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Striking Out the Plaintiff Using The Anti-SLAPP Statute, Code of Civil Procedure Section 425.16; What, Who, Where, When, Why and How

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1. The Wheels Of Justice Can Grind So Slowly You Could Scream….

So...your city has been sued. The case is baseless and an attempt to shake you down for a handsome settlement. You dread the hefty costs of defense. You look wearily down the long and tortuous road, filled with demurrers, endless leaves to amend, intrusive and improper discovery, motions for protective orders and to compel meaningful answers, depositions of slippery, evasive witnesses, unsuccessful motions for summary adjudication or judgment and finally, heaven forbid, a trial. "Surely," you say to yourself, "there's got to be a better way!" And, there is.

Enter the anti-SLAPP statute,[1] Code of Civil Procedure section 425.16![2]

2. What Does The Anti-SLAPP Statute Provide?

a. A Special Motion To Strike

The key provision is found in subsection (b) of Section 425.16. It provides:

> [1] A *cause of 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 connection with a public issue *shall be subject to a special motion to strike, unless* the court determines that the plaintiff has established that [2] *there is a probability that the plaintiff will prevail on the claim.*

(Emphasis and numbers added.)

b. Two Prongs

Thus, the statute has two prongs: 1) whether the cause of action "arises from" protected activity; and if so, 2) whether plaintiff failed to establish a probability of success. If the answer is "yes" to both prongs, the special motion to strike **must** be granted.

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[1] SLAPP is an acronym for a Strategic Lawsuit Against Public Participation. Code of Civil Procedure section 425.16 is known as the anti-SLAPP statute. (See *Briggs v. Eden Council for Hope and Opportunity* (1999) 219 Cal.4th 1106, 1109 fn 1.) All statutory references are to the Code of Civil Procedure unless otherwise indicated.

[2] Section 425.16.(a) states:

> The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly

c. The Statutorily Protected Activity Is Defined By Section 425.16(e)

The uninitiated reader might be misled into believing that the statute only applies to constitutionally protected activity because it uses constitutional nomenclature in describing the activity at the heart of the anti-SLAPP statute - "act in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." That is, actually, not the case.

These seeming constitutional terms are statutorily defined in a much broader and practical way, especially when it comes to proceedings in which public officials and entities may be involved, as defined in subsections (e)(1) and (e)(2) described next.

d. Four Non-Exclusive Categories Of Conduct Are Protected In Section 425.16(e)

Note that the definitions of protected activity in Section 425.16(e) are not exclusive. At minimum, however, the statute includes the following areas of protected activity delineated in subsections (e)(1) through (e)(4):

> As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" *includes*: (1) *any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding* authorized by law*,* (2) *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*,* (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other 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.
>
> (Emphasis added.)

In *Briggs v. Eden Council for Hope and Opportunity*, *supra*, 19 Cal.4th at p. 1116-17, the California Supreme Court explained that subdivisions (e)(1) through (4) of section 425.16 operate independently of each other and are not subject to any

further limitation derived from subdivision (b)(1) of section 425.16. "[A]t least as to acts covered by clauses one and two of section 425.16, subdivision (e), the statute requires simply *any* writing or statement made in, or in connection with an issue under consideration or review by, the specified proceeding or body." (*Briggs*, *supra*, 19 Cal.4th at 1116-17 [emphasis in original], citing *Braun v. Chronicle Publishing Co*. (1997) 52 Cal.App.4th 1036, 1046-47.) No showing has to be made that the issue is a public issue. (*Id*.)

Later, in *Navellier v. Sletten* (2002) 29 Cal.4th 82, 94-95, the Supreme Court held that the moving party need make no showing that the defendant's activity challenged in the SLAPP suit was protected by the First Amendment, noting that in its decision in *Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, the court had previously determined that the moving party need not establish that the plaintiff intended to chill the exercise of constitutional rights. (*Ibid.*)

"Mixed" causes of action are subject to an anti-SLAPP motion so long as "'at least one of the underlying acts is protected conduct.'" (*Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1551.) When a cause of action alleges multiple, independent bases for relief, the anti-SLAPP statute applies if any of the alleged bases arises from protected conduct. (*Ibid*.; *Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1187 (*Wallace*).)

e. First "Arises From" Prong Turns On What Activity Is Challenged - Burden Is On The Moving Party To Show It Is Protected Under The Anti-SLAPP Statute

"The moving defendant's burden is to demonstrate that the act or acts *of which the plaintiff complains* were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' *as defined in the statute*." (*Equilon*, *supra*, 29 Cal.4th at p. 67.)(Emphasis added.) "The anti-SLAPP statute's definitional focus is not the *form* of the plaintiff's cause of action but, rather, the defendant's activity that gives rise to his or her asserted liability – and whether that activity constituted protected speech or petitioning." (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 92.)

f. To Determine The Special Motion To Strike, The Court Looks At The Pleadings And Supporting Opposing Affidavits

Subdivision (b)(2) of section 425.16 provides that:

> In making its determination, [on the special motion to strike] the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

g. Second Prong – Probability Of Success – Plaintiff's Burden Must Be Established With Competent Admissible Evidence

Once a defendant demonstrates that the complaint's claims fall within section 425.16's purview, the complaint must be stricken unless the plaintiff establishes a reasonable probability of prevailing on the merits. (*DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 568.)

The courts apply a "summary-judgment-like" test (*Taus v. Loftus* (2007) 40 Cal.4th 683, 714.) Plaintiff must produce "sufficient admissible evidence to establish the probability of prevailing on the merits of every cause of action asserted." (*Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 721.) Plaintiff must make that showing by competent, admissible evidence (*Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 11; see also *Morrow v. Los Angeles Unified School Dist*. (2007) 149 Cal.App.4th 1424, 1435.)

The evidence put forward at this stage must be admissible; even allegations in a verified complaint are insufficient. (*Wallace*, *supra*, 196 Cal.App.4th at p. 1212.) "In addition to considering the substantive merits of the plaintiff's claims," the court "must also consider all available defenses to the claims . . . ." (*No Doubt v. Activision Publishing, Inc*. (2011) 192 Cal.App.4th 1018, 1026.)

For purposes of the Anti-SLAPP statute, '"admissible evidence' . . . is evidence which, by its nature, is capable of being admitted at trial, i.e., evidence which is competent, relevant, and not barred by a substantive [evidentiary] rule." (*Fashion 21 et al v. Coalition for Humane Immigrant Rights of Los Angeles* (2004) 117 Cal.App.4th 1138, 1147.) Evidence that is barred by the hearsay rule, or because it is speculative, not based on personal knowledge or consists of impermissible opinion testimony, "cannot be used by the plaintiff to establish a

probability of success on the merits because it could never be introduced at trial." (*Id* (emphasis added); see also *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 829-30, [hearsay inadmissible], overruled on other grounds by *Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 68 fn.5; *Tuchscher Devel. Enterprises, Inc. v. San Diego Unified Port Dist*. (2003) 106 Cal.App.4th 1219, 1238 [opinion testimony]; *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1497 [court looks to evidence that would be presented at trial]; *Morrow, supra,* 149 Cal.App.4th at 1444-1446 [numerous statements excluded as inadmissible due to improper lay opinions and legal conclusions, lack of personal knowledge and foundation, hearsay and relevance].)

h. The Motion May Be Filed Against One Or More Causes Of Action Or The Entire Complaint; No Leave To Amend May Be Granted

A special motion to strike may be granted against an entire complaint or against one or more causes of action. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1004.) If a cause of action is properly subject to a motion to strike, the court may not grant leave to amend. (*Simmons v. Allstate Insurance Co*. (2001) 92 Cal.App.4th 1068, 1073.)

i. Includes Causes Of Action In Cross-Complaints Pursuant To Subsection (h)

Section 425.16(h) provides:

> For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "**cross-defendant**" **and** "**respondent**."

Be careful not to file cross-complaints based on the plaintiff's filing of the complaint, since the filing of the complaint is protected activity under subdivisions (e)(1) and (e)(2) (i.e. oral and written communications before and in connection with a judicial proceeding.) If you do so, the burden will shift to you as the cross-defendant to establish through affidavits the probability of prevailing on your cross-complaint. Moreover, if you lose you will be liable for the cross-defendant's attorney's fees.

Practice Pointer - At the first hint that the plaintiff believes your cross-complaint is a SLAPP, check and amend immediately **before** the plaintiff files the special motion to strike. If you wait until the motion is filed you will be subject to

attorney's fees and will have to defend against the motion anyway for purposes of the court determining the plaintiff cross-defendant's entitlement to attorney's fees. (*Sylmar Air Conditioning v. Pueblo Contracting Services, Inc*. (2004) 122 Cal.App.4th 1049, 1056 [first amended complaint filed in response to anti-SLAPP motion does not render motion moot]; *White v. Lieberman* (2002) 103 Cal.App.4th 210, 220-221 [involuntary dismissal after demurrer is sustained without leave to amend does not render pending anti-SLAPP motion moot]; *Pfeiffer Venice Properties v. Bernard* (2002) 101 Cal.App.4th 211, 218-219 [trial court had jurisdiction to award attorney's fees to a prevailing defendant whose anti-SLAPP motion was not heard solely because the matter was dismissed before defendants obtained a ruling on the motion]; and *Liu v. Moore* (1999) 69 Cal.App.4th 745, 752-753 [party may not avoid liability for attorney's fees and costs by voluntarily dismissing a cause of action in response to an anti-SLAPP motion]; *James Kyle v. Shelly Carmon* (1999) 71 Cal.App.4th 901 [dismissal filed after anti-SLAPP motion but before the court ruled on the motion is valid, but trial court retained jurisdiction to consider and properly awarded attorney's fees and costs pursuant to section 425.16(c)]; but see *S.B. Beach Properties v. Berti* (2006) 39 Cal.4th 374, 377 [rule applies only to anti-SLAPP motions filed before action is voluntarily or involuntarily dismissed].)

j. The Anti-SLAPP Statute Does Not Unconstitutionally Burden The First Amendment Right Of Petition

In *Equilon v. Enterprises, LLC v. Consumer Cause, Inc*., (2002) 29 Cal.4th 62, the California Supreme Court held that the fee shifting provision of the anti-SLAPP statute does not burden the right of petition:

> Contrary to Equilon's implication, section 425.16 does not bar a plaintiff from litigating an action that arises out of the defendant's free speech or petitioning. It subjects to potential dismissal only those causes of action as to which the plaintiff is unable to show a probability of prevailing on the merits (§ 425.16, subd. (b)), a provision we have read as 'requiring the court to determine only if the plaintiff has stated and substantiated a legally sufficient claim' *(Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 412 [58 Cal.Rptr.2d 875, 926 P.2d 1061] (Rosenthal)). So construed, 'section 425.16 provides an efficient means of dispatching, early on in a lawsuit, [and discouraging, insofar as fees may be shifted,] a plaintiff's meritless claims.'
>
> (*Equilon*, supra, 29 Cal.4th at 62, (citation omitted).)

3. Who Is Protected Under The Anti-SLAPP Statute?

a. Public Entities And Officials Are Protected

In *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 19, the California Supreme Court cited to the statement of legislative intent contained in subsection (a) and noted that its "legislative history indicates that the Legislature's concern regarding the potential chilling effect that abusive lawsuits may have on statements relating to a public issue or a matter of public interest extended to statements by public officials or employees acting in their official capacity as well as to statements by private individuals or organizations."

The Court then described the legislative history of the amendment requiring that the section be broadly construed. "A legislative analysis of this amendment approvingly quoted a passage from a then recent law review article that identified as "a typical SLAPP suit scenario" a situation in which an abusive lawsuit is brought against both public officials and private individuals. (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1296 (1997–1998 Reg. Sess.) as amended June 23, 1997, p. 2, quoting Sills, *SLAPPS: How Can the Legal System Eliminate Their Appeal?* (1993) 25 Conn. L. Rev. 547, 547 (*Sills article*); see also *Sills article*, *supra*, 25 Conn. L. Rev. 547, 550 ["Just as SLAPPs filed against individuals have a 'chilling' effect on their participation in government decision making, *SLAPPs filed against public officials, who often serve for little or no compensation, may likely have a similarly 'chilling' effect on their willingness to participate in governmental processes"*].) (Emphasis added.) (*Vargas v. City of Salinas*, *supra*, 46 Cal.4th at 19 fn. 9.)

The *Vargas* court first observed that "a long and uniform line of California Court of Appeal decisions explicitly holds that governmental entities are entitled to invoke the protections of section 425.16 when such entities are sued on the basis of statements or activities engaged in by the public entity or its public officials in their official capacity." (*Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 17.) (Internal citations omitted.) It went on to hold that "the statutory remedy afforded by section 425.16 extends to statements and writings of governmental entities and public officials on matters of public interest and concern that would fall within the scope of the statute if such statements were made by a private individual or entity." (*Id.*)

The *Vargas* Court also dismissed as irrelevant, claims that the statute should not apply because public entities do not have First Amendment rights. The Court explained that the only relevant inquiry is whether the defendants' challenged

activity fell within the plain language of subdivision (e) of Section 425.16 defining protected activity:

> Section 425.16, subdivision (e) does not purport to draw any distinction between (1) statements by private individuals or entities that are made in the designated contexts or with respect to the specified subjects, and (2) statements by governmental entities or public officials acting in their official capacity that are made in these same contexts or with respect to these same subjects. Although there may be some ambiguity in the statutory language, section 425.16, subdivision (e) is most reasonably understood as providing that *the statutory phrase in question includes all such statements, without regard to whether the statements are made by private individuals or by governmental entities or officials.*
>
> (*Vargas v. City of Salinas*, *supra*, 46 Cal.4th at 18 [emphasis added].)

b. Public Officials' Oral And Written Communications And Writings In Official Proceedings Are Protected Under § 425.16(e)(1) And (e) (2)

Subdivision (e)(1) of Section 425.16 protects "any written or oral statement or writing made before … any … official proceeding authorized by law." Subdivision (e)(2) of Section 425.16 protects such statements "made in connection with an issue under consideration or review by any … official proceeding authorized by law." They "protect all direct petitioning of governmental bodies" and "petition-related statements and writings." (*Briggs v. Eden Council for Hope and Opportunity*, *supra*, 219 Cal.4th 1121.)

It is clear that the Legislature "intended to protect speech concerning matters of public interest in a governmental forum." (*Olaes v. Nationwide Mutual Ins. Co.* (2006) 135 Cal.App.4th 1501, 1507.) All discretionary governmental proceedings, as opposed to ministerial ones, are "official proceedings" within the meaning of Section 425.16(e)(1) and (2). (*City of Industry v. City of Fillmore* (2011) 198 Cal.App.4th 191, 215-217.)

These sections have been broadly construed: (*Nesson v. Northern Inyo County Local Hospital Dist.* (2012) 204 Cal.App.4th 65 [where peer review process prompted a hospital to terminate agreement with disciplined physician, termination was protected conduct]; *Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257 [complaint alleging gender discrimination by Sherriff in allocating

cases to lawyers arose from protected activity]; *Schaffer v. City and County of San Francisco* (2008) 168 Cal.App.4th 992, 1001–04, [police officers' statements supporting criminal charges against Plaintiff were protected under 425.16(e)(2), because they were made in connection with an issue under consideration by the District Attorney and the granting of an anti-SLAPP motion was upheld on appeal]; *Gallanis-Politis v. Medina* (2007) 152 Cal.App.4th 600 [plaintiff employee's retaliation claim arose from the employer's protected investigation of her conduct which she claimed was pretextual] *Vergos v. McNeal* (2007) 146 Cal.App.4th 1387 [plaintiff's suit against the hearing officer who had rejected her sexual harassment complaint against the University of California arose out of oral and written communications in an official proceeding]; *Kibler v. Inyo County Hospital* (2006) 39 Cal.4th 192, 203 [suit arose out of oral and written communications in connection with a hospital peer review proceeding which is an official proceeding because it is authorized by statute and subject to section 1094.5 administrative mandamus review]; *Holbrooke v. City of Santa Monica* (2006) 144 Cal.App.4th 1242 [challenge by dissident members of the City Council to the Council's procedures for public comment and length of meetings arose from oral and written communications of the City Councilmembers in the course of City Council meeting and was protected]; *Levy v. City of Santa Monica* (2004) 114 Cal.App.4th 1252 [cause of action against city and city councilman seeking declaratory judgment that child's playhouse conformed with zoning ordinance was subject to special motion to strike because city inspector's noncompliance finding arose from concerned citizen's petitioning activity and city's investigation in response thereto]; *Mission Oaks Ranch, Ltd v. County of Santa Barbara* (1998) 65 Cal.App.4th 713 [developer's suit against CEQA consultant challenging environmental impact report is part of an official proceeding before a legislative body]; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777 [suit challenging letter written in preparation for filing a complaint with the attorney general is a communication in connection with an official proceeding].)

c. Protected Activity Under § 425.16(e)(3) And (e)(4)

Subdivision (e)(3) of Section 425.16 protects any "written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest."

A web site can be a public forum. (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883 ["Wolk's statements are published in her Web site on the Internet, meaning that they are accessible to anyone who chooses to visit her Web site. As a result, her statements hardly could be more public …. The Village Voice was a public forum

in the sense that it was a vehicle for communicating a message about public matters to a large and interested community. All interested parties had full opportunity to read the articles in the newsletter."])

Comments by public officials to the media on an issue of public concern are also protected. In *Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, 1113–16 a Sheriff filed suit against the District Attorney and the County because of the District Attorney's issuance of a report critical of the Sheriff's method of procuring a search warrant in connection with the shooting death of a property owner during the execution of that warrant. The Court of Appeal reversed the trial court's denial of the District Attorney's anti-SLAPP motion. It noted that "[S]ection 425.16 extends to public employees who issue reports and comment on issues of public interest relating to their official duties. Where, as here, a governmental entity and its representatives are sued as a result of written and verbal comments, both may move to dismiss under 425.16." (*Id.* at p. 1115.)

The *Bradbury* Court also observed that the comments of public officials on matters of public interest are entitled to First Amendment protection, "because the investigation, the report, and the utterances made thereafter involved a matter of public interest." (*Id.* at p. 1116.) In addition, the "complaint allege[d] that the shooting 'led to much publicity both local and national' and triggered a 'media frenzy.'" (*Ibid.*) "[Public officials] had a First Amendment right to keep the public informed, issue the report, respond to media questions, and ask other law enforcement agencies to conduct their own investigation." (*Ibid.*)

Section 425.16 subdivision (e)(4) protects "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." The First Amendment's guarantee of freedom of speech protects government employees from termination because of their speech on matters of public concern." (*Board of County Comm'rs v. Umbehr* (1996) 518 U.S. 668, 116 S. Ct 2342.) Public employees also have a statutory right to report unlawful conduct as whistleblowers without retribution. (See Labor Code Section 1102.5.)

d. Attorney's Fee Awards Under The Anti-SLAPP Statute To Public Entities Do Not Unconstitutionally Burden The Right Of Petition

The Court of Appeal issued another important opinion in the *Vargas* case after remand, upholding an award of attorney's fees to the City of Salinas and finding that public entities were equally entitled to attorney's fees under the anti-SLAPP statute, notwithstanding the plaintiff's claim that such an award would violate

constitutional rights to petition the government for redress of grievances. (*Vargas v. City of Salinas* (2011) 200 Cal.App.4th 1331, rehearing denied Dec. 12. 2011, review denied Feb. 29, 2012 ("*Vargas II*").) The United States Supreme Court denied certiorari in *Vargas II*. (*Vargas v. City of Salinas*, 2012 WL 2028449, Case No. 11-1459.)

e. Statutory Exemptions: Sections 425.16(d) And 425. 17

Section 425.16(d) exempts "any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor."

Section 425.17 sets forth a series of statutory exceptions the most notable of which is the exception in subsection (a) for actions brought solely in the public interest or on behalf of the general public. For the subdivision (a) public interest exception to apply, the suit must meet conditions which are similar to the standards applicable to awards of attorney's fees under section 1021.5: (1) the plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member; (2) the action would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons; and (3) private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter.

Subdivision (c) of section 425.17 creates an additional statutory exemption relating to statements made in the course of certain commercial sales and leases on specified conditions. Finally, subsection (d) excepts certain actions from the exemptions created by subdivsions (b) and (c).

f. Other Exceptions

The anti-SLAPP statute does not apply to a mandamus action where mandamus is the judicial remedy provided by law to review the underlying proceedings. (*Young v. Tri-City Healthcare District* (2012) 210 Cal.App.4th 35):

> Nothing in the anti-SLAPP statute wholly exempts a writ petition against a public entity from its potential coverage of protected speech. (§§ 425.16, 1085, 1094.5; *San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees' Retirement Assn*. (2004) 125 Cal.App.4th 343, 353, 22 Cal.Rptr.3d 724 (San Ramon).) However, on de novo review, we conclude the fifth cause

> of action does not "arise" from the District's acts in furtherance of its rights of petition or free speech in connection with peer review (a public issue), but rather, the substance of that cause of action arises from the statutory provision giving a right to judicial review of a governmental decision, and the making of such a decision does not in itself amount to an exercise of free speech. (*San Ramon*, *supra*, at p. 355, 22 Cal.Rptr.3d 724; § 425. 16, subd. (b)(1).) The anti-SLAPP statutory protections do not clearly apply as a matter of law. (Pt. V, post.)

In short, do not use a special motion to strike under the anti-SLAPP statute when routine administrative mandamus actions are filed to seek review of adjudicatory actions or traditional mandate actions seek statutory remedies against CEQA determinations and approval of projects.

4. <u>Where</u> Can The Special Motion To Strike Be Filed?

In addition to filing a special motion to strike in state court actions, such a motion can be filed to challenge causes of action brought under state law in federal court. (*United States v. Lockheed Missiles & Space Co., Inc.* (9th Cir.1999) 190 F.3d 963, 970-73. ["there is no direct conflict between (section 425.16(b) and (c)) and the Federal Rules"].) However, "[b]ecause the discovery-limiting aspects of §425.16(f) and (g) collide with the discovery-allowing aspects of Rule 56, these aspects of sub-sections (f) and (g) cannot apply in federal court." (*Metabolife International, Inc. v. Wornick* (9th Cir. 2001) 264 F.3d 832, 846.)

5. <u>When</u> Can The Special Motion To Strike Be Filed?

The timing of a special motion to strike is governed by section 425.16(f):

> The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

Because the language of this section provides for filing *after* the 60 day period only "in the court's discretion" it is advisable to file the motion *within* the 60 day period either coupled with a demurrer or other similar motion or after an answer.

6. Why File A Special Motion To Strike Under The Anti-SLAPP Statute?

- Unlike a demurrer it is a "speaking" motion: "the court shall consider . . . supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16(b)(2).)

- The motion gets final resolution of the merits at the very outset of a case, within 60 days of its filing. (§ 425.16(f).)

- The motion is entitled to priority in setting and must be heard within 30 days of the filing of the motion, the court's docket permitting. (§ 425.16(f).)

- Except in federal court, discovery is stayed (limited discovery may be allowed only upon a noticed motion and showing of good cause. (§ 425.16(g).)

- If the motion is granted, the court may not allow leave to amend (*Simmons v. Allstate Insurance Co*. *supra*, 92 Cal.App.4th at p. 1073), thus avoiding multiple rounds of pleading and inordinate defense costs before the complaint is finally dismissed.

- If the motion is *granted*, the moving party is entitled to attorney's fees and costs (§ 425.16(c)(1) unless it is brought pursuant to Government Code sections 6259 (Public Records Act) 11130, 11130.3, (the Bagley-Keene Open Meeting Act.) 54960, or 54960.1 (the Brown Act). Attorney's fees and costs are *not recoverable* by the opposing party when the motion is *denied* unless the court finds that the motion is "*frivolous or is solely intended to cause unnecessary delay*" pursuant to § 128.5.

- Grant or denial of a special motion to strike under Section 425.16 is made appealable by sections 425.16(i) and 904.1(a)(13). Rulings on demurrers are not.

- The noticing of an appeal stays all further trial court proceedings on the merits during the pendency of the appeal as provided in section 916 and the California Supreme Court's decision in *Varian Medical Systems, Inc. v. Delfino*, *supra*, 35 Cal.4th at p. 194.

- Denial of the motion does not prejudice continued defense of the proceeding: "If the court determines that the plaintiff has established a

probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding." (Section 425.16 (b)(3).)

7. How Should A Special Motion To Strike Be Filed And Framed?

a. May Be Coupled With Demurrer Or Filed After An Answer

The motion can be coupled with a demurrer as part of a first appearance. Demurrers can reach only the face of the complaint and matters which may be judicially noticed. A special motion to strike can and should be submitted with supporting affidavits (declarations) but may also include judicially noticeable documents. It can be filed after an answer but it should be filed within 60 days of the filing of the complaint, as discussed in section 5 of this paper.

b. Include Affidavits To Establish Both Prongs Of The Anti-SLAPP Statute In Your Moving Papers

The moving party should lay out the relevant facts that relate to *both prongs* of the anti-SLAPP statute. This means that the evidence submitted with the motion should both expand on the underlying factual allegations of the complaint in order to show that the causes of actions subject to the special motion to strike "arise from" protected activity as well as that the plaintiff has no probability of prevailing on the challenged claims. The attached appellate brief in the *Kapler v. Alameda* case shows how a combination of a special motion to strike coupled with a successful demurrer and amended complaint led to the ultimate successful dismissal of virtually the entire law suit and an award of attorney's fees for the defendant city. The Court of Appeal decision in Kapler is also attached.

Making your factual case is critically important in an anti-SLAPP motion because you have to be able to show both that the action involves protected activity and that it is meritless. Assume nothing and tell your story cogently and completely to make sure you have submitted the relevant facts. For example in the Kapler case, submitting all the articles of press coverage concerning Kapler's theft of City gas for his BMW captured the importance of the public issue to which he was referring in his complaint and immediately got the Court's attention before the justices were buried in the details of subdivisions (e)(1)-(4) and the substantive elements of each of Kapler's nine causes of action.

c. Admissibility Of Plaintiff's Submissions; Making Objections

Often, the plaintiff's attorney does not pay attention to the admissibility of the averments or exhibits of his/her declarations. Since the burden is on the plaintiff to show by *admissible* evidence that s/he has a probability of prevailing on the challenged causes of action, the inadmissible evidence may be struck, possibly leaving the plaintiff with little or nothing with which to sustain his/her burden of establishing a probability of success on the merits.

In the attached Gallant v. Alameda case, the Court of Appeal reversed the trial court on the first prong of the anti-SLAPP statute finding that all causes of action arose from protected activity but was unable to reach the second prong because the trial court failed to rule on the City's objections.

d. Compliance With Section 425.16(j)(1) Judicial Council Filing Requirements

Section 425.16(j)(1) provides:

> Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

e. Preparation Of Trial Court Orders Granting Motion

If you prevail on the special motion to strike, take the time to carefully craft the order in your favor, laying out the factual and legal basis for the trial court's grant of your motion on both prongs of the anti-SLAPP statute. A well crafted order will deter an appeal and will create a favorable impression on an appellate court if the matter is appealed.

f. Denial Of Motion – Timeliness Of Appeal

"'If a judgment or order is appealable, an aggrieved party must file a timely appeal or forever lose the opportunity to obtain appellate review.'" [Citations omitted.]" (*Maughan v. Google Technology, Inc.* (2006) 143 Cal.App.4th 1242, 1247.) Since grant or denial of a special motion to strike is appealable, it must

be appealed within 60 days of the order since no appeal will lie from later entry of a final judgment. (*Id.)*

g. Seeking Attorney's Fees

"[A]n award of fees may include not only the fees incurred with respect to the underlying claim, but also the fees incurred in enforcing the right to mandatory fees under Code of Civil Procedure section 425.16." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1141.)

h. Avoiding Triggering A Special Motion To Strike Under The Anti-SLAPP Statute

The anti-SLAPP statute can also be used as a weapon against public entities when they file suit or when they file cross-complaints in an existing lawsuit. Be very careful how you frame either your complaints or your cross-complaints to ensure that they do not "arise from" activity protected by the anti-SLAPP statute. For example, the plaintiff's action in filing the complaint itself would be protected by (e)(1) and (2). As explained earlier, the fact that the complaint arises from protected activity does not by itself lead to dismissal of the complaint or cross-complaint. However, if you are unable to establish a probability of success in response to a special motion to strike under the anti-SLAPP statute you will subject your city to liability for the moving party's attorney's fees.

8. Conclusion

The anti-SLAPP statute is a powerful tool which can lead to the relatively speedy demise of meritless SLAPP suits and recovery of the city's attorney's fees in the trial court. Since the interlocutory order granting or denying the motion is immediately appealable, it can result in a final order on the merits on appeal. The *Kapler* case was decided on the merits by the Court of Appeal within sixteen months of the filing of the original complaint. In *Kapler*, while a small section of one cause of action remains, the annual interest alone payable on the City's attorney's fee award of $260,000 exceeds the amount of the health premium for which Kapler claims reimbursement, making it uneconomic for him to litigate the case any further. In short, at each stage of the litigation it is vital to think strategically and comprehensively about your client city's best interests, employing a cost-benefit analysis.

ATTACHMENT A

Kapler Court of Appeal Opening Brief

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

DAVID KAPLER, Plaintiff/Respondent, v. CITY OF ALAMEDA; LENA TAM; DEBRA KURITA, Defendants/Appellants.	)	No. A133001 Alameda County Superior Court Case No. HG11570933

APPELLANT'S OPENING BRIEF

On Appeal from an Order of the Superior Court of the State of California in and for the County of Alameda
Honorable Brenda Harbin-Forte, Judge.

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City of Alameda; Lena Tam and Debra Kurita

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I. INTRODUCTION – NATURE OF ACTION

The three appellants in this Court (defendants below) are Alameda Councilmember Lena Tam ("Tam"), former Alameda City Manager Debra Kurita ("Kurita"), and the City of Alameda ("City") (collectively "Alameda Defendants"). They seek review of an appealable order of the Alameda County Superior Court denying their special motion to strike each of nine causes of action in the Complaint, pursuant to Code of Civil Procedure Section 425.16 ("anti-SLAPP motion").[1] The trial court order is subject to de novo review.

The plaintiff below and respondent herein is David Kapler ("Kapler"), a former Alameda Fire Chief. Kapler was terminated after an investigation confirmed media photographs and reports that he had been filling up the gas tanks of his personal sports car and all-terrain-vehicle at the Alameda fire station gasoline pumps. The President of the Alameda firefighter's union, Dominick Weaver, reported to then Alameda Mayor Beverly Johnson that Alameda firefighters had caught Kapler doing so on camera and were the source of the media reports and incriminating photographs. According to Mr. Weaver, while Alameda firefighters had been aware of Kapler's misappropriation of City gas for his personal use for some time, they had only recently captured the misappropriation on camera. Mr. Weaver asked that the firefighters be protected from any reprisals against them by Kapler.

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[1] All statutory references are to the Code of Civil Procedure unless otherwise indicated. Section 425.16 is referred to as the anti-SLAPP statute. SLAPP is an acronym for the Strategic Lawsuits Against Public Participation which the statute is designed to protect against. (See *Briggs v. Eden Council for Hope and Opportunity* (1999) 219 Cal.4th 1106, 1109 fn. 1.) Appellants thus refer to their special motion to strike pursuant to the anti-SLAPP statute as an "anti-SLAPP motion."

The coverage of the scandal spread through the news media, necessitating comment by the Mayor and City Councilmembers and eliciting public and City officials' demands that the matter be investigated by Alameda officials and appropriate action taken. Kapler did not dispute using City gas in this manner, but maintained that he had reasonably assumed that he could put City gas in any personal vehicle he acquired because the City had allowed him to use City gas for official purposes with respect to a particular vehicle he owned - one which had been specially outfitted by the City for firefighting purposes. Not surprisingly, the City's official investigation into this matter concluded that no City official had authorized the use of City gas in Kapler's sports car or all-terrain vehicle. Kapler was thereafter discharged from his at-will employment as Fire Chief, when his last ditch attempt to secure a lucrative financial settlement was rejected by the City Council.

At the heart of the nine contract and tort causes of action in the Complaint are a long litany of complaints by Kapler about city employees and officials embodied in allegations that are incorporated by reference into each cause of action. Kapler complains that: City firefighters improperly made written and oral reports to the media about his misuse of City gas resulting in his public embarrassment and damage to his reputation; City officials then made critical statements to the media on the subject; they failed to defend his use of City gas and suggested that he be placed on administrative leave and his use of City gas investigated; they made oral and written assessments that he had misappropriated City gas during the City's official investigation into his misconduct; they made critical statements about his improper use of gas including terminating his employment; and they claimed that he had misused City gas on a pretextual basis because they were biased against him and in favor of the Alameda firefighters' union who had been conspiring against him.

Appellants filed an anti-SLAPP motion to strike all causes of action in the Complaint on the grounds that they arose from the communicative conduct of Alameda employees and officials, both "before" and "in connection with" an official Alameda proceeding to investigate and determine the appropriate action to take against Kapler regarding his misappropriation of City gas for his personal use, and thus such communicative conduct was protected by subdivisions (e)(1) and (2) of Section 425.16. Appellants' special motion to strike also argued that all Kapler's causes of action arose from the exercise of Alameda employees' and officials' free speech and petition rights on a matter of public concern and in a public forum, protected by subdivisions 425.16 (e)(3) and (4) of Section 425.16.

The trial court committed reversible error in denying Appellants' anti-SLAPP motion. It failed to perform its statutory duty to examine the pleadings and affidavits to ascertain what activity of Alameda employees and officials Kapler had challenged in each of his causes of action, as the anti-SLAPP statute requires. It then denied the protection of the anti-SLAPP statute to communicative conduct of Alameda employees and officials expressly under attack in the Complaint and in Kapler's declaration, even though such conduct was expressly protected by the plain language of subdivisions (e)(1), (2), (3) and (4) of Section 425.16.

While the trial court did not rule on whether Kapler had established a probability of prevailing on the merits of his causes of action in connection with the anti-SLAPP motion, it did sustain Appellants' general demurrer to all causes of action against all defendants in the Complaint. This ruling was the functional equivalent of holding that Kapler had no probability of success on any cause of action against any defendant under subdivision (b)(1) of Section 425.16. Tellingly, in response Kapler deleted two causes of action, i.e. defamation and intentional interference with

Economic Relationship, and deleted the current and former individual officials as defendants. He did not materially change any remaining allegations in his First Amended Complaint ("FAC"). Kapler thereby effectively conceded the lack of merit of : 1) the two dismissed causes of action; 2) all causes of actions against all individual officials; and 3) all remaining causes of action subject to the sustained general demurrer since they remain materially unchanged.

II. THE RECORD ON APPEAL CONSISTS OF A JOINT APPENDIX AND A REPORTER'S TRANSCRIPT OF THE JULY 13, 2011 ORAL ARGUMENT ON APPELLANTS' ANTI-SLAPP MOTION.

The record in this case consists of a two volume Joint Appendix ("JA") and a Reporter's Transcript ("RT") of the July 13, 2011 oral argument concerning Appellants' anti-SLAPP motion.[2] Kapler did not contest the tentative ruling in favor of Appellants that granted their general demurrer to all causes of action against all defendants. (RT 1:23-2:4.)[3] The merit of the trial court's ruling sustaining Appellants' general demurrer on all causes of action (*see* Tab 48, 2 JA 454-456) is therefore conceded for purposes of this appeal of the denial of Appellants' anti-SLAPP motion.

III. THE JULY 25, 2011 ORDER IS APPEALABLE AND THE APPEAL WAS TIMELY FILED ON AUGUST 19, 2011.

The denial of a special motion to strike under Section 425.16 is made appealable by sections 425.16 (i) and 904.1 (a)(13). The order denying the Alameda Defendants' anti-SLAPP motion was issued on July

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[2] Citations to the Joint Appendix begin with the tab number at which the pleading appears, succeeded by the volume and page of the Joint Appendix. For example, a reference to the Complaint found at Tab 1, volume 1, pages 1 through 24, would be cited as, "Tab 1, 1 JA 1-24."

[3] Kapler's counsel withdrew her request that her late pleadings opposing Appellants' general demurrer be considered by the trial court. (RT-23:6-15.)

25, 2011. (Tab 52, 2 JA 470-474.) Alameda Defendants' Notice of Appeal was thereafter timely filed in the trial court on August 19, 2011. (Tab 61, 2 JA 545-546.) It was succeeded by the filing of a Notice of Stay Of All Proceedings Pursuant To California Rule Of Court 3.650 Pending Appeal Of Order Denying Anti-SLAPP Motion To Strike Entire Complaint And Each Cause Of Action Within It Under Code of Civil Procedure § 425.16. (Tab 64, 2 JA 549-555.)[4]

IV. STATEMENT OF THE CASE – PROCEDURAL HISTORY

A. The Defendants

Kapler's complaint was filed on April 14, 2011. (Tab 1, 1 JA 1.) It named the following four defendants: the City of Alameda, (Tab 1, 1 JA 1) the former City Manager Debra Kurita (Tab 1, 1 JA 2:11-14) who hired Kapler as Fire Chief, (Tab 1, 1 JA 2:13-16) an Interim City Manager successor, Ann Marie Gallant, (hereafter "Gallant") (Tab 1, 1 JA 3:15-18) and Councilmember Tam. (Tab 1, 1 JA 3:8-10.) The Complaint primarily challenges Kapler's termination from employment as a result of media reports and the City's ensuing investigation which confirmed his misappropriation of City gas for his personal use. (Tab 1, 1 JA 8:4-9:15, ¶¶ 26-32.)

B. The Key Initial Charging Allegations Are Included In Each Cause Of Action And They Are Illuminated By Undisputed Facts And Documents Submitted By The City.

The key charging allegations in Kapler's Complaint (Tab 1, 1 JA 8:4-9:15, ¶¶ 26-32) are incorporated by reference into each of his nine causes of action. They are described next.

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[4] Section 916 operates to stay all further proceedings on the merits of causes of action subject to the anti-SLAPP motion during the pendency of an appeal of an order granting or denying the anti-SLAPP motion. (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 194).

Kapler alleges that on or about August 18, 2010, "several news articles generally circulated in the City of Alameda, the San Francisco Bay Area, statewide and nationally, were printed about [Kapler]" and published without his authorization containing "[s]erious and defamatory allegations that [Kapler] used [City] gasoline in his personal vehicle." (Tab 1, 1 JA 8:4-9, ¶ 26.) According to the Complaint, "[Kapler's] photograph was printed in newspapers of general circulation without [Kapler's] permission" and the "photographs were "taken and/or obtained and published by employees, agents, officials, or assigns" of the City. (Tab 1, 1 JA 10-13, ¶ 27.) Kapler goes on to complain that the "general public was made aware of the photographs and allegations putting [Kapler] in a false light to his community and peers in his profession." (Tab 1, 1 JA 8:14-17.) Kapler also asserts that "[City] officials, employees, agents and assigns, failed to notify the public" that Kapler used the gasoline and filled his personal vehicle by agreement of City officials, Kurita and 0 (sic)." (Tab 1, 1 JA 8:14-20, ¶¶ 28-29.)

Kapler further alleges that in September 2010, "the [City], its officials, employees, agents and assigns conducted or caused to be conducted an investigation of the allegations of improper by (sic) [Kapler] of [City] owned gasoline," conducted a biased investigation and terminated him for the "purported reason" of his misuse of gasoline, even though they found that an agreement for his use of gasoline existed. (Tab 1, 1 JA 8: 28, ¶ 30.) The City's investigation actually concluded no such thing.

The City's independent investigative report concluded in pertinent part: "Kurita did not expressly authorize Kapler to use City gas pumps to fuel any vehicle other than the personal vehicle owned by Kapler which the City agreed to equip with emergency lights, sirens, etc. Kurita did not expressly authorize Kapler to use City gas pumps to fuel any vehicle he was using primarily for personal use. Nor did she expressly authorize

Kapler to use City gas pumps to fuel any personal vehicle of Kapler's which was going to be driven by non-City employees for personal use." (Tab 13, 1 JA 217.)

The City's investigative report recounted the statements of an eye witness, Assistant City Manager David Brandt, who had been present in the conversations between Kurita and Kapler. According to the report "Brandt said Kapler 'swore up and down that he was only going to use gas for his City-equipped vehicle while he was on duty.' Brandt said he was absolutely certain of this." (Tab 13, 1 JA 209.) Kapler admitted to the City investigator that "he has permitted his daughters and fiancé to drive his Honda truck for personal purposes as well." (Tab 13, 1 JA 217.) Kapler also admitted to the City investigator that he fueled his BMW at City gas pumps after he bought it in 2009, that the BMW is used for his personal travel and he has permitted his daughters and fiancé to drive it as well. (Tab 13, 1 JA 217.)

Kapler also claims that Gallant notified him that the City intended to terminate him, extended his time to respond and then was going to terminate him when he resigned. (Tab 1, 1 JA 9:1-15, ¶¶ 31-32.) Finally, Kapler alleges that his termination was "politically motivated" based on "unlawful collusion" between the firefighter's union and Councilmember Tam because they disliked his proposed budgetary cuts and positions on labor negotiations. (Tab 1, 1 JA 7:1-28, ¶¶ 21-25.)

Kapler incorporates these initial charging allegations into each of his nine causes of action and indeed incorporates by reference all prior charging allegations into each successive cause of action. (Tab 1, 1 JA 10:8-9, ¶ 37; 1 JA 12:19-20, ¶43; 1 JA 14:1-2, ¶ 50; 1 JA 16:3-5, ¶ 55; 1 JA 17:25-26, ¶ 64; 1 JA 19:3-5, ¶ 70; 1 JA 19:20-21, ¶ 73; 1 JA 20:14-15, ¶ 77; 1 JA 21:23-24, ¶ 84.)

In short, Kapler's claims are in essence an attack on everything City employees and officials said and wrote about his misuse of City gas in a public forum and in the course of the City's official discretionary proceeding authorized by its charter to investigate and take action concerning Kapler's misappropriation of City gas for his personal use.

C. The Nine Causes Of Action

The Complaint contains nine causes of action. (The ninth cause of action is misnumbered as the tenth cause of action.)

- First Cause of Action – Breach of Contract against City, Kurita and Gallant. (Tab 1, 1 JA 10:8-12:13, ¶¶ 37-42.)

- Second Cause of Action – Intentional Interference With Economic Relationship against Council, Kurita and Tam (Tab 1, 1 JA 12:17-13:23) although "Council" is not actually alleged to be a defendant in the Complaint. (Tab 1, 1 JA 3:4-7, ¶3.)

- Third Cause of Action – Breach of Covenant of Good Faith and Fair Dealing against City, Tam, Kurita and Gallant. (Tab 1, 1 JA 13:24-15:25, ¶¶ 50-54.)

- Fourth Cause of Action – Wrongful Termination In Violation of Public Policy against City, Tam, Kurita and Gallant. (Tab 1, 1 JA 15:26-17:19, ¶¶ 55-63.)

- Fifth Cause of Action – Constructive Discharge against Tam, Kurita and Gallant. (Tab 1, 1 JA 17:20-18:26, ¶¶ 64-69.)

- Sixth Cause of Action – Intentional Infliction of Emotional Distress against Tam, Kurita and Gallant. (Tab 1, 1 JA 20:10-18:27-19:15, ¶¶ 70-72.)

- Seventh Cause of Action – Negligent Infliction of Emotional Distress against City, Tam, Kurita and Gallant. (Tab 1, 1 JA 19:16-20:9, ¶¶ 73-76.)

- Eighth Cause of Action – Defamation against City, Kurita and Tam. (Tab 1, 1 JA 20:10-21:18, ¶¶77-83.)

- No Ninth Cause of Action.

- Tenth Cause of Action – Violation of FireFighter's Bill of Rights against City. (Tab 1, 1 JA 21:19-22:9, ¶¶ 84-87.)

D. The Alameda Defendants' Three Linked Motions And The Trial Court's Rulings On Them

The Alameda defendants filed three linked motions in response to the Complaint:

1. A general demurrer to the Complaint, and to each cause of action in it, as to each defendant, for failure to state facts sufficient to state a cause of action under Section 430.10(e) (Tabs 5 & 6, 1 JA 33-55);

2. A motion to strike each individual former and current Alameda official from the Complaint and to strike allegations concerning punitive damages sought against them, pursuant to Sections 435 and 436, (Tabs 7 & 8, 1 JA 56-81); and

3. A Special Motion To Strike Pursuant to CCP § 425.16; Demand For Attorney's Fees And Costs as to each cause of action against

each defendant on the grounds that each arose from the protected activity of public officials and Kapler had no probability of success on the merits as to these causes of action thereby necessitating dismissal of his entire Complaint and an award in favor of defendants' for attorney's fees and costs. (Tabs 9-13, 1 JA 82-233.)

The trial court sustained the general demurrer to each cause of action as to each defendant with leave to amend. (Tab 48, 2 JA 454-456.) It dropped the motion to strike in light of the ruling that plaintiff had leave to amend after the sustaining of the general demurrer and provided that defendants may renew their motion at that time. (Tab 46, 2 JA 449-450.) Finally, the trial court denied the defendants' special motion to strike, holding, that Kapler's claims did not arise from statutorily protected activity. (Tab 52, 2 JA 470-474.)

E. The First Amended Complaint ("FAC") Deletes All Individual Current and Former Officials And Two Causes Of Action – Kapler Thereafter Deleted The Names Of The Officials From The Caption As Well.

Kapler filed his First Amended Complaint ("FAC") on August 8, 2011. (Tab 55, 2 JA 479-496.) The FAC deleted all allegations against the current and former officials naming them as individual defendants, thereby leaving the City of Alameda as the only remaining defendant. The FAC continues, however, to make allegations about these officials' communicative conduct. The FAC also deleted the Second Cause of Action for Intentional Interference With Economic Relationship; and the Eighth Cause of Action for Defamation. For ease of reference and to make the changed provisions more readily identifiable, the trial court record contains a strike-out and underlined version of the FAC, which depicts the differences between the Complaint and the FAC. (See Exhibit D to

Declaration of Manuela Albuquerque In Support of Defendants' Ex Parte Application To Dismiss All Individual Defendants With Prejudice. (Tab 57, 2 JA 514-531).)

The caption of the FAC at first, however, still contained the officials' names. Kapler's counsel was to have filed an errata sheet deleting them from the FAC. When she failed to do so, Defendants filed an ex parte application seeking to have them dismissed with prejudice from the action, which the Court denied without prejudice when Kapler's attorney was unable to attend the hearing due to illness. (Tabs 56-60, 2 JA 497-544.) The Alameda defendants thereupon filed the instant appeal of the trial court's order denying their anti-SLAPP motion. (Tab 61, 2 JA 546-546.) Kapler subsequently filed an errata sheet removing the former and current city officials as defendants from the caption. (Tab 69, 2 JA 565-566.)

V. THE FACTUAL RECORD BEFORE THIS COURT CONTAINS NO DISPUTES OF MATERIAL FACT.

A. The Appellants' Unopposed Request For Judicial Notice Was Granted By The Trial Court; It Attached The Alameda City Charter And Municipal Code Sections As Exhibits.

Appellants' anti-SLAPP motion was supported by their unopposed Request for Judicial Notice which was granted by the trial court in its ruling on the anti-SLAPP motion. (Tab 52, 2 JA 472.) The Request for Judicial Notice attached relevant sections of the City Charter (hereafter "Charter") and Alameda Municipal Code ("AMC"). These established that Kapler, as a City department head, served at the pleasure of the City Manager and could only receive the compensation and retirement benefits approved by the Alameda City Council. (Tab 11, 1 JA 112-117.)

B. The Undisputed Declaration Of Carol Amberg Provided Copies Of The Media Coverage Of Kapler's Misappropriation Of City Gasoline About Which Kapler Complained In The Key Charging Allegations Of His Complaint.

Appellants' anti-SLAPP motion was also supported by the declaration of Carol Amberg (hereafter "Amberg Decl.") describing and providing copies of the widespread media coverage of Kapler's misuse of City gasoline for his personal use. (Tab 12, 1 JA 118-163.) Kapler did not dispute the authenticity or relevancy of these articles or that they were the very articles which were the subject of the allegations in Kapler's Complaint.

C. The Undisputed Declaration Of Alameda Human Resources Director, Karen Willis, Describes Kapler's Employment And Termination As Fire Chief.

The declaration of Alameda's Human Resources Director, Karen Willis, (hereafter "Willis Decl.") provided a history of Kapler's employment and termination and attached relevant documents as exhibits. (Tab 13, 1 JA 164-233.) Kapler did not dispute any of the facts described in Ms. Willis' declaration and even cited to it with approval in his own declaration in opposition to the anti-SLAPP motion.

D. The Trial Court Erred In Failing To Rule On Appellants' Objections – Kapler's Declaration Consists Largely Of Inadmissible Averments But Also Contained Admissions.

Kapler's own declaration in opposition to the motion (Tab 23, 2 JA 295-322) was largely based on incompetent evidence. Interestingly though, it confirmed Appellants' contention that Kapler was targeting the communicative conduct of Alameda officials and employees in his

Complaint.[5] Defendants objected to the admissibility of the vast majority of Kapler's averments. (Tab 30, 2 JA 359-368.) The trial court did not rule on Appellants' objections, concluding that they were moot in light of the court's ruling that Kapler's claims did not arise from activity protected by the anti-SLAPP statute. (Tab 52, 2 JA 472.)

The trial court was mistaken. "In deciding whether the 'arising from' requirement is satisfied, 'the court shall consider 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' (§ 425.16, subd. (b)(2).)" (Emphasis added) (*Navallier v. Sletten* (2002) 29 Cal.4th 82, 89.)

E. The Alameda County District Attorney's September 2, 2011 Letter

Kapler's declaration makes irrelevant and unrelated ad hominem attacks on defendant and Appellant Tam, falsely claiming that she committed a crime. He included a letter from a prior Alameda special counsel written to the District Attorney in this regard. Defendants' objected to this averment and related exhibit as irrelevant, prejudicial and inadmissible hearsay. (Tab 30, 2 JA 364:24-365:7.)

However, in an abundance of caution, Appellants also submitted a copy of the District Attorney's letter unequivocally finding insufficient factual or legal support for any assertion that Tam had committed a crime. (Tab 27, 2 JA 351-353.) Kapler made no objection to its introduction nor disputed the fact that the District Attorney had flatly rejected the claims made in the letter proffered as an exhibit.

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[5] It later turned out that Kapler had never filed his opposition papers to the anti-SLAPP motion, but merely served them on the defendants and the court in which this matter was assigned. Since the Court considered them, defendants do not object to this filing omission on Kapler's part.

VI. FACTUAL BACKGROUND

A. The Fire Chief Served At The Pleasure Of The City Manager

Article II Section 3 of the Charter (Tab 11, 1 JA 112) provides in pertinent part as follows: "The City Council shall establish by ordinance offices for the administration of departments of the City and the incumbents thereof shall be appointed by and hold office at the pleasure of the City Manager." (Emphasis added.) AMC Section 2-30.1, governing the appointment of heads of departments, including the Fire Chief, implements Article II Section 3. (Tab 11, 1 JA 114.) AMC Section 2-30.1 provides that "such appointees shall serve at the pleasure of the City Manager." Thus, Kapler held an at-will appointment, serving at the pleasure of the City Manager.

B. The City Council Establishes Employee Compensation.

Section 3-7 (G) of the Charter (Tab 11, 1 JA 117) requires that the Council must fix the compensation of all employees. It provides that the Council shall: "Establish and abolish offices and positions of employment and fix the compensation and duties thereof ...." (*Id.*)

C. The City Council Must Establish Retirement Benefits-It Did Not Authorize Kapler To Obtain Lifetime Medical Benefits.

Section 3-7 (I) of the Charter (Tab 11, 1 JA 117) provides that the City Council shall establish "a retirement and pension and insurance system for City officers and employees based on sound actuarial principles ...." The City Council never authorized the Fire Chief to receive lifetime medical benefits upon retirement. (Tab 13, 1 JA 166:21-24.) Kapler did not submit any evidence to the contrary.

D. The Media Coverage Of Kapler's Misappropriation Of City Gas At The Heart Of His Complaint

On August 17, 2010, the San Jose Mercury News broke a story headlined "Alameda Fire Chief Takes Heat For Filling Personal Vehicles At City Pumps." (Tab 12, 1 JA 119:15-21; Tab 12, 1 JA 123-124.) The story quoted a witness who saw Kapler fill up a blue BMW coupe at the City gas pumps on Saturday August 14, 2010, with a female passenger in the car. (Tab 12, 1 JA 123.) Kapler admitted using City gas for his personal vehicles, but told the press that he had done nothing wrong because his employment agreement allegedly permitted him to do so. (*Id.*) In response, the story quotes Alameda Mayor Beverly Johnson as stating that the City would be taking "a close look" at Kapler's employment agreement to see if it permitted Kapler to fuel his personal vehicles at the City pump. (Tab 12, 1 JA 119:18-21; Tab 12, 1 JA 123.)

The story quickly spread. On August 18, multiple news outlets reported on Kapler's use of City fuel for his personal vehicles, including the San Francisco Chronicle newspaper; the Chronicle's website, SFGate.com; the Associated Press, NBC local television news; and NBC's website, nbcbayarea.com. (Tab 12, 1 JA 119:22-120:13; Tab 12, JA 126-136.) Several reports included color photographs of Kapler, dressed in civilian clothes, fueling a blue BMW coupe at the City pump. (Tab 12, 1 JA 129, 135-136, 138, 148, 155, 162, 189-190.) Mayor Johnson told the San Francisco Chronicle that in her opinion, "it was a very inappropriate thing" for Kapler to do and she asked the Interim City Manager Ann Marie Gallant to investigate the matter. (Tab 12. 1 JA 119:24-26; Tab 12, 1 JA 126.)

The controversy over Kapler's use of the City gas pump grew as stories continued to appear in the media. (Tab 12, 1 JA 129-142.) On August 22, the San Francisco Chronicle ran a story on its website "SFGate.com" asserting that in 1991, Kapler had resigned as Fire Chief for the Tahoe Douglas Fire Protection District "amid allegations that he had used a department vehicle for personal purposes while off duty." (Tab 12, 1 JA 120:20-24; Tab 12, 1 JA 144.) The Bay Citizen reported that Councilmember Tam "called for the chief to be placed on administrative leave" while the allegations were investigated. (Tab 12, 1 JA 148-149.)

The City placed Kapler on leave pending an investigation. Again, multiple media outlets reported on this latest development in the controversy, which was termed "Kapplergate" in a story from the Alameda Sun. (Tab 12, 1 JA 151-158.)

Public interest in the controversy continued unabated. On November 12, 2010, the Alameda Sun reported that the City Council had rejected a settlement agreement proposed by Kapler that would have "entitled Kapler to lifetime medical benefits." (Tab 12, 1 JA 160.) In the same article, the Alameda Sun reported that Kapler resigned on November 5, 2010. (*Id.*; see also, Tab 12, 1 JA 162-163.)

E. Kapler And The City

In August 2007, then City Manager, Kurita, was negotiating to hire David Kapler as the City's new Fire Chief. (Tab 13, 1 JA 165:16-17; Tab 13, 1 JA 181-183.) In 2007 – and currently – the City provided just two types of vehicle benefits to its employees: (1) a "take-home" vehicle, or (2) a car allowance. (Tab 13, 1 JA 165:18-19) This choice is reflected in Kapler's Offer Letter. (Tab 13, 1 JA 181-183). The City's Human Resources Director, Karen Willis ("Willis") stated that since she has worked for the City it has never been the City's practice to provide a

separate gas allowance to any employee, even to department heads like the Fire Chief. (Tab 13, 1 JA 165:19-23.) Moreover, the City has always forbidden the personal use of take-home vehicles – and for the same policy reason, would never authorize the personal use of public gas. (*Id.*)

In August 2007, Willis provided a standard draft Offer Letter to Kurita for use in her negotiations with Kapler. (Tab 13, JA 165.) That Letter did not include any reference to gas, nor any discussion of post-employment medical benefits. (*Id.*) This is because as a matter of established practice, neither was typically offered to potential City department heads, like the Fire Chief. (*Id.*) The position of Fire Chief is an "unrepresented classification," which means it is "not included in any bargaining group or union." (Tab 13, 1 JA 166:1-2; Tab 13, 1 JA 171.) Therefore, a former Fire Chief does not qualify to receive any post-retirement insurance benefits under the fire union's MOU. (Tab 13, 1 JA 166:2-3.) Instead, under the City Charter, a Fire Chief may only be granted such benefits by a vote of the City Council.

At Kapler's suggestion, Kurita added a provision to the executed offer letter providing that Kapler would "receive the post-retirement insurance benefit" outlined in the "2001-2008 Fire Management Association MOU," unless he voluntarily resigned in less than three years. (Tab 13, 1 JA 166:17-20.) The Council never approved this provision as required by the City Charter. (Tab 13, 1 JA 166:21-24.)

After Kapler learned that City policy prohibited use of a "take-home" vehicle while off duty, he informed Willis that he had decided to purchase his own truck for both personal use and City business. (Tab 13, 1 JA 166:8-27.) Kapler subsequently began his employment as the City's Fire Chief on October 1, 2010. (Tab 13, 1 JA 167:1-3.) He never made any mention of a gas allowance – nor does any such allowance appear in his Offer Letter. (Tab 13, 1 JA 167:4-5.) He in fact executed a request to be

provided a car allowance as City policy authorized. (Tab 13, 1 JA 167: 1-3; Tab 13, 1 JA 185.)

On August 17, 2010, Domenick Weaver ("Weaver"), the president of the Alameda Firefighters IAFF Local 689 Association (the "Firefighters' Union"), sent then Interim City Manager, Defendant Ann Marie Gallant ("Gallant"), an email at the request of then Alameda Mayor Beverly Johnson to bring to her attention the fact that firefighters had witnessed Kapler fueling his BMW at the City gas pumps on several occasions. (Tab 13, 1 JA 167:10-22; Tab 13, 1 JA 187-192.) On August 17, 2010, Weaver also informed the press of these incidents. (Tab 13, 1 JA 167:23-24.) Weaver had previously called for Kapler's resignation after the Firefighters' Union took a unanimous Vote of No Confidence against Kapler in May 2009. (Tab 13, 1 JA 167:26-27; Tab 13, 1 JA 194-199.)

On September 1, 2010, Interim City Manager Gallant placed Kapler on paid administrative leave and commissioned an independent investigation of the allegations against him. (Tab 13, 1 JA 168:7-10; Tab 13, 1 JA 201.) The investigator's report concluded that Kapler's use of City gas to fuel his personal BMW was not authorized by the City. (Tab 13, 1 JA 168:11-14; Tab 13, 1 JA 203-218.) On September 17, 2010, Gallant notified Kapler that his employment would be terminated after a name-clearing hearing. (Tab 13, 1 JA 168:24-27; Tab 13, 1 JA 220.) At the hearing, Kapler continued to maintain that he had been authorized to put City gas in any vehicle of his choosing notwithstanding the investigator's report and proposed a settlement that would include his resignation. (Tab 13, 1 JA 169:1-10; Tab 13, 1 JA 225-229.) He initially requested two years' severance (approximately $400,000) plus retiree medical benefits for both himself and his spouse. (*Id.*) Eventually, Kapler dropped his demand to $75,000 and retiree medical benefits for himself. (Tab 13, 1 JA 169:6-7.) Kapler's proposed settlement was rejected by the

City Council on November 3, 2010. (Tab 13, 1 JA 169:14.) On November 5, 2010, Kapler preemptively resigned in lieu of termination. (Tab 13, 1 JA 169:14-19; Tab 13, 1 JA 231, 233.)

VII. ARGUMENT

A. Section 425.16. Subdivision (b) (1) Requires A Two Step Analysis.

Subdivision (b)(1) of Section 425.16 provides that a cause of action against a person arising from the act of that person "in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue" is subject to a special motion to strike, "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." The prevailing defendant is entitled to attorneys' fees under subdivision (c)(1) of Section 425.16.

As this Court observed in *Dible v. Haight Ashbury Free Clinics* (2009) 170 Cal.App.4th 843, 848, ("*Dible*"), quoting the California Supreme Court in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67, "Section 425.16, subdivision (b)(1) requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. [Citation.] If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers 'the pleadings, and

supporting and opposing affidavits stating the facts upon which the liability or defense is based.' "

B. The Trial Court's Order Denying The Anti-SLAPP Motion Is Subject To *De Novo* Review; The Reviewing Court Must Employ The Same Two-Step Analysis As The Trial Court.

In *Dible*, *supra*, 170 Cal.App.4th at 848, this Court also explained that the reviewing court conducts *de novo* review of the trial court's order and goes through the same two-step analysis as the trial court. (*See also Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055; *Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257, 266-267; *City of Industry v. City of Fillmore* (2011) 198 Cal.App.4th 191, 213, *Vergos v. McNeal* (2007) 146 Cal.App.4th 1387, 1394)

C. Section 425.16 Subdivision (e) Defines Protected Activity.

This Court in *Dible, supra*, 170 Cal.App.4th at 848-49, delineated the scope of the anti-SLAPP statutes' express protections. "Helpfully, the statute itself gives definition to the protected activity. '(e) As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) 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; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other 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." (§ 425.16, subd. (e).)

These four examples operate independently of each other and are not subject to any further limitation derived from the introductory portion of the statute. (*Briggs v. Eden Council for Hope and Opportunity* (1999) 19 Cal.4th 1106, 1117.) They are not exhaustive. (*Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, 1175.)

D. Any Cause of Action Or The Whole Complaint Is Subject To The Anti-SLAPP Statute; Leave To Amend May Not Be Granted After A Cause Of Action Is Dismissed.

A special motion to strike may be granted against an entire complaint or against one or more causes of action. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1004.) If a cause of action is properly subject to a motion to strike, the court may not grant leave to amend. (*Simmons v. Allstate Insurance Co.* (2001) 92 Cal.App.4th 1068, 1073.)

E. To Apply The "Arises From" Requirement The Focus Must Be On The Plaintiff's Complaint *And The Activity Of The Defendants* That The Complaint Challenges, As Further Elucidated By Affidavits.

In *Dible*, this Court explained the first step of the analysis thus: "The preliminary inquiry in an action like that before us is to determine exactly what act of the defendant is being challenged by plaintiff. In doing so we review primarily the complaint, but also papers filed in opposition to the motion to the extent that they might give meaning to the words in the complaint. (§ 425.16, subd. (b); *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89, 124 Cal.Rptr.2d 530, 52 P.3d 703; *Martinez v. Metabolife Internat., Inc.* (2008) 113 Cal.App.4th 181, 186, 6 Cal.Rptr.3d 494.)" (Emphasis added.) (*Dible, supra,* 170 Cal.App.4th at 849.)

In deciding this initial "arising from" question, "[t]he anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92 [emphasis in original].) "In deciding whether the 'arising from' requirement is satisfied, the court shall consider 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'(§ 425.16, subd. (b)(2).)" (Emphasis added) (*Id.* 29 Cal.4th at 88; see also *City of Industry v. City of Fillmore* (2011) 198 Cal.App.4th 191, 214.)

F. The Anti-SLAPP Statute Must Be Broadly Construed; If The Plaintiff Challenges The Protected Activity Of City Officials, Those City Officials And The City Itself Are Entitled To The Protections Of The Statute.

The anti-SLAPP statute in subdivision (a) of Section 425.16 contains the Legislature's determination that "it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process." The Legislature went on to direct that the anti-SLAPP statute "shall be construed broadly."

In *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 19, the California Supreme Court cited to this provision and noted that its "legislative history indicates that the Legislature's concern regarding the potential chilling effect that abusive lawsuits may have on statements relating to a public issue or a matter of public interest extended to statements by public officials or employees acting in their official capacity as well as to statements by private individuals or organizations." (Emphasis added.)

The Court then described the legislative history of the amendment requiring that the section be broadly construed. "A legislative analysis of

this amendment approvingly quoted a passage from a then recent law review article that identified as "a typical SLAPP suit scenario" a situation in which an abusive lawsuit is brought against both public officials and private individuals. (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1296 (1997–1998 Reg. Sess.) as amended June 23, 1997, p. 2, quoting Sills, *SLAPPS: How Can the Legal System Eliminate Their Appeal?* (1993) 25 Conn. L. Rev. 547, 547 (*Sills article*); see also *Sills article, supra*, 25 Conn. L. Rev. 547, 550 ["Just as SLAPPs filed against individuals have a 'chilling' effect on their participation in government decision making, SLAPPs filed against public officials, who often serve for little or no compensation, may likely have a similarly 'chilling' effect on their willingness to participate in governmental processes"].) (Emphasis added.) (*Vargas v. City of Salinas*, *supra*, 46 Cal.4th at 19 fn. 9.)

The *Vargas* court first observed that "a long and uniform line of California Court of Appeal decisions explicitly holds that governmental entities are entitled to invoke the protections of section 425.16 when such entities are sued on the basis of statements or activities engaged in by the public entity or its public officials in their official capacity." (*Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 17.) (Internal citations omitted.) It went on to hold that "the statutory remedy afforded by section 425.16 extends to statements and writings of governmental entities and public officials on matters of public interest and concern that would fall within the scope of the statute if such statements were made by a private individual or entity." (*Id.*)

The *Vargas* Court also dismissed as irrelevant, claims that the statute should not apply because public entities do not have First Amendment rights. The Court explained that the only relevant inquiry is whether the defendants' challenged activity fell within the plain language of subdivision

(e) of Section 425.16 defining protected activity: "Section 425.16, subdivision (e) does not purport to draw any distinction between (1) statements by private individuals or entities that are made in the designated contexts or with respect to the specified subjects, and (2) statements by governmental entities or public officials acting in their official capacity that are made in these same contexts or with respect to these same subjects. Although there may be some ambiguity in the statutory language, section 425.16, subdivision (e) is most reasonably understood as providing that the statutory phrase in question includes all such statements, without regard to whether the statements are made by private individuals or by governmental entities or officials." (Emphasis added.) (*Vargas v. City of Salinas* , *supra*, 46 Cal.4th at 18.)

Appellants next explain that the allegations of Kapler's Complaint, illuminated by the undisputed evidence proffered by the Appellants in their affidavits (as the case law discussed earlier requires), makes it clear that the challenged activities of defendants and Appellants in Kapler's Complaint constitute activity protected by the plain and unambiguous language of subdivision (e) of Section 425.16.

G. Kapler Challenges Protected Activity On A Public Issue Expressly Protected By CCP § 425.16 (e)(3).

Subdivision (e)(3) of Section 415.16 protects any "written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest."

This Court in *Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, held that even speech on a web site was protected under this subdivision: "Wolk's statements are published in her Web site on the Internet, meaning that they are accessible to anyone who chooses to visit her Web site. As a result, her statements hardly could be more public .... The Village Voice was a public forum in the sense that it was a vehicle for communicating a

message about public matters to a large and interested community. All interested parties had full opportunity to read the articles in the newsletter.")

The parties agree that the coverage of Kapler's corruption by both traditional and new media was extensive. This is reflected in the undisputed articles attached to the Amberg Declaration and City documents and averments in the Willis declaration. They shed light on the Complaint's long list of alleged misdeeds by Alameda employees all committed by oral and written communications in a public forum, in the exercise of free speech and petition rights and before and in connection with the Alameda's official proceeding to investigate and act upon Kapler's malfeasance and hold Kapler accountable.

The misappropriation of public resources by a high ranking public official is manifestly a subject of great public interest and concern. This was reflected in the extensive coverage of what the media dubbed "Kapplergate." Kapler himself complains that the issue was covered throughout the Bay Area, state and nationally, as Appellants explained at length in their description of the charging allegations of his Complaint. (See Appellants Opening Brief, *supra,* at pp. 5-8.)

In *Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, 1113–16 a Sheriff filed suit against the District Attorney and the County because of the District Attorney's issuance of a report critical of the Sheriff's method of procuring a search warrant in connection with the shooting death of a property owner during the execution of that warrant. The Court of Appeal reversed the trial court's denial of the District Attorney's anti-SLAPP motion. It noted that "[S]ection 425.16 extends to public employees who issue reports and comment on issues of public interest relating to their official duties. Where, as here, a governmental entity and

its representatives are sued as a result of written and verbal comments, both may move to dismiss under 425.16." (*Id.* at p. 1115.)

The *Bradbury* Court also observed that the comments of public officials on matters of public interest are entitled to First Amendment protection, "because the investigation, the report, and the utterances made thereafter involved a matter of public interest." (*Id.* at p. 1116.) In addition, the "complaint allege[d] that the shooting 'led to much publicity both local and national' and triggered a 'media frenzy.'" (*Ibid.*) "[Public officials] had a First Amendment right to keep the public informed, issue the report, respond to media questions, and ask other law enforcement agencies to conduct their own investigation." (*Ibid.*)

Similarly, in *Schaffer v. City and County of San Francisco* (2008) 168 Cal.App.4th 992, 1001–04, police officers' statements supporting criminal charges against Plaintiff were protected under 425.16(e)(2), because they were made in connection with an issue under consideration by the District Attorney and the granting of an anti-SLAPP motion was upheld on appeal.

H. The Complained Of Oral And Written Statements Of City Employees And Public Officials Are Protected By Section 425.16(e) (4).

Section 425.16 subdivision (e) (4) protects "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." The First Amendment's guarantee of freedom of speech protects government employees from termination because of their speech on matters of public concern." (*Board of County Comm'rs v. Umbehr* (1996) 518 U.S. 668, 116 S. Ct 2342.) Public employees also have a statutory right to report unlawful conduct as whistleblowers without retribution. (See Labor Code Section 1102.5.)

The firefighters whom Kapler alleges took the photographs of Kapler filling up his sports car (Tab 13, 1 JA 189-190) and all-terrain vehicle (Tab 13, 1 JA 192) at a City gas pump provided them to the their union President, who in turn took them to the Mayor and City Manager. These officials spoke out about the appropriate action to be taken, drew oral and written conclusions in investigative reports, denied that Kapler's misuse of City resources had been authorized by them and criticized his performance in other regards. They and the City are being sued for their communicative conduct on a matter of public concern. The officials and employees were exercising their First Amendment rights to make the challenged statements. They are entitled to the protection of subdivision (e)(4) of Section 425.16.

I. Subdivisions (e)(1) and (2) Must Be Broadly Construed.

Subdivision (e)(1) of Section 425.16 protects "any written or oral statement or writing made *before* ... any ... official proceeding authorized by law." Subdivision (e)(2) of Section 425.16 protects such statements "made *in connection* with an issue under consideration or review by any ... official proceeding authorized by law." These sections "protect all direct petitioning of governmental bodies" and "petition-related statements and writings." (*Briggs v. Eden Council for Hope and Opportunity*, *supra*, 219 Cal.4th 1121.)

1. Oral And Written Communications In Any Discretionary Governmental Proceeding Are Protected By Subdivision (e)(1) and (2) of Section 425.15.

It is clear that the Legislature "intended to protect speech concerning matters of public interest in a governmental forum." (*Olaes v. Nationwide Mutual Ins. Co.* (2006) 135 Cal.App.4th 1501, 1507.) All discretionary governmental proceedings, as opposed to ministerial ones, are "official

proceedings" within the meaning of Section 425.16(e)(1) and (2). (*City of Industry v. City of Fillmore* (2011) 198 Cal.App.4th 191, 215-217.

2. The Anti-SLAPP Statute Has Been Applied To Employment Cases.

In *Miller v. City of Los Angeles* (2008) 169 Cal.App.4th 1373 ("*Miller*"), a City of Los Angeles construction supervisor was terminated from his job for "engaging in conduct constituting a conflict of interest, misconduct on the job seriously reflecting on his City employment and theft of City property." (*Id.* at p. 1376.) He filed suit against the City of Los Angeles asserting six claims alleging "racial discrimination, harassment, retaliation and failure to correct as well as intentional infliction of emotional distress and defamation (based on his termination and underlying findings)." (*Id.* at p. 1378.) In evaluating the trial court's dismissal of plaintiff's action under the anti-SLAPP statute, the court applied subdivisions (e)(1)-(4) of Section 425.16. (*Id.* at p. 1383.)

It held that "the thrust of Miller's defamation and intentional infliction of emotional distress claims is the City's investigation into Miller's conduct in connection with his public employment and its determination and report that he had engaged in misconduct on the job constituting a conflict of interest as well as theft of City property. On this record, the first prong of section 425.16 is satisfied." (*Miller*, *supra*, 169 Cal.App.4th at 1383.) The court also found that the plaintiff employee could not meet his burden of establishing a probability of success since he was estopped from challenging his termination because he had failed to exhaust his administrative remedies. (*Ibid.*)[6]

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[6] The trial court did not discuss the *Miller* case in its order even though it was cited by defendants and discussed during oral argument at some length. (*See, e.g.*, RT 4-7, 13.) The court instead cited to *San Ramon Valley Fire Protection District v. Contra Costa Employee's Retirement Association*

Similarly, in *Vergos v. McNeal* (2007) 146 Cal.App.4th 1387 ("*Vergos*") a plaintiff's complaint named a hearing officer who had rejected her grievance as a defendant in one of her causes of action. The plaintiff asserted that the hearing officer's rejection of her grievance had denied her a right to be free from sexual discrimination, sexual harassment or retaliation by the University's supervisors and managers. The court found that this cause of action arose from the defendant hearing officer's protected activity. "'Under the plain terms of the statute it is the context or setting that makes the issue a public issue: all that matters is that the First Amendment activity take place in an official proceeding or be made in connection with an issue being reviewed by an official proceeding.'" (*Id* at 1395 *quoting*, *Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at 1116.)

Courts must ignore the form of the cause of action as well as the motive plaintiff ascribes to the defendant's challenged action and employ a straight forward "but-for" analysis focused squarely on the defendant's

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(2004) 125 Cal.4th 343, a case not cited by either side or discussed or briefed. In that case, a mandamus action was brought by one public agency against another based on what it contended were invalid calculations made by its actuary. The case is factually and legally inapposite. It was filed under section 1085, to enforce a mandatory duty not to challenge a discretionary power.

Here Kapler's entire complaint is replete with attacks on the oral and written statements made by City employees and officials to the media, and those made in the course of the City's discretionary administrative official proceeding. The very essence of the right to petition the government for redress of grievances is under assault by Kapler's request for compensatory and punitive damages against the officials and City daring to inquire into and divulge Kapler's corruption and hold him accountable on behalf of the public. This Court has itself recognized the importance of protecting such proceedings. In short, there is overwhelming support in the case law for applying the anti-SLAPP statute to the facts of this case. Nothing in the *San Ramon* case suggests otherwise.

activity that gives rise to the alleged liability. (*Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257, citing *Navellier*, *supra*, 29 Cal.4th at 90.) In *Tuszynska*, the court held that the plaintiff lawyer's claims, alleging that the defendants Sheriffs' Association and its legal defense trust discriminated against her by failing to assign legal cases to her because she is a woman, arose from protected activity. In its analysis on this issue, the court teaches that "[t]he question whether defendants had a gender-based discriminatory motive is a question that is entirely separate and distinct from whether, under the anti-SLAPP statute, plaintiff's gender discrimination claims are based on defendants' selection and funding decisions. Courts must be careful not to conflate such separate and distinct questions." (*Tuszynska*, *supra*, 199 Cal.App.4th at p. 269.)

Heeding this advice, the Court of Appeal employed the "but for" analysis to conclude that "plaintiff's gender discrimination claims would have no basis in the absence of defendants' attorney selection and litigation funding decisions themselves. Thus here, defendants' selection and funding decisions constitute the gravamen, principal thrust, and core injury-producing conduct underlying plaintiff's gender discrimination claims." (*Id.*, at p. 270.)

3. This Court In *Dible* Recognized That The Anti-SLAPP Statute Protects Communicative Conduct Before And In Connection With A Variety Of Official Proceedings.

In *Dible,* s*upra*, 170 Cal.App.4th at 848-49, this Court applied the anti-SLAPP statute to the plaintiff's single remaining defamation cause of action. Her other causes of action had been the subject of a sustained general demurrer and plaintiff had failed to amend these causes of action. This Court found that the gravamen of her complaint was that "she was wrongfully terminated for the 'false reason' that she was responsible for the suicide [of a patient] and that defendants had 'defamed her' by advising

EDD in response to her unemployment insurance claim that she had held a license and/or was responsible for the inmates' death." The Court found that the plaintiff's statements in her complaint and declaration filed in opposition to the defendant's anti-SLAPP motion "unequivocally establish that the alleged communication by the defendant employer was part of an 'official proceeding'" and qualified under subdivisions (e)(1) and (2). (*Dible*, *supra*, 170 Cal.App.4th at 850.)

Pointing out that these sections have been broadly construed (*id.*) the *Dible* Court cited the *Vergos* case, discussed above, along with others as illustrative of this history of broad construction of the official proceeding language. (See, e.g., *Kibler v. Inyo County Hospital* (2006) 39 Cal.4th 192, 203 [suit arose out of oral and written communications in connection with a hospital peer review proceeding which is an official proceeding because it is authorized by statute and subject to section 1094.5 administrative mandamus review]; *Mission Oaks Ranch, Ltd v. County of Santa Barbara* (1998) 65 Cal.App.4th 713 [developer's suit against CEQA consultant challenging environmental impact report is part of an official proceeding before a legislative body]; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777 [suit challenging letter written in preparation for filing a complaint with the attorney general is a communication in connection with an official proceeding.].)

J. The Challenged Activities Of The City, Its Officials And Employees Are Protected By Subdivision (e)(1) and (2) Of Section 425.16 Because The Communicative Conduct Occurred "Before" And "In Connection With An Issue Under Consideration In" An Official Alameda Proceeding Authorized By The City Charter And Constitution.

The undisputed facts are set forth in the declaration of the Alameda Human Resources Director Karen Willis and the City documents attached to that declaration. (Tab 13, 1 JA 164-233) They are also discussed in

greater detail earlier in this brief both when Appellants discuss Kapler's allegations in his Complaint and when they recount the factual background of this action based on the undisputed evidence.

In sum, the undisputed facts reveal that it was City employees who first reported Kapler's malfeasance to the media. Their union representative then went to the Mayor and Interim City Manager Gallant and asked for protection against any Kapler retaliation. Gallant placed Kapler on administrative leave and commissioned an independent investigation which included an interview with Kapler. Kapler confirmed the material facts of his gas usage. The investigation concluded that Kapler had not been authorized to use gas in the manner he had admitted to, nonetheless Gallant gave him one last opportunity to provide additional information before seeking to terminate him.

In response, Kapler continued to maintain that he had reasonably assumed that authorization to use City gas in one particular vehicle outfitted with lights and sirens while on official City business meant he could reasonably assume that he could use City gas in any new vehicles he acquired for personal use and driven by his daughters and fiancé. When his proposal to obtain a lucrative financial payout was firmly rejected by the City Council he resigned in lieu of termination.

These proceedings were authorized by the City Charter, since Kapler served at the City Manager's pleasure. Moreover the charter authority is itself derived from Article 11, section 5 (b) of the California Constitution which confers plenary power on charter cities over the manner of appointment, compensation, tenure and terms of appointment of elected and appointed officials. Under the charter and applicable state law governing labor relations of municipal employees, City employees were authorized to complain to their unions and elected and appointed officials about their boss Kapler's misappropriation of City resources. City Councilmembers

also were entitled to express their concerns to Gallant who was authorized to act as she did to investigate and start termination proceedings against Kapler.

Kapler's long laundry list of grievances against City employees and officials all target these employees' and officials' communicative conduct before and in connection with the official discretionary charter city proceedings to receive information, investigate and take action concerning Kapler's malfeasance.

The City itself is entitled to the protection of the statute because of the communicative conduct of its officials and employees. Both Kurita, who participated in the City's investigation, and Tam, who demanded that investigative action be taken, are likewise protected. The burden thus shifted to Kapler to demonstrate that he has a likelihood of prevailing on the merits.

K. Kapler Has To Demonstrate His Probability Of Prevailing On The Merits By Affidavits Proferring Admissible Evidence.

Once a defendant demonstrates that the complaint's claims fall within Section 425.16's purview, the complaint must be stricken unless the plaintiff establishes a reasonable probability of prevailing on the merits. (*DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 568.) To establish that reasonable probability, plaintiff must demonstrate that the complaint is "legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the . . . [complainant] is credited." (*Wilcox v. Superior Cour*t (1994) Cal.App.4th at 809, 823.) Plaintiff must produce "sufficient admissible evidence to establish the probability of prevailing on the merits of every cause of action asserted." (*Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 721.)

In order to demonstrate that he will prevail on her claims, Kapler must show that each of his causes of action is supported by competent, admissible evidence and that statements within his declaration are within his personal knowledge. (*Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 11; see also *Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424, 1435.)

For purposes of the Anti-SLAPP statute, '"admissible evidence' . . . is evidence which, by its nature, is capable of being admitted at trial, i.e., evidence which is competent, relevant, and not barred by a substantive [evidentiary] rule." (*Fashion 21 et al v. Coalition for Human Immigrant Rights of Los Angeles* (2004) 117 Cal.App.4th 1138, 1147.) Evidence that is barred by the hearsay rule, or because it is speculative, not based on personal knowledge or consists of impermissible opinion testimony, "cannot be used by the plaintiff to establish a probability of success on the merits because it could never be introduced at trial." (*Id.*) (emphasis added); see also *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 829-30, [hearsay inadmissible], overruled on other grounds by *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68 fn.5; T*uchscher Devel. Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1238 [opinion testimony]; *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1497 [court looks to evidence that would be presented at trial]; *Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424, 1444-1446 [numerous statements excluded as inadmissible due to improper lay opinions and legal conclusions, lack of personal knowledge and foundation, hearsay and relevance].)

Virtually all allegations in Kapler's declaration are inadmissible.

L. Kapler's Declaration Consists Of Inadmissible Opinion Testimony Which Also Lack Foundational Support.

Under Evidence Code section 350, no evidence is admissible except relevant evidence. "Relevant evidence" is defined as "evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) As evidenced by the Kapler Declaration, (Tab 23, 2 JA 295-321.) Kapler has entirely ignored this rule by submitting evidence, which is both irrelevant to the material allegations in his Complaint and which confirms that Kapler and Defendants agree on the facts comprising the gravamen of Kapler's Complaint.

Kapler does not dispute that he used City gas, does not dispute that City firefighters saw him using City gas to fuel his BMW, and that information was provided to news media concerning his use of City gas. (Tab 23, 2 JA 297:9-23, 2 JA 299:20-24.) Moreover, none of the statements in the Kapler Declaration dispute any of the evidence in support of Defendants' Motion, namely the Declarations of Karen Willis and Carol Amberg and the exhibits attached to Defendants' Request for Judicial Notice. Plaintiff does not dispute a single fact or document in either of these declarations. Instead, the Kapler Declaration, and the exhibits attached thereto, are consistent with all of Appellants' proffered evidence.

Kapler's Declaration includes several allegations that are irrelevant. Allegations in the Kapler Declaration concerning prior unsuccessful attempts by Tam and Union members to terminate him are irrelevant to his actual termination in the fall of 2010. (Tab 23, 2 JA 298:12-25.) Likewise, all the statements in the Kapler Declaration concerning the entirely unrelated and unfounded claim that Councilmember Tam had committed a crime are irrelevant (Tab 23, 2 JA 298:24- 299:13), as are statements concerning City budget shortfalls and Kapler's recommended budget cuts

in 2007-2009 (Tab 23, 2 JA 298:12-18.) In addition to lacking any relevance to the Complaint's material allegations, all of this evidence additionally lacks probative value, is highly prejudicial to Defendants, and confuses the issues. (Evid. Code, § 352.)

Kapler's perception about the extent of Kurita's legal authority and his perceptions about Kurita's perceptions are both improper opinion testimony and legal argument. (Tab 23 2 JA 2 JA 296: 4-6, 15:16.)[7]

M. Public Employment Is Held By Statute Not By Contract.

"[I]t is well settled in California that public employment is not held by contract but by statute and that, insofar as the duration of such employment is concerned, no employee has a vested contractual right to continue in employment beyond the time or contrary to the terms and conditions fixed by law." (*Miller v. State of California* (1977) 18 Cal.3d 808, 813.) This principle applies equally to local government employees whose employment is held by ordinance and also limits the employee to the compensation established by law. (See *Markman v. County of Los Angeles* (1973) 35 Cal.App.3d 132, 135.) Where a public employee attempts to circumvent this rule by suing under a contract theory, courts regularly dismiss the employee's claims. (See, e.g., *Shoemaker v. Myers* (1990) 52 Cal.3d 1 [sustaining demurrer to public employee's breach of contract claim against government employer and supervisors]; *Sonoma County Association of Retired Employees v. Sonoma County*, 2010 U.S. Dist. LEXIS 47774 (ND. Cal. May 14, 2010) (slip copy) [dismissing contract claims brought by employee association because the purported contract needed to be made by a county resolution or ordinance in order to be valid and enforceable].)

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[7] The objections are delineated in greater detail in Defendants' Objections to Evidence. (Tab 30, 2 JA 359-368.)

N. A Charter City Has Plenary Authority Over Employment.

The California Constitution grants "plenary authority" to cities to promulgate rules providing for "the terms for which the several municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal." (Calif. Const. art. 11, § 5(b).) This plenary authority trumps any contrary official act. (See, e.g., *Brown v. City of Berkeley* (1976) 57 Cal.App.3d 223 [voiding portions of the city's police review commission ordinance that conflicted with the city manager's power under the charter to appoint, discipline and remove city employees]; *Lucchesi v. City of San Jose* (1980) 104 Cal.App.3d 323 [voiding an ordinance regarding promotion because it conflicted with a city charter provision that appointments to the civil service would be made by competitive examination].)

O. Kapler's Contract-Based Claims Fail As A Matter Of Law.

1. Public contracts are void if contrary to applicable law.

Any contractual provision or grant of benefits that conflicts with a public entity's charter, municipal code or other statutory scheme is void as a matter of law. (See, e.g., *American Federation of State Employees v. County of Los Angeles* (1983) 146 Cal.App.3d 879, 888-89 [voiding certain portions of a ratified memorandum agreement between the county and the firefighters' association relating to grievance procedures because the county charter granted sole authority over grievance procedures to the county commission]; *Markman, supra*, 35 Cal.App.3d [denying overtime benefits to former sheriff because they conflicted with a county ordinance]; *Wheeler v. Santa Ana* (1947) 81 Cal.App.2d 811 [denying pension benefits to disabled fireman because the civil service board that granted them had no power to establish a pension system]; *Domar Electric, Inc. v. City of Los*

Angeles (1994) 9 Cal.4th 161, 170 [holding that a city "charter operates not as a grant of power, but as an instrument of limitations and restriction on the exercise of power over all municipal affairs which the city is assumed to possess"]; *Association for Los Angeles Deputy Sheriff's v. County of Los Angeles* (2007) 154 Cal.App.4th 1536 [holding that sheriff's department policies were invalid where they provided more generous employment benefits than the County's ordinance].)

2. Kapler was an at-will employee terminable without cause or process.

If a city's operative charter and municipal code provide that a public employee serves at the pleasure of the appointing authority, "that employee is subject to removal without judicially cognizable good cause." (*Bogacki v. Board of Supervisors* (1971) 5 Cal.3d 771, 78 [holding that building inspector was employed at-will based on county ordinances and could be terminated without cause or procedural safeguards].) Since the Fire Chief served at the pleasure of the City Manager, he could have been terminated at any time without cause or procedural safeguards. (*Id.*)

Because a general demurrer was sustained to all Kapler's causes of action, it is already established that none of his causes of action alleged facts sufficient to state a cause of action.

Kapler's first cause of action based on breach of contract fails as a matter of law since his employment was not held by contract. (*Shoemaker v. Myers*, *supra*, 52 Cal.3d 1.) His second cause of action for "Intentional Interference with Economic Relationship" likewise fails, since it is premised on the existence of "a contractual express or implied relationship between [Kapler] and the CITY." (Tab 1, 1 JA 12: 22-26, ¶ 44.) Most importantly, Kapler has already dismissed it from his FAC and thus he has conceded that it has no merit.

Kapler's third cause of action alleging a breach of the implied covenant of good faith and fair dealing is flawed for the same reasons. It is yet another attempt to plead a theory premised on the existence of a non-existent contract. As Appellants have already explained, this claim conflicts with the Charter and Alameda Municipal Code providing that Kapler served at the pleasure of the City Manager. This cause of action thus fails as matter of law, as well. Moreover, it is undisputed that the City acted in a considered and reasonable way by conducting an investigation which confirmed all the relevant facts before acting, something it was not required to do for an at-will employee.

Kapler's fourth cause of action against the City and all three individually named defendants for termination in violation of public policy fails because neither the City nor its employees can be liable for such wrongful termination. (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 900 ["a Tameny action for wrongful discharge can only be asserted against an employer," not against an individual who is merely the employer's agent]; see also *Palmer v. Regents of University of California* (2003) 107 Cal.App.4th 899, 909 [wrongful termination is common-law, judicially-created tort action, and thus may not be asserted against a public entity].) In any event, no violation of public policy is even alleged.

Kapler's fifth cause of action entitled constructive discharge again fails as a matter of law and, in any event, is not a cause of action. The City concedes that Kapler was discharged but maintains that it was under no legal constraint in so acting because Kapler was an at-will employee who served at the pleasure of the City Manager and was subject to discharge without any cause or process.

3. Kapler cannot obtain retirement benefits the Council did not authorize.

Only the City Council may "[e]stablish and abolish . . . offices and positions of employment and fix the compensation and duties thereof," including a "retirement, pension and insurance system." As Appellants previously explained, under Charter Sections 3-7(G) and (I), Kapler cannot seek retirement benefits that have not been authorized by the City Council.

P. Kapler's Tort Causes Of Action Also Fail As A Matter Of Law

Kapler's tort causes of action (the sixth and seventh causes of action for intentional and negligent infliction of emotional distress and the eighth cause of action for defamation) all fail as a matter of law against both the City and the individual defendants by virtue of immunities and privileges as Appellants now explain and Kapler's deletion of all individual defendants' in his FAC.

1. Public entities cannot be held directly liable for torts nor derivatively liable where employees are immune.

The California Government Tort Claims Act, Cal. Gov. Code §§ 810-996.6, abolishes all public entity liability except when provided for by statute. (Cal. Gov. Code § 815(a).) Under the Act, public entities, such as the City, cannot be held directly liable for common law torts. (*Id.*; *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 899.) In the absence of a statute a public entity cannot be held liable for an employee's act or omission if the employee himself would be immune (Cal. Gov. Code § 815.2(b).)

5. Immunity protects institution of administrative proceedings.

Public employees acting within their scope of employment are personally immune from liability for the prosecution of administrative proceedings even if they act maliciously and without probable cause. (Cal. Gov. Code § 821.6; *Scannell v. County of Riverside* (1984) 152 Cal.App.3d 596, 604.) Under Government Code § 815.2(b), the employee immunity of Government Code § 821.6 inures to the benefit of public entity employers. In *Summers v. City of Cathedral City,* (1990) 225 Cal.App.3d 1047, 1065, the Court held that the City and its employees were entitled to immunity under Government Code Sections 820.2, 821.6 and 815.2 for a disciplinary termination: "All defendants are immune from any tort liability for their actions in connection with the termination of plaintiff, and the summary judgment was properly granted as to the three causes of action asserting such liability…"

6. All of Kapler's tort claims are barred by Civil Code § 47(a).

Throughout his Complaint, Kapler complains of oral and written communications by the employees and officials of the City. All these are protected as communications in the course of the performance of official duties.

Section 47(a) of the California Code of Civil Procedure extends an absolute privilege to any communication made "[i]n the proper discharge of an official duty." This privilege extends to "all state and local officials" and covers all statements an official makes "(a) while exercising policy-making functions, and (b) within the scope of his [or her] official duties." (*Royer v. Steinberg* (1979) 90 Cal. App. 3d 490, 501 [holding that members of the board of trustees of a school district were immune to tort liability for

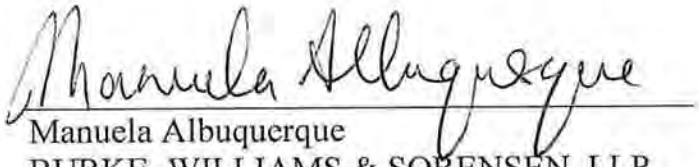
publishing accusation against a former school superintendent of preparing and distributing forged election materials]; *Morrow, supra,* 149 Cal.App.4th at p. 1440–1443 [official duty privilege protected school district officials who published statement announcing the replacement of plaintiff high school principal and implying he was responsible for outbreaks of violence on campus]; *Maranatha Corrections, LLC v. Department of Corrections and Rehabilitation* (2008) 158 Cal.App.4th 1075 [official duty privilege protected director of the Department of Corrections, who published a letter terminating the state's contract with a private prison contractor on the grounds that the contractor had "misappropriated" public funds].)

7. All Of Kapler's Tort Claims Are Also Barred By Civil Code § 47(b).

Under Section 47(b) of the California Civil Code, "a privileged publication or broadcast is one made: . . (b) In any . . . official proceeding authorized by law." This code section bars all tort causes of action except malicious prosecution. (*Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 960; see also *Hansen v. Department of Corrections & Rehabilitation* (2008) 171 Cal.App.4th 1537, 1546 [statements intended to instigate investigation are privileged under § 47(b), even if statements were made in bad faith]; *Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d 1426, 1439 [§ 47(b) protects all "written and oral statements or other publications [that] may have been made in the implementation of [a] policy decision to undertake disciplinary proceedings"]; *Agostini v. Strycula* (1965) 231 Cal.App.2d 804) [affirming demurrer to claims for intentional infliction of emotional distress and intentional interference with contractual relations brought by dismissed city employee against other city employees who had questioned his suitability for the discharge of his duties as a supervisor of children].)

Appellants dismissing the Complaint in its entirety with prejudice and awarding Appellants their attorneys' fees and costs.

Respectfully submitted.



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Attorneys for Appellants
City of Alameda, Lena Tam and Debra Kurita

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 16, 2011, at Oakland, California.

MONET GARRETT

ATTACHMENT B
Kapler Court of Appeal Opinion

Filed 9/6/12

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

DAVID KAPLER,

Plaintiff and Respondent,

v.

CITY OF ALAMEDA et al.,

Defendants and Appellants.

A133001

(Alameda County
Super. Ct. No. HG11570933)

I. INTRODUCTION

Plaintiff and respondent David Kapler resigned as the City of Alameda's fire chief after he was photographed filling a personal vehicle with city gasoline and an administrative investigation resulted in a termination decision. Kapler then sued the city and several of its officials for breach of contract and wrongful termination. The city and its officials responded with a special motion to strike under Code of Civil Procedure section 425.16[1] (an "anti-SLAPP" motion) claiming (a) their actions in investigating and taking adverse action against Kapler are protected conduct under the statute and (b) Kapler cannot establish a probability of prevailing on his claims. The trial court denied the motion on the first ground—ruling Kapler's claims do not arise from any protected conduct. We reverse, except as to one of Kapler's breach of contract theories. As to all other theories and causes of action, we conclude the challenged conduct is

[1] All further statutory reference are to the Code of Civil Procedure unless otherwise indicated.

protected under the anti-SLAPP statute and Kapler has not shown a probability of prevailing on the merits.

II. FACTUAL AND PROCEDURAL BACKGROUND

A city resolution, effective June 25, 2006, established the position of fire chief as an "unrepresented classification not included in any bargaining group." The city's municipal code provides the fire chief shall serve "at the pleasure of the City Manager." (Alameda Muni. Code, § 2-30.1.)

The city hired Kapler as fire chief effective October 1, 2007. According to Kapler, the terms of his employment were set forth in an August 17, 2007, letter from and oral representations by defendant and appellant Debra Kurita, then the city manager.

The letter stated Kapler's employment was "at will" and he would serve at the "discretion of the City Manager." It promised a "post-retirement insurance benefit" available under an existing memorandum of understanding, unless Kapler voluntarily resigned before three years of service. The letter also gave Kapler the choice between a city take-home vehicle, which he could use only for city business, and a car allowance of $250 per month, to be put toward the cost of using his personal vehicle for city business. Kurita orally promised him if he chose the car allowance option, the city would outfit his personal vehicle with emergency response equipment, and, as further reimbursement for city business, would permit him to use gas from pumps at city-owned fire stations. By letter dated October 5, 2007, Kapler opted for the car allowance.

Kapler claims he had the right to fuel not only his Honda Ridgeline truck, which he mostly used for city business and which had been outfitted with emergency response equipment, but also a later-acquired personal car, a blue BMW, which he occasionally used for city business.

Firefighters witnessed Kapler filling up his BMW and snapped photographs. These photographs made their way to the president of the firefighters' union, Domenick Weaver, who forwarded them to the interim city manager, the mayor, and the press. The

media went into overdrive; reprints of the photos and articles about the city's concerns about Kapler's gas use appeared in the San Francisco Chronicle, the Bay Citizen, the Island and eventually in media outlets across the country. The story continued to have legs throughout the administrative proceedings that followed.

On September 1, 2010, then Interim City Manager Ann Marie Gallant wrote to Kapler, placing him on paid administrative leave while the city investigated his alleged unauthorized use of city gas. An investigator then reviewed Kapler's personnel file and city policy documents, and interviewed Kapler and various present and former city officials, including Kurita, who had made the employment offer. Kapler could not recall any discussions about which particular vehicles he would be entitled to refuel at city pumps, and claimed he had not violated the terms and conditions of his employment. Kurita and other city employees recalled making it clear the gas benefit was limited to the vehicle the city would equip for emergency use. The investigator prepared a 14-page report dated September 15, 2010, summarizing his findings and concluding Kapler fueled his BMW, the non-equipped car, without authorization.

On September 17, 2010, the city informed Kapler by letter that it planned to terminate his employment effective September 22, 2010. The letter stated Kapler was not entitled to a "pre-termination Skelly meeting" because his employment was at-will, but offered him a meeting with the interim city manager should he wish to respond to the termination notice or the investigator's report. The city and Kapler agreed to postpone the meeting and termination so his attorney could have adequate time to prepare.

At the rescheduled meeting on September 27, 2010, Kapler denied his gas use was unauthorized. He then proposed a settlement, and he and the interim city manager signed an agreement. In exchange for Kapler's resignation and release of claims against the city, the city would pay him $75,000 and provide postseparation insurance benefits for him, alone, but not his spouse. The settlement agreement's preamble reiterated Kapler was an "at-will" employee.

On November 3, 2010, the city council rejected the proposed settlement, and the city proceeded with its plan to terminate Kapler on November 5, 2010. However, before the city physically delivered its written termination notice, Kapler resigned on November 5 in an effort to preserve what he claimed was a 40-year exemplary employment record.

Convinced the stealth photos, and ensuing investigation and termination process, were politically motivated in retaliation for fiscal decisions he had made and which the firefighters' union had opposed, Kapler filed an administrative claim in anticipation of suing the city and various city officials. After the city rejected his claim, he filed a complaint against the city, Council Member Lena Tam, former City Manager Kurita, and Interim City Manager Gallant on April 14, 2011. The complaint alleged nine causes of action.

The first was for breach of contract. Kapler claimed the city had breached his employment agreement by (1) terminating him without cause because he was entitled to use the city gas in question, and (2) not paying postretirement benefits because he had completed three years of service with the city. The third cause of action, for breach of the implied covenant of good faith and fair dealing, was based on the same alleged conduct.

The second cause of action was for intentional interference with an economic relationship. Kapler claimed city officials wrongfully instigated his termination without cause.

The fourth cause of action was for wrongful termination in violation of the employment agreement and the Brown Act. (Gov. Code, § 3500 et seq.) The gas theft claim, according to Kapler, was a pretext for union allies who disliked his policies. The fifth cause of action, for constructive discharge, similarly alleged the city allowed publication of false information about him in the media and then relied on those false reports to wrongfully instigate termination proceedings.

The sixth and seventh causes of action, respectively, were for intentional and negligent infliction of emotional distress. The eighth cause of action was for defamation based on the city's statements he had stolen gas. The ninth and final cause of action alleged that the city had violated the Firefighters Procedural Bill of Rights ("FFBOR"), found in Government Code section 3250 et seq. Although the complaint is unclear, Kapler's respondent's brief on appeal clarifies the city allegedly violated the FFBOR by not providing him an administrative appeal and by allowing the photographs to be disseminated to the media.

On June 16, 2011, the city and individual defendants demurred to the complaint, moved to strike the individual defendants, and moved to strike all causes of action as a SLAPP (Strategic Lawsuit Against Public Participation). On July 13, 2011, the trial court ruled the demurer had some facial merit and, declining to consider Kapler's late-filed opposition, sustained it with leave to amend. The court then dropped the motion to strike the individual defendants pending the filing of a first amended complaint.

On July 25, 2011, the trial court denied defendants' anti-SLAPP motion, ruling Kapler's claims did not arise from defendants' "exercise of the right to petition or right of free speech" and therefore no conduct protected by the anti-SLAPP statute was implicated. The court did not reach the issue of whether Kapler had carried his burden of demonstrating some probability of succeeding on the merits of his claims.

Kapler filed a first amended complaint on August , 201 1. This pleading retained seven of the originally pleaded

III. DISCUSSION

"The Legislature enacted the anti-SLAPP statute to address the societal ills caused by meritless lawsuits that are filed to chill the exercise of First Amendment rights. [Citation.] The statute accomplishes this end by providing a special procedure for striking meritless, chilling causes of action at the earliest possible stages of litigation."[2] (*Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 443.) Government defendants, whether entities or officials, may, like their private counterparts, invoke the anti-SLAPP statute's protection. (*Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 18-19.)

" 'Under the statute, the court makes a two-step determination: "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. (§ 425.16, subd. (b)(1).) 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e)' [citation]. If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. (§ 425.16, subd. (b)(1) . . . .)" [Citations.] "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." [Citation.]' " (*Tutor-Saliba Corp. v. Herrera* (2006) 136 Cal.App.4th 604, 609.)

An appellate court reviews an order granting or denying an anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326; *Gerbosi v. Gaims, Weil, West*

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[2] The statute provides: "A cause of 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 connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b) (1).)

& Epstein, LLP, *supra*, 193 Cal.App.4th at p. 444; *Tutor-Saliba Corp. v. Herrera*, *supra*, 136 Cal.App.4th at p. 609.) This includes whether the challenged activity is protected under the statute and whether the plaintiff has established a reasonable probability of success on his or her claim. (*Tutor-Saliba Corp. v. Herrera*, *supra*, at pp. 609-610.)

Protected Activity

The anti-SLAPP statute applies only to protected activity—that is, activity "in furtherance of a person's right of petition or free speech under the United States Constitution or California Constitution in connection with a public issue." (§ 425.16, subds. (b)(1), (e).) Such activity includes: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) 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, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other 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." (§ 425.16, subd. (e).)

"[T]he party moving to strike a cause of action has the initial burden to show that the cause of action 'aris[es] from [an] act . . . in furtherance of the [moving party's] right of petition or free speech.' " (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) "In determining whether a defendant sustained its initial burden of proof, the court relies on the pleadings and declarations or affidavits." (*Brill Media Co., LLC v. TCW Group, Inc.* (2005) 132 Cal.App.4th 324, 329, overruled on other grounds by *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 25; § 425.16, subd. (b); see also *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.)

"Our Supreme Court has recognized the anti-SLAPP statute should be broadly construed [(*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 60, fn. 3)]

and that a plaintiff cannot avoid operation of the anti-SLAPP statute by attempting, through artifices of pleading, to characterize an action as a garden variety tort or contract claim when in fact the claim is predicated on protected speech or petitioning activity." (*Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1271-1272.) "The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's activity that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92, italics omitted.)

Kapler's causes of action for constructive discharge, intentional and negligent infliction of emotional distress, and violation of the FFBOR arise, at least in part, from the city's divulging to the media accusations of misconduct and allegedly incriminating photographs. These causes of action, based at least in part on alleged communications by the city and its employees with the media, fall squarely within the ambit of the anti-SLAPP statute. They implicate statements "made in connection with an issue under consideration or review by a legislative . . . body." (§ 425.16, subd. (e)(2); see *Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1041-1042, 1044 [reports on state investigatory audit were protected speech under subdivision (e)(2)]; *Maranatha Corrections, LLC v. Department of Corrections and Rehabilitation* (2008) 158 Cal.App.4th 1075, 1085 (*Maranatha Corrections*) [dissemination of letter with misconduct allegations to press was protected under subdivision (e)(2)].) They also implicate statements "made in a . . . public forum in connection with an issue of public interest." (§ 425.16, subd. (e)(3).) (*Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, 1115-1116 [subdivision (e)(3) of "section 425.16 extends to public employees who issue reports and comment on issues of public interest relating to their official duties"].)

All of the causes of action, including the breach of contract cause of action, also arise, at least in part, from the city's investigation into whether Kapler engaged in misconduct and its ultimate decision to terminate his employment.

Statements made during investigations of government employee misconduct are clearly protected under the anti-SLAPP statute. (*Hansen v. Department of Corrections & Rehabilitation* (2008) 171 Cal.App.4th 1537, 1544 [allegedly false accusations made during government body's internal investigation of misconduct protected under subdivision (e)(2)]; *Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1061 ["Tichinin's claims are based on the investigative reports by the Council's surveillance subcommittee reports, the Council's hearing, and subsequent resolution adopted by Council condemning him"; conduct protected under subdivision (e)(2).]; cf. *Miller v. City of Los Angeles* (2008) 169 Cal.App.4th 1373, 1383, 1378-1379 [defamation and intentional infliction of emotional distress claims based on city's "investigation into Miller's conduct in connection with his public employment and its determination and report that he had engaged in misconduct on the job constituting a conflict of interest as well as theft of City property" arose from protected activity].)

Ultimate personnel actions, such as censure, demotion, or termination, following such investigations are also imbued with anti-SLAPP protection. The cases of *Vergos v. McNeal* (2007) 146 Cal.App.4th 1387 (*Vergos*), and *Gallanis-Politis v. Medina* (2007) 152 Cal.App.4th 600 (*Gallanis-Politis*), are illustrative. In *Vergos*, the trial court ruled the plaintiff's civil rights cause of action against an administrator who denied his workplace sexual harassment claims did not arise from protected activity. (*Vergos, supra*, at p. 1390.) The plaintiff's cause of action, said the court, was based on allegedly retaliatory "conduct and not on the content of what she stated in any proceeding or in the exercise of the right to petition." (*Id.* at p. 1397.) The Court of Appeal reversed. "The hearing, processing, and deciding of the grievances (as alleged in the complaint) are meaningless without a communication of the adverse results." (*Ibid.*) Thus, the administrator's conduct "as a hearing officer denying plaintiff's grievances" was protected conduct under subdivision (e)(2). (*Vergos*, at pp. 1390, 1399.)

Gallanis-Politis also involved a retaliation claim. The plaintiff alleged county employees refused to process a request for bonus pay after commencing an investigation undertaken for the sole purpose of blocking the pay. (*Gallanis-Politis*, *supra*, 152 Cal.App.4th at p. 605.) The trial court denied a motion to strike, assuming the anti-SLAPP statute applied but concluding the plaintiff had demonstrated a reasonable probability of prevailing. (*Id.* at pp. 607-608.) The Court of Appeal agreed the anti-SLAPP statute applied, explaining the "fundamental basis" for the plaintiff's claim was "the allegedly pretextual investigation . . . and the allegedly false report" which led to a recommendation that the bonus pay request was unfounded. (*Id.* at pp. 610-611.) "Absent the investigation and report, nothing of substance exist[ed] upon which to base a retaliation claim against . . . ." (*Id.* at p. 611.) As had the court in *Vergos*, the *Gallanis-Politis* court focused on the inexorable progression from report or suspicion of wrongdoing, to investigation and report, and finally administrative action. The appellate court thus concluded the plaintiff's retaliation claim arose from protected activity under subdivision (e)(2). (See also *Nesson v. Northern Inyo County Local Hospital Dist.* (2012) 204 Cal.App.4th 65 [where peer review process prompted a hospital to terminate agreement with disciplined physician, termination was protected conduct; *Levy v. City of Santa Monica* (2004) 114 Cal.App.4th 1252 [cause of action against city and city councilman seeking declaratory judgment that child's playhouse conformed with zoning ordinance was subject to special motion to strike because city inspector's noncompliance finding arose from concerned citizen's petitioning activity and city's investigation in response thereto].)[3]

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[3] *Martin v. Inland Empire Utilities Agency* (2011) 198 Cal.App.4th 611, and *McConnell v. Innovative Artists Talent & Literary Agency, Inc.* (2009) 175 Cal.App.4th 169, also involved employment actions, but distinctly different factual scenarios, placing them outside section 425.16. In *Martin*, the plaintiff alleged a long history of specific acts of retaliation, the last of which was his supervisor's successful effort to have him demoted. The plaintiff's retaliation claim was grounded primarily on unprotected conduct preceding the board's investigation and adverse personnel action. (*Martin,*

The instant case is of the same milieu as the cases just discussed. The city's decision to terminate Kapler was the final step in a lengthy, public investigation of alleged misconduct. The investigation and termination decision—itself memorialized in writing—are protected under subdivision (e)(2) as "written or oral statement[s] or writing[s] 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." (§ 425.16, subd. (e)(2); *Vergos*, *supra*, 146 Cal.App.4th at p. 1397.)

The investigation and termination decision in this case are also protected conduct under subdivision (e)(3), which protects statements "made in a place open to the public or a public forum in connection with an issue of public interest," and subdivision (e)(4), which protects "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." (§ 425.16, subd. (e)(3)-(4).) Kapler's alleged misuse of city gas, a public asset, was a public issue, and the resulting termination decision was discussed in public fora, namely in city proceedings and in the press. (See *Maranatha Corrections, supra*, 158 Cal.App.4th at p. 1086 [disclosure to local paper of an accusation of public funds misappropriation was protected conduct].)

We reject Kapler's assertion that his alleged misconduct and the city's investigation and disciplinary actions were not "issue[s] of public interest" under subdivision (e)(3) or "public issue[s]" under subdivision (e)(4). Misappropriation of public property is a classic public issue under the anti-SLAPP statute. (See *Maranatha*

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supra, at pp. 618-619, 625.) In *McConnell,* the plaintiffs were fired after they filed a lawsuit challenging some of the terms of their employment. (175 Cal.App.4th 169.) While statements related to pending litigation are protected, the letters terminating plaintiffs were not related to any issue involved in the pending lawsuit and therefore did not constitute protected conduct. Neither case purports to be at odds with the numerous cases discussed above holding investigation of suspected misconduct by a government employee and personnel action taken pursuant to such an investigation is protected activity under section 425.16.

Corrections, *supra*, 158 Cal.App.4th at p. 1086 [the "government's business is the people's business and . . . California's citizens have a right to full disclosure of all information which affects the public fisc"]; *Copley Press, Inc. v. Superior Court* (1998) 63 Cal.App.4th 367, 376 ["the public has a legitimate interest in knowing how public funds are spent and how claims (formal or informal) against public entities are settled"]; *McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 102-103, 111 [defamation action based on statements published in newspaper regarding university's reasons for terminating football coach was subject to an anti-SLAPP motion under subdivision (e)(3)].)[4]

Several of Kapler's causes of action may arise, in part, from unprotected conduct—for example, the breach of contract cause of action is based in part on the claim the city has wrongfully denied Kapler *post*-termination benefits, and the FFBOR cause of action is based in part of the claim the city denied him certain administrative procedures. However, that does not render the anti-SLAPP statute inapplicable. As we have discussed, each cause of action also arises, in part, from protected conduct. "Mixed" causes of action are subject to an anti-SLAPP motion so long as " 'at least one of the underlying acts is protected conduct.' " (*Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1551.) When a cause of action alleges multiple, independent bases for relief, as do Kapler's breach of contract and FFBOR claims, the anti-SLAPP statute applies if any of the alleged bases arises from protected conduct. (*Ibid.*; *Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1187 (*Wallace*).)

In sum, all of Kapler's causes of action are based, in whole or in part, on protected activity and therefore all come within the ambit of the anti-SLAPP statute. The trial court

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[4] Having concluded the city's conduct is protected under the various provisions of section 425.16, subdivision (e) in the manner discussed above, we need not address the applicability of other provisions of subdivision (e) to the city's conduct.

accordingly erred in denying defendants' anti-SLAPP motion on the ground they failed to show that the anti-SLAPP statute applies.

Probability of Prevailing on the Merits

When, as here, a trial court erroneously denies an anti-SLAPP motion on the ground the plaintiff's causes of action do not arise from protected activity, an appellate court has two options. It can remand the case to the trial court to address, in the first instance, whether the plaintiff has carried his or her burden of establishing a "probability of prevailing" on the merits. (See, e.g., *Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257, 267.) Or, the Court of Appeal can, itself, in the interests of judicial efficiency, examine the plaintiff's merits showing and decide whether he or she has demonstrated a probability of prevailing on the challenged causes of action. (See, e.g., *Silverado Modjeska Recreation & Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 312; *Wallace*, *supra*, 196 Cal.App.4th at p. 1195 ["we have discretion to decide the issue ourselves, since it is subject to independent review"].)

Given the heavy burdens now confronting our trial courts, we turn directly to the second inquiry under the anti-SLAPP statute—whether Kapler has demonstrated a "probability of prevailing" on his causes of action. In this regard, we apply a "summary-judgment-like" test (*Taus v. Loftus* (2007) 40 Cal.4th 683, 714), accepting as true the evidence favorable to the plaintiff and evaluating the defendant's evidence only to determine whether it defeats the plaintiff's evidence as a matter of law. (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 823, disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.) The evidence put forward at this stage must be admissible; even allegations in a verified complaint are insufficient. (*Wallace, supra,* 196 Cal.App.4th at p. 1212.) "In addition to considering the substantive merits of the plaintiff's claims," the court "must also consider all available defenses to the claims . . . ." (*No Doubt v. Activision Publishing, Inc.* (2011) 192 Cal.App.4th 1018, 1026.)

When a cause of action states multiple grounds for relief, "the plaintiff may satisfy its obligation in the second prong by showing a probability of prevailing on any" one of those grounds, regardless of whether the ground arises from protected or unprotected conduct. (*Wallace, supra*, 196 Cal.App.4th at p. 1212 [expressing serious reservations about this rule, but noting it is the law as set forth by our Supreme Court].)

Contract Claims

"[T]erms and conditions of public employment, unlike those of private employment, generally are established by statute or other comparable enactment (e.g., charter provision or ordinance) rather than by contract." (*White v. Davis* (2003) 30 Cal.4th 528, 564.) Thus, insofar as "the duration of such employment is concerned, no employee has a vested contractual right to continue in employment beyond the time or contrary to the terms and conditions fixed by law." (*Miller v. State of California* (1977) 18 Cal.3d 808, 813-814; see also *Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1689 [foreclosing claims for breach of contract and breach of the implied covenant].)

"Nonetheless, a long line of California cases establishes that with regard to at least certain terms or conditions of employment that are created by statute, an employee who performs services while such a statutory provision is in effect obtains a right, protected by the contract clause, to require the public employer to comply with the prescribed condition." (*White v. Davis*, *supra*, 30 Cal.4th at pp. 564-565, italics omitted.) Thus, our Supreme Court has "caution[ed]" that its " 'often quoted language that public employment is not held by contract' has limited force where . . . the parties are legally authorized to enter (and have in fact entered) into bilateral contracts to govern the employment relationship." (*Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1182.) In *Retired Employees Assn.*, the court held "under California law, a vested right to health benefits for retired county employees can be implied under certain circumstances from a county ordinance or resolution." (*Id.* at 1194.) It further endorsed an appellate court's statement that " '[w]hen a public

employer chooses instead to enter into a written contract with its employee (assuming the contract is not contrary to public policy), it cannot later deny the employee the means to enforce that agreement.' " (*Id.* at p. 1182, quoting *Shaw v. Regents of University of California* (1997) 58 Cal.App.4th 44, 55.)

Kapler's contract claims are based on two purported breaches of his employment agreement: (1) seeking to terminate him without cause, and (2) refusing to pay postretirement benefits even though he completed three years of service with the city.

Kapler has not shown a probability of succeeding on his breach of contract claim based on his termination. The city's municipal code provides the fire chief shall serve "at the pleasure of the City Manager." (Alameda Muni. Code, § 2-30.1.) A 2006 city resolution stated the position of fire chief was an "unrepresented classification not included in any bargaining group." The August 17 letter awarding Kapler the fire chief job also stated his employment was "at-will" and he would serve at the "discretion of the City Manager." Even the failed settlement agreement with the city, which Kapler signed, stated he was an "at-will" employee. Kapler has produced no admissible evidence suggesting he was something other than an at-will employee or that his employment contract afforded him any protection from termination without cause.[5] Therefore, he has not demonstrated a probability of prevailing on this aspect of his contract claim.[6]

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[5] At oral argument, as in his brief, Kapler suggested there might be other municipal enactments inconsistent with the at-will status the city ascribed to him. Kapler, however, has not cited a single such provision to this court, and we consider Kapler's suggestion no further. (See *McComber v. Wells* (1999) 72 Cal.App.4th 512, 522 [" '[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.' "].)

[6] Kapler's claim that he was the victim of a political conspiracy between the firefighters' union, council member Tam, and other unnamed city officials to end his tenure as fire chief, while adding color to his complaint, does not advance his breach of contract claim. At will public officials who serve at the pleasure of a governing body are inevitably subject to prevailing political winds; whether the union and Tam were angered by budget cuts and unhappy with Kapler is immaterial. Kapler has not alleged that he is a

However, Kapler's breach of contract claim based on withholding post-retirement insurance benefits passes the minimal merits showing required under the anti-SLAPP statute. The August 17, 2007, letter hiring Kapler stated he was entitled to benefits "as described in paragraph 3 of Section 13.1 of the 2001-2008 Fire Management Association MOU unless [he] voluntarily resign[ed] or retire[d] prior to the third anniversary of the date of commencement of employment with the City . . . ." This assurance is not, on its face at least, inconsistent with Article III of the city's charter, which authorizes "a retirement, pension, and insurance system for City officers and employees." Accordingly, based on the current state of the record, Kapler has met his burden of showing a probability of success on this particular breach of contract claim.[7] (See *Retired Employees Assn. of Orange County, Inc. v. County of Orange, supra,* 52 Cal.4th at p. 1182.)

Tort Claims

Kapler alleges four tort claims against the city and individual defendants: wrongful termination, constructive discharge, intentional infliction of emotional distress, and negligent infliction of emotional distress. Defendants claim immunity from these claims under the Government Claims Act.

The Government Claims Act, Government Code section 810 et seq., establishes the limits of common law liability for public entities. In general, there is no such liability. "Except as otherwise provided by statute: (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public

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member of any protected class and was the victim of unlawful, invidious discrimination. (See *Scotch v. Art Institute of California-Orange County, Inc.* (2009) 173 Cal.App.4th 986, 1007 [in wrongful termination action, must be a causal connection between the employee's protected status, such as disabled, and the adverse employment decision].)

[7] We hold only that Kapler has survived the city's special motion to strike as to this particular breach of contract claim. This is not any kind of prognostication as to whether Kapler will ultimately prevail on the claim, nor does it preclude any further dispositive motions by the city.

employee or any other person." (Gov. Code, § 815, subd. (a); see *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 899 [statute abolishes common law tort liability].)

Kapler contends, however, that two statutory exceptions to governmental immunity allow his tort claims to proceed, namely Government Code sections 815.2 and 815.6.

Government Code section 815.2 subjects public entities to a form of vicarious liability, stating public entities are "liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative." (Gov. Code, § 815.2, subd. (a).) However, no such vicarious liability arises where the public employee is immune from direct liability. (*Id.*, subd. (b).)

The city and individual defendants therefore direct our attention to Government Code section 821.6, which provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." (Gov. Code, § 821.6.) " 'The policy behind section 821.6 is to encourage fearless performance of official duties. [Citations.] State officers and employees are encouraged to investigate and prosecute matters within their purview without fear of reprisal from the person or entity harmed thereby. Protection is provided even when official action is taken maliciously and without probable cause.' " (*Paterson v. City of Los Angeles* (2009) 174 Cal.App.4th 1393, 1404-1405 [applying immunity to an internal police misconduct investigation giving rise to claims for intentional infliction of emotional distress and negligent supervision]; see also *Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407, 1424 [immunity applies to claim of wrongful termination in violation of public policy].) "[S]ection 821.6 extends to actions taken in preparation for formal proceedings, including

investigation," (*Patterson*, at p. 1405) and also to "[a]cts undertaken in the course of an investigation, including press releases reporting the progress or results of the investigation." (*Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1048.)

Thus, Government Code section 821.6 forecloses direct liability on the part of the city's employees in investigating and disciplining Kapler and, as a result, the vicarious liability provisions of Government Code section 815.2 do not save Kapler tort causes of action. (See, e.g., *Summers v. City of Cathedral* City (1990) 225 Cal.App.3d 1047, 1064-1065 ["since its employees were immune, the county was also immune"].) Additionally, section 815.2, which only provides for *vicarious* liability based on employee's torts, does not save his wrongful termination and constructive discharge causes, which are, by definition, *direct* claims against the city alone and not actions for which city employees could be liable. (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 900-901 [an "action for wrongful discharge can only be asserted against *an employer*" and section 815.2 does not make the employer liable for this action].)

Government Code section 815.6, in turn, subjects public entities to direct liability when the "entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury" and its failure to discharge that duty, or to exercise reasonable diligence to discharge it, proximately causes that kind of injury. (Gov. Code, § 815.6.) (See generally *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1127 ["The Tort Claims Act draws a clear distinction between the liability of a public entity based on its own conduct, and the liability arising from the conduct of a public employee."].)[8]

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[8] The employee immunity provided by Government Code section 821.6 "does not provide a defense to a claim of breach of mandatory duty under section 815.6." (*Roe v. California* (2001) 94 Cal.App.4th 64, 75; see also *Novoa v. County of Ventura* (1982) 133 Cal.App.3d 137, 143 ["a public entity can be liable under Government Code section 815.6 for breach of a mandatory duty even though its employee is immune from liability under section 821.6"; the immunity "would not necessarily be a defense to direct entity liability under section 815.6"].)

Kapler contends the city breached mandatory duties under the FFBOR and injured him by not providing him an administrative appeal and by facilitating the publication of his photograph in the media. These alleged injuries do not create liability under Government Code section 815.6. As our Supreme Court has explained, section 815.6 applies only to an injury of " 'such nature that it would be actionable if inflicted by a private person.' " (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 968 (*Aubry*), quoting Gov. Code, § 810.8 [defining injury], italics omitted.) In *Aubry*, the plaintiff alleged the hospital district's failure to perform a mandatory duty resulted in workers receiving "less than the prevailing wage while engaged on a public work." (*Aubry, supra*, at p. 968, italics omitted.) The court continued: "This injury is one which by its very nature could not exist in an action between private persons; if the defendant awarding body were not a public entity, there would be no injury. As a result, the injury alleged in this case is not included within the Tort Claims Act's definition of injury." (*Ibid.*)

"Under *Aubry*, we therefore must determine whether the 'injuries' " Kapler alleges "would be actionable against a defendant which was not a public entity." (*Forbes v. County of San Bernardino* (2002) 101 Cal.App.4th 48, 55.) The FFBOR provisions Kapler cites create obligations for and remedies against only an "employing department" or "licensing or certifying agency." (Gov. Code, § 3260, subd. (a) ["It shall be unlawful for any employing department or licensing or certifying agency to deny or refuse to any firefighter the rights and protections guaranteed by this chapter."].) Thus, a FFBOR violation "by its very nature could not exist in an action between private persons." (*Aubry, supra*, 2 Cal.4th at p. 968.) Accordingly, section 815.6 is not an avenue by which Kapler can pursue his tort claims against the city on the basis of supposed mandatory duties imposed by the FFBOR.[9] (See *Aubry*, at p. 968.)

[9] Because the Government Claims Act bars Kapler's tort claims, we do not consider the applicability of the privileges in Civil Code section 47.

Statutory Claim

We alternatively consider Kapler's FFBOR (Gov. Code, §§ 3250-3262) cause of action as strictly a statutory claim. The FFBOR became effective on January 1, 2008. (Stats. 2007, ch. 591, § 2.) The Legislative Counsel's Digest described the legislation as follows: " 'This bill would enact the Firefighters Procedural Bill of Rights Act to prescribe various rights of firefighters, defined as any firefighter employed by a public agency, including a firefighter who is a paramedic or emergency medical technician, with specified exceptions. The bill would prescribe rights related to, among others, political activity, interrogation, punitive action, and administrative appeals, with specified requirements imposed upon the employing agency and the imposition of a civil penalty for a violation thereof.' " (*International Assn. of Firefighters Local Union 230 v. City of San Jose* (2011) 195 Cal.App.4th 1179, 1187-1188.) The FFBOR was enacted "to mirror the Public Safety Officers Procedural Bill of Rights Act that is applicable to public safety officers." (Sen. Floor Com., Bill Analysis Rep. of Assem. Bill No. 220 (2007-2008 Reg. Sess.) as amended July 2, 2007.)

The FFBOR gives aggrieved firefighters a private right of action in superior court. (Gov. Code, § 3260, subd. (b).) The court may render injunctive relief to remedy a FFBOR violation. (*Id.*, subd. (c).) "In addition . . . upon a finding by a superior court that a fire department, its employees, agents, or assigns, with respect to acts taken within the scope of employment, maliciously violated any provision of this chapter with the intent to injure the firefighter, the fire department shall, for each and every violation, be liable for a civil penalty not to exceed twenty-five thousand dollars ($25,000) to be awarded to the firefighter whose right or protection was denied and for reasonable attorney's fees as may be determined by the court." (*Id.*, subd. (d).)

As a preliminary matter, we reject the city's only argument on the merits of Kapler's FFBOR claims—that his use of gas was outside his official duties and therefore he had no rights under the FFBOR. It is true "[t]he rights and protections described [in

the FFBOR] shall only apply to a firefighter during events and circumstances involving the performance of his or her official duties." (Gov. Code, § 3262.) But this cannot reasonably be read to divest a firefighter of the procedural protections afforded by the FFBOR during proceedings to resolve whether or not conduct was authorized and within the scope of the employee's official duties. (Cf. *Paterson v. City of Los Angeles*, *supra*, 174 Cal.App.4th at p. 1401 [applying Peace Officers' Bill of Rights to investigation of fraudulent sick leave use, though the Peace Officers' Bill of Rights does not have an equivalent to section 3262].)

Kapler alleges two violations of the FFBOR. First, he complains the city never offered him an administrative appeal in violation of section 3254, subdivision (c), which states: "A fire chief shall not be removed by a public agency or appointing authority without providing that person with written notice, the reason or reasons for removal, and an opportunity for administrative appeal."[10] (Gov. Code, § 3254, subd. (c).) However, Kapler offers no evidence, despite being represented by counsel, that he ever asked the city to provide him an administrative appeal during the months leading up to the city's

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[10] In turn, Government Code section 3254.5, subdivision (a) states: "An administrative appeal instituted by a firefighter under this chapter shall be conducted in conformance with rules and procedures adopted by the employing department or licensing or certifying agency that are in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2." (Gov. Code, § 3254.5, subd. (a).) "Section 11502, subdivision (a) of part 1 of division 3 of title 2 provides in part, 'All hearings of state agencies required to be conducted under this chapter shall be conducted by administrative law judges on the staff of the Office of Administrative Hearings.' An alternative is provided by subdivision (b) of section 3254.5, a recent amendment to section 3254.5 (Stats. 2010, ch. 465, § 1) that provides in part, 'Notwithstanding subdivision (a) [of section 3254.5], if the employing department is subject to a memorandum of understanding that provides for binding arbitration of administrative appeals, the arbitrator or arbitration panel shall serve as the hearing officer in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 and notwithstanding any other provision that hearing officer's decision shall be binding.' " (*International Assn. of Firefighters, Local Union 230 v. City of San Jose*, *supra*, 195 Cal.App.4th at p. 1188.)

final decision to terminate him. We cannot endorse a rule allowing a firefighter to remain silent throughout the duration of disciplinary proceedings, only to claim additional procedural protections long after the fact and for the first time in a lawsuit. (Cf. *Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 869 ["Murray admittedly failed to invoke, and thereby forfeited, his right to . . . a formal adversarial hearing of record" before an administrative law judge, as was offered to him by the Federal whistleblower statute.].) Furthermore, Kapler's preemptive act of resigning to preserve his assertedly exemplary career record is inconsistent with an administrative appeal under the FFBOR.

Kapler also complains the city allowed photographs of him using city gas to reach the media in violation of Government Code section 3253, subdivision (e)(2). This provision states: "When any firefighter is *under investigation and subjected to interrogation by his or her commanding officer, or any other member designated by the employing department* or licensing or certifying agency, that could lead to punitive action, the interrogation shall be conducted under the following conditions: [¶] . . . [¶] The employer shall not cause the firefighter under interrogation to be subjected to visits by the press or news media without his or her express written consent free of duress, and the firefighter's photograph, home address, telephone number, or other contact information shall not be given to the press or news media without his or her express written consent." (Gov. Code, § 3253, subd. (e)(2), italics added.)

Although Kapler has sued the city, his "employer," for disseminating the photographs, the record evidence establishes that the only person who gave photographs to the press was Weaver, the firefighters' union president, who was neither Kapler's "commanding officer" nor a designee of the fire department for investigating disciplinary matters. There is no evidence the city otherwise disseminated or facilitated Weaver's dissemination of the photographs. When Weaver publicized the photographs, Kapler was not yet "under investigation" by the city—rather, the photographs led to the investigation.

Thus, the protections of Government Code section 3253 had not yet attached.[11] (See *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1287 [protections of similar Government Code section 3303 of Peace Officers' Bill of Rights inapplicable when prerequisites of an "investigation" not present]; *Shafer v. County of Los Angeles Sheriff's Dept.* (2003) 106 Cal.App.4th 1388, 1399 [same].)

Accordingly, Kapler cannot show a probability of prevailing on his FFBOR cause of action.

Dropped Claims

Finally, we address relics from Kapler's original complaint: (1) causes of action for defamation and intentional interference with an economic relationship, and (2) the naming of individual defendants in most causes of action. Kapler dropped these two causes of action and the individual defendants when he filed his first amended complaint after the trial court sustained the defendant's demurrer with leave to amend.

We typically analyze an anti-SLAPP motion by reference to the complaint actually challenged in the trial court—in this case, the original complaint, not the subsequently filed first amended complaint. (*Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 463.) Further, when an amended complaint eliminates a cause of action challenged by an anti-SLAPP motion, or even drops the defendant who filed the anti-SLAPP motion, the anti-SLAPP motion does not become moot. An aggrieved defendant is still entitled to the relief an anti-SLAPP motion can provide, namely an award of attorney fees. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1365 [a defendant had standing to appeal denial of anti-SLAPP motion even though plaintiff dismissed it from case before appeal].)

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[11] Indeed, at the time, Weaver and the press had strong First Amendment interests in the photographs. (See Gov. Code, § 6250 ["access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state"].)

Accordingly, defendants' appeal is not moot as to either the dropped defamation and intentional interference claims or the claims against the individual city officials. For all the reasons we have discussed, Kapler has not carried his burden of showing any probability of succeeding on the two tort claims. Nor has he carried his burden as to any other claim asserted against the individual defendants, except as to his breach of contract claim based on an alleged failure to provide him with post-resignation benefits "as described in paragraph 3 of Section 13.1 of the 2001-2008 Fire Management Association MOU."

Attorney Fees

A party who succeeds on an anti-SLAPP motion is entitled to an award of reasonable attorney fees. (§ 425.16, subd. (c).) Partial success may militate a reduced fee award. (See *Mann v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 341.) Here, the defendants have prevailed on the lion's share of their special motion to strike and therefore are entitled to a fee award for work in both the trial court and on appeal. (See *Carpenter v. Jack In The Box Corp.* (2007) 151 Cal.App.4th 454, 461.) The amount of fees, and any reduction for partial success, is to be determined by the trial court on remand, pursuant to noticed motion. (See *Vergos*, *supra*, 146 Cal.App.4th at p. 1404.)

DISPOSITIO N

The order denying defendants' special motion to strike is reversed, except as to Kapler's breach of contract claim (his first cause of action) for alleged deprivation of postresignation benefits. Defendants are awarded costs on appeal. They are also entitled to an award of reasonable attorney fees, the amount of which is to be determined by the trial court pursuant to noticed motion.

Banke, J.

We concur:

Marchiano, P. J.

Dondero, J.

A133001, *Kapler v. City of Alameda*

A133001

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ATTACHMENT C
Gallant Court of Appeal Opinion

Filed 6/20/13

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

ANN MARIE GALLANT,

Plaintiff and Respondent,

v.

CITY OF ALAMEDA,

Defendant and Appellant.

A133777

(Alameda County
Super. Ct. No. RG11590505)

Defendant City of Alameda (the city) appeals from an order denying its special motion to strike the complaint of plaintiff Ann Marie Gallant as a strategic lawsuit against public participation pursuant to Code of Civil Procedure,[1] section 425.16 (hereafter referred to as SLAPP statute or anti-SLAPP statute). The trial court determined that the complaint was not based on petitioning or free speech activity protected by section 425.16. We disagree, and accordingly, we reverse and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Ann Marie Gallant was formerly employed as interim city manager, pursuant to a written employment contract, for a minimum period of 24 months, commencing April 1, 2009 and ending March 31, 2011. At a December 28, 2010, public meeting, the city council voted to "terminate" Gallant's contract.

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1 All further unspecified statutory references are to the Code of Civil Procedure.

Under the complaint's causes of actions, designated "Labor Code § 1102.5(b)[2]"; Labor Code § 1102.5(c),[3]" "declaratory relief," and "breach of contract," Gallant alleged her employment had been "terminated" because (1) she refused to participate in illegal activity; and (2) she disclosed information pertaining to illegal activity to government agencies regarding a city council member. She also alleged the reported city council member had influenced two other council members to vote to terminate her contract. Gallant also alleged the city council's vote to terminate her contract violated section 2-2 of the city charter[4] and paragraph two of the employment contract.[5] Because Gallant's

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[2] Labor Code section 1102.5, section (b), reads: "An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation."

[3] Labor Code section 1102.5, section (c), reads: "An employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation of noncompliance with a state or federal rule or regulation."

[4] Section 2-2 of the city charter reads: "(A) The following offices are hereby established and the incumbents thereof shall be appointed or removed by a vote of a majority of the full Council: City Manager, City Attorney, City Clerk. [¶] (B) During a period of ninety days immediately following the date of installation of any person newly elected to the Council at a regular or special municipal election or of any person newly appointed to the Council, the Council shall take no action, whether immediate or prospective, to remove, suspend, request the resignation of, or reduce the salary of, the incumbents in the aforementioned appointive offices."

[5] Paragraph two of the contract reads: "Interim City Manager shall be hired as a limited term employee for a minimum period of twenty four (24) months, commencing April 1, 2009 and ending March 31, 2011, unless extended by mutual agreement. Such extensions shall be in 90 day increments, at the commencement of which the City council shall initiate its selection and recruitment procedure for the appointment of a permanent City Manager. [¶] Should the City council elect to delay its executive search for a City Manager, or elect not to select a candidate at the term of this agreement, this agreement shall automatically renew in 90 days increments as provided herein until such time as the City council has selected a permanent City Manager or until such time as the City provides the Interim City Manager with timely notice of non-renewal. The City council shall provide the Interim City Manager with written notice of non-renewal at least 90 days prior to the initial Termination Date or any succeeding Termination Date."

contract had not been properly terminated, she alleged the city was obligated to continue to pay her but it had stopped paying her on or about April 1, 2011. Gallant sought a declaration to resolve the parties' "actual controversy" relating to the validity of the city council's vote to terminate her contract on December 28, 2010, and damages for loss of pay and benefits, continuing to accrue until 90 days after the city complied with the termination terms of the employment contract.

After filing its answer, the city filed a special motion to strike the complaint, which was opposed by Gallant. After a hearing, the trial court issued a written order denying the city's special motion to strike the complaint. The court explained: "Plaintiff's claims arise from the City of Alameda's termination of her employment contract rather than any petitioning or free speech activity protected by the anti-SLAPP statute. Because the Court finds that the complaint does not arise from protected activity within the meaning of [section] 425.16, the Court need not reach the issue of whether plaintiff has made a sufficient showing on the merits of her claims." The city now timely appeals.

DISCUSSION

Section 425.16, subdivision (b), states, in pertinent part: "(1) A cause of 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 connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." "[T]he word 'person' as used in section 425.16, subdivision (b) must be read to include a governmental entity." (*Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, 1114.)

We review the trial court's order denying the city's special motion to strike under section 425.16 de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.) "[A] special motion to strike involves a two-part inquiry. First, the defendant must make a prima facie showing that a cause of action arises from an act in furtherance of his or her constitutional rights of petition or free speech in connection with a public issue.

[Citations.] If such a showing has been made, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the claim. [Citation.] If the plaintiff fails to carry that burden, the cause of action is 'subject to be stricken under the statute.' " (*Birkner v. Lam* (2007) 156 Cal.App.4th 275, 280-281.)

The SLAPP statute's protected activity is broadly defined to include "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) 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, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other 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." (§ 425.16, subd. (e).) "[A] defendant moving to strike a cause of action arising from a statement made before, or in connection with an issue under consideration by, a legally authorized official proceeding need *not* separately demonstrate that the statement concerned an issue of public significance." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123, fn. omitted.) Instead, "the statutory remedy afforded by section 425.16 extends to statements and writings of governmental entities and public officials on matters of public interest and concern that would fall within the scope of the statute if such statements were made by a private individual or entity." (*Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 17.)

In analyzing the first prong of the section 425.16 analysis, "courts must be careful to distinguish allegations of conduct on which liability is to be based from allegations of motives for such conduct. '[C]auses of action do not arise from motives; they arise from acts.' [Citation.] 'The statute applies to claims "based on" or "arising from" statements or writings made in connection with protected speech or petitioning activities, regardless of any motive the defendant may have had in undertaking its activities, or the motive the plaintiff may be ascribing to the defendant's activities.' " (*People ex rel. Fire Ins.*

Exchange v. Anapol (2012) 211 Cal.App.4th 809, 823.) Also, "[t]he anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability – and whether that activity constituted protected speech or petitioning." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92 (*Navellier*).) Thus, regardless of the labeled causes of action, Gallant "cannot avoid operation of the anti-SLAPP statute by attempting through artifices of pleading, to characterize an action as a garden variety tort or contract claim when in fact the claim is predicated on protected speech or petitioning activity." (*Hylton v. Frank E. Rogozienski*, *Inc.* (2009) 177 Cal.App.4th 1264, 1271-1272.)

We agree with the city that the overarching premise of all of Gallant's causes of action is the termination of her employment contract, which is protected conduct under the anti-SLAPP statute as either a "written or oral statement or writing made before a legislative . . . proceeding, or any other official proceeding authorized by law," or a "written or oral statement or writing made in connection with an issue under consideration or review by a legislative . . . body, or any other official proceeding authorized by law." (§ 425.16, subds. (e)(1) & (2).) As Gallant concedes in her responsive brief, her retaliation and breach of contract claims, and request for declaratory relief, "would have no basis in the absence of" the city's alleged actions taken in connection with the termination of her employment *itself*. (*Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257, 270 (*Tuszynska*); cf. *Martin v. Inland Empire Utilities Agency* (2011) 198 Cal.App.4th 611, 624 (*Martin*) [court concluded gravamen of plaintiff's complaint was one of racial and retaliatory discrimination, not an attack on agency's chief executive officer or evaluations of plaintiff's performance as an employee]; *Department of Fair Employment & Housing v. 1105 Alta Loma Road Apartments, LLC* (2007) 154 Cal.App.4th 1273, 1284 [court concluded gravamen of complaint was discrimination, not exercise of defendant's protected speech].) Thus, because the city's decision to terminate Gallant's employment constitutes "the gravamen, principal thrust, and core injury-producing conduct underlying [Gallant's] . . . claims"

(*Tuszynska, supra*, at p. 270), the lawsuit "falls squarely within the ambit of the anti-SLAPP statute's 'arising from' prong" (*Navellier, supra*, 29 Cal.4th at p. 90).[6]

Gallant's reliance on *McConnell v. Innovative Artists Talent & Literary Agency, Inc.* (2009) 175 Cal.App.4th 169, and *Marlin v. Aimco Venezia, LLC* (2007) 154 Cal.App.4th 154, is misplaced as neither case concerns a municipality's protected activity as defined in section 425.16, subdivisions (e)(1) and (e)(2).[7] Additionally, the *McConnell* court's statement that "no one would suggest that a statement or writing firing an employee is protected First Amendment activity" (175 Cal.App.4th at p. 180), misconstrues the issue before us. "[T]he salient question in this case is not whether [defendant's] acts are protected as a matter of law under the First Amendment of the United States Constitution in some other context, but whether they fall within the statutory definition of conduct that the Legislature deemed appropriate for anti-SLAPP motions." (*Schaffer v. City and County of San Francisco* (2008) 168 Cal.App.4th 992, 1001 (*Schaffer*).) "The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' *as defined in the statute*." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon Enterprises*), italics added.)

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[6] To avoid the application of the anti-SLAPP statute, Gallant asks us to consider the events before December 28, 2010, which explain that the motive for her termination was "retaliatory" unprotected conduct. But, Gallant confuses "a defendant's alleged injury-producing conduct with the unlawful motive the plaintiff is ascribing to that conduct." (*Tuszynska, supra,* 199 Cal.App.4th at p. 271.) " '[C]onduct alleged to constitute breach of contract may also come within constitutionally protected speech or petitioning.' " (*Id.* at p. 269.) Gallant is "positing a '*false dichotomy* between actions that target "the . . . performance of contractual obligations" and those that target "the exercise of the right of free speech." ' " (*Ibid.,* quoting *Navellier, supra*, 29 Cal.4th at p. 92.)

[7] In her opening brief, Gallant also refers us to *Kapler v. City of Alameda*, which was then pending review in Division One of this court. However, since the filing of the parties' briefs, our colleagues in Division One have decided *Kapler* in a nonpublished opinion. (Sept. 6, 2012, A133001) [nonpub. opin.].) Consequently, we do not rely on or further discuss this case. (Cal. Rules of Court, rules 8.1105(e)(1) & 8.1115(a).)

We also see no merit to Gallant's argument that the anti-SLAPP statue has not been applied to wrongful termination claims. " 'There is simply no authority for creating a categorical exception [from the anti-SLAPP law] for any particular type of claim . . . .' " (*People ex rel. Fire Ins. Exchange v. Anapol, supra,* 211 Cal.App.4th at p. 823.) " ' "Considering the purpose of the [anti-SLAPP] provision, expressly stated, the nature or form of the action is not what is critical but rather that it is against a person who has exercised certain rights" [citation]. "The Legislature recognized that 'all kinds of claims could achieve the objective of a SLAPP suit—to interfere with and burden the defendant's exercise of his or her rights.' " ' [Citation.] 'Nothing in the statue itself categorically excludes any particular type of action from its operation, and no court has the " 'power to rewrite the statute so as to make it conform to a presumed intention which is not expressed.' " ' [Citation.] Given these pronouncements, and the Legislature's express reminder that anti-SLAPP motions should be 'construed broadly' (§ 425.16, subd. (a)), we do not find room to except claims involving [wrongful termination] from the reach of the statute." (*Beach v. Harco National Ins. Co*. (2003) 110 Cal.App.4th 82, 91.)

In sum, we conclude the city met its burden of showing that the complaint's causes of action were based on "constitutional free speech and petitioning activity as *defined in the anti-SLAPP statute*[]," and "arose from activity protected *by the anti-SLAPP statute*." (*Navellier, supra,* 29 Cal.4th at p. 95; italics added.) Whether the city's conduct "was wrongful" is a matter Gallant must "support in the context of the discharge of [her] burden to provide a prima facie showing of the merits of [her causes of action]." (*Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1367, disapproved on other grounds in *Equilon Enterprises, supra*, 29 Cal.4th at p. 68, fn. 5).

The parties ask us to address whether Gallant met the second prong of the section 426.15 analysis, namely, whether she met her burden of establishing a reasonable probability of prevailing on her claims by producing "evidence that would be admissible at trial." (*Integrated Healthcare Holdings, Inc. v. Fitzgibbons* (2006) 140 Cal.App.4th 515, 527.) However, the trial court did not rule on the city's numerous written objections

challenging Gallant's proffered evidence, the appellate record does not include Gallant's written responses, if any, to the city's evidentiary objections, and she has not specifically addressed the objections in her responsive brief. "Rulings on the evidentiary objections are necessary before the trial court or this court can determine whether [Gallant] has presented admissible evidence that demonstrates a probability of prevailing on the merits of her claims. . . . ' "Trial courts have a duty to rule on evidentiary objections." [Citation.] When that duty is not performed, appellate courts are left with the nebulous task of determining whether the ruling that was purportedly made was within the authority and discretion of the trial court and was correct.' " (*Martin, supra*, 198 Cal.App.4th at p. 630.) Given the procedural posture of this case, we conclude it is more appropriate to remand the matter to the trial court so that it may rule on the outstanding evidentiary and substantive issues in the first instance. (*Birkner v. Lam, supra*, 156 Cal.App.4th at p. 286.)

DISPOSITION

The November 10, 2011, order denying defendant's special motion to strike is reversed. The matter is remanded to the trial court for further proceedings consistent with this opinion. The parties shall bear their respective costs on appeal.

_____
Jenkins, J.

We concur:

_____
McGuiness, P. J.

_____
Siggins, J.