541 F.Supp.3d 1020 (2021)

DIAMOND RESORTS U.S. COLLECTION DEVELOPMENT, LLC, et al., Plaintiffs,

v.

PANDORA MARKETING, LLC d/b/a Timeshare Compliance, et al., Defendants.

Intermarketing Media, LLC d/b/a Resort Advisory Group, Counter-claimant,

v.

Diamond Resorts U.S. Collection Development, LLC, et al., Counter-defendants.

CV 20-5486 DSF (ADSx).

United States District Court, C.D. California.

Signed May 24, 2021.

1022 *1022 Lindy Kathryn Keown, Pro Hac Vice, Brandon T. Crossland, Pro Hac Vice, Baker and Hostetler LLP, Orlando, FL, Albert G. Lin, Pro Hac Vice, Douglas A. Vonderhaar, Pro Hac Vice, Kayla Marie Prieto, Pro Hac Vice, Marissa A. Peirsol, Pro Hac Vice, Baker and Hostetler LLP, Columbus, OH, Caroline Dettmer Slye, Pro Hac Vice, Baker and Hostetler LLP, Cincinnati, OH, Elizabeth Marie Treckler, Teresa C. Chow, Baker and Hostetler LLP, Los Angeles, CA, Emily B. Thomas, Pro Hac Vice, Emily B. Thomas, Baker and Hostetler LLP, Houston, TX, for Plaintiffs/Counter-defendants Diamond Resorts U.S. Collection Development, LLC, Diamond Resorts Hawaii Collection Development, LLC.

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Order DENYING Lawyer Defendants' Motions to Strike (Dkts. 361, 362)

DALE S. FISCHER, United States District Judge.

Defendants Miranda McCroskey, McCroskey Legal, and Unlock Legal (collectively, McCroskey Defendants) and Defendants Slattery Sobel & Decamp, LLP; Del Mar Law Group, LLP; Carlsbad Law Group, LLP; and JL "Sean" Slattery (collectively, Slattery Defendants, and, all collectively, Lawyer Defendants) move, pursuant to California's anti-SLAPP statute, to strike the claims asserted against them in Defendants Diamond Resorts U.S. Collection Development, LLC and Diamond Resorts Hawaii Collection Development, LLC's (collectively, Diamond) Fourth Amended Complaint (FAC). Dkts. 361-1 (McCroskey Mot.), 362 (Slattery Mot.). Diamond opposes. Dkt. 393 (Opp'n). The Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15. For the reasons stated below, the motions to strike are DENIED.

I. BACKGROUND

A. The Exit Scheme

Diamond owns, operates, and manages timeshare resorts. Dkt. 307 (FAC) ¶ 64. Diamond offers its owners and members the ability to reserve and use vacation interests at different resorts with multi-site timeshare plans called "Collections." Id. ¶ 65. To become a member of a "Collection," individuals enter into a contract to purchase and finance the membership (Timeshare Contracts). Id. ¶ 66. The purchaser (Diamond Owner or Owner) can either pay in full at the time of purchase or make an upfront payment and finance the remaining amount. Id. Diamond Owners are also required to pay annual maintenance fees. Id.

Defendants are part of the "timeshare exit industry" and advertise their services helping timeshare owners cancel or terminate their timeshare contracts. Id. ¶¶ 72-75. Defendants Pandora Marketing, LLC (Pandora) and Intermarketing Media, LLC (RAG and, collectively, Exit Company Defendants) state on their websites that they help those who engage their services remove all liability from their timeshare contracts so timeshare owners "will no longer be responsible for maintenance fees, assessment fees, or payments on debts." Id. ¶ 75. However, the Exit Company Defendants are not actually able to remove all liability from a Diamond Owner on the Timeshare Contract. Id.

The Exit Company Defendants charge the Diamond Owners to "exit" their timeshares. Id. ¶¶ 84, 117, 120. Pandora uses information about how much the Owner is currently paying for the timeshare to determine
1024 how much to charge for the "exit." Id. ¶ 84. Once engaged, Exit Company *1024 Defendants refer Diamond Owners to the Lawyer Defendants. Id. ¶ 105. The Lawyer Defendants instruct the Owners to refrain from paying anything owed under their Timeshare Contracts, and to change their address on file with Diamond to the address of a Lawyer Defendant. Id. ¶¶ 106-107. However, the Lawyer Defendants have "no legal or viable method to assist the Diamond Owners in exiting the Timeshare Contracts." Id. ¶ 119.

B. The Lawyer Defendants' Role

Diamond alleges the Lawyer Defendants interfere with the Timeshare Contracts by lending legitimacy to the Exit Company Defendants' false and misleading advertising, encouraging or directing the nonpayment of fees owed to Diamond, and keeping the Diamond Owners in the dark regarding adverse financial consequences resulting from the nonpayment of fees. Id. ¶¶ 199-219.

The Lawyer Defendants accept clients who are brought into the scheme by the Exit Company Defendants' advertisements promoting a guarantee. Id. ¶¶ 180-182. However, after the initial fee payment is made, the Lawyer Defendants inform Owners there is no such guarantee. Id. ¶ 181.

In exchange for a flat fee from the Exit Company Defendants — typically $700 or less per Owner — the Lawyer Defendants send two types of "exit" letters. Id. ¶¶ 120, 123-127. First, the Lawyer Defendants send letters demanding Diamond cease and desist communicating with the Owner. Id. ¶ 124. As a result, the Owners do not receive billing statements, late payment notices, default notices, and other correspondence. Id. ¶ 126. The Owners do not know when their accounts are headed for default. Id. Second, the Lawyer Defendants send letters seeking to negotiate an exit or cancellation of the Timeshare Contract. Id. ¶ 127.

The Lawyer Defendants often do nothing to follow up on the exit letters. Id. ¶¶ 130-131. Some Diamond Owners never speak to their assigned Lawyer Defendants. Id. ¶ 133. The Lawyer Defendants do not tell their clients that ceasing to pay will result in an unlawful breach of the Timeshare Contracts. Id. ¶ 132. Additionally, when Diamond notifies the Lawyer Defendants that their demand is denied, the Lawyer Defendants and Exit Company Defendants fail to inform the Diamond Owners of the denial. Id. The Lawyer Defendants intend to represent the Owners only in pre-litigation activities. Id. ¶¶ 140-145. Diamond alleges the McCroskey Defendants have never appeared in any arbitration or judicial proceeding adverse to Diamond on behalf of a Diamond Owner, and the Slattery Defendants have represented Diamond Owners in eleven arbitrations. Id. ¶¶ 141-142.

C. Procedural History

On November 13, 2020, the Court denied the Lawyer Defendants' motions to strike Diamond's Second Amended Complaint. Dkt. 238 (Anti-SLAPP Order). Diamond filed a Fourth Amended Complaint on January 15, 2021. FAC. In addition to bringing these motions to strike, the Lawyer Defendants also moved to dismiss the claims against them. Dkts. 329, 331. On April 12, 2021, the Court dismissed counts VIII and XIII — for tortious interference with contractual relations and intentional interference with prospective economic relations — against the Lawyer Defendants. Dkt. 385. The Court denied the motion to dismiss as to the remaining claims asserted against the Lawyer Defendants. Id.

II. DISCUSSION

The Lawyer Defendants move to strike all state law claims asserted against them. Anti-SLAPP motions are
1025 subject to *1025 a two-step analysis with shifting burdens. First, the Lawyer Defendants must make a prima facie showing that Diamond's claims arise from an "act in furtherance of [their] right of petition or free speech." Cal. Civ. Proc. Code § 425.16(e); Mindys Cosmetics, Inc. v. Dakar, 611 F.3d 590, 595 (9th Cir. 2010). They can meet this burden by demonstrating that the act underlying the challenged claim fits into one of the four categories of section 425.16(e). If the Lawyer Defendants make this prima facie showing, the burden shifts to Diamond to demonstrate "a probability of prevailing on the challenged claims." Mindys Cosmetics, 611 F.3d at 595 (quoting Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1110 (9th Cir. 2003)).

"Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute — i.e., that arises from protected speech or petitioning *and* lacks even minimal merit — is a SLAPP, subject to being stricken under the statute." Oasis W. Realty, LLC v. Goldman, 51 Cal. 4th 811, 820, 124 Cal.Rptr.3d 256, 250 P.3d 1115 (2011) (quoting Navellier v. Sletten, 29 Cal. 4th 82, 89, 124 Cal.Rptr.2d 530, 52 P.3d 703 (2002)).

California courts have "interpreted the anti-SLAPP statute's `arising from' language to mean that a claim is based on whatever conduct constitutes the `specific act[ ] of wrongdoing' that gives rise to the claim." Jordan-Benel v. Universal City Studios, Inc., 859 F.3d 1184, 1190 (9th Cir. 2017) (alteration in original) (quoting Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP, 133 Cal. App. 4th 658, 671, 35 Cal.Rptr.3d 31 (2005)). "Put another way, a court focuses its anti-SLAPP analysis on the specific conduct that the claim is challenging." Id. (citing Wang v. Wal-Mart Real Estate Bus. Trust, 153 Cal. App. 4th 790, 809, 63 Cal.Rptr.3d 575 (2007)).

To determine the gravamen of Diamond's claims, the Court "must examine the allegedly wrongful conduct itself, without particular heed to the form of action within which it has been framed." Peregrine Funding, 133 Cal. App. 4th at 671, 35 Cal.Rptr.3d 31. "The first prong of the anti-SLAPP analysis involves two related inquiries: (1) whether the Complaint alleges activity protected by section 425.16 and (2) whether the cause or causes of action alleged arise from those activities." Contreras v. Dowling, 5 Cal. App. 5th 394, 408, 208 Cal.Rptr.3d 707 (2016). In making this determination, "the court is not limited to examining the allegations of the complaint alone but rather considers the pleadings and the factual material submitted in connection with the special motion to strike." Id.

The Lawyer Defendants argue their conduct is protected under two categories of section 425.16(e): speech made in connection with a judicial proceeding and conduct in connection with an issue of public interest. McCroskey Mot. at 3-11; Slattery Mot. at 7-13.

A. Speech Made in Connection with a Legislative, Executive, or Judicial Proceeding

Statements made in ligation, or in connection with litigation, are protected by the anti-SLAPP statute. Briggs v. Eden Council for Hope & Opportunity, 19 Cal. 4th 1106, 1115, 81 Cal.Rptr.2d 471, 969 P.2d 564 (1999). Protected speech includes "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." Cal. Civ. Proc. Code § 425.16(e)(2). Even when litigation "may not have commenced, if a statement `concern[s] the subject of the dispute' and is made `in anticipation of litigation contemplated in good faith and under serious consideration,' then the 1026 *1026 statement may be petitioning activity protected by section 425.16." Neville v. Chudacoff, 160 Cal. App. 4th 1255, 1268, 73 Cal.Rptr.3d 383 (2008) (alteration in original) (citations and quotation marks omitted) (quoting Rohde v. Wolf, 154 Cal. App. 4th 28, 36, 64 Cal.Rptr.3d 348 (2007)).

Prelitigation conduct can be protected by the anti-SLAPP statute, but only if a party seriously considers litigation in good faith. Bel Air Internet, LLC v. Morales, 20 Cal. App. 5th 924, 940, 230 Cal.Rptr.3d 71 (2018). "The requirement to show that litigation is seriously contemplated ensures that prelitigation communications are actually connected to litigation and that their protection therefore furthers the anti-SLAPP statute's purpose of early dismissal of meritless lawsuits that arise from protected petitioning activity." Id. at 941, 230 Cal.Rptr.3d 71. "Thus, for example, when a cause of action arises from conduct that is a `necessary prerequisite' to litigation but will lead to litigation only if negotiations fail or contractual

commitments are not honored, future litigation is merely theoretical rather than anticipated and the conduct is therefore not protected prelitigation activity." Id.

In determining whether speech is protected, courts also look to the litigation privilege as an aid in construing the scope of section 425.16(e)(2) because "the two statutes serve similar policy interests." Neville, 160 Cal. App. 4th at 1263, 73 Cal.Rptr.3d 383. In Edwards v. Centex Real Estate Corp., 53 Cal. App. 4th 15, 39, 61 Cal.Rptr.2d 518 (1997), the court held that statements were not privileged because the defendants had failed to establish "anything more than the mere *possibility* that appellants might consider litigation." And in Dickinson v. Cosby, 17 Cal. App. 5th 655, 683-84, 225 Cal.Rptr.3d 430 (2017), the court held that a demand letter written by an attorney did not fall within the litigation privilege because, by the time of the court's decision, the demand letter had not resulted in litigation.

In its previous Anti-SLAPP Order, the Court found the Lawyer Defendants' conduct did not fall under this category of protected speech because (1) the Lawyer Defendants did not submit adequate evidence that the demand letters resulted in litigation and (2) Diamond alleges the Lawyer Defendants never intended to represent the Diamond Owners in any actual litigation. Anti-SLAPP Order at 8-10. The latter remains true in the Fourth Amended Complaint. See FAC ¶ 139.

The Slattery Defendants argue the demand letters were protected conduct because they were made "in anticipation of contemplated litigation," and the Slattery Defendants "were prepared and willing to represent their clients in litigation," and have in fact filed lawsuits against Diamond Resorts and "defended over ten clients in arbitration against Diamond Resorts who sued the Diamond Owners after the Slattery Defendants sent demand letters." Slattery Mot. at 8-9. Additionally, the Slattery Defendants assert their legal representation of and advice to Owners to stop making payments to Diamond are protected activities. Id. at 9. The McCroskey Defendants make the same arguments and note that Miranda McCroskey has assisted in the preparation of a class action lawsuit brought by Diamond Owners. McCroskey Mot. at 9-11. The McCroskey Defendants also claim arbitration is a pre-litigation forum to which the anti-SLAPP statute applies. Id. at 9-10.

Future litigation arising from the demand letters was clearly theoretical here. As explained below, there is no evidence that any litigation — at least that was not imminently compelled to arbitration arose from the Lawyer Defendants' demand letters. Further, the demand letters clearly contemplated negotiations, see
1027 *1027 FAC ¶ 127, and therefore would "lead to litigation only if negotiations fail" making litigation "merely theoretical rather than anticipated." Bel Air Internet, 20 Cal. App. 5th at 941, 230 Cal.Rptr.3d 71.

Additionally, the Diamond Owners are all subject to contractually mandated arbitration. Dkts. 393-1 ¶ 26, 393-26. In Century 21 Chamberlain & Associates v. Haberman, a California appellate court held arbitration is not "an official proceeding authorized by law subject to anti-SLAPP protection." 173 Cal. App. 4th 1, 9, 92 Cal.Rptr.3d 249 (2009) (internal quotation marks omitted); see also Mission Beverage Co. v. Pabst Brewing Co., LLC, 15 Cal. App. 5th 686, 703, 223 Cal.Rptr.3d 547 (2017) ("As a general rule private contractual arbitration is not an official proceeding authorized by law ... even though arbitration awards are subject to judicial confirmation or vacation." (quotation marks and ellipsis omitted)). On issues of state law, federal courts "follow decisions of the California Court of Appeal unless there is convincing evidence that the California Supreme Court would hold otherwise." Carvalho v. Equifax Info. Servs., LLC, 629 F.3d 876, 889 (9th Cir. 2010). Even if made in good faith anticipation of subsequent proceedings, because the demand letters could only precede an arbitration, they are not protected activity under the anti-SLAPP statute.[1]

The Lawyer Defendants also point to court cases they were involved in to illustrate that the demand letters were made in anticipation of litigation. The Slattery Defendants filed one lawsuit on behalf of a Diamond Owner, which was referred to arbitration. Dkt. 362-1 (Slattery Decl.) ¶ 17; Opp'n at 20-21 & n.8. Miranda McCroskey "assisted" with a class action against Diamond. McCroskey Mot. at 9; dkt. 191-1 ¶ 6. As the Court noted in its previous Anti-SLAPP Order, neither McCroskey nor any other individual associated with Unlock Legal or McCroskey Legal is listed as an attorney of record in that case. Anti-SLAPP Order at 9. Additionally, it is not apparent that the case arose from the McCroskey Defendants' conduct that is at issue here.

The Court holds that the Lawyer Defendants' conduct was not protected speech under this prong of the anti-SLAPP statute.

B. Speech Made in Connection with a Public Issue

The Lawyer Defendants also argue their conduct is protected speech under section 425.16(e)(4), which protects "any ... conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." Cal. Civ. Proc. Code § 425.16(e)(4).

"The definition of `public interest' within the meaning of the anti-SLAPP statute has been broadly construed to include not only governmental matters, but also private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity." Damon v. Ocean Hills Journalism Club, 85 Cal. App. 4th *1028 468, 479, 102 Cal.Rptr.2d 205 (2000). California courts have not articulated a single test for or definition of "public interest." In Rivero v. American Federation of State, County, and Municipal Employees, AFL-CIO, 105 Cal. App. 4th 913, 924, 130 Cal. Rptr.2d 81 (2003), the court identified three non-exclusive categories that would fall within the public interest catchall provision: (1) statements that "concerned a person or entity in the public eye"; (2) "conduct that could directly affect a large number of people beyond the direct participants"; and (3) "a topic of widespread, public interest."

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Determining whether a communication was made in the public interest is a two-step process. "First, we ask what `public issue or [ ] issue of public interest' the speech in question implicates — a question we answer by looking to the content of the speech. Second, we ask what functional relationship exists between the speech and the public conversation about some matter of public interest." FilmOn.com Inc. v. DoubleVerify Inc., 7 Cal. 5th 133, 149-50, 246 Cal.Rptr.3d 591, 439 P.3d 1156 (2019) (alteration in original) (citation omitted) (quoting Cal. Civ. Proc. Code § 425.16(e)(4)). There must be "`some degree of closeness' between the challenged statements and the asserted public interest." Id. at 150, 246 Cal.Rptr.3d 591, 439 P.3d 1156 (quoting Weinberg v. Feisel, 110 Cal. App. 4th 1122, 1132, 2 Cal.Rptr.3d 385 (2003)). "[I]t is not enough that the statement refer to a subject of widespread public interest; the statement must in some manner itself contribute to the public debate." Id. (quoting Wilbanks v. Wolk, 121 Cal. App. 4th 883, 898, 17 Cal.Rptr.3d 497 (2004)).

The Lawyer Defendants assert that "whether timeshare owners who were victims of high-pressure and fraudulent business practices can legally exit their timeshare contracts" is a matter of public interest, and the Lawyer Defendants provided legal advice, advocacy, and representation to those timeshare owners. Slattery Mot. at 11-12; see also McCroskey Mot. at 4-6. The Court has already held there is a relevant issue of public interest because "California has enacted a law that mandates timeshare companies provide timeshare owners a certain amount of time to terminate or cancel their timeshares, county and state

attorneys general have entered into agreements with timeshare companies related to fraudulent timeshare sales practices, and numerous class action lawsuits have been filed against Diamond alleging fraudulent sales practices." Anti-SLAPP Order at 11.

However, in that same Order, the Court found there was not a sufficient level of closeness between the public issue and the Lawyer Defendants' conduct. There, like here, the Slattery Defendants relied on Ruiz v. Harbor View Community Association, 134 Cal. App. 4th 1456, 37 Cal. Rptr.3d 133 (2005), a pre-FilmOn case, which held that two letters sent by a homeowners' association's lawyer to a resident about the architectural guidelines in the housing development were protected speech under the public interest prong of the anti-SLAPP statute. The court found the letters were part of ongoing disputes that were of interest to the members of the homeowners' association because they would be affected by the outcome of the disputes and would have a stake in the association's governance. Id. at 1468, 37 Cal.Rptr.3d 133. Because the letters were written in the context of the dispute and were part of the ongoing discussion, they contributed to the public debate. Id. at 1468-70, 37 Cal.Rptr.3d 133 ("The focus and primary purpose of the letters concerned HVCA governance and enforcement of its architectural guidelines, issues of concern to the many HVCA members.").

In discussing Ruiz, this Court noted:

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> *1029 The Court relies on the California Supreme Court's controlling holding in FilmOn.com. As in that case, the communications here — though regarding an issue of public concern — were not made to further public discussion. They were letters from the Lawyer Defendants to Diamond that were not intended to and did not enter the public sphere. Many of the letters had boilerplate language. Unlike Ruiz, the letters did not advocate for a change in general policies that would affect other Diamond owners. Instead, the letters requested only the cancellation or termination of individual contracts. Nothing about the letters indicates that the Lawyer Defendants sent them in furtherance of free speech in connection with an issue of public interest.

Anti-SLAPP Order at 13 (citations omitted).

The Lawyer Defendants now identify additional conduct in an attempt to show they are involved with the larger public interest debate about timeshares. The Slattery Defendants argue that "Sean Slattery actively works with Irene Parker and other advocates for changes in the advertising practices by timeshare developers such as Diamond Resorts multiple times each year ... to create and establish a best practices paradigm which will improve the methods timeshare developers employ to advertise their services." Slattery Mot. at 12-13.[2]

While Slattery's work with Irene Parker might in fact further the public interest, such conduct is not at issue in this case. In order to be subject to an anti-SLAPP motion to strike, claims must "arise from" protected conduct. See Park v. Bd. of Trs. of Cal. State Univ., 2 Cal. 5th 1057, 1062-63, 217 Cal.Rptr.3d 130, 393 P.3d 905 (2017) ("A claim arises from protected activity when the activity underlies or forms the basis for the claim. Critically, the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech." (citations and quotation marks omitted)). The Slattery Defendants' general advocacy is not at issue here.[3]

The McCroskey Defendants also identify conduct they argue shows their actions were connected to the public interest. They point to two paragraphs in the FAC that allege (1) Defendants communicate with

Diamond owners by email, telephone, webinar, YouTube videos and other means, (2) McCroskey Legal posted a video to its website regarding timeshare services, and (3) McCroskey Legal sent a letter to the Better Business Bureau (BBB) regarding its services. McCroskey Mot. at 5-6. The FAC alleges in relevant part:

> When interfering with Timeshare Contracts, Defendants interacted with Diamond Owners by e-mail, telephone, webinar, YouTube videos, or other remote means....
>
> In a video posted to McCroskeyLegal.com, McCroskey represents: ["]We are a firm that has been retained to help you with your timeshare cancellation. I want to introduce myself and let you know that I and my team are here to 1030 *1030 support you.["] McCroskey has also sent correspondence to the BBB requesting the removal of a complaint filed by a client that McCroskey Legal represented "in regard to the cancellation of his timeshare contract."

FAC ¶¶ 58, 114.

The Court rejects this argument. First, the BBB letter McCroskey sent was not to complain about Diamond's conduct as a business in a way that furthered the public discourse, but rather to request that a client's complaint be "removed and withdrawn immediately." FAC, Ex. 6. In fact, the letter said nothing about Diamond's conduct at all. Id. And, as reproduced above, the excerpt from the McCroskey Legal video included in the FAC does not discuss the wrongful conduct of Diamond or the timeshare developer industry in a way that furthers public discourse.

Second, even though the BBB letter and website video are included in the FAC, Diamond's claims do not "arise from" that conduct. In Park, the California Supreme Court distinguished "between activities that form the basis for a claim and those that merely lead to the liability-creating activity or provide evidentiary support for the claim." 2 Cal. 5th at 1064, 217 Cal. Rptr.3d 130, 393 P.3d 905. Park brought a discrimination claim alleging he was denied tenure because of his Korean national origin. Id. at 1067-68, 217 Cal.Rptr.3d 130, 393 P.3d 905. Park's complaint alleged the school dean made comments to Park that reflected his prejudice and that Park pursued an internal grievance. Id. The school moved to strike Park's suit because the communications that led up to and followed the University's decision to deny Park tenure were protected activities. Id. at 1061, 217 Cal.Rptr.3d 130, 393 P.3d 905. The court held Park's claims did not "arise from" such communications because "[t]he elements of Park's claim ... depend not on the grievance proceeding, any statements, or any specific evaluations of him in the tenure process, but only on the denial of tenure itself and whether the motive for that action was impermissible." Id. at 1068, 217 Cal.Rptr.3d 130, 393 P.3d 905. While "[t]he dean's alleged comments m[ight] supply evidence of animus, ... that d[id] not convert the statements themselves into the basis for liability." Id.

Here, the Lawyer Defendants' at-issue conduct is the exit letters, the advice and counsel they give Diamond Owners, and any coordination with the Exit Company Defendants. While the BBB letter and McCroskey Legal video are mentioned in the FAC, they are not the basis for liability. Diamond is not claiming the Lawyer Defendants are liable because they sent a letter to the BBB and posted a video. Instead, they are linking the Lawyer Defendants to the larger exit scheme through this evidence.[4] See FAC ¶¶ 103-117.

The McCroskey Defendants also identify a letter sent from McCroskey Legal to Diamond regarding 79 Diamond Owners that "itself participates in and furthers the public conversation on timeshare practices (and specifically Diamond's wrongful sales practices)." McCroskey Mot. at 6. The brief letter informs Diamond

that McCroskey seeks to negotiate cancellation or termination of the Owners' Timeshare Contracts "based on the misrepresentations and allegations of fraud claimed by" the Owners. FAC, Ex. 9.

The McCroskey Defendants argue Murray v. Tran, 55 Cal. App. 5th 10, 269 Cal.Rptr.3d 231 (2020),
1031 supports a finding *1031 that the letter furthers the public conversation because the Murray court held that a private conversation could relate to the public interest. McCroskey Mot. at 6. In Murray, the appellate court analyzed five categories of defamatory statements and found one was related to the public interest. 55 Cal. App. 5th at 31-36, 269 Cal. Rptr.3d 231. In all, defendant Tran, a dentist and former partner of Murray's, also a dentist, communicated to others about Murray's level of care as a dentist. Id.

In the single category of communications that the appellate court found was made in the public interest, Tran texted and telephoned a third dentist, Murray's boss, to tell him that Murray's care was substandard. Id. at 34-35, 269 Cal.Rptr.3d 231. The court found Tran's communications seeking to "protect ... patients from `substandard care' ... — made to a current employer — were directly tethered to the issue of public interest (a dentist's competence to perform dental work) and promoted the public conversation on that issue because they were made to a person who had direct connection to and authority over the patient population with whom Dr. Murray was working at the time." Id. at 35, 269 Cal.Rptr.3d 231. The other four categories of communications — which the court found failed under FilmOn's second prong — included communications by Tran to individuals associated with Tran's own practice, Tran's consultant, and a retired dentist. Id. at 31-36, 269 Cal.Rptr.3d 231. The Court found these were internal, private communications that did not further the public discourse.

The McCroskey Defendants allege McCroskey Legal's letter on behalf of 79 Diamond Owners is comparable to the public interest-related communication in Murray because the letter states McCroskey Legal represents Diamond Owners who seek to exit their Timeshare Contracts because of Diamond's misrepresentations and high-pressure sales tactics. McCroskey Mot. at 6-7. The letter from McCroskey Legal addresses a private dispute between the Owners and Diamond and does not involve any third party, let alone a third party with authority over Diamond. This is more like the other four categories of unprotected communications at issue in Murray. As in FilmOn.com, the communications "never entered the public sphere, and the parties never intended [them] to." FilmOn.com, 7 Cal. 5th at 153, 246 Cal.Rptr.3d 591, 439 P.3d 1156.

The Court finds the Lawyer Defendants' conduct from which Diamond's claims arise is not protected speech under the California anti-SLAPP statute.

III. CONCLUSION

Because the Lawyer Defendants have not satisfied their burden of showing that their at-issue conduct falls into one of the four section 425.16(e) categories of protected conduct, the Court DENIES the motions to strike.

IT IS SO ORDERED.

[1] The McCroskey Defendants cite two cases in which state appellate courts held that statements and conduct in arbitration were protected by the anti-SLAPP statute. McCroskey Mot. at 9-10. However, as the McCroskey Defendants themselves note, this was because the arbitration in both cases was "mandated by statute." Id. (citing Philipson & Simon v. Gulsvig, 154 Cal. App. 4th 347, 358, 64 Cal. Rptr.3d 504 (2007) and Mallard v. Progressive Choice Ins. Co., 188 Cal. App. 4th 531, 542, 115 Cal.Rptr.3d 487 (2010)). That is not the case here. See Century 21, 173 Cal. App. 4th at 9, 92 Cal.Rptr.3d 249 ("[U]nlike mandatory fee arbitration, private arbitration is not required by statute.").

[2] The Slattery Defendants also argue they "frequently take on pro bono cases or work for greatly reduced rates in order to assist timeshare owners in need." Slattery Mot. at 13. However, though the Slattery Defendants attach a declaration by Sean Slattery, it contains no information about pro bono work. The Court therefore disregards this argument.

[3] In arguing that the claims arise from protected activity, the Lawyer Defendants identify only their legal representation of Diamond Owners, including their advice and counsel, and the demand letters. Dkt. 402 (Reply) at 2-3.

[4] The Lawyer Defendants appear to acknowledge this. In their Reply, they state the "video demonstrates the Lawyer Defendants' participation in the `exit scheme' which underlies the basis for all of Plaintiffs' claims." Reply at 5. While the video is evidence of participation, it is not the conduct from which Diamond alleges liability arises.