APPENDIX

NOT FOR PUBLICATION

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APR 18 2023

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL MOGAN, Appellant, v. SACKS, RICKETTS & CASE, LLP, et al. Appellee.	Nos. 22-15254, 22-15793 D.C. No. 3:21-cv-08431-TSH MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California,
Judge Thomas S. Hixson, Magistrate Judge, Presiding

Submitted April 14, 2023**
San Francisco, California

Before: S.R. THOMAS and H.A. THOMAS, Circuit Judges, and RAKOFF,*** District Judge.

Michael Mogan appeals from the district court's decision to sanction him and dismiss his claims against Sacks, Ricketts & Case, LLP ("SRC"), including several

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The anel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

of its attorneys (collectively, the "SRC defendants"), and against Airbnb, Inc. and its employees (collectively, the "Airbnb" defendants). He also argues that the district court abused its discretion in denying his motions for reconsideration, reassignment, and recusal; in affirming the jurisdiction of Magistrate Judge Hixson over this litigation; and, finally, in calculating the amount Mogan must pay to the appellees in attorneys' fees. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

Mogan's claims arise from his representation of a client in her 2018 state-court lawsuit against Airbnb Inc. and its employees. Early on in that litigation, the state court compelled his client to arbitrate her claims and stayed the case pending arbitration. Following the state court's decision, the American Arbitration Association ("AAA") requested, via email, that each party pay the filing fee necessary to proceed with arbitration. In April 2019, the AAA notified Mogan and representatives of Airbnb that it was closing the matter because Airbnb had apparently failed to pay the required fee. A few weeks later, the AAA contacted the same parties to clarify that Airbnb had, in fact, timely paid the fee and that the AAA's conclusion that it had not was due to a clerical error. It also offered to reopen the proceeding if it received confirmation from Mogan that his client wanted to continue arbitrating her claims.

Mogan did not respond to these communications. Instead, with full knowledge of the AAA's reasons for closing the proceeding, he filed a motion to lift the state-

court judicial stay, arguing that Airbnb's purported failure to timely pay the fee amounted to a default. Defendants moved for sanctions. Finding that Mogan's motion was both "factually and legally frivolous," the state court granted the Airbnb defendants' request for sanctions and directed Mogan to pay their attorneys fees in the amount of $22,159.50.

After the state appellate court affirmed that decision, Mogan filed this lawsuit. In response, the SRC defendants and the Airbnb defendants filed separate motions to dismiss the claims against them. Alongside their motion to dismiss, the Airbnb defendants also filed a Rule 11 motion for sanctions based on Mogan's conduct. The district court granted the parties' motions to dismiss, and the Airbnb defendants' motion for sanctions. The defendants—appellees here—then filed motions for attorneys' fees, which the district court also granted.

1. After a de novo review, we find that the district court did not err in dismissing Mogan's claims as to the Airbnb defendants on collateral estoppel grounds. *See Beckington v. Am. Airlines, Inc.*, 926 F.3d 595, 604 (9th Cir. 2019). Under California law, issue preclusion applies "(1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party." *DKN Holdings LLC v. Faerber*, 61 Cal. 4th 813, 825 (2015).

All these requirements are satisfied here. Both the instant lawsuit and the state-court sanctions proceedings—a "final adjudication"—present the "identical issue(s)" of the timeliness of Airbnb's filing fee payment and the propriety of Mogan's actions in response to communications from the AAA. *See Consumer Advoc. Grp. Inc. v. Kintetsu Enters. of Am.*, 150 Cal. App. 4th 953, 980 (2007); *Lucido v. Super. Ct.*, 51 Cal. 3d 335, 342 (1990). Moreover, these issues were "actually litigated and necessarily decided" against Mogan and, indeed, form the essential factual predicates for his claims in this litigation. Finally, because the state court's decision to impose sanctions was based on Mogan's conduct during that litigation, Mogan—though not a party to the proceeding—was in "privity" with a party in that he should have expected to be bound by that decision. *DKN Holdings*, 61 Cal. 4th at 826 (citation and quotation marks omitted) (finding privity exists where "the nonparty should reasonably have expected to be bound by the first suit") (internal quotation marks omitted).[1]

2. Moreover, the district court properly granted the SRC defendants' motion to strike the abuse of process claim that Mogan brought against them.[2] Here, the

[1] Because we believe the district court did not err in dismissing the claims against the Airbnb defendants on collateral estoppel grounds, we see no reason to review its ruling that many of Mogan's claims were independently barred under California's litigation privilege.

[2] California's anti-SLAPP statute applies in federal court. *See CoreCivic Inc. v. Candide Grp.*, 46 F.4th 1136, 1141 (9th Cir. 2022).

SRC defendants have clearly made a prima facie case that Mogan sued them for "conduct in furtherance of the constitutional right of petition or free speech," and thereby satisfied the first step for motions to strike under the statute. *See* Cal. Civ. Proc. Code § 425.16(e). The statute, in no uncertain terms, protects "all communicative acts performed by attorneys as part of their representation of a s in a judicial proceeding or other petitioning context," because such activity is "per se protected as petitioning activity.'" *Contreras v. Dowling*, 5 Cal. App. 5th 394, 409 (2016).

Proceeding to the second step, Mogan has not stated a claim that is plausible on its face under Rule 12(b)(6). *Cf. Planned Parenthood Fed. of Am., Inc. v. Ctr. for Med. Progress,* 890 F.3d 828, 834-35 (9th Cir. 2018). His complaint contains nothing more than "unadorned, the-defendant-unlawfully-harmed-me accusation[s]" and naked "recitation[s] of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). And the conduct forming the basis for his claim is plainly barred by California's litigation privilege, because it consists entirely of lawful communications made in furtherance of litigation and arbitration proceedings. *See Moore v. Conliffe*, 7 Cal. 4th 634, 641-43 (1994) (describing the litigation privilege and applying it to communications in arbitration proceedings).[3]

[3] Mogan argues that, even if the district court was correct to dismiss his claims, he should have nonetheless been allowed additional discovery to rectify any defects in his complaint. However, we refuse to "unlock the doors of discovery" for

3. The district court did not abuse its discretion in granting the Airbnb defendants' Rule 11 sanctions motion.[4] Reversal on this issue is appropriate only if the district court applied the incorrect legal standard contained in Rule 11 or based its ruling "on a clearly erroneous assessment of the evidence." *Cooler Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). The district court's decision that Mogan's motion was—in light of his intimate knowledge of the state court's sanctions proceedings—"frivolous, legally unreasonable or without factual foundation" falls within the "broad range of permissible conclusions" and, therefore, must be upheld. *Cotter & Gell*, 496 U.S. at 400; *Estate of Blue v. County of Los Angeles*, 120 F.3d 982, 985 (1997) (noting that sanctions are appropriate for a litigant's decision to assert a claim barred by collateral estoppel if "a reasonable investigation would [have] reveal[ed] that a claim is barred by . . . collateral estoppel"). Mogan's contention that the sanctions proceedings deprived him of due process is also meritless, as he was given full notice of the basis for sanctions in the motion briefing and was provided an opportunity to respond. *See Lambright v. Ryan*, 698 F.3d 808, 826 (9th Cir. 2012).

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appellants who, like Mogan, are "armed with nothing more than conclusions." *Iqbal*, 556 U.S. at 678-79.

[4] Because the Airbnb defendants' motion for sanctions was meritorious, the district court appropriately denied Mogan's request for sanctions against the Airbnb defendants.

4. Finally, the district court did not abuse its discretion with respect to the amount of sanctions and attorneys' fees awarded.[5] *See Manufactured Home Cmtys., Inc. v. Cty. of San Diego*, 665 F.3d 1171, 1181 (9th Cir. 2011) (reviewing anti-SLAPP fee for abuse of discretion); *Cooter & Gell*, 496 U.S. at 409 (reviewing Rule 11 monetary sanctions award for abuse of discretion). The defendants' billing records listed the hours they worked with sufficient specificity, and the district court did not abuse its discretion by determining that the defendants' counsel billed at the "prevailing market rate." *See Carson v. Billings Police Dep't*, 470 F.3d 889, 892 (9th Cir. 2006). Moreover, the district court did not ignore Airbnb's "duty to mitigate" their fees. In the context of Rule 11, this "duty" requires only that the court consider the moving party's culpability in prolonging the lawsuit, which it did here. *See Hudson v. Moore Business Forms, Inc.*, 898 F.2d 684, 687 (9th Cir. 1990).[6]

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[5] As a threshold matter, the Airbnb defendants' motion for fees was timely filed, submitted as it was before the deadline set by the magistrate judge. Moreover, the district court did not err in finding that the very brief declaration Mogan submitted to describe his financial situation was insufficient to show he was unable to pay the fees' award. *See Gaskell v. Weir*, 10 F.3d 626, 629 (9th Cir. 1993) ("[The] sanctioned party bears the burden of producing probative evidence of his inability to pay." (internal quotation marks and citations omitted)). In any event, sanctions in the amount of attorneys' fees that the Airbnb defendants incurred are reasonable to compensate the appellees for Mogan's misconduct. *See Am. Unites for Kids v. Rousseau*, 985 F.3d 1075, 1089 (9th Cir. 2021).

[6] We also affirm the district court's decisions to reject Mogan's challenges to Magistrate Judge Hixson's jurisdiction, and to deny his motions for reconsideration, reassignment, and recusal. First, as to Judge Hixson's jurisdiction, all parties in this litigation consented to proceed before a magistrate judge and that consent remains

AFFIRMED.

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binding even after a case is reassigned. *See Wilhelm v. Rotman*, 680 F.3d 1113, 1119 (9th Cir. 2012).

Second, a motion for reconsideration may be granted only if a change of law or fact arises or if the district court exhibited a "manifest failure . . . to consider material facts or dispositive legal arguments," of which there is no evidence here. *See* N.D. Cal. R. 7.9. As to reassignment, "judges may reassign cases for almost any reason, provided that the assignments are not for an impermissible reason." *United States v. Gray*, 876 F.2d 1411, 1415 (9h Cir. 1989). Here, Magistrate Judge Hixson determined that the cases arose from a common set of facts, and therefore were related—hardly an impermissible reason.

Finally, Mogan's recusal motion is completely meritless. Any alleged claim of bias "must stem from an extrajudicial source," and almost all of Mogan's arguments as to any potential bias arise from his disagreement with the Judge's decisions. *Liteky v. United States*, 510 U.S. 540, 554-56 (1994). Moreover, there is not, as Mogan contends, a requirement that a judge recuse himself because he had previously worked with one or more of the parties' attorneys on matters unrelated to the case at issue. *Cf.* 28 U.S.C. § 455(b)(2) (requiring a judge to recuse without a showing of bias when "in private practice he served a lawyer *in the matter in controversy*, or a lawyer with whom he previously practiced law served during such association as a lawyer *concerning the matter*." (emphasis added)).

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Michael Mogan

Plaintiff(s),

v.

Sacks, Ricketts & Case LLP, Airbnb Inc., Dave Willner, Jeff Henry, Sanaz Ebrahini, Michele Floyd and Jacqueline Young

Defendant(s).

Case No. 4:21-cv-08431-KAW

CONSENT OR DECLINATION TO MAGISTRATE JUDGE JURISDICTION

INSTRUCTIONS: Please indicate below by checking **one** of the two boxes whether you (if you are the party) or the party you represent (if you are an attorney in the case) choose(s) to consent or decline to magistrate judge jurisdiction in this matter. Sign this form below your selection.

☑ **CONSENT to Magistrate Judge Jurisdiction**

In accordance with the provisions of 28 U.S.C. § 636(c), I voluntarily **consent** to have a United States magistrate judge conduct all further proceedings in this case, including trial and entry of final judgment. I understand that appeal from the judgment shall be taken directly to the United States Court of Appeals for the Ninth Circuit.

OR

☐ **DECLINE Magistrate Judge Jurisdiction**

In accordance with the provisions of 28 U.S.C. § 636(c), I **decline** to have a United States magistrate judge conduct all further proceedings in this case and I hereby request that this case be reassigned to a United States district judge.

DATE: November 13, 2021

NAME: Michael Mogan

/s/ Michael Mogan

Signature

COUNSEL FOR (OR "PRO SE"):

Michael Mogan
Law Office Of Michael Mogan
4803 N. Milwaukee Ave,
Suite B, Unit #244
Chicago, IL 60630
mm@michaelmogan.com
p: (949) 424-5237

Appendix B

CERTIFICATE OF SERVICE

I am over 18. My business address is 4803 N. Milwaukee Ave, Suite B, Unit #244 Chicago, IL 60630. I hereby certify that on November 13, 2021, I caused the CONSENT OR DECLINATION TO MAGISTRATE JUDGE JURISDICTION to be filed and served upon counsel of record through the Court's electronic service system (ECF/CM) [and served by mail on anyone unable to accept electronic filing]. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system [or by mail to anyone unable to accept electronic filing]. Parties may access this filing through the Court's system. On November 13, 2021, I served the following persons and/or entities at the last known addresses by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows:

Corporation Service Company Which Will
Do Business In California As CSC - Lawyers
Incorporating Service
c/o Airbnb Inc.
2710 Gateway Oaks Drive, Suite 150N
Sacramento, CA 95833

Sacks, Ricketts & Case LLP
2800 N Central Ave Suite 1230
Phoenix, AZ 85004
Defendant and attorneys for Michele Floyd,
Jeff Henry, Dave Willner and Sanaz Ebrahini

Jacqueline Young
777 Old Creek Rd
Danville, CA 94526-3653
Defendant

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

Dated: November 13, 2021

/s/ Michael Mogan
Michael Mogan
Attorney for Plaintiff

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RELATED CASE ORDER

A Motion for Administrative Relief to Consider Whether Cases Should be Related or a *Sua Sponte* Judicial Referral for Purpose of Determining Relationship (Civil L.R. 3-12) has been filed. The time for filing an opposition or statement of support has passed. As the judge assigned to case

21-cv-06959-TSH
MOGAN v. Petrou

I find that the more recently filed case(s) that I have initialed below are related to the case assigned to me, and such case(s) shall be reassigned to me. Any cases listed below that are not related to the case assigned to me are referred to the judge assigned to the next-earliest filed case for a related case determination.

Case	Title	Related	Not Related
21-cv-08431-KAW	Mogan v. Sacks, Ricketts & Case LLP	X	

ORDER

The parties are instructed that all future filings in any reassigned case are to bear the initials of the newly assigned judge immediately after the case number. Any case management conference in any reassigned case will be rescheduled by the Court. The parties shall adjust the dates for the conference, disclosures and report required by FRCivP 16 and 26 accordingly. Unless otherwise ordered, any dates for hearing noticed motions are vacated and must be re- noticed by the moving party before the newly assigned judge; any deadlines set by the ADR Local Rules remain in effect; and any deadlines established in a case management order continue to govern, except dates for appearance in court, which will be rescheduled by the newly assigned judge.

Dated: December 10, 2021

By: _____
Thomas S. Hixson
United States Magistrate Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MICHAEL MOGAN,

Plaintiff,

v.

SACKS, RICKETTS & CASE LLP, et al.,

Defendants.

Case No. 21-cv-08431-TSH

ORDER GRANTING MOTIONS TO DISMISS

Re: Dkt. Nos. 12, 16

I. INTRODUCTION

Plaintiff Michael Mogan sues Airbnb and three of its employees, Jeff Henry, Dave Willner and Sanaz Ebrahini (collectively, the "Airbnb Defendants") and counsel that represented the Airbnb Defendants in an underlying state court action, Sacks, Ricketts & Case, LLP and two of its attorneys, Michele Floyd and Jacqueline Young (collectively, the "SRC Defendants") for claims related to a sanction award against him. The Airbnb Defendants now move to dismiss all claims against them as being barred by the litigation privilege or, alternatively, on grounds of issue preclusion. ECF Nos. 12 (Airbnb Mot.). The SRC Defendants move to dismiss and for an order striking Mogan's sole claim against them for abuse of process pursuant to California Code of Civil Procedure Section 425.16. ECF No. 16 (SRC Mot.). Mogan opposes both motions. ECF Nos. 21 (Airbnb Opp'n), 26 (SRC Opp'n). The Court finds these matters suitable for disposition without oral argument. *See* Civ. L.R. 7-1(b). Having considered the parties' positions, relevant legal

authority, and the record in this case, the Court **GRANTS** both motions for the following reasons.[1]

II. REQUESTS FOR JUDICIAL NOTICE

As an initial matter, the parties request the Court take judicial notice of over 60 documents from the underlying state court action and related arbitration proceedings, consisting of documents that were filed and correspondence between the parties. ECF Nos. 12-1. 16-1, 21, 26.

In general, the Court may not look beyond the four corners of a complaint in ruling on a Rule 12(b)(6) motion, except for documents incorporated into the complaint by reference and any relevant matters subject to judicial notice. *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curiam); *Lee v. City of L.A.*, 250 F.3d 668, 688-89 (9th Cir. 2001). The Court may take judicial notice of matters that are either (1) generally known within the trial court's territorial jurisdiction or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b).

A court may "take judicial notice of undisputed matters of public record, including documents on file in federal or state courts." *See Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 & n.6 (9th Cir. 2006) (taking judicial notice of court filings and a hearing transcript and noting that a court "may take judicial notice of court filings and other matters of public record"); *Porter v. Ollison*, 620 F.3d 952, 954-55 & n.1 (9th Cir. 2010) (taking judicial notice of court dockets); *McCurdy v. Davey*, 2020 WL 43110, at *5 n.1 (N.D. Cal. Jan. 2, 2020) (same). The same holds true for arbitration filings. *See Trs. of the Operating Eng'rs Pension Tr. v. Smith-Emery Co.*, 2018 WL 5983551, at *2 n.3 (C.D. Cal. Nov. 14, 2018) (taking judicial notice of arbitration filings); *Glob. Indus. Inv. Ltd. v. Chung*, 2020 WL 5355968, at *4 (N.D. Cal. Sept. 7, 2020) (same). Further, because Mogan's complaint references many of the documents, including pleadings and communications and orders leading to the sanction award against him, the Court may fairly consider those exhibits under the doctrine of incorporation by reference, without converting the motion into one for summary judgment. *Paulsen v. CNF Inc.*, 559 F.3d 1061, 1071 (9th Cir. 2009); *United States v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003); *Davis v. HSBC*

[1] The parties have consented to magistrate judge jurisdiction pursuant to 28 U.S.C. § 636(c). ECF Nos. 8, 18, 23.

Bank Nevada, N.A., 691 F.3d 1152, 1160 (9th Cir. 2012) ("where a document has been incorporated by reference in a complaint, a court 'may treat such a document as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6).'"); *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1058 n.10 (9th Cir. 2014) ("Because Plaintiffs incorporate by reference Mr. Hunt's declaration, relying on portions of it in their complaint, we may properly consider the declaration in its entirety").

Accordingly, the Court **GRANTS** the parties' requests for judicial notice.

III. BACKGROUND

Mogan is an attorney licensed to practice in California. Compl. ¶ 17, ECF No. 1. In 2018 he filed a civil complaint in San Francisco Superior Court on behalf of his client, Veronica McCluskey, "after . . . Airbnb employees destroyed her business in retaliation for reaching out to Fox News and the Los Angeles Police Department about Airbnb Inc's inaction towards an Airbnb Superhost William Hendricks who was trafficking illegal drugs through the United States mail including at his Airbnb rental in Los Angeles." *Id.*; *see also McCluskey v. Henry et al.*, San Francisco County Superior Court Case No. CGC18567741. After the Airbnb Defendants filed a motion to compel arbitration based upon an agreement executed between Airbnb and McCluskey, the court granted the motion and stayed the case pending the outcome of arbitration proceedings. Compl. ¶ 19.

McCluskey subsequently filed an arbitration claim, and on February 26, 2019, the American Arbitration Association ("AAA") emailed the parties with a request for $200 from McCluskey and $7,500 from the Airbnb Defendants to proceed with the arbitration. *Id.* ¶ 20. Mogan alleges AAA closed the arbitration proceedings because the Airbnb Defendants did not pay the $7,500 filing fee by the due date. *Id.* ¶¶ 22-25. McCluskey filed a motion to lift the stay, arguing that Airbnb's purported untimely payment resulted in a "default" in arbitration such that the state litigation could move forward. Taylor Decl., Ex. 20, ECF No. 12-22. However, on August 8, 2019, the superior court denied her motion, finding the Airbnb Defendants' payment was timely and the AAA had acknowledged as much in writing. Compl. ¶ 30; Taylor Decl., Ex. 22, ECF No. 12-24. Specifically, the court found:

> Contrary to Plaintiff's contention, Defendants are not in "default" in the arbitration proceeding. Rather, the American Arbitration Association made a clerical error by misapplying defendants' timely fees and then, as a result, administratively closed the case. Once the AAA realized and acknowledged its mistake, it requested confirmation from plaintiff that she wants the case reopened. Plaintiff's counsel did not respond to that repeated request by the AAA. The Court will not allow Plaintiff to take advantage of the AAA's clerical error and her own lengthy delays in order to evade her contractual obligation to arbitrate her claims, if she wishes to pursue them.

Taylor Decl., Ex. 22

Prior to the court's ruling, and in response to McCluskey's motion to lift the stay, the SRC Defendants served a California Code of Civil Procedure section 128.7 safe harbor letter that stated their intent to file a motion for sanctions, along with a draft of the motion. Compl. ¶ 33. Mogan alleges "Defendant SRC LLP sent Plaintiff the email on behalf of all the Defendants in an attempt to force Plaintiff to choose between being extorted out of $25,047.70 or withdrawing the motion to lift stay and paying the AAA a filing fee because based on information and belief, no $7,500 payment had been made by Airbnb Inc. on April 5, 2019 to the AAA." *Id.* ¶ 38. He further alleges it was "sent to annoy and harass Plaintiff and to use the threat of disciplinary charges by the state bar to obtain an advantage in a civil dispute between Veronica McCluskey and Defendants Dave Willner, Jeff Henry and Sanaz Enrahini and with the conscious disregard of the rights of Plaintiff, and with the intent to vex, injure or annoy such as to constitute oppression, fraud or malice upon Plaintiff." *Id.* ¶ 35.

After the court denied McCluskey's motion, the SRC Defendants filed a revised sanctions motion. *Id.* ¶ 44. On September 11, 2019, the court granted the motion in part, finding the motion to lift the stay was "both factually and legally frivolous." Taylor Decl., Ex. 23, ECF No. 12-25. In its order, the court reiterated its findings about Airbnb's timely payment of its arbitration fee and McCluskey's improper purposes in bringing such a motion:

> Defendants' motion for sanctions pursuant to Cal. Civ. Proc. Code § 128.7 is granted. The Court finds that Plaintiff Veronica McCluskey's motion to lift stay, which the Court [denied] by order dated August 8, 2019, was both factually and legally frivolous. In particular, the Court finds that plaintiff's contention that defendants were in "default" in the arbitration proceedings was entirely lacking in either evidentiary or legal support. In fact, as set forth in the order, and as was fully

> known to plaintiff's counsel, the American Arbitration Association had made a clerical error by misapplying defendants' timely fees and then, as a result, administratively closed the case. Once the AAA realized and acknowledged its mistake, it requested confirmation from plaintiff that she wanted the case reopened. Plaintiff's counsel did not respond to that repeated request by the AAA, but instead brought the frivolous motion to lift the stay, by which counsel sought to take advantage of the AAA's clerical error and her own lengthy delays in order to evade her contractual obligation to arbitrate her claims and to avoid the effect of the Court's earlier order granting defendants' petition to compel arbitration. Plaintiff's counsel now compounds his misconduct by accusing defendants' counsel of "continued attempts to commit fraud upon this Court and Plaintiff" and of "lying," among other things, accusations which the Court finds to be baseless and unprofessional.

Id. The court then ordered Mogan (but not McCluskey) to pay the attorneys' fees the Airbnb Defendants incurred in opposing the motion to lift the stay, totaling $22,159.50. *Id.*

McCluskey appealed the sanctions order, but the California Court of Appeal found that "by the time Mogan filed the request to lift the stay, AAA had already informed counsel that defendants were not in default, waiver, breach or violation of the covenant of good faith and fair dealing." Taylor Decl., Ex. 25 at 16, ECF No. 27. The court went on to state that Mogan had selectively relied on "isolated portions" of AAA's emails to counsel, and that "reading [those emails] as confirmation that AAA considered the arbitration closed . . . due to defendants' nonpayment of fees . . . strains credulity." *Id.* The court concluded:

> No reasonable attorney could conclude, as Mogan contends, that AAA had determined the case would not be reopened due to *defendants' conduct.* Instead, the only reasonable view of those emails is that despite the payment issue, if any, AAA did not consider the case finally closed and would reopen it as soon as counsel confirmed McCluskey wanted to proceed to arbitration. In brief, and as the trial court correctly found, the matter did not proceed to arbitration *solely due to the failure of Mogan to confirm that McCluskey wanted to proceed to arbitration* and there was no legal support for McCluskey's request to lift the stay.

Id. at 16-17 (emphasis in original). Both the California Supreme Court and the Supreme Court of the United States denied Mogan's petitions for review. Taylor Decl., Exs. 26–27, ECF Nos. 28-29.

On September 8, 2021, Mogan filed a complaint in this District against San Francisco Superior Court Judge Ethan Schulman, who entered the sanctions order, and Justice Ioana Petrou,

the Appellate Court Justice, who authored the opinion affirming the order, claiming they violated his constitutional rights. *Mogan v. Petrou*, No. 21-cv-06959-TSH, (N.D. Cal. Sept. 8, 2021). That case was dismissed on November 17, 2021. *Id.*, ECF No. 13; *Mogan v. Petrou*, 2021 WL 5359400 (N.D. Cal. Nov. 17, 2021).

Mogan filed the present complaint on October 29, 2021, alleging one cause of action for abuse of process against all named defendants and the following causes of action against the Airbnb Defendants: intentional infliction of emotional distress; intentional interference with prospective economic relations; civil conspiracy; violations of RICO, 18 U.S.C. § 1962(c) and (d); and unfair business practices, Cal. Bus. & Prof. Code §§ 17200, et seq.

The Airbnb Defendants filed their motion to dismiss on November 24, 2021. The SRC Defendants filed their motion on November 29, 2021.

IV. LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of a claim. A claim may be dismissed only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Cook v. Brewer*, 637 F.3d 1002, 1004 (9th Cir. 2011) (citation and quotation marks omitted). Rule 8 provides that a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Thus, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Plausibility does not mean probability, but it requires "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009). A complaint must therefore provide a defendant with "fair notice" of the claims against it and the grounds for relief. *Twombly*, 550 U.S. at 555 (quotations and citation omitted).

In considering a motion to dismiss, the court accepts factual allegations in the complaint as true and construes the pleadings in the light most favorable to the nonmoving party. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).; *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007). However, "the tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere

conclusory statements." *Iqbal*, 556 U.S. at 678.

If a Rule 12(b)(6) motion is granted, the "court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (citations and quotations omitted). However, a court "may exercise its discretion to deny leave to amend due to 'undue delay, bad faith or dilatory motive on part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party . . ., [and] futility of amendment.'" *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 892–93 (9th Cir. 2010) (alterations in original) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

V. DISCUSSION

A. Airbnb Defendants

1. Litigation Privilege

The Airbnb Defendants argue Mogan's complaint against them fails because it relies exclusively on allegations covered by California's litigation privilege. Airbnb Mot. at 7. This privilege applies to "any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that [has] some connection or logical relation to the action." *Action Apartment Ass'n, Inc. v. City of Santa Monica*, 41 Cal. 4th 1232, 1241 (2007) (alteration in original); *see also* Cal. Civ. Code § 47(b). The California Supreme Court previously summarized the privilege as follows:

> The requirement that the communication be in furtherance of the objects of the litigation is, in essence, simply part of the requirement that the communication be connected with, or have some logical relation to, the action, i.e., that it not be extraneous to the action. A good example of an application of the principle is found in the cases holding that a statement made in a judicial proceeding is not privileged unless it has some reasonable relevancy to the subject matter of the action.

Silberg v. Anderson, 50 Cal. 3d 205, 219-20 (1990), *as modified* (Mar. 12, 1990). "The breadth of the litigation privilege cannot be understated. It immunizes defendants from virtually any tort liability (including claims for fraud), with the sole exception of causes of action for malicious

prosecution." *Olsen v. Harbison*, 191 Cal. App. 4th 325, 333 (2010). The privilege exists to afford litigants "the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort action," *Action Apartment Ass'n*, 41 Cal. 4th at 1241, and to ensure that lawyers "zealously protect their clients' interests" by "protect[ing] them from the fear of subsequent derivative actions for communications made in the context of judicial proceedings." *Edwards v. Centex Real Est. Corp.*, 53 Cal. App. 4th 15, 30 (1997).

a. Judicial or Quasi-Judicial Proceedings

All seven of Mogan's claims against the Airbnb Defendants arise from his allegations that Airbnb, its employees, and its former attorneys lied about paying the arbitration fee in the underlying arbitration and sought sanctions in the state case for improper purposes. These communications were made in judicial or quasi-judicial proceedings. First, Airbnb sought and then moved for sanctions in San Francisco Superior Court in McCluskey's case against the Airbnb Defendants after Mogan filed his motion to lift the stay. This was a communication within a judicial proceeding. Second, Airbnb communicated with AAA about the timeliness of its arbitration payment as part of the impending arbitration between McCluskey and the Airbnb Defendants. Communications within arbitration equally satisfy this element of the test. *See Moore v. Conliffe*, 7 Cal. 4th 634, 642-43 (1994) (holding that the litigation privilege applies to communications in arbitration). Further, the privilege applies even though Airbnb communicated with AAA about its payment before arbitration began because it was done "in anticipation of" arbitration—and was necessary for the arbitration to commence. *See Visto Corp. v. Sproqit Techs., Inc.*, 360 F. Supp. 2d 1064, 1068 (N.D. Cal. 2005) (noting that "[p]re-litigation demands in anticipation of litigation" satisfy the test); *Herterich v. Peltner*, 20 Cal. App. 5th 1132, 1138 (2018), *as modified on denial of reh'g* (Mar. 28, 2018) ("The litigation privilege also extends to communications that have some relation to an anticipated proceeding."); *Lopez Reyes v. Kenosian & Miele, LLP*, 525 F. Supp. 2d 1158, 1161 (N.D. Cal. 2007) ("California courts have held that pleadings and proceedings, even potentially those occurring before or after the lawsuit, that have 'some relation' to the lawsuit are privileged under section 47(b).").

In his opposition, Mogan focuses on the original version of the sanctions motion—which

the Airbnb Defendants served on him but did not ultimately file—and argues that claims based on this first version are not barred. Airbnb Opp'n at 1-3. As the basis for his argument, he characterizes the Airbnb Defendants' attempt to meet and confer in connection with the first version of the sanctions motion, along with the June 10, 2019 cover letter sent with service of that motion, as a "demand letter" and a "threat." *Id.* at 3. He then argues that the litigation privilege does not apply because these communications, along with service of the first version, were a "hollow threat of litigation" and not a "necessary or useful step in the litigation process." *Id.* (citing *Action Apartment Ass'n*, 41 Cal. 4th at 1251). However, as the June 10, 2019 cover letter noted, service of the motion for sanctions was pursuant to and in accordance with California Civil Procedure Code section 128.7(c)(1)4, as were Airbnb's efforts to meet and confer before filing the motion. *See* Mogan's Request for Judicial Notice in Support of Opp'n ("Mogan's RJN"), Ex. 1, Ex. 3 at 7, Ex. 7 at 5, ECF No. 21-1; Compl. ¶ 106. It is clear that serving a motion in compliance with the rules—a motion that was ultimately granted by the superior court—was a step in the litigation process. Moreover, this is a distinction without a difference, since the revised motion, which was served, filed, and granted, asserted substantively the same arguments as the previous version.[2] If anything, the Airbnb Defendants' subsequent filing of the revised version of the motion, which was also served on Mogan in advance pursuant to section § 128.7(c)(1), demonstrates that the filing was seriously contemplated and in good faith. *Compare* Mogan's RJN, Ex. 3 (first motion for sanctions, dated June 10, 2019), with Mogan's RJN, Ex. 7 (second motion for sanctions, filed August 8, 2019).

b. Litigants or Other Participants

Second, the communications regarding the Airbnb Defendants' motions for sanctions and the statements to the AAA about the timeliness of the payments were both communications made by Airbnb's counsel, who were participants in the state court litigation. *See Silberg*, 50 Cal. 3d at 219 ("Defendant's statements . . . were made by a participant, i.e., the attorney for a party.").

[2] The Court also notes that the Airbnb Defendants were required to serve Mogan with the motion but to refrain from filing it within 21 days of service to allow Mogan time to withdraw his motion to lift the stay. Cal. Civ. Proc. Code § 128.7(c)(1).

c. Communications Made to Achieve the Objects of the Litigation and Logically Related to the Action

The final two elements overlap and are satisfied here. "The requirement that the communication be in furtherance of the objects of the litigation is, in essence, simply part of the requirement that the communication be connected with, or have some logical relation to, the action, i.e., that it not be extraneous to the action." Id. at 219-20. Both communications at issue here were directly related to the Airbnb Defendants' efforts to defend themselves in state court and arbitration. First, when Airbnb corrected the AAA with respect to its clerical error that led it to administratively close the arbitration, Airbnb did so in order to proceed with arbitration. Such a communication aimed at reopening the case was made to achieve the objects of arbitration, in lieu of litigation. Second, when the Airbnb Defendants served and filed their respective motions for sanctions, they sought to deter Mogan's conduct—the filing of what they considered a frivolous motion to lift stay—from obstructing the objects of litigation. Although Mogan claims they brought the motions for sanctions to threaten him and for other improper purposes, the sanctions motion was connected to the action at bar and therefore satisfies the final element required to establish the litigation privilege. See, e.g., Eisenberg v. Alameda Newspapers, Inc., 74 Cal. App. 4th 1359, 1379-80 (1999) (noting that a "classic example" of an application of the litigation privilege is an "attorney demand letter threatening to file a lawsuit if a claim is not settled" (citation omitted)).

d. Summary

In sum, the Court finds that Mogan's state law claims against the Airbnb Defendants fail under the litigation privilege. However, the Airbnb Defendants have not shown that this California privilege applies to Mogan's federal claims. Accordingly, dismissal of Mogan's state law claims (claims 1-4 and 7) is appropriate based on the litigation privilege.

2. Issue Preclusion

In the alternative, the Airbnb Defendants argue the Court should dismiss all counts of Mogan's complaint under the doctrine of issue preclusion—also called collateral estoppel—because the allegations underlying each count have already been repeatedly rejected in California state court. Airbnb Mot. at 10.

Issue preclusion "'protect[s] against the expense and vexation attending multiple lawsuits, conserve[s] judicial resources, and foster[s] reliance on judicial action by minimizing the possibility of inconsistent decisions.'" *Media Rights. Techs., Inc. v. Microsoft Corp.*, 922 F.3d 1014, 1020 (9th Cir. 2019) (quoting *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). Under California law,[3] this doctrine applies "(1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party." *DKN Holdings LLC v. Faerber*, 61 Cal. 4th 813, 825 (2015).

a. Final Adjudication

Issue preclusion requires that "the judgment sought to be invoked in bar must be the last word of the rendering court—a final judgment." *Franklin & Franklin v. 7-Eleven Owners for Fair Franchising*, 85 Cal. App. 4th 1168, 1175 (2000) (simplified). Here, the sanctions order is a final judgment on the merits with respect to the issues contained therein. *See Consumer Advoc. Grp. Inc. v. Kintetsu Enters. of Am.*, 150 Cal. App. 4th 953, 980 (2007) (holding that a sanctions order, the time for which to appeal had expired, was "final and on the merits" as to the issues contained within the order, even though the merits of the underlying case had not reached final judgment). The issues that the state court relied upon in sanctioning Mogan included that Airbnb paid its arbitration fee on time, that Airbnb did not conceal or lie about the timeliness of its payment, and that Airbnb's purpose in seeking sanctions against Mogan was necessarily proper. *See* Taylor Decl., Exs. 22-25. Once the Court of Appeal affirmed the sanctions order, the "finality required to invoke [preclusion was] achieved." *Kay v. City of Rancho Palos Verdes*, 504 F.3d 803, 808 (9th Cir. 2007) (citation omitted) (noting that finality occurs when an appeal "has been exhausted or the time to appeal has expired").

In his opposition, Mogan argues "[t]here is no state court decision that was a final judgment on the merits" as to the "unfiled sanctions motion" in the state court action and a "plethora [of] conduct afterwards," which he never specifies. Airbnb Opp'n at 4. This argument

[3] "In determining the preclusive effect of . . . state court judgment[s], [federal courts] follow the state's rules of preclusion." *White v. City of Pasadena*, 671 F.3d 918, 926 (9th Cir. 2012).

is without merit, as the state court sanctions order was exactly such a decision. *See* Taylor Decl., Ex. 23. Both versions of the sanctions motion made the same arguments challenging the same motion to lift the stay. The sanctions order—which was affirmed on appeal and which ruled upon the issue of whether the arbitration fee was timely paid and, by definition, the issue of whether the motion was brought for a proper purpose—was final, and that final judgment necessarily subsumes the issues raised in both versions of the motion. *Id.*, Exs. 23, 25. While Mogan is correct that the final judgment did not reference the first, unfiled version of the sanctions motion, it is a pointless distinction since the same substantive arguments were made in the filed version. A sanctions order is "final" as to the issues contained therein once its appeal has concluded, even where the merits of that case have not reached final judgment. *Consumer Advoc. Grp.*, 150 Cal. App. 4th at 980.

Accordingly, the sanctions order is a final judgment on the merits with respect to all issues the Airbnb Defendants seeks to preclude.

b. Identical Issue

"The 'identical issue' requirement addresses whether 'identical factual allegations' are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same." *Hardwick v. Cty. of Orange*, 980 F.3d 733, 740 (9th Cir. 2020) (quoting *Lucido v. Superior Court*, 51 Cal. 3d 335, 342 (1990)). Each of Mogan's claims here relies on factual allegations (1) that Airbnb's arbitration payment was late and (2) that Airbnb served and filed its motions for sanctions for improper purposes. These exact allegations were litigated in state court, where the San Francisco Superior Court determined them to be false, including in a sanctions order that was affirmed on appeal.

For example, in denying Mogan's motion to lift the stay, the state trial court found that the AAA "made a clerical error by misapplying defendants' timely fees," and stated that it would "not allow [McCluskey] to take advantage of the AAA's clerical error and her own lengthy delays in order to evade her contractual obligation to arbitrate her claims, if she wishes to pursue them." Taylor Decl., Ex. 22. The court repeated these findings in granting Airbnb's motion for sanctions following the "factually and legally frivolous" motion to lift the stay. *Id.*, Ex. 23. The court then

stated that Mogan "compounds his misconduct by accusing defendants' counsel of 'continued attempts to commit fraud upon this Court and Plaintiff' and of 'lying,' among other things, accusations which the Court finds to be baseless and unprofessional." *Id.* These rulings, which the state court affirmed on appeal, concern the exact allegations that Mogan relies upon now in each of his seven causes of action.

c. Issues Were Actually Litigated and Necessarily Decided in State Court

California courts "have understood the 'necessarily decided' prong to require only that the issue not have been entirely unnecessary to the judgment in the initial proceeding." *Samara v. Matar*, 5 Cal. 5th 322, 327 (2018) (alterations omitted). In granting Airbnb's motion for sanctions, the state court necessarily concluded that the motion had merit and was not brought for improper purposes. Likewise, in denying Mogan's motion to lift the stay, the state court was required to consider and reject Mogan's argument that Airbnb had failed to pay the arbitration fee on time. These issues were also actually litigated. In both his motion to lift the stay and his opposition to the motion for sanctions, Mogan argued that Airbnb's payment was untimely and that Airbnb lied about and concealed that fact. Taylor Decl., Exs. 20, 28. And although not made as an explicit argument in the state court, the question of whether Airbnb's motives were proper in seeking sanctions in state court was necessarily litigated; as the state court would not have granted the motion had it been meritless and without a proper purpose.

Mogan argues that the issues were "not actually litigated and decided in any court" because the time to appeal the order denying the amended motion to lift the stay has not run. Airbnb Opp'n at 4. However, the Airbnb Defendants are not asserting issue preclusion on the basis of the order denying the amended motion to lift the stay in McCluskey's case. Rather, they assert issue preclusion on the basis of the issues decided in the sanctions order against Mogan, as affirmed on appeal by the state appellate court. As stated above, a judgment is "final and on the merits" as to the issues contained therein once the time for appeal has been exhausted, even if the merits of the case are still pending. *Consumer Advoc. Grp. Inc.*, 150 Cal. App. 4th at 980. Here, the sanctions

order became final after it was affirmed on appeal.[4]

d. Same Parties or in Privity

Issue preclusion can only be asserted against parties to a prior lawsuit or those in privity with them. *Samara*, 5 Cal. 5th at 327. For preclusion purposes, a party "is one who is 'directly interested in the subject matter, and had a right to make defense, or to control the proceeding, and to appeal from the judgment.'" *DKN Holdings*, 61 Cal. 4th at 825 (quoting *Bernhard v. Bank of Am. Nat'l Tr. & Savings Ass'n*, 19 Cal. 2d 807, 811 (1942)).

The Airbnb Defendants argue Mogan was a party to the action because (1) his personal conduct (in moving to lift the stay) necessitated the sanctions motion, (2) he was directly affected by the sanctions order, and (3) he appealed from the judgment both on behalf of his client and (as "Objector and Appellant") in his personal capacity. *See* Taylor Decl., Ex. 25. They note that Mogan alleges the underlying litigation caused him "severe emotional distress." Compl. ¶ 66. However, even without deciding whether Mogan, as an attorney representing a client, could be considered a party in the underlying litigation, it is clear that he was in privity with McCluskey. "[P]rivity requires the sharing of an identity or community of interest, with adequate representation of that interest in the first suit, and circumstances such that the nonparty should reasonably have expected to be bound by the first suit." *DKN Holdings*, 61 Cal. 4th at 826 (citation and quotation marks omitted). Mogan should have "expected to be bound" by the state court's timeliness finding. The state court sanctioned him for moving to lift the stay on the basis that the timeliness of Airbnb's payment was "fully known" to him at the time of filing, and he was admonished for accusing Airbnb's counsel of misconduct and lying about the timeliness of the payment. *See* Taylor Decl., Exs. 23-24. After these repercussions, which implicated him personally, Mogan cannot be allowed to relitigate the factual allegations on the grounds that he did not expect to be bound by the state court's decision. Further, although Airbnb itself was not a party to the sanctions proceedings, issue preclusion does not require identical parties on both sides

[4] Mogan also suggests that the state appellate court actually found that Airbnb's arbitration payment was late. Airbnb Opp'n at 4. This a misrepresentation of the appellate order, which makes clear that the payment was timely. *See McCluskey v. Henry*, 56 Cal. App. 5th 1197, 1203-04 (2020).

of the courtroom; rather, it applies when "asserted against one who was a party in the first suit or one in privity with that party." *Samara*, 5 Cal. 5th at 327. Here, both Airbnb and its individual defendant employees assert the same issue preclusion argument against Mogan, so it is irrelevant whether Airbnb was a party or in privity with a party to the original action. *See Sartor v. Superior Court*, 136 Cal. App. 3d 322, 326 (1982) (noting that master-servant and indemnitor-indemnitee are examples of privity relationships).

e. Summary

In sum, the Court finds the four required elements of the litigation privilege are satisfied. Mogan is therefore bound by the following facts determined in state court: (1) Airbnb timely paid its arbitration fee, and (2) Airbnb sought sanctions for a proper purpose. Because Mogan's allegations to the contrary underlie each of his causes of action before this Court, the application of issue preclusion means that each of Mogan's causes of action fails to state a claim upon which relief can be granted. Dismissal is therefore appropriate.

B. SRC Defendants

The SRC Defendants argue Mogan's abuse of process claim must be dismissed under California's Anti-SLAPP statute because it is premised exclusively on litigation-related speech and activity and is therefore privileged under Civil Code section 47.

1. Legal Standard

California Code of Civil Procedure section 425.16 provides for a special motion to strike a "strategic lawsuit against public participation" ("SLAPP"). Such a motion, commonly called an "anti–SLAPP motion," provides courts with a remedy to dismiss at an early stage non-meritorious litigation that challenges various kinds of protected speech. *See Kashian v. Harriman*, 98 Cal. App. 4th 892, 905 (2002); Cal. Civ. Proc. Code § 425.16(b)(1). The anti–SLAPP statute is given full effect in federal court. *Thomas v. Fry's Elecs., Inc.*, 400 F.3d 1206, 1206-07 (9th Cir. 2005); *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999).

Section 425.16(b)(1) provides:

> 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 there is a probability that the plaintiff will prevail on the claim.

Subdivision (e) specifically immunizes:

> (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;
>
> (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law

Cal. Civ. Proc. Code § 425.16(e).

In ruling on an anti-SLAPP motion, the trial court engages in a two-step process. *Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 67 (2002). First, the court decides whether the defendant has made a threshold showing that the challenged cause of action arises from acts in furtherance of the defendant's right of petition or free speech under the United States or California constitutions in connection with a public issue. *Id.* Second, "[i]f the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." *Id.* The claim is subject to dismissal only when the defendant shows that the claim is based on protected conduct and the plaintiff fails to show a probability of success on that claim. *Navellier v. Sletten*, 29 Cal. 4th 82, 88–89 (2002).

For the first part of the test, a defendant must make a prima facie showing that the claim "arises from" its conduct "in furtherance of" its exercise of free speech or petition rights as defined in section 425.16(e). *Equilon*, 29 Cal. 4th at 61. "For purposes of the anti-SLAPP statute, a cause of action 'arises from' conduct that it is 'based on.'" *Graham-Sult v. Clainos*, 756 F.3d 724, 735 (9th Cir. 2014) (citing *Copenbarger v. Morris Cerullo World Evangelism*, 215 Cal. App. 4th 1237, 1244–45 (2013)). Thus, a court must ask what activities form the basis for each of a plaintiff's causes of action. *Id.* The court then must ask whether those activities are "protected" and thereby bring the cause of action within the scope of the anti-SLAPP statute. *Id.* (citing *Wallace v. McCubbin*, 196 Cal. App. 4th 1169, 1182–84 (2011)).

For the second part of the test, the burden shifts to the plaintiff to establish as a matter of law that no such protection exists. *Governor Gray Davis Comm. v. Am. Taxpayers Alliance*, 102

Cal. App. 4th 449, 456 (2002). To establish a probability of prevailing, a plaintiff must demonstrate that the complaint is legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. *Premier Med. Mgmt. Systems, Inc. v. Cal. Ins. Guar. Ass'n*, 136 Cal. App. 4th 464, 476 (2006). The plaintiff must also present evidence to overcome any privilege or defense to the claim that has been raised. *Flatley v. Mauro*, 39 Cal. 4th 299, 323 (2006).

2. Analysis

a. Anti-SLAPP Step One

The SRC Defendants' initial burden of making a prima facie showing of protected activity is "not an onerous one." *Okorie v. L.A. Unified Sch. Dist.*, 14 Cal. App. 5th 574, 590 (2017). The statute protects "conduct in furtherance of the constitutional right of petition." Cal. Civ. Proc. Code § 425.16(e). This includes "[s]tatements made in litigation, or in connection with litigation." *Bergstein v. Stroock & Stroock & Lavan LLP*, 236 Cal. App. 4th 793, 803 (2015). Courts have found "'all communicative acts performed by attorneys as part of their representation of a client in a judicial proceeding or other petitioning context are per se protected as petitioning activity by the anti-SLAPP statute.'" *Kulkarni v. Upasani*, 659 F. App'x 937, 940 (9th Cir. 2016) (quoting *Contreras v. Dowling*, 5 Cal.App.5th 394, 409 (2016)).

"A cause of action 'arising from' defendant's litigation activity may appropriately be the subject of a section 425.16 motion to strike." *Rusheen v. Cohen*, 37 Cal. 4th 1048, 1056 (2006). Here, Mogan's claim for abuse of process falls within the first prong because it arises exclusively out of protected litigation activity. *See id.* (A claim for abuse of process arises from litigation activity because it "arises when one uses the court's process for a purpose other than that for which the process was designed."); *see also Booker v. Rountree*, 155 Cal. App. 4th 1366, 1370 (2007) ("that is the essence of the tort of abuse of process—some misuse of process in a prior action—and it is hard to imagine an abuse of process claim that would not fall under the protection of the statute."). Mogan alleges "Defendants' conduct amounts to an abuse of process because [the RSC] Defendants maliciously misused the first sanctions motion and letter sent over email and served upon Plaintiff at his office to accomplish a purpose not warranted by the law." Compl.

¶ 59; *see also id.* ¶¶ 60 ("Defendants' conduct and fraudulent preparation and service of the letter and first sanctions motion was done intentionally and with the purpose and ulterior motive of delaying the California court hearing for Plaintiff's motion to lift the stay . . . ."); 61 ("Defendants' conduct and fraudulent preparation and service of the sanctions motion upon Plaintiff was an improper use of the process in the litigation of the California proceedings between Plaintiff's client Veronica and [the Airbnb Defendants]."). These communications were all performed by the SRC Defendants as part of their representation of the Airbnb Defendants. His claim is based on "statements, writings and pleadings in connection with civil litigation [which] are covered by the anti-SLAPP statute." *Rohde v. Wolf*, 154 Cal. App. 4th 28, 35 (2007).

Mogan argues the "sanction motion and Ms. Young's declaration did not include the statements from the May 9, 2019 AAA email" and "the second sanctions motion Ms. Floyd now included a statement in her declaration '[f]irst, and foremost, the AAA's payment deadline was April 5, 2019 and Defendants' fees were paid on April 5. The AAA misapplied the payment to a different case, however, and administratively closed the file." SRC Opp'n at 7; *see also* Floyd Decl., ECF No. 26-3 at 71-73, Young Decl., ECF No. 26-3 at 78-81. However, Ms. Young's declaration, the original sanctions motion, and the filed sanctions motion all constitute "communicative acts performed by attorneys as part of their representation of a client in a judicial proceeding or other petitioning context are per se protected as petitioning activity by the anti-SLAPP statute." *Contreras*, 5 Cal. App. 5th at 409.

Mogan also argues the criminal illegality exception applies in this case. SRC Opp'n at 8. California courts have created a very narrow exception to the anti-SLAPP statute that does not provide protection for criminal conduct that has been conceded or is determinable as a matter of law based on uncontroverted evidence. *Flatley*, 39 Cal. 4th at 320. Mogan argues that exception applies here because "[t]he declarations include false testimony which is illegal as matter a matter of law and the Defendants should be prevented from arguing the sanctions motion filed requires the Court to strike Plaintiff's complaint under Cal. Civ. Pro. §425.16 for an unfiled motion." SRC Opp'n at 8. However, Mogan himself concedes that this exception is narrow and applies only to conduct that was either conceded by the moving party to be illegal or demonstrated by the

nonmoving party to be illegal as a matter of law. *See Flatley*, 39 Cal. 4th at 314; SRC Opp'n at 9. Neither has occurred here, and the mere allegation that the SRC Defendants engaged in criminally illegal conduct by following the sanctions procedure outlined in section 128.7 cannot withstand a motion to strike. *See Kashian*, 98 Cal. App. 4th at 911 (holding that the criminal illegality exception does not apply to conduct that is simply alleged to have been illegal: "If that were the test, the statute (and the [litigation] privilege) would be meaningless."). Indeed, "[n]umerous cases have held that the SLAPP statute protects lawyers sued for litigation-related speech and activity." *Thayer v. Kabateck Brown Kellner LLP*, 207 Cal. App. 4th 141, 154 (2012); *Huntingdon Life Scis., Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, 129 Cal. App. 4th 1228, 1245–46 (2005) ("Mere allegations that defendants acted illegally, however, do not render the anti-SLAPP statute inapplicable.").

As California courts have noted, "a plaintiff's complaint always alleges a defendant engaged in illegal conduct in that it violated some common law standard of conduct or statutory prohibition, giving rise to liability, and we decline to give plaintiffs a tool for avoiding the application of the anti-SLAPP statute merely by showing any statutory violation." *Mendoza v. ADP Screening & Selection Servs., Inc.*, 182 Cal. App. 4th 1644, 1654 (2010). Thus, to "conclusively establish" the conduct as illegal as a matter of law, Mogan must proffer "uncontroverted and conclusive evidence." *Flatley*, 39 Cal. 4th at 320. Mogan alleges that SRC's "letter was issued to extort funds from Plaintiff so he would send another filing fee to the AAA, not to engage in speech on a public issue." SRC Opp'n at 12 (citing *Garretson v. Post*, 156 Cal. App. 4th 1508, 1522–25 (2007) (holding act of noticing a nonjudicial foreclosure sale does not qualify as a protected activity under the anti-SLAPP statute because it is a private procedure without a close link "to any governmental, administrative, or judicial proceedings or regulation."). But "[e]xtortion is the obtaining of property from another, with his consent . . . induced by a wrongful use of force or fear." Cal. Pen. Code § 518. Here, the SRC Defendants attempted to meet and confer in connection with the first version of the sanctions motion, along with the June 10, 2019 cover letter sent with service of that motion, in accordance with California Civil Procedure Code § 128.7(c)(1). Serving a motion in compliance with the rules—a motion that was

ultimately granted by the superior court and affirmed on appeal—was a step in the litigation process. The Court also notes that the revised motion, which was served, filed, and granted, asserted substantively the same arguments as the previous version.

Further, Mogan has conceded that "[w]hether evidence of extortion exists is disputed as explained below but it is undisputed what the AAA stated in its May 9, 2019 email versus the misrepresentations in two separate declarations filed in state court." SRC Opp'n at 13; *see also id.* at 11 ("The Court must therefore determine whether the letter and sanctions motion are a writing made 'in connection with' the litigation between Ms. McCluskey and Defendant Airbnb employees pending in San Francisco Superior Court."). At most, Mogan alleges a fact which is in dispute and confirms the Court should move to the second prong of the analysis. *See Governor Gray Davis Com.*, 102 Cal. App. 4th at 460 (where "the legality of [a defendant's] exercise of a constitutionally protected right [is] in dispute in the action, the threshold element in a section 425.16 inquiry has been established."); *Seltzer v. Barnes*, 182 Cal. App. 4th 953, 965 (2010) (factually disputed allegation of fraud under Cal. Bus. & Prof. Code, § 6128 insufficient to meet *Flatley*).

In short, "but for the [SRC Defendant's] alleged actions taken in connection with that litigation, [Mogan's] present claims would have no basis. This action therefore falls squarely within the ambit of the anti-SLAPP statute's 'arising from' prong." *Navellier*, 29 Cal. 4th at 90. Accordingly, the Court finds the SRC Defendants have met the first step burden of showing their activity is protected under the anti-SLAPP statute.

b. Anti-SLAPP Step Two

The second prong shifts the burden back to Mogan and requires him "to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated." *Baral v. Schnitt*, 1 Cal. 5th 376, 396 (2016). The Rule 12(b)(6) standard for a motion to dismiss applies here because the SRC Defendants challenge the legal sufficiency of Mogan's complaint, arguing it is apparent on the face of the complaint that he cannot succeed. *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 834–35 (9th Cir.), *amended,* 897 F.3d 1224 (9th Cir. 2018) ("when an anti-SLAPP motion to strike challenges only the legal sufficiency

of a claim, a district court should apply the Federal Rule of Civil Procedure 12(b)(6) standard and consider whether a claim is properly stated."). They argue the conduct he challenges is privileged under California's litigation privilege, Cal. Civ. Proc. Code § 47. SRC Mot. at 8. As noted above, California's litigation privilege applies to "any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that [has] some connection or logical relation to the action." *Action Apartment Ass'n*, 41 Cal. 4th at 1241 (alteration in original); *see also* Cal. Civ. Code § 47(b).

Here, Mogan's allegations against the SRC Defendants are premised entirely on communications made as part of a judicial proceeding. In short, Mogan is suing the SRC Defendants because they represented a client, successfully used the procedure authorized under Code of Civil Procedure section 128.7 and were awarded sanctions which were not disturbed on appeal. As courts routinely recognize, 'it's hard to imagine an abuse of process claim that would not fall under the protection of the [Anti-SLAPP] statute." *Booker*, 155 Cal. App. 4th at 1370; *Thayer*, 207 Cal. App. 4th at 154 ("if the plaintiff is a nonclient who alleges causes of action against someone else's lawyer based on that lawyer's representation of other parties, the anti-SLAPP statute is applicable to bar such nonmeritorious claims"); *Asia Inv. Co. v. Borowski*, 133 Cal. App. 3d 832, 843 (Cal. Ct. App. 1982) (settlement proposals, even if "made in a manner which might be considered a veiled 'threat,'" are privileged); *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 936 (9th Cir. 2006) (same); *Blanchard v. DIRECTV, Inc.*, 123 Cal. App. 4th 903, 921-22 (2004) ("The litigation privilege is simply a test of connectedness or logical relationship to litigation," and noting that a party cannot avoid application of the privilege by arguing that statements were published to coerce a settlement); *Bergstein*, 236 Cal. App. 4th at 814 ("A plaintiff cannot establish a probability of prevailing if the litigation privilege precludes the defendant's liability on the claim."). As such, the Court finds Mogan's abuse of process claim is barred by the litigation privilege. *See Holland v. Jones*, 210 Cal. App. 4th 378, 382 (2012) ("statements, whether true or false or made with malice or without, in her declaration filed in the marital dissolution proceedings, on which Holland bases his defamation cause of action against

her, fall squarely within the litigation privilege."); *Chang v. Lederman*, 172 Cal. App. 4th 67, 87 (2009) ("letter to Chang directing her to leave the Sherman Oaks residence is absolutely protected under the litigation privilege codified in Civil Code section 47, subdivision (b), because it was sent to further the objectives of the probate proceedings initiated by Hadar"). The Court is satisfied that its conclusion is consistent with the public policy underpinnings of the litigation privilege; specifically, to ensure that attorneys "zealously protect their clients' interests" by "protect[ing] them from the fear of subsequent derivative actions for communications made in the context of judicial proceedings." *Edwards*, 53 Cal. App. 4th at 30.

c. Discovery

In the alternative, Mogan argues the Court cannot determine the merits of the SRC Defendants' motion because he has not been afforded a sufficient opportunity to conduct discovery on matters relevant to oppose the motion and demonstrate the merit of his claim. SRC Opp'n at 13-14. It is true that the Ninth Circuit requires a party opposing an anti-SLAPP motion be afforded the same right of discovery as a party opposing summary judgment under Rules 56(f) and (g). *See Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (reversing district court's granting of certain defendants' anti-SLAPP motions and remanding to the district court to, in part, permit discovery where information "in the defendants' exclusive control" may have been "highly probative to [plaintiff's] burden"); *Rogers v. Home Shopping Network, Inc.*, 57 F. Supp. 2d 973, 982 (C.D. Cal. 1999) ("Because the discovery-limiting aspects of § 425.16(f) and (g) collide with the discovery allowing aspects of Rule 56, these aspects of subsections (f) and (g) cannot apply in federal court"). However, Mogan has not shown how any discovery he seeks would have been material to establishing his claim was meritorious. Instead, he seeks discovery directed toward the merit of the claim he made in the underlying motion to lift the stay, i.e., that the Airbnb Defendants' AAA payment was not timely. *See* Mogan Decl.¶ 43, ECF 26-2 (seeking "all email correspondence between Defendants and Airbnb Inc. and the AAA between April 1, 2019 and May 31, 2019 concerning Ms. McCluskey's arbitration claim" which Mogan expects to "show Defendants knew all along the $7,500 payment was not made before May 1, 2019."). The timeliness of the payment, however, is not at issue here and was, in fact, the subject of the

underlying motion to lift the stay, the sanctions motion and the appeal. Regardless, no discovery is necessary here, where Mogan's claim is not viable as a matter of law because it is based upon conduct that "is clearly protected by California's litigation privilege." *Ekorus, Inc. v. Elohim EPF USA, Inc.*, 2020 WL 3891449, at *4 (C.D. Cal. 2020); *Semiconductor Equip. & Materials Int'l, Inc. v. The Peer Grp., Inc.*, 2015 WL 5535806, at *8 (N.D. Cal. Sept. 18, 2015) (denying request for discovery because "even if such evidence were uncovered in discovery, it would not overcome the litigation privilege.").

d. Summary

The Court concludes that the conduct that forms the basis of Mogan's complaint is protected activity under California's anti–SLAPP statute, and that the litigation privilege applies. Accordingly, because Mogan cannot prevail on the merits of these claims, the Court **GRANTS** the SRC Defendants' special motion to strike Mogan's abuse of process claim against them.

3. Attorney's Fees

For the first time in their reply brief, the SRC Defendants argue they should be awarded the fees they incurred "under the separate Noticed Motion." Reply at 3, 10. In any action subject to the anti-SLAPP statute, "a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." Cal. Code Civ. P. § 425.16(c); *Verizon Delaware v. Covad Comms.*, 377 F.3d 1081, 1091 (9th Cir. 2004); *Pinnacle Ventures LLC v. Bertelsmann Educ. Servs. LLC*, 2020 WL 1082764, at *2 (N.D. Cal. Mar. 6, 2020) ("Unless the plaintiff establishes a probability of prevailing on the claim, the court must grant the motion and ordinarily must also award the defendant its attorney's fees and costs.") (quoting *Barry*, 2 Cal. 5th at 320). However, the SRC Defendants did not move for attorney's fees as part of their motion to dismiss, and there is no "separate Noticed Motion" on the docket. Accordingly, the request is denied without prejudice.

VI. CONCLUSION

For the reasons stated above, the Court **GRANTS** the SRC and Airbnb Defendants' motions to dismiss. As leave to amend would be futile, dismissal is with prejudice. The Court shall enter a separate judgment, after which the Clerk of Court shall terminate this matter. If the

SRC Defendants seek attorney's fees, they shall file any motion by February 10, 2022.

IT IS SO ORDERED.

Dated: January 10, 2022

THOMAS S. HIXSON
United States Magistrate Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MICHAEL MOGAN,

Plaintiff,

v.

SACKS, RICKETTS & CASE LLP, et al.,

Defendants.

Case No. 21-cv-08431-TSH

ORDER RE: MOTION FOR SANCTIONS; MOTION TO DECLARE PLAINTIFF A VEXATIOUS LITIGANT

Re: Dkt. Nos. 32, 34

I. INTRODUCTION

Plaintiff Michael Mogan, an attorney licensed in California, brought this case against Airbnb and three of its employees, Jeff Henry, Dave Willner and Sanaz Ebrahini (collectively, "Defendants") for claims related to a sanction award against him in an underlying state court action brought on behalf of a client. The Court previously dismissed the case, and Defendants now move for sanctions and an order declaring Mogan a vexatious litigant. ECF Nos. 32 (sanctions motion), 34 (vexatious litigant motion). Mogan filed an Opposition to the sanctions motion (ECF No. 37), but not the vexatious litigant motion. Defendants filed a Reply (ECF No. 45). The Court finds these matters suitable for disposition without oral argument and **VACATES** the February 3, 2022 hearing. *See* Civ. L.R. 7-1(b). Having considered the parties' positions, relevant legal authority, and the record in this case, the Court **GRANTS** Defendants' motion for sanctions and **DENIES** their motion to declare Mogan a vexatious litigant for the following reasons.[1]

[1] The parties have consented to magistrate judge jurisdiction pursuant to 28 U.S.C. § 636(c). ECF Nos. 8, 18, 23.

II. BACKGROUND

The facts of the action are well known to the parties, and the Court has previously summarized the background of this case in its January 10, 2022 Order Granting Motions to Dismiss (the "MTD Order"). ECF No. 38; *Mogan v. Sacks, Ricketts & Case LLP*, 2022 WL 94927 (N.D. Cal. Jan. 10, 2022). The Court incorporates by reference the factual background set forth in the MTD Order.[2]

III. SANCTIONS

Defendants move the Court to award Federal Rule of Civil Procedure 11 sanctions against Mogan in the form of an order to pay their reasonable attorney's fees incurred in this matter. They argue the complaint is sanctionable because it is frivolous and baseless, and no reasonable attorney would have found the complaint to be well-founded after conducting a reasonable and competent inquiry. Mot. at 8-10. They further argue sanctions are appropriate because the complaint was brought for an improper purpose, namely to harass and retaliate against those involved in his defeats in prior litigation. *Id.* at 10-11.

A. Legal Standard

Rule 11 of the Federal Rules of Civil Procedure imposes upon attorneys a duty to certify that they have read any pleadings or motions they file with the court and that such pleadings/motions are well-grounded in fact, have a colorable basis in law, and are not filed for an improper purpose. Fed. R. Civ. P. 11(b); *Bus. Guides, Inc. v. Chromatic Commc'ns Enterprises, Inc.*, 498 U.S. 533, 542 (1991). Frivolous filings, or filings made for improper purpose, undermine this certification. *Est. of Blue v. Cty. of Los Angeles*, 120 F.3d 982, 985 (9th Cir. 1997); *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362-63 (9th Cir. 1990). Frivolous filings are both (1) objectively legally or factually baseless; and (2) made without a reasonable and competent inquiry. *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002); *Buster v. Greisen*, 104 F.3d 1186, 1190 (9th Cir. 1997), *as amended on denial of reh'g* (Mar. 26, 1997). Similarly, whether a filing is made for an improper purpose is judged objectively. *Townsend*, 929

[2] For the reasons stated in that order, the Court also grants the parties' requests for judicial notice.

F.2d at 1362. If an attorney violates Rule 11(b), courts may impose appropriate sanctions under Rule 11(c)(1). Sanctions do not require a finding of bad faith, but under Rule 11(c)(4) they are limited to what is sufficient to deter repetition of the sanctioned conduct.

"Rule 11 is an extraordinary remedy, one to be exercised with extreme caution." *Operating Eng'rs Pension Tr. v. A-C Co.*, 859 F.2d 1336, 1345 (9th Cir. 1988). Thus, in determining whether Rule 11 has been violated, a "court must consider factual questions regarding the nature of the attorney's pre-filing inquiry and the factual basis of the pleading." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 399 (1990). However, courts should "avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted." Fed. R. Civ. P. 11 Advisory Comm. Notes (1983 Amendment). "[T]he imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate." *Cooter*, 496 U.S. at 396.

B. Analysis

Defendants argue Mogan's complaint is baseless because all seven causes of action are barred by the preclusive effect of the state court's rulings on the motion to lift the stay and the motion for sanctions in the underlying state court action. The Court agrees. As this Court discussed in its previous order on Defendants' motion to dismiss, the state trial court found that Airbnb had timely paid its arbitration fee, that the "American Arbitration Association made a clerical error by misapplying defendants' timely fees" and administratively closing the case, and that Mogan failed to respond to AAA's repeated request for him to confirm that his client wanted to reopen her case. *Mogan*, 2022 WL 94927, at *7; *see also* Taylor Decl. Ex. 21, ECF No. 34-22.[3] The court admonished Mogan's client, Veronica McCluskey, saying that it would "not allow [her] to take advantage of the AAA's clerical error and her own lengthy delays in order to evade her contractual obligation to arbitrate her claims, if she wishes to pursue them." Taylor Decl. Ex. 20,

[3] The Court took judicial notice of the state court's order and other related documents in its previous order. MTD Order at 2-3; *Mogan*, 2022 WL 94927, at *1-2.

ECF No. 34-21. On Defendants' motion for sanctions, the superior court found Mogan's motion to lift the stay "was both factually and legally frivolous" and that the "contention that defendants were in 'default' in the arbitration proceedings was entirely lacking in either evidentiary or legal support." *Id.*, Ex. 21. The court reiterated that AAA misapplied the timely fees paid by Airbnb and that Mogan "sought to take advantage of the AAA's clerical error and [McCluskey's] own lengthy delays in order to evade her contractual obligation to arbitrate her claims and to avoid the effect of the Court's earlier order granting defendants' motion to compel arbitration." *Id.* Additionally, the court's order admonished Mogan personally for his "baseless and unprofessional" accusations that Airbnb lied and committed fraud upon the court with respect to the timeliness of the payments. *Id.* As a result, Mogan was sanctioned $22,159.50 for the fees incurred by Airbnb in opposing the motion. *Id.* The state appellate court affirmed this award, noting, among other things, that Mogan's motion to lift the stay was a "clear contradiction of the order compelling arbitration." *Id.*, Ex. 23 at 12, ECF No. 34-23. The appellate court also reasoned that "[n]o reasonable attorney could conclude, as Mogan contends, that AAA had determined the case would not be reopened due to defendants' conduct." *Id.* at 16.

Despite the state courts' rulings, Mogan brought seven counts in this case, ranging from abuse of process and unfair business practices to conspiracy and racketeering—premised on the allegations that (1) Airbnb failed to pay its arbitration fee on time and lied about it, and (2) Airbnb sought sanctions for improper purposes like harassment and extortion. Because these allegations have already been rejected on multiple occasions in state court, a complaint premised on the same allegations is frivolous. As noted in its previous order, not only do Mogan's five state law claims fail under California's litigation privilege, Cal. Civ. Code § 47(b), but all seven of his claims are also barred by the doctrine of issue preclusion because they were brought after final adjudication of these issues in state court. *Mogan*, 2022 WL 94927, at *5-9; *see Buster*, 104 F.3d at 1190 (Rule 11 sanctions proper where claims barred by issue preclusion) (citing *In re Grantham Brothers*, 922 F.2d 1438, 1442 (9th Cir. 1991) (collateral attack with no basis in law or fact is frivolous under Rule 11), *cert. denied*, 502 U.S. 826 (1991)); *Maciosek v. Blue Cross & Blue Shield United of Wisconsin*, 930 F.2d 536, 542 (7th Cir. 1991) (finding that Rule 11 sanctions can be awarded

when parties assert the same or similar claims in lawsuits raising claims previously decided in other cases); *Welk v. GMAC Mortg., LLC*, 720 F3d 736, 738-39 (8th Cir. 2013) (same); *Roberts v. Chevron*, 117 F.R.D. 581 (M.D. La. 1987) (bringing state court action attacking prior federal judgment and failing to dismiss after removal justified Rule 11 sanctions; reasonable inquiry would have shown that res judicata barred action), *aff'd*, 857 F.2d 1471 (5th Cir. 1988)).

Further, the Court finds that no reasonable attorney would have found the complaint to be well-founded after conducting a reasonable and competent inquiry. *See Estate of Blue*, 120 F.3d at 985 ("When a reasonable investigation would reveal that a claim is barred by res judicata or collateral estoppel, for example, Rule 11 sanctions may be imposed within the district court's discretion."). "The reasonable inquiry test is meant to assist courts in discovering whether an attorney, after conducting an objectively reasonable inquiry into the facts and law, would have found the complaint to be well-founded." *Holgate v. Baldwin*, 425 F.3d 671, 677 (9th Cir. 2005). "It is well-settled in the Ninth Circuit that the filing of 'successive complaints based upon propositions of law previously rejected may constitute harassment under Rule 11.'" *Kaufman v. Int'l Long Shore & Warehouse Union*, 2017 WL 3335760, at *5 (N.D. Cal. Aug. 4, 2017) (quoting *Buster*, 104 F.3d at 1190).

Here, Mogan had no need to conduct an inquiry into the facts because he personally experienced them while litigating the underlying state court cases. He was personally sanctioned for moving to lift the stay based on the purported untimeliness of Airbnb's arbitration payment and admonished for his unprofessional claims that Airbnb and its counsel were lying about the timing of Airbnb's payment. Taylor Decl., Exs. 21-23. Likewise, he is well aware that Airbnb's sanctions motion was granted for the reasons stated in the court's order, yet he still claims that the motion was brought solely for improper purposes. No reasonable attorney would, after such sanctions and admonitions, think that claims premised on those very facts, even when embellished into new theories, would form a "well-founded" complaint. Moreover, a reasonable inquiry into the law would have revealed that Airbnb's alleged conduct underlying the complaint was protected against his state law claims by California's litigation privilege. *See Bletas v. Deluca*, 2011 WL 13130879, at *11 (S.D.N.Y. Nov. 15, 2011) (concluding that pro se plaintiffs failed to

undertake a reasonable inquiry into the governing law and sanctioning them for bringing claims premised on privileged statements made in arbitration and court proceedings).

Finally, the complaint is also sanctionable because it was brought for an improper purpose. The Ninth Circuit has held that "efforts to relitigate [a] prior case . . . support[s] a finding of harassment." *Buster*, 104 F.3d at 1190.[4] Here, Mogan attempted to relitigate numerous prior cases, simply refusing to accept prior rulings in Defendants' favor. After being sanctioned in state court and admonished for his false and unprofessional accusations, the Court finds Mogan's complaint offers no reasonable basis for which an action could proceed, and his sole purpose is to harass and retaliate against Defendants. These litigation tactics warrant sanctions under Rule 11.

Mogan argues Defendants failed in their motion to dismiss to argue that California's litigation privilege applies to allegations in his complaint regarding a draft motion for sanctions they served but did not file in the state court action. Opp'n at 7. However, a review of the motion to dismiss shows that Defendants argued the litigation privilege applies to "all of Airbnb's alleged conduct that underlies the Complaint." Mot. to Dismiss at 9, ECF No. 12. And as the Court affirmed in its dismissal order, the litigation privilege applies to all of the state causes of action in Mogan's complaint because each relies exclusively on allegations related to communications made in litigation or arbitration to achieve the objects of litigation or arbitration. MTD Order at 7-10; *Silberg v. Anderson*, 50 Cal. 3d 205, 212 (1990) (the privilege "applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved."). This is true of all the complaint's factual allegations as they pertain to the state-law causes of action, including those related to the "sanctions motion never filed in state court and the arbitration proceedings," Opp'n at 7, and any other emails sent or communications made while litigating or arbitrating the underlying matters, *id.* at 10. Further, as the Court affirmed in dismissing this action, Mogan's remaining federal-law claims are barred by

[4] In his opposition, Mogan argues that *Buster* is inapposite because his complaint is not barred by issue preclusion, whereas the complaint underlying *Buster* was. Opp'n at 12-13. However, Mogan's claims are barred by issue preclusion. *See* MTD Order at 10-15.

issue preclusion, and so those arguments also fail. MTD Order at 10-15. For these reasons, no licensed California attorney could file a complaint based on these privileged communications and legally barred issues in good faith after conducting an objectively reasonable inquiry into the facts and law. *Holgate*, 425 F.3d at 677 ("Even the most cursory legal inquiry would have revealed the required elements of the federal claims asserted, elements that the Holgates' complaint did not allege.") (citing *Truesdell v. S. Cal. Permanente Med. Group*, 293 F.3d 1146, 1153 (9th Cir. 2002)).

Mogan also argues Defendants' motion "is fatally flawed" because it does "not discuss[] each of Plaintiff's claims in the complaint even in summary form." Opp'n at 10. This argument is without merit, as the motion addresses the inadequacies of each of the seven causes of action in light of the litigation privilege and issue preclusion. Belaboring the merits of each individual claim was unnecessary given that Mogan is barred from bringing all of them. Mogan also asserts that Defendants "do not claim the [complaint's] allegations are utterly lacking in support." *Id.* at 8. However, Defendants have, in fact argued that Mogan's claims utterly lack support. *See, e.g.*, Mot. at 1 ("Mogan's Complaint before this Court brings outlandish causes of actions premised entirely upon facts already rejected in state court—claims for which he was previously sanctioned."); *id.* at 8-9 (arguing that the complaint's allegations are entirely barred by issue preclusion and the California litigation privilege). That is the central argument of all of Defendants' briefing.

Mogan contends Defendants gave inadequate notice of their intent to seek sanctions and that the Rule 11 motion did not describe the specific conduct they challenge. Opp'n at 9. However, Defendants served the motion on Mogan more than 24 days before they filed it, to account for Rule 11's 21-day safe harbor plus a three-day extension for service by mail. Fed. R. Civ. P. 11(c)(2), 6(d); *see also* ECF No. 33 (Proof of Service). The motion described the "specific conduct" Defendants challenge: the filing of his complaint in this case. The reasons for challenging the complaint are also made clear in Defendants' briefing. For example, the motion states:

> Mogan has been repeatedly defeated in arbitration, state court, and

> federal court, both on the merits of his client's claims and in the secondary squabbles about whether his client must arbitrate and whether Airbnb timely paid its arbitration fee. Mogan nonetheless refuses to accept the courts' and arbitrators' rulings and now brings yet another action on the same grounds, this time suing in his personal capacity and repackaging his claims using nonsensical conspiracy and racketeering theories. The allegations underlying these claims—that Airbnb filed its arbitration fee late and that Airbnb had an improper purpose in moving for sanctions—have been repeatedly rejected in state court.

Mot. at 7. The motion also argues that the complaint's allegations are barred by issue preclusion and California's litigation privilege, as well as for the remaining reasons explained in the motion to dismiss. *Id.* at 8-9. Thus, Mogan had adequate notice of Defendants' intent to seek sanctions and the specific conduct at issue.

In sum, the Court finds Mogan's complaint was frivolous and therefore grants Defendants' motion to sanction him under Rule 11.[5] The Court agrees that an award of reasonable fees and costs is an appropriate deterrent here. As the Ninth Circuit has explained, an award of attorney fees can be "an appropriate deterrent to future frivolous suits." *Cook v. Peter Kiewit Sons Co.*, 775 F.2d 1030, 1037 (9th Cir. 1985) (quoting *Callow v. Amerace Corp.*, 681 F.2d 1242, 1243 (9th Cir. 1982)) (affirming sanctions). As Defendants have submitted no evidence of their fees and costs, they shall file a separate motion, bearing in mind that fee awards under Rule 11 are subject to two conditions. First, the fee award is limited to fees "directly resulting from the violation." Fed. R. Civ. P. 11(c)(4). Second, the fees to be awarded must be reasonable. *See* Fed. R. Civ. P. 11(c)(2), (4) (Rule 11 permits recovery of "all of the reasonable attorney's fees and other expenses directly resulting from the violation" and for "the reasonable expenses, including attorney's fees, incurred for the [sanctions] motion."). Courts typically determine reasonableness by conducting a lodestar analysis of the hours expended and the hourly rate charged. *See McGrath v. Cty. of*

[5] As part of his opposition, Mogan asks the Court to rule that Defendants' Rule 11 motion "is itself frivolous and was filed for malicious and improper purposes," and he therefore "seeks costs and sanctions for having to file this opposition or a sanction payable to the Court and non-monetary sanctions" under Rule 11. Opp'n at 13-14. As an initial matter, Mogan's request cannot be entertained because it violates Rule 11's procedural requirements. Fed. R. Civ. P. 11(c)(2) ("A motion for sanctions must be made separately from any other motion . . . . The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper . . . is withdrawn or appropriately corrected within 21 days after service . . . ."). Regardless, given the success of Defendants' motion, this argument is without merit.

Nevada, 67 F.3d 248, 252 (9th Cir. 1995) (citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983)).

In addition, "[a] sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(4). And sanctions may not be imposed for expenses incurred in proceedings bearing only an "attenuated" relation to the sanctionable conduct. *See Lloyd v. Schlag*, 884 F.2d 409, 415 (9th Cir. 1989) (finding that a motion to reopen and amend bore only "attenuated" relation to frivolous complaint previously filed). "A district court should [also] exclude from the lodestar amount hours that are not reasonably expended because they are excessive, redundant, or otherwise unnecessary." *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1045 (9th Cir. 2000) (citation and internal quotation marks omitted).

IV. VEXATIOUS LITIGANT

Defendants also move the Court to declare Mogan a vexatious litigant, to impose pre-filing restrictions against him pursuant to the Court's inherent power to control vexatious litigants, and to impose pre-filing sanctions against him pursuant to the Court's inherent power to regulate attorneys' abusive or bad-faith litigation practices. ECF No. 34.

A. Legal Standard

Federal courts can "regulate the activities of abusive litigants by imposing carefully tailored restrictions under . . . appropriate circumstances." *De Long v. Hennessey*, 912 F.2d 1144, 1147 (9th Cir. 1990) (quotation marks omitted). The All Writs Act, 28 U.S.C. § 1651(a), provides district courts with the inherent power to enter pre-filing orders against vexatious litigants. *See also De Long*, 912 F.2d at 1147 ("enjoining litigants with abusive and lengthy [litigation] histories is one such . . . restriction" that courts may impose). "Restricting access to the courts is, however, a serious matter." *Ringgold-Lockhart v. Cty. of Los Angeles*, 761 F.3d 1057, 1061 (9th Cir. 2014). Thus, "[o]ut of regard for the constitutional underpinnings of the right to court access, 'pre-filing orders should rarely be filed,' and only if courts comply with certain procedural and substantive requirements." *Id.* (quoting *De Long*, 912 F.2d at 1147). When district courts seek to impose pre-filing restrictions, they must: (1) give litigants notice and "an opportunity to oppose the order before it [is] entered"; (2) compile an adequate record for appellate review, including "a listing of

all the cases and motions that led the district court to conclude that a vexatious litigant order was needed"; (3) make substantive findings of frivolousness or harassment; and (4) tailor the order narrowly so as "to closely fit the specific vice encountered." *De Long*, 912 F.2d at 1147-48.

B. Analysis

In deciding whether to enter a pre-filing order constraining a litigant's scope of actions in future cases, the Court must engage in "a cautious review of the pertinent circumstances." *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1057 (9th Cir. 2007). Having done so here, the Court does not believe such an order is warranted. First, Mogan has filed only two cases in this District, and this is the only one brought against the Airbnb defendants. "[T]wo cases is far fewer than what other courts have found 'inordinate.'" *Ringgold-Lockhart*, 761 F.3d R 1065 ("Whether a litigant's motions practice in two cases could ever be so vexatious as to justify imposing a pre-filing order against a person, we do not now decide. Such a situation would at least be extremely unusual, in light of the alternative remedies available to district judges to control a litigant's behavior in individual cases."). Second, these appear to be the only cases Mogan has filed on behalf of himself. Even if the Court were to consider Mogan's client's state court cases against Defendants, they number far fewer than the number of cases the Ninth Circuit has found meet the standard for declaring a vexatious litigant. *See id.* (citing *Molski*, 500 F.3d at 1060 (roughly 400 similar cases); *Wood v. Santa Barbara Chamber of Com., Inc.*, 705 F.2d 1515, 1523, 1526 (9th Cir. 1983) (35 actions filed in 30 jurisdictions); *In re Oliver*, 682 F.2d 443, 444 (3d Cir. 1982) (more than 50 frivolous cases); *In re Green*, 669 F.2d 779, 781 (D.C. Cir. 1981) (per curiam) (between 600 and 700 complaints)). Finally, while much of Defendants' argument focuses on the related arbitration and state court proceedings, it is unclear how declaring Mogan a vexatious litigant and imposing a pre-filing order against him in this District would affect proceedings in those jurisdictions. Accordingly, the Court denies Defendants' motion to declare Mogan a vexatious litigant.[6]

[6] Mogan's motion to extend time to file an opposition to Defendants' motion (ECF No. 46) is therefore denied as moot.

V. CONCLUSION

For the reasons stated above, the Court **GRANTS** Defendants' motion for sanctions in the form of attorney's fees and costs. As instructed above, Defendants shall file a separate motion by February 10, 2022. Defendants' motion to declare Mogan a vexatious litigant is **DENIED**. However, the Court advises Mogan that if he files another action against Defendants premised on the same transactional nucleus of facts, the Court will be more likely to entertain a request to subject him to a pre-filing injunction pursuant to 28 U.S.C. § 1651(a).

IT IS SO ORDERED.

Dated: January 12, 2022

THOMAS S. HIXSON
United States Magistrate Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MICHAEL MOGAN,

Plaintiff,

v.

SACKS, RICKETTS & CASE LLP, et al.,

Defendants.

Case No. 21-cv-08431-TSH

ORDER DISREGARDING WITHDRAWAL OF MAGISTRATE JUDGE CONSENT

Re: Dkt. No. 63

On November 13, 2021, Plaintiff Michael Mogan filed a consent to have a United States magistrate judge conduct all further proceedings in this case, including trial and entry of final judgment, pursuant to 28 U.S.C. § 636(c). ECF No. 8. However, he subsequently filed a request for reassignment on February 11, 2022. ECF No. 63.

A party to a federal civil case has, subject to some exceptions, a constitutional right to proceed before an Article III judge. *Dixon v. Ylst*, 990 F.2d 478, 479 (9th Cir. 1993) (citation omitted). The right to an Article III court can be waived, allowing parties to consent to trial before a magistrate judge. *Id.* at 479-80; 28 U.S.C. § 636(c)(1). Once a civil case is referred to a magistrate judge under section 636(c), the reference can be withdrawn only by the court, and only "for good cause shown on its own motion, or under extraordinary circumstances shown by any party." *Dixon*, 990 F.2d at 480 (simplified). "In ruling on a motion to withdraw consent, courts consider factors including timeliness, whether granting the motion would unduly interfere with or delay the proceedings, the burdens and costs to litigants, and whether consent was voluntary and uncoerced." *Quinn v. Centerplate*, 2014 WL 2860666, at *3 (N.D. Cal. June 23, 2014) (citing *United States v. Neville*, 985 F.2d 992, 1000 (9th Cir. 1993)). "There is no absolute right, in a civil case, to withdraw consent to trial and other proceedings before a magistrate judge." *Dixon*,

990 F.2d at 480.

Here, Mogan has not shown good cause or extraordinary circumstances to withdraw his consent. Further, judgment has already been entered, the only matters pending are Defendants' attorneys' fees motions, and allowing Mogan to withdraw his consent now would only delay the proceedings. Accordingly, no reassignment shall occur. *See, e.g., McCracken v. Wells Fargo Bank NA*, 2017 WL 6209178, at *1 (N.D. Cal. May 6, 2017) (noting that allowing withdrawal of consent would delay the proceedings); *Malasky v. Julian*, 2018 WL 4679958, at *3 (N.D. Cal. Sept. 24, 2018) (disregarding withdrawal of consent where no good cause or extraordinary circumstances shown).

IT IS SO ORDERED.

Dated: February 11, 2022

THOMAS S. HIXSON
United States Magistrate Judge

United States District Court
Northern District of California

§ 636. Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate judge serving under this chapter shall have within the district in which sessions are held by the court that appointed the magistrate judge, at other places where that court may function, and elsewhere as authorized by law--

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgements, affidavits, and depositions;

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section;

(4) the power to enter a sentence for a petty offense; and

(5) the power to enter a sentence for a class A misdemeanor in a case in which the parties have consented.

(b)(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial1 relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties

Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the

report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

(2) A judge may designate a magistrate judge to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate judge to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrate judges shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary--

(1) Upon the consent of the parties, a full-time United States magistrate judge or a part-time United States magistrate judge who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment

in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate judge may exercise such jurisdiction, if such magistrate judge meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate judge is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate judge is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate judge to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate judge may again advise the parties of the availability of the magistrate judge, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States

court of appeals from the judgment of the magistrate judge in the same manner as an appeal from any other judgment of a district court. The consent of the parties allows a magistrate judge designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate judge under this subsection.

(5) The magistrate judge shall, subject to guidelines of the Judicial Conference, determine whether the record taken pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means.

(d) The practice and procedure for the trial of cases before officers serving under this chapter shall conform to rules promulgated by the Supreme Court pursuant to section 2072 of this title.

(e) Contempt authority.--

(1) In general.--A United States magistrate judge serving under this chapter shall have within the territorial jurisdiction prescribed by the appointment of such magistrate judge the power to exercise contempt authority as set forth in this subsection.

(2) Summary criminal contempt authority.--A magistrate judge shall have the power to punish summarily by fine or imprisonment, or both, such contempt of the authority of such magistrate judge constituting misbehavior of any person in the magistrate judge's presence so as to obstruct the administration of justice. The order of contempt shall be issued under the Federal Rules of Criminal Procedure.

(3) Additional criminal contempt authority in civil consent and misdemeanor cases.--In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge shall have the power to punish, by fine or imprisonment, or both, criminal contempt constituting disobedience or resistance to the magistrate judge's lawful writ, process, order, rule, decree, or command. Disposition of such contempt shall be conducted upon notice and hearing under the Federal Rules of Criminal Procedure.

(4) Civil contempt authority in civil consent and misdemeanor cases.--In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge may exercise the civil contempt authority of the district court. This paragraph shall not be construed to limit the authority of a magistrate judge to order sanctions under any other statute, the Federal Rules

of Civil Procedure, or the Federal Rules of Criminal Procedure.

(5) Criminal contempt penalties.--The sentence imposed by a magistrate judge for any criminal contempt provided for in paragraphs (2) and (3) shall not exceed the penalties for a Class C misdemeanor as set forth in sections 3581(b)(8) and 3571(b)(6) of title 18.

(6) Certification of other contempts to the district court.--Upon the commission of any such act--

(A) in any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, or in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, that may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection, or

(B) in any other case or proceeding under subsection (a) or (b) of this section, or any other statute, where--

(i) the act committed in the magistrate judge's presence may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection,

(ii) the act that constitutes a criminal contempt occurs outside the presence of the magistrate judge, or

(iii) the act constitutes a civil contempt,

the magistrate judge shall forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into question under this paragraph, an order requiring such person to appear before a district judge upon a day certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge.

(7) Appeals of magistrate judge contempt orders.--The appeal of an order of contempt under this subsection shall be made to the court of appeals in cases proceeding under subsection (c) of this section. The appeal of any other order of contempt issued under this section shall be made to the district court.

(f) In an emergency and upon the concurrence of the chief judges of the districts involved, a United States magistrate judge may be temporarily assigned to perform any of the duties specified in subsection (a), (b), or (c) of this section in a judicial district other than the judicial district for which he has been appointed. No magistrate judge shall perform any of such duties in a district to which he has been temporarily assigned until an order has been issued by the chief judge of such district specifying (1) the emergency by reason of which he has been transferred, (2) the duration of his assignment, and (3) the duties which he is authorized to perform. A magistrate judge so assigned shall not be entitled to additional

compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of his duties in accordance with section 635.
(g) A United States magistrate judge may perform the verification function required by section 4107 of title 18, United States Code. A magistrate judge may be assigned by a judge of any United States district court to perform the verification required by section 4108 and the appointment of counsel authorized by section 4109 of title 18, United States Code, and may perform such functions beyond the territorial limits of the United States. A magistrate judge assigned such functions shall have no authority to perform any other function within the territory of a foreign country.

(h) A United States magistrate judge who has retired may, upon the consent of the chief judge of the district involved, be recalled to serve as a magistrate judge in any judicial district by the judicial council of the circuit within which such district is located. Upon recall, a magistrate judge may receive a salary for such service in accordance with regulations promulgated by the Judicial Conference, subject to the restrictions on the payment of an annuity set forth in section 377 of this title or in subchapter III of chapter 83, and chapter 84, of title 5 which are applicable to such magistrate judge. The requirements set forth in subsections (a), (b)(3), and (d) of section 631, and paragraph (1) of subsection (b) of such section to the extent such paragraph requires membership of the bar of the location in which an individual is to serve as a magistrate judge, shall not apply to the recall of a retired magistrate judge under this subsection or section 375 of this title. Any other

requirement set forth in section 631(b) shall apply to the recall of a retired magistrate judge under this subsection or section 375 of this title unless such retired magistrate judge met such requirement upon appointment or reappointment as a magistrate judge under section 631.

§ 425.16. Anti-SLAPP motion

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b)(1) 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.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that the plaintiff will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

(c)(1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover that defendant's attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(2) A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section 11130, 11130.3, 54960, or 54960.1 of the Government Code, or pursuant to Chapter 2 (commencing with Section 7923.100) of Part 4 of Division 10 of Title 1 of the Government Code. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs pursuant to Section 7923.115, 11130.5, or 54960.5 of the Government Code.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "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" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (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, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(j)(1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by email or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

Federal Rules of Civil Procedure Rule 11

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name--or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have

evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.

(1) In General. If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) Motion for Sanctions. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) On the Court's Initiative. On its own, the court may order an attorney, law firm, or party to show

cause why conduct specifically described in the order has not violated Rule 11(b).

(4) Nature of a Sanction. A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) Limitations on Monetary Sanctions. The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) Requirements for an Order. An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.