. App. 4th 941, 949-50 (2007), the Court held that a popular web site that provides information about motion pictures such as MY BIG FAT GREEK WEDDING is a matter of public interest. In *Seelig v. Infinity Broadcasting Corp.*, 97 Cal. App. 4th 798 (2002), the Court held that an "on-air discussion between the talk-radio cohosts and their on-air producer about a television show [*i.e.*, WHO WANTS TO MARRY A MULTI-MILLIONAIRE] of significant interest to the public and the media" satisfied the public interest requirement, particularly because the show "generated considerable debate within the media on what its advent signified about American society" and because the plaintiff "voluntarily subjected herself to inevitable scrutiny and potential ridicule by the public and the media." *Id.* at 807-08; *see also Ingels*, 129 Cal. App. 4th at 1062-64 ("[w]e have no trouble concluding that [defendants'] activity in providing an open forum by means of a call-in radio talk show fits within the scope" of the Statute); *Dora v. Frontline Video, Inc.*, 15 Cal. App. 4th 536, 544-46 (1993) (film about surfing was a matter of public interest).

In particular, speech about public figures such as Hilton is regularly held to be a matter of public interest under the Statute. *See, e.g., Hall v. Time Warner, Inc.*, 153 Cal. App. 4th 1337 (2007) (lawsuit arising from statements about Marlon

Brando's estate satisfied first prong due to "public's fascination with Brando and widespread public interest in his personal life"); *Sipple v. Foundation for Nat. Progress*, 71 Cal. App. 4th 226, 239-240 (1999) (statement about prominent political consultant fell within first prong of the Statute). "Public interest attaches to people who by their accomplishments or mode of living create a bona fide attention to their activities." *Dora*, 15 Cal. App. 4th at 542; *Carlisle v. Fawcett Publications, Inc.*, 201 Cal. App. 2d 733, 746 (1962).

This public interest extends to works that comment on or lampoon celebrities because such works are "especially valuable" in society. *Cardtoons*, 95 F.3d at 972. "Because celebrities are an important part of our public vocabulary, a parody of a celebrity … exposes the weakness of the idea or value that the celebrity symbolizes in society." *Cardtoons*, 95 F.3d at 972. Celebrities are "common points of reference for millions of individuals who may never interact with one another, but who share by virtue of their participation in a mediated culture, a common experience and a collective memory." *Id.* Thus, "[i]n order to effectively criticize society, parodists need access to images that mean something to people, and thus celebrity parodies are a valuable communicative resource. Restricting the use of celebrity identities restricts the communication of ideas." *Id*; *see also World Wrestling Federation v. Big Dog Holdings, Inc.*, 280 F. Supp. 2d 413, 445 (W.D. Penn. 2003) (parody that "poke[d] fun at celebrities and societal

icons is an important form of entertainment and expressive commentary”). Hallmark’s publication of greeting cards as its method of expression to assert that commentary is no less protectable than a film, newspaper or trading card.

Ignoring the foregoing authorities and Hilton’s admissions that she is a matter of public interest, the District Court erroneously held that Hallmark had failed to meet its first prong burden on the basis that “whether the card is entitled to First Amendment protection ... would require an analysis [that would] go well beyond an *assessment of the allegations in the First Amended Complaint*.” ER 7 (emphasis added). In ruling on an Anti-SLAPP motion, however, the Court must consider the extrinsic evidence submitted by the parties and is not bound by the allegations of the plaintiff’s complaint. *Wilson*, 28 Cal. 4th at 821. Moreover, the District Court improperly conflated the first and second prongs of the Statute. It is not Hallmark’s burden to prove that the Card ultimately qualifies as a parody to satisfy the first prong. Hallmark need only show that the Card constitutes conduct in furtherance of free speech rights on a matter in the public interest:

> The Legislature did not intend that in order to invoke the special motion to strike the defendant must first establish [its] actions are constitutionally protected under the First Amendment as a matter of law. If this were the case then the [secondary] inquiry as to whether the plaintiff has established a probability of success would be superfluous. . . . Rather, any claimed illegitimacy of the defendant’s acts is an issue which the plaintiff must raise and support in the context of the discharge of the plaintiff’s [secondary] burden to prove a prima facie showing of the merits of the plaintiff’s case.

1-800 Contacts, Inc. v. Steinberg, 107 Cal. App. 4th 568, 583 (2003) (citations omitted).[7]

Hallmark has amply demonstrated this first prong. Here, Hilton is an acknowledged public figure who has paraded her life, image and accomplishments in a manner that places her squarely within the category of "public interest" for the purposes of the Statute. As a result, Hilton has "voluntarily subjected herself to inevitable scrutiny" and commentary. *Seelig*, 97 Cal. App. 4th at 808.[8] Because the Card comments on Hilton and an idiom of popular culture, through the fully-protected medium of a greeting card, it constitutes speech about a matter of public interest and satisfies the first prong. *Id.*; *Hall*, 153 Cal. App. 4th at 1341 (first

[7] Hilton will doubtless argue (as she did in response to the Motions) that the Card constitutes "commercial speech" because it is sold to the public and that her claim therefore falls outside the ambit of the Statute. As set forth in Section VIII(B)(1)(a), *infra*, there is no merit to the argument that the Card is "commercial speech." Indeed, such a contention was expressly rejected in *Kronemyer*, *supra*, in which the plaintiff argued that the defendant's internet website "constitutes unprotected commercial speech because [defendant] earns money from the Web site." *Kronemyer*, 150 Cal. App. 4th at 948-49. The court held that the website was not commercial speech and the action was properly subject to an Anti-SLAPP motion. *Id.* In particular, the court held that if plaintiff's position was correct "that the prospect of some financial benefit from a publication places the material in the area of 'commercial speech,' [and thus outside of the protection of the Statute] it would include virtually all books, magazines, newspapers, and news broadcasts. There is no authority for so sweeping a definition." *Id.* at 949.

[8] Public figures "must tolerate some criticism as the price of living in a free society." *Gilbert v. National Enquirer, Inc.*, 43 Cal. App. 4th 1135, 1147 (1996); *see also Burnett v. Twentieth Century Fox Film Corp.*, 491 F. Supp. 2d 962, 972 (C.D. Cal. 2007) ("public figures, who seek the public spotlight must accept the concomitant risk of public ridicule in the form of parody").

prong met where statement related to performer who "was often in the public eye for his exploits on and off the screen and his at times tumultuous private life").

B. Hilton Did Not And Cannot Meet Her Burden To Demonstrate A Probability She Will Prevail On Her Right Of Publicity Claim

Because Hallmark satisfied the first prong of the Statute's test by demonstrating that the Card is speech in connection with a matter of public interest, the burden shifts to Hilton to demonstrate by "competent and admissible evidence" a probability that she will prevail on her right of publicity claim. *Macias v. Hartwell*, 55 Cal. App. 4th 669, 675 (1997); C.C.P. § 425.16. Hilton cannot satisfy this burden and thus her right of publicity claim must be stricken.[9]

1. The Card Is Subject To Full First Amendment Protection

It is well established that entertainment, parody, lampooning and even "subtle social criticism," are all entitled to full constitutional protection. *Comedy III*, 25 Cal. 4th at 398-406-07; *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) ("Entertainment, as well as political and ideological speech, is protected" by the First Amendment); *Polydoros v. Twentieth Century Fox Film Corp.*, 67 Cal. App. 4th 318, 324 (1997) ("popular entertainment is entitled to the

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[9] Moreover, based on the facts incorporated in the Complaint (*i.e.,* the Card), Hilton's admission that she is a public figure and matter of public interest, and on those facts subject to judicial notice (*i.e.*, undisputed articles regarding Hilton's notoriety and her actual likeness), Hilton's right of publicity claim fails as a matter of law, warranting dismissal under Hallmark's Motion to Dismiss.

same constitutional protection as the exposition of political ideas"). The scope of First Amendment protection for works of visual art and entertainment extends to "cartoons and caricatures," which "have played a prominent role in public and political debate throughout our nation's history." *Cardtoons*, 95 F.3d at 969.[10]

Here, the Card is easily recognized as protected expression. Its characterization of Hilton in a fanciful setting is not only entertainment and parody, but also social commentary on Hilton's lifestyle and idiom. ER 317. Thus, the Card is protected by the First Amendment.

Such First Amendment protection bars Hilton's right of publicity and Lanham Act claims for the reasons set forth in greater detail below. Based on the oppositions filed by Hilton, it is anticipated that Hilton will make a number of arguments in an effort to push the Card out from under the umbrella of First Amendment protection. None of those arguments have any merit.

a. Hilton Cannot Prove A Probability Of Prevailing By Fixing On Sale Of The Card

The main argument advanced by Hilton in attempting to demonstrate a probability of prevailing on her right of publicity claim was that the Card is not

[10] *See also Hustler Magazine v. Falwell*, 485 U.S. 46, 53-56 (1988) (cartoonists, parodists, caricaturists and satirists enjoy First Amendment protection); *Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996) ("[v]isual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection").

entitled to First Amendment protection because it is offered for sale to the public. As courts have repeatedly made clear, sale of expressive materials is not a basis for denying First Amendment protection. Indeed, such a contention has been categorically rejected by every court to which it has been made. Newspapers, magazines, books, movies, television shows, internet websites, trading cards, songs, artwork, concerts and many other forms of expression typically undertaken as "commercial endeavors" where the expressive content is sold to the public have all been found to be fully protected. Indeed, if Hilton's argument were correct, celebrities would be able to quash virtually all commentary about them.

It is well-established that the sale of a vehicle of speech, such as the Card, does not obviate First Amendment protection: "[t]he fact that expressive materials are sold neither renders the speech unprotected nor alters the level of protection under the First Amendment." *Cardtoons*, 95 F.3d at 970 (citation omitted); *Time, Inc. v. Hill,* 385 U.S. 374, 397 (1967) ("[t]hat books, newspapers, and magazines are published and sold for a profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment'"); *Leidholdt v. L.F.P. Inc.*, 860 F.2d 890, 895 (9th Cir. 1988) (Court dismissed misappropriation of image claim and stated that the "fact that Hustler Magazine is offered for profit does not extend a commercial purpose to every article within it"); *MCA,* 296 F.3d at 907 (use of trademark in song fully protected despite the fact that "[t]o be sure,

MCA used Barbie's name to sell copies of the song"); *Kirby v. Sega of America, Inc.*, 144 Cal. App. 4th 47, 58 (2006) (protections extend to all forms of expression "whether or not sold for a profit"); *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400, 411 (2001) ("Profit, alone, does not render expression 'commercial'"); *Hoffman*, 255 F.3d at 1186 (use protected even if "it may help to sell copies"); *ETW Corp. v. Jireh Pub. Inc.*, 332 F.3d 915, 924 (6th Cir. 2003) ("fact that expressive materials are sold does not diminish the degree of protection to which they are entitled under the First Amendment"); *Comedy III*, 25 Cal.4th at 396 (speech "does not lose its constitutional protection because it is undertaken for profit") (citation omitted).

Thus, as the Court in *Comedy III* succinctly put it, a contention such as the one made below by Hilton – that selling expressive materials for profit somehow strips the communication in that product of First Amendment protection – is a position that "has no basis in logic or authority." *Comedy III*, 25 Cal. 4th at 408; *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal.3d 860, 869 (1979) (fact that defendants "sought to profit from the production and exhibition of a film utilizing [plaintiff's] name and likeness is not constitutionally significant").[11]

[11] Although a concurring opinion, "Justice Bird's views in *Guglielmi* commanded the support of the majority of the court." *Comedy III*, 25 Cal. 4th at 396 n. 7; *see also Cher v. Forum Intern., Ltd.*, 692 F.2d 634, 638-39 (9th Cir. 1982) (citing with approval Justice Bird's opinion in *Guglielmi*).

b. Factually Inapposite Cases Involving Promotional Materials Do Not Support Hilton's Claim

In addition to her unsupportable argument that the Card is not protected by the First Amendment because it is sold to the public, Hilton has also relied on a number of "commercial use" cases for the proposition that full First Amendment protection should not be afforded the Card. In particular, the cases Hilton relies upon involve the use of a person's identity in promotional materials relating to goods or services, *i.e.*, print advertisements for VCRs, television commercials for automobiles or a product catalog for clothing. Unlike those cases, here the challenged use is the sale of speech itself – artwork and editorial that comments on a well-known public figure – not a use undertaken to sell another product.

Hilton relies heavily on *Downing*. Her reliance is misplaced. Indeed, as set forth in Section VIII(B)(2) below, the salient and applicable aspects of *Downing* relating to the facts in this case mandate the dismissal of Hilton's right of publicity claim under the First Amendment "public interest" exemption.

The ultimate holding in *Downing*, that the use was not barred by the First Amendment, stemmed from facts unlike those here. In *Downing*, a clothing company ("A&F") used a photograph of the plaintiffs wearing numbered t-shirts in a catalog which offered for sale t-shirts that looked exactly like those worn by the plaintiffs. *Id*. at 1000. This Court held that A&F's use of plaintiffs' images to

promote the sale of its identical clothing was "commercial in nature" and thus not entitled to full First Amendment protection. *Downing*, 265 F.3d at 1003 n.2.

Thus, *Downing* stands for the proposition that the use of a celebrity image in promotional material to hawk a consumer product associated with that celebrity – *i.e.*, a "commercial use" – is not necessarily granted full First Amendment protection. Here, of course, Hallmark did not use a photograph of Hilton in a catalog to sell products associated with her. Virtually all of the cases Hilton relies upon are similarly distinguishable on their facts. *See Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988)[12] and *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407 (9th Cir. 1996) (use of identities in car commercials); *Waits v. Frito-Lay*, 978 F.2d 1093 (9th Cir. 1992) (use of sound-alike in potato chip commercial); *White v. Samsung Electronics*, 971 F.2d 1395 (9th Cir. 1992) (use of identity in VCR advertisement);[13] *Newcombe v. Adolf Coors Co.*, 157 F.3d 686 (9th Cir. 1998) (use of likeness in beer advertisement); *Onassis v. Christian Dior-New York, Inc.*, 472 N.Y.S. 2d 254 (N.Y. Sup. 1984) (use of look-alike in fashion items advertisement).

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[12] This Court in *Midler* limited its holding to the purely commercial advertising context at issue in that case. Indeed, this Court specifically noted that "[t]he First Amendment protects much of what the media do in the reproduction of likenesses" and thus if "the purpose [of the use] is 'informative or cultural' the use is immune" from liability. *Midler*, 849 F.2d at 462. The holding in *Midler* therefore supports the dismissal of Hilton's claim here.

[13] This Court particularly noted in *White* that if a case does not involve advertising, "the First Amendment hurdle will bar most right of publicity claims against expressive activity." *White*, 971 F.2d at 1401 n.3.

Those uses are different from the use complained of here – the Card simply and obviously is not an advertisement or promotion. It is a greeting card bearing art and editorial that pokes fun at Hilton and her mode of expression.[14] Hilton's mere allegation that the Card is an advertisement (ER 353) cannot make it so and does not support a claim, nor does her reliance on factually inapposite cases. Hilton's unsustainable argument that the Card is commercial speech does not meet her burden to demonstrate a probability of prevailing on her claim.

c. The *Zacchini* Case Is Inapposite And Does Not Support Hilton's Claim

Inexplicably, Hilton also relies on the inapposite and routinely distinguished case of *Zacchini v. Scripps-Howard Broadcasting Co.* 433 U.S. 562 (1977) for the proposition that the card should not be afforded First Amendment protection. That reliance is misplaced. In *Zacchini*, a local television station aired a performer's entire 15-second "human cannonball" act without his consent. The Supreme Court, in a holding limited to the precise facts before the Court, held that the First

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[14] *See Hoffman*, 255 F.3d at 1185 (use of name and likeness in article protected by First Amendment which this Court contrasted with the advertisements that were not protected in *Newcombe*, *Abdul-Jabbar*, *Waits*, *White* and *Midler*); *Gionfriddo*, 94 Cal.App.4th at 413 (finding protected the use of baseball players' images and names in a product that was a compilation of historical events and information pertaining to players and contrasting that with cases where "plaintiff's identity is used, without consent, to promote an *unrelated* product" – citing *Abdul-Jabbar*, *Waits*, *Newcombe*, *White* and *Midler*).

Amendment did not necessarily bar Zacchini's right of publicity claim because the television station had aired Zacchini's "entire act." *Zacchini*, 433 U.S. at 578-79.[15]

The Supreme Court distinguished what happened to Zacchini from the usual right of publicity case, observing that "the broadcast of petitioner's entire performance, unlike the unauthorized use of another's name for purposes of trade or the incidental use of a name or picture by the press, goes to the heart of petitioner's ability to earn a living as an entertainer." *Id*. at 576. The *Zacchini* Court addressed not a cartoon depiction and commentary on a well known celebrity, as is the case here, but the complete appropriation of a performer's act, which negated any reason for viewers to attend his performance.

Since *Zacchini* was decided, courts have consistently distinguished its holding from cases involving the kind of right of publicity claim made here by Hilton. For instance, in *Guglielmi*, the estate of Rudolph Valentino brought right of publicity claims regarding the use of Valentino's name and likeness in a television film about his life. The California Supreme Court held that the *Zacchini* decision did not afford right of publicity protection because *Zacchini* involved the appropriation of Zacchini's entire act, whereas the use of Valentino's identity was "much more akin to commenting upon or reporting the facts of Zacchini's

[15] *See Rogers v. Grimaldi*, 695 F. Supp. 112, 118 (S.D.N.Y. 1988) (*Zacchini* is "a narrowly drawn opinion effectively limited to its facts"), *aff'd*, 875 F.2d 994 (2nd Cir. 1989).

performance, which the Supreme Court regarded as entirely permissible." *Guglielmi*, 25 Cal.3d at 875 (citing *Zacchini* at 569, 574); *see also Comedy III*, 25 Cal.4th at 401 (*Zacchini* was not an ordinary right of publicity case: the defendant "had appropriated the plaintiff's entire act"); *Cardtoons*, 95 F.3d at 973 (*Zacchini* is a "red herring" and not a right of publicity case at all, but a "right of performance" case). Thus, *Zacchini* provides no support for Hilton's claims.

2. Hilton's Right Of Publicity Claim Fails Because The Card Is Non-Commercial Speech Which Relates To A Matter Of Public Interest

Not only did Hallmark make a *prima facie* showing that the Card contains speech about a matter of public interest in connection with Hallmark meeting its first prong burden under the Statute, but the facts and relevant case law supporting that showing lead to only one conclusion: as a matter of law, Hilton cannot prevail on her claims. A claim under California's common law right of publicity is defeated "where the publication or dissemination of matters is 'in the public interest.'" *Daly v. Viacom, Inc.*, 238 F. Supp. 2d 1118, 1122 (N.D. Cal. 2002). This Court has held that the public interest defense to a right of publicity claim is a "complete" defense and provides "extra breathing space" even beyond the First Amendment. *New Kids,* 971 F.2d at 309-10; *see also Maheu v. CBS, Inc.*, 201 Cal.

App. 3d 662, 676-77 (1988) (affirming dismissal on demurrer of right of publicity claims).

Publishers enjoy wide latitude to engage in expression regarding matters that "the public is interested in and constitutionally entitled to know about," such as "'things, people and events that affect it.'" *Baugh*, 828 F. Supp. at 754 (*quoting Dora,* 15 Cal. App. 4th at 546). In *Dora*, which involved the use of a surfer's name and likeness in a film about surfing, the court noted that "public interest attaches to people who by their accomplishments or mode of living … create bona fide attention to their activities" and held that plaintiff's right of publicity claim was barred by the "public interest" defense. *Dora*, 15 Cal. App. 4th at 542-43.

In *Downing*, this Court distinguished speech in advertisements, commercials or catalogs, the purpose of which is to promote the sale of a separate product, from speech commenting on a plaintiff in connection with a matter of public interest. Thus, a use of the plaintiff's identity that "directly contributed" to a commentary about a person or subject "which came within the protected interest" would be immune from liability. *Downing*, 265 F.3d at 1002; *Chapman v. Journal Concepts, Inc.*, 528 F. Supp. 2d 1081, 1096-97 (D. Hawaii 2007) (applying "public interest" immunity to right of publicity claims brought by "iconic figure in the surfing world" regarding use of plaintiff's image in surf journal). Indeed, Hilton

admits that a right of publicity claim fails where the "use of the plaintiff's name or likeness is reasonably related to a matter of public interest." ER 112.

As in *Dora*, Hilton's lifestyle and idiom are the "point of the [Card]" and the use of her identity "directly contribute[s]" to the commentary about Hilton who is, as she admits, a matter of public interest. *Downing*, 265 F.3d at 1002. Hilton indisputably attracts vast amounts of attention and publicity – much of it as a result of her own efforts and actions. Seemingly every aspect of her life is fodder for the press and for water cooler conversations – the lavish lifestyle she leads, her party hopping, her romances and sexual escapades, her idiom, her incarceration (and controversial early release) and even the filing of this lawsuit. ER 132-222. That notoriety has bred social comment, criticism, spoofs and parody. *Id*. Hilton admits she is a well-known public figure. ER 96.[16] The Card and its commentary on her certainly qualify as a matter of "public interest" or "public affairs" under the broad definitions of those terms. The protection for speech on such topics in non-commercial uses is "complete" and bars Hilton's right of publicity claim. *New Kids,* 971 F.2d at 309-10; *Downing*, 265 F.3d at 1002.

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[16] In addition to Hilton's admission that she is a "well known celebrity" (ER 125) who has "widespread public recognition" (ER 124), the particular facts evidencing this widespread notoriety were set forth in articles which are the proper subject of judicial notice. ER 15-16, 127-222. *See Seelig*, 97 Cal. App. 4th at 808 n. 5 (court took judicial notice of articles discussing television show and stated that "the fact that news articles discussing topics provoked by the Show were published is not reasonably subject to dispute").

3. Hallmark's Use Here Is Transformative As A Matter Of Law, Mandating Dismissal Of Hilton's Right Of Publicity Claim

It has long been recognized that the right of publicity "has not been held to outweigh the value of free expression." *Guglielmi*, 25 Cal. 3d at 872 (affirming dismissal of right of publicity claim on free speech grounds); *Cher*, 692 F.2d at 638-39 (holding that no action for right of publicity will lie for a "publication which is protected by the First Amendment"); *see also Daly*, 238 F. Supp. 2d at 1123 (dismissing common law right of publicity claim on motion to dismiss). This right of free expression particularly applies to commentaries about celebrities and other public figures: "Once the celebrity thrusts himself or herself forward into the limelight," as Hilton has most certainly done, "the First Amendment dictates that the right to comment on, parody, lampoon, and make other expressive uses of the celebrity image must be given broad scope." *Comedy III*, 25 Cal. 4th at 403. Indeed, Hilton concedes that the First Amendment "permits the use of a person's likeness … to parody that individual." ER 114.[17]

Affording First Amendment protection to commentaries about celebrities is important because "celebrities take on public meaning, [and thus] the appropriation

[17] Without such protection, "reports and commentaries on the thoughts and conduct of public and prominent persons [would] be subject to censorship under the guise of preventing the dissipation of the publicity value of a person's identity." *Guglielmi*, 25 Cal.3d at 872; *see also Comedy III*, 25 Cal. 4th at 403 ("the right of publicity cannot, consistent with the First Amendment, be a right to control the celebrity's image by censoring disagreeable portrayals").

of their likenesses may have important uses in uninhibited debate on public issues, particularly debates about culture and values." *Comedy III*, 25 Cal. 4th at 397; *see also Cardtoons,* 99 F.3d at 972. Moreover, because these celebrities "take on personal meanings to many individuals in society, the creative appropriation of celebrity images can be an important avenue of individual expression." *Comedy III*, 25 Cal. 4th at 397. *Comedy III* is particularly instructive here:

> Entertainment and sports celebrities are the leading players in our Public Drama. We tell tales, both tall and cautionary, about them. We monitor their comings and goings, their missteps and heartbreaks. We copy their mannerisms, their styles, *their modes of conversation* and of consumption. Whether or not celebrities are 'the chief agents of moral change in the United States,' they certainly are widely used – far more than are institutionally anchored elites – to symbolize individual aspirations, group identities, and cultural values. Their images are thus important expressive and communicative resources: the peculiar, yet familiar idiom in which we conduct a fair portion of our cultural business and everyday conversation.

Id. (emphasis added, citations omitted).[18]

Thus, to safeguard free expression, the California Supreme Court devised the "transformative use" test to determine whether a work is shielded by the First

[18] *See also L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 34 (1st Cir. 1987) ("Denying parodists the opportunity to poke fun at symbols and names which have become woven into the fabric of our daily life, would constitute a serious curtailment of a protected form of expression"); Mark Sableman, *Artistic Expression Today: Can Artists Use the Language of our Culture*, 52 St. Louis U.L.J. 187, 193 (2007) (courts must guard against the "danger that overprotection of commercial interests will stifle and limit expression that employs the language and symbols of our popular culture").

Amendment. *Comedy III*, 25 Cal. 4th at 405; *Winter*, 30 Cal. 4th at 888. Borrowing from the fair use test in copyright law, the California Supreme Court held that "when a work contains significant transformative elements," the use is protected under the First Amendment. *Comedy III*, 25 Cal. 4th at 405. Indeed, such a transformative work is "not only especially worthy of First Amendment protection, but it is also less likely to interfere with the economic interest protected by the right of publicity." *Id.*[19] The Court held, by way of example, that "works of parody or other distortions of the celebrity figure are not, from the celebrity fan's viewpoint, good substitutes for conventional depictions of the celebrity and therefore do not generally threaten markets for celebrity memorabilia that the right of publicity is designed to protect." *Id.* (*citing Cardtoons*, 95 F.3d at 974).

Works that comment on or parody a celebrity, or that manipulate the context in which celebrities appear, will be considered transformative and therefore fully protected under the First Amendment and immune from right of publicity liability. *See Comedy III,* 25 Cal. 4th at 406, 408-409 (agreeing with the "unassailable" conclusion reached in *Cardtoons* that "works parodying and caricaturing

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[19] In particular, "[s]ince celebrities will seldom give permission for their identities to be parodied, granting them control over the parodic use of their identities would not directly provide them with any additional income" but would only allow them "to shield themselves from ridicule and criticism." *Cardtoons*, 95 F.3d at 974. Courts must not allow celebrities to use the right of publicity as a vehicle for "censoring significant expression by suppressing alternative versions of celebrity images that are iconoclastic, irreverent, or otherwise attempt to redefine the celebrity's meaning." *Comedy III*, 25 Cal. 4th at 398.

celebrities are protected by the First Amendment") (discussing *Cardtoons*, 95 F.3d at 969-976); *Winter*, 30 Cal. 4th at 890 (claims based on cartoon depictions of celebrity plaintiffs barred by transformative use test); *see also Kirby*, 144 Cal. App. 4th at 59 (right of publicity and Lanham Act claims by celebrity were barred by First Amendment because use was transformative and "added creative elements to create new expression").

This Court applied the "transformative use" test in *Hoffman*. In that case, defendant used a photograph of Dustin Hoffman from the movie TOOTSIE and replaced his body with a photograph of a male model in the same pose but wearing a different outfit than the one Hoffman wore in TOOTSIE. The Court held that "there is no question that [defendants'] publication of the 'Tootsie' photograph contained 'significant transformative elements.' Hoffman's body was eliminated and a new, differently clothed body was substituted in its place." *Hoffman*, 255 F.3d at 1184 n.2. Accordingly, Hoffman's claims were barred.

Thus, the Court in *Hoffman* found that a less obviously fictional use than the use made by the Card was transformative as a matter of law. In this action, it is abundantly clear that the Card is more creative and more transformative than the image found sufficiently transformative in *Hoffman*. In the Card, like in *Hoffman*, a photograph of Hilton's head was used but, whereas in *Hoffman* a photograph of an actual male model's body replaced Hoffman's body, the Card eliminates

Hilton's body altogether and adds a new, differently clothed, differently proportioned cartoon body in an entirely cartoon fictional setting. Furthermore, the Card's editorial contains an obvious play on words which spoofs Hilton's use of the phrase "that's hot" and shows Hilton performing a menial service job in a competent and workmanlike manner. This Court found the use in *Hoffman* was transformative despite the fact it did not make any focused commentary on, or criticism of, Hoffman himself, but simply commented in general on films and modern day fashion. In contrast to *Hoffman*, the Card specifically comments on Hilton (by portraying her in an environment that is diametrically opposite of her regular glitzy lifestyle) and pokes fun at her oft-repeated phrase "that's hot." Since the use in *Hoffman* was transformative, the significantly more differentiated and embellished use with the cartoon art, fictional dialogue and social commentary contained in the Card must be transformative as a matter of law.

Likewise, California Supreme Court decisions establish that the use made by the Card is transformative as a matter of law. First, in *Comedy III*, the Court noted that the use in *Cardtoons* of parody images of baseball players on trading cards sold to the public was consistent with the transformative use test. *Comedy III*, 25 Cal. 4th at 406. Second, the California Supreme Court held in *Winter* that a use arguably less transformative than the use made here in the Card was transformative as a matter of law, barring plaintiffs' right of publicity claim. *Winter* involved

fictional comic book characters who were "less-than-subtle evocations of [famous musicians] Johnny and Edgar Winter." *Winter*, 30 Cal. 4th at 890. The court held that these images could not serve as the basis for right of publicity claims because the depictions of plaintiffs were "distorted for purposes of lampoon, parody, or caricature." *Id.*[20] Indeed, Hilton concedes that First Amendment protection applied in *Winter* because, even though defendant's characters had features "similar to [those of] the Winter brothers," the characters were "distorted pictures" of plaintiffs and thus transformative. ER 100.

That concession is fatal to Hilton's right of publicity claim. The Card is clearly a "distorted" image of Hilton. Indeed, the Card is more transformative than the use in *Winter* because while the artists in that case used the Winter brothers as the inspiration for their worm-like cartoon creatures, they did not otherwise comment on the Winter brothers or their music. In contrast, the Card here, both through the artwork and the editorial, comments on Hilton's posh lifestyle by placing her in a blue-collar world where she performs her job as it should be performed and it pokes fun at her non-literal incantations of the phrase "that's hot." Again, as was the case with *Hoffman*, the finding that the use in *Winter* was

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[20] *See also*, *Kirby*, 144 Cal. App. 4th at 59 (use transformative in part because defendant's computer character had an "extremely tall, slender computer-generated physique" that was "dissimilar from" plaintiff); *ETW Corp.*, 332 F.3d at 938 (painting of Tiger Woods transformative because work consisted of a collage of images in addition to Woods and thus conveyed a message about Woods).

transformative dictates that the use here must also be found transformative as a matter of law. Hallmark's partial use of Hilton's image – placing an oversized glamorous photograph of Hilton's face over a distorted, non-literal cartoon body, injecting her into a fictional situation with a fictional character, and creating a title, fictional dialogue and greeting card sentiment to accompany the visual art – is undoubtedly transformative.

Moreover, contrary to Hilton's assertion, the Card is not a "literal depiction" of Hilton – as she appeared in one segment of the Show or otherwise – as even a cursory comparison of the Card and the materials *submitted by Hilton* reveals. That segment of the Show featured Hilton, her hair in braids, wearing a red shirt, yellow baseball hat and roller skates and serving bags of food as a car hop or at the take out window at a fast food restaurant. ER 61-69.[21] In contrast, the Card shows a beautifully coiffed Hilton with an undersized, three-fingered cartoon body wearing a light blue shirt, white apron and oven mitt and serving a plate of food to a customer in a sit-down restaurant. ER 130. Furthermore, the Card contains much more than a cartoon of Hilton – it contains a fictional cartoon customer,

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[21] In addition to submitting "screen capture" photographs of the Show, Hilton submitted a dvd copy of the Show. *See* ER 50-51. With the filing of this Brief, Hallmark filed a Motion requesting that this Court instruct the District Court to transmit that dvd exhibit to this Court pursuant to Ninth Circuit Rule 11-4.2. This Court can and should review that evidence. *See Simpson Strong-Tie*, 2008 WL. 1886602 at *11 (in deciding the second prong question of potential merit, the court must consider "the pleadings and evidentiary submissions of both the plaintiff and the defendant").

dialogue between the characters in which the phrase "that's hot" is used literally and, on the inside, birthday greetings to the recipient containing a play on words. ER 130-131.

Thus, unlike in *Comedy III*, Hallmark has not produced a "literal, conventional depiction[]" of Hilton or of the segment from the Show. *See Comedy III*, 25 Cal. 4th at 409. Hilton saying that Hallmark's use is literal does not make it so. *Daly*, 238 F. Supp. 2d at 1122 ("Factual allegations may be disregarded, however if contradicted by documents to which the court may properly refer"). Rather, Hallmark has "added significant creative elements to create new expression" which, as Hilton acknowledged, is the correct standard for the transformative use test. ER 100.

The District Court was incorrect when it held that it could not determine if the transformative use test was met at this stage of the proceedings. *Winter* is precisely on point: "courts can often resolve the question [of whether a work is transformative] as a matter of law simply by viewing the work in question and, if necessary, comparing it to an actual likeness of the person … portrayed." *Winter*, 30 Cal. 4th at 891-892. Thus, as summarized by the Court in *Kirby*, the transformative use test "simply requires the court to examine and compare the allegedly expressive work with the images of the plaintiff to discern if the defendant's work contributes significantly distinctive and expressive content *i.e.*, is

'transformative.'" *Kirby*, 144 Cal. App. 4th at 61 and n.6. This Court performed a similar analysis in *Hoffman*, where it reviewed the image at issue and determined that it was sufficiently transformative. *Hoffman*, 255 F.3d at 1184 n.2. This Court can easily do the same here, and it has all the necessary materials before it to do so. *Compare* ER 130 *with* ER 61-69.

Moreover, the District Court incorrectly stated that Hallmark was required to demonstrate that the Card is a "parody" for it to be protected. ER 6-7. *Winter* directly addressed this issue. There, plaintiffs cited (as the District Court cited here – ER 6) *Dr. Seuss Enters., L.P. v. Penquin Books USA, Inc.*, 109 F.3d 1394, 1405 (9th Cir. 1997) and argued that the use was not a protected parody because it did not specifically target the Winter brothers for commentary. The California Supreme Court in *Winter* rejected that argument:

> The distinction between parody and other forms of literary expression is irrelevant to the *Comedy III* transformative test. It does not matter what precise literary category the work falls into. *What matters is whether the work is transformative, not whether it is a parody or satire or caricature or serious social commentary or any other specific form of expression.*

Winter, 30 Cal. 4th at 891 (emphasis added). "[W]hether one actually appreciates [a work's] comedic value, is entirely irrelevant to the issue of whether this expression of ideas should be afforded First Amendment protection." *GTFM, LLC v. Universal Studios, Inc.*, 79 U.S.P.Q.2d 1213, 1215 (S.D.N.Y. 2006); *Comedy III*,

25 Cal. 4th at 406 ("We emphasize that the transformative elements or creative contributions that require First Amendment protection are not confined to parody"); *Kirby*, 144 Cal. App. 4th at 617 ("[t]he law does not require [defendant's cartoon character] to 'say something – whether factual or critical or comedic' about [plaintiff] the public figure in order to receive First Amendment protection").

Thus, the Card need not be biting, side-splittingly funny or obviously parodic to someone unfamiliar with Hilton to be protected under the transformative use test or the First Amendment.[22] *See E.S.S. Entertainment 2000, Inc. v. Rock Star Videos, Inc.*, 444 F. Supp. 2d 1012, 1043 (C.D. Cal. 2006) ("First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed") (citations omitted). Indeed, the transformative use test specifically protects works such as the Card that contain a "fictionalized portrayal" that serves as a "subtle social criticism" of "the celebrity phenomenon." *Comedy III*, 25 Cal. 4th at 406. The Card is transformative, is not a literal

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[22] Moreover, although not required, the Court can determine that the Card is a protected parody. Whether a work is a parody is a question of law for the Court. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582-83 (1994). As this Court stated in *Walking Mountain*, the Card need only "loosely target" Hilton such that it "reasonably could be perceived as commenting on" her "to some degree" to be a protected parody. *Walking Mountain*, 353 F.3d at 801. The Card's parodic nature can be perceived simply by looking at the irreverent representation of Hilton (combining perfectly coiffed glamour head shot as she appears at parties and on the red carpet with a cartoon working woman and tweaking her use of the phrase "that's hot"). Thus, as a matter of law, the Card is a protected parody.

depiction of Hilton and it need not convey any parodic message to be entitled to First Amendment protection. This bars Hilton's claim as a matter of law.

C. Hilton's Lanham Act Claim Fails As A Matter Of Law

In addition to asserting a common law right of publicity claim, Hilton alleges a violation of the Lanham Act. That claim fails under several defenses, a finding on any *one* of which bars the claim as a matter of law.

1. The Same First Amendment Principles That Bar Hilton's Right Of Publicity Claim Bar Her Lanham Act Claim

Hilton's Lanham Act claim essentially echoes the allegations in her right of publicity claim. ER 353. The First Amendment defenses that bar a right of publicity claim serve equally to defeat a claim under the Lanham Act. *Kirby*, 144 Cal. App. 4th at 61-62 (because plaintiff's right of publicity claims were "subject to a First Amendment defense" her "Lanham Act claim is also barred"); *Hoffman*, 255 F.3d at 1183 (Lanham Act, right of publicity and "unfair competition" claims all barred by First Amendment defense); *ETW Corp.*, 332 F.3d at 937 (stating that "a Lanham Act false endorsement claim is the federal equivalent of the right of publicity" and rejecting both claims on First Amendment grounds). Accordingly, for the reasons set forth above, the First Amendment protections afforded the Card defeat Hilton's Lanham Act claim as a matter of law.

2. Hilton's Lanham Act Claim Fails Because The Use Of Her Name And Likeness Are Artistically Relevant To The Card And The Card Is Not Misleading

In a standard trademark infringement action (for example, when it is alleged that one company is using a mark as an indication of source for its goods that is similar to a mark used to designate the goods of another company), the Court looks to whether there is a "likelihood of consumer confusion" as demonstrated by a multi-factor test. *See, e.g.*, *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341 (9th Cir. 1979). This Court and other courts have made it clear, however, that the "likelihood of confusion" test is not appropriate in the context of expressive works like the Card because that test "fails to account for the full weight of the public's interest in free expression." *MCA,* 296 F.3d at 900 ("trademark rights do not entitle the owner to quash an unauthorized use of the mark by another who is communicating ideas or expressing a point of view"); *Walking Mountain,* 353 F.3d at 807 (when claim involves use of mark that raises First Amendment issues, likelihood of confusion test is not used); *ETW*, 332 F.3d at 926-28 (likelihood of confusion test is not appropriate "where the defendant has articulated a colorable claim that the use of a celebrity's identity is protected by the First Amendment" because the test "fails to adequately consider the interests protected by the First Amendment"); *Kirby*, 144 Cal. App. 4th at 57 n.4 (same). Rather, this Court has

adopted a different test for a situation such as that presented here – the "artistic relevance" test.

In *MCA*, defendants produced a song named "Barbie Girl" in which a band member impersonates Barbie and which contains numerous uses of the name "Barbie." Mattel claimed that the song would likely confuse consumers into thinking Mattel was affiliated with it. *MCA*, 296 F.3d at 899. This Court concluded, however, using a two-part test established by *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), that the use of the mark by defendants was protected by the First Amendment because (1) it was artistically relevant to the work (*i.e.*, a song that "pokes fun at Barbie and the values that [defendant] contends she represents") and (2) it was not specifically misleading as to sponsorship or endorsement (*i.e.*, the song did not "explicitly or otherwise, suggest that it was produced by Mattel"). *MCA*, 296 F.3d at 901-902.

Similarly, in *Walking Mountain*, a photographer produced and sold various photographs of Mattel's Barbie doll in precarious situations and used the word "Barbie" in his works. Mattel again sued, claiming trademark infringement. This Court applied the same two-part test and held that the trademark claims were barred: the use of the Barbie mark was protected because (1) it was artistically relevant to help defendant "depict Barbie and target the doll with [defendant's] parodic message" and (2) defendant did not do anything to "explicitly mislead as to

Mattel's sponsorship of the works." *Walking Mountain*, 353 F.3d at 807; *see also E.S.S.*, 444 F. Supp. 2d at 1043 ("the *Rogers* balancing approach is generally applicable to Lanham Act claims against works of artistic expression").

Thus, where the "mark" is a person's name and/or likeness and the "use" is the insertion of that person's name and/or likeness into a work of protected speech, the Lanham Act claim fails if the use is artistically relevant and not specifically misleading as to sponsorship or endorsement. That, of course, is precisely the situation here: the use of Hilton's name and likeness is artistically relevant to the commentary on her made by the Card, and the Card is not specifically misleading as to sponsorship or endorsement. Indeed, not only does the Card contain no statement that Hilton sponsors or endorses the Card, but it clearly states the contrary – that the Card comes "from Hallmark." ER 130. Accordingly, Hilton's Lanham Act claim is barred as a matter of law by the First Amendment.

3. Hilton's Lanham Act Claim Is Also Barred By The Nominative Fair Use Doctrine

The nominative fair use doctrine prevents a trademark holder from appropriating "a descriptive term for his exclusive use and so prevent others from accurately describing a characteristic of their goods." *New Kids*, 971 F.2d at 306. Indeed, this Court has held that "it is often virtually impossible to refer to a particular product for purposes of comparison, criticism, point of reference or any

other such purpose without using the mark." *Id.* at 309. Moreover, this Court held that celebrities cannot be permitted to "use the trademark laws to prevent the publication of an unauthorized group biography or to censor all parodies or satires which use their name." *Id*; *Cairns*, 292 F.3d at 1153-54 (holding that nominative fair use defense protected sale of commemorative plates featuring likeness of Princess Diana).

Here, the alleged "marks" at issue in Hilton's Lanham Act claim, her name and likeness, were used to express a commentary and parody of Hilton. Hilton's claim cannot be maintained in the face of the Lanham Act's nominative fair use doctrine. *See Walking Mountain*, 353 F.3d at 810 (nominative fair use doctrine barred claim: defendant "used Mattel's Barbie figure and head in his works to conjure up associations of Mattel, while at the same time to identify his own work, which is a criticism and parody of Barbie"); *E.S.S.*, 444 F. Supp. 2d at 1043 ("Any visual work that seeks to offer an artistic commentary on a particular subject must use identifiable features of that subject so that the commentary will be understood and appreciated by the consumer").

4. Hilton's Lanham Act Claim Also Fails Because It Does Not Allege And Hilton Cannot Show Actual Malice

As this Court held in *Hoffman*, for a public figure to sustain a claim under the Lanham Act for the use of his or her likeness, that public figure must plead and

prove, with clear and convincing evidence, that the defendant acted with actual malice intending "to create the false impression in the minds of its readers" that when they saw the image they were seeing something endorsed by plaintiff. *Hoffman*, 255 F.3d at 1187, 1189 n.3; *Kournikova v. General Media Communications Inc.*, 278 F.Supp.2d 1111, 1128 (C.D. Cal. 2003) ("Courts have placed limits on Lanham Act lawsuits because of the potential impact on First Amendment rights. When a public figure brings a false endorsement claim, it is barred by the First Amendment unless the plaintiff produces clear and convincing evidence that the defendant acted with actual malice in creating the false impression of endorsement").

That Hilton is a public figure is not in dispute – she admits as much. ER 96. There is no allegation in the Amended Complaint that Hallmark acted with actual malice.[23] Nor could Hilton ever make such an allegation in good faith, let alone prove it by clear and convincing evidence. It is clear from the Card that Hallmark did not intend "to create the false impression in the minds of its readers that when they saw the altered" image on the Card they were instead actually seeing Hilton herself. *Hoffman*, 255 F.3d at 1187, 1189 n.3. Unlike in *Hoffman* where that might have been a possibility (although it was ultimately found not to be proven)

[23] The District Court erred in concluding that Hilton's boilerplate allegation of a purported "disregard of Hilton's rights" is equivalent to an allegation of actual malice. ER 9.

because defendants had swapped a real body for Hoffman's own body, here the Card gives Hilton a categorically unrealistic cartoon body.

Moreover, it cannot be alleged in good faith that Hallmark intended to create the false impression that Hilton sponsored or endorsed the Card because no reasonable reader of the Card could have such an impression in light of the Card's parody of Hilton and its specific designation of Hallmark as the source of the Card. *See Burnett*, 491 F. Supp. 2d at 965 (granting motion to dismiss, holding that "no reasonable viewer would mistake" plaintiff as anything but the target of a parody). Accordingly, as a matter of law, Hilton could never make a showing by clear and convincing evidence of actual malice sufficient to overcome the full First Amendment protection afforded to an expressive work such as the Card. Therefore, her Lanham Act claim fails as a matter of law and must be dismissed.

IX. CONCLUSION

Hilton's effort to target the exercise of First Amendment rights should meet with swift disposal. *Winter*, 30 Cal.4th at 891 ("speedy resolution of cases involving free speech is desirable"); *Baugh*, 858 F.Supp. at 752 (summary disposition "favored in cases involving First Amendment rights"). Indeed, the policy behind California's Anti-SLAPP statute is to effectuate the "early dismissal of meritless first amendment cases aimed at chilling expression through costly,

time-consuming litigation." *Metabolife Intern., Inc. v. Wornick*, 264 F.3d 832, 839 (9th Cir. 2001); *Batzel*, 333 F.3d at 1024.

Hallmark should not be compelled to expend additional time and resources, others should not be placed in fear of similar reprisals, nor should the courts' dockets be clogged, by allowing further prosecution of an action aimed at speech that is clearly a spoof of Hilton. Hallmark's defenses are entirely legal in nature and are based on facts as alleged by Hilton or otherwise undisputed. The Court can and should examine the Card and the other information properly before it and determine that there is no viable claim against Hallmark. Accordingly, the District Court's Order should be reversed and this case should be remanded to the District Court with instructions to dismiss Hilton's claims with prejudice.

Dated: May 13, 2008.

Lincoln D. Bandlow
SPILLANE SHAEFFER ARONOFF BANDLOW LLP
Attorneys for Defendant/Appellant
HALLMARK CARDS, INCORPORATED

CERTIFICATE OF COMPLIANCE

[F.R.A.P. 32(a)(7)(C) and Circuit Rule 32-1]

I certify that the attached Appellant's Opening Brief is proportionately spaced, has a typeface of 14 points or more, and contains 13,756 words.

Dated: May 13, 2008.

____
Lincoln D. Bandlow
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HALLMARK CARDS, INCORPORATED

STATEMENT OF RELATED CASES

Hallmark Cards, Incorporated is not aware of any cases related to this action.

Dated: May 13, 2008.

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Lincoln D. Bandlow
SPILLANE SHAEFFER ARONOFF BANDLOW LLP
Attorneys for Defendant/Appellant
HALLMARK CARDS, INCORPORATED

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 1880 Century Park East, Suite 1004, Los Angeles, CA 90067. On **May 13, 2008**, I served the foregoing document(s) described as: **APPELLANT'S OPENING BRIEF** on the interested party below, using the following means:

Brent H. Blakely
Blakely Law Group
915 North Citrus Avenue
Hollywood, CA 90038-2401
Counsel for Appellee Paris Hilton

☒ BY OVERNIGHT DELIVERY I enclosed the document(s) in an envelope or package provided by an overnight delivery carrier and addressed to the respective address(es) of the party(ies) stated above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

☐ (STATE) I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

☒ (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on **May 13, 2008** at Los Angeles, California.

Shelly Djeloshevic
[Print Name of Person Executing Proof]

[Signature]