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9

10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

12

13 CORY SPENCER, an individual;
 14 DIANA MILENA REED, an
 individual; and COASTAL
 PROTECTION RANGERS, INC., a
 15 California non-profit public benefit
 corporation,

16 Plaintiffs,

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vs.

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19 LUNADA BAY BOYS; THE
 INDIVIDUAL MEMBERS OF THE
 LUNADA BAY BOYS, including but
 20 not limited to SANG LEE, BRANT
 BLAKEMAN, ALAN JOHNSTON
 21 AKA JALIAN JOHNSTON,
 MICHAEL RAE PAPAYANS,
 22 ANGELO FERRARA, FRANK
 FERRARA, CHARLIE FERRARA;
 23 and N.F. ; CITY OF PALOS
 VERDES ESTATES; CHIEF OF
 24 POLICE JEFF KEPLEY, in his
 representative capacity; and DOES 1-
 25 10,

26 Defendants.

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CASE NO. 2:16-cv-02129-SJO (RAOx)

Assigned District Judge Hon. S. James Otero, Courtroom 10C

Discovery Assigned to Magistrate Judge Hon. Rozella A. Oliver

**DEFENDANT SANG LEE' S
 NOTICE OF MOTION AND
 MOTION FOR PARTIAL
 SUMMARY JUDGMENT**

[Filed concurrently with Memorandum of Points and Authorities; Separate Statement of Uncontroverted Facts/Evidence; Declaration of Tera A. Lutz; Notices of Lodging; [Proposed] Statement of Uncontroverted Facts/Evidence; and [Proposed] Order lodged herewith]

Date: August 21, 2017
 Time: 10:00 a.m.
 Ctrm: 10C

Complaint filed: March 29, 2016
 Trial Date: November 7, 2017

1 **TO THE COURT AND ALL PARTIES AND THEIR ATTORNEYS OF**
2 **RECORD:**

3 **PLEASE TAKE NOTICE** that on August 21, 2017, at 10:00 a.m., in
4 Department 10C of the United States District Court, located at 312 North Spring
5 Street, Los Angeles, California 90012, Defendant SANG LEE (“Defendant”),
6 pursuant to Federal Rule of Civil Procedure 56, will request the Court grant
7 Defendant’s Motion for Partial Summary Judgment on the Complaint of Plaintiffs
8 CORY SPENCER, DIANA MILENA REED, and COASTAL PROTECTION
9 RANGERS, INC. (collectively “Plaintiffs”) as follows:

10 Summary Judgment as to the First Cause of Action for violation of the Bane
11 Act (California Civil Code §52.1(b)) on the basis that plaintiffs were not prohibited
12 from exercising their right to recreate in Lunada Bay.

13 Summary Judgment as to the Second Cause of Action for Public Nuisance
14 based on a failure of evidence.

15 Summary Judgment as to the conspiracy claims alleged in the First and
16 Second Causes of Action based on a failure of evidence.

17 Summary Judgment on the Sixth Cause of Action for Assault on the basis that
18 it is undisputed that Sang Lee did not do anything to put plaintiffs in apprehension
19 of immediate injury.

20 Summary Judgment on the Seventh Cause of Action for Battery on the basis
21 that it is undisputed that Sang Lee did not touch plaintiffs.

22 This would leave only the Eighth Cause of Action for negligence against
23 Sang Lee.

24 This Motion is based on this Notice, the Memorandum of Points and
25 Authorities, all exhibits, the Declaration of Tera A. Lutz, the proposed Statement of
26 Uncontroverted Facts, the Court’s file in this action, all matters of which this Court
27 must or may take judicial notice and on such further evidence and argument which
28 may be presented at the hearing on this matter.

1 This Motion is made following the conference of counsel pursuant to
2 U.S.D.C. Local Rule 7-3 which took place on June 19, 2017. [Declaration of Tera
3 A. Lutz, ¶ 6].
4

5 DATED: July 21, 2017

LEWIS BRISBOIS BISGAARD & SMITH LLP

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7
8 By: /s/ Tera A. Lutz
9 Dana Alden Fox
10 Eric Y. Kizirian
11 Edward E. Ward
12 Tera A. Lutz
13 Attorneys for Defendant SANG LEE
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs allege they have been prohibited from enjoying a small stretch of beach in Southern California known as Lunada Bay. In their complaint plaintiffs allege Defendant Sang Lee (“Lee”) has engaged in threats, intimidation, assault, and battery to prevent them from enjoying the surf and sand at Lunada Bay. However, plaintiffs have admitted that Lee has never threatened or physically harmed them. In fact, none of the plaintiffs have interacted with Lee. Therefore, plaintiffs’ claims for violation of the Bane Act, public nuisance, civil conspiracy, assault, and battery should be dismissed.

II. FACTUAL SUMMARY

A. Factual Events Specific to Plaintiff Cory Spencer

Before January 2016, Cory Spencer (“Spencer”) visited Lunada Bay on at least eight to ten occasions. [Separate Statement of Uncontroverted Facts (“SSUF”) 1]. Since January 29, 2016, Spencer has visited Lunada Bay on at least three to five occasions. [SSUF 2].

Spencer has only seen Lee on one occasion. [SSUF 3]. During a visit to Lunada Bay on January 29, 2016, Spencer saw Lee communicating with Christopher Taloa. [SSUF 4]. Lee has never spoken to Spencer. [SSUF 5]. Lee has never threatened Spencer. [SSUF 6]. Lee has never made any physical contact with Spencer [SSUF 7].

Spencer has never seen Lee injure anyone at Luanda Bay or engage in the destruction of anyone’s property. [SSUF 8].

B. Factual Events Specific to Plaintiff Diana Reed

Plaintiff Diana Milena Reed (“Reed”) has visited Lunada Bay on at least four occasions- January 6, 2016; January 29, 2016; February 5, 2016; and February 13, 2016. [SSUF 9]. Reed has never had any interaction with Lee and did not see him during any of her visits to Lunada Bay. [SSUF 10].

1 **C. Factual Events Specific to Plaintiff Coastal Protection Rangers**

2 California Coastal Protection Rangers, Inc. (“CPR”) makes no specific
3 allegations nor does it provide any facts to support a claim for violation of the Bane
4 Act, public nuisance, conspiracy, battery, or assault.

5 **III. PROCEDURAL HISTORY**

6 Plaintiffs’ class action complaint was filed on March 29, 2016. [Docket
7 Number 1]. The complaint alleges six causes of action against Defendant Lee,
8 including violation of the Bane Act, Public Nuisance, violations of various
9 provisions of the California Coastal Act, assault, battery, and negligence. [Docket
10 Number 1]. On July 11, 2016, this Court issued an Order granting a Motion to
11 Dismiss the California Coastal Act claims. [Docket Number 84].

12 On February 21, 2017, this Court issued an Order denying Plaintiffs’ Motion
13 for Class Action Certification. [Docket No. 225]. On or about March 7, 2017,
14 plaintiffs filed a Petition for Permission to Appeal with the United States Court of
15 Appeals for the Ninth Circuit under Federal Rule 23(f). The Petition was denied.
16 [Lutz Decl., ¶ 5]. Trial in this matter is set for November 7, 2017.

17 **IV. STANDARD FOR A MOTION FOR SUMMARY JUDGMENT**

18 A party moving for summary judgment has the initial burden to establish
19 there is no genuine issue of material fact and the moving party is entitled to
20 judgment as a matter of law. *F.R.Civ.P.*, Rule 56(c); *British Airways Board v.*
21 *Boeing Co.*, 585 F.2d 946, 951 (9th Cir. 1978). The moving party is not required to
22 disprove matters upon which the non-moving party will have the burden of proof at
23 trial; indeed, the moving party need not produce any evidence at all on those issues.
24 *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The moving party’s burden is met
25 simply by “‘showing’ – that is, pointing out to the District Court – that there is an
26 absence of evidence to support the non-moving party’s case.” *Id.* at 325.

27 The opposing party’s burden is to show a triable issue of fact as to matters
28 upon which he will bear the burden of proof at trial. “A complete failure of proof

1 concerning an essential element of the non-moving party's case necessarily renders
2 all other facts immaterial." *Celotex*, 477 U.S. at 323. Summary judgment requires
3 facts, not simply unsupported denials or rank speculation. *Poppell v. City of San*
4 *Diego* 149 F.3d 951, 954 (9th Cir. 1998). "Where the nonmoving party will bear the
5 burden of proof at trial on a dispositive issue, Rule 56(e) requires the nonmoving
6 party to go beyond the pleadings and by her own affidavits, or by the 'depositions,
7 answers to interrogatories and admissions on file,' designate 'specific facts showing
8 that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-
9 324 (1986). The mere existence of a scintilla of evidence does not satisfy this
10 standard; rather, the plaintiff can meet it only with such admissible evidence that a
11 reasonable trier of fact could return a verdict in his or her favor. *Anderson v. Liberty*
12 *Lobby*, 477 U.S. 242, 252 (1986).

13 V. **THERE IS NO GENUINE, MATERIAL FACTUAL DISPUTE AS TO**
14 **THE FIRST CAUSE OF ACTION FOR VIOLATION OF THE BANE**
15 **ACT**

16 "California's Bane Act creates a cause of action when a defendant interferes
17 by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation,
18 or coercion, with the exercise or enjoyment of rights secured by the Constitution or
19 laws of the United States, or of the rights secured by the Constitution or laws of
20 California." (*Gant v. County of L.A.* (9th Cir. 2014) 772 F.3d 608, 623).

21 To prevail on a Bane Act claim plaintiffs must make two showings: "(1)
22 defendants interfered with the plaintiffs' constitutional or statutory rights; and (2)
23 that interference was accompanied by actual or attempted threats, intimidation, or
24 coercion. Only if Plaintiffs can first establish that Defendants violated a
25 constitutional or statutory right can the Court consider whether such interference
26 was the product of threats, intimidation, or coercion." (*Campbell v. Feld Entm't,*
27 *Inc.*(N.D. Cal. 2014) 75 F. Supp. 3d 1193, 1211)

28 ///

1 **A. Sang Lee Did Not Interfere with Plaintiffs’ Constitutional or**
2 **Statutory Right**

3 Plaintiffs allege that Defendant has interfered with plaintiffs’ “state and
4 federal rights to recreate in Lunada Bay.” (Docket No. 1, ¶50). Plaintiffs, however,
5 cite no actual statutory or constitutional provision in support of this claim. Nor do
6 plaintiffs cite any authority to suggest that Bane Act liability may be premised on a
7 violation of a person’s right to use the public beaches.

8 Nevertheless, plaintiffs right to recreate at Lunada Bay was not been
9 interfered with because both Cory Spencer and Diana Reed have recreated at
10 Lunada Bay on several occasions. There is no evidence to suggest that CPR, as an
11 entity, has the ability to recreate at Lunada Bay.

12 **1. Plaintiff Cory Spencer**

13 Spencer’s constitutional right to recreate at Lunada Bay has not been violated
14 because Spencer has visited Lunada Bay at least thirteen times. [SSUF 1] [SSUF 2].
15 Spencer has also surfed and recreated at Lunada Bay in January and February 2016,
16 as alleged in his complaint. (Docket Number 1, ¶21). Clearly Spencer’s right to
17 recreate at Luanda Bay has not been impeded because he has successfully done so
18 on over a dozen occasions. There is no evidence to suggest that Spencer was refused
19 access to Lunada Bay on any of these visits.

20 **2. Plaintiff Diana Reed**

21 Reed visited Lunada Bay on January 6, 2016; January 29, 2016; February 5,
22 2016; and February 13, 2016. [SSUF 9].

23 Similar to Spencer, Reed’s right to recreate at Lunada Bay has not been
24 interfered with because she has clearly been to Lunada Bay on numerous occasions.

25 **3. Plaintiff Coastal Protection Rangers**

26 CPR makes no specific allegations nor does it provide any facts to support a
27 claim for violation of the Bane Act. [Docket Number 1]. Because CPR is an entity it
28 is unclear how CPR could have been deprived of its constitutional right to recreate.

1 There are also no facts to suggest that CPR has attempted to recreate at Lunada Bay,
2 therefore no interference has occurred.

3 **B. Sang Lee Did Not Threaten, Intimidate, or Coerce Plaintiffs**

4 Even if the court determines that plaintiffs' right to recreate was interfered
5 with, even though evidence suggests it was not, it is undisputed that Lee did not
6 threaten, intimidate, or coerce plaintiffs.

7 **1. Plaintiff Cory Spencer**

8 Spencer has seen Lee on one occasion at Lunada Bay. [SSUF 3]. Spencer
9 admits that Lee did not speak to him, did not threaten him, and did not make any
10 physical contact with him. [SSUF 5] [SSUF 6] [SSUF 7].

11 **2. Plaintiff Diana Reed**

12 Reed admits that she has never seen Lee at Lunada Bay and has never had any
13 interaction with Lee. [SSUF 10]. If Reed has never seen Lee at Lunada Bay and has
14 never had any interactions with him, it is impossible for him to have threatened,
15 intimidated, or coerced her from being at Lunada Bay.

16 **3. Plaintiff Coastal Protection Rangers**

17 Again, CPR makes no specific allegations against Lee and it does not provide
18 any facts to support the claim that Lee has threatened, intimidated, or coerced the
19 entity. There is no evidence to suggest that Lee has had any interaction with CPR.

20 **VI. THERE IS NO GENUINE, MATERIAL FACTUAL DISPUTE AS TO**
21 **THE SECOND CAUSE OF ACTION FOR PUBLIC NUISANCE**

22 Plaintiff brings a cause of action for public nuisance under California Civil
23 Code §§3479 and 3480, as well as public nuisance per se pursuant to the City of
24 Palos Verdes Estates Municipal Code ("PVE Code") §8.48.015.

25 **A. Public Nuisance under California Civil Code §§3479 and 3480**

26 "A nuisance affecting an entire community or neighborhood, or any
27 considerable number of persons is a public nuisance." (*Castaic Lake Water Agency*
28 *v. Whittaker Corp.* (C.D. Cal. 2003) 272 F.Supp.2d 1053, 1070). "California law

1 defines a nuisance, in part, as anything which is injurious to health or is indecent or
2 offensive to the senses, or an obstruction of the free use of property, so as to
3 interfere with the comfortable enjoyment of life or property.” (*Coppola v. Smith*
4 (E.D.Cal. 2013) 935 F.Supp.2d 993, 1017).

5 “Actions to abate a public nuisance may be maintained either by a public
6 body authorized by law or by a private party who has been specially injured by the
7 nuisance.” (*Castaic Lake Water Agency v. Whittaker Corp.* (C.D. Cal. 2003) 272
8 F.Supp.2d 1053, 1070). California Civil Code §3493 provides that “a private person
9 may maintain an action for a public nuisance, if it is specially injurious to himself,
10 but not otherwise. “California courts generally have limited the group of plaintiffs
11 with standing to sue on a public nuisance theory to plaintiffs who can show special
12 injury to himself of a character different in kind-not merely in degree- from that
13 suffered by the general public. (*Ileto v. Glock In.* (9th Cir. 2003) 349 F.3d 1191,
14 1211).

15 Since neither Reed nor CPR have interacted with or observed Lee at Lunada
16 Bay, there are no facts to prove either plaintiffs were caused a substantial harm
17 rising to the level of a public nuisance.

18 In addition, while Spencer has observed Lee at Lunada Bay on one occasion,
19 he has never interacted with Lee. [SSUF 3]. Lee did not speak to Spencer and did
20 not make any physical contact with Spencer. [SSUF 5] [SSUF 7]. Further, Spencer
21 did not observe Lee cause any injury to anyone else. [SSUF 8].

22 None of the plaintiffs have facts to support a public nuisance claim because
23 none of the plaintiffs were substantially harmed by Lee.

24 **B. Public Nuisance under PVE Code §8.48.015**

25 Plaintiffs allege the following violations constitute a public nuisance under
26 the PVE Code §8.48.015: Smoking in undeveloped public places (§8.56.020);
27 erecting, placing, constructing, establishing, or maintaining any structure or object
28 on public property without a permit (§12.04.020); making or causing to be made any

1 excavation, cut, or fill in any public place in the city without a permit (§12.12.020);
2 violating city rules governing use and enjoyment by the public of any park or
3 grounds (§12.24.020); disorderly conduct (§12.24.100); violating building codes
4 (§15.08.130); failure to obtain a coastal development permit (§19.020.030).

5 There is no evidence to suggest that Lee has violated any of the
6 aforementioned code sections or engaged in the unlawful behavior outlined therein.

7 **VII. THERE IS NO GENUINE, MATERIAL FACTUAL DISPUTE AS TO**
8 **CONSPIRACY CLAIM**

9 Civil conspiracy is not an independent tort, rather it is a legal doctrine that
10 imposes liability on persons who, although not actually committing a tort
11 themselves, share with the immediate tortfeasors a common plan or design in its
12 perpetration. (*Idema v. Dreamworks, Inc.* (C.D.Cal. 2001) 162 F.Supp.2d 1129,
13 1196-1197).

14 “Under California law, a conspiracy is an agreement entered into between two
15 or more persons with the specific intent to agree to commit a specified crime, with
16 the further specific intent to commit that crime, followed by an overt act committed
17 in the state by one (or more) of the parties for the purpose of accomplishing the
18 object of the agreement.” (*United States v. Fernandez* (9th Cir. 2004) 388 F.3d 1199,
19 1225).

20 California law makes clear, however, that knowledge alone of tortious
21 conduct is insufficient to prove a conspiracy agreement. Actual knowledge of the
22 planned tort, without more, is insufficient to serve as the basis for a conspiracy
23 claim. Knowledge of the planned tort must be combined with intent to aid in its
24 commission. (*Sebastian Int’l, Inc. v. Russolillo* (C.D.Cal 2001) 162 F.Supp.2d 1198,
25 1207).

26 Plaintiffs have failed to provide any evidence suggesting that Lee agreed to
27 commit a crime. Plaintiffs are likely to argue that Lee engaged in communication
28 with co-defendants via email, text, and phone calls, however, communication alone

1 does not prove Lee’s intent to aid in the commission of a crime. There is no
2 evidence to suggest these communications were in furtherance of an overt act. Just
3 because one person emails another or calls another does not establish an intent to
4 commit a crime. None of the communication between Lee and the other co-
5 defendants establishes an agreement or actual knowledge to commit a planned tort.
6 These communications are simply emails, text messages, and phone calls exchanged
7 between friends.

8 **VIII. THERE IS NO GENUINE, MATERIAL FACTUAL DISPUTE AS TO**
9 **THE SIXTH CAUSE OF ACTION FOR ASSAULT**

10 Assault is the unlawful attempt, coupled with a present ability, to commit a
11 violent injury on the person of another. (*Tekle v. United States* (9th Cir. 2007) 511
12 F.3d 839, 855). “Harmful or offensive contact, intentionally done, is the essence of
13 battery, while apprehension of that contact is the basis of assault.” *Id.* “To establish
14 civil assault, a plaintiff would need to establish that (1) defendants threatened to
15 touch him in a harmful or offensive manner; (2) it reasonably appeared to him that
16 they were about to carry out the threat; (3) he did not consent to the conduct; (4) he
17 was harmed; and (5) the defendants’ conduct was a substantial factor in causing the
18 harm.” *Id.*

19 **A. Plaintiff Cory Spencer**

20 Spencer has only seen Lee on one occasion at Lunada Bay. [SSUF 3].
21 Spencer admits that he never spoken to Lee and that Lee has never threatened him.
22 [SSUF 5] [SSUF 6]. Spencer admits that Lee did not make any physical contact with
23 him. [SSUF 7].

24 Because Spencer himself admits that Lee never threatened to physically touch
25 him, there are no facts to suggest that Lee committed assault against Spencer.

26 **B. Plaintiff Diana Reed**

27 Reed has never had any interaction with Lee. [SSUF 10]. Reed has never seen
28 Lee at Lunada Bay. [SSUF 10]

1 Since Reed has never interacted with Lee and has never even seen Lee at
2 Lunada Bay, there are no facts to suggest that Lee committed assault against Reed.

3 **C. Plaintiff CPR**

4 As an entity, it is entirely unclear how CPR intends to support its claim for
5 assault. There are no facts to suggest that Lee touched CPR in a harmful or offensive
6 manner or that CPR is even capable of being apprehensive of contact. It is
7 physically impossible for Lee to have touched or put fear into an entity.

8 **IX. THERE IS NO GENUINE, MATERIAL FACTUAL DISPUTE AS TO**
9 **THE SEVENTH CAUSE OF ACTION FOR BATTERY**

10 “A battery is any willful and unlawful use of force or violence upon the
11 person of another.” (*Tekle v. United States* (9th Cir. 2007) 511 F.3d 839, 855). The
12 elements of a battery claim in California are that (1) the defendant intentionally did
13 an act that resulted in harmful or offensive contact with the plaintiff’s person, (2) the
14 plaintiff did not consent to that contact, and (3) the contact caused injury, damage,
15 loss or harm to the plaintiff. *Id.*

16 **A. Plaintiff Cory Spencer**

17 Spencer admits that Lee has never made physical contact with him. [SSUF 7].
18 Because Lee has never made physical contact with Spencer, there are no facts to
19 suggest that Lee committed battery.

20 **B. Plaintiff Diana Reed**

21 Reed also admits that Lee has never made physical contact with her. [SSUF
22 10]. Because Lee has never made physical contact with Reed, there are no facts to
23 suggest that Lee committed battery.

24 **C. Plaintiff CPR**

25 As an entity, it is entirely unclear how CPR intends to support its claim for
26 battery. There are no facts to suggest that Lee ever physically touched CPR.

27 **X. THERE IS NO LEGITIMATE CLAIM FOR INJUNCTIVE RELIEF**

28 Plaintiffs allege that they are entitled to injunctive relief under California

