SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 19, Honorable Theodore C. Zayner Presiding

Maggie Castellon, Courtroom Clerk
191 North First Street, San Jose, CA95113
Telephone: 408.882.2310

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LAW AND MOTION TENTATIVE RULINGS
DATE: OCTOBER 16, 2024 TIME: 1:30 P.M.
PREVAILING PARTY SHALL PREPARE THE ORDER
UNLESS OTHERWISE STATED (SEE RULE OF COURT 3.1312)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	19CV358675	Hancock v. Resources Enterprise Services, LLC, et al. (Class Action)	See Line 1 for tentative ruling.
LINE 2	1997-1-CV-770214	In Re Santa Maria Valley Groundwater Litigation (coordinated into Twitchell Dam Cases, JCCP4948)	Lines 2 – 4: Report will be accepted by the Court and Court will sign Proposed Order, absent objection at the hearing.
LINE 3	1997-1-CV-770214	In Re Santa Maria Valley Groundwater Litigation (coordinated into Twitchell Dam Cases, JCCP4948)	
LINE 4	1997-1-CV-770214	In Re Santa Maria Valley Groundwater Litigation (coordinated into Twitchell Dam Cases, JCCP4948)	
LINE 5	20CV366939	ZL Technologies, Inc. v. Splitbyte Inc., et al. (LEAD CASE; Consolidated With 20CV373027, 20CV373149, 21CV378097, 21CV382329)	See Line 5 for tentative ruling.

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LAW AND MOTION TENTATIVE RULINGS

LINE 6	20CV366939	ZL Technologies, Inc. v. Splitbyte Inc., et al. (LEAD CASE; Consolidated With 20CV373027, 20CV373149, 21CV378097, 21CV382329)	See Line 5 for tentative ruling.
LINE 7	24CV432129	Bobadilla v. Loan Factory, Inc. (Class Action)	See Line 7 for tentative ruling.
LINE 8			
LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: Hancock v. Resources Enterprise Services, LLC, et al. (Class Action)
Case No.: 19CV358675

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on October 16, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

This is a putative class and representative action arising out of alleged wage and hour violations, brought by Plaintiff Paul Hancock ("Plaintiff") against Defendants Resources Enterprises Services, LLC ("RES") and Work Market, Inc. ("Work Market") (collectively, "Defendants"). On November 19, 2019, Plaintiff commenced this action by filing a Class Action Complaint against Defendants, alleging various employment law violations.

On July 1, 2020, Plaintiff filed his operative First Amended Class Action Complaint ("FAC"). According to the FAC's allegations, Plaintiff began working for Defendants in or about 2018. (FAC, ¶ 7.) Defendants are temporary services employers that contract with clients or customers to supply workers to perform services for the clients or customers. (*Id.* at ¶ 20.) Defendants misclassified Plaintiff as an independent contractor and uniformly administered a corporate policy that misclassified their employees as independent contractors. (*Id.* at ¶¶ 7, 20.) Due to this misclassification, Plaintiff and the putative class members were not paid their proper minimum or overtime wages, not given proper meal and rests periods, and not provided accurate wage statements. (*Id.* at ¶ 20.)

The FAC sets forth causes of action for: (1) violation of Labor Code sections 510, 1194, 1194.2, and 1197.1; (2) violation of Labor Code sections 1194, 1197, and 1197.1; (3) violation of Labor Code sections 226.7 and 512; (4) violation of Labor Code section 226.7; (5) violation of Labor Code section 226; (6) violation of Labor Code sections 221 and 224; (7) violation of Labor Code section 2802; (8) violation of Business and Professions Code section 17200, *et seq.*; and (9) violation of Labor Code section 2698, *et seq.*

Plaintiff moved for class certification, and on March 24, 2022, the court (Hon. Patricia M. Lucas) entered an order ("Mar. 24, 2022 Order") denying the motion in part and granting

the motion in part. (Mar. 24, 2022 Order, p. 16:25-28.) The court denied the motion as to the minimum wage and overtime claims, finding that Plaintiff failed to establish that common questions predominate. (*Id.* at pp. 11:3-12:3, 16:27-28.) The court granted Plaintiff's motion for class certification in all other respects. (*Id.* at pp. 6:23-13:13;16:28.)

Now before the court is Defendants' motion for summary judgment. Plaintiff opposes the motion.

II. Evidentiary Issues

A. Request for Judicial Notice

In connection with his opposition, Plaintiff asks the court to take judicial notice of: (1) the court's March 24, 2022 Order Granting Plaintiff's Motion for Class Certification; and (2) Defendants' Opposition to Plaintiff's Motion for Class Certification.

Plaintiff's request for judicial notice is DENIED. (*Duarte v. Pacific Specialty Inc. Co.* (2017) 13 Cal.App.5th 45, 51, fn. 6 [denying request where judicial notice is not necessary, helpful, or relevant].) The documents in question are already part of the record in this action, and taking judicial notice of them is unnecessary.

B. Evidentiary Objections

In connection with his opposition, Plaintiff submits objections to portions of the declaration of Bridget Kirchner, submitted by Defendants in support of their motion.

Plaintiff's objections do not comply with California Rules of Court, rule 3.1354. The rule requires the objecting party to submit its written objections and a proposed order in separate documents. Here, Plaintiff submitted a single document containing his objections, detailed arguments in support, and blanks for the court to indicate its rulings and a place for the court to sign. (See Cal. Rules of Ct., rule 3.1354, subd. (b) [a party must provide written objections that comply with one of the formats described in the rule], and subd. (c) [a party must provide a proposed order that complies with one of the formats described in the rule].) Plaintiff's hybrid document does not comply with the rule.

The court is not required to rule on evidentiary objections that do not comply with the California Rules of Court. (See *Vineyard, supra*, 120 Cal.App.4th 633, 642 [trial court only have duty to rule on evidentiary objections presented in proper format]; see also *Hodjat v. State*

Farm Mut. Auto. Ins. Co. (2012) 211 Cal.App.4th 1, 8 [the trial court is not required to rule on objections that do not comply with California Rules of Court, rule 3.1354 and is not required to give objecting party a second chance at filing properly formatted papers].)

Accordingly, the court declines to rule on Plaintiff's evidentiary objections.

III. Legal Standard for Summary Judgment

A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue of material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) "[T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact[.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id.* at p. 851.)

If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (*Aguilar, supra*, 25 Cal.4th at p. 850.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid.*) "[I]f the court concludes that the [opposing party's] evidence or inferences raise a triable issue of material fact, it must conclude its consideration and deny the [moving party's] motion." (*Id.* at p. 856.)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences reasonably drawn therefrom[.]" (*Aguilar, supra,* 25 Cal.4th at p. 844 [internal quotations omitted].) The moving party's evidence is strictly construed, while the opposing party's evidence is liberally construed. (*Id.* at p. 843.)

IV. Discussion

Defendants seek the following order:

> [G]ranting summary judgment in Defendants' favor as to all causes of action and claims for damages alleged by Plaintiff's First Amended Complaint ("FAC") on an individual, class-wide, and representative basis on the grounds that there is no merit to Plaintiff's causes of action and claims for damages, that Defendants are entitled to judgment as a matter of law on their affirmative

> defenses based on the referral agency exception under Labor Code section 2777 and based on the ABC test, and that Defendant Resources Enterprises Services, LLC ("RES") should be dismissed with prejudice as a named defendant because RES did not contract with Plaintiff or any member of the certified class during the relevant time period.

(Defendants' Notice of Motion and Motion for Summary Judgment ("Notice"), p. 1:6-14.)

As an initial matter, Defendants do not sufficiently develop or support their request to dismiss Resource Enterprise Services, LLC as a Defendant, with prejudice. Moreover, the issue appears to be one more appropriately addressed by other procedural means. Accordingly, the request to dismiss Resource Enterprise Services, LLC as Defendant is DENIED.

A. Summary Adjudication Not Noticed

In opposition, Plaintiff initially contends that Defendants' motion improperly seeks adjudication of various issues without expressly moving for summary adjudication. (Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment ("Plaintiff's Opp."), pp. 6:5-7, 15:20-16:12.)

"A motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment." (Code Civ. Proc., § 437c, subd. (f)(2).) However, a court cannot grant summary adjudication where a motion for summary adjudication has not been noticed for hearing. (*Maryland Cas. Co. v. Reeder* (1990) 221 Cal.App.3d 961, 974, fn. 4; see also *Jimenez v. Protective Life Ins. Co.* (1992) 8 Cal.App.4th 528, 534-535 [same rule applies where motion is heard by stipulation rather than on notice].) Classification of a case as "complex" does not relieve the parties of the procedural requirements set forth in Code of Civil Procedure section 437c. (See *McCarthy v. CB Richard Ellis, Inc.* (2009) 174 Cal.App.4th 106, 121.)

Here, Plaintiff is correct that Defendants' Notice for this motion does not mention summary adjudication. Likewise, there is no mention of summary adjudication in Defendant's Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment ("Defendants' MPA"). On April 11, 2023 and on June 18, 2024, the court entered orders on two separate stipulations presented by the Parties' regarding the briefing schedule for the instant motion, neither of which indicates that Defendants would be seeking summary adjudication in the alternative.

Accordingly, there is no motion for summary adjudication before the court, and the court treats Defendants' motion as one for summary judgment only. Consequently, the existence of a triable issue as to a single material fact is sufficient to defeat the motion. (See Code Civ. Proc., § 437c, subd. (c) [motion shall be granted if "all the papers submitted show that there is no triable issue of material fact"]; see also Cal. Rules of Ct., rule 3.1350 ["Material facts" are "facts that relate to the cause of action, claim for damages, issue of duty, or affirmative defense that is the subject of the motion and that could make a difference in the disposition of the motion."].)

C. Analysis

Defendants initially contend that Plaintiff's individual and class-wide claims fail because Work Market qualifies for the "referral agency" exemption set forth in Labor Code section 2777 and, therefore, California's "ABC test" for determining whether a party is an employee, or an independent contractor does not apply to Work Market. (Defendants' MPA, p. 1:16-23.) Defendants further argue that, even if the ABC test does apply, Work Market satisfies each prong of the test. (*Id.* at pp. 1:24-2:5.)

Labor Code section 2775, subdivision (b)(1) provides:

> For purposes of this code and the Unemployment Insurance Code, and for purposes of wage orders of the Industrial Welfare Commission, a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied:
>
> > **(A)** The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
> >
> > **(B)** The person performs work that is outside the usual course of the hiring entity's business.
> >
> > **(C)** The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

"In 2019, the Legislature enacted Assembly Bill No. 5 (2019-2020 Reg. Sess.) (Assembly Bill 5), which codified the decision of our high court in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903 [] (*Dynamex*). [Citation.]" (*People v. Uber Technologies, Inc.* (2020) 56 Cal.App.5th 266, 275 (*People v. Uber*).) "As currently found in

Labor Code section 2775, Assembly Bill 5 set forth the "standard for distinguishing employees from independent contractors … known as the 'ABC' test." (*Ibid*., citation omitted.)

Under the statutory scheme enacted by Assembly Bill 5, the ABC test codified in Labor Code section 2775 is the general rule in testing for employee versus independent contractor status, subject to a series of exceptions. (*People v. Uber*, *supra,* 56 Cal.App.5th at p. 277, fn. 5.) "If a hiring entity can demonstrate compliance with all of conditions set forth in any one of Sections 2776 to 2784, inclusive, then Section 2775 and the holding in *Dynamex* do not apply to that entity, and instead the determination of an individual's employment status shall be governed by *Borello* [*S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*)]." (Lab. Code, § 2785, subd. (d).) In *Borello,* the California Supreme Court set forth a multifactor test addressing the employee or independent contractor question. (*Dynamex*, *supra*, 4 Cal.5th at pp. 929-935; see also *People v. Czirban* (2021) 67 Cal.App.5th 1073, 1092-1094.)

1. *Section 2777*

Defendants first contend that Work Market meets the requirements for the referral agency exemption set forth in Labor Code section 2777 ("Section 2777"). (Defendants' MPA, pp. 8:12-9:8.) Defendants assert that this entitles Work Market to summary judgment based on its 47th Affirmative Defense. (*Id.* at pp. 9:19-20, 14:12-15.)

According to Defendants, Work Market satisfies each of the eleven criteria to qualify for the referral agency exemption under Section 2777, subdivision (a). (Defendants' MPA, pp. 9:1-14:15.) In opposition, Plaintiff focuses his arguments on disputing the first and tenth criteria, i.e., whether the service provider is free from the control of the referral agency and whether the service provider sets or negotiates their own rates. (Plaintiff's Opp., pp. 17:10-14, 20:19-27 [labeling subdivision (a)(10) of Section 2777 as subdivision (a)(11)].)

The first criterion for the exemption under Section 2777 is: "The service provider is free from the control and direction of the referral agency in connection with the performance of the work for the client, both as a matter of contract and in fact." (Section 2777, subd. (a)(1).)

i. *Defendants' Showing*

In support of their contention that Work Market satisfies the first criterion (see Defendants' MPA, pp. 9:21-12:5), Defendants proffer the following purportedly undisputed material facts: Work Market is a software company that operates a proprietary electronic platform to connect clients and workers for the purposes of performing work assignments. (Defendants' Separate Statement of Undisputed Material Facts ("Defendants' UMF."), No. 1.) Work Market does not dictate what services workers offer to clients; workers themselves determine what types of services to provide based on many factors, including the worker's particular background, education, training, qualifications, and the type of business the worker operates. (*Id.* at No. 13.) Workers determine when and how much to work. (*Id.* at No. 18.) Workers negotiate how they will provide each type of service they offer with clients. (*Id.* at No. 21.)

Work Market cannot direct how a worker performs services for a client. (Defendants' UMF, No. 22.) Workers retain total control over the other terms and conditions of their assignments, such as their compensation, when the assignment will be performed, and the rules surrounding the work. (*Id.* at No. 23.) Workers may apply for assignments, negotiate the payment for the work in an assignment, or negotiate the timing and means in which is completed. (*Id.* at No. 24.) All negotiations are between the client and the worker and do not involve Work Market in any way. (*Ibid.*) It is in a worker's sole discretion to accept an assignment under terms acceptable to the worker. (*Ibid.*)

Work Market does not impose terms on workers, nor can it punish a worker for negotiating better terms or declining an assignment. (Defendants' UMF, No. 28.) Workers can decide whether to accept or decline an opportunity, for any reason, and negotiate terms of their assignments without fear of discipline or termination of their profile. (*Ibid.*) Work Market does not require workers to purchase any equipment or tools to market their services on the web platform. (*Id.* at No. 32.) Reimbursements for necessary business expenses are left to the negotiation between the client and the worker for each assignment. (*Id.* at No. 33.) Work Market does not provide any tools, equipment, or supplies to perform services, and does not tell workers how to perform the services. (*Id.* at No. 34.)

Work Market does not prevent workers from offering their services through other outlets, or from obtaining clients through their own independent marketing outside of the Work Market platform. (Defendants' UMF, No. 36.) Worker ratings come from clients based on the client's experience with the worker. (*Id.* at No. 37.) Work Market does not adjust ratings based on cancellation or abandonments or for any other reasons. (*Id.* at No. 38.) Work Market reminds workers that such conduct could result in poor ratings from a vendor, which will be shown on the platform. (*Ibid.*)

Work Market does not rate or supervise Worker's performance. (Defendants' UMF, No. 39.) A worker's rating does not direct or control a worker's compensation, schedule, availability, type of work, place of work, and the clients with whom workers may work. (*Id.* at No. 40.) When workers agree to the Community Guidelines, as Plaintiff did here, they expressly certify that they will update their profile to include all skills, certifications, licenses, tools, photos and insurance that will accurately represent the worker. (*Id.* at No. 42.)

Plaintiff communicated directly with the clients in response to job postings on the web platform. (Defendants' UMF, No. 54.) The client provided Plaintiff the job details for each opportunity, the timeline for completion, and other relevant parameters. (*Id.* at No. 55.) Plaintiff's compensation and other terms of the work were determined between Plaintiff and the client. (*Id.* at No. 57.) Plaintiff did not receive performance evaluations from Work Market. (*Id.* at No. 59.) Work Market did not set Plaintiff's hours of work or schedule or impose minimum or maximum number of opportunities that Plaintiff was required to accept or reject. (*Id.* at No. 60.)

ii. *Plaintiff's Showing*

In opposition, Plaintiff disputes many of the facts proffered by Defendants, as follows: Defendants control job engagement through their Freelance Management System ("FMS"). (Plaintiff's Separate Statement of Disputed Material Facts [in response to Defendants' UMF] ("Plaintiffs' UMF"), No. 1.) Worker's profiles must be approved by Defendants, who enforce certain criteria to allow workers to be qualified for assignments. (*Id.* at No. 13.) Defendants maintain data as to all assignments. (*Ibid.*)

Workers must comply with Defendants' Community Guidelines, requiring workers to answer questions and client contact in a timely manner, only taking assignments the which the worker is qualified to complete, and not subcontracting an assignment with the employer's consent. (Plaintiffs' UMF, No. 18.) Defendants further require workers to comply with additional rules, including those prohibiting workers from abandoning clients, no calls or no shows, soliciting the client to perform work off of the FMS platform, and cancelling assignments with less than 24 hours' notice. (*Ibid.*)

To be accepted onto Defendants' FMS, workers must agree to Defendants' Terms of Use, which impose significant control on Plaintiff and class members beyond just agreeing to be labeled as independent contractors. (Plaintiff's UMF, No. 22.) Among other things, the Terms of Use require workers to communicate in a respectful and professional manner and prohibit the reassignment of tasks to another worker once accepted. (*Ibid.*)

Defendants' rules prohibit workers from contacting clients directly over payment disputes. (Plaintiffs' UMF, No. 54.) When Plaintiff disputed a non-payment, Defendants suspended his account for three months, such that he could not work for that period. (*Ibid.*) Plaintiff was not paid at least $1,160.69 for work done on four separate projects for Work Market. (*Ibid.*) Defendants are involved in the pay structure of Plaintiff and class members. (*Id.* at No. 57.) Defendants derive some of their income by charging a transaction fee on the worker's pay. (*Ibid.*) Workers are only paid after the client pays Defendants. (*Ibid.*)

iii. Discussion

Defendants contend that Work Market easily meets the first criterion for the referral agency exception because the evidence shows that workers are free from the control and direction with the performance of the work for client, both as a matter of contract and in fact. (Defendants' MPA, p. 12:3-5.)

In opposition, Plaintiff contends the evidence shows that Defendants control how Plaintiff and class members performed their work. (Plaintiff's Opp., p. 16:13-14.) Plaintiff further asserts that this court has already considered and rejected Defendants' contention that it qualifies for the referral agency exemption under Section 2777. The court's (Hon. Patrcia M. Lucas) class certification order issued on March 24, 2022 reads as follows in pertinent part:

> Defendants state that Plaintiff qualifies for the subject exemption because, among other things, he was free from their control and direction in connection with the performance of work for the client, both as a matter of contract and in fact. (See Lab. Code, § 2777, subd. (a)(1) [to qualify for the exemption, the referral agency must establish that "the service provider is free from the control and direction of the referral agency in connection with the performance of the work for the client, both as a matter of contract and in fact"].) As Plaintiff persuasively argues, Defendants cannot meet the requirements of the statute because the evidence shows that Plaintiff was not free from Defendants' control and direction in connection with the performance of work for clients. Specifically, Defendants' Community Guidelines prohibit workers from subcontracting assignments without the client's consent, falsifying documents and/or deliverables, abandoning clients, no calls or no show, cancelling assignments with less than 24 hours' notice, discussing or attempt to retrieve payment from an end user, failing to return equipment, and engaging in unprofessional conduct (such as profanity).) (Lee Dec., Ex. C, pp. 119-122 & Ex. 20.) Thus, as a matter of contract, Plaintiff's performance of work for clients was subject to some control and direction by Defendants.

(Mar. 24, 2022 Order, p. 14:2-16.)

Plaintiff asks the court to apply the same reasoning with respect to Defendants' motion for summary judgment. (Plaintiff's Opp., p. 17:15-28.)

Plaintiff reiterates the ways in which he contends Defendants exercise significant control over how class members perform their work. (Plaintiff's Opp., pp. 17:27-19:3.) In particular, Plaintiff emphasizes that Defendants' rules regulate work conduct and are not limited to worker's use of the FMS platform, and further, that Defendant enforce the rules. (*Id.* at pp. 18:24-19:3.)

In reply, Defendants argue that the court's prior order on Plaintiff's motion for class certification "has no bearing" on Defendants' instant motion for summary judgment. (Reply, p. 2:4-7.) Defendants assert the discussion of Section 2777 in the certification order was merely addressing Defendants' argument that Plaintiff could not satisfy the typicality requirement for certification because Plaintiff in particular, and no other worker, was subject to the referral agency exemption. (*Id.* at p. 2:7-12.) Defendants further contend that because the certification question is essentially procedural, the court's certification order did not analyze the merits of the control factor. (*Id.* at p. 2:13-20.)

Nevertheless, in ruling on a class certification motion, a court may consider how various claims and defenses relate even though such considerations may overlap with the

case's merits. (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1023-1024.) "Indeed, issues affecting the merits of a case may be enmeshed with class action requirements, such as whether substantially similar questions are common to the class and predominate over individual questions or whether the claims or defenses of the representative plaintiffs are typical of class claims or defenses. [Citations.]" (*Miller v. Bank of America, N.A.* (2013) 213 Cal.App.4th 1, 11, quoting *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 443.)

Furthermore, even if the discussion of the Section 2777 exemption in the court's certification order does not dispose of the issue on the merits, Defendants offer no convincing argument as to why the same analysis cannot apply on summary judgment. Here, much as before, Plaintiff is arguing that Defendants cannot meet the requirements of the statute because the evidence shows that workers are not free from Defendants' control and direction in connection with the performance of their work for client.

There are of course some differences to the Section 2777 here as opposed to on class certification. As Defendants' point out, the court previously analyzed Section 2777 in relation to Plaintiff because Defendants challenged his typicality on the grounds that Section 2777 presented a defense unique to Plaintiff. Now, Defendants contend that the defense is not unique, arguing that "Plaintiff's individual and class-wide claims fail" because Work Market qualifies for referral agency exemption under Section 2777. (Defendants' MPA, p. 1:16-18.) Both parties have proffered additional evidence and argument in support of their respective position, which the court has considered. Having done so, the court finds that Defendants exercise some level of control over both Plaintiff and other members of the class and finds Defendants' conclusory arguments to the contrary unpersuasive.

Defendants argue that Work Market does not exercise sufficient control and direction because they provide an online platform that resembles an online marketplace. (Defendants' MPA, pp. 9:28-10:22.) In making this argument, Defendants rely upon several federal decisions as persuasive authority in support of their position, most notably *Sportsman v. A Place for Rover, Inc.* (N.D. Cal. 2021) 537 F.Supp.3d 1081 (*Sportsman*). (*Ibid.*) The court declines to follow the federal authority cited by Defendants. (See *People v. Uribe* (2011) 199

Cal.App.4th 836, 875 [federal authority may be regarded as persuasive by California state courts].)

Furthermore, *Sportsman* is distinguishable because, there, the plaintiff did not challenge the first criterion under Section 2777, subdivision (a), and instead focused upon criterion 10 on the basis that the defendant deducted a 20% service from payments to workers. (*Sportsman*, *supra*, 537 F.Supp.3d at p. 1089-1090.) The court in fact declined to decide the referral agency exemption because it found that the defendant was entitled to summary judgment under the ABC test. (*Id.* at p. 1090.) In finding that the plaintiff met prong A, the court stated that the defendant's rules only established the terms that both clients and workers must abide by to use the platform and did not "dictate the conditions of work." (*Id.* at p. 1092.)

Here, by contrast, the Defendants' rules subject workers to some control and direction regarding the conditions of the work and the interactions with clients off the platform, rather than simply the use of the platform itself. (See, e.g., Plaintiff's UMF, No. 22 [Defendants' Community Guidelines prohibit subcontracting assignments without the client's consent, discussing payment with clients, soliciting work to be performed off of Defendants' platform, and cancelling clients with less than 24 hours' notice.].)

Therefore, the court finds that Defendants have not met their initial burden with respect to the criteria of the Section 2777 exemption because they have not shown that the worker's performance of work for clients through their platform is not subject to some control and direction by Defendants, as a matter of contract and in fact. Accordingly, the court declines to address whether Defendants met their initial burden as to the remaining 10 criteria under Section 2777, subdivision (a). Moreover, even if Defendants did meet their initial burden with respect to all eleven criteria, Plaintiffs have established a triable issue as to whether Work Market workers are in fact free from the control and direction of Work Market.

2. *ABC Test*

Defendants argue that even if the referral exemption does not apply, Work Market is entitled to summary judgment because it satisfies the ABC test. (Defendants' MPA, p. 18:11-14.) As set forth above, a hiring entity must demonstrate that all three conditions are satisfied

in order to classify a person as an independent contractor rather than an employee. (Lab. Code, § 2775, subd. (b)(1).)

To satisfy prong A, the entity must demonstrate that the person "is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact." (Lab. Code, § 2775, subd. (b)(1)(A).) After asserting in a conclusory manner that Work Market easily satisfies prong A, Defendants refer the reader to its analysis of the control factor from *Borello*. (Defendants' MPA, p. 18:15-23.) Defendants' analysis of the *Borello* control factor, in turn, refers to its discussion of the first criterion of the referral agency exemption. (*Id.* at p. 14:27-15:2.) Similarly, Plaintiff's discussion with the condition of the ABC test overlaps with his contention that Defendants do not meet the first requirement for the Section 2777 exemption. (Plaintiff's Opp., pp. 16:13-19:9.)

Therefore, for the same reasons discussed above, the court finds that Defendants fail to meet their initial burden with respect to prong A, and thus, the ABC test. Even if Defendants had met their burden as to prong A, Plaintiffs have presented sufficient evidence to demonstrate a triable issue regarding whether Work Market workers are free from Work Market's control and direction in connection with the performance of the work, both under contract and in fact.

Accordingly, Defendants have failed to establish the existence of an affirmative defense to Plaintiff's individual and class claims.

V. Conclusion

The motion is DENIED in its entirety.

The prevailing party shall prepare the order in accordance with California Rules of Court, rule 3.1312.

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Calendar Line 2

Case Name: In Re Santa Maria Valley Groundwater Litigation (coordinated into Twitchell Dam Cases, JCCP4948)
Case No.: 1997-1-CV-770214

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Calendar Line 3

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Calendar Line 4

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Calendar Line 5 – 6

Case Name: ZL Technologies, Inc. v. Splitbyte Inc., et al. (LEAD CASE; Consolidated With 20CV373027, 20CV373149, 21CV378097, 21CV382329)
Case No.: 20CV366939

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on October 16, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

This consolidated action involves five related matters in this superior court: (1) *ZL Technologies, Inc. v. SplitByte Inc. et al.* (Case No. 20CV366939) (the "Lead Case"); (2) *Arvind Srinivasan v. ZL Technologies, Inc. et al.* (Case No. 20CV373027) (the "Second Action" or "Section 304 Action"); (3) *Arvind Srinivasan v. ZL Technologies, Inc.* (Case No. 20CV373149) (the "Third Action"); (4) *ZL Technologies, Inc. et al. v. Arvind Srinivasan* (Case No. 21CV378097) (the "Fourth Action"); (5) *Arvind Srinivasan v. ZL Technologies, Inc. et al.* (Case No. 21CV382329) (the "Fifth Action").[1]

In the Lead Case, ZL Technologies, Inc. ("ZL" or "Plaintiff") filed the Complaint in June 2020 against Defendants SplitByte Inc. ("SpiltByte"), and Arvind Srinivasan ("Srinivasan"). In August 2022, ZL filed the operative Second Amended Complaint ("SAC") against SplitByte, Srinivasan, Kapisoft Inc. ("Kapisoft"), MI17 Inc. ("MI17") (collectively, "Defendants").

The SAC sets forth causes of action for: (1) breach of fiduciary duty; (2) unfair competition, Business and Professions Code sections 17200, *et seq.*; (3) conversion; (4) rescission of IP agreement; (5) breach of contract; (6) breach of contract; (7) rescission of confirmation of repayment; (8) rescission of Note 2; (9) misappropriation of trade secrets under the California Uniform Trade Secrets Act (CUTSA), Code of Civil Procedure section 3426.1, *et seq.*; (10) violation of the Comprehensive Computer Data and Access Fraud Act (CDAFA),

[1] In its *Order Re: Motion for Consolidation of Related Cases and Designation of Consolidated Cases as Complex*, issued on September 22, 2021, the court (Hon. Patrcia M. Lucas) sets forth a detailed description of the five separate matters comprising this consolidated action.

Penal Code section 502; and (11) violation of the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. section 1962, subdivision (c).

According to the allegations of the SAC, ZL is a California corporation co-founded by Srinivasan, a former officer and employee of ZL. (SAC, ¶¶ 1, 3, 8.) In April 2020, the ZL board of directors voted to remove Srinivasan as Chief Technology Officer and terminate his employment. (*Id.* at ¶ 3, 8.) During his tenure at ZL, Srinivasan founded Kapisoft and MI17 and did so without the knowledge or consent of the ZL board of directors. (*Id.* at ¶ 8.) Kapisoft and MI17's technology competes with ZL's technology. (*Id.* at ¶¶ 4-5.)

According to the SAC, Srinivasan improperly controlled and managed ZL's technology and related personnel, allowing him to make unfair and overreaching demands of ZL in breach of his fiduciary duties to ZL. (SAC, ¶ 9.) Srinivasan recruited ZL's employees to work for SplitByte and used his knowledge as a director and officer of ZL to solicit investments in SplitByte. (*Id.* at ¶¶ 19-22.) Srinivasan made unfair demands of ZL, including a demand to open a ZL office in Chennai, India (with office space rented from his parents) and a demand for a $500,000 personal loan. (*Id.* at ¶¶ 11, 27.)

In Second Action, or "Section 304 Action," Srinivasan filed the Complaint against ZL and Kon Leong ("Leong") in March 2021, followed by the First Amended Complaint, setting forth a single claim to remove Leong as director and officer of ZL under Corporations Code section 304.[2] According to the allegations of the First Amended Complaint, Leong engaged in a wide variety of misconduct and self-dealing during his management of ZL, including paying undisclosed amounts of compensation to himself and his wife, Chimmy Shioya ("Shioya"), using ZL's funds for personal endeavors, causing ZL to file false tax documents, taking actions without board approval, and refusing Srinivasan's request for company information. (First Amended Complaint, ¶¶ 8-17.)

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[2] Corporations Code section 304 (hereinafter "Section 304") provides as follows in full:

> "The superior court of the proper county may, at the suit of shareholders holding at least 10 percent of the number of outstanding shares of any class, remove from office any director in case of fraudulent or dishonest acts or gross abuse of authority or discretion with reference to the corporation and may bar from reelection any director so removed for a period prescribed by the court. The corporation shall be made a party to such action."

Thereafter, Srinivasan commenced the Third Action relating to his alleged right to inspect ZL records. ZL, Leong, and Shioya then filed the Fourth Action, stating a single cause of action for defamation against Srinivasan. Finally, Srinivasan commenced the Fifth Action, seeking enforcement of ZL's alleged obligation to pay for the costs of his defense in the defamation action.

On August 6, 2021, Srinivasan filed a motion to consolidate the five related cases and for assignment of the cases to the complex division. On September 22, 2021, the court (Hon. Patricia M. Lucas) issued an order granting Srinivasan's motion to consolidate.

On June 23, 2023, the Sixth District Court of Appeal affirmed in part and reversed in part an order by the court (Hon. Drew C. Takaichi) denying Srinivasan's special motion to strike the defamation cause of action under the anti-SLAPP statute. Specifically, the reviewing court directed the trial court to issue a new order granting the motion to strike defamation claims arising out of an October 7, 2020 letter that Srinivasan's counsel sent to ZL's counsel and denying the motion with respect to claims arising out of other republications and communications. (See *Zl Techs. v. Srinivasan* (June 26, 2023, No. H049444) [2023 Cal. App. Unpub. LEXIS 3675, at **22-23].)

On August 29, 2022, the court (Hon. Patricia M. Lucas) issued an order setting a trial date of September 25, 2023. Following further continuances, trial is currently set to begin on November 4, 2024.

The following motions are now before the court: (1) Srinivasan's motion to bifurcate the Section 304 Action for court trial ("Motion to Bifurcate"); and (2) ZL's motion for terminating sanctions against Defendants ("Motion for Sanctions"); and (3) ZL's related motions to seal. The Motion to Bifurcate and the Motion for Sanctions are opposed.

II. Motions to Seal

A. Legal Standard

"The court may order that a record be filed under seal only if it expressly finds facts that establish: (1) There exists an overriding interest that overcomes the right of public access to the record; (2) The overriding interest supports sealing the record; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4)

The proposed sealing is narrowly tailored; and (5) No less restrictive means exists to achieve the overriding interest." (Cal. Rules of Court, rule 2.550(d).) Pleadings, in particular, should be open to public inspection "as a general rule," although they may be filed under seal in appropriate circumstances. (*Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 104, fn. 35.)

"Courts have found that, under appropriate circumstances, various statutory privileges, trade secrets, and privacy interests, when properly asserted and not waived, may constitute overriding interests." (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 298, fn. 3 (*Providian*).) "[A] binding contractual agreement not to disclose" may suffice. (*Huffy Corp. v. Superior Court* (2003) 112 Cal.App.4th 97, 107.) In addition, confidential matters relating to the business operations of a party may be sealed where public revelation of the information would interfere with the party's ability to effectively compete in the marketplace. (See *Universal City Studios, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1273, 1285-1286 (*Universal*).)

Where some material within a document warrants sealing, but other material does not, the document should be edited or redacted, if possible, to accommodate both the moving party's overriding interest and the strong presumption in favor of public access. (Cal. Rules of Court, rule 2.550(d)(4), (d)(5).) In such a case, the moving party should take a line-by-line approach to the information in the document, rather than framing the issue to the court on an all-or-nothing basis. (*Providian*, *supra*, 96 Cal.App.4th at p. 309.)

B. ZL's Motion to Seal its Supporting Documents

On August 23, 2024, Plaintiff ZL filed a motion to seal portions of its declarations and exhibits filed in support of its Motion for Sanctions. As further detailed in its papers, ZL moves to seal portions of the following: (1) Declaration of Nick Ferrara in support of Motion for Sanctions; (2) Declaration of Kon Leong in support of Motion for Sanctions; (3) Declaration of Phani Shanker Kuppa in support of Motion for Sanctions; (4) Declaration of James Wagstaffe in support of Motion for Sanctions. The motion is unopposed.

ZL asserts that the material in question consists of documents and computer systems content designated as Confidential or Attorneys' Eyes Only under the Protective Order in this

case. (Declaration of Maria Radwick in Support of ZL Technologies, Inc.'s Motion to File Confidential Documents Under Seal (dated August 23, 2024), ¶¶ 3-7.) The court previously authorized some of the documents in question to be sealed in its Order dated December 8, 2023. (*Id.* at ¶ 3.) The materials at issue contain ZL's confidential business and employment information. (*Id.* at ¶ 8.) These materials are not publicly available, and their disclosure would create a substantial risk of harm to ZL and/or third-party interests. (*Ibid.*)

The proposed sealing appears to be narrowly tailored to the confidential information. Therefore, the court finds that ZL has established an overriding interest that justifies sealing these materials, and the other factors set forth in rule 2.550 are satisfied. Accordingly, the motion to seal is GRANTED.

B. ZL's Motion to Seal Defendants' Supporting Documents

On October 7, 2024, Plaintiff ZL filed a motion to seal portions of documents filed by Defendants in support of Srinivasan's Motion to Bifurcate and of Defendants' Opposition to ZL's Motion for Sanctions. As further detailed in its papers, ZL moves to seal portions of the following: (1) Declaration of Arvind Srinivasan in Support of Motion to Bifurcate; (2) Declaration of Arvind Srinivasan in Support of Reply Re: Motion to Bifurcate; (3) Declaration of Ji W. Kim in Support of Motion to Bifurcate; (4) Declaration of Ji W. Kim in Support of Reply Re: Motion to Bifurcate; (5) Arvind Srinivasan's Reply Re: Motion to Bifurcate; (6) Declaration of Arvind Srinivasan in Support of Defendants' Opposition to Motion for Sanctions; (7) Declaration of Ji W. Kim in Support of Defendants' Opposition to Motion for Sanctions; (8) Declaration of K.Y. Ravikumar in Support of Defendants' Opposition to Motion for Sanctions; (9) Declaration of Karthik Subramanian in Support of Defendants' Opposition to Motion for Sanctions. The motion is unopposed.

ZL asserts the documents specified contain its confidential business and corporate governance information and communications. (Declaration of Maria Radwick in Support of ZL Technologies, Inc.'s Motion to File Confidential Documents Under Seal (dated October 7, 2024), ¶¶ 3-12.) The materials in question contain detailed references to ZL customers, products, projects, technology agreements, personnel matters, and other confidential business information as well as communications with in-house and outside counsel. (*Id.* at ¶ 8.) These

materials are not publicly available, and their disclosure would create a substantial risk of harm to ZL and/or third-party interests. (*Ibid.*)

The proposed sealing appears to be narrowly tailored to the confidential information. Therefore, the court finds that ZL has established an overriding interest that justifies sealing these materials, and the other factors set forth in rule 2.550 are satisfied. Accordingly, the motion to seal is GRANTED.

II. Request for Judicial Notice

In connection with his Motion to Bifurcate, Srinivasan asks the court to take judicial notice of various court documents filed in this consolidated action.

The existence of the subject documents, and the truth of the results reached in the court orders decisions, are proper subjects of judicial notice as they are relevant to issues raised in the pending motion. (See Evid. Code, § 452, subd. (d) [permitting judicial notice of court records]; see also *People v. Woodell* (1998) 17 Cal.4th 448, 455 [Evid. Code, § 452, subd. (d) permits trial courts to "take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decisions, and judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact."].)

Accordingly, the request for judicial notice is GRANTED.

III. Srinivasan's Motion to Bifurcate

Srinivasan moves to bifurcate the Section 304 Action for court trial pursuant to Code of Civil Procedure sections 598 and 1048, subdivision (b). (Srinivasans' Notice of Motion and Motion, p. 1:2-6.)

A. Legal Standard

Code of Civil Procedure section 598 provides, "The court may, when the convenience of witnesses, the ends of justice, or the economy and efficiency of handling the litigation would be promoted thereby, on motion of a party, after notice and hearing, make an order, no later than the close of the pretrial conference in cases in which trial is be held, or, in other cases, no

later than 30 days before the trial date, that the trial of any issue or any party thereof shall precede the trial of any other issue or any part thereof in the case … ."

Code of Civil Procedure section 1048, subdivision (b) provides, "The court, in furtherance of the convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action, including a cause of action asserted in a cross-complaint, or of any separate issue or of any number of causes of action or issues, preserving the right of trial by jury required by the Constitution or a statute of this state or of the United States."

"The objective [of Code of Civil Procedure section 598] is avoidance of the waste of time and money caused by the unnecessary trial of damage questions in cases where the liability issue is resolved against the plaintiff." (*Trickey v. Superior Court of Sacramento County* (1967) 252 Cal.App.2d 650, 653; see also *Horton v. Jones* (1972) 26 Cal.App.3d 952, 954 [same].) "[T]he decision to bifurcate is discretionary with the trial court. [Citations.]" (*Regents of University of California v. Sheily* (2004) 122 Cal.App.4th 824, 833.)

B. Merits of the Motion

Srinivasan initially contends the material allegations in the Section 304 Action substantially overlap with those in the other actions consolidated with the Lead Case. (Srinivasan's MPA, pp. 3:4-4:26.) He argues that bifurcation of the Section 304 Action will promote judicial economy, convenience, and expedition by resolving a vast majority of the issues in the consolidated case. (*Id.* at p. 5:2-8:20.) In opposition, ZL contends that this court has already rejected a similar request by Srinivasan to bifurcate these proceedings and that Srinivasan's request here is repetitious and untimely. (ZL's Opposition to Srinivasan's Motion for Bifurcation ("ZL's Opp."), pp. 8:20-9:28.)

As ZL points out, in an order issued on March 9, 2022 and filed the following day, the court (Hon. Patricia M. Lucas) denied Srinivasan's motion to bifurcate these proceedings. (See *Order Re: Motions to Seal; Motion for Summary Adjudication; and Alternative Motion for Bifurcation* (the "March 2022 Order"), pp. 15:11-16:17.) There, Defendants moved for summary adjudication of the Lead Case's fourth cause of action for "rescission of IP agreement." (*Id.* at p. 3:14-26 [addressing the Lead Case's then-operative First Amended

Complaint].) The court found that Defendants failed to meet their initial burden because they did not show that ZL cannot established a prima case for rescission due to fraud or that they have a complete defense. (*Id.* at pp. 13:21, 14:6-19.)

In its March 2022 Order, the court then addressed Defendants' alternative motion for bifurcation of the fourth cause of action from the remaining causes of action. (March 2022 Order, p. 15:11-23.) In support of the motion, Defendants contended that bifurcation of the fourth cause of action would expedite resolution of the parties' disputes because it is the most critical issue and that presenting the relevant documents and testimony would require no more than a day. (*Id.* at pp. 15:23-16:2.)

Nevertheless, the court denied the motion for bifurcation, stating: "a significant portion of the factual issues and evidence involved in the fourth cause of action overlaps with other with other claims alleged in the FAC. For example, the first cause of action for breach of fiduciary duty and the third cause of action for conversion are based, at least in part, on allegations that Srinivasan took ZL Technologies' intellectual property. The bifurcation of the fourth cause of action is not conducive to expedition or economy." (March 2022 Order, p. 16:11-17.)

Here, for similar reasons, the court finds that bifurcation of the Section 304 Action is not conducive to expedition or economy. Srinivasan's asserts in reply that he has never moved to bifurcate the Section 304 claim, but only the Lead Case's fourth cause of action for rescission of IP agreement. (Srinivasan's Reply to ZL Technologies, Inc.'s Opposition to the Motion to Bifurcate the Corporations Code Section 304 Action for Court Trial ("Srinivasan's Reply"), p. 2:1-15.) He further contends that the court's reasoning regarding overlapping claims no longer applies because he has produced evidence supporting his position concerning the IP agreement, and ZL has not.

However, even accepting this assertion as true—despite the numerous declarations and documents that ZL has presented—Srinivasan's argument that this is a new bifurcation motion does not address whether a significant portion of the factual issues and evidence involved in the Section 304 Action overlap with the other unresolved issues and claims in this consolidated action. To the contrary, Srinivasan himself points out a significant portion of the factual issues

and evidence involved in the fourth cause of action overlaps with other with other claims alleged in the FAC. (Srinivasan's MPA, p. 3:4-4:26.)

Moreover, even if the court has not yet ruled upon a motion to bifurcate the Section 304 Action specifically, ZL persuasively argues that Srinivasan's instant motion is untimely. As set forth above, Code of Civil Procedure section 598, the court may make a bifurcation order on the motion of party "no later than the close of pretrial conference in cases in which such pretrial conference is to be held, or, in other cases, no later than 30 days before the trial date."

Here, the court's (Hon. Patricia M. Lucas) August 29, 2022 *Order Re: Pretrial and Trial Dates* indicates that a pretrial conference took place on August 10, 2022, at which time counsel for ZL and Srinivasan appeared and discussed proposed trial and pretrial dates at length. This conference took place more than a year after Srinivasan filed his successful motion to consolidate the five related cases, on August 6, 2021. As discussed above, the trial date has since been continued on multiple occasions at subsequent case management conferences.

Thus, it is indisputable that a pretrial conference was held in this case and Srinivasan did not file his instant motion to bifurcate until August 23, 2024, more than two years after the initial pretrial conference. Furthermore, even if this were an action in which no pretrial conference is to be held, Srinivasan's motion is also untimely because trial in this consolidated action is currently set to begin on November 4, 2024 – less than 30 days after the hearing set for this motion.

In reply, Srinivasan contends that the motion is not untimely because there has not yet been a "final pretrial conference" and because the court can make a bifurcation order on its own motion at any time. (Srinivasan's Reply, pp. 4:18-5:4.) Nevertheless, the court has not in fact made its own motion for bifurcation, and Srinivasan presents no authority in support of his position that the deadline described in Code of Civil Procedure 598 for a party's bifurcation is extended when a "final pretrial conference" is contemplated. (See *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 ["When [a party] fails to raise a point, or asserts but fails to support it with reasoned argument and citations to authority, we treat the point as waived."]; see also *Schaeffer Land Trust v. San Jose City Council* (1989) 215 Cal.App.3d 612, 6129, fn. 2

["[A] point which is merely suggested by a party's counsel, with no supporting argument or authority, is deemed to be without foundation and requires no discussion."].)

Accordingly, the motion for bifurcation of the Section 304 Action is DENIED as untimely. Furthermore, even if the motion were not deemed untimely, the court finds that bifurcation of the Section 304 Action is not conducive to expedition or judicial economy because, as Srinivasan himself argues, a significant portion of the factual issues and evidence involved in the Section 304 Action overlap with other claims alleged in this consolidated action. Srinivasan's arguments to the contrary do not convince the court otherwise.

For example, Srinivasan contends that bifurcation of the Section 304 Action is proper under the "equity first rule." (Srinivasan's MPA, pp. 8:21-10:4.) More specifically, he argues that the right of a court to remove directors falls within the court's authority in equity, and that this issue should be determined prior to a jury trial to minimize inconsistencies and prevent duplication of effort. (*Id.* at p. 9:4-23.)

"Where plaintiff's claims consist of a 'mixed bag' of equitable and legal claims, the equitable claims are properly tried first by the court. A principal rationale for this approach has been explained as follows: ' "When an action involves both legal and equitable issues, the equitable issues, ordinarily, are tried first, for this may obviate the necessity for a subsequent trial of the legal issues." [Citation.]' [Citations.]" (*DiPirro v. Bondo Corp.* (2007) 153 Cal.App.4th 150, 185 (*DiPirro*).) However, where a court's determination of an equitable issue is not dispositive of a legal issue and the court does not act as a proper fact finder on the legal issue, the "equity first" rule does not apply. (*Darbun Enterprises, Inc.* (2015) 239 Cal.App.4th 399, 411.)

Thus, while a trial court may try equitable issues first when doing so may obviate the need for a subsequent trial of the legal issues, Srinivasan presents no authority that a court must apply the equity first rule when doing so will not obviate the need for a jury trial. Here, as Srinivasan effectively concedes, even if his proposed bifurcation plan were adopted, resolution of the Section 304 Action will not obviate the need for a jury trial for the other claims in this consolidated action. (See Srinivasan's MPA, pp. 1:8-13 [asserting that bifurcation would

dispose of "virtually all contested issues"], 13:4-5 ["[A] determination made in the 304 Action will result in determination of nearly all the claims in this consolidated action."].)

Thus, determining the Section 304 Action first in this case still will not remove the need for a jury trial. Therefore, the rationale for the "equity first" rule does not apply here. (See *DiPirro, supra*, 153 Cal.App.4th at 185 [the principal rationale for the equity first rule is that trying the equitable issues first could obviate the necessity for a subsequent trial of the legal issues].)

Accordingly, Srinivasan's Motion for Bifurcation is DENIED.

IV. ZL's Motion for Terminating Sanctions

ZL moves for "terminating sanctions against Defendants in this consolidated action pursuant to [Code of Civil Procedure sections 2023.010 and 2023.030, subdivisions (a)-(d)] and the court's inherent authority, including striking Defendants' pleadings, dismissing Arvind Srinivasan's actions and rendering a judgment of default against Defendants on the grounds of their pervasive pattern of misuse of discovery and the judicial system which culminated in the intentional destruction of critical evidence." (ZL's Notice of Motion and Motion, p. 2:6-11.)

A. Legal Standard

Code of Civil Procedure section 2023.030 subdivisions (a)-(d) provide as follows, in pertinent part:

> **(a)** The court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct. …
> **(b)** The court may impose an issue sanction ordering that designated facts shall be taken as established in the action in accordance with the claim of the party adversely affected by the misuse of the discovery process. The court may also impose an issue sanction by an order prohibiting any party engaging in the misuse of the discovery process from supporting or opposing designated claims or defenses.
> **(c)** The court may impose an evidence sanction by an order prohibiting any party engaging in the misuse of the discovery process from introducing designated matters in evidence.
> **(d)** The court may impose a terminating sanction by one of the following orders:
>
> > **(1)** An order striking out the pleadings or parts of the pleadings of any party engaging in the misuse of the discovery process.
> > **(2)** An order staying further proceedings by that party until an order for discovery is obeyed.

> **(3)** An order dismissing the action, or any part of the action, of that party.
> **(4)** An order rendering a judgment by default against that party.

In the discovery context, the general rule is that sanctions may be imposed only to the extent authorized by statute. (See Code Civ. Proc., § 2023.030 [a court may impose sanctions for discovery abuse "[t]o the extent authorized by the chapter governing any particular discovery method or any other provision of this title"].) "This means that the statutes governing the particular discovery methods limit the permissible sanctions to those sanctions provided under the applicable governing statutes." (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1422 (*New Albertsons*).)

Additionally, the Civil Discovery Act only authorizes nonmonetary sanctions where a party has violated a court order. (See *New Albertsons, supra,* 168 Cal.App.4th at p. 1423, citing Code Civ. Proc., §§ 2030.290, subd. (c), 2030.300, subd. (e), and 2031.310, subd. (e), & 2031.320, subd. (c); see also *Liberty Mutual Fire Ins. Co. v. Lcl Administrators, Inc.* (2008) 163 Cal.App.4th 1093, 1102 [two facts are generally prerequisite to the imposition of non-monetary discovery sanctions: (1) there must be a failure to comply with a court order, and (2) the failure must be willful].) "The statutory requirement that there must be a failure to obey an order compelling discovery before the court may impose a nonmonetary sanction for misuse of the discovery process provides some assurance that such a potentially severe sanction will be reserved for those circumstances where the party's discovery obligation is clear and the failure to comply with the obligation is clearly apparent." (*New Albertsons, supra,* 168 Cal.App.4th at p. 1423.)

The restrictions on the exercise of the court's sanctioning power set forth in the Civil Discovery Act "are binding unless they materially impair the court's ability to ensure the orderly administration of justice." (*New Albertsons, supra,* 168 Cal.App.4th at p. 1431; see also *Aghaian v. Minassian* (2021) 64 Cal.App.5th 603, 618-619 ["[a]bsent unusual circumstances, nonmonetary sanctions are warranted only if a party willfully fails to comply with a court order. [Citations.]"].) In those rare circumstances, a court may exercise its inherent equity, supervisory, and administrative powers, and inherent power to control litigation, to impose nonmonetary sanctions as a remedy for litigation misconduct. (See *id.* at pp. 1424

["Some courts, however, have held that nonmonetary sanctions for misuse of the discovery process may be imposed in certain circumstances not involving the sanctioned party's failure to obey an order compelling discovery."]; see also *Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736, 758.)

For example, courts have imposed nonmonetary sanctions without violation of a court order where the sanctioned party cannot provide discovery it promised it would provide; the sanctioned party misrepresented the existence or availability of discovery; an order would be futile because the material sought did not exist or was destroyed; the sanctioned party repeatedly falsely assured the requesting party that all responsive discovery had been produced; or the sanctioned party engaged in a pattern of willful discovery abuses based in part on disobeying discovery orders. (*New Albertsons, supra,* 168 Cal.App.4th at pp. 1424-1431.)

"Courts have articulated two major guidelines for imposing sanctions under both the current Civil Discovery Act and its predecessor." (*City of Los Angeles v. PricewaterhouseCoopers* (2014) 17 Cal.5th 46, 63.) "First, because the very purpose of discovery is to promote the efficient and effective conduct of trial, discovery sanctions are not to be used to 'provide a weapon for punishment, forfeiture and the avoidance of a trial on the merits.' [Citation.]" (*Ibid.*) "Second, a more severe sanction is disfavored if a lesser sanction is available. [Citation.]" (*Ibid.*) "This means that a court ordinarily must consider monetary sanctions … before it proceeds to consider whether other nonmonetary sanctions are appropriate to address the misconduct at issue." (*Ibid.*)

B. Merits of the Motion

This motion arises from Srinivasan's alleged misappropriation and misuse of ZL's intellectual property, personnel and other resources—and more specifically—ZL's discovery efforts regarding such allegations. (ZL's Memorandum of Points and Authorities in Support of Motion for Terminating Sanctions Against Defendants ("ZL's MPA"), p. 6:9-12.) ZL asserts it "has discovered that key evidence of misappropriation and misuse of ZL source code, software, computer systems and personnel was first concealed for years, and now has been irretrievably destroyed." (*Id.* at p. 6:13-15.)

ZL contends that Srinivasan had ZL source code and software transferred to a virtual machine called "Haifa" on a cloud account under a fictitious name paid for by Defendants. (ZL's MPA, p. 6:15-19.) ZL obtained an order from the Discovery Referee compelling Defendants to produce a forensic copy of Haifa (the "Discovery Referee's July 24, 2023 Order"), but before this court adopted that order on February 1, 2024, Defendants allowed the subject data stored on an Azure cloud account to be irretrievably deleted by not making the associated monthly payments. (*Id.* at pp. 6:19-22, 14:5-15:4.)

According to ZL, this is a textbook case of failure to preserve and intentional spoliation of evidence for which the only appropriate remedy is terminating sanctions. (ZL's MPA, pp. 6:23-7:4 ["[W]hile the full panoply of sanctions authorized by law are certainly justified, the only remedy that would do justice to Defendants' pattern of abuse of discovery and the court system are terminating sanctions in this consolidated action."]; see also ZL's Reply in Support of Motion for Terminating Sanctions Against Defendants ("Reply"), p. 13:4 ["Terminating sanctions are the only remedy that could do justice"].)

ZL asserts that, at a minimum, Defendants acted with reckless disregard of the likelihood that, by failing to take affirmative steps to ensure preservation, the evidence in question would be irretrievably lost. (Reply, p. 13:20-24.) Nevertheless, the court finds that ZL has not presented a sufficient justification for the drastic option of terminating sanctions. Case law instructs that an incremental approach to discovery sanctions should be the customary one, not an approach that immediately consider the most severe remedy of terminating sanctions without first considering whether a less severe remedy is available.

> California discovery law authorizes a range of penalties for a party's refusal to obey a discovery order, including monetary sanctions, evidentiary sanctions, issue sanctions, and terminating sanctions. A court has broad discretion in selecting the appropriate penalty, and we must uphold the court's determination absent an abuse of discretion. …
>
> Despite this broad discretion, the courts have long recognized that the terminating sanction is a drastic penalty and should be used sparingly. A trial court must be cautious when imposing a terminating sanction because the sanction eliminates a party's fundamental right to a trial, thus implicating due process rights. The trial court should select a sanction that is tailored to the harm caused by the withheld discovery. Sanctions should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery.

> The discovery statutes thus evince an incremental approach to discovery sanctions, starting with monetary sanctions and ending with the ultimate sanction of termination. Although in extreme cases a court has the authority to order a terminating sanction as a first measure, a terminating sanction should generally not be imposed until the court has attempted less severe alternatives and found them to be unsuccessful and/or the record clearly shows lesser sanctions would be ineffective.

(*J.W. v. Watchtower Bible & Tract Society of New York, Inc.* (2018) 29 Cal.App.5th 1142, 1169 (*J.W.*), internal punctuation and citations omitted; see also *Creed-21 v. City of Wildomar* (2017) 18 Cal.App.5th 690, 701-702 [discovery statutes evince an incremental approach to discovery sanctions].)

"Except for in cases of extreme misconduct and when other viable options are unavailable, a trial court abuses its discretion when a sanctions order deprives a party of any right to defend the action upon its merits and designed not to accomplish the purposes of discovery but designed to punish the party for not fully complying with its discovery obligations. [Citations.]" (*Victor Valley Union High School Dist. v. Superior Court* (2023) 91 Cal.App.5th 1121, 1159, internal quotations marks omitted.)

In opposition, Defendants assert that they were unaware of the deletion of the cloud account until after they sought to comply with the court order and that they did not discover that the Azure account had been deleted until March 23, 2024. (Defendants' Opposition to ZL Technologies, Inc.'s Motion for Terminating Sanctions Against Defendants, pp. 10:22-12:9.) In reply, ZL contends that Defendants' purportedly innocent explanations for failing to preserve and produce Haifa are merely baseless excuses. (Reply, pp. 5:9-9:3.)

As relevant here, the appellate court in *New Albertsons* identified a concern about imposing nonmonetary sanctions based on spoliation claims where there is a dispute as to whether the evidence was destroyed innocently. "A party moving for discovery sanctions based on the intentional destruction of evidence could argue that the mere fact that the evidence no longer exists supports an inference of intentional spoliation. Rather than decide the facts with respect to intentional destruction of evidence and impose a nonmonetary sanction on a pretrial motion in circumstances not contemplated by the discovery statutes, we believe that in most cases of purported spoliation the facts should be decided and any appropriate inference should be made by the trier of fact after a full hearing at trial." (*New Albertsons, supra*, 168

Cal.App.4th at p. 1431, citing *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 15-16.)

In this case, ZL does not demonstrate that sanctions less severe than a terminating sanction present an insufficient remedy for the failure to produce the discovery in question. For example, ZL does not seek monetary sanctions and makes no effort to explain why an issue sanction or evidence sanction would be unsatisfactory, and instead asks the court to weigh the credibility of the Parties' respective explanations regarding the spoliation of evidence and render a judgment of default in ZL's favor on that basis. ZL's request is overbroad, it suggests no possible lesser sanctions for the court's consideration and its analysis ignores the incremental approach to sanctions evinced by the discovery statutes. (See *J.W.*, *supra*, 29 Cal.App.5th at p. 1169.)

Accordingly, the motion for terminating sanctions is DENIED.

V. Conclusion

The motions to seal are GRANTED. The motion for bifurcation is DENIED. The motion for terminating sanctions is DENIED.

The prevailing party shall prepare the order in accordance with California Rules of Court, rule 3.1312.

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Calendar Line 6

Case Name: ZL Technologies, Inc. v. Splitbyte Inc., et al. (LEAD CASE; Consolidated With 20CV373027, 20CV373149, 21CV378097, 21CV382329)
Case No.: 20CV366939

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Calendar Line 7

Case Name: Bobadilla v. Loan Factory, Inc. (Class Action)
Case No.: 24CV432129

I. BACKGROUND

This is an action for misappropriation of likeness brought by plaintiff Derek Bobadilla ("Bobadilla"), and all others similarly situated, against defendant Loan Factory, Inc. ("Loan Factory") and various Does. The original complaint filed on February 29, 2024, states causes of action for: (1) Violation of Civil Code section 3344; (2) Common Law Misappropriation of Name and Likeness; (3) Violation of Business and Professions Code section 17200; and (4) Unjust Enrichment. [3]

The complaint alleges, on information and belief only[4] except as to Bobadilla's own conduct, that Loan Factory created a website (www.loanfactory.com) that includes a "Find a Loan Officer" search function which allows users to obtain results that could include Bobadilla's name, photograph, phone number and professional license number, despite his having no affiliation with Loan Factory. Bobadilla did not consent to the inclusion of his information. The complaint alleges (on information and belief only) that this was done to promote Loan Factory's website and services and to solicit the use of Loan Factory's mortgage loan brokerage services. (See complaint at ¶¶ 20, 23.) There are no exhibits attached to the complaint.

Currently before the court is Loan Factory's special motion to strike the entire complaint, sometimes referred to as an "anti-SLAPP" motion, filed on May 13, 2024. Bobadilla's opposition to the motion was filed on August 27, 2024.

II. LOAN FACTORY'S SPECIAL MOTION TO STRIKE THE COMPLAINT

A. General Standards

[3] The causes of action are listed in the order they appear in the body of the complaint.
[4] See complaint at p. 1:1-4.

Code of Civil Procedure section 425.16 authorizes a person to bring a special motion to strike allegations "arising from any act . . . in furtherance of [his or her] right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." (Code Civ. Proc., § 425.16, subd. (b)(1).) The special motion to strike is also referred to as an "anti-SLAPP" motion.

Courts evaluate anti-SLAPP motions using a two-step analysis. (*Country Side Villas Homeowners Assn. v. Ivie* (2011) 193 Cal.App.4th 1110, 1116.) "First, the moving defendant must identify 'all allegations of protected activity' and show that the challenged claim arises from that activity." (*Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924, 934 (citations omitted).) "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.' 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.'" (*Ibid*.)

1. First Step: Protected Activity

"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*).) Examples of protected speech include:

> (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).)

"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 (*Baharian-Mehr*).)

2. Second Step: Probability of Prevailing

The plaintiff meets its burden of showing a probability of prevailing by demonstrating "'that the [challenged claims are] both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.'" (*Soukop v. Law Offices of Herbert Hafif* (*Soukop*) (2006) 39 Cal.4th 260, 291 [quoting *Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548].) This "probability of prevailing" standard is similar to the standard governing a motion for summary judgment in that it is the plaintiff's burden to make a prima facie showing of facts that would support a judgment in the plaintiff's favor. (See *Taus v. Loftus* (2007) 40 Cal.4th 683, 714 (*Taus*).) Stated differently, the "plaintiff need only establish that his or her claim has 'minimal merit' [citation] to avoid being stricken as a SLAPP." (*Soukup, supra*, 39 Cal.4th at p. 291.)

A plaintiff must show that there is admissible evidence that, if credited, would be sufficient to sustain a favorable judgment. (See *McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 108.) While the burden on the second prong belongs to the plaintiff, in determining whether a party has established a probability of prevailing on the merits of his or her claims, a court considers not only the substantive merits of those claims, but also all defenses available to them. (See *Traditional Cat Assn., Inc. v. Gilbreath* (2004) 118 Cal.App.4th 392, 398.) Affidavits or declarations not based on personal knowledge, or that contain hearsay or impermissible opinions, or that are argumentative, speculative or conclusory, are insufficient to show a "probability" that the plaintiff will prevail. (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 26; *Dwight R. v. Christy B.* (2013) 212 Cal.App.4th 697, 714.)

In order to demonstrate a probability of prevailing, the plaintiff must also produce admissible evidence sufficient to overcome any privilege or defense the defendant has asserted. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 323 (*Flatley*); (*Bergstein v. Stroock & Stroock & Lavan LLP* (2015) 236 Cal.App.4th 793, 819-821 (*Bergstein*).)

B. Statutory Exemptions

In the opposition to the motion Bobadilla contends that the complaint is exempt from the anti-SLAPP statute under the "public interest" and "commercial speech" exemptions.

A threshold consideration in evaluating an anti-SLAPP motion is whether the plaintiff's lawsuit is exempt from the anti-SLAPP statute. (*People ex rel. Strathmann v. Acacia Research Corp.* (2012) 210 Cal.App.4th 487, 498; *San Diegans for Open Government v. San Diego State University Research Foundation* (2017) 13 Cal.App.5th 76, 93 (*San Diegans*); *Takhar v. People ex rel. Feather River Air Quality Management Dist.* (2018) 27 Cal.App.5th 15, 24 (*Takhar*).) The burden is on the plaintiff to show that an exemption applies. (*Simpson Strong–Tie Company, Inc. v. Gore* (2010) 49 Cal.4th 12, 25 (*Simpson*).)

1. Public Interest Exemption

Code of Civil Procedure section 425.17, subdivision (b) provides that the anti-SLAPP statute does not apply to "any action brought solely in the public interest" if: (1) "[t]he plaintiff does not seek any relief greater than or different from the relief sought for the general public"; (2) the action, if successful, would "enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public"; and (3) "[p]rivate enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter."

The section "thus provides a 'safe harbor' for a plaintiff from having to satisfy the anti-SLAPP statute. [Citation.] As an exception to the anti-SLAPP statute, it is to be 'narrowly interpreted.' [Citation.]" (*San Diegans, supra,* 13 Cal.App.5th at p. 93.) "'A plaintiff has the burden to establish the applicability of this exemption. [Citation.]' [Citation.]" (*Takhar, supra*,

27 Cal.App.5th at p. 24; see *Simpson, supra,* 49 Cal.4th at p. 26 [the burden of proof as to the applicability of an exemption falls on the party seeking the benefit of it].)

Here, Bobadilla has not met his burden as, at a minimum, he has not shown that if this action were ultimately successful, it would enforce an important right affecting the public interest and would confer a significant benefit on the general public. The complaint and the declaration of non-party Alan Eidinger (the only evidence submitted with the opposition to this motion) do not come close to establishing this element. The court also does not find the cursory analysis of this element in *Batis v. Dun & Bradstreet Holdings, LLC* (2024) 106 F.4th 932, the main support for this argument cited in the opposition brief, to be persuasive.

2. Commercial Speech Exemption

Code of Civil Procedure section 425.17, subdivision (c) provides:

> Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services, including, but not limited to, insurance, securities, or financial instruments, arising from any statement or conduct by that person if both of the following conditions exist:
>
> (1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services.
>
> (2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer, or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding, or investigation….

Both prongs must be satisfied. (*Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 273.) Again, statutory exemptions are narrowly construed. (*San Diegans, supra*, 13 Cal.App.5th at p. 93.) "[T]he language of section 425.17, subdivision (c), and subsequent case law indicate that the provision exempts 'only a subset of commercial speech' – specifically, comparative advertising." (*FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 147 (*FilmOn*); see also *Ross v. Seyfarth Shaw LLP* (2023) 96 Cal.App.5th 722, 740 [commercial exemption "applies only to comparative advertising – 'representations of fact about [the defendant's] or a business competitor's business operations, goods or services.'"].)

Bobadilla has not met his burden to establish that the commercial speech exemption applies either. Allegations that a person using the "Find a Loan Officer" function on Loan Factory's website might be led to Bobadilla's information and might, without any express statement from Loan Factory, draw the conclusion that Bobadilla was connected to Loan Factory do not establish comparative advertising or establish that Loan Factory was making representations about Bobadilla's business operations or services. The Eidinger declaration, the only evidence submitted with the opposition, cannot serve as an amendment to the complaint's allegations and does not establish comparative advertising.

C. Analysis of Loan Factory's Special Motion to Strike

Loan Factory's special motion to strike is DENIED as follows.

Loan Factory contends that its website, specifically the inclusion of the "Find a Loan Officer" function the complaint is based upon, is protected activity under Code of Civil Procedure section 425.16, subdivision (e)(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") because "information about loan officers is a matter of public interest." (See supporting memorandum at pp. 13:16-14:28 generally.)[5]

Loan Factory's web site does qualify as a public forum. (See *Kronmeyer v. Internet Movie Database Inc.* (2007) 150 Cal.App.4th 941, 950 ["The California Supreme Court held

[5] For some reason Loan Factory's notice of motion and supporting memorandum were submitted as one continuously paginated document.

that Web sites accessible to the public are 'public forums' for the purposes of the anti-SLAPP statute."].) However, Loan Factory has failed to demonstrate that the "Find a Loan Officer" search function on its web site is a statement or writing made in connection with an issue of public interest. Contrary to what it argues, this search function cannot reasonably be construed as having "educated the public about selecting a loan officer, a matter of public interest under the ambit of the statute." (Supporting memorandum at p. 9:19-20.)

The California Supreme Court has set forth a general definition of "public issue" or "public interest" by identifying three qualifying categories of statements. "The first is when the statement or conduct concerns 'a person or entity in the public eye'; the second, when it involves 'conduct that could directly affect a large number of people beyond the direct participants'; and the third, when it involves 'a topic of widespread, public interest.' [Citations.]" (*Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 621.) Only the third category could apply to the "Find a Loan Officer" search function.

In the *FilmOn* decision, the Supreme Court set forth a two-step test for evaluating the nexus between a statement and an issue of public interest: "First, we ask what 'public issue or [ ] issue of public interest' the speech in question implicates—a question we answer by looking to the content of the speech." (*FilmOn, supra,* 7 Cal.5th at p. 149., quoting Code Civ. Proc., § 425.16, subd. (e).) "Second, we ask what functional relationship exists between the speech and the public conversation about some matter of public interest." (*FilmOn, supra*, 7 Cal.5th at pp. 149–50.) "It is at the latter stage that context proves useful." (*Id*. at p. 150.) "[W]e agree with the court in *Wilbanks* [*v. Wolk* (2004) 121 Cal.App.4th 883, 898] that 'It is not enough that the statement refer to a subject of widespread public interest; the statement must in some manner itself contribute to the public debate.'" (*Ibid.*)

It is well-established that commercial speech about a specific product or service is not a matter of public interest within the meaning of the anti-SLAPP statute, even if the product category is a subject of public interest. (*L.A. Taxi Cooperative, Inc. v. Independent Taxi Owners Association of Los Angeles* (2015) 239 Cal.App.4th 918, 927-28; see also *Commonwealth Energy Corp. v. Investor Data Exchange, Inc*. (2003) 110 Cal.App.4th 26, 28–29 [telemarketing pitch made on behalf of firm selling information was not speech "made in connection with a public issue or an issue of public interest" because pitch was not "a

disquisition on the role of information in the investment market or the general need to be wary about investment scams"].)

Nothing in Loan Factory's motion or the declaration of Loan Factory CEO Thuan Nguyen, the only evidence offered in support of the motion, establishes that the "Find a Loan Officer" function on Loan Factory's web site itself contributed to any public debate about selecting loan officers.[6] As Bobadilla points out, Loan Factory "fails to explain how a mere directory of names, images, contact information, and professional license numbers contributes to public debate on the services of loan officers. It simply does not." (Opposition at p. 15:18-20.)[7]

As Loan Factory has failed to establish that the act the complaint is based on, the "Find a Loan Officer" function, was protected activity, the motion is denied for failure to satisfy the first step or prong of the analysis. It is therefore unnecessary for the court to consider the second step of the analysis, the probability of prevailing. (See *Baharian-Mehr*, *supra*.)

III. ATTORNEYS' FEES

The "prevailing defendant" on a special motion to strike "shall be entitled" to recover his or her attorney fees and costs related to the motion. (Code Civ. Proc. § 425.16(c)(1).) The purpose of this fee-shifting provision is both to discourage meritless lawsuits and to provide financial relief to the SLAPP lawsuit victim. "[A]ny SLAPP defendant who brings a successful motion to strike is entitled to mandatory attorney fees." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131.) As Loan Factory's motion has been denied for failure to meet its initial burden on the first step of the analysis its request for attorneys' fees is also DENIED.

A prevailing plaintiff may only recover attorneys' fees and costs if the court makes a finding that a denied special motion to strike "is frivolous or is solely intended to cause unnecessary delay." (Code Civ. Proc. § 425.16(c)(1).) The court does not find that Loan Factory's motion was frivolous or "solely" intended to cause delay.

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[6] Bobadilla's boilerplate objections to the Thuan Nguyen declaration are all overruled.

[7] This accurate assessment undercuts Bobadilla's argument that the public interest exemption could apply to this case.

IV. CONCLUSION

Loan Factory's special motion to strike and request for attorneys' fees are DENIED.

The prevailing party shall prepare the order in accordance with California Rules of Court, rule 3.1312.

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