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SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES
DEC 17 2012
John A. Clarke, Executive Officer/Clerk
BY Mary Flores, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

KOVAC MEDIA GROUP, INC. d/b/a TENTH STREET ENTERTAINMENT, a California corporation; 11-7 RECORDING CORP., a California corporation,

Plaintiffs,

v.

DINA LAPOLT, an individual; LAPOLT LAW, P.C., a California professional corporation; and DOES 1-10, inclusive,

Defendants.

CASE NO. BC493706

Assigned to the Honorable Joseph R. Kalin
Department 50

NOTICE OF MOTION AND SPECIAL MOTION OF DEFENDANTS TO STRIKE PLAINTIFFS' FIRST AMENDED COMPLAINT PURSUANT TO C.C.P. § 425.16; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; REQUEST FOR ATTORNEYS' FEES AND COSTS (C.C.P. § 425.16(C)(1))

[Declaration of Steven V. Tallarico p/k/a Steven Tyler; Declaration of Dina LaPolt; Declaration of Bradley J. Mullins; Appendix of Non-California Authorities; Defendants' Demurrers; Request for Judicial Notice; and *Pro Hac Vice* Application submitted concurrently herewith]

Date: January 14, 2013
Time: 8:30 a.m.

File Date: October 11, 2012
Trial Date: TBD

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NOTICE OF MOTION AND SPECIAL MOTION TO STRIKE

PLEASE TAKE NOTICE that, on January 14, 2013 at 8:30 a.m., or as soon thereafter as the matter may be heard, in Department 50 of the above-entitled Court, located at the Stanley Mosk Courthouse, 111 North Hill Street, Los Angeles, California 90012, Defendants Dina LaPolt and LaPolt Law, P.C. (collectively, "LaPolt") will and hereby do move, pursuant to Code of Civil Procedure section 425.16, for an order striking the First Amended Complaint filed by Plaintiffs Kovac Media Group, Inc. d/b/a Tenth Street Entertainment and 11-7 Recording Corp. ("Plaintiffs"). Pursuant to Code of Civil Procedure section 425.16(c)(1), LaPolt also move for an order awarding their attorneys' fees and costs in an amount to be proven through a subsequent application and motion according to proof.

This motion is and will be made on the grounds that: (1) the communications and conduct of LaPolt was in furtherance of the exercise of their constitutional right of free speech in connection with a matter of public interest; and (2) the communications and conduct of LaPolt consisted of litigation-related activity. Plaintiffs cannot bear their burden of establishing, through competent and admissible evidence, a probability that they will prevail on any cause of action because, *inter alia*, (1) Plaintiffs' claims are barred by a general release; (2) Plaintiffs cannot establish that an attorney-client relationship existed between Plaintiffs and LaPolt; (3) Plaintiffs have not alleged and cannot sufficiently allege necessary elements of their causes of action for interference with contract and interference with prospective business advantage; and (4) LaPolt's conduct was privileged.

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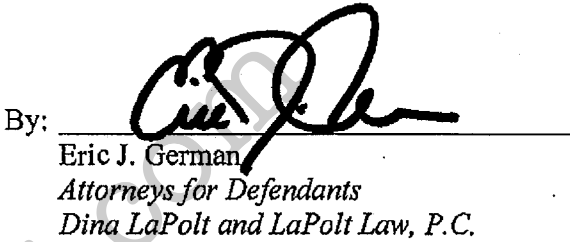
This motion is based on this notice, the accompanying memorandum of points and authorities, the Declarations of Dina Lapolt, Steven Tallarico p/k/a Steven Tyler, and Bradley J. Mullins, the concurrently-filed appendix of non-California authority, the pleadings, documents, and files of record in this Court for this matter, any reply that Defendants may file, and upon such oral and documentary evidence and argument as may be presented at the time of the hearing on this motion.

DATED: December 17, 2012

MITCHELL SILBERBERG & KNUPP LLP



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Code of Civil Procedure
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I. INTRODUCTION

The baseless claims alleged by Plaintiffs Kovac Media Group, Inc. d/b/a Tenth Street Entertainment ("TSE") and 11-7 Recording Corp. ("11-7") (collectively, "Plaintiffs"), both owned by Allen Kovac ("Kovac"), in their First Amended Complaint ("FAC") should be stricken pursuant to California's anti-SLAPP statute, Code of Civil Procedure section 425.16(b)(1). This lawsuit is nothing more than Kovac's desperate attempt to exact revenge for his loss of one valuable management client, mega famous rock star and television personality Steven Tallarico p/k/a Steven Tyler ("Tyler"), and his fear of losing a second, a renowned rock band, Mötley Crüe. Kovac has no one to blame for his troubles but himself, yet he is intent on seeking to harm and publicly embarrass Defendants Dina LaPolt and LaPolt Law, P.C. (collectively, "LaPolt"), and to interfere with her relationships with her clients. Throughout their FAC, Plaintiffs pretend that LaPolt hurt her clients, and Tyler in particular. Laying that nonsense to rest, Tyler, in his accompanying declaration, fully supports LaPolt and makes it clear that it was Kovac who was Tyler's adversary and who potentially jeopardized Tyler's relationships and career. **Declaration of Steven V. Tallarico p/k/a Steven Tyler, dated December 2, 2012 ("Tyler Decl."), ¶¶ 7-9.**

Indeed, Plaintiffs' entire FAC is based on false allegations, including the contrived contention (tactically crafted to try to avoid section § 425.16(b)(1)) that LaPolt was Plaintiffs' lawyer. LaPolt was not Plaintiffs' lawyer; LaPolt in fact represented Tyler (and Mötley Crüe) adverse to TSE. Plaintiffs' further false allegations are that: (1) TSE was entitled to, but did not, receive a certain amount of management commissions from Tyler's income as a result of LaPolt's "interference" with its alleged contractual rights; (2) LaPolt somehow disclosed confidential information and deprived TSE of a "prospective economic benefit" of receiving more money in connection with the negotiation of Tyler's contract as a judge on the hit show "*American Idol*"; and (3) LaPolt has done some unspecified "wrong" to TSE regarding Mötley Crüe.

All of the communications and conduct at issue in the FAC, however, is protected under California Code of Civil Procedure section 425.16. First, LaPolt's communications relating to Tyler's negotiation of his *American Idol* contract – a topic widely covered by the press – and Tyler's management representation are undeniably protected activity "in furtherance of [Defendants'] right of petition or free speech under the United States or California Constitution in connection with a public issue." Civ. P. Code § 425.16(b)(1). Second, the alleged conduct and communications of LaPolt underlying Plaintiffs' claims are protected activity in that they took place in a "pre-litigation" context and as part of a settlement of a dispute between Tyler and TSE,

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and in response to the filing of the instant lawsuit by Plaintiffs. Accordingly, Plaintiffs can only proceed with their claims if they meet their burden of proving, through competent and admissible evidence, a probability that they will prevail on their claims.

Plaintiffs plainly cannot meet this burden. Their claims fail because: (1) LaPolt never represented Plaintiffs, and any contentions to the contrary are blatant falsehoods; (2) TSE signed a release which bars it from bringing the majority of its claims here; (3) the litigation privilege immunizes LaPolt's allegedly tortious conduct; (4) there was no breach of any underlying agreements, a prerequisite of any intentional interference with contract claim; and (5) TSE had no claim of right to any economic advantage with *American Idol* producers – only Tyler had such right. Accordingly, the Court should grant LaPolt's motion to strike the FAC, and award to LaPolt their reasonable attorneys' fees and costs incurred in connection with this motion.

II. STATEMENT OF FACTS

A. The Parties' Relationships with, and Agreements Regarding, Tyler

LaPolt is an experienced entertainment attorney who began representing Steven Tyler, the lead signer of the legendary and iconic rock band *Aerosmith*, in connection with transactional entertainment matters in February 2010. **Declaration of Dina LaPolt, dated December 17, 2012 ("LaPolt Decl."), ¶¶ 4-8, 10, 45; Tyler Decl., ¶ 3.** LaPolt and her firm, Defendant LaPolt Law, P.C., have represented Tyler continuously since that time. **LaPolt Decl., ¶ 10.**

Kovac is engaged in the business of artist management and is the owner of Plaintiff TSE, a personal management company, and Plaintiff 11-7, a record company. **LaPolt Decl., ¶¶ 29-30.** TSE provided artist management services to Tyler from January 1, 2010 until August 1, 2011, pursuant to a Personal Management Agreement, as amended (the "PMA"). ***Id.*, ¶ 51 & Ex. C; Tyler Decl., ¶ 6.** Tyler's relationship with TSE was terminated by a written release on August 1, 2011. **LaPolt Decl., ¶ 70 & Ex. F, p. 3, ¶ 5(c)-(d).** As clearly stated in the first paragraph of the PMA and in the amendment thereto, TSE was represented by Douglas Mark of Mark Music & Media Law, P.C., and Tyler was represented by LaPolt and LaPolt Law, P.C. ***Id.*, Ex. C, pp. 1 & 9.** Douglas Mark is and at all relevant times has been the lawyer for TSE, 11-7 and Kovac. ***Id.*, ¶¶ 43-44.** On the other hand, LaPolt was Tyler's attorney during the entire time that TSE provided artist management services to Tyler. ***Id.*, ¶ 47.** At no point did LaPolt or anyone at her law firm ever serve as the attorney for Kovac, TSE or 11-7, nor has LaPolt ever been requested to render legal advice or services to Kovac, TSE or 11-7, ever entered into any retainer and/or engagement agreement with Kovac, TSE or 11-7, or ever billed, invoiced, or been paid for any

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legal services rendered to Kovac, TSE or 11-7. ***Id.*, ¶¶ 31-35.** To the contrary, LaPolt acted ***adverse*** to TSE and Kovac on behalf of Tyler. ***Id.*, ¶ 37.**

TSE's management services to Tyler under the PMA were provided by Eric Sherman ("Sherman"), TSE's employee responsible for handling the management of Tyler throughout that time. **LaPolt Decl., ¶¶ 49-50, 53-56.** Sherman had first become an employee of TSE on July 1, 2009, and brought Tyler to TSE as a management client. ***Id.*, ¶¶ 49-50.** Paragraph 19 of the PMA contained a "Key Man" provision, pursuant to which Tyler had the unequivocal and immediate right to terminate the PMA in the event that Sherman was no longer in charge of TSE's day-to-day responsibilities and operations with respect to Tyler. ***Id.*, ¶ 53 & Ex. A, ¶ 19.** Tyler's understanding that Sherman – and not Kovac – would be primarily responsible for managing Tyler was the ***reason*** Tyler agreed to engage TSE in the first place, as Tyler did not like or trust Kovac. **Tyler Decl., ¶ 8; LaPolt Decl., ¶ 54.** In a 2010 amendment to the Employment Agreement between Sherman and TSE, TSE formally agreed that "Kovac shall not act as a representative of Steven Tyler nor shall Kovac operate, either within [TSE] or in dealing with third parties as a representative of Tyler, unless and until so requested, if ever . . . ." **LaPolt Decl., Ex. B, ¶ 3.**

During the time TSE managed Tyler, January 1, 2010 through August 1, 2011, Kovac's relationships with both Tyler and Sherman grew increasingly strained, difficult and acrimonious. **LaPolt Decl., ¶ 57.** Despite TSE's agreements with Tyler and Sherman, discussed above, Kovac attempted to dictate to Tyler's representatives how Tyler's activities and negotiations with third parties should be handled, and communicated with third parties about Tyler. **Tyler Decl., ¶ 9.** Kovac was hot-headed, disrespectful and abusive when dealing with Tyler's business associates, family and friends, all to the detriment of Tyler. ***Id.*, ¶ 7; Lapolt Decl., ¶ 57.** Kovac persisted in trying to exert power and control, making demands upon LaPolt and Sherman, and creating a tense and litigious atmosphere. In mid-2011, this dispute escalated, when Kovac aggressively interfered with the negotiation of Tyler's *American Idol* contract. **LaPolt Decl., ¶¶ 58-62.** LaPolt was representing Tyler in connection with the negotiation of his *American Idol* contract at that time, along with Creative Artists Agency. ***Id.*, ¶ 60.** Kovac's actions spurred the growing feud within the Tyler camp, amidst public speculation as to whether Tyler would return as an *Idol* judge. *See, e.g.*, **Declaration of Bradley J. Mullins, dated December 12, 2012 ("Mullins Decl."), Exs. 1-3.** Kovac's interference, done for his own gain, put Tyler's *American Idol* 2011 contract and business dealings in potential jeopardy. **LaPolt Decl., ¶ 60.**

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While the *Idol* negotiations still were in process, in July 2011, TSE filed a lawsuit against Sherman in New York, directly and adversely impacting Tyler's management contract and career. TSE accused Sherman of mishandling the ongoing 2011 *Idol* negotiations for Tyler, allegations which largely mirror those set forth in this FAC. **LaPolt Decl., ¶¶ 65-67.** In its lawsuit, TSE asserted, *inter alia*, that Sherman tortiously interfered with the PMA by "commit[ing] intentional acts designed to . . . create disruption in" the "relationship" between TSE and Tyler, that Sherman was ignoring Kovac's negotiating strategy with respect to Tyler's *American Idol* contract, and that Sherman was trying to "steal[]" TSE's client. ***Id.*, Ex. E, ¶¶ 8, 18, 24, 31.**

In late July 2011, the TSE litigation was pending, the *Idol* negotiations were in potential jeopardy, and the threat of further imminent litigation hung over Tyler and TSE's relationship. TSE, Sherman and Tyler were able, however, to come to a resolution of their disputes, including the litigation filed by TSE. Simultaneously entered into on August 1, 2011 were: (1) an Assignment and Release Agreement between Sherman, TSE and Tyler (the "Assignment and Release Agreement"); and (2) a Termination and Release Agreement between TSE and Sherman (the "TSE/Sherman Release Agreement"). **LaPolt Decl., ¶¶ 70-80, Exs. F & G.** Each of these parties was represented by separate and independent counsel in connection with the negotiation and execution of these agreements – Sherman was represented by Donald Passman, TSE was represented by Douglas Mark, and Tyler was represented by LaPolt. ***Id.*, Ex. F, p. 1.** Pursuant to these agreements, the PMA, and all of the rights and obligations thereunder, was assigned by TSE to Sherman. ***Id.*, Ex. F, p. 1, ¶ 1.** The parties further agreed that the PMA and all rights, duties and obligations thereunder would terminate as of June 30, 2012. ***Id.*, Ex. F, pp. 1-2, ¶¶ 2 & 4.** These agreements also contained release provisions. TSE lost all privity with Tyler and released all claims relating to the PMA. Sherman became the only party entitled to any management commissions from Tyler, and only through June 30, 2012. **Tyler Decl., ¶ 12; LaPolt Decl., ¶¶ 76-80, Ex. E, ¶ 5 & Ex. G, ¶ 2.**

In the Assignment and Release Agreement, TSE expressly released:

> Tyler and each of his . . . **attorneys** . . . from and of any and all claims, demands, liabilities, covenants, agreements, contracts and promises in law or equity which TSE may have or acquire against the Tyler Released Parties, or any of them, whether or not they have been subject to dispute and whether or not known or unknown or suspected or unsuspected, by reason of any matter, or cause whatsoever, relating to or arising from the Management Agreement.

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LaPolt Decl., Ex. F, ¶ 5(c)(d) (emphasis added). TSE thus released LaPolt by this clear and unambiguous release, and discontinued its lawsuit against Sherman. ***Id.*****, ¶ 74.**

In his separate August 2011 TSE/Sherman Release Agreement, which Tyler did not sign or agree to, and under which Tyler has ***no*** obligation, Sherman agreed with TSE to pay TSE a portion of his commissions from Tyler. As the release agreements make clear, all commissions under the PMA end June 30, 2012. Sherman agreed that if he and Tyler entered into a new agreement post-June 30, 2012, Sherman would continue to remit a percentage of his commission, ***if any***, to TSE for a specified period of time. **LaPolt Decl., ¶¶ 76-77.** No provision in either agreement required Sherman and Tyler to enter into any further agreement after June 30, 2012, nor does any provision compel Tyler to pay to Sherman (or anyone else) any particular amount of commission after June 30, 2012. ***Id.*****, ¶¶ 78-80.**

While prior to June 30, 2012, under the PMA, Sherman had a right to a commission of two percent (2%) of Tyler's band touring related income complained of in the FAC, ***after*** June 30, 2012 Sherman had no such right or concomitant obligation to pay TSE a percentage based upon any two percent (2%) commission, as the PMA had ended. **LaPolt Decl., ¶¶ 76, 79.** Accordingly, following the June 30, 2012 PMA termination date, effective July 1, 2012, Tyler, as was his right, entered into a new, at-will arrangement with Sherman's employer XIX Entertainment ("XIX") for the provision of management services. ***Id.*****, ¶ 81.** Tyler's new agreement with XIX is more favorable to Tyler than the PMA. ***Id.*** Among other things, Tyler chose to pay XIX only one percent (1%) of Tyler's band touring related income, as was his right. Sherman thus only has to remit a percentage of that 1% to TSE, and TSE has no right or standing to claim anything more. ***Id.*****, ¶ 82.** The monies that XIX/Sherman received from Tyler as management commissions both prior to and after June 30, 2012 have been properly remitted to TSE under the clear and unambiguous terms of the Assignment and Release Agreement and the TSE/Sherman Release Agreement. ***Id.*****, ¶¶ 86-87.**

B. LaPolt's Actions Following the Initiation of this Action

In addition to Tyler, LaPolt also represents Mötley Crüe and one of its individual members, Mick Mars ("Mars"). **LaPolt Decl., ¶¶ 27-28.** TSE serves as the manager for Mötley Crüe, and Mötley Crüe is also signed to 11-7. ***Id.*****, ¶¶ 29-30.** Following the initiation of this lawsuit by Plaintiffs, LaPolt had an (entirely warranted) concern that Plaintiffs would also attempt to drag Mötley Crüe into this litigation. LaPolt was also concerned that that Plaintiffs and/or Kovac would seek to involve other third parties. In order to prevent some of the damage that

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1 would inevitably be caused by this lawsuit, LaPolt advised her client, Mars, to obtain separate
2 counsel while this litigation was pending. **LaPolt Decl., ¶ 89.** LaPolt also notified other
3 interested parties about the Plaintiffs' allegations against her in this lawsuit. ***Id.*, ¶ 91.**

4 **C. Plaintiffs' Allegations**

5 Plaintiffs have alleged six meritless claims against Defendants. At the heart of Plaintiffs'
6 misrepresentations are their vague and conclusorily allegations, without any factual support, that
7 "LaPolt represented Plaintiffs" and that "[a]s a result of her attorney-client relationship with
8 Plaintiffs, LaPolt owed each Plaintiff a fiduciary duty to maintain the confidence of, and to
9 preserve the secrets of, each Plaintiff; and . . . a duty of loyalty to refrain from acting in any way
10 that would injure any Plaintiff." **FAC, ¶¶ 9-11.** Plaintiffs claim Defendants breached such
11 purported duties by "undermin[ing]" TSE's strategy in connection with the 2011 negotiation of
12 Tyler's *American Idol* contract; by "facilitat[ing] [Sherman's] and [Tyler's] departure from TSE";
13 by "cut[ting] TSE out of its rightful commission for [Tyler's] management as specified in the
14 [TSE/Sherman Release Agreement] and the [Assignment and Release Agreement];" and by having
15 a "goal" of interfering with TSE's relationship with Mötley Crüe. ***Id.*, ¶¶ 17, 21, 27, 38, 74.** As
16 discussed below, Plaintiffs' claims should all be stricken pursuant to section 425.16.

17 **III. THE LEGAL STANDARD**

18 Pursuant to section 425.16, "[a] cause of action against a person arising from any act . . . in
19 furtherance of the person's right of petition or free speech . . . in connection with a public issue
20 shall be subject to a special motion to strike, unless the court determines that the plaintiff has
21 established that there is a probability that the plaintiff will prevail on the claim." The anti-SLAPP
22 statute was enacted to allow for early dismissal of meritless cases "aimed at chilling expression
23 through costly, time-consuming litigation." *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 839
24 (9th Cir. 2001). In applying section 425.16, courts consider the pleadings, affidavits and
25 declarations stating the facts upon which the liability or any defense is based. Civ. P. Code §
26 425.16(b)(2); *Salma v. Capon*, 161 Cal. App. 4th 1275, 1290 (2008). The analysis has two steps:
27 First, the defendant must make a *prima facie* showing that the claims at issue "arise from"
28 protected activity – namely, "any act of that person in furtherance of the person's right of petition
29 or free speech under the United States or California Constitution in connection with a public
30 issue." Civ. P. Code § 425.16(b)(1). "[A] court must generally presume the validity of the
31 claimed constitutional right in the first step of the anti-SLAPP analysis." *Chavez v. Mendoza*, 94
32 Cal. App. 4th 1083, 1089 (2001). It is sufficient that the challenged claims arise at least in part
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from activities protected under the statute. *Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal. App. 4th 294, 307-08 (2001).

Second, once it is shown that the claims arise from protected activity, the burden then shifts to the plaintiff to show, by "competent, admissible evidence," the ***probability*** he or she will prevail on the merits. *Roberts v. Los Angeles County Bar Ass'n*, 105 Cal. App. 4th 604, 614 (2003). Specifically, an anti-SLAPP motion should be granted unless the plaintiff can show that: (i) each claim is legally viable and supported by competent admissible evidence on all essential elements, sufficient to defeat a directed verdict at trial and to support a judgment in plaintiff's favor; and (ii) the admissible evidence the plaintiff offers negates defenses to the claims. *See Tuchscher Dev. Enter. Inc. v. San Diego Unified Port Dist.*, 106 Cal. App. 4th 1219, 1235-1230 (2003); *Seelig v. Infinity Broad. Corp.*, 97 Cal. App. 4th 798, 809 (2002). If the plaintiff cannot make the requisite showing, the action is dismissed and the defendant must be awarded its attorneys' fees and costs. Civ. P. Code § 425.16(c).

IV. PLAINTIFFS' FAC IS SUBJECT TO THE ANTI-SLAPP STATUTE

All of Plaintiffs' claims in this action clearly "arise from" protected activity under section 425.16(e), and are therefore properly subject to a special motion to strike. Section 425.16(e) defines an "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" as including " . . . (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; . . . (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." The communications and conduct at issue here are protected under both prongs.

A. All of Plaintiffs' Claims Arise From Protected Litigation-Related Activity

Courts have adopted a "fairly expansive view" of what constitutes litigation-related activities within the scope of section 425.16. *Thayer v. Kabateck Brown Kellner LLP*, 207 Cal. App. 4th 141, 154 (2012). "[A] statement is 'in connection with' litigation under section [425.16(e)(2)], if it relates to the substantive issues in the litigation and is directed to persons having some interest in the litigation." *Seltzer v. Barnes*, 182 Cal. App. 4th 953, 962 (2010).

1. Plaintiffs' First Through Fourth Causes of Action

The communications and conduct of Defendants underlying Plaintiffs' First through Fourth Causes of Action claims fall squarely within section 425.16(e)(2), as these claims all arise

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from LaPolt's representation of Tyler adverse to TSE during 2011, as discussed above in detail. Notably, legal advice and settlement made in connection with litigation are within section 425.16, and section 425.16 absolutely protects defendant attorneys from suits brought by third parties on any cause of action "arising from" those protected activities. *Thayer*, 207 Cal. App. 4th at 154; *Cabral v. Martins*, 177 Cal. App. 4th 471, 482 (2009). During that time period, Tyler had troubled dealings with TSE under the PMA and in connection with his *Idol* negotiations, and was the object of TSE's litigation against Eric Sherman filed in July 2011, while the *Idol* negotiations were still ongoing. TSE's interference with Tyler's business, improper exercise of control and rights under the PMA, and the commencement of litigation (resulting in the global settlement agreements discussed above terminating TSE's rights in the PMA with broad releases), created the context and forum for LaPolt's protected communications and conduct. The fight TSE commenced in mid-2011 regarding how Tyler's *American Idol* negotiations should be pursued on Tyler's behalf and LaPolt's communications in that regard are at the core of Plaintiffs' First through Fourth Causes of Action. The very real threat of litigation on that subject materialized when TSE sued Sherman in July 2011 in New York over those negotiations. With this spectre of litigation, and then the ***actual*** litigation involving Tyler's rights under the PMA and his *Idol* contract, at hand, LaPolt's communications were protected speech, dedicated, at Tyler's instruction, to protecting Tyler's interests, and preventing the litigious Kovac from interfering with the *Idol* contract and other business, in derogation of Tyler's interests and in violation of the PMA. ***See*** **Tyler Decl., ¶¶ 9-10; LaPolt Decl., ¶¶ 57-62, 65-69.**

LaPolt's conduct and communications representing Tyler in his allocation of management commissions under the Assignment and Release Agreement, also qualify as protected conduct under section 425.16. *See, e.g.*, *Rubin v. Green*, 4 Cal. 4th 1187, 1194-95 (1993) (settling a client's claims are acts in furtherance of protected activity). Plaintiffs' First through Fourth claims expressly relate to this settlement and release agreement, the content of which Plaintiffs self-servingly misrepresent, and tellingly fail to attach to the FAC, as these agreements do not help them. A highlight of Plaintiffs' misrepresentation is that LaPolt "caused, instructed, advised, counseled, or persuaded [Sherman/XIX] to alter the agreed-upon commission distributions, thereby depriving TSE of monies and benefits it was entitled to under the agreements." **FAC, ¶ 59.** As is evident from the face of the settlement documents, Sherman was not entitled to receive ***any*** specified amount of management commissions from Tyler's activities after June 30, 2012. **LaPolt Decl., ¶¶ 78-80, Ex. F, ¶ 2, 4(b).** Furthermore, the express release of Tyler and his

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attorneys bars these claims, as discussed further below. ***Id.*, Ex. F, ¶ 5(c)-(d).** Because LaPolt's conduct and communications clearly were all in connection with the aforesaid pre-litigation and litigation activity, as well as in the settlement of potential claims, Plaintiffs' First through Fourth claims, all of which are premised upon that conduct and communications, are entitled to protection under section 425.16.

2. Plaintiffs' Fifth and Six Causes of Action

The Fifth and Sixth claims added in Plaintiffs' FAC are also premised upon protected activity under section 425.16(e). Plaintiffs assert these two claims, for intentional interference with contract and breach of fiduciary duty, in an almost unintelligible manner. The only factual allegations in the FAC that could even arguably relate to these claims are (i) LaPolt's alleged referral of Mars to a new attorney, **FAC, ¶¶ 35-36**; (ii) LaPolt's alleged advice to Mars that he "align" himself with the band's drummer, ***id.*, ¶ 37**; and (iii) LaPolt's alleged "bad-mouthing" of Kovac to other representatives of Mötley Crüe, ***id.*, ¶ 39**. However, Plaintiffs admit that the entirety of this allegedly wrongful conduct took place after, and was in fact necessitated by, Plaintiffs' filing of the instant lawsuit. **LaPolt Decl., ¶¶ 89-91; FAC, ¶ 33** (alleging that Defendants' conduct was done "recently in retaliation for TSE/Kovac causing this lawsuit to be filed"). LaPolt's allegedly wrongful communications – to the extent they even occurred – unequivocally arose in the context of this litigation and consisted of informing and advising her client, Mars, as to steps he should take to protect his interests in light of and in response to this lawsuit, and of informing other interested individuals, all of whom have past and/or present relationships with TSE and Kovac, about this lawsuit. Such communications have been oft recognized as protected speech within the contours of section 425.16(e)(2). *See Contemporary Servs. Corp. v. Staff Pro Inc.*, 152 Cal. App. 4th 1043, 1055 (2007) (communications to individuals who had "some involvement in the parties' litigation" fell within section 425.15(e)(2)); *Healy v. Tuscany Hills Landscape & Recreation Corp.*, 137 Cal. App. 4th 1, 5-6 (2006) (informing interested parties about pending litigation was "unquestionably 'in connection with' judicial proceedings"). Moreover, it is well recognized that even private communications can be protected under section 425.16(e)(2). *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, 47 Cal. App. 4th 777, 784 (1996). As such, the communications of LaPolt that allegedly support Plaintiffs' Fifth and Six Causes of Action constituted protected activity pursuant to section 425.16.

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B. Plaintiffs' First Through Fourth Claims Arise From Speech In Connection With A Public Issue

In addition, the alleged communications and conduct underlying Plaintiffs' First through Fourth Causes of Action were in furtherance of LaPolt's right of free speech in connection with issues of substantial public interest. Again, the gravamen of these claims targets LaPolt's representation of Steven Tyler in his business activities, most notably his dealings with the producers of *American Idol* regarding that shows' creation and his role as a judge thereon.

Significantly, "[a]n act is in furtherance of the right of free speech if the act helps to advance that right or assists in the exercise of that right. The creation of a television show is an exercise of free speech." *Tamkin v. CBS Broadcasting, Inc.*, 193 Cal. App. 4th 133, 143 (2011) (citation omitted). LaPolt communicated with the representatives of the producers/creators of *Idol* regarding Tyler's contract negotiations and his role as a judge on that very popular television show – all to advance and assist in the creation of that show. LaPolt's communications that lie at the core of Plaintiffs' FAC pertain to the determination of whether, and on what terms, Tyler would remain a judge on *Idol*. Those communications squarely constituted acts in furtherance of LaPolt's right of free speech. *See id.*; *accord Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) ("Entertainment . . . is protected" by the First Amendment).

These activities also clearly involve matters of public interest. "[A]n issue of public interest . . . is any issue in which the public is interested. In other words, the issue need not be 'significant' to be protected by the anti-SLAPP statute – it is enough that it is one in which the public takes an interest." *Tamkin*, 193 Cal. App. 4th at 143 (the "creation and broadcasting of [an episode of a television show] is an issue of public interest because the public was demonstrably interested in the creation and broadcasting of that episode . . . ."); *see also Seelig*, 97 Cal. App. 4th at 807-08 (talk show's discussion of plaintiff's appearance on a reality television show constituted "an issue of public interest"). There can be no question that LaPolt's conduct and communications upon which Plaintiffs' claims are based relate to "the creation, casting, and broadcasting of . . . a popular television show," which is an "an exercise of free speech" on "an issue of public interest." *Tamkin*, 193 Cal. App. 4th at 143; *Seelig*, 97 Cal. App. 4th at 807-08. Indeed, Plaintiffs themselves allege that *Idol* is "popular television show," and that the show's "ratings were soaring" as a result of Tyler's role as a judge. **FAC, ¶ 15.**

Further, "public interest" attaches to private individuals "who by their accomplishments or mode of living create a bona fide attention to their activities." *Dora v. Frontline Video, Inc.*, 15

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Cal. App. 4th 536, 542 (1993). The details of their lives are matters of public interest. *See, e.g.*, *Hall v. Time Warner, Inc.*, 153 Cal. App. 4th 1337, 1347 (2007) ("[W]idespread public interest in his personal life" of Marlon Brando); *Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1042 (2008). Plaintiffs admit Tyler's fame and renown. **FAC, ¶ 13.** Here, Plaintiffs' First through Fourth Causes of Action, and the alleged communications upon which those claims are based, arise from the terms and conditions of Tyler's relationship with *American Idol* as well as from other aspects of Tyler life, including his decisions regarding his management and representation, his payment of those individuals, and touring activities with his band. The substantial public interest in Tyler, including in his role as a judge on *American Idol*, is demonstrated by the press coverage on those topics, as well as of the filing of the instant lawsuit. **Mullins Decl., Exs. 1-6.**[1]

V. PLAINTIFFS CANNOT PREVAIL ON ANY OF THEIR FRIVOLOUS CLAIMS

Given the clear applicability of the anti-SLAPP statute, the burden shifts to Plaintiffs to establish, through competent, admissible evidence, "a probability [they] will prevail on the claim." Civ. P. Code § 425.16(b)(1). Plaintiffs will be unable to do so.

A. Plaintiffs Released LaPolt From Any And All Claims Relating to the PMA

Plaintiffs' First through Fourth Causes of Action are barred pursuant to the Assignment and Release Agreement, in which TSE expressly released Tyler and his attorneys, including LaPolt, from any claims, whether known or unknown, relating to the PMA (and including the pre-existing dispute involving the *Idol* negotiations). **LaPolt Decl., ¶ 72; Ex. F., ¶ 5(c)-(d).** TSE expressly "releas[ed] and discharge[ed]": "Tyler and each of his . . . ***attorneys*** . . . (individually and collectively, the 'Tyler Released Parties') from and of any and all claims . . . which TSE ***may have or acquire*** against the Tyler Released Parties, or any of them, whether or not they have been subject to dispute and whether or not known or unknown or suspected or unsuspected, by reason of any matter, or cause whatsoever, relating to or arising from the [PMA]." *Id.*

Such general release provisions releasing all claims, both known and unknown, are enforceable. *Winet v. Price*, 4 Cal. App. 4th 1159, 1173 (1992). Further, third party beneficiaries of such release provisions, such as LaPolt and her law firm, can enforce such release provisions. *Performance Plastering v. Richmond Am. Homes of Cal., Inc.*, 153 Cal. App. 4th 659, 667 (2007); *Brinton v. Bankers Pension Servs., Inc.*, 76 Cal. App. 4th 550, 560 (1999). Significantly, the third

[1] Again, it is irrelevant whether LaPolt's communications occurred in private, as section 425.16(e)(4) "applies to private communications concerning issues of public interest." *Terry v. Davis Cmty. Church*, 131 Cal. App. 4th 1534, 1546 (2005).

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party beneficiary need not be identified by name, but rather only "belong[] to a class of persons for whose benefit [the release] was made." *Brinton*, 76 Cal. App. 4th at 558.

Here, at the time TSE executed this express release, TSE was aware that LaPolt were attorneys for Tyler. As Tyler's attorneys, LaPolt belonged to a class of persons to whom the benefit of the release extended. Critically, all of Plaintiffs' claims here relate to or arise under the PMA: (a) LaPolt's representation of Tyler in connection with *American Idol* in July/August 2011, (b) connection with the termination of TSE's rights in the PMA in August 2011; (c) in connection with the move of Sherman to XIX and his dispute with Kovac (same time); and (d) in connection with the payments of further monies allegedly due from Tyler – "arising" under and "relating to" the PMA. Accordingly, Plaintiffs' First through Fourth Causes of Action are barred.

B. <u>LaPolt Never Represented Plaintiffs</u>

Plaintiffs' First, Second and Sixth Causes of Action, for breaches of fiduciary duty and breach of the duty of confidence, fail because LaPolt never represented Kovac, TSE or 11-7. LaPolt represented ***Tyler*** and ***Mötley Crüe***, adverse to TSE, 11-7 and/or Kovac. Plaintiffs intentionally misrepresent their relationship with LaPolt by making vague and conclusory statements that "Defendants had a fiduciary relationship with both of the Plaintiffs by virtue of LaPolt's legal representation of Plaintiffs in connection with business matters including negotiations, strategy and general legal advice" and that "Defendants also had a fiduciary duty to TSE because LaPolt and her firm LaPolt Law were part of the management team for various TSE clients" including Tyler and Mötley Crüe. **FAC, ¶¶ 43-44, 78.** But "[a]n attorney-client relationship is not created by the unilateral declaration of one party to the relationship. Rather, the relationship can only be created by contract, express or implied." *Koo v. Rubio's Rests., Inc.*, 109 Cal. App. 4th 719, 729 (2003); *see also Zenith Ins. Co. v. Cozen O'Connor*, 148 Cal. App. 4th 998, 1011 (2007). Plaintiffs do not – because they cannot – allege that they entered into any contract with LaPolt, signed any engagement or retainer letter for LaPolt's services, received any bills or invoices in connection with legal services Defendants allegedly rendered to them, or paid LaPolt for any legal services she allegedly rendered to them. **LaPolt Decl., ¶¶ 31-35.** Plaintiffs do not – as they cannot – allege what purported "negotiations, strategy and general legal advice" LaPolt undertook on behalf of or provided to Plaintiffs, as opposed to their mutual artist claims. ***Id.*, ¶ 41.** None exist. Because there is absolutely no legal or factual basis for these claims, Plaintiffs' First, Second and Sixth Causes of Action must be stricken.

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1 **C. Plaintiffs' Cannot Demonstrate A Breach Of Any Contract**

2 The elements of a cause of action for intentional interference with contractual relations are:
3 (1) a valid contract between the plaintiff and a third party; (2) defendant's knowledge of this
4 contract; (3) defendant's intentional acts designed to induce a breach or disruption of the
5 contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5)
6 resulting damage. *Quelimane Co. v. Stewart Title Guar. Co.*, 19 Cal. 4th 26, 55 (1998). TSE
7 asserts two separate causes of action for intentional interference with contract in its FAC. Both
8 fail, however, as no contract to which TSE is a party have been breached.

9 First, TSE's Third Cause of Action fails because TSE cannot establish any breach of or
10 disruption of the TSE/Sherman Release Agreement or the Assignment and Release Agreement –
11 the core element of the claim. As discussed above, pursuant to the Assignment and Release
12 Agreement, the PMA was assigned to Sherman, along with the right to receive any and all
13 management commissions thereunder. On August 1, 2011, TSE lost all rights in the PMA, period.
14 TSE cannot even claim third party beneficiary status, as stated therein. **LaPolt Decl., ¶ 71, Ex. F,**
15 **¶ 1(a).** The Assignment and Release Agreement expressly states that Tyler's obligations to pay
16 any management commissions to ***anyone*** pursuant to the PMA ended on June 30, 2012, ***id.*****, Ex. F,**
17 **¶¶ 2 & 4(b)**, Tyler had no obligation to enter into any new management agreement post June 30,
18 2012, or to pay Sherman or anyone else any amount of commission, no less a 2% management
19 commission relating to his band touring income. There is no claim by Plaintiffs that they did not
20 fully receive their percentage of monies Sherman received under the PMA through June 30, 2012.
21 Since Sherman's rights under the PMA ended on June 30, 2012, including any right to receive a
22 2% commission on Tyler's band touring income, Sherman was only obligated to remit back to
23 TSE thereafter a percentage of any further commission Sherman received under any new
24 agreement with Tyler, post June 30, 2012. ***Id.*** Accordingly, TSE is only entitled to a percentage
25 share of whatever Sherman receives, if anything, following the June 30, 2012 end of the PMA.
26 TSE has no right to claim Tyler is obligated to pay Sherman, or XIX, anything post June 30, 2012.
27 TSE has not claimed and cannot claim any breach of or disruption of Sherman's obligations to pay
28 TSE any "agreed" upon percentage of his commissions received from Tyler post June 30, 2012,
29 and its intentional interference with contract claim thus fails.

30 Second, TSE's Fifth Cause of Action fails because TSE does not even ***allege*** that there has
31 been any breach of any agreement with Mötley Crüe, nor that there has been any disruption of any
32 other contractual relationship between TSE and Mötley Crüe. TSE also does not identify any
33

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specific contractual provisions with which LaPolt might have even allegedly interfered. As TSE cannot even allege that there has been a breach of any Mötley Crüe agreement, or any other contractual relationship, it is readily apparent that it will not be able to come forward with any evidence demonstrating any possibility of prevailing on its Fifth Cause of Action. *See, e.g.*, *Davis v. Nadrich*, 174 Cal. App. 4th 1, 10 (2009) (dismissing interference claim where no facts alleged to show that there was an actual breach of agreement).

D. Plaintiffs' Prospective Economic Advantage Claim Is Insufficiently Pled

TSE's prospective economic advantage claim is insufficiently pled and, because facts sufficient to cure its deficiencies do not exist, it should be stricken. First, TSE fails to allege that it had an economic relationship with any specified third party, and that any such relationship was disrupted. Any cause of action for interference with prospective economic advantage is insufficient absent such allegations. *See Roth v. Rhodes*, 25 Cal. App. 4th 530, 546 (1994). TSE did ***not*** have the third party relationship with *Idol* – Tyler did. Second, TSE's claim that its efforts would have led to a more lucrative deal for ***Tyler*** are purely speculative and actually refutable. Notably, there is no allegation that Tyler would have even ***let*** Kovac negotiate on his behalf, and he would ***not***. ***See*** **Tyler Decl., ¶¶ 7-10.** The law precludes recovery for overly speculative expectancies. *See Westside Ctr. Assocs. v. Safeway Stores 23, Inc.*, 42 Cal. App. 4th 507, 522 (1996). TSE also fails to allege any wrongful act by Defendants. *See Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1158 (2003). Defendants did not owe or breach any duties to TSE, and no facts support TSE's vague and conclusory allegations of "bad-mouthing" – which is not an actionable wrong. Thus, TSE cannot show a probability of success on its prospective business advantage claim.

E. Plaintiffs' Claims Are Barred By The Litigation Privilege

As in set forth in Section IV.A., *supra*, all of Plaintiffs' Third, Fourth and Fifth claims arise either (i) from Defendants' communications in connection with a potential litigation and an eventual lawsuit relating to the management relationship dispute among Tyler, Kovac, and Sherman, ending in a settlement, or (ii) from Defendants' communications and advice to interested parties in response to the instant lawsuit. Notably, "it has been established for well over a century that a communication is absolutely immune from any tort liability if it has some relation to judicial proceedings." *Healy*, 137 Cal. App. 4th at 5. This litigation privilege "encompasses not only testimony in court and statements made in pleadings", but also statements made prior to the filing

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of a lawsuit and statements relating to settlements. *Hagberg v. Cal. Fed. Bank FSB*, 32 Cal. 4th 39, 50 (2004); *Navarro v. IHOP Props., Inc.*, 134 Cal. App. 4th 834, 843 (2005).

Here, as discussed in detail above, the communications underlying TSE's Third and Fourth claims for intentional interference with contract and intentional interference with prospective economic advantage are premised entirely upon Defendants' communications in connection with (1) their representation of Tyler in mid-2011 in the context of a contentious dispute between Tyler, Kovac, and Sherman related to the PMA and Tyler's *Idol* negotiation, that resulted in the filing of a lawsuit in New York; and (2) counseling Tyler in the settlement of that litigation and dispute and in matters related to those agreements. TSE's lawsuit filed on July 12, 2011, against Sherman in New York directly implicated Tyler's rights under the PMA, immediately after the feud erupted over Kovac's attempt to dictate the *Idol* negotiations. "Protecting attorneys during the course of the representation of their clients is necessary to promote the litigants securing free access to the courts." *Asia Inv. Co. v. Borowski*, 133 Cal. App. 3d 832, 843 (1982).

Similarly, TSE's Fifth cause of action for interference with a Mötley Crüe agreement is premised upon Defendants' communications (1) to their client, Mars, informing him of the instant lawsuit and advising him of actions to take in light of this lawsuit; and (2) to other interested third parties discussing Plaintiffs' allegations herein. Such communications, addressing issues under consideration in this lawsuit and directed to clearly interested parties, fall squarely within the litigation privilege codified in section 47. *See Healy*, 173 Cal. App. 4th at 5-6. In light of the clear policy of section 47 "to afford litigants the utmost freedom of access to the courts to secure their rights and defend themselves without fear of being harassed by retaliatory lawsuits," *Asia Inv. Co.*, 133 Cal. App. 3d at 841, LaPolt's communications are entitled to absolute immunity pursuant to litigation privilege, and TSE will be unable to succeed on its interference claims.

VI. CONCLUSION

For the foregoing reasons, LaPolt respectfully request that the Court strike the FAC and award to LaPolt their reasonable attorneys' fees and costs incurred in connection with this motion.

DATED: December 17, 2012

MITCHELL SILBERBERG & KNUPP LLP

By: ______________________
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Attorneys for Defendants
Dina LaPolt and LaPolt Law, P.C.

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California, I am over the age of eighteen years and am not a party to this action; my business address is Mitchell Silberberg & Knupp LLP, 11377 West Olympic Boulevard, Los Angeles, CA 90064-1683, and my business email address is kls@msk.com.

On December 17, 2012, I served a copy of the foregoing document(s) described as **NOTICE OF MOTION AND SPECIAL MOTION OF DEFENDANTS TO STRIKE PLAINTIFFS' FIRST AMENDED COMPLAINT PURSUANT TO C.C.P. § 425.16; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; REQUEST FOR ATTORNEYS' FEES AND COSTS (C.C.P. § 425.16(C)(1))** on the interested parties in this action at their last known address as set forth below by taking the action described below:

Louis R. Miller MILLER BARONDESS, LLP 1999 Avenue of the Stars, Suite 1000 Los Angeles, CA 90067 Tel.: (310) 552-4400 Fax: (310) 552-8400 E-Mail: smiller@millerbarondess.com	Attorneys for Plaintiffs, KOVACS MEDIA GROUP, INC., d/b/a TENTH STREET ENTERTAINMENT, and 11-7 RECORDING CORP.

☒ **BY PLACING FOR COLLECTION AND MAILING:** I placed the above-mentioned document(s) in sealed envelope(s) addressed as set forth above, and placed the envelope(s) for collection and mailing following ordinary business practices. I am readily familiar with the firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at 11377 West Olympic Boulevard, Los Angeles, California 90064-1683 in the ordinary course of business.

☐ **BY ELECTRONIC MAIL:** I served the above-mentioned document electronically at _________ [a.m./p.m.] on the parties listed at the email addresses above and, to the best of my knowledge, the transmission was complete and without error in that I did not receive an electronic notification to the contrary.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on December 17, 2012, at Los Angeles, California.

____

Kimberly Stewart

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