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3 **UNITED STATES DISTRICT COURT**
4 **NORTHERN DISTRICT OF CALIFORNIA**
5 **SAN JOSE DIVISION**

6
7 NICK MILETAK,
8 Plaintiff,

9 v.

10 ACUITY MUTUAL INSURANCE
11 COMPANY,
12 Defendant.

Case No. 22-cv-00633-BLF

**ORDER GRANTING PLAINTIFF'S
MOTION TO DISMISS THE CROSS-
CLAIMS AND GRANTING
PLAINTIFF'S MOTION TO STRIKE**

[Re: ECF No. 59]

13 In this case, *pro se* Plaintiff Nick Miletak sues Defendant Acuity Mutual Insurance
14 Company for defamation, intentional infliction of emotional distress, and intentional interference
15 with economic advantage. Miletak alleges that Darcel Lang, an employee of Acuity, falsely
16 reported Miletak to Miletak's employer about improper conduct related to an insurance claim
17 made by Miletak's goddaughter. Miletak alleges that the report caused him humiliation and led
18 him to resign from his employment. Miletak filed this lawsuit in Santa Clara Superior Court on
19 November 10, 2021. *See* ECF No. 6-1 ("Compl."). Defendant Darcel Lang brought a cross-claim
20 for defamation, which accompanied Defendants' Answer. *See* ECF No. 6-2 ("Answer & Cross-
21 cl."). Defendants removed the case to this Court on January 31, 2022. *See* ECF No. 1. Miletak
22 then filed a motion to dismiss and a motion to strike Lang's cross-claim, as well as a motion to
23 remand the case in its entirety for lack of subject matter jurisdiction. *See* ECF Nos. 16, 17, 20.
24 Defendants' also filed a motion to deem Miletak a vexatious litigant. *See* ECF No. 41. The Court
25 denied Miletak's motion to remand, granted Miletak's motion to dismiss Lang's cross-claim with
26 leave to amend, denied Miletak's motion to strike without prejudice, and denied Defendants'
27 motion to declare Miletak a vexatious litigant. *See* ECF No. 51 ("Order re Pending Mots.") at 10-
28 11.

1 Defendant filed an amended answer, as well as cross-claims by Lang for Intentional
 2 Infliction of Emotional Distress (“IIED”) and Negligent Infliction of Emotional Distress (“NIED”) and by Acuity for malicious prosecution. *See* ECF No. 55 (“Am. Answer & Cross-cl.”). Now
 3 before the Court is Miletak’s motion to dismiss Lang’s amended cross-claims for IIED and NIED,
 4 Miletak’s motion to dismiss Acuity’s cross-claim for malicious prosecution, and Miletak’s motion
 5 to strike all three claims under California’s anti-SLAPP law. *See* ECF No. 59 (“Mot.”); *see also*
 6 ECF No. 63 (“Reply”). Defendants oppose the motion. *See* ECF No. 62 (“Opp.”).

8 For the reasons discussed herein, the Court (1) GRANTS Miletak’s motion to dismiss
 9 Lang’s cross-claim for IIED; (2) GRANTS Miletak’s motion to dismiss Lang’s cross-claim for
 10 NIED; (3) GRANTS Miletak’s motion to dismiss Acuity’s cross-claim for malicious prosecution;
 11 and (4) GRANTS Miletak’s motion to strike under California’s anti-SLAPP law.

12 I. MOTIONS TO DISMISS

13 A. Legal Standard

14 “A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a
 15 claim upon which relief can be granted ‘tests the legal sufficiency of a claim.’” *Conservation*
 16 *Force v. Salazar*, 646 F.3d 1240, 1241–42 (9th Cir. 2011) (quoting *Navarro v. Block*, 250 F.3d
 17 729, 732 (9th Cir. 2001)). When determining whether a claim has been stated, the Court accepts
 18 as true all well-pled factual allegations and construes them in the light most favorable to the
 19 plaintiff. *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 690 (9th Cir. 2011). However, the Court
 20 need not “accept as true allegations that contradict matters properly subject to judicial notice” or
 21 “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable
 22 inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (citations omitted).
 23 While a complaint need not contain detailed factual allegations, it “must contain sufficient factual
 24 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*,
 25 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A
 26 claim is facially plausible when it “allows the court to draw the reasonable inference that the
 27 defendant is liable for the misconduct alleged.” *Id.* On a motion to dismiss, the Court’s review is
 28 limited to the face of the complaint and matters judicially noticeable. *See MGIC Indem. Corp. v.*

1 *Weisman*, 803 F.2d 500, 504 (9th Cir. 1986); *N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578,
2 581 (9th Cir. 1983).

3 **B. Motion to Dismiss Lang's Cross-claims for IIED and NIED**

4 Darcel Lang alleges IIED by Miletak for “pursuing frivolous litigation alleging defamation
5 and related causes of action for a single statement allegedly made by Ms. Lang to Mr. Miletak’s
6 employer.” Am. Answer & Cross-cl. ¶ 9. Lang alleges that these actions caused her “substantial
7 and enduring emotional distress.” *Id.* ¶ 10. Darcel Lang additionally alleges NIED, claiming that
8 Miletak “negligently engaged in certain acts, and filed a frivolous, ridiculous and baseless lawsuit,
9 which proximately resulted in injury and emotional distress.” *Id.* ¶ 15. Miletak filed a motion to
10 dismiss these cross-claims, arguing that the underlying factual basis for the IIED and NIED claims
11 is protected by litigation privilege. Mot. at 9–10. Miletak cites to this Court’s prior Order, which
12 dismissed Lang’s earlier cross-claim for defamation on the same basis. *See* Order re Pending
13 Mots. at 7.

14 In dismissing Lang’s original cross-claim with leave to amend, the Court warned Lang to
15 be cautious in bringing an amended claim, and to only do so if she could plead statements by
16 Miletak unprotected by litigation privilege. *See* Order re Pending Mots. at 7. Lang, instead,
17 appears to have merely changed the causes of action from defamation to IIED and NIED, while
18 still basing the claim on Miletak’s statements in this litigation. *Compare* Answer & Cross-cl. ¶ 2
19 *with* Am. Answer & Cross-cl. ¶¶ 9, 15. Cal. Civ. Code § 47(b) states that “[a] privileged
20 publication . . . is one made . . . in any . . . judicial proceeding.” Under this law, “communications
21 made in or related to judicial proceedings are absolutely immune from tort liability.” *Ingrid &*
22 *Isabel, LLC v. Baby Be Mine, LLC*, 70 F. Supp. 3d 1105, 1140 (N.D. Cal. 2014). Therefore, a
23 claim for IIED or NIED cannot be based on evidence protected by litigation privilege. *See id.*
24 (“Courts have applied the litigation privilege to all torts, with the exception of actions for
25 malicious prosecution.”). The privilege applies to “any communication (1) made in judicial or
26 quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve
27 the objects of the litigation; and (4) that have some connection or logical relation to the action.”
28 *Id.* (quoting *Silberg v. Anderson*, 50 Cal. 3d 205, 212 (1990)). “Pleadings . . . in a case are

1 generally viewed as privileged communications,” particularly where they are in the form of a
 2 claim that “furthers a litigant’s interest in a case.” *Navellier v. Sletten*, 106 Cal. App. 4th 763, 771
 3 (2003); *see also Visto Corp. v. Sproqit Techs., Inc.*, 360 F. Supp. 2d 1064, 1070 (N.D. Cal. 2005)
 4 (noting that the privilege even applies to prelitigation communications, so long as they are made
 5 “in good faith and actual contemplation of litigation.”); *Eisenberg v. Alameda Newspapers, Inc.*,
 6 74 Cal. App. 4th 1359, 1378 (1999). Thus, for the same reasons the Court outlined in its prior
 7 order, *see Order re Pending Mots.* at 6–7, Miletak’s statements that form the basis for Lang’s
 8 claims are protected by litigation privilege.

9 Therefore, the Court GRANTS Miletak’s motion to dismiss Lang’s cross-claims for IIED
 10 and NIED. The Court previously provided Lang leave to amend her cross-claim, giving her the
 11 opportunity to plead statements by Miletak that were not protected by the California litigation
 12 privilege. *See Order re Pending Mots.* at 7. Lang has not done so here, so the Court dismisses
 13 WITHOUT LEAVE TO AMEND.

14 C. Motion to Dismiss Acuity’s Cross-claim for Malicious Prosecution

15 Acuity also brings a cross-claim against Miletak for malicious prosecution. *See Am.*
 16 *Answer & Cross-cl.* ¶¶ 2–7. Miletak originally filed his lawsuit against Acuity claiming “extreme
 17 embarrassment, humiliation and emotional and mental distress” for the allegedly false allegation
 18 that Plaintiff misused company resources. *See Compl.* ¶¶ 29, 33. Acuity alleges that Miletak filed
 19 this lawsuit “maliciously and for an improper purpose of continuing to harass Acuity and Ms.
 20 Lang.” *Am. Answer & Cross-cl.* ¶6. Acuity alleges that “no reasonable person, including
 21 Miletak, would believe there was reasonable grounds to bring the lawsuit against Acuity.” *Id.* ¶ 3.
 22 Miletak moves to dismiss the cross-claim, arguing that a malicious prosecution claim requires that
 23 a case be brought to its conclusion, which has not occurred, and that there is not sufficient
 24 evidence to determine whether the case was initiated with malice. *See Mot.* at 11–12.

25 The Ninth Circuit has outlined the test for malicious prosecution cases. “[I]n California,
 26 [malicious prosecution] has three elements: (1) the prosecution ‘was commenced by or at the
 27 direction of the defendant and was pursued to a legal termination’ in the plaintiff’s favor; (2) ‘was
 28 brought without probable cause’; and (3) ‘was initiated with malice.’” *Myles v. United States*, 47

1 F.4th 1005, 1014 (9th Cir. 2022) (citation omitted); *see also L. Offs. of Bruce Altschuld v. Wilson*,
 2 632 F. App'x 321, 323 (9th Cir. 2015). “Malice in this context ‘is not limited to actual hostility or
 3 ill will toward [the] plaintiff,’ but also ‘exists when proceedings are instituted primarily for an
 4 improper purpose’ such as when ‘the person initiating [the charges] does not believe that his claim
 5 may be held valid.’” *Myles*, 47 F.4th at 1014 (citation omitted) (alterations in original).

6 On this basis, Acuity’s cross-claim for malicious prosecution clearly fails. The case
 7 remains active, and, consequently, it has not been “pursued to a legal termination in the plaintiff’s
 8 favor.” *See Myles*, 47 F.4th at 1014 (citation omitted) (internal quotations omitted). Acuity does
 9 not address this fact in its opposition, even though it cites to the correct legal test. *See Opp.* at 4.

10 Therefore, the Court GRANTS Miletak’s motion to dismiss Acuity’s cross-claim for
 11 malicious prosecution. Here, it is clear that any amendment would be futile since the case remains
 12 active and has not been pursued to termination in favor of the plaintiff. The Court will leave the
 13 door open for Acuity to file a new lawsuit should it prevail in defeating this case. Therefore, the
 14 Court dismisses the cross-claim without prejudice to filing a new lawsuit after this case has
 15 concluded.

16 **II. MOTION TO STRIKE UNDER CALIFORNIA’S ANTI-SLAPP LAW**

17 Miletak also seeks to strike the cross-claims under California’s anti-SLAPP law. *See Mot.*
 18 at 5–6. Though he does not specifically “move” to strike the claims, instead only asserting that
 19 anti-SLAPP law applies, *see id.* at 1, 5–6, the Court will overlook this pleading error as filings by
 20 *pro se* litigants are to be construed liberally. *See Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir.
 21 2010). Additionally, Miletak incorrectly states that the malicious prosecution cross-claim was
 22 brought by Darcel Lang, *see Mot.* at 11, when it was actually brought by Acuity. *See Am. Answer*
 23 *& Cross-cl.*, ¶ 1. This presents an issue with Miletak’s motion to strike, as it is directed
 24 exclusively at cross-claims by “Darcel Lang[.]” *Mot.* at 6. For the purposes of this Order, the
 25 Court will construe the motion to strike as applying to all three claims, as Miletak indicated that
 26 “[a]ll three of [sic] actions alleged in the amended cross complaint . . . are subject to the Anti-
 27 SLAPP statute . . .” *Id.* at 2.

28 “Under California’s anti-SLAPP statute, a defendant may bring a special motion to strike a

1 cause of action arising from constitutionally protected speech or petitioning activity.” *Barry v.*
 2 *State Bar of California*, 2 Cal. 5th 318, 320 (2017). “Unless the plaintiff establishes a probability
 3 of prevailing on the claim, the court must grant the motion and ordinarily must also award the
 4 defendant its attorney’s fees and costs.” *Id.* “The analysis of an anti-SLAPP motion proceeds in
 5 two steps.” *Id.* at 321. “At the first step, the [movant] . . . bears the burden of identifying all
 6 allegations of protected activity, and the claims for relief supported by them.” *Baral v. Schnitt*, 1
 7 Cal. 5th 376, 396 (2016). “When relief is sought based on allegations of both protected and
 8 unprotected activity, the unprotected activity is disregarded at this stage.” *Id.* Only “[i]f the court
 9 determines that relief is sought based on allegations arising from activity protected by the statute”
 10 is the second step reached. *Id.* At step two, “the burden shifts to the plaintiff to demonstrate that
 11 each challenged claim based on protected activity is legally sufficient and factually substantiated.”
 12 *Id.* An analysis of each of these claims against this legal standard for anti-SLAPP analysis
 13 demonstrates that Miletak’s motion to strike passes both steps for all three claims. Therefore,
 14 Nick Miletak’s motion to strike Acuity’s cross-claim for malicious prosecution and Lang’s cross-
 15 claims for IIED and NIED is GRANTED for the reasons stated herein.

16 **A. Step 1 — Identification of Protected Activity**

17 Here, Miletak argues that all three cross-claims he desires to be stricken — IIED, NIED,
 18 and malicious prosecution — “are barred by Plaintiff’s immunity from actions protected by
 19 litigation privilege.” *See* Mot. at 2. Protected activity for purposes of anti-SLAPP is defined in
 20 Cal. Civ. Proc. Code § 425.16(e) and includes a written statement in a judicial proceeding. *See*
 21 Cal. Civ. Proc. Code 425.16(e)(1) (“any written or oral statement or writing made before a . . .
 22 judicial proceeding . . .”). The cross-claims are based on Plaintiff’s statements in this lawsuit.
 23 Additionally, courts have applied the anti-SLAPP statute to claims of IIED, NIED, and malicious
 24 prosecution. *See Sarver v. Chartier*, 813 F.3d 891, 907 (9th Cir. 2016) (affirming dismissal of an
 25 IIED claim pursuant to California anti-SLAPP statute); *Doe v. Gangland Prods., Inc.*, 730 F.3d
 26 946, 961 (9th Cir. 2013) (dismissing an NIED claim pursuant to California anti-SLAPP statute);
 27 *Roberts v. McAfee, Inc.*, 660 F.3d 1156, 1164–66 (9th Cir. 2011) (indicating that California’s anti-
 28 SLAPP statute may properly apply to malicious prosecution claims). Cross-plaintiffs also do not

1 dispute that the protected activity was properly identified. *See Opp.*

2 **B. Step 2 — Proof of Legal Sufficiency and Factual Substantiation**

3 Now, the cross-plaintiffs must prove that these claims are legally sufficient and factually
 4 substantiated to satisfy Step 2 of the California anti-SLAPP analysis. *See Baral*, 1 Cal. 5th at 396.
 5 Cross-plaintiffs have not done so. Where the anti-SLAPP motion challenges only the legal
 6 sufficiency of the claims, the district court applies the Rule 12(b)(6) standard to consider whether
 7 a claim is stated. *See Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d
 8 828, 834 (9th Cir. 2018), amended, 897 F.3d 1224 (9th Cir. 2018). Miletak's motion focuses on
 9 the legal sufficiency of the cross-claims. *See Mot.* at 10 (asserting that the "causes of action
 10 contained in the amended cross-complaint fails [sic] to plead the necessary elements"); *see also*
 11 *Planned Parenthood*, 890 F.3d at 834 (applying Rule 12(b)(6) analysis if motion to strike is based
 12 on the same arguments as motion to dismiss with no additional evidentiary-based argument other
 13 than a declaration). The Court has already performed a 12(b)(6) analysis on each of the three
 14 cross-claims and has found that none of them state a claim. *See supra* I.B, I.C. Further, neither
 15 Acuity nor Lang has offered any evidence to support their claims and the attorney argument
 16 suggesting such evidence is not sufficient. *See Opp.* Therefore, the cross-plaintiffs fail on Step 2.

17 **C. Attorney's Fees**

18 Since the anti-SLAPP motion succeeds on all three cross-claims, the Court must now
 19 consider the issue of attorney's fees. Under California's anti-SLAPP statute, "unless the plaintiff
 20 establishes a probability of prevailing on the claim, the court must grant the motion and *ordinarily*
 21 *must also award the defendant its attorney's fees and costs.*" *Barry*, 2 Cal. 5th at 320 (emphasis
 22 added); Cal. Civ. Proc. Code § 425.16(c)(1). Here, cross-plaintiffs have not established a
 23 probability of prevailing on any of their claims. However, since Miletak is representing himself
 24 *pro se*, no attorney's fees shall be awarded. *See Blanchard v. Morton Sch. Dist.*, 509 F.3d 934
 25 (9th Cir. 2007) ("Pro se plaintiffs . . . are not entitled to attorney's fees"); *see also Alfaro v. Real*
 26 *Time Resols.*, 19-cv-06365-BLF, 2020 WL 13470817, at *4 (N.D. Cal. Mar. 2, 2020).

27 **III. ORDER**

28 For the foregoing reasons, IT IS HEREBY ORDERED that:

United States District Court
Northern District of California

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- Nick Miletak’s motion to dismiss Darcel Lang’s amended cross-claim for intentional infliction of emotion distress is GRANTED WITHOUT LEAVE TO AMEND;
- Nick Miletak’s motion to dismiss Darcel Lang’s amended cross-claim for negligent infliction of emotion distress is GRANTED WITHOUT LEAVE TO AMEND;
- Nick Miletak’s motion to dismiss Acuity’s cross-claim for malicious prosecution is GRANTED WITHOUT PREJUDICE;
- Nick Miletak’s motion to strike Acuity’s cross-claim for malicious prosecution and Darcel Lang’s amended cross-claims for intentional infliction of emotional distress and negligent infliction of emotional distress is GRANTED; and
- Attorney’s fees are NOT GRANTED for Nick Miletak’s motion to strike.

Dated: November 14, 2022


BETH LABSON FREEMAN
United States District Judge