SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 10/04/23 TIME: 1:30 P.M. DEPT: B CASE NO: CV1900414

PRESIDING: HON. JAMES T. CHOU

REPORTER: CLERK: JOEY DALE

PLAINTIFF: FRANK B. GLASSNER and DEFENDANT: CRYSTINE M. LEE	

NATURE OF PROCEEDINGS: MOTION – LEAVE TO CONDUCT ANTI-SLAPP DISCOVERY

RULING

Defendant/Cross-Complainant Dr. Crystine Lee's motion to lift the automatic discovery stay pending the determination of Plaintiff's anti-SLAPP motion to strike, is denied. (Code Civ. Proc. § 425.16(g).)

BACKGROUND

Plaintiff Frank Glassner's most recent version of his complaint (Consolidated Amended Complaint), alleges that from March 2009 until October 2018, the parties had lived together in a romantic relationship as "unmarried life-partners" during which time they shared all expenses, assets, debts and obligations of a married couple pursuant to a "Pooling and Support" Agreement as recognized in *Marvin v. Marvin* (1978) 18 Cal. 3d 660. (¶s 13, 30-32, 38, 111) Plaintiff alleges that Defendant had improperly transferred the couple's shared assets to third-parties without Plaintiff's consent. (¶s 49-52, 104 et seq.)

More particularly for purposes of this motion, Plaintiff also alleges that after he filed the original Complaint and during the discovery phase, he had learned Defendant, a physician, was romantically involved with one of her co-workers (¶ 4) and that Defendant was sharing Plaintiff's confidential medical information and other embarrassing details of Plaintiff's personal life with her friends and medical colleagues, some of whom either had been Plaintiff's physicians or who had been clients of Plaintiff's professional services in negotiating executive compensation. (¶s 5-7) Plaintiff alleges that these defendants were aware of Dr. Lee's affair and shared this information between themselves, without any legitimate medical purpose, but solely to humiliate and ridicule him. (¶s 5-7, 273-281, 294-296, 308-316, 326-331, 346-349.)

In addition to alleging breach of the pooling and support agreement and related improper activities, the 68-page amended Complaint filed against Lee, third-party individuals and professional corporations, alleges causes of action arising out of the alleged improper sharing of Plaintiff's confidential medical and personal information: 1 – Slander *per se* based on the false accusation that Plaintiff was attempting to cause Lee great bodily injury by pouring water into her car's gas tank, that she made to the Novato Police Dept., to individuals who knew Plaintiff, and to the issuer of the life insurance policy on Lee's life on which Plaintiff is the beneficiary. (13th); 2 – Unlawful Disclosure of Private Medical Information. (17th); 3 – Breach of Fiduciary Duty of Confidentiality. (18th); 4 – Negligence (19th); 5 – Intentional Infliction of Emotional Distress (20th); 6 – Invasion of Privacy (24th); and 7 – Unfair Business Practices (25th).

The Cross-Complaint filed by Dr. Lee on October 7, 2022 alleges that Plaintiff, without Defendant's consent, had illegally hacked into her personal electronic devices, i.e., iPhones, laptop, and iPad, to access her private information. Plaintiff then intentionally and maliciously "misappropriated said information and disseminated it in a false light for the sole purpose of trying to harm Lee." (Cross-Complaint ¶s 7, 24) Cross-Complainant alleges this information was personal and confidential and includes her private financial, professional, employment information and personal communications, as well as statutorily-protected patient and third-party medical information. (¶s 8-9) It is alleged Plaintiff published this information to Dr. Lee's friends and colleagues "in a false and defamatory light" to defame her in front of friends and professional colleagues. (¶s 12, 19) Lee alleges this conduct injured her in her occupation and caused her to suffer severe emotional distress. (¶s 12, 19, 23) The Cross-Complaint also alleges Plaintiff intentionally destroyed portions of the house they had shared in Novato. (¶ 13)
Dr. Lee alleges causes of action for: 1 – Invasion of Privacy; 2 – Damage to Real Property; 3 – Intentional Infliction of Emotional Distress; and 4 – Negligent Infliction of Emotional Distress.[1]

Plaintiff's Anti-SLAPP Motion

Glassner has filed an anti-SLAPP special motion to strike (Code Civ. Proc. § 425.16) that seeks to dismiss causes of action 1, 3 & 4, contending that he obtained this information from the electronic devices, *supra*, in attempting to respond to Lee's discovery requests. Plaintiff contends this conduct is absolutely protected and privileged under the anti-SLAPP statute (Code Civ. Proc. § 425.16(e)), and the litigation privilege codified in Civil Code § 47(b), as activities connected to and/or performed in furtherance of this civil litigation. (See *City of Cotati v. Cashman* (2002) 29 Cal.4th 69,75 [recognizing anti-SLAPP statute covers speech that is absolutely privileged under the litigation privilege pursuant to Civ. Code § 47(b)].)

Glassner asserts that he and his company Veritas Executive Compensation Consultants (Veritas) own the electronic devices which he allowed Lee to use early in their romantic relationship, but when that relationship ended, Lee returned the computers and phone to Glassner by February 2019. (Glassner Ex. 5, ¶ 6) He declares that in response to a request to produce documents served on him in October 2019 (Glassner Ex. 7), he hired a forensic I.T. specialist to search the devices for "any documents and/or relevant meta-data maintained on electronic devices that Defendant used during our relationship." (MPA p. 6; RJN Ex. 5, ¶ 2.) (MPA p. 6)

[1] On November 17, 2022 Cross-Complainant voluntarily dismissed the second cause of action for false light.

Plaintiff argues he did this because it was necessary to respond to requests for documents, e.g., No. 73 - All Documents which discuss, refer or relate to any issue which is the subject of the complaints on file in case no. 1900414; and No. 125 - Any and all documents which discuss, refer, or relate to Plaintiff's claim for damages in this matter. (MPA pp. 2, 5-8.)

Lee's Motion to Conduct Limited Discovery

In the motion before the court, Lee is requesting the anti-SLAPP discovery stay to be lifted (§ 425.16(g)), to permit her to take Glassner's deposition concerning two related issues: 1 – to test the veracity of Glassner's claim that he searched the electronic devices used by Lee only in order to respond to her discovery requests, and not for some ulterior, non-privileged, purpose; and 2 – to obtain evidence that Glassner's motive was to exact revenge on Lee because she had terminated their relationship, which purpose Lee claims is not protected activity. (Notice pp. 2-3; MPA pp. 3-4) Glassner is currently serving a 12-month sentence in federal prison in North Carolina for securities fraud crimes.

Lee argues that this discovery is needed to allow her to make a prima facie showing of facts that would, if proved, support a judgment in her favor. (See *Chaker v. Mateo* (2012) 209 Cal.App.4th 1138, 1143.) (MPA p. 7)

DISCUSSION

Anti-SLAPP Law Generally

"The special motion to strike established in section 425.16 may be used to attack a cause of action if (1) the cause of action arises from 'any act [by the defendant] in furtherance of the person's right of petition or free speech under the United States or California Constitution,' and (2) the defendant was exercising his or her right of free speech 'in connection with a public issue.' (*Id.,* subd. (b)(1).)" (*Chabak v. Monroy* (2007) 154 Cal.App.4th 1502, 1509.) "Thus, statements, writings and pleadings in connection with civil litigation are covered by the anti-SLAPP statute, and that statute does not require any showing that the litigated matter concerns a matter of public interest. [Citations.]" (*1100 Park Lane Associates v. Feldman* (2008) 160 Cal.App.4th 1467, 1478.)

Similarly, communications with some relation to judicial proceedings are absolutely immune from tort liability by the "litigation privilege" codified in Civil Code § 47(b). (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1193.) That statute covers communications in furtherance of pre-trial discovery. (See *Rusheen v. Cohen* (2006) 37 Cal. 4th 1048, 1057 ["[I]t applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved. [Citations.]"]; e.g., *Sipple v. Found. For Nat. Progress* (1999) 71 Cal. App. 4th 226, 243 [a deposition is considered a judicial proceeding within the meaning of Civil Code § 47(b)].)

"[S]ection 425.16 requires the trial court to undertake a two-step process in determining whether to grant a SLAPP motion. 'First, the court decides whether the defendant has made a threshold prima facie showing that the defendant's acts, of which the plaintiff complains, were ones taken in furtherance of the defendant's constitutional rights of petition or free speech in connection with a public issue.' [Citation.]" (*Chaker v. Mateo* (2012) 209 Cal.App.4th 1138,

1142-1143.) "If the court finds the defendant has made the requisite showing, the burden then shifts to the plaintiff to establish a 'probability' of prevailing on the claim by making a prima facie showing of facts that would, if proved, support a judgment in the plaintiff's favor. [Citation.]" (*Chaker, supra,* 209 Cal.App.4th at p. 1143.)

DISCOVERY RULES

Relying on § 425.16, subd.(g), Lee contends she has good cause to depose Glassner in order to determine whether he harbored an intent and motive to seek revenge on Lee, and not in a legitimate effort to respond to her discovery requests, and that Glassner is the only person who can testify as to his mental state. (MPA p. 8) Lee expects to ask Glassner: "what he was looking for, why he was looking for it in Lee's devices, and why he reasonably believed that conducting a diligent search for materials in his possession required him to hire a date extraction specialist to make [a] forensic copy of Lee's communications with her friends and colleagues." (MPA p. 9) Lee maintains that if she can obtain evidence that Glassner's motive was merely to harass her as revenge for her breaking up with him, this negates his claim that he was engaging in protected pre-trial related conduct.

In support of her claim, Lee cites a report by Glassner's therapist submitted at his federal sentencing hearing, to explain that he acted out of character in committing the crime because he "was obsessed with revenge" and engaged "in a monumental vendetta" against Lee. (MPA p. 4, Martin Ex. 7)

ANALYSIS

"A request for discovery in opposition to an anti-SLAPP motion should be determined with reference to the issues raised in the motion. [Citation.]" (*Carver v. Bonds* (2005) 135 Cal.App.4th 328, 359.) Discovery may be allowed pending a SLAPP motion if Plaintiff shows "that the specified discovery is necessary for the plaintiff to oppose the motion and is tailored to that end. [Citations.]" (*Britts v. Superior Court* (2006) 145 Cal.App.4th 1112, 1125.)

Good cause to lift the SLAPP statute's discovery ban exists " '[i]f the plaintiff makes a timely and proper showing in response to the motion to strike, that a defendant or witness possesses evidence needed by plaintiff to establish a prima facie case[.]' [Citation.]" (*The Garment Workers Center. v. Superior Court* (2004) 117 Cal. App. 4th 1156, 1161.)

Here, the court is unable to determine if the proposed deposition will aid Lee in establishing a *prima facie* case to causes of action 1, 3 and/or 4 that are the target of Glassner's anti-SLAPP motion. Lee has provided no discussion or legal authority showing how the information sought will help her prove one or more elements of these causes of action. The court finds Lee has not sustained her burden. The motion is denied.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are strongly encouraged to appear remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for October 4, 2023 is as follows:
Meeting ID: 161 827 0831
Passcode: 591912
https://www.zoomgov.com/j/1618270831?pwd=NlhEVXN1ZFoyd0Yvei9HaSsxQnFlZz09

If you are unable to join by video, you may join by telephone by calling (669) 254-5252 and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: https://www.marin.courts.ca.gov/

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 10/04/23 TIME: 1:30 P.M. DEPT: B CASE NO. CV1903932

PRESIDING: HON. JAMES T. CHOU

REPORTER: CLERK: JOEY DALE

PLAINTIFF: DAVID HOWARD LICHTENGER vs. DEFENDANT: BRETT THOMAS WEISEL, ET AL	

NATURE OF PROCEEDINGS: MOTION – OTHER: TO AUGMENT DESIGNATION OF EXPERT WITNESS AND THE WITHDRAWAL OF EXPERT ROLLINS BY DEFENDANTS

RULING

Plaintiff's Requests for Judicial Notice Nos. 1-5 are granted. (Evid. Code, § 452, subd. (d).)

The Court denies Defendants' motion to augment their expert witness designation and imposes sanctions of $5,280 on Defendants and their counsel. (Code Civ. Proc., §§ 2034.610, 2034.620, 2034.630.)

The Court has reviewed Defendants' late-filed reply filed on October 3, 2023.

BACKGROUND

This action arises out of a dispute among related entities and their managing and general/limited partners regarding breach of fiduciary duties and contractual obligations. On August 29, 2022, Plaintiff served his Demand for Exchange of Expert Witness Declarations and Reports pursuant to Code of Civil Procedure, section 2034.210. (Graves Dec., ¶ 4.) The parties timely exchanged expert declarations on September 21, 2022, Plaintiff disclosing Monica Ip and Defendants disclosing Harley Rollins ("Rollins"). (*Id.*, ¶ 5.) Shortly thereafter, the parties agreed to a continuance and stipulated that "[a]ll pretrial deadlines and cut-offs (including discovery cut-off) shall be reset on the new trial date." (*Id.*, Ex. 3.) On February 7, 2023, the Court set a new trial date of October 16, 2023. (*Id.*, ¶ 7.)

On August 16, 2023, Defendants moved ex parte for a continuance on the grounds that they had associated new counsel and Rollins had become unavailable. (Request for Judicial Notice (hereafter "RJN"), Ex. 2.) Rollins explained that he was "unavailable between October 9, 2023 and November 15, 2023" and so could not testify at a trial beginning on October 16 "[b]ecause of unforeseen commitments for the preparation of financial statements for the 3rd

quarter of 2023 which are due to be filed on November 15, 2023." (RJN, Ex. 3.) On August 28, 2023, Defendants served a second expert witness disclosure pursuant to Code of Civil Procedure, section 2034.260, this time for expert Stuart H. Harden ("Harden"). (Léger Dec., Ex. J.) Defendants now move to augment their original expert witness designation to withdraw Rollins and designate Harden. (Memorandum, p. 4.)

LEGAL STANDARD

Code of Civil Procedure, section 2034.610, subdivision (a) provides:

"On motion of any party who has engaged in a timely exchange of expert witness information, the court may grant leave to do either or both of the following: (1) Augment that party's expert witness list and declaration by adding the name and address of any expert witness whom that party has subsequently retained. (2) Amend that party's expert witness declaration with respect to the general substance of the testimony that an expert previously designated is expected to give."

Such motion must be brought a sufficient time in advance of the deadline for completion of discovery to allow the expert in question to be deposed before discovery closes. (Code Civ. Proc., § 2034.610, subd. (b).) The Court may permit the motion to be made at a later time "[u]nder exceptional circumstances." (*Ibid.*) The movant must also file a meet and confer declaration (see Code Civ. Proc., § 2016.040) alongside the motion. (Code Civ. Proc., § 2034.610. subd. (c).)

The Court may grant such motion only if it "has taken into account the extent to which the opposing party has relied on the list of expert witnesses[]" and "has determined that any party opposing the motion will not be prejudiced in maintaining that party's action or defense on the merits." (Code Civ. Proc., § 2034.620, subds. (a), (b).) Additionally, the Court must determine either that "[t]he moving party would not in the exercise of reasonable diligence have determined to call that expert witness or have decided to offer the different or additional testimony of that expert witness" or that "[t]he moving party failed to determine to call that expert witness, or to offer the different or additional testimony of that expert witness as a result of mistake, inadvertence, surprise, or excusable neglect." (Code Civ. Proc., § 2034.620, subd. (c).) If the Court grants the motion based on this latter "mistake" criterion, it must find that the moving party "sought leave to augment or amend promptly after deciding to call the expert witness or to offer the different or additional testimony" and "[p]romptly thereafter served a copy of the proposed expert witness information concerning the expert or the testimony described in Section 2034.260 on all other parties who have appeared in the action." (Code Civ. Proc., § 2034.620, subd. (c)(2).) The Court's grant of leave to amend is conditioned on the movant making the expert available for a deposition immediately and on any other terms as may be just. (Code Civ. Proc., § 2034.620, subd. (d).)

DISCUSSION

Defendants contend that the combined effect of the parties' stipulation and the Court's order setting a new trial date of October 16, 2023 was to reset the deadline for the disclosure of expert witness declarations, and they timely served Harden's declaration pursuant to the new deadline on August 28, 2023. (Graves Dec., ¶¶ 8-9.) For this reason, Defendants take the position that they were not actually required to file the instant motion. (Memorandum, p. 5.) In effect,

Defendants argue that the continuance in this case mooted their disclosure of Rollins and gave them a second bite at the apple of expert witness disclosures.

Defendants do not cite, nor has the Court found, any authority for the idea that a trial continuance obviates discovery efforts undertaken before the continuance was granted or voids previously served expert witness disclosures, regardless of whether said continuance involved the resetting of all discovery deadlines. Even if the continuance had somehow erased all previous expert witness disclosures and invited the parties to start from scratch, there is no statutory basis for Defendants' decision to effect this simply by serving a new expert disclosure.

Code of Civil Procedure, section 2034.230 does not contemplate one party serving expert disclosures on another apropos of nothing. Instead, it provides that one party may serve on the other a demand for a mutual and simultaneous exchange of expert witness information on a specified date. (Code Civ. Proc., § 2034.230, subd. (b).) The Court finds that the expert witness disclosure Defendants served on September 21, 2022 naming Rollins continued to be in force after the Court reset the trial date. Code of Civil Procedure, section 2034.610, subdivision (a)'s procedure for augmenting or amending an expert designation governed the conditions under which Defendants could replace Rollins with a new expert. (*Richaud v. Jennings* (1993) 16 Cal.App.4th 81, 90 [interpreting substantively identical precursor to Section 2034.610] ["[A] party who wishes to call at trial an expert who was not designated when expert witness information was exchanged and who is intended to take the place of a previously designated but now unavailable expert, must make a motion...to augment that party's expert witness list to include the new expert."].)

Defendants have not offered enough detail regarding Rollins's unavailability for the Court to find that their present need to replace him with Harden is a product of "reasonable diligence" or due to "mistake, inadvertence, surprise, or excusable neglect." (*Id.*) In the declaration Rollins submitted in support of Defendants' August 16, 2023 request for a continuance, he explained that he cannot testify at a trial beginning on October 16 "[b]ecause of unforeseen commitments for the preparation of financial statements for the 3rd quarter of 2023 which are due to be filed on November 15, 2023." (RJN, Ex. 3.) Rollins fails to explain how this commitment was unforeseen in light of regular and predictable business responsibilities that include the filing of quarterly financial statements. Absent any explanation, the Court cannot evaluate whether the circumstances of Rollins's unavailability or Defendants' diligence in bringing the motion satisfy the requirements of the statute.

Even if Rollins's unavailability were a qualifying "surprise" within the meaning of the statute, Defendants' motion was not brought promptly upon deciding to exchange Harden for Rollins. (Code Civ. Proc., § 2034.620, subd. (c).) Rollins's unavailability was a matter of record as of August 16, 2023, and defense counsel was pursuing Harden as early as August 9. (RJN, Ex. 3; Léger Dec., Ex. H.) Defendants did not file this motion until September 18, nearly six weeks later.

Accordingly, the Court denies Defendants' motion and imposes sanctions of $5,280 against Defendants and their counsel. (Code Civ. Proc., § 2034.630; Léger Dec., ¶ 28.) Defendants' motion for sanctions is denied as well. (Code Civ. Proc. § 2034.630.)

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are strongly encouraged to appear remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 10/04/23 TIME: 1:30 P.M. DEPT: B CASE NO: CV2203963

PRESIDING: HON. JAMES T. CHOU

REPORTER: CLERK: JOEY DALE

PLAINTIFF: MCCARTHY BUILDING COMPANIES, INC. vs. DEFENDANT: SCHUFF STEEL COMPANY, ET AL	

NATURE OF PROCEEDINGS: 1) DEMURRER – TO SCHUFF STEEL COMPANY'S CROSS-COMPLAINT [CRDF] QUALITY ASSURANCE ENGINEERING INC. DBA CONSOLIDATED ENGINEERING LABORATORIES
2) DEMURRER – TO COMPLAINT [DEFT] QUALITY ASSURANCE ENGINEERING INC. DBA CONSOLIDATED ENGINEERING LABORATORIES

RULING

Defendant/Cross-Defendant Quality Assurance Engineering, Inc. dba Consolidated Engineering Laboratories' ("CEL") demurrer to the Third, Fifth and Sixth Causes of Action in the Complaint is overruled. CEL's demurrer to the Seventh Cause of Action in the Complaint is sustained with leave to amend.

CEL's demurrer to the Third Cause of Action in Schuff Steel Company's First Amended Cross-Complaint is overruled.

Procedural Deficiencies

The Court draws CEL's attention to Local Rule 2.8(C)2, which requires attachment of the operative pleading as an exhibit to the demurrers. CEL's demurrers also do not comply with California Rule of Court 3.1320(a), which requires that "[e]ach ground of demurrer must be in a separate paragraph and must state whether it applies to the entire complaint, cross-complaint, or answer, or to specified causes of action or defenses." Further, one of the meet and confer declarations submitted by CEL, the declaration of Sandy Kaufman in connection with the demurrer to the Complaint, states only that Mr. Kaufman exchanged correspondence with MCarthy's counsel. It does not appear that these efforts complied with Code of Civil Procedure Sections 430.41 which requires the party filing the demurrer to meet and confer "in person or by telephone". The demurrer to the Complaint will not be overruled on this basis. (Code Civ. Proc. § 430.41(a)(4).) The Court nevertheless admonishes CEL to follow all applicable rules when filing matters with the court.

Standard

"The function of a demurrer is to test the sufficiency of the complaint as a matter of law, and it raises only a question of law." (*Holiday Matinee, Inc. v. Rambus, Inc.* (2004) 118 Cal.App.4th 1413, 1420.) A complaint "ordinarily is sufficient if it alleges ultimate rather than evidentiary facts" (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550), but the plaintiff must set forth the essential facts of his or her case "with reasonable precision and with particularity sufficient to acquaint [the] defendant with the nature, source and extent" of the plaintiff's claim. (*Doheny Park Terrace Homeowners Assn., Inc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076, 1099 [citation and internal quotations omitted].) Legal conclusions are insufficient. (*Id.* at 1098–1099; *Doe,* 42 Cal.4th at 551, fn. 5.) The court "assume[s] the truth of the allegations in the complaint, but do[es] not assume the truth of contentions, deductions, or conclusions of law." (*California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 247.)

CEL's Demurrer to the Complaint

Allegations in the Complaint

Plaintiff McCarthy Building Companies, Inc. ("McCarthy") alleges that on or about March 23, 2016, it entered into a Design-Build Agreement with Marin Healthcare District ("Marin") to construct the Marin General Hospital Replacement Building (the "Project"). (Complaint, ¶6.) On June 24, 2015, McCarthy entered into a subcontract with Schuff to perform the structural steel work on the Project (the "Schuff Subcontract"). (*Id.*, ¶7.) On or about March 2, 2016, Marin entered into a contract with Ballard & Watkins ("B&W") to act as the Inspector of Record ("IOR") on the Project, pursuant to the requirements of the Department of Health Care Access and Information, formerly known as the Office of Statewide Health Planning and Development ("OSHPD"). (*Id.*, ¶¶8, 9.) On or about May 11, 2016, Marin entered into a contract with Quality Assurance Engineering, Inc. dba Consolidated Engineering Laboratories ("CEL") to act as the IOR's special inspector on the Project for, among other things, structural steel and welding inspection testing. Pursuant to that contract, CEL was required to provide independent inspection and testing for shop fabrication and welding, as well as field erection and welding of structural steel components. (*Id.*, ¶10.)

During construction, the IOR identified a number of defects and deficiencies in the structural steel work which resulted in additional inspections and repairs which caused significant delay and disruption to the Project. (*Id.* ¶¶11-21, 25-27.) Schuff fell below the standard of care concerning its quality control and inspection obligations and resisted efforts to participate in inspections, evaluations, and dialogue regarding remedial efforts. McCarthy was forced to enter into a contract with SidePlate to assist with evaluation and remedial efforts. (*Id.*, ¶¶22-24.) CEL failed to fulfill its inspection and testing responsibilities concerning structural steel fabrication, welding and erection, causing delays and damage to McCarthy. (*Id.*, ¶¶28, 29.).

McCarthy asserts three causes of action against Schuff only – the First Cause of Action for breach of contract, the Second Cause of Action for express indemnity, and the Fourth Cause of Action for breach of express warranties. The Third Cause of Action for express indemnity is asserted against CEL only. The Fifth Cause of Action for negligence, the Sixth Cause of Action for equitable indemnity, the Seventh Cause of Action for breach of implied warranties, and the Eighth Cause of Action for declaratory relief, are asserted against both Schuff and CEL.

Third Cause of Action

McCarthy's Third Cause of Action for express indemnity against CEL alleges that on or about May 11, 2016, Marin entered into a contract with CEL to act as the structural and steel welding inspector on the Project (the "Marin-CEL Agreement"). Paragraph 5.1 of that agreement states: "Contractor [CEL] will indemnity, defend and hold harmless MGH its subsidiaries and affiliates (and the employees, partners, officers, directors, members, contractors and agents of each against all losses, claims, liabilities, damages, demands, costs and expenses (including without limitation reasonable attorney fees and court costs ("Claims"), to the extent such a Claim is caused by (a) the negligence or fault of Contractor of its agents, subcontractors, subconsultants, or the employees or representatives of any of them, or (b) from Contractor's breach of any term of this Agreement." (Complaint, ¶59.) McCarthy alleges that its damages arise out of the performance of CEL's obligations under the Marin-CEL Agreement, but CEL refuses to indemnity McCarthy. (*Id.*, ¶¶60-65.)

CEL demurs to this cause of action on the ground that McCarthy does not allege that it is either a party or a third-party beneficiary of the Marin-CEL Agreement. CEL argues that while the word "contractors" appears in Paragraph 5.1, indemnity is only available only for Marin's subsidiaries and affiliates, and McCarthy is not a subsidiary or affiliate of Marin.

In its Opposition, McCarthy argues that CEL is required to indemnify it because the phrase "and the employees, partners, officers, directors, members, contractors and agents of each" applies to Marin *and* its subsidiaries and affiliates. Because it is a contractor of Marin's for construction of the Project, McCarthy argues, it can take advantage of the indemnity provision in Paragraph 5.1.

"[W]here an ambiguous contract is the basis of an action, it is proper, if not essential, for a plaintiff to allege its own construction of the agreement. So long as the pleading does not place a clearly erroneous construction upon the provisions of the contract, in passing upon the sufficiency of the complaint, we must accept as correct plaintiff's allegations as to the meaning of the agreement." (*Marina Tenants Assn. v. Deauville Marina Development Co.* (1986) 181 Cal.App.3d 122, 128.) The interpretation of Paragraph 5.1 advanced by McCarthy in its Complaint is not clearly erroneous. The demurrer to this cause of action is therefore overruled.

Fifth and Sixth Causes of Action

McCarthy's Fifth Cause of Action for negligence alleges that CEL owed it a duty to provide services, including quality control and quality assurance inspections and testing, with reasonable care and that CEL's failure to use reasonable care injured McCarthy. McCarthy's Sixth Cause of Action for equitable implied indemnity alleges that it was damaged as a result of CEL's conduct and thus it is entitled to recover those damages from CEL through indemnity.

CEL demurs to these two causes of action on the ground that it does not owe any duty to McCarthy under the factors set forth in *Biakanja v. Irving* (1958) 49 Cal.2d 647 and *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 340.

The demurrer to these two causes of action is overruled as CEL fails to show McCarthy cannot establish a duty under the *Biakanja-Bily* factors. Among other things, as discussed above in connection with the demurrer to the Third Cause of Action, McCarthy's interpretation of the

Marin-CEL Agreement is not clearly erroneous and is sufficient to withstand a demurrer. Under that interpretation, McCarthy can potentially assert a claim for express indemnity against CEL, which would weigh in favor of finding a duty. Further, the Complaint alleges facts that could support a finding of foreseeability of harm to McCarthy as a result of alleged deficient testing or inspection work by CEL, certainty of damages suffered by McCarthy, a close connection between CEL's conduct and McCarthy's damages, and a policy of preventing future harm. The determination of duty based on consideration of the various *Biakanja-Bily* factors in this instance is a fact-based inquiry inappropriate for determination on demurrer.

Seventh Cause of Action

McCarthy's Seventh Cause of Action for breach of implied warranties alleges that CEL agreed to furnish labor, services and/or skills with respect to quality control/quality assurance inspections preformed on the Project, impliedly warranting that the services performed would be performed in a good and workmanlike manner.

CEL demurs to this cause of action on the ground that there is no privity of contract between it and McCarthy. McCarthy argues that it is sufficient that it alleges a duty owed by CEL, but fails to cite any authority for its position. McCarthy also argues that under *Kuitems v. Covell* (1951) 104 Cal.App.2d 482, CEL impliedly warranted it would perform its work in a good and competent manner. *Kuitems* is distinguishable in that the plaintiff there alleged that the defendant provided materials that were insufficient or inappropriate for the plaintiff's project. Here, McCarthy does not allege that CEL provided materials but rather a service, i.e., to inspect and test another entity's work. (Complaint. ¶10.) The demurrer to this cause of action is sustained with leave to amend.

Fifth, Sixth and Seventh Causes of Action

CEL demurs to all three causes of action on the ground that they are barred by the economic loss rule. CEL contends that because these causes of action arise solely out of contract, any damages suffered are purely economic in nature and McCarthy must seek any remedy through contract instead. In its Opposition, McCarthy points out that it has alleged CEL has caused property damage in paragraph 29 of the Complaint.

The demurrer to these three causes of action based on the economic loss rule is overruled. Paragraph 29 alleges that CEL's conduct resulted in, among other things, damage to the Project structure. (See *Dhital v. Nissan North America, Inc.* (2022) 84 Cal.App.5th 828, 837 ["The economic loss rule provides that, '[i]n general, there is no recovery in tort for negligently inflicted 'purely economic losses,' meaning financial harm *unaccompanied by physical or property damage*'"] [citation omitted] [emphasis added]; *Cornejo v. Lightbourne* (2013) 220 Cal.App.4th 932, 944 [demurrer will not lie to only part of cause of action].)

CEL's Demurrer to the Third Cause of Action in the First Amended Cross-Complaint

Schuff's Third Cause of Action for equitable indemnity, apportionment, and contribution is against CEL and a number of other cross-defendants. Schuff alleges that the costs, expense and other damages McCarthy claims to have incurred are the result of the negligence, carelessness and fault of these cross-defendants.

Duty of Care

Traditional equitable indemnity does not require a contractual relationship between an indemnitor and indemnitee, but there must be a joint legal obligation to the injured party, i.e., the indemnity and indemnitor must share liability for the injury. (*Jocer Enters., Inc. v. Price* (2010) 183 Cal.App.4th 559, 573.) "Thus, no indemnity may be obtained from an entity that has no pertinent duty to the injured third party, that is immune from liability, or that has been found not to be responsible for the injury." (*Id.* at pp. 573-574 [citations omitted].) Therefore, in order to survive a demurrer to the Third Cause of Action, Schuff must allege that CEL had a duty to McCarthy, and that Schuff and CEL share liability for any damages suffered by McCarthy.

As discussed above in connection with CEL's demurrer to the Complaint, the Complaint sufficiently alleges, for purposes of withstanding a demurrer, a duty owed by CEL to McCarthy. The Complaint also alleges facts that may support allegations that Schuff and CEL share liability for some or all of the damages allegedly suffered by McCarthy relating to the structural steel work. (Complaint, ¶¶11-21, 23, 24-29.) The demurrer to the Third Cause of Action on the ground there is no duty of care alleged is overruled.

Joint and Several Liability

"It is well-settled in California that equitable indemnity is only available among *tortfeasors* who are jointly and severally liable for the plaintiff's injury." (*Stop Loss Ins. Brokers, Inc. v. Brown & Toland Medical Group* (2006) 143 Cal.App.4th 1036, 1040 [emphasis in original].) Schuff does not dispute this rule, but argues that McCarthy has alleged facts sufficient to impose joint and several liability on CEL and Schuff. For the reasons discussed above, the Complaint does include sufficient allegations so as to allow McCarthy to proceed on a joint and several liability theory. The demurrer is overruled on this basis as well.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are strongly encouraged to appear remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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https://www.zoomgov.com/j/1618270831?pwd=NlhEVXN1ZFoyd0Yvei9HaSsxQnFlZz09

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 10/04/23 TIME: 1:30 P.M. DEPT: B CASE NO: CV0000494

PRESIDING: HON. JAMES T. CHOU

REPORTER: CLERK: JOEY DALE

PLAINTIFF: GRAPE OFF K.K vs. DEFENDANT: WINERY EXCHANGE, INC.	

NATURE OF PROCEEDINGS: ORDER TO SHOW CAUSE – PRELIMINARY INJUNCTION

RULING

Plaintiff Grape Off K.K's ("Plaintiff") request for a Preliminary Injunction is DENIED. Plaintiff has failed to demonstrate that there is a "reasonable probability" it will prevail on the merits at trial. (*Yu v. University of La Verne* (2011) 196 Cal.App.4th 779, 786–787; *Fleishman v. Superior Ct.* (2002) 102 Cal.App.4th 350, 356.)

BACKGROUND

Plaintiff, a Japanese corporation, is a wine and spirits import and distribution company with its primary business located in Japan. Defendant Winery Exchange, Inc., dba WX Brands (hereinafter "Defendant'), a California corporation, is the current owner of the Bread & Butter wine brand.

Plaintiff alleges that on or about August 10, 2013, Plaintiff was offered the exclusive import and distribution rights for Bread & Butter wine brand in Japan which was, at the time, produced by Alcohol by Volume. The allegations are a bit unclear regarding whether Plaintiff alleges Alcohol by Volume offered this exclusivity or whether it was allegedly offered by "Diva California," the supplier of Bread & Butter wine.

In any case, Plaintiff further alleges that it conducted sales of Bread & Butter brand wines throughout Japan from Hokkaido to Okinawa, wholesale, retail, and on premise. Plaintiff asserts that it invested millions of dollars over the next several years making the Bread & Butter brand one of the number one sellers of California wines in Japan. In April of 2017, Alcohol by Volume sold the Bread & Butter brand to Defendant. Plaintiff alleges that "it continued to be the exclusive importer and distributor in Japan."

In or around August 2021, Grupo Penaflor, one of the Largest wine companies in South America, invested in Defendant. After Groupo Penaflor became an investor, Defendant purported to end the relationship with Plaintiff in order to make Mikuni Wines the sole distributor of Bread & Butter brand wines in Japan. Plaintiff contends that this is a breach of the long standing exclusive distributorship agreement it had with Defendant.

Plaintiff's First Amended Complaint alleges causes of action for Injunctive Relief and Damages, Breach of Contract, Promissory Estoppel, Intentional Interference with Prospective Economic Advantage, Negligent Interference with Prospective Economic Advantage, and Unfair Business Practices.

Presently before the Court is Plaintiff's request for a preliminary injunction.

REQUEST FOR JUDICIAL NOTICE

Defendant's Request for Judicial Notice of its Demurrer to the First Amended Complaint is GRANTED. (Evid. Code, 452, subd. (d).) However, the Court does not take judicial notice of the truth of the statements contained therein.

OBJECTIONS TO EVIDENCE

Plaintiff's Evidentiary Objections to the Declaration of Greg Ahn are OVERRULED.

Plaintiff's Evidentiary Objections to the Declaration of Dan Irving are OVERRULED.

Plaintiff's Evidentiary Objection to the Declaration of Melissa Culp Granillo is OVERRULED.

Defendant's Objections to Plaintiff's Supplemental Evidence (consisting of two declarations) and Supplemental Memorandum are SUSTAINED as to each document in its entirety. The Objection to the Reply as whole is OVERRULED. The Court notes, however, that the application of Japan's Continuous Transaction Doctrine as well as the theory of implied contract are both improperly raised for the first time on reply.

PROCEDURAL DEFECTS

Plaintiff filed an unauthorized "Supplemental Memorandum" and supporting declarations on September 27, 2023 in addition to the statutorily authorized Reply. This is an improper attempt to circumvent Reply page limits. Per the Court's original order on July 31, 2023, Plaintiff was ordered to file the moving papers for the request for the injunction by August 18, 2023. The Court has only considered the Reply and not any of these unauthorized documents.

LEGAL STANDARD

The preliminary injunction is intended to "preserv[e] ... the status quo until a final determination of the merits of the action." (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528.) A trial court must weigh two interrelated factors when deciding whether to grant a

plaintiff's motion for a preliminary injunction: (1) the likelihood that the plaintiff will prevail on the merits at trial, and (2) the relative interim harm to the parties from the issuance or non-issuance of the injunction. (*SB Liberty, LLC v. Isla Verde Assn., Inc.* (2013) 217 Cal.App.4th 272, 280, as modified on denial of reh'g (June 11, 2013); *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1109; *Butt v. State of California* (1992) 4 Cal.4th 668, 677–678.)

Thus, "[t]he trial court's determination must be guided by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction." (*Butt v. State of California, supra*, 4 Cal.4th at p. 678.) "A trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is some possibility that the plaintiff would ultimately prevail on the merits of the claim." (*Ibid.*) Accordingly, the trial court must deny a motion for a preliminary injunction if there is no reasonable likelihood the moving party will prevail on the merits. (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 447; *see Yu v. University of La Verne, supra,* 196 Cal.App.4th at p. 786–787 [order denying a motion for preliminary injunction should be affirmed if the trial court correctly found the moving party failed to show she was likely to prevail on merits, regardless of interim harm].)

The burden is on plaintiff, as the party seeking injunctive relief, to show all elements necessary to support issuance of a preliminary injunction by presenting facts establishing the requisite reasonable probability of success on the merits. (*O'Connell v. Superior Ct.* (2006) 141 Cal.App.4th 1452, 1481; *Fleishman v. Superior Ct., supra,* 102 Cal.App.4th 350, 356.) The drastic remedy of an injunction pendente lite may not be permitted except upon a sufficient factual showing, by someone having knowledge thereof, made under oath or by declaration under penalty of perjury. (*Ibid.*)

The trial court's order on a request for a preliminary injunction "reflects nothing more than the superior court's evaluation of the controversy on the record before it *at the time* of its ruling; it is not an adjudication of the ultimate merits of the dispute." (*People v. Uber Techs., Inc.* (2020) 56 Cal.App.5th 266, 283, as modified on denial of reh'g (Nov. 20, 2020); *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1109; *Yee v. American National Ins. Co.* (2015) 235 Cal.App.4th 453, 457–458.)

DISCUSSION

With this Motion, Plaintiff requests that a preliminary injunction during the pendency of the action issue as follows: (a) Plaintiff would act and continue to act as the exclusive distributor of Bread & Butter wines in Japan; (b) Immediate delivery of 1,650 cases of Bread & Butter ordered by Plaintiff; (c) Enjoining Defendant from "giving Plaintiff's $3 million annual sales revenue from the sales of Bread & Butter wines to its competitor"; and (d) Enjoining Defendant from soliciting Plaintiff's employees to go to work for Plaintiff's competitors and take with them Plaintiff's proprietary marketing and sales information and Plaintiff's customer lists and contacts.

The Court must weigh the interrelated factors of likelihood of success on the merits and interim harm in deciding whether to grant Plaintiff's request.

Likelihood of Success on the Merits

Plaintiff has failed to demonstrate that it is likely to succeed on the merits of this case. Plaintiff repeats: "In or about August 10, 2013, Plaintiff was offered the exclusive import and distribution rights in Japan for a new wine brand called Bread & Butter, produced by Alcohol by Volume, being offered by the sole supplier Diva California." (Rann Decl., ¶ 2.) But this vague assertion is insufficient to demonstrate the likelihood of success on the merits. Who made the offer? Where was the contract entered into? How was the offer communicated? What were the terms of the offer? Is the Court supposed to assume that Plaintiff was offered the exclusive import and distribution rights in perpetuity? What were the cancellation terms of the alleged offer? Who accepted the offer? How did both parties evidence the offer moving forward? If Diva is alleged to have made the offer, did Diva have the ability to bind Defendant to the terms of the alleged offer, etc.? Plaintiff's assertion, in its Reply, that Japan's Continuous Transaction Doctrine requires this Court to find that Plaintiff was the exclusive distributor of Bread & Butter wines in Japan also contains many gaps, the first being why this Court should apply Japanese law. Plaintiff, until this point, has been seeking to have the Court apply California law. Moreover, the applicability of this doctrine and allegations that the contract is "implied" are improperly raised for the first time in Reply.

The allegations that Plaintiff "continued to be the exclusive importer and distributor in Japan after the sale to Defendant" and that "[s]ince 2017, based on Plaintiff and Defendant's agreement that Plaintiff would continue to be the exclusive distributor of Bread & Butter wines in Japan, Plaintiff continued to invest millions of dollars in growing the Bread & Butter brand in Japan" also lack key details. Again, how did Defendant agree with Plaintiff in 2017? Who made the offer? What were the terms? How was it accepted? Where was the contract entered into? What were the cancellation terms?

Although Plaintiff alleges that it is the exclusive distributor of Bread & Butter brand wines in Japan, the evidence presented to the Court in Plaintiff's moving papers is insufficient to establish that the parties entered into a valid and binding agreement regarding the same.

Similarly, with respect to the assertion that Defendant is refusing to honor Plaintiff's purchase order for 1,650 cases of Bread & Butter wines, Plaintiff again fails to provide necessary details. Has the purchase order been paid for? Did Defendant sign off on the order? Some of the evidence seems to suggest that this order was made instead to the supplier, and not to Defendant itself. If this is the case, is Defendant obligated to honor the agreement between the supplier and Plaintiff? Again, too many important details are missing for the Court to find that Plaintiff will likely be able to show a binding and enforceable agreement between Plaintiff and Defendant to purchase the wine at issue existed, that Plaintiff has performed the terms of that agreement, and Defendant has breached the agreement, etc.

Finally, with respect to the allegations of soliciting Plaintiff's employees to work for Defendant, the Court also finds that Plaintiff has failed to demonstrate that it is likely to prevail on the merits of this claim at trial. As evidence, Plaintiff cites to an email from a Mikuni employee to an employee of Plaintiff's. That email references the change in distributor and asks if Plaintiff's employee if there is time for a phone call to discuss the change in importers. (Compl., Ex. C.) Without more, it is unclear whether this call was intended to be a solicitation of

Plaintiff's employee, or whether it was going to be a discussion of loose ends related to the transition. Moreover, even if Plaintiff had demonstrated a clear attempt to solicit its employees, and the Court finds that it has not, it is unclear whether such solicitation would be actionable. Plaintiff has not provided any evidence to support the argument that Defendant is asking for Plaintiff's proprietary marketing and sales information and Plaintiff's customer lists and contacts.

Accordingly, the Court finds that Plaintiff has failed to establish the first factor in the two factor analysis. Because Plaintiff has not shown a reasonable possibility that it will prevail on the merits of the case at trial (on the facts currently before the Court), the Court must deny the request for a Preliminary Injunction. (*Butt v. State of California, supra*, 4 Cal.4th at p. 678; *Yu v. University of La Verne, supra,* 196 Cal.App.4th at p. 786–787.)

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are strongly encouraged to appear remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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