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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA

10  
11 PARIS HILTON,

12 Plaintiff,

13 vs.

14 HALLMARK CARDS,

15 Defendants.  
16 \_\_\_\_\_

) CASE NO. 07-5818 PA (AJWx)

) ***PLAINTIFF PARIS HILTON'S  
OPPOSITION TO HALLMARK'S  
MOTION TO STRIKE***

) Hearing

) Date: December 17, 2007

) Time: 1:30 p.m.

) Dept.: 15

1 **I. INTRODUCTION**

2 Hallmark’s Motion to Strike fails for the simple reason that its unauthorized  
3 use of Plaintiff Hilton’s name and photo was primarily for a commercial purpose.  
4 Although the First Amendment, which California’s anti-SLAPP statute is designed  
5 to advance, allows wide latitude to engage in speech and commentary, it does not  
6 allow the non-consensual commercial exploitation of a celebrity’s name and  
7 likeness. [Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977)] As  
8 the Ninth Circuit held in Downing v. Abercrombie & Fitch, 265 F.3d 994 (9<sup>th</sup> Cir.  
9 2001), where the primary purpose of the use in question is commercial, it will not  
10 be entitled to First Amendment Protection.

11 Hallmark is in the business of selling greeting cards, and everything  
12 Hallmark does is engineered towards that singular purpose. Any purported  
13 humorous/parodic aspect of Hallmark’s card is subservient to the commercial  
14 element - the sale of a product. Quite simply, Hallmark is selling greeting cards and  
15 used Plaintiff’s image to aid in that singular commercial endeavor. As the Supreme  
16 Court and Ninth Circuit have repeatedly held, such unauthorized exploitation hardly  
17 implicates the First Amendment.

18 Likewise, there is nothing “transformative” about Hallmark’s greeting card.  
19 Hallmark has done nothing more than take a literal depiction of Ms. Hilton and  
20 place it in the same context as a role she played in the popular television show The  
21 Simple Life. Indeed, the card is a rip-off of the episode Sonic Burger Shenanigans  
22 where Ms. Hilton works as a waitress serving customers. As the California  
23 Supreme Court noted in Comedy III Productions v. Sarderup (2001) 25 Cal. 4<sup>th</sup> 387,  
24 404, when, as here, “artistic expression takes the form of a literal depiction of a  
25 celebrity for commercial gain, directly trespassing on the right of publicity without  
26 adding significant expression beyond that trespass, the state law interest in  
27 protecting the fruits of artistic labor outweighs the expressive interests of the  
28 imitative artist.”

1           Because Hallmark’s speech is primarily commercial, it cannot make a *prima*  
2 *facie* showing that its speech is protected by the First Amendment. In any event,  
3 Plaintiff Hilton has clearly established a *prima facie* showing of facts which would  
4 support a judgment in her favor, thereby precluding Hallmark’s Motion to Strike.

5           As discussed hereinbelow and in Hilton’s Opposition to Hallmark’s Motion  
6 to Dismiss, Hallmark has taken the position that whenever an infringer claims that  
7 its’ misappropriation of a celebrity’s identity was done in connection with a  
8 “parody” or is a matter of “public interest,” its conduct is somehow automatically  
9 immunized. This misconceived argument is disabused by Zacchini and every other  
10 case which discusses the weighing process that must be utilized by the trier of fact  
11 when the right to publicity comes into conflict with the First Amendment. As these  
12 courts have held, whether a defendant’s use of a celebrity’s likeness is primarily  
13 related to a commercial purpose, and therefore not protected by the First  
14 Amendment, is a matter of fact that must be left to the jury to decide. Indeed, the  
15 attorneys now representing Hallmark in this case had the very same “automatic  
16 immunization” argument shot down by the Ninth Circuit in Downing when they  
17 represented clothing retailer Abercrombie & Fitch.

18           Hallmark has ignored this controlling legal precedent (Downing is not even  
19 mentioned in their papers) and instead chosen to take the low road by personally  
20 attacking Plaintiff. This is clearly a tactic by Hallmark to shift attention away from  
21 its own unlawful conduct. Contrary to what Hallmark would like this Court to  
22 believe, this case is not about Paris Hilton or an attempt at censorship. It is about a  
23 multi-billion dollar company’s calculated theft of the economic value generated by  
24 a celebrity’s fame for its own profit. No amount of ducking and weaving on the  
25 part of Hallmark will change the fact that its’ unauthorized use of Plaintiff’s  
26 identity in connection with the sale of its’ merchandise is a violation of Plaintiff’s  
27 right of publicity and is not protected by the First Amendment. At a minimum,  
28 these are questions for a jury to decide and Hallmark’s motion must be denied.

1 **II. FACTS**

2 Plaintiff Hilton is an American businesswoman, model, actress and recording  
3 artist. Some of her most recognizable screen work has been alongside friend Nicole  
4 Richie in *The Simple Life*. (FAC, ¶ 6)

5 The *Simple Life* is a television series broadcast on Fox since 2003. The  
6 comedic show depicts two wealthy young socialites (Hilton and Richie) as they  
7 struggle to do manual, low-paying jobs such as cleaning rooms, doing farm work,  
8 serving meals in fast-food restaurants and working as camp counselors. (FAC, ¶ 7)

9 The idea for *The Simple Life* was generated in Fox's comedy department.  
10 Brad Johnson, senior VP of comedy development, has said that *The Simple Life*  
11 was born out of a challenge from Fox Television Entertainment Group Chairman  
12 Sandy Grushow and News Corp. President and Chief Operating Officer Peter  
13 Chernin to find another way to do comedies outside of the traditional sitcom format.  
14 *The Simple Life* was inspired by *Green Acres*, a sitcom about a New York society  
15 couple who moved to a farm. Cameras would observe as the former socialites,  
16 deprived of access to their bank accounts and Beemers, attempt to get a job, buy  
17 groceries and fit in with average Americans. At the same time the comedy  
18 department was developing the idea, Paris Hilton was meeting with the studio's  
19 casting department. The two departments talked and realized they had their show:  
20 Send Hilton and Richie to live and work on a farm. (Blakely Decl., Exh. 1)

21 In the first season, Hilton and Richie moved in with the Leding family in  
22 Altus, Arkansas for a month. What was supposed to be an experiment in learning  
23 how to adapt to doing chores and getting their hands dirty turned out to be a failure.  
24 In the process they would ruin a dairy farmer's milk supply, wreak havoc at a local  
25 Sonic Drive-In and take advantage of an employer's credit card, ultimately getting  
26 fired from every job they took up.

27 The show started airing on Fox December 2, 2003, to well received ratings.  
28 The premiere episode drew 13 million viewers, increasing Fox's Adults 18-49 rating

1 a phenomenal 79%. The second episode drew 13.3 million viewers, an increase of  
2 200,000 viewers over its premiere. During the airing of the series, Fox added two  
3 extra episodes and a reunion special, which continued to draw ratings. The DVD of  
4 this season was released in U.S. on January 20, 2004. Some international releases  
5 included the bonus episode and the reunion episode.<sup>1</sup> (Blakely Decl., Exh. 2)  
6 In the December 9, 2003 episode, Sonic Burger Shenanigans, Hilton and Richie  
7 take a job at a fast-food joint, only to find that serving the public is their private  
8 nightmare. Showing up 45 minutes late, the girls tasks included cooking food,  
9 serving customers and taking out trash. (FAC, ¶8; Blakely Decl., Exh. 3)

10 During the filming of the Simple Life, Ms. Hilton coined the phrase “That’s  
11 Hot,” which she has since registered on the Principal Register of the United States  
12 Patent & Trademark Office as Registration No. 3209488, for International Class 25.  
13 (FAC, ¶9)

14 Defendant Hallmark, a privately owned American company based in Kansas  
15 City, Missouri, is the largest manufacturer of greeting cards in the United States.  
16 Approximately 50% of greeting cards sent in the United States every year are  
17 manufactured by Hallmark. The company's cards are sold under various brand  
18 names and can be found in more than 43,000 US retail stores. Hallmark has  
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20 <sup>1</sup>The Simple Life has received and/or was nominated for the following  
21 awards:

- 22 • 2004, won ASCAP Award for Top TV Series.
- 23 • 2004, won BMI TV Music Award
- 24 • 2004, nominated for Teen Choice Awards for Choice Reality/Variety  
25 TV Star - Female Paris Hilton and Choice TV Show - Reality/Variety.
- 26 • 2005, nominated for Teen Choice Award, Choice TV Show: Reality  
27 and for 'The Simple Life: Interns'.
- 28 • 2006, nominated in the Teen Choice Awards for TV - Choice Reality  
Star (Female) - Paris Hilton.
- 2007, nominated in the Teen Choice Awards for Choice TV: Female  
Reality/Variety Star - Paris Hilton.

1 approximately 16,000 employees and its revenues in 2006 were \$4.1 billion.  
2 Hallmark’s Chairman, Donald J. Hall, who along with his sisters inherited and now  
3 own 65% of the company, is one of the wealthiest persons in the world, with a net  
4 worth of \$1.9 billion. As Forbes Magazine stated, the Hall family has “turned fuzzy  
5 feelings into hard cash.” (Blakely Decl., Exh. 4)

6 In or around 2007 Hallmark manufactured, published, released and  
7 distributed greeting cards wherein an actual photograph of Ms. Hilton’s face is  
8 superimposed over a cartoon of a waitress serving food to a patron, along with the  
9 dialogue: “Don’t touch that, it’s hot. What’s hot? That’s hot.” The card is entitled  
10 “Paris’s First Day as a Waitress.” Hallmark’s “That’s Hot” cards have a sales price  
11 of \$2.49 each and have been sold throughout the United States. (FAC, ¶¶ 10 and  
12 11)

### 13 **III. ARGUMENT**

14 California Code of Civil Procedure Section 425.16 is directed against suits  
15 known as strategic lawsuits against public participation, or SLAPP suits. These are  
16 “ “civil lawsuits ... aimed at preventing citizens from exercising their political  
17 rights or punishing those who have done so.” [Church of Scientology v.  
18 Wollersheim (1996) 42 Cal.App.4th 628, 645] Such suits “are brought, not to  
19 vindicate a legal right, but rather to interfere with the defendant's ability to pursue  
20 his or her interests.” [ Id. at 645] The aim is to force the defendants to devote time,  
21 energy and money to combat the lawsuit long enough for the plaintiff to accomplish  
22 his underlying objectives. [Id.]

23 The party making a special motion to strike must make a *prima facie* showing  
24 that the plaintiff's cause of action arises from the defendant's free speech or petition  
25 activity. [Navellier v. Sletten (2002) 29 Cal.4th 82, 88; Church of Scientology at  
26 646] Once the defendant makes a *prima facie* showing, “the burden shifts to the  
27 plaintiff to ... ‘make a *prima facie* showing of facts which would, if proved at trial,  
28 support a judgment in plaintiff's favor.’ ” [Church of Scientology at 646]

1 In making these determinations, the trial court considers the pleadings and the  
2 supporting and opposing affidavits setting forth the facts upon which liability or  
3 defense is predicated. [§ 425.16, subd. (b)(2); Church of Scientology at 646]  
4 Similar to a motion for summary judgment, the court does not weigh the credibility  
5 or comparative strength of the evidence. [Soukup v. Law Offices of Herbert Hafif  
6 (2006) 39 Cal. 4<sup>th</sup> 260, 291]

7 Advertising or commercial speech do not raise a public issue within the  
8 meaning of §425.16. Therefore, false advertising and publicity claims generally  
9 cannot be stricken as SLAPP suits. [Rezec. v. Sony Pictures Inc. (2004) 116 Cal.  
10 App. 4<sup>th</sup> 135, 140; Scott v. Metabolife Int’l, Inc. (2004) 115 Cal. App. 4<sup>th</sup> 404, 423]  
11 For purposes of the anti-SLAPP statute, if Hallmark’s unauthorized use of Hilton’s  
12 image is primarily for a commercial purpose, the statute does not apply because the  
13 use did not “further[ ] ... [Hallmark’s] right of petition or free speech [arising] under  
14 the United States or California Constitution in connection with a public issue.” [§  
15 425.16, subd. (b)(1); see Nagel v. Twin Laboratories, Inc. (2003) 109 Cal.App.4th  
16 39, 46-51;Rezec]

17 When the communicator has an economic motivation in publishing the  
18 communication, there is “strong support” for the conclusion that the communication  
19 is commercial speech. [Bolger v. Youngs Drug Products Corp. (1983) 463 U.S. 60,  
20 66-67; Kirby at 140] This is true even though the communication also discusses  
21 important public issues. [Id.]

22 “In typical commercial speech cases, the speaker is likely to be someone  
23 engaged in commerce-that is, generally, the production, distribution, or sale of  
24 goods or services-or someone acting on behalf of a person so engaged, and the  
25 intended audience is likely to be actual or potential buyers or customers of the  
26 speakers goods or services, or persons acting for actual or potential buyers or  
27 customers, or persons (such as reporters or reviewers) likely to repeat the message  
28 to or otherwise influence actual or potential buyers or customers....

1 “[I]n deciding whether speech is commercial, two relevant considerations are  
2 advertising format and economic motivation.... These considerations imply that  
3 commercial speech generally or typically is directed to an audience of persons who  
4 may be influenced by that speech to engage in a commercial transaction with the  
5 speaker or the person on whose behalf the speaker is acting. Speech in advertising  
6 format typically, although not invariably, is speech about a product or service by a  
7 person who is offering that product or service at a price, directed to persons who  
8 may want, and be willing to pay for, that product or service.... Economic motivation  
9 likewise implies that the speech is intended to lead to commercial transactions,  
10 which in turn assumes that the speaker and the target audience are persons who will  
11 engage in those transactions, or their agents or intermediaries. [Kasky v. Nike, Inc.,  
12 27 Cal.4th 939, 960-961]

13 Because the use in question is primarily commercial, Hallmark has failed to  
14 make a *prima facie* showing that its unauthorized use of Plaintiff’s image arose from  
15 protected First Amendment rights. However, as will now be discussed Plaintiff has  
16 stated a viable cause of action for her claims.

17 **A. PLAINTIFF’S CLAIMS ARE NOT BARRED BY THE FIRST**  
18 **AMENDMENT**

19 **1. The First Amendment Does Not Immunize the Exploitative**  
20 **Use of A Person’s Name and Likeness**

21 Although the Constitution gives the media wide latitude to engage in speech,  
22 commentary and entertainment, First Amendment immunity is not without  
23 limitations. The media’s rights must take into account a plaintiff’s competing  
24 interest in protecting his/her identity from unauthorized use. This was expressly  
25 recognized by the Supreme Court in Zacchini v. Scripps-Howard Broadcasting Co.,  
26 433 U.S. 562 (1977)(First Amendment did not provide defense to plaintiff’s right of  
27 publicity claim). The Ninth Circuit has also recognized the right of publicity and  
28 the right of celebrities to control the use of their identities. [ See, e.g. Midler v. Ford



1 Motor Co., 849 F.2d 460 (9<sup>th</sup> Cir. 1988); White v. Samsung Electronics, 971 F.2d  
2 1395 (9<sup>th</sup> Cir. 1992); Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9<sup>th</sup> Cir. 1992); Abdul-  
3 Jabbar v. General Motors Corp., 85 F.3d 407, 410 (9<sup>th</sup> Cir. 1996)]

4 In some cases, the right of publicity will take a backseat to the First  
5 Amendment, because the defendant's use of the plaintiff's name or likeness is  
6 reasonably related to a matter of public interest, or because it constitutes another  
7 form of speech that the law has determined may outweigh the right of publicity  
8 under particular circumstances. However, when a defendant takes for itself a  
9 person's property- the right to control the use to which his identity is put - to  
10 exploit or attract attention to itself, the First Amendment justifications disappear,  
11 and the right to publicity will prevail. As noted by the Ninth Circuit, if the purpose  
12 of the use of a person's identity is to exploit that individual, there will be no First  
13 Amendment immunity. [Midler at 462] "The First Amendment is not a license to  
14 trespass, to steal, or to intrude . . ." [Dietemann v. Time, Inc., 449 F.2d 245, 249  
15 (9<sup>th</sup> Cir. 1971); see also Lugosi v. Universal Pictures, (1979) 25 Cal. 3d 813, 851]

16 The only United States Supreme Court case to rule on the interaction of the  
17 First Amendment and the right of publicity is Zacchini where the High Court held  
18 that even a clearly newsworthy report using a plaintiff's name and likeness in a  
19 television newscast may violate his right of publicity without implicating the First  
20 Amendment.

21 In Zacchini the issue was whether a local television station's newscast  
22 showing plaintiff's "human cannonball" act violated his right of publicity. The  
23 Supreme Court held that the station's interest in free speech did not permit it to  
24 broadcast the plaintiff's performance. Zacchini, 433 U.S. at 575. The television  
25 station's broadcast was completely truthful and it even praised the plaintiff's  
26 performance and urged the public to go see it. Yet, its violation of the plaintiff's  
27 right to publicity was not immunized by the First Amendment.

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1 In White v. Samsung the hostess of “Wheel of Fortune” sued Samsung after it  
2 ran an advertisement of a robot, dressed in a wig, gown, and jewelry which  
3 resembled White’s hair and dress. The robot was placed next to a game board  
4 instantly recognizable as the Wheel of Fortune game show set. White sued the  
5 electronic manufacturer alleging its product ads violated the California Civil Code,  
6 common-law right to publicity and privacy, and the Lanham Act. Samsung  
7 attempted to shield its conduct behind the “parody” defense, arguing that the ad’s  
8 spoof of Vanna White was protected by the First Amendment. The Ninth Circuit  
9 rejected this argument, stating that “The ad’s spoof of Vanna White and Wheel of  
10 Fortune is subservient and only tangentially related to the ad’s primary message:  
11 ‘buy Samsung VCRs.’” [White at 1401] The Ninth Circuit further stated that “the  
12 difference between “parody” and “knock-off” is the difference between fun and  
13 profit.” [Id.]

14 Similar to White where Samsung, realizing that the First Amendment did not  
15 protect commercial speech, “attempt[ed] to elevate its ad above the status of  
16 garden-variety commercial speech by pointing to the ad’s parody of Vanna White,”<sup>2</sup>  
17 Hallmark argues that its use of Plaintiff’s photo is not exploitive, but rather a  
18 parody. As instructed by the Supreme Court and Ninth Circuit, the right to  
19 publicity permits the use of a person’s likeness only to the limited extent reasonably  
20 required to convey the news to the public, or in this case, to parody that individual,  
21 and it cannot be primarily related to a commercial purpose. [Zacchini; Downing]  
22 Therefore, the proper focus is whether Plaintiff’s photograph served primarily as an  
23 “exploitive” purpose.

24 As J. Thomas McCarthy, a leading scholar on the right to publicity, has  
25 written, “the question to ask for purposes of First Amendment analysis is, ‘what is  
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27  
28 <sup>2</sup>White at 1401, fn.3

1 the *primary* purpose of this media use of human identity?” McCarthy, The Rights  
 2 of Publicity and Privacy, §8.14 at 103 (2007) (emphasis in original).

3 Given the facts of Zacchini, where the broadcast of the human cannonball  
 4 performance by a television station at least involved some aspect of  
 5 newsworthiness, Downing, where Abercrombie’s Quarterly contained articles of  
 6 public interest, or White, which involved a parody, all of which were to some  
 7 degree “expressive”, it is a’ fortiori that Hallmark cannot avail itself of the First  
 8 Amendment. At a minimum, there would be triable issues of fact as to whether  
 9 Hallmark’s use of Plaintiff’s name and likeness was essentially “exploitive,” using  
 10 her name and likeness to “attract attention” or was essentially “informative or  
 11 cultural,” and if it was essentially informative, whether, under these circumstances,  
 12 that informative purpose is outweighed by the interest of protecting an individual’s  
 13 right of publicity. However, an examination of the “That’s Hot” card and the  
 14 circumstances surrounding its use would seem to resolve those issues quite clearly  
 15 in favor of Plaintiff. Hallmark cannot disguise the fact that the use of Plaintiff’s  
 16 image on its greeting cards was for the commercial purpose of selling more cards  
 17 and making money.<sup>3</sup> “Unless the First Amendment bars all right to publicity  
 18 actions – and it does not – then it does not bar this case.” [White at 1401, fn.3.

19 **2. Downing v. Abercrombie & Fitch: The Case Hallmark**  
 20 **Doesn’t Want to Talk About; and Why**

21 This is not the first case in which the parties’ respective attorneys have  
 22 squared off against one another on the issue of whether or not the First Amendment  
 23 barred a right of publicity action. In Downing a group of legendary surfers  
 24 (represented by Hilton’s counsel in this case) depicted in photograph of a surfing  
 25

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26 <sup>3</sup>The speaker, Hallmark, is engaged in commerce. The audience is  
 27 Hallmark’s actual or potential customers. The cards are economically motivated  
 28 because they are intended to lead to commercial transactions. [Kasky v. Nike  
 (2002) 27 Cal. 4<sup>th</sup> 939, 960-961]

1 competition held over 30 years earlier brought suit against clothing retailer  
2 Abercrombie & Fitch (represented by Hallmark’s counsel in this case) which had  
3 used the photograph without their permission in surf-themed Quarterly catalog,  
4 asserting statutory and common law commercial misappropriation claims under  
5 California law, and also asserting Lanham Act claims.

6 As in this present case, in Downing Abercrombie/Hallmark’s counsel argued  
7 (citing much of the same case law contained in their present motion) that the First  
8 Amendment immunized Abercrombie’s unauthorized use of the plaintiffs’ names  
9 and photos in its Quarterly because it was connected to a “newsworthy” use. This  
10 argument, and the district court’s grant of summary judgment, was soundly rejected  
11 by the Ninth Circuit.

12 Although noting that the First Amendment defense extends “to almost all  
13 reporting of recent events,” as well as to publications about “people who, by their  
14 accomplishments, mode of living, professional standing or calling, create a  
15 legitimate and widespread attention to their activities” the Ninth Circuit ruled that  
16 “the defense is not absolute”, instructing that “we must find ‘a proper  
17 accommodation between [the] competing concerns’ of freedom of speech and the  
18 right of publicity.” [Downing at 1001] The Downing court went on to hold that  
19 because the use of the plaintiffs’ photo was exploitive in nature, i.e., it was  
20 primarily related to a commercial use, it was not entitled to First Amendment  
21 protection. [Downing at 1002-1003]

22 The Downing court also made a point of distinguishing Hoffman v. Capital  
23 Cities/ABC Inc, 225 F.3d 1180 (9<sup>th</sup> Cir. 2001), a case on which Hallmark relies  
24 heavily upon in the present motion:

25 In that case, L.A. Magazine used a digitally-altered picture of  
26 Hoffman, as “Tootsie,” in a current designer dress to illustrate its  
27 “Grand Illusions” article. We concluded that such use was  
28 noncommercial speech entitled to full First Amendment protection. In  
contrast to the present case, where Abercrombie, itself, used  
Appellants' images in its catalog to promote its clothing, L.A.  
Magazine was unconnected to and received no consideration from the

1 designer for the gown depicted in the article. Further, while L.A.  
2 Magazine merely referenced a shopping guide buried in the back of the  
3 magazine that provided stores and prices for the gown, Abercrombie  
4 placed the Appellants' photograph on the page immediately preceding  
5 the "Final Heat Tees" for sale. Based on these factors, we conclude  
6 that Abercrombie's use was much more commercial in nature and,  
7 therefore, not entitled to the full First Amendment protection accorded  
8 to L.A. Magazine's use of Hoffman's image.

9 [Downing at 1003, fn. 2]

10 As in Downing, although plaintiff Hilton is a public figure and a subject of  
11 public interest, Hallmark's unauthorized use of her name and photo on its greeting  
12 cards is undeniably commercial in nature. Indeed, it is even more so than the  
13 unauthorized use of the surfer's photograph in Downing. In Downing the Ninth  
14 Circuit held that there was no First Amendment protection when the use of the  
15 surfer's photo was found to be primarily *related* to a commercial use. Here, the  
16 unauthorized use of Plaintiff's name and likeness is *inseparable* from Hallmark's  
17 commercial purpose, to sell greeting cards. Hallmark is the Goliath of greeting  
18 cards and everything it does is directed towards the singular purpose of making  
19 money. As Forbes Magazine stated, the Hall family has "turned fuzzy feelings into  
20 hard cash."

21 Given the Ninth Circuit's ruling in Downing, which is controlling authority  
22 in this case, it is understandable, if not exactly intellectually honest, why Hallmark  
23 does not even mention this case in its papers. The fact that Downing is a re-  
24 affirmation of the Ninth Circuit's prior rulings also explains why Hallmark spends  
25 much of its brief citing to non-controlling cases from other Federal Circuits.  
26 Hallmark's legal gymnastics aside, both the U.S. Supreme Court and Ninth Circuit  
27 have repeatedly held that when, as in this case, the unauthorized use of an  
28 individual's identity is primarily exploitive, it is not protected by the First  
Amendment.

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1           **3. It is In the Exclusive Province of The Jury to Decide Whether**  
2           **Hallmark’s Unauthorized Use of Plaintiff’s Name and Likeness is**  
3           **Protected by the First Amendment**

4           Stripped of its rhetoric, Hallmark’s First Amendment defense boils down to  
5 one extreme proposition: that if a clever infringer can somehow cloak its  
6 unauthorized commercial use of a celebrity’s name and likeness with any pretext of  
7 newsworthiness or parody, i.e., an “expressive” element, the infringer’s conduct is  
8 automatically immunized.<sup>4</sup> Zacchini itself would seem to dispose of this  
9 misconceived argument. The fact that a defendant’s use of a plaintiff’s name and  
10 likeness provides some entertainment or information, as the newscast in Zacchini or  
11 the parody in White certainly did, does not mean that it necessarily acquires  
12 constitutional immunity. Even in that situation, there is a weighing process  
13 evaluating such factors as the primary nature of defendant’s work, the quantum of  
14 “information” it provides and the extent of the misappropriation of the plaintiff’s  
15 name or likeness.<sup>5</sup> Such a weighing process is within the exclusive province of the  
16 trier of fact. [White at 1401; Newcombe v. Adolf Coors Company, 157 F.3d 686,  
17 693 (9<sup>th</sup> Cir.1998) (whether the use of an individual’s name and likeness is  
18 connected to commercial sponsorship “shall be a question of fact.”); Wendt at 811]

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21           <sup>4</sup>“As every marketer knows, the best way to sell is to slip the message “buy  
22 me” in between informing and entertaining the prospective customer.” McCarthy,  
23 8:16 at 107.

24           <sup>5</sup>As McCarthy instructs: “No one has an overriding constitutional ‘right’ to  
25 spray paint ‘Wintergreen for President’ or ‘No Nukes’ on the front of your house. It  
26 is no defense whatsoever for the spray painter to argue that your house is so  
27 particularly attractive and prominently situated that it is ‘necessary’ to use it as a  
28 medium for the message. Similarly, no one should have any immunizing  
constitutional ‘right’ to use your name or picture without permission as a vehicle to  
attract his or her social or political message, whether there is a false impression of  
endorsement or not.” [McCarthy].

1 Hallmark’s “Constitutionally-mandated” automatic immunization argument is  
2 further disabused by Downing, Abdul-Jabbar at 415; Eastwood v. Superior Court,  
3 149 CA.3d 409 (1983) and every other case which discusses the weighing process  
4 that must be utilized by the trier of fact when the right to publicity comes into  
5 conflict with the First Amendment. California’s Legislature has even defined this  
6 test: “It shall be a question of fact whether or not the use of the person’s name, ...  
7 photograph, or likeness was so directly connected with the commercial sponsorship  
8 or with the paid advertising as to constitute a use for which consent is required  
9 under subdivision (a).” (emphasis added) [C.C. §3344(d)]<sup>6</sup>

10 Similar to Newcombe, just because Paris Hilton may be of public interest, it  
11 does not give Hallmark the automatic right, as it suggests, to misappropriate her  
12 name and Photo for a commercial purpose. In Newcombe the Ninth Circuit

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14 <sup>6</sup>Hallmark’s reliance on Cardtoons L.C. v. Major League Baseball Players  
15 Ass’n, 95 F.3d 959, 969 (10<sup>th</sup> Cir. 1996) for the proposition that a violation of an  
16 individual’s right of publicity is automatically immune from liability is misguided.  
17 In Cardtoons, which was an action for declaratory relief, the Tenth Circuit weighed  
18 the evidence - there was no automatic immunity. Furthermore, many of the factors  
19 the court considered in ruling in favor of Cardtoons is clearly inapposite to the  
20 present case.

21 Unlike Cardtoons, where the court held that “Cardtoons ... is not merely  
22 hitching its wagon to a star” but rather has “added a significant creative component  
23 of its own to the celebrity identity,” [Id. at 976] in the present case there is nothing  
24 transformative about Hallmark’s card. Hallmark has not created a fanciful  
25 caricature of Ms. Hilton and placed her in a new or unusual context. Instead,  
26 Hallmark has taken the most literal depiction of Ms. Hilton possible, her  
27 photograph, along with her name, and placed her in the exact same context as a role  
28 she played in the television show The Simple Life.

Finally, to the extent the Tenth Circuit’s opinion in Cardtoons conflicts with  
the numerous Ninth Circuit cases such as Downing, White, Midler, Abdul-Jabar,  
etc., which hold that the determinating factor is whether the primary *purpose* of the  
use is primarily exploitative, Cardtoons must be rejected.

1 reversed a summary judgment, holding that the District Court improperly ignored  
2 the “express command” that the connection between the defendants’ use of a  
3 celebrity’s likeness and the commercial sponsorship is a matter of fact, that must be  
4 left to the jury to decide. [Newcombe at 694; See also, Abdul-Jabbar at 1401  
5 (“While [plaintiff’s] basketball record may be said to be ‘newsworthy,’ its use is not  
6 automatically privileged.”); Wendt at 811 (“the ultimate issue for the jury to decide  
7 is whether the defendants are commercially exploiting the likeness of the figures to  
8 Wendt and Ratzenberger intending to engender profits from their enterprises.)]

9 As demonstrated by the over four hundred pages of exhibits attached to  
10 Hallmark’s Motion to Dismiss, Hallmark is asking this Court to weigh the evidence.  
11 However, to do so would be in contravention of the foregoing controlling authority  
12 which holds that whether an unauthorized use of a person’s identity is primarily  
13 exploitive is a question of fact for a jury to decide.

14 **4. Hallmark’s “That’s Hot” Greeting Card is not**  
15 **“Transformative”**

16 In Comedy III the California Supreme Court, borrowing from Federal  
17 Copyright law, developed the “transformative” test to determine whether an  
18 expressive work merely appropriates a celebrity’s economic value, and thus is not  
19 entitled to First Amendment protection, or has been transformed into a creative  
20 product that the First Amendment protects. The transformative, Comedy III test  
21 calls for a careful evaluation whether the use of the celebrity's image or identity is  
22 of the transformative type that advances knowledge and the progress of the arts or  
23 whether it merely repackages, free-riding on the celebrity's commercial value.

24 The “inquiry is whether the celebrity likeness is one of the 'raw  
25 materials' from which an original work is synthesized, or whether the  
26 depiction or imitation of the celebrity is the very sum and substance of  
27 the work in question. We ask, in other words, whether a product  
28 containing a celebrity's likeness is so transformed that it has become  
primarily the defendant's own expression rather than the celebrity's  
likeness. And when we use the word 'expression,' we mean expression  
of something other than the likeness of the celebrity.... [A]n artist  
depicting a celebrity must contribute something more than a ' 'merely



1 trivial' variation, [but must create] something recognizably his own', in  
2 order to qualify for legal protection. [W]hen an artist's skill and talent  
3 is manifestly subordinated to the overall goal of creating a  
4 conventional portrait of a celebrity so as to commercially exploit his or  
5 her fame, then the artist's right of free expression is outweighed by the  
6 right of publicity.

7 [Comedy III at 408]

8 In Comedy III California's Supreme Court held that the right of publicity  
9 prevailed over the First Amendment where an artist, who, without permission, sold  
10 lithographs and t-shirts bearing a likeness of The Three Stooges reproduced from a  
11 charcoal drawing the artist had made. The court held that:

12 The artist's undeniable skill is manifestly subordinated to the overall  
13 goal of creating literal, conventional depictions of The Three Stooges so as to  
14 exploit their fame. Indeed, were we to decide that [the artist's] depictions  
15 were protected by the First Amendment, we cannot perceive how the right of  
16 publicity would remain a viable right other than in cases of falsified celebrity  
17 endorsements. Moreover, the marketability and economic value of [the  
18 artist's] work derives primarily from the fame of the celebrities depicted.  
19 While that fact alone does not necessarily mean the work receives no First  
20 Amendment protection, we can perceive no transformative elements in  
21 [the] works that would require such protection.

22 [Id. at 409]

23 Winter v. DC Comics (2003) 30 Cal. 4<sup>th</sup> 881 is an example of a case where  
24 the use in question was held to be transformative. In that case, the defendant  
25 published a series of comics featuring two half-worm, half-human characters based  
26 on singers Edgar and Johnny Winter. Both characters had long white hair and  
27 albino features similar to the Winter brothers. The court held that the Winters were  
28 merely part of the raw material from which the comic's plot and characters were  
fashioned. In addition, the characters were distorted pictures of the Winters, in  
stark contrast to the near literal depictions of the Three Stooges in Comedy III, the  
comic book characters depicted were "fanciful, creative characters, not pictures of  
the Winter brothers." [Id. at 892]

As this Court can readily see, this present case is much more akin to Comedy  
III than Winter. Hallmark has not added significant creative elements to create new  
expression and its use of Plaintiff's identity is not transformative.

1 The premise of the comedic television show, The Simple Life, was to depict  
2 two wealthy young socialites, Hilton and Richie, as they struggle to do manual,  
3 low-paying jobs such as cleaning rooms, doing farm work, or serving meals in  
4 restaurants; i.e., performing service jobs which are their own “private nightmare.”  
5 The Simple Life is, as intended, a spoof of Hilton’s lifestyle.

6 Hallmark has done nothing more than take a literal depiction of Ms. Hilton, a  
7 photograph of her face, along with her name, and placed her in the exact same  
8 context as a role she played in The Simple Life: the episode entitled Sonic Burger  
9 Shenanigans where Ms. Hilton works as a waitress serving customers. For good  
10 measure, Hallmark has also misappropriated Plaintiff’s trademarked phrase, “That’s  
11 Hot”, which she repeatedly used for comedic effect in the show. Put simply,  
12 Hallmark has stolen Ms. Hilton’s act for its own personal gain.

13 As expressly noted in Comedy III, such use is not transformative and  
14 therefore not protected by the First Amendment.

15 **B. PLAINTIFF IS ENTITLED TO DISCOVERY**

16 Because an anti-SLAPP motion is a pseudo motion for summary judgment,  
17 the court is allowed to review evidence submitted in connection therewith. In the  
18 present case, the parties have just recently had their FRCP 26 meeting and therefore  
19 Plaintiff has yet to obtain any discovery from Defendant. Although Plaintiff  
20 believes that she has clearly established a *prima facie* case against Hallmark,  
21 Plaintiff requests the ability to conduct discovery regarding the issues raised in  
22 Hallmark’s motion if this Court is in any way inclined to same.

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