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SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

FREMONT AUTOMOBILE DEALERSHIP, LLC, D/B/A FREMONT TOYOTA, and HANK TORIAN, Plaintiff, v. BRIAN MARTIN, ROBERT KIRALY, and DOES 1-50, Defendants.	Case No.: 22CV006171 ASSIGNED FOR ALL PURPOSES TO JUDGE DELBERT GEE DEPARTMENT 514 **DEFENDANT ROBERT KIRALY'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STRIKE COMPLAINT PURSUANT TO CODE OF CIVIL PROCEDURE § 425.16** Date: May 27, 2022 Time: 2:00 p.m. Reservation No.: 996312152773

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I. INTRODUCTION

This matter arises out of websites published by Defendant Robert Kiraly ("Kiraly") which express constitutionally-protected opinions regarding Plaintiffs Fremont Automobile Dealership LLC d/b/a Fremont Toyota and Hank Torian[1] (collectively, Plaintiffs"). In an effort to chill Kiraly's exercise of his free speech rights, Plaintiffs have filed a Complaint against Kiraly which purports to allege causes of action for injunctive relief, appropriate name and likeness, defamation, stalking, invasion of privacy, and civil conspiracy. Kiraly hereby moves to the strike the Complaint pursuant to Code of Civil Procedure § 425.16 on the ground that each of the causes of action arises out of written statements made in a public forum in connection with an issue of public interest, and is meritless.

II. FACTUAL BACKGROUND

A. The Parties

Plaintiff Fremont Automobile Dealership, LLC d/b/a Fremont Toyota ("Fremont Toyota") is an automobile dealership. Plaintiff Henry Khachaturian aka "Hank Torian", is the late owner of Fremont Toyota. (Declaration of Robert Kiraly ("Kiraly Decl.") ¶ 2.)

Kiraly is a graduate of the University of California, Berkeley, and a software architect with 44 years of professional experience including work in anti-terrorism, data forensics, CCPA and HIPAA privacy enforcement, and the detection of fraud of different types for two national chains. Over the past decade, he has spent a significant amount of time on fraud detection in particular. (Kiraly Decl. ¶ 3.)

Defendant Brian Martin ("Martin") is a licensed private investigator in the San Francisco Bay Area. (Kiraly Decl. ¶ 4.)

B. The Loan Fraud at Fremont Toyota

In December 2020, Martin purchased a Toyota Tacoma from Fremont Toyota. In connection

[1] Hank Torian, also known as Henry Khachaturian died on May 11, 2021, and is improperly named as a plaintiff in this case. (*See* Code Civ. Proc. § 377.30 [A cause of action that survives the death of the person entitled to commence an action or proceeding passes to the decedent's successor in interest, subject to Chapter 1 (commencing with Section 7000) of Part 1 of Division 7 of the Probate Code, and an action may be commenced by the decedent's personal representative or, if none, by the decedent's successor in interest."].)

with the vehicle purchase, Fremont Toyota provided Martin with a forged document that Fremont Toyota claimed evidenced Martin's agreement to pay $9,995 more than had actually been agreed to. Kiraly's understanding was that this worked out to about $6,000 in terms of the actual net cost to Martin. In fact, the forged document didn't even purport to be an agreement. It was just an electronic copy of a signature pasted onto a copy of a price sticker. There was nothing about an agreement other than the hand-scrawled words "Market Adjust". The figures didn't add up. In short, this was not simply loan fraud but an unusually clear and inept example of the practice. (Kiraly Decl. ¶ 5.)

Martin first noticed the loan fraud in Spring 2021 when he looked into discrepancies in the paperwork. Shortly afterward, in mid-2021, he asked Kiraly to determine whether or not there was evidence that confirmed the issue existed. Kiraly agreed to look as a personal favor and in the public interest. Kiraly determined, based on his professional experience in fraud detection and his analysis of the data, that loan fraud had certainly occurred. He elected to put the story online for the purpose of protecting automobile consumers from being defrauded by Fremont Toyota. (Kiraly Decl. ¶ 6.)

C. <u>The Websites</u>

Ultimately, Kiraly put three websites online: fremonttoyota.org, markhashimi.org, and christinelong.attorney. He created a number of alternate domain names as well. The alternate domain names simply linked to the original three sites. (Kiraly Decl. ¶ 7.)

The fremonttoyota.org and markhashimi.org set forth Kiraly's opinions "that Fremont-Toyota side has committed auto loan fraud against multiple unwary Toyota buyers" including co-Defendant Brian Martin. The websites offer advice to auto buyers, including to "Be suspicious of every dealership regardless of history unless you trust a particular sales-person" and to "nail down the numbers." The websites further recommend that the public: "Never buy from a dealership that has a history of fraud or abuse of different types. This includes Fremont-Toyota of Fremont, California. The rhyme to remember is: Stay away or be prey." (Kiraly Decl. ¶ 8.)

The third website, christinelong.attorney, discusses, as well, the retaliation that Fremont-Toyota customers may face if they talk publicly about loan fraud. (Kiraly Decl. ¶ 9.)

Two people came forward to Kiraly to comment regarding Fremont Toyota. Their statements suggested that the loan fraud issue wasn't limited to Mr. Martin's experience and that the general

public was at risk. (Kiraly Decl. ¶ 10.)

One person was a woman, Sandra Melendez, who was falsely said to have agreed to a $9,995 markup, the same number that had appeared in the forged document in Mr. Martin's case. Kiraly looked at the evidence that Melendez was sending to attorneys at the time. It seemed similar to what Martin had shown to Kiraly. Kiraly's assessment was that the dealership might be using a standard approach to commit fraud on a regular basis. This was consistent with what Kiraly learned from the next person. (Kiraly Decl. ¶ 10.)

The next person was an ex-employee of Fremont Toyota, Sam Pawar, who told Kiraly that fraud against the general public was a common practice at the dealership. Pawar confirmed that the following statement which appeared on the websites was true:

> Most USA people are bad at math. The Fremont-Toyota people took advantage of this. If a dollar figure was at $9,999, Mark Hashimi and his people just added $10,000 to make it $19,999. Fremont-Toyota figured that it was on the customer to detect a mistake and that it would be no big deal to take care of it in the cases where somebody did. I saw them committing fraud and stealing from people. I talked to General Manager Kamal [Mark Hashimi]. He told me to get out of his office. Mark Hashimi was part of the fraud operation, so I lost my job. But I did the right thing. I just wanted to protect Toyota buyers from the fraud and explain how to buy a car from Fremont Toyota without being robbed.

(Kiraly Decl. ¶ 10.)

None of the websites are used for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services. (Kiraly Decl. ¶ 11.)

D. <u>The Emails</u>

Martin and Kiraly separately sent email related to the loan fraud to employees and agents of Fremont Toyota. (Kiraly Decl. ¶ 12.)

In 2021, Kiraly published online primarily letters between Martin and Hashimi. The purposes of publication included transparency related to inquiry into the loan fraud and to let the car-buying public judge for itself whether or not Fremont Toyota's denials of fraud were credible. (Kiraly Decl. ¶ 13.)

In January 2022, Kiraly wrote a detailed letter intended to be read by Hashimi and Fremont Toyota's attorney, Christine Long. The letter offered for consideration points related to a case that had

been filed against Martin. Kiraly wasn't aware at the time of any case against him. He sent the letter to multiple parties with the request that it be forwarded. In some cases, he added that consensual communication related to the points made in the letter would be welcome. (Kiraly Decl. ¶ 14.)

E. Kiraly Has Not Stalked Plaintiffs

Kiraly has not followed, alarmed, placed under surveillance or harassed Plaintiffs. He has never made any threats against the Plaintiffs. (Kiraly Decl. ¶ 15.)

F. Kiraly Has Not Invaded Plaintiffs' Privacy

Kiraly has never intruded upon Plaintiffs' private matters, nor has he disclosed any private facts concerning the Plaintiffs. (Kiraly Decl. ¶ 16.)

G. Kiraly Has Not Conspired with Anyone

Martin and Kiraly were associated prior to 2021. Martin never hired Kiraly for anything. Kiraly offered to help Martin as a personal favor and in the public interest. Kiraly has not conspired with Martin or anyone else regarding the matters alleged in the Complaint. The websites at issue were created solely by Kiraly except for statements that he edited and published and evidence such as photographs and court filings that he elected to use. (Kiraly Decl. ¶ 17.)

III. PROCEDURAL BACKGROUND

On December 23, 2021, Fremont Toyota filed a Petition for Workplace Violence Restraining Order against Kiraly, *in Fremont Toyota v. Kiraly*, Alameda Superior Court, Case No. 21CV004608. On January 21, 2022, Fremont Toyota's counsel also filed a Petition for Workplace Violence LLP against Kiraly, in *Berliner Cohen LLP v. Kiraly*, Alameda Superior Court, Case No. 22CV005860. A hearing is scheduled in both of the Workplace Violence Restraining Order cases is scheduled for April 14, 2022, before Judge Tamiza Hockenhull.

The instant lawsuit was filed on January 25, 2022 by Fremont Toyota and its late owner, Hank Torian. Plaintiffs' Complaint alleges causes of action for injunctive relief, appropriate name and likeness, defamation, stalking, invasion of privacy, and civil conspiracy. As explained below, each of these causes of action must be stricken as they arise out of constitutionally-protected speech, and are meritless.

IV. LEGAL ARGUMENT

A. The anti-SLAPP Statute

Code of Civil Procedure Section 425.16, commonly referred to as the anti-SLAPP law, provides in relevant part: "(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 or 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 he or she 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, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination. [¶] … [¶] (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: … (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; (4) or 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."

Under the anti-SLAPP statute, the court makes a two-step determination: "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. (§ 425.16, subd. (b)(1).) 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e)' [citation]. If the court finds that such a showing has been made, it

must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. (§ 425.16, subd. (b)(1) … .)" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88; *see also Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) "Only a cause of action that satisfies both prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning and lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten, supra*, 29 Cal.4th at 89.)

B. Plaintiffs' Claims Are Based on Constitutionally Protected Writings

1. Overview of the First Step of the anti-SLAPP Analysis

Under the first step of the anti-SLAPP analysis, the Court considers whether the party filing the motion has made "a prima facie showing that the 'cause of action [sought to be stricken] aris[es] from' an act by the [moving party] 'in furtherance of [that party's] right of petition or free speech ... in connection with a public issue.'" (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21, *quotin*g Code Civ. Proc. § 425.16, subd. (b)(1).) To make such a showing, the moving party need not demonstrate that its actions were protected as a matter of law, but need only establish a prima facie case that the actions fell into one of the categories listed in section 425.16, subdivision (e). (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 314.)

Here, Plaintiffs' claims arise out of the statements published by Kiraly on the publicly-accessible websites concerning the loan fraud. As explained below, the statements were made in a place open to the public or a public forum in connection with an issue of public interest.

2. The Website Statements Were Made in a Public Forum

"Web sites accessible to the public ... are 'public forums' for purposes of the anti-SLAPP statute." (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 41; *see also Muddy Waters, LLC v. Superior* Court (2021) 62 Cal.App.5th 905, 917 ["Internet postings on websites that 'are open and free to anyone who wants to read the messages' and 'accessible free of charge to any member of the public' satisfies the public forum requirement of section 425.16. [citation]"]; *Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, 693; *Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1366; *D.C. v. R.R.* (2010) 182 Cal.App.4th 1190, 1226.) In this regard, the websites at issue do not cease "to be public simply because interested persons may not be able to respond" as "an individual's right to free speech should

be limited or curtailed based upon the ability of another person to respond." (*Muddy Waters,* 62 Cal.App.5th at 917-918.)

3. <u>The Statements on the Websites Concern an Issue of Public Interest</u>

The statements on the websites address an issue of "public interest," namely Fremont Toyota's fraudulent loan practices which affect large portions of the public who purchase automobiles.

The anti-SLAPP statute does not define "public interest," but "its provisions 'shall be construed broadly' to safeguard 'the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.'" (S*ummit Bank, supra,* 206 Cal.App.4th at 693, *quoting* Cal. Code Civ. Proc. § 425.16, subd. (a).) In determining whether an issue is a matter of public interest, courts may consider "whether the subject of the speech or activity was a person or entity in the public eye or could affect large numbers of people beyond the direct participants; and whether the activity occur[red] in the context of an ongoing controversy, dispute or discussion." (*FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 145, internal quotation marks and citations omitted.)

Court have routinely found that websites which provide information to consumers fall within the scope of the anti-SLAPP statute. (*See, e.g., Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883; *Chaker v. Mateo* (2012) 209 Cal.App.4th 1138, 1144.)

In *Wilbanks*, defendant Wolk, a self-styled "consumer watchdog" in the viatical insurance industry, maintained a website that provided "information about those who broker life insurance policies, including information about licenses, suits brought by clients against brokers and investigations of brokers by governmental agencies." (*Wilbanks, supra*, 121 Cal.App.4th at 889.) In connection with that purpose, she published allegedly defamatory statements suggesting that plaintiffs, a broker of viatical settlements and its principal, had engaged in wrongful conduct against their customers and were under state investigation. In concluding that the posting involved matters of public interest, the *Wilbanks* court first made clear that the issue of plaintiffs' business practices, in and of itself, did not meet the normal criteria for matters of public interest, since "plaintiffs are not in the public eye, their business practices do not affect a large number of people and their business practices are not, in and of themselves, a topic of widespread public interest." (*Id.* at 898.) However, the court nonetheless concluded that the posting was protected, because it was "in the nature of

consumer protection information …" (*Id.* at 900.) As the *Wilbanks* court explained, "It is undisputed that Wolk has studied the industry, has written books on it, and that her Web site provides consumer information about it, including educating consumers about the potential for fraud. As relevant here, Wolk identifies the brokers she believes have engaged in unethical or questionable practices, and provides information for the purpose of aiding viators and investors to choose between brokers. The information provided by Wolk on this topic, including the statements at issue here, was more than a report of some earlier conduct or proceeding; it was consumer protection information." (*Id.* at 899.) In other words, Wolk's statements about plaintiffs were made in connection with her overarching goal of providing consumer protection information to those interested in the viatical industry, and "[i]n the context of information ostensibly provided to aid consumers choosing among brokers …" (*Id*. at 900.)

Similarly, in *Chaker*, the defendant posted derogatory comments about the plaintiff and his forensics business on a website, Ripoff Report. (*Chaker, supra,* 209 Cal.App.4th at 1146.) The defendant's statements included "'You should be scared. This guy is a criminal and a deadbeat dad. …' 'I would be very careful dealing with this guy. He uses people, is into illegal activities, etc. I wouldn't let him into my house if I wanted to keep my possessions or my sanity.'" (*Id.* at 1142.) The defendant also accused the plaintiff of picking up streetwalkers and homeless drug addicts. (*Id*.) The court had "little difficulty finding the statements were of public interest. The statements posted to the Ripoff Report [website] about Chaker's character and business practices plainly fall within the rubric of consumer information about Chaker's 'Counterforensics' business and were intended to serve as a warning to consumers about his trustworthiness." (*Id*. at 1146.)

Likewise, here, the websites provide information to consumers about Fremont Toyoya's fraudulent loan practices, including its forgery of documents. This is quintessential consumer information, and is protected speech under Code of Civil Procedure § 425.16, subdivisions (3) and (4).

C. Plaintiffs Cannot Establish a Probability of Prevailing on Any of the Causes of Action in their Complaint

1. Plaintiffs Have the Burden of Establishing Their Claims Have Merit

Because the Plaintiffs' claims arise from protected speech, the Court must turn to the second prong of the section 425.16 analysis: whether Plaintiffs have established a probability of prevailing on

the causes of action in their Complaint.

"'In order to establish a probability of prevailing on the claim [citation], a plaintiff responding to an anti-SLAPP motion must 'state[ ] and substantiate[ ] a legally sufficient claim.' [Citation.] Put another way, the plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' [Citations.] In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant [citation]; though the court does not weigh the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.'" (*Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 19-20.)

2. <u>The Complaint's First Cause of Action for Injunctive Relief Is Meritless as Injunctive Relief Is Not a Cause of Action</u>

The Complaint's First Cause of Action for Injunctive Relief seeks an injunction against "Defendants' wrongful conduct" including, in particular, the removal of "the libelous websites" and to restrain Defendants from making "defamatory communications …" (Complaint ¶¶ 27, 28.) This cause of action is defective on its face as "[i]njunctive relief is a remedy, not a cause of action. [Citations.]" (*Ivanoff v. Bank of America, N.A.* (2017) 9 Cal.App.5th 719, 734.)

3. <u>The Complaint's Second and Third Causes of Action for Appropriate of Name and Likeness Fail Due to Plaintiffs' Lack of Standing and Because Kiraly Did Not Use Plaintiffs' Name and Likeness for Any Commercial Purpose</u>

The Complaint's Second Cause of Action and Third Cause of Action are for Appropriate of Name and Likeness and are respectively brought pursuant to Civil Code § 3344 and the common law. (*See generally, Fleet v. CBS* (1996) 50 Cal.App.4th 1911, 1918 ["Under California law, an individual's right to publicity is invaded if another appropriates for his advantage the individual's name, image, identity or likeness. This is an actionable tort under both common law and Civil Code section 3344."].) Both causes of action are based on the allegation that "Defendants used the names

and likeness of Plaintiff, its employees, its late owner, its late owner's family members, and its legal counsel without consent and continues to use their name and likeness to defame them …" (Complaint ¶¶ 32, 36.) As explained below, these claims fail due to: (a) Plaintiffs' lack of standing; and (b) because Kiraly did not use Plaintiffs' name and likeness for any commercial purpose.

a. Lack of Standing

Fremont Toyota lacks standing to bring a claim for violation of its right of publicity as it is a limited liability company, and not an individual. (*See Ross v. Roberts* (2013) 222 Cal.App.4th 677, 684 ["The right of publicity protects an individual's right to profit from the commercial value of his or her identity."].) Torian lacks standing to bring a claim for violation of his right of publicity because he is dead, and there are no allegations in the Complaint that he transferred his publicity rights to any party. (*See* Civ. Code § 3344.1, subd. (c) ["If any deceased person does not transfer his or her rights under this section by contract, or by means of a trust to testamentary instruction, and there are no surviving persons as described in subdivision (d), then the rights set forth in subdivision (a) shall terminate."].)

b. No Commercial Use

The Appropriate of Name and Likeness claims also fail because Plaintiffs do not allege that Kiraly used their name and likeness for any commercial purpose, nor did he.

California Civil Code § 3344 prohibits unauthorized use of "another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services …" (Civ. Code § 3344, subd. (a).) "[T]he obvious import of its language" is that the statute … is that the statute "is limited to commercial use." (*See Pott v. Lazarin* (2020) 47 Cal.App.5th 141, 150-151; *see also Comedy III Productions, Inc. v. Gary Saderup, Inc*. (2001) 25 Cal.4th 387, 403 ["T]he right of publicity is essentially an economic right. What the right of publicity holder possesses is not a right of censorship, but a right to prevent others from misappropriating the economic value generated by the celebrity's fame through the merchandising of the 'name, voice, signature, photograph, or likeness' of the celebrity."].)

Because Kiraly did not use Plaintiffs' names or likenesses for any commercial purpose,

Plaintiffs' claim for Appropriate of Name and Likeness must be stricken. (*See Pott, supra*, 47 Cal.App.5th at 151 [trial court by not striking right of publicity claim as plaintiff did not identify any commercial use of name of likeness by defendant].)

4. Plaintiffs' Defamation Claims Are Meritless Because Kiraly Did Not Make Any False Statements of Fact Concerning the Plaintiffs

Plaintiffs' Fourth Cause of Action for Defamation Per Se and Fifth Cause of Action for Defamation Per Quod are both based on the allegation that "Defendants intentionally published one or more false statements about Plaintiff, its employees, its late owner,[2] its late owner's family members, and its legal counsel for persons other than Plaintiff to view." (Complaint ¶¶ 39, 45.) These claims fail as the Complaint does not identify any false statements made by Kiraly concerning the Plaintiffs.[3] At most, the name-calling statements that are pled in the Complaint amount to nonactionable opinions.

"The sine qua non of recovery for defamation … is the existence of falsehood.' [Citation.] Because the statement must contain a provable falsehood, courts distinguish between statements of fact and statements of opinion for purposes of defamation liability. Although statements of fact may be actionable as libel, statements of opinion are constitutionally protected. [citation.]'" (*Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, 695.) "'[I]t is a question of law for the court whether a challenged statement is reasonably susceptible of [a defamatory] interpretation …'" (*Bently Reserve LP v. Papaliolios* (2013) 218 Cal.App.4th 418, 428.) "'The key is not parsing whether a published statement is fact or opinion, but 'whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact.' [citations]" (*Id*. at 428.)

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[2] The Complaint does not allege any defamatory statements made by Kiraly regarding Torian, but such statements would not be actionable as Torian is dead. (*See Kelly v. Johnson Publishing Co*. (1958) 160 Cal.App.2d 718, 725 ["no civil action will lie for the defamation of one who is dead …"].)

[3] The Complaint's allegations about statements made about Plaintiff's employees, its late owner's family members, and its legal counsel, are irrelevant as the alleged statements were not "of and concerning" the Plaintiffs. (*See Dong v. Board of Trustees* (1987) 191 Cal.App.3d 1572, 1587 ["In defamation actions the First Amendment requires 'that the statement on which the claim is based must specifically refer to, or be 'of and concerning,' the plaintiff in some way.' [citation]"]; *see also Vogel v. Felice* (2005) 127 Cal.App.4th 1006, 1023 ["[a] defamation action may proceed only where the challenged statement conveys a meaning 'of and concerning' the plaintiff."].)

To decide whether a statement expresses or implies a provably false assertion of fact, courts use a totality of the circumstances test. (*Summit Bank, supra*, 206 Cal.App.4th at 696.) "[A] court must put itself in the place of an average reader and determine the natural and probable effect of the statement …" (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1011.) Thus, a court considers both the language of the statement and the context in which it is made. (*Id.*; *Summit Bank, supra*, 206 Cal.App.4th at 696.) "The contextual analysis requires that courts examine the nature and full content of the particular communication, as well as the knowledge and understanding of the audience targeted by the publication." (*Overstock.com v. Gradient Analytics, Inc*. (2007) 151 Cal.App.4th 688, 701.)

Here, the alleged defamatory statements concerning Fremont Toyota (as opposed to its employees and attorney who are not plaintiffs in this case) are "that Fremont-Toyota may have committed forgery in the past", is "a Muslim-run organized-crime operation that is arguably RICO-level" and "a well-defined external jihad group." (Complaint ¶¶ 13, 14, and 21.) These statements clearly "fall into the category of crude, satirical hyperbole which, while reflecting the immaturity of the speaker, constitute protected opinion under the First Amendment." (*Krinsky v. Doe 6* (2008) 159 Cal.App.4th 1154, 1178; *see also Summit Bank, supra,* 206 Cal.App.4th at 699 ["Looking at the actual language used in [defendant's] s posts, it is obvious [defendant's] messages are intended to be free-flowing diatribes (or 'rants') in which he does not use proper spelling or grammar, and which strongly suggest that these colloquial epithets are his own unsophisticated, florid opinions about the Bank and its key personnel."].) The fact that the statements were published on the Internet and made in the context of an unpleasant business experience further supports a finding that the statements are not actionable opinions. (*See Chaker, supra, 2* Cal.App.4th at 1149 [defendant's statements "to the effect [plaintiff] picks up streetwalkers and homeless drug addicts and is a deadbeat dad, would be interpreted by the average Internet reader as anything more than the insulting name calling—in the vein of 'she hires worthless relatives,' 'he roughed up patients' or 'he's a crook'—which one would expect from someone who had an unpleasant personal or business experience with [plaintiff] and was angry with him rather than as any provable statement of fact."].)

In summary, Plaintiffs are unable to demonstrate that Kiraly made any false statements of fact

of and concerning them, as would be necessary to establish that their defamation claims have minimal merit.

5. Plaintiffs' Stalking Claim Is Meritless Due to Plaintiffs' Lack of Standing

Plaintiffs stalking claims against Kiraly are defective as neither of the Plaintiffs has standing to bring the claims. Under California's anti-stalking statute, a defendant is liable for the tort of stalking when the plaintiff proves:

> (1) The defendant engaged in a pattern of conduct the intent of which was to follow, alarm, place under surveillance, or harass the plaintiff ….
>
> (2) As a result of that pattern of conduct, either of the following occurred:
> (A) The plaintiff reasonably feared for his or her safety, or the safety of an immediate family member. . . .
> (B) The plaintiff suffered substantial emotional distress, and the pattern of conduct would cause a reasonable person to suffer substantial emotional distress.
> (3) One of the following:
> (A) The defendant, as a part of the pattern of conduct specified in paragraph (1), made a credible threat with either (i) the intent to place the plaintiff in reasonable fear for his or her safety, or the safety of an immediate family member, or (ii) reckless disregard for the safety of the plaintiff or that of an immediate family member. In addition, the plaintiff must have, on at least one occasion, clearly and definitively demanded that the defendant cease and abate his or her pattern of conduct and the defendant persisted in his or her pattern of conduct unless exigent circumstances make the plaintiff's communication of the demand impractical or unsafe.
> (B) The defendant violated a restraining order, including, but not limited to, any order issued pursuant to Section 527.6 of the Code of Civil Procedure, prohibiting any act described in subdivision (a).

(Civ. Code § 1708.7.)

A California District Court has ruled that business entities, such as Fremont Toyota, cannot properly bring a stalking claim. (*See Thunder Studios, Inc. v. Kazal* (C.D.Cal. Mar. 22, 2018) 2018 U.S.Dist.LEXIS 226079, at *13 ["The second element of the tort requires that the plaintiff either 'reasonably feared for his or her safety, or the safety of an immediate family member" or "suffered substantial emotional distress.' Cal Civ. Code § 1708.7(a)(2). A corporation, as a fictitious entity, cannot experience fear or emotional distress. [citations]. Thus, [plaintiff] cannot plausibly establish

the elements of a California stalking claim."].) Likewise, Torian cannot properly bring a stalking claim as he is dead, and cannot experience emotional distress. Thus, the stalking claim is infirm.

6. Plaintiffs' Invasion of Privacy Claim Is Meritless Due to Plaintiffs' Lack of Standing

Fremont Toyota's Seventh Cause of Action for Privacy fails because "a corporation may not pursue a common law action for invasion of privacy …" (*Coulter v. Bank of America* (1994) 28 Cal.App.4th 923, 930; *see also Ion Equipment Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 878 ["It is generally agreed that the right to privacy is one pertaining only to individuals, and that a corporation cannot claim it as such. [citation] This is because the tort is of a personal character '[concerning] one's feelings and one's own peace of mind.' [citations] A corporation is a fictitious person and has no 'feelings' which may be injured in the sense of the tort."]; *Russo v. Microsoft Corp.* (N.D.Cal. June 30, 2021) 2021 U.S.Dist.LEXIS 122601, at *20 ["[A] corporation has no personal right of privacy and thus has no cause of action for invasion of privacy."].) Torian cannot pursue a claim for privacy because he is dead. (*See Hendrickson v. California Newspapers, Inc.* (1975) 48 Cal.App.3d 59, 62 ["It is well settled that the right of privacy is purely a personal one; … the right does not survive but dies with the person."].)

7. The Eighth Cause of Action for Civil Conspiracy Is Meritless

Plaintiffs' Eighth Cause of Action for Civil Conspiracy is based on the allegation that "Defendant Kiraly agreed with Defendant Kiraly that the wrongful acts be committed." (Complaint ¶ 62.) "Because civil conspiracy is so easy to allege, plaintiffs have a weighty burden to prove it." (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 333.) "To prove a claim for civil conspiracy, [Plaintiffs are] required to provide substantial evidence of three elements: (1) the formation and operation of the conspiracy, (2) wrongful conduct in furtherance of the conspiracy, and (3) damages arising from the wrongful conduct." (*Kidron v. Movie Acquisition Corp*. (1995) 40 Cal.App.4th 1571, 1581.)

Plaintiffs cannot provide the first element of their conspiracy claim, as Kiraly did not conspire with Martin or anyone else regarding the matters alleged in the Complaint. In this regard, "'[c]onspiracies cannot be established by suspicions. There must be some evidence. Mere association

does not make a conspiracy. There must be evidence of some participation or interest in the commission of the offense." [(*Kidron, supra* at 1582.)

Also, Plaintiffs have also not established any tortious conduct by Kiraly in furtherance of the conspiracy. (*See Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 511 ["Standing alone, a conspiracy does no harm and engenders no tort liability. It must be activated by the commission of an actual tort."].)

Finally, the Complaint does not allege any damages suffered by the business entity plaintiff or its late owner, Torian.

D. Kiraly Is Entitled to Recover His Attorney's Fees and Costs

Section 425.16, subdivision (c), makes an award of attorney fees and costs to a defendant who prevail on an anti-SLAPP motion mandatory. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131.) Kiraly will submit an itemization of his attorney's fees upon prevailing on the anti-SLAPP Motion

V. CONCLUSION

Plaintiffs' Complaint is an improper attempt to chill Kiraly's free speech rights by forcing him to defend factually and legally meritless claims. The Court should strike the Complaint pursuant to the anti-SLAPP statute, and award Kiraly his attorney's fees and costs.

Dated: March 21, 2022

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