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**Ruling on Matter Taken Under Submission**

Judge Theresa M. Traber, Department 47

Sherri R. Carter, Executive Officer/Clerk  
By Ingrid Flores Deputy

HEARING DATE: **December 21, 2021**

TRIAL DATE: Not set.

CASE: **Michal Story v. David Carlson, et al**

CASE NO.: **21STCV29163**

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**SPECIAL MOTION TO STRIKE COUNTS 1, 2, 3, 6, AND 7 OF PLAINTIFF'S  
UNVERIFIED FIRST AMENDED COMPLAINT PURSUANT TO CCP § 425.16**

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**MOVING PARTY:** Defendants David Carlson and Film Foetus, Inc.

**RESPONDING PARTY(S):** Plaintiff Michal Story

**CASE HISTORY:**

- 08/06/21: Complaint filed.
- 08/13/21: First Amended Complaint filed.

**STATEMENT OF MATERIAL FACTS AND/OR PROCEEDINGS:**

This is an action for breach of contract. Plaintiff alleges that she entered into an agreement with Defendant Film Foetus to develop a feature-length documentary about her deceased husband's life and that Defendants failed to perform certain obligations under the agreement.

Defendants move to strike the first amended complaint under CCP § 425.16.

**FINAL RULING:**

Defendants' special motion to strike Plaintiff's unverified first amended complaint pursuant to CCP § 425.16 is GRANTED as to the third and seventh causes of action and DENIED as to the first, second, and sixth causes of action.

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## DISCUSSION:

### Special Motion To Strike

#### Timeliness of Motion

An anti-SLAPP motion is to be filed within 60 days of service of the complaint. (CCP § 425.16(f).) Here, it does not appear that the original complaint was served on Defendants, but the first amended complaint was served on each Defendant by mail on either August 17, 2021 or August 24, 2021. The motion was filed on October 26, 2021. Thus, it is timely, given that service is deemed complete on out-of-state defendants on the tenth day after mailing. (CCP § 415.40.)

#### Request for Judicial Notice

Defendants request judicial notice of various articles available online to show a public interest in certain topics relevant to this motion.

These requests are GRANTED per Evidence Code § 452(h) (matters not reasonably subject to dispute and capable of accurate determination), as to the existence of the articles and the subject matter they cover, not the truth of their contents.

#### Defendants' Evidentiary Objections

*Declaration of Michal Story* – The Court sustains Objections No. 1 (improper argument), 2 (irrelevant and vague), 3 (irrelevant and lack foundation), 4 (improper legal opinion), 5 (irrelevant), 6 (lacks foundation and improper argument), 7 (irrelevant), 8 (improper argument, opinion and speculation), 9 (irrelevant and lacks foundation), 10 (lacks foundation), 11 (improper argument and lacks foundation), 13 (improper expert opinion and irrelevant), 15 (improper argument), 16 (lacks foundation), 17 (lacks foundation), 18 – part of first sentence [“not in conformity with the production agreement”], second and last sentences (improper legal argument), 19 (improper argument or opinion), Objections Nos. 12, 14, the remainder of 18, and 20 are overruled.

#### Analysis

Defendants bring an anti-SLAPP special motion to strike the first, second, third, sixth, and seventh causes of action from Plaintiff's unverified first amended complaint.

In ruling on a defendant's special motion to strike, the trial court uses a “summary-judgment-like procedure at an early stage of the litigation. (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.) This is a two-step process. First, the defendant must show that the act or acts of which the plaintiff complains were taken “in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue.” (CCP § 425.16(b)(1).) Second, if the defendant carries that burden, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the claim.

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(CCP § 425.16(b)(3).) The defendant has the burden on the first issue, and the plaintiff on the second. (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 928; *Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 919.) In making both determinations, the trial court is to consider “the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.” (CCP § 425.16(b)(2); *Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

Whether Plaintiffs’ Causes of Action Arise Out of an Act in Furtherance of Defendant’s Right of Petition or Free Speech

To satisfy the first prong of the two-prong test, the defendant’s acts underlying the cause of action must themselves have been in furtherance of the right of petition or free speech. (*City of Cotati v. Cashman* (2002) 29 Cal. 4th 69, 76-78.) The defendant’s acts are protected activity – that is, made in furtherance of protected petition or free speech in connection with a public issue – if they fit into one of the following categories under the section 425.16(e): (1) oral or written statements made before a legislative, executive, judicial or any other official proceeding; (2) oral or written statements made in connection with an issue under consideration or review by a legislative, executive, judicial body, or any other official proceeding authorized by law; (3) written or oral statements made in a place open to the public or in a public forum in connection with an issue of public interest; and (4) any other conduct in furtherance of the exercise of the constitutional rights of petition or free speech in connection with a public issue or an issue of public interest. (CCP § 425.16(e); *City of Cotati, supra*, 29 Cal.4th at 78; *Equilon Enterprises, supra*, 29 Cal.4th at 67.)

In determining whether a cause of action is based on protected activity, we “examine the *principal thrust* or *gravamen* of a plaintiff’s cause of action to determine whether the anti-SLAPP statute applies.” (*Optional Capital, Inc. v. Akin Gurap Strauss, Hauer & Feld LLP* (2017) 18 Cal.App.5th 95, 110, citation omitted.) “We assess the principal thrust by identifying ‘[t]he allegedly wrongful and **injury-producing conduct** ... that provides the **foundation** for the claim.’” (*Id.* at 111, bold emphasis added, citation omitted.) In other words, CCP § 425.16 does not apply if Defendant’s constitutionally protected activity is “merely incidental” or “collateral” to the unprotected activity. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 395.) “Allegations of protected activity that merely provide context, without supporting a claim for recovery, cannot be stricken under the anti-SLAPP statute.” (*Ibid.*)

Here, the challenged causes of action are for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, constructive fraud, and intentional interference with economic relationship. The entire 1AC arises out of a contract between Plaintiff and Defendant Film Foetus to develop a feature-length documentary about Plaintiff’s deceased spouse, Joe Frank. (1AC ¶ 6.) Plaintiff alleges that Film Foetus is the alter ego of Defendant David Carlson. (¶ 39.) In the first cause of action for breach of contract, Plaintiff alleges that Defendants breached the contract by (1) failing to account to Plaintiff; (2) commingling funds; (3) not depositing revenues in the bank account for the movie; (4) not identifying investors or reporting all monies raised; (5) not consulting meaningfully with Plaintiff regarding distribution; (6) not according Plaintiff producer credit; (7) creating inconsistent budgets and changing

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budgets without meaningful consultation with Plaintiff; and (8) not securing financing for the project. (¶ 43(a)-(h).) The second cause of action is based on the same allegations. (¶ 45.) The third cause of action for fraud is based on Defendants' promise to perform the acts described in ¶ 43 with no intention to do so. (¶ 50.) The sixth cause of action for constructive fraud is based only on Defendants' commingling of funds, holding sums due to Plaintiff, and withdrawing funds for personal use. (¶ 68.) Finally, the intentional interference cause of action is based on Defendant Carlson's disruption of the relationship between Plaintiff and Defendant Film Foetus by diverting funds to his own bank account and by causing Defendant Film Foetus to breach other elements of the contract, including Defendant Film Foetus' obligations to consult with Plaintiff about distribution and budget for the film and to identify Plaintiff as co-owner of the project and copyright. (¶ 75.)

Defendants argue that their alleged acts are protected activity as "any other conduct in furtherance of the exercise of the constitutional rights of petition or free speech in connection with a public issue or an issue of public interest." (CCP § 425.16(e)(4).)

Defendants are correct that their conduct, if undertaken in furtherance of their free speech rights, was "in connection with a public issue or an issue of public interest." A "public issue is implicated if the subject of the statement or activity underlying the claim . . . was a person or entity in the public eye." (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1254.) Here, Joe Frank had a "loyal following of tens of thousands of listeners . . . nationwide" and "worldwide," and he received numerous awards, including an Emmy and a Peabody, in his 39-year career on public radio. (1AC ¶ 3.) The proposed documentary is therefore directed at someone who was already of public interest, as additionally shown by the articles proffered by Defendants about Joe Frank. (Defendants' RJN.)

Defendants are also correct that an action based on breach of contract can be stricken under § 425.16 if the "defendant's activity that gives rise to his or her asserted liability . . . constitutes protected speech or petitioning." (*Navellier v. Sletton* (2002) 29 Cal.4th 82, 88.) There is no question that films involve the exercise of free speech, so the issue here is whether the conduct challenged by Plaintiff constitutes action in furtherance of Defendants' free speech rights in connection with the Joe Frank documentary.

Some conduct challenged by Plaintiff amounts to mere breaches of financial duties under the parties' contract, such as the allegations that Defendants improperly commingled funds, failed to account for funds, and failed to deposit revenues. But there is established authority holding that certain business activities connected with the production of films and other expressive activities constitute acts in furtherance of protected speech rights because they "help[ed] to advance that right or assist[ed] in the exercise of that right." (*Tamkin v. CBS Broad., Inc.* (2011) 193 Cal.App.4th 133, 143 [Citation omitted].) Consistent with this authority, Plaintiff's concern about an inadequate credit as a producer on the film implicates free speech rights. (*Kronemyer v. Internet Movie Data Base, Inc.* (2007) 150 Cal.App.4th 941, 947 [listing or failure to list credit on the defendant's website constituted acts in furtherance of free speech rights].) Further, her allegations that Defendants failed to secure adequate funding for the film project and did not identify investors or report all monies fall within the scope of the anti-SLAPP statute because they are aspects of Defendants' protected activity of soliciting investment

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funding for the film. (*Ojeh v. Brown* (2019) 43 Cal.App.5th 1027, 1040 [soliciting investment funding for film is conduct in furtherance of documentary's production].) Finally, Plaintiff's contentions that Defendant failed to engage in meaningful consultation with her about budgeting for and distribution of the film are grounded on protected conduct because these activities unquestionably advance or assist in the exercise of free speech rights. (E.g., *San Diegans for Open Government v. San Diego State University Research Foundation* (2017) 13 Cal.App.5th 76, 103 [lawsuit challenging contracts and lease for public broadcast station that dictated how specific news stories would be delivered and published arose from protected conduct].)

The Court finds that Plaintiff's first cause of action for breach of contract, second cause of action for breach of the implied covenant of good faith and fair dealing, third cause of action for fraud, and seventh cause of action for intentional interference with economic relationship are all grounded at least in part on protected conduct and, thus, are subject to attack under CCP § 425.16. (*Musero v. Creative Artists Agency, LLC* (2021) 72 Cal.App.5th 802, 287 Cal.Rptr.3d 625, 637.) Thus, the burden shifts to Plaintiff to demonstrate a probability of prevailing on these claims to survive the special motion to strike.

Because Plaintiff's sixth cause of action for constructive fraud is based only on Defendants' commingling of funds, holding sums due to Plaintiff, and withdrawing funds for personal use, and not on the protected activities that advanced Defendants' free speech, this cause of action is not subject to being stricken pursuant to CCP § 425.16, and the burden does not shift to Plaintiff as to this claim.

Whether Plaintiff Has Demonstrated a Probability of Prevailing on Her First, Second, Third and Seventh Causes of Action.

Plaintiff has the burden on the second prong of a SLAPP analysis to establish that there is a probability that she will prevail on her claims. (CCP § 425.16(b)(1); *Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 928.)

“[A] SLAPP motion, like a summary judgment motion, pierces the pleadings and requires an evidentiary showing.” (*Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1073 [112 Cal. Rptr. 2d 397].) “ [A]lthough by its terms [Code of Civil Procedure] section 425.16, subdivision (b)(1) calls upon a court to determine whether “the plaintiff has established that there is a probability that the plaintiff will prevail on the claim” ... , past cases interpreting this provision establish that the Legislature did not intend that a court, in ruling on a motion to strike under this statute, would weigh conflicting evidence to determine whether it is more probable than not that plaintiff will prevail on the claim, but rather intended to establish a summary-judgment-like procedure available at an early stage of litigation that poses a potential chilling effect on speech-related activities.’ [Citation.] ‘[T]he court's responsibility is to accept as true the evidence favorable to the plaintiff ... .’ [Citation.] ‘[T]he defendant's evidence is considered with a view toward whether it defeats the plaintiff's showing as a matter of law, such as by establishing a defense or the absence of a necessary element.’ [Citation.]” (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 215 [105

Cal. Rptr. 3d 683].)

(*Mission Springs Water Dist. v. Verjil* (2013) 218 Cal.App.4th 892, 908-909.)

“We decide the second step of the anti-SLAPP analysis on consideration of ‘the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.’ (§ 425.16, subd. (b).) Looking at those affidavits, ‘[w]e do not weigh credibility, nor do we evaluate the weight of the evidence. Instead, we accept as true all evidence favorable to the plaintiff and assess the defendant’s evidence only to determine if it defeats the plaintiff’s submission as a matter of law.’ (*Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 699–700 [61 Cal. Rptr. 3d 29].) [¶] That is the setting in which we determine whether plaintiff has met the required showing, a showing that is ‘not high.’ (*Overstock.com, Inc. v. Gradient Analytics, Inc.*, supra, 151 Cal.App.4th at p. 699.) In the words of the Supreme Court, plaintiff needs to show only a ‘minimum level of legal sufficiency and triability.’ (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 438, fn. 5 [97 Cal. Rptr. 2d 179, 2 P.3d 27].) In the words of other courts, plaintiff needs to show only a case of ‘minimal merit.’ (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 675 [35 Cal. Rptr. 3d 31], quoting *Navellier v. Sletten*[, supra,] 29 Cal.4th 82, 95, fn. 11 ... .)”

(*Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 468-469).

A claim has “minimal merit” if it is “both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment *if the evidence submitted by the [nonmoving party] is credited.*” (*Gruber v. Gruber* (2020) 48 Cal.App.5th 529, 537.) “Because a court is to accept the nonmoving party’s evidence as true, the court is not to “weigh the credibility or comparative probative strength of competing evidence.” (*Ibid.*)

#### First Cause of Action (Breach of Contract)

To prevail on a breach of contract cause of action, Plaintiff must plead and prove the following elements: “(1) the contract, (2) plaintiff’s performance or excuse for nonperformance, (3) defendant’s breach, and (4) the resulting damages to plaintiff.” (*Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1367.)

Here, Plaintiff has made that limited showing in connection with the first cause of action, which is based, in part, on an allegation that Defendants breached the contract by “[s]elf-distributing in which meaningful consultation was required, which did not occur.” (1AC ¶ 43(e).) In her declaration, Plaintiff states that “Defendant had control over distribution” and “did not fully apprise me, let alone meaningfully consult with me, at any time.” (Declaration of Michel Story ¶¶ 37-38.) Despite Defendants’ argument in reply that Plaintiff should have provided more detail as to “her personal definition of ‘consulting’” and “what Defendants should have done beyond . . . keeping Plaintiff fully informed and inviting her to comment or provide input”

(Reply, at p. 9), Plaintiff's declaratory evidence is sufficient, if credited, to meet her minimal burden of proof.

Second Cause of Action (Breach of the Implied Covenant of Good Faith and Fair Dealing)

The implied covenant of good faith and fair dealing is "implied by law in every contract." (*Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1244.) To state a cause of action for breach of the implied covenant of good faith and fair dealing, a plaintiff must allege that the "conduct of the defendant, whether or not it also constitutes a breach of a consensual contract term, demonstrates a failure or refusal to discharge contractual responsibilities, prompted not by an honest mistake, bad judgment or negligence but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395.)

Given that the second cause of action is based on the same allegations as the first cause of action, as noted above, Plaintiff has met her minimal burden of proof as to the second cause of action.

Third Cause of Action (Fraud)

A claim for fraud involving an intentional misrepresentation is grounded on the following elements: "(1) the defendant represented to the plaintiff that an important fact was true; (2) that representation was false; (3) the defendant knew that the representation was false when the defendant made it, or the defendant made the representation recklessly and without regard for its truth; (4) the defendant intended that the plaintiff rely on the representation; (5) the plaintiff reasonably relied on the representation; (6) the plaintiff was harmed; and (7) the plaintiff's reliance on the defendant's representation was a substantial factor in causing that harm to the plaintiff." (*Manderville v. PCG&S Group, Inc.* (2007) 146 Cal.App.4th 1486, 1498.)

The third cause of action for fraud is based on Defendants' promise to perform the acts described in ¶ 43 of the 1AC with no intention to do so. (¶ 50.)

Aside from asserting that Defendants made false representations, Plaintiff's declaration does not offer any admissible evidence that Defendants knew these representations were false when made or were made recklessly, that Defendants intended for Plaintiff to rely on the representations, that Plaintiff reasonably relied on them, or that Plaintiff's reliance was a substantial factor in causing her harm. Nor has Plaintiff offered evidence of any of the specifics as to the representations themselves. Her declaration responds to statements in Defendant Carlson's declaration; it does not offer evidence as to the representations that form the basis of the complaint.

Accordingly, Plaintiff has not met her burden as to the third cause of action.

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Seventh Cause of Action (Intentional Interference with Economic Relationship)

The seventh cause of action asserts a claim against Defendant Carlson for interfering with Plaintiff's contract with Defendant Film Foetus. "To prevail on a cause of action for intentional interference with contractual relations, a plaintiff must plead and prove (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (*Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1148.)

As in connection with the third cause of action, here, too, Plaintiff fails to offer evidence of Defendant Carlson's intentional acts or his actual breach or disruption of the contract with Defendant Film Foetus. Nothing in Plaintiff's declaration would allow the Court to conclude that Plaintiff has met her burden to show likelihood of success on this claim. Accordingly, Plaintiff has not met her burden as to the seventh cause of action.


Conclusion

For the reasons discussed above, the motion is DENIED as to the first, second, and sixth causes of action. The motion is GRANTED as to the third and seventh causes of action.

Moving party to give notice.

IT IS SO ORDERED.

Dated: February 7, 2022



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Theresa M. Traber  
Judge of the Superior Court

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