

1 Mark Schlachet (OSB 0009881) [Admitted PHV]
2 markschlachet@me.com
3 3515 Severn Road
4 Cleveland, Ohio 44118
5 Tel: (216)225-7559 Fax: (216)932-5390
Attorney for Defendants

6 Christopher J. Hammond (SBN 150024)
7 chammond@bizlawpro.com
8 21540 Prairie Street, Unit A Chatsworth, CA 91311
9 Tel: (866)625-2529 Fax: (866)463-9285
Local Counsel for Defendants

10 **IN THE UNITED STATES DISTRICT COURT**
11 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

12 THIMES SOLUTIONS INC.

13 Plaintiff,

14 vs.

15 TP-LINK USA CORPORATION, et al

16 Defendants.
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CASE NO. CV 19-10374 PA

MEMORANDUM OF THIMES SOLUTIONS INC. IN OPPOSITION TO DEFENDANTS' JOINT NOTICE OF MOTION AND MOTION TO DISMISS AND/OR STRIKE SECOND AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

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1 **I. INTRODUCTION**

2 This is a business tort case where Amazon third-party seller *Thimes*
3
4 *Solutions Inc.* was destroyed as a direct result of defendants’ publication of false
5 counterfeiting accusations made to Amazon. TP-Link USA Corporation (“TP-
6 Link” or “USA”) and Auction Brothers, Inc. dba Amazzia (“Amazzia”) libeled
7 plaintiff on 28 separate occasions, accusing it of listing--not selling—counterfeit
8 TP-Link products. Plaintiff tried to reason with TP-Link/Amazzia . . . but they
9 refused to engage.
10
11

12 Plaintiff’s conduct in all instances was lawful under the First Sale Doctrine.¹
13
14 Under that doctrine a trademark holder enjoys a “distribution right” and may
15 initially sell, or not sell, trademarked items to others on such terms as he or she
16 sees fit. However, the trademark holder’s exclusive distribution right is limited to
17 the first sale of the trademarked item. The distribution right may be exercised
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19
20

21 ¹ William Fikhman, CTO of Auction Brothers, Inc. dba Amazzia (according to Amazzia Rule
22 26(a)(1) disclosure), advocated for the First Sale Doctrine when sued under dba “Super Duper
23 Deals” in *Vivo Per Lei, Inc., a Nevada corporation v. Gadi Bruchim, an individual, William*
24 *Fikhman, an individual, et al*, CV11- 05169GW (CDCA 2011). See “Defendant William
25 Fikhman’s Notice of Motion and Motion to Dismiss,” *id.* at ECF No. 44, filed December 6,
26 2012, attached to Declaration of Mark Schlachet (“Schlachet Dec.”) filed concurrently herewith,
27 at Exhibit 1.
28

1 solely with respect to the initial disposition . . . not to prevent or restrict a lawful
2 purchaser’s listing, resale or further transfer of possession.
3

4 Amazon is fully aware of the foregoing and will not enforce IP complaints
5 against a third-party seller such as plaintiff for listing or selling trademarked goods
6 subsequent to their initial distribution. To circumvent Amazon’s limitations on IP
7 enforcement, defendants lied to Amazon and falsely accused plaintiff of conduct
8 Amazon does deem actionable, i.e. counterfeiting, when defendants never had a
9 good faith belief that plaintiff counterfeited. As a result of these lies, *Thimes* was
10 expelled from the Amazon platform and may longer sell on Amazon.
11
12

13 **II. PROCEDURAL HISTORY**

14
15 On May 29, 2019 Plaintiff filed this *Thimes* action before the United States
16 District Court for the Southern District of New York (“SDNY”) in libel and
17 tortious interference with existing and prospective economic relations, to recover
18 damages and for declaratory relief to the effect that plaintiff’s conduct in
19 marketing TP-Link products was and is lawful.² On December 6, 2019 District
20 Judge Valerie Caproni conducted a Case Management Conference in *Thimes* and
21 expressed herself strongly that, because the “related case” of *Careful Shopper LLC*
22 *v. TP-Link USA Corporation, et al.* was pending before Judge Staton in this United
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28 ² *Thimes Solutions Inc. v. TP Link USA Corporation et al* (“*Thimes*”), Case No. 1:19-cv-04970-VEC (SDNY).

1 States District Court for the Central District of California (“CDCA”), *Thimes*
2 should be transferred to CDCA. With Plaintiff’s consent Judge Caproni entered the
3 order transferring venue that same day. (*Thimes*, at ECF No.51)
4

5 Following transfer of venue to this Honorable Court, Plaintiff TSI filed a
6 Second Amended Complaint (ECF No. 78 on January 13, 2020), following Court
7 order to comply with rules relating to the correct assertion of diversity jurisdiction.
8 The Second Amended Complaint added a Sherman Act claim to the two state law
9 claims of Tortious Interference with Business Relations and Trade Libel. The two
10 State law claims have been pled substantially *verbatim* since commencement in
11 SDNY on May 29, 2019.
12
13
14

15 **III. FACTS**

16 TSI became a third-party seller on Amazon in 2016. To become an Amazon
17 seller TSI signed Amazon’s standard Business Solutions Agreement that, among
18 other things, allowed Amazon to terminate TSI as a seller for any reason or for no
19 reason at all. (SAC at ¶6) TP-Link USA Corporation operates as an indirect
20 subsidiary of TP-LINK Technologies Co., Ltd., a Chinese parent company. The
21 parent TP-Link has lately been the world's number one provider of Wi-Fi products.
22 (*Id.* at ¶13) USA retained Amazzia to monitor specific TP-Link products on the
23 Amazon marketplace and do a “third-party seller clean up” of those selling TP-
24 Link products outside TP-Link’s authorized distribution channels. (*Id.* at ¶20)
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1 USA and Amazzia published 28 written complaints to Amazon charging
2 Plaintiff with infringing TP-Link intellectual property by listing or selling on
3 amazon.com counterfeit goods (on 27 occasions), or otherwise infringing a
4 trademark (on one occasion) (“IP Complaints”). (*Id.* at ¶18) TP-Link’s fraudulent
5 IP complaints directly caused plaintiff’s suspension from the Marketplace in May
6 2018 and also caused TSI’s permanent expulsion as a seller on the Amazon
7 website, effective on or about August 27, 2018. (*Id.* at ¶19)

8 Amazzia describes itself as affording Amazon marketplace sellers “price
9 protection” by reporting and removing third-party sellers that discount trademarked
10 products (*Id.* at ¶¶21-22). According to Amazzia, the “main risk involves
11 companies deviating from your minimum advertised price.” (*Id.* at ¶24) Amazzia
12 entered into a TP-Link-Amazon Brand Protection Agreement under which (i)
13 Amazzia committed to an “Amazon cleanup,” (ii) TP-Link provided Amazzia with
14 specific ASIN’s to be watched, (iii) Amazzia promised to “report non-compliant
15 sellers to Amazon until they are removed by Amazon,” and (iv) Amazzia’s
16 commitment was to rid the Marketplace of “resellers” as follows: “50% of resellers
17 to be removed in 60 days, 75% in 90 days, and 90% in 120 days.” (*Id.* at ¶25)
18 Unable to eliminate TSI sales as “unauthorized” or “discounted”—all perfectly
19 lawful--Amazzia sent fraudulent IP complaints to Amazon charging Plaintiff with
20 counterfeiting, at all times acting in concert with TP-Link. (*Id.* at ¶26) During
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1 2018 TP-Link/Amazzia complained to Amazon on at least 28 separate occasions,
2 all or substantially all of which alleged counterfeiting. (*Id.* at ¶28) TP-
3 Link/Amazzia coordinated their assault with four (4) different identities in
4 complaining to Amazon, to wit: compliance-us@tp link.com, compliance-usa@tp-
5 link.com, us-compliance@tp-link.com and compliance.usa@tp-link.com. (*Id.* at
6 ¶29)

7
8
9 Amazon's IP Infringement Reporting System is rife with abuse vis-à-vis
10 unethical sellers and IP owners that "game the system" with bogus IP, trademark,
11 copyright and patent reports. (*Id.* at ¶30) TP-Link made four (4) test purchases of
12 authentic products from TSI beginning on January 18, 2019 and, thus, all of its IP
13 complaints for counterfeiting (the first being on January 19, 2019) were knowingly
14 false.³ (*Id.* at ¶32) Amazon nevertheless stated that it would act favorably if TP-
15 Link/Amazzia would retract the accusations; but, despite TSI requesting a
16 retraction and asking for evidence of TP-Link/Amazzia's claims, both directly and
17 through counsel, TP-Link/Amazzia refused to retract the IP complaints or even
18 respond to TSI or its counsel at all; and indeed continued to file dozens of new
19 complaints afterwards. (*Id.* at ¶64) Defendants' acts destroyed Plaintiff's
20 relationship with Amazon, thereby causing the destruction of Plaintiff's Amazon
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28 ³ SAC at ¶27, bullets 3 and 4.

1 business. TSI's last six (6) months of unimpeded Amazon-related operations
2 showed net profits of \$368,000. (*Id.* at ¶65)
3

4 TP-Link has no justification for its counterfeiting accusation. It seeks to
5 obfuscate, however, by advancing a purported justification for trademark
6 infringement complaints, wholly irrelevant to this case. Defendants claim that TSI
7 could not convey TP-Link's original manufacturer's warranty to its purchasers
8 because, the theory goes, TP-Link disclaimed its original manufacturer's warranty
9 as to Grey Market Goods, thus rendering such goods "materially different" and
10 subject to a trademark infringement claim under law.
11
12

13
14 However Amazon, as a matter of policy and with respect to TP-Link
15 specifically, has refused to enforce TP-Link's claims of trademark infringement.
16 See SAC at ¶50n.16 and accompanying text. TP-Link has never explained how,
17 even if it had a good faith trademark infringement concern, it would be justified in
18 accusing plaintiff of counterfeiting. As to New York sellers (such as TSI)
19 moreover, a special statutory provision (NYGBL §369-b), operative here, renders
20 manufacturers' warranty disclaimers based on Grey Market Sales null and void.
21 SAC at ¶40. TP-Link never enforced any warranty disclaimer, as to any purchaser,
22 prior to the filing of instant litigation against it. (¶¶33, 36-40) This entire
23 "warranty ploy" is a hoax.
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28 **IV. RULE 12(b)(6) ANALYSIS**

1 **A. The Legal Standard**

2 This Court has consistently articulated the correct legal standard to
3
4 adjudicate a Rule 12(b)(6) motion to dismiss. E.g., *Daar v. Oakley, Inc.*, 2018 U.S.
5 Dist. LEXIS 231237 at **3-4 (C.D. Cal. 2018)(“The Ninth Circuit is particularly
6 hostile to motions to dismiss under Rule 12(b)(6).”) Under that standard, as all
7
8 Judges looking at false counterfeit complaints to Amazon have ruled, this case is
9
10 plausible if, indeed, not compelling. See Section IV.C. *infra*.

11 **B. Defendants’ Primary Defense Does Not Go to SAC Sufficiency and**
12 **is Not True—Not Even a Little Bit**

13 Woven into TP-Link/Amazzia’s factual statement and arguments on
14
15 causation is a matter in avoidance, to wit, that, even if Defendants lied as alleged
16
17 and caused TSI’s expulsion and economic harm, Plaintiff has nevertheless failed to
18
19 state a claim because, subsequent to being suspended and thereafter expelled from
20
21 the Amazon Platform, TSI had an opportunity, which it failed to implement, to
22
23 establish to Amazon’s satisfaction the authenticity of its products, and thereby
24
25 successfully overturn its loss of selling privileges.⁴ Thus employing a frequently-
26
27 encountered defense tactic, Defendants have conjured up pleading requirements
28 that are actually the flip side of movant’s defensive matter, and have little to do
with the allegations required to sufficiently state a claim and survive a Rule

⁴ “Plaintiff does not allege that it provided any further information about the authenticity of its products.” Defendants’ Mem. at p. 3.

1 12(b)(6) motion. See *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S. Ct. 1920, 64 L.
2 Ed. 2d 572 (1980) (“finding ‘no basis for imposing on plaintiff an obligation
3 to anticipate [an affirmative] defense by stating it his complaint’ its negative.”).
4 This Court has opined accordingly. *Am. Nat'l Trading Corp. v. McGladrey &*
5 *Pullen, LLP*, 2009 U.S. Dist. LEXIS 135692, at *16 (C.D. Cal. 2009)(“The SAC
6 does not specify the nature of the sale of AM&G, nor is it something, in this
7 instance, that ANTC should be required to allege to satisfy the federal pleading
8 standard.”)
9
10
11

12 In fact, however, TSI made extensive efforts to appeal and rectify its
13 Policy Violations, suspensions, and expulsion. Although TP-Link ignores
14 the allegation, plaintiff has alleged that it “exhausted all possible
15 administrative options at Amazon, including appellate procedures.” SAC at
16 ¶52. For example, immediately upon receipt of the first IP-complaint of
17 January 19, 2018 Plaintiff emailed TP-Link at the designated address in an
18 effort to satisfy TP-Link that TSI’s product was authentic and not
19 counterfeit. SAC at ¶42 and Exhibit 5. TP-Link refused to engage. *Id.*
20 Plaintiff engaged expert Amazon counsel who emailed a letter to TP-Link
21 on February 1, 2018, but TP-Link again did not respond to counsel’s letter.
22 SAC at ¶44 and Exhibit 6. Plaintiff appealed to Amazon and got reinstated
23 from a subsequent May 7th suspension, but TP-Link continued its onslaught
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1 on May 28 and 30, and on June 14 and 21. SAC at ¶46 and Exhibit 8.

2 Despite its exhaustion of internal remedies, TSI was expelled on August 27,
3
4 2018.⁵

5 The truth is that the key to retractions and overturning succeeding
6 suspensions is the IP owner's voluntary action, without which a retraction
7 and reinstatement is virtually impossible to achieve. SAC at ¶64.⁶ There is
8 no genuine opportunity for the accused to overturn Amazon's
9 suspension/expulsion without the complaining IP owner's assistance, which
10 in this case TSI sought but Defendants refused to discuss.⁷ And this whole
11 discussion (*dehors* the pleadings) of TSI's efforts to establish its innocence
12 *post facto* begs the question: did TP-Link/Amazzia's false IP complaints
13 libel TSI and tortiously interfere with TSI's business relationships in the
14 first instance?
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22 ⁵ Amazon advises: "Most reviews are completed within 30 days; however, we may extend the
23 review period at our discretion . . . We will notify you of our decision when the account review is
24 complete." <https://sellercentral.amazon.com/forums/t/how-long-does-it-take-for-amazon-to-review-your-seller-account/206457/2> See Schlachet Dec. at Exhibit 8.

25 ⁶ Amazon Expert Chris McCabe's Declaration in *Johnson v. John Does*, Case No. 18-00689,
26 ECF 34 (E.D. VA filed January 10, 2019), opines at ¶13: "[t]hat means the seller must obtain a
27 retraction from the rights owner (or their agent) and have the rights owner contact Amazon
28 directly to withdraw the claim against the seller." See Declaration of Chris McCabe (McCabe
Dec.), annexed to Declaration of Mark Schlachet as Exhibit 2 thereto.

⁷ McCabe Dec. at ¶¶11,14.

1 **C. All Authorities to Date Deny Rule 12 (b)(6) Motions to Dismiss**
 2 **Defamation and Tortious Interference Claims Following IP**
 3 **(Counterfeit) Complaints to Amazon⁸**

4 Three United States District Judges have adjudicated Rule 12(b)(6) motions
 5 by IP owners advancing “specificity” arguments similar to those made here. All
 6 three Rule 12(b)(6) motions were denied, finding the statement as reported by
 7 Amazon, i.e. “counterfeit,” sufficient to survive a Rule 12(b)(6) motion. In *Eternity*
 8 *Mart, Inc. v. Nature's Sources, LLC* 1:19-cv-02436 (N.D. IL filed April 10, 2019),
 9 the District Court denied the Motion to Dismiss, setting forth his reasoning in part
 10 as follows: “defendant falsely told Amazon that goods were counterfeit on
 11 February 6th of 2019. That's pretty specific. That's not conclusory allegations. I
 12 mean, that is one specific allegation. There's a lot more context around that.”⁹
 13 Similarly, in *Johnson v. Incopro, Inc. et al*, 1:18-cv-00689 (E.D. VA) Honorable
 14 Leonie M. Brinkema denied a Rule 12(b)(6) Motion, ruling firmly that “that word
 15 ‘counterfeit’ is very strong and “there's no question that there's been serious
 16 interference between Ms. Johnson's business and Amazon.”¹⁰ Further, the Court in
 17 *SZS Sols., Inc. v. Brother Int'l Corp.*, 2018 U.S. Dist. LEXIS 106093 *6 (S.D. Fla.
 18
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24 _____
 25 ⁸ “In the absence of any California authority on the issue, the Court considered persuasive
 26 authority from other jurisdictions.” *Wolfstein v. Morgan, Lewis & Bockius LLP*, No. CV 15-
 27 7150 PA, 2016 U.S. Dist. LEXIS 14497, at *23 (C.D. Cal. 2016).

28 ⁹ Transcript of Ruling annexed as Exhibit 3 to Schlachet Declaration. See p.2, lines 13-25.

¹⁰ Transcript of Ruling annexed as Exhibit 4 to Schlachet Declaration. See p.7, line 10 through
 p.8, line 5.

1 2018) (IP complaint of trademark infringement only) ruled that “[p]laintiff’s
2 original complaint satisfied the liberal pleading standard required by *Iqbal*: the
3 Complaint described the allegedly defamatory statement and stated when it was
4 communicated to Amazon by Brother.”
5

6 This District has opined in judicial *dicta* that a false accusation of
7 counterfeiting (which did not occur in that case but has occurred here) would
8 satisfy the “wrongful act” element of a tortious interference claim.¹¹ Beyond cavil,
9 an accusation that a business offers counterfeit goods is an accusation of highly
10 culpable conduct . . . easily satisfying the “specificity” and “wrongful act”
11 requirement of both state law tort claims.
12
13

14 **D. Trade Libel**

15 Under California law, "trade libel is an intentional disparagement of the
16 quality of property, which results in pecuniary damage." *Films of Distinction, Inc.*
17 *v. Allegro Film Prods.*, 12 F. Supp. 2d 1068, 1081 (C.D. Cal. 1998).
18
19

20 1. Particularity

21 TP-Link argues that TSI’s trade libel claim is insufficient alleged because
22 TSI has failed to identify the “author or speaker, recipient, and location of each
23 allegedly libelous statement by Defendants, and has not pled facts sufficient to
24
25
26

27 ¹¹ *Hand & Nail Harmony, Inc. v. ABC Nails & Spa Prods.*, 2016 U.S. Dist. LEXIS 188902, at
28 *13 (C.D. CA 2016).

1 demonstrate the falsity of any alleged complaints to Amazon.” **Not true:** TSI has
2 identified TP-Link/Amazzia as the speaker and Amazon the recipient. SAC ¶28
3
4 TSI lists 28 IP complaints, their dates, and email address of the IP reporter. Exhibit
5 8.1-8.4 are four (4) true copies of Policy Warnings TSI received from Amazon,
6
7 confirming the conspirators’ “counterfeit” complaints. Since TP-Link is in privity
8 of contract with Amazon, SAC at ¶38, it follows that under Evidence Rule
9 801(d)(2)(C) Amazon’s statements to TSI are non-hearsay and admissible to prove
10 what TP-Link stated to Amazon, i.e. “counterfeit.”
11

12 2. Falsity

13
14 As to facts demonstrating falsity, TSI plausibly alleges (SAC at ¶49) that
15 [a]ll [of TSI’s TP-Link products] were authentic and TP-Link has never stated to
16 the contrary;” and in SAC ¶27 TSI asserts that “Plaintiff has possession of
17 approximately 100 of these items to date, all of which are authentic and not
18 counterfeit.” Again, having repeatedly alleged the “counterfeit” complaints to be
19 false, Plaintiff need not prove authenticity at the pleading stage. Both California
20 and federal law assume that people act lawfully unless proven otherwise. Federal
21 Rule of Civil Procedure 8 provides that illegality is an affirmative defense to be
22 pled in the defendant's answer. *Rock River Communs., Inc. v. Universal Music*
23 *Grp., Inc.*, 745 F.3d 343, 350 (9th Cir. 2014)
24
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27

28 The question is “plausibility.” TP-Link has not to date, though having test

1 purchased TSI product on four (4) occasions, alleged TSI's products to be
2 counterfeit. Until it does, TSI's assertions of authenticity must be taken as
3 unchallenged and true. *Id.* See also *TechnoMarine S.A. v. Giftports, Inc.*, 2012
4 U.S. Dist. LEXIS 130128, at *16-17 (S.D.N.Y. 2012) (“equally plausible that
5 defendant . . . lawfully acquired the subject watches and is simply reselling them,
6 as it has a right to do.”).

9 3. Actual Malice

10 SAC ¶¶32, 49, 56, and 63 each allege actual malice based upon alleged facts
11 in yet other paragraphs of the SAC. These allegations of malice rest upon the
12 sheer number of IP complaints, assertions of counterfeiting contrary to the results
13 of their own test purchases, refusal to engage with TSI in search of the truth, and
14 the actual ill will that must accompany the foregoing. All 28 IP complaints can be
15 found malicious under the allegations of the SAC.

19 4. Causation.

20 TSI very specifically and plausibly alleged causation: “Amazon harshly
21 enforces brand owner complaints of counterfeiting” (SAC at ¶1, 4th bullet); TP-
22 Link lodged about 28 counterfeiting complaints (*Id.* at ¶28); Amazon routinely
23 sent Policy Warnings (Exhibits 8.1-8.4) threatening expulsion; and Plaintiff,
24 unable to obtain TP-Link's cooperation, was ultimately expelled. TP-Link also
25 argues that Plaintiff, not TP-Link/Amazzia, is responsible for its misfortune. As
26
27
28

1 shown above, such an argument is (i) an affirmative defense, (ii) does not go to
2 the pleadings, (iii) at best premature and ill-suited for ruling in the Rule 12(b)(6)
3 context, and (i) wrong in fact.
4

5 **E. Tortious Interference**

6
7 1. Wrongful Act.

8 TSI has adequately addressed the highly culpable nature of
9 Defendants' conduct in IV.C. above: "Authorities to Date Deny Rule 12 (b)(6)
10 Motions" . . . and this Court has ruled in judicial dicta that an accusation of
11 counterfeiting is a "wrongful act." We incorporate that discussion at this point.
12

13
14 2. Casuation.

15 We incorporate argument advanced in IV.B. and IV.D.4 above.

16 **F. Antitrust, Section 1-Sherman Act, Naked Restraint**

17 Plaintiff has sufficiently alleged a *per se* Section 1 Sherman Act claim.¹²
18
19 Defendants "had a conscious commitment to a common scheme designed to
20 achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Service Corp.*, 465
21 U.S. 752, 104 S. Ct. 1464, 1471, 79 L. Ed. 2d 775 (1984). The unlawful objective
22
23
24
25

26
27 ¹² To state a claim under Section 1, a plaintiff must allege facts that, if true, will prove: (1) the
28 existence of a conspiracy, (2) intention on the part of the co-conspirators to restrain trade, and (3)
actual injury to competition. *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008),
Coal. for ICANN Transparency, Inc. v. VeriSign, Inc., 611 F.3d 495, 501-02 (9th Cir. 2010)

1 was the “removal of MAP violators.” *United States v. General Motors Corp.*, 384
2 U.S. 127 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).
3

4 Defendants do not contest the sufficiency of Plaintiff’s Section 1 claim aside
5 from the requirements of joint/concerted action and horizontality. Specifically,
6 they contest being competitors capable of entering into a conspiracy to violate the
7 antitrust laws. We agree that TP-Link’s instant arguments put into play Amazzia’s
8 status as a competitor; but we suggest that meeting TP-Link’s new defensive
9 matter was not required to state a claim in the first instance. See *Gomez v. Toledo*,
10 446 U.S. 635, 640, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980) (finding "no basis for
11 imposing on plaintiff an obligation to anticipate [an affirmative] defense by stating
12 in his complaint" its negative.). We did not anticipate that that Defendants would
13 claim to be a “single entity.”
14
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17

18 In making their argument TP-Link/Amazzia rely on *Copperweld Corp. v.*
19 *Independence Tube Corp.*, 467 U.S. 752,768 (1984), as applied in *Jack Russell*
20 *Terrier Network of Northern Ca. v. American Kennel Club*, 407 F.3d 1027, 1034
21 (9th Cir. 2005). The short answer to TP-Link is that *Jack Russell* by its own terms
22 is inapplicable: ““where firms are not an economic unit **and are at least potential**
23 **competitors**, they are usually not a single entity for anti-trust purposes.” *Id.* (bold
24 added)
25
26
27

28 In truth, Auction Brothers, Inc., dba Amazzia, dba Super Duper Deals and

1 perhaps other fictitious names, has long been a third-party seller—hence, a TP-
2 Link competitor --on Amazon. Its Amazzia profile as of January 20, 2020 showed
3 31,080 ratings or reviews. Schlachet Dec., Exhibit 5. Author Gayle Laakman
4 McDowell states that about .5% of purchasers post a review, although some sellers
5 post fake reviews at a far greater rate. [https://www.quora.com/What-percentage-](https://www.quora.com/What-percentage-of-buyers-write-reviews-on-Amazon)
6 [of-buyers-write-reviews-on-Amazon](https://www.quora.com/What-percentage-of-buyers-write-reviews-on-Amazon). Assuming Amazzia is not a “fake reviewer,”
7 its review numbers suggest sales of products since 2008 as high as 6,000,000
8 items. Further, as of February 9, 2020 Amazzia (i) is known in the trade as the
9 7,639th largest volume Fulfilled by Amazon seller (Schlachet Dec., Exhibit 6), and
10 (ii) it was advertising on its own LinkedIn site for marketing personnel as of
11 January 20, 2020. Schlachet Dec., Exhibit 7.

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15
16 Plaintiff does not agree, moreover, that a service provider and brand owner
17 may not jointly conspire and nakedly restrain competition. In *Nexstar Broad., Inc.*
18 *v. Granite Broad. Corp.*, No. 1:11-CV-249 RM, 2012 U.S. Dist. LEXIS 95024, at
19 **25, 26 (N.D. Ind. 2012) plaintiff joined an advertising representative and station
20 owner upon allegations of *per se* Section 1 liability. The District Court denied the
21 motion to dismiss: “Nexstar's conspiracy claims ‘plausible’. Nothing more is
22 required at this stage of the proceedings.”
23
24
25

26 And assuming *arguendo* that only competitors can conspire, plaintiff has
27 alleged in SAC ¶41 that “Amazzia directly or indirectly sells products on Amazon
28

1 through multiple seller accounts.” This allegation, ignored by TP-Link, means that
 2 Amazzia is a competitor, whether actual or potential, in the relevant market of
 3 online retail sales. TP-Link as well is an Amazon vendor. SAC at ¶38.
 4 Denomination as “actual” or “potential” competitor reflects an entity’s actual or
 5 potential *entry* in the relevant market, i.e. not its inventory of products for listing or
 6 sale at given time.¹³ Accordingly, Auction Brothers, Inc. is and has been TP-
 7 Link’s actual competitor and potential competitor at the horizontal level.

8
 9 Further, TP-Link’s “single entity” assertions cannot stand in light of *Am.*
 10
 11 *Needle, Inc. v. NFL*, 560 U.S. 183, 130 S. Ct. 2201 (2010), a Section 1, controlling
 12 case that Defendants neither cited nor distinguished. The Supreme Court there
 13 discussed and applied *Copperweld* where NFL Properties, a licensing joint venture
 14 that granted an exclusive license to Reebok, was sued under Section 1 by
 15 American Needle, a former non-exclusive licensee. NFL sought to evade scrutiny
 16 as a “single entity” under *Copperweld*. The Supreme Court disagreed, finding the
 17 parties to be separate economic entities. All decision-making was held to be
 18 concerted, not independent. As for the argument that NFL Properties’ concerted
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¹³ *Power Analytics Corp. v. Operation Tech.*, No. SA CV16-01955 JAK (FFMx), 2017 U.S. Dist. LEXIS 226665, at *65 (C.D. Cal. Dec. 7, 2017)(“ . . . establish unreasonable barriers to entry in the future, a potential competitor might have a legitimate antitrust claim.”) The usage is routine and non-controversial: *Ixchel Pharma, LLC v. Biogen Inc.*, No. 2:17-00715 WBS EFB, 2018 U.S. Dist. LEXIS 13548, at *2 (E.D. Cal. Jan. 25, 2018)(“ . . . plaintiff was not a current or potential competitor in the alleged market.”)

1 decision-making was in the common interests of the teams, the Court accepted the
2 premise but explained that it made no difference: “illegal restraints often are in the
3 common interests of the parties to the restraint, at the expense of those who are not
4 parties.” *Id.* at 198. Defendants’ “single entity” argument is governed—and
5 rejected--by *Am. Needle*.
6
7

8 Under circumstances of Amazzia ascendance, its promotional material and
9 an express contract¹⁴ followed by higher prices to consumers (SAC at ¶81), an
10 unlawful horizontal conspiracy to maintain MAP pricing by excluding competitors
11 may be found. *U.S. v. Apple*, 791 F.3d 290, *aff’g* CV-12-2826 (SDNY).
12
13

14 We acknowledge *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S.
15 877, 888, 127 S. Ct. 2705, 2714 (2007)], where the Court rejected reliance on
16 rules governing horizontal restraints when defining rules applicable to vertical
17 price restraints. Specifically, *Leegin* overruled *Dr. Miles Medical Co. v. John D.*
18 *Park & Sons Co.*, 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502, which established
19 a *per se* rule against a vertical agreement between a manufacturer and its
20 distributor to set minimum resale prices.
21
22

23 However, *Leegin* has never been held to overrule cases such as *Arnold*
24 *Pontiac-GMC, Inc. v. Gen. Motors Corp.*, 786 F.2d 564 (3d Cir. 1986), where
25 General Motors and its dealers, admittedly vertical parties, combined and
26
27

28 ¹⁴ SAC, Exhibit A to Exhibit 9: “a true and correct copy of TP-Link’s contract with Amazzia.”

1 conspired, *without* an express agreement, to restrict marketplace access. GM was
 2 held **not** to have acted independently and was denied summary judgment. Thus,
 3
 4 *Leegin* does not control a *per se* challenge to a hybrid conspiracy amongst
 5 horizontal competitors to exclude discounters.¹⁵ The instant conspiracy isn't about
 6 vertical price setting, but rather, it's about horizontal competitors destroying
 7 competition at the horizontal level and stabilizing supra-competitive price levels
 8 within the relevant market.
 9

11 **G. Declaratory Judgement**

12 Space limitations preclude a full discussion of Plaintiff's allegations in
 13 support of a declaratory judgment. Plaintiff has set forth an adequate basis for
 14 such relief in SAC at ¶¶88-92.
 15

17 **H. The Noerr-Pennigton Doctrine does not Shield the Sham at Issue 18 from Antitrust Scrutiny**

19 TP-Link seeks safe harbor under *Noerr-Pennington*¹⁶ by analogizing the
 20 instant case to **non-precedential** *Hard2Find Accessories, Inc. v. Amazon.com, Inc.*,
 21
 22

23 ¹⁵ See also *Doctor's Hosp. v. Se. Med. All.*, 123 F.3d 301, 308 (5th Cir. 1997)(manufacturer not
 24 acting unilaterally in best interest); *ES Dev., Inc. v. RWM Enters., Inc.*, 939 F.2d 547, 556-57
 25 (8th Cir. 1991)(though facially vertical, inducement emanated from horizontals' intent to restrain
 26 competition); *Travelpass Grp. LLC v. Caesars Entm't Corp.*, No. 5:18-CV-00153-RWS-CMC,
 27 2019 U.S. Dist. LEXIS 166542, at *5-6 (E.D. Tex. Sep. 27, 2019)(additional horizontal
 28 secondary conspiracies); *In re Tableware Antitrust Litig.*, 485 F. Supp. 2d 1121, 1124 (N.D. Cal.
 2007)(though complaints vertical, part and parcel of effort to restrain trade); *U.S. v. All Star
 Industries*, 962 F.2d 465 (5th Cir. 1992)(cannot escape *per se* treatment by using a middle man).

¹⁶ *E. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523 (1961).

1 691 Fed. App'x 406, 407 (9th Cir. 2017), aff'g 2014 U.S. Dist. Lexis 160980 (W.D.
2 WA 2014), where Apple was protected in its *single infringement complaint* to
3 Amazon. The analogy fails, however, because, unlike the instant case, the
4 *Hard2Find* Court found that Apple had lodged its IP complaints in good faith and
5 plaintiff did not allege Apple's complaint to be a "sham" or baseless. TP-Link,
6 unlike H2F, was not in good faith; and TSI vigorously disputes, and has pleaded
7 with particularity TP-Link's bad faith throughout. See SAC at ¶50.
8
9

10
11 The Ninth Circuit expounded the Supreme Court's "sham exception" to
12 *Noerr-Pennington* as follows: "ostensibly directed toward influencing
13 governmental action . . . is a mere sham to cover to what is actually nothing more
14 than an attempt to interfere directly with the business relationships of a
15 competitor.' *Noerr*, 365 U.S. at 144. *Or. Nat. Res. Council v. Mohla*, 944 F.2d
16 531, 534 (9th Cir. 1991) . Accordingly, *Noerr-Pennington* does not apply here
17 because TP-Link's misconduct was "an attempt to interfere directly" and was not
18 genuine petitioning conduct. *Id.*
19
20
21

22 TSI has specifically pled, non-conclusory, the particulars of the "Sham
23 Exception" at SAC ¶50, establishing that the 28 counterfeiting complaints were
24 objectively baseless assertions that no reasonable seller could expect to
25 successfully advance. See *Profl Real Estate Inv'rs, Inc. v. Columbia Pictures*
26 *Indus., Inc.*, 508 U.S. 49, 60, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993). Indeed,
27
28

1 Amazzia’s modus operandi here, i.e. of automatically filing IP complaints until
2 removal of the MAP violator, is a scenario that the Ninth Circuit regards as “sham”
3 as a matter of law” *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau,*
4 *Inc.*, 690 F.2d 1240, 1254 (9th Cir. 1982) (“Baseless protests, instituted without
5 regard to merit, are "nothing more than an attempt to interfere directly with the
6 business relationships of a competitor." *Noerr*, 365 U.S. at 144, 81 S. Ct. at 533.
7

8
9 Unfortunately Defendants have misrepresented the holding of *Rock River*
10 *Communs., Inc. v. Universal Music Grp., Inc.*, 745 F.3d 343 (9th Cir. 2014),
11 representing to the Court that “infringement notice protected by Noerr-Pennigton
12 immunity.” In fact, the Ninth Circuit ruled: “The district court, however, found
13 that triable issues of fact prevented summary adjudication of the *Noerr-Pennington*
14 defense, and we agree.” 745 F.3d at 351.
15
16

17
18 Should the Court find the record not sufficiently developed to decide
19 whether Noerr-Pennington applies, then we respectfully suggest that decision on
20 the matter be deferred. *Rock River, supra*; see also *Eon Corp. IP Holdings, LLC v.*
21 *Landis+Gyr Inc.*, Civil Action No. 6:11-cv-00317-LED-JDL, 2013 U.S. Dist.
22 LEXIS 191810, at *22 (E.D. Tex. 2013)
23
24

25 **V. RULE 12(f) ANTI-SLAPP/LITIGATION PRIVILEGE**
26 **ANALYSIS**

27 **A. No litigation privilege exists absent a good faith anticipation of**
28 **imminent litigation to resolve a dispute, wholly absent here.**

1
2 Defendants' statements were not made "in anticipation of litigation", as is
3 required for protection under Cal. Civ. Code § 47(b)'s litigation privilege. Indeed,
4 the statements at issue did not even hint at litigation. Despite defendants'
5 convenient characterization of them as "functional equivalents of cease and desist
6 letters," a patent stretch, TP-Link cannot convert an IP complaint to
7
8 Amazon into threatened litigation against Thimes:
9

10 That is, a lawsuit or some other form of proceeding must actually be
11 suggested or proposed, orally or in writing. Without some actual
12 verbalization of the danger that a given controversy may turn into a lawsuit,
13 there is no unmistakably objective way to detect at what point on the
14 continuum between the onset of a dispute and the filing of a lawsuit the
15 threat of litigation has advanced from mere possibility or subjective
16 anticipation to contemplated reality.
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19

20
21 *Edwards v. Centex Real Estate Corp.*, 53 Cal. App. 4th 15 - Cal: Court of Appeal,
22 1st Appellate Dist., 3rd Div. 1997.¹⁷ Defendants have nowhere alleged that a
23

24 ¹⁷ Cited approvingly: *Estrada v. Wal-Mart Stores, Inc.*, No. 16-cv-04091-LB, 2016 U.S. Dist.
25 LEXIS 140089, at *8 (N.D. Cal. Oct. 6, 2016)("'Good faith' contemplation of is a question of
26 fact."); *GA Escrow, LLC v. Autonomy Corp. PLC*, No. C 08-01784 SI, 2010 U.S. Dist. LEXIS
27 67996, at *12 (N.D. Cal. July 8, 2010)(no litigation privilege "until the prospect of litigation has
28 gone from being a mere possibility to becoming a contemplated *reality*."); *Tobin v. BC Bancorp*,
No. 09cv0256 DMS (CAB), 2010 U.S. Dist. LEXIS 8049, at *11 (S.D. Cal. Feb. 1, 2010)("facts
are clearly in dispute . . . Defendants are not entitled to judgment on the pleadings on these
claims.;) *Mezzetti v. State Farm Mut. Auto. Ins. Co.*, 346 F. Supp. 2d 1058, 1066 (N.D. Cal.

1 "lawsuit or some other form of proceeding" was "actually suggested or proposed",
2 and their litigation privilege claims fail for that reason alone.
3

4 **B. Timeliness**

5 During the Rule 26(f) process in SDNY, on July 27, 2019, TP-Link counsel
6 complained that "Plaintiff has not made any settlement demand. If plaintiff
7 identifies its supplier . . . TP-Link USA Corporation is open to early settlement . .
8 ." The resultant mediation process, which lasted with intensity from August 9 to
9 October 25, 2019, failed to achieve its goal, when TP-Link filed a letter with
10 Magistrate Judge Freeman a week before mediation, requesting that further
11 mediation efforts be cancelled.¹⁸
12
13
14

15 TSI's core allegations at bar have been in litigation, substantially *verbatim*,
16 since May 29, 2019. *Newport Harbor Ventures, LLC v. Morris Cerullo World*
17 *Evangelism*¹⁹ adopts a "first opportunity" approach ("the anti-SLAPP statute is
18 designed to resolve these lawsuits early, but not to permit the abuse that delayed
19
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21

22 2004)("mere potential or bare possibility' that judicial proceedings might be instituted' in the
23 future is insufficient to invoke the litigation privilege.")

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28 ¹⁸ *Id.* at ECF Nos. 45-47.

¹⁹ 4 Cal. 5th 637, 639-640, 230 Cal. Rptr. 3d 408, 413 P.3d 650 (2018).

1 motions to strike might entail”). *Newport Harbor* has been followed by NDCA.²⁰
2 That instant plaintiff filed an amended complaint is of no moment because
3 successive pleadings are deemed identical if, as here, the “transactional nucleus of
4 facts” remains unchanged. Cf. *Kulick v. Leisure Vill. Ass'n*, 2018 U.S. Dist.
5 LEXIS 113771, at *4 (C.D. Cal. 2018). Defendants anti-SLAPP motion is
6 untimely.
7
8

9 **C. TP-Link’s Challenged Conduct is not anti-SLAPP Protected**

10
11 Falsely accusing a business of counterfeiting is wrongful and unprotected as
12 “petitioning conduct.” *Eternity Mart, Incopro, and Hand & Nail* discussed at p.
13 10, *supra*. “As Professor McCarthy notes, counterfeiting is the ‘hard core’ or ‘first
14 degree’ of trademark infringement that seeks to trick the consumer into believing
15 he or she is getting the genuine article, rather than a ‘colorable imitation.’” *Gucci*
16 *Am., Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, 242 (SDNY 2012).
17
18

19 Thus, even assuming *arguendo* that TP-Link would be anti-SLAPP
20 “protected” vis-a-vis steps taken as to reporting trademark infringement to
21 Amazon, TSI’s instant state law claims do not threaten such activity, but rather,
22 instant claims challenge accusations of counterfeiting. TP-Link has not argued,
23 because it cannot argue, that lying about one’s competitors to destroy them is
24
25
26

27 ²⁰ *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 402 F. Supp. 3d 615, 715
28 (N.D. Cal. 2019).

1 protected conduct. There is no privilege in law to kill off the competition with lies
2 blocking its access to the marketplace.
3

4 **D. Probability of Prevailing on Counterclaims**

5 1. The “Probability of Prevailing” Standard

6
7 Where an anti-SLAPP movant shows protected activity (which TP-Link has
8 **not** shown in fact, but which we assume *arguendo* it has), the burden shifts to the
9 claimant to establish a “probability that the plaintiff will prevail on the claim.” Cal.
10 Civ. Proc. Code § 425.16(b)(1). The Ninth Circuit holds that “probability” is not a
11 likelihood of success, but rather, a somewhat minimal showing. See *Hilton v.*
12 *Hallmark Cards*, 599 F.3d 894,908 (9th Cir. 2010)("'Reasonable probability' . . .
13 requires only a 'minimum level of legal sufficiency and triability.'")
14
15

16 TSI stands on its discussion in Section IV.B.-E. above to establish its
17 probability of prevailing on its state law claims.
18

19 **CONCLUSION**

20
21 Having responded to each of the many issues raised by Defendants, we pray
22 that the Court deny the Joint Motion of Defendants in its entirety and, should any
23 count warrant dismissal, we request leave to amend the Complaint.²¹
24
25

26
27 ²¹ The Court need “not reach . . . [here TP-Link’s] argument that—given the horizontal aspect of
28 the conspiracy . . .the conspiracy is subject to *per se* condemnation.” *W. Penn Allegheny Health*
Sys. v. UPMC, 627 F.3d 85, 101 n.10 (3d Cir. 2010), cert. denied *UPMC v. W. Penn Allegheny*
Health Sys., 565 U.S. 817, 132 S. Ct. 98 (2011).

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LAW OFFICE OF MARK SCHLACHET
/s/ Mark Schlachet
Mark Schlachet (admitted PHV)
3515 Severn Road
Cleveland, OH 44118
Telephone: (216) 225-7559
Facsimile: (216) 932-5390 Email: markschlachet@me.com
Attorney for Plaintiff Thimes Solutions Inc.

LA LAW GROUP, APLC
/s/ Christopher J. Hammond Christopher J. Hammond (SBN 150024) 21540 Prairie Street, Unit A Chatsworth, CA 91311
Telephone: (866) 625-2529
Facsimile: (866) 463-9285
Email: chammond@bizlawpro.com
Attorney for Plaintiff Thimes Solutions Inc.

CERTIFICATE OF SERVICE OF MEMORANDUM IN OPPOSITION

Undersigned counsel to Plaintiff Thimes Solutions Inc. hereby certifies that on February 14, 2020 all parties entitled to service via the Court’s ECF system were served accordingly.

/s/Mark Schlachet _____
Mark Schlachet