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: 9/26/2024 TIME: 9:00 A.M.

TO CONTEST THE RULING: Before 4:00 p.m. today (9/25/2024) 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	23CV425288	MOBILE MINI INC. vs JOSEPH CAPOSIO	Hearing: Order of Examination Against Defendant Joseph Caposio, an individual dba Maxx Roofing by Plaintiff Mobile Mini Inc. OFF CALENDAR. No proof of service.
LINE 2	23CV420692	Andre LaForge et al vs Matthew Leal	Hearing: Motion to Strike (ANTI-SLAPP) Causes of Action 1-6 of Plaintiff's Complaint by Defendant Mathew Leal (Pro per) [**continued from 9/12/2024 per 9/5/2024 order**] Crtl Click (or scroll down) on Lines 2-5 for tentative ruling. The court will prepare the order.

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LINE 3	23CV420692	Andre LaForge et al vs Matthew Leal	Hearing: Motion to Strike (ANTI-SLAPP) Causes 7&8 et al. of Plaintiff's Complaint by Defendant Matthew Leal [**continued from 9/17/2024 per 9/5/2024 order**] Crtl Click (or scroll down) on Lines 2-5 for tentative ruling. The court will prepare the order.
LINE 4	23CV420692	Andre LaForge et al vs Matthew Leal	Hearing: Demurrer to Plaintiff's Complaint by Defendant Matthew Leal Crtl Click (or scroll down) on Lines 2-5 for tentative ruling. The court will prepare the order.
LINE 5	23CV420692	Andre LaForge et al vs Matthew Leal	Hearing: Motion to Strike Portions of Plaintiff's Complaint by Defendant Matthew Leal Crtl Click (or scroll down) on Lines 2-5 for tentative ruling. The court will prepare the order.
LINE 6	23CV414641	Nathaniel Figueroa vs Alberto Lustre et al	Motion: Order for publication by Plaintiff Good cause appearing, GRANTED. Moving party to submit order for signature by the court.
LINE 7	23CV426482	SANTA CLARA VALLEY OPEN SPACE AUTHORITY vs EDGAR ANDRADE et al	Hearing: Motion hearings to Set Phase One Trial Date to Adjudicate Defendants' Objections to OSA's Right to Take by Plaintiff Ctrl Click (or scroll down) on Lines 7-8 for tentative rulings. The court will prepare the order.
LINE 8	23CV426482	SANTA CLARA VALLEY OPEN SPACE AUTHORITY vs EDGAR ANDRADE et al	Hearing: Motion to Augment to Administrative Record by Defendant Edgar Andrade and Suleyma Lesley Andrade Ctrl Click (or scroll down) on Lines 7-8 for tentative rulings. The court will prepare the order.
LINE 9	23CV418248	CBM Two Hotels LP v. Santa Clara Valley Transportation Authority (CEQA) [Consolidated with Case No. 23CV425757]	Hearing: Motion hearings VTA's Motion for Prejudgment Possession * set per Order entered 4/30/24 Ctrl Click (or scroll down) on Line 9 for tentative ruling. The court will prepare the order.
LINE 10			
LINE 11			
LINE 12			

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Calendar Line 1

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Calendar Lines 2-5

Case Name: *Andre LaForge, et al. v. Matthew Reid Leal, individually and dba Leal Law Firm*
Case No.: 23-CV-420692

Special Motions to Strike, Demurrer, and Motion to Strike to the Second Amended Complaint by Defendant Matthew Reid Leal, individually and dba Leal Law Firm

Factual and Procedural Background

This is an action for malicious prosecution and other claims brought by plaintiffs Andre LaForge and Apache Tech, Inc. ("Plaintiffs" or "LaForge") against defendant Matthew Reid Leal, individually and dba Leal Law Firm ("Leal").

According to the second amended complaint ("SAC"), on November 15, 2012, defendant Leal filed a complaint on behalf of his client, Anthony Tran ("Tran"), and against LaForge for breach of contract, fraud, conversion, and other claims arising out of the LED light business that LaForge developed. (SAC at ¶ 7.) The action was filed in Santa Clara County Superior Court as *Anthony Tran v. Andre La Forge, et al.* (case no. 112CV236232) ("Underlying Action"). (Ibid.) In the lawsuit, Tran claimed he was the true owner of the LED light business carried on by LaForge. (Ibid.)

Defendant Leal filed the Underlying Action despite the fact that no reasonable attorney would have thought the claims legally tenable and out of hostility and ill will. (SAC at ¶¶ 8-10.) He also harassed and intimidated LaForge to attack their business efforts with the aim of taking over the LED business. (Id. at ¶¶ 10-11.)

Following a bench trial, the court issued judgment in favor of LaForge on March 7, 2017. (SAC at ¶ 12.) Thereafter, on May 4, 2017, Leal appealed the judgment on behalf of Tran with the Sixth District Court of Appeal. (Id. at ¶ 14.) The appellate court affirmed the judgment on August 18, 2021 and issued a remittitur remanding the case to the superior court on October 20, 2021. (Id. at ¶ 15.)

On August 9, 2023, Plaintiffs filed a complaint against defendant Leal alleging causes of action for malicious prosecution and intentional infliction of emotional distress.

On December 26, 2023, defendant Leal filed a demurrer to the complaint. The motion was set for hearing on February 13, 2024.

On January 25, 2024, prior to the hearing, Plaintiffs filed a first amended complaint ("FAC") asserting causes of action for:

(1) Malicious Prosecution;
(2) Intentional Infliction of Emotional Distress;
(3) Intentional Interference with Contractual Relations;
(4) Negligent Interference with Contractual Relations;
(5) Intentional Interference with Prospective Economic Advantage; and
(6) Negligent Interference with Prospective Economic Advantage.

Given the filing of the FAC, the demurrer was taken off calendar.

On March 20, 2024, defendant Leal filed a demurrer to the FAC based on the statute of limitations. The matter was heard and submitted on May 14, 2024. Thereafter, this court (Hon. Monahan) sustained the demurrer to the malicious prosecution claim with leave to amend and overruled the demurrer to the second, third, fourth, fifth and sixth causes of action.

On June 3, 2024, Plaintiffs filed a SAC, now the operative pleading, setting forth causes of action for:

(1) Malicious Prosecution;
(2) Intentional Infliction of Emotional Distress;
(3) Intentional Interference with Contractual Relations;
(4) Negligent Interference with Contractual Relations;
(5) Intentional Interference with Prospective Economic Advantage;
(6) Negligent Interference with Prospective Economic Advantage;
(7) Fraudulent Misrepresentation; and
(8) Fraud on the Court.

On July 9, 2024, defendant Leal filed a motion for leave to file a special motion to strike the first through sixth causes of action and other allegations in the SAC. The motion was heard and submitted on August 15, 2024. Thereafter, this court granted the motion and directed Leal to file and serve the motion within five days of the order.

The following motions, filed by defendant Leal, are currently before the court: (1) a special motion to strike the first through sixth causes of action and other allegations; (2) a special motion to strike the seventh and eighth causes of action and other allegations; (3) a demurrer to the SAC; and (4) a motion to strike portions of the SAC. Plaintiffs filed written oppositions. Leal filed reply papers.

A further case management conference is set for October 15, 2024.

Special Motion to Strike to the SAC (1st through 6th COA and Other Allegations)

Defendant Leal moves to strike the first through sixth causes of action and other allegations in the SAC on the ground that such claims arise from protected activity and Plaintiffs will be unable to demonstrate a probability of success on the merits.

Plaintiffs' Request for Judicial Notice

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

Here, Plaintiffs request judicial notice of the following:

(1) The complaint filed by Tran in *Tran v. LaForge, et al.* (case no. 2012-CV-236232);
(2) The judgment and statement of decision, dated March 7, 2017, entered in *Tran v. LaForge, et al.*;
(3) The complaint filed by Tran in *Tran v. Advanced Technologies Innovations Inc., et al.* (case no. 2016-CV-292520);
(4) Declaration of Andre LaForge in Opposition to Tran's Motion to Strike and Request for Sanctions in *Tran v. Advanced Technologies Innovations Inc., et al.* (case no. 2016-CV-292520). (See Exs. A-B, R-T to Plaintiffs' Index of Exhibits).

The court may take judicial notice of these exhibits as records filed in the superior court under Evidence Code section 452, subdivision (d). But, "while courts are free to take judicial notice of the existence of each document in a court file, including the truth of results reached, they may not take judicial notice of the truth of hearsay statements in decisions and court files." (*Richtek USA, Inc. v. uPI Semiconductor Corp.* (2015) 242 Cal.App.4th 651, 658.) Similarly, courts may not take judicial notice of allegations in affidavits and declarations in court records as such matters are reasonably subject to dispute and therefore require formal proof. (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882.) The exhibits also appear relevant to arguments raised in support of the opposition. (See *Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301 [judicial notice is confined to those matters which are relevant to the issue at hand].)

Consequently, the request for judicial notice is GRANTED as to the existence of the documents as court records.

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.)

First Cause of Action: Malicious Prosecution

The plain language of the anti-SLAPP statute dictates that every claim of malicious prosecution is a cause of action arising from protected activity because such claims necessarily depend on written and oral statements in a prior judicial proceeding. (*Area 55, LLC v. Nicholas & Tomasevic, LLP* (2021) 61 Cal.App.5th 136, 151 (*Area 55*); see *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734-735 [malicious prosecution suits arise out of protected activity under the anti-SLAPP statute]; see also *Maleti v. Wickers* (2022) 82

Cal.App.5th 181, 200 (*Maleti*) ["By definition, a malicious prosecution suit alleges that the defendant committed a tort by filing a lawsuit."].)

Thus, defendant Leal, as the moving party, has met his initial burden of establishing the malicious prosecution claim arises from protected activity.

Therefore, the court examines whether Plaintiffs can demonstrate a probability of prevailing on their malicious prosecution cause of action.

Second through Sixth Causes of Action

Defendant Leal argues the second, third, fourth, fifth and sixth causes of action arise from protected activity under section 425.16, subdivisions (e)(1), (2), and (4). (See Motion at p. 13:10-24.)

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."

"These first two clauses of subdivision (e) of section 425.16 'safeguard free speech and petition conduct aimed at advancing self government, as well as conduct aimed at more mundane pursuits' and 'all that matters is that the First Amendment activity take place in an official proceeding or be made in connection with an issue being reviewed by an official proceeding.' [Citation.] A defendant who invokes either subparagraph (1) or subparagraph (2) of subdivision (e) of section 425.16 'need not separately demonstrate that the statement concerned an issue of public significance.' [Citation.]" (*Laker v. Board of Trustees of California State University* (2019) 32 Cal.App.5th 745, 764.)

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.) 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.)

Aside from the litigation conduct in the malicious prosecution claim, the second through sixth causes of action arise from fraudulent misrepresentations about the outcome of the subject lawsuit made by defendant Leal and emailed to third parties including assemblers,

fabricators, manufacturers, and suppliers for Plaintiffs' LED light business that caused damage to Plaintiffs. (See SAC at ¶¶ 13, 17, 25, 26, 28, 30, 31, 35, 37, 39, 43, 46, 48, 49, 51, 55, 57, 59, 63, 65, 67, 69.) This alleged wrongful conduct and interference continued during trial and appeal. (Id. at ¶¶ 16, 25, 28, 39, 49, 59.) Such communications made to third parties about ongoing or anticipated litigation has been found to constitute protected activity under section 425.16, subdivision (e)(2). (*Summerfield v. Randolph* (2011) 201 Cal.App.4th 127, 136; see *Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, 1055 [email to customers accusing competitor of litigation-related misconduct]; see also *Healy v. Tuscany Hills Landscape & Recreation Corp.* (2006) 137 Cal.App.4th 1, 5-6 ["Because one purpose of the letter was to inform members of the association of pending litigation involving the association, the letter is unquestionably 'in connection with' judicial proceedings [citation] and bears ' "some relation" ' to judicial proceedings"].) There are also allegations that Leal threatened legal action against these third parties which may also constitute protected activity. (SAC at ¶¶ 31, 43, 52, 64.)

In opposition, Plaintiffs contend the conduct set forth in the second through sixth causes of action constitute commercial speech which is not protected by the anti-SLAPP statute. (See OPP at p. 13:3-13.)

In order to curb abuse of the anti-SLAPP statute, the Legislature enacted Code of Civil Procedure section 425.17 to exempt certain actions from the statute, including a specific exemption for commercial speech. (*BioCorRx, Inc. v. VDM Biochemicals, Inc.* (2024) 99 Cal.App.5th 727, 735 (*BioCorRx*).)

"The commercial speech exemption applies 'when (1) the cause of action is against a person primarily engaged in the business of selling or leasing goods or services; (2) the cause of action arises from a statement or conduct by that person consisting of representations of fact about that person's or a business competitor's business operations, goods, or services; (3) the statement or conduct was made either 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 in the course of delivering the person's goods or services; and (4) the intended audience for the statement or conduct meets the definition set forth in section 425.17(c)(2).'[1] [Citation.]" (*BioCorRx, supra,* 99 Cal.App.5th at p. 735.)

"The purpose of this exemption is straightforward: A defendant who makes statements about a business competitor's goods or services to advance the defendant's business cannot use the anti-SLAPP statute against causes of action arising from those statements. [Citations.]" (*Xu v. Huang* (2021) 73 Cal.App.5th 802, 813 (*Xu*).)

"The commercial speech exemption is a threshold issue." (*BioCorRx, supra*, 99 Cal.App.5th at p. 735.) "As a statutory exemption, it must be narrowly construed, and the plaintiffs bear the burden of proving each of its elements." (*Xu, supra,* 73 Cal.App.5th at p.

[1]Section 425.17(c)(2) provides, "[t]he 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, except where the statement or conduct was made by a telephone corporation in the course of a proceeding before the California Public Utilities Commission and is the subject of a lawsuit brought by a competitor, notwithstanding that the conduct or statement concerns an important public issue."

813.) "If applicable, the challenged speech or conduct is not protected by the anti-SLAPP statute." (*BioCorRx, supra,* 99 Cal.App.5th at p. 735.)

Here, Plaintiffs, in opposition, fail to advance any substantive argument addressing the elements of the commercial exemption in connection with the second through sixth causes of action and thus the contention is undeveloped. (See *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52 ["We are not required to examine undeveloped claims or to supply arguments for the litigants"].) Nor does the commercial speech exemption apply as the alleged false statements do not concern defendant Leal's business operations, goods, or services. Rather such statements pertain to the outcome of the subject lawsuit as stated above which constitutes protected activity. Thus, Plaintiffs do not meet their burden in showing the commercial speech exemption applies to this action.

Therefore, defendant Leal has satisfied his burden on the first prong. Having done so, the burden shifts to Plaintiffs to establish a probability of success on the merits.

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,* 61 Cal.App.5th at p. 151.)

"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.)

First Cause of Action: Malicious Prosecution

"To establish a cause of action for the malicious prosecution of a civil proceeding, a plaintiff must plead and prove that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor [citations]; (2)

was brought without probable cause [citations]; and (3) was initiated with malice [citations]." (*Bertero v. National General Corp*. (1974) 13 Cal.3d 43, 50 (*Bertero*).)

"The malicious commencement of a civil proceeding is actionable because it harms the individual against whom the claim is made, and also because it threatens the efficient administration of justice. The individual is harmed because he is compelled to defend against a fabricated claim which not only subjects him to the panoply of psychological pressures most civil defendants suffer, but also to the additional stress of attempting to resist a suit commenced out of spite or ill will, often magnified by slanderous allegations in the pleadings. In recognition of the wrong done the victim of such a tort, settled law permits him to recover the cost of defending the prior action including reasonable attorney's fees [citations], compensation for injury to his reputation or impairment of his social and business standing in the community [citations], and for mental or emotional distress [citation]." (*Bertero, supra,* 13 Cal.3d at pp. 50-51.)

"The judicial process is adversely affected by a maliciously prosecuted cause not only by the clogging of already crowded dockets, but by the unscrupulous use of the courts by individuals '. . . as instruments with which to maliciously injure their fellow men.' [Citation.]" (*Bertero, supra,* 13 Cal.3d at p. 51.)

In support of malicious prosecution, Plaintiffs allege the following:

- Defendant Leal filed the Underlying Action against LaForge even though no reasonable attorney would have thought the claims were legally tenable;
- The Underlying Action resulted in a judgment issued in favor of LaForge against Tran; and
- The Underlying Action was initiated and maintained out of hostility and ill will. (See SAC at ¶¶ 8-10, 12, 18-24.)

But, in order to prevail on the second prong, Plaintiffs must also submit *evidence* to establish a claim for malicious prosecution, including proof of malice.

" 'The malice element of the malicious prosecution tort goes to the defendant's subjective intent in initiating the prior action. [Citations.]' [Citation.] As such, malice—being 'the defendant's motivation' [citation]—is a question of fact within the province of the jury. The requisite showing of malice 'is not limited to actual hostility or ill will toward plaintiff but exists when the proceedings are instituted primarily for an improper purpose. [Citations.]' [Citation.] 'Malice "may range anywhere from open hostility to indifference. [Citations.]" ' [Citation.] Malice may be found 'where the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim.' [Citation.] And '[s]ince parties rarely admit an improper motive, malice is usually proven by circumstantial evidence and inferences drawn from the evidence. [Citation.]' [Citation.]" (*Maleti, supra,* 82 Cal.App.5th at p. 223.)

As stated above, Plaintiffs allege the Underlying Action was initiated and maintained out of hostility and ill will. Plaintiffs however do not proffer any substantive evidence addressing the malice element and thus fail to satisfy their burden of establishing a probability of success on the merits of their malicious prosecution claim.

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

Second Cause of Action: Intentional Infliction of Emotional Distress

The elements of an intentional infliction of emotional distress claim are (1) the defendant's conduct was extreme and outrageous; (2) the defendant intended to cause emotional distress or recklessly disregarded the probability of causing emotional distress; (3) the plaintiff suffered severe emotional distress; and (4) the defendant's outrageous conduct was the cause of the severe emotional distress. (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209.)

"An essential element of a cause of action for intentional infliction of emotional distress is 'extreme and outrageous conduct by the defendant.' [Citation.]" (*Yurick v. Super. Ct.* (1989) 209 Cal.App.3d 1116, 1123.) "[T]he standard for judging outrageous conduct does not provide a 'bright line' rigidly separating that which is actionable from that which is not. Indeed, its generality hazards a case-by-case appraisal of conduct filtered through the prism of the appraiser's values, sensitivity threshold, and standards of civility." (*Id.* at p. 1128.) "[I]t is generally held that there can be no recovery for mere profanity, obscenity, or abuse, without circumstances of aggravation, or for insults, indignities, or threats which are considered to amount to nothing more than mere annoyances. The plaintiff cannot recover merely because of hurt feelings." (*Ibid.*) Thus, "[c]onduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001.)

Whether conduct is outrageous is usually a question of fact. (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 204.)

Here, Plaintiffs do not allege facts establishing extreme and outrageous conduct to support a claim for intentional infliction of emotional distress. Nor does the opposition even address the emotional distress cause of action with reference to admissible evidence. Therefore, Plaintiffs fail to demonstrate a probability of success on the merits.

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

Third Cause of Action: Intentional Interference with Contractual Relations

"[I]n California, the law is settled that 'a stranger to a contract may be liable in tort for intentionally interfering with the performance of the contract.' [Citation.]" (*Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1148 (*Reeves*).)

"To prevail on a cause of action for intentional interference with contractual relations, a plaintiff must plead and prove (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage. [Citation.] To establish this claim, the plaintiff need not prove that a defendant acted with the primary purpose of disrupting the contract, but must show the defendant's knowledge that the interference was

certain or substantially certain to occur as a result of his or her action. [Citation.]" (*Reeves, supra,* 33 Cal.4th at p. 1148.)

Here, Plaintiffs allege facts supporting the elements of a claim for intentional interference with contractual relations in the SAC. (See SAC at ¶¶ 28-38.) As to the evidence, Plaintiffs direct the court to a declaration by plaintiff Andre LaForge in an earlier action related to the current lawsuit. (See Plaintiffs' Ex. R.) But, this declaration does not provide admissible evidence supporting a cause of action for intentional interference with contractual relations. For example, the declaration does not establish the existence of valid and enforceable contracts between Plaintiffs and the assemblers, fabricators, manufacturers and suppliers of LED light products. Nor does the declaration show defendant Leal's knowledge of the existence and terms of these contracts. Thus, Plaintiffs do not demonstrate a probability of success on the merits of the claim.

Furthermore, as mentioned in the moving papers, the third cause of action appears to be subject to the litigation privilege.

"Civil Code section 47, subdivision (b) defines what is commonly known as the 'litigation privilege.' 'The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.' [Citation.]" (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 912 (*Kashian*).)

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

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

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

The litigation privilege applies as the interference claims arise from false statements and communications by defendant Leal to the assemblers, fabricators, manufacturers and suppliers for Plaintiffs' LED light business about the subject lawsuit involving Tran. (See SAC at ¶¶ 30-31.) The litigation privilege has been applied in "numerous cases" involving

"fraudulent communication or perjured testimony." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 218; see, e.g., *Home Ins. Co. v. Zurich Ins. Co.* (2002) 96 Cal.App.4th 17, 20, 22-26 [attorney's misrepresentation of available insurance policy limits to induce the settlement of a lawsuit]; *Doctors' Co. Ins. Services v. Super. Ct.* (1990) 225 Cal.App.3d 1284, 1300 [subornation of perjury]; *Carden v. Getzoff* (1987) 190 Cal.App.3d 907, 915 [perjury]; *Steiner v. Eikerling* (1986) 181 Cal.App.3d 639, 642-643 [preparation of a forged will and presentation of it for probate]; *O'Neil v. Cunningham* (1981) 118 Cal.App.3d 466, 472-477 [attorney's letter sent in the course of judicial proceedings allegedly defaming his client].) Plaintiffs do not address the litigation privilege in opposition. And, since the privilege is absolute, Plaintiffs cannot allege a viable claim for intentional interference with contractual relations.

Therefore, the special motion to strike the third cause of action is GRANTED.

Fourth Cause of Action: Negligent Interference with Contractual Relations

The fourth cause of action is a claim for negligent interference with contractual relations. But, "[i]n California there is no cause of action for *negligent* interference with contractual relations." (*Davis v. Nadrich* (2009) 174 Cal.App.4th 1, 9.) While there exists a cause of action for negligent interference with *prospective* economic advantage [citation], the California Supreme Court in *Fifield Manor v. Finston* (1960) 54 Cal.2d 632 (*Fifield*), rejected a cause of action for negligent interference with contract. (*Ibid*.) In *Fifield*, the California Supreme Court stated:

> "[W]ith the exception of an action by the master for tortious injuries to his servant, thus depriving the master of his servant's services, which traces back to medieval English law [citations], the courts have quite consistently refused to recognize a cause of action based on negligent, as opposed to intentional, conduct which interferes with the performance of a contract between third parties or renders its performance more expensive or burdensome. [Citations.]" (*Fifield, supra*, 54 Cal.2d at p. 636.)

While some may question the continuing validity of *Fifield* in light of the California Supreme Court's recognition of a cause of action for negligent interference with prospective economic advantage in *J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, the high court has yet to disapprove *Fifield*. And, since the Supreme Court never overruled *Fifield*, this court is bound by it. (See *Auto Equity Sales, Inc. v. Super. Ct.* (1962) 57 Cal.2d 450, 455 ["Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court."].) Thus, Plaintiffs cannot demonstrate, as a matter of law, a probability of success on the merits of this claim.

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

Fifth Cause of Action: Intentional Interference with Prospective Economic Relations

"Intentional interference with prospective economic advantage has five elements: (1) the existence, between the plaintiff and some third party, of an economic relationship that contains the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentionally wrongful acts designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm proximately

caused by the defendant's action." (*Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* (2017) 2 Cal.5th 505, 512.)

Here, Plaintiffs allege facts supporting the elements of a claim for intentional interference with prospective economic relations in the SAC. (See SAC at ¶¶ 49-58.) Plaintiffs however do not direct the court to any admissible evidence in support of this claim in their opposition. (See OPP at p. 15:7-16.) To the extent that Plaintiffs rely on the declaration by plaintiff Andre LaForge in the earlier action (see Plaintiffs' Ex. R.), that declaration, standing alone, does not provide admissible evidence in support of this claim. Moreover, the interference claim would be barred by the litigation privilege for the same reasons as the third cause of action.

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

Sixth Cause of Action: Negligent Interference with Prospective Economic Relations

The special motion to strike the sixth cause of action is GRANTED for the same reasons explained above with respect to the fifth cause of action.

Separate Allegations

Defendant Leal also moves to strike allegations separate and apart from the first through sixth causes of action. Since those claims have been stricken for reasons stated above, the separate allegations are also hereby stricken.

Therefore, the special motion to strike the separate allegations identified in the notice of motion is GRANTED.

Special Motion to Strike to the SAC (7th and 8th COA and Other Allegations)

Defendant Leal moves to strike the seventh and eighth causes of action and other allegations in the SAC on the ground that such claims arise from protected activity and Plaintiffs will be unable to demonstrate a probability of success on the merits.

First Prong: Protected Activity

Seventh Cause of Action: Fraudulent Misrepresentation

The seventh cause of action is a claim for fraudulent misrepresentation. Plaintiffs allege defendant Leal emailed certain misrepresentations about the outcome of the lawsuit to third parties including assemblers, fabricators, manufacturers, and suppliers for Plaintiffs' LED light business. (See SAC at ¶¶ 71-76.) As stated above, such communications made to third parties about ongoing or anticipated litigation has been found to constitute protected activity under section 425.16, subdivision (e)(2). Thus, defendant Leal has satisfied his burden on the first prong. Having done so, the burden shifts to Plaintiffs to establish a probability of success on the merits.

Eighth Cause of Action: Fraud on the Court

The eighth cause of action is a claim identified as "fraud on the court." Plaintiffs allege defendant Leal misrepresented to the court that he had authority from Tran to file and prosecute appeals. (See SAC at ¶¶ 77-85.) The filing, maintaining and prosecution of appeals constitutes protected activity under section 425.16, subdivision (e)(1). Having satisfied the first prong, the burden shifts to Plaintiffs to demonstrate a probability of success on the merits.

Second Prong: Probability of Success on the Merits

Seventh Cause of Action: Fraudulent Misrepresentation

"To establish a claim for fraudulent misrepresentation, the plaintiff must prove: '(1) the defendant represented to the plaintiff that an important fact was true; (2) that representation was false; (3) the defendant knew that the representation was false when the defendant made it, or the defendant made the representation recklessly and without regard for its truth; (4) the defendant intended that the plaintiff rely on the representation; (5) the plaintiff reasonably relied on the representation; (6) the plaintiff was harmed; and (7) the plaintiff's reliance on the defendant's representation was a substantial factor in causing that harm to the plaintiff. [Citations.]' [Citation.]" (*Perlas v. GMAC Mortgage, LLC* (2010) 187 Cal.App.4th 429, 434, italics omitted.)

Here, Plaintiffs fail to demonstrate a probability of success on the merits of their fraudulent misrepresentation claim as no opposition has been filed. Thus, the special motion to strike the seventh cause of action is GRANTED.

Eighth Cause of Action: Fraud on the Court

As stated above, Plaintiffs did not file opposition to the motion and thus fail to establish a probability of success on the merits of their fraud claim. Therefore, the special motion to strike the eighth cause of action is GRANTED.

Separate Allegations

The special motion to strike the separate allegations identified in the notice of motion is GRANTED for the same reasons articulated above.

Demurrer to the SAC

Given the court's ruling on the special motions to strike, the demurrer to the SAC is rendered MOOT.

Motion to Strike Portions of the SAC

Given the court's ruling on the special motions to strike, the motion to strike portions of the SAC is rendered MOOT.

Disposition

The special motions to strike the SAC are GRANTED in their entirety.

The demurrer to the SAC is MOOT.

The motion to strike portions of the SAC is MOOT.

The court will prepare the Order.

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Calendar Lines 7-8

Case Name: *Santa Clara Valley Open Space Authority vs Edgar Andrande, et al.*

Case No.: 23CV426486

Defendants Edgar Andrande and Suleyma Lesley Andrade ("Andrades") motion for an order to augment plaintiff Santa Clara Valley Open Space Authority's ("SCVOSA")'s incomplete record of proceedings ("ROP") is GRANTED IN PART.

The ruling on the 6 Categories requested by the Andrades is as follows:

1. **2021 Coyote Valley Conservation Areas Master Plan (CVCAMP)**

   GRANTED IN PART. The ROP will be augmented to include all preliminary documents related to the CVCAMP that had been presented to the OSA Board before September 14, 2023--the date it adopted the RON. These documents are attached as exhibits to the Declaration of Nicholas Perry filed 9/13/2024.

   Otherwise DENIED. In writ cases, parties who which to cite to a general plan, municipal code, or any other local law may do so through a Request for Judicial Notice ("RJN"). (See citations in opposition filed 9/13/2024, at p. 6.)

2. **Relevant Excerpts of Santa Clara County's 1994 General Plan**

   DENIED. The staff report cites numerous Santa Clara County General Plan policies that support acquisition of the Andades' property. The staff report, and each of these policies are already included in the ROP. (ROP 4-6.)

   In writ cases, parties who which to cite to a general plan, municipal code, or any other local law may do so through a RJN. (See citations in opposition filed 9/13/2024, at p. 6.)

3. **Coyote Valley Climate Resilience Overlay District, Santa Clara County General Plan.**

   DENIED. The staff report briefly mentions the Climate Resilience Overlay District. (ROP 7.)

   In writ cases, parties who which to cite to a general plan, municipal code, or any other local law may do so through a RJN. (See citations in opposition filed 9/13/2024, at p. 6.)

4. **Documents Related to County's consideration and adoption of the Coyote Valley Climate Resilience Overlay District (combining district) and general plan and zooming [sic.] amendments---including Resolution(s) (BOS-2021-191, etc.), Ordinance(s) (NS 1200.379, NS-1200.380, etc.), studies sessions, reports,**

attachments, exhibits, correspondence from SCVOSA, etc. (Board of Supervisors' public hearings: December 15, 2020, February 9, 2021 and December 14, 2021, etc.)

The staff report briefly mentions the Climate Resilience Overlay District. (ROP 7.)

GRANTED IN PART. Any responsive documents that were submitted to the OSA Board or in OSA's possession at the time of the Board's decision shall be part of the certified ROP that is certified by 10/11/2024.

Otherwise DENIED. In writ cases, parties who which to cite to a general plan, municipal code, or any other local law may do so through a RJN. (See citations in opposition filed 9/13/2024, at p. 6.)

The rest of these documents shall be assembled by 10/11/2024 so they may be presented to the phase one trial court for MILs. However, they shall *not* be considered part of the certified ROP, unless the trial court rules otherwise.

5. **Edgar & Suleyma Andrade's Santa Clara County Department of Planning and Development "Building Site and Grading Approval" Application (Santa Clara County Department of Planning and Development File No. PLN21-184), and all related submittals, reports, studies, correspondence and other documents.**

   GRANTED IN PART. Any responsive documents that were submitted to the OSA Board or in OSA's possession at the time of the Board's decision shall be part of the certified ROP that is certified by 10/11/2024.

   Otherwise DENIED. The Andrades' development application was submitted to and was being reviewed by the County---not the OSA. Already included in the staff report as Exhibit E are a set of plans for the Andrades' development that were in OSA's possession at the time of the OSA Board's decision. (ROP 22-25.)

   The rest of these documents shall be assembled by 10/11/2024 so they may be presented to the phase one trial court for motions in limine ("MILs"). However, they shall *not* be considered part of the certified ROP, unless the trial court rules otherwise.

6. **Santa Clara County Board of Supervisors' Consideration of Edgar & Suleyma Andrade's Objection, pursuant to Cal. Pub. Res. Code §35153, to SCVOSA's Resolution 23-51, the certified transcript and minutes of the Board of Supervisors' November 7, 2023 hearing, and all related submittals, reports, studies, correspondence and other related documents.**

   GRANTED IN PART. Any responsive documents that were submitted to the OSA Board or in OSA's possession at the time of the Board's decision shall be part of the certified ROP that is certified by 10/11/2024.

Otherwise DENIED. Here, after the OSA Board adopted the RON, the Andrades filed an objection with the Board of Supervisors. The complaint alleges the Board of Supervisors unanimously adopted the RON. This occurred *after* the OSA Board adopted the RON.

The rest of these documents shall be assembled by 10/11/2024 so they may be presented to the phase one trial court for MILs. However, they shall *not* be considered part of the certified ROP, unless the trial court rules otherwise.

NOTE: This ruling on Categories Nos. 1 -6 is WITHOUT PREJUDICE to the trial judge determining that any records should be augmented in the RON (or excluded from the RON) at time of trial.

The ROP shall be augmented as set forth in this order and certified by SCVOSA by 10/11/2024**.**

SVOSPA's motion under Code of Civil Procedure ("CCP") section 1260.110(b) for an order setting the date for the first phase trial to adjudicate (a) the objection to the OSA's resolution of necessity ("RON") asserted by Andrades in paragraphs 1-12 of the Andrades' "Affirmative Allegations" in their Answer to the Complaint in Eminent Domain filed April 22, 2024, and (b) the Tenth Affirmative Defense of Defendant Zanker Road Resource Recovery, Inc. ("Zanker") asserted in its Answer to the Complaint in Eminent Domain filed April 22, 2024 is GRANTED.

Briefing schedule: Mutual Opening Trial Briefs (and any Requests for Judicial Notice ("RJNs") and MILs) shall be filed and served by 10/31/2024, Mutual Opposition Trial Briefs (and any Opposition to RJNs and MILs) shall be filed and served by 11/15/2024, Mutual Reply Trial Briefs (and any Reply to RJNs and MILs) shall be filed and served by 12/2/2024. The trial court may order additional briefing.

This right to take phase one **court trial** is set for Monday, **12/9/2024 at 8:45 AM** in Dept. 3 with a Trial Readiness Conference ("TRC") on Thursday 12/5/2024 at 1:30 PM in Dept. 6. (NOTE: Dept. 6 will set the actual trial department at the TRC.)

The phase one court trial **time estimate** is one hour (by SCVOSA) to 1-2 days (by the Andrades.)

The court will prepare the order.

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Calendar line 9

Case Name: *CBM Two Hotels LP v. Santa Clara VTA et al.*

Case No.: 23CV418248 (lead case)

I. FACTUAL AND PROCEDURAL BACKGROUND

This is a challenge to a portion of the Interstate 280/Wolfe Road Interchange Improvement Project ("Project") brought by Petitioner CBM Hotels LP ("CBM"), a long-term ground lessee of property allegedly affected by the Project. The original and still operative verified petition for writ of mandate ("Petition") was filed on June 30, 2023 and names the Santa Clara Valley Transportation Authority ("VTA"), the California Department of Transportation ("Caltrans") and the City of Cupertino ("City") as respondents.

The Petition states three causes of action: (1) "Writ of Mandate—CCP §§ 1094.5 and/or 1085; Pub. Res. Code § 21000 et seq." (a claim for violation of CEQA); (2) Violation of the federal Administrative Procedures Act (based on alleged violation of the NEPA), and (3) "Writ of Mandate—CCP § 1085" (challenging the decision by VTA that acquisition of a portion of the property leased by CBM was necessary). The Petition alleges that a Resolution of Necessity ("RON"), making findings under the eminent domain law (Code of Civ. Proc. § 1230.010 et seq.) was adopted by respondent VTA on May 4, 2023. (See Petition at ¶¶ 3, 21-22 and 45.) Attached to the Petition as Exhibit A is a copy of the RON passed and adopted by VTA (and only VTA) on May 4, 2023.

Previously on June 30, 2024 the court (Judge Zayner) heard three separate demurrers to the Petition brought by Caltrans, VTA and the City. In its formal order issued on July 11, 2024 the court sustained the demurrers by all three respondents to the first cause of action without leave to amend; sustained all three demurrers to the second cause of action without leave to amend; and sustained the demurrers by the City and Caltrans to the third cause of action without leave to amend (VTA did not challenge the third cause of action).[2] All that remains of the Petition is the third cause of action as alleged against VTA.

Case no. 23CV418248, has been consolidated with a related eminent domain case, case no. 23CV425757, brought by VTA. The operative pleading in that case is the first amended complaint ("FAC") filed by VTA on December 13, 2023. It is simply an eminent domain action and names several defendants, including CBM. Another copy of the RON is attached to the FAC as exhibit 1.

Currently before the court is a motion for prejudgment possession pursuant to Code of Civil Procedure sections 1255.410 and 1260.250, filed by VTA on April 30, 2024 in its capacity as plaintiff in the eminent domain action. (See April 30, 3034 Notice of Motion and Motion.) CBM's opposition to this motion was filed on May 30, 2024.

II. REQUESTS FOR JUDICIAL NOTICE

[2] The court on its own motion takes judicial notice of the July 11, 2024 order pursuant to Evidence Code section 452, subsection (d).

Both sides have submitted requests for judicial notice. "Judicial notice may not be taken of any matter unless authorized or required by law." (Evidence Code, § 450.) A precondition to judicial notice in either its permissive or mandatory form is that the matter to be noticed be relevant to the material issue before the Court. (*Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 307, citing *People v. Shamrock Foods Co*. (2000) 24 Cal.4th 415, 422 fn. 2; See also *Aquila, Inc. v. Superior Court* (2007) 148 Cal.App.4th 556, 569 [Since judicial notice is a substitute for proof, it is always confined to those matters that are relevant to the issue at hand.]) It is the Court, and not the parties, that determines relevance. Evidence Code section 453, subdivision (b) requires a party seeking notice to "[furnish] the court with sufficient information to enable it to take judicial notice of the matter."

A. VTA's Request for Judicial Notice

In support of the motion, VTA has submitted a request for judicial notice of a "Caltrans Right of Way Manual" published on Caltrans' website. A purported copy of chapter 14 of this manual is attached to the request as exhibit 1. This exhibit is not authenticated by a declaration. (See Evid. Code, § 1401(a) ["Authentication of a writing is required before it may be received into evidence."]; *Greenspan v. LADT, LLC* (2010) 191 Cal.App.4th 486, 523 [explaining that ordinarily in law and motion matters, a writing is authenticated by declarations establishing how the documents were obtained, who identified them, and their status as "true and correct" copies of the original].) VTA contends that the manual can be noticed pursuant to Evidence Code section 452, subdivision (b) (regulations and legislative enactments).

The law revision commission comments for section 452 note that subdivision (b) "provides for judicial notice of regulations and legislative enactments adopted by or under the authority of the United States or of any state, territory or possession of the United States, including public entities therein. See the broad definition of 'public entity' in Evidence Code § 200. The words 'regulations and legislative enactments' include such matters as 'ordinances' and other similar legislative enactments. Not all public entities legislate by ordinance."

VTA's request for judicial notice of the entire manual is DENIED. (See *Jolley v. Chase Home Finance LLC* (2013) 213 Cal.App.4th 872, 889 ["[W]e know of no 'official web site' provision for judicial notice in California."]; see also *Duronslet v. Kamps* (2012) 203 Cal.App.4th 717, 737 [refusing to take judicial notice of information on the Cal. Bd. of Registered Nursing web site].) VTA has not shown that the manual is a legislative enactment and has not demonstrated that the entire manual is relevant to the material issue before the court. The court also DENIES the request for judicial notice of the unauthenticated exhibit 1.

B. CBM's Request for Judicial Notice

With its opposition to the motion CBM has submitted a request for judicial notice of a copy of the writ petition in case no. 23CV418248, pursuant to Evidence Code section 452, subdivision (d) (court records). While it has limited relevance, the court will GRANT notice of the existence and filing date of the petition pursuant to section 452, subdivision (d) but not of its contents or the contents of any attached exhibit. (See *Oh v. Teachers Ins. & Annuity Assn. of America* (2020) 53 Cal.App.5th 71, 79-81 [truth of contents of court records cannot be judicially noticed].)

III. MOTION FOR PREJUDGMENT POSSESSION

A. General Standards

In the standard eminent domain proceeding, the condemning entity does not take possession and title until after judgment and full payment of just compensation. As an alternative to the standard proceeding, the California Constitution authorized the Legislature to "provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation." (Cal. Const., art. I, § 19, subd. (a).) The Legislature exercised this authority by enacting section 1255.410 and related provisions that create the "quick take" procedure that is the subject of this writ proceeding.

Subdivision (a) of section 1255.410 states that, after the complaint is filed, "the plaintiff may move the court for an order for possession under this article, demonstrating that the plaintiff is entitled to take the property by eminent domain and has deposited pursuant to Article I (commencing with Section 1255.010) an amount that satisfies the requirements of that article." The subdivision also requires the motion to contain certain information, including a notice that the defendant may file a written opposition within 30 days from the date of service.

The timely filing of an opposition affects the trial court's review of the motion. Subdivision (d)(1) of section 1255.410, states: "If the motion is not opposed within 30 days of service on each defendant and occupant of the property, the court *shall* make an order for possession of the property *if the court finds* each of the following: (A) The plaintiff is entitled to take the property by eminent domain. (B) The plaintiff deposited pursuant to Article I (commencing with Section 1355.010) an amount that satisfies the requirements of that article."

In comparison, if a timely opposition is filed, the trial court *may* make an order for possession if it makes the foregoing findings and also finds that the plaintiff has an "overriding need" for immediate possession and that hardship to the plaintiff of denying immediate possession outweighs the hardship to the defendant of granting immediate possession. (§ 1255.410, subd. (d)(2)(C), (D).)

(*Robinson v. Superior Court* (2023) 88 Cal.App.5th 1144, 1163-1164 [internal citations omitted, emphasis in original]; see also 8 Witkin, *Summary of Cal. Law* (11th ed., 2017) § 1353.)

If the Court grants VTA's motion, then it is also required by Code of Civil Procedure section 1260.250 to issue an order requiring the county tax collector to certify the current assessed value of the subject property, as well as information regarding any unpaid taxes on the property.

Granting or denying the motion does not end the eminent domain proceeding. The determination of the right to take by eminent domain-- a condition of an order granting the motion-- is preliminary only. "The granting of an order for possession does not prejudice the

defendants' right to demur to the complaint or to contest the taking. Conversely, the denial of an order for possession does not require a dismissal of the proceeding and does not prejudice the plaintiff's right to fully litigate the issue if raised by the defendant." (Law Rev. Com. Comment for Code Civ Proc. § 1255.410; see also Code Civ. Proc. § 1255.470.)

B. Basis for VTA's Motion

VTA's notice of motion contains the required remainder that an opposition had to be filed within 30 days. In the motion VTA argues that it needs an order allowing it to take possession of the targeted portion of the subject property by August 2024 not because it needs to take actual possession at that time but rather to comply with the Federal Highway Administration's certification requirements. Compliance with these requirements will allow VTA to advertise the project, apply for the funding for the work, and award the construction contract by December 2024. This would allow the work to begin in the spring of 2025. VTA notes that it has complied with CEQA as the Project was found categorically exempt from CEQA and approved for CEQA purposes on November 2, 2020, more than two and a half years before CBM filed its petition in this consolidated matter.

VTA argues that it has satisfied all the requirements for prejudgment possession. It is a public agency authorized to exercise eminent domain power under Article I, Section 19 of the California Constitution, the California Public Utility Code, and various sections of the Code of Civil Procedure. (See VTA's supporting memorandum at p. 16:15-23.) It has conducted an appraisal of the subject property, determined that the fair market value of the portion of the property needed was $ 1,651,000, and made a written offer in that amount to the owners of the property[3] which included a copy of the appraisal. VTA, through its governing board, then adopted the RON on May 4, 2023 which authorized the eminent domain action. VTA has also deposited the full amount of the appraised value with the State Treasury Condemnation Deposits Fund.

VTA argues that its overriding need for prejudgment possession is demonstrated by the need to maintain the overall project's schedule and budget. Possession by August 2024 would allow funding to be secured and allow the contractor ultimately selected to use the fall and winter of 2024 to prepare and be able to begin construction work in the dry months of 2025. Any delay would cause preparation time to creep into the period best suited for construction and result in escalating costs. (See supporting memorandum at pp. 12:18-15:6.)

Finally, VTA argues that the hardship it would suffer from delay greatly outweighs any hardship to the property owners or CBM as granting prejudgment possession would have little or no impact on the property until 2025 (likely after the conclusion of the eminent domain action) and would not cause a closure of the hotel, reduce parking, or reduce access. To the extent CBM or the actual property owners believe that the later removal of trees as part of the temporary construction easement will have a negative impact on the value of the property, they will be able to seek compensation during the remainder of the eminent domain proceeding.

[3] The owners are Chris Marchese, Rosalie Cacitti and Carmen Russo, as co-Trustees of The Rosalie Cacitti Family Trust dated December 22, 1972. They are named defendants in the eminent domain action, but they have not opposed VTA's motion.

The motion is supported by two declarations. The first, from VTA counsel Jeffrey Wilcox, authenticates attached exhibits 1-7. Exhibit 1 is a copy of the legal description of the area VTA seeks prejudgment possession of (a 3,370 square foot fee interest, a 17 square foot fee interest, and the 4,921 square foot temporary construction easement). Exhibit 2 is a copy of the plot maps of the parcels containing this area. Exhibit 3 is a copy of a memorandum to the VTA Board of Directors from VTA's CFO summarizing the need for the RON. Exhibit 4 is a copy of the June 25, 2020 notice of the overall project's categorical exemption from CEQA, filed with both the State Office of Planning and Research and the Santa Clara County Clerk's Office. Exhibit 5 is a copy of VTA's Notice of Deposit of the appraised value with the State Treasurer on March 7, 2024. Exhibit 6 is a copy of the November 15, 2022 offer by VTA to the property owners to purchase a partial fee interest and a temporary construction easement for the appraised value. Exhibit 7 is another copy of the May 4, 2023 RON.

The second declaration is from registered professional engineer Gene Gonzalo, who is the Deputy Director of VTA's Highway Capital Program. He states that he has primary responsibility for overseeing the implementation of the Project. He states that based on his review of the Project, it is necessary for VTA to acquire a portion of the property belonging to the defendants in the eminent domain action and to remove "a stand of mature trees" on the property. He authenticates attached exhibits 1-3, copies of an aerial photograph of the property, a map of the Project and a copy of a Property Fact Sheet respectively.

Regarding VTA's overriding need for immediate possession by no later than August 2024, Deputy Director Conzalo states in part that:

> Funding for this Project comes from three sources: the 2016 Measure B Highway Interchange Program, local funds from the City of Cupertino through developer impact fees, as well as State Transportation Improvement Program (STIP) Funds. In particular, STIP funds are used for bidding and construction. VTA cannot begin to advertise and award construction contracts and thus begin the Project work until it secures these funds.
>
> Under the STIP guidelines, allocation of STIP funds for construction will only be considered by the California Transportation Commission (CTC) for projects ready to advertise. For ready to advertise projects, the CTC expects Caltrans to certify that a project's plans, specifications and estimate (PS&E) are complete, environmental and right-of-way clearances are secured, and all necessary permits and agreements are executed. Projects not ready for advertisement will not be placed on the CTC agenda for allocation of approval. To obtain Caltrans' Right of Way certification, VTA must secure possessory rights to all parcels needed for the Project.
>
> VTA plans to request a STIP fund allocation of $6 million at the August 2024 CTC meeting in order to award the construction contract for the Project by December 2024. This will then allow the selected contractor enough time to fulfill all the contract submittal requirements and mobilize during Winter 2024, so that the contractor will be ready to begin construction in early Spring 2025, maximizing the favorable weather from Spring through Fall of 2025. A delay of possession of the necessary portion of the Property would delay the planned start of construction, leading to a shortened initial construction season, and delay the completion of the Project.

(Gonzalo Decl. at ¶¶ 10-12.) Gonzalo goes on to state that delays could result in additional costs of approximately $143,000 per month, and that paying those costs could only accomplished by seeking additional funding through a process that will take several months.

C. CBM's Opposition

CBM does not dispute that VTA, as a general matter, is an agency with the authority to take property via eminent domain proceedings or dispute whether VTA deposited an amount equal to its appraised value of the portion of the property sought. What it does dispute is whether VTA can show an "overriding need" for prejudgment possession and whether such a need would outweigh the hardship prejudgment possession would inflict on CBM.

The opposition makes three main arguments. The first of these, claiming that VTA is not entitled to prejudgment possession because it "grossly abused" its discretion in adopting the RON by not considering project alternatives and by relying on the 2020 finding that the Project was exempt from CEQA, is unpersuasive. (See Opposition at pp. 11:17-13:28.) This argument is foreclosed by the court's July 11, 2024 order sustaining the demurrers to CBM's CEQA cause of action in these consolidated cases without leave to amend. The court has already found that any CEQA challenge to the Project, including a challenge to the categorical exemption finding, became time-barred more than two years before CBM filed its writ petition in case no. 23CV418248. Notably, if a project is categorically exempt from CEQA, no further environmental review is required. (See *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1386.) A lead agency need not consider any alternatives or mitigation measures for a project determined to be categorically exempt, as the Project here has been. (See *Hines v. California Coastal Com.* (2010) 186 Cal.App.4th 830, 858.) Even if CBM's argument that the RON should have adopted a different alternative could be separated from its CEQA argument, VTA's reliance on the earlier CEQA approval in adopting the RON and refusal to adopt CBM's preferred alternative cannot reasonably be framed as a "gross abuse" of discretion as CBM claims. The present motion, for prejudgment possession only, cannot be denied based on claims that the environmental review for the Project was inadequate, or that VTA's reliance on that review in adopting the RON, was unreasonable or an abuse of discretion.

The second argument, presented as the third, is that VTA cannot show substantial hardship because there is no guarantee it can secure funding for the Project and some other delay might arise. (See opposition at p. 15:8-25.) This is also not persuasive. The court is not aware of any authority (and CBM does not cite any) standing for the proposition that a public agency in an eminent domain proceeding must establish full funding for a larger project that the eminent domain action is part of or guarantee there will be no delays before it can seek prejudgment possession. Such a proposition would appear to significantly complicate eminent domain proceedings related to large public works projects, whose funding may depend upon the annual budgets of state and federal agencies and annual grants. In any event the court finds that the Gonzalo Declaration sufficiently establishes VTA's "overriding need" and the substantial hardship it would suffer if prejudgment possession were denied. The remaining question is whether that hardship is outweighed by the potential hardship to CBM caused by prejudgment possession.

CBM's hardship argument is based entirely on the removal of trees that will occur when construction of the Project takes place. (See Opposition at pp. 14:3-15:6.) This is not a

persuasive argument for denying the present motion because (as VTA points out in its reply) the tree removal is not—and cannot reasonably be considered as—a "hardship" that would be caused by prejudgment possession. Based on the Gonzalo declaration the trees will be removed in the Spring of 2025 at the earliest, assuming VTA is successful in securing funding and prevails in this eminent domain matter, as part of the implementation of the actual Project. Prejudgment possession, which is the only matter before the court, will not have any impact on the trees in and of itself. CBM will have the opportunity to seek compensation for any claimed decrease in property value or loss of business that can be attributed to the tree removal as part of the eminent domain proceedings.

CBM has submitted two declaration with the opposition. The first, from Eric Hasenoehrl, P.E., opines that VTA should have selected a different alternative for the positioning of Wolfe Road that would, in his opinion, have less of an impact on "adjacent properties." As VTA, when considering the RON in May of 2023, had no obligation to consider any alternatives or changes to the categorically exempt Project that was approved on November 2, 2020, this declaration does support an argument that VTA abused its discretion in refusing to adopt CBM's proposed alternative or support a denial of the present motion.

The second declaration is from Charles Lathem, who is the President of CBM Two Hotels LLC, the general partner of petitioner/defendant CBM. Mr. Lathem authenticates attached photos of the line of trees near the hotel as exhibit A and copies of correspondence between CBM and VTA as exhibits B through D. Mr. Lathem's declaration is the only evidence cited to support CBM's argument that granting the present motion would cause it to suffer hardship because of tree removal. Paragraphs 5-8 of his declaration state that "one of" the selling points of the hotel is the presence of the redwood trees, and that "premature cutting" of the trees would be detrimental to sales efforts. He also states that CBM will be harmed if VTA were to "remove these trees prior to judgment."

There is no evidence before the court that granting VTA prejudgment possession (which is the only thing the court is presently deciding) would result in the removal of any trees before this eminent domain matter is resolved or goes to trial. The Gonzalo declaration states that the earliest the trees could be removed is in the Spring of 2025 and VTA has not submitted any evidence disputing that assertion.

D. Analysis

The court GRANTS VTA's motion for prejudgment possession. VTA's evidence is sufficient to establish that it is entitled to exercise eminent domain power over the property, it has deposited an amount equal to the appraised value, it has an overriding need for prejudgment possession of the identified portion of the property, and that the hardship to VTA of denying prejudgment possession outweighs any identified hardship to CBM, the only eminent domain defendant to oppose the motion.

The court will prepare the order

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