Filed 2/11/20 Bikkina v. Mahadevan CA1/4
(unmodified opinion attached)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

PREM BIKKINA, Plaintiff and Respondent, v. JAGAN MAHADEVAN, Defendant and Appellant.	A156582 (Alameda County Super. Ct. No. RG14717654)

THE COURT:

It is ordered that the opinion filed herein on January 14, 2020, be modified as follows:

1. On page 12, the first two full sentences and their accompanying citations:

> "There is no reporter's transcript of the trial to support these assertions, and Mahadevan's citations to the complaint and a settlement conference brief are insufficient. (See *Ehrler v. Ehrler* (1981) 126 Cal.App.3d 147, 154 [trial briefs in the record are no substitute for reporter's transcript showing actual testimony].) This argument therefore fails. (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608–609.)"

are replaced with:

"Mahadevan has demonstrated only a conflict in the evidence, not that Bikkina knowingly or purposefully presented false evidence, so he has not established fraud."

There is no change in judgment.

The requests for publication and judicial notice are denied. The petition for rehearing is also denied.

Date: _____ _____ P. J.

Filed 1/14/20 Bikkina v. Mahadevan CA1/4 (unmodified opinion)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

PREM BIKKINA, Plaintiff and Respondent, v. JAGAN MAHADEVAN, Defendant and Appellant.	A156582 (Alameda County Super. Ct. No. RG14717654)

Jagan Mahadevan appeals the trial court's denial of his motion for relief from a judgment under Code of Civil Procedure section 473 and his motion to quash post-judgment discovery.[1] He argues the judgment is void and the trial court had no jurisdiction to enforce post-judgment discovery against him. We affirm.

I. BACKGROUND

Prem Bikkina sued Mahadevan for falsely stating that Bikkina had fabricated various research results and plagiarized several academic works when Bikkina was a doctoral student in engineering at the University of Tulsa in Oklahoma. He alleged claims for defamation, intentional infliction of emotional distress, and negligence. A jury returned a special verdict for Bikkina on all counts and awarded $776,000 in damages. In response to Bikkina's request for punitive damages, the jury found that Mahadevan had engaged in malice, oppression, or fraud.

[1] All further statutory references are to the Code of Civil Procedure unless otherwise specified.

Immediately after the jury delivered the verdict on liability and compensatory damages, Bikkina offered to waive the punitive damages phase of trial if Mahadevan would waive his right to appeal the verdict. Mahadevan was not in the courtroom so Mahadevan's counsel, Jeremy Tissot, left the courtroom and phoned Mahadevan to present the offer. Following a 15-minute conversation, Tissot returned to the courtroom and announced that there was an agreement on Bikkina's proposed stipulation. The clerk entered the stipulation in the minutes and the trial judge dismissed the jury.

Following the trial, Mahadevan returned to his home in Texas. On February 15, 2018, at 4:12 PM Central Standard Time, Mahadevan filed a bankruptcy petition in Texas. The trial court entered judgment on the jury verdict on the same day. Mahadevan avers, based on his description of a phone conversation with court staff, that the judgment was filed at 4:19 PM Pacific Standard Time (i.e., 6:19 PM Central Standard Time). Mahadevan notified the trial court and Bikkina of his bankruptcy filing the next day. Ten days later, Mahadevan moved to dismiss the bankruptcy filing. The bankruptcy court ordered the case dismissed on March 19, 2018.

The judgment instructed Bikkina to file a memorandum of costs and motion for interest on the judgment from the date of Mahadevan's offer under Code of Civil Procedure section 998. Bikkina therefore moved to amend the judgment to add an award of costs and to specify the date that interest began to accrue on the judgment. Mahadevan did not oppose the motion and the trial court entered the amended judgment on August 1, 2018.

A short time later, Mahadevan moved to vacate the stipulation, judgment, and amended judgment under Code of Civil Procedure sections 473 and 663. Mahadevan claimed he had not agreed to waive his right to appeal the jury verdict and argued the resulting judgment was therefore void. He attacked the amended judgment on various substantive grounds, such as that the interest was miscalculated, Bikkina's claims were barred by the statute of limitations, and there were errors in the jury instructions. Mahadevan also argued the judgment was void because it was entered in violation of the

automatic stay created by Mahadevan's bankruptcy filing. The trial court denied the motion.

Around this time, Bikkina served Mahadevan with special interrogatories and requests for production of documents under the procedures for requesting discovery from a judgment debtor under sections 708.020 and 708.030. Mahadevan moved under sections 410.10, 410.30, and 418.10 to quash these discovery requests based on due process and inconvenience of forum. The trial court denied this motion as well.

II. DISCUSSION

We begin by delineating the scope of Mahadevan's arguments that we will consider in this appeal. Mahadevan's notice of appeal indicated he was appealing from (1) the judgment, (2) the order denying his motion to vacate the judgment, (3) the order denying his motion to quash discovery; and (4) an order directing the parties to meet and confer concerning Bikkina's discovery requests. Bikkina moved to dismiss the appeal because Mahadevan waived his right to appeal the judgment and because the appeal from the judgment was untimely under California Rules of Court, rule 8.104. (Cal. Rules of Court, rule 8.104 [notice of appeal must be filed within 60 days after service of notice of entry of judgment]. This court granted Bikkina's motion as to Mahadevan's appeal from the final judgment but denied it as to the other post-judgment orders. This court ordered the parties to limit their briefing to the post-judgment orders and not to address the merits of the judgment. Mahadevan's brief nonetheless discusses substantive defects he perceives in the jury's verdict and the resulting judgment. We will not address such arguments.

A. Motion under section 473[2]

1. Automatic bankruptcy stay

Mahadevan argues the judgment is void because it was entered in violation of the automatic stay created by his bankruptcy filing. He contends the trial court therefore

[2] Mahadevan's motion in the trial court was also styled as one under sections 473, 663, 664, and 657. However, his briefing here addresses only the standards for motions under section 473, so we do likewise.

erred in denying his motion under section 473, subdivision (d), because that statute allows a court to "set aside any void judgment or order." (§ 473, subd. (d).) We review de novo a ruling based on section 473, subdivision (d). (*Talley v. Valuation Counselors Group, Inc.* (2010) 191 Cal.App.4th 132, 146.) However, if a trial court resolved conflicting evidence to decide whether a judgment was void, we review that ruling for abuse of discretion. (*Ramos v. Homeward Residential, Inc.* (2014) 223 Cal.App.4th 1434, 1441 & fn. 5.)

"The filing of a bankruptcy petition operates as an automatic stay of the commencement or continuation of any action against a bankrupt debtor or against the property of a bankruptcy estate. (11 U.S.C. § 362(a)(4); *U.S. v. Dos Cabezas Corp.* (9th Cir. 1993) 995 F.2d 1486, 1491.) Actions taken in violation of the stay are void, even where there is no actual notice of the stay. (*In re Schwartz* (9th Cir. 1992) 954 F.2d 569, 571.)" (*Pioneer Construction, Inc. v. Global Investment Corp.* (2011) 202 Cal.App.4th 161, 167.)

Mahadevan asserts it is undisputed that the judgment was entered several hours after he filed for bankruptcy, so that the judgment is necessarily void. He further contends that because the judgment was void, the amended judgment is likewise void. We disagree.

Federal courts have recognized an exception to the automatic bankruptcy stay for ministerial acts. "This exception stems from the common-sense principle that a judicial 'proceeding' within the meaning of [Title 11 United States Code] section 362(a) ends once a decision on the merits has been rendered. Ministerial acts or automatic occurrences that entail no deliberation, discretion, or judicial involvement do not constitute continuations of such a proceeding." (*McCarthy, Johnson & Miller v. North Bay Plumbing, Inc.* (*In re Pettit*) (9th Cir. 2000) 217 F.3d 1072, 1080 (*In re Pettit*).) *Rexnord Holdings, Inc. v. Bidermann* (2d Cir. 1994) 21 F.3d 522 (*Rexnord*) applied this exception in circumstances analogous to those here. In that case, the plaintiff moved for entry of judgment based on a defendant's breach of a settlement. (*Id.* at pp. 524–525.) At a hearing on the motion, the district court stated orally that it would grant the motion

and enter judgment for the plaintiff and endorsed the motion papers to that effect. (*Id.* at pp. 525, 528.) After the hearing but before the district court's order was docketed, the defendant filed for bankruptcy. (*Id.* at p. 525.) The Second Circuit held that the docketing of the judgment did not violate the stay. (*Id.* at p. 528.) "The judicial proceedings were concluded at the moment the judge directed entry of judgment, a decision on the merits having then been rendered." (*Ibid.*)

The ministerial principle applies here. The jury's verdict rendered the decision on the merits of Bikkina's claims and the parties' subsequent stipulation to waive the punitive damages phase of trial (discussed further below) resolved the only other pending issues. At that point, no further deliberation or decision by the jury or the court on those claims was necessary or permitted. Mahadevan is correct that the trial court modified Bikkina's proposed judgment to instruct him to file a memorandum of costs and motion for prejudgment interest based on his section 998 offer. But precisely because this instruction left the issues of costs and interest for future proceedings, this aspect of the judgment did not embody any judicial decision beyond what the jury verdict already provided.

Mahadevan contends the ministerial exception does not apply here because the Ninth Circuit has not adopted it. This is incorrect, as the Ninth Circuit recognizes the ministerial exception. (*In re Pettit, supra*, 217 F.3d at p. 1080 ["We now adopt the ministerial act exception for this circuit"].)[3] Mahedevan also argues the doctrine applies only in federal court. The only authority Mahadevan cites for this argument, however, is *Musso v. Ostashko* (2d Cir. 2006) 468 F.3d 99, which distinguished *Rexnord* as irrelevant to the question of whether a state court judgment was final for the purposes of determining what property was part of a bankruptcy estate. (*Id.* at p. 107, fn. 2.) As this case concerns the scope of the federal bankruptcy stay—the same question at issue in

[3] This contention is also irrelevant, as we are not bound by decisions of the Ninth Circuit or any other lower federal court, even on matters of federal law. (*Tully v. World Savings & Loan Assn.* (1997) 56 Cal.App.4th 654, 663.)

Rexnord—we find that decision to be persuasive and *Musso v. Ostashko* to be inapplicable.

Even if the original judgment were void for violating the automatic bankruptcy stay, the trial court's entry of the amended judgment cured any violation. If the original judgment were void, as Mahadevan contends, then the amended judgment was the first judgment entered in this case. Because the automatic bankruptcy stay expired in March 2018, the entry of the amended judgment did not violate the stay.

Mahadevan contends the amended judgment was still void because courts cannot make substantive amendments to a judgment to correct judicial error. (See *Rochin v. Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th 1228.) But if the original judgment were void and of no legal effect, then the amended judgment was not correcting a judicial error so much as entering a judgment for the first time. Mahadevan also asserts that the amended judgment contains substantive errors and that Bikkina's motion for entry of the amended judgment was unopposed only because his counsel, Tissot, failed to file an opposition or even inform Mahadevan that the motion was pending. Mahadevan has cited no authority holding that either of these assertions, even if true, would make the amended judgment void.

2. Stipulation waiving right to appeal

Mahadevan separately argues the original judgment was void because it was based on his attorney's unauthorized stipulation waiving his right to appeal. "As a general proposition the attorney-client relationship, insofar as it concerns the authority of the attorney to bind his client by agreement or stipulation, is governed by the principles of agency. [Citation.] Hence, 'the client as principal is bound by the acts of the attorney-agent within the scope of his actual authority (express or implied) or his apparent or ostensible authority; or by unauthorized acts ratified by the client.' " (*Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 403 (*Blanton*).) While an attorney has authority, either apparent or implied in law, to take certain actions in litigation simply by virtue of his relationship with a client, that authority does not allow the attorney to "to 'impair the client's substantial rights or the cause of action itself.' [Citation.] For example, 'the law

is well settled that an attorney must be specifically authorized to settle and compromise a claim, that merely on the basis of his employment he has no implied or ostensible authority to bind his client to a compromise settlement of pending litigation.' " (*Id.* at pp. 403–404.) In addition, an attorney does not have authority to prevent a party from appealing a judgment by waiving findings. (*Id.* at pp. 404–405.)

We agree with Mahadevan that under *Blanton*, his right to appeal the jury verdict was a substantial right that Tissot could not settle, compromise, or waive without Mahadevan's authorization. To that extent, we conclude the trial court erred by ruling, based on *Blanton*, that Tissot had apparent authority to waive Mahadevan's right to appeal merely because Tissot represented Mahadevan in the litigation.

However, that is not the end of the matter. The trial court also found that Tissot had actual authority to agree to the stipulation waiving the right to appeal. It rejected as "self-serving" Mahadevan's declaration to the contrary submitted in support of his motion to set aside the judgment. The trial court did not abuse its discretion in making this finding. Tissot's declaration in support of Mahadevan's motion to set aside the judgment stated that after receiving Bikkina's offer to stipulate, Tissot spoke to Mahadevan for 15 minutes and then returned to court and announced there was an agreement. The trial court could reasonably read this as implying that Mahadevan had agreed over the phone to the proposed stipulation. Emails between Tissot and Mahadevan during the days after the entry of the stipulation confirm this reading. They show that Mahadevan was aware of the appellate waiver and wanted to evade it because he still disagreed with the jury's verdict. However, nowhere in those emails did Mahadevan complain that Tissot acted without authority or contrary to Mahadevan's wishes. Even if we were to review this evidence de novo, as Mahadevan urges, we would reach the same conclusion as the trial court.

Because we conclude the trial court did not abuse its discretion by finding that Tissot had actual authority to agree to the waiver, the authorities Mahadevan cites regarding the invalidity of attorneys' actions taken in excess of actual or implied authority are inapposite. (See, e.g., *Blanton*, *supra*, 38 Cal.3d at p. 403 [noting that it was

undisputed in that case that the attorney "acted not only without his client's express authority but contrary to her express instructions"]; *Romadka v. Hoge* (1991) 232 Cal.App.3d 1231, 1237 [allowing parties to vacate an attorney's mistaken dismissal with prejudice because parties did not authorize it].)[4]

Mahadevan attacks the trial court's finding that Tissot had actual authority to agree to the stipulation by arguing based on section 664.6 that if a party is not personally in court, the party must personally sign any settlement of litigation for it to bind the party. Section 664.6 states, "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement." A settlement is only enforceable under section 664.6 if a party personally signs it or agrees to it in court. (*Levy v. Superior Court* (1995) 10 Cal.4th 578, 586.) But section 664.6 does not provide the exclusive mechanism to enforce a settlement. (See *id.* at p. 586, fn. 5.) Because Tissot had actual authority to agree to the stipulation, it is still valid and otherwise enforceable even though it could not be enforced under section 664.6.

3. Trial court's subject matter jurisdiction

As independent bases for setting aside the judgment as void, Mahadevan contends the trial court never had subject matter jurisdiction over Bikkina's suit in light of workers' compensation exclusivity provisions, federal research misconduct policy, and copyright law preemption. None of these contentions has merit.

Mahadevan first asserts that Bikkina's claims concerned workplace injuries, which under Oklahoma or California law are committed to the exclusive jurisdiction of the workers' compensation system. Under Oklahoma law, workers' compensation rights and

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[4] The same reasoning applies to Mahadevan's arguments that the trial court should have set aside the judgment under section 473, subdivision (b)'s provisions relating to mandatory and discretionary relief based on "mistake, inadvertence, surprise, or excusable neglect." (§ 473, subd. (b).) We will therefore not address those arguments further.

remedies are "exclusive of all other rights and remedies of the employee." (Okla. Stat., tit. 85A, § 5(A).) But this statute and cases interpreting it describe its protections as conferring an immunity from suit, not as depriving trial courts of subject matter jurisdiction over civil suits. (See, e.g., *id.* § 5(C); *Davis v. CMS Continental Natural Gas, Inc.* (Okla. 2001) 23 P.3d 288, 296 [referring to "[t]he immunity afforded employers under" the predecessor statute].)

Mahadevan relies in the alternative on California workers' compensation law. Although some of Mahadevan's alleged actions took place in California, Mahadevan has not shown that Bikkina and Mahadevan ever worked for the same employer in California, so we fail to see how California law could apply. (See Lab. Code, § 3601, subd. (a) [workers' compensation is "exclusive remedy for injury or death of an employee *against any other employee of the employer* acting within the scope of his or her employment," italics added].) Additionally, "[w]here a complaint indicates that an employment relationship exists between a plaintiff and a defendant, it is the defendant's burden to plead and prove that the [workers' compensation] act applies. The trial court has jurisdiction 'unless and until' the defendant proves otherwise. (*Doney v. Tambouratgis* (1979) 23 Cal.3d 91, 98; see *Lucich v. City of Oakland* (1993) 19 Cal.App.4th 494, 498–499.)" (*Ventura v. ABM Industries Inc.* (2012) 212 Cal.App.4th 258, 265–266.) Mahadevan tried the case to a verdict without proving that Bikkina's claims were barred by workers' compensation exclusivity provisions, so he cannot now seek to set aside the judgment on this basis.[5]

Mahadevan next argues that Bikkina's claims were beyond the trial court's jurisdiction because the veracity of his statements that Bikkina had fabricated various

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[5] Mahadevan argues for the first time in his reply brief that Oklahoma courts, not California courts, were the proper venue for Bikkina's negligence and intentional infliction of emotional distress claims because Mahadevan's conduct took place in Oklahoma. Arguments raised for the first time in a reply brief are waived. (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894–895, fn. 10.)

research results and plagiarized several academic works turns on issues of federal law. Mahadevan's federal law argument relies mostly on authorities concerning federal policies and procedures for investigations of plagiarism and fabrication of results in federally-funded research.[6] None of those authorities, however, establishes that the procedures relating to federally-funded research deprive state courts of subject matter jurisdiction over related common law claims between employees. At most, Mahadevan's authorities indicate that when an institution is investigating someone for fabrication, the target must exhaust administrative review of that investigation before challenging its propriety. (See *Anversa v. Partners Healthcare System, Inc.* (D.Mass. 2015) 116 F.Supp.3d 22, 31–32.) This principle has no application here, where Bikkina is not challenging any institution's investigation and there is no indication the investigations are under administrative review.

In asserting the trial court's lack of subject matter jurisdiction because Bikkina's claims involved copyrighted materials, Mahadevan relies on the principle that federal courts have exclusive jurisdiction over claims that arise under federal copyright law. (28 U.S.C. § 1338(a); *Durgom v. Janowiak* (1999) 74 Cal.App.4th 178, 182.) The test for whether a claim falls within federal courts' exclusive copyright jurisdiction is the well-pleaded complaint rule, which examines whether the copyright issue arises from the face of the complaint and does not examine potential defenses to an action. (*Id.* at pp. 182–183.) Additionally, under the doctrine of complete preemption, any claim preempted by federal copyright law should be treated as arising under copyright law for the purposes of exclusive federal court jurisdiction. (*Id.* at p. 186; *Ritchie v. Williams* (6th Cir. 2005) 395

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[6] In support of this argument, Mahadevan has requested judicial notice of an administrative decision by an appeals board at the federal Department of Health and Human Services' Office of Research Integrity, various federal regulations and policies, and printouts of websites of the University of Tulsa and Lawrence Berkeley National Laboratory. We deny these requests as irrelevant to the issues to be resolved in this appeal. (See *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1089, fn. 4 [denying request for notice of materials that were not "particularly supportive of respondent's cause or relevant to the action"].)

F.3d 283, 286–287.) A state law claim is preempted if it concerns a copyrightable work and asserts rights equivalent to those provided by copyright law. (*Kabehie v. Zoland* (2002) 102 Cal.App.4th 513, 520.) By contrast, a state law right is not equivalent to rights under copyright law if, to assert it in court, a plaintiff must prove some "extra element" beyond mere reproduction, performance, distribution, or display of a copyrighted work. (*Id.* at pp. 520–521.)

Mahadevan asserts that copyright law is relevant here because two of the defamatory statements that the jury found he made related to Bikkina's plagiarism of two academic papers. However, Mahadevan does not address how copyright issues necessarily arise on the face of those claims or how they assert rights equivalent to those provided by copyright law. Indeed, Bikkina's claims are premised on the absence of copying from other research, which makes them the antithesis of copyright claims. Bikkina's defamation claims also included extra elements such as publication of statements about the alleged copying, failure to exercise due care, and harm to reputation that took them outside the realm of copyright law. (See *Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645 [reciting elements of defamation].) Mahadevan may have tried to defend this action by proving the truth of Bikkina's alleged plagiarism, thereby perhaps indirectly proving copyright infringement. But he cites no authority establishing that such a defense would support federal jurisdiction under the well-pleaded complaint rule or principles of complete preemption. (See *Durgom v. Janowiak*, *supra*, 74 Cal.App.4th at p. 183.)

4. Extrinsic fraud

Mahadevan also argues the judgment is void based on extrinsic fraud, in light of discovery misconduct and various misrepresentations made by Bikkina or his witnesses during trial. We reject this contention as well.

A judgment is void if procured by extrinsic fraud. "Extrinsic fraud only arises when one party has in some way fraudulently been prevented from presenting his or her claim or defense." (*Department of Industrial Relations v. Davis Moreno Construction, Inc.* (2011) 193 Cal.App.4th 560, 570.) Mahadevan claims there was extrinsic fraud

because Bikkina presented false testimony that the University of Tulsa investigated Mahadevan's claims that Bikkina fabricated results and plagiarized two papers. There is no reporter's transcript of the trial to support these assertions, and Mahadevan's citations to the complaint and a settlement conference brief are insufficient. (See *Ehrler v. Ehrler* (1981) 126 Cal.App.3d 147, 154 [trial briefs in the record are no substitute for reporter's transcript showing actual testimony].) This argument therefore fails. (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608–609.) Moreover, even if Bikkina's witnesses' testimony were false as Mahadevan asserts, such falsity did not prevent Mahadevan from offering contrary testimony or otherwise presenting his case.

Mahadevan also contends he was hampered by Bikkina's failure to timely produce documents and the University of Tulsa's failure to respond to a subpoena or allow a witness to appear for a deposition. The solution to these problems would have been motions to compel discovery and to enforce the subpoena. These issues do not demonstrate there was any extrinsic fraud in the trial.

There is thus no merit to any of Mahadevan's arguments that the court erred in denying his motion to set aside the judgment as void.

B. Motion to quash

The trial court denied Mahadevan's motion to quash Bikkina's post-judgment discovery requests under sections 418.10, 410.30, and 410.10 because Mahadevan did not dispute that the court had jurisdiction over him during the trial and the court found that jurisdiction extended to Bikkina's efforts to enforce the judgment.[7]

Mahadevan argues the trial court should have granted his motion to quash because the trial court did not have jurisdiction to enforce its judgment against him. He moved to

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[7] Section 418.10 allows a defendant to move to (1) quash service of summons for lack of personal jurisdiction, (2) stay or dismiss an action based on the inconvenience of the forum, and (3) dismiss an action for delay of prosecution. (§ 418.10, subd. (a).) Section 410.30 allows a defendant to move to dismiss or stay an action that should be heard in a forum outside the state. Section 410.10 allows California courts to "exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

Texas during the litigation and asserts that due process principles under the 14th Amendment to the United States Constitution require that efforts to enforce the judgment must take place in Texas courts.

When a challenge to jurisdiction arises from undisputed facts, as here, we review the trial court's ruling de novo, with the party asserting jurisdiction bearing the burden of establishing jurisdiction. (*As You Sow v. Crawford Laboratories, Inc.* (1996) 50 Cal.App.4th 1859, 1866.)

While Mahadevan argues the trial court's assertion of jurisdiction violated due process, the substance of his argument and the authorities he cites concern only the full faith and credit clause in article IV, section 1 of the United States Constitution. Accordingly, we restrict our analysis to the full faith and credit clause. Under that constitutional provision, a "final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land." (*Baker v. General Motors Corp.* (1998) 522 U.S. 222, 233.) "Full faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the evenhanded control of forum law." (*Id.* at p. 235.)

Mahadevan contends this principle means Bikkina must domesticate his judgment in Texas and conduct discovery according to Texas law if he wants to enforce it. If Bikkina wanted to file an action in Texas to execute the judgment against Mahadevan's assets located in Texas, Mahadevan would likely be correct that Bikkina would have to follow Texas procedures. But that is not this case. Bikkina is trying to use California's judgment enforcement measures to enforce a California judgment, so the discovery requests do not implicate the full faith and credit clause.

In addition to attacking the denial of his motion to quash, Mahadevan also contends the trial court erred in entering two orders directing the parties to meet and confer regarding Bikkina's discovery requests and continuing the hearing on those

requests. He contends the orders are invalid because they were entered before finality of rulings on his petition for writ of mandate challenging the denial of his motion to quash and petition for review in the California Supreme Court. (See § 418.10; Cal. Rules of Ct., rule 8.491.)

We will not consider this argument because the challenged orders are not appealable. Although post-judgment orders are generally appealable under section 904.1, subdivision (a)(2), such orders must themselves still be sufficiently final. (*In re Marriage of Olson* (2015) 238 Cal.App.4th 1458, 1462.) Orders that are preparatory to later proceedings are not sufficiently final. (*Ibid.*) The trial court's orders merely direct the parties to meet and confer and do not finally resolve any issues about Bikkina's discovery requests. The orders explicitly contemplated future action in that they continued the hearing on Bikkina's motions to compel until a later date.

III. DISPOSITION

The trial court's orders are affirmed.

BROWN, J.

WE CONCUR:

POLLAK, P. J.

TUCHER, J.

Law Offices of Edward C. Casey Jr.
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Superior Court of California, County of Alameda
Hayward Hall of Justice

Bekinna Plaintiff/Petitioner(s) VS. Mahadevan Defendant/Respondent(s) (Abbreviated Title)	No. RG14717654 Order Motion to Vacate/Set Aside Judgment Denied

The Motion to Vacate/Set Aside Judgment filed for Jagan Mahadevan was set for hearing on 12/04/2018 at 03:00 PM in Department 517 before the Honorable Stephen Pulido. The Tentative Ruling was published and was contested.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

The tentative ruling is affirmed as follows: The Motion of Defendant and Judgment Debtor Jagan Mahadevan ("Defendant") to Vacate the Order of February 9, 2018, entered pursuant to the Stipulation of Defendant and Plaintiff and Judgment Creditor Prem Bikkina ("Plaintiff"), pursuant to CCP §§ 663 and 473(b), is DENIED.

On February 9, 2018, at the conclusion of trial, the jury filed its special verdict form and awarded Plaintiff Prem Bikkina the sum of $776,000.00. On the same day, counsel for Plaintiff and Defendant Mahadevan's prior attorney, Jeremy Tissot, recited in open court that they had reached a Stipulation agreed upon by their clients regarding the upcoming trial of Plaintiff's punitive damages claim against Defendant Mahadevan. Counsel advised the Court that Plaintiff had agreed to waive his right to prosecute his punitive damages claim in exchange for Defendant's waiver of his right to appeal the Judgment entered upon the special verdict. Defendant contends in his motion that he never gave his authorization to Mr. Tissot to make the stipulation, and that it should therefore be vacated at this time. The Court notes that although Defendant reiterates the same arguments regarding the alleged prejudicial errors that occurred during the trial in his fifteen (15) page memorandum of points and authorities, the instant motion is limited to Mr. Tissot's unauthorized representation to the Court that Defendant had agreed to the terms of the Stipulation. The Court's understanding of the scope of the motion is based on the "Summary and Relief Requested" Section of the memorandum on pages 17 and 18. Even if Defendant had intended to seek relief based on the claimed prejudicial errors described in his memorandum and supporting declarations, the Court cannot reach those issues because they constitute untimely and improper requests for reconsideration of the findings and conclusions in the Court's May 17, 2018 order denying Defendant's Motion for New Trial. See CCP § 1008(a) (party has 10 days to request reconsideration); Lennar Homes of Calif., Inc. v. Stephens (2014) 232 Cal.App.4th 673, 681-682 (motion is a motion for reconsideration if it asks the court to resolve the same issues previously decided); and Powell v. County of Orange (2011) 197 Cal.App.4th 1573, 1577 (same).

Exhibit "A"

The Court denies Defendant's Motion to Vacate the Stipulated Order because Defendant has not met his burden of presenting some evidence beyond his self-serving declaration testimony made nearly six (6)

months after the Stipulation was announced in open court that counsel did not have his authorization to waive his appeal rights. The Court notes that Defendant obtained a substantial benefit from the Stipulation, as any punitive damages award would not be dischargeable in bankruptcy. It has long been the rule that parties are bound by the decisions, actions and omissions of the attorneys they retain to represent them in litigation. See Blanton v. Womancare, Inc. (1985) 38 Cal.3d 396, 403. The Court concludes that Mr. Tissot had both the actual and apparent authority to represent to the Court that his client agreed with the terms of the Stipulation on February 9, 2018.

Finally, Defendant's contention that the Court lacked jurisdiction to enter the Judgment against him on February 15, 2018, because the case was stayed by his bankruptcy filing is without merit. See CCP § 473(d). Counsel for Defendant did not give notice of his client's bankruptcy filing until February 16, 2018. In addition, the Court's entry of Judgment on February 15, 2018 did not result in any prejudice to Defendant because Defendant's bankruptcy action was dismissed on March 19, 2018.

The Court declines to consider the new evidence submitted by Defendant with his reply papers on November 26, 2018. Defendant has submitted another declaration in support of the motion. Defendant has also submitted a Declaration of Alan R. Price, Ph. D. Based on its cursory review, the additional declaration testimony pertains to the merits of Plaintiff's claims and Defendant's affirmative defenses. The Court refers the parties to the discussion in the second paragraph regarding Defendant's contention that he is entitled to a new trial due to procedural and evidentiary errors during the trial.

The Court will prepare the order and mail copies to the parties. Counsel for Plaintiff Bikkina shall file and serve the Notice of Entry of Order within five (5) days of the date shown on the Clerk's Certificate of Mailing.

NOTICE: Effective June 4, 2012, the Court will not provide a court reporter for civil law and motion hearings, any other hearing or trial in civil departments, or any afternoon hearing in Department 201.

Dated: 01/08/2019

facsimile

Judge Stephen Pulido

Filed 10/9/15

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

PREM BIKKINA, Plaintiff and Respondent, v. JAGAN MAHADEVAN, Defendant and Appellant.	A143031 (Alameda County Super. Ct. No. RG14-717654)

I.
INTRODUCTION

Appellant Jagan Mahadevan (Mahadevan) appeals from the denial of his special motion to strike pursuant to California's anti-SLAPP statute (Code Civ. Proc., § 425.16)[1] filed in response to respondent Prem Bikkina's (Bikkina) complaint alleging that Mahadevan made false and libelous statements about Bikkina's research. The trial court denied the motion, finding Mahadevan's statements did not arise from protected activity. We agree with the trial court and further conclude that, even if the conduct arose from protected activity, the claims have sufficient merit to survive a motion to strike. Therefore, we affirm.

[1] SLAPP is an acronym for "strategic lawsuit against public participation." All further statutory references are to the Code of Civil Procedure unless otherwise noted.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. Bikkina's Complaint

We begin with the facts alleged in the complaint. In 2007, Bikkina entered a Ph.D. program at the McDougall School of Petroleum Engineering at the University of Tulsa (University). Mahadevan was his dissertation advisor and supervisor from 2007 to 2010. Bikkina complained that Mahadevan was repeatedly reassigning him to different projects and requested a new advisor, which he was given in May 2010. In March 2011, Bikkina published a scientific paper on carbon sequestration (Paper 1) that Mahadevan believed contained inaccuracies. The dispute over the paper led both Bikkina and Mahadevan to file formal complaints alleging violations of the University's harassment policy. The University found that Bikkina had not violated the policy, but instead that Mahadevan had committed "serious violations."

In 2011, Bikkina published a second scientific article in a professional journal (Paper 2) and Mahadevan claimed he was a co-author. Bikkina submitted a second formal complaint to the University. The University concluded Mahadevan had no co-authorship rights.

In March 2012, Mahadevan filed a complaint against Bikkina under the University's ethical conduct policy claiming Bikkina had falsified data in Paper 2 and plagiarized Mahadevan's work. In April 2013, Mahadevan filed another complaint with the vice provost for research stating that Bikkina had engaged in plagiarism and falsified data in his dissertation.

In May 2013, the senior vice provost for the University found that Mahadevan had violated the University's harassment policies through bad faith efforts to interfere with and undermine Bikkina's research, publications, and reputation. The provost found that Bikkina had engaged in no harassment, unethical conduct, plagiarism or academic misconduct.

In June 2013, Bikkina completed his Ph.D. and began working at Lawrence Berkeley National Laboratory (LBNL). Shortly thereafter, Mahadevan contacted one of

Bikkina's superiors to inform him that Bikkina had falsified the data in Papers 1 and 2. On August 30, 2013, Mahadevan made a presentation at LBNL and told Bikkina's colleagues that Bikkina had published a paper using false data. Mahadevan also contacted LBNL's research and institutional integrity officer to claim Bikkina had falsified data.

In March 2014, Bikkina filed a complaint for damages against Mahadevan alleging four causes of action: (1) libel per se for Mahadevan's published written statements to the University and LBNL that Bikkina had falsified data and plagiarized Mahadevan's work; (2) negligence for Mahadevan's course of conduct; (3) intentional infliction of emotional distress and; (4) slander per se for Mahadevan's oral statements to University and LBNL employees.

B. Mahadevan's Anti-SLAPP Motion to Strike

Mahadevan filed a special motion to strike Bikkina's complaint pursuant to section 425.16. Mahadevan argued that Bikkina improperly sought to chill public discourse on carbon sequestration and its impacts on global warming. Mahadevan asserted that his statements concerned important public issues and constituted protected speech. He further argued that Bikkina could not prevail on the merits because all his statements were true and fell under the common interest privilege in Civil Code section 47, subdivision (c).

Mahadevan submitted a declaration supporting his motion which set forth his version of the underlying facts. The declaration stated that Bikkina worked under his supervision on research relating to carbon dioxide sequestration. Bikkina's research used contaminated data and did not follow proper procedures. After leaving Mahadevan's research group, Bikkina published Paper 1 which was based upon the contaminated data, specifically relying on a quartz sample contaminated by fluorine deposits.

Mahadevan asserts that Paper 2 contained content that he had originally authored. He claims Paper 2 originally listed him as a co-author but his name had been deleted. He contacted the listed co-author to inform him that Paper 2 was the product of his intellectual efforts.

In 2013, Mahadevan spoke to an "audience of scientists" at LBNL about the contamination of Bikkina's data because they had an interest in the issue and had either used Bikkina's false data or cited to it.

Mahadevan also supported his motion with the declaration of Dr. Winton Cornell, a professor at the University. Cornell stated that he once saw Bikkina using a sample of quartz crystal that appeared to be contaminated, but he had no knowledge as to whether this contaminated sample formed the basis of Bikkina's research papers. He stated he is aware of one scholarly article that raised concerns about Bikkina's research and techniques.

Bikkina filed an opposition to the motion to strike, arguing Mahadevan's statements were not made in a public forum and did not concern matters of public interest. He contended that the motion also failed because his claims had "minimal merit." He argued Mahadevan's comments were not conditionally privileged, and further that there was evidence the statements were made with malice.

In support of his opposition, Bikkina submitted the declaration of Winona Tanaka, the senior vice provost for the University (the provost). The provost handled the various complaints and investigations related to Mahadevan's allegations. She confirmed Mahadevan complained about Paper 1, disowned any interest in the paper's contents, and demanded that Bikkina correct inaccuracies. Bikkina submitted a formal complaint against Mahadevan alleging that Mahadevan had presented false and wrongful claims about Bikkina's research. He further alleged that Mahadevan had told him, "Prem, I am going to screw you."

In 2011, the provost appointed a three-member investigatory committee to investigate the complaints filed by both men. The provost issued a final decision and concluded that Mahadevan had repeatedly violated the University's harassment policy and that these violations were abusive and egregious. The decision listed a series of sanctions against Mahadevan. After reviewing the decision, Mahadevan stated that he would resign from the University, where he had been recently denied tenure, in exchange for an agreement that the provost not finalize the decision regarding his conduct.

After leaving the University, Mahadevan contacted the co-authors of Paper 2 claiming he had co-authorship rights to the paper. The provost reviewed emails from Mahadevan to Bikkina's co-author, Dr. Ramgopal Uppaluri, claiming co-authorship rights. The investigatory committee, however, found that Mahadevan had disassociated himself from Bikkina's research, given his permission for Bikkina to use the data, and that Bikkina had been given University approval to publish the research.

Bikkina filed a second formal complaint in response to Mahadevan's allegations about co-authorship rights to Paper 2. The provost sent a letter to Bikkina's co-author, Dr. Uppaluri, stating that Mahadevan had no ownership or authorship rights to any of the data or content of Paper 2. Mahadevan then filed two additional formal complaints in 2012 and 2013 claiming Bikkina had falsified data in Paper 1, plagiarized Mahadevan's work in Paper 2, and committed plagiarism and data falsification in his dissertation. The provost conducted a further investigation and issued a formal memorandum of decision concluding that all of Mahadevan's complaints against Bikkina were "wholly unfounded and spurious." She found that Mahadevan had disclaimed ownership and disassociated himself from Bikkina's research and relinquished any right to control the research or data. She further found that Mahadevan "has repeatedly violated the Harassment Policy by knowingly and in bad faith making false accusations against Mr. Bikkina regarding Paper #1 and Paper #2 and engaging in conduct that is defamatory, retaliatory, demeaning, intimidating, threatening and otherwise harmful [conduct] to Mr. Bikkina's educational and professional reputation on and off campus." She further concluded that Mahadevan had violated the University's ethical conduct policy by "making false allegations that were grounded in bad faith and with malicious intent to damage Mr. Bikkina's reputation, research and scholarship on and off campus." She concluded that Bikkina had not committed plagiarism.

Timothy Kneafsey, a department head at LBNL and Bikkina's supervisor, submitted a declaration stating that Mahadevan appeared at his office without an appointment and told him that Bikkina published a paper using falsified data. The research and institutional integrity officer for LBNL, Meredith Montgomery, was also

contacted by Mahadevan who stated that Bikkina had falsified data in a research article. Montgomery reviewed the University's investigation and report and found it dispositive of the issue. Montgomery sent Mahadevan a letter that his claims were unsubstantiated and in bad faith.

Tetsu Tokunaga, a scientist at LBNL, declared that he attended the August 2013 lecture Mahadevan gave at LBNL. At the end of the lecture, Mahadevan showed slides of Bikkina's data and stated there were problems with the research. The slides did not appear to be related to Mahadevan's lecture. The LBNL lecture was made to approximately 25 employees.

C. Trial Court's Ruling on the Motion to Strike

At a hearing, the parties addressed the court's tentative ruling denying the motion. Mahadevan argued that his statements related to a matter of public interest under section 426.15, subdivision (e)(4).[2] He relied on *Taus v. Loftus* (2007) 40 Cal.4th 683 (*Taus*) to support his contention that his comments and speech about global warming were of widespread public interest.

In a written order, the court denied the motion to strike finding "[w]hile the content of any scholarly works may arguably concern a matter of public interest, the facts here do not invoke the SLAPP statute." Citing *Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122 (*Weinberg*), the court concluded that a matter of public interest must concern a substantial number of people and is not something of concern only to the speaker or a small group of people. The court found that the statements were not made in a public forum, but were made to individuals and attendees at a scientific conference.

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[2] Under section 425.16, the initial inquiry is whether the moving defendant has made a threshold showing that the challenged causes of action arise from protected activity which includes: (1) written or oral statements made before a legislative, executive, or judicial proceeding; (2) written or oral statements made in connection with an issue under consideration or review by a legislative, executive, or judicial body; (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; or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or free speech in connection with a public issue or an issue of public interest. (§ 425.16, subd. (e).)

The court also concluded that because Mahadevan did not meet his burden of demonstrating the complaint arose from his protected activity, it need not decide whether Bikkina could demonstrate a probability of success on the merits.

III.

DISCUSSION

A. Standard of Review for Granting a Special Motion to Strike

"A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

Our Supreme Court has outlined the two steps involved in applying the anti-SLAPP statute: " 'First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one "arising from" protected activity. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim.' [Citation.]" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 819–820 (*Oasis West*).) Only a cause of action that arises from protected speech and lacks even minimal merit is subject to being stricken under the anti-SLAPP statute. (*Id.* at p. 820.)

We review de novo an order granting or denying a motion to strike under section 425.16. (*Oasis West, supra*, 51 Cal.4th at p. 820.) "In considering the pleadings and supporting and opposing declarations, we do not make credibility determinations or compare the weight of the evidence. Instead, we accept the opposing party's evidence as true and evaluate the moving party's evidence only to determine if it has defeated the opposing party's evidence as a matter of law." (*Albanese v. Menounos* (2013) 218 Cal.App.4th 923, 928-929.)

B. The First Prong—Protected Activity or Speech

Mahadevan argues on appeal that his statements about Bikkina's research related to matters of public interest and constitute protected speech. Mahadevan contends that the trial court only considered section 425.16, subdivision (e)(3) as to whether the statements were made in a place open to the public or a public forum and did not properly consider section 425.16, subdivision (e)(4). We conclude Mahadevan's statements were not protected activity under either subdivisions (e)(3) or (e)(4).

A claim is subject to the anti-SLAPP statute under section 425.16, subdivision (e)(3) if it is an "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" as including: "(3) any written or oral statement or writing *made in a place open to the public or a public forum* in connection with *an issue of public interest.*" (Italics added.) To come within section 425.16, a statement must not only be made in a " 'place open to the public or a public forum,' " it must also be made " 'in connection with an issue of public interest.' " *(Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1039 (*Nygard*).)

Mahadevan contends that his statements were made in public settings or in communications to a large number of people. This is not an accurate characterization. Mahadevan's statements were made to faculty at the University and researchers at LBNL; they were not made in a place open to the public or a public forum. (§ 425.16, subd. (e)(3).) His statements were not reported in the media (see *Nygard, supra*, 159 Cal.App.4th at p. 1038 [newspaper is a public forum]) or posted on a Web site (*Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, 693 (*Summit Bank*) [Internet message boards are places " 'open to the public or a public forum' " for purposes of § 425.16, subd. (e)].) "In our view, whether a statement is 'made in a place open to the public or in a public forum' depends on whether the means of communicating the statement permits open debate." (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 896-897 (*Wilbanks*).)

Initially, Mahadevan's statements were made during the University complaint process to University faculty and were not part of an open debate. He then made the

same complaints to a specialized group of scientists at LBNL.[3] The fact that Mahadevan made statements about the alleged faulty data in Bikkina's research at a lecture to a small number of LBNL scientists does not constitute a public forum under subdivision (e)(3). Therefore, the court did not err in concluding that Mahadevan failed to make a prima facie finding that his challenged conduct was protected activity under subdivision (e)(3).

As to his alternative argument that this speech was protected under subdivision (e)(4), we agree with the trial court's conclusion that the statements were not made concerning matters of public interest. "Section 425.16 does not define 'public interest,' but its preamble states that its provisions 'shall be construed broadly' to safeguard 'the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.' [Citation.]" (*Summit Bank, supra*, 206 Cal.App.4th at p. 693.) " 'The definition of "public interest" within the meaning of the anti-SLAPP statute has been broadly construed to include not only governmental matters, but also private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity. [Citations.]' [Citations.]" (*Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107, 115 (*Du Charme*).)

Mahadevan contends that his criticism of Bikkina's data was on a topic of public interest because it relates to "one of the most important issues of our time—climate change and greenhouse gases." Thus, he argues the trial court incorrectly relied on *Weinberg, supra*, 110 Cal.App.4th 1122 when it concluded that his criticism of Bikkina was not a matter of public interest. He asserts that even though his statements at LBNL

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[3] Mahadevan's letter to the editor of the International Journal of Greenhouse Gas Control entitled "*Comments on the Paper Titled 'Contact angle measurements of CO_2-water-quartz/calcite systems in the perspective of carbon sequestration': A case of contamination?*" <http://www.sciencedirect.com/science/article/pii/S1750583611001721> (as of Oct. 9, 2015) could be considered part of a scholarly debate on the topic and may constitute protected speech, but this letter was not the subject of Bikkina's complaint or the motion to strike.

were made to a small group of attendees, they were addressed to "the entire scientific community," establishing the public nature of the dispute.

In *Weinberg*, defendant, a token collector, made statements to the token collector community that plaintiff was dishonest and had stolen a token from him. (*Weinberg, supra*, 110 Cal.App.4th at p. 1126.) He published an advertisement in the token collector newsletter, sent letters to other collectors, and discussed his allegations at the token collector society. (*Id.* at p. 1128.) Plaintiff sued for libel and slander. Defendant brought an anti-SLAPP motion claiming that his statements served the public interest by discussing criminal activity. (*Ibid.*) The court concluded that defendant's "private campaign" to discredit plaintiff to a relatively small group of fellow collectors was a private matter. (*Id.* at p. 1127.) The fact that the statements accused plaintiff of criminal conduct did not make them a matter of public interest. (*Ibid.*)

The *Weinberg* court surveyed the case law to discern what constitutes a matter of public interest and found public interest does not equate "with mere curiosity," and should be of "concern to a substantial number of people. [Citation.]" (*Weinberg, supra*, 110 Cal.App.4th at p. 1132.) "[A] matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest. [Citations.]" (*Ibid.*) Conversely, a person cannot turn an otherwise private matter into a matter of public interest simply by communicating it to a large number of people. (*Id.* at p. 1133.)

Like the conduct in *Weinberg*, Mahadevan's statements were made to a small, specific audience: University faculty and LBNL scientists. His broad assertions about the public interest in climate change are not closely connected to his actual statements. Mahadevan statements were specific complaints about contaminated quartz samples and plagiarism in two papers that were not distributed to a broad audience.[4] Simply because carbon sequestration is related to climate change, it does not convert his technical objections into a topic of public interest. Mahadevan's speech was a private campaign to

[4] Paper 1 was published in the International Journal of Greenhouse Gas Control and Paper 2 was published in the Journal of Chemical and Engineering Data.

discredit another scientist at the University, and later at LBNL, and not part of a public debate on a broader issue of public interest.

Mahadevan fails in his effort to distinguish the decision by Division Two of this appellate district in *Rivero v. American Federation of State, County, and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913 (*Rivero*). Rivero was a janitorial supervisor on the University of California, Berkeley campus. (*Id.* at p. 916.) The union published and distributed documents claiming Rivero engaged in misconduct. (*Id.* at pp. 916-917.) The union argued that they raised issues of public interest because abuse in the university system impacted the whole community of public employees. (*Id.* at p. 919.) The court concluded that the statements were not a matter of public interest because Rivero supervised a small staff, was not a public figure, and the publication of information in the union newsletter was not sufficient to make it a public issue. (*Id.* at pp. 924-926.) Although case law did not define the precise boundaries of "public issue," in each of the cases, "the subject statements either concerned a person or entity in the public eye [citations], conduct that could directly affect a large number of people beyond the direct participants [citations] or a topic of widespread public interest [citation]." (*Id.* at p. 924.)

Similarly here, Bikkina was not a public figure, the dispute about an allegedly contaminated quartz sample did not affect a large number of people, and the two scientific papers were not a topic of widespread public interest. Even recognizing public interest in climate change generally, there was no public interest in the private dispute between Mahadevan and Bikkina about data in papers on carbon sequestration.

Mahadevan asserts that because the dispute was part of a scholarly debate on climate change, it is a subject of general public interest. The only evidence of an academic "debate" is one article published by the Society of Petroleum Engineers that mentions, in one sentence, Mahadevan's concerns that Bikkina's results may have been adversely affected by fluorine contamination.

Our Supreme Court addressed the issue of academic debate in *Taus*, *supra*, 40 Cal.4th at page 712, holding the plaintiff's cause of action arose from activity " 'in

furtherance of [defendants'] exercise of . . . free speech . . . in connection with a public issue' within the meaning of section 425.16." Plaintiff was the subject of a case study described in a "prominent scholarly article about long-repressed memory of childhood abuse." (*Id.* at p. 689.) Defendants published two articles raising doubts about the original article. (*Ibid.*) The court concluded that the articles were about a topic of "substantial controversy" in the mental health field. (*Id.* at p. 712.) Defendants were conducting an investigation of the research, writing about the topic and speaking at conferences all of which was conduct "in furtherance of [their] exercise of . . . free speech." (*Ibid.*)

Unlike *Taus*, there is no evidence that Bikkina's two papers were prominent scholarly articles about a topic in substantial controversy in the field of climate change. Mahadevan's statements were only remotely related to the broader subject of global warming or climate change, and involved specific accusations of plagiarism and use of a contaminated sample. "[I]t is not enough that the statement refer to a subject of widespread public interest; the statement must in some manner itself contribute to the public debate. . . ." (*Wilbanks*, *supra*, 121 Cal.App.4th at p. 898, citing *Du Charme*, *supra*, 110 Cal.App.4th 107; *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 111 (*Mann*) ["Although pollution can affect large numbers of people and is a matter of general public interest, the focus of the anti-SLAPP statute must be on the specific nature of the speech rather than on generalities that might be abstracted from it. [Citation.] . . . [¶] [D]efendants' alleged statements were not about pollution or potential public health and safety issues in general, but about [the plaintiffs'] specific business practices[,]" and did not fall within the anti-SLAPP statute].)

" ' "The fact that 'a broad and amorphous public interest' can be connected to a specific dispute is not sufficient to meet the statutory requirements" of the anti-SLAPP statute. . . . By focusing on society's general interest in the subject matter of the dispute instead of the specific speech or conduct upon which the complaint is based, defendants resort to the oft-rejected, so-called "synecdoche theory of public issue in the anti-SLAPP statute," where "[t]he part [is considered] synonymous with the greater whole." . . . In

evaluating the first [step] of the anti-SLAPP statute, we must focus on "the *specific nature of the speech* rather than the generalities that might be abstracted from it. . . ." ' [Citations." (*D.C. v. R.R.* (2010) 182 Cal.App.4th 1190, 1216, quoting *World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.* (2009) 172 Cal.App.4th 1561, 1570, original italics; see also *Hailstone v. Martinez* (2008) 169 Cal.App.4th 728, 736.) Here, the specific nature of the speech was about falsified data and plagiarism in two scientific papers, not about global warming.[5]

Finally, Mahadevan argues this case is of public interest because research done at LBNL is publically funded; the assumption being that because Bikkina works at LBNL, his research is of public interest. This argument was rejected in *Rivero* because not every use of public funds constitutes a matter of public interest. (*Rivero, supra*, 105 Cal.App.4th at p. 925.) Additionally, Papers 1 and 2 were completed before Bikkina was employed at LBNL.

Although we conclude that the trial court correctly determined that Mahadevan did not satisfy his burden under the first prong of the anti-SLAPP statute, we choose also to address the potential merits of Bikkina's causes of action under the second prong.

C. The Second Prong—Probability of Prevailing on the Claim

Even if Mahadevan could demonstrate that his statements arose from protected activity, shifting the burden to Bikkina, Bikkina demonstrated below that his claims have minimal merit to survive the motion to strike. To satisfy the second prong of the anti-SLAPP analysis, the plaintiff " ' " ' "must demonstrate the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment" ' " ' " if plaintiff's evidence is credited. (*Summit Bank, supra*, 206 Cal.App.4th at p. 695, citing *Feldman v. 1100 Park Lane Associates* (2008) 160

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[5] On December 1, 2014, appellant filed an unopposed request for judicial notice of multiple websites addressing research integrity and climate change. This court issued an order on December 17, 2014, stating that the request would be considered with the merits of the appeal. We deny the request, finding none of the materials to be relevant to the dispositive issues on appeal. (See Evid.Code, §§ 452, 459.)

Cal.App.4th 1467, 1477–1478.) "Thus, the only question for purposes of our review is whether, accepting [plaintiff's] evidence as true and only looking to defendants' evidence to assess whether it defeats [plaintiff's] as a matter of law, [plaintiff] established his causes of action against . . . defendant[] ha[s] minimal merit. [Citation.]" (*Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 275 (*Hawran*).)

Mahadevan raised five arguments as to why Bikkina did not carry his burden to demonstrate his claims have minimal merit: (1) Bikkina has failed to allege sufficient facts either in his complaint or in opposition to the motion to strike to state the claims asserted in his complaint; (2) Mahadevan's statements about Bikkina's research were, in fact, true; (3) the statements were privileged under Civil Code section 47, subdivisions (b), (c); (4) the applicable statute of limitations had expired before Bikkina brought suit; and (5) Bikkina cannot show actual malice.

1. Bikkina's Opposition to the Motion to Strike Constituted Prima Facie Evidence Supporting the Claims Pleaded in His Complaint

a. Defamation

Bikkina pleaded two defamation causes of action in his complaint: libel per se and slander per se. "Defamation consists of, among other things, a false and unprivileged publication, which has a tendency to injure a party in its occupation. [Citations.]" (*Wilbanks, supra*, 121 Cal.App.4th at p. 901.) "Because the statement must contain a provable falsehood, courts distinguish between statements of fact and statements of opinion for purposes of defamation liability. Although statements of fact may be actionable as libel, statements of opinion are constitutionally protected. [Citation.]" (*McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 112 (*McGarry*).)

Civil Code section 45 provides, "Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Statements that "contain such a charge directly, and without the need for explanatory matter, are libelous per se. [Citation.]" (*McGarry, supra*, 154 Cal.App.4th at p. 112.) "To state a

defamation claim that survives a First Amendment challenge, . . . a plaintiff must present evidence of a statement of fact that is 'provably false.' [Citation.]" (*Nygard, supra*, 159 Cal.App.4th at p. 1048.)

Bikkina contends on appeal that his opposition to the motion demonstrated a prima facie case of libel and slander per se because Mahadevan's written and oral statements stated Bikkina had falsified and plagiarized data in his scientific papers. Bikkina submitted declarations from University faculty and administration as well as LBNL scientists, that Mahadevan made false statements to them. These statements are defamatory per se because they were damaging to Bikkina's professional reputation. The University provost's written decision concluded that Mahadevan "knowingly and in bad faith" made "false accusations against Mr. Bikkina regarding Paper #1 and Paper #2." She concluded that Bikkina had not committed plagiarism.

Mahadevan's evidence to the contrary was the declaration of Dr. Cornell, and four scholarly articles that were submitted as exhibits. As to Dr. Cornell's declaration, Mahadevan contends it supports his claims that Papers 1 and 2 were based on falsified data. Cornell's declaration, however, is far more limited. While Dr. Cornell stated that he once saw Bikkina using a sample of quartz crystal that appeared to be contaminated, he acknowledged that he did not know whether this contaminated sample formed the basis of Bikkina's research papers.

The first article Mahadevan submitted as an exhibit stated that the authors agreed with Mahadevan generally that surface contamination can lead to highly biased measurements, but they made no mention of Bikkina's papers. The second article stated that the authors did not observe the "hysteresis effect" reported by Bikkina. The third article mentioned Bikkina's research and stated that different results are presented in the literature from experiments under different conditions, making comparison difficult and necessitating more research. The final article stated, "The results reported by Bikkina (2011) in turn may be adversely affected by fluorine contamination on solid surfaces which raises question [*sic*] on the accuracy of the data." However, the article cited only to Mahadevan's comment on Bikkina's work as support for this statement.

Bikkina presented contrary evidence to show that his research was accurate, in addition to the University investigative findings. For example, in his declaration Bikkina contends that Mahadevan was wrong that the presence of fluorine constituted proof of contamination. He noted that even after Mahadevan raised his complaints about contamination of the data to the peer-reviewed journal that published Paper 1, the journal went forward with publication, demonstrating that it did not believe that Bikkina's research was faulty.

The parties' evidentiary showing as to the issue of truth as a defense was disputed, and cannot be resolved on defendants' section 425.16 special motion to strike. (*Taus*, *supra*, 40 Cal.4th at p. 714 [court does not weigh evidence or assess the credibility of the declarations in support of the anti-SLAPP motion].) Bikkina need only demonstrate a prima facie showing of facts to sustain a favorable judgment if his evidence is credited. (*Hawran*, *supra*, 209 Cal.App.4th at p. 293.) Accepting Bikkina's evidence as true, he has demonstrated his defamation claims have sufficient merit to survive a motion to strike.

b. Intentional Infliction of Emotional Distress

The elements of a cause of action for intentional infliction of emotional distress are: " '(1) outrageous conduct by the defendant, (2) intention to cause or reckless disregard of the probability of causing emotional distress, (3) severe emotional suffering and (4) actual and proximate causation of the emotional distress.' " (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 946, disapproved on another point in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 574, fn. 4.) Shame, humiliation, embarrassment, or anger can constitute emotional distress, but it must be severe and not trivial or transient. (*Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 397.)

Bikkina has provided sufficient evidence to survive a motion to strike that his distress was severe and enduring. Bikkina's declaration stated that Mahadevan's "campaign" against him had brought great stress to himself and his family. It caused him to begin clenching his teeth to such a degree that he had broken two teeth requiring dental implants. He had ongoing stomach problems and chest pains requiring him to visit a

hospital. He was also suffering from insomnia. Bikkina was fearful that he would lose his job and concerned that Mahadevan would contact his new employer, Oklahoma State University. Mahadevan's "erratic" behavior also caused him and his wife to fear for their physical safety.

This showing is akin that that made in *Grenier v. Taylor* (2015) 234 Cal.App.4th 471, 477 where a claim of intentional infliction of emotional distress brought by a pastor who was accused by the defendant of drug dealing and child molestation in Internet posts survived an anti-SLAPP motion to strike. There was evidence in opposition to the motion that the comments "ruined" the reputations of the pastor and his wife and they feared for their physical safety such that they did not want to leave their residence, and even considered moving away so they could continue with a life of anonymity. (*Id.* at p. 487.) The court concluded the defendants' actions were more than mere insults, threats, or annoyances. (*Ibid.*)

This case is distinguishable from *Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1376 (*Wong*), a case cited by Mahadevan. In *Wong*, the court found that a professional dispute which arose between the parents of a patient and the patient's dentist did not involve severe emotional distress. (*Id.* at p. 1377.) The plaintiff dentist had experienced loss of sleep, stomach upset and generalized anxiety. (*Ibid.*) The court held this minimal showing did not reflect severe or enduring emotional distress. (*Ibid.*)

"An anti-SLAPP-suit motion is not a vehicle for testing the strength of a plaintiff's case, or the ability of a plaintiff, so early in the proceedings, to produce evidence supporting each theory of damages asserted in connection with the plaintiff's claims. It is a vehicle for determining whether a plaintiff, through a showing of minimal merit, has stated and substantiated a legally sufficient claim. [Citations.]" (*Wilbanks, supra*, 121 Cal.App.4th at p. 906.) Under this standard, Bikkina has made a sufficient prima facie showing of intentional infliction of emotional distress.

c. Negligence

Civil Code section 1714 provides: "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of

ordinary care or skill in the management of his or her property or person . . . ." (Civ. Code, § 1714.) "The mandate of this duty is to act with ordinary care and skill in the management of one's property and person. Breach of that duty occurs when a want of ordinary care in such management causes an injury. The result is liability, i.e., 'responsibility.' " (*Krupnick v. Hartford Accident & Indemnity Co.* (1994) 28 Cal.App.4th 185, 200.) In order to make a prima facie case for negligence, a plaintiff must demonstrate defendant owed him a duty. (*Rivera v. First DataBank, Inc.* (2010) 187 Cal.App.4th 709, 719.)

Bikkina alleges that Mahadevan failed to use ordinary care in engaging in the course of conduct set forth in the complaint. His negligence claim is based on the same conduct as the defamation claims: Mahadevan made false and malicious statements about him. As outlined above, Bikkina has presented a prima case showing of facts sufficient to support his allegations of defamation and intentional infliction of emotional distress. Mahadevan only addresses the negligence claim in one paragraph in his reply brief, without citing any evidence or legal authority. His sole argument is that his statements were true. As we have outlined above in detail, Bikkina has presented substantial evidence to the contrary. Moreover, "a finding of actual malice generally includes a finding of negligence, and evidence that is sufficient to support a finding of actual malice is usually, and perhaps invariably, sufficient also to support a finding of negligence." (*Khawar v. Globe Internat., Inc.* (1998) 19 Cal.4th 254, 279.)

Bikkina has stated a legally sufficient claim for both actual malice and negligence.

d. Civil Code Section 47 Privileges

Mahadevan argues that the common interest privilege under Civil Code section 47, subdivision (c) applies. In his opening brief, however, he argues Civil Code section 47, subdivision (b) applies as well. We will address both privileges.

The defendant bears the burden of proving the privilege's applicability. (*Carver v. Bonds* (2005) 135 Cal.App.4th 328, 348–349.) Whether the privilege applies is a question of law. (*Hawran, supra*, 209 Cal.App.4th at p. 279.)

Civil Code section 47, subdivision (b) applies to a publication or broadcast made in legislative proceeding, judicial proceeding or other proceeding authorized by law. The privilege does not apply unless the statements were made in an anticipation of an official proceeding or during an official proceeding. (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 368.) Initially we note that there is no evidence the University's internal complaint process is either authorized by law or reviewable by mandate as required for application of the privilege as part of an official proceeding authorized by law. (See *Cruey v. Gannett Co.* (1998) 64 Cal.App.4th 356, 368 (*Cruey*).)

But, even if were to assume that Mahadevan's statements made as part of the University complaint process to University personnel fall within the privilege,[6] his later statements to LBNL scientists and his allegation of plagiarism to Bikkina's non-University co-author would not fall within the privilege. (See *Hawran, supra*, 209 Cal.App.4th at p. 286.)

Civil Code section 47, subdivision (c) provides a conditional privilege for communications made "without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information." (*Mann, supra*, 120 Cal.App.4th at p. 108.) The "interest" must be something other than mere general or idle curiosity, such as where the parties to the communication share a contractual, business, or similar relationship or the defendant is protecting his own pecuniary interest. (*Rancho La Costa, Inc. v. Superior Court* (1980) 106 Cal.App.3d 646, 664–665.)

Under Civil Code section 47, subdivision (c), defendant generally bears the initial burden of establishing that the statement in question was made on a privileged occasion,

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[6] There is no evidence the University's internal complaint process was either authorized by law or reviewable by mandate as required for application of the privilege as part of an official proceeding authorized by law. (See *Cruey, supra*, 64 Cal.App.4th at p. 368.)

and thereafter the burden shifts to plaintiff to establish that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1202.) A plaintiff must show "actual malice" that the conduct was motivated by hatred or ill will. (*Taus*, *supra*, 40 Cal.4th at p. 722.)

Citing to unpublished federal authority, Mahadevan argues that scholarly communications among scientists fall within the common interest privilege. This privilege within the context of an academic debate was discussed by our Supreme Court in *Taus*. (*Taus*, *supra*, 40 Cal.4th at p. 720.) Plaintiff objected to a statement that she was engaged in destructive behavior followed by a reference to the fact she was currently in the military. (*Id.* at p. 702.) "[I]t is clear that the alleged defamatory statement here in question—a statement made by Loftus, a psychology professor and author, at a professional conference attended by other mental health professionals and that was related to the subject of the conference—falls within the reach of this statutory common-interest privilege. [Citations.]" (*Id.* at p. 721.)

Once again, even if the privilege applies here, Bikkina has made a prima facie showing Mahadevan acted with malice. " ' "The malice necessary to defeat a qualified privilege is 'actual malice' which is established by a showing that the publication was motivated by hatred or ill will towards the plaintiff *or* by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and thereafter acted in reckless disregard of the plaintiff's rights (citations)." ' " (*Taus*, *supra*, 40 Cal.4th at p. 721, original italics.)

In *Hawran*, a genetic analysis company issued a press release that it had not used adequate protocols in its studies related to Down Syndrome, that it had accepted the resignation of the chief financial officer, Hawran, and was conducting an investigation into his actions. Hawran sued the company for defamation among other allegations and the company filed an anti-SLAPP motion to strike. (*Hawran*, *supra*, 209 Cal.App.4th at pp. 264-265.) The company alleged their press release was privileged under section 47 subdivision (c), but Hawran was able to demonstrate malice to defeat the privilege. (*Id.* at pp. 286-287.) In his declaration, he asserted that naming him in the press release was

motivated by his earlier actions in questioning the board and raising concerns. (*Id.* at p. 288.) "In view of the standard required for Hawran to meet his burden, and drawing all inferences in his favor, we conclude there is enough circumstantial evidence to support a prima facie case that malice motivated the statements made concerning Hawran in the September press release." (*Ibid.*)

Bikkina's declaration along with the declarations of the University provost and LBNL scientists support a conclusion that Mahadevan acted with ill will toward Bikkina or with reckless disregard of Bikkina's rights. Mahadevan's allegations against Bikkina were repeatedly found to be meritless by the University and yet he continued in his private campaign to discredit Bikkina's work. As outlined above, the provost's memorandum of decision documents that Mahadevan had disassociated himself from Bikkina's research and publications, yet he contacted a co-author to claim he had been plagiarized and made the same allegations to LBNL scientists. After the provost's original decision in 2011 that the allegations were untrue and merited sanctions against Mahadevan, he raised the same allegations with the University in 2012 and 2013. The provost described his conduct as "defamatory, retaliatory, demeaning, intimidating, threatening and otherwise harmful to Mr. Bikkina's educational and professional reputation on and off campus." She further concluded that Mahadevan had violated the University's ethical conduct policy by "making false allegations that were grounded in bad faith and with malicious intent to damage Mr. Bikkina's reputation, research and scholarship on and off campus." The provost further stated after Bikkina requested a new faculty advisor, Mahadevan threatened he would "screw [him]."

Therefore, even accepting that Mahadevan's statements at his presentation at LBNL were grounded in academic debate, his actions in reaching out to Bikkina's supervisor and LBNL's research and institutional integrity officer demonstrate malice. Bikkina's supervisor stated that he has "never had a scientist do this before." Similarly the University provost also stated that she could not "recall a single instance where any faculty persisted in attempting to re-argue the same allegations over and over again."

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July 21, 2020

Clerk
Supreme Court of the United States
1 First Street, NE
Washington, D.C. 20002

RE: JAGAN MAHADEVAN V. PREM BIKKINA

Dear Sir or Madam:

As required by Supreme Court Rule 33.1(h), I certify that the Petition for a Writ of Certiorari referenced above contains **8,991** words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Sincerely,

Jack Suber, Esq.
Principal

LISA KAY NICHOLSON
Notary Public
State of Maryland
Montgomery County
My commission exp. October 12, 2022

Sworn and subscribed before me this 21st day of July 2020.

Lisa K Nicholson