

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA**

Department 16

**Honorable Sunil R. Kulkarni, Presiding
(covering for Judge Amber Rosen)**

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 11-14-23 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear by video.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.

Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.

The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. today you must notify the:

- (1) Court by calling (408) 808-6856 and
- (2) Other side by phone or email that you plan to appear and contest the ruling (California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court strongly prefers in person appearances. If you must appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.

https://www.sccscourt.org/general_info/ra_teams/video_hearings_teams.shtml

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. Phone lines are now open for you to call and reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Where to call for your hearing date: **408-882-2430** When you can call: **Monday to Friday, 8:30 am to 12:30 pm**

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

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3.1312.)**

LINE #	CASE #	CASE TITLE	RULING
LINE 1	20CV366611	JOSE MONTES et al vs DURAN & VENABLES, INC. et al	See tentative ruling. The Court will prepare the final order.
LINE 2	23CV415700	WEN ZHAO et al vs JING QIN et al	See tentative ruling. The Court will prepare the final order.
LINE 3	23CV415700	WEN ZHAO et al vs JING QIN et al	See line 2.
LINE 4	21CV387960	Nextbt Group LLC vs Peter Jewett et al	See tentative ruling. The Court will prepare the final order.
LINE 5	21CV389131	UHG I, LLC vs Ramin Eskandarian	See tentative ruling. The Court will prepare the final order.

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3.1312.)**

LINE 6	2012-1-CV-220303	Cavalry SPV I, LLC vs O. Williams	Good cause having been shown, the Court grants Judgment Creditor's unopposed motion as follows: The Court enters Application for Renewal of Judgment <i>nunc pro tunc</i> to December 1, 2022. The Court grants this Application and enters a Renewed Judgment <i>nunc pro tunc</i> as follows: Judgment Principal remaining unsatisfied of \$21,117.64; remaining accrued and unpaid interest in the amount of \$20,989.41; and renewal application fee of \$ 60.00 for a total renewed judgment of \$42,167.05. Prevailing party to prepare order.
LINE 7			
LINE 8			
LINE 9			
LINE 10			
LINE 11			
LINE 12			

Calendar Line 1

Case Name: *Montes, et al. v. Duran & Venables, Inc., et al.*

Case No.: 20CV366611

According to the allegations of the second amended complaint (“SAC”), plaintiff Xochitl Alvarez (“Alvarez”) is the widow of plaintiff Jose Montes’ (“Montes”) deceased business partner, Don Alvarez. (See SAC, ¶ 16.) Upon Mr. Alvarez’s untimely death, Mrs. Alvarez executed a power of attorney assigning all rights, obligations, and duties to Montes to enable Montes to operate as the sole, remaining business owner. (*Id.*) Alvarez later transferred ownership to Montes, which he duly recorded. (*Id.*) Plaintiffs Alvarez and Montes (collectively, “Plaintiffs”) were in lawful possession of the subject property at 5430 Pacheco Pass Highway when, on May 15, 2017, Plaintiffs received correspondence from the County of Santa Clara Department of Planning and Development (“Department”) informing them that the property was in violation of the County Ordinance Code. (See SAC, ¶¶ 18, 26.) Upon investigation, Plaintiffs discovered that an unknown party had dumped an enormous amount of dirt onto the property. (See SAC, ¶ 19.) Department Supervising Construction Inspector Jerry G. Guevara identified defendants Duran & Venables, Inc. (“D&V”) and Load Count, LLC (“Load Count”) as the parties that committed the unauthorized dirt dumping on the subject property. (See SAC, ¶¶ 20-24.)

On May 13, 2020, Plaintiffs filed a complaint against D&V, asserting causes of action for trespass, invasion of right of private occupancy and negligent disposal of material. On August 17, 2020, Plaintiffs filed a first amended complaint against D&V, Stoer Construction, Inc. (“Stoer”) and Sean Anderson, asserting the same causes of action as the initial complaint. On February 26, 2021, Plaintiffs dismissed Stoer and Anderson without prejudice, stating that they “were incorrectly named as Defendants.”

On March 30, 2022, Plaintiffs filed the SAC against D&V and Load Count, again asserting the same causes of action.

On May 20, 2022, D&V filed a cross-complaint (“XC”) against Load Count, asserting causes of action for indemnification, apportionment of fault and declaratory relief. On January 12, 2023, D&V filed an amendment to their XC, naming Stoer as Roe 1.

On February 24, 2023, the Court granted Plaintiffs’ ex parte application to substitute Stoer as Doe 1, Sean Anderson as Doe 2 and Michael Ward as Doe 3.

On March 27, 2023, D&V dismissed Stoer without prejudice from the XC.

On April 11, 2023, Alvarez was dismissed as a named plaintiff.

Stoer demurs to each cause of action of the SAC on the ground that they fail to state facts sufficient to constitute a cause of action against it, the SAC fails to allege any facts supporting alter ego or other theories of vicarious liability, and Montes lacks standing to sue.

STOER’S DEMURRER TO THE SAC

Stoer demurs to each cause of action of the SAC, arguing that: the SAC fails to allege any basis of liability against it; the SAC fails to sufficiently allege facts supporting vicarious liability or alter ego; and Montes lacks standing to sue because he is not a real party in interest.

Stoer's request for judicial notice

In support of its demurrer, Stoer requests judicial notice of:

- The request for dismissal of Stoer and Sean Anderson, filed on February 26, 2021 (attached as Exhibit 1);
- The SAC (attached as Exhibit 2);
- The order to substitute true names for Doe defendants, filed on February 24, 2023 (attached as Exhibit 3);
- The request for dismissal of cross-defendant Stoer from the XC¹, filed on March 27, 2023 (attached as Exhibit 4);
- The request for dismissal of plaintiff Xochitl Alvarez, filed on April 11, 2023 (attached as Exhibit 5); and,
- The proof of service of summons, filed on June 22, 2023 (attached as Exhibit 6).

Stoer's request for judicial notice of the SAC is GRANTED. (Evid. Code § 452, subd. (d).)

As to the other documents, while court documents are subject to judicial notice, they do not appear relevant to any of Stoer's arguments. "Only relevant material is a proper subject of judicial notice, even where the Evidence Code provides in mandatory terms that matters be judicially noticed." (*Hayward Area Planning Assn. v. City of Hayward* (2005) 128 Cal.App.4th 176, 182; see also *Aquila, Inc. v. Super. Ct. (City and County of San Francisco)* (2007) 148 Cal.App.4th 556, 569 (stating that "judicial notice, since it is a substitute for proof... is always confined to those matters which are relevant to the issue at hand"); see also *Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301 (stating same); see also *Golden Gate Land Holdings LLC v. East Bay Regional Park Dist.* (2013) 215 Cal.App.4th 353, 366 (stating that "[o]nly relevant evidence is admissible by judicial notice").) Stoer's request for judicial notice of the remainder of the documents is DENIED.

Montes' request for judicial notice

In opposition to the demurrer, Montes requests judicial notice of:

- The SAC (attached as Exhibit A);
- The February 24, 2023 order granting the substitution of Stoer as Doe 1, Sean Anderson and Doe 2 and Michael Ward as Doe 3 (attached as Exhibit B);
- The January 12, 2023 amendment to D&V's cross-complaint, naming Stoer as Roe 1 (attached as Exhibit C); and,

¹ Stoer misrepresents in the request for judicial notice that it is a "Request for Dismissal of **Defendant** Stoer" when it is in fact a request for dismissal of *cross-defendant* Stoer from the XC.

- The docket in *Ward v. Anderson* (Super. Ct. Santa Clara County, 2022, No. 22CV395964) (attached as Exhibit D).

Montes' request for judicial notice of the SAC, the February 24, 2023 order and the January 12, 2023 amendment to D&V's cross-complaint is GRANTED. (Evid. Code § 452, subd. (d).)

Montes' request for judicial notice of the docket in the unrelated matter is DENIED. (See *Hayward Area Planning Assn.*, *supra*, 128 Cal.App.4th at p.182 (stating that "[o]nly relevant material is a proper subject of judicial notice, even where the Evidence Code provides in mandatory terms that matters be judicially noticed"); see also *Aquila, Inc.*, *supra*, 148 Cal.App.4th at p. 569 (stating that "judicial notice, since it is a substitute for proof... is always confined to those matters which are relevant to the issue at hand"); see also *Gbur*, *supra*, 93 Cal.App.3d at p. 301 (stating same).)

Montes alleges facts demonstrating standing to bring the SAC

Stoer argues that Montes lacks standing to sue because he is not a real party in interest. Stoer asserts that while "Plaintiff Montes alleges purported damage arising out of the alleged unauthorized dumping of dirt on the subject property... [a]t no relevant time... did Montes have an ownership interest in the subject property located." (Stoer's memorandum of points and authorities in support of demurrer ("Stoer's memo"), p.8:8-10.) Stoer contends that "[t]itle records for the property show that as of January 15, 2021, the current record owner of the property is AMG Enterprises LLC and at the time of the alleged unauthorized dumping of dirt on the property in 2017, the record owner of the property was Donato and Xochitl Alvarez." (*Id.* at p.8:10-13, citing Lloyd decl. in support of demurrer ("Lloyd decl."), exh. B.) Stoer further notes that the letter from the Department regarding the property's alleged violations of the County Ordinance Code was addressed to Donato and Xochitl Alvarez. (*Id.* at p.8:13-16.) Lastly, Stoer argues that the SAC's allegation regarding the execution of a power of attorney is of no moment because "it is well established that the holder of a power of attorney is merely an agent of the party who appointed him and not the real party in interest as to the rights belonging to the principal (here, Xochitl Alvarez as the property owner at the time of the alleged incident) and can neither sue to enforce these rights nor sue derivatively for damages suffered by the principal." (*Id.* at pp.8:25-26, 9:1-3.)

However, as to the title records, a "demurrer tests the pleading alone and not the evidence or other extrinsic matters which do not appear on the face of the pleading or cannot be properly inferred from the factual allegations of the complaint." (*Lafferty v. Wells Fargo Bank* (2013) 213 Cal.App.4th 545, 566; see also *Hayter Trucking, Inc. v. Shell Western E&P, Inc.* (1993) 18 Cal.App.4th 1, 17 (stating same).) On demurrer, the Court may not consider the records attached to Ms. Lloyd's declaration.

Regardless, even if Montes is not the owner of the property despite the SAC's allegation, the SAC also alleges that Montes was "in lawful possession of the Property." (SAC, ¶ 26.) Stoer's argument does not address Montes' possession of the subject property and "it is well-settled that the proper party plaintiff in an action for trespass to real property is the person in actual possession." (*Whittaker v. Otto* (1967) 248 Cal.App.2d 666, 672.) Similarly, a cause of action for invasion of the right of private occupancy also concerns the

intrusion of a party's possessory rights. (See *Fibreboard Corp. v. Hartford Accident & Indemnity Co.* (1993) 16 Cal.App.4th 492, 514-515 (stating that the "'invasion of the private right of occupancy' has been held to pertain to torts against real property... [o]ccupancy goes to the holding, possessing or residing in or on something"); see also *Albert v. Truck Ins. Exchange* (2018) 23 Cal.App.5th 367, 380 (stating that "[o]ccupancy goes to the holding, possessing or residing in or on something"); see also *Waranch v. Gulf Ins. Co.* (1990) 218 Cal.App.3d 356, 360 (stating that "the phrase 'right to private occupancy'... clearly encompasses an insured's interference with another's 'right' to possess an interest in real property").)

Stoer's argument regarding the execution of a power of attorney also does not address the SAC's allegation that Montes was in lawful possession of the subject property. Montes has sufficiently pled facts establishing standing. Accordingly, Stoer's demurrer to the SAC on the ground that it fails to allege facts supporting standing is **OVERRULED**.

The SAC states facts sufficient to constitute a cause of action as to defendant Stoer

Stoer argues that "the First, Second and Third Causes of Action fail to state ultimate facts sufficient to constitute the causes of action for trespass, invasion of right of private occupancy, and negligent disposal of material... [and] simply identify the law and elements of each cause of action but make no specific allegations in support against Stoer." (Stoer's memo, p.6:16-20.)

Stoer does not cite to any legal authority—and the Court is unaware of any authority—that requires causes of action for trespass, invasion of right of private occupancy, or negligence to be pled with specificity; rather, these causes of action may be alleged in general terms. (See *Guilliams v. Hollywood Hospital* (1941) 18 Cal.2d 97, 101 (stating that "it is established that a cause of action may be stated in which negligence is alleged in general terms, without detailing the specific manner in which the injury occurred"); see *Morris v. JPMorgan Chase Bank, N.A.* (2022) 78 Cal.App.5th 279, 291-292 (stating that "[a] complaint, with certain exceptions, need only contain a 'statement of the facts constituting the cause of action, in ordinary and concise language'... [t]o withstand a demurrer, a complaint must allege ultimate facts, not evidentiary facts or conclusions of law... a general demurrer will be overruled if the complaint contains allegations of every fact essential to the statement of a cause of action, regardless of mistaken theory or imperfections of form that make it subject to special demurrer").) Stoer concedes that each of the causes of action alleges the elements of each cause of action. The SAC has also alleged facts in general terms with regards to those elements. Stoer's demurrer on this ground is **OVERRULED**.

The SAC's allegations of agency are sufficient against demurrer

Stoer lastly argues that the SAC "insufficiently alleges vicarious theories of liability based on agency, employment, aiding and abetting, joint venture and/or alter ego relationship between all of the Defendants." (Stoer's memo, pp.6:26-28, 7:1.) Stoer acknowledges that paragraph 7 of the SAC includes the allegation that each of the defendants are alleged to be he agents of their co-defendants. (*Id.* at p.7:1-6, citing to SAC, ¶ 7.) Paragraph 8 of the SAC also alleges that the defendants were acting within the course and scope of their agency and had knowledge of their agent's actions, authorizing and ratifying the acts of their co-defendants. (See SAC, ¶ 8.) Stoer asserts that this is insufficient "to state a cause of action based upon any

purported agency... [because the SAC] contains no factual support for these conclusory allegations of law, and no actual facts or specific allegations to support Stoer's liability as a purported agent... [and a] complaint must allege ultimate facts, not conclusion of laws." (Stoer's memo, p.7:6-13.)

As Stoer states, for purposes of demurrer, "[i]t is only necessary for a plaintiff to plead ultimate facts." (*Doheny Park Terrace Homeowners Assn., Inc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076, 1085; see also *Frasch v. London & Lancashire Fire Ins. Co.* (1931) 213 Cal. 219, 224 (stating that "[a]s against a general demurrer it is only necessary that the ultimate facts be alleged"); see also *Roger v. County of Riverside* (2020) 44 Cal.App.5th 510, 533 (stating that "[t]o survive demurrer, a plaintiff is 'only required to plead ultimate facts'").) Despite Stoer's protestations to the contrary, "[t]he general allegation of agency is one of ultimate fact, sufficient against a demurrer." (*Kiseskey v. Carpenters' Trust for So. California* (1983) 144 Cal.App.3d 222, 230; see also *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 886 (Sixth District, stating that "an allegation of agency is deemed an allegation of ultimate fact"); see also *City of Industry v. City of Fillmore* (2011) 198 Cal.App.4th 191, 212 (stating that "[a]n allegation of agency is an allegation of ultimate fact that must be accepted as true for purposes of ruling on a demurrer").) Thus, the SAC adequately alleges the ultimate fact of Stoer's co-defendants as the agents of Stoer.

Accordingly, Stoer's demurrer to the SAC is OVERRULED in its entirety.

The Court will prepare the Order.

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Calendar Line 2

Case Name: *Wen Zhao, et al. v. Jing Qin, et al.*

Case No.: 23CV415700

Factual and Procedural Background

This is an action for unfair business practices, interference, and abuse of process among real estate professionals.

According to the complaint, plaintiffs Wen Zhao (“Zhao”) and Jin Zong (“Zong”) (collectively “Plaintiffs”) are real estate agents from their respective real estate brokerages. (Complaint, ¶ 8.) Defendant Sheng Zhang aka Jason Zhang or Ivan Zhang (“Jason”²) was a real estate agent of BQ Group, Inc. (“BQ”), a brokerage firm founded by defendant Jing Qin aka Bill Qin (“Qin”), Jason’s supervisor. (Id., ¶¶ 9-10.)

Beginning on July 9, 2021, Plaintiffs allege defendant Jason began approaching and stealing their clients. (Complaint, ¶¶ 11-18.) Thereafter, Plaintiffs contacted defendant Qin to take immediate action to stop Jason from engaging in unfair business practices. (Id., ¶ 19.) Qin, however, turned a blind eye to Jason’s actions as he continued to steal potential clients away from Plaintiffs. (Id., ¶¶ 19-27.)

In addition, Plaintiffs allege defendant Jason, with assistance from Tony Shine, retaliated against them by posting a negative review on plaintiff Zhao’s Google Review page criticizing her business. (Complaint, ¶¶ 36-37.) Defendant Qin also retaliated against Plaintiffs by publishing negative content on WeChat groups alleging Zhao had defamed “all agents” of BQ. (Id., ¶ 52.) Finally, Qin along with his attorney, defendant Michael Cheng (“Cheng”), made various court filings making false accusations against Zhao resulting in a complaint entitled *Jing Qin and BQ Group, Inc. v. Wen Zhao* (case number 22CV398204) (“Defamation Lawsuit”). (Id., ¶ 57.) Other court filings included motions, discovery responses and documents, and filings in arbitration. (Ibid.) In particular, Plaintiffs allege Cheng filed the Defamation Lawsuit on behalf of Qin and BQ with false claims and fabricated evidence against Zhao with the intention of seeking retaliation and illegally gaining an economic advantage. (Id., ¶ 119.)

On May 3, 2023, Plaintiffs filed a complaint against defendants setting forth causes of action for:

- (1) Unfair Business Competition in Violation of Business and Professions Code, § 17200 [Plaintiffs against Qin and Jason];
- (2) Intentional Interference of Prospective Economic Advantage [Zong against Jason and Qin];
- (3) Intentional Interference of Contractual Relationship [Zhao against Jason, Qin and Cheng];
- (4) Intentional Interference of Prospective Economic Advantage [Zhao against Jason];
- (5) Abuse of Process [Zhao against Qin and Cheng];

²The Court refers to defendant Sheng Zhang as “Jason” for purposes of clarity. No disrespect is intended.

(6) Intentional Infliction of Emotional Distress [Zhao against Qin and Cheng].

On June 29, 2023, defendant Jason filed an answer to the complaint alleging a general denial and affirmative defenses.

On October 5, 2023, Plaintiffs dismissed defendant Cheng from this action without prejudice.

Currently before the court are a special motion to strike and demurrer to the complaint by defendants Qin and Cheng.³ Both sides filed requests for judicial notice in conjunction with the motions. Plaintiffs filed written oppositions. Defendant Qin filed reply papers and evidentiary objections.

A further case management conference is scheduled for January 23, 2024.

Special Motion to Strike the Complaint

Defendant Qin moves to strike the fifth and sixth causes of the complaint on the ground that both claims arise from protected activity and Plaintiffs will be unable to demonstrate a probability of success on the merits.

Defendant Qin's Request for Judicial Notice

“Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter.” (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117.)

In support of the motion, defendant Qin requests judicial notice of the following:

- (1) Defendant Qin is a plaintiff in the Defamation Lawsuit, for which plaintiff Zhao is the defendant.
- (2) Defendant Chang is counsel of record for defendant Qin and for BQ Group, Inc. in the Defamation Lawsuit.
- (3) In the Defamation Lawsuit, plaintiff Zhao filed a special motion to strike pursuant to Code of Civil Procedure section 425.16 seeking attorney's fees in the amount of \$7,590.00.
- (4) The Honorable Drew C. Takaichi's Order denying the special motion to strike filed by plaintiff Zhao in the Defamation Lawsuit (Ex. C.).
- (5) The Honorable Drew C. Takaichi's Order awarding monetary sanctions to defendant Qin and BQ Group, Inc. against plaintiff Zhao (Ex. D.).
- (6) On March 13, 2013, plaintiff Zhao filed a motion for leave to file a cross-complaint in the Defamation Lawsuit.
- (7) Defendant Qin and BQ Group, Inc. filed an opposition to the motion for leave to file a cross-complaint on June 1, 2023 in the Defamation Lawsuit.
- (8) On June 1, 2023, plaintiff Zhao filed a notice of withdrawal of motion for leave to amend in the Defamation Lawsuit.

³ As Cheng is no longer a party to this action, the court will address the motions only on behalf of defendant Qin.

- (9) The Defamation Lawsuit is still an active case before this court and no trial date has been set.

The court grants the request as to nos. 1, 2, and 9 as information related to court records under Evidence Code section 452, subdivision (d). (See *Stepan v. Garcia* (1974) 43 Cal.App.3d 497, 500 [the court may take judicial notice of its own file].) The court denies the request as to the remaining items as they are not relevant to issues raised on the special motion to strike. (See *Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301 [judicial notice is confined to those matters which are relevant to the issue at hand].)

Therefore, the request for judicial notice is GRANTED IN PART and DENIED IN PART.

Plaintiffs' Request for Judicial Notice

In opposition, Plaintiffs request judicial notice of the Defamation Lawsuit, filed on May 9, 2022 in Santa Clara County (Ex. 1). As stated above, the court may take judicial of this complaint as a record of the superior court under Evidence Code section 452, subdivision (d).

Accordingly, the request for judicial notice is GRANTED.

Defendant Qin's Evidentiary Objections

In reply, defendant Qin filed evidentiary objections to the declaration submitted by plaintiff Zhao in the opposition. The court however declines to consider the objections as they are not material in resolving issues raised by the special motion to strike.

Legal Standard

Code of Civil Procedure section 425.16 provides for a "special motion to strike" when a plaintiff's claims arise from certain acts constituting the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc., § 425.16, subds. (a) & (b)(1).)

"Consistent with the statutory scheme, ruling on an anti-SLAPP motion involves a two-step procedure. First, the moving defendant must identify 'all allegations of protected activity' and show that the challenged claim arises from that activity. [Citations.] Second, if the defendant makes such a showing, the 'burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated.' [Citation.] Without resolving evidentiary conflicts, the court determines 'whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment.' [Citation.]" (*Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924, 934.)

First Prong: Protected Activity

Law

“A defendant meets his or her burden on the first step of the anti-SLAPP analysis by demonstrating the acts underlying the plaintiff’s cause of action fall within one of the four categories spelled out in [Code of Civil Procedure] section 425.16, subdivision (e).” (*Collier v. Harris* (2015) 240 Cal.App.4th 41, 50-51 (*Collier*)). That section provides that an “act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” (Code Civ. Proc., § 425.16, subd. (e).) “These categories define the scope of the anti-SLAPP statute by listing acts which constitute an ‘act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue.’ ” (*Collier, supra*, 240 Cal.App.4th at p. 51, citing Code Civ. Proc., § 425.16, subd. (e).)

“A claim arises from protected activity when that activity underlies or forms the basis for the claim. [Citations.] Critically, ‘the defendant’s act underlying the plaintiff’s cause of action must itself have been an act in furtherance of the right of petition or free speech.’ [Citations.] ‘[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute.’ [Citations.] Instead, the focus is on determining what ‘the defendant’s activity [is] that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.’ [Citation.]” (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1062-1063 (*Park*)).

“[A] claim may be struck only if the speech or petitioning activity itself is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted.” (*Park, supra*, 2 Cal.5th at p. 1060.) To determine whether the speech constitutes the wrong itself or is merely evidence of a wrong, “in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by defendant supply those elements and consequently form the basis for liability.” (*Id.* at p. 1063.)

“In deciding whether the ‘arising from’ requirement is met, a court considers ‘the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.’ ” (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 670.) “[I]f the defendant does not demonstrate this initial prong, the court should deny the anti-SLAPP motion and need not address the second step.” (*Baharian-Mehr v. Smith* (2010) 189 Cal.App.4th 265, 271.)

Fifth Cause of Action: Abuse of Process

The fifth cause of action is a claim for abuse of process arising from defendant Qin's filing of the Defamation Lawsuit and related motions and discovery alleging false claims and evidence against plaintiff Zhao.⁴ (See Complaint at ¶¶ 57, 118-123.)

Here, the filing of the Defamation Lawsuit and other pleadings constitute statements or conduct made in connection with issues under consideration by a judicial body under Code of Civil Procedure section 425.16, subdivision (e)(2). (See *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89 [the filing of a complaint in breach of a general release is a writing made in connection with an issue under review by a judicial body and therefore satisfies the first prong of the analysis]; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 [the right to petition protected under section 425.16 includes the basic act of filing litigation].) In addition, California cases have determined that claims for abuse of process arise from protected activity. (See *S.A. v. Maiden* (2014) 229 Cal.App.4th 27, 42 (*S.A.*) [like malicious prosecution, an abuse of process claim involves protected activity and satisfies the first prong]; see also *Booker v. Rountree* (2007) 155 Cal.App.4th 1366, 1370 ["Abuse of process claims are subject to a special motion to strike."].) Plaintiffs appear to concede this point as they fail to address it in opposition. (See *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal. App. 4th 507, 529 [failure to challenge a contention in a brief results in the concession of that argument].)

Consequently, defendant Qin has satisfied his burden in demonstrating the fifth cause of action arises from protected activity.

Sixth Cause of Action: Intentional Infliction of Emotional Distress

The sixth cause of action is a claim for intentional infliction of emotional distress. Plaintiffs allege Zhao suffered severe emotional distress following the making of false claims by defendant Qin. (See Complaint at ¶¶ 125-127.) The false claims alleged here originate from the filing of the Defamation of Lawsuit and related motions by defendant Qin and thus the sixth cause of action arises also from protected activity.

Therefore, defendant Qin has satisfied his burden in showing the sixth cause of action arises from protected activity. Having done so, the burden shifts to Plaintiffs to establish a probability of success on the merits of their claims.

Second Prong: Probability of Success on the Merits

Law

"In determining whether a plaintiff meets its responsive burden under the second prong, 'the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' [Citations.] In doing so, ' "[t]he court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff's evidence as true, and evaluates the

⁴ Defendant Qin contends the fifth cause of action is, in substance, a premature claim for malicious prosecution. (See Motion at p. 6:8-9.) Despite this characterization, the court considers this claim as an abuse of process cause of action for purposes of the motion.

defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law." ' [Citations.]" (*Area 55, LLC v. Nicholas & Tomasevic, LLP* (2021) 61 Cal.App.5th 136, 151 (*Area 55*).)

"Courts have described this procedure as a 'motion for summary judgment in "reverse." Rather than requiring the *defendant* to defeat the plaintiff's pleading by showing it is legally or factually meritless, the motion requires the *plaintiff* to demonstrate that he possesses a legally sufficient claim which is "substantiated," that is, supported by competent, admissible evidence.' [Citations.] Consistent with this summary-judgment-like procedure, the court 'must draw all reasonable inferences from the evidence in favor of [the party opposing the anti-SLAPP motion].' [Citation.]" (*Area 55, supra*, 61 Cal.App.5th at p. 152.)

Furthermore, " 'evidence may be considered at the anti-SLAPP motion stage if it is *reasonably possible* the evidence set out in supporting affidavits, declarations or their equivalent will be admissible at trial' [citation]. 'Conversely, if the evidence relied upon *cannot* be admitted at trial, because it is categorically barred or undisputed factual circumstances show inadmissibility, the court may not consider it in the face of an objection.' [Citation.]" (*Area 55, supra*, 61 Cal.App.5th at p. 152.)

"When evaluating an affirmative defense in connection with the second prong of the analysis of an anti-SLAPP motion, the court, following the summary-judgment-like rubric, generally should consider whether the defendant's evidence in support of an affirmative defense is sufficient, and if so, whether the plaintiff has introduced contrary evidence, which, if accepted, would negate the defense. [Citations.]" (*Bently Reserve LP v. Papaliolios* (2013) 218 Cal.App.4th 418, 434.)

Fifth Cause of Action: Abuse of Process

"The common law tort of abuse of process arises when one uses the court's process for a purpose other than that for which the process was designed. [Citations.] It has been 'interpreted broadly to encompass the entire range of "procedures" incident to litigation.' [Citation.]" (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056-1057 (*Rusheen*).)

" '[T]he essence of the tort [is] ... misuse of the power of the court; it is an act done in the name of the court and under its authority for the purpose of perpetrating an injustice.' [Citation.] To succeed in an action for abuse of process, a litigant must establish that the defendant (1) contemplated an ulterior motive in using the process, and (2) committed a willful act in the use of the process not proper in the regular conduct of the proceedings. [Citation.]" (*Rusheen, supra*, 37 Cal.4th at p. 1057.)

Defendant Qin argues Plaintiffs cannot establish a probability of success on the merits of the fifth cause of action as the claim is barred by the litigation privilege. (See *Timothy W. v. Julie W.* (2022) 85 Cal.App.5th 648, 661 ["A plaintiff cannot establish a prima facie case if the litigation privilege precludes a defendant's liability on the claim."].)

"Civil Code section 47, subdivision (b) defines what is commonly known as the 'litigation privilege.' 'The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have

some connection or logical relation to the action.’ [Citation.]” (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 912 (*Kashian*).)

“The litigation privilege is absolute; it applies, if at all, regardless whether the communication was made with malice or the intent to harm. [Citation.] Put another way, application of the privilege does not depend on the publisher’s ‘motives, morals, ethics or intent.’ [Citation.] Although originally applied only to defamation actions, the privilege has been extended to *any* communication, not just a publication, having ‘some relation’ to a judicial proceeding, and to all torts other than malicious prosecution. [Citations.]” (*Kashian, supra*, 98 Cal.App.4th at p. 913.)

“The litigation privilege is not limited to the courtroom, but encompasses actions by administrative bodies and quasi-judicial proceedings. [Citation.] The privilege extends beyond statements made in the proceedings, and includes statements made to initiate action. [Citation.]” (*Wise v. Thrifty Payless, Inc.* (2000) 83 Cal.App.4th 1296, 1303.)

“The litigation privilege furthers several public policies. The principal one is ensuring free access to the courts by prohibiting derivative tort actions. [Citation.] The privilege also promotes complete and truthful testimony, encourages zealous advocacy, gives finality to judgments, and avoids unending litigation. [Citation.]” (*Budwin v. American Psychological Assn.* (1994) 24 Cal.App.4th 875, 880.)

“The ‘[p]leadings and process in a case are generally viewed as privileged communications.’ [Citation.] The privilege has been applied specifically in the context of abuse of process claims alleging the filing of false or perjurious testimony or declarations.” (*Rusheen, supra*, 37 Cal.4th at p. 1058; see *Pollock v. University of Southern California* (2003) 112 Cal.App.4th 1416, 1431 [declaration “functions as written testimony,” is a “communication, not conduct,” and “is exactly the sort of communication the privilege is designed to protect”]; *Pettitt v. Levy* (1972) 28 Cal.App.3d 484, 489 [“[p]reparing and presenting false documents is equivalent to the preparation and presentation of false testimony”]; see also *Carden v. Getzoff* (1987) 190 Cal.App.3d 907, 913-915 [claim that expert witness had manufactured false evidence for former wife in dissolution action was privileged].)

Here, as explained above, the abuse of process claim is based on the filing of the Defamation Lawsuit and related pleadings, motions, and discovery which are protected under the litigation privilege. (See *Baker v. Littman* (1956) 138 Cal.App.2d 510, 514, fn. 1 [filing of civil action subject to litigation privilege]; see also *Sipple v. Foundation For Nat. Progress* (1999) 71 Cal.App.4th 226, 242-243 [litigation privilege applies to discovery].) In opposition, Plaintiffs do not submit any substantive argument or supporting authorities to defeat the litigation privilege. Thus, the litigation privilege, which is absolute, applies and Plaintiffs cannot establish a probability of success on the merits. (See *Weeden v. Hoffman* (2021) 70 Cal.App.5th 269, 288 [“At this stage, a plaintiff must show that any asserted defenses are inapplicable as a matter of law or make a prima facie showing of facts that, if accepted, would negate such defenses.”]; *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1263, fn. 7 [if alleged conduct is subject to litigation privilege, plaintiff cannot establish probability of prevailing to defeat an anti-SLAPP motion].)

Accordingly, the special motion to strike the fifth cause of action is GRANTED.

Sixth Cause of Action: Intentional Infliction of Emotional Distress

“The elements of a cause of action for intentional infliction of emotional distress are: ‘ (1) outrageous conduct by the defendant, (2) intention to cause or reckless disregard of the probability of causing emotional distress, (3) severe emotional suffering and (4) actual and proximate causation of the emotional distress.’ ” [Citation.]” (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1376.)

The litigation privilege also bars IIED claims arising out of litigation conduct. (*S.A., supra*, 229 Cal.App.4th at p. 43; see *Komarova v. National Credit Acceptance, Inc.* (2009) 175 Cal.App.4th 324, 341 [“It is well settled that the litigation privilege bars causes of action for intentional infliction of emotional distress.”]; *Rusheen, supra*, 37 Cal.4th at p. 1063 [“modern public policy seeks to encourage free access to the courts and finality of judgments by limiting derivative tort claims [(i.e., IIED claims)] arising out of litigation-related misconduct and by favoring sanctions within the original lawsuit”]; see also *Silberg v. Anderson* (1990) 50 Cal.3d 205, 215 [litigation privilege has “been held to immunize defendants from tort liability based on theories of ... [citations] intentional infliction of emotional distress”].)

As stated above, the sixth cause of action arises from litigation conduct alleged in support of the abuse of process claim. Thus, the intentional infliction of emotional distress cause of action is also barred by the litigation privilege. Again, Plaintiffs do not overcome the litigation privilege defense in opposition and thus cannot establish a probability of success on the merits of the sixth cause of action.

Consequently, the special motion to strike the sixth cause of action is GRANTED.

Request for Attorney’s Fees

Defendant Qin’s request for attorney’s fees and costs is DENIED WITHOUT PREJUDICE subject to a noticed motion and attorney declaration to support an award of fees and costs. (Code Civ. Proc., § 425.16, subd. (c); *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131.)

Demurrer to the Complaint

Defendant Qin argues the third, fifth, and sixth causes of action are subject to demurrer for failure to state a valid claim. (See Code Civ. Proc., § 430.10, subd. (e).)

Defendant Qin’s Request for Judicial Notice

Defendant Qin’s request for judicial notice in support of the demurrer includes many of the same items requested in support of his special motion to strike. Thus, the request is granted in part and denied in part for reasons explained above.

Legal Standard

“In reviewing the sufficiency of a complaint against a general demurer, we are guided by long settled rules. ‘We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. We also consider matters which may be judicially noticed.’ ” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) “A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff’s ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court.” (*Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213–214.)

“The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. The court does not, however, assume the truth of contentions, deductions or conclusions of law. ... [I]t is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment.” (*Gregory v. Albertson’s, Inc.* (2002) 104 Cal.App.4th 845, 850.)

Third Cause of Action: Intentional Interference of Contractual Relationship

“To state a claim for intentional interference with contractual relations, a plaintiff must plead ‘ “(1) a valid contract between plaintiff and a third party; (2) defendant’s knowledge of this contract; (3) defendant’s intentional acts designed to induce a breach or disruptions of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.” ’ [Citation.]” (*The Kind & Compassionate v. City of Long Beach* (2016) 2 Cal.App.5th 116, 129.)

According to the notice of motion, the third cause of action is subject to demurrer because it violates Civil Code section 1714.10 as plaintiff Zhao failed to obtain an order from the court before suing defendant Cheng. That section provides in relevant part:

- (a) No cause of action against an attorney for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute, and which is based upon the attorney’s representation of the client, shall be included in a complaint or other pleading unless the court enters an order allowing the pleading that includes the claim for civil conspiracy to be filed after the court determines that the party seeking to file the pleading has established that there is a reasonable probability that the party will prevail in the action. The court may allow the filing of a pleading claiming liability based upon such a civil conspiracy following the filing of a verified petition therefor accompanied by the proposed pleading and supporting affidavits stating the facts upon which the liability is based. The court shall order service of the petition upon the party against whom the action is proposed to be filed and permit that party to submit opposing affidavits prior to making its determination. The filing of the petition, proposed pleading, and accompanying affidavits shall toll the running of any applicable statute of limitations until the final determination of the matter, which ruling, if favorable to the petitioning party, shall permit the proposed pleading to be filed.
- (b) Failure to obtain a court order where required by subdivision (a) shall be a defense to any action for civil conspiracy filed in violation thereof. The defense shall be raised by

the attorney charged with civil conspiracy upon that attorney's first appearance by demurrer, motion to strike, or such other motion or application as may be appropriate. Failure to timely raise the defense shall constitute a waiver thereof.

(Civ. Code, § 1714.10, subds. (a) – (b).)

But, this ground for demurrer is not sustainable as Plaintiffs have dismissed defendant Chang from this action without prejudice. The alternative basis for demurrer is for failure to state facts against defendant Qin. (See Notice of Motion at p. 1.) The moving papers however do not advance any substantive argument in connection with this ground for demurrer.

Therefore, the demurrer to the third cause of action is OVERRULED.

Fifth Cause of Action: Abuse of Process

The demurrer to the fifth cause of action is MOOT given the court's ruling granting the special motion to strike for reasons stated above.

Sixth Cause of Action: Intentional Infliction of Emotional Distress

The demurrer to the sixth cause of action is MOOT given the court's ruling granting the special motion to strike for reasons stated above.

Disposition

The request for judicial notice by defendant Qin is GRANTED IN PART and DENIED IN PART.

Plaintiffs' request for judicial notice is GRANTED.

The special motion to strike the fifth and sixth causes of action is GRANTED.

The request for attorney's fees and costs is DENIED WITHOUT PREJUDICE.

The demurrer to the third cause of action is OVERRULED in its entirety.

The demurrer to the fifth and sixth causes of action is MOOT.

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See line 2.

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Case No.: 21CV387960

Case Name: *Nextbt Group LLC vs Peter Jewett et al*

All parties now agree that all claims in the case (either in the operative complaint or the operative cross-complaint) should be arbitrated by JAMS Silicon Valley. Therefore, the Court GRANTS the petitions to compel arbitration and STAYS this case. The Court sets a case management conference in this case on May 16, 2024 at 10 am so as to monitor the arbitration.

The Court DECLINES Plaintiffs' request to decide the exact arbitration agreement and accompanying procedures that will govern the arbitration. That procedural matter is something JAMS can decide; it is unnecessary for the Court to decide it. It may well be improper for the Court to do so, as well, as discussed in the cases cited by Defendants/Cross-Complainants on p. 5 of their reply brief.

The Court will prepare the final order.

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Case No.: 21CV389131

Case Name: *UHG I, LLC vs Ramin Eskandarian*

Plaintiff UHG I, LLC filed this collections case against Defendant Ramin Eskandarian in September 2021. Defendant filed a cross-complainant against UHG in December 7, 2021. Now that some discovery has occurred, Defendant seeks leave to file an amended cross-complaint that adds new claims. Plaintiff opposes this request.

After a review of the parties' filings and the record, the Court GRANTS Defendant's request for the following reasons:

1. Plaintiff does not argue that Defendant did not meet all procedural requirements for their motion for leave to file an amended cross-complaint. (See Cal. R. Ct. 3.1324(a).)

2. "There is a strong policy in favor of liberal allowance of amendments." (*Mesler v. Bragg Mgmt. Co.*, 39 Cal.3d 290, 296 (1985).) Here, Plaintiff shows no prejudice from allowing the amended cross-complaint. No trial date has been set, no new parties are being added, there was no unreasonable delay in bringing this motion, and discovery is ongoing.

Plaintiff argues that Defendant should have sought to leave to amend earlier, but the Court credits Defendant's counsel's statements in his declaration that he only received relatively recently the evidence underlying the new claims.

3. Granted, the Court has discretion to deny leave to amend if the new claims to be added plainly would fail to state valid causes of action. (See *Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 230.) Here, after reviewing the new claims, the Court believes that the allegations might well state valid causes of action. Put another way, Plaintiff have not shown at this time that Defendant's new claims must fail as a matter of law. (The Court is not foreclosing, however, the opportunity for Plaintiff to file a demurrer to the amended cross-complaint.)

Therefore, the Court GRANTS the motion for leave to amend. Defendant has 20 days from the date of service of this order to file the amended cross-complaint.

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