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	3	smccaskill@grsm.com GORDON REES SCULLY MANSUKHAN	TIP		14/2021 at 04:40:00 PM		
	4	101 W. Broadway, Suite 2000 San Diego, CA 92101	1, LL1	By Adriar	rk of the Superior Court na Ive Anzalone,Deputy Clerk		
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, CA	14	SUPERIOR COURT OF CALIFORNIA					
San Diego, CA 92101	15	COUNTY OF SAN DIEGO					
	16	JOSHUA BILLAUER,			00006367-CU-DF-		
	17	Plaintiff,) CTL				
	18	vs.		[Assigned to Hon. Kenneth J. Medel, Dept. C-66]			
	19	OLGA MARCELA ESCOBAR-ECK; and) OPPOSITI	ON TO I	PLAINTIFF AND		
	20	DOES 1 through 1,000,) CROSS-DE) BILLAUEF		NT JOSHUA		
	21	Defendants.) APPLICAT	TON TO	SHORTEN TIME		
	22) ON MOTIO) DEPOSITION		THIRD-PARTY		
	23) WITNESS		TEND DEADLINE		
		AND ALL RELATED ACTIONS.)				
	24		 Hearing Date Hearing Time 				
	25) Complaint F	iled:	February 16, 2021		
	26) Trial Date:		None Set		
	27	-1-					
59700231v		OPPOSITION TO PLAINTIFF AND CROSS-DEFEN TO SHORTEN TIME ON MOTION TO COMPEL DE DEADLINE FOR		RD-PART			

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TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Defendant and Cross-Complainant Marcela Escobar-Eck ("Escobar-Eck") respectfully
submit this Opposition to plaintiff Joshua Billauer ("Plaintiff")'s Ex Parte Application to
Shorten Time on Motion to Compel Third Party Witness and Extend Deadline for Anti-SLAPP
Motion ("Motion").

I. INTRODUCTION

Plaintiff's Motion should be denied as futile, as the Subpoena Plaintiff seeks to enforce
failed to comply with the notice requirements under Code of Civil Procedure (hereinafter
"C.C.P.") Section 1985.6, and is thus invalid.

10 Substantively, the Subpoena cannot be enforced as Plaintiff seeks to force Atlantis Group 11 Land Use Planning ("Atlantis"), a non-party, to determine what legal claims are being asserted 12 by its employee, Ms. Escobar-Eck. Specifically, Plaintiff seeks to force Atlantis to produce 13 testimony and documents regarding the "financial losses suffered by The Atlantis Group as a 14 result of one or more of the allegedly defamatory statements described in that certain 15 crosscomplaint [sic] filed by Olga Marcela Escobar-Eck in San Diego County Superior Court 16 case no. 37-2021-00006367-CU-DF-CTL". (See Subpoena, Motion, Ex. B.) However, Escobar-17 Eck has not even defined her damages yet. As such, there is no way for Atlantis to be able to 18 speak as to what documents or witnesses its employee is claiming as damages. 19 Further, there is no basis for Plaintiff's request to extend the deadline to file an Anti-

SLAPP motion, as the requested discovery from Atlantis goes solely to Ms. Escobar-Eck's asyet-undefined damages. Thus, Defendant respectfully requests this Court deny Plaintiff's
Motion.

II. LEGAL ANALYSIS

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A. Plaintiff's Motion is Futile as the Subpoena is Procedurally Defective

The law does not require a party to participate in futile acts. (*Bollengier v. Doctors Medical Center* (1990) 222 Cal.App.3d 1115, 1131.) For instance, motions for leave to amend a

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28 OPPOSITION TO PLAINTIFF AND CROSS-DEFENDANT JOSHUA BILLAUER'S *EX PARTE* APPLICATION TO SHORTEN TIME ON MOTION TO COMPEL DEPOSITION OF THIRD-PARTY WITNESS AND EXTEND DEADLINE FOR ANTI-SLAPP MOTION

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1 pleading are properly denied where the proposed amendment would be futile. (Royalty Carpet 2 Mills, Inc. v. City of Irvine (2005) 125 Cal.App.4th 1110, 1125.) 3 Here, the Motion is futile because the Subpoena is void, as it failed to provide proper 4 notice to Ms. Escobar-Eck. To wit, along with the Subpoena Plaintiff also served a Notice to Consumer or Employee (the "Notice"). However, the Notice was served on Ms. Escobar-Eck's counsel on July 2, 2021, the same date the Subpoena was served on Atlantis. (See Notice,

attached as **Exhibit 1** to Declaration of Scott McCaskill.) Thus, the Notice violates Code of

Civil Procedure section 1985.6, subd. (b)(3), which requires the Notice be served on the

employee "[a]t least five days prior to service upon the custodian of the employment records . . .

"As such, the Notice is defective and Atlantis has exercised its rights under Code of Civil Procedure section 1985.6, subd. (j) to not produce the requested documents. Thus, Plaintiff seeks to waste this Court's time by expediting a motion to compel a legally unenforceable

subpoena. The Court should deny the Motion on the grounds that the planned motion to compel will be futile.

Atlantis Cannot Comply With the Subpoena

The Motion is further futile as it impermissibly seeks to force Atlantis, a non-party, to define the claims brought by its employee and to determine what facts, witnesses, and documents 18 support its employees' claims. As outlined in Atlantis' objections, the Subpoena seeks to force 19 to produce:

> Each and every **WRITING** that pertains in any way to the basis, nature, and/or extent of Olga Marcela Escobar-Eck's share of any and all financial losses suffered by The Atlantis Group as a result of one or more of the allegedly defamatory statements described in that certain cross-complaint filed by Olga Marcela Escobar-Eck in San Diego County Superior Court case no. 37-2021-00006367-CU-DF-CTL (a copy of which is attached hereto as Exhibit "A").

(Motion, Ex. B.) 25

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OPPOSITION TO PLAINTIFF AND CROSS-DEFENDANT JOSHUA BILLAUER'S EX PARTE APPLICATION TO SHORTEN TIME ON MOTION TO COMPEL DEPOSITION OF THIRD-PARTY WITNESS AND EXTEND DEADLINE FOR ANTI-SLAPP MOTION

1	This demand fails to identify the requested documents with reasonable particularity. To			
2	wit, this demand would force Atlantis to speculate at what "financial losses" its employee, Ms.			
3	Escobar-Eck, is claiming resulted from Plaintiff's actions. Atlantis is not a party to the lawsuit			
4	between plaintiff and Ms. Escobar-Eck and thus is not privy to what losses Ms. Escobar-Eck is			
5	claiming as damages in her cross-complaint. As such, this demand calls for Atlantis to make			
6	legal conclusions as to what its employee is claiming as damages.			
7	Plaintiff's categories of Examination contained in the Subpoena are similarly			
8	objectionable as outlined below:			
9	1. <u>Category 1</u>			
10	Plaintiff demands Atlantis produce a designee to testify as to:			
11	The basis, nature, and/or extent of Olga Marcela Escobar-Eck's share of			
12	any and all financial losses suffered by The Atlantis Group as a result of one or more of the allegedly defamatory statements described in that			
13	certain cross-complaint filed by Olga Marcela Escobar-Eck in San Diego County Superior Court case no. 37-2021-00006367-CU-DF-CTL (a copy			
14	of which is attached hereto as Exhibit "A").			
15	(Motion, Ex. B.)			
16	This category is impermissibly vague as it does not describe the "financial losses suffered			
17	by The Atlantis Group as a result of one or more of the allegedly defamatory statements". The			
18	category thus fails to describe the area of testimony with reasonable particularity in violation of			
19	Code of Civil Procedure § 2025.230. Moreover, this category would force Atlantis to speculate			
20	as to what financial losses Ms. Escobar-Eck is claiming resulted from plaintiff's actions.			
21	Atlantis is not a party to the lawsuit between plaintiff and Ms. Escobar-Eck and thus is not privy			
22	to what losses Ms. Escobar-Eck is claiming as damages in her cross-complaint. As such, this			
23	category calls for Atlantis to make legal conclusions as to what its employee is claiming as			
24	damages.			
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28	OPPOSITION TO PLAINTIFF AND CROSS-DEFENDANT JOSHUA BILLAUER'S EX PARTE APPLICATION TO SHORTEN TIME ON MOTION TO COMPEL DEPOSITION OF THIRD-PARTY WITNESS AND EXTEND DEADLINE FOR ANTI-SLAPP MOTION			

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1	2. <u>Category 2</u>					
2	Plaintiff demands Atlantis produce a designee to testify as to:					
3	The name, last known mailing address(es), last known business					
4	address(es), last known telephone number(s), and last known e-mail address(es) of each and every natural person with any information about					
5	the basis, nature, and/or extent of Olga Marcela Escobar-Eck's share of any and all financial losses suffered by The Atlantis Group as a result of					
6	one or more of the allegedly defamatory statements described in that certain cross-complaint filed by Olga Marcela Escobar-Eck in San Diego					
7	County Superior Court case no. 37-2021-00006367-CU-DF-CTL (a copy of which is attached hereto as Exhibit "A").					
8	(Motion, Ex. B.)					
9	As discussed above, Atlantis in unable to speculate as to what legal position its employee					
10	is taking as to her claimed damages. As such, this category is impermissibly vague as it fails to					
11	describe the area of testimony with reasonable particularity in violation of Code of Civil					
12	Procedure § 2025.230 and calls for an improper legal conclusion. Moreover, Atlantis is not					
13	required to produce a witness who has memorized all contact information for an undefined list of					
14	people.					
15	3. <u>Category 3</u>					
16	Plaintiff demands Atlantis produce a designee to testify as to:					
17	The existence, origin, authenticity, alteration, and chain of custody of each and every WRITING that pertains in any way to the basis, nature, and/or					
18	extent of Olga Marcela Escobar-Eck's share of any and all financial losses suffered by The Atlantis Group as a result of one or more of the allegedly					
19 20	defamatory statements described in that certain cross-complaint filed by Olga Marcela Escobar Eck in San Diego County Superior Court case no					
20 21	37-2021-00006367-CU-DF-CTL (a copy of which is attached hereto as Exhibit "A").					
22						
22	(Motion, Ex. B.)					
24	As discussed above, Atlantis is unable to speculate as to what "financial losses" Ms.					
25	Escobar-Eck is claiming resulted from plaintiff's conduct. Moreover, this category is					
26	impermissibly vague, as it demands Atlantis produce a witness to testify as to unidentified					
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28	-5- OPPOSITION TO PLAINTIFF AND CROSS-DEFENDANT JOSHUA BILLAUER'S <i>EX PARTE</i> APPLICATION TO SHORTEN TIME ON MOTION TO COMPEL DEPOSITION OF THIRD-PARTY WITNESS AND EXTEND DEADLINE FOR ANTI-SLAPP MOTION					

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documents. The category thus fails to describe the area of testimony with reasonable
 particularity in violation of Code of Civil Procedure § 2025.230.

As outlined above, the Subpoena is overly broad, vague, and calls for Atlantis to make
legal conclusions it cannot make. Plaintiff has failed to provide any authority that a non-party
can be forced to draw such legal conclusions regarding the claims made by a party, despite being
asked to provide such authority prior to bringing the Motion. (See Correspondence, attached as **Exhibit 2** to McCaskill Dec.)¹

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C.

Plaintiff Fails to Identify Any Basis to Extend Anti-SLAPP Deadline

9 Plaintiff provides no basis for his requested extension of the deadline to file an Anti10 SLAPP motion. Indeed, plaintiff failed to raise this issue at all in the meet and confer
11 correspondence and thus failed to make a serious attempt to obtain "an informal resolution of
12 each issue" as required by the Discovery Act. (§ 2025, subd. (o); *DeBlase v. Superior Court*13 (1996) 41 Cal.App.4th 1279, 1284, 49 Cal.Rptr.2d 229.) This alone is grounds to deny
14 Plaintiff's requested extension.

15 Moreover, there is no nexus between the deposition Plaintiff is seeking and any Anti-16 SLAPP motion he may wish to file. The purpose of the Anti-SLAPP law is to strike "cause[s] of 17 action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in 18 19 connection with a public issue. ... " (C.C.P. § 425.16, subd. (b)(1).) In ruling on a motion under 20 Section 425.16, the trial court engages in a two-step process. First, "the defendant must establish 21 that the challenged claim arises from activity protected by section 425.16." (Baral v. Schnitt 22 (2016) 1 Cal.5th 376, 384, (*Baral*).) Second, "[i]f the defendant makes the required showing, the 23 burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of 24 success." (Id.)

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27 $||^{1}$ This email was not included as an Exhibit to the Motion.

28 OPPOSITION TO PLAINTIFF AND CROSS-DEFENDANT JOSHUA BILLAUER'S *EX PARTE* APPLICATION TO SHORTEN TIME ON MOTION TO COMPEL DEPOSITION OF THIRD-PARTY WITNESS AND EXTEND DEADLINE FOR ANTI-SLAPP MOTION

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1 Here, Plaintiff seeks to depose Atlantis as to the facts, witnesses and documents 2 underlying Cross-Complainant's as-yet-undefined damages claims. Nothing about that issue has 3 any nexus to whether the claim arises from protected activity. Moreover, the Cross-Complaint 4 alleges libel per se, for which damages are presumed. (Barnes-Hind, Inc. v. Superior Court (1986) 181 Cal.App.3d 377, 382.) Thus, the Subpoena does not seek information relevant to Cross-Complainant's probability of success. As such, there is no basis for Plaintiff's request to extend the deadline to file an Anti-SLAPP motion. **CONCLUSION** III. As outlined above, Plaintiff's Motion is futile as it seeks to expedite the hearing to enforce a defective subpoena. Further, the Subpoena cannot be enforced as it seeks to force a non-party to define the claims of its party employee. Finally, there is no basis for Plaintiff's request to extend the deadline to file an Anti-SLAPP motion. As such, the Motion should be denied. Respectfully submitted, Dated: July 14, 2021 GORDON REES SCULLY MANSUKHANI, LLP By: Craig J. Mariam 18 Scott W. McCaskill Attorneys for Defendant 19 MARCELA ESCOBAR-ECK 20 21 AUSTIN LEGAL GROUP, APC 22 23 By: /s/ Tamara Leetham Gina Austin/Tamara Leetham 24 Attorneys for Cross-Complainant MARCELA ESCOBAR-ECK

-7-OPPOSITION TO PLAINTIFF AND CROSS-DEFENDANT JOSHUA BILLAUER'S EX PARTE APPLICATION TO SHORTEN TIME ON MOTION TO COMPEL DEPOSITION OF THIRD-PARTY WITNESS AND EXTEND DEADLINE FOR ANTI-SLAPP MOTION