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8
9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11

12 PARIS HILTON, an individual,
13 Plaintiff,
14 vs.
15 HALLMARK CARDS, a Missouri
16 corporation; and DOES 1 through 10
inclusive,
17 Defendants.

CASE NO. CV 07-05818 PA (AJWx)

**REPLY BY DEFENDANT
HALLMARK CARDS,
INCORPORATED IN SUPPORT
OF SPECIAL MOTION TO
STRIKE UNDER C.C.P. § 425.16**

Date: December 17, 2007
Time: 1:30 p.m.
Judge: Hon. Percy Anderson

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 In her Opposition (“Opp.”) to Hallmark’s Special Motion to Strike, Hilton
4 concedes that her first claim for relief, for misappropriation of right of publicity, is
5 based on Hallmark’s speech in connection with issues of public interest. *See* Opp. at
6 12 (Hilton concedes that she is a “public figure and a subject of public interest”).
7 Moreover, Hilton does not dispute the detailed showing set forth in the Motion that
8 there is a public interest in (1) the activities of public figures; (2) parodies, such as
9 Hallmark’s parody of Hilton in the Card; (3) speech contained in greeting cards; and
10 (4) the injection by celebrities into the public vernacular of catch-phrases such as
11 Hilton’s repeated and vapid incantation of the phrase “that’s hot.” Having conceded
12 that the subject of the Card is a matter of public interest, the burden squarely falls on
13 Hilton’s shoulders to demonstrate a probability of success on her claim. Because
14 Hilton did not meet that burden, the claim should be stricken.

15 Hilton’s Opposition to the Motion to Strike, like her opposition to the Motion to
16 Dismiss, rests on the argument that the Card is offered for sale to the public and thus is
17 “commercial speech.” Therefore, she argues the anti-SLAPP statute does not apply
18 and her claims are not barred. That argument, however, has been categorically
19 rejected by all courts that have faced it, and the few cases Hilton cites in her
20 Opposition are of no avail to her. Hilton’s failure to address controlling authority,
21 citation to inapplicable cases and misstatement of the facts do not defeat the legally
22 mandated conclusion that her claim must fail.

23 **II. THE ANTI-SLAPP STATUTE APPLIES TO HILTON’S CLAIM**

24 In her Opposition, Hilton does not dispute that: (1) the anti-SLAPP statute must
25 be applied broadly; (2) the anti-SLAPP statute protects media and entertainment
26 defendants such as Hallmark; (3) the anti-SLAPP statute applies to common law right
27 of publicity claims, such as Hilton’s first claim for relief; (4) Hilton’s right of publicity
28 claim is based on Hallmark’s speech; or (5) there is a public interest in activities of

1 public figures, parodies of such individuals, speech contained in greeting cards, the
2 methods of communication by celebrities such as Hilton, and humor that is designed to
3 skewer celebrities and popular culture.

4 Rather than dispute any of this, Hilton rests her entire Opposition on the
5 argument that the Motion to Strike fails because the use of Hilton's "name and photo
6 was primarily for a commercial purpose." Opp. at 1. Thus, if that argument fails –
7 and it does – the Motion to Strike must be granted.

8 **A. The False Advertising "Commercial Speech" Cases Relied Upon By**
9 **Hilton Do Not Save Her Claim**

10 Hilton does not dispute that the anti-SLAPP statute is to be "construed broadly"
11 and that, consistent with this broad construction, Section 425.16 is routinely applied to
12 protect media and entertainment defendants. Instead, Hilton responds that false
13 advertising or commercial speech does not raise a public issue within the meaning of
14 Section 425.16 and thus such claims generally cannot be stricken as SLAPP suits.
15 Opp. at 6. Hilton relies on *Rezec v. Sony Pictures Inc.*, 116 Cal.App.4th 135 (2004),
16 *Scott v. Metabolife Int'l, Inc.*, 115 Cal.App.4th 404 (2004), *Nagel v. Twin*
17 *Laboratories, Inc.*, 109 Cal.App.4th 39 (2003) and *Kasky v. Nike, Inc.*, 27 Cal.4th 939
18 (2002) for this contention.

19 At the outset, one thing should be perfectly clear: not a single one of those
20 cases involved a right of publicity claim. Rather, they all dealt with allegedly false
21 statements in advertisements. In *Rezec*, a motion picture studio advertised films by
22 falsely portraying a person as a film critic for a newspaper and attributing to him
23 laudatory reviews about the films. 116 Cal.App.4th at 137. In response, a group of
24 film viewers filed a lawsuit against the studio under California's False Advertising law
25 (Cal. Bus. & Prof. Code § 17200) and Consumers Legal Remedies Act (Cal. Civ. Code
26 § 1750 *et. seq.*). The studio filed a Motion to Strike under the Anti-SLAPP statute.
27 The trial court denied the motion and was affirmed on appeal. The court held that the
28 studio's advertisements for its films, which included the spurious reviews, were

1 commercial speech governed by the consumer protection laws asserted in the case
2 rather than the anti-SLAPP statute, which is directed at non-commercial speech.
3 Because “commercial speech” is not an act in furtherance of the right of free speech,
4 the Anti-SLAPP statute did not apply. *Id.* at 140.

5 Importantly, the court acknowledged that the films that were advertised
6 “constitute noncommercial speech under the First Amendment notwithstanding any
7 economic motivation in making them.” *Id.* at 142. Had the claims related to the films
8 themselves instead of advertisements for them, the anti-SLAPP statute would have
9 applied. Thus, *Rezec* **supports** the application of the anti-SLAPP statute to Hilton’s
10 claim. This is not a case where Hallmark has issued false advertisements about the
11 nature or quality of its cards. Rather, Hilton’s claim relates to the expressive content
12 of the Cards themselves. Just as *Rezec* noted that the expressive content of a film is
13 fully protected by the First Amendment despite the “economic motivation” in making
14 such films, the Card is likewise fully protected by the First Amendment, and the anti-
15 SLAPP statute applies despite Hilton’s contention that Hallmark has an “economic
16 motivation” (Opp. at 6) in distributing such Cards.

17 In *Metabolife*, plaintiff sued for personal injuries after suffering a stroke
18 allegedly attributable to Metabolife dietary supplements. Plaintiff included a false
19 advertising claim under California’s Business and Professions Code, alleging that
20 Metabolife’s advertisements misled users about the product. Metabolife brought a
21 Motion to Strike the false advertising claims under the anti-SLAPP statute. The court
22 held that the anti-SLAPP statute did not apply because “commercial speech about the
23 safety of a product by the manufacturer of that product for the purposes of the sale of
24 the product does not constitute an issue of public interest for purposes” of the anti-
25 SLAPP statute. *Metabolife*, 115 Cal. App. 4th at 418. Likewise, in *Nagel*, defendant
26 manufactured and marketed dietary supplements containing ephedra alkaloids.
27 Plaintiffs brought unfair competition and false advertising claims against defendant
28 alleging that defendant’s statement that the ephedrine in its product was “standardized”

1 was false and misleading. Defendant moved to strike under the anti-SLAPP statute,
 2 but the court held that the statute did not apply to the list of ingredients found on the
 3 product and on defendant's website. *Nagel*, 109 Cal.App.4th at 46.

4 The facts in *Metabolife* and *Nagel* are unlike any facts in this case.¹ Hilton does
 5 not allege that Hallmark has falsely advertised the nature and quality of its goods.
 6 Rather, she complains of the content of the Card itself. Moreover, the cases cited by
 7 Hilton stand, irrelevantly, for the proposition that pure "commercial speech" is not
 8 subject to an anti-SLAPP motion. As set forth below and in the Reply in Support of
 9 Hallmark's Motion to Dismiss (hereinafter "Dismiss Reply" which is incorporated
 10 herein by reference), the use of Hilton's name and likeness in the Card to parody her
 11 and comment on popular culture clearly does not constitute "commercial speech."²

12 Indeed, Hilton's exact argument – *i.e.*, that because Hallmark seeks to make
 13 money on the Card it is "commercial speech" and not the proper subject of an anti-
 14 SLAPP motion – was specifically rejected in *Kronemyer*. There, defendant operated
 15

16
 17 ¹ *Kasky* involved a press release issued by the Nike shoe company in which Nike discussed
 18 its labor practices and the working conditions in the factories that make its products. The
 19 court held that the press release was "commercial speech" primarily because the press release
 20 "made representations of fact about [Nike's] own business operations for the purpose of
 21 promoting sales of its products." *Kasky*, 27 Cal.4th at 946. Not only do the facts distinguish
 22 *Kasky* from the issues presented here, but *Kasky* was also **not** an anti-SLAPP case and
 23 therefore has no bearing on this matter. *Kronemyer v. Internet Movie Database, Inc.*, 150
 24 Cal.App.4th 941, 948 (2007) (*Kasky* did not involve a motion to strike and therefore "is not
 25 helpful" on the issue of whether a particular action comes within the anti-SLAPP statute). In
 26 any event, the *Kasky* court acknowledged that to the extent the press release contained
 27 "expressions of opinion or points of view on general policy questions" then the speech "is
 28 noncommercial speech subject to full First Amendment protection." *Kasky* at 967.

² To the extent Hilton is asserting that her claim is like a "false advertising" claim because the
 Card implies Hilton's endorsement and thus it is "commercial speech," such an argument was
 rejected in *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184-86 (9th Cir. 2001).
 Moreover, there can be no such false impression because the parodic nature of the Card
 makes it clear the Card is not endorsed by Hilton. See *Burnett v. Twentieth Century Fox Film
 Corp.*, 491 F. Supp. 2d 962, 972 (C.D. Cal. 2007) (granting motion to dismiss, holding that
 "no reasonable viewer would mistake" plaintiff as anything but the target of a parody).

1 an internet website that provided information concerning films, television, actors and
 2 other entertainment industry professionals. Plaintiff alleged that he had been a
 3 producer on the movie *My Big Fat Greek Wedding* but that defendant failed to list this
 4 credit on its internet database. Plaintiff brought a declaratory relief action, seeking to
 5 require defendant to list plaintiff's credit. Defendant brought a motion to strike the
 6 action under the anti-SLAPP statute.

7 In response to the anti-SLAPP motion, plaintiff asserted that defendant's
 8 website "constitutes unprotected commercial speech because [defendant] earns money
 9 from the Web site." *Id.* at 948. The court rejected that argument, holding that the
 10 website was not commercial speech and the action was subject to an anti-SLAPP
 11 motion. In particular, the court held that if plaintiff's position "that the prospect of
 12 some financial benefit from a publication places the material in the area of
 13 'commercial speech,' it would include virtually all books, magazines, newspapers, and
 14 news broadcasts. There is no authority for so sweeping a definition." *Id.* at 949.

15 Accordingly, the anti-SLAPP statute applies to Hilton's claim.

16 **III. HILTON DID NOT AND CANNOT MEET HER BURDEN TO**
 17 **DEMONSTRATE THAT SHE PROBABLY WILL PREVAIL**

18 "[A] defendant's anti-SLAPP motion should be granted when a plaintiff
 19 presents an insufficient legal basis for the claims." *New.Net, Inc. v. Lavasoft*, 356
 20 F.Supp.2d 1090, 1099 (C.D.Cal. 2004). Here, as a matter of law, Hilton's claims are
 21 barred by the First Amendment.

22 Hilton acknowledges that the First Amendment "gives the media wide latitude
 23 to engage in speech, commentary and entertainment" and that the First Amendment
 24 "permits the use of a person's likeness ... to parody that individual." *Opp.* at 6-8.
 25 Moreover, Hilton does not dispute that the First Amendment protects cartoons and
 26 caricatures (*Opp.* at 15), parodies of celebrities (*Opp.* at 8) and greeting cards which,
 27 as one attachment to Hilton's Opposition notes, help people "express their feelings and
 28 touch the lives of others." *Blakely Decl.*, Ex. 4, p. 20. In addition, Hilton concedes

1 that she is a “public figure and a subject of public interest” (Opp. at 13). Finally,
 2 Hilton admits that the Card is similar to the “spoof of Hilton’s lifestyle” (Opp. at 15)
 3 presented in Hilton’s show *The Simple Life*.

4 Thus, as a parody, the Card’s depiction of Hilton is protected by the First
 5 Amendment. *See Cardtoons v. M.L.B. Players*, 95 F.3d 959, 972 (10th Cir. 1996)
 6 (trading card parodies protected); *Winter v. DC Comics*, 30 Cal.4th 881, 890 (2003)
 7 (cartoon parody of celebrities protected); *Kirby v. Sega*, 144 Cal.App.4th 47, 54 (2006)
 8 (use in video game protected); *New Kids on the Block v. News America Publ’g, Inc.*,
 9 971 F.2d 302, 309 (9th Cir. 1992) (900 number survey about band protected); *World*
 10 *Wrestling Federation Entert., Inc. v. Big Dog Holdings*, 280 F.Supp.2d 413, 445
 11 (W.D. Penn. 2003) (images on t-shirts that “poke[d] fun at celebrities and societal
 12 icons” protected). Hilton’s protestations that the First Amendment does not dispose of
 13 her claim are unavailing.

14 **A. *Downing, Zacchini And The Other Cases Cited In The Opposition***
 15 ***Are Inapplicable And Do Not Save Hilton’s Claim***

16 Having basically conceded the factual basis for striking her claim, Hilton
 17 ignores or fails to distinguish the controlling law.³ Rather, Hilton relies on cases that
 18 are irrelevant to the issues here. As set forth in the Dismiss Reply, in all of the cases
 19 cited by Hilton other than *Zacchini*, the defendant used a person’s identity to market an
 20 unrelated consumer product.⁴ Such use is entirely different from the use here, which
 21

22 _____
 23 ³ Hilton’s Opposition ignores *Kirby*, *Wrestling*, *Daly v. Viacom*, 238 F.Supp.2d 118
 24 (N.D.Cal. 2002); *Dora v. Frontline Video*, 15 Cal.App.4th 536 (1993); *Guglielmi v. Spelling-*
 25 *Goldberg Prods*, 25 Cal. 3d 860 (1979); *Polydoros v. Twentieth Century Fox*, 67 Cal.App.4th
 318 (1997) and *ETW Corp. v. JirehPubl’s. Inc.*, 332 F.3d 915 (6th Cir. 2003).

26 ⁴ *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1003 n.2 (9th Cir. 2001); *Midler v. Ford*,
 27 849 F.2d 460 (9th Cir. 1988); *Abdul-Jabbar v. General Motors*, 978 F.2d 1093 (9th Cir.
 28 1992); *Waits v. Frito-Lay*, 978 F.2d 1093 (9th Cir. 1992); *White v. Samsung Electronics*, 971
 F.2d 1395 (9th Cir. 1992); *Newcombe v. Adolf Coors Company*, 157 F.3d 686 (9th Cir.
 1998); *Onassis v. Christian Dior*, 472 NYS 2d 254 (1984).

1 was in a greeting card that pokes fun at Hilton and her mode of expression and which
2 is not used in advertisements and commercials to market an unrelated product.

3 Hilton's reliance on the inapposite and routinely distinguished case of *Zacchini*
4 *v. Scripps-Howard Broadcasting Co.* 443 U.S. 562 (1977) is similarly misplaced and
5 does not stave off dismissal. In *Zacchini*, a local television station aired a performer's
6 entire 15-second "human cannonball" act on the evening news without his consent.
7 The Supreme Court, in a holding limited to the precise facts before the Court, held that
8 the First Amendment did not bar Zacchini's right of publicity claim because the
9 television station aired Zacchini's "entire act." *Zacchini*, 443 U.S. at 578-79.

10 The Supreme Court distinguished what happened to Zacchini from the usual
11 right of publicity case, observing that "the broadcast of petitioner's entire performance,
12 unlike the unauthorized use of another's name for purposes of trade or the incidental
13 use of a name or picture by the press, goes to the heart of petitioner's ability to earn a
14 living as an entertainer." *Id.* at 576. The *Zacchini* Court addressed not a cartoon
15 parody of a well known celebrity, as is the case here, but "the appropriation of the very
16 activity by which the entertainer acquired his reputation in the first place." *Id.*

17 Since *Zacchini*, courts have consistently distinguished its holding from cases
18 involving the kind of right of publicity claim made by Hilton here. For instance, in
19 *Guglielmi*, the estate of Rudolph Valentino brought right of publicity claims in
20 connection with the use of Valentino's name and likeness in a television film about
21 Valentino's life. The California Supreme Court held that the *Zacchini* decision did not
22 afford Valentino's estate right of publicity protection because the *Zacchini* case
23 involved the appropriation of Zacchini's entire act, whereas the use of Valentino's
24 identity was "much more akin to commenting upon or reporting the facts of Zacchini's
25 performance, which the Supreme Court regarded as entirely permissible." *Guglielmi*,
26 25 Cal.3d at 875 (citing *Zacchini* at 569, 574); see also *Comedy III Productions, Inc. v.*
27 *Gary Saderup, Inc.*, 25 Cal.4th 387, 401 (2001) (*Zacchini* was not an ordinary right of
28 publicity case: the defendant "had appropriated the plaintiff's entire act"); *Rogers v.*

1 *Grimaldi*, 695 F. Supp. 112, 118 (S.D.N.Y. 1988) (*Zacchini* was “a narrowly drawn
2 opinion effectively limited to its facts”), *aff’d*, 875 F.2d 994 (2nd Cir. 1989);
3 *Cardtoons*, 95 F.3d at 973 (*Zacchini* is a “red herring” and not a right of publicity case
4 at all, but a “right of performance” case). Moreover, in *Zacchini*, “the Supreme Court
5 recognized each state’s authority to prescribe the contours of its right of publicity.”
6 *Guglielmi*, 25 Cal.3d at 876. California has done so with the “transformative use” test
7 which defeats Hilton’s claims. *See infra*.

8 In sum, neither the cases Hilton cites regarding the use in advertisements to sell
9 unrelated consumer products, nor the *Zacchini* case, support Hilton’s claim. Rather,
10 the inquiry is controlled by the cases set forth in the Motion which hold that when the
11 purported “product” being sold is speech, the use of a person’s image in connection
12 with that speech is protected by the First Amendment.⁵ *See Winter*, 30 Cal.4th at 889-
13 91 (cartoon image of celebrity in comic books protected); *Kirby*, 144 Cal.App.4th at
14 58-62 (use of celebrity in video game protected); *Hoffman*, 255 F.3d at 1189 (9th Cir.
15 2001) (use of photo of celebrity’s head on different body in magazine article
16 protected); *Daly*, 238 F.Supp.2d at 122 (use in documentary protected); *Kournikova v.*
17 *General Media*, 278 F.Supp.2d 1111, 1128-29 (C.D. Cal. 2003) (use of name and
18 likeness of tennis player on magazine protected); *New Kids*, 971 F.2d at 309 (use of
19 celebrity musicians’ mark in newspaper survey protected); *Dora*, 15 Cal.App.4th at
20 543 (use in documentary protected); *Guglielmi*, 25 Cal.3d at 872 (use of actor’s name
21 and likeness in TV drama protected); *Polydoros*, 67 Cal.App.4th at 211 (use in
22

23 ⁵ Hilton’s repeated references (Opp. at 2, 12) to Hallmark’s supposed assertion that the First
24 Amendment creates an “automatic immunization” for any use of a celebrity’s likeness is a
25 straw man – Hallmark is making no such argument. Rather, as in any right of publicity
26 claim, whether the use is protected by the First Amendment depends on the use made in a
27 particular case. Here, where the subject is a public figure, the speech about her is of public
28 interest, the use is a transformative parody and is not commercial speech used to advertise
another product, the claims are all barred by the First Amendment. *Guglielmi*, 25 Cal.3d at
864 (on demurrer, Court found use was protected, noting that “context and nature of the use
is of preeminent concern” in making such a determination).

1 fictional motion picture protected). These controlling authorities dictate that the use of
2 Hilton's identity and catch-phrase in the Card is protected by the First Amendment.

3 **B. The Sale Of The Card Does Not Defeat First Amendment Protection**

4 As set forth in the Dismiss Reply, Hilton's argument that the Card is not subject
5 to First Amendment protection because Hallmark is "making money" from the Card
6 has been categorically rejected by the courts. *See* Dismiss Reply, Section II(B); *Kirby*,
7 144 Cal.App.4th at 58 (protections "extend to all forms of expression ... whether or
8 not sold for a profit"); *Hoffman*, 255 F.3d at 1186 (use "does not fall outside of the
9 protections of the First Amendment because it may help to sell copies"); *Guglielmi*, 25
10 Cal.3d at 869 (expressive activity "does not lose its constitutional protection because it
11 is undertaken for profit").

12 **C. Courts Routinely Determine, As A Matter Of Law, If A Use Is**
13 **Subject To First Amendment Protection**

14 As set forth in the Dismiss Reply, it is not within the "exclusive province of the
15 jury" (Opp. at 11) to determine if a use is protected by the First Amendment. Indeed,
16 in **all** of the cases set forth in the Motion, the courts (and not a jury) decided the First
17 Amendment issue **as a matter of law**. This Court has before it all the information it
18 needs to make such a determination. *See Kirby*, 144 Cal.App.4th at 61 and n.6 (courts
19 can resolve the question of whether a work is transformative as a matter of law
20 "simply by viewing the work in question and, if necessary, comparing it to an actual
21 likeness of the person ... portrayed") (*quoting Winter*, 30 Cal.4th at 891-892).

22 **D. The Use Is Transformative As A Matter Of Law**

23 Hilton concedes that under *Comedy III* and *Winter*, the Card is protected by the
24 First Amendment if the use of Hilton's identity is transformative. Opp. at 14. Hilton
25 recognizes that First Amendment protection applied in *Winter* because, even though
26 defendant's characters had features "similar to [those of] the Winter brothers," the
27 characters were "distorted pictures" of plaintiffs and thus transformative. Opp. at 15.
28

1 Notwithstanding this concession, Hilton summarily asserts, without support, that
2 the use in the Card was not transformative. Hilton's argument that the use of Hilton's
3 name and image and the phrase "that's hot" on the Card is not transformative is refuted
4 by not only contentions in the Amended Complaint and the Card itself, but by the
5 additional information submitted by Hilton with the Opposition. First, the Card on its
6 face is plainly and sufficiently transformative. It presents a distorted caricature of
7 Hilton (combining an oversized photographic head on a cartoon body) in a fictional
8 setting having a fictional dialogue with a fictional diner. The use on the Card is
9 unquestionably not a literal depiction of Hilton.

10 Indeed, the Court in *Hoffman* found that a less apparently fictional use,
11 compared to the use here, was transformative as a matter of law. In *Hoffman*,
12 defendant used a photograph of Dustin Hoffman's head from the movie *Tootsie* and
13 replaced his body with a photograph of a male model in the same pose but wearing a
14 different outfit than the one Hoffman wore in *Tootsie*. The Court held that "there is no
15 question that [defendants'] publication of the 'Tootsie' photograph contained
16 'significant transformative elements.' Hoffman's body was eliminated and a new,
17 differently clothed body was substituted in its place." *Hoffman*, 255 F.3d at 1184 n.2.

18 Here it is abundantly clear that the image is more creative and transformative
19 than that found sufficient in *Hoffman*. A photograph of Hilton's head was used, but
20 her body was eliminated and a new, differently clothed **cartoon** body was used. The
21 Card here is significantly **more** transformative than in *Hoffman* because whereas that
22 involved the swap of a photograph for a photograph and a model posing exactly the
23 same as Hoffman had posed in *Tootsie*, here the Card swaps a **cartoon** for Hilton's
24 body and depicts her in a pose and situation different from any prior pose of Hilton.
25 Further transforming its use, the Card creates a fictional dialogue to accompany its
26 fictional setting.

27 The California Supreme Court has also held that a use similar to that made here
28 was transformative as a matter of law. In *Comedy III*, the Court held that the

1 *Cardtoons* use of parody images of baseball players on trading cards sold to the public
2 was consistent with the transformative use test that the Court set forth to define First
3 Amendment protection. *Comedy III*, 25 Cal.4th at 406; *see also, Kirby*, 144
4 Cal.App.4th at 59 (use transformative because defendant’s computer character had an
5 “extremely tall, slender computer-generated physique” that was “dissimilar from”
6 plaintiff); *ETW Corp.*, 332 F.3d at 938 (lithographs of Tiger Woods transformative
7 because work consisted of a collage of images in addition to Woods’ image and thus
8 conveyed a message about Woods).

9 Contrary to Hilton’s assertion, the Card is not a “literal depiction” of Hilton as
10 she appeared in one segment of *The Simple Life*. Indeed, the exhibits submitted by
11 Hilton confirm as much. As Exhibit 4 to the Blakely Declaration shows, that segment
12 featured Hilton wearing a red shirt, yellow baseball hat and rollerskates and acting as a
13 car hop at a fast food restaurant. In contrast, the Card shows a hatless Hilton in a light
14 blue shirt, white apron and oven mitt serving a plate of food to a customer seated at a
15 counter in a sit-down restaurant. Thus, the Card is not a literal depiction of Hilton or
16 of the segment from *The Simple Life*; Hallmark has “added significant creative
17 elements to create new expression” which, as Hilton’s Opposition acknowledges, is the
18 correct standard. *Opp.* at 16. Accordingly, the Card is transformative, which defeats
19 all of Hilton’s claims.

20 **IV. HILTON SHOULD NOT BE ALLOWED TO AMEND NOR IS SHE**
21 **ENTITLED TO CONDUCT ANY DISCOVERY**

22 Hilton’s suggestion that she should be given the opportunity to take discovery or
23 to again amend her complaint should not be countenanced. The right of publicity
24 claim fails as a matter of law. Factual inquiry serves no interest here. No amount of
25 discovery or amendment will help Hilton, and Hilton does not articulate anything to
26 the contrary. *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 991 (9th Cir. 1999)
27 (leave to amend should not be granted where the complaint cannot be saved). In
28 permitting the application of the anti-SLAPP statute in federal cases, the Ninth Circuit

1 recognized that “California has articulated the important, substantive state interests
2 furthered by the Anti-SLAPP statute,” which include “the protection of ‘the
3 constitutional right of freedom of speech,’” *see* C.C.P. § 425.16(a), and “procedural
4 and substantive remedies for prompt exposure, dismissal and discouragement of
5 SLAPP suits.” *U.S. ex. rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963,
6 971-73 (9th Cir. 1999). These interests would be severely undermined if Hallmark
7 were forced to continue litigating this claim that has no chance of success. *See Winter*,
8 30 Cal.4th at 891 (“because unnecessarily protracted litigation would have a chilling
9 effect upon the exercise of First Amendment rights, speedy resolution of cases
10 involving free speech is desirable”); *Simmons v. Allstate Ins. Co.*, 92 Cal.App.4th
11 1068, 1073-74 (2001) (allowing leave to amend in claim subject to anti-SLAPP statute
12 “totally frustrates the Legislature’s objective of providing a quick and inexpensive
13 method of unmasking and dismissing such suits”).

14 **V. CONCLUSION**

15 Hilton’s claim for violation of common law right of publicity is subject to a
16 Motion to Strike under the anti-SLAPP statute, and Hilton did not (and cannot) meet
17 her burden to show that there is a probability she will prevail on her claim.
18 Accordingly, Hilton’s first claim for misappropriation of right of publicity should be
19 dismissed with prejudice.

20
21 DATED: December 10, 2007.

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23
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25
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