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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
HONORABLE DANIEL NISHIGAYA, JUDGE
DEPARTMENT 13

BLACK SAILS TECHNOLOGY, INC.,)
a California corporation;)
ZHOU WANG, an individual,)
)
Plaintiffs,)
)
vs.)
)
RUOXI ZHAO, an individual;)
DOES 1-10,)
Defendants.)
)
_____)
and Related Cross-Action.)
)
_____)

CASE NO. 19-CV-348400

COPY

REPORTER'S TRANSCRIPT OF PROCEEDINGS
SEPTEMBER 25, 2024

APPEARANCES:

FOR THE PLAINTIFFS AND CROSS-DEFENDANTS: ANDREWS G. WATTERS
ATTORNEY AT LAW

FOR THE DEFENDANT AND CROSS-COMPLAINANT: MONICA L. HARTSOCK, ESQ.
and
SCOTT MAUCERE, ESQ.

REPORTER: THERESA A. NARDELLO
CSR No. 9966

1 SAN JOSE, CA

SEPTEMBER 25, 2024

2 ---oOo---

3 THE COURT: Thank you very much. Have a seat.
4 We're on the record, this is the time we have set aside to
5 address some of the pretrial motions and legal issues that
6 the parties have raised. Unless there's anything else the
7 parties would like to start with this morning, it was my
8 desire to start by discussing Cross-Defendant Black Sails
9 Technology's Motion for Judgment on the Pleadings.

10 MR. WATTERS: Yes, Your Honor. Andrew Watters for
11 Plaintiff, and Ms. Alexandresan will be here a little bit
12 later this morning. With me is Ms. Wang, corporate
13 representative.

14 THE COURT: Thank you.

15 MS. HARTSOCK: Monica Hartsock, and with me is
16 Scott Maucere.

17 THE COURT: All right, thank you.

18 Mr. Watters, I've had the opportunity to review the
19 written pleading that you filed with the attachment that is
20 the cross-complaint. Would you like to supplement your
21 written work with additional argument this morning?

22 MR. WATTERS: Yes, Your Honor, just some final
23 notes on the motion for judgment on the pleadings with two
24 remaining causes of action, malicious prosecution and
25 intentional infliction of emotional distress.

26 On the issue of malicious prosecution, I want to
27 make a note that on page 5, there's no allegation as to the
28 determination on the merits that was favorable to

1 cross-complainant. There's also no allegation from which
2 damages could be determined. There's no indication whether
3 the cross-complainant incurred attorney's fees, which are
4 the primary element of damages for malicious prosecution
5 under authority cited in the CACI instruction 1501.

6 I cite for the proposition Sagonowsky versus More,
7 1998 64 Cal.App 4th 122, in cite 132, that the remedies for
8 malicious prosecution are twofold; it's out-of-pocket loss
9 in the form of attorney fees, as well as emotional distress,
10 et cetera. However, there's no allegation in the
11 cross-complaint whether those damages occurred.

12 If you want to take the trial brief as an offer of
13 proof, then Defendant's 137, which is mentioned in the trial
14 brief, which you can take judicial notice of, is the denial
15 of the temporary restraining order. The denial of a
16 temporary restraining order is not a judicial finding on the
17 merits. And further, the case was voluntarily dismissed
18 without prejudice on May 13, 2019. That's Case No.
19 19CH0086666. So dismissal without prejudice is also not a
20 finding that the sole claim on a malicious prosecution cause
21 is the filing of the civil harassment, the restraining
22 order. Without the favorable determination element and
23 without damages, my client's entitled to judgment on that
24 issue.

25 As to intentional infliction of emotional distress,
26 as I mentioned, even if you take the trial brief as an offer
27 of proof, there's still insufficient facts as to
28 nonprivileged conduct, none of which is extreme or

1 outrageous as a matter of law. None of those bullet points
2 are extreme or outrageous.

3 There's no point in having the trial, and judicial
4 economy would be greatly served by eliminating the claims at
5 this stage.

6 Thank you.

7 THE COURT: Mr. Watters, thank you. And let me ask
8 you -- and if you'd like to remain seated for these
9 purposes, all counsel, I make that indication, I do not
10 require it. Whatever you are most comfortable doing when
11 you are arguing to the Court is fine with me this morning.

12 Mr. Watters, on the cause of action for malicious
13 prosecution that you've referenced on page 5 of the
14 cross-complaint, bullet point No. 23 does say in defendant's
15 cross-complaint and has been damaged by having to spend time
16 and incur expense in responding to the above actions. You
17 feel that is an insufficient pleading of facts?

18 MR. WATTERS: Correct, Your Honor. She's not
19 indicated whether attorney fees were incurred, and emotional
20 distress was not alleged in paragraph 23.

21 THE COURT: Mr. Watters, do you feel any of the
22 arguments regarding judgment on the pleadings are informed
23 by your arguments regarding litigation privilege?

24 MR. WATTERS: To the extent litigation privilege
25 applies -- the conduct claimed by the Cross-Complainant is
26 alleged extreme or outrageous behavior -- I'm just saying if
27 you were to take the trial brief as a pleading as part the
28 court file, to the extent that it may inform your decision,

1 it may be relevant. But I think you're limited to the four
2 corners of the pleading.

3 For example, in the trial brief, taking as an offer
4 of proof then, for example, the filing of a false police
5 report. While the statute, Civil Code 47 was amended in
6 2021, but this conduct relates to pre-2021 conduct. So at
7 that time, even a false police report was privileged.
8 However, if it was malicious and false, then there may be
9 case law on that issue. But the police report itself was
10 privileged at the time of the underlying conduct.

11 Further, the complaints to Homeland Security
12 regarding visa status would also be privileged as a report
13 to a government agency at the time of the underlying
14 conduct. And with no remaining non-privileged basis for the
15 causes, I think my client's entitled to judgment.

16 THE COURT: Thank you.

17 MS. HARTSOCK: Is there a particular order you'd
18 like to address anything?

19 THE COURT: Ms. Hartsock, you may address them in
20 any order you choose.

21 MS. HARTSOCK: Okay. First, let's start with the
22 fact that I did give Your Honor the 2021 version of Civil
23 Code 47, but -- and these actions did happen in 2019.
24 However, it was not established law in 2019 that false
25 police reports were absolutely privileged. The case on
26 point -- and I admit there's cases going both ways, but it
27 wasn't established. Fenelon versus Superior Court, 223
28 Cal.App 3(b) (1) 476, and it says knowingly false reports of

1 suspected criminal misconduct made to a police department,
2 as opposed to in a judicial context, is not absolutely
3 privileged, but is protected by qualified privilege, and
4 thus, to be privileged, statements must have been made
5 without malice.

6 Our position is that this was outrageous malicious
7 conduct. We asked for punitive damages. We think making
8 that false police report was malicious. We're in that area
9 of the litigation privilege.

10 THE COURT: I'm sorry, the case you just cited,
11 what year was that?

12 MS. HARTSOCK: 1990.

13 THE COURT: Thank you.

14 MS. HARTSOCK: And then further, we've pulled the
15 legislative history on what -- on the bill that amended
16 Civil Code 47 in 2021, and the bill states, Existing law on
17 false police reporting does not address the growing number
18 of cases in which peace officers are summoned to violate the
19 rights of individuals for engaging in everyday activities,
20 such as those individuals essentially living their lives.
21 So the legislature acknowledged that the law as it existed
22 pre-2021 did not set forth that this was a privileged
23 action.

24 So we have a case saying that it's not privileged;
25 we have the legislature saying that the law is not
26 establishing that it's privileged, and all of this is
27 relevant because this is the day we're supposed to start
28 trial. Maybe the day after we're supposed to start trial.

1 If this was brought up in this motion for summary judgment,
2 which they filed -- was it years ago -- May 27th, 2021, it
3 could have been briefed; it could have been fully brought to
4 the Court; the Court could have considered the conflicting
5 cases on the issue and the claim of malice.

6 As for the position the cross-complaint is not pled
7 correctly, we respectfully disagree. We agree with the
8 Court in citing to Section 23. We also draw attention to
9 the prayer for relief at the end that asks for compensatory
10 damages according to proof and punitive and exemplary
11 damages. And as we know, the U.S. Supreme Court has said
12 emotional distress damages are damage. So we are requesting
13 emotional distress damages for the claims as set forth in
14 the prayer of the cross-complaint.

15 The idea that the temporary restraining order -- so
16 switching gears to the malicious prosecution claim, the one
17 remaining issue is the denial of the temporary restraining
18 order. There's an order where the Court denied the
19 temporary restraining order. The Court then did set a
20 hearing later as to whether there would be a permanent
21 restraining order. Then the case was dismissed. But there
22 was judicial action on the merits favorable to our client
23 when the temporary restraining order was denied.

24 And that's -- if the Court would like to see that
25 order, it is our trial Exhibit 137, page 2.

26 I think those were all of the issues.

27 Oh, the only other one is that this is an extensive
28 brief. It made -- the litigation privilege is the only one

1 that I think deserves briefing. I think we would prevail on
2 it for the reasons that I gave you, but I do think that this
3 is why such a motion like this shouldn't be weighted until
4 the last day.

5 It also ties in with our motion to deem all -- the
6 motion in limine to deem all unpled affirmative defenses
7 waived. The reason this is such a disarming thing with the
8 2019 law, and that is a substantive law issue; therefore, it
9 cannot be waived, and that's set out in our motion in limine
10 to deem all affirmative defenses not pled waived.

11 Litigation privilege is not set forth in the answer
12 as an affirmative defense. It was waived. It was not set
13 forth with any kind of clarity. There's one statement that
14 says there wasn't a -- what does it say? The
15 cross-complaint fails to state facts sufficient to
16 constitute a cause of action. That is not setting forth
17 litigation privilege as an affirmative defense. So we think
18 that this does link with our motion in limine to deem unpled
19 affirmative defenses as waived.

20 THE COURT: Ms. Hartsock, what do you think about
21 the argument that on a malicious prosecution cause of
22 action, that there's no allegation regarding a favorable
23 decision on the merits?

24 MS. HARTSOCK: Another reason this kind of thing is
25 usually addressed before trial is we can move to amend
26 paragraph 22 to say this restraining order was denied, and
27 then the permanent restraining order request was eventually
28 dismissed. I think that the language was enough to put them

1 on notice. I wish that we had a copy of their order,
2 because this was their temporary restraining order, and I
3 think that the next section is saying that in defending,
4 they had to incur these things, is enough for California's
5 liberal notice pleadings standard.

6 Because if this was brought as a demurrer or some
7 form of motion to strike earlier in the case, the Court
8 would have had the ability to decide whether or not they
9 could amend to add a statement that says, you know, it was
10 adjudicated in the Plaintiff's favor.

11 MR. WATTERS: I have a rebuttal, Your Honor.

12 THE COURT: I have one additional question. So in
13 December of 2021, the Court ruled on a motion for summary
14 judgment on cross-complaint with respect to the malicious
15 prosecution cause of action; the Court issued an order that
16 said the Court finds that Cross-Defendant's voluntary
17 dismissal of those actions was not an implicit concession
18 that they could not maintain those actions, and thus, do not
19 constitute decisions on the merits that terminated in Zhao's
20 favor. The Court went on to say, Absent this element, Zhao
21 cannot succeed on her malicious prosecution cause of action.

22 But the important statement is "the Court finds."
23 What, if anything, should I do with that statement? Or
24 finding?

25 MS. HARTSOCK: It was incumbent upon the plaintiff
26 in this case to present the Court all of the arguments. In
27 their motion for summary judgment, there was no agreement
28 specifically made that the order denying the temporary

1 restraining order was not adjudication of the issues.

2 We agree with the Court's ruling, and the fact that
3 it becomes, I think, a res judicata issue, if the Court
4 reviewed this issue, I think it applies to the small claims
5 case being dismissed, and I think it applies to the
6 temporary restraining order -- permanent restraining order
7 dismissal. I do not think it applies to the denial of the
8 temporary restraining order because that was not brought
9 before the Court, and it was the Plaintiff's burden to tell
10 the Court at that time the issues the Court was to review.

11 THE COURT: That sounds to me like, for purposes of
12 trial, you're telling the Court and Cross-Defendant that
13 your theory of the malicious prosecution cause of action is
14 solely based on the pursuit of a temporary restraining
15 order.

16 MS. HARTSOCK: Correct.

17 THE COURT: Do you believe that you have a proper
18 claim for punitive damages as to the malicious prosecution
19 cause of action?

20 MS. HARTSOCK: Yes.

21 THE COURT: Do you believe that that was
22 sufficiently pleaded in the cross-complaint?

23 MS. HARTSOCK: Yes.

24 THE COURT: Can you point me to where you think
25 that occurred?

26 MS. HARTSOCK: In the prayer, and it says, for
27 punitive and exemplary damages.

28 I'm not saying that it was the best pled complaint.

1 I'm not saying that it followed right under the intentional
2 infliction of emotional distress cause of action, or any of
3 the causes of action, but it is set forth in the prayer, and
4 if the Cross-Defendants or the Court had any concern with
5 that, the proper way of dealing with this would have been a
6 demurrer or a motion to strike the punitive damage, wherein
7 the Court is allowed to allow leave to amend to allow any
8 such things five years ago when this was filed in 2019.

9 And to the extent the Court thinks that the
10 punitive damages language should have been directly under
11 the cause of action as the last paragraph, we can orally
12 move to amend and provide an amended cross-complaint. But
13 it did put the other side on notice.

14 THE COURT: All right, thank you.

15 MS. HARTSOCK: Thank you.

16 THE COURT: Mr. Watters.

17 MR. WATTERS: Thank you, Your Honor.

18 On the issue of the intentional infliction of
19 emotional distress cause, paragraph 26, there's no
20 allegation that the report was false and malicious. Without
21 malice, there can be no claim, because under the pre-2021
22 law, even a false police report without even allegation of
23 being false, it was qualified privilege. So there is a
24 missing element in IIED that should terminate the claim in
25 my client's favor.

26 As to the motion to amend, so far we have no motion
27 to amend and there's no proposed amended pleading. But even
28 if you were to allow an amendment to the malicious

1 prosecution cause, you could still take judicial notice of
2 the dismissal without prejudice of the restraining order.
3 So if you were to grant leave to amend, and we take judicial
4 notice of the dismissal without prejudice, then that doesn't
5 solve the problem that their amended pleading has sought to
6 solve: The denial of the temporary restraining order. Once
7 again, the temporary restraining order is not adjudication
8 after trial. It's done on pleadings that are filed with the
9 Court to determine whether a temporary restraining order
10 should issue, and it's also equitable relief on damages.

11 So for the reasons indicated, I think that this is
12 the appropriate time to resolve these claims.

13 Thank you.

14 THE COURT: Ms. Hartsock, this may be a little bit
15 outside the small box of the question of judgment on the
16 pleadings, but with respect to the malicious prosecution
17 cause of action, do you believe that the question of
18 favorable termination on the merits is a legal decision for
19 the Court?

20 MS. HARTSOCK: Yes.

21 THE COURT: And also the question of probable cause
22 in the -- to support the initiation of the legal cause?

23 MS. HARTSOCK: Yes and no. Yes, it's a question
24 for the Court. But as I was writing this jury instruction
25 last night, the CACI actually allows for us to put a list of
26 facts that we would like the jury to decide so that the
27 Court may make that determination, and we did set forth
28 three factual issues that we think the jury should decide

1 that would assist the Court in ruling on this particular
2 issue. There are no facts that we felt the jury needed to
3 decide, for the first issue. We believe there's a blank for
4 it, but we didn't fill that in.

5 THE COURT: And I didn't look at your proposed jury
6 instructions in that much detail, but were the three
7 contested facts that you think are critical to a probable
8 cause decision?

9 MS. HARTSOCK: The way we wrote them for discussion
10 is whether or not the texts and phone calls on October 17th
11 and 18th, 2018 were such that a reasonable person would
12 believe they were in immediate danger or had received a
13 physical threat.

14 Second question, whether or not the email of March
15 21, 2019 was such that a reasonable person would believe
16 they were in immediate danger or had received physical
17 threat. Question No. 3, whether or not a reasonable person
18 would inform the Court of an improper translation of the
19 October 18, 2018 text message.

20 And the reason we made those questions is those
21 questions are specifically the factual allegations --
22 they're based on the factual allegations that Ms. Wang made
23 in her application for the temporary restraining order.

24 THE COURT: Okay.

25 MR. WATTERS: Can I make one final comment, Your
26 Honor, on that subject?

27 THE COURT: You may.

28 MR. WATTERS: In the intentional infliction of

1 emotional distress cause of action, there's no allegation
2 that the emails just referred to, or other communications,
3 were extreme or outrageous. Without that element, the cause
4 of action also fails.

5 THE COURT: All right, thank you.

6 May I move to the question of whether
7 Cross-Complainant has waived the jury trial.

8 Mr. Watters, is there anything else you wanted to
9 add to your motion?

10 MR. WATTERS: Yes, Your Honor.

11 So I've seen, obviously, the case management
12 statements where both parties indicate we're requesting a
13 jury trial. The key issue is, the first case management
14 statement waived a jury trial, and so our view is that
15 without that, we're free to waive a jury trial, which we've
16 done, and now we have to hold the other side to their waiver
17 of a jury trial.

18 So I think we can do that and Your Honor can do
19 that because there's no motion for relief on the motion for
20 jury trial or leave to post late jury fees.

21 THE COURT: Can you tell me if it would be
22 important to the decision on prejudice that your client may
23 suffer by the granting of a jury trial under these
24 circumstances?

25 MR. WATTERS: Yes, Your Honor. I think the legal
26 questions predominate the favorable termination. For
27 example, probable cause both legal determinations and
28 malicious prosecution and the underlying story, under

1 Evidence Code 352 there may be some issues of prejudice that
2 might inflame the jury. But I think primarily because legal
3 questions predominate, that's the reason to restrict a jury
4 trial.

5 THE COURT: Let me ask you to respond to your
6 opponent's criticism of your raising of the litigation
7 privilege now, or at a later stage in the proceeding, and
8 how you think that plays out, or that assertion plays out
9 through the course of the trial process.

10 MR. WATTERS: This is another example of legal
11 issues predominating, because it should ultimately be a
12 legal decision whether the conduct is privileged or not,
13 under 47(b). So once again, it may confuse the jury, or
14 mislead the jury to present evidence that might inflame
15 them, but which is ultimately legally a different decision
16 than the jury might otherwise make.

17 In terms of the timing of the issue, the answer
18 says facts not sufficient to constitute a cause of action.
19 It's been no secret that Civil Code 47 has been an issue
20 throughout these proceedings. It's raised in the
21 cross-complaint papers and our papers, and I think that
22 saying they are surprised by this is a little bit unfair.

23 THE COURT: As I understand the allegations in the
24 cross-complaint, and then as perhaps somewhat highlighted in
25 the trial brief of Cross-Complainant, there might be, for
26 example, an allegation of reporting to the police and
27 reporting to Homeland Security, and then separately
28 allegations of threatening to report to the police and

1 threatening to report to Homeland Security.

2 Do you agree that if any of that behavior is
3 privileged, it would only be the behavior that is actually
4 directed at the law enforcement agency, not a claim that
5 your client emailed their client or called their client on
6 the phone and made threats?

7 MR. WATTERS: I don't entirely agree with you, Your
8 Honor, but I think mostly yes. But the issue would be
9 threatening to call the police. For example, if someone
10 threatens to call the police to get their property back,
11 that's not illegal. So saying, I will call the police on
12 you if you don't return my property is not against the law.
13 And that's just an example of why this is not entirely a yes
14 to that question, Your Honor.

15 THE COURT: Well, it may not be against the law to
16 do that depending on the circumstances, but perhaps it could
17 form the basis of an argument that there's a pattern of
18 harassing behavior.

19 MR. WATTERS: I would agree with you that
20 threatening without any cause or without any basis to call
21 the police on someone is against the law, Your Honor, when
22 taken together in a pattern.

23 THE COURT: Okay. I suppose part of what I'm
24 pondering is, I don't see your assertion of litigation
25 privilege, to the extent it may apply, as a complete
26 response to all of the allegations that Plaintiff/
27 Cross-Complainant is making in the intentional infliction of
28 emotional distress claim. And tell me if you disagree with

1 that, but I appreciate that some of the allegations it made
2 in the cross-complaint and in the trial brief include
3 reports to law enforcement and government agencies, but
4 that's not the only thing they're basing their claim on.

5 MR. WATTERS: I appreciate that, Your Honor, and I
6 draw your attention to paragraphs 26 and 27 to the cross-
7 complaint. As I mentioned earlier, paragraph 26 does not
8 inform that it was false and malicious. There was also no
9 indication in paragraph 27 that the e-mails and claimed
10 threats were outrageous and false and malicious, or
11 extremely outrageous for that matter. So it's a combination
12 of missing elements, Your Honor.

13 THE COURT: Okay. All right, thank you.

14 I have on the table now a few different things and
15 I appreciate, Counsel -- or indulge me on a variety of
16 topics, so you may talk about jury trial.

17 MR. MAUCERE: Sure. And I think Ms. Hartsock did a
18 great job explaining what the legislature's position is. I
19 would like to just touch on that before going back to the
20 jury issue.

21 THE COURT: Well -- and one of the reasons that I
22 raised it is because if I have to do some balancing in terms
23 of whether to revive or respect an arguably waived claim to
24 jury trial, I am trying to understand how much of this case
25 is for the Court to decide regardless.

26 MR. MAUCERE: Sure. And I think that that's a
27 valid question and I'm happy to discuss here.

28 Regarding the affirmative defense of immunity, it

1 was an affirmative defense. They're alleging elements that
2 are not present in either the complaint or the cross-
3 complaint, or the cross-answer. And so the code is very
4 clear that you need to plead all affirmative defenses in
5 that first responsive pleading. It doesn't require
6 specificity, but it requires it to specifically set out the
7 various affirmative defenses.

8 You know, that's basically equivalent to the
9 Federal 12(b)(6) standard of an affirmative defense. That
10 would be -- if you were in federal court, you'd file a
11 12(b)(6) on that. That does not say that there's immunity
12 that they're talking about. So I think it's very clear that
13 they do not comply with the -- you know, you must plead
14 affirmative defenses within that time period, and I think
15 it's pretty clear.

16 I would like to point out, to your point of what is
17 jury, what is the judge. I'd agree that according to CACI
18 instructions, that the second and third elements of a
19 malicious prosecution claim are largely one for the Court to
20 decide once the jury -- and specifically allows that the
21 jury handles the preliminary fact-finding of that matter.
22 But on the IIED claim, that's a hundred percent a jury. We
23 were not talking about here that there's any role that the
24 judge must take as law finder. It's assigned to the jury as
25 a fact finder on each of those elements of the IIED.

26 But the Court has already zoned in on what we're
27 talking about. If the cross-defendant, Ms. Wang, went to
28 the police, filed a report in a vacuum, or went to the USCIS

1 in a vacuum and made some allegations, that's bad. We're
2 not -- I'm not saying that that's the right thing to do, and
3 I think it was done maliciously. But it's a "If a tree
4 falls in the forest" argument on the IIED. If our client
5 didn't hear about it, then she couldn't be emotionally
6 disturbed by it, right.

7 What we're focusing in on is the fact she used that
8 as a weapon to then threaten Ms. Zhao, our client, to her
9 face. That is primarily -- although I think the element --
10 the filing is bad in and of itself, I think it's part of
11 that pattern of practice that the jury instructions talk
12 about in furthering a claim for IIED, furthering a claim for
13 malice and damages. But the real crux of that weapon that
14 she used to terrorize Ms. Zhao is the telling her. Because
15 if she didn't tell her, she's not terrorized. It's the,
16 Hey, by the way, I'm calling the police on you, I'm telling
17 USCIS and you might be deported. That's essentially the
18 inference that the evidence will show.

19 The word "deported" may or may not be in the
20 phrase. Certainly there was a direct threat that I'm using
21 these things that I did with law enforcement and with
22 Homeland Security in order to make you scared, to get you to
23 comply with my -- what I want you to do. And there's like
24 an 18-month pattern of her doing that. That's where the
25 crux of our argument is. That's 100 percent a jury
26 question.

27 And you're indicating the litigation privilege only
28 applies so far here, and I think the facts show that even

1 litigation privilege, if the Court were to let it in, even
2 though it's an affirmative defense, it would show they're
3 mistranslating documents to the police to tell them what
4 they think they should hear. There's no basis in that, and
5 we think that does meet that malicious standard.

6 On what goes to the jury, what goes to the judge, I
7 think other than that question really of, you know, was the
8 case dismissed on the merits, this is purely a jury case.
9 So it's appropriate, we should be looking at a jury here.

10 And in particular -- because, Your Honor, you know,
11 emotional damage and emotional compensation are difficult
12 questions for a bench trial to get right. Judges don't like
13 to have to make very difficult decisions based on facts
14 regarding emotional damage. That's something that is left
15 to the jury. Only a jury of 12 should be able to hear those
16 questions, because they're better able to put themselves in
17 that position where they can make a determination as to
18 appropriate compensation. And I think that it's appropriate
19 that the Court leaves that to the jury.

20 Now I would like to also point out a couple of
21 other things. Mr. Watters is incorrect. Threatening to
22 call the police to get your property back is illegal.
23 That's called civil extortion, and that exists in almost
24 every state in the country. You can't say, You better give
25 this back to me or I'm going to call the police. I know
26 people do it a lot. That's illegal, and especially if you
27 put it in writing.

28 But here the underlying malicious and outrageous

1 actions do not have to be, per se, illegal. You can use the
2 law as a weapon on your side to terrorize someone else, and
3 that's what happened here. What essentially the
4 Cross-Defendant has done is weaponize the United States
5 Immigration against an immigrant, to put her in fear of her
6 status, her place of residence, her ability to earn a
7 living, and to stay with loved ones in the country. I mean
8 she used the law against our client. And so it's not just
9 the fact that it's something that's illegal, it's the
10 underlying pattern of practice in order to achieve that.

11 Turning to the issue of -- do you want to hear more
12 about the jury trial issue, Your Honor?

13 THE COURT: Well, Ms. Hartsock did make some
14 comments yesterday about the history of notification of
15 demand for jury and the lodging of jury fees issue, and if
16 you want to make any of that more clear on the record, this
17 would be the time.

18 MR. MAUCERE: Well, I would like just to establish
19 it on the record, the first CMC statements in 2019 -- August
20 of 2019 by the Defendant's counsel did say this was a
21 non-jury trial. A year and a half later, in April of 2021,
22 both Defendant's counsel and Mr. Watters signed a CMC
23 requesting a jury trial. Both sides requested a jury trial.

24 What Mr. Watters is doing here is, he's trying to
25 have his cake and eat it too, because what happened on
26 September 12th is all of his claims went away. All of his
27 jury claims. Prior to that point, it seemed like he wanted
28 a jury trial. We had proposed jury instructions; it was on

1 the jury calendar; there was discussion regularly about
2 jury. Now, all of a sudden, when his claims were dismissed,
3 suddenly the cross-claims are the ones the judge is more
4 appropriate to handle. He's trying to have it both ways.
5 When it was favorable to him, he wanted a jury trial, and
6 now when he's the defendant, suddenly he wants the judge to
7 make the decision regarding how badly his client acted and
8 how much money the defendant is entitled to because of his
9 client's bad acts.

10 I don't think it's appropriate to have it both
11 ways. I also think he's, frankly, estopped from that case
12 management in 2021, from saying, No, I don't want a jury
13 trial. He claimed then he wanted that jury trial.

14 Now, we've not found any evidence that counsel --
15 two counsels ago; I guess this would have been Mr. Ruiz that
16 filed the cross-complaint, we don't have any evidence that
17 he filed the jury fees. The code is specific, though, that
18 the court can waive the fee, and this is under Section G of
19 the CCP 631(g), which says, The court may, in its discretion
20 upon just terms, allow a trial by jury, although there may
21 have been a waiver of a trial by jury.

22 Now, we've taken our absolute steps to comply with
23 the letter of the law here. As soon as we reviewed this
24 issue and thought, Oh, there are jury fees, we went ahead
25 and lodged those fees. We lodged them on August 16th -- it
26 was filed on August 20th, as soon as we became aware of
27 this. At worst, Your Honor, I think the Court should grant
28 leave here. If the Court wants to determine, under 473(b),

1 this is something that would be considered excusable
2 neglect, for a mistake on the part of -- based on the fact
3 that Ms. Hartsock was not engaged until the beginning of
4 this year and has not received a complete report of every
5 single thing that went on in this case. We're doing our
6 best to comply with the letter of law, with what the Court
7 wants. It's something that, at worst, the Court should
8 grant us leave, and I think these are very clearly jury
9 questions.

10 THE COURT: I do want to go back to the litigation
11 privilege and Civil Code Section 47. You referenced it as
12 an affirmative defense. I've had conversations that
13 involved both sides, I think, about if it is applicable, to
14 what extent does it apply to everything Cross-Complainant is
15 alleging, versus only certain types of behavior.

16 While I appreciate the litigation privilege as
17 what's sometimes called a tort privilege, as opposed to
18 evidentiary privilege, is it not also an evidentiary
19 privilege? I mean, if there's certain behavior that fits
20 within that code section as privileged behavior, how can I
21 allow that into evidence?

22 MS. HARTSOCK: Right. We don't mean to double-team
23 you, it's just he had the jury privilege and I had the
24 litigation --

25 THE COURT: That's okay.

26 MS. HARTSOCK: So that's the issue of notice. So
27 if it's not brought as an affirmative defense, it could not
28 be used as an evidentiary ruling.

1 The other part that is really kind of a tough spot
2 I think for the Court, is when we're making an argument for
3 intentional affliction of emotional distress, and we're
4 showing that pattern and practice that's done, if we are
5 excluding the actual speaking to the police and the actual
6 speaking to the Department of Homeland Security as an
7 evidence piece, right, so the police report itself, the
8 document, Exhibit No. 1, whatever, is not getting to the
9 jury, does the jury know that she called the police?

10 It seems like a very important question for them to
11 know in deciding whether there's a pattern and practice.
12 They're going to be told that she threatened to call the
13 police, and sent a text later saying, I have called the
14 police. So the jury's going to be like, Did she or did she
15 not call the police? And I do not think that the litigation
16 privilege would go so far as to say the jury is not
17 answering that. And the fact is that she did.

18 So even if the Court were to parse out what -- and
19 allay the litigation privilege as an evidentiary issue,
20 okay, we don't enter the police report, we don't enter the
21 email to Homeland Security into evidence as a document; the
22 jury still has to hear that she did it. She threatened to
23 do it; she did do it, and then she told our client that she
24 did it, and all the horrible things that she said.

25 So it really makes more sense, especially
26 considering this is a substantive legal issue, it's set
27 forth in the Civil Code, the jury should be able to see that
28 the police report was made and that an email was made. And

1 to the extent the Court believes that the litigation
2 privilege should be used as an evidentiary argument, the
3 jury still needs to know that it was actually done. Even if
4 the limits of the evidentiary argument would be to keep the
5 actual document from being admitted into evidence, it
6 couldn't be to not tell the jury that it happened.

7 Also, both of those documents include false
8 statements, and later-admitted wrong translations, and all
9 of that is relevant for purposes that are not protected by
10 the litigation privilege, and impeachment.

11 THE COURT: All right.

12 MR. WATTERS: May I be heard briefly, Your Honor?

13 THE COURT: Yes.

14 MR. WATTERS: I respectfully object to the offer of
15 proof, if that's what it was, concerning the factual claims
16 that are going to be presented to the jury on the motion for
17 judgment on the pleadings. The four corners of pleading
18 contain no allegations concerning the content of reports to
19 the police or immigration authorities. For the assertions
20 of those reports, there's just bare allegations in paragraph
21 25 and 26, that the complaints were in retaliation for
22 filing a complaint with the Department of Industrial
23 Relations, et cetera.

24 Concerning the litigation privilege, I agree with
25 you. I think what you were saying, Your Honor, was that the
26 evidentiary privilege may apply, and I agree with that,
27 because under 352 of the Evidence Code, if the privileged
28 conduct is going to prejudice the jury, then either it

1 shouldn't be heard at all, or it should be heard with
2 limited instruction instructing the jury to not infer
3 anything wrong with that conduct if it's privileged.

4 But in all fairness, I think with limited
5 instruction, you could address the evidentiary privileged
6 issue; but I still think these claims are subject to the
7 judgment on pleadings.

8 Thank you.

9 MS. HARTSOCK: I have one additional argument that
10 I'm not sure if I made clear --

11 THE COURT: Go ahead.

12 MS. HARTSOCK: -- because we switched back to the
13 motion for judgment on the pleadings.

14 By way of sandbagging this argument until trial --
15 the first we heard of it, by the way, was at the beginning
16 of the settlement conference before we signed something
17 saying settlement conference was confidential. So I think I
18 can say that this was basically a motion for judgment on the
19 pleadings brought via ex parte. They brought it orally
20 yesterday. The Court asked for briefing by noon on Tuesday.
21 This is a very -- nonsuit motions are argued orally after
22 evidence has been presented, but this is a pretty extreme
23 request that would be prejudicial to us in granting in this
24 manner, with basically 48 hours notice. And also, I think,
25 prejudicial to the Court. You had to drop everything to
26 review all of this yesterday and today, which I understand
27 you might say is your job, but there's a reason there's
28 notice requirements for these types of motions, and there's

1 a reason that we're able to go research them and present the
2 Court with the right laws; and one of our obligations is to
3 make sure we give Your Honor all the case law on both sides,
4 and in order to have that, we have to have the time to brief
5 the issues.

6 It's one of the reasons the California Supreme
7 Court said a lot of these can't be granted, because it's
8 prejudicial to the Court, because it's our requirement to
9 give the Court the best argument and the best cases. So I
10 wanted to make an argument that it's prejudicial that it's
11 being brought in this manner.

12 THE COURT: All right. I've allowed our
13 conversation this morning to bleed into a variety of
14 different topics, but I do feel that there's some overlap to
15 some of the questions and I'm finding it helpful to address
16 in somewhat of a global approach. What I described as
17 Plaintiff's motion in limine No. 1, regarding police reports
18 and testimony on the issues of phone calls to the police, I
19 think is exactly in the realm of the privilege claim that
20 Cross-Defendant is making regarding Civil Code Section 47,
21 as is the motion in limine No. 2 regarding communications
22 with USCIS; motion in limine No. 3 on behalf of
23 Cross-Defendant is to bar testimony or exhibits regarding
24 things that may or may not have occurred after the filing of
25 the cross-complaint.

26 Let me hear Cross-Complainant's response to that.

27 MR. MAUCERE: In this in particular, they're
28 talking about the fact that after the lawsuit was filed and

1 after the Cross-Complainant filed their cross-complaint,
2 Cross-Defendants engaged in an intricate and suspect series
3 of corporate, I would say, shenanigans, in which they have
4 attempted to sell the company to silent partners, who have
5 stressed that they are silent, and then assigned back the
6 claim -- this claim to Ms. Wang.

7 There are several corporate documents that may
8 evidence this, may contradict this, may bring in certain
9 serious questions about who's responsible to pay this, who
10 is responsible to answer questions at trial. What they're
11 trying to do is cut the ability for us to inquire into those
12 serious and concerning areas off at the knees simply because
13 they continued their shenanigans --

14 THE COURT: Well, let me just ask you, why would
15 you want to inquire into them on these claims and what would
16 the relevance be?

17 MR. MAUCERE: Well, I think it is relevant. So
18 it's a joint and several claim against both defendants, and
19 who is responsible here is a relevant area of inquiry.
20 It's, in fact, the area of inquiry that Judge Pennypacker
21 sanctioned the Cross-Defendant on for not cooperating.
22 There's a big cloud of what is going on here that I think
23 the jury is entitled to find out about, and inquire, first
24 of all, whether or not Ms. Wang had the corporate authority
25 to commit the acts that we've alleged that she's committed.
26 Second of all, who's responsible for any of this; were
27 there false statements made in any of those documents we're
28 entitled to inquire of both parties about. It goes to a

1 credibility issue, as well. We're entitled to issue
2 documents to impeach someone whether or not they may be
3 correctly related to something that happened two years ago.

4 Oh, and one of the main things is -- and for a
5 brief offer of proof, there's two emails that were sent from
6 an investor/advisor named Rick Yang. He sent an email to
7 Ms. Mona Wang regarding the ongoing tentative sale of the
8 source code from Black Sails to Mr. Yang. On September 5th,
9 2019, three months after the initial pleadings here, he sent
10 an email to Ms. Wang saying, No, I'm not going to buy it
11 because Ms. Zhao, our client, the cross-complainant, stole
12 the code. Okay. Well -- but five minutes before he had a
13 contradictory email saying, I'm just not interested because
14 the code may have been compromised. Five minutes later, he
15 he's now naming Ms. Zhao's name as the reason that they're
16 backing out of this deal.

17 Cross-Defendants have made a lot of this, as far
18 as -- this was their whole basis for the damage claims that
19 were dismissed. They're certainly going to use it against
20 Ms. Zhao to attempt to discount her damages or impeach her
21 credibility, and we're entitled to inquire about that.

22 I think there could be a discussion in trial
23 regarding the particular admissibility of a document, but to
24 say as a blanket rule that anything after the complaint
25 doesn't come in, that's overbroad; it's using a hammer when
26 you should use, you know, a tack -- it's a bad metaphor, but
27 it's overbroad; it's attempting to whitewash the intricacies
28 of the situation.

1 And so just as Ms. Hartsock has pointed out, one of
2 the main defenses is that Ms. Wang's actions were not
3 outrageous, not egregious, because she had a good faith
4 basis for doing so, i.e., Ms. Zhao's alleged conduct. And
5 so these documents go directly to that.

6 THE COURT: All right, go ahead, Mr. Watters.

7 MR. WATTERS: Thank you, Your Honor. The
8 cross-complaint doesn't allege any litigation conduct after
9 the filing of cross-complaint, of course. It was also never
10 amended to assert claims concerning litigation conduct in
11 this case with my client. Litigation privilege itself,
12 47(b), make it privileged to litigate a case, and so this
13 whole theory about the Plaintiff/Cross-Defendant's
14 manipulating the process of litigation is completely
15 irrelevant to any issue in the cross-complaint.

16 I think, also, under 352, prejudicial to inform the
17 jury that there have even been terminating sanctions in this
18 case. That's the rule objection -- the point is no
19 litigation conduct has been alleged. The cross-complaint's
20 never been amended and none of the particular conduct of my
21 client is relevant to any issue that would be presented to
22 the jury.

23 THE COURT: Okay.

24 MS. HARTSOCK: Is Cross-Defendant just now arguing
25 that any documents after the filing of the cross-complaint
26 that have been presented as evidence to support their claims
27 up until two weeks ago, when their claim was dismissed, were
28 solely created for purposes of litigation, as some form

1 of -- it sounds like some form of discovery abuse? Or are
2 you saying these documents were created for this litigation
3 and therefore cannot be used in this case because they're
4 not acts, they are just manufactured when we were bringing
5 this claim? That's a more serious manufacturing problem,
6 that -- if that's what the argument is, that's just
7 completely improper.

8 THE COURT: Counsel, how is it that you articulate
9 the corporate defendant being potentially liable for either
10 or both of the remaining causes of action?

11 MR. MAUCERE: So Black Sails/Ms. Wang was acting as
12 CEO when she took both the malicious prosecution steps and
13 the steps regarding threatening Ms. Zhao about the
14 immigration status. It's all inextricably tied to the
15 employment of Black Sails as the employer. So you have a
16 situation in which Black Sails hired Ms. Zhao, sponsored her
17 H-1B visa in the lottery, got that, and then didn't pay
18 Ms. Zhao; and then when Ms. Zhao filed a complaint against
19 Black Sails, Black Sails then, through its CEO, called
20 police, filed a USCIS report, used company confidential
21 information regarding things that Ms. Zhao may have told to
22 Ms. Wang, and used them against Ms. Zhao to create fear and
23 retaliation, essentially for her filing and being successful
24 on a wage labor complaint.

25 So then what happened in 2022 -- well, then the
26 claims were filed -- the Cross-Defendant's claims were filed
27 primarily on behalf of Black Sails, though Ms. Wang was also
28 a Plaintiff. In 2022 Ms. Wang sold -- apparently sold Black

1 Sails to a Mr. Shi, who has not been made available, and
2 then assigned back the claims and the defenses to Ms. Wang.
3 You cannot assign claims. I don't think you can assign
4 defenses. And so what they're trying to do is -- they're
5 both inextricably tied, because our argument is that the
6 steps Ms. Wang took are individually, certainly, but they
7 were also taken essentially by the company. And so both
8 Black Sails and its CEO, we hold, are responsible under a
9 joint-several theory, in the same way that a lot of
10 corporate fraud that might be before the court may have been
11 committed by the CEO, but it was committed as a part of
12 their abuse through business sales, and therefore, both
13 parties are jointly and severally liable.

14 And it should be pointed out that in the 2022
15 documents, when Ms. Wang left the company, it reappointed
16 her a quote, unquote director -- I'm not sure what that
17 means, but a director for the purposes of maintaining this
18 claim.

19 Thank you.

20 MR. WATTERS: Your Honor, if I may.

21 THE COURT: Yes.

22 MR. WATTERS: The situation is covered by Civil
23 Code 3294(b), which states an employer should not be liable
24 for punitive damages except in limited circumstances. If
25 Mr. Shi, the current CEO of Black Sails, is claimed to be
26 liable for these, 3294(b) specifically states the corporate
27 officer must have been personally guilty of malice,
28 oppression, or fraud. With the sale occurring in 2022, four

1 years after the underlying events of the case, there's
2 simply no possibility the current leadership of Black Sails
3 would be liable for any conduct of Ms. Wang under 3294(b).

4 In addition, back in the underlying facts; at the
5 time frame Ms. Wang was the CEO of the company, but in the
6 current state after the assignment, if you do find a valid
7 assignment, then there's just no liability here for the
8 current leadership under 3294(b).

9 MS. HARTSOCK: And that's really why it's
10 important, the liability for the current leadership.

11 So in 2022, when the company was possibly sold,
12 basically Mr. Shi, S-h-i, who is the alleged current owner
13 of Black Sails, said, Ms. Wang, You can continue terrorizing
14 Roxie, keep doing your thing, I don't care. In fact, I'm
15 going to make you a director of my company so that you can
16 keep doing your thing, and I'm going to go about my business
17 over here. Whatever you do, don't drag me into the case.
18 I'm not showing up for depositions or trial. I don't care
19 what you do; and I'm making you a director of the company so
20 that you can keep doing it.

21 At the very least, that's reckless disregard
22 of another person's rights. That's a ratification of a
23 corporation putting her in a director's position to keep
24 doing it. That is stuff the jury does need to hear in
25 ruling on liability of Black Sails and any punitive damages,
26 for the section Mr. Watters read.

27 THE COURT: All right, thank you. I'd like to take
28 a recess for about 15 or 20 minutes.

1 MR. WATTERS: Yes, Your Honor.

2 MS. HARTSOCK: Thank you, Your Honor.

3 (Recess.)

4 THE COURT: All right, thank you very much. We are
5 back on the record. Thank you to counsel and the parties
6 for appreciating that I needed to address some things this
7 morning and needed to break until this afternoon at 1:30.

8 I wanted to take a final opportunity to hear any
9 additional comments and arguments regarding Cross-
10 Defendant's motion for judgment on the pleadings, if
11 anything has arisen during the break that you'd like to make
12 sure the Court is aware of.

13 MR. WATTERS: If I may begin, Your Honor.

14 THE COURT: Yes, go ahead.

15 MR. WATTERS: Just a final verification. The case
16 of Stoops versus Abbassi, which I previously cited to the
17 Court, (2002) 100 Cal. App. 4th 644, I cited that for the
18 proposition that the motion for judgment on pleadings may be
19 made at any point up to and including trial. I wanted to
20 clarify that the motion may be made on the Court's own
21 motion as well. Apparently this case involved a motion on
22 the Court's own motion made just before the trial started.
23 So regardless of any timing issues, you also have the
24 authority, independently of our motion, to decide on a
25 motion for judgment on the pleadings. I wanted to clarify
26 that.

27 Secondly, in normal scenario there is a meet and
28 confer requirement under Section 439. However, under

1 439(d)(4), a motion brought less than 30 days before trial
2 for judgment on the pleadings does not require a meet and
3 confer. So I just wanted to clarify those two points, Your
4 Honor.

5 THE COURT: All right, thank you.

6 Anything further on behalf of Cross-Complainant?

7 MS. HARTSOCK: My co-counsel informed me that when
8 he was looking at this last night, and he confirmed that
9 Stoops is a 2002 case, and I guess the 30-day requirement is
10 from a law that was amended in 2023. So --

11 MR. MAUCERE: Yeah, that's -- sorry, Your Honor,
12 438(b) says 30 days before trial --

13 MS. HARTSOCK: Effective 2023. So that's all we
14 have --

15 MR. MAUCERE: To the extent the Court wants to
16 consider that.

17 MS. HARTSOCK: We think we've mostly argued
18 completely this morning.

19 THE COURT: Okay, thank you.

20 Based on the Court's understanding of the legal
21 authorities and my review, I do think that the Court can
22 entertain the motion for judgment on the pleadings at the
23 time of trial; and I do agree that it is also a motion that
24 can be brought sua sponte by the Court, so I do not think
25 that Cross-Defendants are outside of their rights in
26 bringing the motion for judgment on the pleadings at this
27 time and raising the issues at this time. And I am,
28 therefore, going to consider the motion that has been

1 brought for judgment on the pleadings.

2 In reviewing the cross-complaint the Court does
3 believe that there are substantial shortcomings in the
4 manner in which the remaining causes of action have been
5 pleaded in the cross-complaint. To the question of whether
6 any of these shortcomings should warrant a granting of the
7 motion that is brought by Cross-Defendant at this time, let
8 me begin by addressing the cause of action for malicious
9 prosecution.

10 The cross-complaint alleging malicious prosecution
11 describes Cross-Defendant having filed a meritless
12 restraining order. And then in point No. 22, paragraph No.
13 22 states that the restraining order was eventually
14 dismissed. In this court's view the conclusory and
15 unexplained statement that the restraining order was
16 dismissed does not allege sufficiently or plead sufficient
17 facts to allow the Cross-Defendant to appreciate the basis
18 upon which Cross-Complainant believes that the litigation
19 ended in Cross-Complainant's favor.

20 As we know, not only from the law but from the
21 history of this case, a mere dismissal of a legal proceeding
22 does not in and of itself lead to a conclusion or a
23 determination that a civil action has ended in favor of the
24 Plaintiff in that case or the Defendant/Respondent in the
25 restraining order case. I believe that this is a
26 shortcoming in pleading that -- that causes the cause of
27 action to fail to allege sufficient facts that do support
28 the claim and the cause of action. In that regard, I

1 believe that Cross-Defendant's motion for judgment on the
2 pleadings with respect to the cause of action for malicious
3 prosecution is well taken and under the law merits granting.

4 Now, the question whether the Cross-Complainant
5 should have opportunity to amend that cause of action or is
6 unduly prejudiced by the motion being brought at this time,
7 at a stage in the case when amending the cause of action may
8 be difficult on the eve of trial, or without opportunity to
9 appreciate the critique that Cross-Defendant has brought, I
10 understand, not only from a prior ruling of this Court with
11 a finding that the dismissal of the restraining order action
12 that is the subject of this cause of action was not
13 termination in favor of Cross-Complainant of that
14 restraining order matter, and also that Cross-Complainant at
15 this time would offer to the Court and would offer to pursue
16 that claim in this trial on the theory that the mere
17 petition for a restraining order that includes a request for
18 a temporary restraining order within it, if that interim
19 temporary restraining order is denied, that can be
20 considered its own litigation, or its own civil action that
21 was terminated in favor of the Cross-Complainant in this
22 case.

23 I do not agree with that. I believe that a
24 petition for a restraining order is a legal proceeding that
25 includes within it the possibility of the granting of a
26 temporary restraining order pending full hearing on the
27 petition. But that type of interim process and that type of
28 interim requested relief to me does not implicate a decision

1 on the merits if the reviewing magistrate or judicial
2 officer finds that there is insufficient facts stated in the
3 petition to warrant granting of the temporary restraining
4 order, but schedules the matter for a full hearing on the
5 request for a complete restraining order.

6 The Court, in denying temporary restraining orders
7 but setting the matter for a full hearing on the merits of
8 the petition, is often tasked with and offers the Petitioner
9 the opportunity to understand what has been found to be a
10 shortcoming in the issuing of the extreme temporary
11 restraining relief, and what may or may not transpire at the
12 hearing is the subject of the opportunity for full
13 presentation of evidence, full litigation, and full
14 participation by both the Petitioner and the Respondent in
15 the case.

16 This is my way of saying that in my view there is
17 no reasonable likelihood or opportunity that amending this
18 claim would result in the Cross-Complainant being able to
19 state a cause of action for malicious prosecution based on
20 all of the theories that have been presented to me here as
21 part of the trial proceeding, and the only remaining theory
22 of the claim that seems to be supported, and certainly was
23 not at all specifically pleaded in the cross-complaint.
24 Therefore, I am granting judgment on the pleadings as to the
25 cause of action for malicious prosecution without leave to
26 amend.

27 With respect to the fourth cause of action for
28 intentional infliction of emotional distress against all

1 defendants, again, the Court finds that there are
2 substantial shortcomings in the manner in which this cause
3 of action has been pleaded in the cross-complaint. The
4 cause of action for intentional infliction of emotional
5 distress requires conduct that is described as outrageous;
6 it requires conduct that is alleged to have been intended to
7 cause emotional distress; it requires conduct that causally
8 can be shown to establish that the Plaintiff, or
9 Cross-Complainant in this case, suffered extreme emotional
10 distress. Outrageous conduct is generally thought to be
11 conduct that is so extreme that it goes beyond all possible
12 bounds of decency; conduct so outrageous that a reasonable
13 person could regard the conduct as intolerable in a
14 civilized community. Looking at the
15 limited amount of factual information that is presented in
16 the cross-complaint, the Court is hard pressed to find that
17 Cross-Complainant has alleged sufficient facts to establish
18 that there is, in fact, a cause of action for intentional
19 infliction of emotional distress in this case. The most
20 significant assertion made in the cross-complaint regarding
21 any type of intention on the part of Cross-Defendant or
22 Cross-Defendants is an allegation that conduct was done in,
23 quote, retaliation.

24 The factual information that would support a claim
25 that the Defendant or Cross-Defendants -- Cross-Defendant or
26 Defendants engaged in outrageous conduct is an assertion
27 that the Defendant/Cross-Complainant is lawfully in this
28 country, and therefore by inference, any intention to report

1 her to immigration authorities might have been contrary to
2 any right for her to be removed. And in the allegations
3 that law enforcement was engaged by Cross-Defendants without
4 any probable cause. Probable cause, of course, in many
5 circumstances being considered to be a legal standard, one
6 that may or may not be related to factual truth.

7 These claims and allegations, and these assertions
8 as being sufficient to particularly plead a cause of action
9 for intentional infliction of emotional distress I think are
10 problematic.

11 In addition, there is the question and the specter
12 overlying the case of the litigation privilege. Whether the
13 litigation privilege is considered to be an affirmative
14 defense, a tort privilege, intertwined with an evidentiary
15 privilege, or a requirement of a prima facia case for a
16 cause of action for intentional infliction of emotional
17 distress, such that it would be Plaintiff's responsibility
18 to prove that the Defendant's conduct was not privileged,
19 the Court believes that the allegations that are raised in
20 the fourth cause of action for intentional infliction of
21 emotional distress, to the extent that they are pleaded, all
22 relate to conduct which falls within the litigation
23 privilege for reaching out to law enforcement, reporting
24 activity to law enforcement, reporting activity to
25 government agencies that may or may not come to fruition in
26 terms of the ultimate merits of any concerns that are raised
27 to the law enforcement agencies, they are not alleged
28 specifically in the complaint to have been false claims;

1 they are not alleged specifically in the cross-complaint to
2 have been claims made with knowing falsity, or with intent
3 to cause emotional distress; they are not alleged with any
4 specificity in the cross-complaint as activity that is
5 outrageous and so beyond the bounds of common decency that
6 they can be said to support the claim of emotional distress.

7 In addition, while these claims of litigation
8 privilege are raised in limine as issues in this particular
9 trial, they inform the Court on the question whether
10 amendment of the fourth cause of action could result in
11 a claim of intentional infliction of emotional distress that
12 would survive further challenge in front of this or some
13 other Court.

14 The Cross-Complainant's allegations regarding
15 intentional infliction of emotional distress are that the
16 Cross-Defendants informed Cross-Complainant that she
17 intended to report her to immigration authorities; that she
18 called the police without probable cause, and it is not even
19 alleged for what purpose or what the claim was when calling
20 the police; that she sent a number of, quote, harassing, end
21 quote, emails and phone calls in making threats about
22 reporting her to police and immigration authorities. I
23 believe all of this conduct, whether directly related to
24 reporting, or directly related to stated intention, or what
25 are described in a conclusory way in the
26 Cross-Complainant's threats to report, all fall within the
27 purview of the litigation privilege as it existed at the
28 time of the alleged conduct.

1 And therefore, I do not believe granting leave to
2 amend would cause this complaint for intentional infliction
3 of emotional distress to survive further challenge either.
4 And so for that reason, I am also granting Cross-Defendant's
5 motion for judgment on the pleadings as to the fourth cause
6 of action without leave to amend.

7 So on those bases and for those reasons, judgment
8 is for the Cross-Defendants on the remaining causes of
9 action for malicious prosecution and intentional infliction
10 of emotional distress based on the granting of judgment on
11 the pleadings as I have just explained and described.

12 MS. HARTSOCK: For the record, we would like to
13 request an ability to brief the litigation privilege and
14 respond, and have this be a tentative ruling instead of a
15 final ruling, so that we can address the Court's concerns
16 and properly have an opportunity to brief a response.

17 THE COURT: I believe the litigation privilege was
18 briefed by you in your trial materials.

19 MS. HARTSOCK: We only touched on it briefly
20 because it was mentioned at the settlement conference, but
21 did not get into the Fenelon case, and we've not had an
22 opportunity to give the Court the briefing and the case law
23 that would support that the emails saying, I'm going to
24 report you to police, and the emails saying, I did report
25 you to police are not part of the litigation privilege as it
26 stood in 2019. There is a significant amount of case law on
27 that issue, and while we understand that it's very likely
28 the Court reviewed all of that, we would like the

1 opportunity to add it the record in written form and brief
2 the issue and have this heard again at a later date.

3 THE COURT: Mr. Watters, did you want to respond to
4 that question?

5 MR. WATTERS: Yes, Your Honor. I think that the
6 legal issues were correctly and fully stated and discussed
7 by the Court. You have been apprised of the authority from
8 the party that they wish to rely on. There's been ample
9 opportunity to argue that authority, at least between the
10 filing of the motion and today. Nothing that the case law
11 discusses would, I think, change the ruling, but if the
12 other party wishes to supplement for the record only with a
13 brief on what they think the issues are, feel free to pursue
14 whatever remedies they desire, then I think that's the
15 correct procedure.

16 THE COURT: All right, thank you.

17 My ruling on the motion for judgment on the
18 pleadings as to causes of action 3 and 4 is based only in
19 part on my comments regarding the litigation privilege, and
20 my comments on the litigation privilege are substantially in
21 the context of whether or not the Court believes that it is
22 appropriate at this stage to grant or consider any leave to
23 amend.

24 Despite, and even in the absence of, authority
25 regarding the litigation privilege, I think the fourth cause
26 of action fails to state sufficient facts to establish a
27 cause of action as it is pleaded in the cross-complaint, and
28 I think that that alone would support the granting of the

1 motion for judgment on the pleadings.

2 With respect to the question whether the litigation
3 privilege should or should not fully apply to the conduct
4 that is alleged in the fourth cause of action currently, or
5 to the conduct that could be alleged in the fourth cause of
6 action if Plaintiff/Cross-Complainant were given the
7 opportunity to further explore the ability to plead facts
8 related to that, from the Court's perspective, I have made
9 my ruling on this and I do not desire or believe that there
10 is any need for further briefing or authority. I do not
11 desire to make this a tentative and have further argument on
12 it. But of course, Cross-Complainant is entitled to pursue
13 any review of the Court's decision as it sees fit.

14 MS. HARTSOCK: And one more thing just to add to
15 the record, is that we did offer briefing while we were in
16 chambers yesterday, and the Court did inform us that you
17 were not interested in reviewing additional briefing. So
18 for the purposes of putting together a record of our ability
19 to provide briefing, I just wanted that on the record
20 as well.

21 THE COURT: I understand. Okay. Anything else?

22 MR. WATTERS: No, Your Honor.

23 THE COURT: Thank you.

24 (Pause in the proceedings.)

25 THE COURT: All right, thank you. We are back on
26 the record. Ms. Hartsock, you had a request?

27 MS. HARTSOCK: Yes. So it's been kind of a
28 lingering thing. We've been trying to get Ms. Wang's

1 address. She was unwilling to give it to us in deposition;
2 she was unwilling to give it to us in discovery; we brought
3 it up at the beginning that we would like her address. With
4 the Court's ruling there is the one outstanding issue at
5 whether or not the underlying case that was dismissed last
6 week creates its own separate malicious prosecution case.
7 Mr. Watters is unsure if he will be counsel of record for
8 that case, or unsure at this moment if he could accept
9 service on her behalf in that case.

10 We wanted to bring up a request to the Court to
11 assist us in getting the party's address.

12 MR. WATTERS: I respectfully object, Your Honor.
13 This is for the purpose of a new lawsuit for malicious
14 prosecution by the Cross-Complainant. There's no request
15 before the Court, there's no written motion; I think this is
16 not before the Court at this time.

17 MS. HARTSOCK: It's really a discovery issue.

18 THE COURT: I don't know that I have any propriety
19 of being involved in the request. I don't know what my
20 authority would be. So I think that regard, I appreciate
21 the request, but I don't know that I have the authority to
22 order it for any purpose that is before the Court.

23 MS. HARTSOCK: Okay. Thank you, Your Honor.

24 MR. WATTERS: Thank you, Your Honor.

25 THE COURT: Mr. Watters, based on the Court's
26 rulings today, perhaps you should be directed to prepare
27 a judgment.

28 MR. WATTERS: I'm fine with that, Your Honor.

1 STATE OF CALIFORNIA)
2) SS.
3 COUNTY OF SAN MATEO)

4 I, THERESA A. NARDELLO, A CERTIFIED SHORTHAND
5 REPORTER HEREBY CERTIFY: That I was the duly appointed,
6 qualified shorthand reporter of said court in the
7 above-entitled action taken on the above-entitled date; that
8 I reported the same in machine shorthand and thereafter had
9 the same transcribed through computer-aided transcription as
10 herein appears; and that the foregoing typewritten pages
11 contain a true and correct transcript of the proceedings
12 held in said matter at said time and place to the best of my
13 ability.

14 I further certify that I have complied with CCP
15 237(a)(2), in that all personal juror identifying
16 information has been redacted, if applicable.

17 DATED SEPTEMBER 30, 2024.

18
19
20 *Theresa A. Nardello*

21 THERESA A. NARDELLO, CSR 9966

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