LAW & MOTION CALENDAR
TENTATIVE RULINGS

May 16, 2024

Judge R. Shawn Nelson
Department C19

Department C19 hears law and motion on Thursdays at 10:00 a.m. and 1:30 p.m.

Court reporters: Official court reporters are not provided in this department for any proceedings. If the parties desire the services of a court reporter, the parties should follow the procedures set forth in the Privately Retained Court Reporter Policy on the court's website at www.occourts.org.

Tentative rulings: The court endeavors to post tentative rulings on the court's website by 9:00 a.m. the day of the hearing. Tentative rulings may not be posted in every case. Please do not call the department for tentative rulings if tentative rulings have not been posted. The court will not entertain a request to continue a hearing or the filing of further documents once a tentative ruling has been posted.

Submitting on tentative rulings: If all counsel intend to submit on the tentative ruling and do not desire oral argument, please advise the Courtroom Clerk or Courtroom Attendant by calling (657) 622-5219. Please do not call the department unless all parties submit on the tentative ruling. If all sides submit on the tentative ruling and so advise the court, the tentative ruling shall become the court's final ruling and the prevailing party shall give notice of the ruling and prepare an order for the court's signature if appropriate under Cal. R. Ct. 3.1312.

Appearances and public access: Appearances, whether in person or remote, must comply with Civil Procedure Code section 367.75, California Rule of Court 3.672, Orange County Superior Court Local Rule 375, and Orange County Superior Court Appearance Procedure and Information—Civil Unlimited and Complex (pub. 9/9/22).

Unless the court orders otherwise, remote appearances will be conducted via Zoom. All counsel and self-represented parties appearing via Zoom must check in through the court's civil remote appearance website before the hearing begins. Check-in instructions are available on the court's website.

The public may attend hearings by coming to court or via remote access as described above.

Photographing, filming, recording, and/or broadcasting court proceedings are prohibited unless authorized pursuant to California Rule of Court 1.150 or Orange County Superior Court Local Rule 180.

Non-appearances: If nobody appears for the hearing and the court has not been notified that all parties submit on the tentative ruling, the court shall determine whether the matter is taken off calendar or the tentative ruling becomes the final ruling.

NO.	CASE NAME	MATTER
1:30 p.m.		
1	Behle v. Courseco, Inc.	Plaintiffs Roger N. Behle, Jr., individually and as Co-Trustee of The Behle Revocable Living Trust UTD May 19, 2002 and Restated March 3, 2008, and Denise M. Behle, individually and as Co-Trustee of The Behle Revocable Living Trust UTD May 19, 2002 move to compel Defendant GRiver Golf, LLC to supplement its discovery responses and produce the documents requested. For the following reasons, **Plaintiffs' motion is GRANTED.** Defendant is ordered to serve complete and verified responses, without objections, and responsive documents to Plaintiffs' Request for

		Production of Documents, Set One, within 20 days of service of the notice of ruling. On receipt of a response to a demand for inspection, the demanding party may move for an order compelling a further response if the demanding party deems that any of the following apply: (1) A statement of compliance with the demand is incomplete; (2) A representation of inability to comply is inadequate, incomplete, or evasive; (3) An objection in the response is without merit or too general. (Code Civ. Proc., § 2031.310, subd. (a).) Plaintiffs served Defendant with the requests for production on August 9, 2023. (Behle Decl. ¶ 3.) On October 13, 2023, the parties exchanged communications regarding Defendant's counsel's request for an extension of time to respond. (*Id*. at ¶ 4.) Plaintiffs granted Defendant's request for a three week extension of time to respond. (*Id*.) Arguably, this extension appears to have been extended to December 12, 2024. (*Id*. at ¶ 7, Exh. A [Plaintiffs' counsel states that Plaintiffs will seek a resolution from the Court if they do not receive responses by December 12, 2023].) Defendant served its responses to the production requests on December 14, 2023. (Oertel Decl. ¶ 17, Exh. 8.) The record before the Court indicates that Defendant failed to serve timely responses to the requests. Accordingly, Defendant "waive[d] any objection to the demand, including one based on privilege or on the protection for work product . . . ." (Code Civ. Proc., § 2031.300(a).) Because Defendant's Responses to Plaintiff's Request for Production of Documents, Set One consist only of objections, Plaintiffs' motion to compel is granted. Defendant's **request for sanctions is denied**. Plaintiffs to give notice.
2	Breaux v. Reynolds	Off calendar.
3	Cruz v. Cal Stripe, Inc.	Defendant Cal Stripe, Inc.'s **motions to compel further responses to its Form Interrogatories and Special Interrogatories are GRANTED** as to Form Interrogatory nos. 4.1, 20.2, and 20.5, as well as Special Interrogatory nos. 17 and 20. Plaintiff Francisco Javier Cruz and his counsel are ordered to serve full, complete, and verified responses within 30 days of service of the notice of ruling. Defendant's **motions to compel further responses are DENIED as to Form Interrogatory no. 20.8 and Special Interrogatory no. 14**. Defendant's requests for evidence sanctions (Code Civ. Proc., § 2023.030, subd. (c)) are DENIED. <u>Form Interrogatory no. 20.8 and Special Interrogatory no. 14</u> Defendant presented no evidence it made any attempt to meet and confer with Plaintiff regarding these two interrogatories. (Code Civ. Proc.§ 2030.300, subd. (b)(1).) (See Miller Declaration, ¶¶ 8-11 and Exhibits C-D to Miller Declaration [Defendant's meet-and-confer communications do not reference Form Interrogatory no. 20.8 or Special Interrogatory no. 14].)

While the level of effort that is required varies depending on the circumstances, "some effort is required in all instances…." (*Clement v. Alegre* (2009) 177 Cal.App.4th 1277, 1293.)

In the absence of any effort to meet and confer regarding these two interrogatories, Defendant is not entitled to further responses.

Form Interrogatory nos. 4.1, 20.2 and 20.5 and Special Interrogatory nos. 17 and 20

A party responding to interrogatory requests must respond to each request separately, and as complete and straightforward as the information reasonably available to the responding party permits. (Code Civ. Proc., §§2030.210, 2030.220.) If an interrogatory cannot be answered completely, it shall be answered to the extent possible. (Code Civ. Proc., § 2030.220, subd. (b).) If the responding party does not have personal knowledge sufficient to respond fully, that party shall so state, but shall make a reasonable and good faith effort to obtain the information by inquiry to other natural persons or organizations, except where the information is equally available to the propounding party. (Code Civ. Proc., § 2030.220, subd. (c); see *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 406.)

> If the answer to an interrogatory would necessitate the preparation or the making of a compilation, abstract, audit, or summary of or from the documents of the party to whom the interrogatory is directed, and if the burden or expense of preparing or making it would be substantially the same for the party propounding the interrogatory as for the responding party, it is a sufficient answer to that interrogatory to refer to this section and to specify the writings from which the answer may be derived or ascertained. This specification shall be 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. The responding party shall then afford to the propounding party a reasonable opportunity to examine, audit, or inspect these documents and to make copies, compilations, abstracts, or summaries of them.

(Code Civ. Proc., § 2030.230; *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 784.)

However, section 2030.230 "applies only if the summary is not available and the party *specifies* the records from which the information can be ascertained. A broad statement that the information is available from a mass of documents is insufficient." (*Deyo*, *supra*, 84 Cal.App.3d at p. 784.) Thus, and since answers must be complete and responsive, "it is not proper to answer by stating, 'See my deposition,' 'See my pleading,' or 'See the financial statement.' " (*Id.* at pp. 783-784.)

In addition,

> If a party to whom interrogatories are directed fails to serve a timely response, the following rules apply:

(a) The party to whom the interrogatories are directed waives any right to exercise the option to produce writings under Section 2030.230, as well as any objection to the interrogatories, including one based on privilege or on the protection for work product under Chapter 4 (commencing with Section 2018.010). The court, on motion, may relieve that party from this waiver on its determination that both of the following conditions are satisfied:

(1) The party has subsequently served a response that is in substantial compliance with Sections 2030.210, 2030.220, 2030.230, and 2030.240.

(2) The party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect.

(Code Civ. Proc., § 2030.290, subd. (a).)

Plaintiff's responses are deficient for the following reasons:

- Form Interrogatory no. 4.1: Plaintiff does not identify the name, address, and telephone number of each named insured, the policy limits, or whether any reservation of rights or controversy or coverage dispute exists. In addition, while Plaintiff provides some information regarding his automobile insurance, he has not provided any information for any other applicable insurance, such as any health insurance or excess liability coverage that may cover any of his damages.
- Form Interrogatory no. 20.2: Plaintiff failed to provide the license plate number of his vehicle, he has not confirmed who the registered owner of the 2003 Chevrolet Tahoe is, and he has not provided the names, addresses, and telephone number of any other occupants in his vehicle.
- Form Interrogatory no. 20.5: Plaintiff does not specify what street or roadway Lennon was traveling on, what lane Lennon was in, or what direction Lennon was traveling in. It is also unclear whether Plaintiff was on Bristol Street, or if he was on McFadden.
- Special Interrogatory no. 17: it is improper for Plaintiff to merely refer to "all photos and documents previously produced," as Plaintiff has made no meaningful effort to identify, summarize, and/or specify the photos and documents so that his response may be considered fully responsive to the interrogatory. (Code Civ. Proc., § 2030.230; *Deyo*, *supra*, 84 Cal.App.3d at pp. 783-784.) In addition, since Plaintiff's responses to the Special Interrogatories were untimely, and since he did not file a motion for relief, he is not entitled to exercise the option to produce writings under section 2030.230. (Code Civ. Proc., § 2030.290, subd. (a).)
- Special Interrogatory no. 20: while referring to his Medical File, and specifying the file as being Exhibit A to Defendant's document request, might comply with section 2030.230 and *Deyo*, Plaintiff waived his right to exercise his option to produce writings under section 2030.230, as he did not timely respond to the Special Interrogatories, and because he has not obtained relief from the Court from this waiver. (Code Civ. Proc., § 2030.290, subd. (a).)

Evidence Sanction

		To impose an evidence sanction, the party subject to the sanction must have acted willfully. (See *Lee v. Lee* (2009) 175 Cal.App.4th 1553, 1559 ["absent unusual circumstances, such as repeated and egregious discovery abuses, two facts are generally prerequisite to the imposition of a nonmonetary sanction. There must be a failure to comply with a court order and the failure must be willful"].) While Plaintiff failed to comply with the Court's order that he serve verified responses by December 6, 2023, Plaintiff ultimately served verified discovery responses. Thus, there is insufficient evidence to support a finding that Plaintiff's failure to comply with the Court's order was willful. Further, imposing an evidence sanction would place Cal Stripe in a better position than it would have been had Plaintiff provided the desired discovery, and had the desired discovery been favorable to Cal Stripe. (*In re Marriage of Chakko* (2004) 115 Cal.App.4th 104, 109.) <u>Monetary Sanction</u> Monetary sanctions against Plaintiff are warranted under section 2023.030, subdivision (a) of the Code of Civil Procedure, which authorizes monetary sanctions against a party engaging in the misuses of the discovery process. Unlike evidence sanctions, willfulness is not required for the imposition of monetary sanctions. (*Ellis v. Toshiba America Information Systems, Inc.* (2013) 218 Cal.App.4th 853, 878; *Clement v. Alegre* (2009) 177 Cal.App.4th 1277, 1286.) A trial court has "every right to impose a monetary sanction to compel obedience to its lawful orders, or to punish disobedience and disrespect of the court's processes." (*20th Century Ins. Co. v. Choong* (2000) 79 Cal.App.4th 1274, 1278 [imposing a $250 monetary sanction under section 177.5].) Monetary sanctions are also warranted under section 2030.300, subdivision (d) of the Code of Civil Procedure, as, by not opposing the motions, Plaintiff has not provided the Court with any evidence that he acted with substantial justification, and as he has not presented any circumstance that makes the imposition of a monetary sanction unjust. Here, Defendant presented evidence it made attempts to meet and confer with Plaintiff, which could have potentially avoided these motions, yet Plaintiff did not call Cal Stripe's counsel back, as he had promised to do. (Exhibits C-D to Miller Declaration.) However, and as noted, Cal Stripe seeks further responses to Form Interrogatory no. 20.8, and Special Interrogatory no. 14, even though there is no evidence it made an attempt to meet and confer with Plaintiff regarding these two interrogatories before filing its Motions. Thus, the Court reduces the sanctions for the two motions, from a total of $2,580.00 ($1,290.00 per motion), to $1,760.00 ($880.00 per motion), or eight total hours at $205.00 per hour, plus the $120.00 in filing fees. Moving party to give notice.
4	Kim v. Shin	Plaintiff Shin Kim moves to deem RFAs (Set One) admitted by Defendant Jung Hyeb Shin. For the following reasons, the **motion is CONTINUED to July 18, 2024 in this Department.**

		Proof of electronic service must include all of the following: (1) The electronic service address and the residence or business address of the person making the electronic service. (2) The date of electronic service. (3) **The name and electronic service address of the person served**. (4) A statement that the document was served electronically. (Code Civ. Proc., § 1013b, subd. (b).) Here, Plaintiff filed insufficient proof of service of the motion and underlying discovery. The proofs of service do not provide the name and electronic service address of the person served, instead providing only defense counsel's office *mailing* address. No later than nine (9) court days before the continued hearing, Plaintiff shall file additional proof of service addressing the issues contained in this ruling. Moving party to give notice.
5	McBrady v. Montage Deer Valley, LLC	Defendants Montage Deer Valley, LLC, Montage International North America, LLC, Montage North America, LLC, and Montage Hotels & Resorts, LLC's Motion to Dismiss, or Alternatively, Stay **Plaintiffs' Complaint for Forum Non Coveniens is GRANTED**. The **Court orders the matter stayed.** <u>Statement of Law</u> "A defendant, on or before the last day of his or her time to plead or within any further time that the court may for good cause allow, may serve and file a notice of motion for one or more of the following purposes: … [t]o stay or dismiss the action on the ground of inconvenient forum." (Code Civ. Proc., § 418.10, subd. (a)(2).) "When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just." (Code Civ. Proc., § 410.30, subd. (a).) "Forum non conveniens is an equitable doctrine invoking the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere." (*Stangvik v. Shiley Inc.* (1991) 54 Cal.3d 744, 751; accord, *St. Paul Fire and Marine Insurance Company v. AmerisourceBergen Corporation* (2022) 80 Cal.App.5th 1, 13.) In determining whether to grant a motion based on forum non conveniens, a court must first determine whether the alternate forum is a 'suitable' place for trial. If it is, the next step is to consider the private interests of the litigants and the interests of the public in retaining the action for trial in California. The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for

attendance of unwilling witnesses. The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation. [Citations.]

(*Stangvik*, *supra*, 54 Cal.3d at p. 751.)

Utah is a Suitable Alternative Forum

"[T]he question of a suitable alternative forum depends not on the factors relevant to the convenience of the parties and the interests of the public, but on whether an action may be commenced in the alternative jurisdiction and a valid judgment obtained there against the defendant." (*Stangvik*, *supra*, 54 Cal.3d at p. 752, fn. 3.) "Generally, an alternative forum is suitable if there is jurisdiction and no statute of limitations bar to hearing the case on the merits. [Citations.] '[A] forum is suitable where an action "can be brought," although not necessarily won.' [Citations.]" (*Zhi An Wang v. Fang* (2021) 59 Cal.App.5th 907, 918; *Morris v. AGFA Corp.* (2006) 144 Cal.App.4th 1452, 1464.)

Contrary to their claim that Utah has either a "minimal connection" or "minimal ties" to the litigation, the Complaint concedes the subject incident occurred in Utah. While Defendants' principal place of business is located in Orange County, Utah is a suitable alternative jurisdiction because Plaintiffs can commence their lawsuit in Utah, and they are able to obtain a valid judgment against Defendants there. (*Stangvik*, *supra*, 54 Cal.3d at p. 752, fn. 3.) Further, since Utah has a four-year statute of limitations, Plaintiffs' claims, which arise out of the March 22, 2023 incident, would not be time-barred. (*Wang*, *supra*, 59 Cal.App.5th at p. 918; *Morris, supra,* 144 Cal.App.4th at p. 1464.) (Johnston Declaration, ¶¶ 1, 4.) In addition, Defendants have agreed to submit to the personal jurisdiction of Utah. (Johnston Declaration, ¶¶ 1, 3, 4.) Further, since Utah has a four-year statute of limitations, Plaintiffs' claims, which arise out of the March 22, 2023 incident, would not be time-barred. (*Wang*, *supra*, 59 Cal.App.5th at p. 918; *Morris, supra,* 144 Cal.App.4th at p. 1464.) (Johnston Declaration, ¶¶ 1, 4.)

While Orange County is a presumptively convenient forum because Defendants' principal place of business is located in Irvine, this presumption is not conclusive, and a resident defendant may overcome the presumption of convenience by evidence the alternative jurisdiction is a more convenient place for trial of the action. (*Stangvik, supra,* 54 Cal.3d 744, 755-756.)

Further, while a non-resident Plaintiff's choice of venue may be entitled to due deference, it is not entitled to a strong presumption. Instead, that deference is to be weighed and balanced with all the other pertinent factors, including the defendant's principal place of business, and the deference has no direct bearing on the moving party's burden of proof. (*Stangvik*, *supra*, 54 Cal.3d 744, 754-755; *National Football League v. Fireman's Fund Ins. Co.* (2013) 216 Cal.App.4th 902, 929-930.) "It is difficult to justify giving preferential status to a plaintiff's choice of forum if the plaintiff is not a resident. Since the preference is based on factors which apply only to residents, it would appear that the underlying justification for the preference does not apply to nonresidents." (*Stangvik*, *supra*, 54 Cal.3d at p. 755, fn. 7.)

In their Opposition, Plaintiffs cite to *Ford Motor Co. v. Insurance Co. of North America* (1995) 35 Cal.App.4th 604 and *Morris v. AGFA Corp.* (2006) 144 Cal.App.4th 1452 for the proposition that Defendants are required to establish California is a "seriously inconvenient forum." However, courts have held it is error to require a moving defendant to show California is a seriously inconvenient forum in order to obtain a dismissal or stay under the forum non conveniens doctrine. (*Fox Factory, Inc. v. Superior Court* (2017) 11 Cal.App.5th 197, 204-207; *National Football League v. Fireman's Fund Ins. Co.* (2013) 216 Cal.App.4th 902, 930-933.)

This is particularly so when, as here, the plaintiff is not a California resident. (*Fox Factory*, *supra*, 11 Cal.App.5th at p. 205; *National Football League*, *supra*, 216 Cal.App.4th at p. 932; see *Stangvik*, *supra*, 54 Cal.3d at pp. 754-755 [the rule that a plaintiff's choice of forum should rarely be disturbed does not apply if the plaintiff is not a resident of the jurisdiction in which the suit is filed].) (See Complaint, ¶¶ 1-2 [Plaintiffs are residents of Washington D.C.]; Johnston Declaration, ¶ 2.)

Plaintiffs also submit evidence as to why it would be more convenient to have the matter tried in Orange County. (Shea Declaration, ¶¶ 2-10, 13-16; Exhibits 3-6 to Shea Declaration.) They also argue that Orange County is a more convenient location because there are more inbound and outbound flights to both Los Angeles International Airport and John Wayne Airport, as opposed to flying into and out of Salt Lake City, but also because the Orange County Superior Court is closer to John Wayne Airport.

However, the Court's initial step is to merely determine whether there is a suitable alternative forum. As discussed, Utah would be such a forum, and the location of evidence and witnesses is not a factor to be considered in determining whether Utah is a suitable alternative forum.

<u>The Private Interest Factors Do Not Favor Retaining the Action for Trial in California</u>

"The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses." (*Stangvik*, *supra*, 54 Cal.3d 744, 751; accord, *Fox Factory*, *supra*, 11 Cal.App.5th 197, 203.)

" 'The residences of the plaintiff and the defendant are relevant, and a corporate defendant's principal place of business is presumptively a convenient forum. [Citation.] If the plaintiff is a California resident, the "plaintiff's choice of a forum should rarely be disturbed unless the balance is strongly in favor of the defendant. [Citations.]" [Citations.]' " (*National Football League, supra,* 216 Cal.App.4th 902, 917, citing to *Stangvik*, *supra*, at 54 Cal.3d at pp. 754-755.) However, where the plaintiffs are not residents of California, their choice of forum is not entitled to great weight or deference. (*Stangvik*, *supra*, 54 Cal.3d at pp. 754-755; *Id.* at p. 755, fn. 7; *National Football League*, *supra*, 216 Cal.App.4th at pp. 929-930.) Thus, the Court is not persuaded by Plaintiffs' contention that they have significant ties to California, including local family.

Further, while defendant's residence supports a presumption that it would be convenient to maintain the action in California, this presumption is not conclusive, and it can be overcome by evidence the alternative jurisdiction is a more convenient place for trial of the action. (*Stangvik*, *supra*, 54 Cal.3d at pp. 755-756.)

According to Defendants, the majority of the potential witnesses, are either located in Utah, or are otherwise located outside California. (Johnston Declaration, ¶¶ 5, 7-8, 9, 11.) Thus, requiring these witnesses to testify, whether at a deposition or at trial, would be more convenient, and less expensive, in Utah. (Johnston Declaration, ¶ 12; Johnston Reply Declaration, ¶ 4.) In addition to potential witnesses, all of the evidence is located in Utah. (Johnston Declaration, ¶ 13; Johnston Reply Declaration, ¶¶ 1-3.)

Defendants also present evidence litigating this matter in Utah would be more expeditious, as there are far fewer cases filed in Utah, and as the average case age in Utah is two years. (Johnston Declaration, ¶ 14; Johnston Reply Declaration, ¶¶ 5-6.)

In response, Plaintiffs contend depositions can be conducted remotely, and, rather than live testimony, certain witness testimony can simply be played by videotape at the time of trial. (Shea Declaration, ¶¶ 2-3.) They also present evidence, in the form of four nearly identical declarations, that four witnesses have attested to it being "extremely inconvenient" to travel to Utah, and that it would be more convenient to either attend trial in Orange County, or to provide a remote videotaped deposition for use at trial. (Shea Declaration, ¶¶ 13-16; Exhibits 3-6 to Shea Declaration.)

Next, Plaintiffs contend none of the experts are located in Utah, and that, in fact, all of Plaintiffs' experts are located in California. (Shea Declaration, ¶¶ 4-6.) However, they have offered no evidence that these experts are unable to attend trial in Utah, or that it would be cost prohibitive to have these experts attend trial in Utah.

Plaintiff then maintains Defendants' documentary evidence and corporate representatives are *likely* located in Orange County. (Shea Declaration, ¶ 8.) This is speculative.

Plaintiffs also provide evidence the yurt has already been inspected, and there are no future plans to travel to the incident site. They also maintain Defendants indicated their intent to destroy what remained of the yurt. (Shea Declaration, ¶¶ 9-10.)

If the site has already been inspected, and there are no future plans to perform additional inspections, then this factor does not weigh in either party's favor. Second, Defendants have presented evidence they do not intend to destroy what remains of the yurt. Instead, the yurt has been dismantled, and all of the yurt and components are still on-site in Utah. (Johnston Reply Declaration, ¶¶ 1-3.)

Considering the evidence submitted by both parties, the Court finds "the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses" weighs in favor of having this matter litigated in Utah, as the private interest factors do not favor retaining the action for trial in California. (See *Stangvik*, *supra*, 54 Cal.3d at pp. 761-762 [in light of vastly improved transportation and transmission methods,

courts may be less concerned with the convenience of the parties, or with harassment of defendants by the filing of lawsuits in a forum inconvenient for them, than with forum shopping by the parties]; see *Id.* at pp. 762-763 [while it is probable both parties will suffer some disadvantage from trial in their home forums, "these problems are implicit in many cases in which forum non conveniens motions are made, and it is for the trial court to decide which party will be more inconvenienced"]; see *Animal Film, LLC v. D.E.J. Productions, Inc.* (2011) 193 Cal.App.4th 466, 474 [private interest factors weighed in favor of California where all of the parties, witnesses, and documents were located in California]; see *Williamson v. Mazda Motor of America, Inc.* (2012) 212 Cal.App.4th 449, 451, 452, 455 [in a products liability case where the plaintiffs were Utah residents, and the automobile accident occurred in Utah, the Hon. Linda Marks (ret.) correctly granted defendant's motion for reconsideration of its motion to stay or dismiss, and she stayed the case, as defendant's causation defense would be a major issue at trial, and the presentation of this defense would involve the testimony of the numerous Utah accident eyewitnesses].)

<u>The Public Interest Factors Do Not Favor Retaining the Action for Trial in California</u>

"The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation. [Citations.]" (*Stangvik*, *supra*, 54 Cal.3d 744, 751; accord, *Fox Factory*, *supra*, 11 Cal.App.5th 197, 203.) "Also of potential concern is 'the interest in trying the case in a forum familiar with the applicable law, and the interest in avoiding unnecessary conflicts of laws.' [Citation.]" (*Fox Factory*, *supra*, 11 Cal.App.5th 197, 204.)

In *Stangvik*, the Supreme Court implied the public interest factor was not concerned with protecting the rights of non-resident plaintiffs, as "California's interest in deterring future improper conduct by defendants would be amply vindicated *if the actions filed by California resident plaintiffs* resulted in judgments in their favor." (*Stangvik*, *supra*, 54 Cal.3d 744, 763, italics added; see Stangvik, supra, 54 Cal.3d at pp. 753-755 [a foreign plaintiff's choice of forum not entitled to the same preference as a California resident, and "the fact that plaintiffs chose to file their complaint in California is not a substantial factor in favor of retaining jurisdiction here"]; see *Animal Film, LLC v. D.E.J. Productions, Inc.* (2011) 193 Cal.App.4th 466, 475 [California only "has a significant interest in providing a forum for its residents and for resolving disputes between California-based businesses"].)

For example, in *Roulier v. Cannondale* (2002) 101 Cal.App.4th 1180, the *Roulier* Court held the local community had a concern about the case because a shop sold, and continued to sell, defective and/or dangerous Cannondale bicycles in Southern California, and the state had a strong interest in preventing the production and sale of defective products. (*Roulier*, *supra*, 101 Cal.App.4th at pp. 1190-1192; see *Wang*, *supra*, 59 Cal.App.5th at p. 921 [trial court must determine whether the public had an interest in keeping the action in California].)

No such public interest exists here. While Plaintiffs contend California has an interest in deterring the negligent conduct of its domestic corporations, the fact remains that the allegedly wrongful conduct

		occurred in Utah. The *only* connection to California is the fact Defendants have their principal offices in Orange County. (See *Animal Film*, *supra*, 193 Cal.App.4th at p. 475 [California has significant interest in providing a forum for its residents and for resolving disputes between California-based businesses].) (Exhibit 1 to Shea Declaration.) While California has an "interest in deciding actions against resident corporations whose conduct in this state causes injury to persons in other jurisdictions (*Stangvik*, *supra*, 54 Cal.3d 744, 756, fn. 10), such that "the jurisdiction's interest in deterring future wrongful conduct of the defendant will usually favor retention of the action if the defendant is a resident of the forum" (*id.* at p. 761, fn. 4), the California Supreme Court also held that private and public interest factors must be applied flexibly, without giving undue emphasis to one element (*id.* at p. 753). (See *Animal Film*, *supra*, 193 Cal.App.4th at p. 475 [California has significant interest in providing a forum for its residents and for resolving disputes between California-based businesses].) Further, and as noted, any presumption that it would be convenient for a resident corporation to litigate in California may be overcome. (*Stangvik, supra,* 54 Cal.3d at p. 756.) (See Exhibit 1 to Shea Declaration [Defendants' headquarters are in Orange County].) Plaintiffs also argue that, in a straightforward case involving two plaintiffs and four defendants, maintaining this action in Orange County would have little to no impact on court congestion. (See *Animal Film*, *supra*, 193 Cal.App.4th at p. 475 [garden variety claims involving one plaintiff, two defendants, and narrow issues will not unduly burden courts].) While this statement of law is true, this is not the only factor for the Court's consideration. Instead, and as discussed, one of the other factors is "protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern…." (*Stangvik*, *supra*, 54 Cal.3d at p. 751.) And as discussed, Orange County has little concern regarding a lawsuit where all of the relevant events happened in Utah, and where the majority of witnesses and evidence are similarly located in Utah. Given the foregoing, and after considering the public interest factors, **the Court finds those interests weighs in favor of having this matter litigated in Utah.** Moving party to give notice.
6	Nguyen v. Le	On July 17, 2023, Defendants purported to file a demurrer to all causes of action in the complaint. At the initial January 18, 2024 hearing on the demurrer, the court found that "missing from Defendants' moving papers is actually the 'demurrer' that contains the separate paragraphs as required by CRC 3.1320 and CCP § 430.60." [ROA 37]. The court also found that Defendants failed to meet and confer and comply with CCP 430.41 (a). As such, the court continued the hearing on the demurrer to this date to allow Defendants the opportunity to cure these defects. While Defendants did file a meet and confer declaration on April 29, 2024 [ROA 39], the court's records do not contain a "demurrer" that complies with CRC 3.1320 and/or CCP 430.60, as noted in the court's January 18, 2024 minute order. CRC 3.1320 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." (CRC 3.1320(a)). Similarly, CCP 430.60 requires "[a] demurrer [to] distinctly specify the grounds upon which any of the objections to the complaint, cross-complaint, or answer are taken. Unless it does so, it may be disregarded." CCP 430.10 lists the grounds on which a party may object to a complaint or cross-complaint. (See CCP 430.10(a)-(h)). While Defendants' moving papers included a notice and a memorandum of points and authorities, still missing from Defendants' moving papers is actually the "demurrer" that contains the separate paragraphs as required by CRC 3.1320 and CCP § 430.60. The notice on the demurrer merely states that Defendants "demurrer to all cause [sic] of action of the complaint based on the Code of Civil Procedure § 430.30." (See ROA #20 at p. 2.) That notice, however, fails to list each cause of action separately and the specific grounds under CCP 430.10 under which Defendants object to each cause of action. The court identified this defect in the court's initial January 18, 2024 minute order. Defendants had the opportunity to cure this defect, but failed to do so. The demurrer is, therefore, **overruled as procedurally defective**.
7	Oleander Villas, LLC v. Chung	Defendant Tae Hoon Chung moves for leave to file the Proposed Cross-Complaint attached as Exhibit C to the Declaration of Ellsworth Vines. For the following reasons, the **Defendant's motion is GRANTED**. Code of Civil Procedure section 428.10 governs permissive cross-complaints. It provides in relevant part: "A party against whom a cause of action has been asserted ... may file a cross-complaint setting forth [¶] ... [¶] (b) Any cause of action he has against a person alleged to be liable thereon, whether or not such person is already a party to the action, if the cause of action asserted in his cross-complaint (1) arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause brought against him." (Code Civ. Proc., § 428.10, subd. (b).) It is undisputed that the causes of action asserted in Defendant's proposed Cross-Complaint are directly related to the causes of action asserted in Plaintiff's Complaint. Accordingly, the proposed Cross-Complaint is compulsory. Plaintiff argues that Defendant's delay in bringing the instant motion was grounded in bad faith. Defendant states that he was waiting until after the parties' completed mediation to move for leave to file the proposed Cross-Complaint. Plaintiff asserts that Defendant's unilateral suspension of the mediation and his nearly one-month delay in filing the instant motion after mediation ended demonstrates bad faith. Plaintiff also accuses Defendant of discovery abuse. What constitutes bad faith must be determined in light of the liberality conferred upon the trial court by section 426.50. Hence, a strong showing of bad faith must be made to support denial of the right to file a compulsory cross-complaint. (*Foot's Transfer & Storage Co. v. Superior Court* (1980) 114 Cal.App.3d 897, 902.) A finding of bad faith will be affirmed if supported by substantial evidence. (*Ibid.*) Here, the record indicates the parties attended mediation on August 8, 2023. (Mousavi Decl. ¶ 4.) Defendant unilaterally suspended the mediation that same day. (*Id.*) On August 18, 2023, Defendant's former

		counsel moved to be relieved as counsel of record. (See ROA # 69.) The court granted counsel's motion on October 12, 2023. (See ROA # 84.) On November 6, 2023, Defendant filed a Substitution of Attorney for his current counsel. (ROA # 99.) The instant motion was filed on January 15, 2024. Even assuming the period between the end of mediation and Defendant's motion for leave to file his cross-complaint constituted an unreasonable delay, "the late filing of the motion to file a compulsory cross-complaint absent some evidence of bad faith is insufficient evidence to support denial of the motion." (*Silver Organizations Ltd. v. Frank* (1990) 217 Cal.App.3d 94, 101.) "[A]ny 'surprise' that may be visited on a party due to a belated motion pursuant to section 426.50 may be mitigated by postponement or other conditions to prevent injustice. The legislative committee comment to section 426.50 provides that, '[w]here necessary, the court may grant such leave [to file a cross-complaint] subject to terms or conditions which will prevent injustice, such as postponement or payment of costs.' " (*Ibid*.) Next, Plaintiff argues that the proposed Cross-Complaint fails to state facts to constitute a cause of action. The court will usually not consider the validity of the proposed amended pleading in deciding whether to grant leave to amend. The preferred practice is to "permit the amendment and allow the parties to test its legal sufficiency by demurrer, motion for judgment on the pleadings or other appropriate proceedings. [Citation omitted.]" (*Kittredge Sports Co. v. Super. Ct.* (1989) 213 Cal.App.3d 1045, 1048.) The motion for leave to file the cross-complaint is granted. Defendant shall file and serve the proposed Cross-Complaint attached as Exhibit C to the Declaration of Ellsworth Vines within 10 days of service of the notice of ruling. Defendant to give notice.
8	Parra v. Grieves	Defendant The Estate of Shannon Denise Grieves, Deceased, ("Defendant Estate") moves to strike portions of the First Amended Complaint of Plaintiffs Kyle Robin Parra and Steven Joel Parra. Plaintiffs filed no opposition to the motion. For the following reasons, the unopposed **motion is GRANTED with leave to amend.** Pursuant to Code of Civil Procedure Section 436 the court may, upon a motion made or at any time in its discretion, strike out "any irrelevant, false, or improper matter inserted in any pleading." The grounds for a motion to strike must appear on the face of the pleading or from matters which the court may judicially notice. (Code Civ. Proc., § 437.) A motion to strike may be used specifically to strike punitive damages allegations in a complaint lacking factual foundation. (*Turman v. Turning Point of Central Calif., Inc.* (2010) 191 Cal.App.4th 53, 63.) Defendant Estate moves to strike the punitive damages allegations in the first cause of action (¶ 26) and the prayer for punitive damages (FAC Prayer at ¶ 3). To plead a claim to recover punitive damages, a plaintiff must plead and show one of the following bases for imposition of exemplary damages, i.e. malice, oppression, or fraud. (Civ. Code, § 3294, subd. (a).) A complaint must allege specific factual allegations to support a request for punitive damages. (*See*, *e.g.*, *Anschutz Entertainment Group, Inc. v. Snepp* (2009) 171 Cal.App.4th 598, 643 [allegations that defendant's conduct was intentional, willful, malicious, performed with ill will, and in

		conscious disregard of plaintiffs' rights does not satisfy the specific pleading requirement].) "Not only must there be circumstances of oppression, fraud, or malice, but facts must be alleged in the pleading to support such a claim . . . ." (*Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 166.) Punitive damages may be available in a negligence action where a defendant acts in a manner where risk of injury is probable. (*See, e.g., Taylor v. Superior Court* (1979) 24 Cal.3d 890 [plaintiff had pleaded defendant's operation of an automobile under the influence disclosed a conscious disregard of the probable dangerous consequences, where defendant was an alcoholic who was aware of the seriousness of his problem, of his tendency to drive while intoxicated, and of the dangerousness of his driving while in such condition]; *Dawes v. Superior Court* (1980) 111 Cal.App.3d 82, 87–88 [complaint alleged defendant was driving while intoxicated in a manner where risk of injury was probable, by driving while intoxicated, zigzagging in and out of traffic in excess of 65 miles per hour in a 35-mile per hour zone, in crowded beach recreation area at 1:30 on a weekend afternoon].) Here, **the FAC does not allege facts supporting punitive damages**. Should Plaintiffs desire to file an amended complaint that addresses the issues in this ruling, Plaintiffs shall file and serve the amended complaint within 15 days of service of the notice of ruling. Defendant to give notice.
9	Paquette v. The Hertz Corporation	Defendant The Hertz Corporation moves to compel arbitration of the claims set forth in Plaintiff Robert Paquette's Complaint. For the following reasons, **the motion is DENIED without prejudice**. Arbitration, whether under the California Arbitration Act or the Federal Arbitration Act ("FAA"), "is a matter of consent, not coercion . . . A party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236 [internal quotations and citations omitted].) The existence of a valid agreement to arbitrate is a "question of arbitrability" to be decided by the court unless the parties expressly agree otherwise. (*Garden Fresh Restaurant Corp. v. Superior Cour*t (2014) 231 Cal.App.4th 678, 684 citing *Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 83 [questions of arbitrability include whether parties are bound by an arbitration clause or whether binding clause applies to particular case or controversy].) To determine whether the parties formed an agreement to arbitrate, courts 'apply ordinary state-law principles that govern the formation of contracts.'" (*Int'l Brotherhood of Teamsters v. NASA Servs., Inc.* (9th Cir. 2020) 957 F.3d 1038, 1042, quoting *First Options of Chi., Inc. v. Kaplan* (1995) 514 U.S. 938, 944.) The party seeking to arbitrate must prove the existence of the agreement. (*Pinnacle*, *supra*, 55 Cal.4th at p. 236.) If an agreement exists, then public policy substantially favors arbitration (*see* Code Civ. Proc., § 1281.2 [court shall order arbitration if it determines valid agreement to arbitrate exists]; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614, 631 [there is an "emphatic federal policy in favor of arbitral dispute resolution"]) and the burden shifts to the party opposing arbitration to "demonstrate that an arbitration provision cannot be interpreted to require arbitration of the dispute." (*Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 686-87.) Courts apply general state

		contract law to determine consent. (*Marcus & Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co.* (1998) 68 Cal.App.4th 83, 89.) The moving party bears the burden of proving by the preponderance of the evidence the existence of a valid arbitration agreement covering the parties' dispute, and a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense. (*Little v. Pullman* (2013) 219 Cal.App.4th 558, 565.) In these summary proceedings, the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination. (*Id.*) Defendant Hertz does not submit sufficient evidence of a valid and enforceable arbitration agreement. Specifically, Defendant Hertz provides and relies on a copy of Gold Plus Rewards terms and conditions dated 11/30/2020 (*see* Schloss Decl., Ex. A), without establishing that Plaintiff Paquette agreed to those terms. It is undisputed that when Paquette enrolled in the Gold Plus Rewards program in or before 2013, the applicable terms and conditions (the "Original Terms and Conditions") included no arbitration provision. (*See* Paquette Decl. ¶¶ 5, 9, 10, Exs. A-B; *see generally* Reply.) The Original Terms and Conditions include a clause providing Hertz the opportunity to revise the terms and conditions (the "Revision Provision"). (Paquette Decl., Ex. B. at Part II.) Specifically, the Revision Provision provides: The terms and conditions of these Rental Terms or Your Enrollment may be revised or supplemented from time to time by Hertz sending You notice of such changes. It will be presumed that You have received any such notice mailed to Your address specified in Your Enrollment or otherwise provided by You to Hertz. If applicable law allows such notice is to be effective if sent using electronic records (for example, by e-mail), it will also be presumed that You have received any such notice transmitted/sent to the address for electronic records (for example, the e-mail address) specified in Your Enrollment or otherwise provided by You to Hertz. (Paquette Decl., Ex. B. at Part II.) Here, Defendant Hertz does not show that it revised the Original Terms and Conditions pursuant to the Revision Provision—namely, that Hertz provided notice of the relevant 2020 arbitration provision: (1) by mail or e-email; (2) to an address or e-mail address provided by Plaintiff to Hertz; and (3) if by e-mail, that applicable law permits such electronic notice. In sum, Defendant Hertz does not meet its burden to show that Plaintiff agreed to the arbitration agreement, as set forth in the moving papers. Plaintiff's evidentiary objections are not relevant to the disposition of this motion. (*See* Code Civ. Proc., § 437c, subd. (q).) Plaintiff to give notice.
10	Viva Wealth Fund, LLC v. Morris	Defendants Chris Morris and Tina Johnson move to strike the Complaint filed by Plaintiff Viva Wealth Fund, LLC pursuant to Code Civ. Proc. § 425.16. For the following reasons, the **motion is GRANTED**.

		Defendants' request for judicial notice is GRANTED as to the existence of these documents but not as to the truth of the matters stated therein. (Evid. Code § 452(d) and (h); *Richtek USA, Inc. v. UPI Semiconductor Corp*. (2015) 242 Cal.App.4th 651, 658.) The court's determination of an anti-SLAPP motion is a two-step process. First, the court determines if the party moving to strike a cause of action has met its initial burden to show that the cause of action arises from an act in furtherance of the moving party's right of petition or free speech. Then, if the court determines that showing has been made, the court determines whether the opposing party has demonstrated a probability of prevailing on the claim. (*Navelier v. Sletten* (2002) 29 Cal.4th 82, 88; see Code Civ. Proc. § 425.16.) The Complaint in this action asserts a cause of action for malicious prosecution. The basis for Plaintiff's malicious prosecution claim is the filing of the Underlying Lawsuit– *Johnson v. Lee* (2021-01234127). On December 2, 2021, Defendants filed the Underlying Lawsuit against Thomas Lee, Viva Wealth Fund, and other businesses to pursue third parties that possessed property belonging to Lee from which the Judgment could be collected. (RJN, Ex. 1.) On January 3, 2022, the Court granted a Temporary Restraining Order (TRO) against Defendants, including Viva Wealth Fund. (RJN, Ex. 3.) On January 26, 2022, the Court issued an order dissolving the TRO and stating that none of the entities identified in that lawsuit are owned by Lee and that no portion of the assets in the identified bank accounts belong to Lee. (Hadley Dec., ¶ 8, Ex. F.) Then on February 3, 2022, Defendants dismissed Viva Wealth with prejudice. (Hadley Dec., ¶ 9, Ex. G.) A party's litigation activities in an earlier action and statements made during judicial proceedings are protected by the anti-SLAPP statute. (Code Civ. Proc. § 425.16(e)(1), 425.16(e)(4); *Navellier v. Sletten* (2002) 29 Cal. 4th 82, 88-90.) "The constitutional right to petition, as we have seen, includes the basic act of filing litigation." (*Ludwig v. Superior Court*. (1995) 37 Cal.App.4th 8, 19.) "Further, the filing of a judicial complaint satisfies the 'in connection with a public issue' component of section 425.16, subdivision (b)(1) because it pertains to an official proceeding." (*Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087.) A malicious prosecution action is subject to a section 425.16 special motion to strike. Because every malicious-prosecution action is predicated on the filing of an earlier civil action or petition, "it is settled that a claim for malicious prosecution is subject to a special motion to strike under Cal. Civ. Proc. Code § 425.16." (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734-735; see also *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863 ("Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win.").) Plaintiff does not dispute that this is protected activity. Defendants have met their threshold burden, and Plaintiff now must establish a probability of prevailing on its malicious prosecution claim. The burden then shifts to plaintiff to establish that there is a probability it will prevail on its claim. (Code Civ. Proc. § 425.16(b)(1); *Taus v Loftus* (2007) 40 C4th 683, 713; *Equilon Enters. v Consumer Cause, Inc*. (2002) 29 C4th 53, 67.)

		"In every case, in order to establish a cause of action for malicious prosecution a plaintiff must plead and prove that the prior proceeding commenced by or at the direction of the malicious prosecution defendant, was: (1) pursued to a legal termination favorable to the plaintiff; (2) brought without probable cause; and (3) initiated with malice." (*Villa v. Cole* (1992) 4 Cal.App.4th 1327, 1335.) In the Underlying Lawsuit, on January 26, 2022, the Court issued an order dissolving the TRO. (Hadley Dec., ¶ 8, Ex. F.) Defendants then dismissed Viva Wealth with prejudice on February 3, 2022. (Hadley Dec., ¶ 9, Ex. G.) Defendants do not dispute that the dismissal of Viva Wealth constituted a termination of the Underlying Lawsuit as to Viva Wealth in Viva Wealth's favor. (See also *Fuentes v. Berry* (1995) 38 Cal.App.4th 1800, 1808.) Plaintiff has sufficiently shown that the Underlying Lawsuit resulted in a termination favorable to Plaintiff. "In analyzing the issue of probable cause in a malicious prosecution context, the trial court must consider both the factual circumstances established by the evidence and the legal theory upon which relief is sought. A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him." (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 164-165.) "In making its determination whether the prior action was legally tenable, the trial court must construe the allegations of the underlying complaint liberally in a light most favorable to the malicious prosecution defendant. [Citation.]" (Id. at p. 165.) As to the probable cause element, a lenient standard applies to avoid chilling the right of petition. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 817.) "[P]robable cause to bring an action does not depend upon it being meritorious, as such, but upon it being arguably tenable, i.e., not so completely lacking in apparent merit that no reasonable attorney would have thought the claim tenable." (*Id*. at p. 824.) As the Supreme Court has explained: "[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. The resolution of that question of law calls for the application of an objective standard to the facts on which the defendant acted." (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 871.) "The standard safeguards the right of both attorneys and their clients " "to present issues that are arguably correct, even if it is extremely unlikely that they will win." " " (*Parrish v. Latham & Watkins* (2017) 3 Cal.5th 767, 776.) "Probable cause exists when a cause of action is, objectively speaking, legally tenable. [Citations.]" (*Videotape Plus, Inc. v. Lyons* (2001) 89 Cal.App.4th 156, 161.) The claim need not be meritorious in fact, but only " 'arguably tenable. ...' " (*Paiva v. Nichols* (2008) 168 Cal.App.4th 1007, 1019.) "The presence or absence of probable cause is viewed under an objective standard applied to the facts upon which the defendant acted in prosecuting the prior case. [Citation.] The test ... is whether any reasonable attorney would have thought the claim to be tenable. [Citation.]" (*Id*., at p. 1018; see id. at p. 1019 ["not so completely lacking in apparent merit that no reasonable attorney would have thought the claim tenable."].) Thus "[a] litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a

		legal theory which is untenable under the facts known to him." (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 164–165.) Defendants contend they had probable cause to assert their claims for (1) Creditor Suit (Code. Civ. Proc. § 708.210), (2) Fraudulent Transfer (Civ. Code § 3439 et seq.), (3) Common Law Fraudulent Conveyance and (4) Conspiracy against Viva Wealth in the Prior Lawsuit. Defendants have established that Lee was designated as a manager of Viva Wealth when it was formed in 2020. (Kislig Dec., ¶ 18, Ex. 18.) At the same time, Lee executed an operating agreement for Viva Wealth on behalf of Wealth Space, LLC as its CEO. (Ibid.) Defendants have also shown that, in attempting to purchase the assets of a business, Lee sent an email on July 8, 2021 that included a screenshot of 9 bank accounts that Lee claimed to be his funds. Specifically, the email was entitled, "Tom Lee Proof of Funds" and Lee stated in the email, "See my proof of funds." (Ortiz Dec., ¶¶ 8, 12, Exs 7, 13; Hadley Dec., Ex. E; Berggren Dec., ¶ 40, Ex. 2.) One of those accounts was a Viva Wealth Fund bank account containing $1,988.751.44. (Id.) A reasonable attorney would have thought the claims asserted were tenable. The Complaint asserted a claim for creditor suit under Code Civ. Proc. § 708.210, which allows a judgment creditor to sue a third-party for "property" in the possession or control of the third-party, but that the debtor has "an interest in". To the extent that the third-party owes the debtor money, it allows the creditor to stand in the shoes of the debtor. Defendants had probable cause to believe Viva Wealth was in possession of property belong to Lee. Defendants also asserted a cause of action for fraudulent transfer. (Civ. Code §§ 3439–3439.12.) The essential elements for an intentional fraudulent transfer claim are a transfer made (1) by the "debtor" (one who is liable on a claim) (2) with actual intent to hinder, delay or defraud any creditor of the debtor. (Civ. Code §§ 3439.01(e), 3429.04(a)(1).) "Actual intent" may be determined from a number of factors enumerated by statute, commonly referred to as "badges" of fraud. (*Id*.; *Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 834.) Defendants have shown that a number of these badges of fraud were present when Defendants filed the Underlying Lawsuit, including the fact that Lee had an insider relationship with Viva Wealth, Lee suddenly stopped earning any income and emptied his bank account when the Judgment was on the horizon, and Lee claimed insolvency while simultaneously claiming control over almost $2MM in funds in Viva Wealth's account. Defendants have met their burden of proving their claims did not lack probable cause. Plaintiff has not shown that Defendants either relied upon facts which they had no reasonable basis to believe to be true or sought recovery upon a legal theory which was untenable. Defendants also rely on the interim adverse judgment rule to establish that their claims did not lack probable cause. However, as far as this Court can tell, no reported California Court of Appeal has applied the interim adverse judgment rule only on the granting of a temporary restraining order. In fact, one Court declined to apply the rule in such a circumstance, though that decision was based in large part on an incomplete record. (*L.G. v. M.B*. (2018) 25 Cal.App.5th 211, 230.) The Court declines to find that the interim adverse judgment rule applies, nor is such a finding necessary in light of the above analysis.

		" 'The "malice" element ... relates to the subjective intent or purpose with which the defendant acted in initiating the prior action. [Citation.] 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. [Citation.] The plaintiff must plead and prove actual ill will or some improper ulterior motive.' [Citations.] Malice 'may range anywhere from open hostility to indifference. [Citations.] Malice may also be inferred from the facts establishing lack of probable cause.' " (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292.) "Since parties rarely admit an improper motive, malice is usually proven by circumstantial evidence and inferences drawn from the evidence." (*HMS Capital, Inc. v. Lawyers Title Co*. (2004) 118 Cal.App.4th 204, 218.) Here, there is insufficient evidence of malice. Plaintiff contends that malice may be inferred because there was no probable cause in bringing the Underlying Action. As discussed previously, Plaintiff has not established a lack of probable cause as a matter of law. And Defendants dismissed Viva Wealth a week after the TRO was dissolved in the Underlying Lawsuit. Defendants also submit that Plaintiff's claims are defeated by the advice of counsel defense. "Good faith reliance on the advice of counsel, after truthful disclosure of all the relevant facts, is a complete defense to a malicious prosecution claim." (*Bisno v. Douglas Emmett Realty Fund 1988* (2009) 174 Cal.App.4th 1534, 1544; accord *Bertero v. National General Corp*. (1974) 13 Cal.3d 43, 53–54.) The burden of proving the advice of counsel defense is on Nunez. (*Bertero, supra*, at p. 54.) In their anti-SLAPP motion and supporting papers, Defendants "failed to establish that they informed counsel of specific relevant facts prior to the filing of the ... action." (*Ibid*.) Defendants' declarations do not provide any evidence of any particular facts about which they informed counsel. Defendants have not provided sufficient evidence to merit application of the advice of counsel defense. Both Plaintiff and Defendants act as if the Complaint also asserts a cause of action for abuse of process. The caption of the Complaint states: "COMPLAINT FOR MALICIOUS PROSECUTION AND ABUSE OF PROCESS." But the Complaint does not actually assert (in the body) a cause of action for malicious prosecution. If the Complaint had asserted a cause of action for abuse of process, however, such a cause of action would fall under the Anti-SLAPP statute. (*Booker v. Rountree* (2007) 155 Cal.App.4th 1366, 1370 ("Abuse of process claims are subject to a special motion to strike.").) The tort of abuse of process has two elements: " '[F]irst, an ulterior purpose, and second, a willful act in the use of the process not proper in the regular conduct of the proceeding. Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.' " (*Spellens v. Spellens* (1957) 49 Cal.2d 210, 232.) Abuse of process is distinct from the tort of malicious prosecution. "[W]hile a defendant's act of improperly instituting or maintaining an action may, in an appropriate case, give rise to a cause of action for malicious prosecution, the mere filing or maintenance of a lawsuit—even for an improper purpose—is not a proper basis for an abuse of process action." (*Oren Royal Oaks*

		Venture v. Greenberg, Bernhard, Weiss & Karma, Inc. (1986) 42 Cal.3d 1157, 1169.) Subject to express exceptions, a privileged publication or broadcast is one made in "any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure." (Civ. Code, § 47, subd. (b).) "The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Holland v. Jones* (2012) 210 Cal.App.4th 378, 381, citing *Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 955.) The litigation privilege is "an 'absolute' privilege, and it bars all tort causes of action except a claim of malicious prosecution." (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 322.) Plaintiff's purported abuse of process claim is based on Defendants' conduct in filing and maintaining the Underlying Lawsuit. (Opp. at 17:5-8.) Plaintiff has not shown it can overcome the litigation privilege. It contends the privilege only applies to communications authorized by law, and it claims Defendants maintained the Underlying Lawsuit for an improper purpose. The litigation privilege is a complete bar to an abuse of process claim. (See, e.g., *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1061; *Flatley v. Mauro* (2006) 39 Cal.4th 299, 322.) Defendants to give notice.
11	Wells Fargo Bank, N.A. v. Tran	A party may move for summary judgment in an action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding." (*Cal. Code Civ. Proc*., § 437c(a)(1)) "The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (*Cal. Code Civ. Proc*., § 437c (c).) "A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if the party contends that the cause of action has no merit, that there is no affirmative defense to the cause of action, that there is no merit to an affirmative defense as to any cause of action, that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (*Cal. Code. Civ. Proc.* § 437c(f)(1)). A motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment. (*Cal. Code Civ. Proc*., § 437c(f)(2).) "It is elemental that a notice of motion must state in writing the 'grounds upon which it will be made.'" (*Gonzales v. Superior Court* (1987) 189 Cal. App. 3d 1542, 1545). "Only the grounds specified in the notice of motion may be considered by the trial court." (*Id*.) "This

		rule has been held to be especially true in the case of motions for summary adjudication of issues." (*Id*.) "The language in Code of Civil Procedure section 437c, subdivision (f) makes it clear that a motion for summary adjudication cannot be considered by the court unless the party bringing the motion duly gives notice that summary adjudication is being sought." (*Id*. at 1545–46). "If a party desires adjudication of particular issues or sub-issues, that party must make its intentions clear in the motion ...." (*Id*. at 1546). "There is a sound reason for this rule: *'... the opposing party may have decided to raise only one triable issue of fact in order to defeat the motion, without intending to concede the other issues. It would be unfair to grant a summary adjudication order unless the opposing party was on notice that an issue-by-issue adjudication might be ordered if summary judgment was denied.'"* (*Id*.) "The motion must be denied if the movant fails to establish an entitlement to summary adjudication of the matters thus specified; the court cannot summarily adjudicate other issues or claims, even if a basis to do so appears from the papers*." (Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 744). In Plaintiff's notice of summary judgment on **Plaintiff's complaint, the notice only requests summary judgment, with no alternative request for summary adjudication**. To the extent that any one issue creates a triable issue of fact, therefore, Plaintiff's entire motion must be denied—the court may not grant summary adjudication of stand-alone issues or any individual causes of action. In other words, if there is a triable issue of fact as to one cause of action, the court must deny the entire motion. The entire action must be disposed of for Plaintiff to be granted summary judgment. The court has reviewed the moving papers on the motion, including the moving memorandum, the moving separate statement, and the moving declaration of Kelly J. Christoffersen. The court noticed that the moving memorandum and the "undisputed material facts" in the moving separate statement contend that Plaintiff issued a credit card to Defendant in 2029 ending in 4710. (See SUMF #1). Exhibit 2 of the declaration of Kelly J. Christoffersen, however, contains account balance statements for an account ending in 7759 from July 2019 to April 2022 and a second account ending in 4710 from April 2022 to September 2022. The moving memorandum, the moving separate statement, and the testimony in the moving declaration do not mention the existence of an account ending in 7759 and/or explain why balance statements for accounts ending in two different numbers exist. This omission creates a triable issue as to at least one of Plaintiff's causes of action. Plaintiff alleges a fifth cause of action against Defendant for an open book account. "A party may recover for the sum due on an open book account." (*Interstate Group Administrators, Inc. v. Cravens, Dargan & Co.* (1985) 174 Cal.App.3d 700, 708.) "A 'book account' is defined as a 'detailed statement, kept in a book, in the nature of debit and credit, arising out of contract or some fiduciary relation.'" (*Id*.) A party may prevail on a common count for an open book account when the open book account "...***contains a statement of the debits and credits of the transactions involved completely enough to supply evidence from which it can be reasonably determined what amount is due to the claimant***." (*Id*.) Here, Plaintiff's evidence is insufficient to detail all of the debits and

		credits of the transactions completely enough to determine the amount due on an account ending in 4710. The "book account" for an account ending in 4710, which is what Plaintiff is moving on, is incomplete and starts in April 2022, with an already outstanding balance, even though Plaintiff alleges that a credit card was issued in 2019 ending in 4710. The evidence is insufficient to show all of the debits and credits from April 2019 to September 2022 on one account ending in 4710—which is what Plaintiff is trying to recover. There is insufficient evidence to detail the credits and debits that created the outstanding balance that is on the first April 2022 account statement for the account ending in 4710 in Exhibit 2. The disjointed evidence of credit card statements for an account ending in 7759 (which is not mentioned) and then another account ending in 4710, without explanation and/or foundation, is insufficient for Plaintiff to meet its prima facie burden to establish Plaintiff's fifth cause of action for an open book account. Because a triable issue exists as to at least one cause of action in Plaintiff's complaint and because Plaintiff did not alternatively seek summary adjudication, summary judgment must be denied since Plaintiff cannot completely dispose of this action. The **motion is, therefore, DENIED**. Plaintiff to give notice.
12	Yarn v. Ford Motor Company	Off calendar.