SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding

David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

DATE: May 7, 2024 TIME: 9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

FOR ORAL ARGUMENT: Before 4:00 PM today you must notify the:

(1) Court by calling (408) 808-6856 and

(2) Other side by phone or email that you plan to appear at the hearing to contest the ruling

(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

FOR APPEARANCES: The Court strongly prefers in-person appearances. If you must appear virtually, you must use video. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 6:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

FOR COURT REPORTERS: The Court does **not** provide official court reporters. If you want a court reporter to report your hearing, you must submit the appropriate form, which can be found here:
https://www.scscourt.org/general_info/court_reporters.shtml

FOR YOUR NEXT HEARING DATE: Use Court Schedule to reserve a hearing date for your next motion. Court Schedule is an online scheduling tool that can be found on the court's website here:
https://reservations.scscourt.org/

PLEASE JOIN US FOR A CIVIL BENCH PRESENTATION:

Civil Trials and Civil Motion Practice: Best Practices in Santa Clara County Superior Court

Date: June 20, 2024
Time: 12-1:30
Place: Department 6 TEAMS (virtual only)

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1, 14	21CV378850	Bobbi Rodriquez vs Diane Rodriguez	The parties are ordered to appear in person for defendant's deposition and trial setting.
2-3	23CV422810	Isaiah Clapp et al vs City Heights at Pellier Park Homeowners Association et al	This hearing is off calendar. By order dated May 2, 2024, the Court sustained Defendant City Heights at Pellier Park Homeowners Association's demurrer with 20 days leave to amend. Plaintiff will thus be filing an amended complaint, rendering this demurrer and motion to strike filed collectively by the individual Defendants moot. The Court further VACATES the 5/14, 5/16, 5/21, 5/23 dates that appear to also be reserved for the individual Defendants' demurrers and motions to strike. This order will be reflected in the minutes.
4	23CV424510	Creditors Adjustment Bureau, Inc. vs Reveneer, Inc.	Defendant's motion to quash is GRANTED. Scroll to line 4 for complete ruling. Court to prepare formal order.
5	23CV427611	Carrie LeRoy vs Robin Love	Defendant's Special Motion to Strike is GRANTED. Scroll to line 5 for complete ruling. Court to prepare formal order.
6	21CV389034	EUGENUS, INC. vs SSNE GROUP INC.	Plaintiff Eugenus, Inc.'s motion for summary judgment is GRANTED. A notice of motion with this hearing date and time was served on defendant by U.S. mail on February 16, 2024. Defendant did not oppose the motion. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) It is also undisputed that Plaintiff paid Defendant for $411,747.94 for goods Plaintiff never received. (Declaration of Roy Ok, ¶¶5-7; Order Deeming RFAs Admitted.) Accordingly, summary judgment is granted in favor of Plaintiff and against Defendant. Plaintiff shall prepare a form of judgment for the Court's review within 10 days of service of the formal order, which formal order the Court will prepare.
7	21CV377974	Lawrence Meeks vs James Nucci	Plaintiff's motion to quash is DENIED. The Court finds Defendant has met his burden to show that the information sought through these subpoenas is directly relevant to the issues in this personal injury (car collision) case in which Plaintiff alleges injuries to his neck and back. First, by bringing this lawsuit, Plaintiff has put the condition of his neck and back at issue. Next, medical records and correspondence regarding Plaintiff's neck and back conditions both before and after the alleged collision are relevant to the issue of whether the collision caused Plaintiff's current neck and back condition. Given that Plaintiff underwent neck and back treatment as far back as the 90s, the time limitation Plaintiff seeks is too narrow. Finally, the subpoenas are directed to radiology records and physical therapy records, both of which are likely to lead to the discovery of admissible evidence regarding Plaintiff's neck and back. Thus, there is a compelling interest for these documents to be produced. Such production can be made subject to a protective order to protect Plaintiff's privacy rights as to those outside of this litigation. The parties are encouraged to meet and confer, agree to terms of a protective order, and submit a form of order to the Court for review and approval. Court to prepare formal order on this motion.

8-9	21CV389205	Shannon Krzycki vs Norman Y. Mineta San Jose International Airport et al	Plaintiff's motions to reopen discovery and compel depositions are DENIED. The Court already considered and denied this request in connection with Plaintiff's opposition to Defendants' summary judgment motions. The Court again denied this request couched as Plaintiff's motion for clarification of the Court's interim summary judgment ruling permitting extremely limited discovery. Again, none of the requested depositions is likely to lead to the discovery of admissible evidence because none of these witnesses could possibly have personal knowledge of whether the bathroom floor was wet at the time Plaintiff fell since they were not at the scene. The Court agrees with Defendants that these numerous motions regarding the same depositions ignore the Court's written and oral orders and are designed to delay the Court's ruling on summary judgment, that the motions were not substantially justified, and that sanctions are therefore appropriate. While the Court finds Defense counsel's hourly rate reasonable, given the close relationship between the motions, the Court does not find the number of hours reasonable and orders Plaintiff to pay Defendants $3,115 in attorney's fees within 30 days of entry of the formal order, which formal order the Court will prepare.
10	21CV390702	Paul Medina vs Jimmy Herrera, Jr.	Plaintiff's motion to compel will be heard in Department 16.

11	23CV415930	Payroll Express LLC dba Payroll Express et al vs HOP Capital et al	Plaintiffs' motion for relief to file a late motion to compel is GRANTED. Plaintiff filed a timely motion, that motion was rejected for failing to first obtain a hearing date, then Plaintiff obtained the hearing date and refiled the motion. The requirement to have a hearing date before filing a motion changed in the local rules as of January 1, 2024, thus the Court finds it was excusable neglect for counsel not to have reserved the hearing date in time, particularly since the court's phone lines for reservations then closed at 12:30. (Hearing reservations can now be made at https://reservations.scscourt.org/, which will avoid these problems going forward.) While the 45-day time limit is jurisdictional, here Plaintiff did timely file the motion, so the Court has jurisdiction to here the motion on the merits. Plaintiff's motion to compel responses to requests for admissions (set one) is DENIED. Defendants' objection that many of the requests are overbroad is well taken. Requests for admissions are different than other discovery devices; they are designed to compel admission as to all matters that cannot reasonably be controverted to expedite trial by reducing the number of triable issues that must be adjudicated. (*City of Glendale v. Marcus Cable Assoc., LLC* (2015) 235 Cal.App.4th 344, 352; *Doe v. Los Angeles County Dep't of Children & family Servs.* (2019) 37 Cal.App.5th 675, 690; *Orange County Water Dist. v. The Arnold Eng'g Co.* (2018) 31 Cal.App.5th 96, 119. As such, they must be written with precision. Given the imprecision of these requests, Defendants' answers are code compliant. A party responding to a request for admission may answer by objecting or that the party admits or denies the matter. (Code of Civ. Proc. § 2033.210(b).) If part of a request for admission is objectionable, the responding party must answer the unobjectionable part. (Code of Civ. Proc. § 2033.230(a).) The denial of all or a portion of a request must be unequivocal. (*Id.*; *American Fed'n of State, County & Mun. Employees v. Metropolitan Water Dist.* (2005) 126 CalApp.4th 247, 268.) Defendants' responses clearly state what they can and cannot answer, then provide an answer. Plaintiff's motion to compel form interrogatories (set one) is GRANTED for form interrogatory no. 3.3 (many names are referenced but not identified) but otherwise DENIED. Defendant is ordered to produce a verified supplemental response to interrogatory no. 3.3 within 20 days of service of this formal order. Plaintiff's motion for $1050 in sanctions is DENIED. Each party had substantial justification for seeking court assistance with this dispute. Court to prepare formal order.

12	23CV426804	WELLS FARGO BANK, N.A. vs WANDALEE WHITE	Wells Fargo Bank, N.A.'s motion for an order deeming the truth of the matters specified in Plaintiff's requests for admission as admitted is GRANTED. A notice of motion with this hearing date and time was served on defendant by U.S. mail on March 1, 2024. Defendant did not oppose the motion. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) There is also good cause to grant this motion. Plaintiff served requests for admission on Defendant by mail on January 11, 2024. To date, Defendant has served no responses. A party served with requests for admission must serve a response within 30 days. (Code of Civ. Pro. §2033.250.) When a party fails to respond—even in the face of a motion to have the matters in the requests for admission deemed admitted—as Defendant has done here, the Court must order the requests for admission deemed admitted. (Code of Civ. Pro. §2033.280(c); *St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 775-776.) Such a "deemed admitted" order establishes that the nonresponding party has responded to the requests for admission by admitting the truth of the matters contained in the requests. (*Id.*) Accordingly, Plaintiff's motion is granted, and the matters set forth in Plaintiff's requests for admission are deemed admitted. Court to prepare formal order.
13	19CV343179	Elise Mitchell vs Grady Williams	Defendant Grady Williams' motion to set aside default is off calendar. The Court is unable to locate a proof of service demonstrating that this motion was served on Plaintiff. The California Code of Civil Procedure, Rules of Court and Civil Local Rules require that the moving party serve a written notice of motion with the hearing date and time. (See Code Civ. Proc. §§1005(a), 1010.) A court lacks jurisdiction to hear a motion that has not been properly served, even if the non-moving party had some type of advanced notice. (See *Diaz v. Professional Community Mgmt.* (2017) 16 Cal.App.5th 1190, 1204-1205; *Five-O-Drill Co. v. Superior Court of Los Angeles County* (1930) 105 Cal. App. 232.) Accordingly, this motion is off calendar. If Defendant wants to have his motion to set aside default heard, Defendant may reserve a new hearing date at https://reservations.scscourt.org/, serve a notice of motion and motion with the hearing date and time, and file a proof of such service with the court. These orders will be reflected in the minutes.
15	22CV396774	Gregory Young vs D&L Movers et al	Plaintiff Gregory Young's motion for attorney's fees is GRANTED. On February 27, 2024, the Court granted Plaintiff's motion to enforce the parties' settlement agreement pursuant to Code of Civil Procedure section 664.6. That agreement provides: "In the event that any party to this Agreement files any petition or institutes litigation, including arbitration, to interpret or enforce the terms of this Agreement, the Parties expressly agree that the prevailing party or parties, in addition to any other relief provided by law, will be entitled to such reasonable attorneys' fees and court costs as may be incurred." (Declaration of Tyler Call, Ex. A at ¶12.) Under this provision, Plaintiff is entitled to fees and costs incurred to enforce the parties' settlement agreement. The Call Declaration and Declaration of Cinthia P. Martin detail Plaintiff's counsel's billable rates and number of hours spent on this motion and the motion to enforce, both of which the Court finds reasonable. Accordingly, Defendant is ordered to pay Plaintiff $4,780 in attorneys' fees. Court to prepare formal order. Plaintiff to prepare form of judgment for the Court's review within 10 days of service of the formal order.

16	23CV421935	Michelle Santos vs Bohr Bhandal et al	Plaintiff's motion for leave to file a first amended complaint is GRANTED. A notice of motion with this hearing date and time was served on Defendant by U.S. and electronic mail on March 27, 2024. Defendant did not oppose the motion. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) Moreover, [it] is a rare case in which 'a court will be justified in refusing a party leave to amend his pleadings so that he may properly present his case.' (*Guidery* v. *Green*, 95 Cal. 630, 633; *Marr* v. *Rhodes*, 131 Cal. 267, 270. If the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion. (*Nelson* v. *Superior Court*, 97 Cal.App.2d 78; *Estate of Herbst*, 26 Cal.App.2d 249; *Norton* v. *Bassett*, 158 Cal. 425, 427.)" (*Morgan v. Superior Court of Los Angeles County* (1959) 172 Cal. App. 2d 527, 530-531 (error for trial court to fail to give leave to amend). Plaintiff's request is timely and will not prejudice Defendant. Plaintiff is ordered to file the First Amended Complaint within 10 days of service of this formal order, which formal order the Court will prepare.
17	2011-1-CV-212974	W. Dresser vs A. Hiramanek	Mr. Hiramanek's motion is DENIED. Material contained in Mr. Hirmanek's motion appears to be a verbatim recitation of what occurred during the hearing on Mr. Dresser's motion to lift the stay, thus the Court is extremely concerned that Mr. Hiramanek is recording court proceedings in violation California Rule of Court, Rule 1.150 (c) and Local Rule 2(B)(2). Those rules make clear that recording court proceedings is prohibited. **The Court therefore no longer authorizes Mr. Hiramanek to appear virtually for any court proceedings. Mr. Hiramanek must appear in person if he wishes to contest this ruling and at any other future hearing of any kind in this case. The Court will not hear argument from Mr. Hiramanek by phone, video, or any other virtual means**. Court to prepare formal order.

Calendar line 4
Case Name: *Creditors Adjustment Bureau, Inc. v. Reveneer, Inc.*
Case No.: 23CV424510

Before the Court is Specially Appearing Defendant Reveneer, Inc.'s motion to quash service for lack of personal jurisdiction. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises from Reveneer, Inc.'s alleged breach of a membership agreement with LinkedIn. LinkedIn's assignee, Creditors Adjustment Bureau, Inc., brought this action alleging Defendant became indebted to LinkedIn in the amount of $227,655.61. (Complaint, ¶ 11.) Plaintiff is a California collection agency seeking to collect that debt. (Complaint, ¶¶ 5, 22.) On October 18, 2023, Plaintiff thus initiated this action alleging open book account and account stated and reasonable value. On March 12, 2024, Defendant moved to quash service of summons for lack of personal jurisdiction.

Greg Casale, Defendant's Chief Executive Officer, declares that Defendant is a Delaware corporation with its principal place of business in Massachusetts. (Casale Decl., ¶¶ 3-4.) According to Casale, Defendant has never been licensed or registered in California, does not have any offices in California, does not have employees based in California, and does not have property or bank accounts in California. (Casale Decl., ¶¶ 5-11.) Casale also explains that the LinkedIn subscriptions are like other online subscription products, such as Netflix, where the end user has no connection to the state where the subscription provider is based. (Casale Decl., ¶ 23.) Accordingly, Casale did not travel to California to purchase the LinkedIn subscriptions—all discussions about the purchases occurred over the phone, on Zoom, or by email; the subscriptions were made available completely online and only accessed at locations outside of California; and all invoices were sent electronically by LinkedIn to Defendant's Massachusetts-based headquarters. (Casale Decl., ¶¶ 17-19.) There was also no ongoing collaboration between Defendant and LinkedIn; employees simply logged into LinkedIn and accessed the services from their location. (Casale Decl., ¶ 25.)

According to Plaintiff's Vice President, Huberto Matz, Plaintiff is registered to do business, and does business, in California. (Matz Decl., ¶¶ 1-2.) Plaintiff was assigned this matter from

LinkedIn for collection purposes only, and all of Plaintiff's witnesses with respect to the assignment of this matter are located and reside in California. (Matz Decl., ¶ 3.) According to Patty Montanez, LinkedIn's Assistant Credit Manager and custodian of records, LinkedIn is a Delaware corporation with its principal place of business in California and all witnesses likely to testify in this case are located in California. (Montanez Decl., ¶¶ 1, 3.) Montanez also submits certain contracts between LinkedIn and Defendant, including the May 5, 2021 LinkedIn Subscription Agreement ("Subscription Agreement"), relevant portions of which are set forth below. (Montanez Decl., ¶¶ 1-2, Ex. 1.)

Relevant Subscription Agreement terms:

> 11 MISCELLANEOUS:
>
> If a conflict exists between of the terms of the Agreement, then the ordering document will govern, followed by the DPA, this LSA, the Service terms, and finally the User Agreement. Neither party relies on any undertaking, promise, assurance, statement, representation, warrant or understanding of any person relating to the subject matter of the Agreement, other than as stated in the Agreement.
>
> . . .
>
> Except as otherwise provided in the ordering document, either party may assign this Agreement to an Affiliate or success-in-interest that is not a competitor of the non-assigning party, made in connection with (i) the sale of all or substantially all of the assigning party's assets; (ii) any change in the ownership of more than 50% of the assigning party's voting capital stock in one or more related transactions; or (iii) the assigning party's merger with or acquisition by such success-in-interest. Except for the assignments set forth in the foregoing sentence, neither party will assign the Agreement in whole or in part without the other party's prior written consent (which consent will not unreasonably be denied, delayed or conditioned). Any attempted assignment in violation of this restriction

is void. The Agreement shall bind and insure to the benefit of the parties, their respective successors and permitted assigns.

Relevant User Agreement terms:

6. Governing Law and Dispute Resolution

For others outside of Designated Countries, including those who live outside of the United States: You and LinkedIn agree that the laws of the State of California, U.S.A., excluding its conflict of laws rules, shall exclusively govern any dispute relating to this Contract and/or the Services. You and LinkedIn both agree that all claims and disputes can be litigated only in the federal or state courts in Sant Clara County, California, USA, and you and LinkedIn each agree to personal jurisdiction in those courts.

7. General Terms. . . you agree that LinkIn may assign this Contract to its affiliates or a party that buys it without your consent. There are no third-party beneficiaries to this Contract.

LinkedIn assigned this matter to Plaintiff for collection purposes only. (Montanez Decl., ¶ 4.) That assignment states, in full:

Re: REVENEER, INC.

For and on behalf of LINKEDIN, I have been authorized to assign the above-referenced account(s) for collections in the sum of $227,656.61.

We hereby assign the above referenced account to CREDITORS ADJUSTMENT BUREAU, INC., for collection with full right to file legal action in the name of CREDITORS ADJUSTMENT BUREAU, INC.

II. Legal Standard

A defendant may specially appear and file a motion to quash service for lack of personal jurisdiction under Code of Civil Procedure section 418.10, subdivision (a)(1). "[W]here a defendant properly moves to quash service of summons the burden is on the plaintiff to prove facts requisite to

the effective service." (*Sheard v. Superior Ct.* (1974) 40 Cal.App.3d 207, 211.) "[T]he burden of proof is upon the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence." (*Evangelize China Fellowship, Inc. v. Evangelize Ching Fellowship Hong Kong* (1983) 146 Cal.App.3d 440, 444.) The plaintiff must provide affidavits and other authenticated documents to demonstrate competent evidence of specific evidentiary facts that would permit a court to form an independent conclusion on the issue of jurisdiction. (*In re Automobile Antitrust Cases I & II* (2005) 135 Cal.App.4th 100, 113.) Allegations in an unverified complaint are insufficient to satisfy this burden of proof. (*Id*.)

Evidence of the jurisdictional facts or their absence may be in the form of declarations. "Where there is a conflict in the declarations, resolution of conflict by the trial court will not be disturbed on appeal if the determination is supported by substantial evidence. However, where the evidence of jurisdictional facts is not conflicting, the question of whether a defendant is subject to personal jurisdiction is one of law. (*Elkman v. National States Ins. Co.* (2009) 173 Cal.App.4th 1305, 1312-1313 (*Elkman*); see also *Greenwell v. Auto-Owners Ins. Company* (2015) 233 Cal.App.4th 783, 789 (*Greenwell*), citing *Elkman, supra*.)

Personal jurisdiction may be either general or specific. (*Snowney v. Harrah's Entertainment, Inc.* (2005) 35 Cal.4th 1054, 1062 (*Snowney*).) Where general jurisdiction exists due to a non-resident defendant's "continuous and systematic" activities in a state, the defendant can be sued on causes of action not related to its activities within the state. (*Cornelison v. Chaney* (1976) 16 Cal.3d 143, 147.) Absent a showing adequate to confer general jurisdiction, a defendant may still be subject to specific jurisdiction, meaning "jurisdiction in an action arising out of or related to the defendant's contacts with the forum state." (*Healthmarkets, Inc. v. Superior Ct.* (2009) 171 Cal.App.4th 1160, 1167.)

III. Analysis

A. Applicability of Forum Selection Clause

Plaintiff asserts LinkedIn and Defendant expressly agreed to a California forum selection clause, which confers personal jurisdiction over Defendant in California. "[A] plaintiff opposing a motion to quash for lack of personal jurisdiction has the initial burden of proving facts justifying the exercise of jurisdiction. The allocation of the burden comports with the importance to due process of

limiting jurisdiction. A forum selection clause, however, is presumed valid; the party opposing its enforcement bears the 'substantial' burden of proving why it should *not* be enforced." (*Global Packaging, Inc. v. Superior Ct.* (2011) 196 Cal.App.4th 1623, 1633 [emphasis original; internal citations omitted].) "Using a forum selection clause as the sole means of establishing personal jurisdiction in effect places the burden of proof on exercise of jurisdiction on the defendant." (*Ibid*.)

The parties spend significant time addressing the enforceability of the forum selection clause, but this is a debt collection action, not a breach of contract action. Of course, to collect its debt, Plaintiff will have to prove it is owed that debt. But LinkedIn did not assign the Subscription Agreement—or any purported agreement between Defendant and LinkedIn—to Plaintiff; LinkedIn assigned the right to sue for and collect $227,656.61 from Defendant. There seems to be no dispute between the parties as to the narrowness of this assignment. And, just as Plaintiff would cannot sue Defendant for misuse of the services in violation of LinkedIn and Defendant's agreements governing those services, Plaintiff cannot otherwise enforce the other terms of those agreements because LinkedIn did not assign those *agreements* to Plaintiff. Put another way, Plaintiff has no obligations to Defendant under the LinkedIn agreements—Defendant could not sue Plaintiff for failing to provide the services, for example. Thus, Plaintiff cannot enforce the rights under the agreements.

However, even if the Court were to assume the agreements govern Plaintiff's and Defendant's relationship in this lawsuit, enforcing the forum selection clause in the User Agreement would be improper. There is a conflict between the Subscription and User Agreements:

The User Agreement provides:

> You and LinkedIn agree that the laws of the State of California, U.S.A., . . . shall exclusively govern any dispute relating to this Contract and/or the Services. You and LinkedIn both agree that all claims and disputes ***can be litigated only in the federal or state courts in Santa Clara County***, California, USA, and you and LinkedIn each agree to personal jurisdiction in those courts.

(Montanez Decl., Ex. 1, p. 028 [emphasis added].)

Whereas the Subscription Agreement provides:

> If an issue arises under the Agreement and the applicable ordering document was signed by (a) LinkedIn Corporation . . . then the Agreement is governed by the laws of the State of California, and any action or proceeding (including those arising from non-contractual

disputes or claims) related to the Agreement ***will be brought in federal court in the Northern District of California***.

(Montanez Decl., Ex. 1, p. 020 [emphasis added].)

The contract terms are clear that the Subscription Agreement governs where there is such a conflict, and this is not federal court. Accordingly, the forum selection clause is insufficient to subject Defendant to personal jurisdiction in California.

B. General Jurisdiction

"A defendant is subject to general jurisdiction when it has substantial, continuous, and systematic contacts in the forum states, i.e., its 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, 222-223 (*Strasner*).)

Defendant is a Delaware corporation with its principal place of business in Massachusetts; all of its employees are located outside of California; and Defendant maintains no affiliates or operations in California. The Court finds Defendant does not have "substantial, continuous, and systematic contacts in California," a point Plaintiff appears to concede. (*Strasner, supra,* 5 Cal.App.5th at p. 222.)

C. Specific Jurisdiction

"A court may exercise specific jurisdiction over a nonresident defendant only if: (1) the defendant has purposefully availed himself or herself 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." (*Pavlovich v. Superior Ct.* (2002) 29 Cal.4th 262, 269 (*Pavlovich*).)

1. Purposeful Availment

"An out-of-state defendant purposefully avails itself of a forum state's benefits if the defendant (1) purposefully directs its activities at the forum state's residents, (2) purposefully derives a benefit from its activities in the forum states, or (3) purposefully invokes privileges and protections of the forum state's laws by (a) purposefully engaging in 'significant activities' within the forum states or (b)

purposefully creating 'continuing [contractual] obligations' between itself and the residents of the forum state. Purposeful availment can occur from afar; the out-of-state defendant's physical presence in the forum state is not required." (*Jacqueline B. v. Rawls Law Group, P.C.* (2021) 68 Cal.App.5th 243, 253 (*Jacqueline B.*).)

"As the name and definition of purposeful availment make plain, an out-of-state defendant's conduct toward the forum State or its residents is relevant to the jurisdictional analysis only if that conduct is purposeful, deliberate, and intentional. An out-of-state defendant's contact with a forum state that is 'random' 'fortuitous' or 'attenuated' is not enough. This is why the mere fact that the out-of-state defendant's conduct has some 'effect' on a California resident is not enough, by itself, to constitute purposeful availment; to count, that effect must be *intended*." (*Jacqueline B., supra,* 68 Cal.App.5th at p. 254 [emphasis original; internal citations omitted].)

Defendant argues it did not purposefully avail itself of California's benefits because it is a company based outside of California and received access to an online, off-the-shelf subscription service for its employees who do not work in California. (Motion, p. 6:3-7.) LinkedIn knew Defendant was located outside of California and indicated it would charge Defendant with a Massachusetts sales tax. (*Ibid*.) Additionally, the order forms indicate that the subscription services were being shipped to Defendant in Massachusetts. (Motion, p. 7:3-4.)

Plaintiff does not address specific jurisdiction or attempt to make a showing that Defendant purposefully availed itself of California's benefits. Further, the execution of an agreement with a resident of the forum does not, standing alone, establish that a defendant has sufficient minimum contacts with the forum to support the exercise of personal jurisdiction. (See *Burger King Corp. v. Rudzewicz* (1985) 417 U.S. 462, 474; *Picot v. Weston* (9th Cir. 2015) 780 F.3d 1206, 1212 ["'A contract alone does not automatically establish minimum contacts in the plaintiff's home forum'"].) Therefore, Defendant's execution of the agreements with LinkedIn is not sufficient to support the exercise of personal jurisdiction.

2. Controversy Arising out of Defendant's Contacts with California

California uses a "substantial connection" test in determining if a controversy is related to a defendant's purported contacts with California which is satisfied if there is a substantial nexus or

connection between the defendant's forum activities and the plaintiff's claim. (*Snowney, supra,* 35 Cal.4th at p. 1068.) The more significant the forum contacts are, the less related to the cause of action they need to be. (*Ibid*.)

"Case-linked jurisdiction . . . requires a showing not only that the defendant has purposefully directed its activities at the form but also that the litigation results from alleged injuries that arise out of or relate to those activities. There must be a connection between the forum and the specific claims at issue. If the operative facts of the allegations of the complaint do not relate to the nonresident's contacts in this state, then the cause of action does not arise from that contact such that California courts may exercise specific jurisdiction." (*Rivelli*, *supra*, 67 Cal.App.5th at p. 399.)

Plaintiff here fails to show Defendant purposefully availed itself of the benefits of California or that the controversy arises from Defendant's contacts with California and Plaintiff's claims. Therefore, Plaintiff fails to meet its burden to demonstrate facts to justify the exercise of jurisdiction and the burden does not shift to Defendant. (*Rivelli, supra,* 67 Cal.App.5th at p. 393.) Consequently, the Court does not need to reach the last prong of the specific jurisdiction analysis. (*Greenwell, supra*, 233 Cal.App.4th at 792; see also *Pavlovich, supra,* 29 Cal.4th at p. 269.) Thus, the motion to quash is GRANTED.

Calendar Line 5
Case Name: *Carrie LeRoy v. Robin Love*
Case No.: 23CV427611

Before the Court is defendant Robin Love's special motion to strike plaintiff Carrie LeRoy's Complaint pursuant to Code of Civil Procedure section 425.16. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action concerns a dispute between sisters. (Complaint, ¶ 6.) Plaintiff alleges that around July 10, 2023 her sister, Robin Love, coerced their eighty-two year old father Leonard Wandling to make an offer to purchase a $1.3 million dollar property (the "Property") for Love. (*Ibid*.) Love instructed Wandling not to inform LeRoy about the purchase, which would have required that Wandling deplete his entire life savings, apply his only source of income—social security payments—to purchase the Property, and assume mortgage payments in excess of $8,000 per month. (*Ibid*.)

Plaintiff further alleges she prevented Love's alleged financial elder abuse of Wandling when she notified the seller's real estate agent that the transaction violated California's elder abuse statutes. (Complaint, ¶ 7.) On July 18, 2023, LeRoy claims that after witnessing Love bully and threaten Wandling, she initiated an Adult Protective Services ("APS") investigation about Love's treatment of Wandling. (*Ibid*.)

Around this same time, July 17, 2023 and July 18, 2023, LeRoy alleges Love made the following statements to friends and family:

(1) LeRoy is an unethical lawyer who abuses her power and violates the law to take advantage of others, including her elderly father;

(2) LeRoy's only interest in Wandling is financial—that she wants to exploit him financially;

(3) LeRoy is a pathological person who suffers from a serious mental illness or personality disorder; and

(4) LeRoy is responsible for a serious crime that Love alleged occurred on July 9, 2023, on LeRoy's property—specifically that LeRoy's failure to report such crime made her an accomplice to the crime for which she should be held accountable. (Complaint, ¶ 9.)

Plaintiff further alleges Love told her in Wandling's presence, that Love intended to report LeRoy's alleged misconduct to her law firm to damage her reputation and cause her to lose her position. (Complaint, ¶ 10.) Plaintiff claims Love's statements are false. (Complaint, ¶¶ 11-12.) LeRoy claims she suffered severe emotional distress as a result of Love's statements and attacks on her reputation and integrity, which are critical for her profession and standing in her field and as an advocate for her pro bono clients. (Complaint, ¶ 13.)

LeRoy initiated this action on December 12, 2023, asserting (1) defamation per se; (2) defamation per quod; (3) intentional infliction of emotional distress; and (4) negligent infliction of emotional distress. On March 20, 2024, Love filed the instant motion, which LeRoy opposes.

II. Request for Judicial Notice

Love requests judicial notice of the following four items:

(1) Exhibit A: LeRoy's Complaint in this matter;

(2) Exhibit B: The Court's (Hon. Overton) Order regarding LeRoy's anti-SLAPP motion in the Elder Abuse Matter, filed January 2, 2024 (the "Order");

(3) Exhibit C: LeRoy's declaration in support of her anti-SLAPP motion in the Elder Abuse Matter, filed on September 2023; and

(4) Exhibit D: Notice of Withdrawal of Petition for Appointment of Probate Conservator of the Person and Estate of Leonard Wandling, filed on April 22, 2024.

As court records, these items are the proper subject of judicial notice. (Evid. Code, § 452, subd. (d).) Thus, Love's request for judicial notice is GRANTED.

III. 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 (*Bel Air Internet*).)

Love moves to strike the Complaint on the grounds it arises from protected activity and LeRoy cannot establish a likelihood of success on the merits.

IV. Analysis

A. First Prong: Protected Activity

"A defendant meets his or her burden on the first step of the anti-SLAPP analysis by demonstrating the acts underlying the plaintiff's cause of action fall within one of the four categories spelled out in [Code of Civil Procedure] section 425.16, subdivision (e)." (*Collier v. Harris* (2015) 240 Cal.App.4th 41, 50-51 (*Collier*).) 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,* 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 is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Park, supra,* 2 Cal.5th at p. 1060.) To determine whether the speech constitutes the wrong itself or is merely evidence of a wrong, "in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by defendant supply those elements and consequently form the basis for liability." (*Id.* at p. 1063.)

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

An anti-SLAPP motion can target a "mixed" cause of action—on that combines allegations of protected and nonprotected activity under one cause of action. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 395 (*Baral*).) When a mixed cause of action contains allegations of protected activity that, on their own, could support a cause of action, those allegations are subject to an anti-SLAPP motion. (*Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1551.) Such a motion, if successful, can strike claims arising out of protected activity while allowing other claims to proceed, even if both appear within a single cause of action. (*Baral, supra,* 1 Cal.5th at p. 392.)

Love contends the alleged defamatory statements were made in preparation for potential litigation and concerned a matter of public importance. In *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1263-1266 (*Neville*), the appellate court gathered cases interpreting when a statement may be considered in connection with anticipated litigation for purposes of protection under the anti-SLAPP statute.

> These cases stand for the proposition that a statement is "in connection with" litigation under Section 425.16, subdivision (e)(2), if it relates to substantive issues in the litigation and is directed to persons having some interest in the litigation. Cases construing the scope of the litigation privilege embodied in Civil Code section 47 have reached similar results. To be privileged under section 47, a statement must be "reasonably relevant" to pending or *contemplated* litigation. The reasonable relevancy requirement of section 47 is analogous to the "in connection with" standard of section 425.16, subdivision (e)(2).

(*Neville, supra,* 160 Cal.Ap..4th at p. 1266.)

Claims arising from statements or writings made prior to litigation may be subject to an anti-SLAPP motion. (*CKE Restaurants, Inc. v. Moore* (2008) 159 Cal.App.4th 262, 271 [action properly subject to special motion to strike because it arose "entirely" from defendants' filing of 60-day notice under Proposition 65]; *Comstock v. Aber* (2012) 212 Cal.App.4th 931, 944-945 [prelitigation statement of abuse to a mandated reporter is protected activity under anti-SLAPP statute].)

However, prelitigation communication is protected "only when its related to litigation that is contemplated in good faith and under serious consideration." (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1251.) Protection "attaches at that point in time that imminent access to the court is seriously proposed by a party in good faith for the purpose of resolving a dispute, and not when a threat of litigation is made merely as a means of obtaining a settlement." (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 37.)

For purposes of the anti-SLAPP statute, "the mere fact that a plaintiff has filed an action after a defendant has engaged in some protected activity does not mean that the plaintiff's actions arose from

that activity." (*Gallimore v. State Farm Fire & Casualty Ins. Co.* (2002) 102 Cal.App.4th 1388, 1398.) "Prelitigation communications…may provide evidentiary support for the complaint without being a basis of liability. An anti-SLAPP motion should be granted if liability is based on speech or petitioning activity itself." (*Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 1818 Cal.App.4th 1207, 1215.) Prelitigation communication may trigger a complaint without itself being a basis for the complaint. (*Gotterba v. Travolta* (2014) 228 Cal.App.4th 35, 42 (*Gotterba*).) "The critical issue concerns where 'the plaintiff's cause of action was *based on an* act in furtherance of the defendant's right of petition or free speech." (*Ibid*, [emphasis original].)

Love provides declarations from herself; Wandling; her brother Leonard Wandling Jr; her son, Michael Love; her daughter, Sarah Love; Kevin Juentes; and Joshua Henderson in support of her assertion that her statements were made once she started evaluating her legal options, including the potential for filing a lawsuit for tortious interference with contract. (MPA., p. 9:21-24.) Love states after the real estate transaction "imploded," she "promptly consulted with an attorney to explore her legal options which included pursuing legal action against [Leroy] for intentional interference with contractual relations, intentional infliction of emotional distress, defamation, and other potential claims" and she reached out to family members and close family friends to discuss [LeRoy's] actions because she thought [LeRoy] was abusing their father with her interference and wanted to see if they could help resolve the dispute without a lawsuit." (Love Decl., ¶ 9.) Love's counsel Joshua J. K. Henderson states Love contacted him on July 16, 2023, regarding the real estate transaction and considerations were made "for lawsuits against the seller and real estate agents, as well as potential legal action against [LeRoy] for interference with contractual relations, intentional infliction of emotional distress, defamation, and other possible causes of action." (Henderson Decl., ¶ 2.) Wandling states he and Love evaluated their legal options after LeRoy's interference with their transaction. (Wandling Decl., ¶ 10.)

LeRoy argues Love did not genuinely contemplate litigation and provides the declaration of John Wandling, their uncle, who attached his text message exchange with Love, dated August 6, 2023, which states "neither my dad or I have threated [LeRoy] with a law suit. It's the other way around." (John Wandling Decl., ¶¶ 3-4, Exh. A.) In response, Love provides a supplemental declaration from

Wandling, who attached his text message exchange with LeRoy, in which she states, "[m]y own son (and Philippe) told me that [Love] has been recruiting people to bring a restraining order against me." (Wandling Supp. Decl., ¶ 2; Exh. E.) Therefore, it appears that litigation was seriously considered by Love. The fact that such litigation had not yet been "threatened" does not change this fact.

Love relies on *Timothy W. v. Julie W.* (2022) 85 Cal.App.5th 648, 658 (*Timothy W.*), which involved statements the defendant made to a private investigator, who was hired in furtherance of an ongoing marriage dissolution to conduct a financial investigation. (*Id.* at p. 658.) The basis for the plaintiff's claims was the defendant's communication of sensitive information to the private investigator, who then shared the information with others. (*Ibid.*) The appellate court held that the communications constituted protected activity because the investigation involved a financial misdeed that was directly related to the sensitive information, thus disclosing it was necessary for the private investigator to do his job. (*Id.* at p. 659.) The appellate court noted, "[Section 425.16,] subdivision (e)(2), has been held to protect statements to persons who are not parties or potential parties to litigation, provided such statements are made 'in connection with' pending or anticipated litigation." (*Ibid*, quoting *Summerfield v. Randolph* (2011) 201 Cal.App.4th 127, 136.)

The statements in the instant matter were made to family members and close friends all in the same time period in which LeRoy was engaging in discussions regarding potential litigation. They are therefore protected under Section 425.16, and the burden therefore shifts to LeRoy to establish a "probability" that she will prevail on the claims. (Code Civ. Proc., § 425.16, subd. (b)(1).)

B. Second Prong

To meet its burden to defeat a defendant's special motion to strike, a plaintiff "must demonstrate that the [challenged claims are] both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." (*Soukop v. Law Offices of Herbert Hafif* (*Soukop*) (2006) 39 Cal.4th 260, 291 (*Soukop*).) This "probability of prevailing" standard is tested by the same standard governing a motion for summary judgment in that it is the plaintiff's burden to make a prima facie showing of facts that would support a judgment in the plaintiff's favor. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 714 (*Taus*).)

A plaintiff must show that there is admissible evidence that, if credited, would be sufficient to sustain a favorable judgment. (*McGarry v. University of San Diego* (2007) 154 Cal.App 4th 97, 108 (*McGarry*).) The court does not weigh credibility or comparative strength of the evidence; the court must consider the defendant's evidence only to determine if it defeats the plaintiff's showing as a matter of law. (See *Soukop, supra*, 39 Cal.4th at 291.) "In making this assessment it is the court's responsibility… to accept as true the evidence favoring the plaintiff… The plaintiff need only establish that his or her claim has 'minimal merit' to avoid being stricken as a SLAPP." (*Id*. at 291.) While the burden on the second prong belongs to the plaintiff, in determining whether a party has established a probability of prevailing on the merits of his or her claims, a court considers not only the substantive merits of those claims, but also all defenses available to them. (See *Traditional Cat Assn., Inc. v. Gilbreath* (2004) 118 Cal.App.4th 392, 398.)

1. Litigation Privilege

Love argues LeRoy's claims fail because the statements were privileged under Civil Code section 47, subdivision (b) as statements in preparation for litigation.

The litigation 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." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) The privilege is absolute and applies regardless of whether the communication was made with malice or the intent to harm. (*Wise v. Thrifty Payless, Inc.* (2000) 83 Cal.App.4th 1296, 1302.) The litigation privilege extends not only to statements made during litigation or official proceedings but also to prelitigation communications. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057.) Prelitigation communications are protected when it "relates to litigation that is contemplated in good faith and under serious consideration" and is "connected with, or ha[s] some logical relation to" the anticipated litigation or is "in furtherance of the objects of the litigation." (*Action Apartment Ass'n, Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1251 (*Action Apartment*).) Communications preparatory to or in anticipation of the bringing of an action or other official proceeding come within the protection of the special motion to strike under the anti-SLAPP

statute. (*Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1570; *A.F Brown Elec. Contractor, Inc. v. Rhino Elec. Supply, Inc.* (2006) 137 Cal.App.4th 1118, 1125-26.)

LeRoy argues Love has not shown she genuinely and in good faith considered litigation. For the reasons stated above, this argument is without merit.

Love again relies on *Timothy W, supra,* in which the appellate court found the statements to the private investigator were not incidental but rather had some bearing on the subject matter of the litigation. (*Timothy W, supra,* 85 Cal.App.5th at p. 663.) However, in *Timothy W, supra,* the information was necessary for the private investigator carry out his investigation and the statements were in the context of the ongoing marital dissolution proceedings. (*Id*. at p. 662.) Here, Love's statements were prelitigation statements which were made in response to LeRoy's interference with Love and Wandling's real estate transaction. Thus, litigation privilege applies to them.

2. First and Second Causes of Action: Defamation Per Se and Defamation Per Quod

There are two types of defamation, libel and slander. (Civ. Code, § 44.) "Slander is a false and unprivileged publication, orally uttered…which (1) charges any person with crime, or with having been indicted, convicted, or punished for crime; (2) imputes in him the present existence of an infectious, contagious, or loathsome disease; (3) tends directly to injure him in respect to his office, profession, trade, or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputed something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits; (4) imputes to him impotence or a want of chastity; or (5) which, by natural consequences, causes actual damage." (Civ. Code, § 46.)

The elements of a defamation claim are: "(1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage." (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1369.) Defamation per se and per quod share these elements. Defamation per se is when a defamatory meaning is reflected from the language itself and does not require extrinsic facts to explain why the statement is defamatory. (*Palm Springs Tennis Club v.*

Rangel (1999) 73 Cal.App.4th 1, 5.) In contrast, defamation is per quod is when the defamatory meaning is only ascertainable through extrinsic facts. (*Ibid*.)

b. Fact or Opinion

"Because the statement must contain a provable falsehood, courts distinguish between statements of act and statements of opinion for purposes of defamation liability." (*McGarry, supra* 154 Cal.App.4th at p. 112.) "Courts apply a totality of the circumstances test that accounts for the substantive language and context of the publication to determine whether it is an actionable statement of fact or a nonactionable opinion." (*Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, 696.) "In considering the language of the statement itself, [courts] look at whether the purported opinion discloses all of the facts on which it is based and does not imply that there are other, unstated facts which support the opinion." (*Dickinson v. Cosby* (2017) 17 Cal.App.5th 655, 686 (*Cosby*).) "If that is the case, the statement is defamatory only if the disclosed facts themselves are false and defamatory." (*Ibid*.) "In considering the *context* of the statement, [courts] look at facts including the audience to whom the statement was directed, the forum in which the statement was made, and the author of the statement." (*Cosby, supra,* 17 Cal.App.5th at p. 686 [emphasis original].)

There seems to be agreement between these parties about one thing: they have not gotten along for most, if not all, of their lives. The declarations submitted by both sides demonstrate that the audience to whom these statements were allegedly made know this, with some family members and close friends seeing this as a one-sided problem and others seeing it as two. These statements were not posted on social media, no phone call or other contact was made to Plaintiff's law firm—the only people who heard these statements are people who knew the context of what appears to be an unfortunate life-long feud. Thus, the special motion to strike the first and second causes of action is GRANTED.

c. Third Cause of Action: Intentional Infliction of Emotional Distress

The elements of the tort of intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's

outrageous conduct." (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001.) For the purposes of the tort, "extreme and outrageous" conduct is that which exceeds "all bounds of that usually tolerated in a civilized community." (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050-1051.)

For the reasons state above, the special motion to strike is GRANTED.

d. Fourth Cause of Action: Negligent Infliction of Emotional Distress

"The law of negligent infliction of emotional distress in California is typically analyzed by reference to two 'theories' of recovery: the 'bystander' theory and the 'direct victim' theory. We have repeatedly recognized that the negligent causing of emotional distress is not an independent tort, but a tort of negligence. (*Fluharty v. Fluharty* (1997) 59 Cal.App.4th 484, 490.) "Whether plaintiffs can recover damages for [NIED] is dependent upon traditional tort analysis, and the elements of duty, breach of duty, causation, and damages must exist to support the cause of action." (*Klein v. Children's Hosp Medical Ctr.* (1996) 46 Cal.App.4th 889, 894.)

LeRoy fails to allege or provide any evidence to establish a prima facie showing of this claim, particularly the negligence elements. Therefore, she fails to meet her burden as to this claim and thus, the special motion to strike the fourth cause of action is GRANTED.