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Attorneys for Defendant KYOCERA DOCUMENT SOLUTIONS AMERICA INC. (*fka* KYOCERA MITA AMERICA, INC.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

BENJAMIN J. STEIN

Plaintiff,

vs.

KYOCERA MITA AMERICA, INC., a New Jersey corporation; SEITER & MILLER ADVERTISING, INC., a New York corporation; LIVINSTON MILLER, an individual; GRACE JAO, an individual; and DOES 1 through 30, inclusive,

Defendants.

Case No.: BC476821

Assigned to the Honorable Elizabeth Allen White, Dept. 48

NOTICE OF ENTRY OF ORDER ON DEFENDANT KYOCERA DOCUMENT SOLUTIONS AMERICA INC.'S (*fka* KYOCERA MITA AMERICA, INC.) SPECIAL MOTION TO STRIKE PURSUANT TO CCP §425.16

Complaint filed: January 11, 2012
Pretrial Conference: Not Set
Trial Date: Not Set

ORIGINAL

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 23, 2012, the Court issued its Minute Order and Ruling on Defendant Kyocera Document Solutions America, Inc.'s Special Motion to Strike Pursuant to CCP §425.16. True and correct copies of the Court's Minute Order and Ruling are attached hereto as Exhibit 1.

Dated: May 1, 2012

STEPTOE & JOHNSON LLP

MARK A. NEUBAUER
CELINA MUNOZ

By: _____
MARK A. NEUBAUER
Attorneys for Defendant KYOCERA DOCUMENT SOLUTIONS AMERICA INC. (*fka* KYOCERA MITA AMERICA, INC.)

05/03/12

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 04/26/12			DEPT. 48
HONORABLE ELIZABETH ALLEN WHITE BY: JOSEPH R. KALIN	JUDGE	A. BARTON	DEPUTY CLERK
HONORABLE #15	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
S. SATO, C.A.	Deputy Sheriff	NONE	Reporter

4:00 pm	BC476821 BENJAMIN J. STEIN VS KYOCERA MITA AMERICA, INC., ET AL. 170.6-Sohigian (pltff)	Plaintiff Counsel Defendant Counsel	NO APPEARANCES

NATURE OF PROCEEDINGS:

RULING ON SUBMITTED MATTER

AO

The court, having taken defendant Kyocera Mita America, Inc.'s special motion to strike pursuant to Code of Civil Procedure Section 425.16 and defendant Seiter & Miller Advertising, Inc.'s joinder under submission on April 25, 2012, now rules as follows:

Defendant Kyocera Mita America, Inc.'s anti-SLAPP motion to strike is granted as to the first, second, third, fourth, fifth, seventh, eighth and ninth causes action and denied as to the sixth cause of action and defendant Seiter & Miller Advertising, Inc.'s joinder is granted as fully reflected in the court's written RULING filed this date and incorporated herein by reference to the court file.

Counsel for defendant Kyocera is to give notice.

CLERK'S CERTIFICATE OF MAILING/
NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of April 26, 2012 upon counsel named below by depositing in the United States Mail at the courthouse in Los

MINUTES ENTERED
04/26/12
COUNTY CLERK

05/03/12

EXHIBIT 1

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 04/26/12			DEPT. 48
HONORABLE ELIZABETH ALLEN WHITE BY: JOSEPH R. KALIN	JUDGE	A. BARTON	DEPUTY CLERK
HONORABLE #15A	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
S. SATO, C.A.	Deputy Sheriff	NONE	Reporter

4:00 pm	BC476821	Plaintiff Counsel	
	BENJAMIN J. STEIN VS KYOCERA MITA AMERICA, INC., ET AL.		NO APPEARANCES
		Defendant Counsel	
	170.6-Sohigian (pltff)		

NATURE OF PROCEEDINGS:

Angeles, California, a copy of the original entered herein in a sealed envelope, addressed as shown below, with the postage thereon fully prepaid.

Mark A. Neubauer, Esq.
Steptoe & Johnson LLP
2121 Avenue of the Stars, Suite 2800
Los Angeles, California 90067-2800

Date: April 26, 2012

JOHN A. CLARKE, Executive Officer/Clerk of the Superior Court of California, County of Los Angeles

By: A. Barton
A. Barton, Judicial Assistant

MINUTES ENTERED
04/26/12
COUNTY CLERK

05/03/12

RULING

ORIGINAL FILED

APR 2 8 2012

LOS ANGELES SUPERIOR COURT

TO: Judge Elizabeth Allen White, Department 48

FROM: Nathan Taba, Research Attorney (x 4-7536)

HEARING DATE: April 26, 2012 TRIAL: Not set.

CASE: Benjamin J. Stein v. Kyocera Mita America, Inc., et al.

CASE NO.: BC476821

Opposed: Yes.

(1) SPECIAL MOTION TO STRIKE – CCP § 425.16 (ANTI-SLAPP);
(2) JOINDER

MOVING PARTY: (1) Defendant Kyocera Document Solutions America, Inc. (*fka* Kyocera Mita America, Inc.);
(2) Defendant Seiter & Miller Advertising, Inc. (Joinder)

RESPONDING PARTY(S): (1) & (2) Plaintiff Benjamin J. Stein

PROOF OF SERVICE:

- Correct Address: (1) Yes; (2) Yes.
- 16/21 days (CCP § 1005(b)): (1) OK. Served by mail on March 2, 2012; (2) OK. Served by mail on March 2, 2012.

CASE HISTORY:

- 01/11/12: Complaint filed by P.
- 02/02/12: First Amended Complaint filed by P.

STATEMENT OF FACTS

Plaintiff Ben Stein is a well-known economist, actor, writer, humorist, game show host, public speaker, university teacher and lawyer. Plaintiff alleges that he entered into a contract with Defendant Kyocera Mita America ("Kyocera") to appear in Kyocera commercials for computer printers and to give a speech at a Kyocera company event. Plaintiff alleges that he was terminated from employment after Kyocera discovered Plaintiff's religious views on the weather.

Defendant Kyocera Mita America, Inc. brings a special motion to strike the First Amended Complaint ("1AC") per CCP § 425.16. Defendant Seiter & Miller Advertising, Inc. filed a joinder in the motion.

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~~RECOMMENDATION~~

- **GRANT anti-SLAPP special motion to strike as to the first, second, third, fourth, fifth, seventh, eighth and ninth causes of action.**
- **DENY anti-SLAPP special motion to strike as to the sixth cause of action.**
- GRANT joinder.

ANALYSIS

Plaintiff's Evidentiary Objections

Declaration of Grace Jao

No. 1: OVERRULED.
No. 2: SUSTAINED as to statement that lawsuit seeks to punish KMA; otherwise OVERRULED.
No. 3: OVERRULED.
No. 4: OVERRULED.
No. 5: OVERRULED.
No. 6: OVERRULED.
No. 7: OVERRULED.
No. 8: OVERRULED.
No. 9: SUSTAINED. Hearsay, not subject to exception because not being offered against declarant.
No. 10: SUSTAINED.

Declaration of Daniel Butler

No. 1: OVERRULED.
No. 2: OVERRULED.
No. 3: SUSTAINED.
No. 4: OVERRULED.
No. 5: SUSTAINED as to oral testimony of writing (Evid. Code § 1523); OVERRULED as to Exhibit 18.
No. 6: OVERRULED.
No. 7: SUSTAINED. Hearsay, not subject to exception because not being offered against declarant.
No. 8: OVERRULED.
No. 9: OVERRULED.

Defendant's Evidentiary Objections

Declaration of Benjamin J. Stein

No. 1: OVERRULED.
No. 2: SUSTAINED as to statements made by Ms. Hurwitz – hearsay, not subject to exception because not being offered against declarant; otherwise OVERRULED.

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No. 3: SUSTAINED. Hearsay, not subject to exception because not being offered against declarant.
No. 4: SUSTAINED. Hearsay, not subject to exception because not being offered against declarant; lack of personal knowledge.
No. 5: SUSTAINED. Hearsay, not subject to exception because not being offered against declarant; lack of personal knowledge.
No. 6: SUSTAINED as to Hurwitz forwarding email and Stein's purported authentication of email – no personal knowledge; otherwise OVERRULED.
No. 7: SUSTAINED as to what Hurwitz said (hearsay, no exception); otherwise OVERRULED.
No. 8: OVERRULED.
No. 9: OVERRULED.
No. 10: SUSTAINED as to what Hurwitz told Stein; otherwise OVERRULED.
No. 11: OVERRULED.
No. 12: OVERRULED.
No. 13: OVERRULED.
No. 14: OVERRULED.
No. 15: OVERRULED.
No. 16: OVERRULED.
No. 17: SUSTAINED. Oral testimony of writing (Evid. Code § 1523).
No. 18: OVERRULED.
No. 19: SUSTAINED.
No. 20: OVERRULED.
No. 21: OVERRULED.
No. 22: SUSTAINED.
No. 23: SUSTAINED.
No. 24: SUSTAINED. Oral testimony of writing (Evid. Code § 1523).
No. 25: SUSTAINED.
No. 26: OVERRULED.
No. 27: OVERRULED.
No. 28: SUSTAINED. Hearsay; Oral testimony of writing (Evid. Code § 1523).
No. 29: OVERRULED.
No. 30: OVERRULED.
No. 31: OVERRULED.
No. 32: SUSTAINED.
No. 33: SUSTAINED.
No. 34: SUSTAINED.
No. 35: SUSTAINED.
No. 36: SUSTAINED.

Declaration of Marcia Hurwitz

No. 1: SUSTAINED as to what Stein said – hearsay, not subject to exception because not being offered against declarant; otherwise OVERRULED.
No. 2: OVERRULED.
No. 3: SUSTAINED as to what Stein said – hearsay, not subject to exception because not being offered against declarant; otherwise OVERRULED.

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No. 4: OVERRULED.
No. 5: OVERRRULED.
No. 6: OVERRULED.
No. 7: SUSTAINED as to statement that parties had an Agreement and whether Jao believed the same thing; otherwise OVERRULED.
No. 8: SUSTAINED as to industry custom and standard practice; otherwise OVERRULE.
No. 9: OVERRULED.
No. 10: SUSTAINED as to contents of email (oral testimony of writing—Evid. Code § 1523); otherwise OVERRULED.
No. 11: SUSTAINED.
No. 12: SUSTAINED as to contents of email (oral testimony of writing—Evid. Code § 1523); otherwise OVERRULED.
No. 13: SUSTAINED.
No. 14: SUSTAINED.
No. 15: OVERRULED.
No. 16: OVERRULED.
No. 17: SUSTAINED.
No. 18: SUSTAINED.
No. 19: SUSTAINED. Hearsay, not subject to exception because not being offered against declarant.
No. 20: OVERRULED.
No. 21: OVERRULED.
No. 22: SUSTAINED.
No. 23: OVERRULED.
No. 24: SUSTAINED.
No. 25: SUSTAINED.
No. 26: SUSTAINED.
No. 27: SUSTAINED.

Declaration of Charles J. Harder

No. 1: OVERRULED.
No. 2: SUSTAINED.
No. 3: SUSTAINED.
No. 4: SUSTAINED.
No. 5: SUSTAINED.
No. 6: OVERRULED.
No. 7: OVERRULED.
No. 8: OVERRULED.
No. 9: OVERRULED.
No. 10: OVERRULED.
No. 11: OVERRULED.
No. 12: SUSTAINED. Hearsay.
No. 13: SUSTAINED. Hearsay.
No. 14: SUSTAINED. Hearsay.
No. 15: SUSTAINED. Partially based on hearsay.

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No. 16: OVERRULED.
No. 17: SUSTAINED.

Request For Judicial Notice

Defendant Kyocera requests that the Court take judicial notice of the following:

(1) February 23, 2012 Google search for "climate change" returns 116,000,000 results; (2) February 23, 2012 Google search for "environment" returns 1,310,000,000 results; (3) April 27, 2009 Treehugger News Release: "Ben Stein: 'Global Warming is By No Means Proved"; (4) May 25, 2008 New York Times: "Everybody's Business – Running Out of Fuel, but Not Out of Ideas," by Ben Stein; (5) September 4, 2005 The American Spectator Special Weekend Posting: "Get Off His Back (*Updated*)," by Ben Stein; (6) May 6, 2011 NY Daily News: "Rashard Mendenhall fired as Champion spokesman after controversial Osama bin Laden tweets"; (7) March 14, 2011 Mashable Business: "Gilbert Gottfried Fired Over Japan Jokes on Twitter"; (8) October 6, 2011 ESPN: "ESPN, Hank Williams Jr. part ways"; (9) February 5, 2009 People Magazine: "Kellogg's Drops Michael Phelps over Bong Photo"; (10) January 12, 2012 Gawker: "Fake Economist Ben Stein Sues Company for Discriminating Against Global Warming Deniers"; (11) January 12, 2012 The Wall Street Journal: "Ben Stein Sues Kyocera Over Ad Campaign"; and (12) January 12, 2012 Bloomberg Businessweek: "Ben Stein Suit Says Kyocera Unit Canceled Ads Over Climate Views."

Requests Nos. 1-12 are DENIED and Plaintiff's objections thereto are SUSTAINED. The documents attached to the request for judicial notice do not stand for the facts or propositions for which they are offered. They are merely evidence which is consistent with Defendant's proposed facts or propositions, but do not prove those facts or provisions.

Joinder

Defendant Seiter & Miller Advertising, Inc.'s joinder was timely filed and served on March 2, 2012 and is GRANTED.

A defendant may properly join in an anti-SLAPP special motion to strike and seek affirmative relief, including an award of attorneys fees, by way of the joinder:

> In order to trigger a response from a plaintiff in a special motion to strike, a moving defendant need only demonstrate that the action arises out of protected First Amendment activity. (Paul for Council v. Hanyecz (2001) 85 Cal.App.4th 1356, 1365 [102 Cal. Rptr. 2d 864], disapproved on other grounds in by Equilon Enterprises v. Consumer Cause, Inc. (2002) 29 Cal.4th 53, 68, fn. 5 [124 Cal. Rptr. 2d 507, 52 P.3d 685].) Here, appellant's complaint alleges malicious prosecution which qualifies for treatment under section 425.16 as a matter of law. (Dickens v. Provident Life & Accident Ins. Co. (2004) 117 Cal.App.4th 705, 713 [11 Cal. Rptr. 3d 877].) Thus, it was not necessary for Larivee to present admissible evidence to shift the burden to appellant to provide opposition.

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In addition, Larivee's joinder not only states that he joins in the motion brought by the Quisenberry Law Firm, he requests affirmative relief: "Defendant LARIVEE seeks an order striking Plaintiff's Complaint as to Defendant LARIVEE and awarding Defendant LARIVEE his costs and attorney's fees in bringing a special motion to strike." In the penultimate paragraph, he states why a ruling on the special motion to strike brought by the Quisenberry Law Firm would also be applicable to him: "Most significantly, Defendant LARIVEE is the client of attorney Defendants .... Accordingly, relief afforded to [the attorney] Defendants under a special motion to strike should also be afforded to Defendant LARIVEE because all the Defendants are in the same relative position with regards to Plaintiff's claims set forth in the Complaint."

In short, the nature of appellant's claim established the necessary foundation for application of section 425.16 and Larivee's joinder sought affirmative relief on behalf of himself. We find no abuse of discretion by the trial court in entertaining the joinder.

Barak v. The Quisenberry Law Firm (2006) 135 Cal.App.4th 654, 661.

Anti-SLAPP Motion

In ruling on a defendant's special motion to strike, the trial court uses a "summary-judgment-like procedure at an early stage of the litigation." Varian Medical Systems, Inc. v. Delfino (2005) 35 Cal.4th 180, 192. This is a two-step process. First, the defendant must show that the act or acts of which the plaintiff complains were taken "in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue. CCP § 425.16(b)(1). Second, if the defendant carries that burden, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the claim. CCP § 425.16(b)(3). The defendant has the burden on the first issue, and the plaintiff on the second. Kajima Engineering & Construction, Inc. v. City of Los Angeles (2002) 95 Cal.App.4th 921, 928; Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO (2003) 105 Cal.App.4th 913, 919. In making both determinations the trial court considers "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." CCP § 425.16(b)(2); Equilon Enterprises, LLC v. Consumer Cause, Inc. (2002) 29 Cal.4th 53, 67.

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

petition or free speech in connection with a public issue or an issue of public interest. CCP § 425.16(e); City of Cotati v. Cashman, *supra*, 29 Cal.4th at 78; *see also* Equilon Enterprises, LLC v. Consumer Cause, Inc, *supra*, 29 Cal.4th at 67.

If such a showing is made, the burden shifts to Plaintiff to show a probability of prevailing on the claim. CCP § 425.16(b)(1). To establish a probability of prevailing on the merits, 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. Matson v. Dvorak (1995) 40 Cal. App. 4th 539, 548. In making this assessment it is the court's responsibility to accept as true the evidence favorable to the plaintiff. HMS Capital, Inc. v. Lawyers Title Co. (2004) 118 Cal. App. 4th 204, 212. The Complaint needs only to establish that his or her claim has minimal merit (Navellier v. Sletten (2002) 29 Cal. 4th 82, 89) to avoid being stricken as a SLAPP. Jarrow Formulas, Inc. v. LaMarche, supra, 31 Cal. 4th at 738.

"For purposes of this inquiry, 'the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)); 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.' (Citation omitted.)" Soukup v. Law Offices of Herbert Hafif (2006) 39 Cal.4th 260, 291.

1. Re: Whether the Causes of Action Are Subject To Being Stricken Pursuant to CCP § 425.16.

As noted above, the first step in the anti-SLAPP analysis is to determine whether each cause of action against Defendant "aris[es] 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. . ." CCP § 425.16(b)(1).

As is relevant to this motion, CCP § 425.16(e)(4) provides:

> (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: . . . (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.**

(Bold emphasis added.)

Plaintiff's 1AC frames this case as arising out of "freedom of speech, freedom of religion, and political freedom." 1AC, ¶ 29. But, this case also implicates Defendant Kyocera's freedoms just as much as it does Plaintiff's.

Not all speech by a business enterprise constitutes "commercial speech," a term

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often used in the advertising context. But it is well [*1653] recognized that **business-entity speakers have a First Amendment right to express themselves on social and political issues**. (See, e.g., First National Bank of Boston v. Bellotti (1978) 435 U.S. 765 [55 L.Ed.2d 707, 98 S.Ct. 1407].) Our state Supreme Court has recognized such a right, with the proviso that, in making factual representations, a business enterprise "must speak truthfully," or be subject to a cause of action alleging a violation of the state's unfair competition law. (Kasky v. Nike, Inc. (2002) 27 Cal.4th 939, 946, 960–969 [119 Cal.Rptr.2d 296, 45 P.3d 243].) **Regardless of content, however, the protection afforded by the First Amendment is "not limited to those who publish without charge."** (Guglielmi v. Spelling-Goldberg Productions (1979) 25 Cal.3d 860, 868 [160 Cal.Rptr. 352, 603 P.2d 454] (conc. opn. of Bird, J.).) In other words, **speech does not lose its constitutional protection because it is "undertaken for profit," and the fact that a party seeks to make a profit from its speech "is not constitutionally significant."** (Id. at pp. 868–869.)

Mendoza v. ADP Screening & Selection Services, Inc. (2010) 182 Cal. App. 4th 1644, 1652-53 (bold emphasis added).

Although the Court has denied Defendant's request for judicial notice, the Court takes judicial notice that global warming is an issue of public interest, as is evidence by California legislation addressing the perceived problem:

> The proposition that climate-change impacts are significant environmental impacts requiring analysis under CEQA was bolstered by several ongoing [*91] developments. First, the Legislature enacted the California Global Warming Solutions Act of 2006 (Health & Saf. Code, § 38500 et seq.), which implements deep reductions in greenhouse gas emissions after recognizing that "[g]lobal warming poses a serious threat to the economic well-being, public health, natural resources, and the environment of California. ..." (Health & Saf. Code, § 38501, subd. (a).) Through this enactment, the Legislature has expressly acknowledged that greenhouse gases have a significant environmental effect. Also, in January 2008, a "white paper" was issued by the California Air Pollution Control Officers Association entitled CEQA and Climate Change: Evaluating and Addressing Greenhouse Gas Emissions from Projects Subject to the California Environmental Quality Act (Jan. 2008) <http://www.capcoa.org/CEQA/CAPCOA%20White%20Paper.pdf> (as of Apr. 26, 2010). Among other topics, the paper discusses different approaches for making a determination whether a project's greenhouse gas emissions would be significant or less than significant.

Communities for a Better Environment v. City of Richmond (2010) 184 Cal.App.4th 70, 90-91.

The gist of Plaintiff's 1AC is that Defendant Kyocera wished to know Plaintiff Stein's views on global warming and whether he viewed the position that it was a man-made problem as

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a hoax because Kyocera was concerned "about whether BEN STEIN's views on global warming and on the environment were sufficiently conventional and politically correct for Kyocera." 1AC, ¶ 21. ¶ 24 alleges that "BEN STEIN said, he was by no means certain that global warming was man-made, a position held by many scientists and political conservatives. He also told Hurwitz to inform defendants that as a matter of religious belief, he believed that God, and not man, controlled the weather." Plaintiff alleges that Defendant subsequently withdrew its offer for Plaintiff to appear in its commercial because of "Ben's official positions on various policy issues, but also statements widely attributed to him that appear on the web of which we have only lately become aware." ¶ 26.

With the exception of the sixth cause of action for violation of the common law right of publicity, all of the causes of action alleged in the 1AC arise out of Defendant Kyocera's conduct in furtherance of its exercise of its constitutional right to free speech on the public issue of global warming. Defendant had a constitutional right not to be associated with Plaintiff, whose views on global warming as being the act of God, was different from that which Kyocera wished to espouse, i.e., that global warming was man-made.

> The privacy of personal association is protected by the First and Fourteenth Amendments of the United States Constitution. (N.A.A.C.P. v. [*71] Alabama (1958) 357 U.S. 449, 460-461 [2 L.Ed.2d 1488, 1498-1499, 78 S.Ct. 1163]; Britt v. Superior Court (1978) 20 Cal.3d 844, 852-853 "[143 Cal.Rptr. 695, 574 P.2d 766].) . . .
>
> Freedom of expressive association stands protected as an "indispensable means of preserving" the liberty to "associate for the purpose of engaging in those activities protected by the First Amendment -- speech, assembly, petition for the redress of grievances, and the exercise of religion." (468 U.S. at p. 618 [82 L.Ed.2d at p. 471].) The freedom of expressive association enjoys a "close nexus" with the freedom of speech (N.A.A.C.P. v. Alabama, supra, 357 U.S. at p. 460 [2 L.Ed.2d at p. 1498]), and embodies a "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." (Roberts v. United States Jaycees, supra, 468 U.S. at p. 622 [82 L.Ed.2d at p. 474].)

Pacific-Union Club v. Superior Court (1991) 232 Cal.App.3d 60, 70-71.

The first cause of action for breach of contract, the second cause of action for breach of the implied covenant of good faith and fair dealing, the third cause of action for promissory estoppel, the fourth cause of action for wrongful discharge in violation of fundamental public policy, the fifth cause of action for statutory wrongful discharge, the seventh cause of action for intentional interference with contract/prospective economic advantage, the eighth cause of action for negligent interference with contract/prospective economic advantage, and the ninth cause of action for negligent infliction of emotional distress all arise out of Defendant Kyocera's alleged decision not to utilize Plaintiff Stein in Kyocera's commercial due to Stein's political and religious beliefs. Although Plaintiff characterizes this conduct as commercial speech, it was actually a precursor to commercial speech, as Plaintiff did not appear in Defendant's

commercials. The foregoing causes of action against Defendant do not arise out of the actual Kyocera commercial, and thus does not come within the CCP § 425.17 exception, discussed immediately below. As such, all causes of action in the 1AC, except for the sixth cause of action, are subject to being stricken under CCP § 425.16.

The sixth cause of action for violation of common law right of publicity is the only cause of action which falls within the CCP § 425.17 exemption from the special motion to strike provisions of CCP § 425.16. CCP § 425.17(c) provides:

> (c) Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services, including, but not limited to, insurance, securities, or financial instruments, arising from any statement or conduct by that person if both of the following conditions exist:
>
> (1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services.
>
> (2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer, . . . notwithstanding that the conduct or statement concerns an important public issue.

Here, ¶¶ 28, 48, 49 allege that Defendant violated Plaintiff's right of publicity by intentionally using Plaintiff's likeness and identity without Plaintiff's consent in a national advertising campaign to sell Kyocera Mita products by hiring a University of Maryland economics teacher to do the commercials by adopting Plaintiff Stein's persona. This right of publicity cause of action falls squarely within CCP § 427.17(c) and is thus not subject to being stricken under CCP § 425.16.

The special motion to strike the sixth cause of action is DENIED.

The burden shifts to Plaintiff to demonstrate a probability that he will prevail on his first, second, third, fourth, fifth, seventh, eighth and ninth causes of action.

2. Re: Whether Plaintiffs Have Established That There Is A Probability They Will Prevail On The Claims – CCP ¶ 425.16(b)(1).

A. First Cause Of Action – Breach Of Contract

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To plead breach of contract, the complaint must allege: 1) existence of a contract; 2) plaintiff's performance or excuse of non-performance; 3) defendant's breach; and 4) resulting damage. Wall Street Network, Ltd. v. N. Y. Times Co. (2008) 164 Cal.App.4th 1171, 1178.

An essential element of any contract is "consent." (Civ. Code, § 1550; 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 6, p. 44.) The "consent" must be "mutual." (Civ. Code, § 1565; 1 Witkin, Summary of Cal. Law, supra, Contracts, § 119, p. 144 ["Every contract requires mutual assent or consent."]; Meyer v. Benko (1976) 55 Cal. App. 3d 937 [127 Cal. Rptr. 846].) "Consent is not mutual, unless the parties all agree upon the same thing in the same sense." (Civ. Code, § 1580; see also Civ. Code, § 1636 [contracts must be enforced according to the "mutual intention of the parties as it existed at the time of contracting."].)

"The existence of mutual consent is determined by objective rather than subjective criteria, the test being what the outward manifestations of consent would lead a reasonable person to believe." (Meyer v. Benko, supra, 55 Cal. App. 3d 937, 942-943.) Outward manifestations thus govern the finding of mutual consent required by Civil Code sections 1550, 1565 and 1580 for contract formation. (See also 1 Witkin, Summary of Cal. Law, supra, Contracts, § 119, p. 144 [". . . the outward manifestation or expression of assent is controlling. Mutual assent is gathered from the reasonable meaning of the words and acts of the parties, and not from their unexpressed intentions or understanding."].) The parties' outward manifestations must show that the parties all agreed "upon the same thing in the same sense." (Civ. Code, § 1580.) If there is no evidence establishing a manifestation of assent to the "same thing" by both parties, then there is no mutual consent to contract and no contract formation. (Civ. Code, § 1550, 1565 & 1580.)

In order for acceptance of a proposal to result in the formation of a contract, the proposal "must be sufficiently definite, or must call for such definite terms in the acceptance, that the performance promised is reasonably certain." (1 Witkin, Summary of Cal. Law, supra, Contracts, § 145, p. 169.) A proposal " 'cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain. [P] . . . The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.' " (Ibid., quoting from Rest.2d Contracts, § 33.) If, by contrast, a supposed "contract" does not provide a basis for determining what obligations the parties have agreed to, and hence does not make possible a determination of whether those agreed obligations have been breached, there is no contract. (See, e.g., 1 Williston on Contracts (4th ed. 1990) § 4:18, p. 414 ["It is a necessary requirement that an agreement, in order to be binding, must be sufficiently definite to enable the courts to give it an exact meaning."]; see also Civ. Code, § 3390, subd. 5 [a contract is not specifically enforceable unless the terms are [*812] "sufficiently certain to make the precise act which is to be done clearly

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ascertainable."].) "In particular . . . a provision that some matter shall be settled by future agreement, has often caused a promise to be too indefinite for enforcement." (1 Williston, supra, § 4:18, pp. 418-420.) "[I]f an essential element is reserved for the future agreement of both parties, as a general rule the promise can give rise to no legal obligation until such future agreement. Since either party in such a case may, by the very terms of the promise, refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise." (Id., § 4:26, pp. 585-587, fn. omitted.)

Weddington Productions, Inc. v. Flick (1998) 60 Cal.App.4th 793, 811-12.

[T]erms proposed in an offer must be met exactly, precisely and unequivocally for its acceptance to result in the formation of a binding contract (citations omitted); and a qualified acceptance amounts to a new proposal or counteroffer putting an end to the original offer (citations omitted).

An offer "must be approved in the terms in which it is made. The addition of any condition or limitation is tantamount to a rejection of the original offer and the making of a counteroffer (citation omitted).

A counteroffer containing a condition different from that in the original offer is a new proposal and, if not accepted by the original offeror, amounts to nothing (Citations omitted.)

"Where a person offers to do a definite thing and another introduces a new term into the acceptance, his answer is a mere expression of willingness to treat or is a counter proposal, and in neither case is there a contract; if it is a new proposal and it is not accepted it amounts to nothing (citations)." (Citations omitted.)

Apablasa v. Merritt & Co. (1959) 176 Cal.App.2d 719, 726.

Here, Plaintiff has not met his burden of demonstrating a probability of prevailing on the merits of his breach of contract cause of action because he has not cited to any evidence that he or his agent objectively accepted Defendant Kyocera's offer such that the parties mutually assented to the terms of a contract.

The December 15, 2010 email from Grace Jao of Seiter & Miller Advertising states "Here are some basics I would like to discuss with you and hope we can reach an agreement to push the project forward." Hurwitz Decl., Exh. B.

On January 21, 2011, Jao attached the "latest draft" of an agreement to an email to Hurwitz. Decl., Exh. C. Hurwitz responded with the question: "This is a formal offer correct? Not a letter of intent? ? Don't want any miscommunication." Hurwitz Decl., Exh. D. Jao responded, "Yes. It is a formal offer." Id. Thus, both parties expressed an understanding that this was a formal offer capable of being accepted, which implies that no binding contract had yet been formed as of these January 21, 2011 email exchanges.

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After Jao confirmed that there was a formal offer on the table, Hurwitz responded with a need to clarify some things and proposed different terms. Hurwitz Decl., Exh. E. This was not an unequivocal acceptance of the formal offer and constituted a counterproposal. Under the principles set forth in Apablasa, supra, this did not constitute acceptance.

Further, on January 28, 2011 Jao notified Hurwitz that a modified agreement was being prepared. Hurwitz Decl., Exh. F. There is no evidence that this modified agreement was accepted by Stein.

On February 4, 2011, Jao notified Hurwitz that Seiter & Miller's lawyer drafted an agreement/contract, which was being reviewed by Kyocera's lawyer. Hurwitz Decl., ¶ Exh. I. However, there is no evidence that this draft was accepted by Stein.

On February 16, 2011, Livingston Miller, President of Seiter & Miller, notified Hurwitz that Kyocera had decided to withdraw its offer and not pursue an endorsement arrangement with Ben Stein. Hurwitz Decl., Exh. J.

Plaintiff has not submitted any evidence that he accepted an offer made by Defendant. As such, the first element of a breach of contract cause of action cannot be established and Plaintiff has not demonstrated a probability of prevailing on this cause of action.

The special motion to strike is GRANTED as to the first cause of action.

B. Second Cause Of Action – Breach Of The Implied Covenant Of Good Faith And Fair Dealing

One of the elements of a cause of action for breach of the implied covenant of good faith and fair dealing sounding in contract is the existence of a contractual relationship between the parties. Racine & Laramie, Ltd. v. Department of Parks & Recreation (1992) 11 Cal.App.4th 1026, 1031. Because Plaintiff has not demonstrated the existence of a contract between the parties, he cannot prevail on this cause of action.

The special motion to strike is GRANTED as to the second cause of action.

C. Third Cause Of Action – Promissory Estoppel

The elements of a cause of action for promissory estoppel are:

". . . (1) a promise clear and unambiguous in its terms (citation omitted); (2) reliance by the party to whom the promise is made (citation omitted); (3) his reliance must be both reasonable and foreseeable (citation omitted); (4) the party asserting the estoppel must be injured by his reliance (citation omitted)."

Thomson v. International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators (1965) 232 Cal.App.2d 446, 454.

The evidence submitted by Plaintiff does not show a promise clear and ambiguous in its terms made by Defendant, as the agreements were being revised and Hurwitz had made a counterproposal. It is unclear what, if any, promise Defendant made to Plaintiff, as both parties understood that Defendant was only making a formal offer.

Plaintiff has not demonstrated a probability of prevailing on this cause of action.

The special motion to strike is GRANTED as to the third cause of action.

D. Fourth Cause Of Action – Wrongful Discharge In Violation Of Fundamental Public Policy

Without a contract, there is no probability that Plaintiff can demonstrate the existence of an employer-employee relationship, without which this cause of action fails.

The special motion to strike is GRANTED as to the fourth cause of action.

E. Fifth Cause Of Action – Statutory Wrongful Discharge

Without a contract, there is no probability that Plaintiff can demonstrate the existence of an employer-employee relationship, without which this cause of action fails.

The special motion to strike is GRANTED as to the fifth cause of action.

F. Seventh Cause Of Action – Intentional Interference With Contract/Prospective Economic Advantage

An enforceable contract is required to state a cause of action for intentional interference with contract:

> "It is logical to force the plaintiff to plead and prove an enforceable contract when stating a cause of action for intentional interference with contract. If a party is not obligated to perform a contract and may refuse to do so at his election without penalty, then the other party to that agreement enjoys nothing more than an expectancy. A stranger intentionally interfering with that relationship quite obviously does not disturb an enforceable contract but only a prospective economic relationship." (PMC, Inc. v. Saban Entertainment, Inc., supra, 45 Cal. App. 4th at pp. 599-600.)
>
> We agree with PMC's analysis and conclusion that a cause of action for intentional interference with contractual relations requires an underlying enforceable contract, and where the underlying contract is unenforceable, only a claim for interference with prospective economic advantage lies. We believe this rule is a proper extension of the California Supreme Court's admonition that courts should not blur the analytical line between the two interference torts and its

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recognition that the "formally cemented economic relationship" created by an "existing contract" is entitled to greater solicitude than a relationship falling short of that. (Della Penna v. Toyota Motor Sales, U.S.A., Inc., supra, 11 Cal. 4th at p. 392, italics in original.)

Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners (1997) 52 Cal.App.4th 867, 879.

Moreover, a party to the contract cannot interfere with its own contract:

[C]onsistent with its underlying policy of protecting the expectations of contracting parties against frustration *by outsiders* who have no legitimate social or economic interest in the contractual relationship, the tort cause of action for interference with contract does not lie against a party to the contract. (Citations omitted.)

Applied's conspiracy theory is fundamentally irreconcilable with the law of conspiracy and the tort of interference with contract as just discussed. One contracting party owes no general tort duty to another not to interfere with performance of the contract; its duty is simply to perform the contract according to its terms. The tort duty not to interfere with the contract falls only on strangers--interlopers who have no legitimate interest in the scope or course of the contract's performance.

Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal.4th 503, 514 (italics in original).

In order to prove a claim for intentional interference with prospective economic advantage, a plaintiff has the burden of proving five elements: (1) an economic relationship between the plaintiff and a third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) an intentional act by the defendant, designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the defendant's wrongful act, including an intentional act by the defendant that is designed to disrupt the relationship between the plaintiff and a third party. (Citation omitted.) The plaintiff must also prove that the interference was wrongful, independent of its interfering character. (Citation omitted.) "[A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." (Citation omitted.)

Edwards v. Arthur Andersen LLP (2008) 44 Cal. 4th 937, 944.

Here, Plaintiff has not shown an economic relationship with a third party, nor a wrongful act, independent of its interfering character. Thus, Plaintiff has not demonstrated the probability of prevailing on this cause of action.

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The special motion to strike is GRANTED as to the seventh cause of action.

G. Eighth Cause Of Action – Negligent Interference With Contract/Prospective Economic Advantage

> In California there is no cause of action for *negligent* interference with contractual relations. While there exists a cause of action for negligent interference with *prospective* economic advantage (J'Aire Corp. v. Gregory (1979) 24 Cal.3d 799 [157 Cal. Rptr. 407, 598 P.2d 60]), the California Supreme Court in Fifield Manor v. Finston (1960) 54 Cal.2d 632 [7 Cal. Rptr. 377, 354 P.2d 1073], has rejected a cause of action for negligent interference with contract.

Davis v. Nadrich (2009) 174 Cal.App.4th 1, 9 (italics in original).

> The tort of negligent interference with prospective economic advantage is established where a plaintiff demonstrates that (1) an economic relationship existed between the plaintiff and a third party which contained a reasonably probable future economic benefit or advantage to plaintiff; (2) the defendant knew of the existence of the relationship and was aware or should have been aware that if it did not act with due care its actions would interfere with this relationship and cause plaintiff to lose in whole or in part the probable future economic benefit or advantage of the relationship; (3) the defendant was negligent; and (4) such negligence caused damage to plaintiff in that the relationship was actually interfered with or disrupted and plaintiff lost in whole or in part the economic benefits or advantage reasonably expected from the relationship. (Citation omitted.)

North American Chemical Co. v. Superior Court (1997) 59 Cal.App.4th 764, 786.

"[A] plaintiff seeking to recover for alleged interference with prospective economic relations has the burden of pleading and proving that the defendant's interference was wrongful "by some measure beyond the fact of the interference itself." (Citation omitted.)." Della Penna v. Toyota Motor Sales, U.S.A. (1995) 11 Cal.4th 376, 392-93. "[T]he element of independent wrongfulness [applies] in analyzing claims for negligent as well as intentional interference with prospective economic advantage. (Citations omitted.)" Nat'l Medical Transp. Network v. Deloitte & Touche (1998) 62 Cal.App.4th 412, 440. "An act is independently wrongful if it is *unlawful*, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." (Citation omitted.)" Edwards v. Arthur Andersen LLP (2008) 44 Cal. 4th 937, 944 (italics added).

In that no cause of action for negligent interference with contract exists in California, and Plaintiff has not shown an economic relationship with a third party, nor a wrongful act, independent of its interfering character, Plaintiff has not demonstrated the probability of prevailing on this cause of action.

The special motion to strike is GRANTED as to the eighth cause of action.

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H. Ninth Cause Of Action – Negligent Infliction Of Emotional Distress

"[U]nless the defendant has assumed a duty to plaintiff in which the emotional condition of the plaintiff is an object, recovery is available only if the emotional distress arises out of the defendant's breach of some other legal duty and the emotional distress is proximately caused by that breach of duty. Even then, with rare exceptions, a breach of the duty must threaten physical injury, not simply damage to property or financial interests." (Citation omitted.) Gravillis v. Coldwell Banker Residential Brokerage Co. (2006) 143 Cal. App. 4th 761, 777.

Here, Plaintiff has not cited any evidence whereby Defendant assumed a duty to Plaintiff in which Plaintiff's emotional condition was an object, nor any other duty, the breach of which proximately caused Plaintiff emotional distress.

The special motion to strike is GRANTED as to the ninth cause of action.

PROOF OF SERVICE
F.R.C.P. 5 / C.C.P. § 1013a(3)/ Cal. R. Ct. R. 2.260

I am a resident of, or employed in, the County of Los Angeles. I am over the age of 18 and not a party to this action. My business address is: Steptoe & Johnson LLP, 2121 Avenue of the Stars, Suite 2800, Los Angeles, California 90067.

On **May 1, 2012,** I served the following listed document(s), by method indicated below, on the parties in this action:

NOTICE OF ENTRY OF ORDER ON DEFENDANT KYOCERA DOCUMENT SOLUTIONS AMERICA INC.'S (*fka* KYOCERA MITA AMERICA, INC.) SPECIAL MOTION TO STRIKE PURSUANT TO CCP §425.16

SEE ATTACHED SERVICE LIST

☒ **BY U.S. MAIL**
By placing ☐ the original / ☒ a true copy thereof enclosed in a sealed envelope(s), with postage fully prepaid, addressed as per the attached service list, for collection and mailing at Steptoe & Johnson LLP, 2121 Avenue of the Stars, Suite 2800, Los Angeles, California 90067, following ordinary business practices. I am readily familiar with Steptoe & Johnson LLP's practice for collection and processing of documents for mailing. Under that practice, the document is deposited with the United States Postal Service on the same day as it is collected and processed for mailing in the ordinary course of business.

☐ **BY OVERNIGHT DELIVERY**
By delivering the document(s) listed above in a sealed envelope(s) or package(s) designated by the express service carrier, with delivery fees paid or provided for, addressed as per the attached service list, to a facility regularly maintained by the express service carrier or to an authorized courier or driver authorized by the express service carrier to receive documents. Note: Federal Court requirement: service by overnight delivery was made ☐ pursuant to agreement of the parties, confirmed in writing, or ☐ as an additional method of service as a courtesy to the parties or ☐ pursuant to Court Order.

☐ **BY ELECTRONIC SERVICE via electronic filing service provider LexisNexis**
By electronically transmitting the document(s) listed above to LexisNexis File and Serve, an electronic filing service provider at www.fileandserve.lexisnexis.com, from the email address _____@steptoe.com, at approximately _____. To my knowledge, the transmission was reported as complete and without error. *See* Cal. R. Ct. R. 2.253, 2.255, 2.260.

☐ **BY EMAIL**
By electronically transmitting the document(s) listed above to the email address(es) of the person(s) set forth on the attached service list from the email address _____@steptoe.com at approximately _____. To my knowledge, the transmission was reported as complete and without error. Service by email was made ☐ pursuant to agreement of the parties, confirmed in writing, or ☐ as an additional method of service as a courtesy to the parties or ☐ pursuant to Court Order. *See* Cal. R. Ct. R. 2.260.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct. Executed on May 1, 2012 at Los Angeles, California.

Maria Rodriguez
Type or Print Name

Signature

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