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9
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11
 12 UNITED STATES DISTRICT COURT
 13 EASTERN DISTRICT OF CALIFORNIA

14 ERIC GRANT,)	No. 2:08-cv-00672-FCD-KJM
)	
15 Plaintiff,)	
)	PLAINTIFF AND COUNTER-DEFENDANT
16 v.)	ERIC GRANT'S NOTICE OF MOTION,
)	MOTION FOR SUMMARY JUDGMENT,
17 KAMEHAMEHA SCHOOLS/BERNICE)	AND BRIEF IN SUPPORT THEREOF
PAUahi BISHOP ESTATE; J. DOUGLAS)	[Fed. R. Civ. P. 56(a); L.R. 56-260(a)]
18 ING, NAINOA THOMPSON, DIANE J.)	
PLOTTS, ROBERT K.U. KIHUNE, and)	
19 CORBETT A.K KALAMA, in their)	
capacities as Trustees of the Kamehameha)	
20 Schools/Bernice Pauahi Bishop Estate;)	Hearing Date: Oct. 31, 2008
JOHN DOE; and JANE DOE,)	Time: 10:00 a.m.
)	Courtroom: 2
21 Defendants.)	Judge: Hon. Frank C. Damrell, Jr.
22)	
23 JOHN DOE and JANE DOE,)	
)	
24 Counter-Claimants,)	
)	
25 v.)	
)	
26 KAMEHAMEHA SCHOOLS/BERNICE)	
PAUahi BISHOP ESTATE, et al.,)	
27)	
Counter-Defendants.)	
28)	

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1 **NOTICE OF MOTION**

2 TO DEFENDANTS AND THEIR COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that on October 31, 2008, at 10:00 a.m., or as soon thereafter as
4 the matter may be heard in the above-entitled Court, located at 501 “I” Street, Sacramento, Cali-
5 fornia, Plaintiff and Counter-Defendant Eric Grant (“Grant”) will move for summary judgment as
6 set forth below.

7 **MOTION FOR SUMMARY JUDGMENT**

8 Pursuant to Federal Rule of Civil Procedure 56(a) and Local Rule 56-260(a), the plead-
9 ings on file, together with the declarations filed herewith, show that there is no genuine issue as to
10 any material fact and that Grant is entitled to judgment as a matter of law. Specifically, Grant seeks
11 a judgment

12 (a) against Defendant Kamehameha Schools/Bernice Pauahi Bishop Estate, along with
13 Defendants J. Douglas Ing, Nainoa Thompson, Diane J. Plotts, Robert K.U. Kihune, and Corbett
14 A.K. Kalama, in their capacities as Trustees of the Kamehameha Schools/Bernice Pauahi Bishop
15 Estate (collectively, “KSBE”), declaring that Grant is not liable in any manner to KSBE in contract
16 or in tort or on any other basis whatsoever—whether for money damages or for any other kind of
17 relief—with respect to, pertaining to, or arising from any alleged breach of the Doe-KSBE settle-
18 ment agreement by any person, or for any alleged disclosures of confidential information by John
19 Goemans, or for any related matter; and

20 (b) against Defendants and Counter-Claimants John Doe and Jane Doe (“the Does”)

21 (1) declaring, on Grant’s Claim for Relief, that Grant is not liable in any manner
22 to the Does in contract or in tort or on any other basis whatsoever—whether for money damages or
23 for any other kind of relief—with respect to, pertaining to, or arising from any alleged breach of
24 the Doe-KSBE settlement agreement by any person, or for any alleged disclosures of confidential
25 information by John Goemans, or for any related matter;

26 (2) declaring, on the Does’ Third, Fourth, and Fifth Counter-Claims for Relief,
27 that the Does are *not* entitled to indemnity, in whole or in part, from Grant for any sum the Does
28 may pay to KSBE; and also that the Does are *not* entitled to indemnity, in whole or in part, from

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1 Grant for any costs, expenses, or attorney’s fees the Does have incurred or will incur either (i) in
2 defending themselves against claims by KSBE or any other party to this action, or (ii) in prosecut-
3 ing their counter-claims and cross-claims; and
4 (3) for all reasonable costs, expenses, and attorneys’ fees incurred by Grant as
5 a result of this action.
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6 B.E. Witkin, *Summary of California Law: Torts* (10th ed. 2005) 12-14

INTRODUCTION

1
2 Plaintiff and Counter-Defendant Eric Grant (“Grant”) brought this action against KSBE¹
3 and against John and Jane Doe (“the Does”), seeking a declaration that he is not liable in any man-
4 ner to any of those parties for an alleged breach of a settlement agreement between the Does and
5 KSBE resulting from alleged disclosures of confidential information by non-party John Goemans.
6 KSBE has filed a motion to dismiss and a motion to transfer venue, to which Grant will separately
7 respond. Because the essential facts are undisputed, and because on those facts Grant is entitled to
8 judgment against both KSBE and the Does as a matter of law, he hereby moves for summary judg-
9 ment. As demonstrated below, Defendants’ putative claims against Grant are legally and factually
10 groundless, and the Court should so declare without further delay.

STATEMENT OF FACTS²

11
12 As the Court well knows from the numerous previous filings in this case, Grant served as
13 counsel to the Does in a federal civil rights action against KSBE. That litigation began in June of
14 2003, when the Does filed their complaint in federal district court in Hawaii, and ended in May of
15 2007, when the Does and KSBE reached a settlement while their dispute was pending in the U.S.
16 Supreme Court. The agreement memorializing the settlement, cited herein as the “Doe-KSBE Set-
17 tlement Agreement,” obligated KSBE to pay the Does a sum of money in exchange for a dismissal
18 of the Does’ claims against KSBE, and in particular a dismissal of the Does’ pending petition for
19 certiorari in the Supreme Court. The parties to the agreement performed those obligations without
20 incident. *See generally* KSBE’s Memorandum of Points and Authorities in Support of Motion to
21 Dismiss (“KSBE Dismiss Mem.”) 1-4 (doc. 51, filed July 9, 2008).

22 For present purposes, the crucial provision of the Doe-KSBE Settlement Agreement was a
23 confidentiality provision under which (as KSBE describes it) “no signatory or releasee—‘including

24 _____
25 ¹ “KSBE” stands for Defendant Kamehameha Schools/Bernice Pauahi Bishop Estate, along with
26 Defendants J. Douglas Ing, Nainoa Thompson, Diane J. Plotts, Robert K.U. Kihune, and Corbett
27 A.K. Kalama, in their capacities as Trustees of the Kamehameha Schools/Bernice Pauahi Bishop
28 Estate.

² The following section is a very broad factual overview. The facts relevant to particular aspects
of Grant’s arguments are set out in detail, with supporting citations to the accompanying Statement
of Undisputed Facts, in the appropriate sections below.

1 counsel’—would disclose the Does’ names or any term of the Settlement Agreement . . . specific-
2 ally includ[ing] the settlement amount.” *Id.* at 4:4-6. Despite this provision, the putative amount
3 and other terms of the Doe-KSBE settlement were disclosed to the Honolulu media on February 7,
4 2008. All parties agree that the person who made these disclosures was John Goemans, a lawyer
5 who at one time (the Does and KSBE dispute precisely when the relationship ended) served as the
6 Does’ counsel in the underlying civil rights litigation and who learned of the settlement’s terms in
7 that capacity. *See* Statement of Undisputed Facts (“SUF”) ¶ 3, at 2 (filed concurrently herewith)
8 (source of Goemans’ knowledge); *id.* ¶ 4, at 2 (Goemans as Does’ counsel); *id.* ¶ 11, at 4 (fact of
9 Goemans’ disclosure).

10 What the parties dispute, of course, is who is responsible for Goemans’ disclosures or, to
11 be more precise, who if anyone will have to compensate KSBE for the literally *millions* of dollars
12 in damages it has allegedly suffered as a result of those disclosures. KSBE says that the Does and
13 Grant are responsible; it has already sued the Does in Hawaii and is holding the threat of suit over
14 Grant’s head. The Does say that if anyone is responsible, it is Goemans and Grant; they have sued
15 Grant in the present case. Grant says that he—as a non-party to the Doe-KSBE Settlement Agree-
16 ment and as the person who took extraordinary measures to *prevent* Goemans from doing what he
17 did—is indisputably *not* responsible regardless of who else might be; he brought this action, and
18 brings the present motion, to obtain a judgment so declaring.

19 ARGUMENT

20 Grant seeks distinct though similar declaratory relief against KSBE and against the Does.
21 As set out below, there is no genuine issue as to any material fact, and so Grant is entitled to such
22 relief as a matter of law.

23 I. Grant Is Entitled to a Declaratory Judgment Against KSBE.

24 Though KSBE has not filed its compulsory counter-claims, the essence of KSBE’s putative
25 claims against Grant is readily apparent from its pleadings: Grant is somehow legally responsible
26 for an alleged breach of a settlement agreement to which he was *not* a party and where such breach
27 was indisputably accomplished by another person’s disclosures made in direct violation of a court
28 order that Grant himself obtained in an attempt to prevent those disclosures. As explained below,

1 KSBE’s putative claims against Grant are legally and factually groundless, and Grant is entitled as
2 a matter of law to a judgment so declaring.

3 **A. Declaratory Relief Is Appropriate.**

4 The Declaratory Judgment Act provides: “In a case of actual controversy within its juris-
5 diction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare
6 the rights and other legal relations of any interested party seeking such declaration, whether or not
7 further relief is or could be sought.” 28 U.S.C. § 2201(a). We consider in turn whether there is an
8 “actual controversy” between Grant and KSBE and whether this Court should exercise its discre-
9 tion to “declare the rights and other legal relations” of those parties.³

10 **1. There Is an Actual Controversy Between Grant and KSBE.**

11 In one of the leading cases in the field, the Ninth Circuit observed that “[t]he ‘actual con-
12 troversy’ requirement of the [Declaratory Judgment] Act is the same as the ‘case or controversy’
13 requirement of Article III of the United States Constitution.” *Societe de Conditionnement en Al-*
14 *uminium v. Hunter Engineering Co., Inc.*, 655 F.2d 938, 942 (9th Cir. 1981) (*SCAL*). In that case,
15 moreover, the court of appeals worked to “formulat[e] a standard” for determining “whether a par-
16 ticular action is a case or controversy within the meaning of Article III.” *Id.* at 943-44.

17 The Ninth Circuit began by reiterating some “familiar general principles”: “Basically, the
18 question in each case is whether the facts alleged, under all the circumstances, show that there is a
19 substantial controversy, between parties having adverse legal interests, of sufficient immediacy and
20 reality to warrant the issuance of a declaratory judgment.” *Id.* at 942 (quoting *Maryland Casualty*
21 *Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). The court of appeals then fleshed out
22 these general principles with two specific innovations.

23 First, the Ninth Circuit acknowledged that the Declaratory Judgment Act addresses more
24 than just imminent disputes; rather, the Act “was designed to relieve potential defendants from the

25 _____
26 ³ As stated in § 2201(a), the controversy must be “within [the] jurisdiction” of the federal courts.
27 Here, of course, the controversy is within the diversity jurisdiction of the federal courts. *See Com-*
28 *plaint ¶ 1*, at 1 (doc. 1, filed Mar. 28, 2008). In its motion to dismiss, KSBE argues that “the Court
lacks subject matter jurisdiction because there is not complete diversity when the parties are cor-
rectly aligned.” KSBE Dismiss Mem. 7:12-13 (section heading). Grant will address this argument
in his opposition to KSBE’s motion.

1 Damoclean threat of impending litigation which a harassing adversary might brandish, while ini-
2 tiating suit at his leisure or never.” *Id.* at 943 (quoting *Japan Gas Lighter Association v. Ronson*
3 *Corp.*, 257 F. Supp. 219, 237 (D.N.J. 1966)), *quoted in Hal Roach Studios, Inc. v. Richard Feiner*
4 *& Co., Inc.*, 896 F.2d 1542, 1556 (9th Cir. 1990), *quoted in Spokane Indian Tribe v. United States*,
5 972 F.2d 1090, 1091 (9th Cir. 1992); *accord, e.g., Sony Electronics, Inc. v. Guardian Media Tech-*
6 *nologies, Ltd.*, 497 F.3d 1271, 1284 (Fed. Cir. 2007) (acknowledging that “the Declaratory Judg-
7 ment Act was intended to fix the problem that arises when the other side does not sue”). In effect,
8 the Act “brings to the present a litigable controversy, which otherwise might only by tried in the
9 future.” *SCAL*, 655 F.2d at 943.

10 Second, like KSBE in the present case, the parties in *SCAL* believed that “an actual threat
11 of litigation must be made by the [federal defendant] for a case or controversy to exist”; however,
12 the Ninth Circuit concluded that “the Constitution has a much lower threshold than this standard
13 would suggest.” *Id.* at 944. In fact, the standard “is less strict than an actual threat of litigation.”
14 *Id.* As the court has reaffirmed in later cases, “the requirements of the Declaratory Judgment Act
15 [are] satisfied ‘if the plaintiff has a real and reasonable apprehension that he will be subject to lia-
16 bility.’” *Chesebrough-Pond’s, Inc. v. Faberge, Inc.*, 666 F.2d 393, 396 (9th Cir.) (quoting *SCAL*,
17 655 F.2d at 944), *cert. denied*, 459 U.S. 967 (1982); *accord, e.g., Hal Roach Studios*, 896 F.2d at
18 1555; *Rhoades v. Avon Products, Inc.*, 504 F.3d 1151, 1157 (9th Cir. 2007). This Court has only
19 recently applied this standard: “A specific threat of imminent litigation is not necessary to show
20 that the declaratory relief plaintiff held a real and reasonable apprehension that he would be sub-
21 ject to liability.” *Mitsui Sumitomo Insurance Co. v. Delicato Vineyards*, No. CIV. S-06-2891 FCD
22 GGH, slip op. at 10:16-18 (E.D. Cal. May 10, 2007).⁴

23 Subsequent decisions have clarified that in applying “reasonable apprehension” standard,
24 the Ninth Circuit has “focused upon the position and perceptions of the *plaintiff*, declining to iden-
25 tify specific acts or intentions of the defendant that would automatically constitute a threat of liti-
26 gation”; instead, a court is to examine “the acts of the defendant” generally, in order “to determine

27 _____
28 ⁴ A copy of the quoted opinion is reproduced as Exhibit 1 to the Appendix of Non-Standard Auth-
orities filed concurrently herewith.

1 if the threat perceived by the plaintiff [is] real and reasonable.” *Chesebrough-Pond’s*, 666 F.2d at
2 396 (emphasis added), *quoted in Rhoades*, 504 F.3d at 1157. In short, the Ninth Circuit “requires
3 a flexible approach that is oriented to the reasonable perceptions of the plaintiff.” *Chesebrough-*
4 *Pond’s*, 666 F.2d at 396, *quoted in Hal Roach Studios*, 896 F.2d at 1556.

5 Applying these principles to the present case leads easily to the conclusion that there is an
6 actual controversy between Grant and KSBE. First, even if it is true that KSBE “*presently* has no
7 intention to sue Mr. Grant,” KSBE is nonetheless expressly “reserving all of its rights and claims”
8 against Grant. SUF ¶ 18, at 5 (emphasis added). Thus, KSBE is brandishing over Grant the very
9 “Damoclean threat of impending litigation” that Declaratory Judgment Act was exactly “designed
10 to relieve.” *SCAL*, 655 F.2d at 943. In other words, KSBE is the very exemplar of the “harassing
11 adversary” who coyly reserves the right to “initiat[e] suit at [its] leisure or never.” *Id.* But the Act
12 “brings to the present” KSBE’s maybe-sometime/maybe-never suit against Grant—and makes it
13 “a litigable controversy.” *Id.*

14 Second, Grant need not show “an actual threat of litigation” by KSBE; instead, Grant need
15 show “a much lower threshold,” specifically whether he has “a real and reasonable apprehension”
16 that he will be sued by KSBE in relation to the alleged breach of the Doe-KSBE Settlement Agree-
17 ment. *Id.* Grant does indeed have such an apprehension in light of the following undisputed facts:

- 18 • Before this action was filed, KSBE’s then-counsel David Schulmeister stated to the Does’
19 counsel that although KSBE “initially . . . believed that Grant had no potential liability re-
20 sulting from Goemans’ disclosure to the press, and intended only to pursue it claims against
21 the Does,” KSBE subsequently determined (based on new information) that it “was going
22 to reserve its claims against both Grant and the Does.” SUF ¶ 14, at 4.
- 23 • Also before this action was filed, Grant asked KSBE’s counsel Kathleen Sullivan to assure
24 him that KSBE had *not* threatened to sue him for breach of the Settlement Agreement. Al-
25 though Ms. Sullivan did acknowledge receiving Grant’s message, she never provided the
26 requested assurance. *See* SUF ¶ 15, at 5.
- 27 • Less than two weeks after this action was filed, Grant offered to dismiss KSBE in exchange
28 for KSBE’s enforceable acknowledgment that “it has no claim for breach of the settlement
agreement against [Grant]”; that offer would not have required KSBE to pay any damages,
attorney’s fees, or costs to Grant. KSBE did not accept Grant’s offer. *See* SUF ¶ 16, at 5.
- Indeed, the very next day, in an e-mail message sent to Grant’s counsel, KSBE’s counsel
Paul Alston reiterated that although KSBE “has no present intention to sue Mr. Grant,” it is
“not correct to say that [KSBE] has decided it has no claims against Mr. Grant.” Moreover,
Alston stated that KSBE “is still in the process of evaluating its rights and claims” against
Grant and others. SUF ¶ 17, at 5.

- 1 • In a separate message that same day, Alston assured the Does' counsel that KSBE does not
2 "presently intend to sue your clients." SUF ¶ 18, at 5. Yet not more than four months later,
3 KSBE did indeed sue the Does in Hawaii Circuit Court. *See* SUF ¶ 19, at 5.
- 4 • KSBE has informed this Court that it expects "the Hawaii Circuit Court will . . . be asked
5 to resolve . . . who (between and among the Does, Goemans, *and Grant*) bears financial re-
6 sponsibility for the breach" of the Doe-KSBE Settlement Agreement. KSBE Supplemental
7 Memorandum in Support of Motion to Dismiss 4:19-23 (doc. 80, filed Aug. 29, 2008) (em-
8 phasis added).

9 Under the Ninth Circuit's "flexible approach that is oriented to the reasonable perceptions
10 of the plaintiff," *Chesebrough-Pond's*, 666 F.2d at 396, the foregoing facts are more than sufficient
11 to establish a "case or controversy" between Grant and KSBE. If not actually threatening to sue
12 Grant, KSBE has hinted that such a suit is in the works: as quoted above, the Hawaii Circuit Court
13 "will . . . be asked" to determine whether Grant, among others, bears responsibility for the alleged
14 breach of the Settlement Agreement. *Cf. Rhoades*, 504 F.3d at 1157 (observing that in the present
15 context, a threat "does not have to be said in so many words" but "can be expressed in the attitude
16 of the defendant as expressed[, for example,] in 'circumspect language in a letter'"). Moreover,
17 the hint is all the more ominous for Grant in light of KSBE's course of conduct vis-à-vis the Does:
18 having assured their counsel that it does not "presently intend to sue your clients," SUF ¶ 18, at 5,
19 KSBE did indeed the Does just a few months later. Finally, the Ninth Circuit has recognized that
20 it is highly relevant, in these circumstances, that the party in KSBE's position "has not indicated to
21 [the plaintiff] that it will *not* institute [a future] action" against him. *Hal Roach Studios*, 896 F.2d
22 at 1556 (emphasis in original).

23 Accordingly, the dispute between Grant and KSBE presents a "case or controversy" within
24 the meaning of Article III and an "actual controversy" under the Declaratory Judgment Act.

25 **2. The Court Should Exercise its Discretion to Award Relief.**

26 As this Court has recently stated, "even when subject matter jurisdiction exists, the district
27 court may, in the exercise of its discretion, decline to entertain the action." *Mitsui Sumitomo*, slip
28 op. at 11:12-14 (citing *GEICO v. Dizol*, 133 F.3d 1220, 1223 (9th Cir. 1998) (en banc)). Even so,
"there is no presumption in favor of abstention in declaratory actions," and a "court's decision
to abstain from entertaining such a suit must be based on more than 'whim or personal disinclina-
tion.'" *Id.* at 12:1-6 (citing *GEICO v. Dizol*, 133 F.3d at 1225).

1 KSBE has advanced several abstention-related arguments in Part III.C of its motion to dis-
2 miss. *See* KSBE Dismiss Mem. 22-24; KSBE Supplemental Memorandum in Support of Motion
3 to Dismiss 2-5 (doc. 80, filed Aug. 29, 2008). Grant will address those arguments in his opposition
4 to KSBE’s motion. In the present context, it is sufficient to observe that the Declaratory Judgment
5 Act “was designed to relieve” parties like Grant of precisely what he faces here: “the Damoclean
6 threat of impending litigation” brandished by “a harassing adversary” like KSBE. *SCAL*, 655 F.2d
7 at 942. For this reason, the Court ought to exercise its discretion to hear and resolve the merits—
8 especially when, as demonstrated below, they are so simple.

9 **B. Grant Is Not Liable to KSBE for Breach of Contract.**

10 Putting aside for a moment possible contract-*related* theories that actually sound in tort, we
11 consider first whether Grant is liable to KSBE for a breach of contract. For two reasons, he most
12 assuredly is not: (1) Grant had no contractual relationship with KSBE; and (2) in the alternative,
13 Grant did not breach any contractual duty to KSBE.

14 **1. Grant Had No Contractual Relationship with KSBE.**

15 According to KSBE, the “principal issue” in this action is “whether any actionable breach
16 of contract has occurred.” KSBE Dismiss Mem. 9:25 n.48. That formulation masks the obvious
17 question: breach of *what* contract? Fortunately, KSBE has told us plainly: more specifically, the
18 “principal issue . . . is whether [KSBE] has a claim for breach of *the settlement agreement in the*
19 *underlying litigation* (the ‘Settlement Agreement’).” *Id.* at 1:5-6 (emphasis added); *accord, e.g.,*
20 *id.* at 6:9-10 (alleging a “flagrant breach of the confidentiality provisions of the Settlement Agree-
21 ment”); *id.* at 6:11-12 (recounting that KSBE’s counsel stated that KSBE “believed the Settlement
22 Agreement had been breached and that [KSBE] was entitled to damages”); *id.* at 8:28-9:1 (refer-
23 ring to KSBE’s putative “claim for breach of the Settlement Agreement based upon Goemans’ dis-
24 closures”); *id.* at 23:6-7 (referring also to KSBE’s alleged “damages caused by the past breach of
25 the Settlement Agreement”).

26 It is undisputed that Grant was *not* a party to the Doe-KSBE Settlement Agreement. Here
27 is what KSBE itself says on this point: “By its express terms, the Settlement Agreement was ‘by
28 and between’ [1] the Does and [2] the then-current and former trustees of [KSBE].” *Id.* at 3:16-17.

1 Moreover, KSBE concedes that as a mere negotiator on behalf of the Does, Grant himself “had no
2 authority to reach a binding agreement” with KSBE; “[o]nly the clients . . . had that power.” *Id.* at
3 3:11-12. As a non-party to the Settlement Agreement, Grant cannot possibly be liable for breaching
4 that agreement. *See, e.g., Filippo Industries, Inc. v. Sun Insurance Co.*, 74 Cal. App. 4th 1429,
5 1443 (1999) (“It is clear . . . that an agent cannot be held liable for breach of a duty which flows
6 from a contract to which he is not party.”); *Mission Insurance Co. v. Hartford Insurance Co.*, 155
7 Cal. App. 3d 1199, 1215 (1984) (“[W]e fail to see how the contract could be enforced as to Hart-
8 ford, a ‘non-party’ to the agreement.”).

9 **2. Grant Did Not Breach Any Contractual Duty to KSBE.**

10 If, contrary to the foregoing, Grant did assume a contractual duty directly to KSBE, he in
11 fact did not breach that duty.

12 *First*, what was the relevant duty? As specified by the confidentiality provision of the Set-
13 tlement Agreement, it was (with certain important exceptions) the duty not to

14 disclose, provide, furnish or deliver, or permit to be disclosed, provided, furnished
15 or delivered, . . . all or any part of this Settlement Agreement and General Release
16 or any copy hereof or any information relating to the amount or any term or provi-
sion hereof, or any communication, negotiation or document relating to any of the
foregoing.

17 SUF ¶ 1, at 1.

18 *Second*, did Grant breach that duty? Certainly not. Undoubtedly, there was a disclosure of
19 the putative amount and other terms of the Doe-KSBE settlement. As KSBE concedes, however,
20 it was *Goemans*—not Grant—who made this disclosure: “[O]n February 7, 2008, Goemans spoke
21 by telephone with representatives of newspapers and television stations in Hawaii. In those inter-
22 views, Goemans disclosed what he claimed to be the amount of the settlement between the Does
23 and [KSBE].” SUF ¶ 11, at 4 (quoting KSBE Dismiss Mem. 6:3-6); *accord* SUF ¶ 13, at 4 (dec-
24 laration by Grant that he “never disclosed provided or furnished or delivered to the Honolulu me-
25 dia any information relating to the Doe-KSBE settlement that had not already been disclosed to the
26 public by KSBE”).

27 If Grant himself did not make any prohibited disclosures, did Grant nevertheless “permit”
28 Goemans to make such disclosures within the meaning of the foregoing confidentiality provision?

1 Again, certainly not. This is apparent if we consider the three ways in which Grant might conceiv-
2 ably be said to have “permit[ted]” Goemans’ disclosures.

3 • *Grant told Goemans the amount of the (proposed) settlement payment.* This is both true
4 and irrelevant. It is undisputed that Grant provided this information to Goemans well *before* the
5 Does executed any settlement document—and thus well before any contractual duty of confiden-
6 tiality could have arisen. *See* SUF ¶ 3, at 2. Moreover, Grant reasonably believed at the time that
7 Goemans was then acting as the Does’ counsel. *See* SUF ¶ 4, at 2. Accordingly, even if (contrary
8 to fact) the contractual duty of confidentiality had already arisen, Grant’s disclosure to Goemans
9 would have fallen within the confidentiality provision’s express exception for disclosures “to ob-
10 tain . . . legal . . . advice.” SUF ¶ 1, at 1.

11 • “[A]n attorney representing Grant breached the confidentiality clause by mailing a copy
12 of the agreement to Goemans last year.” So Goemans is reported to have stated. *See* Declaration
13 of Jane Doe, Exh. 3, at 3 (doc. 9-4, filed Apr. 3, 2008). But in fact, Grant’s counsel did *not* mail a
14 copy of the Settlement Agreement to Goemans. *See* SUF ¶ 6, at 3. What really occurred was that
15 in June of 2007, the Does’ then-counsel wrote to Grant’s counsel, complained that Jane Doe “has
16 made multiple requests for this Settlement Agreement to date,” and demanded that Grant’s counsel
17 “provide [him] a copy of the Settlement Agreement executed by [Jane Doe].” SUF ¶ 5, at 2. As
18 the Doe’s former lawyer, Grant obviously had no choice but to heed this demand.⁵ Accordingly,
19 Grant’s counsel did indeed send a copy of the Agreement to Jane Doe through her then-counsel. If
20 Jane Doe subsequently provided a copy to Goemans—either directly or through counsel—Grant
21 cannot fairly be charged with that action.

22 • *Although Grant did ask the Sacramento Superior Court to issue a protective order bar-*
23 *ring Goemans from disclosing any of the confidential terms of the Settlement Agreement, he only*
24 *did so “belatedly.”* So KSBE charges. *See* KSBE Dismiss Mem. 5:22-24. In the first place, the

25 _____
26 ⁵ *See, e.g.,* Cal. R. Prof. Conduct 3-700(D)(1) (“A member whose employment has terminated shall
27 . . . [s]ubject to any protective order or non-disclosure agreement, promptly release to the client, at
28 the request of the client, all the client papers and property.”). This duty is, of course, “[s]ubject to
29 . . . any non-disclosure agreement.” There can be no reasonable argument, however, that the Set-
tlement Agreement’s non-disclosure provision precluded Jane Doe from obtaining a copy of that
Agreement, which she herself had executed and to which she herself was a party.

1 notion that Grant somehow “permit[ted]” Goemans to make his disclosures because Grant did not
2 affirmatively seek a protective order on what KSBE now deems a “timely” basis is ridiculous. In
3 any event, Grant’s efforts in this regard were timely, not to mention extraordinary. Goemans made
4 his disclosures on February 7, 2008. That was nearly three weeks after Grant had filed a noticed
5 motion in the Sacramento Superior Court for a protective order against Goemans, seeking to com-
6 pel him to abide by the confidentiality provisions of the Settlement Agreement. *See* SUF ¶ 9, at 3.
7 When Goemans in the interim made additional threats to disclose confidential information, Grant
8 did not wait for his motion to be heard as noticed. Rather, Grant sought—and on February 5, 2008
9 obtained—a temporary protective order on an ex parte basis; that order expressly prohibited Goe-
10 mans from “[d]isclosing, except as set forth in the written Settlement Agreement, any of the terms
11 of the settlement reached in the [Doe-KSBE] Litigation.” SUF ¶ 10, at 3. As Goemans has admitted
12 both in and out of court, he received actual personal notice of the order that very afternoon, or two
13 days before he made his disclosures to the Honolulu media. *See* SUF ¶ 12, at 4. Indeed, as KSBE
14 acknowledges, Goemans spoke to the media “[d]espite the newly issued protective order issued by
15 the Superior Court” as a result of Grant’s efforts. KSBE Dismiss Mem. 6:3 (emphasis added).

16 In light of the foregoing, Grant cannot be said to have “permit[ted]” Goemans to make his
17 disclosures within the meaning of the confidentiality provision of the Settlement Agreement. To
18 the contrary, Grant did everything reasonably possible to *prevent* Goemans from making his dis-
19 closures. For that reason, and because Grant himself did not make any prohibited disclosure, Grant
20 did not breach any contractual duty to KSBE. Accordingly, and because Grant had no contractual
21 relationship with KSBE in the first place, Grant is not liable to KSBE for beach of contract.

22 **C. Grant Is Not Liable to KSBE in Tort.**

23 Just as Grant is not liable to KSBE for a breach of contract, he is not liable to KSBE in tort
24 either, for he committed no act or omission that could give rise to tort liability under any conceiv-
25 able theory. We consider in turn intentional torts, negligence, and vicarious tort liability.

26 **1. Intentional Torts.**

27 In general, assuming for the sake of argument that disclosure of the putative amount and
28 other terms of the Doe-KSBE settlement was an intentional tort against KSBE, Grant obviously is

1 not chargeable with that tort because he did not commit it. Nor, in particular, is Grant chargeable
2 with civil conspiracy or intentional interference with contractual relations.

3 As for civil conspiracy, the California Supreme Court has explained that “[c]onspiracy is
4 not a cause of action, but a legal doctrine that imposes liability on persons who, although not actu-
5 ally committing a tort themselves, share with the immediate tortfeasors a common plan or design
6 in its perpetration.” *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 510-11
7 (1994). As a matter of undisputed fact, Grant did not “share with [Goemans] a common plan or de-
8 sign” to disclose the amount and other terms of the Doe-KSBE settlement. Instead, Grant’s plan or
9 design—which he implemented by obtaining a court order—was to *prevent* such disclosure.

10 As for intentional interference with contractual relations, “California recognizes a cause of
11 action against noncontracting parties who interfere with the performance of a contract.” *Id.* at 513.
12 To prevail on this cause of action, a plaintiff must prove, among other things, the “defendant’s in-
13 tentional acts designed to induce a breach or disruption of the contractual relationship.” *Id.* at 514
14 n.5 (quoting *Pacific Gas & Electric Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1126 (1990)). To
15 repeat, however, Grant’s intentional acts—most prominently his obtaining a court order prohibit-
16 ing Goemans from disclosing the terms of the Doe-KSBE settlement—were designed to *prevent* a
17 breach of the Doe-KSBE Settlement Agreement.

18 **2. Negligence.**

19 Under general negligence principles, “a person ordinarily is obligated to exercise due care
20 in his or her own actions so as not to create an unreasonable risk of injury to others.” *Lugtu v. Cal-*
21 *ifornia Highway Patrol*, 26 Cal. 4th 703, 716 (2001). But this is not a case where any possible in-
22 juries to KSBE arose from carelessness. That is, the disclosure of the putative amount and other
23 terms of the Doe-KSBE settlement (which disclosure allegedly injured KSBE) did not result from,
24 say, carelessly discussing the terms of the settlement where they might be overheard by a stranger,
25 or by carelessly leaving a copy of the Settlement Agreement where it might be found by a stranger.
26 Instead, the disclosure resulted from Goemans’ deliberate decision to speak to the media “[d]espite
27 the newly issued protective order issued by the Superior Court.” KSBE Dismiss Mem. 6:3.

28 ///

1 What was Grant’s duty vis-à-vis Goemans’ intentional act? The courts sometimes say that
2 a “general duty to exercise due care includes the duty not to place another person in a situation in
3 which the other person is exposed to an unreasonable risk of harm through the reasonably foresee-
4 able conduct . . . of a third person.” *Lugtu*, 26 Cal. 4th at 716. It is highly questionable, however,
5 whether such duty extends so far as to impose on a person the duty to prevent another person (not
6 the first person’s agent or employee) from disclosing information that the second person rightfully
7 learned and now possesses. But that question may be left for another day, for whatever the scope
8 of Grant’s duty, “the applicable standard of care by which the [Grant’s] conduct must be measured
9 in this context is simply that ‘of a reasonably prudent person under like circumstances,’” *id.* at 721
10 (quoting *Ramirez v. Plough, Inc.*, 6 Cal. 4th 539, 546 (1993)), or more specifically, whether Grant
11 “took reasonable precautions in light of the observable danger presented,” *Nicole M. v. Sears, Roe-*
12 *buck & Co.*, 76 Cal. App. 4th 1238, 1249 (1999) (quoting *Robison v. Six Flags Theme Parks Inc.*,
13 64 Cal. App. 4th 1294, 1301 (1998)).

14 Grant satisfied this standard of care as a matter of law, because on the undisputed facts, it
15 is readily apparent that Grant did *all he reasonably could do* to prevent Goemans from making his
16 disclosures. As described above, Grant at his own expense sought and obtained from the Sacra-
17 mento Superior Court a protective order expressly enjoining Goemans from “[d]isclosing, except
18 as set forth in the written Settlement Agreement, any of the terms of the settlement reached in the
19 [Doe-KSBE] Litigation.” SUF ¶ 10, at 3. Even if Grant had a duty to “stop” Goemans, what else
20 (short of physical violence) could Grant have done?

21 **3. Vicarious Liability.**

22 Because Grant is not directly liable to KSBE in tort, we are left with possible theories under
23 which Grant might be vicariously liable for the conduct of Goemans. Witkin summarizes the law
24 in this regard: “Tort liability of a person for the acts of others does not exist unless there is some
25 relationship or other circumstance justifying the imposition of this liability.” 6 B.E. Witkin, *Sum-*
26 *mary of California Law: Torts* § 1220, at 597 (10th ed. 2005). The qualifying relationships and
27 circumstances may be grouped into four categories:

- 28 (a) special relationship between defendant and wrongdoer;

1 (b) special relationship between defendant and plaintiff;

2 (c) statutory liability; and

3 (d) dangerous instrumentality.

4 *See id.* at 597-98. We consider these four categories in turn.

5 As for a special relationship between defendant and wrongdoer, Witkin cites as examples
6 principals and agents, employers and employees (and even independent contractors), joint ventur-
7 ers, charges of persons having dangerous propensities, physicians and patients, and family mem-
8 bers. *See id.* It is apparent that Grant and Goemans had no relationship even remotely similar to
9 those examples at the time of the latter's disclosures. Although at one time they were co-counsel,
10 neither Grant nor Goemans on February 7, 2008 was representing the Does. In addition, the two
11 lawyers were adversaries actively litigating a fee dispute in Sacramento Superior Court. In partic-
12 ular, Grant had only just obtained a temporary protective order against Goemans and was seeking
13 a permanent protective order against him as well.

14 As for a special relationship between defendant and plaintiff, Witkin cites the example of a
15 landowner and a person coming on the land. *See id.* at 598; *cf., e.g., Sharon P. v. Arman, Ltd.*, 21
16 Cal. 4th 1181, 1185 (1999) (affirming that "in the case of a landlord, the general duty of mainten-
17 ance includes the duty to take reasonable steps to secure common areas against foreseeable crim-
18 inal acts of third parties that are likely to occur in the absence of such precautionary measures"),
19 *cert. denied*, 530 U.S. 1243 (2000). Obviously, Grant and KSBE did not have any special relation-
20 ship of this kind. Moreover, there is nothing inherent in the relationship between a lawyer and the
21 *adversary* of that lawyer's client that should impel the courts to impose an "an affirmative duty of
22 care" by the former toward the latter. 6 Witkin, *supra*, at 598.

23 As for statutory liability, the examples cited by Witkin are highly specific: the liability of
24 a parent for torts of a child, *see* Cal. Civil Code § 1714.1(a); the liability of an motor vehicle owner
25 for the negligence of one who drives the vehicle with the owner's permission, *see* Cal. Veh. Code
26 § 17150; and the liability of an insurance carrier for negligence of an insured driver, *see* Cal. Ins.
27 Code § 11580(b)(2). We are confident that no statute likewise imposes vicarious liability on Grant
28 in the present circumstances.

1 Finally, the law imposes vicarious liability “[w]here the defendant entrusts a dangerous in-
2 strumentality to an improper person.” 6 Witkin, *supra*, at 598. That principle is not relevant here.

3 For these reasons, Grant committed no intentional tort against KSBE, he did not act negli-
4 gently toward KSBE, and he is not vicariously liable to KSBE for Goemans’ conduct. Therefore,
5 Grant is not liable to KSBE in tort.⁶

6 Because Grant also is not liable to KSBE for a breach of contract, and because declaratory
7 relief is appropriate here, Grant is entitled to the requested declaratory judgment against KSBE.

8 **II. Grant Is Entitled to a Declaratory Judgment Against the Does.**

9 In contrast to KSBE, the Does have filed compulsory counter-claims against Grant; these
10 seek to hold Grant legally responsible for Goemans’ conduct and to require Grant to defend them
11 against KSBE’s claims. Because the undisputed facts demonstrate that Grant is faultless vis-à-vis
12 the Does and because Grant’s limited contractual duty to defend is obviously inapplicable, Grant
13 is entitled as a matter of law to a judgment so declaring.

14 **A. Declaratory Relief Is Appropriate.**

15 There is doubtless an actual controversy between Grant and the Does: the Does have filed
16 counter-claims against Grant in which they seek a declaratory judgment regarding the very same
17 subjects as Grant seeks such judgment. *See* John and Jane Doe’s Cross-Claim, Etc.; and Counter-
18 claim for Indemnity (“Doe Counter-Claim”) ¶¶ 21-28, at 6-7 (doc. 13, filed Apr. 3, 2008) (assert-
19 ing three claims against Grant); *id.* at 8:18-9:1 (praying for relief against Grant). Moreover, there
20 is no other action pending between Grant and the Does, and the Does (in contrast to KSBE) have
21 not asked this Court to abstain.

22 **B. Grant Is Not Liable to the Does on Any Ground Alleged by Them.**

23 As considered in detail below, the Does have asserted essentially two types of indemnity
24 claims against Grant, implied and express. Neither has merit.

25 _____
26 ⁶ In its action pending in Hawaii Circuit Court, KSBE asserts a claim against the Does sounding in
27 tort, namely, “intentional/negligent misrepresentation.” *See* Declaration of Paul Alston, Exh. 25,
28 ¶¶ 23-28, at 6-7 (doc. 80-3, filed Aug. 29, 2008). Although “the acts and omissions of Defendants
and their lawyers” (including Grant) are elsewhere alleged in the complaint to have constituted a
breach of contract, *id.* ¶ 16, at 4 (emphasis added), KSBE’s single *tort* claim does not refer to any
acts or omissions by Grant.

1 **1. Equitable or Implied Indemnity.**

2 The Does purport to assert distinct claims against Grant for both “equitable indemnity” and
3 “implied [contractual] indemnity.” See Doe Counter-Claim ¶¶ 21-28, at 6-7. In *Bay Development,*
4 *Ltd. v. Superior Court*, 50 Cal. 3d 1012, 1029 n.10 (1990), the California Supreme Court observed
5 that “the implied contractual indemnity doctrine and the implied noncontractual equitable indem-
6 nity doctrine arose separately and were sometimes characterized as distinct categories.” The court
7 went on to recognize, however, that “the advent of the comparative indemnity doctrine” in *Amer-*
8 *ican Motorcycle Association v. Superior Court*, 20 Cal. 3d 578 (1978), had abolished any practical
9 distinction between the two doctrines. See *Bay Development*, 50 Cal. 3d at 1029 n.10. As the two
10 doctrines are now understood, “implied contractual indemnity [is] a form of equitable indemnity,”
11 such that the principle established in *American Motorcycle*—i.e., “equitable apportionment of loss
12 based on the relative responsibility of the parties”—is “as applicable to a claim for implied con-
13 tractual indemnity as it is to a claim for noncontractual equitable indemnity.” *Id.* Thus, whenever
14 “parties have not entered into an express indemnification agreement specifying that one party will
15 bear all of the liability for a loss for which both parties may be partially responsible, the principles
16 of *American Motorcycle* support an apportionment of the loss under comparative indemnity prin-
17 ciples.” *Id.* Accordingly, we will consider together the Does’ claims for equitable indemnity and
18 implied indemnity and apply the principles of *American Motorcycle* to resolve them.⁷

19 The California Supreme Court explicated those principles in *Far West Financial Corp. v.*
20 *D&S Co., Inc.*, 46 Cal. 3d 796 (1988), which explained that “after *American Motorcycle*, there are
21 not two separate equitable indemnity doctrines in California, but a single ‘comparative indemnity’
22 doctrine which permits partial indemnification on a comparative fault basis in appropriate cases.”
23 *Id.* at 808 (citation omitted). This “comparative equitable indemnity,” as it is called, “includes the

24 _____
25 ⁷ The Does’ pleading bears out the understanding that implied indemnity is a form of equitable in-
26 demnity, not a distinct category. Thus, in their claim for equitable indemnity, the Does allege that
27 KSBE’s alleged injuries were “the direct and proximate result of and/or attributable to the acts or
28 omissions of Grant” generally. Doe Counter-Claim ¶ 22, at 7:2-3. In their claim for equitable in-
demnity, the Does allege very similarly, if somewhat more narrowly, that KSBE’s alleged injuries
were “the direct and proximate result of, and/or attributable to Grants’ acts or omissions in his per-
formance and/or breach of [his] contractual duties under his contracts with the Does.” *Id.* ¶ 27, at
7:20-21.

1 entire range of possible apportionments, from no right to any indemnity to a right of complete in-
2 demnity.” *Id.* (quoting *Standard Pacific v. A.A. Baxter Corp.*, 176 Cal. App. 3d 577, 587 (1986)).

3 One of the circumstances in which there is “no right to any indemnity” is where there is no
4 fault on the part of the alleged indemnitor. As the California Court of Appeal has repeatedly em-
5 phasized: ““At the heart of the doctrine [of equitable indemnity] is apportionment based on fault.
6 At a minimum equitable indemnity “requires a determination of *fault* on the part of the alleged in-
7 demnitor”” *Heritage Oaks Partners v. First American Title Ins. Co.*, 155 Cal. App. 4th 339,
8 348 (2007) (quoting *City of Huntington Beach v. City of Westminster*, 57 Cal. App. 4th 220, 225-26
9 (1997), in turn quoting *Coca-Cola Bottling Co. v. Lucky Stores, Inc.*, 11 Cal. App. 4th 1372, 1378
10 (1992)). In other words, “there can be no indemnity without liability,” which is to say that “unless
11 the prospective indemnitor and indemnitee are jointly and severally liable to the plaintiff there is
12 no basis for indemnity.” *Id.* (quoting *Munoz v. Davis*, 141 Cal. App. 3d 420, 425 (1983)). Cruci-
13 ally, this “no indemnity without fault” rule applies even where the prospective indemnitor and in-
14 demnitee are equally innocent: “There is no equitable basis for a total shifting of a loss from one
15 fault-free party to another.” *City of Huntington Beach*, 57 Cal. App. 4th at 222.

16 Applying these precepts to the present case is straightforward. There can be no indemnity
17 in favor of the Does without liability to KSBE on Grant’s part. But as demonstrated above, Grant
18 is simply not liable to KSBE on any ground. To say the same thing, indemnity requires a determi-
19 nation of *fault* on Grant’s part. But as demonstrated above, Grant is without fault. Thus, even if
20 we assume that Does are fault-free parties as well, there is no equitable basis for shifting any loss
21 from the Does to Grant. In short, this is one of those circumstances where, as a matter of law, the
22 correct apportionment between the Does and Grant is “no right to any indemnity.”⁸

23 _____
24 ⁸ It is not logically impossible for both Grant and the Does to be fault-free with respect to the dis-
25 closures of confidential information. Under the regime of comparative equitable indemnity formu-
26 lated in *American Motorcycle*, 20 Cal. 3d at 589 n.2, it “is not necessary [for] a person be a party
27 to the action in order for the court to assess that person’s proportion of fault.” *Seamen’s Bank v.*
28 *Superior Court*, 190 Cal. App. 3d 1485, 1492-93 (1987). Rather, “the totality of 100 percent fault
is to be apportioned among the plaintiff, defendant, and *nonparty tortfeasors.*” *Platt v. Coldwell*
Banker Residential Real Estate Services, 217 Cal. App. 3d 1439, 1446 (1990) (emphasis added).
Therefore, the (obvious) fault of Goemans could be found to account for “the totality of 100 per-
cent fault.” The important point for present purposes is that exonerating Grant from liability for

(continued...)

1 ment Agreement. *See* Declaration of Paul Alston, Exh. 25 (doc. 80-3, filed Aug. 29, 2008) (com-
2 plaint in Hawaii Circuit Court). But those claims are assuredly not based upon an alleged breach
3 by *Grant*. Rather, consistent with the undisputed facts, KSBE alleges in that suit: “On or about
4 February 7, 2008, *Goemans* spoke by telephone with representatives of newspapers and television
5 stations in Hawaii. In those interviews, *Goemans* disclosed details of the Settlement Agreement,
6 including what he claimed to be the amount of the settlement between the Does and [KSBE].” *Id.*
7 ¶ 10, at 3 (emphasis added).

8 The relevant contractual language is unambiguous: Grant undertook a duty to defend the
9 Does only against claims by KSBE based on *Grant*’s alleged breach of the confidentiality clause.
10 KSBE categorically has not asserted such a claim against the Does, either in the present action or
11 in KSBE’s action in Hawaii Circuit Court. Therefore, the Does’ claim for express indemnity fails
12 as a matter of law. *See, e.g., Dore v. Arnold Worldwide, Inc.*, 39 Cal. 4th 384, 393 (2006) (holding
13 that if the relevant language of a contract is not “reasonably susceptible” to a competing interpre-
14 tation, “the case is over”); *id.* (holding that when the contract “contain[s] no ambiguity,” there are
15 “no triable issues of fact” precluding summary judgment).

16 For these reasons, Grant is not liable to the Does for indemnity, either express or implied.
17 Consequently, because both parties have appropriately sought declaratory relief, Grant is entitled
18 to the requested declaratory judgment against the Does.

19 CONCLUSION

20 For all of the foregoing reasons, there is no genuine issue as to any material fact and Grant
21 is entitled to judgment as a matter of law, specifically a declaration that Grant is not liable in any
22 manner whatsoever to any Defendant in connection with an alleged breach of the Doe-KSBE Set-
23 tlement Agreement or related matters.

24 Dated: October 3, 2008.

25 Respectfully submitted,

26 /s/ Eric Grant
ERIC GRANT

27 Counsel for Plaintiff and
28 Counter-Defendant ERIC GRANT