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: January 16, 2024 TIME: 9:00 A.M.

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, please 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: You no longer need to file a blank notice of motion to obtain a hearing date. **Phone lines are now open for you to call and reserve a date before you file your motion**.

Where to call:408-882-2430
When to call: Monday through Friday, 8:30 am to 12:30 pm

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	21CV385527	Michael Darden vs The Board of Trustees of the Leland Stanford University et al	This matter is off calendar pursuant to the Court's December 8, 2023 Discovery Order Following Informal Discovery Conference.
2	21CV391656	Jia Wei Shi vs Ying Tuo et al	Defendant's motion to quash service of summons is GRANTED. Please scroll down to line 2 for full tentative ruling. Court to prepare formal order.
3	23CV414397	JONATHAN HOLMES vs KARYN GUARASCIO et al	Holmes's Demurrer is SUSTAINED with 20 days leave to amend. Please scroll down to line 3 for full tentative ruling. Court to prepare formal order.
4	23CV418654	Freidrik Ternian vs Ninos Ternian et al	This case will now be heard in Department 20 in light of the motion to relate Case No. 22CV39822 heard in Department 20 on January 9, 2024. Plaintiff's Motion for Trial Preference and Defendant's Demurrer are CONTINUED to February 6, 2024 at 9 a.m. in Department 20 to be heard with three other pending motions and to permit the parties to assess next steps in light of Mr. Ternian's apparent recent passing.
5	23CV422611	Senen Trinidad vs Aida Lopez Alban et al	Defendant Aida Miranda's Demurrer is CONTINUED to February 29, 2024 at 9 a.m. in Department 6. The Court was unable to locate proof of service of an amended notice of motion with the January 16, 2024 hearing date. The California Code of Civil Procedure, Rules of Court, and Civil Local Rule in effect at the time this motion was filed require that the moving party serve a written notice of motion with the hearing date and time. (See Cal. Code Civ. Proc. §§1005(a), 1010.) A court lacks jurisdiction to hear a motion that has not been properly served, even if there is a claim that 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.) Under Civil Local Rule 8(C) in effect at the time this motion was filed, the moving party must file an amended notice of motion with the hearing date once that date is assigned by the clerk. It appears to the Court that this did not occur. The Court accordingly continues the hearing on this motion (to join with the hearing on Defendant's motion to strike) to February 29, 2024 at 9 a.m. in Department 6. Defendant is ordered to serve an amended notice of motion with this hearing date and time. Failure to file a proof of service demonstrating such service will result in the Court denying this motion at the next hearing.
6	23CV425111	Demidchik Anna et. al vs Jun lin	Defendant's Special Motion to Strike is GRANTED, in part. Please scroll down to line 6 for full tentative ruling. Court to prepare formal order.

7	19CV355396	Jane Doe vs Keith Crawford et al	Loma Kay Flowers' Motion for Summary Judgment is GRANTED. An amended notice of motion with this hearing date and time was served by electronic mail on October 3, 2023. An opposition to a summary judgment motion "shall be served and filed not less than 14 days preceding the noticed or continued date of the hearing, unless the court for good cause orders otherwise." (Code Civ. Proc. § 437c(b)(2).) Without explanation, Plaintiff filed her opposition 7 days late. While the Court has discretion to consider late filed papers, the Court finds it would be prejudicial to Defendant Flowers to consider these late filed papers, particularly when the matter has been pending for over four years. Moreover, what was said in the radio broadcast is not disputed, and it is clear Dr. Flowers did not publicly disclose private facts about Plaintiff, Plaintiff has no evidence of an agreement between Dr. Flowers and Crawford to disclose Plaintiff's private information or intentionally inflict emotional distress, and there is no evidence that Dr. Flowers substantially assisted or encouraged Crawford. Crawford was the party disclosing private information, gratuitously repeating Plaintiff's full name, and deliberately disclosing her workplace and job title. Accordingly, summary judgment in favor of Dr. Flowers is appropriate. Court to prepare formal order.
8	21CV387789	Michael Johnson vs William Knowles et al	William W. Knowles and Belgica M. Knowles' Motion for Summary Judgment is GRANTED. An amended notice of motion with this hearing date and time was served by electronic mail on September 14, 2023. No opposition was filed. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) Where a party fails to submit declarations in opposition to a summary judgment motion, the facts set forth in declarations submitted in support of such motion are deemed true. (*M. Miller Co. v. Dames & Moore* (1961) 198 Cal. App. 2d 305, 308 ("Since there were no counteraffidavits filed, we accept as true the facts stated in the affidavits of the moving party.") The Court has also studied the moving papers and finds there is good cause to grant this motion based on what are now undisputed facts demonstrating that Plaintiff has no evidence that Defendants engaged in the alleged conduct. Moving party to prepare formal order and form of judgment.
9	21CV387789	Michael Johnson vs William Knowles et al	The Court ordered Plaintiff to appear on January 16, 2024 and show cause why this case should not be dismissed for Plaintiff's repeated failures to appear. Plaintiff submitted no response to this order. However, rather than dismiss this case, the Court will enter judgment in favor of Defendants in accordance with the Court's ruling on Defendants' summary judgment motion.
10	21CV385527	Michael Darden vs The Board of Trustees of the Leland Stanford University et al	This matter is off calendar pursuant to the Court's December 8, 2023 Discovery Order Following Informal Discovery Conference.
11	22CV399866	Bank Of America, N.a. vs Sonny Tam	The motion to compel was incorrectly set and is vacated. An OSC for failure to serve is set at 10:00 a.m. in Department 3 on March 14, 2024.
12	22CV399886	Stayce Cavanaugh vs Google LLC	This is settled, and the motion is off calendar.

13	18CV321554	Palo Alto Property Owner LLC vs The Grocery Men I, LLC et al	Palo Alto Property Owner, LLC's and College Terrace Centre, LLC's Motion for Attorney Fees is GRANTED, in part. The parties agree moving parties are entitled to attorney fees as the prevailing parties; they disagree on the amount of those fees, each submitting detailed declarations in support. The Court finds Hanson and Bridgett's billing rates for its lawyers and non-lawyers for 2018 through the present to be reasonable rates for this case type and the Silicon Valley legal market. Attachments 1-6 to the Whitehorn declaration look at California as a whole and do not distinguish between complex big dollar and more routine smaller scale cases. The Court further finds the number of lawyers and non-lawyers that billed to this case over five years is reasonable and to be expected given the passage of time. The number of hours and the types of tasks the timekeepers performed, including those identified in Exhibits 7-8 of the Whitehorn declaration, are also appropriate; it is reasonable to expect a team representing a single client on the same matter to have conferences and meetings to coordinate strategy and distribute tasks and for more senior lawyers to communicate with the court and review and supervise routine tasks such as filings and service. Nor is it surprising for team members to be in different offices. The Court can take judicial notice of the fact that significant business is now conducted virtually, including hearings in this court. The Court also finds that the cross claims were intimately intertwined with the Lease dispute and are recoverable. A significant portion of the fees described in the Supplemental Declaration of Jordan Lavinsky relate to the appeal, which fees are better addressed in that context. Accordingly, the Court awards Palo Alto Property Owner, LLC and College Terrace Centre, LLC $637,825 in attorney fees. Court to prepare formal order.
14	19CV351403	NOEL MILLICAN et al vs FORD MOTOR COMPANY et al	The Court orders the parties to appear and provide the Court with an update on the status of the arbitration. The Court does find there is a change in the law that could warrant reconsideration of the prior order sending this case to arbitration. However, this case has been pending since July 17, 2019 and was ordered to arbitration nearly two years ago. Thus, it would be potentially prejudicial for the Court grant this motion at this late stage. Further, P.F. Automotive, LLC is a signatory to the arbitration agreement Plaintiff indisputably entered and moved to compel arbitration. Thus, this case is distinguishable from *Montemayor v. Ford Motor Co.* (2023) 92 Cal.App.5th 958, 968–971; *Ford Motor Warranty Cases* (2023) 89 Cal.App.5th 1324, 1333–1336, review granted July 19, 2023, S279969, and *Kielar v. Superior Court* (2023) 94 Cal. App. 5th 614, 617 where only the manufacturer moved to compel arbitration.
15	23CV418654	Freidrik Ternian vs Ninos Ternian et al	This case will now be heard in Department 20 in light of the motion to relate Case No. 22CV39822 heard in Department 20 on January 9, 2024. Plaintiff's Motion for Trial Preference and Defendant's Demurrer are CONTINUED to February 6, 2024 at 9 a.m. in Department 20 to be heard with three other pending motions and to permit the parties to assess next steps in light of Mr. Ternian's apparent recent passing.

16	2005-1-CV-043903	GLOBAL PROTEIN PRODUCTS, INC. vs K. LE, et al	David A. Bernstein's motion to withdraw as counsel of record for Defendant Kevin K. Le is GRANTED. The form of order granting this motion shall be modified to make clear that the February 26, 2024 contempt hearing will not be continued. Court to use form of order on file.
17	2011-1-CV-212974	W. Dresser vs A. Hiramanek	Defendant requested accommodation under Cal. Rules of Court, rule 1.100, and the Court accordingly continued this matter and the January 23, 2024 case status conference to March 14, 2024 at 9:00 a.m. in Department 6. The Court is aware of the nature of this matter and will not grant further continuances.

Calendar Line 2
Case Name: *Jia Wei Shi v. Ying Tuo, et al.*
Case No.: 21CV391656

Before the Court is Specially Appearing Defendant Ying Tuo's motion to quash service effectuated by publication under Code of Civil Procedure section 415.50. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises out of the allocation of marital properties after plaintiff Jia Wei Shi divorced Tuo. (FAC, ¶ 9-10.) Shi and Tuo are residents of the People's Republic of China. (FAC, ¶¶ 1-2.) During their divorce proceedings, Tuo refused to divide and distribute their marital properties located in the United States. (FAC, ¶ 10.)

Shi initiated this action on November 29, 2021, and, on September 29, 2023, filed an FAC, asserting: (1) breach of implied covenant of good faith and fair dealing; (2) breach of fiduciary duty; (3) negligence; (4) money had and received; (5) accounting; and (6) fraud-concealment. On December 8, 2023, Tuo filed the instant motion, which Shi opposes.

II. Legal Standard

Where a defendant moves to quash based on improper service of the summons and complaint, the burden is on the plaintiff to prove the validity of service by a preponderance of the evidence. (See *Boliah v. Superior Court (Bijan Fragrances, Inc*.) (1999) 74 Cal.App.4th 984, 991.) Plaintiff's filing of a proof of service creates a rebuttable presumption that service was proper, so long as the proof of service complies with applicable statutory requirements. (*Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1442; see also *Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1205.)

"A defendant is under no duty to respond in any way to a defectively served summons. It makes no difference that defendant had actual knowledge of the action. Such knowledge does not dispense with statutory requirements for service of summons." (*Kappel v. Bartlett* (1988) 200 Cal.App.3d 1457, 1466.) Notice does not substitute for proper service; until statutory requirements are satisfied, the court lacks jurisdiction over a defendant. (*Ruttenberg v. Ruttenberg* (1997) 53 Cal.App.4th 801, 808 (*Ruttenberg*).) The statutory provisions regarding service of process are liberally construed to effectuate service and uphold the jurisdiction of the court if actual notice has been received by the defendant;

substantial compliance is sufficient. (*Dill v. Berquist Construction Co*. (1994) 24 Cal.App.4th 1426, 1436.) Substantial compliance means actual compliance in respect to the substance essential to every reasonable objective of the statute. (*Id.* at 1439.)

III. Analysis

Shi first argues this motion is an improper motion for reconsideration. Code of Civil Procedure, section 1008, subdivision (a) permits a party to move for reconsideration under certain circumstances "within 10 days *after service* upon the party of written notice of entry of order". (See Code Civ. Proc., § 1008, subd. (a) (emphasis added).) The Court granted Shi's ex parte application for service by publication on September 26, 2023. Shi fails to provide any evidence that Tuo was ever served with the order. Thus, Shi cannot establish this is an improper motion for reconsideration.

Even if this were a late-filed motion for reconsideration, the Court has discretion to reconsider an order on its own motion under Section 1008, subdivision (c), and its "constitutionally derived authority." (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1096 (*Le Francois*) ("We cannot prevent a party from communicating the view to a court that it should reconsider a prior ruling… We agree that it should not matter whether the judge has an unprovoked flash of understanding in the middle of the night or acts in response to a party's suggestion. If a court believes one of its prior interim orders was erroneous, it should be able to correct that error no matter how it came to acquire that belief.") And, Tuo's argument that the Court improperly granted service by publication is well taken.

Code of Civil Procedure, section 415.50, provides:

> (a) A summons may be served by publication if upon affidavit it appears to the satisfaction of the court in which the action is pending that the party to be served cannot with reasonable diligence be served in another manner specified in this article and that either:
>
> (1) A cause of action exists against the party upon whom service is to be made or he or she is a necessary or proper party to the action.
>
> (2) The party to be served has or claims an interest in real or personal property in this state that is subject to the jurisdiction of the court or the relief demanded in the

action consists wholly or in part in excluding the party from any interest in the property.

(Code Civ. Proc., § 415.50, subd. (a).)

Tuo asserts he is a resident of China. (See MPA, 2:15; Complaint, ¶ 2.) Code of Civil Procedure Section 413.10, subdivision (c), provides that when the person is to be served outside the United States, a summons must be served as provided by the Code of Civil Procedure, as directed by the trial court, "or, if the court before or after service finds that the service is reasonably calculated to give actual notice, as prescribed by the law of the place where the person is served or as directed by the foreign authority in response to a letter rogatory. These rules are subject to the provisions of the Convention on the 'Service Abroad of Judicial and Extrajudicial Documents' in Civil or Commercial Matters (Hague Service Convention)." (*Inversiones Papaluchi S.A.S. v. Superior Court* (2018) 20 Cal.App.5th 1055, 1064 (*Inversiones*).)

Therefore, Tuo must be served under the Hague Convention, which mandates certain requirements for service of process of persons residing there. (See *Rockefeller Tech. Invs. (Asia) VII v. Changzhou SinoType Tech. Co. Ltd.* (2020) 9 Cal.5th 125, 134-136 (*Rockefeller*).) Article 2 of the Hague Convention mandates each contracting state, "shall designate a Central Authority which will undertake to receive requests for service coming from other contracting states and proceed in conformity with the provisions of Articles 3 to 6." (*Id*. at 136.) Service of process via China's Central Authority is mandatory. (*Ibid*.) "Failure to comply with the Hague Service Convention procedures voids the service even though it was made in compliance with California law. This is true even where the defendant had actual notice of the lawsuit." (*Id*. at 138, quoting *Kott v. Superior Court* (1996) 45 Cal.App.4th 1126, 1136 (*Kott*).)

In *Kott*, the petitioner sought a writ of mandate to reverse the trial court's order denying his motion to quash. (*Id*. at p. 1130.) The court addressed whether service of summons by publication is invalid under the Hague Service Convention once plaintiffs learned petitioner was a resident and citizen of Canada. (*Ibid*.) The court issued the writ because of the plaintiff's failure to exercise due diligence in locating petitioner in Canada before applying for authorization to serve by publication, stating:

> The only method of service under California law which does not require the transmission of documents abroad, and consequently does not implicate the Hague Service Convention, is service of summons by publication *where the party's address remains unknown* during the publication period despite the exercise of reasonable diligence.

(*Id*. at p. 1136.)

Here, Tuo argues the order for publication should not have been granted because Tuo's address in China was known to Shi. Thus, Tuo contends Shi did not establish reasonable diligence that he could not be served in another manner. In support, Tuo directs the Court to Exhibit 4 of Tony Lu's declaration in support of the application for service by publication. Exhibit 4 is Plaintiff's Request for Service Abroad of Judicial or Extrajudicial Documents, which contains an address for Tuo in China. (Lu's Decl., Exh. 4.) Shi states she began service through the Chinese Central Authority in January 2023, but she had not heard back at the time her opposition in the instant matter was filed. (Opp., 3:28- 4:2.) As a result, there is no evidence of an attempt to serve Tuo at his address in China. Shi contends this supports the need for service by publication, however, she does not provide any authority in support of this position. And the Court could not locate any authority that permits a plaintiff to circumvent the Hague Service Convention based on delays or lack of response by a country's Central Authority. Shi contends Tuo's various addresses results in his location being unknown, however, she fails to cite any authority in support of this contention. Shi also provides no evidence of efforts to follow up on the Request and thus, any efforts to serve Tuo in China.

Shi points to Tuo's ownership of a home at 10 Shaniko Cm. in Fremont, which is also the principal address for Tuo Ying Intellectual Property Services, Inc., and argues Tuo maintains dual residency status in the United States and China. (Lu Decl. in Opposition to Motion to Quash, Exh. 1.) Tuo is listed as an agent on the Business Search page for Tuo Ying Intellectual Property Services, Inc., which states his address is 8077 Hyannisport Dr. in Cupertino. (*Ibid*.) However, Lu also provides an Estimated Settlement Statement which lists a settlement date of November 13, 2018, and states that Shi and Tuo sold that property. (Lu Decl. in Opposition to Motion to Quash, Exh. 2.) Shi fails to provide any other evidence to establish that Tuo maintains his residence at either address or that he maintains

dual residency status. Therefore, Shi must serve Tuo in accordance with the Hague Convention, and the order granting the application to serve by publication was improper.

Thus, Tuo's motion to quash service of summons by publication is GRANTED. (See *Mix v. Yoakum* (1934) 138 Cal.App.290, 293 [stating "when an order directing service of summons by publication is inadvertently made or improperly made the court may quash the service of summons had under such an order].)

Calendar Line 3
Case Name: *Jonathan Holmes v. Karen Guarascio and Mathew Guarascio*
Case No.: 23CV414397

Before the Court is cross-defendant's, Jonathan Holmes, demurrer to Karen Guarascio's and Mathew Guarascio's (collectively, "Guarascios") cross-complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This dispute arises from removal of trees from the neighboring property. According to the Cross-complaint, Mr. Holmes and Guarascios are adjacent neighbors in San Jose. Two birch trees were located on Mr. Holmes' front lawn within three feet of the shared property line. They leaked saps and had dead limbs that fell and damaged Guarascios' vehicles. (Cross-complaint ¶¶ 9, 10.)

In February of 2022, Mathew Guarascio and Mr. Holmes met to discuss the problems that were caused by the tree closest to the property line. Mr. Holmes agreed to the removal of the tree but asked that the removal be delayed since he was in the process of marketing and selling his house. (Cross-complaint ¶ 11.)

By early June 2022, the Holmes property was not in the market and was not sold. Mathew Guaracio approached Mr. Holmes again and they discussed the tree problem. During this meeting, Mr. Holmes commented that it would be strange to leave one tree and therefore the parties agreed to remove both trees. The parties further discussed plant substitution and the necessity of grinding the tree stumps. Mr. Guarascio agreed to pay for the tree removals, replacement plants, and grinding of the stumps if it became necessary. The parties agreed to delay the removal until the winter season when the trees would become dormant. (Cross-complaint ¶¶ 12, 13, 14.)

Between January 13, 2023, and February 15, 2023, Mr. Guarascio attempted to contact Mr. Holmes to notify him of his intent to remove the trees but received no response. On February 15, 2023, Mr. Guarascio removed the birch trees believing he had Mr. Holmes' consent. Shortly after, the parties met outside of their home and Mr. Holmes expressed his anger about the removal of the trees. Mr. Guarascio expressed his willingness to plant replacements, but Mr. Holmes refused to discuss the matter. (Cross-complaint ¶¶ 15, 16.)

On February 21, 2023, Mr. Guarascio met Mr. Holmes's arborist and reiterated his willingness to replace the trees, but he was later told that Mr. Holmes refused his offer and was intent on going to court. On March 25, 2023, Guarascios received a letter from Mr. Holmes' attorney seeking recovery of damages in excess of $100,000.00. Subsequently, early April 2023, Mr. Holmes filed a police report for vandalism against Mr. Guarascio and filed his suit on April 10, 2023. (Cross-complaint ¶¶ 17, 18, 19)

On October 27, 2023, Guarascios filed their operative cross-complaint alleging causes of action for (1) breach of oral and implied in fact contract, (2) fraud, (3) violation of Penal Code § 148.5, and (4) intentional infliction of emotional distress.

II. Legal Standard

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court treats a demurrer "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

The court may, upon a motion or at any time in its discretion and upon terms it deems proper: (1) strike out any irrelevant, false, or improper matter inserted in any pleading; or (2) strike out all or any

part of any pleading not drawn or filed in conformity with the laws of California, a court rule, or an order of the court. (Code Civ. Pro. §§ 436(a)-(b); *Stafford v. Shultz* (1954) 42 Cal.2d 767, 782 ["Matter in a pleading which is not essential to the claim is surplusage; probative facts are surplusage and may be stricken out or disregarded"].)

"Liberality in permitting amendment is the rule, if a fair opportunity to correct any defect has not been given." (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1227.) It is an abuse of discretion for the court to deny leave to amend where there is any reasonable possibility that plaintiff can state a good cause of action. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) The burden is on the plaintiff to show in what manner plaintiff can amend the complaint, and how that amendment will change the legal effect of the pleading. (*Id*.)

III. Analysis

Mr. Holmes demurrers to the cross-complaint on the grounds that it fails to state sufficient facts constituting claims for breach of contract, fraud, violation of Penal Code §148.5, and intentional infliction of emotional distress.

A. First Cause of Action: Breach of Oral and Implied in Fact Contract

The elements of a breach of oral contract claim are the same as those for a breach of written contract: (1) existence of a contract; (2) its performance or excuse for nonperformance; (3) breach; and (4) damages. (*Stockton Mortgage, Inc. v. Tope* (2014) 233 Cal.App.4th 437, 453.) A cause of action for breach of an implied in fact contract has the same elements, except that the agreement is manifested in conduct rather than expressed words. (*Yari v. Producers Guild of America, Inc.* (2008) 161 Cal.App.4th 172, 182; *Maglica v. Maglica* (1998) 66 Cal.App.4th 442, 455.) A cause of action for breach of contract is subject to demurrer if "it cannot be ascertained from the pleading whether the contract is written, is oral, or is implied by conduct." (Code Civ. Proc., §430.10(g).)

Mr. Holmes contends the Cross-complaint (1) lacks facts establishing material terms for a contract (e.g., date of performance, manner of performance, availability of insurance, and plant replacement) and (2) fails to plead there is a contract because his discussion with Guarascios was merely an invitation to receive a proposal for the removal of the trees, and there was no meeting of the minds. First, whether there was a meeting of the minds is a fact question that cannot be resolved on demurrer.

The Cross-complaint is unclear as to whether Guarascios are alleging an oral contract, or a contract implied by conduct. The caption of the first cause of action refers to both breach of an oral contract and a breach of an implied in fact contract. In sections of the Cross-complaint, Guarascios base their contract claim on Mr. Holmes's express consent to removal of the trees, while in other sections they base their claim on Mr. Holmes's engagement in discussions about the aesthetics of keeping one tree, plant replacements, and grinding of the stumps. A cause of action for breach of contract is subject to demurrer if "it cannot be ascertained from the pleading whether the contract is written, is oral, or is implied by conduct." (Code Civ. Proc., §430.10(g).

Further, if Guarascios are alleging an oral contract, the Cross-complaint fails sufficiently allege its terms. An allegation of an oral agreement must "set[] forth the substance of its relative terms." (*Gautier v. General Tel. Co.* (1965) 234 Cal.App.2d 302, 305.) Guarascios vaguely allege a meeting with Mr. Holmes in February of 2022, when he consents to removal of one tree "after" he has marketed and sold his house. At best, this discussion formed an unenforceable open-ended illusory agreement since Mr. Holmes would lack any authority to consent to the removal of the trees after the sale of his house. The Cross-complaint fails to allege any specific facts showing when the parties met again, what was specifically agreed upon, and when performance was due.

Accordingly, the Court SUSTAINS Mr. Holmes' demurrer to the Cross-complaint's first cause of action WITH LEAVE TO AMEND within 20 days from the service date of the final order.

B. Second Cause of Action: Fraud

The elements of fraud are: "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." (*Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 184.) Fraud, including negligent misrepresentation, must be pleaded with specificity. (*Small v. Fritz Companies, Inc*. (2003) 30 Cal.4th 167, 184.) "The particularity demands that a plaintiff plead facts which show how, when, where, to whom, and by what means the representations were tendered." (*Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1469.)

Guarascios allege a meeting with Mr. Holmes in February of 2022 where the parties allegedly discussed the problems created by the tree closest to their shared property line. Mr. Holmes allegedly

consented to removal of this tree "after" he has marketed and sold his house. The house was not sold by June of 2022, and Mr. Guarascio again approached Mr. Holmes about the problem. However, the Cross-complaint fails to allege, with specificity, when the parties met again, who participated in the meetings, what was discussed, and what representations Mr. Holmes made to induce reliance.

Accordingly, Holmes' demurrer to the Cross-complaint's second cause of action for fraud is SUSTAINED WITH LEAVE TO AMEND within 20 days from the service of the final order.

C. Third Cause of Action: Violation of Penal Code § 148.5

Penal Code section 148.5 imposes criminal liability for reporting that a felony or misdemeanor has been committed, knowing the report to be false. This section is remedial. A person alleging injuries from a false police report may pursue civil damages under appropriate and applicable legal theories, such as, defamation, libel, abuse of process, or malicious prosecution.

In testing the sufficiency of the Cross-complaint against the demurrer, the Court is required to give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. "If the Cross-complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer. '[W]e are not limited to plaintiffs' theory of recovery in testing the sufficiency of their complaint against a demurrer, but instead must determine if the *factual* allegations of the complaint are adequate to state a cause of action under any legal theory. …' [Citations.]" (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38-39.)

Here, Guaracios allege (1) on March 25, 2023, they received a letter from Mr. Holmes's attorney seeking damages in excess of $100,000.00 and advising that a civil suit shall be commenced, (2) the suit was commenced on April 10, 2023, (3) a false police report is believed to have been filed in April of 2023, (4) an arrest warrant/notice to appear was issued by this Court on October 6, 2023, and (5) the report was maliciously done to harass and coerce payments. (Cross-complaint ¶¶ 18, 19, 34.) These allegations are inadequate for the Court to reasonably interpret what causes of action Guarascios are pursuing for the filing of the false police report.

Citing *Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, Mr. Holmes argues that irrespective of legal theories, any claim relating to his filing of the police report is privileged and barred

under Civil Code section 47(b). However, Civil Code section 47(b) was amended effective January 1, 2021 to state: "This subdivision does not make privileged any communication between a person and a law enforcement agency in which the person makes a false report that another person has committed, or is in the act of committing, a criminal act or is engaged in an activity requiring law enforcement intervention, knowing that the report is false, or with reckless disregard for the truth or falsity of the report." (Civ. Code § 47(b)(5).) The Court finds Mr. Holmes's interpretation that this exception applies only to activities that require law enforcement intervention and his report required no such intervention unpersuasive.

Nevertheless, as explained above, Guaracios fail to adequately allege a cause of action for violation of the Penal Code section 148.5. Accordingly, Mr. Holmes's demurrer to the Cross-complaint's third cause of action is SUSTAINED WITH LEAVE TO AMEND within 20 days from the service of the final order.

D. Fourth Cause of Action: Intentional Infliction of Emotional Distress

The elements for a claim of intentional infliction of emotional distress are: "(1) outrageous conduct by the defendant; (2) the defendant's intention of causing or reckless disregard of the probability of causing emotional distress; (3) the plaintiff's suffering severe or extreme emotional distress; and (4) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." The "outrageous" conduct "must be so extreme as to exceed all bounds of that usually tolerated in a civilized society." (*Yau v. Santa Margarita Ford, Inc*. (2014) 229 Cal.App.4th 144, 160-161.) Moreover, "the defendant must either intend his or her conduct to inflict injury or engaged in it with the realization that injury will result." (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050-1051 [citations and quotations omitted].)

In addition to the above-discussed litigation privilege, which is equally inapplicable to this claim for the reasons discussed, Mr. Holmes contends that Guarascios have merely alleged the elements of the claim in a conclusory fashion. The Court agrees. Accordingly, Mr. Holmes's demurrer to the Cross-complaint's fourth cause of action is SUSTAINED WITH LEAVE TO AMEND within 20 days from the service of the final order.

Calendar Line 6
Case Name: *Anna Demidchik, et al. v. Jun Lin*
Case No.: 22CV425111

Before the Court is defendant Jun Lin's special motion to strike plaintiffs Demidchik Law Firm, PC's ("Demidchik Law Firm") and Anna Demidchik, Esq.'s ("Demidchik") (collectively, "Plaintiffs") Complaint pursuant to Code of Civil Procedure section 425.16 ("Section 425.16"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows:

I. Background

This action arises out of Plaintiffs' representation of Lin in three matters from January 2021 through approximately July 2022. (Complaint, ¶ 1.) The parties entered several retainer agreements pursuant to which Lin agreed to pay Plaintiffs' attorney's fees and invoices when they came due. (Complaint, ¶¶ 2-3.) Lin was informed of the Plaintiffs' legal work on his behalf, and he regularly approved of the legal work and legal invoices on an ongoing basis. (Complaint, ¶ 4.) Lin paid under the agreements until he discharged Plaintiffs and hired new counsel to represent him in the underlying lawsuits, which are still pending. (Complaint, ¶ 5.)

After discharging Plaintiffs, Lin initiated an arbitration with the Santa Clara County Bar Association pursuant to the Mandatory Fee Arbitration Act ("MFAA"). (Complaint, ¶ 8.) On October 3, 2023, the fee committee issued a non-binding award in favor of Lin, in the amount of $477,510.92, plus the $7,500 filing fee, for a total award of $485,010.92. (Complaint, ¶ 10.) Plaintiffs gave Defendant notice that they rejected the award. (Complaint, ¶ 11.)

Plaintiffs initiated this action, on October 25, 2023, alleging claims for (1) declaratory relief; (2) breach of contract; (3) promissory estoppel; and (4) fraud/misrepresentation. On December 1, 2023, Lin filed the instant motion, which Plaintiffs oppose.

II. 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*).)

III. 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,* 240 Cal.App.4th at 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,* 2 Cal.5th at 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 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—one 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,* 1 Cal.5th at 392.)

Here, Defendant claims Plaintiffs brought this lawsuit as punishment for Defendant conducting a fee arbitration under the MFAA, which is codified in Business and Professions Code section 6200, et seq. Under the statutory scheme, if a client chooses to initiate an MFAA arbitration, the arbitration is

mandatory for the attorney. (Bus. & Prof. Code, § 6200, subd. (c).) The arbitrations must be administered by the local bar association where the subject legal services were substantially performed or where at least one of the attorneys involved had an office when the services were performed. (Cal. State Bar R., 3.505(A).) Therefore, the act of filing a MFAA petition, is an act of petitioning the government. (*Philipson & Simon v. Gulsvig* (2007) 154 Cal.App.4th 347, 358 (*Philipson*) [concluding an MFAA fee arbitration "is an official proceeding established by statute to address a particular type of dispute" and constitutes "petitioning" under California's anti-SLAPP law]; *Dorit v. Noe* (2020) 49 Cal.App.5th 458, 469 (*Dorit*) [concluding MFAA fee arbitrations qualify as official proceedings because they are established by statute and part of the State Bar's comprehensive licensing scheme for attorneys].)

Plaintiffs argue their Complaint is authorized by statute and reflects the process required to dispute arbitration awards pursuant to Business and Professions Code section 6204, subdivision (c). However, there is a difference between filing a lawsuit to challenge the arbitration award by seeking a trial de novo and filing a lawsuit to challenge the appropriateness of Lin's bringing the arbitration at all. Claims based on the first are permitted, while claims based on the latter are not. Indeed, the very purpose of the MFAA—to eliminate disparity in bargaining power between attorneys and clients attempting to resolve disputes about attorney fees—would be undermined if a client's initiation of and participation in the arbitration process subjected them to liability arising from their exercise of protected conduct. (*Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal. 557, 564-565.)

Philipson is instructive. There, the defendant, Gulsvig, retained the plaintiff, a law firm, to collect a judgment. (154 Cal.App.4th at 352.) The law firm obtained $85,000, $15,000 of which was designated towards attorney's fees, which the law firm kept, giving Gulsvig the rest. Gulsvig disputed the law firm's right to the $15,000 under the MFAA, the law firm disputed Gulsvig's right to the balance, and a third party claimed it had a right to the funds. The law firm filed a complaint against Gulsvig on the third party's behalf, Gulsvig filed a cross-complaint against the law firm, and the law firm filed a cross-complaint against Gulsvig for breach of contract, breach of the covenant of good faith and fair dealing, fraud, and misrepresentation, alleging Gulsvig breached her retainer agreement by

refusing to allow the firm to keep the $15,000. The trial court denied Gulsvig's anti-SLAPP motion, and the appellate court reversed, reasoning:

> Gulsvig points out that this is not a case in which she was ever in possession of the disputed $15,000. If she were, she could theoretically have breached her contract by simply refusing to pay it over to [the law firm]. That would have been nonpetitioning activity. But because [the law firm] was at all times in possession of the disputed funds, her alleged 'refusal to pay' required her to take some affirmative steps to dispute [the firm's] right to retain those funds. And she did by initiating State Bar arbitration.
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> . . .
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> [U]nder these circumstances, we must concur with Gulsvig that the breach of contract and breach of covenant claims… are based, at least in part on Gulsvig's petitioning activity. (*Id*. at p. 360-61.)

So too here. It is undisputed that Lin paid the attorney's fees and expenses until Plaintiffs were discharged. (Complaint, ¶ 6.) Therefore, the breach of contract and promissory estoppel claims arise out of Lin's attempt to recover that money by initiating State Bar arbitration. Plaintiffs allege Lin breached the contracts by "*reneging* on the contracts and *wrongfully claiming* the return of attorney's fees and costs…" (Complaint, ¶ 63 [emphasis added].) And, in their promissory estoppel claim, Plaintiffs allege "defendants, including [Lin], have reneged on their clear promises by claiming the *return* of recovery of the attorney's fees and costs…" (Complaint, ¶ 73 [emphasis added].) Lin thus meets his burden as to the second and third causes of action, and the burden shifts to Plaintiff to establish a "probability" that they will prevail on the claims. (Code Civ. Proc., § 425.16, subd. (b)(1).)

Plaintiffs' claims for declaratory relief and fraud/misrepresentation are based on the fee dispute, not Lin's filing of the arbitration. Thus, the Court does not need to consider the second prong of the anti-SLAPP analysis as to those claims. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 314 ["the defendant must present a prima facie showing that the plaintiff's cause of action arise from acts of the defendant taken to further the defendant's rights of free speech or petition in connection with a public issue. [Citation] Only if the defendant makes this prima facie showing does the trial court consider the second step of the section 425.16 analysis."].)

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. (See *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. (*Soukop,* 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.[1] (*Traditional Cat Assn., Inc. v. Gilbreath* (2004) 118 Cal.App.4th 392, 398.)

1. Second Cause of Action-Breach of Contract

To properly state a breach of contract claim, a plaintiff must allege: 1) the existence of a (valid) contract; 2) Plaintiff's performance or excuse for nonperformance; 3) Defendant's breach; and 4) damage to Plaintiff resulting from that breach. (*Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 228, citing *Careau & Co. v. Security Pacific Business Credit, Inc*. (1990) 222 Cal.App.3d 1371, 1388.)

[1] Business and Professions Code, section 6204, subdivision (e), provides, "the *awards and determinations of the arbitrators shall* not be admissible nor operate as collateral estoppel or res judicata in any action or proceedings." (Bus. & Prof. Code, § 6204, subd. (e) [emphasis added].) Therefore, Lin's reliance on the award is inadmissible. However, Lin's attorney declarations, which were presented in the arbitration, are admissible under the statute.

Plaintiffs contend the underlying matters are still pending, thus, "it would be inappropriate and breach attorney/client privileges for Plaintiffs to submit *substantial evidence* demonstrating the merits of their claims and likelihood of prevailing." (Opp., 11:10-13 [emphasis added].) However, Plaintiffs fail to submit *any* evidence to meet their burden. Plaintiff's claim is also untenable, since they allege Lin paid the attorney's fees and expenses until he discharged them. (Complaint, ¶ 2.) Thus, his alleged breach hinges upon his initiation of the arbitration process, which as the Court stated above, is protected conduct. Plaintiffs fail to meet their burden, and the motion is GRANTED as to the second cause of action.

2. Third Cause of Action- Promissory Estoppel

"The required elements for promissory estoppel in California are… (1) a promise clear and unambiguous; (2) reliance by the party to whom the promise is made; (3) his reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." (*Laks v. Coast Fed. Sav & Loan Assn.* (1976) 60 Cal.App.3d 885, 890; see also *US Ecology, Inc. v. State of California* (2005) 129 Cal.App.887, 901 (*US Ecology*).)

"The doctrine of promissory estoppel is set forth in section 90 of the Restatement of Contracts. It provides: 'A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.'" (*Signal Hill Aviation Co. v. Stroppe* (1979) 96 Cal.App.3d 627, 637 (*Signal Hill*).) "California recognizes the doctrine. 'Under this doctrine a promisor is bound when he should reasonably expect a substantial change of position, either by act or forbearance, in reliance on his promise, if injustice can be avoided only by its enforcement." (*Signal Hill*, *supra*, 96 Cal.App.3d at p. 637.) In essence, "the estoppel is a substitute for consideration." (1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §248, p. 250.) "Cases have characterized promissory estoppel claims as being basically the same as contract actions, but only missing the consideration element." (*US Ecology*, *supra*, 129 Cal.App.4th at p. 903.) "[P]romissory estoppel claims are aimed solely at allowing recovery in equity where a contractual claim fails for a lack of consideration, and in all other respects the claim is akin to one for breach of contract." (*Id.* at 904; see also *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation*

Authority (2000) 23 Cal.4th 305, 310 ("Promissory estoppel is 'a doctrine which employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced.' [Citation.]")

As the Court stated above, Plaintiffs fail to submit any evidence to meet their burden here. (See *Taus,* 40 Cal.4th at p. 714.) Thus, the motion is GRANTED as to the third cause of action.

IV. Attorney's Fees

Both parties request attorney's fees pursuant to the anti-SLAPP statute.

Under Section 425.16, subdivision (c), "(1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds the special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonably attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5." (Code Civ. Proc., § 425.16, subd. (c)(1).)

A defendant who partially succeeds on an anti-SLAPP motion is generally considered the prevailing party. (*Mann v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 340.) But only those fees and costs incurred in connection with the successful portion of the anti-SLAPP motion that is granted may be recovered. (*Jackson v. Yarbray* (2009) 179 Cal.App.4th 75, 82 (*Jackson*).)

Lin partially succeeded on the motion, and he is entitled to fees and costs incurred in connection with the second and third causes of action. (See *Jackson, supra,* 179 Cal.App.4th at p. 82.) However, defense counsel Todd Davis did not submit a declaration accounting for the recoverable fees. Moreover, because Lin can only recover fees associated with the second and third causes of action, the request is DENIED WITHOUT PREJUDICE so Davis can submit a declaration accounting for fees associated with the appropriate claims.

Given that the Court found Lin's motion to have merit, Plaintiffs' request for fees is DENIED. (Code Civ. Proc. § 128.5, subd. (b)(2); *Moore v. Shaw* (2004) 116 Cal.App.4th 182, 199 (*Moore*) (An anti-SLAPP motion is "totally and completely without merit for purposes of a finding of frivolousness under section 425.16, subdivision (c)(1), or section 128.5 only if any reasonable attorney would agree that the motion is totally devoid of merit."); *City of Alhambra v. D'Ausilio* (2011) 193 Cal.App.4th

1301, 1309 (A frivolous anti-SLAPP motion or appeal "raises no new permissible arguments that change the result.")