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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

HUDSON MARTIN FERRANTE STREET
WITTEN & DEMARIA, PC,

Plaintiff,

v.

DAVID ALAN FORSYTHE,

Defendant.

Case No. 16-cv-06551-BLF

**ORDER DENYING DEFENDANT’S
SPECIAL MOTION TO STRIKE
COMPLAINT; AND DENYING
PLAINTIFF’S REQUEST FOR
ATTORNEYS’ FEES**

[Re: ECF 8]

Plaintiff Hudson Martin Ferrante Street Witten & Demaria, PC (“Hudson Martin” or “the firm”) claims that Defendant David Alan Forsythe (“Forsythe”) unlawfully accessed and used information stored on the firm’s computers in order to gain an advantage in his divorce from the firm’s managing partner, non-party Jeannette Witten (“Witten”). Forsythe has filed a special motion to strike the complaint under California Code of Civil Procedure § 425.16. Hudson Martin opposes the motion and requests that the Court award it statutory attorneys’ fees on the basis that the motion is frivolous. Both the motion and the request for attorneys’ fees are DENIED for the reasons discussed below.

I. BACKGROUND

Hudson Martin filed the complaint in this action on November 10, 2016, alleging the following facts. The firm is one of the oldest and most prestigious law firms in Monterey, California. Compl. ¶ 7, ECF 1. The firm’s managing partner, Witten, married Defendant Forsythe in 2006. *Id.* ¶ 8. Forsythe is a computer programmer and network integration specialist who works from home as an outside contractor for pharmaceutical companies. *Id.* ¶ 9. Beginning in 2014, Forsythe began performing occasional IT services for Hudson Martin in exchange for use of office space at the firm. *Id.* ¶ 10.

1 On March 16, 2015, Witten filed a divorce petition to commence what have become
2 “[b]itter divorce proceedings.” Compl. ¶ 11. In June 2015, Hudson Martin revoked Forsythe’s
3 office privileges and changed the firm’s locks to ensure that Forsythe would not have access. *Id.* ¶
4 12. Shortly thereafter, on June 27, 2015, an unknown individual accessed the firm’s account at
5 Wells Fargo Bank from a location outside of the firm. *Id.* ¶ 13. Hudson Martin immediately
6 changed all of its financial passwords and user names, but an unknown user continued to access
7 the Wells Fargo account. *Id.* ¶ 15. On July 24, 2015, Wells Fargo prohibited the firm from
8 accessing its accounts online and suggested that the firm might be a victim of spyware. *Id.*

9 In August 2015, Hudson Martin discovered that an unknown individual had accessed the
10 firm’s servers remotely and, in particular, had accessed Witten’s personal email correspondence
11 regarding her divorce proceedings. Compl. ¶ 16. Hudson Martin immediately changed all of its
12 firm passwords, after which there were dozens of failed login attempts. *Id.* ¶ 17. Hudson Martin
13 had IT professionals search all its computers, which resulted in discovery of spyware on computer
14 workstations at the firm and on Witten’s laptop computer which she used both at the firm and at
15 home. *Id.* ¶ 18. The search also revealed that a remote login program had been installed on
16 Witten’s laptop without her permission or knowledge. *Id.* ¶ 19. After the remote login program
17 was removed from the laptop, the unauthorized login attempts to the firm’s Wells Fargo account
18 stopped. *Id.* ¶ 20.

19 In October 2016, Forsythe produced documents to Witten in the divorce proceedings
20 which included images of Hudson Martin checks. Compl. ¶ 24. Hudson Martin determined that
21 the images were cropped screenshots taken from the firm’s QuickBooks files. *Id.* The firm uses
22 its QuickBook files as a client management system, and the files contain attorney-client protected
23 material, including client lists; clients’ contact information and financial information; and
24 employees’ contact information, social security numbers, paycheck information, and medical
25 insurance information. *Id.* ¶ 22. Forsythe had attempted to obtain Hudson Martin’s QuickBook
26 files for use in the divorce proceedings by means of subpoena, but after Hudson Martin objected to
27 production, Forsythe dropped the issue and did not move to compel production. *Id.* ¶¶ 21-23. At
28 no time was any Hudson Martin employee, or non-employee such as Forsythe, authorized to copy

1 or remove the firm’s QuickBook files from the firm’s secure, firewalled server. *Id.* ¶ 25.
2 Forsythe’s divorce attorney thereafter stated that Forsythe had copied Hudson Martin’s
3 QuickBook files to his personal computer and that both Forsythe and his counsel were in
4 possession of the QuickBook files. *Id.* ¶ 26.

5 Hudson Martin believes that Forsythe was the individual who remotely accessed the firm’s
6 servers and the firm’s Wells Fargo account. Compl. ¶¶ 29-13. The firm also believes that
7 Forsythe used that access to view Witten’s email correspondence with her divorce attorney. *Id.*
8 Hudson Martin sues Forsythe for: (1) violation of the federal Computer Fraud and Abuse Act, 18
9 U.S.C. § 1030 et seq.; (2) violation of California’s Comprehensive Computer Data Access and
10 Fraud Act, California Penal Code § 502; and (3) conversion.

11 Forsythe asserts that Hudson Martin’s suit is a strategic lawsuit against public participation
12 (“SLAPP”), and he brings a special motion to strike the complaint under California’s anti-SLAPP
13 statute, California Code of Civil Procedure § 425.16. Hudson Martin opposes the motion and
14 seeks attorneys’ fees under a subsection of § 425.16 which provides for an award of fees where the
15 special motion to strike is frivolous.

16 **II. LEGAL STANDARD**

17 “Under California’s anti-SLAPP statute, a defendant may bring a special motion to strike a
18 cause of action arising from constitutionally protected speech or petitioning activity.” *Barry v.*
19 *State Bar of California*, 2 Cal. 5th 318, 320 (2017) (citing Cal. Civ. P. Code § 425.16(b)(1)). A
20 defendant in federal court may bring an anti-SLAPP motion with respect to California state law
21 claims asserted under either diversity jurisdiction or supplemental jurisdiction. *Jen v. City & Cty.*
22 *of San Francisco*, No. 15-CV-03834-HSG, 2016 WL 3669985, at *11 (N.D. Cal. July 11, 2016).
23 The anti-SLAPP statute does not apply to claims asserted under federal law. *Hilton v. Hallmark*
24 *Cards*, 599 F.3d 894, 901 (9th Cir. 2010).

25 “The analysis of an anti-SLAPP motion proceeds in two steps: First, the court decides
26 whether the defendant has made a threshold showing that the challenged cause of action is one
27 arising from protected activity.” *Barry*, 2 Cal. 5th at 321 (internal quotation marks and citations
28 omitted). When a claim is mixed, meaning that it is based on allegations of both protected and

1 unprotected activity, the unprotected activity is disregarded at the first step. *Baral v. Schnitt*, 1
2 Cal. 5th 376, 396 (2016).

3 “If the court determines that relief is sought based on allegations arising from activity
4 protected by the statute, the second step is reached.” *Baral*, 1 Cal. 5th at 396. “There, the burden
5 shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is
6 legally sufficient and factually substantiated.” *Id.* “The court, without resolving evidentiary
7 conflicts, must determine whether the plaintiff’s showing, if accepted by the trier of fact, would be
8 sufficient to sustain a favorable judgment.” *Id.* “[T]hough the court does not weigh the credibility
9 or comparative probative strength of competing evidence, it should grant the motion if, as a matter
10 of law, the defendant’s evidence supporting the motion defeats the plaintiff’s attempt to establish
11 evidentiary support for the claim.” *Hilton*, 599 F.3d at 903 (internal quotation marks and citations
12 omitted) (brackets in original). If the plaintiff fails to meet its burden at the second step, the claim
13 based on protected activity is stricken and “[a]llegations of protected activity supporting the
14 stricken claim are eliminated from the complaint, unless they also support a distinct claim on
15 which the plaintiff has shown a probability of prevailing.” *Baral*, 1 Cal. 5th at 396.

16 **III. DISCUSSION**

17 Forsythe moves to strike the “entire Complaint.” Amended Notice of Motion at 1, ECF
18 16. As noted above, the anti-SLAPP statute does not apply to federal claims, and therefore does
19 not apply to Claim 1 for violation of the federal Computer Fraud and Abuse Act, 18 U.S.C. § 1030
20 et seq. *See Hilton*, 599 F.3d at 901. The Court’s analysis thus is limited to Claims 2 and 3, which
21 are asserted under state law.

22 At the first step of the analytical framework set forth above, the Court finds that Forsythe
23 has made a threshold showing that Hudson Martin’s state law claims are based at least in part on
24 allegations of protected activity. Claim 2 asserts violations of California Penal Code § 502, which
25 enumerates multiple criminal offenses relating to unauthorized access, taking, and/or use of data
26 stored on a computer, computer system, or computer network, and creates a private right of action
27 for individuals who suffer injury as a result of conduct falling within the statute. Cal. Penal Code
28 § 502(c), (e). Hudson Martin alleges that Forsythe knowingly accessed and without permission

1 took, copied, and/or used data from Hudson Martin’s computers, computer systems and/or
2 computer network. Compl. ¶¶ 42-46. With respect to “use” of the data, Hudson Martin alleges
3 that Forsythe “has used and seeks to use the information obtained to gain advantage, financial and
4 otherwise, in his divorce proceedings.” *Id.* ¶¶ 36, 41.¹ While Forsythe’s alleged conduct in
5 *accessing* the firm’s computers and *taking* data may not constitute protected activity, his alleged
6 conduct in *using* the data in his divorce proceedings certainly does. *See Kolar v. Donahue,*
7 *McIntosh & Hammerton*, 145 Cal. App. 4th 1532, 1537 (2006) (“The anti-SLAPP protection for
8 petitioning activities applies not only to the filing of lawsuits, but extends to conduct that relates to
9 such litigation, including statements made in connection with or in preparation of litigation.”).

10 Claim 3 is for conversion under California common law. “The elements of a conversion
11 claim are (1) the plaintiff’s ownership or right to possession of the property at the time of the
12 conversion; (2) the defendant’s conversion by a wrongful act or disposition of property rights; and
13 (3) damages.” *Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 601 (9th Cir. 2010). “It is
14 necessary to show that the alleged converter has assumed control over the property *or* that the
15 alleged converter has applied the property to his own use.” *Id.* (internal quotation marks and
16 citation omitted) (emphasis added). Hudson Martin alleges specifically that Forsythe has applied
17 the property to his own use, as the firm alleges that Forsythe used and seeks to use the information
18 obtained from the firm’s computers in his divorce proceedings. Compl. ¶¶ 36, 51. As noted
19 above, petitioning activities protected by the anti-SLAPP statute include litigation and conduct
20 that relates to litigation. *See Kolar*, 145 Cal. App. 4th at 1537. Thus at least those the aspects of
21 Hudson Martin’s conversion claim based on Forsythe’s alleged *use* of the firm’s information in his
22 divorce proceedings are based upon protected activity.

23 Because Forsythe has made a threshold showing that Claims 2 and 3 arise at least in part
24 from protected activity, the Court must move on to the second step of the anti-SLAPP analysis,
25 which requires the Court to determine whether Hudson Martin has met its burden to show that

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27 ¹ The allegation regarding Forsythe’s use of the information in his divorce proceedings is set forth
28 in Claim 1 for violation of the federal Computer Fraud and Abuse Act, *see* Compl. ¶ 36, but it is
incorporated into the state law claims for violations of California Penal Code § 502 and for
conversion, *see* Compl. ¶¶ 41, 51.

1 those claims are legally sufficient and factually substantiated. The Court concludes that Hudson
2 Martin’s submission of Witten’s declaration is sufficient to meet its burden. Forsythe concedes in
3 his own declaration submitted with his motion that he possessed the firm’s QuickBooks file; he
4 states that he has turned over a thumb drive containing the file and has deleted the file from his
5 computer. Forsythe Decl. at 1, ECF 8-2. Witten states that nobody, including Forsythe, “has ever
6 been authorized to remove the QuickBooks file from the secure, firewalled server, particularly
7 because the file contains such privileged and sensitive information.” Witten Decl. ¶ 10. She
8 expands at length on that statement, stating specifically that Forsythe was never authorized to
9 download, transfer, or copy the QuickBooks file; was never authorized to copy and possess the
10 QuickBooks file; and was never authorized to download the QuickBooks file to his personal
11 computer. *Id.* ¶¶ 11-12, 27. Witten’s statements, if accepted by the trier of fact, would be
12 sufficient to sustain a favorable judgment for Hudson Martin on its state law claims. *See Baral*, 1
13 Cal. 5th at 396 (at the second step of anti-SLAPP analysis, court “must determine whether the
14 plaintiff’s showing, if accepted by the trier of fact, would be sufficient to sustain a favorable
15 judgment”).

16 In his reply brief, Forsythe argues that even if he took the firm’s data, his actions were
17 authorized. He argues that “Defendant, at the time he took actions related to the accounting
18 information had a community property interest in the bookkeeping information of the firm, and
19 had been given express authority to act in regard to those.” Reply at 11, ECF 19. Forsythe cites
20 no authority for the proposition that the law entitled him to protect his interests in his divorce
21 proceedings by means of self-help access to the confidential files of a third party, Hudson Martin.
22 To the extent that Forsythe relies on his own declaration statements that he was authorized to
23 access and download the firm’s QuickBooks file, *see* Forsythe Decl. at 2, those statements are
24 contradicted by Witten’s declaration, *see* Witten Decl. ¶¶ 11-12, 27. In evaluating Hudson
25 Martin’s showing at the second step of the anti-SLAPP analysis, the Court “does not weigh the
26 credibility or comparative probative strength of competing evidence.” *Hilton*, 599 F.3d at 903.
27 Where there is a conflict in the evidence, the Court may grant the anti-SLAPP motion only “if, as
28 a matter of law, the defendant’s evidence supporting the motion defeats the plaintiff’s attempt to

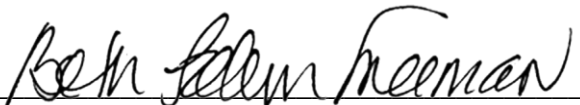
1 establish evidentiary support for the claim.” *Id.* That is not the case here. To the contrary,
2 Hudson Martin has demonstrated that its state law claims have “the requisite minimal merit” to
3 defeat Forsythe’s motion. *Navellier v. Sletten*, 29 Cal. 4th 82, 94 (2002).

4 Accordingly, Forsythe’s special motion to strike is DENIED.² Although Forsythe has not
5 prevailed on motion, the Court declines to find that the motion is frivolous, and therefore Hudson
6 Martin’s request for attorneys’ fees likewise is DENIED. The firm seeks fees under a provision of
7 § 425.16 stating that “[i]f the court finds that a special motion to strike is frivolous or is solely
8 intended to cause unnecessary delay, the court shall award costs and reasonable attorney’s fees to
9 a plaintiff prevailing on the motion.” Cal. Civ. P. Code § 425.16(c)(1). Forsythe made the
10 requisite threshold showing that Hudson Martin’s state law claims are based at least in part on
11 allegations of protected activity. The Court’s denial of his motion turns on the adequacy of
12 Hudson Martin’s evidence submitted in opposition to the motion. Under those circumstances, the
13 Court cannot say that the motion is frivolous.

14 **IV. ORDER**

- 15 (1) Defendant’s special motion to strike is DENIED; and
16 (2) Plaintiff’s request for attorneys’ fees is DENIED.

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18 Dated: April 7, 2017

19 
20 BETH LABSON FREEMAN
21 United States District Judge

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27 _____
28 ² In light of the Court’s disposition of Forsythe’s motion on the grounds discussed above, the
Court need not reach Hudson Martin’s additional argument that the motion is premature or
Forsythe’s arguments regarding evidence not considered by the Court.