SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 3
Honorable William J. Monahan, Presiding

Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2130

DATE: 8/6/2024 TIME: 9:00 A.M.

TO CONTEST THE RULING: Before 4:00 p.m. today (8/5/2024) 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 prefers in-person appearances or by Teams. If you must appear virtually, please use video.

FOR YOUR NEXT HEARING DATE: Please reserve your next hearing date using Court Schedule—an online scheduling tool that can be found on the Santa Clara County court website.

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.) **Please Note:** Any proposed orders must be submitted with the Judicial Council Form EFS-020 Proposed Order (Cover Sheet). Please include the date, time, dept., and line number.

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.

LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV418981	SUDNI FOODS, LLC FKA INDUS FOOD vs MILPITAS HALAL MARKET, A PARTNERSHIP et al	Hearing: Order of Examination as to Shazia Baig by Plaintiff SUDNI FOODS, LLC FKA INDUS FOOD Proof of Personal Service on Shaziz Baig filed 7/1/2024. Note: The name of the deponent is misspelled on the POS. It should be spelled Shazia Baig. Plaintiff may submit an Amended POS at the hearing. **APPEAR.** **Note:** The clerk will administer the oath for the examination at the hearing (if the deponent appears.) If there is no appearance by counsel for the moving party (or no Amended POS with the correct spelling for Shazia Biag), it may be ordered off calendar at the hearing.

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LINE 2	23CV420300	Northeast Securities Co., Ltd. vs Que Wenbin et al	Motion: Quash Service of Summons by Defendant Mike Que Ctrl Click (or scroll down) on Line 2 for tentative ruling. The court will prepare the order.
LINE 3	23CV423144	Beverly Hughes vs Brandon Carter et al	Hearing: Demurrer to the Complaint of Beverly Hughes by Defendant State Farm Insurance Unopposed and Demurrer is SUSTAINED WITH 15 DAYS LEAVE TO AMEND. Moving party to submit order for signature by court.
LINE 4	24CV436049	DAVID DUONG vs HAI HUYNH et al	Motion: Strike for Anti-SLAPP; Plaintiff David Duong's Complaint by Defendant Hai Q. Hyunh Ctrl Click (or scroll down) on Line 4 for tentative ruling. The court will prepare the order.
LINE 5	23CV423260	Zaki Jones vs Evergreen College et al	Hearing: Demurrer to the Complaint of Plaintiff Zaki A. Jones by Defendant Evergren College Unopposed and Demurrer is SUSTAINED WITH 15 DAYS LEAVE TO AMEND. Moving party to submit order for court’s signature.
LINE 6	23CV426673	Wells Fargo Bank, N.a. vs Jose Perez	Motion: Summary Judgment/Adjudication Unopposed and GRANTED. Moving party to submit order for signature by court.
LINE 7	24CV429335	SYLVIA JACKSON vs GILFIX & LA POLL ASSOCIATES, LLP et al	Conference: Further Case Management [set per 6-6/24 MO] **APPEAR.**

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DATE: 8/6/2024 TIME: 9:00 A.M.

LINE 8	24CV429335	SYLVIA JACKSON vs GILFIX & LA POLL ASSOCIATES, LLP et al	Motion: Compel Defendant's production of documents identified on Defendant's privilege log in response to Plaintiff's Requests for production of documents, Set One and Two, and for sanctions by Plaintiff Sylvia Jackson [**C/F 7/18/2024 per 6/7/24 Order**Cont. per MO from 06/06/2024**] **APPEAR**. Odyssey only has REDACTED copies of the 6 documents that were ordered to be filed under seal. The court cannot locate any courtesy copy of the UNREDACTED 6 documents to do its in-camera inspection. The attorney for defendants Gilfix & La Poll Associates, LLP and Mark Gilfix ("Defendants") shall APPEAR with an UNREDACTED copy of the 6 documents so the court may do its in-camera inspection.
LINE 9	24CV434189	Jane Doe vs Calvin Ky et al	Motion: Motion to proceed pseudonymously and for Protective Order by Plaintiff Jane Doe Ctrl Click (or scroll down) on Line 9 for tentative ruling. The court will prepare the order.
LINE 10	16CV295090	Sterling Harwood vs Jane Edwards	Hearing: Motion for Dismissal by defendant Jane Edwards (pro per) OFF CALENDAR. This motion was **RESET to 12/19/24 at 9am in Dept. 3** by minute order at the case management conference on 7/25/24.
LINE 11			
LINE 12			

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Calendar Line 1

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Calendar Line 2
Case Name: *Northeast Securities Co., Ltd. v. Quen Wenbin et al.*
Case No.: 23CV420300

I. Background

On August 3, 2023, Northeast Securities Co., Ltd. ("Plaintiff") brought an action against several defendants, including Mike Que ("Que"), an individual. Plaintiff asserts it obtained a judgment against the named defendants in the People's Republic of China on November 16, 2019, in the amount of RMB 500,000,000. Plaintiff brings its complaint pursuant to the Uniform Voidable Transfers Act (Cal Civ. Code, § 3493 et seq.).

On June 6, 2024, Que filed a motion to quash service of summons for lack of personal jurisdiction. Plaintiff opposes the motion and Que has filed a reply. Previously, Que filed a motion to quash for improper service. This Court issued a tentative ruling denying the motion to quash; however, the day before the hearing, Que requested the motion go off calendar. Thereafter, Que filed a motion for forum non conveniens. On April 23, 2024, the Court (Hon. Monahan) denied the motion.

II. Motion to Quash

Que moves to quash service of summons on the ground the Court lacks personal jurisdiction over him.

A. Legal Standard

A defendant may move to quash service of summons on the ground the court lacks personal jurisdiction over him. (Code Civ. Proc., § 418.10, subd. (a)(1).) Although the moving party is the defendant, "the plaintiff has the burden of proving, by a preponderance of the evidence, the factual bases justifying the exercise of jurisdiction." (*ViaView, Inc. v. Retzlaff* (2016) 1 Cal.App.5th 198, 209-210; see also *Zehia v. Superior Ct.* (2020) 45 Cal.App.5th 543, 552 (*Zehia*).) To carry that burden, "[t]he plaintiff must do more than merely allege jurisdictional facts. It must present evidence sufficient to justify a finding that California may properly exercise jurisdiction over the defendant." (*In re Automobile Antitrust Cases I and II* (2005) 135 Cal.App.4th 100, 110.) If the plaintiff makes such a showing, "the burden shifts to the defendant to present a compelling case demonstrating that the exercise of jurisdiction by our courts would be unreasonable." (*Id.* at pp. 110-111.)

B. Procedural Issues and Code of Civil Procedure section 418.10

Code of Civil Procedure section 418.10 governs motions to quash for lack of personal jurisdiction (subd. (a)(1)) and forum non conveniens motions (subd. (a)(2)). Subdivision (e)(1) states:

> [N]o act by a party who makes a motion under this section, including filing an answer, demurrer, or motion to strike constitutes an appearance, unless the court denies the motion made under this section. If the court denies the motion made under this section, the defendant or cross-defendant is not deemed to have generally appeared until entry of the order denying the motion.

(Code Civ. Proc., § 418.10, subd. (e)(1).)

Plaintiff attempts to rely on section 418.10, subdivision (e)(1) to argue that Que made a general appearance in this matter. Specifically, Plaintiff asserts that the Court's denial of Que's

first motion to quash and its denial of his motion for forum non conveniens "transmutes [Que's] special appearance to a general one." (Opposition, p. 5:6-9, citing *ViaView, Inc. v. Retzlaff* (2016) 1 Cal.App.5th 198, 212.)

Section (e)(1) however pertains to situations where the defendant files a motion to quash along with a demurrer, motion to strike, or an answer. Here, Que separately filed both motions to quash and inconvenient forum motion. Plaintiff does not provide authority which states Que is precluded from filing a second motion to quash for lack of personal jurisdiction if his first motion to quash service is taken off calendar. Thus, the motion cannot be denied on this basis and the Court will address the merits of the motion.

C. Personal Jurisdiction Generally

"Personal jurisdiction may be either general or specific. A nonresident defendant may be subject to general jurisdiction of the forum if [his] contacts in the forum state are 'substantial . . . continuous and systematic' . . . If the nonresident defendant [can] not . . . establish general jurisdiction, [he] still may be subject to the specific jurisdiction of the forum, if the defendant has purposefully availed [himself] of forum benefits . . . and the 'controversy is related to or "arises out of" a defendant's contacts with the forum.'" (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 445-446 [emphasis and internal citations omitted].)

i. General Jurisdiction

"The standard for general jurisdiction is considerably more stringent than that for specific jurisdiction. A defendant is subject to general jurisdiction when [he] has substantial, continuous, and systematic contacts in the forum states, i.e., [his] contacts are so wide-ranging that they take the place of a physical presence in the state. In assessing a defendant's contacts with the forum for purposes of general jurisdiction, we look at the contacts as they existed from the time the alleged conduct occurred to the time of service of summons." (*Strasner v. Touchstone Wireless Repair & Logistics, LP* (2016) 5 Cal.App.5th 215, 222 (*Strasner*); see also *Mansour v. Superior Ct.* (1995) 38 Cal.App.4th 1750, 1758.) For individual defendants, there has been "a dearth of case law" regarding what analysis should be applied in determining general jurisdiction. (*Serafini v. Superior Ct.* (1998) 68 Cal.App.4th 70, 79.) Courts typically describe general jurisdiction relative to an individual as being governed by his domicile. (*Bristol-Myers Squibb Co. v. Superior Ct.* (2017) 582 U.S. 255, 262 ["For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile"]; see also *Daimler AG v. Bauman* (2014) 571 U.S. 117, 137 [stating same].)

In opposition, Plaintiff does not appear to argue that the Court has general jurisdiction over Que, but rather the Court has specific personal jurisdiction over him. Thus, the Court declines to exercise general jurisdiction over Que. The Court next turns to the issue of specific jurisdiction.

ii. Specific Jurisdiction

"A court may exercise specific jurisdiction over a nonresident defendant only if: (1) the defendant has purposefully availed [himself] of forum benefits; (2) the controversy is related to or 'arises out of' the defendant's contacts with the forum; and (3) the assertion of personal jurisdiction would comport with fair play and substantial justice." (*Zehia, supra*, 45 Cal.App.5th at p. 552 [internal citations and quotations omitted]; see also *Pavlovich v. Superior Ct.* (2002) 29 Cal.4th 262, 269 (*Pavlovich*).) Plaintiff "bears the burden of establishing that the

first two requirements for specific jurisdiction have been met. If [it] does so, the burden shifts to [defendant]" to show California's exercise of personal jurisdiction would not comport with fair play and substantial justice. (*Greenwell v. Auto-Owners Ins. Co.* (2015) 233 Cal.App.4th 783, 792 [internal quotations omitted].)

a. Purposeful Availment

"Purposeful availment occurs where a nonresident defendant purposefully [and voluntarily] directs [his] activities at residents of the forum, purposefully derives benefits from its activities in the forum, creates a substantial connection with the forum, deliberately has engaged in significant activities within the forum, or has created continuing obligations between [himself] and residents of the forum." (*Preciado v. Freightliner Custom Chassis Corp.* (2023) 87 Cal.App.5th 964, 978 [internal quotations omitted]; see also *Zehia*, *supra*, 45 Cal.App.5th at p. 553.) "[M]ost courts agree that merely asserting that a defendant knew or should have known that his intentional acts would cause harm in the forum state is not enough to establish jurisdiction[.]" (*Pavlovich*, *supra*, 29 Cal.4th at p. 270.)

In this case, Plaintiff argues the Court previously held that Que purposefully availed himself of doing business in California. The Court explained that "Plaintiff . . . submitted evidence clearly demonstrating [Que's] lengthy history of availing himself of California laws, doing business within California, and that [Que] represented that he resided in California for many years." (Opposition, p. 4:15-18, citing Court's April 23, 2024 Order; Wu Decl., ¶ 11.) To support this assertion, Plaintiff proffers evidence of mail with Que's name and a Palo Alto, CA address (Wu Decl., Ex. 1); the particulars of a company owner, listing Que's address as being in Palo Alto (Wu Decl., Ex. 2, p. 3 [stating Que's "Residential address" is in Palo Alto]; Wu Decl., Ex. 3 [business license application indicating Que's address is in Palo Alto]; Wu Decl., Ex. 5 [corporation information stating Que's address is in Palo Alto]; Wu Decl., Ex. 6 [listing Que's residential address as Palo Alto]. In reply, Que argues he used this address for convenience purposes, however the evidence proffered by Plaintiff indicates the Palo Alto address was his "residential address." Thus, the Court is not persuaded by Que's argument and Plaintiff has met its burden as to the first requirement of specific jurisdiction.

b. Controversy Related to or Arising Out of Contacts with Forum

"In order for a plaintiff to establish personal jurisdiction, the claims must arise out of or relate to the defendant's contacts' with the forum. Or put just a bit differently, there must be an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." (*Daimler Trucks North America LLC v. Superior Ct.* (2022) 80 Cal.App.5th 946, 956 [internal citations and quotations omitted].)

In opposition, Plaintiff contends the causes of action within the Complaint against Que are related to his contacts with California. (Opposition, p. 8:19-20.) As the Court previously explained, the "action is directly related to California because the underlying facts are derived from [defendants'] conduct that occurred in California, and the claims arise out of and brought pursuant to California law giving California a great interest in this matter." (Court's July April 23 Order, p. 7:17-19.) Moreover, as Que concedes, the sale of the property to Que took place from California. (See Reply, p. 10:12-13; see also *Yue v. Yang* (2021) 62 Cal.App.5th 539, 549 ["There must be an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation."][internal quotations omitted].) The Court finds Plaintiff satisfies the second requirement of specific jurisdiction.

c. Fair Play and Substantial Justice

"In determining whether the exercise of jurisdiction would be fair and reasonable, so as to satisfy the third requirement for the exercise of specific personal jurisdiction, a court must consider (1) the burden on the defendant of defending an action in the forum, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining relief, (4) the interstate or international judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the states' or nations' shared interest in furthering fundamental substantive social policies. These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. On the other hand, where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." (*Anglo Irish Bank Corp., PLC v. Superior Ct.* (2008) 165 Cal.App.4th 969, 979-980 [internal citations and quotations omitted].)

The burden now shifts to Que to show that the exercise of specific jurisdiction over him would be unfair and unreasonable. Que fails to address the third requirement of specific jurisdiction in his motion and reply. Therefore, he has not met his burden.

Accordingly, the motion to quash for lack of personal jurisdiction is DENIED. The Court shall prepare the final order.

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Calendar Line 3

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Calendar line 4
Case Name: *David Duong v. Hai Q. Huynh*
Case No.: 24-CV-436049

Special Motion to Strike to the Complaint by Defendant Hai Q. Huynh

Factual and Procedural Background

This is an action for defamation per se brought by plaintiff David Duong ("Duong") against defendant Hai Q. Huynh ("Huynh").

According to the complaint, plaintiff Duong and his family fled communist oppression in his native Vietnam under extremely difficult circumstances and immigrated to the United States in 1980. (Complaint at ¶ 7.) Starting with nothing, Duong and his family have spent decades of hard work and dedication to develop a substantial role in the recycling community in Northern California under the auspices of California Waste Solutions, Inc. (Ibid.)

Defendant Huynh is a bail bonds person who is active in the Vietnamese community in the Bay Area with possible involvement in gambling businesses. (Complaint at ¶ 8.)

Within the past year, defendant Huynh repeatedly made derogatory verbal and written statements concerning plaintiff Duong, including assertions that Duong is a supporter of human rights violations in Vietnam, an agent of the Vietnamese government, a person who unlawfully shares trade secrets with the Vietnamese government, and a person who recruits others to commit industrial espionage for the Vietnamese government. (Complaint at ¶ 9.)

For example, on March 7, 2024, defendant Huynh sent an email to 41 recipients falsely claiming Duong is a "communist lackey" and is pro-communist. (Complaint at ¶ 10.) Recipients of the email include various city and government employees in the County of Santa

Clara, City of San Jose, Vietnamese American business persons and politicians, and various community activists in the Vietnamese American community. (Ibid.) The email was circulated to additional recipients and eventually transmitted to plaintiff Duong. (Ibid.)

Plaintiff Duong alleges the statements made by defendant Huynh were untrue and slanderous per se and aimed to tarnish his reputation. (Complaint at ¶ 11.)

On April 17, 2024, plaintiff Duong filed the operative complaint against defendant Huynh alleging a single claim for defamation per se.

On June 21, 2024, defendant Huynh filed the motion presently before the court, a special motion to strike the complaint. Plaintiff Duong filed written opposition. Huynh filed reply papers and evidentiary objections.

A case management conference is set for October 8, 2024.

Special Motion to Strike the Complaint

Defendant Huynh moves to strike the complaint on the ground that it arises from protected activity and plaintiff Duong will be unable to demonstrate a probability of success on the merits.

Huynh's Evidentiary Objections

In reply, defendant Huynh submitted evidentiary objections to plaintiff Duong's declaration. The evidentiary objections are OVERRULED in their entirety.

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.)

Section 425.16, subdivisions (e)(1)-(2)

Section 425.16, subdivision (e)(1) defines protected activity as "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law."

Section 425.16, subdivision (e)(2) defines protected activity as "any written or oral statement or writing 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."

Here, the alleged defamatory statements are contained in a March 7, 2024 email sent by defendant Huynh to 41 recipients falsely claiming plaintiff Duong is a "communist lackey" and pro-communist. (Complaint at ¶ 10.) Huynh argues statements incorporated in the email constitute protected activity under subdivisions (e)(1)-(2) as they occurred in government proceedings. In support, Huynh relies on paragraphs 5, 26, 37 and 38 of his declaration submitted with the motion. This evidence however does not establish that any such statements were made in accordance with subdivisions (e)(1) or (2) and thus there is no basis for protected activity under these sections.

Section 425.16, subdivision (e)(3)

Section 425.16, subdivision (e)(3) defines protected activity as including "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."

Defendant Huynh contends the alleged defamatory comments were matters under review in a public forum. (See Motion at p. 11:3-4.) "A 'public forum' is traditionally defined as a place that is open to the public where information is freely exchanged." (*Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 475.) "Under its plain meaning, a public forum is not limited to a physical setting, but also includes other forms of public communication." (*Id*. at p. 476.) In fact, numerous courts have broadly construed section 425.16, subdivision (e)(3)'s "public forum" requirement to include publications with a single viewpoint. (*Ibid*.; see *Macias v. Hartwell* (1997) 55 Cal.App.4th 669, 674 [union campaign flyer is a "recognized public forum under the SLAPP statute"]; see also *Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 238 [assuming that Mother Jones magazine is a public forum within the meaning of the anti-SLAPP statute].) The moving papers however fail to cite legal authority or provide any substantive discussion on why the defamatory email in this case constitutes a matter under review in a public forum. (See *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 [court need not consider point unsupported by legal authority]; see also *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52 (*Allen*) ["We are not required to examine undeveloped claims or to supply arguments for the litigants"].) Therefore, the court finds no basis for protected activity under section 425.16, subdivision (e)(3).

Section 425.16, subdivision (e)(4)

Section 425.16, subdivision (e)(4) further defines protected activity as including "conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

Subdivision (e)(4) serves as a catch-all provision. (*FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 139-140 (*FilmOn*).) For purposes of applying subdivision (e)(4), arguably broader than subdivision (e)(3), no public forum is required and even private conduct is protected if it is in furtherance of the constitutional rights of petition or free speech in

connection with a public issue. (*Hailstone v. Martinez* (2008) 169 Cal.App.4th 728, 736.) Both subparts "are subject to the limitation that the conduct must be in connection with an issue of public interest." (*Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1132; see also *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123.)

In *Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610 (*Rand Resources*), the California Supreme Court acknowledged the struggle among the appellate courts on the question of what makes something an issue of public interest. (*Rand Resources, supra,* 6 Cal.5th at p. 621.) Referring to a Court of Appeal opinion, the Supreme Court identified three nonexclusive and sometimes overlapping categories of statements within the ambit of subdivision (e)(4). (*Ibid*.) "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.]" (*Ibid*.)

"So within the framework of section 425.16, subdivision (e)(4), a court must consider the context as well as the content of a statement in determining whether that statement furthers the exercise of constitutional speech rights in connection with a matter of public interest." (*FilmOn, supra,* 7 Cal.5th at p. 149.)

Thus, the *FilmOn* court articulated the appropriate analysis for determining whether challenged speech has a sufficient connection to a public issue to warrant anti-SLAPP protection:

> "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. [Citation.] Second, we ask what functional relationship exists between the speech and the public conversation about some matter of public interest. It is at the latter stage that context proves useful." (*FilmOn, supra,* 7 Cal.5th at pp. 149-150.)

Therefore, "the catchall provision demands 'some degree of closeness' between the challenged statements and the asserted public interest." (*FilmOn, supra,* 7 Cal.5th at p. 150.)

The court now examines the alleged defamatory statements in connection with the two-part test outlined by the Supreme Court in *FilmOn* to determine whether the complaint arises from protected activity.

Step One: Public Issue or Issue of Public Interest

"With respect to the first step, the statute does not define the terms 'public issue' or 'issue of public interest.' However, to make this determination, 'courts look to certain specific considerations, such as whether the subject of the speech or activity "was a person or entity in the public eye" or "could affect large numbers of people beyond the direct participants" [citation]; and whether the activity "occur[red] in the context of an ongoing controversy, dispute or discussion" [citation], or "affect[ed] a community in a manner similar to that of a governmental entity" [citation].' [Citation.]" (*Doe v. Ledor* (2023) 97 Cal.App.5th 731, 744 (*Doe*).)

In *Geiser v. Kuhns* (2022) 13 Cal.5th 1238 (*Geiser*), the California Supreme Court clarified *FilmOn's* first step. In doing so, the Court stated the first step is satisfied "so long as the challenged speech or conduct, considered in light of its context, may reasonably be understood to implicate a public issue, even if it also implicates a private dispute." (*Geiser, supra,* 13 Cal.5th at p. 1253.) Furthermore, *Geiser* made clear that the first step requires "an objective inquiry, without deference to the movant's framing or personal motivations," although those components may inform the analysis if objectively reasonable. (*Id*. at p. 1254.) "If a reasonable inference can be drawn that the challenged activity implicates a public issue, then the analysis proceeds to *FilmOn's* second step." (*Ibid*.)

"[C]ontext plays an equally important role as the content of the speech at issue, and context must be considered at both of *FilmOn*'s steps. [Citations.] Contextual considerations include 'the identity of the speakers or participants,' the 'location and audience,' and its 'purpose and timing.' [Citation.]" (*Doe, supra,* 97 Cal.App.5th at p. 745; see *Musero v. Creative Artists Agency, LLC* (2021) 72 Cal.App.5th 802, 820 ["Context includes the identity of the speaker, the audience and the purpose of the speech."].) And, as to the first step, language cannot be interpreted apart from context and what a particular statement or act is "about" often cannot be discerned from words alone. (*Doe, supra,* 97 Cal.App.5th at p. 745.)

In support of Step One, defendant Huynh submits his declaration along with witness declarations from Nam Xuan Nguyen ("Nguyen") and Jimmy Phan ("Phan"), both long-term residents of San Jose. Taken together, the declarations establish that plaintiff Duong is a well-known public figure in the Vietnamese community. For example, Huynh, in his declaration states:

- Mr. Duong is a substantial businessman with companies and operations in the Bay Area and in Vietnam. I have attended or participated in public events or semi-private get togethers where the issue of Mr. Duong's business and connections with Vietnam has been controversial.
- President Obama appointed Mr. Duong to serve on the Vietnam Education Fund where he served for several years. In local politics, Mr. Duong was a commissioner on boards and directorates for the City of Oakland. (See Huynh Decl. at ¶¶ 16, 38.)

Similarly, Nguyen's declaration provides: "I know Mr. David Duong for over 30 years. He is well known in the Vietnamese community, often appearing on television and radio, social media, and the internet." (Nguyen Decl. at ¶ 10.) Phan also claims Duong is well-known in the Vietnamese community in the Bay Area while portraying himself as the leader of the Vietnamese American Chamber of Commerce. (Phan Decl. at ¶¶ 8-9.)

Along with being a public figure, the defamatory speech at issue, accusing Duong of being a Communist lackey is a topic of widespread public interest in the Vietnamese community. According to Nguyen, "[f]or American Vietnamese, probably the biggest social issue is how to view and whether to support the government of Vietnam, which many label communist." (Nguyen Decl. at ¶ 9.) Similarly, Phan's declaration provides in relevant part:

> For American Vietnamese immigrants in the U.S., the biggest political issue is how to deal with matters relating to the authoritarian government of Vietnam, which is a one party state. The sole political party sanctioned by the Vietnamese Constitution is the

Vietnamese Communist party, all other political parties not affiliated with or sanctioned by the communist party based on my information and belief are either outlawed or not permitted to be active. (Phan Decl.at ¶ 7.)

To further this point, defendant Huynh states:

"Public protests and debate at the City of Westminster City Council Meeting and about the VABA Gala ball held in that City involved Mr. Duong. Citizens objected to a plaque meant for VABA. There was discussion about David Duong having raised the ARVN Flag and laid a Wreath stating: 'Gratitude to the AVRN Soldiers, Remembering the Boat People.' Yet Mr. Duong at an earlier ceremony in Ho Chi Minh City stood under the Vietnam Communist Flag. There were public protests over Mr. Duong, as a VABA member, flying the South Vietnam flag to honor its soldiers." (Huynh Decl. at ¶ 40, Ex. C.)

Such evidence is sufficient to satisfy Step One and the court considers whether defendant Huynh has met his burden on Step Two.

Step Two: Functional Relationship Between Speech and Public Conversation

"*FilmOn's* second step 'moves from a focus on identifying the relevant matters of public interest to addressing the specific nature of defendant's speech and its relationship to matters of public interest.' [Citation.] Because 'virtually always, defendants succeed in drawing a line—however tenuous—connecting their speech to an abstract issue of public interest,' section 425.16(e)(4) 'demands "some degree of closeness" between the challenged statements and the asserted public interest.' [Citation.] ' "[I]t 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." ' [Citation.]" (*Doe, supra,* 97 Cal.App.5th at p. 744.)

" 'What it means to "contribute to the public debate" [citation] will perhaps differ based on the state of public discourse at a given time, and the topic of contention. But ultimately, our inquiry does not turn on a normative evaluation of the substance of the speech. We are not concerned with the social utility of the speech at issue, or the degree to which it propelled the conversation in any particular direction; rather, we examine whether a defendant—through public or private speech or conduct—participated in, or furthered, the discourse that makes an issue one of public interest.' [Citation.]" (*Doe, supra,* 97 Cal.App.5th at pp. 744-745.)

For example, in *Geiser*, the California Supreme Court determined that section 425.16, subdivision (e)(4) protected a sidewalk demonstration "to protect a real estate company's business practices after the company evicted two long-term residents from their home." (*Geiser, supra,* 13 Cal.5th at p. 1243.) The genesis of the demonstration was an individual family's eviction, but around 25 people protested in front of the home of the evicting corporation's chief executive officer in an event sponsored by an advocacy organization committed to fighting against the displacement of long term residents and saving homes from foreclosures. (*Id*. at pp. 1243-1244, 1251.)

The Court of Appeal concluded the demonstration focused on a private matter concerning a former homeowner and the corporation that purchased her former home, and not on any societal issues of residential displacement, gentrification, or the root causes of the great

recession. (*Geiser, supra,* 13 Cal.5th at p. 1250.) The Supreme Court disagreed. "We do not see why defendants' expressive activity fits only one characterization and not both." (*Ibid*.) The court reasoned:

> "It is common knowledge that foreclosures, evictions, and inadequate housing are major issues in communities throughout California, and the participation of more than two dozen members of an advocacy group dedicated to fighting foreclosures and residential displacement must be considered against that backdrop." (*Id*. at p. 1251.)

Thus, the Supreme Court held that the speech implicated a public issue even though it could also be understood to implicate a private dispute. (*Geiser, supra,* 13 Cal.5th at p. 1253.)

By contrast, in *FilmOn*, the allegedly disparaging statements made in confidential reports that the defendant disseminated to clients were not protected by section 425.16, subdivision (e)(4). (*FilmOn, supra,* 7 Cal.5th at p. 140.) There, the defendant was a "for-profit business entity that offers online tracking, verification and 'brand safety' services to Internet advertisers," and the plaintiff owned websites that the defendant identified in its reports as containing "adult content" or "copyright infringement" material. (*Id*. at pp. 140-142.) With respect to *FilmOn's* step one, the defendant argued that the presence of adult content on the plaintiff's website, specifically, were matters of public concern. (*Id*. at p. 150.) It submitted evidence that the plaintiff had been subject to media reports of infringing content on its websites and copyright litigation over its streaming model to support its latter argument. (*Id.* at pp. 150, 152.) The California Supreme Court acknowledged that the reports in the abstract could implicate issues of public interest (*id*. at p. 152), but ultimately determined the reports did not contribute to the public debate on such issues. (*Id*. at pp. 152-153.) The reports were made "privately, to a coterie of paying clients," who used them "for their business purposes alone. The information never entered the public sphere, and the parties never intended it to." (*Id*. at p. 153.) Consequently, the reports were "too remotely connected to the public conversation about [the implicated public] issues" to come within the protection of the anti-SLAPP statute. (*Id*. at p. 140.)

The current action presents an even stronger case than *Geiser* in the Step Two analysis. The alleged defamatory email was sent by defendant Huynh to approximately 41 recipients consisting of government employees in the County of Santa Clara, City of San Jose, along with various Vietnamese American business persons, politicians, and activists. (Complaint at ¶ 10.) The specific text of that email, translated from Vietnamese to English, provides:

> Dear [community] leaders and compatriots,
>
> While you fight communism so eloquently with your words, I put up thousands of dollars of my money for your transportation and meal expenses each time you travel to SF to protest against a communist delegation. **You well know that David Duong is a lackey for the communists**. He has been able to recruit council member Bien Doan and Phuong Nguyen who is a representative and valet for David Cortese. Did you know that Bien Doan and Phuong Nguyen are among the delegates who traveled to Vietnam last year? If you are afraid to speak up just because they are either elected officials or representatives of elected officials, then, let me give you some advice, you should reassess your ineffective and all-talk approach in fighting communism. While Madison Nguyen was still with the Chamber of Commerce, she led a delegation to go

back to work with the communist government and visited David Duong's landfill; furthermore, on the day Madison announced her candidacy, there was even a flag ceremony led by the traitor, Hoang Thuong, and, the MC was none other than Dan Vy who had taken a photo with the communist flag. It's about time you wake up and speak up forcefully otherwise you won't be qualified to sit on any committees representing the community or make any of these all-talk anti-communism utterances.

Good day!

Hai Huynh
Voice for Vietnamese American Foundation

(Huynh Decl. at Ex. A, emphasis in bold added.)

This email clearly demonstrates not just that communism is a matter of widespread public interest in the Vietnamese community but that defendant Huynh intended for his communication to local politicians and activists to further the debate on the issue. Thus, Huynh has satisfied his burden on Step Two and shown that the operative complaint arises from protected activity under section 425.16, subdivision (e)(4). Having done so, the burden shifts to plaintiff Duong to establish a probability of success on the merits of his claim for defamation per se.

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 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.)

Defamation Per Se

"Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645.)

As relevant here, "[l]ibel is a type of defamation based on written or depicted communication." (*Balla v. Hall* (2021) 59 Cal.App.5th 652, 675 (*Balla*).)

" 'A statement is defamatory when it tends "directly to injure [a person] in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office … peculiarly requires, or by imputing something with reference to his office … that has a natural tendency to lessen its profits." [Citation.] Statements that contain such a charge directly, and without the need for explanatory matter, are libelous per se if … a listener could understand the defamatory meaning without the necessity of knowing extrinsic exculpatory matter.' [Citation.] If the false statement is not libelous per se, a plaintiff must prove special damages. [Citation.]" (*Balla, supra,* 59 Cal.App.5th at pp. 675-676.)

As stated above, the subject defamatory statement arises from the March 7, 2024 email sent by defendant Huynh to 41 recipients claiming plaintiff Duong is a "communist lackey" and pro-communist.[1] (Complaint at ¶ 10.) Duong alleges such statements are false, unprivileged, and intended to tarnish his reputation. (Id. at ¶¶ 10-11, 15-16.) Duong supports these allegations with his declaration, signed under penalty of perjury, attesting these statements were categorically false and have injured his reputation in the Vietnamese-American community, adversely affected his business interests, and endangered his safety and the safety of his family. (Duong Decl. at ¶¶ 5-7, 9-12.)

"If the person defamed is a public figure, he must show, by clear and convincing evidence, that the defamatory statement was made with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false. [Citations.]" (*Mitchell v. Twin Galaxies, LLC* (2021) 70 Cal.App.5th 207, 218 (*Mitchell*).) Based on evidence submitted by the moving party, there is no doubt that plaintiff Duong is a public figure and thus must demonstrate actual malice to prevail on his defamation per se claim.

"The existence of actual malice turns on the defendant's subjective belief as to the truthfulness of the allegedly false statement. [Citations.] Actual malice may be proved by direct or circumstantial evidence. Factors such as failure to investigate, anger and hostility, and reliance on sources known to be unreliable or biased 'may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication.' [Citation.]

[1] The parties dispute whether the alleged defamatory statement is "You well know that David Duong is a lackey for the communists" as provided in the email or "communist lackey" as set forth in the complaint. In opposition, plaintiff Duong notes the original email was written in Vietnamese and was translated to English. (See OPP at p. 6, fn. 1.) The court however agrees with Duong that there is not a material difference between the phrase cited in the email and the allegation in the complaint.

However, any one of these factors, standing alone, may be insufficient to prove actual malice or raise a triable issue of fact. [Citation.]" (*Mitchell, supra,* 70 Cal.App.5th at p. 221.)

To support actual malice, plaintiff Duong alleges:

> "Defendant Huynh made these statements with malice because he knew the statements were false or made them in reckless disregard of the truth. In fact, Defendant Huynh has admitted that he launched this campaign of defamatory lies against Plaintiff because he was angry that Plaintiff did not compensate Huynh for supporting Plaintiff in his efforts to retain and extend Plaintiff's business relationship with the City of San Jose." (Complaint at ¶ 12.)

The allegation in paragraph 12 is supported by evidence in plaintiff Duong's declaration which may give rise to an inference of actual malice by way of anger or hostility. (See Duong Decl. at ¶ 13.) There is also nothing in the moving papers to suggest that defendant Huynh took affirmative steps to confirm the accuracy of his information or utilized reliable sources in stating that Duong was a communist lackey. Instead, Huynh generally states that his opinion is based on knowledge from the Vietnamese community that Duong is involved in government contracts for business purposes, as this is necessary to doing business in Vietnam. (Huynh Decl. at ¶ 26.)

Finally, "[a]n inference of malice may be drawn 'when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation[,] … [or] where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. [Citation.]" (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 85.) To that end, plaintiff Duong claims his life story, presumably well-known as he is a public figure, raises serious doubts as to statements made against him that he is a communist lackey. In his declaration, Duong states:

> "My family and I came to the United States over forty years ago after fleeing the brutal crimes and oppression of the Communist regime in Vietnam in 1978. After the fall of Saigon, the Communist regime seized my family's assets, so we arrived in the United States with nothing." (See Duong Decl. at ¶¶ 1-2; Complaint at ¶ 7.)

Similarly, defendant Huynh described his own background and family experience in escaping from Communist Vietnam:

> "My family and I were refugees. We escaped Communist Vietnam in 1981 with nothing. Twice the communists captured me trying to escape. For 6 months in 1977 I was a concentration camp prisoner and again in 1979 for 18 months. My father had been a Police Commander in the former Republic of Vietnam. In a Re-Education camp, the communists tortured him for 12 years (1975-1987). (Huynh Decl. at ¶ 41.)

Thus, given plaintiff Duong's family story and defendant Huynh's own personal experience, there is an inference of actual malice based on the inherent improbability of statements claiming Duong is a communist lackey. The court finds persuasive *Nguyen-Lam v. Cao* (2009) 171 Cal.App.4th 858, a Fourth Appellate District case cited in opposition, where the Court asserts in pertinent part:

> "[P]laintiff's opposition suggested defendant, a fellow Vietnamese immigrant, should have known that since the articles about her disclosed she fled Vietnam to take refuge in the United States in 1975, it was improbable she would be a Communist, yet he hurled the epithet anyway, despite ' the harm that would result f[rom] such accusations' in Westminster. As plaintiff points out, while defendant did not make his statements to Vietnamese individuals, 'they were certainly made to Board members who had to answer to a heavily Vietnamese population.' In sum, the trial court did not err in concluding plaintiff demonstrated the requisite probability a jury would find defendant's baseless accusations and contradictory explanations constituted clear and convincing evidence he harbored actual malice." (*Id*. at p. 869.)

The court therefore finds plaintiff Duong has alleged a legally sufficient cause of action supported by admissible evidence for defamation per se. The court now considers whether any of the challenges or defenses raised in the moving papers preclude Duong from prevailing on the merits of his claim.

Huynh's Defenses

"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.)

Non-Actionable Opinion

Defendant Huynh argues there is no provable statement of fact to support a claim for defamation per se. Rather, the statement of plaintiff Duong being a "communist lackey" is merely rhetorical, not defamatory. (See Motion at p. 12:3-24.)

" 'Defamation consists of, among other things, a false and unprivileged publication, which has a tendency to injure a party in its occupation. [Citations.]' [Citation.] ' "The sine qua non of recovery for defamation … is the existence of falsehood." [Citation.] Because the statement must contain a provable falsehood, courts distinguish between statements of fact and statements of opinion for purposes of defamation liability. Although statements of fact may be actionable as libel, statements of opinion are constitutionally protected. [Citation.]' [Citation.] That does not mean that statements of opinion enjoy blanket protection. [Citation.] On the contrary, where an expression of opinion implies a false assertion of fact, the opinion can constitute actionable defamation. [Citation.]" (*Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, 695-696.)

The question of whether the challenged statements convey the requisite factual imputation is ordinarily a question of law for the court. (*Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1608 (*Kahn*).) But, some statements are ambiguous and cannot be characterized as factual or nonfactual as a matter of law. (*Ibid*.) Under these circumstances, it is for the jury to determine whether an ordinary reader would have understood the statements as a factual assertion. (*Ibid*.)

"The allocation of functions between court and jury with respect to factual content is analogous to the allocation with respect to defamatory meaning in general. On the latter issue, the court must first determine as a question of law whether the statement is reasonably susceptible of a defamatory interpretation; if the statement satisfies this requirement, it is for the jury to determine whether a defamatory meaning was in fact conveyed to the listener or reader. [Citations.] Similarly, it is a question of law for the court whether a challenged statement is reasonably susceptible of an interpretation which implies a provably false assertion of actual fact. If that question is answered in the affirmative, the jury may be called upon to determine whether such an interpretation was in fact conveyed." (*Kahn, supra,* 232 Cal.App.3d at p. 1608.)

"In determining whether the disputed statement communicates or implies a provably false assertion of fact, we look at the totality of the circumstances, looking first to the language of the statement and whether it was understood in a defamatory sense, and then considering the context in which the statement was made. [Citation.] We focus not on the literal truth or falsity of each word in a statement, but rather on ' " 'whether the "gist or sting" of the statement is true or false, benign or defamatory, in substance.' " ' [Citations.] We also consider 'whether the reasonable or "average" reader would so interpret the material. [Citations.] The "average reader" is a reasonable member of the audience to which the material was originally addressed.' [Citation.]" (*Edward v. Ellis* (2021) 72 Cal.App.5th 780, 790.)

"Statements do not imply a provably false factual assertion and thus cannot form the basis of a defamation action if they cannot ' "reasonably [be] interpreted as stating actual facts" about an individual.' [Citations.] Thus, 'rhetorical hyperbole,' 'vigorous epithet[s,' 'lusty and imaginative expression[s] of …contempt,' and language used 'in a loose, figurative sense' have all been accorded constitutional protection. [Citations.]" (*Ferlauto v. Hamsher* (1999) 74 Cal.App.4th 1394, 1401.)

As an initial matter, the moving papers do not offer any analysis of the challenged defamatory statements in connection with the totality of the circumstances test outlined in the caselaw and thus the argument is undeveloped. (See *Allen, supra,* 234 Cal.App.4th at p. 52 ["We are not required to examine undeveloped claims or to supply arguments for the litigants"].) Nor does this appear to be a situation, as the moving papers suggest, where defendant Huynh was engaging in "loose, figurative, or hyperbolic language." (See Motion at p. 11:5-15.) Instead, the term "communist," irrespective of "lackey," is widely recognized as offensive and insulting in the Vietnamese community. On this point, plaintiff Duong, in his declaration, states:

> "Across the Vietnamese diaspora, and in particular among Vietnamese-Americans in California, there is no worse accusation than calling someone a Communist, a Communist collaborator, or a Communist lackey. In my personal experience, such accusations can lead to ostracization and even death threats, if not actual violence. Huynh's false accusations not only injured my reputation, they endangered me and my family." (Duong Decl. at ¶ 10.)

In fact, as stated above, witness declarations submitted by defendant Huynh speak to the issue of someone in the Vietnamese community being labeled a communist. (See Nguyen Decl. at ¶ 9; Phan Decl. at ¶ 7.) Moreover, the context of the subject email occurred in the presence of civic leaders, politicians, and activists in the Vietnamese community. This means

that those who heard the statement would likely be aware of its defamatory meaning. And certainly the substance of the email itself appears to be a call for activism against a perceived threat of communism impacting their community. To that end, defendant Huynh concedes in his declaration that he uses his platform as a journalist to inform his followers and subscribers about matters of interest and controversy in the Vietnamese community. (See Huynh Decl. at ¶¶ 6-14.) In looking at the totality of these circumstances, the court finds the alleged defamation to be a provable factual statement as opposed to rhetorical hyperbole.

No Damages

Defendant Huynh also asserts there is no cause of action for defamation per se as plaintiff Duong cannot show damages. This assertion however fails as a plaintiff does not need to prove actual damages to support such a claim. (See *Contento v. Mitchell* (1972) 28 Cal.App.3d 356, 358 ["[I]t is equally well-settled that in an action for damages based on language defamatory per se, damage to plaintiff's reputation is conclusively presumed and he need not introduce any evidence of actual damages in order to obtain or sustain an award of damages."].)

Third Party Posts

Defendant Huynh contends there is no viable claim for defamation per se based on defamatory statements made by third parties. (See Motion at pp. 13:21-14:11; see also *Hoang v. Tran* (2021) 60 Cal.App.5th 513, 525 [California law and federal law do not allow suits to proceed against a defendant who is not the author of the offending publication].) This contention however is not persuasive as plaintiff Duong only seeks relief for defamation per se based on the March 7, 2024 email discussed above. (See Complaint at ¶¶ 10, 12, 15-16; Duong Decl. at ¶¶ 6-9, 11-12.)

First Amendment Press Protection

Finally, defendant Huynh argues the instant lawsuit impedes his profession as a journalist and seeks to impose a prior restraint on his protected speech and news gathering and disseminating activities. (See Motion at pp. 14:11-15:6.) But, this argument, like others mentioned above, is undeveloped and lacking citation to legal authority. And, the very nature of the anti-SLAPP statute is for the protection of First Amendment rights where claims in a lawsuit arise from protected activity. (See *Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 888 [the preamble to the anti-SLAPP statute does reflect a purpose to protect the "valid exercise" of speech and petition rights].) Such causes of action however survive a special motion to strike where, as here, a plaintiff demonstrates a *probability of success on the merits*. Whether plaintiff Duong ultimately succeeds on his defamation per se claim will be determined at a later time perhaps by dispositive motion for summary judgment or by the trier of fact during trial.

Based on the foregoing, the special motion to strike the complaint is DENIED.

Request for Attorney's Fees

Defendant Huynh's request for attorney's fees is DENIED as he did not prevail on the merits of the special motion to strike.

Disposition

The special motion to strike the complaint is DENIED.

The evidentiary objections are OVERRULED.

The request for attorney's fees is DENIED.

The court will prepare the Order.

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Calendar line 9
Case Name: Jane Doe vs Intervention Center for Autism Needs, LLC, et al.
Case No.: 24CV34189

Plaintiff Jane Doe ("Plaintiff")'s motion to proceed pseudonymously is DENIED. Plaintiff must file an amended complaint in her real name within 15 days of this order.

Plaintiff's request for entry of protective order is DENIED as overly broad WITHOUT PREJUDICE.

Objection to Citation of Unreported and Unpublished Cases

The court SUSTAINS Plaintiff's objections to defendants Intervention Center for Autism Needs, LLC ("ICAN") and Calvin Ky ("Ky") (collectively, "Defendants")' citation to several unreported and unpublished cases. (See Plaintiff's Reply p.3.)

Plaintiff has a Right to Privacy

Plaintiff has a right to privacy. The California Constitution provides that all people "have inalienable rights" which include "privacy." (California Constitution, art. 1, § 1; see also *Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1, 35 [affirming a constitutionally protected interest in precluding the distribution of sensitive and confidential information].)

Plaintiff's Complaint

Plaintiff filed an *unverified* complaint against Defendants for (1) quid pro quo sexual harassment in violation of FEHA (Cal. Gov. Code § 12940(a); (2) hostile work environment sexual harassment in violation of FEHA (Cal. Gov. Code § 12940(j); (3) failure to prevent discrimination & retaliation (Cal. Gov. Code § 129040(k); (4) gender/sex discrimination in violation of FEHA (Cal. Gov. Code [§] 12940(a); (5) retaliation in violation of FEHA, (Cal. Gov. Code § 12940(h); (6) wrongful termination in violation of public policy; (7) battery (sexual battery); and (8) failure to permit inspection of employee records (Cal. Labor Code § 226.)

Footnote 1 on page 2 of Plaintiff's *unverified* complaint states: "Plaintiff has sued under a pseudonym because this case involves sexual harassment."

CCP section 367

Code of Civil Procedure ("CCP") section 367 provides that an action "must be prosecuted in the name of the real party in interest, except as provided by statute."

No Statutory Exception

The Plaintiff does *not* cite, and the court is unaware of, any statute that would permit her to proceed under a pseudonym. (See Opp. p. 8.)

Even in the absence of a statute, anonymity for parties may be granted when necessary to preserve an important privacy interest. (*Doe v. Lincoln Unified School Dist.* (2010)

188 Cal.App.4th 758, 766; see also *Starbucks Corp. v. Superior Court* (2008) 168 Cal.App.4th 1436, 1452, fn. 7.)

(*Department of Fair Employment Housing v. Superior Court* (2022) 82 Cal.App.5th 105, at p. 110 (*DFEH*).)

Plaintiff's Identity is Known to Defendants

Here, both sides agree that the identity of the Plaintiff is known to Defendants.

In determining the appropriate standard, we first note that here the identity of the employee seeking to proceed under a pseudonym is known to the defendant. Significant constitutional concerns would be implicated were it otherwise. (See, e.g., *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1132 [testimony from an anonymous witness unknown to a criminal defendant violates right of confrontation and due process].) *Since the employee's identity is known to the defendant, proceeding anonymously would not similarly intrude on the defendant's rights.*

(*DFEH, supra*, at p. 110 [emphasis added].)

The Overriding Interest Test[2]

When there is no statutory right to prosecute a matter anonymously, the court must apply the standard for such motions articulated in *DFEH, supra*, 82 Cal.App.5th 105 at pages 111 to 112:

"Much like closing the courtroom or sealing a court record, allowing a party to litigate anonymously impacts the First Amendment public access right. Before a party to a civil action can be permitted to use a pseudonym, **the trial court must conduct a hearing and apply the overriding interest test:** A party's request for anonymity should be granted only if the court finds that an overriding interest will likely be prejudiced without the use of a pseudonym, and that it is not feasible to protect the interest with less impact on the constitutional right of access. In deciding the issue the court must bear in mind the critical importance of the public's right to access judicial proceedings. Outside of cases where anonymity is expressly permitted by statute, litigating by pseudonym should occur 'only in the rarest of circumstances.' [Citation omitted.]"

(*DFEH, supra*, at pp. 111 to 112 [emphasis added].)

The court has reviewed Plaintiff's *unverified* complaint and the evidence submitted by Plaintiff under the overriding interest test. It is insufficient to justify the order sought.

[2] Plaintiff's argument that California appellate courts have *not* officially decided the standard by which a party can proceed pseudonymously is *incorrect.* While this statement was correct at the time of *Starbucks Corp. v. Superior Court* (2008) 168 Cal.App.4th 14367, 1452, fn. 7, the "overriding interest test" standard was decided by the Sixth District Court of Appeal in 2022 in *DEFH, supra*, 82 Cal.App.5th 105, at pages 111 to 112.

Here, Plaintiff relies on her *unverified* complaint, and she submitted *no* supporting declaration. The declaration by her counsel attaches a copy of a proposed protective order, confirmed that Defendants refused to execute it, that Plaintiff's counsel "replied sharing Plaintiff's position regarding the issues in the instant Motion", that "Defendants reiterated its position claiming that Plaintiff did not allege facts that warrant her proceeding pseudonymously. This motion followed." (Decl. Melody Rissell Leonard, ¶¶ 3-6.)

When there is no statutory right to prosecute a matter anonymously, given the allegations of this *unverified* complaint, the court agrees with Defendants that admissible evidence is required to support a request to proceed under a pseudonym so the court can identify and balance all competing interests and make the necessary findings to support any order granting the request.

Here, Plaintiff relies on the allegations in her *unverified* complaint. However, as Defendants point out in their Opposition, Plaintiff's unverified complaint merely contends that that Ky "touched her inappropriately," "tried to kiss" her, "attempted to hold [her] hand," "engaged in physical conduct of a sexual nature," and "inappropriately touched [her] body, including kissing her and attempting to fondle her without her consent." (See, Complaint at ¶¶ 21, 22, 24, 36, 100.) Notably absent are any allegations that reasonably trigger Plaintiff's privacy rights, or which would reasonably cause embarrassment or stigmatization. Indeed, Plaintiff does *not* even allege that Defendant Ky attempted to contact with an *intimate part* of her body.[3]

Plaintiff's citation to *Doe v. Lincoln Unified School District* (2010) 188 Cal. App. 4th 758 (2010) (*Lincoln*) for the proposition that California courts have allowed parties to proceed under fictitious names in cases like this alleging sexual assault is misguided. In *Lincoln*, the court rejected the defendant's argument that a fictitious name may never be used by a plaintiff. (*Id*. at pp. 766-67.) It says nothing about the circumstances a plaintiff must establish to proceed under a pseudonym.

Plaintiff's citation to *Starbucks Corp. v. Superior Court* (2008) 168 Cal. App. 4th 1436 (2008) likewise does not establish the propriety of Plaintiff's use of a fictitious name. In *Starbucks*, the court explicitly confirms "[W]e do not decide the appropriate standards or mechanisms for protective nondisclosure of identity in California, because the matter is not now before us." (*Id.* at p. 1452, fn. 7.)

Moreover, the cases cited by the *Starbucks* court in support of the general proposition that the use of "doe" maybe appropriate to protect "legitimate privacy rights" dealt exclusively with sexual abuse or matters of paramount privacy (of non-parties during discovery) which are not at issue here, thereby rendering *Starbucks* further inapposite. (See *Starbucks, supra*, 168 Cal.App.4th p. 1452, fn. 7, citing *Doe v. City of Los Angeles*, 42 Cal. 4th 531 (2007) [doe pseudonym used to protect the identity of plaintiff child sex abuse victims] and *Johnson v. Superior Court*, 80 Cal. App. 4th 1050 (2000) [protecting identity of non-party sperm donor during discovery].)

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[3] "Intimate part means the sexual organ, anus, groin, or buttocks of any person, or the breast of a female." (Cal. Civ. Code § 1708.5.)

The allegations in the present case are very different from the claims in *Doe v. University of Southern California* (2018) 29 Cal.App.5th 1212, 1214 & fn. 1 [permitting victim of sexual misconduct, sexual assault, and rape to proceed confidentiality to "protect their privacy"] that Plaintiff cites on page 7 of her Motion.)

Here, since there is no statutory right to prosecute the matter anonymously, and the allegations of the *unverified* complaint do *not* even allege that Defendants attempted to touch an intimate part of Plaintiff's body, the allegations do *not* allege the type of overriding privacy interest that would fall within the exception in *FEHA, supra,* 82 Cal.App.5th 105, at pp. 111 to 112.

The motion to allow Plaintiff to proceed pseudonymously is DENIED. Plaintiff must file an amended complaint in her real name within 15 days of this order.

Plaintiff Seeks a Protective Order to Shield Public Disclosure of her Identity

CCP section 2017.020(a) provides that discovery can be limited if a court "determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." The CCP also states that a court "may make any order that justice requires to protect any party from unwanted annoyance, embarrassment, oppression, or undue burden and expense." (CCP § 2033.080(b); see also CCP §§ 2025.420(b), 2030.090(b), 2031.060(b).)

Since the motion to allow Plaintiff to proceed pseudonymously is DENIED, the Plaintiff's request for protective order is DENIED as overly broad. Defendants were justified in rejecting Plaintiff's proposed Protective Order. This DENIAL is WITHOUT PREJUDICE to Plaintiff filing a motion for a more narrowly tailored Protective Order after meeting and conferring with Defendants in good faith considering the court's ruling on this motion.

Conclusion

The motion to allow Plaintiff to proceed pseudonymously is DENIED. Plaintiff must file an amended complaint in her real name within 15 days of this order.

The Plaintiff's request for protective order is DENIED as overly broad WITHOUT PREJUDICE.

The court will prepare the order.

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