TENTATIVE RULINGS: CIVIL LAW & MOTION

Friday, July 26, 2024 at **8:30 a.m.**
Courtroom 18 –Hon. Christopher M. Honigsberg
Civil and Family Law Courthouse
3055 Cleveland Avenue
Santa Rosa, California 95403

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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) 521-6723** 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.

1-3. SCV-266002, Hecht v. Nordby Signature Homes, Inc.

Defendant Uponor, Inc.'s Motion to Strike Prayer for Attorney's Fees

Defendant's motion to strike is **GRANTED**. Leave to amend is **GRANTED.** Within 30 days of the filing of the order on the instant motion, Plaintiff may amend the FAC to reflect that attorney's fees are not sought from defendant Uponor, Inc. Defendant's counsel is directed to prepare and submit a proposed order consistent with this tentative ruling and compliant with California Rules of Court, rule 3.1312.

I. Background

This is a construction defect case arising from water leakage in Plaintiffs' newly-constructed home. The operative First Amended Complaint ("FAC"), filed on January 25, 2021, names as defendants Nordby Signature Homes, Inc. ("Nordby"), the builders of the home; Swan Plumbing, Inc. ("Swan"), the

subcontractor that installed the plumbing; and Uponor, Inc. ("Uponor"), the manufacturers of the PEX tubing that allegedly failed and caused the leakage.

Uponor moves to strike the following passage of the Prayer for Relief section of the FAC:

> As a further proximate result, it has been made necessary for Plaintiffs to engage legal counsel for the purposes of bringing this action, entitling Plaintiffs to a further and additional sum for reasonable attorney's fees according to proof.

(FAC at p. 10, ¶ 7.)

Uponor filed the instant motion on February 17, 2023. Plaintiffs filed opposition on June 1, and Uponor filed a reply on June 7. Hearing was set for June 14. However, on that date the Court heard and granted a motion to stay proceedings pending the outcome of the related case *Uponor v. Hecht* (SCV-272688). All pending motions and hearings were dropped from calendar. On May 7, 2024, the parties stipulated to lifting the stay. All parties were notified of the hearing date and time by a Notice of Rescheduled Hearing served on June 26, 2024.

This matter now comes on calendar for hearing on Uponor's motion to strike.

II. Analysis

A. The motion to strike was timely filed

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).)

In their opposition, Plaintiffs argue that the instant motion is untimely filed because "[a] motion to strike any pleading must be filed 'within the time allowed to respond to a pleading' – e.g., 30 days after service of the complaint or cross-complaint unless extended by court order or stipulation." (Oppo at p. 1, citing CCP § 435(b)(1).) The Court disagrees. Because CCP § 436 "grants the trial court discretion to consider striking improper matter from pleadings 'at any time in its discretion,'" courts have "inherent authority" to consider motions to strike on the merits "even though the motion was filed after defendant had filed its responsive pleading." (*CPF Agency Corp. v. R&S Towing* (2005) 132 Cal.App.4th 1014, 1021.) Whether the court's ruling in that situation amounts to granting the motion or striking passages identified by the movant on its own motion is a distinction without a difference.

B. There is no basis for holding Uponor liable for Plaintiff's legal fees.

1. There is no contractual relationship between Plaintiffs and Uponor.

In general, each party to a litigation is responsible for paying its own attorney's fees. (*Alyeska Pipeline Serv. Co. v. Wilderness Society* (1975) 421 U.S. 240, 247.) This, often referred to as the "American rule," is the default assumption, though parties may agree by contract that the prevailing party

in any litigation arising under the contract shall be reimbursed for its attorney's fees, and certain statutes provide for attorney's fees for the prevailing party. (CCP § 1021; *Nasser v. Superior Court* (1984) 156 Cal.App.3d 52, 56.)

Here, the contract between Plaintiffs and Nordby provides that

> In the event of litigation, arbitration, or other dispute resolution procedure the court, arbitrator, judge, or mediator may award reasonable attorney's fees and costs to the party it determines is the prevailing party in the litigation or dispute.

(FAC Exh. A, § 7.6.3) However, that does not justify recovery of attorney's fees from Uponor, because Uponor is not a party to that contract.

2. Civil Code § 1794, part of the Song-Beverly Consumer Warranty Act, is inapplicable here.

Attorney fees can also be shifted by statute. For example, an employee who successfully sues their employer for failing to provide proper paycheck stubs "is entitled to an award of costs and reasonable attorney's fees." (Lab. Code § 226(e)(1).) In their opposition, Plaintiffs argue that they are "entitled to recover fees from Uponor pursuant to Cal. Civ. Code § 1794." (Oppo at p. 2.) Plaintiffs briefly elaborate on this theme:

> Here, Plaintiffs clearly set forth the basis for their entitlement to attorneys' fees within both their Complaint and the FAC. Uponor manufactured and distributed the PEX tubing that was installed in the Plaintiffs' home which ultimately failed, causing substantial damage. These allegations, among others, allow Plaintiffs to recover their attorneys' fees against Uponor pursuant to Cal. Civ. Code § 1794.

(Oppo at p. 4.) The two quoted passages are the entirety of Plaintiffs' argument regarding the applicability of Civ. Code § 1794.

Civ. Code § 1794 is part of the Song-Beverly Consumer Warranty Act, colloquially known as the "lemon law." There is no doubt that it is a fee-shifting statute. It provides that "Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this chapter or under an implied or express warranty or service contract may bring an action for the recovery of damages . . . ," and that a buyer who "prevails in an action under this section . . . shall be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses, including attorneys' fees . . . ." (Civ. Code § 1794(a) and (d).) Thus, to qualify to receive attorney fees from Uponor under this statute, Plaintiffs would have to show that the case at bar is "an action under this section." That, in turn, would involve showing, at a minimum, that Plaintiffs are "buyer[s] of consumer goods," and that they were either covered by an express or implied warranty or damaged by Uponor's failure to comply with some

obligation imposed by the Song-Beverly Act, since both of those things are requirements of the section in question.

The FAC contains a cause of action for breach of implied warranty that is alleged against all defendants, including Uponor. However, implied warranties under the Song-Beverly Act do not last forever. Courts are undecided on how long they do last, but the longest timeframe any court has announced is four years from when the goods subject to the warranty are delivered, based on the Uniform Commercial Code's four-year statute of limitations for warranties. (*Mexia v. Rinker Boat Co.* (2009) 174 Cal.App.4th 1297, 1305-1306; Cal. U. Com. Code § 2725(1) and (2).) The contract between Plaintiffs and Nordby required construction of their home to be complete by November 21, 2014, so Uponor's goods must have been delivered by then. (FAC, Exh. A, §§ 3.1, 3.3.) This action was filed on February 13, 2020, more than five years later. Therefore, Plaintiffs are not covered by an implied warranty.

More importantly, not every lawsuit for breach of implied warranty is ipso facto brought pursuant to Civ. Code § 1794, since that statute applies only to "buyer[s] of consumer goods." (*Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 749.) That raises the question of whether PEX tubing purchased by a contractor for installation in a client's residential property's plumbing system is a consumer good. The answer is no. *Atkinson* is very much on point: it concerns a purported Song-Beverly Act action against a manufacturer of roof shingles. The reviewing court held that the Song-Beverly Act was inapplicable because "roof shingles are not consumer goods." (*Id.* at p. 758.) The court's rationale was that the Act gives manufacturers three options for responding to consumer complaints about goods that cannot be returned to the manufacturer, all of which depend on the goods being "at least removable from their location without causing further damage." (*Id.* at p. 757.) Roof shingles are not; neither are pipes used in plumbing installations. Accordingly, like Mr. Atkinson, Plaintiffs are not "buyer[s] of consumer goods within the meaning of Song-Beverly." (*Ibid.*) Therefore, Civ. Code § 1794 does not provide a basis for Plaintiffs to be awarded attorney's fees from Uponor.

C. The tort of another doctrine does not apply here.

Plaintiffs have not suggested that their prayer for attorney's fees is justified by the tort of another doctrine. However, Defendant argues preemptively in its memorandum of points and authorities that it is not. The Court agrees.

The tort of another doctrine provides that "A person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney's fees, and other expenditures thereby suffered or incurred." (*Prentice v. North American Title Guaranty* (1963) 59 Cal.2d 618, 620.) Plaintiffs are not suing either Nordby or Swan because they were "required to act" by

Uponor's tort; Plaintiffs are suing all three of them as joint tortfeasors. If Plaintiffs believed that Uponor's tort was the sole basis for their injury, they could have just sued Uponor. Nothing about Uponor's alleged misconduct required them to also sue Nordby or Swan. "When two defendants jointly commit a tort, a plaintiff cannot simply argue that one defendant's conduct caused the plaintiff to pursue an action against another." (*Electrical Electronic Control v. Los Angeles Unified School District* (2005) 126 Cal.App.4th 601, 617.) The tort of another doctrine "was not intended to apply to one of several joint tortfeasors in order to justify additional attorney fee damages." (*Vacco Industries, Inc. v. Van Den Berg* (1992) 5 Cal.App.4th 34, 57.)

D. The Court will grant leave to amend.

For the foregoing reasons, the Court agrees with Uponor that it cannot be held liable for Plaintiff's attorney's fees. However, the same cannot be said of Nordby, since, as noted above, Nordby and Plaintiffs are parties to a contract with a fee-shifting clause. Therefore, the prayer for attorney's fees addressed by the instant motion is not wrong; it is merely overbroad.

The Court will strike paragraph 7 of the prayer section of the FAC. However, Plaintiff may amend the FAC to reflect that attorney's fees are sought, but not from Uponor.

III. Conclusion

The motion to strike is GRANTED WITH LEAVE TO AMEND.

Plaintiffs Frederick and Linda Hecht's Individual Motions to Compel Discovery Responses by Defendant Uponor

Plaintiff Frederick Hecht's individual motion to compel further responses to the discovery served defendant Uponor is **GRANTED**. Plaintiff Linda Hecht's individual motion to compel further responses is **DENIED** with respect to special interrogatories no. 2 and 3, and otherwise **GRANTED.** Within 30 days of the filing of the order on the instant motion, Uponor shall serve complete, code-compliant responses to the discovery requests. The responses to Linda Hecht's discovery shall be without objection. Plaintiffs' counsel is directed to prepare and submit a proposed order consistent with this tentative ruling and compliant with California Rules of Court, rule 3.1312.

I. Background

This is a construction defect case arising from water leakage in the newly-constructed home of plaintiffs Linda and Frederick Hecht (collectively "Plaintiffs"; respectively "Linda" and "Frederick"; first names are used due to the shared surname). The operative First Amended Complaint ("FAC"), filed on January 25, 2021, names as defendants Nordby Signature Homes, Inc. ("Nordby"), the builder of the home; Swan Plumbing, Inc. ("Swan"), the subcontractor that installed the plumbing; and Uponor, Inc. ("Uponor"), the manufacturers of the PEX tubing that allegedly failed and caused the leakage.

Frederick propounded discovery demands ("Frederick's discovery") on Uponor on September 8, 2021, to which Uponor served its initial responses on January 24 and February 3, 2022. Linda propounded discovery demands ("Linda's discovery") on Uponor on April 21, 2022, to which Uponor responded on July 15, 2022. Plaintiffs filed the instant motions on February 17, 2023. Uponor filed opposition memoranda on June 1, 2023, and Plaintiffs filed replies on June 7. Hearing was set for June 14. However, on that date the Court heard and granted a motion to stay proceedings pending the outcome of the related case *Uponor v. Hecht* (SCV-272688). All pending motions and hearings were dropped from calendar.

On May 7, 2024, the parties stipulated to lifting the stay. All parties were notified of the hearing date and time by a Notice of Rescheduled Hearing served on June 26, 2024. This matter now comes on calendar for hearing on both motions to compel.

II. Governing law

"California law provides parties with expansive discovery rights." (*Lopez v. Watchtower Bible & Tract Society of N.Y., Inc.* (2016) 246 Cal.App.4th 566, 590-591.) The scope of discovery is one of reason, logic and common sense. (*Lipton v. Superior Court* (1996) 48 Cal.App.4th 1599, 1612.) The right to discovery is generally liberally construed. (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 540; *Davies v. Superior Court* (1984) 23 Cal.2d 291, 300.)

Specifically, "any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." (CCP § 2017.010; see also *Garamendi v. Golden Eagle Ins. Co.* (2004) 116 Cal.App.4th 694, 712, fn. 8.) "For discovery purposes, information is relevant if it might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement . . . . [Citation.] Admissibility is not the test and information unless privileged, is discoverable if it might reasonably lead to admissible evidence. [Citation.] These rules are applied liberally in favor of discovery [citation], and (contrary to popular belief), fishing expeditions are permissible in some cases." (*Garamendi, supra,* at p. 712, fn. 8, internal quotation marks omitted; see also *Gonzalez v. Superior Court* (1995) 33 Cal.App.4th 1539, 1546.) However, even where a "fishing expedition" is permitted, a party seeking discovery must provide sufficient identification of the requested information to acquaint the other party with the nature of information desired. (*Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216, 225.) Relevancy is determined by the allegations of the pleadings. (*John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1185.*)*

A motion to compel further responses to a request for production of documents must "set forth specific facts showing 'good cause' justifying the discovery sought by the demand." (CCP §

2031.310(b)(1).) "[A]bsent a claim of privilege or attorney work product, the party who seeks to compel production has met his burden of showing good cause simply by a fact-specific showing of relevance"; that is, by showing that the requested documents either are admissible in evidence or appear reasonably calculated to lead to the discovery of admissible evidence under CCP § 2017.010. (*Kirkland v. Sup. Ct.* (2002) 95 Cal.App.4th 92, 98.) Once good cause is shown, the burden shifts to the responding party to justify its objections. (See *Coy v. Superior Court of Contra Costa County* (1962) 58 Cal.2d 210, 220-221.)

Failure to respond to discovery requests within the statutory time limit waives most objections, including claims of privilege and work product protection. (CCP §§ 2030.290(a) [interrogatories], 2030.300(a) [document production].)

III. Discussion

A. Because the responses to Linda's discovery demands were untimely served, objections are waived.

1. Counsel's communications

Linda's discovery was served on Uponor on April 21, 2022. Responses were therefore due on Monday, May 23. In an email exchange on May 6, counsel agreed that Plaintiffs' responses to discovery requests propounded on them by Uponor were also due on May 23. On that date, Plaintiffs' counsel (through a paralegal) asked Uponor's counsel for an extension to May 31 to provide Plaintiffs with additional time to review the responses. Uponor's counsel responded "As you may recall, Uponor's responses to Linda Hecht's discovery are due today as well. Based on today being a mutual date for discovery responses, we would propose a mutual one week extension of time to May 31. Is that agreeable?" The paralegal replied "Yes. Thank you." (Declaration of Nicole M. Jaffee in Support of Plaintiff Linda Hecht's Motion ("Jaffee Dec. (Linda)"), Exh. B.) There is no question that as of that exchange, the responses to Linda's discovery were due on May 31. The parties disagree as to whether Plaintiffs granted Uponor an extension.

On June 10, 2022, Uponor's counsel emailed Plaintiffs' counsel that Uponor would serve discovery responses in 45 days; that is, on July 25. At that point, Uponor had not yet responded to either Linda's or Frederic's discovery. On June 14, Plaintiffs' counsel responded that she would agree to an extension to July 15 for responses to Frederick's discovery and added, "Regarding Uponor's responses to Linda Hecht's discovery, the responses were due May 31, 2022 pursuant to the May 6, 2022 emails between our offices. We have not received any responses. As such, your objections are now waived." (Jaffee Dec. (Linda), Exh. C.) (Counsel presumably referred to the above-quoted May 23 emails discussing the May 31 deadline; that email thread began on May 6.)

Later on June 14, Uponor's counsel responded that he "disagree[d] with your suggestion that somehow a waiver of objections has occurred with regard to the discovery requests of Linda Hecht." He described a telephone conversation he had had the previous week in which, by his account, he specifically asked Plaintiffs' counsel if the time extension they discussed would apply to the responses to Linda's discovery, and Plaintiffs' counsel replied "yes, that makes sense." Uponor's counsel commented that "The response was unequivocal and relied upon by Uponor's counsel." (Jaffee Dec. (Linda), Exh, C.)

A few minutes later on June 14, Uponor's counsel again emailed Plaintiffs' counsel, confirming the July 15 deadline for responding to Frederick's discovery, "propos[ing] that the deadline for Uponor's responses to the discovery of Linda Hecht also be July 15, 2022 (since the discovery requests overlap and ask for essentially the same information)," and requesting confirmation. (Jaffee Dec. (Linda), Exh. C.) When that confirmation was not forthcoming by June 22, over a week later, Uponor's counsel emailed Plaintiffs' counsel again, saying "We take your silence to signify confirmation/acknowledgment of the agreement and we are proceeding with that understanding. If you disagree please immediately so advise us." The following day, Plaintiffs' counsel responded "We agree with the timing below but disagree that the discovery from Linda Hecht is the same." (*Ibid*.) Uponor served the responses to Linda's discovery at issue here on July 15, 2022.

2. The Court is not persuaded that Plaintiffs' counsel granted an extension to respond to Linda's discovery beyond May 31, 2022.

In his first June 14, 2022 email, Uponor's counsel refers to a phone conference that had taken place "last week." The email states that in that call, Uponor's counsel proposed extending the deadline for responses to both Linda's and Frederick's discovery to the same date because, among other things, "the information is identical." Plaintiffs' counsel, according to the email, unequivocally responded "yes, that makes sense." (Jaffee Dec. (Linda), Exh. C.) That email presumably refers to the telephone conference on June 7 that Plaintiffs' counsel describes in her email on that date, which reads in part "I write to confirm our agreements during our phone call today. You will get back to me end of the week regarding when we can expect further responses from Uponor." ((Declaration of Nicole M. Jaffee in Support of Plaintiff Frederick Hecht's Motion ("Jaffee Dec. (Frederick)"), Exh. I.) Uponor's counsel's June 10 email, in which he wrote "we respectfully propose that Uponor will provide supplemental responses 45 days from today," was clearly in fulfillment of the agreement to "get back to me end of week." (Jaffee Dec. (Linda), Exh. C.)

The point that emerges from this exchange is that it appears to refer only to Frederick's discovery, not to Linda's. Uponor served responses to Frederick's discovery on January 24, 2022 (request for admission and special interrogatories) and February 3 (form interrogatories and document production). Plaintiffs' counsel sent several letters to Uponor's counsel objecting to those responses, and ultimately

served updated responses on July 15. Linda's discovery, however, was served on Uponor on April 21, and no response to it had been served at all when the emails described above were exchanged. Therefore, it appears that when Plaintiffs' counsel wrote "you will get back to me end of the week regarding when we can expect *further* responses from Uponor" (emphasis supplied), she was referring to an agreement directed at Frederick's discovery, since the responses to Linda's discovery would not have been "further."

The Court does not question Uponor's counsel's credibility in stating, in his first June 14 email, that during that phone call he asked Plaintiffs' counsel if the time extension applied to the responses to Linda's discovery, and that counsel responded "yes, that makes sense." However, because late discovery responses must still be served, it is not inconsistent to suppose that what Plaintiffs' counsel meant was "yes, it makes sense for you to serve your tardy and objection-free responses to Linda's discovery at the same time you serve your timely responses to Frederick's discovery." The Court acknowledges that even if that is what Plaintiffs' counsel meant, it was not necessarily what Uponor's counsel understood her to mean. However, the Court cannot resolve the instant motion to compel on that basis. (CCP § 2030.290(a); see Rutter Group, *Civil Procedure Before Trial* ¶ 8:1033.)

The overarching point, however, is that there is no suggestion, either in Uponor's memorandum or in any of the exchanges between counsel before the Court, that Uponor's counsel requested an extension of the deadline to respond to Linda's discovery before the May 31 due date, as counsel (via a paralegal) did on May 6 to extend the deadline from the initial May 23. (Jaffee Dec. (Linda), Exh. C.) Plaintiffs' counsel's point in her June 14 email appears to be that the responses became untimely at midnight on May 31. In the absence of any suggestion that the deadline had been extended before it expired, counsel was not wrong.

The Court finds that Uponor's responses to the Linda's Special Interrogatories, Set One and her Request for Production of Documents and Things, Set One, both served on Uponor on April 21, 2022, were untimely. Therefore, objections are waived pursuant to CCP §§ 2030.290(a) and 2030.300(a).

B. There was no settlement agreement.

Defendant's argument regarding virtually all of the discovery responses at issue here rests on the premise that because the parties have settled, Plaintiffs do not need the discovery they have requested. Uponor argues that "to mitigate risk of discovery abuse, the operative 'allegations of a complaint' serve to 'limit' the scope of permissible discovery." "Because Uponor has agreed to pay the full amount of repairs to the Property the Hechts claim to have incurred due to the PEX's supposed performance issues . . . , Mrs. Hecht's ongoing gambit to obtain sweeping discovery concerning the Uponor PEX . . . is precisely the type or weaponization of discovery California law forbids." (See, e.g., Opposition to Plaintiff Linda Hecht's Motion ("Oppo (Linda)") at p. 11.)

Plaintiffs argue in response that there has been no settlement. For the following reasons, the Court agrees with Plaintiffs.

1. The July 8 and 11, 2022 emails do not rise to a settlement agreement.

On July 8, 2022, Uponor's counsel wrote to Plaintiffs' counsel that "Uponor is prepared to pay the cost of repair as estimated by the Hechts' selected contractor, Nordby Signature Homes . . . . In exchange for such a payment, Uponor would expect to receive a release from the Hechts related to the above-described payment." (Goldman Omnibus Dec., Exh. 2.) Three days later, on July 11, Plaintiffs' counsel responded as follows by email:

> In response to your attached July 8, 2022 letter, the Hechts would be glad to have Uponor pay for that work understanding such does not settle the matter as regards any defendant. As is known, the Hechts' full damages will not be known until this work is done – only then will any damage caused by the work be known as well as the amounts to compensate the Hechts for their other damages (e.g., loss of the quiet enjoyment of their home since the water damage began, rental value of their interim home while the work is being done, their attorney fees/court costs, watches, any diminution in value of their home, etc.) Please prepare as you may wish a release to this extent for my review. Thank you.

(Goldman Omnibus Dec., Exh. 3.) In a letter to Plaintiffs' counsel on September 16, 2022, Uponor's counsel characterized this exchange as a settlement agreement, stating that "it is apparent that Plaintiffs and Uponor have agreed that Uponor will remit the Repair Settlement Payment to Plaintiffs, and that, in turn, Plaintiffs will release Uponor from liability for repairs to the Property." (Jaffee Dec. (Linda), Exh. G.)

That is less apparent to the Court than it was to Uponor's counsel. For one thing, counsel misread the July 11 email: he characterized it as an agreement that "Uponor's payment would 'not settle the matter as regards any defendant' *other than Uponor*." (Jaffee Dec. (Linda), Exh. G, emphasis supplied.) But the July 11 email does not say "other than Uponor"; it says "any defendant," full stop. Uponor is a defendant. Moreover, the July 11 email clearly contemplates that while Plaintiffs have no problem with Uponor paying Nordby's current estimate of the repair costs, Uponor was still potentially liable for increased repair costs, loss of quiet enjoyment, rent on an interim home, and several other types of damages that could not be accurately determined at that time. This does not qualify as a binding settlement agreement; this is, at best, the opening of settlement negotiations.

2. Subsequent communications between counsel confirm that no agreement was ever reached.

In response to Uponor's counsel's September 16, 2022 letter, Plaintiff's counsel noted in a letter dated October 3 that there was no signed settlement agreement in place, that she had requested "a release to this extent for my review" in her July 11 email, and that "the release needs to include that Uponor

admits liability and the Hechts are still able to pursue all damages against Uponor other than the repairs that are currently underway. (Jaffee Dec. (Linda), Exh. H.) That is a good summary of some of the differences between a full settlement agreement and an agreement in principle as to one of its terms.

On October 6, Plaintiffs' counsel again asked Uponor's counsel when the draft settlement agreement would be forthcoming. (Goldman Omnibus Dec., Exh. 6.) On November 29, Uponor's counsel sent Plaintiffs' counsel a draft settlement agreement, which Plaintiff's counsel agreed to review in an email on December 1. (Goldman Omnibus Dec., Exh. 7.) On December 20, Plaintiffs' counsel rejected the draft agreement on the basis it "does not come anywhere close to what the Hechts agreed to do," and in particular that it called for a full release of all liability, which Plaintiffs were unwilling to provide. (Goldman Omnibus Dec., Exh. 8.) On January 6, 2023, Uponor's counsel emailed Plaintiffs' counsel requesting a redline version of the draft agreement indicating what changes Plaintiffs wanted. Counsel indicated that if he did not receive one, "Uponor will have no choice but to avail itself of the Court in order to enforce the parties' agreement and prevent the Hechts' abuse of the discovery process." (Goldman Omnibus Dec., Exh. 10.)

These exchanges are consistent with the proposition that Plaintiffs' counsel was not as open to settlement as Uponor thought she should be. However, they are not at all consistent with the proposition that a settlement agreement was ever reached. The parties had agreed that Uponor was to pay a certain amount of money toward the repairs to Plaintiffs' home, but it is clear that several other controversial provisions of the agreement remained unresolved.

3. Uponor v. Hecht, no. SCV-272688

On February 24, 2023, Uponor filed *Uponor v. Hecht,* no. SCV-272688, seeking to enforce the purported settlement agreement. The action sought declaratory relief in the form of "a judicial determination of the existence of a Settlement" (cause of action #1), and alleged that Plaintiffs' denial that there was any agreement constituted breach of contract (#2) and breach of the implied covenant of good faith and fair dealing (#3). Uponor filed a First Amended Complaint ("FAC") alleging the same causes of action on August 14, 2023.

On October 16, 2023, Plaintiffs demurred to the FAC on the basis that the exchange between counsel quoted above did not rise to a meeting of the minds sufficient to form an enforceable contract. On March 12, 2024, the Court issued an order sustaining the demurrer without leave to amend. The order stated that it was "clear that [Uponor] will be unable to allege the existence of a contract because there was no meeting of the minds." The Court found that counsel's discussions about the purported agreement "simply agreed to terms that could be included in the final settlement agreement."

The Court's position is unchanged: there was no settlement agreement.

IV. Specific discovery requests

Since the Court finds that there was no settlement agreement, all of Uponor's objections that are based on the premise that there was one are overruled. The Court will address the discovery requests to which Uponor has raised a different objection.

A. Responses to Linda's discovery

The bulk of Linda's interrogatories and production requests addressed by the instant motion share the characteristics that Uponor objected to them, Linda asserted that the objections are waived, and Uponor responded that Linda "improperly seeks to compel Uponor' disclosure of information and documents regarding issues, claims, and damages which are no longer operative or in dispute in light of the parties' binding Settlement." The Court's two rulings above obviate the need to individually address discovery requests that follow that pattern. Linda's demands for objection-free responses are granted due to the untimely responses; Uponor's objections on the basis that the settlement agreement renders them irrelevant are overruled because there is no such agreement.

1. Special interrogatories no. 1-3

These interrogatories request Uponor to identify all persons with knowledge concerning the PEX materials installed at the property, all documents concerning the manufacturing of those PEX materials, and all documents concerning those materials in general. In its opposition, Uponor asserts that in its responses to these interrogatories, it "made clear that it was not aware of the specific PEX that was allegedly installed in the Property, and as such, Uponor 'lacks knowledge' regarding those particular PEX lines." (Oppo (Linda) at p. 12.)

That is not quite accurate: the "lacks knowledge" response appears only in the responses to SROGs no. 2 and 3. The response to SROG no. 1 is, in effect, "you might try asking the people who actually installed the pipe." (Uponor's Response to Plaintiff Linda Hecht's Separate Statement ("Oppo Sep. Stmt. (Linda)") at p. 1.) That is not an adequate response. The interrogatory clearly contemplates that the responding party will identify persons whom it knows to have knowledge concerning the PEX piping. If Uponor does not know of any such persons, it can say so; if Uponor knows of persons who are knowledgeable about PEX piping in general but not about "the PEX MATERIALS which were installed at THE PROPERTY," it can say that.

However, Uponor did do that in its responses to SROGs no. 2 and 3: "UPONOR lacks knowledge as to unique identifying information related to the 'specific PEX MATERIALS which were installed at THE PROPERTY.'" That is an adequate response. If Plaintiffs had intended to ask for documentation regarding PEX materials in general, as distinct from the specific batch installed at Plaintiffs' home, it could have asked that – although such a request would have been vulnerable to an overbreadth objection.

But it did not ask that. Uponor's point, that it does not know which specific pieces of pipe were installed on this particular project, was fair enough.

2. Special interrogatories no. 4-6 and 9-10

These interrogatories request identification of documents exchanged between Uponor and the other parties concerning the subject property and Plaintiffs in general. Uponor's responses, in effect, amounted to "all of those documents are in the document production we provided in response to the request from Frederick Hecht." That is not identification, and is therefore not responsive to the request. Plaintiffs reasonably note that they cannot determine whether or not documents responsive to these interrogatories are missing from the reference document production if they are not even identified. Plaintiffs also correctly point out that "any response referencing other documents shall be specified 'in sufficient detail to permit the propounding party to locate and to identify, as readily as the responding party can, the documents from which the answer may be ascertained.'" (Reply Brief in Support of Plaintiff Linda Hecht's Motion ("Reply (Linda)") at p. 5, citing CCP § 2030.230.)

3. Special interrogatories no. 7-8

These interrogatories request all communications between Uponor and, respectively, Swan and Nordby concerning defects in the PEX tubing. In both cases, Uponor responded that it lacks knowledge of any communication with either defendant "during the construction of THE PROPERTY." Plaintiffs respond that this is evasive because the question is not limited to "during the construction" or to any other timeframe. The Court agrees. The requested material is relevant to whether, when, and to what degree Uponor was aware of defects in the PEX material.

4. Document production request no. 1

The request is for all documents identified in Uponor's responses to the special interrogatories. Since Uponor did not in fact identify any documents in its responses, its objections to the request were unnecessary; Uponor simply needed to say that.

However, for future reference, the Court agrees with Plaintiffs that "Responding Party directs PLAINTIFF Linda Hecht to the documents produced by Responding Party in response to the Request for Production of Documents propounded to it by PLAINTIFF Frederick Hecht" is an inappropriate response. A response to a document request must state "that all the documents . . . in the demanded category that are in the possession, custody, or control of [the responding] party and to which no objection is being made will be included in the production." (CCP § 2031.220.) That necessarily requires *identifying* all of the documents in the demanded category; "you already have them" does not accomplish that. Nor does it comply with the requirement that "[a]ny documents . . . produced in response to a demand for inspection . . . shall be identified with the specific request number to which the documents respond." (CCP § 2031.280(a).)

B. Responses to Frederick's discovery

1. Form interrogatory no. 304.1

The Court agrees with Plaintiffs that a complete answer to this interrogatory would involve providing a response to each sub-part.

2. Special interrogatories no. 2-3

These interrogatories ask Uponor to identify any agreements between itself and, respectively, Nordby and Plaintiffs. Uponor's initial responses, "none other than the settlement agreement," were complete and substantive answers. However, Uponor's supplemental responses, "See the materials produced by Responding Party in response to Propounding Party's Request for Production of Documents," were improper. Any discovery response referencing other documents shall be specified "in sufficient detail to permit the propounding party to locate and to identify, as readily as the responding party can, the documents from which the answer may be ascertained." (CCP § 2030.230.)

3. Production requests no. 4-6, 9-11, 13-16, 20-21, 23

All of Uponor's responses to these requests end with "Investigation continues for potentially responsive documents." The Court agrees with Plaintiffs that this is inadequate. CCP § 2031.230 sets forth the requirements when a responding party represents that it is unable to comply with a production demand. They include an "affirm[ation] that a diligent search and a reasonable inquiry has been made."

In a footnote in its opposition, Uponor states that "Uponor's responses [to these production requests] expressly state that Uponor made 'a good faith effort to locate the requested information[.]' and that all 'information contained herein is given in a good faith effort to supply as much factual information as is present [sic] known by' Uponor." (Oppo (Frederick) at p. 11, fn. 3.) That text does not appear in any of the responses. (Jaffee Dec. (Frederick), Exh. N; Uponor's Response to Plaintiff Frederick Hecht's Separate Statement.)

Uponor is instructed to bring these responses into compliance with CCP §§ 2031.220 and 2031.230.

4. Production request no. 19

This request seeks documents concerning agreements between Uponor and Plaintiffs. Uponor responded "Responding Party refers Propounding Party to documents UP000001 – UP000039, being served concurrently with these responses." Again, this is improper. References to large volumes of documents need to specify the particular documents that respond to the request in sufficient detail to allow the propounding party to find them. (CCP § 2030.230.)

5. Form interrogatories no. 314.2-314.4

These interrogatories request information about any contracts or agreements "alleged in the pleadings." In its opposition, Uponor points out that "the FAC **does not** assert any claim for breach of

contract against Uponor or even make any specific reference to any particular contract to which Uponor is a party." In other words, there *are* no contracts or agreements alleged in the pleadings. Simply saying that would be complete and substantive responses to those interrogatories.

6. Special interrogatories no. 15-16

These interrogatories request identification of any documents concerning communications concerning the property between Uponor and, respectively, Nordby and Plaintiffs. Uponor's initial response to no. 15 was that it "lacks knowledge regarding any communications with NORDBY during the construction of THE PROPERTY." This is evasive, as the interrogatory was not limited to "during the construction." Communication subsequent to the construction would be the most likely to lead to discoverable evidence, and communications directly between Uponor and Nordby would likely be non-privileged.

In the case of both interrogatories, Uponor served a supplemental response referring Plaintiffs to "the materials produced by Responding Party in response to Propounding Party's Request for Production of Documents." As noted repeatedly above, it is not acceptable to respond to a request for identification of documents with "the ones you're asking about are in a large set of documents that you already have." "Identify" means what it says; it does not mean "tell us where to look for it."

Regarding Uponor's comment "that communications with the Hechts would be in the possession of, and equally available to, the Hechts themselves," special interrogatory no. 16 does not request communications *with* Plaintiffs; it requests identification of documents *concerning* such communications. "CONCERNING" is defined to mean "referring to, alluding to, responding to, relating to, connected with, commenting on, about, regarding, discussing, constituting, evidencing, or pertaining to." The only such communications Plaintiffs would be likely to have are those "constituting" communications with them, but the interrogatory has far broader reach.

7. Special interrogatory no. 17

This interrogatory request identification of any documents concerning communications concerning PEX material between Uponor and Swan. Uponor responded that it "lacks knowledge regarding any communications with SWAN during the construction of THE PROPERTY," and that it is "currently unaware" of any subsequent communication, but that "investigation continues." Plaintiffs observe that "during the construction" and "subsequent" are evasive because the interrogatory is not limited to any particular time period, and the Court agrees. Any communications between Uponor and Swan concerning PEX tubing *prior to* the construction of the subject property are encompassed by the interrogatory, and could well be discoverable. To take a hypothetical example, a letter from Uponor to Swan saying "for future reference, we can give you a great price on some PEX tubing with slight manufacturing defects that

probably won't cause very much trouble" would be highly relevant. (The Court does not, of course, suggest that such a letter exists.)

As noted above, "investigation continues" is an unacceptable response.

8. Production requests no. 4-6, 14, 20-21, and 23

In response to all of these document production requests, Uponor has stated that it is "currently not aware of any documents responsive to this request," in some cases adding that "investigation continues." This leaves Plaintiffs to guess as to whether Uponor is currently not aware of them because they do not exist, or because Uponor has not taken the trouble to look for them. That is why "[a] representation of inability to comply with the particular demand for inspection, copying, testing, or sampling shall affirm that a diligent search and a reasonable inquiry has been made in an effort to comply with that demand. This statement shall also specify whether the inability to comply is because the particular item or category has never existed, has been destroyed, has been lost, misplaced, or stolen, or has never been, or is no longer, in the possession, custody, or control of the responding party." (CCP § 2031.230.)

9. Form interrogatory no. 324.1 and production requests no. 24-78

These requests ask Uponor to identify the bases for, and all documents supporting, each of its 55 affirmative defenses. Uponor provided no substantive information in response to any of them. In its opposition, Uponor justifies this in three ways: because Plaintiffs initially failed to produce information regarding "alleged damages still at issue"; because "certain affirmative defenses are potentially no longer applicable in light of the parties' Settlement"; and because of authority for the proposition that attorneys must utilize discovery as a tool rather than a bludgeon. (Opposition to Plaintiff Frederick Hecht's Motion ("Oppo (Frederick)") at p. 12.) As to the first, Uponor's remedy is to propound its own discovery and move to compel responses if they are not forthcoming; it is not a basis for declining to respond to Plaintiffs' discovery. As to the second, see the discussion above regarding the purported settlement agreement.

As to the third, it was Uponor's choice to assert 55 affirmative defenses. Either it has evidence to back them up or it does not. Uponor has provided no authority for the proposition that if a defendant asserts more than some threshold number affirmative defenses, the plaintiff may request evidence in support of only a subset of them.

10. Form interrogatories no. 325.1-325.4

These interrogatories ask whether Uponor attributes the damages sought by Plaintiffs to anyone other than itself or Plaintiff, or to some cause other than construction defects, or contends that the damages are unreasonable. In response to no. 325.3, Uponor states that "discovery is ongoing in this matter and Uponor is seeking additional details regarding the claimed damages." The responses to all of the others are along similar lines.

In its opposition, Uponor states that Plaintiffs' responses to Uponor's discovery requests concerning their damages were inadequate. (Oppo (Frederick) at pp. 11-12.) In this context, unlike the context of the affirmative defenses discussed above, that approaches being a fair point: Uponor cannot be expected to say whether it attributes any damages to someone else if it does not know what damages are sought, or whether the amount of the damages sought is unreasonable if it does not know what that amount is.

However, the form interrogatories in question are carefully worded. No. 325.1 asks if Uponor contends that some third party contributed to the existence of the construction claim; that can be answered without knowing the specific amounts claimed. No. 325.2 asks if Uponor contends that Plaintiffs simply weren't damaged at all by the facts underlying the claim; those facts are set forth in the FAC. Nos. 325.3 and 325.4 both refer to specific categories of damage, but both are qualified by "claimed by plaintiff *thus far in this case*" (emphasis supplied), which opens the door for a "we make no such claim as to damages claimed thus far, but reserve the right to revisit this after Plaintiffs comply with our discovery demands" response. That was presumably Uponor's point in responding "discovery is ongoing and we are seeking additional details," but that does not excuse them from responding on the basis of such details as they have.

Each answer to an interrogatory must be "as complete and straightforward as the information reasonably available to the responding party permits. If an interrogatory cannot be answered completely, it shall be answered to the extent possible." (CCP § 2030.220(a), (b).) The Court acknowledges that Uponor's responses to interrogatories concerning the damages claimed by Plaintiffs could be more complete if Uponor had more information about the nature and extent of those damages, but it has *some* information, and therefore needs to provide responses to the extent it can on the basis of that information.

V. Sanctions

CCP § 2030.290(c) (relating to interrogatories) and CCP § 2031.300(c) (relating to document production) both provide that a monetary sanction "shall" be imposed against the unsuccessful party on a motion to compel unless the court finds substantial justification for that party's position or other circumstances making sanctions unjust. The Court finds no such justification or circumstances here.

Monetary sanctions are to reimburse a party for the "reasonable expenses, including attorney's fees, incurred by anyone as a result of" conduct constituting a misuse of the discovery process. (CCP § 2023.030(a).) Plaintiffs claim a total of $10,850.50 in attorney's fees for both motions, broken down as follows:

	Hourly rate	Hours (Linda)	Hours (Frederick)	Fees claimed
Partner:	$425	6.1	10.7	$7,140.50
Associate:	$250	4.3	6.2	$2,625.00

Paralegal:	$175	1.3	4.9	$1,085.00

In addition, Plaintiffs claim $120 for the two $60 filing fees for the two individual motions, which brings the total claim to $10,970.50.

The Court finds the hourly rates to be in line with customary rates in Sonoma County for lawyers with comparable levels of skill and experience, and the time claimed to be reasonable. Accordingly, sanctions are awarded in the requested amount.

VI. Conclusion

For the reasons set forth above, the motion to compel further responses to Linda's discovery is DENIED as to special interrogatories no. 2 and 3, and otherwise GRANTED. Responses to Linda's discovery shall be without objection. The motion to compel further responses to Frederick's discovery is GRANTED. Sanctions are awarded to Plaintiffs in the amount of $10,970.50.

4. SCV-273534, Gibson v. Becker

Defendants Ekren, Becker, Gagliasso, Lampros, Rhodes, and Pure Property Management (together "Defendants") specially move to strike (the "anti-SLAPP") Plaintiff Gibson's First Amended Complaint ("FAC"). The motion is **GRANTED in part with leave to amend** per Code of Civil Procedure ("C.C.P.") section 425.16 as to the first, second, third, fourth, sixth, and seventh causes of action, and **DENIED in part** as to the fifth cause for abuse of process.

The Court will award mandatory sanctions to the Defendants as the prevailing party of this motion, after the Court considers the motion for fees and costs according to proof that the Defendants intend to file.

Defendant's counsel is directed to prepare and submit a proposed order consistent with this tentative ruling and compliant with California Rules of Court, rule 3.1312.

I. Facts & Procedure

Plaintiff Gibson, self-represented, alleges causes of action for housing discrimination, intentional misrepresentation, malicious prosecution, wrongful eviction, abuse of process, wrongful retention of security deposit, and retaliation in the FAC. Plaintiff resided at the location at 1746 Mt. Olive Drive, Santa Rosa, California 95404 (the "Home") after finding it listed on Craigslist for rent. Defendants were his landlord and property management team. Defendant Ekren brought an unlawful detainer action against Plaintiff for back rent in Case No. MCV-261354, which Defendant voluntarily dismissed without prejudice to make changes to his title on the complaint. Thereafter, Defendant Ekren brought another identical unlawful detainer action against Plaintiff in Case No. 23CV00424, which was fully adjudicated

in Defendants favor awarding them a monetary judgement to be paid out by Plaintiff. Plaintiff filed an appeal, which is still pending.

Defendants filed this anti-SLAPP motion arguing that the FAC seeks to chill protected activity. Plaintiff opposes the anti-SLAPP motion.

II. Request For Judicial Notice

Judicial notice of official acts and court records is statutorily appropriate. (Evid. Code §§ 452(c)-(d).) Plaintiff requests judicial notice of the Complaint, Demurrer, Opposition to Demurrer, and Reply to Opposition filed with the Court in Case No. MCV-261354. Plaintiff's request for judicial notice is **GRANTED**.

III. Analysis

a. Legal Standard

i. Special Motion to Strike (anti-SLAPP)

C.C.P. section 425.16(b)(1) provides that a cause of action against a person "arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue" shall be subject to a special motion to strike or "anti-SLAPP" motion, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. The anti-SLAPP statute further defines the foregoing phrase to include "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law." (C.C.P. § 425.16(e)(1).) It is well established that, the "constitutional right to petition… includes the basic act of filing litigation or otherwise seeking administration action." (*Brings v. Eden Council for Hope Opportunity* (1999) 19 Cal.4th 1106, 1115; *Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087.)

ii. Protected Speech in the anti-SLAPP

A defendant has the initial burden in the anti-SLAPP motion to make a prima facie showing that the complaint "arises from" the exercise of free speech or petition rights. (*Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 61; *Governor Gray Davis Committee v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449 at 458-59.) "At the first step of the analysis, the defendant must make two related showings. Comparing its statements and conduct against the statute, it must demonstrate activity qualifying for protection. (See § 425.16, subd. (e).) Comparing that protected activity against the complaint, defendant must also demonstrate that the activity supplies one or more elements of a plaintiff's claims." (*Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 887.) If defendant meets that initial burden, the burden shifts to the plaintiff to establish that there is a "probability" of prevailing on the claims which are based on protected activity. (C.C.P. § 425.16(b)(1).)

iii. Probability of Success on the Merits

To establish a "probability" of prevailing on the merits, plaintiff must demonstrate that the claim is both legally sufficient and supported by a prima facie showing of facts sufficient to support a favorable judgment if the evidence submitted by the plaintiff is credited. (*Navelier v. Sletten* (2002) 29 Cal.4th 82, 89.) To demonstrate a probability of prevailing on the merits, the plaintiff must produce admissible evidence sufficient to overcome any privilege or defense that the defendant has asserted to the claim. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 323.)

Civil Code section 47(b) litigation privilege is a substantive defense the plaintiff must overcome to demonstrate probability of prevailing. "In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (C.C.P. § 425.16(b)(2).) There is no requirement of finding an intent to chill free speech, or actual chilling of free speech. (*Equilon*, 29 Cal.4th 58-59.)

iv. Fees and Costs on anti-SLAPP Motion

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

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

***b.* <u>Defendants' anti-SLAPP</u>**

i. Protected Activity

Defendants' anti-SLAPP motion argues that the FAC arises from the Defendants' exercise of constitutional right of free speech and petition for redress, including serving lawfully required notices, opposing demurrers, filing and successfully prevailing on a motion to quash, participating in a court ordered settlement conference, appearing at court scheduled hearings, correcting a pleading, pursuing rights and remedies with the Superior Court of Sonoma through judicial process, etc. (Anti-SLAPP, 2:4-9.)

Plaintiff opposes and argues that Defendants' argument is based on bad law and is completely frivolous because Defendants must establish that each cause of action independently arises out of a protected activity. Plaintiff concedes that the malicious prosecution and wrongful eviction causes of action arise out of a protected activity. Plaintiff points out that the abuse of process cause of action is only

against non-moving defendants who have not joined this anti-SLAPP motion. Plaintiff argues that Defendants have otherwise not met their burden to show the first prong was satisfied on any other cause of action.

In paragraph 3 of the FAC, Plaintiff alleges that professional wrongdoing on part of Defendants includes "filing, prosecuting, and maintaining frivolous lawsuits with malicious intent, and intentionally misleading the Court as to both facts and controlling authorities." All seven causes of action reallege and incorporate by reference "each and every paragraph above as if fully set forth herein," including paragraph 3. Thus, all seven causes of action in the FAC incorporate and reallege that it is partially based on the alleged professional wrongdoings, which includes activity Plaintiff has conceded is protected. On the face of the FAC, Plaintiff has realleged the underlying protected activity as a basis for each and every cause of action. So, the first prong has been satisfied.

ii. Probability of Prevailing

Defendants argue that Plaintiff cannot meet his burden of proof of demonstrating a probability of succeeding on each cause of action as the underlying activities are "absolutely protected by Civil Code §47(b), Cal. Evidence Code §§1152 and 1154, lack of a stated claim for which relief can be obtained, lack of standing, and are barred by various other prohibitions..." (Amended Notice of Motion, 2:17-21.)

1. <u>First Cause of Action for Housing Discrimination</u>

Defendants argue that Plaintiff cannot demonstrate the elements of discrimination. Defendants claim that there is nothing discriminatory about inquiring into the stability and dependability of all prospective tenants to ensure their ability to comply with the terms of the lease. Defendants argue that Plaintiff was not evicted due to his perceived or actual status of a protected class, but rather because he failed to pay back rent.

Plaintiff argues that "source of income discrimination" is illegal and gives Plaintiff standing to bring this cause of action.

The Court does not find that Plaintiff has sufficiently shown that he was discriminated against due to his "source of income" or that he has a probability of prevailing on this cause of action on that basis. Defendants brought the underlying unlawful detainer actions due to back rent owed and received a favorable judgment on one of the actions. Plaintiff has not sufficiently shown he was evicted due to his "source of income" as opposed to failure to pay rent consistently.

The motion is **GRANTED** as to the first cause of action.

2. <u>Second Cause of Action for Intentional Misrepresentation</u>

Plaintiff argues that Defendants were legally obligated to produce a copy of the lease agreement controlling the tenancy upon request by Plaintiff, which Defendants did not when Plaintiff asked but later

did "at a time of his choosing in an attempt to enforce its terms…" Plaintiff argues that these facts support a cause of action for intentional and negligent misrepresentation as well as concealment.

Defendants point out that Plaintiff's roommate Sean was the original signatory to the lease and was in possession of it at all relevant times. When the property management company found a copy of the lease agreement, Plaintiff was given a courtesy copy but still refused to pay late fees and rent owed afterwards.

The Court does not find that Plaintiff has sufficiently shown a probability of prevailing on this cause of action.

The motion is **GRANTED** as to this cause of action.

3. <u>Third Causes for Malicious Prosecution</u>

Claims for malicious prosecution are covered by the anti-SLAPP statute, because by definition, a malicious prosecution suit alleges that the defendant committed a tort by filing a lawsuit. (*Mandel v. Hafermann* (2020) 503 F. Supp. 3d 946, 966; *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 735.)

As to the second prong, plaintiff must establish that the underlying action was "(1) initiated or maintained by, or at the direction of, the defendants, and pursued to a legal termination in favor of the malicious prosecution plaintiff; (2) initiated or maintained without probable cause; and (3) initiated or maintained with malice." (*Parrish v. Latham & Watkins* (2017) 3 Cal.5th 757, 775; *Zamos v. Stroud* (2004) 32 Cal.4th 958, 965–966.) In evaluating whether there was a legal termination in favor of the malicious prosecution plaintiff, courts consider whether the legal termination was on the merits, or in other words, whether the legal termination reflects on their innocence regarding the alleged wrongful conduct. (*Roche v. Hyde* (2020) 51 Cal.App.5th 757, 788; *Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1399.) "[T]he probable cause element calls on the trial court to make an objective determination of the 'reasonableness' of the defendant's conduct, i.e., to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable,' as opposed to whether the litigant subjectively believed the claim was tenable." (*Ibid*.) As to the malice element, the plaintiff must plead in the complaint and prove that actual ill will or some improper ulterior motive existed, i.e., the motive of the defendant must have been something other than that of bringing a perceived guilty person to justice or the satisfaction in a civil action of some personal or financial purpose. (*Jay v. Mahaffey* (2013) 218 Cal. App. 4th 1522, 1543.)

Here, Defendants argue that the first unlawful detainer action was voluntarily dismissed without prejudice prior to any finding on the merits in order to make a correction in the naming of the successor trustee as Defendant Ekren and based on expense associated with scheduling issue. Defendant Ekren

nevertheless brought a subsequent unlawful detainer action with the corrections made, which was adjudicated on its merits in favor of Defendants against Plaintiff.

Plaintiff argues that the late fees charged for back rent were punitive in nature and support finding malice. Plaintiff claims that there was not probable cause to bring the unlawful detainer actions and that the voluntary dismissal was due to lack of merit rather than for other reasons. Plaintiff does not mention the second successful unlawful detainer action.

The Court does not find that Plaintiff has satisfactorily shown that the late fees and back rent charged alone demonstrated malice or ill will on the part of Defendants. The unlawful detainer actions brought were for a legitimate purpose. The first unlawful detainer action was voluntarily dismissed without prejudice for technical reasons that were later corrected when the second unlawful detainer action was brought and fully adjudicated in Defendants' favor.

As Plaintiff has failed to show a probability of prevailing, the motion is **GRANTED** as to this cause of action.

4. **Fourth Cause of Action for Wrongful Eviction**

Defendants argue that Plaintiff was issued a notice to pay late fees because he failed to pay rent on time. Defendants' position is that Plaintiff failed to show the necessary elements of knowledge of falsity, material misrepresentation, reasonable reliance, and causation or damages required for a wrongful eviction cause of action.

Plaintiff argues that one of the consequences of the underlying "malicious eviction lawsuit" is that Plaintiff's longtime roommate (Sean) moved out. Plaintiff argues that Defendants were aware that Plaintiff and his roommate were both a party to the rental agreements and that there was an economic relationship between them. Plaintiff claims that by way of prosecuting, they intentionally interfered with Plaintiff's economic relationship with his roommate and ultimately induced Plaintiff's own breach of their rent sharing agreement.

The Court is not persuaded by Plaintiff's argument. Defendants' underlying unlawful detainer actions were brought to recover back rent Plaintiff already owed before his roommate Sean moved out. There was already cause existing for his eviction before his roommate left, so the Court is not convinced that the actions resulted in interference with Plaintiff's economic relationship with his roommate or "induced" him to breach his rent sharing agreement.

Plaintiff failed to demonstrate he could prevail on a wrongful eviction cause of action, so the motion is **GRANTED** as to this cause of action.

5. **Fifth Cause of Action for Abuse of Process**

The Court will not consider this fifth cause of action for abuse of process because Plaintiff has not alleged it against moving defendants. The motion is therefore **DENIED** as to this cause of action.

6. Sixth Cause of Action for Illegal Retention of Security Deposit

Defendants argue that Plaintiff's roommate was the one who signed the lease originally in 2017 and paid the security deposit, so Plaintiff has failed to present sufficient facts to show he was entitled to security deposit, or that he had standing to receive a deposit, or that he ever paid a security deposit to Defendants in the first place, or that he was harmed by not receiving a return of said security deposit. Plaintiff was ordered to pay $16,731.72 in damages to Defendants in the second unlawful detainer action and committed additional damages upon leaving the property.

Plaintiff simply states that Defendants were obligated to return Plaintiff's security deposit within 21 days of him vacating the property without providing any evidence that he submitted any security deposit when he moved in.

Thus, Plaintiff has not sufficiently shown that he could prevail on this cause of action. The motion is **GRANTED** as to this cause of action.

7. Seventh Cause of Action of Retaliation

Defendants argue that Plaintiff does not have a probability of prevailing on this cause of action because there is little to no factual basis to support it. Plaintiff was in default due to non-payment of back rent owed. The eviction and unlawful detainer actions were brought against Plaintiff to recover the back rent owed. Plaintiff has not alleged facts in the FAC that show how each Defendant named is responsible for the claimed retaliation.

Plaintiff did not address this cause of action in the opposition, so the Court finds that Plaintiff has not shown a probability of prevailing on it. The motion is **GRANTED** as to this cause of action.

iii. Fees and Costs

Defendants request that fees and costs be awarded for an amount according to proof in a subsequent motion for fees and costs to be brought. As the Court will partially grant the anti-SLAPP motion, fees and costs will be awarded per noticed motion to be subsequently filed.

IV. Conclusion

For the foregoing reasons, the anti-SLAPP motion is **partially GRANTED** as to the first, second, third, fourth, sixth, and seventh causes of action and **partially DENIED** as to the fifth cause of action for abuse of process. Mandatory sanctions will be awarded to the Defendants as the prevailing party, after the Court considers their anticipated motion for fees and costs according to proof.