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: August 8, 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/

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	21CV382152	Fan Zhang et al vs Good Samaritan Hospital L.P.	Defendant's motion for summary judgment is GRANTED. Please scroll to line 1 for complete ruling. Court to prepare formal order.
2	21CV392042	LINDA GRAY vs FALCON TRADING COMPANY DBA LUCKY, a California Corporation et al	P. David Cienfuegos' motion to be relieved as counsel for Plaintiff Linda Gray is GRANTED. Court to use form of order on file.
3	23CV410398	Nasir Deen vs Purple Lotus	Defendant VMK, Inc. dba Purpose Lotus's motion to compel Plaintiff to provide further responses to special interrogatories and demand for production of documents is DENIED. Scroll to line 3 for complete ruling. Court to prepare formal order.
4	23CV415945	Christopher Stampolis vs Foothill de Anza Community College	Defendant Foothill De Anza Community College District's motion to set aside clerk's entry of default entered on February 16, 2024 is GRANTED. A notice of motion with this hearing date and time was served by electronic and U.S. mail on July 9 and 10, 2024, respectively. Plaintiff did not oppose the motion. "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) Code of Civil Procedure section 473(b) provides: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief . . .shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken." (See also *In re Marriage of Adkins* (1982) 137 Cal. App. 3d 68; (*Dill v. Berquist Construction Co.* (1994), 24 Cal. App. 4th 1426.) Where a party delays in seeking relief, the court properly denies the application. (*Pulte Homes Corp. v. Williams Mechanical, Inc.* (2016) 2 Cal. App. 5th 267 (dissolved corporation not entitled to relief from a default and default judgment because motion filed more than six months after entry of default); *Stafford v. Mach* (1998) 64 Cal. App. 4th 1174 (abuse of discretion to set aside default and default judgment where party did not take steps "within a reasonable time" to set aside its default and default judgment).) Here, Defendant believed the case to be at or near complete resolution after correspondence in June 2024. The Court has also been at several case management conferences where the parties reported they were in settlement discussions and had scheduled mediation in related Case No. 23CV427386. Default was entered on February 16, 2024, and Defendants sought a stipulation to set aside default in March and June, to no avail. The Court accordingly finds Defendant's failure to earlier respond to the complaint to be excusable neglect and its efforts to set aside the default timely. Defendant's motion is granted. Defendant is ordered to file its response to the complaint within 10 days of service of the formal order, which the Court will prepare.

5	23CV416035	Chris Letterman vs LG CREEK APTS, LLC et al	Plaintiff Chris Letterman's motion to quash the deposition subpoena for business records to CBRE, Inc. and for $3,210 in sanctions is GRANTED, IN PART. While discovery is broad, it is not without limits. The Discovery Act declares that "the court shall limit the scope of discovery" if it determines that the burden, expense, or intrusiveness of that discovery "clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." (Code Civ. Pro. § 2017.020(a); *Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 383-385.) Discovery management plainly lies "within the sound discretion of the trial court." (*People v. Sup. Ct.* (2001) 94 Cal.App.4th 980, 987; *see also Orange County Water Dist. v. The Arnold Eng'g Co.* (2018) 31 Cal.App.5th 96, 119 (judge's discretionary functions include managing discovery and trial proceedings before them).) In fact, case law teaches it is up to judges to make sure that the discovery process is not abused. (*See Calcor Space Facility, Inc.* v. *Superior Court* (1997) 53 Cal. App. 4th 216, 221 (discovery abuse is a spreading cancer; judges must be aggressive in curbing abuse; discovery statutes are prone to misuse absent judicial consideration for burden; courts must insist that discovery be used to facilitate litigation rather than as a weapon); *accord Obregon v. Superior Court* (1998) 67 Cal. App. 4th 424, 43.) The Court finds the subpoena here to seek largely irrelevant information. The Court agrees with Plaintiff that the only documents even potentially likely to lead to the discovery of admissible evidence are attendance records. The Court therefore orders Plaintiff's attendance records produced during the time Plaintiff was employed by the subpoenaed party. The Court declines to impose a time limitation for these attendance records, since Plaintiff's attendance pattern before and after taking the subject unit could lead to the discovery of admissible evidence regarding the impact of the alleged uninhabitability of the unit. Plaintiff's motion to quash is otherwise granted. Given the marginal relevance of this subpoena and the numerous attempts Plaintiff made to reach a compromise, the Court also finds it appropriate to order Defendant to pay Plaintiff $2,025 in sanctions within 30 days of service of the formal order. While the $450 dollar per hour rate is reasonable for this County and case type, the Court finds the 4.5 hours claimed for the motion appropriate, since no reply was filed or hearing held as of the preparation of this tentative. Court to prepare formal order.
6	23CV419871	JOHNNY CAYLOR vs California s Great America, LLC et al	This motion is continued to August 15, 2024 at 9 a.m. in Department 6 to be heard with motions to compel already set for that date.
7-8	23CV423612	John Le et al vs Thomas Vo	Defendants' demurrer is OVERRULED AND SUSTAINED, IN PART, WITH 20 DAYS LEAVE TO AMEND. Defendants' motion to strike is DENIED. Scroll to lines 7-8 for complete ruling. Court to prepare formal order.
9	23CV424872	Silverio Zuniga vs Alesia Murrieta et al	Partition Referee Matthew L. Taylor's motion for an order confirming the sale of real property is GRANTED. A notice of motion with this hearing date and time was served by U.S. and electronic mail on July 17, 2024. No opposition was filed. "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) The Court has also studied the motion and finds good cause to enter and order confirming the primary overbid sale and the backup sale. Mr. Taylor is ordered to prepare and submit a formal order. These orders will be reflected in the minutes.

10-11	24CV432739	Kelvin Chong vs Neuron Fuel, Inc. et al	Defendant Inspilearn, LLC's motion to set aside default and default judgment is GRANTED. Pursuant to Code of Civil Procedure section 473(b), "[t]he court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken." Here, Inspilearn's answer is not attached to the pleading. However, the Court may take judicial notice of the fact that Inspilearn attempted to file its answer on May 14, 2024, but default had been entered on May 13, 2024 (with an effective date of May 9, 2024), so the filing was rejected. (*See* Evid. Code §452(d).) Inspilearn's motion was also timely brought even when measured from May 13, 2024. The main opposition Plaintiff has to this motion to set aside appears to be a lack of competent evidence to demonstrate excusable neglect. First, that an attorney for another related entity may have had notice of the lawsuit, does not constitute actual notice to Inspilearn—particularly where the attorney declines to accept service. (*See, e.g., Rosenthal v. Garner* (1983) 142 Cal.App.3d 891, 893-895 (serving attorney from prior lawsuit insufficient for actual notice); *Tunis v. Barrow* (1986) 184 Cal.App.3d 1069, 1077.) Next, where, as here, Plaintiff will not suffer any prejudice other than having to try the case on the merits, courts are directed to liberally apply the broad remedial provisions of Code of Civil Procedure section 473(b). (*See Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 1401; *Shapiro v. Clark* (2008) 164 Cal.App.4th 1128.) Trial courts are further instructed to liberally apply these provisions when the Plaintiff immediately seeks default, as also appears to be the case here. (*See Shaprio v. Clark* (2008) 164 Cal.App.4th 1128.) With these principles in mind, the Court finds Inspilearn's evidence that its agent for service of process failed to forward the served documents to anyone at Inspilearn is sufficient to meet its slight burden to set aside default and default judgment under section 473(b). Thus, the motion to set aside default and default judgment is granted. Inspilearn is ordered to file its responsive pleading as a separate document within 10 days of service of the formal order, which the Court will prepare. Specially Appearing Defendant Think & Learn Private Limited's motion to set aside default is GRANTED. When the Court of Appeal found service on a foreign corporate defendant through a general manager proper in *Yamaha Motor Co., Ltd. v. Superior Court* (2009) 174 Cal. App. 4th 264, that court (a) had evidence of the relationship between the foreign parent subsidiary and (b) was not dealing with a situation where parties aligned as co-plaintiffs in litigation against both the parent and the subsidiary companies were using one another as general managers. Plaintiffs in these three cases admit that the only reason they brought separate lawsuits against the same corporate defendants is because their contracts required them to do so; they do not oppose consolidating these cases. It therefore strains credulity—in fact, the Court finds it appalling—that these parties would email each other their complaints then claim they had authority to accept service of process by email on behalf of a foreign entity. The Court will not participate in or otherwise take any action to condone this conduct. While Plaintiffs did not conceal their complaints from the corporate defendants, they plainly did not serve them on this Defendant. Default is accordingly set aside; this Defendant has not been served, thus no responsive pleading is due. Court to prepare formal order. The parties to Case Nos. 24CV432739, 24CV432742, and 24CV432743 were ordered to appear at this date and time and show cause why the three cases should not be consolidated for all purposes. It appears to the Court that no party opposes consolidation. The cases were filed separately solely to remain in compliance with the subject agreement. Accordingly, the Court orders these cases consolidated for all purposes. Case No. 24CV432739 shall be the lead case. Court will prepare a formal order.

12-13	24CV432742	Srinivas Mandyam vs Neuron Fuel, Inc. et al	Please see lines 10-11, above.
14-15	24CV432743	Krishna Vedati vs Neuron Fuel, Inc. et al	Please see lines 14-15, above.
16	2005-1-CV-034521	Columbia Credit Vs Negus	Off calendar.

Calendar Line 1
Case Name: *Fan Zhang, et al. v. Good Samaritan Hospital, L.P. et al.*
Case No.: 21CV382152

Before the Court is Defendant Good Samaritan Hospital, L.P.'s ("GSH") motion for summary judgment against Plaintiffs' Fan Zhang and Yiyan Shi as Guardian ad Litem for Linghan Zhang ("Plaintiff"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This is an action for medical negligence. Plaintiff alleges that on May 20, 2020, Defendants negligently placed an IV in the Plaintiff's foot, which contained a solution with a vesicant. (Complaint, p. 4.) The IV infiltrated, causing Plaintiff serious physical and emotional harm. (*Ibid*.)

On May 11, 2021, Plaintiff filed her Complaint, asserting one cause of action for negligence. On April 29, 2024, GSH filed the instant motion for summary judgment, which Plaintiff opposes.

II. Evidentiary Objections

A. Plaintiff's Objections

Plaintiff objects to GSH's separate statement, request for judicial notice, and supplemental evidence.

"The general rule of motion practice…is that new evidence is not permitted with reply papers…the inclusion of additional evidentiary matter with the reply should only be allowed in the exceptional case...and if permitted, the other party should be given the opportunity to response." (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-1538 [internal quotations omitted].) Reply evidence should not address substantive issues but only fill gaps in the evidence created by the opposition. (*Ibid*.)

Here, GSH's reply declaration directly responds to contentions Plaintiff raises in opposition. Plaintiff also filed an objection that includes a response, and she can further address the reply declaration at the hearing. The Court therefore exercises its discretion to consider the reply materials, and Plaintiff's objection to the defense counsel Faith Wolinsky's declaration in support of the reply and accompanying exhibit is OVERRULED. While Code of Civil Procedure section 437c does not authorize filing reply separate statements, such a statement is not evidence in any event, and Plaintiff's objection to that statement is also overruled.

B. GSH's Objections

GSH objects to the declaration of Dr. Eleanor Kenney and to a picture included in Plaintiff's opposition.

Objections 1-9 are OVERRULED. The Court declines to rule on objection 10 because matters in Plaintiff's opposition are not evidence. (*Alki Partners, LP v. DB Fund Services, LLC* (2016) 4 Cal.App.5th 574, 590 ["matters set forth in points and authorities are not evidence."].) Plaintiff failed to include the subject picture with its evidence and thus, it is not properly before the Court.

C. Request for Judicial Notice

GSH requests judicial notice of the following facts:

1. "IV infusion pumps are ubiquitous in health care"; and

2. An infusion pump is a medical device that delivers fluids, such as nutrients and medications, into a patient's body in controlled amounts. Infusion pumps are in widespread use in clinical settings such as hospitals, nursing homes, and in the home. In general, an infusion pump is operated by a trained user, who programs the rate and during of fluid delivery through a built-in software interface. Infusion pumps offer significant advantages over manual administration of fluids, including the ability to deliver fluids in very small volumes, and the ability to deliver fluids at precisely programmed rates or automated intervals. They can deliver nutrients or medications, such as insulin or other hormones, antibiotics, chemotherapy drugs, and pain relievers.

While Plaintiff objects to judicial notice of these facts on the ground that judicial notice was requested in support of GSH's reply, it does not appear Plaintiff disputes the facts themselves. Evidence Code section 452, subdivision (g), permits judicial notice of "facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452, subd. (h).) Both facts are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy and they are not being disputed by the parties. Thus, GSH's request for judicial notice is GRANTED.

III. Summary Judgment Standard

Any party may move for summary judgment. (Code of Civ. Proc., §437c, subd. (a); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code of Civ. Proc., 437c, subd. (c); *Aguilar, supra,* 25 Cal.4th at p. 843.) The object of the summary judgment procedure is "to cut through the parties pleading" to determine whether trial is necessary to resolve the dispute. (*Aguilar, supra,* 25 Cal.4th at p. 843.) Summary adjudication works the same way, except it acts on specific causes of action or affirmative defenses, rather than on the entire complaint. (§ 437c, subd. (f).) … Motions for summary adjudication proceed in all procedural respects as a motion for summary judgment.'" (*Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458, 464.)

The "party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact…" (*Aguilar, supra,* 25 Cal.4th at p. 850; see Evid. Code, § 110.) "A prima facie showing is one that is sufficient to support the position of the party in questions. (*Aguilar, supra,* 25 Cal.4th at p. 851.)

If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (Code of Civ. Proc., 437c, subd. (c); *Aguilar, supra,* 25 Cal.4th at p. 850.) A triable issue of material fact exists "if, and only if, the evidence would allow of reasonable trier of fact to find the underlying facts in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra,* 25 Cal.4th at p. 850, fn. omitted.) If the party opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Id*. at p. 843.)

"Another way for a defendant to obtain summary judgment is to 'show' that an essential element of plaintiff's claim cannot be established. Defendant does so by presenting evidence that plaintiff 'does not possess and cannot reasonably obtain, needed evidence' (because plaintiff must be allowed a reasonable opportunity to oppose the motion)." (*Aguilar, supra,* 25 Cal.4th at pp. 854-855.)

"Such evidence usually consists of admissions by plaintiff following extensive discovery to the effect that he or she has discovered nothing to support an essential element of the cause of action." (*Ibid.*)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences drawn therefrom." (*Aguilar, supra*, 25 Cal.4th at p. 856.) The moving party's evidence is strictly construed, while the opponent's is liberally construed. (*Id*. at 843.)

Pursuant to Code of Civil Procedure section 437c, GSH moves for summary judgment against Plaintiff, arguing Plaintiff cannot establish GHS failed to act within the standard of care and that it caused Plaintiff's injury.

IV. Analysis

A. First Cause of Action – Medical Negligence

"The elements of a cause of action for negligence are well established. They are '(a) a legal duty to use due care; (b) a breach of such legal duty; and (c) the breach as the proximate or legal cause of the resulting injury.'" (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917 (*Ladd*).) Medical negligence is still negligence.

> With respect to professions, their specialized education and training do not serve to impose an increased duty of care but rather are considered additional "circumstances" relevant to the overall assessment of what constitutes "ordinary prudence" in a particular situation. Thus the standard for professionals is articulated in terms of exercising "the knowledge, skill, and care ordinarily possessed and employed by members of the profession in good standing…" [Citation.]

(CACI, No. 500; *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 997-998.)

GSH's presents these as undisputed facts: Plaintiff filed her Complaint on May 11, 2021. (GSH's Separate Statement of Undisputed Facts ("UMF"), No. 1.) The Complaint's sole cause of action is for Professional Negligence/Medical Malpractice and it contends that GSH failed to comply with the standard of care when they placed an IV line in Plaintiff's foot and "failed to properly monitor Plaintiff following placement of the IV line in [her] foot, thereby negligently allowing the line to infiltrate and extravasate the tissue in [her] foot, causing permanent and severe damage to the

surrounding tissue." (*Ibid*.) On May 20, 2020, Plaintiff was born at GSH at 9:04. (GSH UMF, No. 2.) She was admitted to the neonatal intensive care unit ("NICU") for transient tachypnea of the newborn. (GSH UMF, No. 3.) A peripheral intravenous line ("PIV") was inserted into a vein in Plaintiff's right foot during the 1100 hour to administer starter total parenteral nutrition ("TPN"). (GSH UMF, No. 4.) The PIV was soft and patent when it was checked during the 1200 and 1300 hours. (GSH UMF, Nos. 5-6.) During the 1400 hour, the PIV was either not checked or checked but not charted. (GSH UMF, No. 7.) The PIV was soft and patent when it was checked during the 1500 and 1600 hours. (GSH UMF, Nos. 8-9.) During the 1700 hour, when the PIV was checked at 1730, it was no longer soft and patent. (GSH UMF, No. 10.) Infiltration had occurred and the PIV line was removed. (*Ibid*.) A stage 4 IV infiltration over the dorsum of Plaintiff's right foot occurred at the site of the PIV insertion. (GSH UMF, No. 11.)

1. **Breach/Standard of Care**

> The standard of care in malpractice cases is also well known. With unimportant variations in phrasing, we have consistently held that a physician is required to possess and exercise, in both diagnosis and treatment, that reasonable degree of knowledge and skill which is ordinarily possessed and exercised by other members of his profession in similar circumstances.

(*Landeros v. Flood* (1976) 17 Cal.3d 399, 408; see also CACI, No. 501; *Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 36.)

> Ordinarily, the standard of care required of a doctor, and whether he exercised such care, can be established only by the testimony of experts in the field. But to that rule there is an exception that is as well settled as the rule itself, and that is where "negligence on the part of a doctor is demonstrated by facts which can be evaluated by resort to common knowledge, expert testimony is not required since scientific enlightenment is not essential for the determination of an obvious fact."

(*Gannon v. Elliot* (1993) 19 Cal.App.4th 1, 6 [citations omitted]; see also CACI, No. 501; see also *Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 215 ["The standard of care against which the acts of a medical practitioner are to be measured is a matter peculiarly within the knowledge of experts; it

presents the basic issue in a malpractice action and can only be proved by their testimony, unless the conduct required by the particular circumstances is within the common knowledge of laymen."].)

GSH relies on the Declaration of Ashlee K. Fontenot, MSN, RNC-NIC, NNP-BC, CPXP ("Fontenot Decl.") to support its argument that it met the standard of care. After reviewing Plaintiff's GHS medical records, Fontenot opines that the placement of the PIV in Plaintiff's right foot and checking the PIV hourly to make sure it was soft and patent was within the standard of care. (Fontenot Decl., ¶¶ 2, 6-8.) Fontenot further opines that the fact that an infiltration occurred does not mean there was a breach in the standard of care because infiltrations "can, and do, occur in the absence of negligence." (Fontenot Decl., ¶¶ 11-12.) This is sufficient to meet GSH's initial burden. Thus, the burden shifts to Plaintiff to demonstrate a triable issue of material fact as to the standard of care.

Plaintiff relies on Kenney's declaration to argue there are triable issues of material fact as to GSH's negligence in placing and monitoring the PIV. (Opp., p. 4:27-28.) Kenny states she reviewed "the medical records for the mother's admission to [GSH], the newborn baby's medical records from the NICU, several of the baby's post discharge/follow up medical records, and [the filings pertaining to the instant motion]." (Kenney Decl., ¶ 4.) Notably, Kenney concedes both that there were no issues with the placement of the IV and that hourly IV checks met the criteria of the NICU protocol, but nevertheless opines that more frequent site checks were warranted given the solution Plaintiff was receiving. (Kenney Decl., ¶ 6.) While doing more might be preferable in many circumstances, the legal test is whether GHS met the standard of care. Kenny concedes that it did for both the IV placement and monitoring.

Kenny's remaining opinion that the nursing staff's failure to use an IV pump for the infusion breached the standard of care also fails to create a triable issue of fact. (Kenney Decl., ¶ 6, ln. 20-22.) Kenney opines that the lack of an IV pump "is a significant absence as this mechanism could have warned the nursing staff that an early infiltration was occurring, allowing the nursing staff to halt the infusion before irreversible damage had developed." (Kenney Decl., ¶ 6, ln. 23-25.) Kenney's opinion regarding the standard of care hinges on her conclusion that there was no evidence in the medical record that an IV pump was used for the infusion. However, this conclusion is undermined by Plaintiff's medical record, which shows that "infusion pump in use" was noted at 10:00, 14:00 and

17:30. (GSH's Exh. D.)[1] Thus, Kenney's declaration fails to create a triable issue of material fact regarding the standard of care.

2. **Causation**

Causation in a medical malpractice case requires expert testimony. To prevail on a medical negligence claim, the plaintiff must demonstrate that the defendant's breach of the standard of care caused injury to the plaintiff. (*Bolen v. Woo* (1979) 96 Cal.App.3d 944, 953.)

> The law is well settled that in a personal injury action causation must be proven within a reasonable medical probability based on competent expert testimony. Mere possibility alone is insufficient to establish a prima facie case. That there is a distinction between a reasonable medical "probability" and a medical "possibility" needs little discussion. There can be many possible "causes," indeed, an infinite number of circumstances that can produce an injury or disease. A possible cause only becomes "probable" when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action. This is the outer limit of inference upon which an issue may be submitted to the jury. Thus, proffering an expert opinion that there is some theoretical possibility the negligent act could have been a cause-in-fact of a particular injury is insufficient to establish causation. Instead, the plaintiff must offer an expert opinion that contains a reasoned explanation illuminating why the facts have convinced the expert, and therefore should convince the jury, that it is more probable than not the negligent act was a cause-in-fact of the plaintiff's injury.

(*Jennings v. Palomar Pomerado Health Systems, Inc.* (2004) 114 Cal.App.4th 1108, 1117 – 1118; internal citations and punctuation omitted.)

Fontenot opines "infiltrations can, and do, occur in the absence of negligence" and some causes can be "vein fragility in babies, their movements, physician examinations, repositioning by nurses, and parent handling of the baby." (Fontenot Decl., ¶ 11.) She further states that once an infiltration has occurred, some degree of tissue damage will occur, and the amount of damage can vary

[1] Exhibit D is attached to Wolinsky's declaration in reply.

depending on the rate of the infusion and the substance being infused. (Fontenot Decl., ¶ 12.) She thus concludes that "the fact this baby suffered some tissue damage does not mean the infiltration was negligently caused, or there was a delay in discovering the infiltration." (*Ibid*.) She further opines that "to a reasonable medical probability, no acts or omissions by the nursing staff at [GSH] caused or contributed to the infiltration that occurred in Plaintiff's right foot." (Fontenot Decl., ¶ 15.) This is sufficient to meet GSH's initial burden. Thus, the burden shifts to Plaintiff to demonstrate a triable issue of material fact as to causation.

Kenney opines that use of an IV pump and earlier observation would have "eliminated or minimized" the tissue damage, "resulting in little or no damage." (Kenney Decl., ¶ 6.) However, Kenney conceded the rate of "timed checks met the criteria of the NICU protocol." (*Ibid*.) And Kenney's conclusion hinges on the erroneous assumption that the nursing staff failed to use an IV pump. (See GSH's Exh. D.) Kenney does not identify any other basis for causation. In fact, Kenny states: "The staff removed the IV, notified the physician and followed the orders as directed. This was a very small child, so the amount of fluid which resulted from the infiltration did not have to be extensive to result in major tissue damage, which is exactly what happened." (Kenny Decl., ¶ 7.) On this record, there is no triable issue of fact as to causation. Again, Kenny indicates the staff did what they were supposed to do. Unfortunately, with this very delicate patient, even a short time of infiltration releasing a small amount of fluid can cause harm.

Thus, GSH's motion for summary judgment is GRANTED.

Calendar Line 3
Case Name: Nasir Deen vs Purple Lotus
Case No.: 23CV410398

Before the Court is Defendant VMK, Inc. dba Purple Lotus's motion to compel Plaintiff to provide further responses to special interrogatories and demand for production of documents.

Plaintiff, who filed this case in pro per and is now represented, claims he suffered psychological damage from consuming a cannabis edible he purchased from Defendant. On January 5, 2024, Defendant served special interrogatories and production demands on Plaintiff. Plaintiff timely served verified written responses and documents, the parties engaged in meet and confer conferences and Plaintiff produced additional discovery material, the parties engaged in even further conferences, the parties reached an impasse, and Defendant now moves to compel. The Court commends the parties for their efforts to resolve the remaining disputes; it is what the Code contemplates but is rarely done.

In opposition, Plaintiff avers that he offered to further supplement written discovery responses but maintains that producing the documents is an unnecessary invasion of his privacy given the thin reed of relevance this information has to this products liability case. Defendant wants the documents, as they might lead to the discovery of admissible evidence regarding Plaintiff's competence during the period when the statute of limitations was running and Plaintiff's claimed psychological damage.

While discovery is broad, it is not without limits. The Discovery Act declares that "the court shall limit the scope of discovery" if it determines that the burden, expense, or intrusiveness of that discovery "clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." (Code Civ. Pro. § 2017.020(a); *Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 383-385.) Discovery management plainly lies "within the sound discretion of the trial court." (*People v. Sup. Ct.* (2001) 94 Cal.App.4th 980, 987; *see also Orange County Water Dist. v. The Arnold Eng'g Co.* (2018) 31 Cal.App.5th 96, 119 (judge's discretionary functions include managing discovery and trial proceedings before them).) In fact, case law teaches it is up to judges to make sure that the discovery process is not abused. (*See Calcor Space Facility, Inc.* v. *Superior Court* (1997) 53 Cal. App. 4th 216, 221 (discovery abuse is a spreading cancer; judges must be aggressive in curbing abuse; discovery statutes are prone to misuse absent judicial consideration for

burden; courts must insist that discovery be used to facilitate litigation rather than as a weapon); *accord Obregon v. Superior Court* (1998) 67 Cal. App. 4th 424, 43.)

Plaintiff has put his psychological health at issue for the time after he consumed the edible he purchased from Defendant. Thus, information relating to Plaintiff's psychological health is plainly relevant, including whether he could care for himself and/or his "property." However, the Court finds Defendant's document demands far too broad.

First, the Court agrees with Plaintiff that the requests can encompass almost anything. Requests seeking information about caring for "property" can include anything from a toothbrush to a home, and those seeking "all contracts" entered in a particular year could include anything Plaintiff purchased using a credit card, including gas, groceries, or prescriptions.

The Court also fails to see why Defendant needs a list of Plaintiff's bank account numbers or a copy of his trust. The mere fact that Plaintiff had bank accounts and was able to use those accounts, created a trust, and owned property is a sufficient response. There are also other less intrusive and far more relevant ways for Defendant to dig deeper into these issues, including by examining Plaintiff's medical records, which records Plaintiff has produced.

Accordingly, Defendant's motion is DENIED.

Calendar Lines 7-8

Case Name: *John Le, et.al., v. Thomas Vo; and related cross-claims*
Case No.: 23CV423612

Before the Court are Cross-Defendants' John Le, Kim Truc Thi Nguen, Johnny Le, Johnson Le special motion to strike and demurrer to Plaintiff's complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises from discord between two neighbors. According to the cross-complaint, Cross-Complainant Thomas Vo, a resident and property owner at 3810 Pleasant Vista Drive, San Jose, CA ("Vo Property"), acquired his property in December 2020. (Cross-Complaint, ¶10.) Cross-Defendants John Le, Kim Truc Thi Nguyen, Johnny Le, and Johnson Le, own and reside at 3799 Pleasant Vista Drive and have an easement over the road, Pleasant Vista Drive, for ingress and egress as the road traverses across the Vo Property. (Cross-Complaint, ¶ 11.)

Shortly after moving in, Cross-Complainant was subjected to ongoing harassment by his neighbors, John Le, Kim Truc Thi Nguyen, Johnny Le, and Johnson Le. Specifically, Cross-Defendant John Le employed vulgar language in communications with Cross-Complainant, challenged Cross-Complainant to physical altercations, engaged in reckless driving and speeding on the Vo Property driveway, repeatedly attempted to initiate the towing of Cross-Complainant's vehicle, and damaged the Vo Property's retaining wall, garden bed, and garbage cans. (Cross-Complaint, ¶¶ 12-14, 17-18, 20-26.) As a result of these actions, Cross-Complainant obtained a Civil Harassment Restraining Order ("CHRO") against Cross-Defendant John Le in May 2021. This CHRO has since been extended to remain valid against Cross-Defendant John Le until November 9, 2026. Cross-Defendant John Le has violated the terms on multiple occasions. (Cross-Complaint, ¶16.)

John Le, Kim Truc Thi Nguyen, Johnny Le, and Johnson Le initiated this action against Thomas Vo on September 29, 2023, for declaratory relief, quiet title, and permanent injunctions. On April 8, 2024, Mr. Vo filed his operative cross-complaint alleging (1) continuing trespass, (2) private nuisance, (3) intentional infliction of emotional distress, and (4) declaratory relief.

II. Legal Standards

A. Demurrer

"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.)

B. Special Motion to Strike

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. Request for Judicial Notice

On reply, Cross-Defendants ask the Court to judicially notice Cross-Complainant's Request for Civil Harassment Restraining Orders (CHRO) against Cross-Defendant John Le, dated May 12, 2021, filed in case no. 21CH010046. Cross-Defendants contend this filing is demonstrates a sham pleading because it contradicts Cross-Complainant's allegation that it was Cross-Defendant Johnson Le who trespassed on his property with his father on May 7, 2021.

Under general rule of motion practice, new evidence or arguments raised for the first time in reply papers are generally not allowed and are only allowed in exceptional cases. (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-1538.) The court has discretion to accept new evidence in reply papers as long as the opposing party is given the opportunity to respond. (*Alliant Ins. Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1307-1308.)

Notwithstanding the Court's discretion, this document may be judicially noticed for its existence but not for the truth of the statements contained therein. (Evid. Code § 452(d); *Arce v. Kaiser Found. Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 482-484.) The hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable. (*Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal. App. 3d 369, 374.)

Accordingly, exercising its discretion, the Court GRANTS Cross-Defendant's request IN PART and judicially notices the existence of the document but not the truth of its statements.

IV. Demurrer Analysis

A. Continuing trespass

"Trespass is an unlawful interference with possession of property. The elements of trespass are: (1) the plaintiff's ownership or control of the property; (2) the defendant's intentional, reckless, or negligent entry onto the property; (3) lack of permission for the entry or acts in excess of

permission; (4) harm; and (5) the defendant's conduct was a substantial factor in causing the harm." (*Ralphs Grocery Co. v. Victory Consultants, Inc.* (2017) 17 Cal.App.5th 245, 261-262 [internal citations and quotations omitted].) "The actor's failure to remove from land in the possession of another a thing which he has tortiously ... placed on the land constitutes a continuing trespass for the entire time during which the thing is on the land and ... confers on the possessor of the land an option to maintain a succession of actions based on a theory of continuing trespass or to treat the continuance of the thing on the land as an aggravation of the original trespass." (*Mangini v. Aerojet-General Corp.* (1991) 230 Cal. App. 3d 1125, 1148-49.)

Cross-Defendants contend the cross-complaint fails to state sufficient facts showing unauthorized entry because, given Cross-Defendants' appurtenant easement rights, specificity is needed to show the location of trespass, and which acts of trespass were committed by which Defendant. In their reply, Cross-Defendants add (1) Johnny's name only appears in the caption, (2) allegation of trespass against Johnson is a sham since it contradicts Cross-Complainants' previous court filing naming John Le as the assailant, and (3) allegations of trespass against Kim are conclusory.

As a matter of law, Cross-Complainant cannot state a trespass cause of action against Cross-Defendants for the use of the Pleasant Vista Drive because an easement gives Cross-Defendants a limited privilege to use the road for access to their property. However, an action in trespass can exist if Cross-Defendants interfered with Cross-Complainants exclusive and unimpeded use of his own property in addition to his use of the easement. (*McBride v. Smith,* 18 Cal. App. 5th 1160, 1175, accord, *Vieira Enterprises, Inc. v. McCoy* (2017) 8 Cal.App.5th 1057.)

Here, the cross-complaint alleges:

- On May 7, 2021, Cross-Defendants John Le, and his son, Johnson Le, drove on the Vo Property on an ATV and assaulted Cross-Complainant by spitting on his face and then striking him in the face with a hammer. (Cross-complaint ¶ 13.)
- On May 8, 2021, John Le traveled on the Vo Property driveway in his car and damaged the retaining wall on the Vo Property. (Cross-complaint ¶ 14.)

- On March 3, 2022, Cross-Defendants John Le and Kim Truc Thi Nguyen trespassed on the Vo Property. (Cross-complaint ¶ 20.)
- Between April 2022 and November 2022, Cross-Defendants trespassed on the Vo Property on several occasions and attempted to tow Cross-Complainant's car from the "disputed Property" i.e., the Pleasant Vista Drive. (Cross-complaint ¶ 21.)
- On November 27, 2022, Cross-Defendant John Le narrowly missed hitting Cross-Complainant with his car while on Vo's Property. (Cross-complaint ¶ 22.)
- On June 6, 2023, Cross-Defendants' employee drove a truck and damaged the retaining wall at the Vo Property. (Cross-complaint ¶ 23.)
- On July 6, 2023, Cross-Defendant John Le trespassed on the Vo Property and repeatedly drove over the Cross-Complainant's garden bed, destroying it. (Cross-complaint ¶ 24.)

While these allegations are sufficient to plead a cause of action for trespass against Cross-Defendant John Le, they are insufficient to state a claim against Cross-Defendants Kim Truc Thi Nguyen, Johnny Le, and Johnson Le. Accordingly, the Court OVERRULES Cross-Defendant John Le's demurrer and SUSTAINS Cross-Defendants Kim Truc Thi Nguyen's, Johnny Le's, and Johnson Le's demurrers WITH 20 DAYS LEAVE TO AMEND.

B. Private Nuisance

The essential elements of private nuisance are: (1) Plaintiff owned/leased/occupied/controlled the property; (2) Defendant created a condition that (a) was harmful to health, (b) was indecent or offensive to the senses, (c) was an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or (d) unlawfully obstructed the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway; (3) this condition interfered with Plaintiff's use or enjoyment of his or her land; (4) Plaintiff did not consent to the condition; (5) an ordinary person would be reasonably annoyed or disturbed by Defendant's conduct; (6) Plaintiff was harmed; (7) Defendant's conduct was a substantial factor in causing Plaintiff's harm; and (8) the seriousness of the harm outweighs the public

benefit of defendant's conduct. (CACI No. 2021; Civ. Code §3479; *San Diego Gas & Electric Co. v. Supr. Ct.* (1996) 13 Cal.4th 893.)

Nuisance is "[a]nything which is…an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." (Civ. Code. §3479.) A private nuisance exists where the interference or obstruction is of the use of private land owned by the plaintiff. (*Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1041.) "So long as the interference is substantial and unreasonable, and such as would be offensive or inconvenient to the normal person, virtually any disturbance of the enjoyment of the property may amount to a nuisance. An interference need not directly damage the land or prevent its use to constitute a nuisance …" (*Id*.)

Here, Cross-Defendants contend the cross-complaint fails to allege a viable claim because (1) no facts are alleged supporting harm to Cross-Complainant's interest, (2) allegations of nuisance are conclusory, and (3) interference with property is neither substantial nor unreasonable.

Cross-Complainant's nuisance claim essentially stems from the same set of facts as his trespass claim—repeated and intentional acts of trespass interfere with Cross-Complainant's comfortable enjoyment of life and property. As explained above, while these allegations are sufficient to allege a nuisance claim against Cross-Defendant John Le, they are insufficient against Cross-Defendants Kim Truc Thi Nguyen, Johnny Le, and Johnson Le.

Accordingly, the Court OVERRULES Cross-Defendant John Le's demurrer and SUSTAINS Cross-Defendants Kim Truc Thi Nguyen's, Johnny Le's, and Johnson Le's demurrer WITH 20 DAYS LEAVE TO AMEND.

C. Intentional Infliction of Emotional Distress

"[T]o state a cause of action for intentional infliction of emotional distress a plaintiff must show: (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. Conduct, to be 'outrageous' must be so extreme as to exceed all bounds of that usually tolerated in a civilized society. To avoid a demurrer, the plaintiff must allege with 'great [ ] specificity' the acts which he or she believes are so extreme as to exceed all bounds of

that usually tolerated in a civilized community." (*Yau v. Santa Margarita Ford, Inc.* (2014) 229 Cal.App.4th 144, 160-161 [internal citations and quotations omitted].)

Defendants contend Cross-Complainant's cause of action is not viable because (1) the alleged conduct does not rise to the level of outrageousness that causes severe or extreme emotional distress, and (2) the claim is time-barred since Cross-Complainant does not/cannot assert Cross-Defendants committed any outrageous conduct in the last two years.

Intentional infliction of emotional distress has a two-year statute of limitations. (Code Civ. Proc., § 335.1; *Pugliese v. Superior Court* (2007) 146 Cal.App.4th 1444, 1450.) "A cause of action for intentional infliction of emotional distress accrues, and the statute of limitations begins to run, once the plaintiff suffers severe emotional distress as a result of outrageous conduct on the part of the defendant." (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 889.)

Importantly, "for a demurrer based on the statute of limitations to be sustained, the untimeliness of the lawsuit must clearly and affirmatively appear on the face of the complaint and matters judicially noticed." (*Coalition for Clean Air v. City of Visalia* (2012) 209 Cal.App.4th 408, 420.) "This will not be the case unless the complaint alleges every fact which the defendant would be required to prove if he were to plead the bar of the applicable statute of limitation as an affirmative defense.": (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 881.) "It is not sufficient that the complaint *might* be barred." (*Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 324-325.) "If the dates establishing the running of the statute of limitations do not clearly [and affirmatively] appear in the complaint . . . [t]he proper remedy 'is to ascertain the factual basis of the contention through discovery and, if necessary, file a motion for summary judgment[.]'" (*Ibid.*)

Here, Cross-Complainant alleges harassment, trespass, and nuisance dating from May 7, 2021 to September 12, 2023. Although, at first glance, Cross-Complainant's claim may be time-barred as it relates to the incidents that occurred in 2021, the Cross-complaint does not clearly and affirmatively establish the statute was not tolled. And Cross-Defendants' argument that they have not acted outrageously in the past two years is negated by Cross-Complainant's allegations that (1) on November 27, 2022, Defendant John Le narrowly missed striking him with his car while he was on his

own property and honked his horn several times before leaving, and (2) on July 6, 2023, Cross-Defendant John Le drove onto Cross-Complainant's property and repeatedly drove over his garden bed destroying it.

For the reasons stated above, the Court OVERRULES Cross-Defendant John Le's demurrer and SUSTAINS Cross-Defendants Kim Truc Thi Nguyen's, Johnny Le's, and Johnson Le's demurrer WITH 20 DAYS LEAVE TO AMEND.

V. Special Motion to Strike Analysis

Pursuant to Code of Civil Procedure section 425.16(e), subdivisions (1) and (2), Cross-Defendants move to strike the following portions of the cross-complaint on the grounds they arise from the valid exercise of his constitutional rights and Plaintiff cannot establish a likelihood of success on the merits:

- The entirety of Paragraph 18, p. 4, lines 11-16.
- The entirety of Paragraph 19, p. 4, lines 17-20.
- Paragraph 37, p. 7, lines 3-4, which alleges: "and making false reports to the Sheriff's department and San Jose Fire Department regarding Cross-Complainant."
- Paragraph 44, p. 8, lines 12-13, which alleges: "and making false reports to the Sheriff's department regarding Cross-Complainant."

"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.) 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).)

Here, Cross-Defendants contend they exercised their right to free speech and petition to the government when they filed a claim in Small Claims Court and made reports to the Sherriff's department, the Police Department, and the San Jose Fire Department. Therefore, the identified portions, which pertain to these protected activities, must be stricken pursuant to Section 425.16, subdivisions (e)(1) and (e)(2). In opposition, Cross-Complainant argues, (1) allegations referencing Cross-Defendants' Small Claim's Court filing and false reports to law enforcement authorities provide context and evidence of a pattern of harassment, (2) the nuisance and intentional infliction of emotional distress causes of action do not rise from Cross-Defendants' alleged protective activities, (3) Cross-Defendants' campaign of harassment, which includes making, false reports, is illegal and cannot be shielded under the Antic-SLAPP statute, and (4) there is a likelihood of prevailing on these claims.

"A claim arises from protected activity when that activity *underlies or forms the basis for the claim*. 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. [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. 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." (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1062-1063 [internal citations and quotations omitted].) "[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." (*Id.* at 1060.)

To determine whether the acts constitute the wrong itself or are 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.)

Cross-Defendants' filing a small claims action is a protected activity under the Code of Civil Procedure section 425.16(e)(1). And Cross-Defendants' reports to law enforcement agencies may be protected under section 425.16(e)(2). However, Cross-Complainant's nuisance and intentional emotional distress claims stem or arise from Cross-Defendant John Le's continuing trespass onto his property and continuing interference with the use and enjoyment of his property interest, not the small claims actions or allegedly false reports to law enforcement. "[A] claim may be struck only if the speech or petitioning activity itself is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1060.)

Accordingly, Cross-Defendants' special motion to strike is DENIED.