TENTATIVE RULINGS
LAW & MOTION CALENDAR
Friday, February 23, 2024 3:00 p.m.
Courtroom 19 –Hon. Oscar A. Pardo
3055 Cleveland Avenue, Santa Rosa

The tentative rulings will become the ruling of the Court unless a party desires to be heard. If you desire to appear and present oral argument, **YOU MUST NOTIFY** the Judge's Judicial Assistant by telephone at **(707) 521-6602**, and all other opposing parties of your intent to appear, **and whether that appearance is in person or via Zoom**, no later 4:00 p.m. the court day immediately preceding the day of the hearing.

If the tentative ruling is accepted, no appearance is necessary unless otherwise indicated.

TO JOIN ZOOM ONLINE:

Department 19 Hearings
MeetingID: 160-421-7577
Password: 410765
https://sonomacourt-org.zoomgov.com/j/1604217577

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PLEASE NOTE: The Court's Official Court Reporters are "not available" within the meaning of California Rules of Court, Rule 2.956, for court reporting of civil cases.

1. 23CV01109, Garcia Ceja v. American Honda Motor Co, Inc.

Plaintiff Adan Garcia Ceja ("Plaintiff") filed the complaint (the "Complaint") in this action against defendant American Honda Motor, Inc. ("Manufacturer" or "Defendant") and Does 1-10 under the Song-Beverly Consumer Warranty Act, Civ. Code § 1790 et seq. (the "Act"), relating to Plaintiff's 2021 Honda CR-V (the "Vehicle") purchased from Manly Honda ("Dealer"). The Complaint contains causes of action for: 1) breach of express warranty (against Manufacturer); 2) breach of implied warranty (against Manufacturer); and 3) violations of Civ. Code § 1793.2 (against Manufacturer). This matter is on calendar for the motion to compel arbitration filed Defendant pursuant to the Federal Arbitration Act ("FAA"), 9 USC §§ 1-16 and CCP § 1281.2. The motion has not drawn opposition. The Motion is **DENIED**.

There is a Proof of Service attached to the filed motion indicating that Plaintiff was served with the moving papers. However, there is no Proof of Service filed thereafter reflecting that Plaintiff was served with any notice of the hearing date assigned by the court clerk. Notice of the motion must be served at least 16 court days prior to the hearing. CCP § 1005. "Notices must be in writing, and the notice of a motion, other than for a new trial, **must state when**, and the grounds upon which it will be made, and the papers, if any, upon which it is to be based." CCP § 1010 (emphasis

added). Proof of service must be filed no later than five court days before the hearing. Cal Rule of Court Rule 3.1300. There is no proof of service reflecting the service of the Notice of Motion with the hearing date included. There being no evidence of the service of the notice of motion with the hearing date included, the motion is **DENIED.**

2. SCV-261461, Sangha v. Artap

Attorney Arthur Liu ("Counsel") seeks to be relieved as counsel for Defendants Michelle Artap and U.S. Property Management, LLC (together "Clients"). Clients were served by mail with the moving papers and notice of the hearing. Counsel confirmed the Clients' address for service by email within the 30 days preceding the hearing. There is no opposition. Counsel's motion to be relieved as counsel for Clients is **GRANTED**.

3-4. SCV-272155, Axos Bank v. Wilcox

Plaintiff, Axos Bank, FSB ("Plaintiff"), has filed a currently operative first amended complaint ("FAC") against defendants Ayn Wilcox and Alan Wilcox (together "Defendants"), and Does 1-10 with one cause of action for declaratory relief. Defendants have in turn filed a cross-complaint on August 7, 2023, alleging 14 causes of action derived from the underlying facts in this case. Defendants' cross-complaint names Plaintiff, AmeriHome Mortgage Company ("Amerihome"), BW Real Estate ("BW"), Western Alliance Bank ("Western", together with Amerihome and BW, "Additional Cross-Defendants") and Roes 1-10. Thereafter, Plaintiff dismissed the FAC.

There are two matters on calendar covered in this ruling. First, is Plaintiff's special motion to strike ("Anti-SLAPP motion") brought pursuant to Cal. Code Civ. Proc. ("CCP") § 425.16 to strike the First, Second, Third, Seventh, Tenth, and Twelfth Causes of Action from the Cross-Complaint. Second, is the Additional Cross-Defendants' Demurrer. Defendants have filed a first amended cross-complaint ("FAXC") on February 8, 2024, and therefore the Additional Cross-Defendants' Demurrer is MOOT. The Anti-SLAPP motion is GRANTED as to the Cross-Complaint.

I. Procedural Issues

The current procedural posture appears to strongly follow *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1055. Defendants have filed the Cross-Complaint alleging 14 causes of action and adding the Additional Cross-Defendants. On November 13, 2023, Plaintiff filed the instant Anti-SLAPP motion, and Additional Cross-Defendants filed the instant Demurrer. Defendants have filed an amended cross-complaint in response to the demurrer. While the Anti-SLAPP motion would normally render the filing of an amended complaint improper, in this unique set of circumstances, the Court finds that filing of the amended complaint is allowable.

"To begin with, SLAPP law is silent as to the issue of amendment." *Oakland Bulk and Oversized Terminal, LLC v. City of Oakland* (2020) 54 Cal.App.5th 738, 750. Generally, amendment of a complaint is prohibited while a special motion to strike under CCP § 425.16 is pending. See, e.g., *Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1073.

In contrast, a plaintiff is normally entitled to amend a complaint in response to a demurrer. CCP § 472. *JKC3H8 v. Colton* (2013) 221 Cal.App.4th 468, 477. The filing of an answer by a co-defendant is no bar to plaintiff's amendment in response to a demurrer by a defendant who has filed no answer. *Barton v. Khan* (2007) 157 Cal.App.4th 1216, 1221. However, amending in response to demurrer does not divest the Court of jurisdiction to determine whether an Anti-SLAPP motion has merit, and grant fees thereon. *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1056.

The policy surrounding the restriction on amendment as to Anti-SLAPP motions is inherently tied to the concept that a plaintiff may attempt to amend around the Anti-SLAPP motion through more artful pleading, drawing out the Anti-SLAPP process and countermanding the principles underlying that statute. See *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1055. However, this does not always outweigh the judicial efficiency in allowing a plaintiff to amend in response to a demurrer. *Id.*

Defendants have filed a first amended cross-complaint ("FAXC") in response to the demurrer by Additional Cross Complainants. This means that the Cross-Complaint has been preempted and is no longer an operative pleading. *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1056. The Court still considers the merits of Plaintiff's Anti-SLAPP motion for the purposes of determining whether to grant attorney's fees. *Id*.

II. The Cross-Complaint

The Cross-Complaint alleges 14 causes of action derived from Defendants' alleged harm suffered resulting from the facts underlying the Plaintiff's Complaint. Relevantly, the Cross-Complaint contains causes of action for negligence, breach of implied duty to perform with reasonable care, breach of fiduciary duty, breach of contract, violations of CCP § 726 and violations of Business and Professions Code § 17200 ("UCL Claims"), among others. Plaintiff is named as a cross-defendant to all causes of action. Defendants allege that the actions of Plaintiff is derive from the recordation of the Full Reconveyance and subsequent filing of this action. Cross-Complaint ¶ 34(a). The filing of this action allegedly breached the terms of the underlying loan contracts. Cross-Complaint ¶ 34(b). In advancing this action, Plaintiff requested attorney's fees and recorded a lis pendens in this case. Cross-Complaint ¶ 34(c)&(e). Defendants allege that this action is per se improper because Plaintiff no longer had an interest in the property when the action was filed, and that the action violates CCP § 726. Cross-Complaint ¶ 34(d)&(i). Plaintiff allegedly improperly concealed information from Defendants, failed to provide timely responses to Defendants consumer requests as required by statute, failed to deliver the promissory note for the property, and resulted in the threat of unlawfully imposed fees. Cross-Complaint ¶ 34(f), (h), (j) & (k). Plaintiff also allegedly seized the Defendants' mortgage escrow account. Cross-Complaint ¶ 34(g).

III. Evidentiary Issues

The Court notes that Plaintiff has filed a number of objections on reply. Whether the Court considers Defendants' evidence or not makes no impact on the result of the motion. The Court

takes permissive judicial notice of both the content of Plaintiff's Complaint and First Amended Complaint under Evid. Code § 452, but not the truth of any allegations therein.

IV. The Anti-SLAPP Motion

A. Legal Standard

CCP § 425.16(b)(1) provides that a cause of action against a person "arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue" shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. CCP § 425.16(e)(1) defines the foregoing phrase to include "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law." "In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." CCP § 425.16(b)(2).

A defendant has the initial burden to make a prima facie showing that the complaint "arises from" her exercise of free speech or petition rights. *Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 61; *Governor Gray Davis Committee v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449 at 458-59. "At the first step of the analysis, the defendant must make two related showings. Comparing its statements and conduct against the statute, it must demonstrate activity qualifying for protection. (See § 425.16, subd. (e).) And comparing that protected activity against the complaint, it must also demonstrate that the activity supplies one or more elements of a plaintiff's claims." *Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 887. If they meet that initial burden, the burden shifts to the plaintiff to establish a "probability" that he will prevail on the claims which are based on protected activity. CCP § 425.16(b).

To establish a "probability" of prevailing on the merits, the plaintiff must demonstrate that the claim is both legally sufficient and supported by a prima facie showing of facts sufficient to support a favorable judgment if the evidence submitted by the plaintiff is credited. *Navelier v. Sletten* (2002) 29 Cal.4th 82, 89. The court does not weigh credibility or comparative strength of the evidence in making this summary judgment-like determination. *See, e.g. Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291. But to demonstrate a probability of prevailing on the merits, the plaintiff must produce admissible evidence sufficient to overcome any privilege or defense that the defendant has asserted to the claim. *See, e.g. Flatley v. Mauro* (2006) 39 Cal.4th 299, 323 (Civil Code section 47(b) litigation privilege is a substantive defense the plaintiff must overcome to demonstrate probability of prevailing). In making its determination, the Court considers the pleadings, as well as supporting and opposing affidavits. CCP § 425.16(b). No finding of intent to chill free speech, or actual chilling of free speech, is required. *Equilon*, 29 Cal.4th 58-59.

A prevailing party on an anti-SLAPP motion to strike may be entitled to recover fees and costs but the standards for determining this differ depending on whether the prevailing party was the defendant moving to strike or the plaintiff opposing the motion to strike. The "prevailing

defendant" on a motion to strike a SLAPP suit "*shall* be entitled" to recover fees and costs and if a plaintiff prevails, the court "*shall* award costs and reasonable attorney's fees" to the plaintiff but only pursuant to CCP section 128.5 and *"[i]f* the court finds that [the motion] is frivolous or is solely intended to cause unnecessary delay." CCP section 425.16(c), emphasis added. In both cases, the award is *mandatory*. *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131; *Foundation for Taxpayer & Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1375, 1388 (fees are mandatory for prevailing plaintiff if court finds motion to be frivolous).

B. Protected Activity

Subdivision (e) sets forth the different types of activity which fall within the ambit of section 425.16. It states, in full,

> As used in this section, "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 or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (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.

"If the acts alleged in support of the plaintiff's claim are of the sort protected by the anti-SLAPP statute, then anti-SLAPP protections apply." *Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 887. "(W)here a cause of action alleges both protected and unprotected activity, the cause of action will be subject to section 425.16 unless the protected conduct is 'merely incidental' to the unprotected conduct." *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672.

C. Probability of Success on the Merits

"(T)he plaintiff must demonstrate that the complaint is 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." *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88–89, internal quotations omitted. Conclusory allegations will not protect insufficient claims from anti-SLAPP remedies. *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1423. Plaintiff is charged with producing "competent and admissible evidence" to meet this burden *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1236. The court must "accept as true all evidence favorable to the plaintiff and assess the defendant's evidence only to determine if it defeats the plaintiff's submission as a matter of law." *Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 699–700.

1. Litigation Privilege

The litigation privilege of CC section 47(b), bars a civil action for damages for communications made "[i]n any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to [statutes governing writs of mandate]."

On the other hand, section 47 (c) provides a *qualified* privilege to other communications *made without malice*, stating that this applies to "communication[s] ... to a person interested therein, (1) by one who is also interested or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information."

Moreover, to be protected, pre-lawsuit communications must relate to litigation either already pending or contemplated in good faith and under serious consideration. *Action Apt. Ass'n, Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1251; *A.F.Brown Electrical Contractor, Inc. v. Rhino Elec. Supply, Inc.* (2006) 137 Cal.App.4th 1118, 1128; *Feldman v. 1100 Park Lane Associates* (App. 1 Dist. 2008) 160 Cal.App.4th 1467. Additionally, the scope of protected activity under the Anti-SLAPP statute and the litigation privilege are similar but not identical. *Flatley v. Mauro* (2006) 39 Cal.4th 299, 323-325. Contract negotiations are not activities protected by the Anti-SLAPP statute, as litigation privilege arises when litigation is no mere possibility, but a genuinely contemplated proceeding. *Haneline Pacific Properties, LLC v. May* (2008) 167 Cal.App.4th 311, 319-320.

Briggs v. Eden Council for Hope & Opportunity (1999) 19 Cal.4th 1106, at 1115, held that "" '[j]ust as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b) [citation], ...such statements are equally entitled to the benefits of section 425.16.'"' See also, *Comstock, supra*. Similarly, the court in *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc*. (2004) 122 Cal.App.4th 1049, at 1058, noted that communications '"within the protection of the litigation privilege of Civil Code section 47, subdivision (b) [citation], ... are equally entitled to the benefits of [Code of Civil Procedure] section 425.16." ' "

2. Negligence

"The elements of a cause of action for negligence are: duty; breach of duty; legal cause; and damages." *Friedman v. Merck & Co.* (2003) 107 Cal.App.4th 454, 463. Whether a duty of care is owed is a question for the court and not a jury. *Ballard v. Uribe* (1986) 41 Cal.3d 564, 572. "Legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done." *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 434. "A financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." *Sheen v. Wells Fargo Bank, N.A.* (2022) 12 Cal.5th 905, 927 (Internal quotations omitted). Generally, once there is privity of contract between the lender and the consumer, the proper remedy is for breach of contract, and the application of tort law violates the economic loss rule. *Sheen v. Wells Fargo Bank, N.A.*

(2022) 12 Cal.5th 905, 937 ("[*Biakanja v. Irving* (1958) 49 Cal.2d 647]) does not displace the contractual economic loss rule when that rule squarely applies.").

3. Breach of Implied Duty to Perform With Reasonable Care

"Accompanying every contract is a common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of the contract. The rule which imposes this duty is of universal application as to all persons who by contract undertake professional or other business engagements requiring the exercise of care, skill and knowledge; the obligation is implied by law and need not be stated in the agreement." *Holguin v. Dish Network LLC* (2014) 229 Cal.App.4th 1310, 1324 (internal quotations and citations omitted). Breach of the implied duty also requires a jury to find all the other elements for breach of contract. See California Civil Jury Instruction 328.

4. Breach of Fiduciary Duty

"The elements of a claim for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) its breach, and (3) damage proximately caused by that breach." *Mendoza v. Cont'l Sales Co.* (2006) 140 Cal.App.4th 1395, 1405; *Gutierrez v. Girargi* (2011) 194 Cal.App.4th 925, 932. "Technically, a fiduciary relationship is a recognized legal relationship such as guardian and ward, trustee and beneficiary, principal and agent, or attorney and client [citation], whereas a 'confidential relationship' may be founded on a moral, social, domestic, or merely personal relationship as well as on a legal relationship. [Citations.] The essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party." *Hudson v. Foster* (2021) 68 Cal.App.5th 640, 663 (internal quotations omitted). There are four elements to establishing a confidential relationship. "1) The vulnerability of one party to the other which 2) results in the empowerment of the stronger party by the weaker which 3) empowerment has been solicited or accepted by the stronger party and 4) prevents the weaker party from effectively protecting itself." *Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257, 272. "The vulnerability that is the necessary predicate of a confidential relation, and which the law treats as 'absolutely essential' (Citation), usually arises from advanced age, youth, lack of education, weakness of mind, grief, sickness, or some other incapacity." *Richelle, supra,* 106 Cal.App.4th at 273. "Before a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law." *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 386 (internal quotations omitted). In the borrower-lender context, courts have consistently found that the relationship between the parties does not constitute a fiduciary relationship. *Copesky v. Superior Court* (1991) 229 Cal.App.3d 678, 690; *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1400.

5. Breach of Contract

The elements of a cause of action for breach of contract are: "'(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff.'" *See Coles v. Glaser* (2016) 2 Cal.App.5th 384, 391; quoting *Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1614, 126 Cal.Rptr.3d 174.

6. CCP § 726

"CCP § 726, commonly referred to as the single action rule, mandates one form of action for the recovery of any debt secured by a mortgage or deed of trust on real property. The single action must be a foreclosure." *In re Prestige Ltd. Partnership-Concord* (Bankr. N.D. Cal. 1998) 223 B.R. 203, 210, *subsequently aff'd* (9th Cir. 2000) 234 F.3d 1108. "The purpose of (CCP § 726) is to limit a secured creditor to a single suit to enforce its security interest and collect its debt and to compel the exhaustion of all security before a monetary deficiency judgment may be obtained against the debtor." *National Enterprises, Inc. v. Woods* (2001) 94 Cal.App.4th 1217, 1221.

7. UCL Claims

Business & Professions Code section 17200, prohibits "any unlawful, unfair or fraudulent" business practices. Bus. & Prof. Code §17200. "Since section 17200 is [written] in the disjunctive, it establishes three separate types of unfair competition" and "prohibits practices that are either 'unfair' or 'unlawful,' or 'fraudulent.'" *Pastoria v. Nationwide Ins.* (2003) 112 Cal.App.4th 1490, 1496; see also *CelTech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, (1999) 20 Cal.4th163, 180 (1999).

A party may bring a section 17200 claim only if he or she shows that he or she "suffered injury in fact and has lost money or property as a result of the unfair competition." Bus. & Prof. Code § 17204. To have standing, a plaintiff must sufficiently allege that (1) he has "lost 'money or property' sufficient to constitute an 'injury in fact' under Article III of the Constitution" and (2) there is a "causal connection" between the defendant's alleged UCL violation and the plaintiff's injury in fact. See, *Rubio v. Capital One Bank* (9th Cir. 2010) 613 F.3d 1195, 1203-1204. "A private plaintiff must make a twofold showing: he or she must demonstrate injury in fact *and* a loss of money or property caused by unfair competition." *Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1590.

The UCL incorporates other laws and treats violations of those laws as unlawful business practices independently actionable under state law. *Chabner v. United Omaha Life Ins. Co.* (9th Cir. 2000) 225 F.3d 1042, 1048. Violation of almost any federal, state, or local law may serve as the "unlawful" basis for a UCL claim. *Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 838-839. "With respect to the *unlawful* prong, virtually any state, federal or local law can serve as the predicate for an action under section 17200." *People ex rel. Bill Lockyer v. Fremont Life Ins. Co.* (2002) 104 Cal.App.4th 508, 515 (internal quotations omitted). In addition, a business practice may be "unfair or fraudulent in violation of the UCL even if the practice does not violate any law." *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 827.

Where plaintiff's UCL claim is entirely derivative of other fatally flawed causes of action, the UCL claim also fails. See, *Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 277 [finding

plaintiff's "UCL claim is derivative of [his] defamation cause of action, that is, it is based on the same [allegations] and likewise that cause of action stands or falls with that underlying claim."]. "A breach of contract may ... form the predicate for Section 17200 claims, *provided it also constitutes conduct that is 'unlawful, or unfair, or fraudulent.*" *Puentes v. Wells Fargo Home Mortgage, Inc.* (2008) 160 Cal.App.4th 638, 645 (internal quotations omitted, emphasis original).

V. Anti-SLAPP Motion

A. Determination of Protected Activity

Here initially, the burden is on Plaintiff to show that the causes of action within the Cross-Complaint are reliant on allegations of protected activity. Plaintiff makes such a showing. The Cross-Complaint repeatedly references not just actions taken in preparation for this litigation, but the litigation itself. The filing of this case is core to the causes of action at issue. Defendants attempt to aver that the protected activity receives scant reference in the Cross-Complaint, only being referred to in Cross-Complaint ¶¶ 34, 36, and 51. This fails to be persuasive. Under each cause of action, the Cross-Complaint repeatedly references some variation on the facts "alleged above" without providing particular citations to what facts constitute the cause of action. At demurrer this may be sufficient, but in response to an Anti-SLAPP motion Defendants cannot hide behind vague pleading practices in an effort to shield allegations which rely on protected activity. Plaintiff has shown that the allegations are at least in part dependent upon protected activity. Certainly, there is adequate cause to show the protected activity is not "merely incidental" to the causes of action. *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672. As such, the alleged actions are clearly subject to determination as protected activity, and therefore is subject to CCP § 425.16. *Ibid*. While Defendants aver that the protected conduct is not "the entirety of the wrongs" suffered, this is not sufficient to prevent mixed actions from being determined protected activity. Therefore, Plaintiff has met their burden at the first stage of the motion, and the burden shifts to Defendants to show that they have a probability of prevailing on the merits of the claims.

B. Probability of Prevailing

Defendants fail to meet their burden to show a probability of prevailing. The burden here is for Defendants to demonstrate that their complaint is adequately plead and they can produce admissible evidence to substantiate their claims. *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88–89.

First, Defendants argue that they will prevail on the claims related to the lis pendens because the underlying FAC was not premised on claims bearing upon the right to title or possession of the property. The Court's ruling on expunging lis pendens was explicit in its repudiation of this point. The order on Defendants' motion found in no uncertain terms that "Plaintiff's claims go to title." See Court's 10/3/2023 Order After Hearing, pg. 8:14. The reiteration of an argument already rejected by the Court, relying on the result where the Court expunged the lis pendens for procedural reasons and without prejudice to the lis pendens being recorded again. *Id*. at pg. 8:15-16. This is unavailing.

Defendants fail to elucidate how the terms of the notice provision of the loan contract, (see Cross-Complaint Exhibit 1 ["Loan Contract"], ¶ 20 ["Notice Provision"]) applies to the Complaint or the FAC. The plain language of the Notice provision clearly indicates that the obligation to confer arises before Plaintiff can file **any case alleging any breach of duty by Defendants.** Neither the Complaint nor the FAC contains such allegations. Rather, each lays out the error by Plaintiff and requests declaratory relief so both Plaintiff and Defendants may "ascertain their rights and obligations with respect to the MORTGAGE LOAN" (FAC ¶ 16), or that the full reconveyance be cancelled (Complaint ¶ 9). In examining the substance of the Plaintiff's pleadings, and the Notice Provision, it is clear that such provision does not apply in the odd circumstances of this case. Defendants provide no explanation of how the Notice Provision applies to the unique facts of this case. The Notice Provision not being applicable, any argument of similarity to *Navellier v. Sletten* (2002) 29 Cal.4th 82, 94 is inapposite.

While this covers the full argument provided by Defendants in opposition, Plaintiff raises several points which merit mention in arguing that the Cross-Complaint fails to make allegations sufficient to meet the pleading standards of the applicable causes of action. Defendants provide no argument in response to these contentions. While it is unnecessary based on Defendants' failure to meet their shifted burden, Plaintiff's points further support granting the motion.

- As to the negligence cause of action, Defendants fail to allege all the facts necessary to support its elements. Particularly, the Court notes that Defendants have failed to plead a cognizable duty owed by Plaintiff. Equally applicable to this cause of action is the contention that litigation privilege protects the right to file the instant case, and Defendants produce no evidence to overcome the defense asserted. *Flatley v. Mauro* (2006) 39 Cal.4th 299, 323.

- Defendants' cause of action for breach of fiduciary duty has again failed to plead facts which would cause the Court to conclude a fiduciary duty is owed by Plaintiff to Defendants. No duty being owed, the cause of action fails.

- Defendants' breach of contract claim fails because, as is noted above, Plaintiffs have not provided any showing or argument how the contract was breached beyond the Notice Provision. The allegations in combination with reading the Complaint and FAC do not place before the Court any evidence that the Notice Provision was breached. Similarly, Plaintiff does not show all the elements of the breach of implied duty, and therefore the cause of action is left unsupported.

- As to the cause of action for violations of CCP § 726, again Defendants have failed to plead the cause of action and offer no meritorious argument in support. CCP § 726 requires that actions to recover a debt that is secured by a deed of trust requires that action take the form of foreclosure. However, the Complaint and FAC make no request for collection of the underlying loan. Rather, it requests declaratory relief. The Court finds that CCP § 726 is entirely inapplicable to the Plaintiff's pleadings, and therefore the cause of action under this provision is inadequately pled.

- Defendants provide no support for their UCL claims, and therefore they have failed to demonstrate that the allegations meet any of the three required prongs. Defendants provide no evidence to support an inference that the conduct of Plaintiff was unfair as defined by the UCL. Defendants also fail to produce evidence of statutory violations, and as such there is no support for a claim of unlawful behavior as elucidated in the Cross-Complaint.

All of the above being considered, the motion to strike is GRANTED as to the Cross-Complaint. However, as noted, the Cross-Complaint has superseded the FAXC. The Court finds that the FAXC remains an operative pleading given that it has been superseded. *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1054. As a preliminary consideration the Court notes that the reiteration of the same causes of action may raise some argument that a subsequent motion to strike under CCP § 425.16 is untimely. Given the procedural posture of the case, such an argument would be ill taken. The Court has struck the relevant causes of action from the Cross-Complaint, and as such the allegations are "fresh" as alleged in the FAXC. Even if this were not the posture, given the results of this motion, the Court has adequate cause to allow "late" filing of the special motion to strike running from the Cross-Complaint. The time to file any subsequent special motion to strike runs from the service of the FAXC.

The Anti-SLAPP Motion is **GRANTED**.

The motion being granted, granting attorney's fees are mandatory. Plaintiff requests $12,937.50. Of this, two hours is for the hearing on this motion which has yet to occur at $345 per hour. The request for speculative time is not actual costs, and therefore there is no basis to grant those fees. Plaintiff's request for fees is GRANTED in the amount of $12,247.50. Defendants are to pay this amount to Plaintiff within 45 days of notice of this order.

VI. Conclusion

Based on the foregoing, the Anti-SLAPP Motion directed at the Complaint is **GRANTED** and the Demurrer is MOOT.

Plaintiffs' counsel shall submit a written order to the Court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b).

5. SCV-272555, Northern v. Building Repair & Management, Inc.

Plaintiff James Northen ("Plaintiff") filed the complaint against defendants Building Repair & Management, Inc. ("BRM"), Christian Andersen ("Andersen" together with BRM, "Defendants") and Does 1-20 arising out of Defendants' alleged negligence resulting in personal injuries (the "Complaint"). This matter is on calendar for the motion by Plaintiff to deem admitted the matters set forth in its first set of requests for admission as directed to BRM pursuant to Cal. Code Civ. Proc. ("CCP") § 2033.280(b).

Cal. Code Civ. Proc. ("CCP") § 2033.280(a) provides in relevant part that if a party to whom requests for admission are directed "fails to serve a timely response," the party to whom the requests are directed waives any objection. CCP § 2033.280(b) provides that "[t]he requesting party may move for an order that the genuineness of any documents and the truth of any matters specified in the requests be deemed admitted, as well as for a monetary sanction." CCP § 2033.280(c) provides that the court "shall make this order" unless it finds that the party to whom the requests have been directed has served a proposed response in substantial compliance with section 2033.220 before the hearing on the motion.

The Motion is accompanied by a declaration that the initial service of the Requests for Admission occurred on October 9, 2023. See Declaration of Johann Hall ("Hall Decl.") ¶ 2. BRM substituted counsel on October 17, 2023. *Id.* at ¶ 3. Plaintiff's counsel confirmed that BRM's new counsel was appraised of the outstanding discovery. *Ibid*. Plaintiff sent subsequent meet and confer letters on November 28, 2023 and December 6, 2023. *Id.* at ¶ 4-5. No response was received. *Id.* at ¶ 5. The instant motion was filed January 5, 2023.

BRM has filed an opposition to this motion averring that responses and verifications have been tendered to Plaintiff, and therefore there is no basis to deem admissions admitted. The opposition does not attach the responses. Therefore, the Court cannot assess whether they are sufficiently substantive to meet the requirements of the statute. However, Plaintiff has not filed a reply claiming the responses are deficient. The Court will therefore take BRM's counsel good faith representation that responses to the request for admissions have been served prior to the hearing and that Plaintiff is in receipt of the same and has found them to be sufficient.

The Motion is therefore **MOOT**.

CCP § 2033.280 (c) provides that a monetary sanction "shall" be imposed against the party "whose failure to serve a timely response to requests for admission necessitated this motion." The purpose of monetary sanctions is to mitigate the effects of the necessity of discovery motions and responses on the prevailing party. Plaintiff seeks $810.00, representing attorney work of one hour at $450 per hour, paralegal work of two hours for the motion at $150 per hour, plus $60 in filing fees. Hall Decl. ¶ 8. The court finds both the time expended and the rates reasonable for a total sanctions award in the amount of $810.00. BRM are to pay $810.00 to Plaintiff within 30 days of this order.

Plaintiff's counsel shall submit a written order to the Court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b).

6. SCV-273386, Nellessen v. LoanCare LLC

This matter is on calendar for the application by Matthew Petersen to appear pro hac vice on behalf of Defendant LoanCare, LLC, in coordination with California-based counsel. Defendant brings this motion pursuant to California Rule of Court("CRC"), Rule 9.40. There is no opposition. However, there is also no proof of service indicating that either the other parties to the case, nor the State Bar have been served with notice of the hearing date, as is required by

CRC Rule 9.40 (c)(1). That provision particularly requires notice of the hearing be given in accordance with CCP § 1005.

The Declaration of Courtney Thompson also states that "On December 8, 2023, I provided notice of this application to the State Bar of California at its San Francisco address and caused the required $50.00 application fee to be paid. A copy of the notice and application fee are attached to this Declaration as **Exhibit A**." *Id*. at ¶ 4. There is no Exhibit A attached.

Petitioner is REQURIED TO FILE the (1) Proof of Service indicating that other parties in this action and the State Bar have been served with this application, and (2) Exhibit A to the Declaration of Courtney Thompson. Petitioner is also REQUIRED TO APPEAR at the hearing.

****This is the end of the Tentative Rulings.*****