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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

FRANCIS SHIVERS, an individual,

Plaintiff,

v.

LAURA PAULINE PERRETT, an individual; THOMAS ARKLIE, an individual; and DOES 1 thru 100, inclusive,

Defendants.

CASE NO. BC540153
UNLIMITED JURISDICTION

[Assigned for all purposes to the Hon. Michael L. Stern, Dept. 62]

PLAINTIFF'S OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO STRIKE PURSUANT TO CCP § 425.16; AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[EVIDENTIARY OBJECTIONS, AND DECLARATIONS OF FRANCIS SHIVERS, DAVID NOTOWITZ, AND PAUL ELAM FILED CONCURRENTLY HEREWITH]

Date:	August 21, 2014
Time:	8:30 a.m.
Department:	62
Complaint Filed:	March 20, 2014
Trial Date:	None set

NOTICE OF OPPOSITION

TO THE HONORABLE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on August 21, 2014 at 8:30 a.m., in Department 62 of the Los Angeles Superior Court located at 111 North Hill Street, Los Angeles, California, the Honorable Michael L. Stern presiding, Plaintiff FRANCIS SHIVERS will oppose the "Special Motion to Strike Pursuant to CCP § 425.16" filed in this action by Defendants LAURA PAULINE PERRETT and THOMAS ARKLIE.

Plaintiff's Opposition will be based on this Notice; the attached Memorandum of Points and Authorities; the attached Declarations of Francis Shivers, David Notowitz, and Paul Elam, and all exhibits thereto; the entire case record on file with this Court; and such other and further oral and documentary evidence, by witnesses or affidavit, as may be presented in or at the briefing and hearing on said motion.

Dated: August 8, 2014

DADGOSTAR LAW LLP

By: _____
Hirad D. Dadgostar

Attorneys for Plaintiff,
FRANCIS SHIVERS

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Nearly 10 years ago, Plaintiff filed for divorce against Defendant Perrett in spite of her threats to destroy him in the manner laid out in her unsold film treatment she titled "Star Crazy." Since then, Defendant has delivered on her promise by abusing the restraining order process. On March 20, 2012, Defendants triggered Plaintiff's violation of Perrett's most recent "temporary"[1] restraining order by figuring out his favorite restaurant and waiting for him there. Defendants' trap has led to a cascading of harm onto Plaintiff, including criminal convictions that are still on appeal, and a gag order infringing on his First Amendment right to use Twitter, which was only recently overturned on appeal. While Plaintiff successfully fought to restore his right to speech, Defendant Perrett took to Twitter to incite her fans against her "stalker" and "violent predator," leading to Plaintiff's receiving death threats from fans of her television show. Having recently succeeded in maintaining his liberty in spite of the costly ordeal Defendants laid out for him, Plaintiff now seeks justice for their abuse of the restraining order process and intentional infliction of emotional distress. In addition, Plaintiff seeks justice for Defendant Arklie's attempt to assault him as he tried to retreat from the restaurant where Defendants laid their trap, which prompted his use of a cell phone camera in self-defense.[2] Defendants' latest motion is yet another attempt to silence Plaintiff and conceal their misconduct from the public eye.

II.

STATEMENT OF FACTS

Plaintiff who was previously married to Defendant Perrett filed for divorce in 2004. (Compl., ¶ 12; *Shivers v. Perrett*, L.A.S.C. Case No. BD417230.) Around that time Perrett, threatened Plaintiff that she would go "Star Crazy" on him, referencing an unsold film idea about

[1] Plaintiff has been subject to this "temporary" restraining order since November 2011.

[2] Notably, in the trial in which Plaintiff was convicted for going to and then trying to leave his favorite restaurant, the jury asked one question: whether self-defense was a defense to the charge predicated on his use of his self-phone camera. The conviction that followed the court's answer in the negative is still under appeal.

a jilted ingénue who exacts revenge on her ex through a campaign of restraining order abuse. (*See* Shivers Decl., ¶¶ 2-5.)

Perrett has already testified that she authored the "Star Crazy" film treatment in 2002, confirming that the plan was spelled out in her own handwriting. (Shivers Decl., ¶ 23, Ex. E at 418:24-27, 421:26-422:7.) That plan, as she swore under oath, involves a "sugar sweet" actress, a "darling in the press," who goes "crazy" when she "meets a guy and it doesn't work out." More specifically, according to Perrett's handwritten plan, the "star" who goes "crazy" over this man's rejection of her, gets a restraining order against him and stalks him to use the restraining order against him. (*Id.* at 424:3-425:7.)

> Q: ***She stalks him, right?*** What she does is she gets—according to your treatment ***she gets a restraining order and uses it against him, right?***
>
> A: ***Yes, she does.***

(*Id.* at 424:27-425:3 (emphasis added).) Perrett also testified that, in her "Star Crazy" story, her character uses her celebrity to schmooze police and to milk her phony ploy of being stalked by her ex for media coverage, all while making charity contributions to bolster her public image. (*See* 425:4-7; 426:27-427:4, 435:18-436:6.)

Witness Courtney Washburn has testified that in 2004, around the time that Plaintiff was going to file for divorce, an enraged and belligerent Defendant Perrett came late in the evening to the home through a back courtyard, and threatened to go "Star Crazy" on Plaintiff if he filed.

> Q: What did she say?
>
> A: She called me a slut and a whore and said that if Coyote proceeded with the divorce proceedings she would be—***would go Star Crazy on him.***

(*Id.* at 790:21-791:24, 803:10-21.)

True to plan, Perrett then sought restraining order after restraining order. Her first restraining order was reluctantly granted, the Court commenting that there was no history of violence as defined in the Family Code by Plaintiff against her, and that the worst conduct was Perrett's own in crawling through Plaintiff's window, and, therefore, the Court gave Plaintiff exclusive possession of what was then his own home. (*See* Shivers Decl., ¶ 6, Ex. A at 12:18-25,

17:3-6.) Amazingly, after Perrett got her restraining order in the absence of any history of violence, and in spite of her professed fear of Plaintiff, she moved from Valencia to Los Angeles, very near Plaintiff's home. (*See* Shivers Decl., ¶ 8.) When that restraining order lapsed without incident, Perrett sought a new "temporary" order which has been in effect since November 2011. (*See* Shivers Decl., ¶ 10.)

On March 20, 2012, Defendants decided to go to Shintaro restaurant in spite of the fact that Plaintiff and his wife, who both lived in the area, had made numerous recent tweets about their favorable dining experiences there and that they would dine there "a couple times a week."[3] (*See* Shivers Decl., ¶ 10, Ex. B.) Upon noticing their presence, Plaintiff and his wife attempted to leave, but Defendant Arklie arose suddenly and without warning, approached Plaintiff in a menacing manner, growled "come here, you faggot," making it reasonably appear to Plaintiff that Defendant Arklie was going to attack him. To document and hopefully diffuse the imminent attack, Plaintiff drew his cell phone camera as he continued to back out of the restaurant, unaware that the months old "temporary" restraining order also forbade his use of recording devices near Defendant Perrett. (*See* Shivers Decl., ¶¶ 12-16.) Plaintiff was prosecuted and convicted for this in spite of the jury's question, answered in the negative by the court, whether the technical violation could be excused on account of his act of self-defense.[4] (*See id.* at 1208:5-11.)

Like her character in her "Star Crazy" film treatment, Defendant Perrett then immediately pressed media attention for the restraining order violation and sham prosecution that she and Defendant Arklie manufactured by lying in wait for Plaintiff at his favorite restaurant. For example, on May 8 2012, Defendant Perrett tweeted this message to her fans:

[3] On the evening of March 20, 2012, Plaintiff and his wife, who had recently tweeted enthusiastically about their new residence at a well-known Hollywood location in the immediate vicinity of the Shintaro restaurant, had also tweeted live about their attendance at a musical performance earlier that evening by the rock group KISS at Jimmy Kimmel Live in Hollywood, a location which would have placed their favorite restaurant, Shintaro, on their direct route home. Defendant Perrett has testified that her assistant monitors Plaintiffs' social media. (Shivers Decl., ¶ 11.)

[4] As the only cell phone video taken by Plaintiff in Shintaro restaurant on March 20, 2012 shows, Plaintiff was backing up and leaving the restaurant, not looming over Defendants or videotaping them at any close range. Indeed, the camera was only drawn as Arklie had gotten up and approached Plaintiff to attack him. The footage which will be available at the hearing in this matter, or for *in camera review*, shows Arklie returning from the middle of the room to his table when the video starts.

> I know who my ***stalker predator*** is. I lived with him for six years. ***Restraining orders*** still won't stop. I have to move.

(Shivers Decl., Ex. E at 436:17-437:2.) Defendant Perrett makes it a point to broadcast her incendiary falsehoods about Plaintiff to her fans through her official Twitter account to ensure retweets from CBS—all done to promote her police procedural drama television series. (Shivers Decl., ¶¶ 21-22 .) As a result of these activities, Plaintiff has and continues to receive death threats from Defendant's Perrett's fans whom she has deliberately misled. (*Id.*) Like her "Star Crazy" character, Defendant Perrett's vindictive use of restraining orders was never for any legitimate purpose for which the process was meant, but to promote her own celebrity while wreaking havoc in Plaintiff's life. In addition to financial harm, Plaintiff has suffered physically as well as emotionally, having had his life threatened by Perrett's misinformed fans. In addition, as a result of Defendants' conduct, Plaintiff's First Amendment rights to use Twitter (even as Perrett uses the medium against him) has been abridged. (Shivers Decl., ¶¶ 18, 22.) The convictions themselves remain under appeal. (Shivers Decl., ¶ 19, Ex. D.)

* * *

Contrary to the spin found in Defendants' sham "information and belief" affidavits, Plaintiff never got in Perrett's face at Shintaro, or snapped "pictures" (plural) (*see* Perrett Decl., ¶ 7). The sham affidavits are even inconsistent with one another, (*compare* Perret Decl., ¶ 7 with Arklie Decl., ¶ 6), begging the question of what story they will tell the Court on their next motion. This is not the first time Defendants have struggled to keep their story straight. Perrett initially admitted on her 911 call from Shintaro that Plaintiff was leaving, that Arklie stood, and then Plaintiff took the picture. (*See* Shivers Decl., ¶ 17.) That is consistent with what she told police, as they testified at trial that Arklie stood and then Plaintiff took the one picture. (*See* Shivers Decl., Ex. E at 821:12-16.) And expert evidence shows there was only ever one picture and one video immediately after, as stipulated at the criminal trial, both taken at some distance during Plaintiff's attempted escape. (*See id.* 830:18-832:11; Shivers Decl., ¶ 10, 13, 15, Ex. B; Notowitz Decl., ¶¶ 5-7.) Also, to be clear, there was never any of this "lingering" and "leering" that Defendants discuss. Shintaro staff testified that Plaintiff saw from a distance he was to be seated

next to Defendants, and immediately turned to leave. (*See id.* at 512:10;515:3, 515:9-19, 516:15-19, 517:2-5, 519:9-21, 521:3-522:13.) It is no wonder that the public is outraged at Defendants' dissembling in furtherance of their tortious and unlawful conduct toward Plaintiff, as the matter has gained worldwide attention. (*See generally* Elam Decl.)

III.

LEGAL ARGUMENT

A. Defendants' Motion Is Not Properly Before the Court, as Defendants Have Failed to Satisfy All Jurisdictional Service Requirements Established by the Legislature.

Ever since Assembly Bill 1675 (Stat. 1999, ch. 960) amended Section 425.16, it has been a requirement that "[a]ny party who files a special motion to strike pursuant to this section, . . . ***shall***, promptly upon so filing, transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed, filed caption page of the motion . . . ." (Code Civ. Proc., § 425.16, sub. (j) (1) (emphasis added).) The Legislature's purpose in imposing this additional filing requirement was to allow "[t]he Judicial Council to maintain a public record" of such filings "for at least three years. (Code Civ. Proc., § 425.16, sub. (j), (2).) By no coincidence, the Legislature four years later enacted Section 425.17, "find[ing] and declar[ing] that there has been a disturbing abuse of Section 425.16, . . . which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of Section 425.16." (Code Civ. Proc., § 425.17, sub. (a).)

There is no indication that Defendants "promptly" satisfied this requirement since filing their Motion a week and a half ago. None of the declarations or proofs of service accompanying the Motion reflect any acknowledgment of or intention to comply with this requirement, nor has there been any subsequent notice of compliance filed to indicate that the jurisdictional reporting requirement has been satisfied. An inspection of the Judicial Council's SLAPP Special Motion Log reflects that the instant Motion has not been reported to the Council as mandated by the Legislature. (*See* Cal. Judicial Council, *SLAPP Special Motion Log, available at* http://www.courts.ca.gov/cms/slapp.htm (last visited Aug. 8, 2014). With an open question as to

the satisfaction of the basic jurisdictional requirement of notice to the Council, the Court should deny the Motion as being improperly presented.

B. Defendants Have Failed Their Initial Burden of Establishing That Their Conduct Is Protected Activity Under the Anti-SLAPP Statute.

To prevail on an anti-SLAPP motion, the moving party must first meet its burden of showing that the acts underlying the plaintiff's claims were protected activity, as defined by the anti-SLAPP statute. (*Premier Med. Mgmt. Sys., Inc. v. Cal. Ins. Guar. Ass'n.* (2006) 136 Cal.App.4th 464, 476). To meet this burden, the moving party must make "a prima facie showing that plaintiff's complaint 'arises from' defendant's constitutionally-protected free speech or petition activity." (R. Weil & I Brown, Civil Procedure Before Trial, ¶ 7:991 (2013) (citation omitted) ("Weil & Brown"); *see also Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1418 (moving party bears the initial burden of establishing a prima facie showing the plaintiff's cause of action arises from the defendant's free speech or petition activity (citing cases)).) If the moving party fails to establish this so-called "first prong" of the anti-SLAPP analysis, the Court need go no farther and the anti-SLAPP motion should be denied.

1. Defendants Have Failed Their Initial Burden of Proof Because They Have Not Submitted Competent, Admissible Evidence That They Are Entitled to the Protections of the Anti-SLAPP Statute.

As noted in Plaintiff's contemporaneously filed Evidentiary Objections, the declarations of both Defendants, Laura Pauline Perrett and Thomas Arklie, are defective, as the alleged foundational language renders them incompetent and inadmissible for purposes of this motion. Specifically, the alleged foundational language at Page 1, Paragraph 1, of each declaration states: "I have personal knowledge of the facts sets forth herein, *except as to those stated on information and belief and, as to those, I am informed and believe them to be true.*" (Italics added.)

As with motions for summary judgment, the prima facie showing in support of or in opposition to a special motion to strike pursuant to C.C.P. § 425.16 must be competent, admissible evidence. (*See Drum v. Bleau, Fox & Assocs.* (2003) 107 Cal. App. 4th 1009 (observing that "special motions to strike pursuant to section 425.16 operate like a . . . motion for

summary judgment in reverse," and that "competent, admissible evidence" is required.) (internal quotations and citations omitted); *see also* Code Civ. Proc., § 437c, sub. (d) (declarations submitted on summary judgment must be based on "personal knowledge," not "information and belief").) Here, neither Defendants' declaration states which portions, if any, are based on "personal knowledge," while also failing to "show affirmatively that the declarant is competent to testify as to the matters stated," rendering both declarations incompetent and inadmissible in their entirety. (*Cf.* Code Civ. Proc., § 437c, sub. (d).)

The Court should be particularly cautious in granting the weight of actual evidence to such inherently unreliable statements that lack basic foundation, especially given the gravity of the relief sought on the instant Motion. Absent any competent, admissible evidence, Defendants have failed to satisfy their initial burden of establishing that their conduct qualified as protective activity, and, therefore, their Motion should be denied.

2. Defendants Have Failed to Meet Their Burden on the First Prong for the Additional Reason that Defendants' Conduct at Issue Was Non-Communicative, and Any Communicative Acts Were Criminal and Therefore Beyond the Protections of the Anti-SLAPP Statute.

In spite of all the attention Defendants draw to the fact of Plaintiff's conviction which resulted from the Shintaro incident they orchestrated, Defendants fail to realize two important points. First, the criminal conviction is still on appeal, and, as discussed in Part C.1, below, this forecloses any collateral estoppel, as Defendants unsuccessfully argued on their prior motions. Second, and most importantly, this action is about Defendants' tortious and unlawful conduct.

The law is clear that criminal conduct is beyond the protections of the anti-SLAPP statute. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 320.) *Flatley* is instructive and dispositive. In *Flatley*, the plaintiff was a well-known entertainer and the defendant sent a demand letter to him in which the defendant threatened to publicly accuse the plaintiff of rape if the plaintiff did not pay a substantial settlement. The California Supreme Court concluded that the letter constituted extortion as a matter of law, and that where the conduct sought to be protected by the anti-SLAPP statute constitutes a crime as a matter of law, the anti-SLAPP statute does not apply. (*Id.*; *see*

also Malin v. Singer (2013) 217 Cal.App.4th 1283, 1302 (claims based on acts of criminal activity not subject to dismissal under anti-SLAPP statute).)

There is absolutely no public interest in Defendants' conduct and nothing about it is protected within the meaning of Section 425.16. Defendants dart and dodge around the issues of their non-communicative acts of stalking Plaintiff through social media and lying in wait at a restaurant he made publicly known that he and his wife would frequent multiple times a week. And yet, tellingly, Defendants admit that Perrett's assistant *did monitor* Plaintiff's social media! (*See* Mot. at 10:10-13.) Of course, Defendants claim that the monitoring was to *avoid* Plaintiff. (*Id.*) Instead, it just so happened, that they managed to run into Plaintiff at none other than the restaurant he had recently before the incident identified on social media as his new favorite which he would visit multiple times a week. It bears emphasis that the jury in the criminal case considered acquittal based on self-defense, at least until instructed by the court it could not do so. However, the jury in this civil case could easily find that Plaintiff had acted reasonably in self-defense, and, moreover, that the sick mind behind the "Star Crazy" film treatment was betting on good odds (a couple nights out of seven in a week, as learned from her monitoring of his Twitter) that Plaintiff would step into her trap.

Instead, Defendants claim that "the gravamen" of Plaintiff's claims is "Perrett's reporting to the police," believing that this protects their conduct under Section 425.16. (*See* Mot. at 10:20, 6:3-7, 8:2-5, 8:22-9:2.) Of course, there is no public interest in, and no protection under the Anti-SLAPP statute for, making false police reports. Although their day of reckoning is still to come, Defendants have yet to appreciate that it is a criminal offense to falsely tell a law enforcement officer that a crime has been committed. (*See* Penal Code, § 148.5.) Defendants' motion is loaded with unsupported references to how Plaintiff allegedly "walked up to [Defendants] table, and started videotaping her with his cell phone and refused to leave." (*See, e.g.*, Mot. at 2:13-15 (emphasis removed), 10:18-19.) Tellingly, in her initial 911call, a very calm and collected Perrett first admitted the proper sequence of events: "My fiancé stood up, and ***then*** he [Plaintiff] started waving a camera around . . . ." (*See* Shivers Decl., ¶ 17 (emphasis added).) She then quickly changed her story, claiming that "he started waving a camera around at me and ***then*** my fiancé

stood up . . . ." (*Id.*) The former is consistent with the forensic expert testimony establishing that there was only one photograph and one video ever taken on Plaintiff's cell phone that night. (*See* Notowitz Decl., ¶¶ 5-7; *see also* Shivers Decl., ¶ 10, Ex. B.) Notably, there was no lingering over the table and taking of multiple photos or videos, as Defendants suggest in their deficient declarations. Perrett is free to testify to rehabilitate the impact of her party admissions, but it does not matter. Not only have Defendants failed to adduce any admissible evidence showing that their conduct was protected, but the actual evidence shows it clearly was not.

In sum, Defendants' cannot cherry-pick their conduct, and ignore the obvious non-communicative acts of monitoring Plaintiff's social media and lying in wait for him where it became apparent he would likely show. It is silly to think, as Defendants apparently do, that the gravamen of the lawsuit has nothing to do with those non-communicative acts, and solely to do with Perrett's *false*, unlawful, and unprotected reporting to the police of the imaginary violation. Defendants conduct must be viewed in context as a whole, and, when seen in this way, it is clear that this lawsuit would not exist if it were not for the non-communicative acts by which Defendants succeeded in making Perrett's "Star Crazy" film idea a miserable reality for Plaintiff.

Having failed to meet their initial burden of demonstrating any protected activity, and failed to adduce any competent, admissible evidence, Defendants Motion should be denied.

C. <u>Plaintiff Has Shown Prima Facie Evidence Establishing a Probability of Prevailing.</u>

If the moving party meets its initial burden of showing that the act underlying the contested cause of action is subject to the anti-SLAPP statute, the burden then shifts to the opposing party to show a probability of prevailing on the claim. (*Ruiz v. Harbor View Comm. Ass'n* (2005) 134 Cal.App.4th 1456, 1466.) To satisfy this burden, the plaintiff must demonstrate the complaint is both legally sufficient and is supported by a prima facie showing of facts sufficient to sustain a favorable judgment if the evidence submitted by the plaintiff is given credit." (*Id.*) To determine whether an opposing party has satisfied its burden, the trial court considers pleadings and evidentiary submissions of both plaintiff and defendant; though the court does not weigh credibility or compare the probative strength of the competing evidence. (*Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 273.) Instead, it is the court's responsibility to

accept as true the evidence most favorable to the opposing party. (*Id.* at 274.) The court must deny the motion if the opposing party's evidence shows even minimal merit. (*Id.*)

Even if Defendants' had presented competent, admissible evidence showing that their conduct is somehow protected by the anti-SLAPP statute—and they have not—the attached declarations and exhibits amply show that Defendants' engaged in tortious pattern of conduct to abuse the restraining order process in the way set forth Defendant Perrett's own handwritten plan. That evidence is clear, direct and overwhelming. This is the same evidence that was presented to the jury in the criminal matter, and is why that jury inquired about the applicability of self-defense. Thus, to the extent the Court concludes that the anti-SLAPP statute somehow applies to Defendants' scheme, Plaintiff has easily carried his burden of establishing his prima facie case.

1. Plaintiff's Conviction Does Not Create Any Collateral Estoppel In This Case.

Defendant again inaccurately argue that Plaintiff's claims are collaterally estopped by the criminal convictions orchestrated by their trap—convictions which are presently under appeal.

It is hornbook law that collateral estoppel requires, among other things, that the decision of the issue on which preclusion is sought "must be final and on the merits." (*See Pac. Lumber Co. v. State Water Res. Control Bd.* (2006) 37 Cal. 4th 921, 943-44.) Here, the convictions that eventually resulted from Defendants' petty trap and aggressive actions at the Shintaro restaurant, are under appeal. (*See* Shivers Decl., Ex. D.) The very existence of the appeal renders any judgment "non-final." Therefore, there can be no preclusive effect.

Even if Defendants could get around the fundamental threshold requirement of there being a ***final*** judgment on the merits—and they cannot—their substantive notion that Plaintiff has no right to petition the Court to complain of their abuse of process, and related torts, is misguided. As noted in opposition to Defendants' previous motions which attempted to silence Plaintiff, the underlying conduct which forms the basis of Plaintiff's Complaint is not his, but Defendants. As the Second Appellate District of the Court of Appeals has observed, to determine whether collateral estoppel applies in this context, the court must "focus on the 'primary right' at stake, that being, if the two actions involve the same injury to the plaintiff and the same wrong by the defendant." (*Zimmerman v. Stotter* (1984) 160 Cal. App. 3d 1067, 1073.) Here, Plaintiff's abuse

of process claim does not seek to relitigate the same right involved in the underlying case described in Defendant's motion (*e.g.*, the "right" of Defendants Perrett and Arklie to trigger criminal charges against him for videotaping Defendant Arklie's attempted attack while Plaintiff and his wife tried to leave the Shintaro restaurant). Rather, it is the "the abuse of that right, which [Plaintiff] seeks to litigate." (*See id.* at 1075.) "Thus, the primary right at stake, while tangentially related, remains distinct . . . ." (*See id.* at 1075.) Quite simply, Plaintiff's claims are not barred by any form of collateral estoppel.

2. Plaintiff's Claims Are Not Barred by Litigation Privilege.

In an attempt to bootstrap everything into litigation privilege, Defendants continue to make the straw man argument that the gravamen of Plaintiffs' claims is Defendant Perrett's obtaining a restraining order and reporting to the police, when it is much more than that. Defendants also imply that the intentional, non-communicative acts of monitoring his movements through social media, and setting a trap for him to trigger the restraining order violation—much like her "Star Crazy" character she threatened to behave like would do—should be ignored. That argument, too, is inapposite because Plaintiff's claims are not premised solely on the filing of the request for restraining order or subsequent communications to the police. Rather, Plaintiff alleges that it was the *use of the process*, *i.e.* the temporary restraining order, *after its issuance* that gave rise to the cause of action through the non-communicative act of moving her body into a location which would result in violation of the restraining order. Because it is based on non-communicative activity, the litigation privilege does not apply. (*Cf. Silberg v. Anderson* (1990) 50 Cal.3d 205.) This also includes Perrett's gratuitous Twitter posts Perrett made less than two months after the incident about her "predator stalker," causing re-Tweets by CBS, and leading to Plaintiff's death threats from her show's fans—all while he had to fight to restore his own free speech rights. (*See* Shivers Decl., ¶ 22.)

In sum, there is ample evidence of conduct well outside the litigation privilege showing Defendants' malice and ulterior motives consistent with the *modus operandi* of the "Star Crazy" film idea Defendant Perrett admits to having authored, which witnesses Courtney Washburn will confirm Perrett threatened to act out in reprisal for Plaintiff's filing for divorce. As with much

their arguments, Defendants' attempt to isolate the obvious petitioning activity that would be involved in any abuse of process claim, and blatantly ignore the full context of non-their communicative conduct surrounding that, including their admitted monitoring of Plaintiff, decision to wait where he revealed on his monitored Twitter he would likely appear, and aggressively approaching him as he attempted to leave the restaurant. As the Second Appellate District of the Court of Appeals has cautioned, "the failure to distinguish between conduct and communication runs the risk of essentially eliminating the tort of abuse of process, something we do not believe the Legislature intended . . . ." (*Drum*, 107 Cal. App. 4th at 1028 (finding that litigation privilege did not bar abuse of process of claim and reversing dismissal of case.)[5].

3. Plaintiff's Claims Are Supported by Admissible Evidence.

a) Abuse of Process

Even at this early stage, there is ample evidence that (1) Defendants entertained an ulterior motive in using the restraining order process and (2) Defendants committed willful acts in the misuse of the restraining order process for the improper purposes for which it was never intended. (*See Coleman v. Gulf Ins. Group* (1986) 41 Cal.3d 782, 792.) Much of this has already been testified to by Defendant Perrett, confirming her handwritten film treatment for "Star Crazy," which instead of a motion picture she turned into a living nightmare for Plaintiff as she threatened she would do for his filing for divorce nearly 10 years ago. (*See* Shivers Decl., Ex. E at 418:24-27, 421:26 to 422:7, 424:3 to 425:7, 426:27 to 427:4, 435:18 to 436:6, 436:17 to 437:2, 790:21 to 791:24, 803:10-21.) In addition to the satisfaction of executing her vindictive scheme of stalking her ex to trigger violations of restraining orders, just like the character in her story, Defendant Perrett undoubtedly stands to obtain collateral benefits in the divorce proceedings which still

[5] Moreover, as discussed in Part III.B.3, above, there is sufficient evidence, from which the jury can infer that DEFENDANTS's statements to law enforcement were knowingly false, and made with malice, in violation of Penal Code section 148.5, obviating any privilege around such communications. This is especially so in light of Plaintiff's testimony regarding the actual events at Shintaro and the only photograph and video taken from several feet away when he was already leaving, which is corroborated by forensic expert testimony and even DEFENDANT Perrett's initial telling of the incident on her 911 call from the restaurant. All of this is in stark contrast to the fabrications about multiple photos and videos taken while leaning in at the table, *etc.*, as set forth in DEFENDANTS' motion and foundationally deficient declarations. The evidence overwhelmingly demonstrates that DEFENDANTS's statements were made with *malice*, extinguishing any privilege that may otherwise have existed under Civil Code Section 47.

remain pending. As a result of Defendants' feigning fear from his Twitter activity, the restraining order process was also used to unlawfully abridge Plaintiff's First Amendment rights —an order prohibiting from using Twitter which was only recently reversed on appeal—all while Defendant Perrett took to Twitter, just like her "press darling" character in "Star Crazy," to create self-serving publicity about her "stalker predator." (*Id.* 425:4-7; 426:27-427:4, 435:18-436:6, 436:17-437:2.) So far, Perrett has had everything to gain and nothing to lose from her conduct, turning it into publicity gold to promote her popular police procedural drama television series.

Defendant's overreliance on the fact that Plaintiff's claims involve, by necessity, the fact of her obtaining multiple restraining orders (like her "Star Crazy" character and inspiration) misses the mark. As noted in Part III.B.3, above, Defendants' conduct must be viewed in context as a whole, including the non-communicative acts of the admitted monitoring of Plaintiff's social media (*see* Mot. at 10:10-12) where he had posted he would go to Shintaro multiple times per week (*see* Shivers Decl., Ex. A), Defendants' decision to wait there, and Defendant Arklie's decision to arise from his seat in an attempt to attack Plaintiff while he and his wife were clearly leaving the restaurant (and thereby nearly escaping Defendants' trap). Defendants' superficial analysis suggesting that the involvement of the restraining order process in this scheme insulates all of the nefarious conduct surrounding it would swallow the tort of abuse of process in a way never contemplated by the Courts. As the Second Appellate District of the Court of Appeals has cautioned, "the failure to distinguish between conduct and communication runs the risk of essentially eliminating the tort of abuse of process, something we do not believe the Legislature intended . . . ." (*Drum*, 107 Cal. App. 4th at 1028.)

b) Assault

Contrary to Defendants' apocryphal and inconsistent accounts of what happened at the Shintaro restaurant on the evening of March 20, 2012, the *only cell phone video* captured by Plaintiff that night shows he was far from Defendants' table—not leaning over them—and that Defendant Arklie was in the process of coming toward Plaintiff even as he attempted to leave. At the start of the footage, the video shows Arklie's back as he returns to Defendants' corner table. A bystander is heard making a statement of present sense impression, "I saw," as Plaintiff

exclaims, "he just threatened me." The video and 911 call will be available for viewing and listening at the hearing on these motions or for *in camera* review by the Court. However, it should be emphasized that Defendants' different accounts of the evening are contradicted within their own motions. For example, at page 9, lines 18 to 19, Defendant Perrett claims in her motion, without any supporting evidence, that Plaintiff approached Defendants' table and videotaped them there. Later in their nearly identical motions, Defendants quote Arklie's previous trial testimony confirming that Plaintiff was "backing up" when he "started filming." Importantly, however, Arklie did not testify accurately when he states that he "actually got up out of [his] chair," as quoted in Defendants' motions, when Plaintiff started filiming while backing up. What the video actually shows—the only cell phone video taken that night—is that Arklie was already out of his seat and approaching Plaintiff until the video came on. Only at that point, did Arklie abandon his attempted attack and confrontation with Plaintiff who is in the process of backing up to escape the trap Defendants had set for him. Although Defendants are likely to testify differently than Plaintiff and come up with new ways to massage the history, such differences at best only create triable issues. Multiple witnesses who already testified, as set forth in the Statement of Facts above, all contradict Defendants' latest machinations.

c) Intentional Infliction of Emotional Distress

As alleged in Plaintiff's Complaint, the conduct to which he has been subjected for nearly a decade of his life ever since filing for his divorce from Defendant Perrett was set forth in painful detail in a Perrett's film treatment she titled "Star Crazy." She has admitted her authorship, handwriting, and every peculiar detail mirroring the manner in which she has calculatedly misused restraining orders to harm Plaintiff, and witness Courtney Washburn has testified about Perrett's threats to carry out that plan against Plaintiff for his seeking divorce. Plaintiff submits that a jury could reasonably find from the evidence submitted that a decade long campaign of this type of harassment is extreme and outrageous conduct. This is particularly so, as Defendant Perrett has used the manufactured incident to promote her own police procedural television drama—just like her press darling character in "Star Crazy" sought media attention for her imagined plight—through false Tweets about her "predator stalker," knowing these would

also be re-Tweeted by her network, CBS, inciting her many fans against Plaintiff. As a direct result of Defendants' conduct, he has been subjected to death threats, gone through unnecessary trials and appeals, had his First Amendment rights to use Twitter abridged, and only recently restored on appeal. Defendants now seek to silence Plaintiff's last avenue for redress by pretending that Perrett "going 'Star Crazy'" on her ex-husband for filing for divorce was not extreme or outrageous. The torment, including death threats from Perrett's fans whom she has incited, has caused Plaintiff severe and palpable emotional distress.

* * *

Although Defendants' have not satisfied their initial burden with their incompetent evidence that attempts to recast their unlawful non-communicative conduct as protected activity, the evidence also shows that Plaintiff's claims have probable merit, and Defendants' Motion should be denied for this reason as well.

IV.

CONCLUSION

Defendants engaged in an extensive but ultimately transparent scheme to orchestrate a technical violation of a temporary restraining order by waiting for Plaintiff at a restaurant he was known to frequent multiple times a week with his wife, and assaulting him as he tried to back out. Consistent with the *modus operandi* set forth in her unsold "Star Crazy" film treatment, Defendant Perrett has milked the drama she created by Tweeting to the fans of her hit TV show, triggering re-tweets by CBS, all causing Plaintiff to face death threats from her ill-informed fans. Now that Plaintiff seeks to petition the Court under long cognizable claims intended to combat such brazen abuse of process, Defendants now come to this Court and claim instead that it is Plaintiff who is curtailing their First Amendment rights. This should not be condoned. The Court should reject Defendants' attempt to hide behind California's anti-SLAPP statute, and deny their motion in its entirety. Moreover, the Court should order that Plaintiff may file a motion for attorneys' fees under C.C.P. § 425.16(c)(1).

Dated: August 8, 2014

DADGOSTAR LAW LLP

By: _____
Hirad D. Dadgostar

Attorneys for Plaintiff,
FRANCIS SHIVERS

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles; I am over the age of eighteen years and not a party to the within entitled action; my business address is 12400 Wilshire Boulevard, Fourth Floor, Los Angeles, California 90025-1030.

On **August 8, 2014**, I served the following document(s) described as **PLAINTIFF'S OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO STRIKE PURSUANT TO CCP § 425.16; AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** on the interested party(ies) in this action by placing true and correct copies thereof enclosed in sealed envelopes and/or packages addressed as follows:

Stanton L. Stein, Esq.
Scott K. Robinson, Esq.
Ashley R. Yeargan, Esq.
LINER LLP
1100 Glendon Avenue, 14th Floor
Los Angeles, CA 90024-3503

Attorneys for Defendants

☒ **BY OVERNIGHT DELIVERY:** I served such envelope or package to be delivered on the same day to an authorized courier or driver authorized by the overnight service carrier to receive documents, in an envelope or package designated by the overnight carrier.

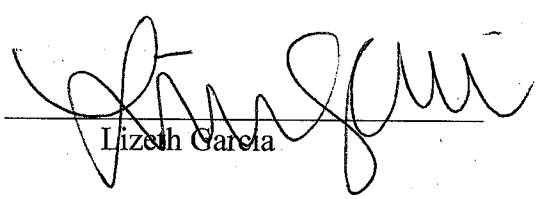
☐ **BY FACSIMILE:** I served said document(s) to be transmitted by facsimile pursuant to Rule 2.306 of the California Rules of Court. The telephone number of the sending facsimile machine was (310) 820-1088. The name(s) and facsimile machine telephone number(s) of the person(s) served are set forth in the service list. The sending facsimile machine (or the machine used to forward the facsimile) issued a transmission report confirming that the transmission was complete and without error. Pursuant to Rule 2.306(h)(4), a copy of that report is attached to this declaration.

☐ **BY EMAIL:** I served said document(s) by email pursuant to stipulation with the person(s) served to receive service in this manner. I caused such document(s) to be delivered by email to the addressee(s). The name(s) and email address(es) of the person(s) served are set forth in the service list.

☐ **BY HAND DELIVERY:** I caused such envelope(s) to be delivered by hand to the office of the addressee(s).

☒ **C.C.P. 426.16(j):** Pursuant to Code of Civil Procedure Section 425.16, subdivision (j), I will cause a copy of the endorsed, filed caption page of said document(s) to be transmitted to the California Judicial Council by e-mail to SLAPP@jud.ca.gov promptly upon filing and receipt of an endorsed, filed caption page.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 8, 2014, at Los Angeles, California.



Lizeth Garcia