

United States District Court
Northern District of California

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

GEMCAP LENDING I, LLC,
Plaintiff,
v.
UNITY BANK MINNESOTA, ROBERT HOWER,
GEORGE VAN BUREN,
Defendants.

Case No.: 18-CV-05979-YGR
ORDER GRANTING IN PART DEFENDANT
ROBERT HOWER’S SPECIAL MOTION TO
STRIKE

Plaintiff GemCap Lending I, LLC filed this action on September 28, 2018, against Defendants Unity Bank Minnesota, Robert Hower, and George Van Buren (collectively, “Defendants”). In its complaint, plaintiff alleges claims for breach of fiduciary duty as to defendant Van Buren, fraud as to defendants Hower and Unity Bank, and aiding and abetting to commit fraud as to all Defendants.¹ Relevant here, defendant Hower thereafter filed a Special Motion to Strike, seeking an order striking (1) paragraphs 41 through 44 of the complaint, (2) plaintiff’s second claim for “fraud,” and (3) all references to defendant Hower in support of plaintiff’s third claim for “aiding and abetting to commit fraud.” (Dkt. No. 42.) Defendant Hower brings this motion pursuant to California Code of Civil Procedure section 425.16 and *Baral v. Schnitt*, 1 Cal. 5th 376 (2016), which permit a court to strike portions of a complaint arising from acts undertaken in furtherance of the Constitutional right of petition or free speech. Cal. Code Civ. Proc. § 425.16(b)(1).

¹ On November 14, 2018, defendant Unity Bank filed an answer on behalf of itself. (Dkt. No. 11.) Defendant Van Buren filed a motion to dismiss for lack of jurisdiction on December 7, 2018 (Dkt. No. 20), which the Court granted on February 6, 2019 (Dkt. No. 30).

1 Having carefully considered the papers submitted, the pleadings in this action, and the
2 arguments of the parties at the hearing held on April 23, 2019, and for the reasons set forth below,
3 the Special Motion to Strike is **GRANTED IN PART**.

4 **I. BACKGROUND**

5 The following background is taken from plaintiff’s complaint:

6 Plaintiff GemCap Lending I, LLC is a lender that provides financing for small to mid-sized
7 businesses that pledge assets, such as inventory, equipment and accounts receivable, as security in
8 exchange for a loan facility. (Dkt. No. 1 (“Compl.”), ¶ 9.) On September 26, 2011, plaintiff
9 entered into a Loan and Security Agreement (the “LSA”) with officers and guarantors of Mountain
10 Thunder Coffee Plantation International, Inc. and Naturescape Holding Group International, Inc.
11 (the “Borrowers”). (*Id.* ¶ 10.) Under the terms of the agreement, the Borrowers agreed to pledge
12 equipment and other property as secured collateral in exchange for receiving financing from
13 plaintiff. (*Id.* ¶ 11.) The Borrowers subsequently defaulted on their loan obligations. (*Id.* ¶ 19.) In
14 December 2015, plaintiff filed an action in Hawaii state court, petitioning for the appointment of a
15 receiver to operate the Borrowers’ businesses and preserve plaintiff’s collateral. (*Id.* ¶ 22.) The
16 court appointed defendant George Van Buren as receiver. (*Id.*)

17 Due, in part, to defendant Van Buren’s failure to supervise and manage the Borrowers’
18 businesses, the Borrowers proceeded to misappropriate the collateral and equipment securing the
19 LSA. (*Id.* ¶¶ 29, 37.) On September 15, 2016, various creditors, including plaintiff, initiated
20 involuntary bankruptcy proceedings as to the Borrowers. (*Id.* ¶ 39.) In the following months, the
21 Borrowers made numerous representations to the Hawaii court that they were in active negotiations
22 with a financial institution for a new loan that would enable them to pay plaintiff the full amount
23 owed under the LSA. (*Id.* ¶ 40.) Plaintiff alleges, on information and belief, that these
24 representations were intended to delay plaintiff’s attempt to sell the secured collateral and afford
25 the Borrowers time to transfer the assets fraudulently. (*Id.*)

26 Thereafter, the Borrowers conspired with defendants Robert Hower and Unity Bank
27 Minnesota in its efforts to deprive plaintiff of recovery on the amounts due under the LSA. (*Id.* ¶
28 56.) At some point, the Borrowers began engaging in discussions with defendants Hower and

1 Unity Bank regarding a potential loan to fulfill the Borrowers' obligations to plaintiff. (*Id.* ¶ 41.)
2 After the Hawaii court became aware of the potential loan, it ordered defendant Unity Bank to
3 prepare written updates on the status of the same. (*Id.*) Defendant Unity Bank provided these
4 written updates to defendant Hower and the Borrowers with the understanding that they would be
5 presented to the court, and with an intent to mislead the court and delay plaintiff's recovery efforts.
6 (*Id.* ¶¶ 41, 43.) Specifically, plaintiff alleges that at a Hawaii court proceeding on September 12,
7 2016, defendant Hower falsely represented that he was the president of defendant Unity Bank and
8 gave the court a verbal update on the potential loan. (*Id.* ¶ 42.) Defendant Hower falsely reported
9 to the court that the loan with defendant Unity Bank was proceeding, even though defendant Unity
10 Bank had already informed the Borrowers that it was unlikely to proceed with a loan. (*Id.*) As a
11 direct result of these representations, the Hawaii court continued hearings in the case, delaying
12 foreclosure on the collateral and giving the Borrowers time to convert the assets. (*Id.* ¶¶ 43-44.)²

13 Notably, the complaint contains two allegations of conduct outside of court proceedings that
14 relate to defendant Hower. First, plaintiff alleges that defendant Unity Bank advertised defendant
15 Hower on a website as a representative of defendant Unity Bank. (*Id.* ¶ 41.) Second, plaintiff
16 alleges that defendant Hower communicated with an employee of Unity Bank that he anticipated
17 funding a loan of \$3,500,000 to \$4,000,000, concluding that the Hawaii court might force plaintiff
18 to accept a loss at a future date because this was less than the full amount needed for the Borrowers
19 to fulfill their obligations to plaintiff. (*Id.*)³

22 ² Defendant Hower is referenced for the first time in paragraph 41 of the complaint, which
23 contains the bulk of the factual allegations related to him. The Court notes that the complaint does
24 not explain, among other things, how defendant Hower became involved in a potential loan deal
25 with the Borrowers, how or whether defendant Hower communicated either with the Borrowers to
26 carry out the alleged conspiracy or with plaintiff regarding the loan, or how or whether defendant
27 Hower stood to benefit from the alleged conspiracy.

26 ³ At the hearing on this motion, plaintiff's counsel proffered additional evidence not
27 included in the complaint indicating that defendant Hower falsely represented to plaintiff that he
28 had authority to execute a loan for the Borrowers and that he could fund the full amount needed to
29 fulfill the Borrowers' obligations to plaintiff. According to plaintiff's counsel's proffer, these
30 representations induced plaintiff to delay foreclosure on the assets.

1 **II. DISCUSSION**

2 **A. Legal Framework**

3 Defendant brings this motion seeking to strike portions of the complaint pursuant to section
4 425.16 of the California Code of Civil Procedure. California enacted section 425.16 to curtail
5 “strategic lawsuits against public participation,” known as “SLAPP” actions, finding “a disturbing
6 increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of
7 freedom of speech and petition for redress of grievances.” Cal. Civ. Proc. Code § 425.16(a). A
8 defendant in federal court may bring an anti-SLAPP motion with respect to California state law
9 claims asserted under diversity or supplemental jurisdiction. *Jen v. City & Cty. of San Francisco*,
10 No. 15-CV-03834-HSG, 2016 WL 3669985, at *11 (N.D. Cal. July 11, 2016).

11 This Court, sitting in diversity, follows the California courts’ two-step process for analyzing
12 a special motion to strike a SLAPP suit. *Hilton v. Hallmark Cards*, 599 F.3d 894, 903 (9th Cir.
13 2010). First, the moving party must make “a threshold showing . . . that the act or acts of which the
14 plaintiff complains were taken ‘in furtherance of the right of petition or free speech under the
15 United States or California Constitution in connection with a public issue,’ as defined in the
16 statute.” *Equilon Enters., LLC v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 67 (2002) (quoting Cal.
17 Code Civ. Proc. § 425.16(b)(1)). The moving party meets this burden by showing that the act
18 underlying the relevant causes of action fits one of the categories spelled out in section 425.16(e).
19 *Navellier v. Sletten*, 29 Cal. 4th 82, 88 (2002) (quoting *Braun v. Chronicle Publishing Co.*, 52 Cal.
20 App. 4th 1036, 1043 (1997)). If the moving party makes such a showing, the burden shifts to the
21 complainant to establish a probability of prevailing on the merits. *Navellier*, 29 Cal. 4th at 88-89.
22 If the plaintiff fails to meet its burden at the second step, the claim based on the protected activity is
23 stricken and “[a]llegations of protected activity supporting the stricken claim are eliminated from
24 the complaint, unless they also support a distinct claim on which the plaintiff has shown a
25 probability of prevailing.” *Baral v. Schnitt*, 1 Cal. 5th 376, 396 (2016) (holding that a court may
26 strike only portions of a cause of action that are based on protected activity while leaving other
27 parts intact).

1 **B. Analysis**

2 The Court considers each prong of the anti-SLAPP motion test.

3 *1. First Prong: Protected Activity*

4 The Court first looks to whether defendant has established that plaintiff’s claims arise from
5 protected activities. An act constitutes protected activity under section 425.16 if it is undertaken
6 “in furtherance of [a] person’s right of petition or free speech under the United States Constitution
7 or the California Constitution in connection with a public issue.” Cal. Civ. Proc. Code
8 425.16(b)(1). Section 425.16(e) sets forth specific categories of protected activities. Among these
9 categories are “(1) any written or oral statement or writing made before a legislative, executive, or
10 judicial proceeding, or any other official proceeding authorized by law,” as well as “(2) any written
11 or oral statement or writing made in connection with an issue under consideration or review by a
12 legislative, executive, or judicial body, or any other official proceeding authorized by law.” Cal.
13 Civ. Proc. Code §§ 425.16(e)(1)-(2). A statement is made “in connection with” litigation under
14 section 425.16(e)(2) if it “relates to the substantive issues in the litigation and is directed to persons
15 having some interest in the litigation.” *Neville v. Chudacoff*, 160 Cal. App. 4th 1255, 1266 (2008).

16 Plaintiff’s claims against defendant Hower arise out of conduct that falls into two
17 categories. The Court reviews each. First, and primarily, plaintiff alleges that its harm results from
18 statements defendant Hower made in the Hawaii court proceeding, namely, that “he was the
19 president of Unity Bank and that Unity Bank was actively in the process of evaluating a potential
20 commercial loan for the Borrowers[.]” (Compl. ¶ 50.) Plaintiff does not and cannot dispute that
21 defendant Hower’s statements, made on the record during a hearing, and which were directed at the
22 court, constitute a statement made “before a . . . judicial proceeding.” Further, defendant Hower’s
23 statements constitute protected activity under section 425.16(e) even though they are alleged to be
24 false. *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures*, 184 Cal. App. 4th 1539,
25 1549 (2010) (“whether or not [appellant’s] statements were false does not determine whether they
26 constitute protected activity for purposes of the SLAPP statute”).⁴ Defendant Hower’s

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28 ⁴ Plaintiff asserts that both the United States Supreme Court and the California Supreme
Court have recognized that “acts of extrinsic fraud do not fall within protected activity in a court
proceeding,” citing *Briscoe v. LaHue*, 460 U.S. 325, 333 (1983); *Silberg v. Anderson*, 50 Cal.3d.

1 representations thus fall within the category of protected activity set forth in section 425.16(e)(1).
2 *See Mello v. Great Seneca Fin. Corp.*, 526 F. Supp. 2d 1024, 1029 (C.D. Cal. 2007) (“[U]nder the
3 statute’s express language, statements and writings made during judicial proceedings are protected
4 by the anti-SLAPP statute, including a complaint filed in a judicial proceeding.”)⁵

5 Moreover, defendant Hower’s statements to the Hawaii court also fall under the category of
6 protected activity set forth in section 425.16(e)(2), because they were made “in connection with an
7 issue under consideration” by the Hawaii court. In order for section 425.16(e)(2) to apply, the
8 moving party need only show that that the relevant statements bear a relationship to the substantive
9 issues before the court. *Neville*, 160 Cal. App. 4th at 1266. Plaintiff alleges that the Hawaii court
10 had previously ordered defendant Unity Bank to provide updates on the status of the loan and to
11 inform the court if defendant Unity Bank concluded it could not make a full or partial loan to
12 plaintiff. (Compl. ¶ 41.) Plaintiff further alleges that defendant Unity Bank provided these updates
13 to the Borrowers and defendant Hower “with the express understanding that these updates would be
14 presented to the court.” (*Id.*) According to plaintiff, “[a]s a **direct consequence and in reliance**
15 **upon** the false representations of defendants Hower and Unity Bank **to the court**, GemCap was
16 unable to proceed with recovery of the collateral and equipment.” (*Id.* ¶ 53, emphasis supplied.)
17 Plaintiff’s own allegations demonstrate that defendant Hower’s representations to the court were
18 relevant to the issues in the Hawaii court litigation—if they were not, the court presumably would
19 not have asked for updates from defendant Unity Bank or altered the schedule in the litigation

20 _____
21 205, 214 (1990). (Opposition, 3.) The Court disagrees. *Briscoe* does not even mention “extrinsic
22 fraud” or “protected activities,” much less address the application of these principles in an anti-
23 SLAPP context. Moreover, *Silberg* recognizes an “extrinsic fraud” exception to the “litigation
24 privilege,” not the protected activity analysis under section 425.16. Insofar as plaintiff contends
25 that the extrinsic fraud creates an exception to application of the litigation privilege, that argument
26 is addressed in full below.

27 ⁵ The Court takes note of the fact that defendant Hower was not sworn in when he
28 addressed the Hawaii court at the September 12, 2016 hearing. (Dkt. No. 43 (“Hower Decl.”), ¶ 7.)
Nothing in the plain language of section 425.16(e)(1) indicates that a person must be sworn in
before his statements are considered a protected activity, and the Court is not aware of any cases
holding as such. However, even if this was the case, defendant Hower’s statements would still be
protected under section 425.16(e)(2) because they were made “in connection with” the litigation
pending in the Hawaii court, as discussed herein.

1 based on one such update.

2 Plaintiff argues that the challenged conduct does not fall within the definition of a protected
3 activity because it does not involve a “public issue,” which plaintiff contends is required to invoke
4 the protections of section 425.16. (Dkt. No. 49 (“Opposition”), 5.) Plaintiff misapprehends the
5 rule. Section 425.16(b)(1) provides that a cause of action arising “from any act of [a] person in
6 furtherance of the person’s right of free petition of free speech under the United States Constitution
7 or the California Constitution in connection with a public issue” may be subject to an anti-SLAPP
8 motion. In *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106 (1999), the
9 California Supreme Court analyzed this provision to determine whether section 425.16 always
10 imposes a “public issue” requirement. The *Briggs* court held that it does not, finding that section
11 425.16 “broadly encompasses participation in official proceedings, generally, **whether or not such**
12 **participation remains strictly focused on ‘public’ issues.**” *Briggs*, 19 Cal. 4th at 1118 (emphasis
13 supplied); see also *Commonwealth Energy Corp. v. Inv’r Data Exch., Inc.*, 110 Cal. App. 4th 26,
14 32 (2003) (“[T]he rule is [] that if the speech was made or the activity was conducted in an official
15 proceeding authorized by law, there is no need that it be connected to a public issue.”). Thus, the
16 “public issue” requirement applies only where the relevant conduct is unrelated to issues before a
17 court in related proceedings, but rather, implicates only free speech rights. *Briggs*, 19 Cal. 4th at
18 1114 (differentiating section 425.16(e)(1) and (2), which “concern[] statements made in connection
19 with issues under review by official proceedings” from section 425.16(e)(3) and (4), which
20 “concern[] statements made in public fora and ‘other conduct’ implicating speech or petition
21 rights”). Because Plaintiff’s claims against defendant Hower are premised on his alleged
22 representations at the Hawaii court proceeding, which implicates sections 425.16(e)(1) and (2), the
23 Court need not consider whether the challenged activities concern a matter of “public interest.”

24 Next, with respect to defendant Hower’s conduct outside of the Hawaii court proceeding,
25 namely the website advertisement of defendant Hower as one of the bank’s representatives and the
26 Defendants’ communications on funding, the Court finds these allegations do not relate to protected
27 activities. The out-of-court conduct was not made before any “official proceeding authorized by
28 law,” and thus, section 425.16(e)(1) does not apply. Nor was the conduct made “in connection

1 with” an issue under consideration by a judicial body. In particular, although the complaint
2 intertwines these allegations with others regarding defendant Hower’s conduct during court
3 proceedings, the complaint does not articulate a direct relationship between the two categories of
4 allegations. Moreover, even if defendant Hower’s out-of-court conduct was sufficiently related to
5 the issues before the Hawaii court, the conduct was not “directed to persons having [] interest in the
6 litigation,” which involved only plaintiff and the Borrowers. *See Neville*, 160 Cal. App. 4th at
7 1266. Thus, section 425.16(e)(2) does not apply.⁶

8 Accordingly, the Court finds that defendant Hower has not met its burden of demonstrating
9 that defendant Hower’s out-of-court statements constitute a protected activity, and thus, these
10 allegations are not entitled to anti-SLAPP protection. *Baral v. Schnitt*, 1 Cal. 5th 376, 396 (2016)
11 (“[W]hen relief is sought based on allegations of both protected and unprotected activity, the
12 unprotected activity is disregarded at th[e] [protected activity] stage.”). However, defendant Hower
13 has met his burden of demonstrating that his statements before the Hawaii court were protected.
14 Thus, the Court proceeds to analyze this conduct under the second prong of the test.

15 *B. Second Prong: Probability of Prevailing*

16 Turning to the second prong, the burden shifts, and plaintiff must put forward evidence to
17 show that it is likely to prevail on its claims against defendant Hower, namely fraud and aiding and
18 abetting. The California Supreme Court has described the second step of the analysis as a
19 “summary-judgment-like procedure.” *Baral v. Schnitt*, 1 Cal. 5th 376, 384 (2016) (quoting *Taus v.*
20 *Loftus*, 40 Cal. 4th 683, 714 (2007)). To establish a probability of prevailing on its claims, a
21 plaintiff must state a legally sufficient claim and must support that claim with a sufficient *prima*

22
23 ⁶ The fact that plaintiff alleges conduct that occurred outside of the court proceeding does
24 not save plaintiff’s claims insofar as they are based on the allegations of protected activity. A
25 plaintiff “cannot frustrate the purposes of the SLAPP statute through a pleading tactic of combining
26 allegations of protected and unprotected activity under the label of one ‘cause of action.’” *Fox*
27 *Searchlight Pictures, Inc. v. Paladino*, 89 Cal. App. 4th 294, 308 (2001). Thus, plaintiff’s
28 additional allegations do not alter the crux of plaintiff’s claims against defendant Hower, which
concern his representations before the Hawaii court. *See Semiconductor Equip. & Materials Int’l,*
Inc. v. The Peer Grp., Inc., No. 15-CV-00866-YGR, 2015 WL 5535806, at *5 (N.D. Cal. Sept. 18,
2015) (“The [anti-SLAPP] statute focuses not on the form of the claim, but the underlying nature of
the activity giving rise to the asserted liability.”) (citing *Tuchscher Dev. Enters., Inc. v. San Diego*
Unified Port Dist., 106 Cal. App. 4th 1219, 1232 (2003)).

1 *facie* evidentiary showing to sustain a favorable judgment, assuming that evidence is credited. *Id.*
2 at 384-85. The *prima facie* showing must be made with evidence that is admissible at trial.
3 *Contreras v. Dowling*, 5 Cal. App. 5th 394, 405 (2016) (internal citations omitted). The Court must
4 consider “the pleadings, and supporting and opposing affidavits stating the facts upon which the
5 liability or defense is based,” Cal. Code Civ. Proc. § 425.16 (b)(2), but “[u]nverified allegations in
6 the pleadings or averments made on information and belief cannot make the showing,” *Contreras*,
7 5 Cal. App. 5th at 405 (internal citations omitted).

8 The standard applied to an anti-SLAPP motion presents a higher burden than the plausibility
9 standard applied for a motion to dismiss. If plaintiffs cannot plead a plausible cause of action under
10 the FRCP 12(b)(6) standard, then plaintiffs as a matter of law cannot meet the probability of
11 success on the merits standard. *Hilton v. Hallmark Cards*, 599 F.3d 894, 902 (9th Cir. 2010)
12 (finding that a defendant who was unsuccessful on a motion to dismiss could still prevail on the
13 anti-SLAPP motion to strike because the plaintiff may state “a legal claim” but may not have “facts
14 to support it”). If the plaintiff cannot demonstrate a probability of prevailing on the merits, “the
15 claim and its corresponding allegations must be stricken.” *Baral*, 1 Cal. 5th at 395.

16 The Court finds that plaintiff fails to meet its burden on the second prong. As an initial
17 matter, the Court considers whether plaintiff has submitted sufficient evidence to establish a
18 likelihood of prevailing against defendant Hower.⁷ To state a claim for fraud under California law,
19 a plaintiff must allege “(a) misrepresentation (false representation, concealment, or nondisclosure);
20 (b) knowledge of falsity (or “scienter”); (c) intent to defraud, i.e. to induce reliance; (d) justifiable
21 reliance; and (e) resulting damage.” *Small v. Fritz Companies, Inc.*, 30 Cal. 4th 167, 173 (2003).

22 ⁷ Plaintiff points to the complaint as evidence to support a probability of prevailing on the
23 merits. However, courts have consistently held that a plaintiff “cannot simply rely on the
24 allegations in the complaint” to meet its burden on the second prong. *ComputerXpress v. Jackson*,
25 93 Cal. App. 4th 993, 1010 (2001) (quoting *Paul for Council v. Hanyecz*, 85 Cal. App. 4th 1356,
26 n.5 (2001)). Rather, the plaintiff “must provide the court with sufficient *evidence* to permit the
27 court to determine whether there is a probability that the plaintiff will prevail on the claim. *Id.*
28 (emphasis in original) (citation omitted); *Roberts v. Los Angeles County Bar Assn.*, 105 Cal. App.
4th 604, 613-614 (2003) (“In assessing the probability of prevailing, a court looks to the evidence
that would be presented at trial, similar to reviewing a motion for summary judgment; a plaintiff
cannot simply rely on its pleadings, even if verified, but must adduce competent, admissible
evidence.”).

1 To state a claim for aiding and abetting, a plaintiff must allege knowledge that another’s conduct
2 constitutes a fraud and substantial assistance or encouragement of the act. *Schulz v. Neovi Data*
3 *Corp.*, 152 Cal. App. 4th 86, 93 (2007) (quoting *Fiol v. Doellstedt*, 50 Cal. App. 4th 1318, 1325
4 (1996)).

5 In support of its claims, plaintiff offers the following evidence: a declaration from plaintiff’s
6 counsel regarding the Hawaii court proceeding; an excerpt of the transcript from the Hawaii court
7 proceeding; defendant Hower’s declaration in support of the motion to strike; and the allegations in
8 the complaint. Even if this evidence was persuasive on the question of whether there is a
9 probability of plaintiff prevailing on the merits of its claims,⁸ plaintiff nevertheless fails on the
10 second prong because its claims are barred by the litigation privilege.

11 California Civil Code, section 47 provides absolute immunity from claims based upon

12 _____
13 ⁸ As to the declaration from plaintiff’s counsel, defendant argues that the declaration
14 contains inadmissible legal conclusions, as well as purported facts about the Hawaii court
15 proceeding without any explanation of whether or how counsel has personal knowledge of such
16 facts. (Dkt. No. 50, 11-13.) Although the Court credits counsel’s sworn statement that he has
17 personal knowledge of the *facts* contained in the declaration, many other statements are purely legal
18 arguments, including those regarding the purpose of the status report, defendant Hower’s intent,
19 whether defendant Hower had any “influence or control” over the placement of a loan with
20 defendant Unity Bank, and whether there was an “extrinsic fraud.” At most, the declaration
21 supports a finding that defendant Hower represented himself as the president of defendant Unity
22 Bank when providing an update on the status of the loan. (Dkt. No. 49-1, ¶ 2.) The Court did
23 consider the transcript from the Hawaii court proceedings, which reflects the Hawaii court’s
24 statement, during the receivership proceeding, that he “s[aw] the bank’s president.” (Dkt. No. 58,
25 12:5-6.) Defendant Hower proceeded to come forward, and state and spell his name on the record.
26 (*Id.*, 12:8-16.) The judge stated that he would “entertain” any “good news” in the form of a
27 “representation” that the loan was approved. (*Id.* 12:25-13:6.) The court was informed that there
28 had not been final approval of the loan. (*Id.* 13:10-13.) Defendant Hower then read out loud what
was purported to be an email from Unity Bank’s Chief Credit Officer. (*Id.* 15:1-16:9.) Following
defendant Hower’s status update, the court asked defendant Hower several questions regarding the
documentation that would be required to finalize the loan and when the loan might be funded. (*Id.*
18:20-19:4; 20:1-22:5.) Defendant Hower stated that he was “looking forward to . . . closing this
loan in November, by the 14th, which the court acknowledged as the “specific date that [defendant
Hower] wish[ed] to have . . . [a] commitment” to the court regarding the loan. (*Id.* 25:15-25.)
Thus, the transcript indicates that defendant Hower represented himself to the Hawaii court as the
president of defendant Unity Bank, gave the court a status update, and made additional affirmative
commitments to the court regarding funding of the loan. Further, defendant Hower’s declaration
establishes that he is a loan broker, not an employee of defendant Unity Bank. (Hower Decl., ¶¶ 3,
7.)

1 communications made as part of a judicial proceeding. Cal. Civ. Code § 47(b). For the litigation
2 privilege to apply, the communication must have been “(1) made in judicial or quasi-judicial
3 proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of
4 the litigation; and (4) that have some connection or logical relation to the action.” *Jacob B. v. Cty.*
5 *of Shasta*, 40 Cal. 4th 948, 955 (2007) (quoting *Silberg v. Anderson*, 50 Cal. 3d 205, 212 (1990)).⁹
6 “The principal purpose of the litigation privilege is to afford litigants and witnesses . . . the utmost
7 freedom of access to the courts without fear of being harassed subsequently by derivative
8 claims.” *Wentland v. Wass*, 126 Cal. App. 4th 1484, 1492 (2005) (internal marks and quotations
9 omitted). The litigation privilege has been interpreted broadly by the California courts, and it
10 applies to any communication made in connection with judicial proceedings. *Feldman v. 1100*
11 *Park Lane Associates*, 160 Cal. App. 4th 1467, 1485 (2008); *see also Neville v. Chudacoff*, 160
12 Cal. App. 4th 1255, 1266 (2008) (holding that to be privileged under section 47, a statement must
13 be “reasonably relevant” to pending or contemplated litigation).

14 The Court finds defendant Hower’s statements before the Hawaii court, allegedly made at
15 the request of the court and in connection with pending litigation, fall within the scope of the
16 litigation privilege. Plaintiff’s contention that the litigation privilege does not apply because
17 defendant Hower’s representations was not made to “achieve the objects of the litigation” is
18 unavailing. Plaintiff itself alleges in the complaint that the Hawaii court expected an update on the
19 potential loan to the Borrowers “in order to determine whether or not to allow GemCap to proceed
20 with a sale of assets,” and that based on defendant Hower’s statement, the Hawaii court continued
21 the case. (Compl. ¶¶ 41, 43.) In any event, given the broad scope of the litigation privilege,
22 defendant Hower’s statements to the court were clearly at least “reasonably relevant” to the
23 proceedings. The litigation privilege therefore applies.

24
25
26 ⁹ Courts have recognized that the standard for determining whether a communication was
27 made in connection with litigation is similar as between section 47 and the anti-
28 SLAPP statute. *See Flatley v. Mauro*, 39 Cal. 4th 299, 322-24 (2006) (noting relationship
between litigation privilege and anti-SLAPP statute, but holding that they are different in substance
and purpose).

1 Plaintiff's argument that an "extrinsic fraud" exception applies does not persuade.¹⁰
2 Plaintiff contends that because defendant Hower's statements to the Hawaii court were false, they
3 constitute an "extrinsic fraud." (Opposition, 3.) Plaintiff asserts that such "extrinsic fraud" is not
4 subject to the protections of the "litigation privilege," and thus, plaintiff's claims against defendant
5 Hower are not barred as a matter of law. As plaintiff correctly points out, courts have recognized
6 an exception to the litigation privilege for extrinsic fraud. *Silberg*, 50 Cal. 3d. at 214. "Extrinsic
7 fraud occurs when a party is deprived of the opportunity to present his claim or defense to the
8 court; where he was kept ignorant or, other than from his own negligence, fraudulently prevented
9 from fully participating in the proceeding. . . . The essence of extrinsic fraud is one party's
10 preventing the other from having his day in court." *Navarro v. IHOP Properties, Inc.*, 134 Cal.
11 App. 4th 834, 844 (2005) (quoting *City and County of San Francisco v. Cartagena*, 35 Cal. App.
12 4th 1061, 1067 (1995)). Where, however, a party "has been given notice of the action and has had
13 an opportunity to present his case and to protect himself from any mistake or fraud of his
14 adversary," any alleged fraud is intrinsic and will not support an exemption from the litigation
15 privilege. *Id.*

16 Plaintiff does not claim that it lacked notice of the Hawaii court proceeding, to which it was
17 a party, nor does it offer any other explanation as to how it was not afforded an adequate
18 opportunity to challenge the veracity of defendant Hower's statements before the Hawaii court.
19 Further, even assuming defendant Hower's statements to the Hawaii court were false or misleading,
20 the Court is doubtful that such wrongdoing would overcome the broad protections of the litigation
21 privilege. *See Flatley*, 39 Cal. 4th at 324 (litigation privilege applies to some forms of unlawful
22 litigation-related activity since the purposes of the privilege outweigh the "occasional unfair result"
23 in an individual case); *Doctors' Co. Ins. Servs. v. Superior Court*, 225 Cal. App. 3d 1284, 1284-85

24 ¹⁰ In its opposition, plaintiff appears to conflate the concepts of "litigation privilege" and
25 "protected activities." Specifically, plaintiff argues that the motion should be denied because,
26 among other reasons, defendant Hower's appearance before the Hawaii court constitutes an
27 "extrinsic fraud." (Opposition, 2-3.) Plaintiff then contends, in a single paragraph in the
28 opposition, that the "extrinsic fraud" allegations "cannot be vested with litigation privilege" and
"do not fall within protected activity." (*Id.*) The concepts of "litigation privilege" and "protected
activity" are distinct, however. Because "extrinsic fraud" is an exception to the litigation privilege,
the Court addresses the issue here, in its analysis of the second prong.

1 (1990) (litigation privilege applies to claim for subornation of perjury in context of defense of
2 action). The Court finds that the “extrinsic fraud” exception to the litigation privilege does not
3 apply to defendant Hower’s alleged misrepresentations to the Hawaii court. The litigation privilege
4 applies, and Plaintiff’s claims against defendant Hower in this Court, based upon this conduct, are
5 therefore barred as a matter of law.¹¹

6 Thus, the litigation privilege applies, and plaintiff’s claims against defendant Hower based
7 on protected activity that occurred before the Hawaii court are barred as a matter of law.

8 **III. PLAINTIFF’S REQUEST FOR LEAVE TO AMEND ITS PLEADINGS**

9 Finally, plaintiff requests that, should the Court find that section 425.16 applies, it be
10 permitted to “conduct discovery and to amend the complaint to supplement its allegations against
11 [d]efendant Hower.” (Opposition, 9.) California courts applying section 425.16 have held that a
12 party cannot use the right to amend to avoid the consequences of the anti-SLAPP statute. *Sylmar*
13 *Air Conditioning v. Pueblo Contracting Servs., Inc.*, 122 Cal. App. 4th 1049, 1054 (2004) (plaintiff
14 may not avoid liability for attorney fees and costs by voluntarily dismissing a cause of action to
15 which an anti-SLAPP is directed or amending the pleading). However, the Ninth Circuit has held
16 that consideration of an anti-SLAPP motion without permitting leave to amend liberally would
17 collide with Rule 15 of the Federal Rules of Civil Procedure. *Verizon Delaware, Inc. v. Covad*
18 *Commc’ns Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004). “Moreover, the purpose of the anti-SLAPP
19 statute, the early dismissal of meritless claims, would still be served if plaintiffs eliminated the
20 offending claims from their original complaint.” *Id.* Because federal procedure governs this case,
21 the Court grants plaintiff leave to amend its complaint to supplement its allegations as to defendant
22 Hower.

23 Although the Court grants plaintiff leave to amend, the Court will not grant plaintiff
24 additional time to conduct discovery into the stricken claims as plaintiff has not established
25 sufficient cause to do so. *See TradeMotion, LLC v. MarketCliq, Inc.*, No. CV113236PSGVBKX,
26
27

28 ¹¹ The Court takes no position on whether these issues can be raised in front of the judge in front of whom the conduct allegedly occurred.

1 2011 WL 13220413, at *8-9 (C.D. Cal. Oct. 25, 2011) (granting anti-SLAPP motion with leave to
2 amend and denying request to develop discovery on the stricken claims).

3 **IV. CONCLUSION**


4 Defendant Hower's Special Motion to Strike pursuant to California Code of Civil Procedure
5 section 425.165 is **GRANTED IN PART**. All allegations related to defendant Hower's statements to
6 the Hawaii court are **STRICKEN**. However, plaintiff's request for leave to amend its pleadings
7 against defendant Hower is **GRANTED**. Plaintiff must file an amended complaint within 21 days.
8 Defendants' response is due 21 days thereafter. Further, a Case Management Conference shall be
9 set for **Monday, July 8, 2019 at 2:00 p.m.** in the Federal Building, 1301 Clay Street, Oakland in
10 Courtroom 1.

11 Because he is the prevailing party, defendant Hower is entitled to an award of attorneys'
12 fees and costs incurred in moving to strike the claims on which he prevailed. Cal. Civ. Proc. Code
13 § 425.16(c); *Verizon Delaware, Inc. v. Covad Commc'ns Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004)
14 (“[D]efendants sued in federal courts can bring anti-SLAPP motions to strike state law claims and
15 are entitled to attorneys' fees and costs when they prevail.”); *Semiconductor Equip. & Materials*
16 *Int'l, Inc. v. The Peer Grp., Inc.*, No. 15-CV-00866-YGR, 2015 WL 5535806, at *1-2 (N.D. Cal.
17 Sept. 18, 2015) (“Even if the pleading is amended . . . , the moving party may still be entitled to
18 attorneys' fees and costs incurred in bringing the anti-SLAPP motion, per section 425.16(c).”);
19 *Resolute Forest Prod., Inc. v. Greenpeace Int'l*, 302 F. Supp. 3d 1005, 1027 (N.D. Cal. 2017)
20 (“Defendants are ‘entitled to recover attorney fees and costs incurred in moving to strike the claims
21 on which ... [they] prevailed, but not fees and costs incurred in moving to strike the remaining
22 claims.’”) (quoting *Choyce v. SF Bay Area Indep. Media Ctr.*, No. 13-CV-01842-JST, 2013 WL
23 6234628, at *10 (N.D. Cal. Dec. 2, 2013)). The parties are directed to meet and confer regarding
24 attorneys' fees, as required under Local Rule 54-5(b)(1).

25 This terminates Docket No. 42.

26 **IT IS SO ORDERED.**

27 Date: May 20, 2019

28 
YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE