TENTATIVE RULINGS: CIVIL LAW & MOTION

Friday, May 31, 2024 at **8:30 a.m.**
Courtroom 18 –Hon. Christopher M. Honigsberg
Civil and Family Law Courthouse
3055 Cleveland Avenue
Santa Rosa, California 95403

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.

CourtCall is not permitted for this calendar.

If the tentative ruling does not require appearances, and is accepted, no appearance is necessary.

Any party who wishes to be heard in response or opposition to the Court's tentative ruling **MUST NOTIFY** the Court's Judicial Assistant by telephone at **(707) 521-6602** and **MUST NOTIFY all other parties of their intent to appear, the issue(s) to be addressed or argued and whether the appearance will be in person or by Zoom**. Notifications must be completed no later than 4:00 p.m. on the court (business) day immediately before the day of the hearing.

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Unless notification of an appearance has been given as provided above, the tentative ruling shall become the ruling of the Court the day of the hearing at the beginning of the calendar.

1. 23CV02013, Clear Heart Drilling, Inc. v. Parker

Defendant's unopposed motion to strike the prayer for punitive damages from the complaint is **GRANTED WITH LEAVE TO AMEND**. Counsel for Defendant shall submit a written order consistent with this tentative ruling and compliant with California Rules of Court, rule 3.1312.

I. Background

This lawsuit arises out of a traffic collision between a vehicle driven by Defendant Chelsea Parker and a truck owned by Plaintiff Clear Heart Drilling and driven by its employee Ricky Vaetoe. The complaint alleges that Defendant was driving under the influence at the time of the collision. This motion comes on calendar for Defendant's motion to strike the prayer for punitive damages from the complaint.

Opposition was due on May 17, 2024. (CCP § 1005(b) [nine court days before hearing; May 27 is a court holiday].) As of May 23, no opposition has been filed.

II. Governing law

A motion to strike lies where a pleading contains "irrelevant, false, or improper matter[s]" or is "not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." (CCP § 436(b).) A motion to strike is properly directed to claims for damages that are not recoverable as a matter of law. (*See, e.g., Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 214 [motion to strike lies against request for punitive damages when the claim sued upon would not support an award of punitive damages as a matter of law].)

Punitive damages may be stricken where the facts alleged do not rise to the level of "malice, fraud or oppression" required to support a punitive damages award. (*Turman v. Turning Point of Central Calif., Inc.* (2010) 191 Cal.App.4th 53, 63.) "'Malice' is defined in the statute as conduct 'intended by the defendant to cause injury to plaintiff, or despicable conduct that is carried on by the defendant with a willful and conscious disregard for the rights or safety of others.'" (*Ibid*., citing Civ. Code § 3294.) "'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (*Ibid.*, citing Civ. Code § 3294.)

"[T]he statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital v. Superior Court* (1994) 8 Cal.4th 704, 725.)

III. Analysis

The Court agrees that Plaintiff has not alleged facts sufficient to support an award of punitive damages under Civ. Code § 3294. Plaintiff has alleged only that Defendant was driving while intoxicated when the collision occurred. Though driving under the influence is unquestionably reckless, it does not necessarily rise to the level of "malice" contemplated by the statute. (*Gombos v. Ashe* (1958) 158 Cal.App.2d 517, 527-528.) Therefore, the Court will grant the motion to strike.

However, the Court also agrees with Defendant's comment that "[t]hat is not to say that punitive damages may never be recovered in instances involving drunk driving." In *Taylor v. Superior Court* (1979) 24 Cal.3d 890, our Supreme Court held that "one who voluntarily commences, and thereafter continues, to consume alcoholic beverages to the point of intoxication, knowing from the outset that he must thereafter operate a motor vehicle demonstrates . . . 'such a conscious and deliberate disregard of the interests of others that his conduct may be called wilful or wanton.'" (*Id.* at p. 899, citing Prosser, *Law of Torts* (4th ed. 1971) § 2 at pp. 9-10.) Accordingly, the Court will grant Plaintiff leave to amend the complaint.

IV. Conclusion

The motion is **GRANTED WITH LEAVE TO AMEND.**

2. SCV-269094, Lopez v. Foley Family Wines, Inc.

The unopposed motion is **GRANTED.** Foley Family Wines, Inc. **shall appear in person, remote appearance is not allowed,** on August 9, 2024 at 8:30 a.m. in Department 18 to show cause why:

(1) Defendant should not be held in contempt pursuant to CCP § 1209 et seq. for willful disobedience of this Court's discovery order of March 28, 2023; and

(2) Defendant should not be sanctioned under CCP § 177.5.

The Court further orders that an **officer or board member** of Foley Family Wines, Inc. **shall also appear in person and remote appearance is not allowed**.

Plaintiff's counsel is directed to prepare an OSC for signature that is consistent with this ruling, including the expedited briefing schedule set forth in the *Conclusion* section below. After the filing of the signed OSC, Plaintiff shall **personally** serve the OSC and this ruling on both Defendant and defendant's counsel, as provided by CCP §§ 1015-1016.

I. Background

This motion is the latest step in ongoing litigation over Defendant's failure to respond to a Request for Production of Documents propounded on June 7, 2022. Plaintiff moved to compel production on October 24, 2022. Defendant filed no opposition. On March 28, 2023, the Court issued an order (the "March 28 Order") granting the motion, awarding $2,860 in sanctions, and requiring Defendant to produce documents responsive to Plaintiff's request. To date, Defendant has not complied with the March 28 Order.

The instant motion comes before the Court for the second time. Plaintiff filed a substantially similar motion on August 11, 2023. It was heard on November 22, 2023. On November 27, 2023, the Court issued an order granting the motion and setting an OSC hearing for January 19, 2024. At that hearing, Defendant's counsel represented to the Court that he would comply with the March 28 Order. The Court therefore continued the OSC hearing to March 20, 2024.

On March 19, the Court issued a tentative ruling stating in pertinent part:

> "The Court has not received any updates from either party since the January hearing. As such, the Court will assume that Defendant has now complied and, unless Plaintiff objects to this tentative ruling, the OSC will be vacated."

In fact, Defendant had not complied. However, Plaintiff's counsel neglected to call the Court's chambers before 4:00 PM the day before the hearing to indicate that he wished to contest the tentative ruling. When counsel's paralegal phoned chambers on March 20 to ask whether there was any recourse, the judicial assistant responded that Plaintiff would need to re-file the motion and request a new OSC date. Plaintiff filed the instant motion five days later.

Opposition was due on May 17, 2024. (CCP § 1005(b) [nine court days before hearing; May 27 is a court holiday].) Plaintiff has filed a Notice of Non-Opposition bringing to the Court's attention that no timely opposition was filed.

II. Analysis

The request for the OSC re contempt is made pursuant to CCP §§ 1209 et seq. The request for monetary sanctions is made pursuant to CCP § 177.5. The request for attorneys' fees and costs is simply a request that if contempt is found, the punishment include an order to pay reasonable attorney fees and costs incurred in connection with the contempt proceeding pursuant to CCP § 1218(a).

Plaintiff's memorandum of points and authorities states, in pertinent part:

> "Accordingly, Plaintiff seeks the entry of an order to show cause, requiring in person appearance by Defendant, as to: (1) Why Defendant should not be held in contempt for its willful disobedience of this Court's March 28th orders; (2) why this Court should not impose additional monetary sanctions on Defendant for its continued non-compliance."

(MPA at 1:25-28.) Therefore, as a procedural matter, the Court interprets the instant motion as simply requesting an OSC be issued directing Defendant to show cause why it should not be held in contempt and why it should not be ordered to pay CCP § 177.5 sanctions. That is, the Court does *not* interpret the motion as requesting two separate and distinct orders — i.e., an OSC re contempt and an immediate order for CCP § 177.5 sanctions.

The Court finds that Plaintiff's counsel's declaration in support of the motion establishes a factual basis for issuance of an OSC re contempt (indirect contempt) under CCP §§ 1211-1212, and further establishes a factual basis for requiring Defendant to show cause why additional monetary sanctions should not be issued under CCP § 177.5.

III. Conclusion

The motion is **GRANTED**. No sanctions are awarded at this time.

Hearing on the OSC shall be on August 9, 2024, at 8:30 a.m. Plaintiff has requested an expedited briefing schedule on the OSC, and the Court finds that request reasonable. Plaintiff's memorandum shall be filed and served no later than nine court days before the hearing date. Any opposition shall be filed no later than five court days before the hearing date. Any reply shall be filed no later than two court days before the hearing date.

3. SCV-272982, Finlink, Inc. v. Reynoso

Defendant's motion for judicial notice is GRANTED**.** The demurrer is **OVERRULED** as to the first through third causes of action, and **SUSTAINED WITH LEAVE TO AMEND** as to the fourth

through sixth causes of action**.**

Counsel for Plaintiffs shall submit a written order consistent with this tentative ruling and compliant with California Rules of Court, rule 3.1312.

I. Background

This lawsuit arises out of a dispute between two former business associates. Vladimir Lounegov is the CEO of the financial services company FinLink (collectively "Plaintiffs"). Joseph Reynoso ("Defendant") was a co-founder of FinLink and served on its board of directors. Defendant resigned from the board and no longer works for FinLink. Plaintiffs allege that this occurred after Defendant defaulted on a loan from the company; Defendant does not address the reasons for the separation.

On January 21, 2023, following the separation, Defendant sent a text message (the "Message") to Raman Korneu. At that time, Defendant, Korneu, and Lounegov were all involved in a Lithuanian startup called TUB; Defendant and Korneu as shareholders and Lounegov as director. The operative Second Amended Complaint ("SAC") alleges that Korneu was also a client of FinLink at that time. The Message contained several statements that are at the heart of this action, including the following:

> -"Vlad [Lounegov] could shortly be the target of multiple lawsuits, both civil and criminal, in multiple jurisdictions in multiple countries. These actions will be brought by a growing number of Finlink shareholders who's [sic] rights are being ignored (and possibly stolen) by Vlad."
>
> -"These actions are the last resort of a large group of shareholders who's [sic] repeated enquiries into facts relating to their company, and to which they are entitled by Delaware statute, have been ignored for months, and in some cases, years."
>
> -"Again, I have no concrete knowledge of what form this campaign will take . . . , but my sense is that this will be very bad for Vlad, and by association, anyone with whom he has business ties."

On August 1, 2023, a publicly-traded company identified in the moving papers as Company A, which had previously loaned funds to FinLink on the understanding that the loan would be repaid with FinLink stock, exercised its contractual option to be repaid in cash instead.

On August 9, 2023, Defendant filed a complaint against FinLink in Delaware Chancery Court, seeking to compel inspection of FinLink's books and records (the "Delaware Action"). (Request for Judicial Notice, Exh. A.)

II. Request for judicial notice

Defendant's request that the Court take judicial notice of the verified complaint in Delaware Chancery Court case no. 2023-0811 is granted pursuant to Evid. Code § 452(d).

III. Governing law

A. Standard on demurrer

"A person against whom a complaint or cross-complaint has been filed may, within 30 days after service of the complaint or cross-complaint, demur to the complaint or cross-complaint." (CCP § 430.40(a).) A demurrer may be on the basis that "the pleading does not state facts sufficient to constitute a cause of action." (CCP § 430.10(e).) Complaints are read as a whole, in context, and are liberally construed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; see also *Stevens v. Superior Court* (1999) 75 Cal.App.4th 594, 601.) In reviewing the sufficiency of a complaint, courts accept as true all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law, or the construction of instruments pleaded, or facts impossible in law. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43; see also *South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 732.) Matters which may be judicially noticed are also considered. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.)

"[A] plaintiff is required only to set forth the essential facts of his case to acquaint a defendant with the nature, source, and extent of his cause of action." (*Ludgate Insurance Co. v. Lockheed Martin* (2000) 82 Cal.App.4th 592, 608.) "[L]ess particularity is required where the defendant may be assumed to have knowledge of the facts equal to that possessed by the plaintiff." (*Jackson v. Pasadena City School Dist.* (1963) 59 Cal.2d 876, 879.)

B. Defamation

Defamation is an invasion of the interest in reputation. (Rest.2d, Torts, § 558 et seq.) The tort involves a publication that is false, defamatory, and unprivileged, and that has a natural tendency to injure or that has a tendency to injure the plaintiff in his occupation. (Civ. Code §§ 45, 46.)

When the effect of the allegedly defamatory language can be determined on its face, the question of whether it is defamatory is one of law for the court. However, if the language is susceptible to both a harmless and a defamatory meaning, the court must determine whether, in the light of the extrinsic facts shown, the language was *capable* of being interpreted in the defamatory manner claimed by the plaintiff. If it does so determine, then the jury determines whether it was used in that defamatory sense. (*Yorty v. Chandler* (1970) 13 Cal.App.3d 467, 475; *Gallagher v. Connell* (2004) 123 Cal.App.4th 1260, 1270; Rest.2d, Torts §§ 614, 615.)

IV. Analysis

The first through third causes of action allege defamation torts related to the Message, and unfair competition derived from those torts. The fourth through sixth allege economic-interference torts related to the filing of the Delaware Action.

A. Causes of action related to the Message

1. Common interest privilege

To begin with, Defendant argues that the Message was "protected by the common interest privilege codified in Cal. Civ. Code § 47(c)." That statute provides that a statement is privileged, for defamation purposes, if it is made "[i]n a communication, without malice, 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." Defendant's point is that he was doing no more than warning Korneu, a fellow TUB stockholder, that his stock's value might be about to decrease as the result of the civil and criminal actions about to be filed against Lounegov.

Defendant quotes Civ. Code § 47(c)'s "without malice" requirement, but does not address it. That is a significant omission, because that requirement is a crucial aspect of the privilege. "The malice necessary to defeat a qualified privilege is 'actual malice' which is established by a showing that the publication was motivated by hatred or ill will towards the plaintiff or by a showing that the defendant lacked reasonable ground for belief in the truth of the publication and thereafter acted in reckless disregard of the plaintiff's rights." (*Taus v. Loftus* (2007) 40 Cal.4th 683, 721.) There is no doubt that Plaintiffs have pleaded that Defendant was motivated to publish the Message to Korneu by ill will toward Plaintiffs. For example, "Defendant has engaged in a smear campaign against Plaintiffs by spreading written lies and mistruths about them in retaliation for being forced to resign from FinLink's Board of Directors as a result of Defendant defaulting on the loans to FinLink." (SAC ¶¶ 33, 45 [sic; "from FinLink" presumably intended].) And again, "Defendant made these statements with a malicious intent to injure plaintiffs, i.e., with knowledge of their falsity, or, alternatively with a reckless disregard for their falsity." (SAC ¶ 39, 50.)

Defendant may be able to persuade a jury that the Message was sent without malice, and that, therefore, it was privileged and non-defamatory. (As a side note, Plaintiffs incorrectly assert that Defendant bears the burden of proving absence of malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1202-1203.)) However, what matters at the present pleading stage is whether Plaintiffs have pled facts that, if proved, would render the common-interest privilege inapplicable to the Message. The Court finds that Plaintiffs have done so.

2. First cause of action: libel

The charge of the commission of a crime is libel per se. (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 80.) Defendant argues that the Message did not directly state that Lounegov had committed a crime, it merely speculated that he might have. Defendant depends on such phrases as

"there *may* be a problem," "Vlad *could* shortly be the target of multiple lawsuits," "this *may* jeopardize your bid for a U.S. license," and so forth.

In the first place, prefacing an otherwise defamatory statement with "in my opinion" or "it could be that" does not automatically convert it from an assertion of fact to an opinion or speculation. "[E]xpressions of 'opinion' may often imply an assertion of objective fact. [¶] If a speaker says 'In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth." (*Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 18.) Unlike the defendants in the Internet message board cases upon which Defendant depends (see MPA at pp. 5-6), Defendant had a very close relationship with Lonnegov, FinLink, and FinLink's stockholders. Korneu, the recipient of the Message, would have known that, and he would therefore have reasonably assumed that Defendant had "a knowledge of facts which lead to the conclusion" that Defendant's insinuations were true. As Defendant acknowledges, "To decide whether a statement is fact or opinion, a court must put itself in the place of an average reader and determine the natural and probable effect of the statement, considering both the language and the context." (*Computer Xpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1011.) Of course, the "average reader" of the Message was Korneu, since he was the *only* reader. When the Court puts itself in Korneu's place, it determines that the natural and probable effect of the Message was to foster Korneu's belief that Defendant had good reason to believe that Lounegov had committed a crime for which he was likely to be charged.

Moreover, not all of the Message is cast in the sort of guarded terms Defendant highlights. It also says that "These actions *will* be brought by a growing number of Finlink shareholders who's [sic] rights *are* being ignored (and possibly stolen) by Vlad" and "These actions *are* the last resort by a large group of shareholders" (emphasis supplied). Also, at least some of the guarded terms do not guard against the right thing: "Vlad could shortly be the target of multiple lawsuits, both civil and criminal" is not the same as "Vlad could have committed crimes and torts for which he could be prosecuted or sued." "Vlad could be criminally charged" is very much susceptible to the interpretation "Vlad has committed a crime and hasn't been found out yet, but he might be at any moment." Historically, language that could be interpreted in an innocent way could not be defamatory, as a matter of law, even if it could also be interpreted as defamation, but that rule was repudiated long ago. (*MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536.) As the law stands now, if a court determines that language is even *capable* of being interpreted in the defamatory manner claimed by the plaintiff, the question of whether it actually *was* defamatory goes to the jury. (*Yorty v. Chandler*, *supra*, 13 Cal.App.3d at p. 475.) That, of course, forecloses any possibility of sustaining a demurrer on the basis that the allegedly defamatory language might or might not really be defamatory.

The demurrer to the first cause of action is overruled.

3. Second cause of action: slander

Defendant's primary argument regarding the second cause of action (leaving aside the privilege argument addressed above) is that it is "not pled with the requisite specificity and particularity." The requisite specificity and particularity, Defendant suggests, is that the complaint must "provide adequate details to notify the defendant of the issue; to enable the preparation of an effective defense; and to ensure that the defendant is well-informed about the allegations it is required to refute." For that proposition, Defendant cites to *Okun v. Superior Court* (1981) 29 Cal.3d 442, 458 and *Medical Marijuana, Inc. v. ProjectCBD.com* (2020) 46 Cal.App.4th 869, 894. Neither case says that. What *Okun* says is "Less particularity is required when it appears that defendant has superior knowledge of the facts, so long as the pleading gives notice of the issues sufficient to enable preparation of a defense. [Citations.] Nor is the allegation defective for failure to state the exact words of the alleged slander." (*Medical Marijuana* simply quotes that passage from *Okun.*)

Defendant notes that all of the allegations in the second cause of action are made on information and belief. That, of course, is common practice when a wishes to make allegations for which he currently has no evidence, but anticipates being able to prove through discovery. And again, less particularity is required in pleading matters of which the defendant has superior knowledge. (*Foster v. Sexton* (2021) 61 Cal.App.4th 998, 1028.) Such matters may be alleged on information and belief, and the complaint will be upheld "so long as it gives notice of the issues sufficient to enable preparation of a defense." (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 549-550; see Rutter Group, *Civil Procedure Before Trial* ¶ 6:121.5.)

This is surely a situation where the defendant has superior knowledge: Defendant knows what he said and to whom he said it better than Plaintiffs do. The SAC alleges on information and belief that Defendant made slanderous statements to shareholders of FinLink. That, in the Court's view, is sufficient information to enable Defendant to prepare a defense. If either party is unclear on which shareholders Defendant is alleged to have spoken to and the exact words he is alleged to have said to them, they can explore those issues through the discovery process.

The demurrer to the second cause of action is overruled.

4. Third cause of action: unfair competition

Defendant's only argument regarding the unfair competition cause of action is that it is derivative of the two defamation causes of action, and since they must be dismissed, the derivative one must too. As noted above, the Court does not agree with Defendant's premise. The demurrer to the third cause of action is overruled.

B. The causes of action related to the Delaware Action

The fourth, fifth, and sixth causes of action all spring from Plaintiffs' claim that upon learning that Defendant had filed the Delaware Action, one of Plaintiffs' funders, Company A, decided to insist on repayment of its loans in cash, rather than in FinLink stock as Plaintiffs had anticipated.

1. The litigation privilege

Defendant argues that the litigation privilege (Civ. Code § 47(b)) requires the dismissal of all of these causes of action. Plaintiffs do not address the litigation privilege argument in their opposition memorandum. The Court agrees with Defendant.

As pertinent here, the litigation privilege applies to a "publication or broadcast . . . made . . . in any judicial proceeding." (Civ. Code § 47(b).) The privilege "derives from common law principles establishing a defense to the tort of defamation." (*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157, 1163.) However, it has come to apply to many other torts; for example, it has "been held to immunize defendants from tort liability based on theories of abuse of process [citations], intentional infliction of emotional distress [citations], intentional inducement of breach of contract [citations], intentional interference with prospective economic advantage [citation], negligent misrepresentation [citation], invasion of privacy [citation], negligence [citation] and fraud [citations]." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 215.) It unquestionably applies to the three torts alleged in the fourth through sixth causes of action.

The allegations in the verified complaint Defendant filed in the Delaware Action clearly fell within the privilege. For example, in paragraph 33 of that complaint, Defendant alleges that "for at least the past year, the Company has been violating its bylaws by failing to regularly hold board meetings or to record minutes from any meetings that have purportedly occurred." If, hypothetically, Plaintiffs had alleged that Company A's decision to call in its note was motivated by learning about these bylaw violations by reading about them in the complaint, there is no doubt whatsoever that the allegation would have violated the litigation privilege. The *content* of a pleading filed in a judicial proceeding is plainly a "publication or broadcast" made in that proceeding.

But Plaintiffs' actual allegations regarding the Delaware Action are not quite like that. They all suggest that Company A was motivated to do what it did, not by the detailed factual underpinnings of the Delaware Action, but by the mere fact that the action was filed at all. For example, SAC ¶¶ 71 (fourth cause of action), 77 (fifth), and 89 (sixth) all refer to "the *initiation* of the frivolous litigation in Delaware" (emphasis supplied), as distinct from any particular aspect of or detail about that litigation. The question, then, is whether the mere act of filing a lawsuit qualifies as a publication or broadcast made in a judicial proceeding and is therefore privileged.

The answer is yes. In *Action Apartment Assn. v. City of Santa Monica* (2007) 41 Cal.4th 1232, our Supreme Court addressed whether Civ. Code § 47(b) preempted a city ordinance prohibiting landlords from filing unlawful detainer actions without a reasonable factual or legal basis. Among other things, the city argued "that the litigation privilege does not apply to an action brought under the ordinance because eviction notices and actions are noncommunicative conduct." (*Id.* at p. 1248.) The court acknowledged that "the key in determining whether the privilege applies is whether the injury allegedly resulted from an *act that was communicative in its essential nature.*" (*Ibid.*, citing *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1058.) "As a general rule, the privilege applies only to communicative acts and does not privilege tortious courses of conduct." (*Id.* at p. 1249, internal quotation marks omitted, citing *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 830.) But "[a]n action brought pursuant to this provision of the ordinance is necessarily based on the filing of a legal action, which by its very nature is a communicative act. The filing of a legal action is not 'an independent, noncommunicative, wrongful act.' [Citation.] We contemplate no communication that is more clearly protected by the litigation privilege than the filing of a legal action." (*Ibid.*)

Therefore, the litigation privilege forecloses any cause of action ascribing tort liability to Defendant on the basis that he filed the Delaware Action. Since the fourth, fifth, and sixth causes of action in the SAC all do that, the Court will sustain the demurrer as to those causes of action. The Court notes that the filing of the Delaware Action is not the sole factual basis of the causes of action; they also refer to Defendant's "slanderous statements made to Company A." (SAC ¶¶ 71, 72 [fourth cause of action], 77 [fifth], 89 [sixth].) This presumably refers to the allegation that "Defendant Reynoso communicated to Company A that FinLink and Mr. Lounegov could be subject to criminal prosecutions in multiple jurisdictions." (SAC ¶ 26.) Because of the possibility that Plaintiffs can rework the fourth through sixth causes of action to avoid allegations that the filing of the Delaware Action was tortious conduct, the Court will grant leave to amend.

Because the Court is sustaining the demurrer to the fourth through sixth causes of action on the basis of the litigation privilege, it does not need to reach Defendant's other arguments regarding them. However, the Court will comment briefly on those arguments in the interest of completeness.

2. Timeframe

The fourth through sixth causes of action both relate to Company A's decision to insist on repayment of its loan to FinLink in cash, rather than in shares of FinLink stock as FinLink had expected. The SAC alleges that "Company A requested repayment of the note . . . to FinLink on August 1, 2023, in lieu of . . . converting the shares to equity in FinLink." (¶ 28.) It also alleges that this action was based, in part, "on the intentional actions of Defendant Reynoso, through his initiation of frivolous litigation in Delaware." (*Ibid.*) Defendant protests that this cannot be right because the Delaware Action was not filed until August 9, 2023. (RJN, Exh. A.)

The Court agrees that this seems somewhat anomalous. However, as noted above, it does not matter when the Delaware Action was filed, because that filing is privileged expressive conduct that cannot be raised as an allegation supporting a tort cause of action.

3. Fourth cause of action: interference with contractual relations

Defendant makes two arguments regarding the fourth cause of action. First, he argues that there was no interference because Company A had every right to request cash repayment under the terms of its contract with Plaintiffs, and therefore it did not breach the contract by doing so. Second, he argues that the cause of action is inadequately pled because Plaintiffs "fail to allege that Company A would not have exercised its option to demand payment but for [Defendant]'s alleged conduct."

Regarding Defendant's second point, the Court notes the following allegation in the SAC:

> "Based on the intentional actions of Defendant Reynoso, through his initiation of frivolous litigation in Delaware, and Defendant Reynoso's slanderous statements made to Company A and to others, Company A requested repayment of the note … to FinLink on August 1, 2023, in lieu of the converting the shares to equity in FinLink."

(SAC ¶¶ 28, 71.) The Court finds that this adequately alleges that Company A's conduct was motivated by Defendant's filing of the Delaware Action. Of course, as discussed above, that allegation is prohibited by the litigation privilege, so Plaintiffs will need to allege a causal connection between some other aspect Defendant's conduct and Company A's actions.

Defendant's first argument would be a good one if the cause of action were for inducing breach of contract. There is no question that actual breach is an element of that cause of action. (CACI No. 2200.) However, "cases have pointed out that while the tort of inducing breach of contract requires proof of a breach, the cause of action for interference with contractual relations is distinct and requires only proof of interference." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1129.) Indeed, actual breach is not an element of the latter cause of action. (*Id.* at p. 1126; CACI No. 2201.)

But intent *is* an element: the defendant must have either "intended to disrupt the performance of this contract" or "[known] that disruption of performance was certain or substantially likely to occur." (CACI No. 2201.) The SAC does not allege that Defendant filed the Delaware Action with the specific intent of interfering with the business relationship between Plaintiffs and Company A, or that Defendant knew that any disruption was likely to occur. It merely alleges that filing the action happens to have had that effect: "Defendant Reynoso's initiation of the Delaware litigation, and his slanderous statements against Plaintiffs, has directly led to Company A requesting repayment of the note under the KISS which caused several million dollars' worth of damage to FinLink." (SAC ¶ 29.) That is consistent with the

notion that it never occurred to Defendant that filing the Delaware Action would motivate Company A to call in its notes.

The demurrer to the fourth cause of action is sustained for this reason as well. The Court notes again that Plaintiffs may not allege anything about the filing of the Delaware Action, but for this cause of action to be viable, Plaintiffs need to plead that Defendant did *something* with the requisite intent.

4. Fifth and sixth causes of action: intentional and negligent interference with economic advantage

To begin with, Plaintiffs argue that "there was a valid contract in existence between Company A and FinLink, which [Defendant] knew about," and that therefore [t]his was not a case of interference with 'prospective' contractual or economic relations." The Court agrees, but that raises the question of how Plaintiffs' fifth cause of action for intentional interference with (current, non-prospective) economic advantage differs from the fourth cause of action for interference with (current, non-prospective) contractual relations. The Court urges Plaintiffs, in amending the complaint, to consider whether the fifth and sixth causes of action add anything to the fourth.

Defendant correctly notes that an element of both of those causes of action is the "disruption" of the Plaintiffs' relationship with the third party. Defendant then argues that the causes of action must be dismissed because Plaintiffs "do not adequately allege an actual breach or disruption of their contract with Company A." As discussed above, they have not alleged an actual breach, but they have sufficiently alleged a disruption, specifically a disruption of Plaintiffs' expectation regarding how the loan would be repaid.

Defendant also argues that "Plaintiffs fail to adequately allege that [Defendant] engaged in any legally wrongful conduct. [Defendant]'s alleged out-of-court statements are not defamatory and his communications in the Delaware books and records action are protected by the litigation privilege." As discussed above, the Court agrees with the second half of the second sentence but disagrees with the first half.

Finally, Defendant argues that because negligent interference with prospective economic advantage is a species of negligence, one of its elements is duty. Defendant is correct: "The tort of *negligent* interference with economic relationship arises only when the defendant owes the plaintiff a duty of care." (*Stoltz v. Wong Communications* (1994) 25 Cal.App.4th 1811, 1825.) The SAC does not directly allege that Defendant had a duty of care to Plaintiffs at the time the allegedly tortious conduct occurred, and no allegation in the complaint supports such an inference. Indeed, the allegations that Defendant was no longer employed by FinLink at the time the conduct occurred (e.g. SAC ¶ 10) suggest the opposite. The demurrer to the sixth cause of action is sustained on that basis as well.

V. Conclusion

The demurrer is **OVERRULED** as to the first through third causes of action, and **SUSTAINED WITH LEAVE TO AMEND** as to the fourth through sixth causes of action**.**

The Court notes that the SAC refers to Exhibit A, a copy of Defendant's LinkedIn profile, and Exhibit B, a copy of the Message. (MPA at p. 4, fn. 3 and 4.) Those exhibits were attached to the original complaint, but they are not attached to the SAC. Plaintiffs are urged to cure this omission when they file their amended complaint.

4. SCV-273861, Waterbug Corporation v. Berryman Health, Inc.

This matter is on calendar for Plaintiff's unopposed motion to compel initial responses to Plaintiff's Requests for Admissions, Set One and Request for Production of Documents, Set One. The motion is **GRANTED IN PART AND DENIED IN PART**. Defendant is ordered to serve responses to the document production requests, with no objections, within 21 days of the filing of this order. Defendant shall pay sanctions in the amount of $1,635.00. No order is made regarding the responses to the request for admission.

Plaintiff's counsel shall submit a written order consistent with this tentative ruling, in compliance with California Rules of Court, rule 3.1312.

I. Background

On January 26, 2024, Plaintiff propounded Requests for Admissions, Set One and Request for Production of Documents, Set One on Defendant Pacifica SL Grove Street (added as defendant by Doe amendment on November 20, 2023). Defendant has not responded to the discovery requests in any way. On February 29, 2024, Plaintiff's counsel contacted Defendant's counsel, asking about the discovery responses, but no responses were served. Plaintiff's counsel made a follow-up phone call on March 5, 2024, but again received no response. The instant motion was filed on March 18, 2024.

Opposition was due on May 17, 2024. (CCP § 1005(b) [nine court days before hearing; May 27 is a court holiday].) As of May 23, no opposition has been filed.

II. Analysis

Responses to requests for admission and document production requests are due 30 days from the date the requests were served. (CCP §§ 2033.250(a) [requests for admissions], 2031.260(a) [document production].) When the discovery requests are served electronically, the deadline is extended by two court days. (CCP § 1010.6(a)(3)(B).) Here, the discovery requests were served by email on January 26, 2024. (Lavine dec, ¶ 2, Exhs. A and B.) Thirty days after that was Sunday, February 25, 2024. With the

two-court-day extension, the responses were due on Tuesday, February 27. Therefore, the responses were not timely served as of March 18, when the instant motion was filed.

A. Document production

When a responding party fails to serve a timely response to a document production request, the propounding party may move for an order compelling a response. (CCP § 2031.300(b).) Plaintiff has done so here. The Court will grant the motion and order Defendant to serve responses to the document production requests within 20 days. By failing to serve timely replies to the requests, Plaintiff has waived all objections, including those based on privilege or protection of work product. (CCP § 2031.300(a).) Therefore, the Court will order Plaintiff to respond to the document production requests with no objections.

B. Requests for admissions

Plaintiff cites to CCP § 2033.290 for the proposition that a propounding party may move to compel verified responses to requests for admissions. However, that statute applies only "[o]n receipt of a response to requests for admissions"; that is, it authorizes only motions to compel *further* responses. There is no statutory basis for a motion to compel *initial* responses to requests for admissions. The statute addressing this situation authorizes only a motion to deem the requests admitted: when a party upon whom requests for admissions have been served fails to serve a timely response, "[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." (CCP § 2033.280(b).) Plaintiff has not so moved here.

The Court will deny Plaintiff's motion to compel initial responses to the requests for admissions on the basis that it is unauthorized by statute. Plaintiff may, if it chooses, move to deem the requests admitted.

III. Sanctions

"The court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct." (CCP § 2023.030.) Defendant has misused the discovery process, and sanctions are appropriate here.

Plaintiff's counsel requests sanctions in the amount of $1,762.50, representing 4.7 hours of work at $375/hour. The Court finds the $375/hour figure reasonable. Counsel attributes the work to "following up the delinquent discovery responses and seeking to meet and confer with opposing counsel, and researching and preparing this motion." As counsel points out in his memorandum of points and authorities, there is no meet-and-confer requirement in the case of discovery responses that are not served at all. Counsel notes that *Civil Procedure Before Trial* recommends meeting and conferring even in that case "to save the time and expense of a motion." (Rutter Group, *Civil Procedure Before Trial* ¶ 8:1143.)

The Court agrees, but does not agree that the time spent doing so should be compensated by sanctions. The Court will accordingly deduct .5 hours from the time counsel claims in his declaration. The Court will award an additional $60 to cover the filing fee for the instant motion. Accordingly, sanctions will be awarded in the amount of $1,635.00. If there is oral argument on this motion and Plaintiff prevails, Plaintiff may request additional sanctions to cover the argument time.

IV. Conclusion

The motion is **GRANTED IN PART AND DENIED IN PART**. Plaintiff shall serve responses to the document production requests, without objection, within 21 days of the date of this order. Sanctions are awarded in the amount of $1,635.00.