SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY
MARTINEZ, CA
DEPARTMENT 39
JUDICIAL OFFICER: EDWARD G WEIL
HEARING DATE: 02/06/2025

GENERAL INSTRUCTIONS FOR CONTESTING TENTATIVE RULINGS IN DEPT. 39

NOTE PROCEDURE CAREFULLY

The tentative ruling will become the Court's ruling unless by 4:00 p.m. of the court day preceding the hearing, counsel or self-represented parties email or call the department rendering the decision to request argument and to specify the issues to be argued. Calling counsel or self-represented parties requesting argument must advise all other affected counsel and self-represented parties by no later than 4:00 p.m. of their decision to appear and of the issues to be argued. Failure to timely advise the Court and counsel or self-represented parties will preclude any party from arguing the matter. (*Local Rule* 3.43(2).)

Note: In order to minimize the risk of miscommunication, parties are to provide an **EMAIL NOTIFICATION TO THE DEPARTMENT OF THE REQUEST TO ARGUE AND SPECIFICATION OF ISSUES TO BE ARGUED**. Dept. 39's email address is: dept39@contracosta.courts.ca.gov. Warning: this email address is not to be used for any communication with the department except as expressly and specifically authorized by the court. Any emails received in contravention of this order will be disregarded by the court and may subject the offending party to sanctions.

Submission of Orders After Hearing in Department 39 Cases

The prevailing party must prepare an order after hearing in accordance with CRC 3.1312. If the tentative ruling becomes the Court's ruling, a copy of the Court's tentative ruling **must be attached to the proposed order** when submitted to the Court for issuance of the order.

Law & Motion

1. 9:00 AM CASE NUMBER: C22-02161
CASE NAME: LAKEITHIA JOHNSTON VS. GEORGIA-PACIFIC GYPSUM LLC
***HEARING ON MOTION IN RE: PRELIMINARY APPROVAL OF CLASS SETTLEMENT**
FILED BY: JOHNSTON, LAKEITHIA
****TENTATIVE RULING:****

Hearing required on a specified issue.

Plaintiff Lakeithia Johnston moves for preliminary approval of her class action and PAGA settlement with defendant Georgia-Pacific Gypsum LLC. Defendant produces gypsum construction products.

A. Background and Settlement Terms

The original complaint was filed on October 7, 2022, raising class action claims on behalf of non-exempt employees, alleging that defendants violated the Labor Code in various ways, including failure to pay minimum and overtime wages, failure to provide meal breaks, failure to provide proper

wage statements, failure to reimburse necessary business expenses, and failure to pay all wages due on separation.

The settlement would create a gross settlement fund of $950,000. The class representative payment to the plaintiff would be $10,000. Attorney's fees would be $316,666.67 (one-third of the settlement). Litigation costs would not exceed $35,000. The settlement administrator's costs (Apex Class Action Administration) would not exceed $6,500. PAGA penalties would be $20,000, resulting in a payment of $15,000 to the LWDA and $5,000 to plaintiffs. The net amount paid directly to the class members would be about $561,833.33. The fund is non-reversionary. There are an estimated 250 class members. Based on the estimated class size, the average net payment for each class member is approximately $2,247.33.

The proposed settlement would certify a class of all current and former non-exempt employees employed by Defendants in California from October 7, 2018, to June 25, 2024.

An escalator clause provides that if the number of work weeks increases by more than 10% above the current estimate, the gross settlement amount will be increased proportionately, or, at defendant's option, the Class Period will terminate "on an earlier date such that the number of Workweeks does not exceed 25,000 by more than 10%."

The class members will not be required to file a claim. Class members may object or opt out of the settlement. (Aggrieved employees cannot opt out of the PAGA portion of the settlement.) Funds would be apportioned to class members based on the number of workweeks worked during the class period.

Various prescribed follow-up steps will be taken with respect to mail that is returned as undeliverable. Checks undelivered or uncashed 180 days after mailing will be voided, and will be paid to tendered to the California Controller's Unclaimed Property Fund in the name of the Class Members who did not cash their checks.

The settlement contains release language covering "all class claims that were alleged, or reasonable could have been alleged, based on the factual allegations stated, in the Operative Complaint, which allegedly occurred in the Class Period." Under recent appellate authority, the limitation to those claims with the "same factual predicate" as those alleged in the complaint is critical. (*Amaro v. Anaheim Arena Mgmt., LLC* (2021) 69 Cal.App.5th 521, 537 ["A court cannot release claims that are outside the scope of the allegations of the complaint." "Put another way, a release of claims that goes beyond the scope of the allegations in the operative complaint' is impermissible." (*Id*., quoting *Marshall v. Northrop Grumman Corp*. (C.D. Cal.2020) 469 F.Supp.3d 942, 949.) PAGA claims are released to the extent they were "alleged, or reasonably could have been alleged, based on the alleged facts and Labor Code violations claimed in the Operative Complaint and the PAGA Notice[.]"

Informal written discovery was undertaken, some of which was reviewed by retained experts. The matter settled after arms-length negotiations, which included a session with an experienced mediator, in March of 2024.

Counsel also has provided an analysis of the case, and how the settlement compares to the potential value of the case, after allowing for various risks and contingencies. This included an estimate of a maximum damage claim of $2,445,027, and a maximum civil penalty of $568,750.

The potential liability needs to be adjusted for various evidence and risk-based contingencies, including problems of proof. PAGA penalties are difficult to evaluate for a number of reasons: they derive from other violations, they include "stacking" of violations, the law may only allow application of the "initial violation" penalty amount, and the total amount may be reduced in the discretion of the court. (See Labor Code, § 2699(e)(2) [PAGA penalties may be reduced where "based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust arbitrary and oppressive, or confiscatory."])

Counsel attest that notice of the proposed settlement was transmitted to the LWDA concurrently with the filing of the motion.

B. Legal Standards

The primary determination to be made is whether the proposed settlement is "fair, reasonable, and adequate," under *Dunk v. Ford Motor Co*. (1996) 48 Cal.App.4th 1794, 1801, including "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the state of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction … to the proposed settlement." (See also *Amaro v. Anaheim Arena Mgmt., LLC, supra,* 69 Cal.App.5th 521.)

Because this matter also proposes to settle PAGA claims, the Court also must consider the criteria that apply under that statute. Recently, the Court of Appeal's decision in *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, provided guidance on this issue. In *Moniz*, the court found that the "fair, reasonable, and adequate" standard applicable to class actions applies to PAGA settlements. (*Id.*, at 64.) The Court also held that the trial court must assess "the fairness of the settlement's allocation of civil penalties between the affected aggrieved employees[.]" (*Id*., at 64-65.)

California law provides some general guidance concerning judicial approval of any settlement. First, public policy generally favors settlement. (*Neary v. Regents of University of California* (1992) 3 Cal.4th 273.) Nonetheless, the court should not approve an agreement contrary to law or public policy. (*Bechtel Corp. v. Superior Court* (1973) 33 Cal.App.3d 405, 412; *Timney v. Lin* (2003) 106 Cal.App.4th 1121, 1127.) Moreover, "[t]he court cannot surrender its duty to see that the judgment to be entered is a just one, nor is the court to act as a mere puppet in the matter." (*California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1990) 50 Cal.3d 658, 664.) As a result, courts have specifically noted that *Neary* does not always apply, because "[w]here the rights of the public are implicated, the additional safeguard of judicial review, though more cumbersome to the settlement process, serves a salutatory purpose." (*Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2006) 141 Cal.App.4th 48, 63.)

C. Attorney fees

Plaintiff seeks one-third of the total settlement amount as fees, relying on the "common fund" theory. Even a proper common fund-based fee award, however, should be reviewed through a lodestar cross-check. In *Lafitte v. Robert Half International* (2016) 1 Cal.5th 480, 503, the Supreme Court endorsed the use of a lodestar cross-check as a way to determine whether the percentage allocated is reasonable. It stated: "If the multiplier calculated by means of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not necessarily required to make such an adjustment." (*Id*., at 505.) Following typical practice, however, the fee award will not be considered at this time, but only as part of final approval.

Similarly, litigation costs and the requested representative payment of $10,000 for plaintiff will be reviewed at time of final approval. Criteria for evaluation of representative payment requests are discussed in *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804-807.

D. Conclusion

The Court finds that the settlement is fair, reasonable, and adequate to justify preliminary approval, with one exception. The Court is concerned whether the escalator clause of Paragraph 9 of the settlement meets the Court and counsel's duty to the entire class.

The escalator clause provides that if the number of work weeks increases by more than 10% above the current estimate, the gross settlement amount will be increased proportionately, or, at defendant's option, the Class Period will terminate "on an earlier date such that the number of Workweeks does not exceed 25,000 by more than 10%. This means that some members of the putative class would be excluded from the benefits of class membership. Perhaps this should be left to determine whether the escalator clause is triggered, or to final approval. Counsel should be prepared to address this issue at the hearing.

Assuming that the escalator clause issue is resolved, counsel will be directed to prepare an order reflecting this tentative ruling, the other findings in the previously submitted proposed order, and to obtain a hearing date for the motion for final approval from the Department clerk. Other dates in the scheduled notice process should track as appropriate to the hearing date. The ultimate judgment must provide for a compliance hearing after the settlement has been completely implemented. Plaintiffs' counsel are to submit a compliance statement one week before the compliance hearing date. 5% of the attorney's fees are to be withheld by the claims administrator pending satisfactory compliance as found by the Court.

2. 9:00 AM CASE NUMBER: C22-02688
CASE NAME: VICTOR GUERRA VS. TRANQUILITY, INCORPORATED
***HEARING ON MOTION IN RE: PRELIMINARY APPROVAL**
FILED BY: GUERRA, VICTOR
****TENTATIVE RULING:****

SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY
MARTINEZ, CA
DEPARTMENT 39
JUDICIAL OFFICER: EDWARD G WEIL
HEARING DATE: 02/06/2025

Hearing required on one specified issue.

Plaintiff Victor Guerra moves for preliminary approval of his class action and PAGA settlement with defendant Tranquility, Incorporated. Defendant operates a rehabilitation and long-term care center doing business as San Miguel Villa.

A. Background and Settlement Terms

The original complaint was filed on December 16, 2022, raising class action claims on behalf of non-exempt employees, alleging that defendants violated the Labor Code in various ways, including failure to pay minimum and overtime wages, failure to provide meal breaks, failure to provide proper wage statements, failure to reimburse necessary business expenses, and failure to pay all wages due on separation. PAGA claims were added by a First Amended Complaint on February 22, 2023.

The settlement would create a gross settlement fund of $374,000. The class representative payment to the plaintiff would be $5,000. Attorney's fees would be $124,666 (one-third of the settlement). Litigation costs would not exceed $14,000. The settlement administrator's costs (ILYM Group, Inc.), would not exceed $5,950. PAGA penalties would be $25,000, resulting in a payment of $18,750 to the LWDA and $6,250 to plaintiffs. The net amount paid directly to the class members would be about $224,384. The fund is non-reversionary. There are an estimated 312 class members. Based on the estimated class size, the average net payment for each class member is approximately $719.18.

The proposed settlement would certify a class of all current and former non-exempt employees employed by Defendants in California from December 16, 2018 through February 29, 2024.

An escalator clause provides that if the number of work weeks increases by more than 10% above the current estimate, the gross settlement amount will be increased proportionately, or, at defendant's option, the Class Period will end the release period on an earlier date such that the number of Workweeks more than 10%.

The class members will not be required to file a claim. Class members may object or opt out of the settlement. (Aggrieved employees cannot opt out of the PAGA portion of the settlement.) Funds would be apportioned to class members based on the number of workweeks worked during the class period.

Various prescribed follow-up steps will be taken with respect to mail that is returned as undeliverable. Checks undelivered or uncashed 180 days after mailing will be voided, and will be paid to tendered to the California Controller's Unclaimed Property Fund in the name of the Class Members who did not cash their checks.

The settlement contains release language covering "all claims for unpaid wages, including without limitation" a variety of other specific Labor Code claims, including "any claim arising from the claims described above under applicable federal, state, local, or territorial law[.]" that were alleged, or reasonable could have been alleged, based on the factual allegations stated, in the Operative

Complaint, which allegedly occurred in the Class Period." As to the PAGA claims, the language does appear to be limited to claims based on the facts alleged or within the LWDA notice. Under recent appellate authority, the limitation to those claims with the "same factual predicate" as those alleged in the complaint is critical. (*Amaro v. Anaheim Arena Mgmt., LLC* (2021) 69 Cal.App.5th 521, 537 ["A court cannot release claims that are outside the scope of the allegations of the complaint." "Put another way, a release of claims that goes beyond the scope of the allegations in the operative complaint' is impermissible." (*Id*., quoting *Marshall v. Northrop Grumman Corp*. (C.D. Cal.2020) 469 F.Supp.3d 942, 949.)

Informal written discovery was undertaken. The matter settled after arms-length negotiations, which included a session with an experienced mediator, in February of 2024.

Counsel also has provided an analysis of the case, and how the settlement compares to the potential value of the case, after allowing for various risks and contingencies. This included an estimate of a maximum damage and penalty claim of $8,150,000, with a risk-adjusted amount of $1,594,394.

The potential liability needs to be adjusted for various evidence and risk-based contingencies, including problems of proof. PAGA penalties are difficult to evaluate for a number of reasons: they derive from other violations, they include "stacking" of violations, the law may only allow application of the "initial violation" penalty amount, and the total amount may be reduced in the discretion of the court. (See Labor Code, § 2699(e)(2) [PAGA penalties may be reduced where "based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust arbitrary and oppressive, or confiscatory."])

Counsel attest that notice of the proposed settlement was transmitted to the LWDA concurrently with the filing of the motion.

B. Legal Standards

The primary determination to be made is whether the proposed settlement is "fair, reasonable, and adequate," under *Dunk v. Ford Motor Co*. (1996) 48 Cal.App.4th 1794, 1801, including "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the state of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction … to the proposed settlement." (See also *Amaro v. Anaheim Arena Mgmt., LLC, supra,* 69 Cal.App.5th 521.)

Because this matter also proposes to settle PAGA claims, the Court also must consider the criteria that apply under that statute. Recently, the Court of Appeal's decision in *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, provided guidance on this issue. In *Moniz*, the court found that the "fair, reasonable, and adequate" standard applicable to class actions applies to PAGA settlements. (*Id.*, at 64.) The Court also held that the trial court must assess "the fairness of the settlement's allocation of civil penalties between the affected aggrieved employees[.]" (*Id*., at 64-65.)

California law provides some general guidance concerning judicial approval of any settlement. First, public policy generally favors settlement. (*Neary v. Regents of University of California* (1992) 3

Cal.4th 273.) Nonetheless, the court should not approve an agreement contrary to law or public policy. (*Bechtel Corp. v. Superior Court* (1973) 33 Cal.App.3d 405, 412; *Timney v. Lin* (2003) 106 Cal.App.4th 1121, 1127.) Moreover, "[t]he court cannot surrender its duty to see that the judgment to be entered is a just one, nor is the court to act as a mere puppet in the matter." (*California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1990) 50 Cal.3d 658, 664.) As a result, courts have specifically noted that *Neary* does not always apply, because "[w]here the rights of the public are implicated, the additional safeguard of judicial review, though more cumbersome to the settlement process, serves a salutatory purpose." (*Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2006) 141 Cal.App.4th 48, 63.)

C. Attorney fees

Plaintiff seeks one-third of the total settlement amount as fees, relying on the "common fund" theory. Even a proper common fund-based fee award, however, should be reviewed through a lodestar cross-check. In *Lafitte v. Robert Half International* (2016) 1 Cal.5th 480, 503, the Supreme Court endorsed the use of a lodestar cross-check as a way to determine whether the percentage allocated is reasonable. It stated: "If the multiplier calculated by means of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not necessarily required to make such an adjustment." (*Id*., at 505.) Following typical practice, however, the fee award will not be considered at this time, but only as part of final approval.

Similarly, litigation costs and the requested representative payment of $5,000 for plaintiff will be reviewed at time of final approval. Criteria for evaluation of representative payment requests are discussed in *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804-807.

D. Conclusion

The Court finds that there is sufficient evidence that the settlement is fair, reasonable, and adequate to justify preliminary approval, with one exception.

The Court is concerned as to whether the escalator clause of the settlement meets the Court and counsel's duty to the entire class. The escalator clause provides that if the number of work weeks increases by more than 10% above the current estimate, the gross settlement amount will be increased proportionately, or, at defendant's option, the Class Period will be shortened. This means that some members of the putative class would be excluded from the benefits of class membership. Perhaps this should be left to determine whether the escalator clause is triggered, or to final approval. Counsel should be prepared to address this issue at the hearing.

Assuming that the escalator clause issue is resolved, counsel will be directed to prepare an order reflecting this tentative ruling, the other findings in the previously submitted proposed order, and to obtain a hearing date for the motion for final approval from the Department clerk. Other dates in the scheduled notice process should track as appropriate to the hearing date. The ultimate judgment must provide for a compliance hearing after the settlement has been completely implemented. Plaintiffs' counsel are to submit a compliance statement one week before the

compliance hearing date. 5% of the attorney's fees are to be withheld by the claims administrator pending satisfactory compliance as found by the Court.

3. 9:00 AM CASE NUMBER: C23-02586
CASE NAME: FLORENCE DROCAN VS. FULL CIRCLE OF CHOICES
***HEARING ON MOTION IN RE: PRELIMINARY APPROVAL HEARING**
FILED BY:
****TENTATIVE RULING:****

Continued to February 14, 2025, 9:00 a.m. The Smith Declaration states that Housing Consortium of the East Bay's "mission aligns with that of Full Circle of Choices," but does not state what the organization actually does. Counsel is to submit a supplemental declaration prior to the next hearing, and if it is satisfactory, the matter will go off-calendar.

4. 9:00 AM CASE NUMBER: C24-00396
CASE NAME: DAVID WHITE VS. JOHN MANOOGIAN
HEARING ON DEMURRER TO:
FILED BY: WHITE, LEIGH
****TENTATIVE RULING:****

[John Manoogian Anti-Slapp]

Introduction

Defendant John Manoogian moves to strike the first cause of action for extortion and the second cause of action for intentional infliction of emotional distress ("IIED") from Plaintiff's Complaint ("Complaint. For the following reasons, the Motion to Strike is granted.

Legal Standard

The purpose of the anti-SLAPP statute is to encourage participation in matters of public importance and prevent meritless litigation aimed at chilling the exercise of constitutional free speech and petitioning rights under the First Amendment. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1060 ("*Park*").)

Code of Civil Procedure § 425.16(b)(1) provides: "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." Section 425.16(e) lists activities that qualify as "an act in furtherance of a person's right of petition or free speech" under the statute. (Code of Civ. Proc. § 425.16(e)(1)-(4).) In *Baral v. Schnitt* (2016) 1 Cal.5th 376, the California Supreme Court explained the two step approach courts take in ruling on an anti-SLAPP motion: "First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation

omitted.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." (*Id.* at 384-385.)

Applicable Law

"[L]itigation privilege is an entirely different type of statute than section 425.16. The former enshrines a substantive rule of law that grants absolute immunity from tort liability for communications made in relation to judicial proceedings [citation]; the latter is a procedural device for screening out meritless claims [citation]." (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 737.) Civil Code section 47 states a statutory privilege, not a constitutional protection. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 324.)

The litigation privilege embodied in Civil Code section 47, subdivision (b) serves broad goals of guaranteeing access to the judicial process, promoting the zealous representation by counsel of their clients, and reinforcing the traditional function of the trial as the engine for the determination of truth. Applying the litigation privilege to some forms of unlawful litigation-related activity may advance those broad goals notwithstanding the "occasional unfair result" in an individual case. (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 214.)

The purpose of section 425.16 is to protect the valid exercise of constitutional rights of free speech and petition from the abuse of the judicial process (CCP § 425.16, subd. (a)), by allowing a defendant to bring a motion to strike any action that arises from any activity by the defendant in furtherance of those rights. (CCP § 425.16, subd. (b)(1).) By necessary implication, the statute does not protect activity that, because it is illegal, is not in furtherance of constitutionally protected speech or petition rights. (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 819 ["If the defendant's act is not constitutionally protected how can doing the act be 'in furtherance' of the defendant's constitutional rights?"].)

Analysis

Prong 1: Protected Pre-Litigation Activity

"[T]he only thing the defendant needs to establish to invoke the protection of the SLAPP statute is that the challenged lawsuit arose from an act on the part of the defendant in furtherance of her right of petition or free speech." (*Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 61 (quoting *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 307). To do so, the defendant must show that the "conduct by which plaintiff claims to have been injured falls within one of the four categories described in subdivision (e)" of Section 425.16. (Id. at 66.) To show that a plaintiff's cause of action "arises" from defendant's protected activity, the defendant must only demonstrate that his or her protected speech satisfies one or more elements of the plaintiff's claim (i.e., forms the basis of the plaintiff's claim). (*Park v Board of Trustees* (2017) 2 Cal.5th 1057, 1063.)

Here, paragraphs 7-23 of Dr. White's Complaint identify nine statements made by Mr. Manoogian over an 18-month period, including the alleged "threat" of a spousal tort lawsuit, that allegedly were extortionate. (Complaint ¶ 27.) "Manoogian's intentional infliction of harm upon Plaintiff through his extortionate misconduct alleged hereinabove was and is tortious, as well as criminal." Id.

Defendant Manoogian argues that these statements were protected under CCP § 425.16(e)(1 [a statement made before a judicial proceeding], 2 [a statement made in connection with a an issue under consideration by a judicial body], and 4 [any other conduct in furtherance of the exercise of the constitutional right of free speech in connection with a public issue or an issue of public interest]) because all communications made by Defendant Manoogian were in connection with the pending dissolution proceeding in which the main issue was the division of marital property, the contemplated spousal tort litigation, or both. (Motion at p. 4: 15-23.)

Defendant Manoogian's Statements are Protected by Anticipated and Pending Litigations

While prelitigation communications may be protected under the Anti-SLAPP law, prelitigation statements are only protected under Code Civ. Proc. § 425.16, subd. (e)(2) "if a statement concern[s] the subject of the dispute and is made in anticipation of litigation contemplated in good faith and under serious consideration." (*Neville v. Chudacoff* (2008) 160 Cal. App. 4th 1255, 1268; (internal citations and quotations omitted).)

Plaintiff contends that Defendant Manoogian's Statements were not protected pre-litigation statements because both the IIED and fraudulent concealment claims are expressly barred by the Anti-Heart Balm Act which prevents litigants from asserting claims related to violations of marriage-related promises in civil court. (Oppo at p. 5: 13-19.) Plaintiff's view on the Anti-Heart Balm Act is too expansive. Civil Code § 43.5 delineates four distinct barred causes of action: a) alienation of affection; b) criminal conversation; c) seduction of a person over the age of legal consent; and d) breach of promise of marriage. Sometimes referred to as the anti-heart-balm statute, section 43.5 was enacted to eliminate a class of lawsuits which were often fruitful sources of fraud and extortion and easy methods 'to embarrass, harass, and besmirch the reputation of one wholly innocent of wrongdoing. (Citations omitted). (*Richard H. v. Larry D.* (1988) 198 Cal. App. 3d 591, 595.) Anti-heart-balm statue did not preclude an extortion action based on defendant's alleged threats to expose the existence of plaintiff's child birthed by another woman during plaintiff's marriage. (*Tran v. Nguyen* (2023) 97 Cal. App. 5th 523.)

Plaintiff does not contend that any cause of action pled in Defendant Leigh White's proposed personal injury Complaint was one of the four enumerated causes of actions barred by Civil Code § 43.5. (Oppo at p. 5: 13-19.) Plaintiff additionally contends that the evidence at minimum leads to the reasonable inference that Defendants Leigh White and Manoogian were not contemplating the litigation seriously and in good faith, but using it as an extortive effort against Plaintiff because Plaintiff never discussed the merits of the personal injury Complaint with the Defendants or firm who drafted the personal injury Complaint, Defendant Leigh White had hesitations about filing the personal injury Complaint, along with the fact that the personal injury Complaint was never filed. (Oppo at p. 6: 7-11; 15-23.)

Taking a closer look at Defendant Leigh White's declaration, her hesitancy to file the personal injury Complaint and the ultimate decision to refrain from filing was due to consideration to her own professional reputation, the possible effect on her business, and for confidentiality requests of her children. (Leigh White Decl. at ¶¶ 7; 9-13.)

SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY
MARTINEZ, CA
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Flatley Exception Does Not Apply

Flatley, a celebrity dancer, sued Mauro, an attorney, under various tort theories based on a letter Mauro sent to Flatley and telephone conversations Mauro had with Flatley's counsel, and the question before the Supreme Court was whether Mauro's communications to Flatley and his counsel were protected under the anti-SLAPP statute. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 320, 305.) The *Flatley* court found that Mauro's letter and subsequent telephone calls to Flatley's attorneys constituted extortion as a matter of law and therefore were not protected under section 425.16. (*Flatley, supra*, 39 Cal.4th at p. 328.) This conclusion rested on five aspects of Mauro's conduct. (*Flickinger v. Finwall* (2022) 85 Cal.App.5th 822, 834.)

Factor 1: Threatened Exposure to Extra-Judicial Sources

First, Mauro's letter contained accusations of criminal conduct which he threatened to expose directly "to the 'worldwide' media," not merely indirectly as a result of commencing litigation. (*Flatley, supra*, 39 Cal.4th at p. 330.) Defendant Manoogian in a July 18, 2023, e-mail sent to opposing counsel at 9:48 am stated, "I had always assumed that the public airing of the claim was something David could, would and should seek to avoid." (Manoogian Decl., Ex. E. at p. 2.) From the context of prior and subsequent emails the Court notes that it seems that Defendant Manoogian was referring to filing the personal injury Complaint when he alludes to public airing of the claim most notably because there was never any other reference to disclosing the Complaint to any media outlet or source other than the court where the Complaint was to be filed. (See Manoogian Decl. generally.)

Factor 2: Exposure of Facts Entirely Unrelated to Client Representation

Second, his threat to expose "criminal activity entirely unrelated to any alleged injury suffered by [his] client 'exceeded the limits of [his] representation of his client' [which was] itself evidence of extortion." (*Flatley, supra*, 39 Cal.4th at pp. 330–331.) Plaintiff argues, "The threatened civil litigation, which concerned the effect of Dr. White's extramarital affairs on Ms. White, was entirely unrelated to the underlying divorce litigation, which was only concerned with the equitable distribution of property." (Oppo at p. 10: 4-6.) Plaintiff's position is inconsistent with the family code. Family Code § 780 provides the presumption that money or property received in satisfaction of a judgment or a settlement for damages for personal injuries where the cause of action arose during the marriage is community property. Family Code § 782 deals with the classification between community and separate property of money or property from personal injuries caused by spouses. What is clear is that a personal injury lawsuit and the money or property received subsequently would clearly affect and be related to a dissolution proceeding in which the main objective is to distribute community and separate property lawfully and justly.

Factor 3: Production of Sham Evidence

Third, the Supreme Court found the threat of a rape allegation was extortion based on evidence that Mauro's client's initial police report was devoid of content and merely a sham designed to "hold a police investigation over Flatley's head." (*Flatley, supra*, 39 Cal.4th at pp. 331–332.) There is no evidence or allegations of either Defendant producing sham evidence. (See Oppo generally.)

Factor 4: Threatened Public Opprobrium

Fourth, Mauro threatened that Flatley's bad acts referenced in his letter "were 'just the beginning,'" suggesting that "Flatley would be exposed to various kinds of opprobrium and he would be disgraced thereby unless he met Mauro's demands." (*Flatley, supra*, 39 Cal.4th at p. 332.) As articulated in factor 1 above, Defendant Manoogian in a July 18, 2023, e-mail sent to opposing counsel at 9:48 am stated, "I had always assumed that the public airing of the claim was something David could, would and should seek to avoid." (Manoogian Decl., Ex. E. at p. 2.) From the context of prior and subsequent emails the Court notes that it seems that Defendant Manoogian was referring to filing the personal injury Complaint when he alludes to public airing of the claim most notably because there was never any other reference to disclosing the Complaint to any media outlet or source other than the court where the Complaint was to be filed. (See Manoogian Decl. generally.)

Factor 5: Lack of Discussion on the Merits and Lack of Interest in Negotiations

Fifth, and finally, in his follow-up calls to Flatley's counsel, "Mauro did not discuss the particulars of the claim or show an interest in negotiations." (*Flatley, supra*, 39 Cal.4th at p. 332.) Rather, he simply reiterated his demand for payment and beat the drum of the consequences if Flatley refused to capitulate: Mauro would "'go public' and 'ruin' Flatley …." (*Ibid.*) The Court notes that Defendant Manoogian demonstrated a willingness to discuss the personal injury Complaint on the merits and in terms of negotiation by having offered dates for negotiations in October. (Manoogian Decl., Ex. H, pp. 1, 3.) Notwithstanding, the evidence presented shows that neither Defendant Manoogian nor the firm who drafted the personal injury Complaint actually discussed the merits or initiated settlement negotiations of said Complaint. (Manoogian Decl. generally.)

On balance, factors one through four cuts against applying the Flatley exception and factor five cuts for application of the exception. Thus, the exception should not be applied in this instance.

Burden of Proof for Prong 1

Plaintiff brought up three cases on the August 5, 2024, hearing in favor of his argument that the Court failed to apply the correct burden of proof in the first step of the Anti-SLAPP analysis.

In *Aguilar,* even though the procedural posture was inapplicable because it was at the summary judgement stage, the court discussed that the party who bears the burden of proof by the preponderance of evidence at trial, must present evidence that would allow the trier of fact to find an unlawful conspiracy more likely than not. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 852.) Even though the court may not weigh the plaintiff's evidence or inferences against the defendants' as though it were sitting as the trier of fact, it must nevertheless determine what any evidence or inference could show or imply to a reasonable trier of fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 856.)

In *Curtin*, Curtin Maritime Corp. filed suit against its competitor, Pacific Dredge and Construction LLC, asserting one cause of action for violation of California's unfair competition law. The parties operate dredging vessels, and, in its complaint, Curtin alleged Pacific was ineligible for two contracts it was awarded over Curtin because its vessel was not "entirely" built in the United States, a violation of the federal Merchant Marine Act, 1920 (Pub.L. No. 66-261 (June 5, 1920), 41 Stat. 988) (commonly

referred to as the Jones Act), as the sole basis for Curtin's UCL claim. (*Curtin Maritime Corp. v. Pacific Dredge & Construction, LLC* (2022) 76 Cal.App.5th 651, 658.) Pacific responded with an Anti-SLAPP motion, asserting Cutin's claim arose from protected speech and that Curtin could not show a probability of prevailing on the merits of its claim, and the trial court agreed with Pacific that the claim arose from protected activity, but ultimately denied the motion because the court found Curtin had met its burden at this early stage of litigation to show the claim had minimal merit. (*Curtin Maritime Corp. v. Pacific Dredge & Construction, LLC* (2022) 76 Cal.App.5th 651, 658-659.) The Appellate reversed the trial court and granted Pacific's Anti-SLAPP on the grounds that Coast Guard is the sole arbiter of whether a vessel is eligible for the coastwise endorsement, and here determined the Pacific's vessel is eligible, Curtin cannot prevail on its claim as a matter of law. (*Curtin Maritime Corp. v. Pacific Dredge & Construction, LLC* (2022) 76 Cal.App.5th 651, 669.)

Nirschl is about whether an alleged defamatory statement, made by two parents about their babysitter who they were terminating, during negotiations over an exchange of a severance package for a waiver or claims. (*Nirschl v. Schiller* (2023) 91 Cal.App.5th 386, 393.) The complaint therefore has the primary role in identifying the claims at issue in the first anti-SLAPP step. (*Nirschl v. Schiller* (2023) 91 Cal.App.5th 386, 404.) The Second Appellate District found that the communications were not protected prelitigation communications because the operative SAC failed to plead that the alleged defamatory statements were made to resolve ongoing litigation or litigation that, "ripened into a *proposed proceeding* that [was] actually contemplated in good faith and under serious consideration as a means of obtaining access to the courts for the purpose of resolving the dispute." (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 39.)

For example, "[o]rdinarily, a demand letter sent in anticipation of litigation is a legitimate speech or petitioning activity that is protected under section 425.16." (*Malin v. Singer* (2013) 217 Cal.App.4th 1283, 1293; but see *Bailey v. Brewer* (2011) 197 Cal.App.4th 781, 793–795 [even express demand letter not protected activity when potential litigation was conclusively barred by the doctrine of res judicata].) Similarly, protected activity may include exhorting others to bring a lawsuit, such as by making "communications in connection with counseling or encouraging others to sue." (*Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924, 940, 942 [anti-SLAPP prong one satisfied where defendants allegedly "'advised, counseled, encouraged and sought to persuade'" employees to refuse to sign a release of potential wage-and-hour claims, and instead to quit and "'pursue employment-related lawsuits'"].) And when a dispute has moved to the point of clearly threatened commencement of legal proceedings, accusations between parties may be litigation activity protected by the anti-SLAPP law. (*Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 36 [statement that party was involved in "conspiracy," made in context of ongoing dispute in which "attorney threatened to file a lawsuit" and "'apprised' … what would be contained in that lawsuit when filed" was protected conduct].)

Here, not only were formal demands exchanged between counsels, but Defendants White and Manoogian secured outside counsel for the personal injury claims, drafted a proposed Complaint, and

discussed tolling agreements about the drafted proposed Complaint. All of Defendants' actions taken together support that this proposed proceeding was contemplated in good faith and under serious consideration to be protected as prelitigation communications.

However, we must also go beyond the pleading and consider the additional evidence proffered by the parties, since, in the first step analysis, we "must consider affidavits as well as pleadings" as "a defense against artful pleading." (*Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924, 937.) As the California Supreme Court has instructed, at the first anti-SLAPP step, when there is a disputed evidentiary question relevant to the analysis, "[w]e do not … weigh the evidence, but accept the plaintiff's submissions as true and consider only whether any contrary evidence from the defendant establishes its entitlement to prevail as a matter of law." (*Nirschl v. Schiller* (2023) 91 Cal.App.5th 386, 405-406; citing *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067 [applying this rule to anti-SLAPP step one].) The trial court merely determines whether a prima facie showing has been made that would warrant the claim going forward. (*Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 356, fn. 3.)

In Plaintiff's declarations in opposition to the Anti-SLAPP motions, counsels' main arguments were that since Defendants never discussed the merits of the proposed personal injury Complaint and never filed, the Complaint must have been frivolous, specifically under California's Anti-Heart Balm Act. (Merril Decl. at ¶¶ 6-7; Kral Decl. at ¶¶ 5-6.) Defendant Leigh White in her declaration did not contradict the fact the personal injury Complaint was never filed but rather explained her hesitancy to the file the personal injury Complaint and ultimate decision to refrain from filing was due to consideration to her own professional reputation, the possible effect on her business, and for confidentiality requests of her children. (Leigh White Decl. at ¶¶ 7; 9-13.) Accepting Plaintiff's submissions as true and considering only whether any contrary evidence from the defendant establishes its entitlement to prevail as a matter of law, the Court finds that Defendants' communications regarding the proposed personal injury Complaint was contemplated in good faith and under serious consideration and that Defendant Leigh White's claims in her proposed personal injury Complaint was not barred by the Anti-Heart Balm Act (explained further below).

Application of Anti-Heart Balm Statute

Plaintiff on the August 5, 2024, hearing brought up two cases in favor of his argument that the Anti-heart Balm Act bars Defendant Leigh White's claims in her personal injury complaint, neither one bearing any application to the facts at hand.

In *Askew*, the ex-husband sued his ex-wife on the grounds that she fraudulently represented to ex-husband that she loved him to induce marriage and transfers of multiple properties to her name. (*Askew v. Askew* (1994) 22 Cal.App.4th 942.) In *Smith*, the ex-husband was unsuccessful in suing a therapist for having an affair with his ex-wife, and the court reasoned that the ex-husband was unable to do so because he could not meet the independent duty of care exception for the alienation of

affection or criminal conversation cause of action. (*Smith v. Pust* (1993) 19 Cal.App.4th 263.) However, internal citations in *Askew* did lead the Court to an applicable case.

In *Kathleen K*., plaintiff and appellant Kathleen K. seeks damages, through a complaint that included intentional infliction of emotional distress and fraud causes of action, because she contracted genital herpes, allegedly by way of sexual intercourse with defendant and respondent Robert B. (*Kathleen K. v. Robert B.* (1984) 150 Cal.App.3d 992, 993-94.) The trial court granted respondent's motion for judgment on the pleadings based upon failure to state a cause of action and the appellate court reversed on the basis that the appellant is seeking damages for injury to her own body. (*Kathleen K. v. Robert B.* (1984) 150 Cal.App.3d 992, 995.)

"After the trial court entered its judgment, the First District Court of Appeal decided the case of *Barbara A.* v. *John G*. (1983) 145 Cal.App.3d 369 (hg. den. Sept. 29, 1983). In *Barbara A*., a woman who suffered an ectopic pregnancy and was forced to undergo surgery to save her life, which rendered her sterile, brought an action against the man who impregnated her (her former attorney), alleging that she consented to sexual intercourse in reliance on the man's knowingly false representation that he was sterile. The court reversed a judgment on the pleadings in favor of the defendant and held that the complaint stated causes of action for battery and for deceit… Here … appellant is seeking damages for severe injury to her own body." (*Kathleen K. v. Robert B.* (1984) 150 Cal.App.3d 992, 995.)

The *Kathleen K*. Court reasoned, "This is precisely the type of conduct alleged in appellant's complaint. Appellant has alleged that she sustained physical injury due to respondent's tortious conduct in either negligently or deliberately failing to inform her that he was infected with venereal disease. The disease which appellant contracted is serious and (thus far) incurable. The tortious nature of respondent's conduct, coupled with the interest of this state in the prevention and control of contagious and dangerous diseases, brings appellant's injury within the type of physical injury contemplated by the court in *Barbara A*." (*Kathleen K. v. Robert B.* (1984) 150 Cal.App.3d 992, 996-997.)

Prong 2: Likeliness of Success on the Merits

Plaintiff contends Defendant Manoogian's argument that Plaintiff's claims are barred by Civil Code § 47 litigation privilege is irrelevant since prelitigation privilege does not apply since the personal injury Complaint was never seriously considered in good faith. The Court disagrees with this assessment.

Plaintiff Unlikely to Succeed on the Merits due to Litigation Privilege

The litigation privilege "precludes liability arising from a publication or broadcast made in a judicial proceeding or other official proceeding." (*Fremont Reorganizing Corp. v. Faigin* (2011) 198 Cal.App.4th 1153, 1172.) Under the usual formulation of the privilege, it applies "to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212 (*Silberg*).) *Silberg* emphasizes that, to be protected by the litigation privilege, a communication

must be "in furtherance of the objects of the litigation." (*Id.* at p. 219.) This is "part of the requirement that the communication be connected with, or have some logical relation to, the action, i.e., that it not be extraneous to the action." (*Id.* at pp. 219–220.)

"Many cases have explained that [Civil Code] section 47(b) encompasses not only testimony in court and statements made in pleadings, but also statements made prior to the filing of a lawsuit, whether in preparation for anticipated litigation or to investigate the feasibility of filing a lawsuit." (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 361.) "A prelitigation communication is privileged only when it relates to litigation that is contemplated in good faith and under serious consideration." (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1251 (*Action Apartment*) [citing cases]; see also *Olsen v. Harbison* (2010) 191 Cal.App.4th 325, 334 ["The litigation privilege attaches to prelitigation communications that are made at the point that 'imminent access to the courts is seriously proposed by a party in good faith for the purpose of resolving a dispute ….'"].) "Whether a prelitigation communication relates to litigation that is contemplated in good faith and under serious consideration is an issue of fact." (*Action Apartment, supra*, 41 Cal.4th at p. 1251.)

As analyzed above, the Court found Plaintiff's contention that Defendants Leigh White and Manoogian were not contemplating the litigation seriously and in good faith unavailing. Plaintiff hedges their position on the fact that Plaintiff never discussed the merits of the personal injury Complaint with the Defendants or firm who drafted the personal injury Complaint, Defendant Leigh White had hesitations about filing the personal injury Complaint, along with the fact that the personal injury Complaint was never filed. (Oppo at p. 6: 7-11; 15-23.)

As to Plaintiff's first point, it is well taken that the evidence demonstrates that although Defendants may have been attempting to plan sit down negotiations with all opposing parties, the fact is that Defendants failed to discuss/meet and confer about the merits of the personal injury Complaint with Plaintiff's counsel. As to the second point, Defendant Leigh White in her declaration explains that her hesitancy to the file the personal injury Complaint and the ultimate decision to refrain from filing was due to consideration to her own professional reputation, the possible effect on her business, and for confidentiality requests of her children. (Leigh White Decl. at ¶¶ 7; 9-13.) The fact that Defendant Leigh White had hired outside counsel to draft a personal injury complaint, and contemplated how the Complaint would affect her and her family cuts towards the litigation being contemplated in good faith and under serious consideration. As to the third point, the fact that Defendants never filed the personal injury Complaint may be indicative of contemplation of litigation in good faith and serious consideration but is not determinative. In other words, a litigation being contemplated in good faith and consideration does not necessitate a filing of a Complaint. For these reasons, Plaintiffs are not able to prove likelihood of success on the merits because the communications that compose the two causes of action in this lawsuit are protected by litigation privilege.

Attorney's Fees Award

CCP § 425.16 permits a defendant to recover his attorney's fees and costs for bringing a successful motion to strike in a so-called strategic lawsuit against public participation. (*Lolley v. Campbell* (2002) 28 Cal. 4th 367.) Although the language of subd (c) is ambiguous, a Senate Committee on the Judiciary report and a Senate floor report showed the Legislature intended that a prevailing defendant be allowed to recover fees and costs only on the motion to strike, not the entire

suit. (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co*. (1995) 39 Cal. App. 4th 1379.) Trial court's order awarding attorney fees to a corporate plaintiff pursuant to CCP § 425.16(c) was affirmed; plaintiff's attorneys provided declarations detailing their experience and expertise supporting their billing rates, and explained the work provided to plaintiff, and defendant did not offer any evidence to challenge any statement in these declarations. (*Raining Data Corp. v. Barrenechea* (2009) 175 Cal. App. 4th 1363.)

In consideration of the above, Defendant Manoogian's counsel has submitted a declaration providing detailed explanations of the experience of counsel, the hourly rate charged, and the hours worked. (Bartlett Decl. at ¶¶ 2-4, 8; Bartlett Reply Decl. at ¶¶ 2-4.) The Court finds Defendant's counsel's declaration well-reasoned and thus grants Defendant Manoogian attorney's fees in the amount of $24,467.00.

[Leigh White Anti-Slapp]

Introduction

Defendant Leigh White moves to strike the third cause of action for conspiracy to commit extortion from Plaintiff's Complaint ("Complaint. For the following reasons, the Motion to Strike is granted.

Legal Standard

The purpose of the anti-SLAPP statute is to encourage participation in matters of public importance and prevent meritless litigation aimed at chilling the exercise of constitutional free speech and petitioning rights under the First Amendment. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1060 ("*Park*").)

Code of Civil Procedure § 425.16(b)(1) provides: "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." Section 425.16(e) lists activities that qualify as "an act in furtherance of a person's right of petition or free speech" under the statute. (Code of Civ. Proc. § 425.16(e)(1)-(4).) In *Baral v. Schnitt* (2016) 1 Cal.5th 376, the California Supreme Court explained the two step approach courts take in ruling on an anti-SLAPP motion: "First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation omitted.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." (*Id.* at 384-385.)

Applicable Law

"[L]itigation privilege is an entirely different type of statute than section 425.16. The former enshrines a substantive rule of law that grants absolute immunity from tort liability for communications made in relation to judicial proceedings [citation]; the latter is a procedural device for screening out meritless claims [citation]." (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 737.) Civil Code section 47 states a statutory privilege, not a constitutional protection. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 324.)

The litigation privilege embodied in Civil Code section 47, subdivision (b) serves broad goals of guaranteeing access to the judicial process, promoting the zealous representation by counsel of their clients, and reinforcing the traditional function of the trial as the engine for the determination of truth. Applying the litigation privilege to some forms of unlawful litigation-related activity may advance those broad goals notwithstanding the "occasional unfair result" in an individual case. (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 214.)

The purpose of section 425.16 is to protect the valid exercise of constitutional rights of free speech and petition from the abuse of the judicial process (CCP § 425.16, subd. (a)), by allowing a defendant to bring a motion to strike any action that arises from any activity by the defendant in furtherance of those rights. (CCP § 425.16, subd. (b)(1).) By necessary implication, the statute does not protect activity that, because it is illegal, is not in furtherance of constitutionally protected speech or petition rights. (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 819 ["If the defendant's act is not constitutionally protected how can doing the act be 'in furtherance' of the defendant's constitutional rights?"].)

Analysis

This Motion is Granted Based on the Analysis Provided for the Manoogian Anti-SLAPP

Defendant Manoogian's Anti-SLAPP motion was granted for the IIED and Extortion causes of action. Defendant Leigh White was implicated in a Conspiracy to Commit Extortion cause of action. Thus, all the analysis granting Defendant Manoogian's Anti-SLAPP for the Extortion cause of action pertains to Defendant Leigh White's cause of action since it is a predicate cause of action to the Extortion claim. Since the Anti-SLAPP motion was granted for the Extortion cause of action for Defendant Manoogian, Defendant Leigh White's Anti-SLAPP motion must also be granted on the same grounds.

Attorney's Fees Award

CCP § 425.16 permits a defendant to recover his attorney's fees and costs for bringing a successful motion to strike in a so-called strategic lawsuit against public participation. (*Lolley v. Campbell* (2002) 28 Cal. 4th 367.) Although the language of subd (c) is ambiguous, a Senate Committee on the Judiciary report and a Senate floor report showed the Legislature intended that a prevailing defendant be allowed to recover fees and costs only on the motion to strike, not the entire suit. (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co*. (1995) 39 Cal. App. 4th 1379.) Trial court's order awarding attorney fees to a corporate plaintiff pursuant to CCP § 425.16(c) was affirmed; plaintiff's attorneys provided declarations detailing their experience and expertise supporting their billing rates, and explained the work provided to plaintiff, and defendant did not offer any evidence to challenge any statement in these declarations. (*Raining Data Corp. v. Barrenechea* (2009) 175 Cal. App. 4th 1363.)

In consideration of the above, Defendant Leigh White's counsel has submitted a declaration providing detailed explanations of the experience of counsel, the hourly rate charged, and the hours worked. (Young Decl. at ¶¶ 2-7.) The Court finds Defendant's counsel's declaration well-reasoned and thus grants Defendant Leigh White attorney's fees in the amount of $23,100.00.

SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY
MARTINEZ, CA
DEPARTMENT 39
JUDICIAL OFFICER: EDWARD G WEIL
HEARING DATE: 02/06/2025

[Leigh White Demurrer]

Introduction

Before the Court is Defendant Leigh White's ("Defendant's") demurrer to Plaintiff's Complaint, pursuant to California Code of Civil Procedure ("CCP") Section 430.10. The Demurrer relates to Plaintiff David White's Complaint for three extortion related causes of action.

Defendant specifically demur to Plaintiff's third cause of action for conspiracy to commit extortion against Defendant Leigh White on the grounds that the acts complained of are protected by litigation privilege under Civil Code § 47(b). (Notice of Demurrer p. 2: 17-18.) Since Defendant Leigh White's Anti-SLAPP motion was granted, this Demurrer is rendered moot.

5. 9:00 AM CASE NUMBER: C24-00396
CASE NAME: DAVID WHITE VS. JOHN MANOOGIAN
***HEARING ON MOTION IN RE: AMENDED NOTICE OF MOTION AND AMENDED SPECIAL MOTION TO STRIKE CCP 425.16**
FILED BY: WHITE, LEIGH
TENTATIVE RULING:
See line 4.

6. 9:00 AM CASE NUMBER: C24-00396
CASE NAME: DAVID WHITE VS. JOHN MANOOGIAN
***HEARING ON MOTION IN RE: AMENDED NOTICE OF MOTION AND AMENDED SPECIAL MOTION TO STRIKE CCP 425.16**
FILED BY: MANOOGIAN, JOHN E.
TENTATIVE RULING:
See line 4.

7. 9:00 AM CASE NUMBER: C24-00396
CASE NAME: DAVID WHITE VS. JOHN MANOOGIAN
HEARING IN RE: APPLICATION TO APPEAR PRO HAC VICE OF NICHOLAS DANTZLER, ESQ.
FILED BY: WHITE, DAVID
TENTATIVE RULING:

Granted.

8. 9:00 AM CASE NUMBER: C24-00484
CASE NAME: MARIA HERNADEZ MORENO VS. GIANNI CHILOIRO
***HEARING ON MOTION IN RE: ORDER APPROVING SETTLEMENT AND AWARDING ATTORNEY FEES AND COSTS**
FILED BY: HERNADEZ MORENO, MARIA ELISA
Hearing required.

SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY
MARTINEZ, CA
DEPARTMENT 39
JUDICIAL OFFICER: EDWARD G WEIL
HEARING DATE: 02/06/2025

Plaintiff Maria Hernandez Moreno moves for approval of her PAGA settlement with defendants Doppio San Carlos LP and Gianni Chiloiro. Defendants operate an Italian restaurant.

A. Background and Settlement Terms

The original complaint was filed on February 22, 2024, raising PAGA claims on behalf of non-exempt employees, alleging that defendants violated the Labor Code in various ways, including failure to failure to provide meal and rest breaks, failure to reimburse necessary business expenses, and other derivative violations. Written notice to the LWDA was provided on December 4, 2023.

The settlement would create a Settlement Sum of $30,000. Deducted from that amount would be $10,000 in attorney's fees, $13,700 in litigation costs, $2,500 in settlement administration costs. The remaining $3,799.20 would be the PAGA penalty, of which 75% ($2,849.40 would be distributed to the LWDA and 25% ($949.80 would be distributed to the Aggrieved Employees. The fund is non-reversionary. There are an estimated 44 aggrieved employees, meaning that the estimated individual payment would be $17.26.

An escalator clause provides that if the number of pay periods increases by more than 15% above the current estimate, the gross settlement amount will be increased proportionately, or, at defendant's option, the release period will end on an earlier date such that the number of pay periods is more than 15%.

The settlement administrator will mail notices to the Aggrieved Employees, based on information provided by defendant. (Aggrieved employees cannot opt out of a PAGA settlement.) Funds would be apportioned to class members based on the number of workweeks worked during the established time period.

Various prescribed follow-up steps will be taken with respect to mail that is returned as undeliverable. Checks undelivered or uncashed 180 days after mailing will be tendered to the California Department of Industrial Relations – Unclaimed Wage Fund in the names of the Aggrieved Employees to whom the checks were issued.

The settlement contains release language in which the Aggrieved Employees release any claims "that were described in the notice of alleged PAGA violations sent by Plaintiff to the LWDA, and alleged or could have been alleged in the Operative Complaint." Under recent appellate authority, the limitation to those claims with the "same factual predicate" as those alleged in the complaint is critical. (*Amaro v. Anaheim Arena Mgmt., LLC* (2021) 69 Cal.App.5th 521, 537 ["A court cannot release claims that are outside the scope of the allegations of the complaint." "Put another way, a release of claims that goes beyond the scope of the allegations in the operative complaint' is impermissible." (*Id*., quoting *Marshall v. Northrop Grumman Corp*. (C.D. Cal.2020) 469 F.Supp.3d 942, 949.) The release appears to meet these standards by being limited to those that were in the LWDA notice.

Informal written discovery was undertaken. The matter settled after arms-length negotiations, which included a session with an experienced mediator, in February of 2024.

Counsel also has provided an analysis of the case, and how the settlement compares to the potential value of the case, after allowing for various risks and contingencies. This included an estimate of a maximum theoretical exposure for penalties of $47,900, based on a $100 penalty for 479 pay periods.

The potential liability needs to be adjusted for various evidence and risk-based contingencies, including problems of proof. PAGA penalties are difficult to evaluate for a number of reasons: they derive from other violations, they include "stacking" of violations, the law may only allow application of the "initial violation" penalty amount, and the total amount may be reduced in the discretion of the court. (See Labor Code, § 2699(e)(2) [PAGA penalties may be reduced where "based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust arbitrary and oppressive, or confiscatory."])

Counsel attest that notice of the proposed settlement was transmitted to the LWDA concurrently with the filing of the motion.

B. Legal Standards

Because this matter proposes to settle PAGA claims, the Court must consider the criteria that apply under that statute. Recently, the Court of Appeal's decision in *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, provided guidance on this issue. In *Moniz*, the court found that the "fair, reasonable, and adequate" standard applicable to class actions applies to PAGA settlements. (*Id.*, at 64.) The Court also held that the trial court must assess "the fairness of the settlement's allocation of civil penalties between the affected aggrieved employees[.]" (*Id*., at 64-65.)

California law provides some general guidance concerning judicial approval of any settlement. First, public policy generally favors settlement. (*Neary v. Regents of University of California* (1992) 3 Cal.4th 273.) Nonetheless, the court should not approve an agreement contrary to law or public policy. (*Bechtel Corp. v. Superior Court* (1973) 33 Cal.App.3d 405, 412; *Timney v. Lin* (2003) 106 Cal.App.4th 1121, 1127.) Moreover, "[t]he court cannot surrender its duty to see that the judgment to be entered is a just one, nor is the court to act as a mere puppet in the matter." (*California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1990) 50 Cal.3d 658, 664.) As a result, courts have specifically noted that *Neary* does not always apply, because "[w]here the rights of the public are implicated, the additional safeguard of judicial review, though more cumbersome to the settlement process, serves a salutatory purpose." (*Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2006) 141 Cal.App.4th 48, 63.)

C. Attorney fees and Costs

Plaintiff seeks one-third of the total settlement amount as fees, relying on the "common fund" theory. Even a proper common fund-based fee award, however, should be reviewed through a lodestar cross-check. In *Lafitte v. Robert Half International* (2016) 1 Cal.5th 480, 503, the Supreme Court endorsed the use of a lodestar cross-check as a way to determine whether the percentage allocated is reasonable. It stated: "If the multiplier calculated by means of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not

necessarily required to make such an adjustment." (*Id*., at 505.) Although *Lafitte* arises in a class action, this Court takes the view that a lodestar cross-check is appropriate in a PAGA case as well.

Based on counsel's declaration, 48.92 hours has been spent on the matter. Given an hourly rate of $750, the lodestar would be $36,690. Under the circumstances of this case, no further cross-check is needed. The fee request of $10,000 is approved.

The request for litigation costs in the amount of $13,700 initially seems high. On examination, however, it includes $12,000 for the cost of the mediator. In this type of litigation, a professional mediator with experience in this area of practices is reasonable and necessary. The amount here, however, appears to be above the market rate for a one-day mediation. Moreover, the Court would expect that the parties would share the cost of mediation, which means the amount paid was less, or the total fee was even higher. Counsel should be prepared to address this issue at the hearing. The remaining expenses are reasonable and are approved.

The administrative fee of $2,500 is reasonable and is approved.

D. Conclusion

The Court finds that the settlement is fair, reasonable, and adequate (including allocation of the PAGA penalties based on pay periods), with two exceptions.

First, the Court is concerned as to whether the escalator clause of the settlement meets the Court and counsel's duty to the entire class. The escalator clause provides that if the number of pay periods increases by more than 15% above the current estimate, the gross settlement amount will be increased proportionately, or, at defendant's option, the PAGA period will be reduced. This means that some of the aggrieved employees would be excluded from the benefits of the settlement. Perhaps this should be left to determine whether the escalator clause is triggered. Counsel should be prepared to address this issue at the hearing.

Second, the Court is concerned about the reasonableness of the mediator's fee.

Assuming that the settlement ultimately is approved, it also must provide for a compliance hearing after the settlement has been completely implemented. Plaintiffs' counsel are to set a compliance hearing date (in consultation with the Department Clerk), and to submit a compliance statement one week before the compliance hearing date. 10% of the attorney's fees are to be withheld by the claims administrator pending satisfactory compliance as found by the Court.

TENTATIVE RULING:

9. 9:00 AM CASE NUMBER: C24-01536
CASE NAME: ISAIAH LOEWINSOHN VS. FAA CONCORD T INC.
HEARING ON PETITION IN RE: PETITION TO COMPEL ARBITRATION
FILED BY: FAA CONCORD T INC.
TENTATIVE RULING:

SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY
MARTINEZ, CA
DEPARTMENT 39
JUDICIAL OFFICER: EDWARD G WEIL
HEARING DATE: 02/06/2025

Off calendar. Resolved by stipulation and order.

10. 9:00 AM CASE NUMBER: MSC21-00403
CASE NAME: RAMOS/CHOLICO VS CB ENTERPRISES, INC.
***HEARING ON MOTION IN RE: JUDGMENT ON THE PLEADINGS**
FILED BY: CALIFORNIA BURRITO #13, INC
****TENTATIVE RULING:****
Off calendar by stipulation.

11. 9:00 AM CASE NUMBER: MSC21-01970
CASE NAME: CREEKSIDE WALK VS. O.C. JONES & SONS, INC.
***HEARING ON MOTION IN RE: TO STRIKE OR TAX COSTS**
FILED BY: CREEKSIDE WALK VENTURES, LLC. A CALIFORNIA LIMITED LIABILITY COMPANY
****TENTATIVE RULING:****

Plaintiff Creekside Walk Ventures moves to strike or tax costs, which are sought by six defendants that plaintiff dismissed from the action. Eleven defendants remain. By virtue of the dismissal, these defendants are prevailing parties for purposes of costs. This is not disputed. There are three primary issues here: (1) apportionment; (2) expert fees; and (3) mediation costs. The propriety of the costs for the petition for writ of mandate and summary judgment motion also will be discussed.

1. **Apportionment**

Dismissed defendants submitted six different cost memoranda for the same costs. Creekside Walk asserts that this would allow defendants to collect six times. Defendants state, however, that they "agree that costs should be apportioned between all defendants" (with one minor exception).

When a prevailing party has incurred costs jointly with one or more party, the court must apportion costs. (CCP §§ 1032(a)(4),1034.) To apportion the costs the court must examine the reason each party incurred each cost, whether each cost is reasonably necessary to incur in the litigation, and the reasonableness of the amount of the cost. (*Quiles v. Parent* (2018) 28 Cal. App.5th 1000, 1017.) The court is not required to wait to allocate costs until the litigation has concluded as to all of the parties. What the court cannot do is simply allocate proportionately based on the number of parties that incurred the costs. (*Charton v. Harkey* (2016) 247 Cal.App.4th 730, 734-735.)

Some of the authorities involve cases in which some defendants prevailed and others did not. The apportionment issue is more important there, because failure to apportion could result in prevailing defendants recovering some costs on behalf of other defendants who did not prevail, and therefore ought to bear their own costs. But no case found by the Court indicates that the apportionment issue only applies in those situations.

The party filing the cost memorandum bears the initial burden of showing that the statute allows the item and is proper on its face. (*Ladas v. California Sate Auto. Assn*. (1993) 19 Cal.App.4th

761, 774-776.) For items that are expressly permitted by statute, the burden is on the objecting party to establish that the costs were not necessary or reasonable, based on evidence. (*Litt v. Eisenhower Med. Ctr.* (2015) 237 Cal.App.4th 1217, 1224.) For items that are not expressly allowed, the burden of proof is on the party claiming them to show that they were reasonable and necessary. (*Foothill-DeAnza Community College Dist. v. Emerich* (2007) 158 Cal.App.4th 11, 29.) The apportionment issue, however, is a portion of establishing what costs were actually incurred, and therefore is an issue on which the cost-seeking party bears the burden of proof.

Moving parties have presented no evidence from which the court could properly apportion the costs. Accordingly, otherwise reimbursable costs are stricken, without prejudice to submission of declarations establishing a basis upon which the Court can make an apportionment.

Moreover, a further apportionment must be made as to those expenses that were made jointly with other defendants who have not been dismissed

2. Expert fees

$68,306 of the requested costs are the costs of retained experts. CCP § 1033.5(b)(1) provides that "fees of experts not ordered by the court" are "not allowable as costs, except when expressly authorized by law[.]" CCP § 998 constitutes such an exception, providing that if "If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her post offer costs and shall pay the defendant's costs from the time of the offer. In addition…the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover post offer costs of the services of expert witnesses." (CCP § 998(c).) (Subsection (d) contains similar language for when the offer is made by a plaintiff, but the defendant fails to obtain a better result.) But neither subsection (c) nor (d) applies here apply here, because no § 998 offer was made by these defendants. Defendants argue that "where Defendants did not accept Plaintiff's offer and Defendants eventually obtained a more favorable judgement than the 998 offer (i.e., dismissal of all claims), then the court in its discretion may require the Plaintiff to pay[.]" The logic may be plausible here, but the wording of the statute clearly applies only in favor of a party that made a section 998 offer, not in favor of a party who received one. (The briefing seems to assume that plaintiff made 998 offers to these defendants, but it is not in the record.)

3. Mediation Costs

$6,130.07 are sought. Fees for mediation are awardable, in the court's discretion. (*Berkeley Cement, Inc. v. Regents of Univ. of Cal.* (2019) 30 Cal.App.5th 1133, 1140.) This is subject to the same apportionment costs as the other costs, with a few wrinkles. Typically, parties have some type of agreement addressing sharing of mediation fees. Defendants have not indicated whether the amount "invoiced" was the total, or a share of the costs pursuant to an agreement. Did they have any agreement about sharing of mediation fees? Did they agree on whether they would be a recoverable cost?

4. Appellate and Summary Judgment Costs

Defendants filed a petition for writ of mandate, which was denied. Of course, a summary denial is not considered a ruling on the merits of the issues raised, but it is still a denial. The issue is whether appellate costs are addressed separately from trial court costs. In the trial court, costs may be awarded for even unsuccessful motions, as long as they were reasonably necessary to the overall litigation of the action. For this reason, the filing fees for the ultimately unsuccessful summary judgment motion is reasonable and necessary. Similarly the costs for the petition for writ of mandate, although rejected (without a ruling on the merits) were reasonable under the circumstances of this case. These are subject to apportionment, however.

Conclusion

The entire amount for experts, $68,306, is stricken

The remaining items are stricken, without prejudice to defendants providing further evidence establishing a proper individual apportionment of the costs in question. Until such an apportionment is provided, the court will not address whether the items such as rush charges and delivery fees are reasonable and appropriate.

12. 9:00 AM CASE NUMBER: N23-1223
CASE NAME: JOSEPH GARAVENTA VS. GARAVENTA ENTERPRISES, INC.
***HEARING ON MOTION IN RE: 1ST AMENDED PETITION FOR WRIT OF MANDATE**
FILED BY: GARAVENTA , JOSEPH
****TENTATIVE RULING:****

Petitioner Joseph Garaventa [Petitioner] brings this Motion for First Amended Petition for Writ of Mandate [Petition or Writ]. The Writ is opposed by Respondent Garaventa Enterprises, Inc. [Respondent].

For the following reasons, the Petition is **granted** as to Petitioner's request for the following corporate records: non-privileged agreements and contracts for compensation and bonuses for Respondent's key non-officer employees, agents, contractors, consultants and attorneys. The Petition is **denied** as to Petitioner's remaining requests for the reasons discussed in detail below.

Background

Petitioner's Writ relates to (a) his requests to Respondent's general counsel for corporate records in the following categories: (1) compensation paid by Respondent to employees, directors and certain contractors, (2) 2022 amendments to the Bylaws, (3) officer misconduct investigation, and (b) a request for order to reinstate Petitioner as Director of Respondent. (First Amended Petition for Writ of Mandate [FAP], ¶ 36, Prayer for Relief, 17:11-18:27.) Petitioner's Writ also refers to certain personnel files that were requested, but Respondent represents that these records, to the extent

they were not privileged, were produced. (Id., Verified Answer to First Amended Petition for Writ of Mandate [Answer], ¶ 36.) On Reply, Petitioner does not contend that personnel records remain outstanding. (Petitioner's Reply, 5:3-19.)

Petitioner is a director of Respondent and owner of approx. six percent of the aggregate outstanding voting shares. (First Amended Petition for Writ of Mandate [FAP], ¶ 2; Verified Answer to First Amended Petition for Writ of Mandate [Answer], ¶ 2.] Based on his standing as director and shareholder, Petitioner made several requests for corporate records, as evidenced in an email from Petitioner to Respondent's general counsel Mike Bonnifield on March 1, 2023, and thereafter in correspondence dated May 17, 2023 from Petitioner's counsel, Wallace Doolittle to Respondent's corporate counsel and in correspondence dated January 10, 2024 from counsel Scott Witlin to Mike Bonnifield. (FAP, ¶¶ 8, 14, 23; Declaration of [Dec.] M. Bonnifield in support of [iso] Respondent's Opposition to Petitioner's Motion re Writ [Opposition], ¶ 27, Ex. N.)

The record reflects that Respondent produced and/or made available to Petitioner certain records for each of the categories above, except for those documents withheld on the basis of privacy and attorney-client and attorney work product privileges. (Dec. M. Bonnifield iso Opposition, ¶¶ 8-18, 27, Ex. N; Dec. M. Iezza iso Opposition, ¶¶ 2-4

Based on review of the record, the court understands the remaining documents in dispute are: (1) W2 tax forms, (2) compensation agreement(s) for unspecified "non-officer employees, agents, contractors and attorneys," (3) work product generated by Respondent's General Counsel and outside counsel; (4) documents pertaining to the 2022 Bylaw amendments, and (5) documents pertaining to the officer misconduct investigation. (FAP, ¶¶ 19 (a)-(e), 37 (a)-(f); Dec. M. Bonnifield iso Opposition, ¶¶ 9, 13-20, 23, 27, Ex. N; Dec. J. Garaventa filed November 29, 2023, 10:17-12:7.); Reply, 5:3-19.)

Standard

A petition for writ of mandate is the appropriate remedy to enforce a shareholder's right to inspect corporate records where the right is being denied by the corporation. (*Valtz v Penta Investment Corp*. (1983) 139 Cal.App.3d 803, 806-807; Corp. Code § 1603.)

Corp. Code § 1601 provides for shareholder rights of inspection, as follows: "(a) (1) The accounting books, records, and minutes of proceedings of the shareholders and the board and committees of the board of any domestic corporation, … shall be open to inspection at the corporation's principal office … upon the written demand on the corporation of any shareholder … at any reasonable time …"

Corp. Code § 1602 provides for director rights of inspection: "Every director shall have the absolute right at any reasonable time to inspect and copy all books, records and documents of every kind and to inspect the physical properties of the corporation of which such person is a director …"

Further, Corp. Code § 1603 provides for enforcement of such provisions: "(a) Upon refusal of a lawful demand for inspection, the superior court of the proper county, may enforce the right of inspection with just and proper conditions …"

However, the scope of the right of inspection, even the absolute right of a director, depends on whether the requesting party is disinterested or is motivated by personal interest. (*See Tritek Telecom, Inc. v. Superior Ct.* (2009) 169 Cal.App.4th 1385, 1391-1392.) "[A] court may properly limit a director's inspection rights because the director's loyalties are divided and documents obtained by a director in his or her capacity as a director could be used to advance the director's personal interest." (*Id*. at 1392.) "[A director] cannot put on his director's hat and request privileged corporate documents which he intends to pass on to a shareholder … for use in litigation against the corporation. Such an act would be inconsistent with his fiduciary duty to the corporation." (*National Football League Properties, Inc. v. Superior Court* (1998) 65 Cal.App.4th 100, 109-110.)

"Where the corporation determines that an unfettered inspection will result in a tort against the corporation, it may decline the request for inspection." (*Havlicek v. Coast-to-Coast Analytical Services, Inc.* (1995) 39 Cal.App.4th 1844, 1856.) Where a petitioner brings an action to enforce his inspection rights as director after he has filed a shareholder action against the corporation, the director is "not a disinterested director and the presumption of good faith does not apply." (*Tritek*, *supra*, 169 Cal.App.4th at p. 1391.) This is particularly true, where "'absolute' inspection rights … gives [the director] access to documents he could not obtain via discovery in the shareholder action." (*Ibid*.)

"[A] corporation['s] … confidential communications with its attorney are protected by the attorney-client privilege." (*National Football League Properties, Inc.*, *supra*, 65 Cal.App.4th at 107; see also Evid. Code § 175, 953.) Further, California precedent has held that an outside attorney's investigation into allegations of impropriety in corporate affairs is protected by attorney-client privilege and work product doctrine. (*City of Petaluma v. Superior Ct.* (2016) 248 Cal.App.4th 1023, 1035; *Wellpoint Health Networks, Inc. v. Superior Ct.* (1997) 59 Cal.App.4th 110, 123.)

Analysis

Petitioner's Petition is based on the language in Article VII, Section 4 of the 2019 version of Respondent's Bylaws, which he contends is unchanged in the "purported and disputed 2022 amendment of the Bylaws." (FAP, ¶¶ 3-4.) Particularly, this Section states, in relevant part: "Every director shall have the absolute right at any reasonable time to inspect all books, records, and

documents of each kind and the physical properties of the Corporation and each of its subsidiary corporations. (FAP, ¶ 3.) Respondent does not dispute the language cited. (Answer, ¶ 3.)

Petitioner concedes that "there may be some limited exceptions to the breadth of inspection rights pursuant to Corporations Code Section 1602." (Petitioner's Memorandum of Points and Authorities [MPA] iso Writ, 8:24-27.) However, Petitioner contends that such exceptions do not apply to his request, which is made pursuant to the Bylaws. (*Ibid*.)

The court notes that the cited Bylaws section generally follows the language of Corp. Code § 1602. As such, the scope of a director's absolute right of inspection pursuant to the Bylaws is properly interpreted with precedent that evaluates the same language in the context of Corp. Code § 1602, particularly where a director is shown to be an interested party. (*Tritek Telecom, Inc.*, *supra*, 169 Cal.App.4th at 1391-1392.)

The FAP and Answer discuss the categories of documents that are requested at paragraphs 19 and 37 and the Prayer for Relief. As summarized above, it is the court's understanding from review of the record that Petitioner has an outstanding request the following records: (1) W2 tax forms, (2) compensation agreement(s) for unspecified "non-officer employees, agents, contractors and attorneys," (3) work product generated by Respondent's General Counsel and outside counsel; (4) documents pertaining to the 2022 Bylaw amendments, and (5) documents pertaining to the officer misconduct investigation. (See also Reply, 5:3-19.)

As to the W2 forms, Respondent has stated that the tax documents were withheld for privacy reasons, given that they are private tax documents containing social security numbers and addresses of the employees, and that the necessary information was provided in a report that was given to Petitioner. (Dec. M. Iezza iso Opposition, ¶ 2.) Respondent has shown a basis for withholding the W2 forms based on the privacy of the employees. Petitioner has not stated a basis that the information included in the format provided is not sufficient or specified particular information that was not provided in the format produced. The court denies the Petition as to the production of the W2 forms.

The next request is for "Contracts, agreements and other documents concerning and relating to compensation and bonuses for Respondent's key non-officer employees, agents, contractors, consultants and attorneys." Petitioner has agreed that he does not need these agreements for Officers but fails to specify which other agreements he believes exists and are subject to this request. (FAP, ¶ 19 d.) General Counsel Mike Bonnifield states that "At the time Petitioner requested the bonus information, I was not aware of any employment or bonus agreements for any employees except for the officers and myself." (Dec. M. Bonnifield, ¶ 9.) It is unclear whether Mr. Bonnifield is now aware of additional responsive agreements, and on what basis he withheld his own employment agreement. The court grants the Petition only with respect to the request for production of agreements and contracts for compensation and bonuses for Respondent's key non-officer employees, agents, contractors, consultants and attorneys. This does not require production of

privileged materials or broadly encompass other related documents. Respondent is required to produce any responsive documents, or, to the extent materials are withheld or not produced, Respondent must advise Petitioner to what extent such agreements exist and on what basis any agreements are being withheld.

As to the broad demand for production of attorney work product and attorney-client communications, Petitioner has not shown a basis to disclose privileged materials. Respondent has made a showing that Petitioner has ongoing litigation against Respondent, and that, as a result, he is not a disinterested director. As such, the corporation has the right to protect its attorney-client and work product privileged materials from disclosure. (*Tritek Telecom, Inc.*, *supra*, 169 Cal.App.4th at 1391-1392; *National Football League Properties, Inc.*, *supra*, 65 Cal.App.4th at 107) For such reasons, the court denies the writ petition as to the broad request for production of privileged materials of Respondent's legal counsel.

As to the demand for production of materials relating to amendment of the Bylaws and investigation of misconduct, Respondent is entitled to protect privileged materials from disclosure, as discussed above. It appears from the record that all non-privileged materials were produced to Petitioner, and that the only documents in dispute are privileged materials relating to these issues. Respondent has shown that Petitioner is not a disinterested director, and Petitioner has not shown that he is entitled to receive privileged documents, including documents relating to the investigation by outside counsel. For such reasons, the court denies the Petition as to the requests for production of further documents relating to the amendment to the Bylaws and the investigations of misconduct.

As to Petitioner's request for order to reinstate Petitioner as Director of Respondent, Petitioner seems to base this request on his version of corporate affairs and investigations. As discussed above, Respondent has demonstrated that it has a basis for its actions with respect to the production of corporate records. Petitioner contends that Respondent is spending too much and questions the leadership of the company. However, Petitioner has not demonstrated any issues with the elections or other formalities of the corporation or demonstrated a legal or factual basis to support this request. For those reasons, the court denies Petitioner's request to be reinstated as Director of Respondent.

Attorney's Fees

Corp. Code § 1604 allows the court to award attorney fees and other reasonable expenses by the moving shareholder or director if there is a finding that the corporation failed to comply with a proper demand without justification. The court has found that several of Petitioner's demands were not proper and that Respondent's failure to comply was justified, as discussed in detail above. For that reason, Petitioner's request for an award of attorney's fees is denied. Corp. Code § 1604 does not

provide for an award of attorney's fees to the corporation if its failure to comply is justified. For that reason, Respondent's request for an award of attorney's fees is also denied.

13. 9:00 AM CASE NUMBER: N23-2201
CASE NAME: SANDIA PEARSON VS. MORAGA-ORINDA FIRE DISTRICT
HEARING IN RE: WRIT OF MANDATE
FILED BY:
TENTATIVE RULING:
Continued to a date to be determined by counsel and approved by the Court.