

**NOT FOR PUBLICATION**

**FILED**

UNITED STATES COURT OF APPEALS

NOV 9 2022

FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

ROYAL HOLDINGS TECHNOLOGIES  
CORP., DBA X.Labs, a Delaware corporation,

Plaintiff-Appellee,

v.

IP VIDEO MARKET INFO, INC., a Hawaii  
corporation and Pennsylvania corporation,

Defendant-Appellant.

No. 21-55048

D.C. No. 2:20-cv-04093-SB-PLA

MEMORANDUM\*

Appeal from the United States District Court  
for the Central District of California  
Stanley Blumenfeld, Jr., District Judge, Presiding

Argued and Submitted March 18, 2022  
San Francisco, California

Before: W. FLETCHER, GOULD, and COLLINS, Circuit Judges.

Plaintiff-Appellee Royal Holdings Technologies Corporation (“X.Labs”) sued Defendant-Appellant IP Video Market Info, Inc. (“IPVM”), alleging defamation and related torts over product reviews IPVM published of X.Labs’ app, Feevr. IPVM made a motion to strike under California’s Strategic Lawsuit Against Public Participation statute, *see* CAL. CODE CIV. PROC. § 425.16(b)(1), which was partially denied. IPVM has appealed, and we reverse and remand.

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Because X.Labs concedes that the viability of all of its claims for relief is “contingent on whether [its] defamation claim survives,” we address only the defamation claim. “The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage.” *See John Doe 2 v. Super. Ct.*, 206 Cal. Rptr. 3d 60, 68 (Ct. App. 2016) (citation omitted). X.Labs must plead sufficient facts to establish each of these elements. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). It has failed to do so with respect to the statements at issue.

1. X.Labs contends that IPVM’s claims regarding Feevr’s accuracy are false because “actual testing of the Feevr system . . . demonstrates that the Feevr system is in fact accurate and reliable for its intended purpose.” X.Labs’ complaint pointed to testing of its products in a controlled testing environment. Under such conditions, “the skin temperature measurements recorded by the Feevr units were within 1°C of the skin temperature measurements recorded” by two other devices.

We conclude that X.Labs failed to plead sufficient facts to establish the falsity of IPVM’s statements regarding Feevr’s accuracy. X.Labs measured Feevr’s accuracy under optimal conditions, and it would not be reasonable to infer that Feevr is similarly accurate under the real-world conditions in which it is intended to be used, *i.e.*, in crowds at public spaces such as airports, train terminals, and concerts. Moreover, X.Labs has not pleaded specific facts showing

that a 1°C average margin of error—let alone a 1°C average margin of error relative to two devices with unspecified accuracies—is sufficiently small for the product to be accurate for measuring elevated human body temperatures. We agree with IPVM that 1°C may be “a significant range for human body temperature.” Indeed, X.Labs alleges that the “[a]verage human body temperature” has an upper range of “37.5°C,” whereas “[w]hen a person has a fever, their core temperature is elevated” to “38.1°C” and higher—a mere 0.6°C difference. Accordingly, we cannot say that X.Labs has carried its burden with respect to IPVM’s criticisms of Feevr’s accuracy.

2. IPVM described X.Labs’ marketing as “misleading.” IPVM explained that X.Labs “repeatedly refers to COVID-19 in its marketing, including [at] the very top of their website” and in “the first ten seconds of their marketing video,” “[b]ut no screening system can detect coronavirus, regardless of what is claimed.” Moreover, IPVM referenced its concerns about Feevr’s accuracy in decrying “how misleading much of [X.Labs’] marketing is.”

We conclude that X.Labs failed to plead sufficient facts to establish falsity. The operative complaint alleges, in relevant part, only that “[c]ommon symptoms of COVID-19 include fever, cough, and shortness of breath or difficulty breathing”; that “[t]he Feevr system performs a preliminary scan to efficiently and effectively screen and detect individuals in a crowd with an elevated forehead skin

temperature”; and (as noted earlier) that Feevr was tested to be “within 1°C of the average skin temperature measurements recorded by” two other thermal devices. For the reasons discussed in the preceding section, X.Labs’ allegations do not plead sufficient facts to show that Feevr is accurate within the relevant parameters. And X.Labs’ allegations wholly fail to establish that Feevr is sufficiently accurate to be useful for detecting and stopping the spread of COVID-19. Accordingly, X.Labs has not carried its burden with respect to showing the falsity of IPVM’s description of X.Labs’ marketing as “misleading.”

3. An IPVM article also identified a “Violation Risk” based on a view that Feevr violated FLIR’s software development kit (“SDK”) license agreement. IPVM claimed that the agreement “prohibits the use of FLIR devices, like the FLIR ONE Pro that Feevr uses, from apps like Feevr’s.” IPVM quoted the agreement’s provision that the “FLIR SDK may not be used in conjunction with any Apps designed for medical or health-related purposes.” IPVM updated the article to include both (1) X.Labs’ denial that it uses the SDK; and (2) FLIR’s disavowal of knowledge of Feevr’s operation and confirmation that the FLIR ONE Pro is not marketed for temperature screening.

X.Labs’ theory is that the article is defamatory because it falsely implies “that X.Labs and the Feevr system have run afoul of the FLIR SDK License Agreement.” The alleged defamatory nature of the statement thus rests on the

asserted combination of a false statement of fact coupled with a *legal* contention that is based on that factual error. But legal claims are generally matters of opinion, not statements of fact. *See Franklin v. Dynamic Details, Inc.*, 10 Cal. Rptr. 3d 429, 437–38 (Ct. App. 2004) (holding that “statements purport[ing] to interpret copyright law and contract law and [to] apply that law to fully disclosed facts” constituted “opinion statements based upon expressly stated facts”).

Moreover, the IPVM statement does not suggest that its claim of a “Violation Risk” is based on any undisclosed facts; on the contrary, it quotes what IPVM contends is the relevant language and it states that this language is implicated, in IPVM’s view, because Feevr uses the “FLIR ONE Pro.” Even assuming that X.Labs is correct that the license agreement is not triggered merely by use of the FLIR One and that Feevr does not use the FLIR SDK in any respect, a statement of a legal opinion based on disclosed facts “can be punished only if the stated facts are *themselves* false and demeaning.” *See Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1439 (9th Cir. 1995) (emphasis added); *see also id.* (“A simple expression of opinion based on disclosed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is.” (simplified)). Because the allegedly false underlying fact at issue here—that Feevr uses the FLIR SDK—is not itself defamatory, X.Labs’ claim fails.

**REVERSED and REMANDED.**

## United States Court of Appeals for the Ninth Circuit

Office of the Clerk  
95 Seventh Street  
San Francisco, CA 94103

### Information Regarding Judgment and Post-Judgment Proceedings

#### Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

#### Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

#### Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

#### Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

#### (1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ▶ A material point of fact or law was overlooked in the decision;
  - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

#### B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

**(2) Deadlines for Filing:**

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- See Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

**(3) Statement of Counsel**

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

**(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))**

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- A response, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.



- The petition or response must be accompanied by a Certificate of Compliance found at Form 11, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

### **Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)**

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.

### **Attorneys Fees**

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms* or by telephoning (415) 355-7806.

### **Petition for a Writ of Certiorari**

- Please refer to the Rules of the United States Supreme Court at [www.supremecourt.gov](http://www.supremecourt.gov)

### **Counsel Listing in Published Opinions**

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send an email or letter **in writing within 10 days** to:
  - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Maria Evangelista ([maria.b.evangelista@tr.com](mailto:maria.b.evangelista@tr.com)));
  - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT  
Form 10. Bill of Costs**

*Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>*

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The Clerk is requested to award costs to *(party name(s))*:

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