1. PEOPLE v. ESQUIVEL PC-20200526

Petition for Forfeiture.

The People filed a petition for forfeiture of cash. The unverified petition contends: $32,370 in U.S. Currency was seized by the El Dorado County Sheriff's Office; such funds are currently in the hands of the El Dorado County District Attorney's Office; and the defendant's property became subject to forfeiture pursuant to Health and Safety Code, § 11470(f), because that money was a thing of value furnished or intended to be furnished by a person in exchange for a controlled substance, the proceeds was traceable to such an exchange, and the money was used or intended to be used to facilitate a violation of various provisions of the Penal Code and Health and Safety Code. The People pray for judgment declaring that the money is forfeited to the State of California.

On November 23, 2020 respondent Esquivel filed a verified claim opposing the People's request for forfeiture.

"The following are subject to forfeiture: ¶ * * * (f) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, or securities used or intended to be used to facilitate any violation of Section 11351, 11351.5, 11352, 11355, 11359, 11360, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11382, or 11383 of this code, or Section 182 of the Penal Code, or a felony violation of Section 11366.8 of this code, insofar as the offense involves manufacture, sale, possession for sale, offer for sale, or offer to manufacture, or conspiracy to commit at least one of those offenses, if the exchange, violation, or other conduct which is the basis for the forfeiture occurred within five years of the seizure of the property, or the filing of a petition

under this chapter, or the issuance of an order of forfeiture of the property, whichever comes first." (Health and Safety Code, § 11470(f).)

"(a) Except as provided in subdivision (j), if the Department of Justice or the local governmental entity determines that the factual circumstances do warrant that the moneys, negotiable instruments, securities, or other things of value seized or subject to forfeiture come within the provisions of subdivisions (a) to (g), inclusive, of Section 11470, and are not automatically made forfeitable or subject to court order of forfeiture or destruction by another provision of this chapter, the Attorney General or district attorney shall file a petition of forfeiture with the superior court of the county in which the defendant has been charged with the underlying criminal offense or in which the property subject to forfeiture has been seized or, if no seizure has occurred, in the county in which the property subject to forfeiture is located. If the petition alleges that real property is forfeitable, the prosecuting attorney shall cause a lis pendens to be recorded in the office of the county recorder of each county in which the real property is located. ¶ A petition of forfeiture under this subdivision shall be filed as soon as practicable, but in any case within one year of the seizure of the property which is subject to forfeiture, or as soon as practicable, but in any case within one year of the filing by the Attorney General or district attorney of a lis pendens or other process against the property, whichever is earlier." (Emphasis added.) (Health and Safety Code, § 11488.4(a).)

"(a)(1) Any person claiming an interest in the property seized pursuant to Section 11488 may, unless for good cause shown the court extends the time for filing, at any time within 30 days from the date of the first publication of the notice of seizure, if that person was not personally served or served by mail, or within 30 days after receipt of actual notice, file with the superior court of the county in which the defendant has been charged with the underlying or related criminal offense or in which the property was seized or, if there was no seizure, in

which the property is located, a claim, verified in accordance with Section 446 of the Code of Civil Procedure, stating his or her interest in the property. An endorsed copy of the claim shall be served by the claimant on the Attorney General or district attorney, as appropriate, within 30 days of the filing of the claim…" (Health and Safety Code, § 11488.5(a)(1).)

"In the case of property described in subdivision (f) of Section 11470 that is cash or negotiable instruments of a value of not less than twenty-five thousand dollars ($25,000), the state or local governmental entity shall have the burden of proving by clear and convincing evidence that the property for which forfeiture is sought is such as is described in subdivision (f) of Section 11470. There is no requirement for forfeiture thereof that a criminal conviction be obtained in an underlying or related criminal offense." (Health and Safety Code, § 11488.4(i)(4).)

"(c)(1) If a verified claim is filed, the forfeiture proceeding shall be set for hearing on a day not less than 30 days therefrom, and the proceeding shall have priority over other civil cases. Notice of the hearing shall be given in the same manner as provided in Section 11488.4. Such a verified claim or a claim filed pursuant to subdivision (j) of Section 11488.4 shall not be admissible in the proceedings regarding the underlying or related criminal offense set forth in subdivision (a) of Section 11488. ¶ (2) The hearing shall be by jury, unless waived by consent of all parties. ¶ (3) The provisions of the Code of Civil Procedure shall apply to proceedings under this chapter unless otherwise inconsistent with the provisions or procedures set forth in this chapter. However, in proceedings under this chapter, there shall be no joinder of actions, coordination of actions, except for forfeiture proceedings, or cross-complaints, and the issues shall be limited strictly to the questions related to this chapter." (Health and Safety Code, § 11488.5(c).)

"(d)(1) At the hearing, the state or local governmental entity shall have the burden of establishing, pursuant to subdivision (i) of Section 11488.4, that the owner of any interest in the seized property consented to the use of the property with knowledge that it would be or was used for a purpose for which forfeiture is permitted, in accordance with the burden of proof set forth in subdivision (i) of Section 11488.4. ¶ (2) No interest in the seized property shall be affected by a forfeiture decree under this section unless the state or local governmental entity has proven that the owner of that interest consented to the use of the property with knowledge that it would be or was used for the purpose charged. Forfeiture shall be ordered when, at the hearing, the state or local governmental entity has shown that the assets in question are subject to forfeiture pursuant to Section 11470, in accordance with the burden of proof set forth in subdivision (i) of Section 11488.4." (Health and Safety Code, § 11488.5(d).)

"(e) The forfeiture hearing shall be continued upon motion of the prosecution or the defendant until after a verdict of guilty on any criminal charges specified in this chapter and pending against the defendant have been decided. The forfeiture hearing shall be conducted in accordance with Sections 190 to 222.5, inclusive, Sections 224 to 234, inclusive, Section 237, and Sections 607 to 630 of the Code of Civil Procedure if trial by jury, and by Sections 631 to 636, inclusive, of the Code of Civil Procedure, if by the court. Unless the court or jury finds that the seized property was used for a purpose for which forfeiture is permitted, the court shall order the seized property released to the person it determines is entitled thereto. ¶ If the court or jury finds that the seized property was used for a purpose for which forfeiture is permitted, but does not find that a person claiming an interest therein, to which the court has determined he or she is entitled, had actual knowledge that the seized property would be or was used for a purpose for which forfeiture is permitted and consented to that use, the court shall order the seized property released to the claimant." (Health and Safety Code, § 11488.5(e).)

At the hearing on August 6, 2021 the court granted the People's request for a continuance of the hearing of this matter. The court has not received any further word about the criminal proceeding.

TENTATIVE RULING # 1: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, OCTOBER 29, 2021 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

2. PEOPLE v. $115,720 U.S. CURRENCY PC-20200401

Hearing Re: Claim Opposing Forfeiture.

On August 3, 2020 claimant Judkins filed a Judicial Council Form MC-200 claim opposing forfeiture in response to a notice of administrative proceedings.

On August 17, 2020 the People filed a petition for forfeiture of cash in the amount of $115,720, gold valued at $21,673, silver valued at $5,538, platinum valued at $785, and collectable U.S. Currency valued at $5,925 that was seized by the El Dorado County Sheriff's Department. The petition states: the funds and other property are currently in the hands of the El Dorado County District Attorney's Office; and the property became subject to forfeiture pursuant to Health and Safety Code, § 11470(f), because that money was a thing of value furnished or intended to be furnished by a person in exchange for a controlled substance, the proceeds was traceable to such an exchange, and the money was used or intended to be used to facilitate a violation of various provisions of the Health and Safety Code. The People pray for judgment declaring that the money is forfeited to the State of California.

The proof of service of the petition declares that on August 17, 2020 the petition was served on the claimant by mail to his address of record.

"The following are subject to forfeiture: ¶ * * * (f) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, or securities used or intended to be used to facilitate any violation of Section 11351, 11351.5, 11352, 11355, 11359, 11360, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11382, or 11383 of this code, or Section 182 of the Penal Code, or a felony violation of Section 11366.8 of this code, insofar as the offense involves manufacture,

sale, possession for sale, offer for sale, or offer to manufacture, or conspiracy to commit at least one of those offenses, if the exchange, violation, or other conduct which is the basis for the forfeiture occurred within five years of the seizure of the property, or the filing of a petition under this chapter, or the issuance of an order of forfeiture of the property, whichever comes first." (Health and Safety Code, § 11470(f).)

"(a) Except as provided in subdivision (j), if the Department of Justice or the local governmental entity determines that the factual circumstances do warrant that the moneys, negotiable instruments, securities, or other things of value seized or subject to forfeiture come within the provisions of subdivisions (a) to (g), inclusive, of Section 11470, and are not automatically made forfeitable or subject to court order of forfeiture or destruction by another provision of this chapter, the Attorney General or district attorney shall file a petition of forfeiture with the superior court of the county in which the defendant has been charged with the underlying criminal offense or in which the property subject to forfeiture has been seized or, if no seizure has occurred, in the county in which the property subject to forfeiture is located. If the petition alleges that real property is forfeitable, the prosecuting attorney shall cause a lis pendens to be recorded in the office of the county recorder of each county in which the real property is located. ¶ A petition of forfeiture under this subdivision shall be filed as soon as practicable, but in any case within one year of the seizure of the property which is subject to forfeiture, or as soon as practicable, but in any case within one year of the filing by the Attorney General or district attorney of a lis pendens or other process against the property, whichever is earlier." (Emphasis added.) (Health and Safety Code, § 11488.4(a).)

"(a)(1) Any person claiming an interest in the property seized pursuant to Section 11488 may, unless for good cause shown the court extends the time for filing, at any time within 30 days from the date of the first publication of the notice of seizure, if that person was not

personally served or served by mail, or within 30 days after receipt of actual notice, file with the superior court of the county in which the defendant has been charged with the underlying or related criminal offense or in which the property was seized or, if there was no seizure, in which the property is located, a claim, verified in accordance with Section 446 of the Code of Civil Procedure, stating his or her interest in the property. An endorsed copy of the claim shall be served by the claimant on the Attorney General or district attorney, as appropriate, within 30 days of the filing of the claim…" (Health and Safety Code, § 11488.5(a)(1).)

"(c)(1) If a verified claim is filed, the forfeiture proceeding shall be set for hearing on a day not less than 30 days therefrom, and the proceeding shall have priority over other civil cases. Notice of the hearing shall be given in the same manner as provided in Section 11488.4. Such a verified claim or a claim filed pursuant to subdivision (j) of Section 11488.4 shall not be admissible in the proceedings regarding the underlying or related criminal offense set forth in subdivision (a) of Section 11488. ¶ (2) The hearing shall be by jury, unless waived by consent of all parties. ¶ (3) The provisions of the Code of Civil Procedure shall apply to proceedings under this chapter unless otherwise inconsistent with the provisions or procedures set forth in this chapter. However, in proceedings under this chapter, there shall be no joinder of actions, coordination of actions, except for forfeiture proceedings, or cross-complaints, and the issues shall be limited strictly to the questions related to this chapter." (Emphasis added.) (Health and Safety Code, § 11488.5(c).)

"(d)(1) At the hearing, the state or local governmental entity shall have the burden of establishing, pursuant to subdivision (i) of Section 11488.4, that the owner of any interest in the seized property consented to the use of the property with knowledge that it would be or was used for a purpose for which forfeiture is permitted, in accordance with the burden of proof set forth in subdivision (i) of Section 11488.4. ¶ (2) No interest in the seized property shall be

affected by a forfeiture decree under this section unless the state or local governmental entity has proven that the owner of that interest consented to the use of the property with knowledge that it would be or was used for the purpose charged. Forfeiture shall be ordered when, at the hearing, the state or local governmental entity has shown that the assets in question are subject to forfeiture pursuant to Section 11470, in accordance with the burden of proof set forth in subdivision (i) of Section 11488.4." (Health and Safety Code, § 11488.5(d).)

"(e) The forfeiture hearing shall be continued upon motion of the prosecution or the defendant until after a verdict of guilty on any criminal charges specified in this chapter and pending against the defendant have been decided. The forfeiture hearing shall be conducted in accordance with Sections 190 to 222.5, inclusive, Sections 224 to 234, inclusive, Section 237, and Sections 607 to 630 of the Code of Civil Procedure if trial by jury, and by Sections 631 to 636, inclusive, of the Code of Civil Procedure, if by the court. Unless the court or jury finds that the seized property was used for a purpose for which forfeiture is permitted, the court shall order the seized property released to the person it determines is entitled thereto. ¶ If the court or jury finds that the seized property was used for a purpose for which forfeiture is permitted, but does not find that a person claiming an interest therein, to which the court has determined he or she is entitled, had actual knowledge that the seized property would be or was used for a purpose for which forfeiture is permitted and consented to that use, the court shall order the seized property released to the claimant." (Emphasis added.) (Health and Safety Code, § 11488.5(e).)

"(2) In the case of property described in subdivision (f) of Section 11470, except cash, negotiable instruments, or other cash equivalents of a value of not less than twenty-five thousand dollars ($25,000), for which forfeiture is sought and as to which forfeiture is contested, the state or local governmental entity shall have the burden of proving beyond a

reasonable doubt that the property for which forfeiture is sought meets the criteria for forfeiture described in subdivision (f) of Section 11470." (Emphasis added.) (Health and Safety Code, § 11488.4(i)(2).)

"(3) In the case of property described in paragraphs (1) and (2), a judgment of forfeiture requires as a condition precedent thereto, that a defendant be convicted in an underlying or related criminal action of an offense specified in subdivision (f) or (g) of Section 11470 which offense occurred within five years of the seizure of the property subject to forfeiture or within five years of the notification of intention to seek forfeiture. If the defendant is found guilty of the underlying or related criminal offense, the issue of forfeiture shall be tried before the same jury, if the trial was by jury, or tried before the same court, if trial was by court, unless waived by all parties. The issue of forfeiture shall be bifurcated from the criminal trial and tried after conviction unless waived by all the parties." (Health and Safety Code, § 11488.4(i)(3).)

"In the case of property described in subdivision (f) of Section 11470 that is cash or negotiable instruments of a value of not less than twenty-five thousand dollars ($25,000), the state or local governmental entity shall have the burden of proving by clear and convincing evidence that the property for which forfeiture is sought is such as is described in subdivision (f) of Section 11470. There is no requirement for forfeiture thereof that a criminal conviction be obtained in an underlying or related criminal offense." (Emphasis added.) (Health and Safety Code, § 11488.4(i)(4).)

"(5) If there is an underlying or related criminal action, and a criminal conviction is required before a judgment of forfeiture may be entered, the issue of forfeiture shall be tried in conjunction therewith. Trial shall be by jury unless waived by all parties. If there is no underlying or related criminal action, the presiding judge of the superior court shall assign the action brought pursuant to this chapter for trial." (Health and Safety Code, § 11488.4(i)(5).)

The court was previously advised that there was a criminal proceeding pending.

At the hearing on June 16, 2021, claimant requested a continuance to retain counsel. The People did not object. The hearing was continued to August 13, 2021. At the hearing on August 13, 2021, the claimant/respondent confirmed that he has retained an attorney. Counsel has advised the People that while he helped claimant prepare the claim, he does not represent claimant in this matter

At the hearing on September 17, 2021, the court continued the hearing to October 29, 2021.

TENTATIVE RULING # 2: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, OCTOBER 29, 2021 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

3. PEOPLE v. KING PCL-20210435

Claim Opposing Forfeiture.

Claimant King filed a claim opposing forfeiture in response to a notice of administrative proceedings to determine that certain funds are forfeited. The verified claim contends $3,775 that he owns was seized from a Chase Bank 401k account and that forfeiture is being pursued under Health and Safety Code, § 11488.5.

The proof of service declares that the El Dorado County District Attorney's Office was served the claim opposing forfeiture. The People have not filed a petition for forfeiture or any other response to the claim.

"The following are subject to forfeiture: ¶ * * * (f) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, or securities used or intended to be used to facilitate any violation of Section 11351, 11351.5, 11352, 11355, 11359, 11360, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11382, or 11383 of this code, or Section 182 of the Penal Code, or a felony violation of Section 11366.8 of this code, insofar as the offense involves manufacture, sale, possession for sale, offer for sale, or offer to manufacture, or conspiracy to commit at least one of those offenses, if the exchange, violation, or other conduct which is the basis for the forfeiture occurred within five years of the seizure of the property, or the filing of a petition under this chapter, or the issuance of an order of forfeiture of the property, whichever comes first." (Health and Safety Code, § 11470(f).)

"(a)(1) Any person claiming an interest in the property seized pursuant to Section 11488 may, unless for good cause shown the court extends the time for filing, at any time within 30

days from the date of the first publication of the notice of seizure, if that person was not personally served or served by mail, or within 30 days after receipt of actual notice, file with the superior court of the county in which the defendant has been charged with the underlying or related criminal offense or in which the property was seized or, if there was no seizure, in which the property is located, a claim, verified in accordance with Section 446 of the Code of Civil Procedure, stating his or her interest in the property. An endorsed copy of the claim shall be served by the claimant on the Attorney General or district attorney, as appropriate, within 30 days of the filing of the claim…" (Health and Safety Code, § 11488.5(a)(1).)

"(j) The Attorney General or the district attorney of the county in which property is subject to forfeiture under Section 11470 may, pursuant to this subdivision, order forfeiture of personal property not exceeding twenty-five thousand dollars ($25,000) in value. The Attorney General or district attorney shall provide notice of proceedings under this subdivision pursuant to subdivisions (c), (d), (e), and (f), including: ¶ (1) A description of the property. ¶ (2) The appraised value of the property. ¶ (3) The date and place of seizure or location of any property not seized but subject to forfeiture. ¶ (4) The violation of law alleged with respect to forfeiture of the property. ¶ (5) The instructions for filing and serving a claim with the Attorney General or the district attorney pursuant to Section 11488.5 and time limits for filing a claim and claim form. ¶ If no claims are timely filed, the Attorney General or the district attorney shall prepare a written declaration of forfeiture of the subject property to the state and dispose of the property in accordance with Section 11489. A written declaration of forfeiture signed by the Attorney General or district attorney under this subdivision shall be deemed to provide good and sufficient title to the forfeited property. The prosecuting agency ordering forfeiture pursuant to this subdivision shall provide a copy of the declaration of forfeiture to any person listed in the receipt given at the time of seizure and to any person personally served notice of the forfeiture

proceedings. ¶ If a claim is timely filed, then the Attorney General or district attorney shall file a petition of forfeiture pursuant to this section within 30 days of the receipt of the claim. The petition of forfeiture shall then proceed pursuant to other provisions of this chapter, except that no additional notice need be given and no additional claim need be filed." (Emphasis added.) (Health and Safety Code, § 11488.4(j).)

"(c)(1) If a verified claim is filed, the forfeiture proceeding shall be set for hearing on a day not less than 30 days therefrom, and the proceeding shall have priority over other civil cases. Notice of the hearing shall be given in the same manner as provided in Section 11488.4. Such a verified claim or a claim filed pursuant to subdivision (j) of Section 11488.4 shall not be admissible in the proceedings regarding the underlying or related criminal offense set forth in subdivision (a) of Section 11488. ¶ (2) The hearing shall be by jury, unless waived by consent of all parties. ¶ (3) The provisions of the Code of Civil Procedure shall apply to proceedings under this chapter unless otherwise inconsistent with the provisions or procedures set forth in this chapter. However, in proceedings under this chapter, there shall be no joinder of actions, coordination of actions, except for forfeiture proceedings, or cross-complaints, and the issues shall be limited strictly to the questions related to this chapter." (Health and Safety Code, § 11488.5(c).)

"(d)(1) At the hearing, the state or local governmental entity shall have the burden of establishing, pursuant to subdivision (i) of Section 11488.4, that the owner of any interest in the seized property consented to the use of the property with knowledge that it would be or was used for a purpose for which forfeiture is permitted, in accordance with the burden of proof set forth in subdivision (i) of Section 11488.4. ¶ (2) No interest in the seized property shall be affected by a forfeiture decree under this section unless the state or local governmental entity has proven that the owner of that interest consented to the use of the property with knowledge

that it would be or was used for the purpose charged. Forfeiture shall be ordered when, at the hearing, the state or local governmental entity has shown that the assets in question are subject to forfeiture pursuant to Section 11470, in accordance with the burden of proof set forth in subdivision (i) of Section 11488.4." (Health and Safety Code, § 11488.5(d).)

"(e) The forfeiture hearing shall be continued upon motion of the prosecution or the defendant until after a verdict of guilty on any criminal charges specified in this chapter and pending against the defendant have been decided. The forfeiture hearing shall be conducted in accordance with Sections 190 to 222.5, inclusive, Sections 224 to 234, inclusive, Section 237, and Sections 607 to 630 of the Code of Civil Procedure if trial by jury, and by Sections 631 to 636, inclusive, of the Code of Civil Procedure, if by the court. Unless the court or jury finds that the seized property was used for a purpose for which forfeiture is permitted, the court shall order the seized property released to the person it determines is entitled thereto. ¶ If the court or jury finds that the seized property was used for a purpose for which forfeiture is permitted, but does not find that a person claiming an interest therein, to which the court has determined he or she is entitled, had actual knowledge that the seized property would be or was used for a purpose for which forfeiture is permitted and consented to that use, the court shall order the seized property released to the claimant." (Health and Safety Code, § 11488.5(e).)

The People did not appear at the hearing on July 23, 2021. The court continued the hearing At the hearing on July 23, 2021 the claimant was directed to serve the People with a copy of the claim that included the hearing date and the hearing was continued to September 17, 2021. The proof of service is not in the court's file. A copy of the July 23, 2021 minute order was placed in the District Attorney's court will call in Department 7 on July 26, 2021.

At the hearing on September 17, 2021 claimant did not appear. The People were present on other cases and stated the People had not been formally served with the claim, so the

People were not formally appearing in this case. The People also stated a prelim and Section 1538 was on calendar in the criminal case on September 28, 2021.

The court continued the hearing and stated that if Mr. King failed to appear at the continued hearing, the court would dismiss his opposition to the forfeiture. On September 17, 2021 the court clerk served a copy of the minute order by mail to claimant King's address of record and a copy of the minute order was placed in the District Attorney's court will call in Department 7.

TENTATIVE RULING # 3: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, OCTOBER 29, 2021 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

4. SIERRA PACIFIC FENCE v. MESTAZ PSC-20200040

Judgment Debtor Exam.

TENTATIVE RULING # 4: THE PERSONAL APPEARANCE OF THE DEBTOR IS REQUIRED AT 8:30 A.M., FRIDAY, OCTOBER 29, 2021 IN DEPARTMENT NINE, PROVIDED PROOF OF SERVICE OF THE ORDER TO APPEAR FOR EXAMINATION IS FILED PRIOR TO THE HEARING SHOWING THAT PERSONAL SERVICE ON THE DEBTOR WAS EFFECTED NO LATER THAN TEN DAYS PRIOR TO THE HEARING DATE (CCP, § 708.110(d)). IF THE APPROPRIATE PROOF OF SERVICE IS NOT FILED, NO EXAMINATION WILL TAKE PLACE.

5. EL DORADO TRUSS CO., INC. v. ZEUGHE PSC-20200161

Judgment Debtor Exam of Hugo Casillas.

TENTATIVE RULING # 5: THE PERSONAL APPEARANCE OF THE DEBTOR IS REQUIRED AT 8:30 A.M., FRIDAY, OCTOBER 29, 2021 IN DEPARTMENT NINE, PROVIDED PROOF OF SERVICE OF THE ORDER TO APPEAR FOR EXAMINATION IS FILED PRIOR TO THE HEARING SHOWING THAT PERSONAL SERVICE ON THE DEBTOR WAS EFFECTED NO LATER THAN TEN DAYS PRIOR TO THE HEARING DATE (CCP, § 708.110(d)). IF THE APPROPRIATE PROOF OF SERVICE IS NOT FILED, NO EXAMINATION WILL TAKE PLACE.

6. MATTER OF MANN PC-20210458

OSC Re: Name Change.

TENTATIVE RULING # 6: THE PETITION IS GRANTED.

7. MATTER OF MITCHELL PC-20210491

OSC Re: Name Change.

TENTATIVE RULING # 7: THE PETITION IS GRANTED.

8. PETERSON v. BST SERVICES, INC. PC-20190427

Petitions to Approve Compromises of Disputed Claims of Minors.

The three petitions relate to a motor vehicle accident that allegedly injured the plaintiffs in this action, including three minors. The gross settlement amounts offered to the three minors are $62,200 for Cruz D.; $513,150 for Aven D.; and $46,650 for Lola P.

One petition states minor Cruz D. sustained Injuries in the accident consisting of seatbelt trauma to his right shoulder and chest and a small laceration to his forehead, which were treated in the emergency room and he was discharged. The petition also states he incurred $51,153,87 in medical expenses and $4,650 is to be paid from the gross settlement amount. There are no copies of the bills substantiating the claimed medical expenses attached to the petitions as required by Local Rule 7.10.12A.(6) or documentation establishing the medical liens to be paid from the gross settlement.

The petition also states that minor Cruz D. has fully recovered from the injuries allegedly suffered. The hospital discharge report states that he currently is not in any pain.

Another petition states minor Aven D. sustained Injuries in the accident consisting of depressed skull fracture, moderate traumatic brain injury, fractures to her lower back, multiple lacerations to her right forehead resulting in a scar that will likely require future plastic surgery, hematoma to the right forehead, and abrasions to her right hand, right knee, left iliac crest, and abdomen due to the seatbelt. The petition also states she incurred $418,240.31 in medical expenses for hospitalization, head surgery, and follow-up care; and $72,500 is to be paid from the gross settlement amount. There are no copies of the bills substantiating the claimed medical expenses attached to the petitions as required by Local Rule 7.10.12A.(6) or documentation establishing the medical liens to be paid from the gross settlement.

The petition also states minor Aven D. has not fully recovered from the injuries allegedly suffered and the minor suffers permanent injury of scar on her forehead that may require future plastic surgery and the attached doctor's developmental neuropsychological assessment report states that she suffers from mild neurocognitive disorder in the context of brain injury. There are current doctor's reports concerning the minor's condition and prognosis of recovery as required by Local Rule 7.10.12A.(3).

The third petition states minor Lola P. sustained Injuries in the accident consisting of seatbelt abrasions and an abrasion on one toe, which were treated in the emergency room and she was discharged. The petition also states Lola P. incurred $8,362.13 in medical expenses and $2,784.13 is to be paid from the gross settlement amount. While there is a letter from the Department of Health Care Services regarding the Medi-Cal lien asserted in the amount of $284.13 attached as Attachment 12b(4)(c) to the petition, there is no document substantiating the assertion there remains another lien in the amount of $2,500 attached to the petition.

The third petition further states minor Lola P. has fully recovered from the injuries allegedly suffered. There is a discharge report from the hospital stating that the minor was smiling with no complaints of pain.

The minor's attorney requests total attorney's fees in the amount of $155,500 from all three minors, which represents 25% of the settlement amounts. The court uses a reasonable fee standard when approving and allowing the amount of attorney's fees payable from money or property paid or to be paid for the benefit of a minor or a person with a disability. (Rules of Court, Rule 7.955(a)(1).) The fee appears to be reasonable. The minor's attorney also requests reimbursement for the total proportionate costs from all three minors in the amount of $43,043.21. There are no copies of bills substantiating the claimed costs itemized in Attachment 13b. of the petitions as required by Local Rule 7.10.12A.(6).

The net settlement amounts are to be used to purchase single premium annuities for each of the three minors.

Pursuant to Rules of Court, Rule 7.952(a) the petitioner and the minors are required to appear at hearings on petitions to approve minor compromises, unless the court dispenses with the requirement upon finding good cause.

TENTATIVE RULING # 8: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, OCTOBER 29, 2021 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

9. HAYNES v. MOKANU PC-20210524

Hearing Re: Preliminary Injunction.

TENTATIVE RULING # 9: THE COURT HAVING BEEN ADVISED THE CASE HAD SETTLED, THE HEARING ON THIS MATTER WAS VACATED.

10. BANK OF AMERICA v. BUTLER PCL-20210269

Plaintiff's Motion to Deem Admitted Requests for Admission.

Plaintiff's counsel declares: on June 2, 2021 requests for admission were served on defendant; and defendant failed to provide any responses to the discovery propounded. Plaintiff moves to deem admitted the requests for admission Plaintiff has not requested an award of monetary sanctions.

The proof of service in the court's file declares that on August 9, 2021 notice of the hearing and copies of the moving papers were served by mail to the address where plaintiff was personally served the summons and complaint. There is no opposition to the motion in the court's file.

Where a party fails to timely respond to requests for admission, the court is mandated to deem such requests admitted, "…unless it finds that the party to whom the requests for admission have been directed has served, before the hearing on the motion, a proposed response to the requests for admission that is in substantial compliance with Section 2033.220. It is mandatory that the court impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) on the party or attorney, or both, whose failure to serve a timely response to requests for admission necessitated this motion." (Code of Civil Procedure, § 2033.280(c).)

Absent opposition, it appears appropriate under the circumstances to grant the motion to deem admitted the request for admission.

TENTATICVE RULING # 10: PLAINTIFF'S MOTION TO DEEM ADMITTED REQUESTS FOR ADMISSION IS GRANTED. THE COURT ORDERS REQUESTS FOR ADMISSION, SET ONE ARE DEEMED ADMITTED. MONETARY SANCTIONS NOT HAVING BEEN REQUESTED, SANCTIONS WILL NOT BE AWARDED. NO HEARING ON THIS MATTER

WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, OCTOBER 29, 2021 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

11. ESTATE OF BRACCO PP-20190004

Review Hearing Re: Status of Administration.

Letters of Administration were issued on May 23, 2019. The Final Inventory and Appraisal was filed on September 16, 2019.

The personal representative's counsel explained that there is pending litigation concerning the estate's real property as well as another probate case, which has been dismissed. Counsel advised the court that until the litigation is complete, they are unable to proceed in the probate case.

At the hearing on July 23, 2021 the court was advised that the personal representative has submitted the judgment in the civil case and once that is signed, the final documents in this probate proceeding will be submitted on waiver of an account.

The matter was continued to October 29, 2021. There is no Final Account and Request for Order of Final Distribution in the court's file.

TENTATIVE RULING # 11: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, OCTOBER 29, 2021 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

12. MISZKEWYCZ v. COUNTY OF PLACER PC-20210419

Defendant's Anti-SLAPP Motion to Strike Complaint.

On May 20, 2021 plaintiff filed a 1st amended complaint against defendant County of Placer (County) asserting a cause of action for Whistleblower Retaliation under Labor Code, § 1102.5.

On September 17, 2021 the court overruled the defendant County's demurrers to the 1st amended complaint.

Prior to the transfer of the case from the Placer County Superior Court to the El Dorado County Superior Court, defendant County filed a special Anti-SLAPP motion to strike the 1st amended complaint asserting: the adverse action of "double demotion" complained of in the 1st amended complaint was the product of an official proceeding returning plaintiff from a management position to her most recent classified position in accordance with the County Code, which is a protected activity; plaintiff can not establish she engaged in a protected activity; plaintiff can not establish that any adverse employment action was taken against her; plaintiff can not establish causation; defendant had a legitimate, non-retaliatory reason to return plaintiff to her prior classified position; and the County is immune from any liability for discretionary acts.

Defendant also requests an award of attorney fees and costs in accordance with Civil Code, § 425.16(c).

The proof of service declares that on July 20, 2021 plaintiff's counsel was served by overnight mail and electronic service the notice of hearing in the Placer County Superior Court and the moving papers.

The case was later assigned to the El Dorado County Superior Court and notice of the assignment and the dates set for the demurrer and anti-SLAPP motion was mailed to counsels for the parties on August 5, 2021.

Inasmuch as the original hearing date was August 17, 2021, the opposition was originally due to be filed around the time of the transfer and the court is unable to find the opposition in the court's file.

Defendant County did file a reply to an opposition, reply declaration and objections to evidence submitted in opposition.

Since there is no evidence in opposition in the court's file, the court will not rule on objections to evidence that has not been presented.

County Immunity for Discretionary Acts

Defendant argues that the County is immune from liability pursuant to the provisions of Government Code, §§ 820.2 and 815.2, because the decision to return plaintiff to the position of Senior Deputy District Attorney is a discretionary decision of a County manager.

The facts before the trial court and appellate court in Whitehall v. County of San Bernardino (2017) 17 Cal.App.5th 352 were: plaintiff "…was a social worker for the San Bernardino County Children and Family Services (CFS or the County) who sought legal advice pertaining to any liability she might have for submitting misleading information and doctored photographs to the juvenile court at the direction of her superiors. Her counsel prepared a filing for the juvenile court to apprise it of the falsified information, and plaintiff was immediately placed on administrative leave for disclosing confidential information to an unauthorized person. Upon being informed she would be terminated for the breach, plaintiff resigned her position and filed a whistleblower action against the County." (Whitehall v. County of San Bernardino (2017) 17 Cal.App.5th 352, 357.) The appellate court expressly rejected the

defendant County's argument that the County was immune from liability for the discretionary personnel decisions made by County employees pursuant to provisions of the Government Code. The appellate court held: "The County argues that the trial court erred because of the provisions of Government Code sections 815.2, 820.2, and 821.6. However, Government Code section 815.2, subdivision (b), pertains to vicarious liability upon a public entity. (See *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 989, fn. 9, 42 Cal.Rptr.2d 842, 897 P.2d 1320, citing *Bradford v. State of California* (1973) 36 Cal.App.3d 16, 20, 111 Cal.Rptr. 852.) Government Code section 820.2 provides that a public employee is not liable for injuries resulting from acts or omissions where the act or omission was the result of the exercise of discretion vested in him, and section 821.6 provides that a public employee is not liable for injury caused by instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he or she acts maliciously and without probable cause. ¶ None of these Government Code sections apply because plaintiff's whistleblower action was not instituted against a public *employee.* "A wrongful termination action is viable where the employee alleges he [or she] was terminated for reporting illegal activity which could cause harm, not only to the interests of the employer but also to the public." (*Southern Cal. Rapid Transit Dist. v. Superior Court* (1994) 30 Cal.App.4th 713, 725, 36 Cal.Rptr.2d 665, citing *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 670-671, 254 Cal.Rptr. 211, 765 P.2d 373; *Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407, 1418-1420, 4 Cal.Rptr.2d 203.) "An action brought under the whistleblower statute is inherently such an action." (*Southern Cal. Rapid Transit Dist., supra,* at p. 725, 36 Cal.Rptr.2d 665.) To preclude a whistleblower from revealing improper conduct by the government based on confidentiality would frustrate the legislative intent underlying the whistleblower statutes. For reasons of public policy, actions against a public entity for claims of discharge from or termination of employment grounded on

a whistleblower claim are not barred by governmental immunity. (*Southern Cal. Rapid Transit Dist., supra,* 30 Cal.App.4th at p. 726, 36 Cal.Rptr.2d 665.)" (Whitehall v. County of San Bernardino (2017) 17 Cal.App.5th 352, 365.)

The discretionary decision immunity provision of the Government Code does not bar whistleblower actions against public entities.

General Anti-SLAPP Motion Principles

"The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. 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." (Code of Civil Procedure, § 425.16(a).)

"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 or 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…" (Code of Civil Procedure, § 425.16(b)(1).) "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." (Code of Civil Procedure, § 425.16(e).) "…[T]his section shall be construed broadly." (Code of Civil Procedure, § 425.16(a).)

"In 1992, the Legislature enacted section 425.16 in an effort to curtail lawsuits brought primarily 'to chill the valid exercise of ... freedom of speech and petition for redress of grievances' and 'to encourage continued participation in matters of public significance.' (§ 425.16, subd. (a).) The section authorizes a special motion to strike '[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 or California Constitution in connection with a public issue ....' (§ 425.16, subd. (b)(1).) The goal is to eliminate meritless or retaliatory litigation at an early stage of the proceedings. (*Liu v. Moore* (1999) 69 Cal.App.4th 745, 750, 81 Cal.Rptr.2d 807; *Macias v. Hartwell* (1997) 55 Cal.App.4th 669, 672, 64 Cal.Rptr.2d 222.) The statute directs the trial court to grant the 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).) ¶ The statutory language establishes a two-part test. First, we determine whether plaintiff's causes of action arose from acts by defendants in furtherance of defendants' rights of petition or free speech in connection with a [*807] public issue. (*Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 721, 77 Cal.Rptr.2d 1, disapproved on another ground in *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123, fn. 10, 81 Cal.Rptr.2d 471, 969 P.2d 564.) Assuming this threshold condition is satisfied, we then determine whether plaintiff has established a reasonable probability that she will prevail on her claims at trial. We must reverse the order denying the motion if plaintiff failed to make a prima facie showing in the trial court of facts, which, if proved at trial, would support a

judgment in her favor. (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 646, 653, 49 Cal.Rptr.2d 620.)" (Seelig v. Infinity Broadcasting Corp. (2002) 97 Cal.App.4th 798, 806-807.)

"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." (Navellier v. Sletten (2002) 29 Cal.4th 82, 89.)

"In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (Code of Civil Procedure, § 425.16(b)(2).)

"Second, and only if the court concludes that the litigant has made this "threshold showing," the court must examine whether the nonmoving party has "established ... a probability that [it] will prevail" on the challenged cause(s) of action. (Code Civ. Proc., § 425.16, subd. (b)(1); *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 819-820, 124 Cal.Rptr.3d 256, 250 P.3d 1115 (*Oasis West*).) This burden is met if the nonmoving party demonstrates that any challenged cause of action has "minimal merit" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 94, 124 Cal.Rptr.2d 530, 52 P.3d 703), and it does so by making a "prima facie factual showing sufficient to sustain a favorable judgment" on that cause of action (*Baral*, *supra*, 1 Cal.5th at pp. 384-385, 205 Cal.Rptr.3d 475, 376 P.3d 604). In assessing the sufficiency of this showing, a court is to "consider the pleadings, and supporting and opposing affidavits" (Code Civ. Proc., § 425.16, subd. (b)(2)), but must " ' "accept as true the evidence favorable to the [nonmoving party] and evaluate the [moving party's] evidence only to determine if it has defeated that submitted by the [nonmoving party] as a matter of law." ' " (*Oasis West*, at p. 820, 124 Cal.Rptr.3d 256, 250 P.3d 1115.) If the nonmoving party satisfies its burden, the anti-SLAPP motion must denied; if it fails to do so, the pertinent cause of action must be dismissed. (*Barry*,

supra, 2 Cal.5th at p. 321, 212 Cal.Rptr.3d 124, 386 P.3d 788.)" (Mission Beverage Company v. Pabst Brewing Company, LLC (2017) 15 Cal.App.5th 686, 698–699.)

Where causes of action are supported by both protective activity allegations and unprotected activity allegations, the court will only strike the allegations of protected conduct from the pleading should a plaintiff be unable to establish with the evidence submitted a reasonable probability that he or she will prevail on his or her claims that are supported by the allegation of protected activities and leave the allegations of unprotected conduct in the pleading to support the cause of action.

"Viewing the term in its statutory context, we conclude that the Legislature used "cause of action" in a particular way in section 425.16(b)(1), targeting only claims that are based on the conduct protected by the statute. Section 425.16 is not concerned with how a complaint is framed, or how the primary right theory might define a cause of action. While an anti-SLAPP motion may challenge any claim for relief founded on allegations of protected activity, it does not reach claims based on unprotected activity. ¶ It follows that "mixed cause of action," the term frequently used to designate a count alleging both protected and unprotected activity, is not strictly accurate. Section 425.16(b)(1) applies only to "causes of action" that arise from allegations of protected speech or petitioning. However, "mixed cause of action" is a term in common usage, and we sometimes employ it for its customary purpose. We also sometimes use "cause of action" in its ordinary sense, to mean a count as pleaded. To avoid confusion, we refer to the proper subject of a special motion to strike as a "claim," a term that also appears in section 425.16(b)(1). [FN 2] ¶ FN 2. A plaintiff must establish a probability of prevailing on any "claim" that arises from protected activity. (§ 425.16(b)(1).) ¶ As we have observed on other occasions, despite the imprecision that may result from the various connotations of the term "cause of action," its meaning is generally evident in context. (*Slater v.*

Blackwood (1975) 15 Cal.3d 791, 795–796, 126 Cal.Rptr. 225, 543 P.2d 593; *Eichler Homes of San Mateo, Inc. v. Superior Court* (1961) 55 Cal.2d 845, 847–848, 13 Cal.Rptr. 194, 361 P.2d 914.) ¶ The Court of Appeal below held that an anti-SLAPP motion must be brought against a mixed cause of action in its entirety. It affirmed the denial of defendant's motion because plaintiff established a probability of succeeding on claims based on allegations of activity not protected by section 425.16. This application of the anti-SLAPP statute unduly limits the relief contemplated by the Legislature. Accordingly, we reverse." (Emphasis added.) (Baral v. Schnitt (2016) 1 Cal.5th 376, 382.)

"For the benefit of litigants and courts involved in this sometimes difficult area of pretrial procedure, we provide a brief summary of the showings and findings required by section 425.16(b). At the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this stage. If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached. There, the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken. Allegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a distinct claim on which the plaintiff has shown a probability of prevailing." (Emphasis added.) (Baral v. Schnitt (2016) 1 Cal.5th 376, 392–396.)

With the above-cited principles in mind the court will rule on the anti-SLAPP motion to strike the 1st amended complaint.

Motion to Strike a Portion of the Complaint

The moving papers request that the court strike the entire 1st amended complaint pursuant to the provisions of Code of Civil Procedure, § 425.16, or, in the alternative, "strike those portions of the FAC that describe protected activity" and which plaintiff is not able to provide sufficient evidence to support. (See Defendant's Memorandum of Points and Authorities in Support of Motion, page 7, lines 17-22; and page 21, lines 12-15.) The notice of this motion to strike only states that the motion is directed at striking the entire 1st amended complaint consisting of the 1st and sole cause of action for Whistleblower Retaliation. (See Notice of Motion, page 1, lines 25-27; and page 2, lines 14-21.) The notice does not specify what particular allegations should be stricken in the event that it is inappropriate to strike the entire 1st amended complaint/cause of action as mandated by Rule 3.1322(a).

"A notice of motion to strike a portion of a pleading must quote in full the portions sought to be stricken except where the motion is to strike an entire paragraph, cause of action, count, or defense. Specifications in a notice must be numbered consecutively." (Rules of Court, Rule 3.1322(a).)

Therefore, if defendant establishes that this action involves a protected activity by defendant and there is sufficient evidence supporting a finding of minimal merit as to any whistleblower claim made in the 1st amended complaint, the court can not strike the entire 1st amended complaint and also can not strike particular allegations, which have not been specified in the notice of motion.

Anti-SLAPP Motion Step One – Conduct in Furtherance of Defendants' Rights of Petition or Free Speech In Connection with a Public Issue

A Whistleblower Retaliation Cause of Action can be subject to anti-SLAPP motion.

"To be clear, we do not hold that a defendant's motives are categorically off-limits in determining whether an act qualifies as protected activity under the anti-SLAPP statute. We hold only that the plaintiff's allegations cannot be dispositive of the question. In some cases (including this one, as we explain below), whether the defendant's act qualifies as one in furtherance of protected speech or petitioning will depend on whether the defendant took the action for speech-related reasons. Nothing in the statutory scheme prevents the defendant from introducing evidence establishing such reasons. But there is an important difference between permitting the defendant to present evidence of its own motives in an effort to make out its prima facie case of protected activity and treating a plaintiff's allegations of illicit motive as a bar to anti-SLAPP protection, as Wilson would have us do here. ¶ To conclude otherwise would effectively immunize claims of discrimination or retaliation from anti-SLAPP scrutiny, even though the statutory text establishes no such immunity. As originally drafted, "[n]othing in the statute itself categorically exclude[d] any particular type of action from its operation." (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 92, 124 Cal.Rptr.2d 530, 52 P.3d 703.) And although subsequent amendments to the statutory scheme have added exclusions (see Code Civ. Proc., § 425.17; *Simpson Strong-Tie Co., Inc. v. Gore*, *supra*, 49 Cal.4th at pp. 21–22, 109 Cal.Rptr.3d 329, 230 P.3d 1117), there are none for discrimination or retaliation actions. Nor can we infer that failure to include such an exception was a legislative oversight. After all, a meritless discrimination claim, like other meritless claims, is capable of "chill[ing] the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a); see *Ingels v. Westwood One Broadcasting Services, Inc.* (2005) 129 Cal.App.4th 1050, 1064, 28 Cal.Rptr.3d 933 [upholding strike of caller's age discrimination claim against call-in radio talk show].) ¶ Wilson, echoing the Court of Appeal, expresses concern that if the plaintiff's allegations of discriminatory motives are not considered

at the first step of the anti-SLAPP analysis, " 'most, if not all, harassment, discrimination, and retaliation cases [will be subject] to motions to strike.' " (*Wilson*, *supra*, 6 Cal.App.5th at p. 835, quoting *Nam v. Regents of University of California*, *supra*, 1 Cal.App.5th at p. 1189, 205 Cal.Rptr.3d 687.) This result would impose substantial burdens on discrimination and retaliation plaintiffs, who would be compelled to establish the potential merit of their claims at an early stage of the litigation, generally "without the benefit of discovery and with the threat of attorney fees looming." (*Nam*, at p. 1189, 205 Cal.Rptr.3d 687; accord, *Bonni v. St. Joseph Health System*, *supra*, 13 Cal.App.5th at p. 864, rev. granted; see *Wilson*, at p. 835.) ¶ The concern is overstated. We see no realistic possibility that anti-SLAPP motions will become a routine feature of the litigation of discrimination or retaliation claims. The anti-SLAPP statute does not apply simply because an employer protests that its personnel decisions followed, or were communicated through, speech or petitioning activity. A claim may be struck under the anti-SLAPP statute "only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Park*, *supra*, 2 Cal.5th at p. 1060, 217 Cal.Rptr.3d 130, 393 P.3d 905.) Put differently, to carry its burden at the first step, the defendant in a discrimination suit must show that the complained-of adverse action, in and of itself, is an act in furtherance of its speech or petitioning rights. Cases that fit that description are the exception, not the rule. ¶ A brief survey of the case law illustrates the point. For example, in *Martin v. Inland Empire Utilities Agency* (2011) 198 Cal.App.4th 611, 624–625, 130 Cal.Rptr.3d 410, the court denied a government agency's motion to strike an employee's discrimination claim because the claim arose from various actions that had culminated in the employee's constructive discharge, even though the complaint also mentioned statements critical of the plaintiff's performance. In *McConnell v. Innovative Artists Talent & Literary Agency, Inc.* (2009) 175 Cal.App.4th 169,

176–177, 96 Cal.Rptr.3d 1, the plaintiffs sued over the modification of their job duties and subsequent termination in retaliation for their filing lawsuits; that these allegedly retaliatory acts were conveyed in writing did not render them protected. And in *Department of Fair Employment & Housing v. 1105 Alta Loma Road Apartments, LLC* (2007) 154 Cal.App.4th 1273, 1284–1285, 65 Cal.Rptr.3d 469, the plaintiff's disability discrimination claims arose from a landlord's failure to accommodate a disability by giving sufficient time to seek alternative housing, not the unlawful detainer action the landlord filed. ¶ In the relatively unusual case in which the discrimination or retaliation defendant does meet its first-step burden of showing that its challenged actions qualify as protected activity, the burden shifts to the plaintiff. But the plaintiff's second-step burden is a limited one. The plaintiff need not prove her case to the court (*Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at p. 1123, 81 Cal.Rptr.2d 471, 969 P.2d 564); the bar sits lower, at a demonstration of "minimal merit" (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 89, 124 Cal.Rptr.2d 530, 52 P.3d 703). At this stage, " '[t]he court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law.' " (*Sweetwater Union High School Dist. v. Gilbane Building Co.* (2019) 6 Cal.5th 931, 940, 243 Cal.Rptr.3d 880, 434 P.3d 1152, quoting *Baral v. Schnitt* (2016) 1 Cal.5th 376, 384–385, 205 Cal.Rptr.3d 475, 376 P.3d 604; see *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821, 123 Cal.Rptr.2d 19, 50 P.3d 733.) ¶ True, in the absence of discovery, even this reduced barrier could pose particular difficulties for discrimination and retaliation plaintiffs, whose claims depend on assertions of motive that are peculiarly within the defendant's knowledge. But "[c]ourts deciding anti-SLAPP motions ... are empowered to

mitigate their impact by ordering, where appropriate, 'that specified discovery be conducted notwithstanding' the motion's pendency." (*Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 66, 124 Cal.Rptr.2d 507, 52 P.3d 685, quoting § 425.16, subd. (g).) A court exercising its discretion to grant or deny a motion under section 425.16, subdivision (g) should remain mindful that the anti-SLAPP statute was adopted to end meritless suits targeting protected speech, "*not* to abort potentially meritorious claims due to a lack of discovery." (*Sweetwater Union High School Dist. v. Gilbane Building Co.*, *supra*, 6 Cal.5th at p. 949, 243 Cal.Rptr.3d 880, 434 P.3d 1152.) Where a defendant relies on motive evidence in support of an anti-SLAPP motion, a plaintiff's request for discovery concerning the asserted motive may often present paradigmatic "good cause." (§ 425.16, subd. (g).) ¶ With careful attention to the limited nature of a plaintiff's second step showing, and to granting discovery in appropriate cases, courts can mitigate the burden of anti-SLAPP enforcement on discrimination and retaliation plaintiffs, even if they cannot eliminate it altogether. If the Legislature believes the residual burden is unnecessary or excessive, it certainly can adjust the statutory scheme, as it has before. We cannot, however, rewrite the statute to create an exception the Legislature has not enacted. ¶ In sum, we conclude that for anti-SLAPP purposes discrimination and retaliation claims arise from the adverse actions allegedly taken, notwithstanding the plaintiff's allegation that the actions were taken for an improper purpose. If conduct that supplies a necessary element of a claim is protected, the defendant's burden at the first step of the anti-SLAPP analysis has been carried, regardless of any alleged motivations that supply other elements of the claim. We disapprove *Bonni v. St. Joseph Health System*, *supra*, 13 Cal.App.5th 851, review granted, and *Nam v. Regents of University of California*, *supra*, 1 Cal.App.5th 1176, 205 Cal.Rptr.3d 687, to the extent they are inconsistent with this conclusion." (Wilson v. Cable News Network, Inc. (2019) 7 Cal.5th 871, 889–892.)

In summary, the plaintiff's allegations cannot be dispositive of the question of protected activity by the defendant, nothing prevents the defendant from introducing evidence establishing protected reasons for the adverse action/conduct taken, and the defendant is permitted to present evidence of its own motives in an effort to make out its prima facie case of protected activity. (Wilson v. Cable News Network, Inc. (2019) 7 Cal.5th 871, 889.)

Plaintiff alleges: in December 2018 plaintiff was promoted to Assistant District Attorney; sometime between March 4 and 6, 2020 District Attorney Wilson advised plaintiff that the FPPC contacted the District Attorney's Office regarding an inquiry into potential unlawful conduct at the County and District Attorney Wilson told plaintiff the FPPC asked whether the County District Attorney's Office will investigate or whether the FPPC will be allowed to investigate; District Attorney Wilson stated he needed to contact the State Attorney General's Office about the claim; on March 9, 2020 the County HR Director and County Counsel called plaintiff and told her that District Attorney Wilson was placed on administrative time off and plaintiff would fill in as interim District Attorney; she was instructed not to talk to District Attorney Wilson about any office related matters; on March 10, 2020 plaintiff emailed the State Attorney General's Office about the FPPC inquiry making clear that there was an unlawful conflict of interest in asking the District Attorney's Office to investigate, or not investigate, potentially unlawful conduct at the County while the County was in the process of appointing a new District Attorney; on March 11, 2020 plaintiff advised the County CEO, HR Director and County Counsel that she had emailed the Attorney General's Office about the FPPC complaint without disclosing she had also stated the FPPC requested the District Attorney investigate; County Counsel advised plaintiff that they were already aware of the FPPC complaint; and on March 12, 2020 plaintiff advised the County CEO, HR Director and County Counsel that the State Attorney General's Office had determined there was a conflict of interest with the District

Attorney's Office handling the investigation. (1st Amended Complaint, paragraphs 8, 11-13, 15, and 16.)

Plaintiff further alleges that on March 19, 2020 plaintiff and Chief Investigator Green disclosed to the County Counsel that there was a text message in which the wife of a County Supervisor attempted to bribe District Attorney Wilson. (1st Amended Complaint, paragraph 18.)

Plaintiff also alleges the following in paragraphs 22, 24, 25 and 37 of the 1st amended complaint: on or around April 15, 2020, just after new District Attorney Gire assumed office, plaintiff told him that she had been interviewed by one of the Attorney General investigators and would comply with their investigation if called upon; between April 2020 and July 20, 2020 plaintiff diligently performed her job duties as Assistant District Attorney; on July 20, 2020 District Attorney Gire told plaintiff she was being demoted from Assistant District Attorney to Senior Deputy District Attorney, a double demotion, because they were moving in a different direction; and defendant unlawfully took adverse actions against plaintiff by imposing a double demotion.

As stated in the ruling on the demurrer, plaintiff has adequately alleged that plaintiff reported to defendant County an attempted violation of law by attempted bribery of the District Attorney, which was a protected activity; allegedly demoting plaintiff two grades sufficiently alleges that defendant materially affected the terms and conditions of plaintiff's employment amounting to an adverse action; and plaintiff has adequately alleged a causal connection between her protected disclosure to the defendant County thorough the District Attorney that she was not only interviewed by an Attorney General investigator concerning the subject investigation of an FPPC complaint, she would also comply with their investigation if called upon and her double demotion a few months thereafter.

The question then becomes whether defendant has set forth sufficient evidence to state a prima facie case that it engaged in a protected activity which resulted in the adverse action complained of.

Defendant asserts in the moving papers that on February 28, 2020 defendant notified plaintiff that she was being investigated by the County due to an employee complaint of discrimination, harassment, sexual harassment and intimidation; despite such pending complaints against plaintiff, on March 9, 2020 plaintiff was appointed acting District Attorney; the double demotion after the new DA was appointed was merely a protected official proceeding as County employees are often transferred from management positions to their most recent classified position when a new DA is elected or appointed, County Code section 3.08.440(E) controls that transfer, and plaintiff was returned to her prior position in accordance with statute, which is a protected activity under Section 425.16; and the 1st amended complaint contains no facts to support the allegation that the County created hostile terms and conditions of employment. (Defendant's Memo of Points and Authorities in Support of Motion, page 9, lines 8-13 and lines 22-23; page 13, lines 19-23; and page 14, lines 15-18 and lines 20-22.)

In short, defendant contends that employment actions returning employees to classified positions held prior to removal from a management position without cause due to a change in the management team of a County Department as provided pursuant to a County Code section is an official proceeding authorized by law.

The Human Resources Director declares: the County elected department heads, including the District Attorney, are appointing authorities who appoint their own management teams when they assume office; the management employees serve in unclassified service; employees who served in management under the prior department head, but are not selected by the incoming department head, return to their most recent position in the classified service;

Placer County Code, § 3.08.440(E) provides that permanent classified employees appointed to management by a department head has a right to return to their prior classified position, unless terminated for cause and such an employee may be required to demote to a prior classified position without cause and at the pleasure of the appointing authority; plaintiff's prior classified position was as a Senior Deputy District Attorney; plaintiff relinquished that classified position to accept at-will management positions under the District Attorney, with the most recent management position of Assistant District Attorney on December 8, 2018; the Board ultimately selected Morgan Gire for the District Attorney position; plaintiff remained as an Assistant District Attorney with additional pay to recognize her duties to assist District Attorney Gire and his management teams transition to their new offices; District Attorney Gire emailed the Human Resources Director on July 29, 2020 to advise her that he was reorganizing his office and plaintiff was returned to her most recent classified position of Senior Deputy District Attorney; and this was done pursuant to Section 3.08.440(E). (Declaration of Kate Sampson in Support of Motion, paragraphs 2-4, 12, and 13)

Defendant cites Vergos v. McNeal (2007) 146 Cal.App.4th 1387 and Kibler v. Northern Inyo County Local Hospital Dist. (2006) 39 Cal.4th 192 in support of its arguments that employment actions returning employees to classified positions held prior to removal from a management position without cause due to a change in the management team of a County Department as provided in a County Code section is an official proceeding authorized by law and the evidence presented in support of the motion establishes that the County's transfer of plaintiff back to her last held classified position was a protected activity.

The appellate court in Vergos, supra, held: "As we have mentioned, this case involves subdivision (e)(2) of section 425.16 (statement or writing made in connection with an issue under review in an official proceeding authorized by law). ¶ Thus, McNeal reviewed

plaintiff's grievances pursuant to the PPSM, which was established by the Regents, which is a constitutional entity having quasi-judicial powers. (Cal. Const., art. IX, § 9; *Campbell v. Regents of the University of California* (2005) 35 Cal.4th 311, 319–321, 25 Cal.Rptr.3d 320, 106 P.3d 976.) The Regents "have rulemaking and policymaking power in regard to the University; their policies and procedures have the force and effect of statute." (*Kim v. Regents of University of California* (2000) 80 Cal.App.4th 160, 165, 95 Cal.Rptr.2d 10.) Statutory hearing procedures qualify as official proceedings authorized by law for section 425.16 purposes. (E.g., *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 46 Cal.Rptr.3d 41, 138 P.3d 193 (Kibler) [hospital peer review procedure qualified as official proceeding under section 425.16 because procedure was required by Business and Professions Code statutes]. [Footnote omitted.])" (Emphasis added.) (Vergos v. McNeal (2007) 146 Cal.App.4th 1387, 1396.)

The California Supreme Court in Kibler, supra, held: "The Legislature has decreed that courts "broadly" construe the anti-SLAPP statute to further the legislative intent of encouraging "continued participation in matters of public significance" by preventing the chilling of such participation "through abuse of the judicial process." (§ 425.16, subd. (a).) Here, the trial court and the Court of Appeal concluded that a hospital's peer review procedure qualifies as an "official proceeding authorized by law" under section 425.16, subdivision (e)(2) because that procedure is required under Business and Professions Code section 805 et seq., governing hospital peer review proceedings. We agree. ¶ Peer review is the process by which a committee comprised of licensed medical personnel at a hospital "evaluate[s] physicians applying for staff privileges, establish[es] standards and procedures for patient care, assess[es] the performance of physicians currently on staff," and reviews other matters critical to the hospital's functioning. (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 10, 56 Cal.Rptr.2d 706,

923 P.2d 1 (*Arnett*).) As we recognized in *Arnett, supra,* 14 Cal.4th at page 12, 56 Cal.Rptr.2d 706, 923 P.2d 1, peer review serves a hospital's self-interest: For example, a hospital may remove a physician from its staff as a means to reduce its exposure to possible malpractice liability. But peer review of physicians also serves an important public interest. Hospital peer review, in the words of the Legislature, "is essential to preserving the highest standards of medical practice" throughout California. (Bus. & Prof.Code, § 809, subd. (a)(3).) ¶ To this end, the Business and Professions Code sets out a comprehensive scheme that incorporates the peer review process into the overall process for the licensure of California physicians. Under California Business and Professions Code section 809, subdivision (a)(8), acute-care facilities, such as the hospital here, must include in their bylaws a provision for conducting peer review. And a hospital must report to the Medical Board of California (Medical Board), which licenses physicians, any hospital action that "restricts or revokes a physician's staff privileges as a result of a determination by a peer review body." (*Arnett, supra,* 14 Cal.4th at p. 11, 56 Cal.Rptr.2d 706, 923 P.2d 1, citing Bus. & Prof.Code, § 805, subd. (b) [requiring notice to the Medical Board within 15 days of the action].) [Footnote omitted.] Similarly, a hospital granting or renewing a physician's staff privileges must request a report from the Medical Board indicating whether the physician has at some other medical facility "been denied staff privileges, been removed from a medical staff, or had his or her staff privileges restricted." (Bus. & Prof.Code, § 805.5, subd. (a).) The failure to comply with this requirement is a misdemeanor. (*Id.,* § 805.5, subd. (c).) And the Medical Board itself must maintain a historical record for each of its licensees that includes, among other things, the "[d]isciplinary information" reported to the Medical Board resulting from actions by hospital peer review committees. (*Id.,* § 800, subd. (a)(4).) ¶ As explained in Business and Professions Code section 809, subdivision (a)(5), "[p]eer review, fairly conducted, will aid the appropriate state

licensing boards in their responsibility to regulate and discipline errant healing arts practitioners." Because a hospital's disciplinary action may lead to restrictions on the disciplined physician's license to practice or to the loss of that license, its peer review procedure plays a significant role in protecting the public against incompetent, impaired, or negligent physicians. (See *Arnett, supra,* 14 Cal.4th at pp. 7, 11, 56 Cal.Rptr.2d 706, 923 P.2d 1.) ¶ There is another attribute of hospital peer review that supports our conclusion that peer review constitutes an "official proceeding" under the anti-SLAPP law. A hospital's decisions resulting from peer review proceedings are subject to judicial review by administrative mandate. (Bus. & Prof.Code, § 809.8.) Thus, the Legislature has accorded a hospital's peer review decisions a status comparable to that of quasi-judicial public agencies whose decisions likewise are reviewable by administrative mandate. (See *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 566–567, 38 Cal.Rptr.2d 139, 888 P.2d 1268 [adjudicatory decisions of the California Air Resources Board reviewable by administrative mandamus]; *McGill v. Regents of University of California* (1996) 44 Cal.App.4th 1776, 1785, 52 Cal.Rptr.2d 466 [Regents' quasi-judicial decisions reviewable by administrative mandate].) As such, hospital peer review proceedings constitute official proceedings authorized by law within the meaning of section 425.16, subdivision (e)(2)." (Kibler v. Northern Inyo County Local Hospital Dist. (2006) 39 Cal.4th 192, 199–200.)

Although County Code, § 3.08.440(e) does not set forth a statutory hearing procedure/official proceeding authorized by law, it does set forth a procedure for the department head appointing authority to remove a management employee from the management position without cause and require the employee to demote to the employee's prior classified position at the pleasure of the appointing authority. That section provides that permanent classified employees appointed to management by a department head has a right

to return to their prior classified position, unless terminated for cause, and such an employee may be required to demote to a prior classified position without cause and at the pleasure of the appointing authority. There is no official proceeding or hearing process involved. Use of the phrase "at the pleasure of the appointing authority" denotes that the department head appointing authority would review and consider whether to exercise discretion to demote at the appointing authority's pleasure. A review or consideration process need not consist of official or formal proceedings in order to be a protected activity under Section 45.16(e)(2). All that is required is that the matter is an issue under consideration or review by a legislative, executive, or judicial body. (Emphasis added.)

"As used in section 425.16[, subdivision (e)(2)], a matter is 'under consideration' if it 'is one kept "before the mind", given "attentive thought, reflection, meditation." [Citation.] A matter under review is one subject to "an inspection, examination." ' " (*Maranatha Corrections, LLC v. Department of Corrections & Rehabilitation* (2008) 158 Cal.App.4th 1075, 1085, 70 Cal.Rptr.3d 614 (*Maranatha*).) The review or consideration process need not consist of official or formal proceedings. (*Ibid*.) In *Maranatha,* a private firm sued a state executive branch department based on alleged defamatory matter in a publicized letter (and subsequent oral comments by an employee) explaining the reasons the department was terminating its contract with the firm (i.e., the firm misappropriated funds). (*Id*. at pp. 1080–1082, 70 Cal.Rptr.3d 614.) For purposes of evaluating the first step of the anti-SLAPP analysis under section 425.16, subdivision (e)(2), the *Maranatha* court rejected an argument that the department was not entitled to bring an anti-SLAPP motion because it had not instituted formal or official proceedings pertaining to the misappropriation allegations. (*Maranatha,* at p. 1085, 70 Cal.Rptr.3d 614.)" (Emphasis added.) (City of Costa Mesa v. D'Alessio Investments, LLC (2013) 214 Cal.App.4th 358, 373.) The appellate court concluded: "At the time in question in the instant case, both an executive body

(the City's government) and a judicial body (the trial court) were considering and reviewing the issue of whether illegal activity was occurring at the Property and what should occur as a consequence. The City, once injunctive relief issued from the court, formulated a policy of refusing to issue certain licenses at the Property. Both forms of review and consideration of the issue of illegal conduct at the Property qualify under section 425.16, subdivision (e)(2)." (Emphasis added.) (City of Costa Mesa v. D'Alessio Investments, LLC (2013) 214 Cal.App.4th 358, 373.)

A department head is part of the County, not an executive body. The executive body is the County Board of Supervisors. The department head exercise of the discretion to remove management employees without cause and demote them to a former classified positions is not an issue under consideration or review by an executive body.

The demotion of plaintiff not having arisen from an official proceeding authorized by law or an issue under consideration or review by an executive body, the activity is not protected under the terms of Section 425.16(e)(2).

Defendant's anti-SLAPP motion to strike is denied as defendant failed to meet its step one burden of proof.

TENTATIVE RULING # 12: DEFENDANT'S ANTI-SLAPP MOTION TO STRIKE THE 1ST AMENDED COMPLAINT IS DENIED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED

PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, OCTOBER 29, 2021 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

13. PAINTER v. BENTON PC-20210202

(1) Defendants Arnest's and Filo Real Estate, Inc.'s Demurrer to 1st Amended Complaint.

(2) Defendants Arnest's and Filo Real Estate, Inc.'s Motion to Strike Portions of 1st Amended Complaint.

Defendants Arnest's and Filo Real Estate, Inc.'s Demurrer to 1st Amended Complaint.

Plaintiff filed a 1st amended complaint asserting causes of action against defendants for quiet title, declaratory relief, cancellation of deed, breach of contract, breach of fiduciary duty by failure to use reasonable care, breach of fiduciary duty by breach of loyalty, negligence, 3rd party tort of another, and requesting a preliminary injunction and other equitable relief.

The action arises from an alleged dispute related to the plaintiffs having purchased the subject real property from defendants, plaintiffs' alleged failure to pay a portion of the down payment in the amount of $45,000 when due and owing, and the plaintiffs allegedly deeding back title to the defendants as provided by the terms of an addendum to the sale/financing agreement, which plaintiffs contend was illegal and void as it allowed defendants to obtain title to the property without resort to the allegedly mandated judicial or non-judicial foreclosure procedure.

Defendants Arnest and Filo Real Estate, Inc. demur to the 9th cause of action for third party tort of another on the ground that the complaint admits that plaintiffs are seeking damages against all the defendants, including Arnest and Filo Real Estate, Inc., under a theory that they are joint tortfeaors, therefore, the tort of another doctrine does not apply.

Plaintiffs oppose the demur on the following grounds: the 1st amended complaint adequately alleges circumstances justifying an award of attorney fees under the tort of anther

doctrine; and the claims plaintiff had to bring against the property sellers, defendants Benton and Ott, relate to title to the property and breach of contract, which were allegedly made necessary by the tortious actions of the dual real estate agent defendants in the transaction (See Opposition, page 9, lines 19-22.);

Defendants Arnest and Filo Real Estate, Inc. replied to the opposition.

General Demurrer Principles

When any ground for objection to a complaint appears on its face, or from any matter of which the court is required to or may take judicial notice, the objection on that ground may be taken by demurrer to the pleading. (Code of Civil Procedure, § 430.30(a).)

"'A demurrer admits all material and issuable facts properly pleaded. [Citations.] However, it does not admit contentions, deductions or conclusions of fact or law alleged therein.' (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 713 [63 Cal.Rptr. 724, 433 P.2d 732].) Also, '... "plaintiff need only plead facts showing that he may be entitled to some relief [citation]." [Citation.] Furthermore, we are not concerned with plaintiff's possible inability or difficulty in proving the allegations of the complaint.' (*Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 572 [108 Cal.Rptr. 480, 510 P.2d 1032].)" (Highlanders, Inc. v. Olsan (1978) 77 Cal.App.3d 690, 696-697.)

"A demurrer challenges only the legal sufficiency of the complaint, not the truth of its factual allegations or the plaintiff's ability to prove those allegations. (*Amarel v. Connell* (1988) 202 Cal.App.3d 137, 140 [248 Cal.Rptr. 276].) We therefore treat as true all of the complaint's material factual allegations, but not contentions, deductions or conclusions of fact or law. (*Id*. at p. 141; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [216 Cal.Rptr. 718, 703 P.2d 58].) We can also consider the facts appearing in exhibits attached to the complaint. (See *Dodd v. Citizens Bank of Costa Mesa*, supra, 222 Cal.App.3d at p. 1627.) We are required to construe the

complaint liberally to determine whether a cause of action has been stated, given the assumed truth of the facts pleaded. (*Rogoff v. Grabowski* (1988) 200 Cal.App.3d 624, 628 [246 Cal.Rptr. 185].)" (Picton v. Anderson Union High School Dist. (1996) 50 Cal.App.4th 726, 732-733.)

""To determine whether a cause of action is stated, the appropriate question is whether, upon a consideration of all the facts alleged, it appears that the plaintiff is entitled to any judicial relief against the defendant, notwithstanding that the facts may not be clearly stated, or may be intermingled with a statement of other facts irrelevant to the cause of action shown, or although the plaintiff may demand relief to which he is not entitled under the facts alleged. (*Elliott v. City of Pacific Grove*, 54 Cal.App.3d 53, 56, 126 Cal.Rptr. 371.) Mistaken labels and confusion of legal theory are not fatal because the doctrine of "theory of the pleading" has long been repudiated in this state. (*Lacy v. Laurentide Finance Corp*., 28 Cal.App.3d 251, 256-257, 104 Cal.Rptr. 547.)" (Spurr v. Spurr (1979) 88 Cal.App.3d 614, 617.)

The rule is that a general demurrer should be overruled if the pleading, liberally construed, states a cause of action under any theory. (Brousseau v. Jarrett (1977) 73 Cal.App.3d 864, 870-871.)

With the above cited principles in mind, the court will rule on the demurrers to the 1st amended complaint.

Tort of Another

""Ordinarily, pursuant to the American rule, a party must pay for its own attorney fees unless a contract or statute provides authority for recovery of attorney fees from a litigation opponent. The tort of another doctrine holds that "[a] person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney's fees, and other expenditures thereby suffered or incurred." (*Prentice v. North*

American Title Guaranty Corp. (1963) 59 Cal.2d 618, 620 [30 Cal.Rptr. 821, 381 P.2d 645] (*Prentice*).) The tort of another doctrine is not really an exception to the American rule, but simply "an application of the usual measure of tort damages." (*Sooy v. Peter* (1990) 220 Cal.App.3d 1305, 1310 [270 Cal.Rptr. 151] [equating recovery of attorney fees as damages to medical fees recovered in personal injury action]; see § 3333 ["the measure of damages ... is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not"].)" (Mega RV Corp. v. HWH Corp. (2014) 225 Cal.App.4th 1318, 1337–1338.)

The Tort of Another Doctrine is not a cause of action and is merely a doctrine allowing recovery of damages consisting of attorney fees and litigation expenses that were incurred when the plaintiff is required to employ counsel to prosecute or defend an action against a third party because of the tort of the defendant. Therefore, there must be an underlying tort by the defendant against whom the tort of another claim is asserted.

"Under the American rule, as a general proposition each party must pay his own attorney fees. This concept is embodied in section 1021 of the Code of Civil Procedure, [Footnote omitted.] which provides that each party is to bear his own attorney fees unless a statute or the agreement of the parties provides otherwise. ¶ Several exceptions to this general rule have been created by the courts. * * * A fourth established exception, sometimes referred to as the "tort of another" or "third party tort" exception, allows a plaintiff attorney fees if he is required to employ counsel to prosecute or defend an action against a third party because of the tort of the defendant. (*Prentice v. North Amer. Title Guar. Corp.* (1963) 59 Cal.2d 618, 620-621, 30 Cal.Rptr. 821, 381 P.2d 645.) This rule is embodied in the Restatement of Torts and is generally followed in the United States. (Rest.2d Torts, § 914, subd. (2), and appen.) ¶ All these exceptions were created by the courts pursuant to their inherent equitable powers,

although statutory authorization for the award of fees has followed in some cases, such as recent statutes which recognize the "private attorney general" doctrine. (§ 1021.5.)" (Gray v. Don Miller & Associates, Inc. (1984) 35 Cal.3d 498, 504-505.)

The appellate court in Vacco Industries, Inc. v. Van Den Berg (1992) 5 Cal.App.4th 34 held that a plaintiff who successfully prosecuted an action against alleged joint tortfeasors could not recover attorney fees as damages against any tortfeasor under the claim of tort of another. The appellate court stated: "…the award is also substantively incorrect. Therefore, this is not a matter which can be resolved by returning it to the trial court for application of the proper procedure. In *Prentice v. North Amer. Title Guar. Corp., supra,* 59 Cal.2d 618, 30 Cal.Rptr. 821, 381 P.2d 645, a paid escrow holder had made it necessary for a vendor of land to file a quiet title action against a third person. The court found that the attorney's fees incurred by the vendor in prosecuting that action were part of the damages sustained by the vendor and were recoverable in the negligence action against the escrow holder. The court held that this circumstance created an exception to the rule of Code of Civil Procedure section 1021. [FN 26.] That section "undoubtedly prohibits the allowance of attorney fees against a defendant in an ordinary two-party lawsuit. [Citations.] ... [¶] [However, the section is not applicable to cases where a defendant has wrongfully made it necessary for a plaintiff to sue a third person. [Citations.] In this case we are not dealing with 'the measure and mode of compensation of attorneys' but with damages wrongfully caused by defendant's improper actions." (*Prentice, supra,* 59 Cal.2d at pp. 620–621, 30 Cal.Rptr. 821, 381 P.2d 645.) ¶ FN 26. Code of Civil Procedure section 1021 provides in pertinent part: "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys ... is left to the agreement ... of the parties."" ¶ This rationale has been used, for example, to award fees (1) against a broker in favor of a prospective purchaser of real estate who had been induced to file

an action for specific performance against the sellers by the fraudulent misrepresentations made by the broker (*Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 505–507, 198 Cal.Rptr. 551, 674 P.2d 253) and (2) against an insurance company for its bad faith failure to pay benefits due under a policy of disability insurance (*Brandt v. Superior Court, supra,* 37 Cal.3d 813, 817, 210 Cal.Rptr. 211, 693 P.2d 796.) ¶ The pleadings and the evidence demonstrated that Van Den Berg and Eastlack, working together with their newly acquired corporate vehicle, Kamer, jointly committed the tortious acts of which Vacco complained. There is nothing about their relationship or their conduct that justifies singling out Van Den Berg as the one whose conduct caused Vacco to have to prosecute a legal action against the other two. Yet, this is the justification which Vacco offers for the imposition of *Prentice* fees against Van Den Berg. The rule of *Prentice* was not intended to apply to one of several joint tortfeasors in order to justify additional attorney's fee damages. If that were the rule there is no reason why it could not be applied in every multiple tortfeasor case with the plaintiff simply choosing the one with the deepest pocket as the "*Prentice* target." Such a result would be a total emasculation of Code of Civil Procedure section 1021 in tort cases. ¶ As *Prentice* originally emphasized, there is no basis for awarding attorney's fees to a successful party in what is essentially a "two party" lawsuit. That is precisely what is presented here. Van Den Berg and his two co-defendants jointly engaged in tortious misconduct for which they were sued by plaintiffs. There is no justification for the application of the third party tortfeasor doctrine as a basis for awarding attorney's fees to plaintiffs. Thus, quite apart from the procedural infirmity, this is not a proper case for an award of fees as damages." (Emphasis added.) (Vacco Industries, Inc. v. Van Den Berg (1992) 5 Cal.App.4th 34, 56–57.)

The appellate court in Mega RV Corp. v. HWH Corp. (2014) 225 Cal.App.4th 1318 distinguished the situation where there is a commonplace, alleged joint tortfeasor action for

personal injuries wherein the defendant/cross-complainant claims he is entitled complete exoneration on the underlying case from the situation wherein a party is found liable for the conduct of another defendant and is entitled to complete indemnity from that other defendant due to the other defendant's breach of a duty owed to the innocent defendant that is held liable under theories of derivative liability, such as the employer or principal of an employee/agent defendant whose conduct caused the damages. The appellate court stated: "The tort of another doctrine applies to economic damages (i.e., attorney fees incurred in litigation with third parties) suffered as a result of an alleged tort. [FN 17.] As such, "nearly all of the cases which have applied the [tort of another] doctrine involve a clear violation of a traditional tort duty between the tortfeasor who is required to pay the attorney fees and the person seeking compensation for those fees." (*Sooy v. Peter, supra,* 220 Cal.App.3d at p. 1310, 270 Cal.Rptr. 151; see *id*. at pp. 1311–1312, 270 Cal.Rptr. 151; see also, e.g., *Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 502, 507–508 [198 Cal.Rptr. 551, 674 P.2d 253] [real estate broker breaches fiduciary duty to buyer]; *Prentice, supra,* 59 Cal.2d at pp. 619–621, 30 Cal.Rptr. 821, 381 P.2d 645 [escrow agent breaches duty of due care to seller]; *Heckert v. MacDonald* (1989) 208 Cal.App.3d 832, 834–835, 837–838, [256 Cal.Rptr. 369] [real estate broker breaches fiduciary duty to seller]…¶ FN 17. The tort of another doctrine is not particularly relevant in cases involving physical injury or property damage. To state the obvious, a tortfeasor who causes physical damage to a person or property (for instance, in a car accident) would be subject to a negligence lawsuit by the affected individual. The plaintiff in this hypothetical case could not recover her attorney fees from the tortfeasor under the tort of another doctrine. The attorney fees in this straightforward negligence case would be "attorney fees qua attorney fees." (*Sooy v. Peter, supra,* 220 Cal.App.3d at p. 1310, 270 Cal.Rptr. 151.) To hold otherwise would obliterate the American rule in tort cases. Nor does the tort of another

doctrine apply as between multiple alleged tortfeasors (e.g., what if our hypothetical plaintiff unsuccessfully sued additional defendants in the car crash case, who sought recovery of their attorney fees from the true tortfeasor?). "The extension of the *Prentice* rule to the commonplace case of an exonerated alleged tortfeasor would go a long way toward abrogation of the American rule.... It would substantially expand the notion of duty under the law of torts to compensation of the litigation expenses incurred by all persons, however connected to any tortious event, whom the injured plaintiff elects to sue who succeed in establishing lack of liability." (*Watson v. Department of Transportation* (1998) 68 Cal.App.4th 885, 894 [80 Cal.Rptr.2d 594].)" (Emphasis added.) (Mega RV Corp. v. HWH Corp. (2014) 225 Cal.App.4th 1318, 1339–1340.)

Defendants Arnest and Filo Real Estate, Inc. argue that the 1st amended complaint, in reality, asserts tort causes of action against the seller defendants Benton and Ott as plaintiff has alleged that the seller defendants refused to grant plaintiffs an extension of time to make the $45,000 payment, they never provided plaintiffs with a notice of default and notice of trustee's sale, plaintiffs were never given the opportunity to sell the property to satisfy their down payment obligation; and in support of the cause of action for declaratory relief against defendants Benton and Ott, it is alleged that the controversy has caused plaintiffs immediate and substantial harm as plaintiff Painter no longer holds title to the property, defendant is pursuing eviction of plaintiffs, plaintiff stands to lose plaintiff's equity in the property, and plaintiff stands to lose plaintiff's down payment on the property. (1st Amended Complaint, paragraphs 53-56 and 74.)

Defendants Arnest and Filo Real Estate, Inc. contend that these allegations clearly are not breaches of contract, by are torts.

Defendants have not identified those purportedly obvious torts in their demurrer.

The only causes of action asserted against the seller defendants are the following: to quiet title as the contract provision that if the down payment was not paid in full by December 31, 2020, the buyer is in breach of contract, the buyer forfeits all moneys previously paid, and the deed shall return to the seller with the buyer to vacate the premises within 30 days is an allegedly illegal and unenforceable provision that resulted in plaintiff Painter executing a deed reconveying the property to the sellers (1st Amended Complaint, paragraphs 37, 59 and 66.); declaratory relief seeking a determination as to the scope, enforceability, and validity of the 2nd addendum to the purchase agreement, which contained the provision concerning plaintiff's failure to pay the down payment in full prior to December 31, 2020 (1st Amended Complaint paragraphs 37, 59, and 76.); to cancel the deed reconveying the property to the sellers, as it was part of a contract that had the aforementioned provision that was allegedly void and unenforceable (1st Amended Complaint, paragraphs 78 and 79.); for breach of the contract for purchase of the property by failure to return to plaintiffs the down payment moneys previously paid (1st Amended Complaint, paragraph 86.); and to impose a preliminary injunction and other equitable relief as plaintiffs allegedly remain the rightful owners of the property, because the deed reconveying the property to the seller defendants is of no force or effect due to an alleged void contract provision (1st Amended Complaint paragraph 99.).

There does not appear to be any mislabeled tort causes of action in the 1st amended complaint that plaintiffs are pursuing against seller defendants Benton and Ott as joint tortfeasors with defendants Arnest and Filo Real Estate, Inc. There are no tort causes of action plead against the seller defendants.

The complaint does assert a cause of action in tort in the negligence cause of action pled against the real estate agent/realtor defendants Arnest and Filo Real Estate, Inc., who allegedly acted in a dual agent capacity in the transaction and allegedly breached their duty of

due care to discuss the agreement's 2nd addendum, failed to explain to plaintiffs the ramifications of the term contained in that addendum, failed to discuss and/or explain the agreement's 3rd addendum with plaintiffs, did not act as a reasonably careful real estate agent, negligently drafted the 2nd addendum that allegedly contains the alleged illegal financing term, and negligently drafted the 2nd addendum to benefit the sellers, whose interest is contrary to plaintiffs'. (1st Amended Complaint, paragraphs 13 and 106.)

At worst, the 9th cause of action is mislabeled as a cause of action and not merely stated in the general allegations in support of the plaintiff's claim they are entitled to an award of damages for attorney fees incurred in pursuing the non-tort causes of action against the seller defendants pursuant to the tort of another doctrine.

The demurrer on the ground that the tort of another claim is prohibited under the allegations admitted in the 1st amended complaint is overruled.

The demurrer that the 9th cause of action does not state a cause of action as there is no such cause of action is sustained with ten days leave to amend to allege those facts as general allegations to support a prayer for recovery of the attorney fees incurred to pursue their action against the seller defendants as damages for the tort action asserted against defendants Arnest and Filo Real Estate, Inc.

Defendants Arnest's and Filo Real Estate, Inc.'s Motion to Strike Portions of 1st Amended Complaint.

Plaintiff filed a 1st amended complaint asserting causes of action against defendants for quiet title, declaratory relief, cancellation of deed, breach of contract, breach of fiduciary duty by failure to use reasonable care, breach of fiduciary duty by breach of loyalty, negligence, 3rd party tort of another and requesting a preliminary injunction and other equitable relief.

The action arises from an alleged dispute related to the plaintiffs having purchased the subject real property from defendants, plaintiffs' alleged failure to pay a portion of the down payment in the amount of $45,000 when due and owing, and the plaintiffs allegedly deeding back title to the defendants as provided by the terms of an addendum to the sale/financing agreement, which plaintiffs contend was illegal and void as it allowed defendants to obtain title to the property without resort to the allegedly mandated judicial or non-judicial foreclosure procedure.

Defendants Arnest and Filo Real Estate, Inc. move to strike portions of the 1st amended complaint that claim damages for attorney fees incurred in this action, punitive damages, emotional distress damages, and non-economic damages. Defendants assert: attorney fees can not be legally recoverable against defendants Arnest and Filo Real Estate, Inc. as provided in Code of Civil Procedure, § 1021 and they can not claim those fees under the theory of tort of another; emotional distress and non-economic damages are not recoverable when the damages arise from a real estate case; and plaintiffs have failed to allege sufficient facts to support an award of punitive damages against defendants Arnest and Filo Real Estate, Inc.

Plaintiffs oppose the motion on the following grounds: plaintiffs are not seeking an award of attorney fees premised upon the attorney fee provision in the purchase agreement; the sole ground for seeking an award of attorney fees against defendants Arnest and Filo Real Estate, Inc. is solely based upon the tort of another claim and plaintiffs have adequately alleged facts to establish entitlement to such an award of attorney fees; plaintiffs may be awarded damages for emotional distress for intentional breach of fiduciary duty pursuant to Civil Code, § 3333 and plaintiffs have adequately alleged intentional breach of fiduciary duty justifying such an award; sufficient facts have been alleged to establish a knowing and intentional breach of

fiduciary duty justifying an award of punitive damages; and there is no need to plead ratification by the corporate defendant, where the act of oppression, fraud or malice is by an officer, director, or managing agent.

Defendants Arnest and Filo Real Estate, Inc. replied to the opposition. Defendants concede in the reply that there are sufficient allegations to support a claim for punitive damages against defendant Arnest and assert that there are insufficient allegations to assert a claim against corporate defendant Filo Real Estate, Inc.

Motion to Strike Principles

"The court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper: ¶ (a) Strike out any irrelevant, false, or improper matter inserted in any pleading. ¶ (b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." (Code of Civil Procedure, § 436.)

"The grounds for a motion to strike shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice." (Code of Civil Procedure, § 437(a).) "Where the motion to strike is based on matter of which the court may take judicial notice pursuant to Section 452 or 453 of the Evidence Code, such matter shall be specified in the notice of motion, or in the supporting points and authorities, except as the court may otherwise permit." (Code of Civil Procedure, § 437(b).)

"A motion to strike, like a demurrer, challenges the legal sufficiency of the complaint's allegations, which are assumed to be true. (See *Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255, 79 Cal.Rptr.2d 747 [an order striking punitive damages allegations is reviewed de novo].)" (Blakemore v. Superior Court (2005) 129 Cal.App.4th 36, 53.)

"We emphasize that such use of the motion to strike should be cautious and sparing. We have no intention of creating a procedural "line item veto" for the civil defendant. However, properly used and in the appropriate case, a motion to strike may lie for purposes discussed in this opinion." (PH II, Inc. v. Superior Court (1995) 33 Cal.App.4th 1680, 1683.)

"In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." (Code of Civil Procedure, § 452.)

With the above-cited principles in mind, the court will rule on the motion to strike portions of the 1st amended complaint.

Tort of Another

The court incorporates by reference its ruling on the demurrer to the 9th cause of action, which is being heard concurrently with this motion.

For the same reasons articulated in that ruling, the court denies the motion to strike the claims and allegations related to the award of attorney fee damages as the 1st amended complaint adequately alleges facts that when taken as true for the purposes of demurrer and motion to strike establish that attorney fees can be awarded to plaintiffs and against defendants Arnest and Filo Real Estate, Inc.

Emotional Distress/Non-Economic Damage Claims

"In an action for breach of contract, the measure of damages is 'the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom' (Civ.Code, § 3300), provided the damages are 'clearly ascertainable in both their nature and origin' (Civ.Code, § 3301). In an action not arising from contract, the measure of damages is 'the amount which will compensate for all the detriment proximately caused thereby, whether it could have been

anticipated or not' (Civ.Code, § 3333). ¶ 'Contract damages are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectation of the parties are not recoverable. [Citations.] This limitation on available damages serves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise.' (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 515, 28 Cal.Rptr.2d 475, 869 P.2d 454 (*Applied Equipment*).)" (Erlich v. Menezes (1999) 21 Cal.4th 543, 550.)

"Tort damages have been permitted in contract cases where a breach of duty directly causes physical injury (*Fuentes v. Perez* (1977) 66 Cal.App.3d 163, 168, fn. 2, 136 Cal.Rptr. 275); for breach of the covenant of good faith and fair dealing in insurance contracts (*Crisci v. Security Ins. Co.* (1967) 66 Cal.2d 425, 433–434, 58 Cal.Rptr. 13, 426 P.2d 173); for wrongful discharge in violation of fundamental public policy (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 175–176, 164 Cal.Rptr. 839, 610 P.2d 1330); or where the contract was fraudulently induced. (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1238–1239, 1 Cal.Rptr.2d 301.) In each of these cases, the duty that gives rise to tort liability is either completely independent of the contract or arises from conduct which is both intentional and intended to harm. (See, e.g., *Christensen v. Superior Court* (1991) 54 Cal.3d 868, 885–886, 2 Cal.Rptr.2d 79, 820 P.2d 181.)" (Emphasis added.) (Erlich v. Menezes (1999) 21 Cal.4th 543, 551–552.)

"…[D]amages for mental suffering and emotional distress are generally not recoverable in an action for breach of an ordinary commercial contract in California. (*Kwan v. Mercedes-Benz of North America, Inc.* (1994) 23 Cal.App.4th 174, 188, 28 Cal.Rptr.2d 371 (*Kwan*); *Sawyer v. Bank of America* (1978) 83 Cal.App.3d 135, 139, 145 Cal.Rptr. 623.) 'Recovery for emotional

disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.' (Rest.2d Contracts, § 353.)" (Erlich, supra at pages 558-559.)

"…a preexisting contractual relationship, without more, will not support a recovery for mental suffering where the defendant's tortious conduct has resulted only in economic injury to the plaintiff. (*Smith v. Superior Court* (1992) 10 Cal.App.4th 1033, 1040, fn. 1, 13 Cal.Rptr.2d 133; *Mercado v. Leong* (1996) 43 Cal.App.4th 317, 324, 50 Cal.Rptr.2d 569 [emotional distress damages are unlikely when the interests affected are merely economic]; *Camenisch v. Superior Court* (1996) 44 Cal.App.4th 1689, 1691, 52 Cal.Rptr.2d 450 (*Camenisch*) [emotional distress damages are not recoverable when attorney malpractice leads only to economic loss].)" (Emphasis added.) (Erlich v. Menezes (1999) 21 Cal.4th 543, 554–555 [87 Cal.Rptr.2d 886, 893–894.)

The allegations of fact of the 1st amended complaint depict a situation were plaintiffs were involved in a transaction to purchase a residence; the same agent represented both the sellers and plaintiff buyers, plaintiffs were desperate to find a permanent living situation for themselves and their eight children; an offer was made; the sellers counteroffered; plaintiffs explained to the defendants that the additional down payment amount of $45,000 could only be covered by her anticipated settlement in her divorce; defendant Arnest convinced plaintiffs that the six months provided in the counter offer would be sufficient time to cover the $45,000 due as the remainder of the down payment; plaintiffs relied on defendant Arnest's superior knowledge and skill; all parties executed the counteroffer and the 1st seller financing addendum; when the time came to close the escrow plaintiffs were presented with a 2nd addendum, which amended the terms for payment of the remaining $45,000 due for the down payment and provided for forfeiture of all amounts paid should the $45,000 not be paid, required reconveyance of the

property to the sellers, and required plaintiff to vacate the property within 30 days; plaintiff signed the 2nd addendum despite defendants Arnest and Filo Real Estate, Inc. not having discussed or explained the written terms; close of escrow was delayed; at the time to close escrow thereafter, a 3rd addendum was presented to be executed in order to close escrow; it changed the transaction to remove plaintiff Cowles from the transaction as her husband would not execute a spousal disclaimer to the property; and plaintiff signed the 3rd addendum despite defendants Arnest and Filo Real Estate, Inc. not having discussed or explained the written terms.

Plaintiffs assert causes of action for breach of fiduciary duty by failure to use reasonable care as defendants Arnest and Filo Real Estate, Inc. failed to act as a reasonably careful real estate agent, drafted the 2nd addendum that allegedly contains illegal financing terms, and drafted the 3rd addendum that contains legal ramifications contrary to the interests of plaintiff Cowles; and breach of fiduciary duty by breach of loyalty by knowingly and intentionally failing to discuss the agreement's 2nd addendum, failing to explain to plaintiffs the ramifications of the terms contained in that addendum, knowingly and intentionally failing to discuss and/or explain the agreement's 3rd addendum with plaintiffs, failing to explain the ramifications of the terms of the 3rd addendum, failing to act as a reasonably careful real estate agent, drafting the 2nd addendum that allegedly contains illegal financing terms, and drafting the 2nd addendum to benefit the sellers, whose interest is contrary to plaintiffs (1st Amended Complaint paragraphs 91 and 95.)

The damages alleged, aside from a claim for emotional distress/non-economic damages, are loss of $100,000 paid as a partial down payment and loss of ownership of the residence.

It appears that the alleged real estate transaction involved a fully disclosed dual agency by the realtor and the realty corporation. The transaction involved the purchase of a home for

$725,000, a total down payment of $145,000, seller financing, and a balloon payment of the principal balance and any interest three years after close of escrow. Plaintiffs allege they could not obtain traditional financing due to poor credit scores. Under the circumstances alleged, it does not appear that the breaches alleged by plaintiffs are of such a kind that serious emotional disturbance was a particularly likely result. Plaintiffs entered into the transaction knowing their financial circumstances, purchased a $725,000 residence, and voluntarily executed the addendums whose terms and ramifications are readily determined by reading them. The damages resulting were likely to only be economic in nature.

The motion to strike the claims for emotional distress/non-economic damages is granted.

Plaintiffs have had two opportunities to properly allege facts to establish that emotional distress damages are recoverable and have failed. It does not appear that there is a reasonable possibility that defects can be cured by amendment. Therefore, the court grants the motion to strike the claims for emotional distress/non-economic damages without leave to amend.

Punitive Damages Claim

"Not only must there be circumstances of oppression, fraud or malice, but facts must be alleged in the pleading to support such a claim. (Citation omitted.)" (Grieves v. Superior Court (1984) 157 Cal.App.3d 159, 166.)

"Punitive damages are "available to a party who can plead and prove the facts and circumstances set forth in Civil Code section 3294." *Hilliard v. A.H. Robins Co.,* 148 Cal.App.3d 374, 392, 196 Cal.Rptr. 117 (1983). "To support punitive damages, the complaint ... must allege ultimate facts of the defendant's oppression, fraud, or malice." *Cyrus v. Haveson,* 65 Cal.App.3d 306, 316–317, 135 Cal.Rptr. 246 (1976). Pleading the language in section 3294 "is not objectionable when sufficient facts are alleged to support the allegation." *Perkins v.*

Superior Court, 117 Cal.App.3d 1, 6–7, 172 Cal.Rptr. 427 (1981)." (Altman v. PNC Mortg. (E.D. Cal. 2012) 850 F.Supp.2d 1057, 1085.)

"In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." (Civil Code, § 3294(a).)

" 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Civil Code, § 3294(c)(1).)

" 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civil Code, § 3294(c)(2).)

" 'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (Civil Code, § 3294(c)(3).)

"The punitive damages theory cannot be predicated on the breach of contract cause of action without an underlying tort. (*Chelini v. Nieri* (1948) 32 Cal.2d 480, 486–487, 196 P.2d 915; *Crogan v. Metz* (1956) 47 Cal.2d 398, 405, 303 P.2d 1029; *Ericson v. Playgirl, Inc.* (1977) 73 Cal.App.3d 850, 854, 140 Cal.Rptr. 921; *Quigley v. Pet, Inc.* (1984) 162 Cal.App.3d 877, 887, 208 Cal.Rptr. 394.) Neither evidence of mere negligence (*Kendall Yacht Corp. v. United California Bank* (1975) 50 Cal.App.3d 949, 959, 123 Cal.Rptr. 848; see *Nolin v. National Convenience Stores, Inc.* (1979) 95 Cal.App.3d 279, 284–288, 157 Cal.Rptr. 32) nor constructive fraud (*Delos v. Farmers Insurance Group* (1979) 93 Cal.App.3d 642, 656–657, 155 Cal.Rptr. 843, and cases there cited; *Estate of Witlin* (1978) 83 Cal.App.3d 167, 177, 147 Cal.Rptr. 723; compare *Day v. Rosenthal* (1985) 170 Cal.App.3d 1125, 1160, 217 Cal.Rptr. 89)

will support a punitive damages award without a showing of the statutory fraud, malice, or oppression." (Palmer v. Ted Stevens Honda, Inc. (1987) 193 Cal.App.3d 530, 536.)

Defendant Arnest having conceded that there are sufficient allegations to assert a claim for punitive damages against that defendant, the motion to strike the allegations as to defendant Arnest is denied.

"An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." (Civil Code, § 3294(b).)

"An act of oppression, fraud or malice, by an officer, director or *managing agent,* is sufficient to impose liability on a corporate employer for punitive damages, without any additional showing of ratification by the employer. (§ 3294, subd. (b); *Agarwal, supra,* 25 Cal.3d at p. 950, 160 Cal.Rptr. 141, 603 P.2d 58.)" (Kelly-Zurian v. Wohl Shoe Co. (1994) 22 Cal.App.4th 397, 420.)

The factual allegations of the 1st amended complaint do not sufficiently allege conduct by defendant Filo Real Estate, Inc. that establish a claim for punitive damages against this corporate defendant.

In an abundance of caution, the court grants ten days leave to amend.

The motion to strike the claims for punitive damages against defendant Filo Real Estate, Inc. is granted with ten days leave to amend.

TENTATIVE RULING # 13: THE DEMURRER THAT THE 9TH CAUSE OF ACTION DOES NOT STATE A CAUSE OF ACTION AS THERE IS NO SUCH CAUSE OF ACTION IS SUSTAINED WITH TEN DAYS LEAVE TO AMEND TO ALLEGE THOSE FACTS AS GENERAL ALLEGATIONS TO SUPPORT A PRAYER FOR RECOVERY OF THE ATTORNEY FEES INCURRED TO PURSUE THEIR ACTION AGAINST THE SELLER DEFENDANTS AS DAMAGES FOR THE TORT ACTION ASSERTED AGAINST DEFENDANTS ARNEST AND FILO REAL ESTATE, INC. THE MOTION TO STRIKE IS GRANTED IN PART AND DENIED IN PART AS DESCRIBED IN THE TEXT OF THE RULING. THE MOTION TO STRIKE THE CLAIMS FOR EMOTIONAL DISTRESS/NON-ECONOMIC DAMAGES IS GRANTED WITHOUT LEAVE TO AMEND. THE MOTION TO STRIKE THE CLAIMS FOR PUNITIVE DAMAGES AGAINST DEFENDANT ARNEST IS DENIED. THE MOTION TO STRIKE THE CLAIMS FOR PUNITIVE DAMAGES AGAINST DEFENDANT FILO REAL ESTATE, INC. IS GRANTED WITH TEN DAYS LEAVE TO AMEND. THE REMAINDER OF THE MOTION TO STRIKE IS DENIED. NO HEARING ON THESE MATTERS WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT

REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, OCTOBER 29, 2021 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

14. WILSON v. COUNTY OF PLACER PC-20210420

Defendant's Anti-SLAPP Motion to Strike Complaint.

On May 20, 2021 plaintiff filed a 1st amended complaint against defendant County of Placer (County) asserting a cause of action for Whistleblower Retaliation under Labor Code, § 1102.5.

On September 17, 2021 the court overruled the defendant County's demurrers to the 1st amended complaint.

Defendant County filed a special Anti-SLAPP motion to strike the 1st amended complaint asserting: placing plaintiff on paid administrative leave pending defendant County's investigation was a protected activity by the County as it was part of an official proceeding; the claim of constructive discharge in inextricably tied to County's official proceedings authorized by law and, therefore, it arises from County's internal investigation protected activity; the claim of overall hostile work conditions is derivative of plaintiff's other alleged adverse employment action, therefore, it arises from County's internal investigation protected activity; plaintiff can not establish his conduct was a protected activity; plaintiff can not prove any adverse employment actions were taken by defendant against plaintiff; defendant County is entitled to immunity for its conduct; plaintiff can not prove causation; and defendant had the legitimate, non-retaliatory reason for placement of plaintiff on paid leave in order to protect complainants pending the investigation.

Defendant also requests an award of attorney fees and costs in accordance with Civil Code, § 425.16(c).

Plaintiff opposes the motion on the following grounds: the anti-SLAPP motion is untimely as it was not filed within 60 days of the filing of the complaint and defendant did not seek leave of the court to file this motion after the expiration of 60 days; plaintiff's claim does not arise out of

a protected activity by defendant; the evidence submitted in opposition establishes a prima facie showing of facts, which, if proved at trial, would support a judgment in plaintiff's favor on the whistleblower action; governmental immunity does not apply to whistleblowing; and the court need not analyze whether there was a legitimate non-retaliatory rationale for the conduct versus pre-textual conduct at this time.

Defendant replied to the opposition and objected to evidence submitted in opposition.

Defendant's Objections to Evidence Submitted in Opposition

- Declaration of Plaintiff Wilson in Opposition to Anti-SLAPP Motion to Strike

Objection number 1 is overruled. The information amounts to direct evidence as defendant personally heard the statement as a witness and it is not offered to prove the truth of the matter asserted therein, as it is evidence of the intent of Mr. Gire.

Objection numbers 2-4 are sustained.

Objection number 5 is overruled as that portion of the declaration is not offered to prove the truth of the matters asserted therein and, instead, is offered to prove the intent and state of mind of plaintiff after being informed of these facts.

Objection numbers 6, and 7 are overruled.

Declaration of Jennifer MIszkewycz in Opposition to Anti-SLAPP Motion to Strike

Second objection numbers 6 and 7 to the Jennifer Miszkewycz's declaration are sustained.

Objection number 8 cites the wrong paragraph number and page and line numbers for the cited portion of the declaration objected to. The objected portion is located in paragraph 10, page 4, lines 2-4. The objection is overruled as she declares she learned about the information, she was in a position to receive that information as an Assistant District Attorney for defendant County (See Plaintiff's Exhibits 17-19, 21, and 22.) and it is offered to explain the

circumstances under which the declarant was copied on emails plaintiff sent to County Counsel Schwab.

Objection numbers 9 and 10 are sustained.

County Immunity for Discretionary Acts

The facts before the trial court and appellate court in Whitehall v. County of San Bernardino (2017) 17 Cal.App.5th 352 were: plaintiff "…was a social worker for the San Bernardino County Children and Family Services (CFS or the County) who sought legal advice pertaining to any liability she might have for submitting misleading information and doctored photographs to the juvenile court at the direction of her superiors. Her counsel prepared a filing for the juvenile court to apprise it of the falsified information, and plaintiff was immediately placed on administrative leave for disclosing confidential information to an unauthorized person. Upon being informed she would be terminated for the breach, plaintiff resigned her position and filed a whistleblower action against the County." (Whitehall v. County of San Bernardino (2017) 17 Cal.App.5th 352, 357.) The appellate court expressly rejected the defendant County's argument that the County was immune from liability for the discretionary personnel decisions made by County employees pursuant to provisions of the Government Code. The appellate court held: "The County argues that the trial court erred because of the provisions of Government Code sections 815.2, 820.2, and 821.6. However, Government Code section 815.2, subdivision (b), pertains to vicarious liability upon a public entity. (See *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 989, fn. 9, 42 Cal.Rptr.2d 842, 897 P.2d 1320, citing *Bradford v. State of California* (1973) 36 Cal.App.3d 16, 20, 111 Cal.Rptr. 852.) Government Code section 820.2 provides that a public employee is not liable for injuries resulting from acts or omissions where the act or omission was the result of the exercise of discretion vested in him, and section 821.6 provides that a public employee is not liable for

injury caused by instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he or she acts maliciously and without probable cause. ¶ None of these Government Code sections apply because plaintiff's whistleblower action was not instituted against a public *employee.* "A wrongful termination action is viable where the employee alleges he [or she] was terminated for reporting illegal activity which could cause harm, not only to the interests of the employer but also to the public." (*Southern Cal. Rapid Transit Dist. v. Superior Court* (1994) 30 Cal.App.4th 713, 725, 36 Cal.Rptr.2d 665, citing *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 670-671, 254 Cal.Rptr. 211, 765 P.2d 373; *Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407, 1418-1420, 4 Cal.Rptr.2d 203.) "An action brought under the whistleblower statute is inherently such an action." (*Southern Cal. Rapid Transit Dist., supra,* at p. 725, 36 Cal.Rptr.2d 665.) To preclude a whistleblower from revealing improper conduct by the government based on confidentiality would frustrate the legislative intent underlying the whistleblower statutes. For reasons of public policy, actions against a public entity for claims of discharge from or termination of employment grounded on a whistleblower claim are not barred by governmental immunity. (*Southern Cal. Rapid Transit Dist., supra,* 30 Cal.App.4th at p. 726, 36 Cal.Rptr.2d 665.)" (Emphasis added.) (Whitehall v. County of San Bernardino (2017) 17 Cal.App.5th 352, 365.)

The discretionary decision immunity provision of the Government Code does not bar whistleblower actions against public entities.

General Anti-SLAPP Motion Principles

"The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. 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." (Code of Civil Procedure, § 425.16(a).)

"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 or 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…" (Code of Civil Procedure, § 425.16(b)(1).) "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." (Code of Civil Procedure, § 425.16(e).) "…[T]his section shall be construed broadly." (Code of Civil Procedure, § 425.16(a).)

"In 1992, the Legislature enacted section 425.16 in an effort to curtail lawsuits brought primarily 'to chill the valid exercise of ... freedom of speech and petition for redress of grievances' and 'to encourage continued participation in matters of public significance.' (§ 425.16, subd. (a).) The section authorizes a special motion to strike '[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 or California Constitution in connection with a public issue

....' (§ 425.16, subd. (b)(1).) The goal is to eliminate meritless or retaliatory litigation at an early stage of the proceedings. (*Liu v. Moore* (1999) 69 Cal.App.4th 745, 750, 81 Cal.Rptr.2d 807; *Macias v. Hartwell* (1997) 55 Cal.App.4th 669, 672, 64 Cal.Rptr.2d 222.) The statute directs the trial court to grant the 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).) ¶ The statutory language establishes a two-part test. First, we determine whether plaintiff's causes of action arose from acts by defendants in furtherance of defendants' rights of petition or free speech in connection with a [*807] public issue. (*Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 721, 77 Cal.Rptr.2d 1, disapproved on another ground in *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123, fn. 10, 81 Cal.Rptr.2d 471, 969 P.2d 564.) Assuming this threshold condition is satisfied, we then determine whether plaintiff has established a reasonable probability that she will prevail on her claims at trial. We must reverse the order denying the motion if plaintiff failed to make a prima facie showing in the trial court of facts, which, if proved at trial, would support a judgment in her favor. (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 646, 653, 49 Cal.Rptr.2d 620.)" (Seelig v. Infinity Broadcasting Corp. (2002) 97 Cal.App.4th 798, 806-807.)

"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." (Navellier v. Sletten (2002) 29 Cal.4th 82, 89.)

"In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (Code of Civil Procedure, § 425.16(b)(2).)

"Second, and only if the court concludes that the litigant has made this "threshold showing," the court must examine whether the nonmoving party has "established ... a probability that [it] will prevail" on the challenged cause(s) of action. (Code Civ. Proc., § 425.16, subd. (b)(1); *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 819-820, 124 Cal.Rptr.3d 256, 250 P.3d 1115 (*Oasis West*).) This burden is met if the nonmoving party demonstrates that any challenged cause of action has "minimal merit" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 94, 124 Cal.Rptr.2d 530, 52 P.3d 703), and it does so by making a "prima facie factual showing sufficient to sustain a favorable judgment" on that cause of action (*Baral*, *supra*, 1 Cal.5th at pp. 384-385, 205 Cal.Rptr.3d 475, 376 P.3d 604). In assessing the sufficiency of this showing, a court is to "consider the pleadings, and supporting and opposing affidavits" (Code Civ. Proc., § 425.16, subd. (b)(2)), but must " ' "accept as true the evidence favorable to the [nonmoving party] and evaluate the [moving party's] evidence only to determine if it has defeated that submitted by the [nonmoving party] as a matter of law." ' " (*Oasis West*, at p. 820, 124 Cal.Rptr.3d 256, 250 P.3d 1115.) If the nonmoving party satisfies its burden, the anti-SLAPP motion must denied; if it fails to do so, the pertinent cause of action must be dismissed. (*Barry*, *supra*, 2 Cal.5th at p. 321, 212 Cal.Rptr.3d 124, 386 P.3d 788.)" (Mission Beverage Company v. Pabst Brewing Company, LLC (2017) 15 Cal.App.5th 686, 698–699.)

Where causes of action are supported by both protective activity allegations and unprotected activity allegations, the court will only strike the allegations of protected conduct from the pleading should a plaintiff be unable to establish with the evidence submitted a reasonable probability that he or she will prevail on his or her claims that are supported by the allegation of protected activities and leave the allegations of unprotected conduct in the pleading to support the cause of action.

"Viewing the term in its statutory context, we conclude that the Legislature used "cause of action" in a particular way in section 425.16(b)(1), targeting only claims that are based on the conduct protected by the statute. Section 425.16 is not concerned with how a complaint is framed, or how the primary right theory might define a cause of action. While an anti-SLAPP motion may challenge any claim for relief founded on allegations of protected activity, it does not reach claims based on unprotected activity. ¶ It follows that "mixed cause of action," the term frequently used to designate a count alleging both protected and unprotected activity, is not strictly accurate. Section 425.16(b)(1) applies only to "causes of action" that arise from allegations of protected speech or petitioning. However, "mixed cause of action" is a term in common usage, and we sometimes employ it for its customary purpose. We also sometimes use "cause of action" in its ordinary sense, to mean a count as pleaded. To avoid confusion, we refer to the proper subject of a special motion to strike as a "claim," a term that also appears in section 425.16(b)(1). [FN 2] ¶ FN 2. A plaintiff must establish a probability of prevailing on any "claim" that arises from protected activity. (§ 425.16(b)(1).) ¶ As we have observed on other occasions, despite the imprecision that may result from the various connotations of the term "cause of action," its meaning is generally evident in context. (*Slater v. Blackwood* (1975) 15 Cal.3d 791, 795–796, 126 Cal.Rptr. 225, 543 P.2d 593; *Eichler Homes of San Mateo, Inc. v. Superior Court* (1961) 55 Cal.2d 845, 847–848, 13 Cal.Rptr. 194, 361 P.2d 914.) ¶ The Court of Appeal below held that an anti-SLAPP motion must be brought against a mixed cause of action in its entirety. It affirmed the denial of defendant's motion because plaintiff established a probability of succeeding on claims based on allegations of activity not protected by section 425.16. This application of the anti-SLAPP statute unduly limits the relief contemplated by the Legislature. Accordingly, we reverse." (Emphasis added.) (Baral v. Schnitt (2016) 1 Cal.5th 376, 382.)

"For the benefit of litigants and courts involved in this sometimes difficult area of pretrial procedure, we provide a brief summary of the showings and findings required by section 425.16(b). At the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this stage. If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached. There, the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken. Allegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a distinct claim on which the plaintiff has shown a probability of prevailing." (Emphasis added.) (Baral v. Schnitt (2016) 1 Cal.5th 376, 392–396.)

With the above-cited principles in mind the court will rule on the anti-SLAPP motion to strike the 1st amended complaint.

Timeliness of Anti-SLAPP Motion

On March 18, 2021 the initial complaint was filed, which asserted a single cause of action for Whistleblower Retaliation in violation of Labor Code, § 1102.5. On May 20, 2021 plaintiff filed a 1st amended complaint. The anti-SLAPP motion to strike was filed on July 20, 2021.

Plaintiff argues in opposition that the anti-SLAPP motion is untimely as it was not filed within 60 days of the filing of the complaint and defendant did not seek leave of the court to file this motion after the expiration of 60 days.

Defendant argues in reply: the motion is timely, because it was filed within 60 days of the filing of the 1st amended complaint; the parties having met and conferred about the initial complaint, plaintiff's counsel indicated the plaintiff would amend the complaint and in reliance on that indication, defendant did not file an anti-SLAPP motion to strike the initial complaint; the 1st amended complaint is significantly different from the initial complaint having removed 19 paragraphs of factual allegations and portions of other paragraphs; plaintiff should be estopped from claiming the motion is untimely due to the conduct of plaintiff's counsel indicating a 1st amended complaint was being filed and the filing of such a 1st amended complaint; since the action was transferred to the El Dorado County Superior Court after a full bench recusal in Placer County Superior Court, the 60 day limitation was renewed, making the filing of the motion prior to the transfer timely; and the court should exercise its discretion to consider the motion even if the court finds it is untimely.

"(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." (Code of Civil Procedure, § 425.16(f).)

The California Supreme Court has stated with regard to the timeliness of an anti-SLAPP motion: "Because the anti-SLAPP statute is designed to resolve these lawsuits early, but not to permit the abuse that delayed motions to strike might entail, we conclude, as did the Court of Appeal, that, subject to the trial court's discretion under section 425.16, subdivision (f), to permit late filing, a defendant must move to strike a cause of action within 60 days of service of the earliest complaint that contains that cause of action." (Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism (2018) 4 Cal.5th 637, 639–640.)

Merely amending the complaint to assert the same cause of action does not restart the limitation clock. The California Supreme Court has held: "Without specifically citing *Yu*, *supra*, 103 Cal.App.4th 298, 126 Cal.Rptr.2d 516, the court in *Hewlett-Packard Co. v. Oracle Corp.* (2015) 239 Cal.App.4th 1174, 191 Cal.Rptr.3d 807 disagreed with this last point, albeit in dicta. "The rule that an amended complaint reopens the time to file an anti-SLAPP motion is intended to prevent sharp practice by plaintiffs who might otherwise circumvent the statute by filing an initial complaint devoid of qualifying causes of action and then amend to add such claims after 60 days have passed. [Citation.] But a rule properly tailored to that objective would permit an amended pleading to extend or reopen the time limit only as to *newly pleaded* causes of action arising from protected conduct. A rule automatically reopening a case to anti-SLAPP proceedings upon the filing of *any* amendment permits defendants to forgo an early motion, perhaps in recognition of its likely failure, and yet seize upon an amended pleading to file the same meritless motion later in the action, thereby securing the 'free time-out' condemned in [*People ex rel. Lockyer v. Brar* (2004)] 115 Cal.App.4th 1315, 1318 [9 Cal.Rptr.3d 844]." (*Hewlett-Packard Co.*, at p. 1192, fn. 11, 191 Cal.Rptr.3d 807.) ¶ The Court of Appeal in this case agreed with *Hewlett-Packard Co. v. Oracle Corp.*, *supra*, 239 Cal.App.4th 1174, 191 Cal.Rptr.3d 807, in this regard. (*Newport Harbor*, *supra*, 6 Cal.App.5th at pp. 1217-1218, 212 Cal.Rptr.3d 216.) It "disagree[d] with *Yu* to the extent it holds that a defendant has an absolute right to file an anti-SLAPP motion to an amended complaint, even when the motion could have been brought against an earlier complaint." (*Id.* at p. 1218, 212 Cal.Rptr.3d 216.) It quoted our explanation in *Varian Medical Systems, Inc. v. Delfino*, *supra*, 35 Cal.4th at page 192, 25 Cal.Rptr.3d 298, 106 P.3d 958, that section 425.16 was intended to end meritless SLAPP suits early without great cost to the target. It said permitting a defendant an absolute right to file an anti-SLAPP motion to an amended complaint "would encourage gamesmanship that could

defeat rather than advance that purpose." (*Newport Harbor*, at p. 1218, 212 Cal.Rptr.3d 216.)" (Emphasis added.) (Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism (2018) 4 Cal.5th 637, 643.)

The California Supreme Court concluded: ""An anti-SLAPP motion is not a vehicle for a defendant to obtain a dismissal of claims in the middle of litigation; it is a procedural device to prevent costly, unmeritorious litigation at the initiation of the lawsuit." (*San Diegans for Open Government v. Har Construction, Inc.* (2015) 240 Cal.App.4th 611, 625-626, 192 Cal.Rptr.3d 559.) To minimize this problem, section 425.16, subdivision (f), should be interpreted to permit an anti-SLAPP motion against an amended complaint if it could not have been brought earlier, but to prohibit belated motions that could have been brought earlier (subject to the trial court's discretion to permit a late motion). This interpretation maximizes the possibility the anti-SLAPP statute will fulfill its purpose while reducing the potential for abuse." (Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism (2018) 4 Cal.5th 637, 645.)

Plaintiff's counsel declares in opposition that on May 20, 2021 defense counsel told him that defendant intended to file an anti-SLAPP motion against plaintiff's initial verified complaint; and plaintiff amended the complaint and filed the 1st amended complaint. (Declaration of Daniel T. Newman in Opposition to Motion, paragraph 3.)

Defense Counsel declares in reply: during meet and confer communications related to the initial complaint on May 6, 2021 plaintiff's counsel agreed by email to amend the pleading and on May 11, 2021 communicated it would be amended by the end of the week or the following Monday; counsel did not indicate what plaintiff would be amending; defense counsel relied on plaintiff's counsel representation that there would be an amendment filed and did not file an anti-SLAPP motion to the initial complaint; as the deadline to file a responsive pleading approached, and not having received an amended pleading, the anti-SLAPP motion was

prepared to file relating to the initial complaint; on May 20, 2021 defense counsel filed with the court an ex parte application to file additional pages supporting the anti-SLAPP motion; the ex parte hearing was set for the next day, May 21, 2021; notice of the ex parte proceeding was set by email to plaintiff's counsel on May 20, 2021 at 9:08 a.m.; and at 9:52 p.m. on May 20, 2021 the 1st amended complaint was filed and served. (Declaration of Jesse J. Maddox in Reply, paragraphs 4-8; and Exhibits A and B.)

While the motion could have been filed against the initial complaint earlier, plaintiff's counsel's conduct created a situation where defense counsel reasonably relied on plaintiff's counsel's affirmative representation that an amended complaint superseding the initial complaint was being filed, which caused the delay in filing the anti-SLAPP motion. This is not a situation where the moving defendant waited to file the motion until long after the initial complaint was filed and significant discovery and litigation had occurred in the interim. At the very least, it appears that plaintiff's counsel's conduct estops plaintiff from claiming that the imitation to file the motion expired when an anti-SLAPP motion was not filed within 60 days of the filing of the initial complaint.

An estoppel may arise even though there was no designed fraud on the part of the person sought to be estopped. It is sufficient to create an equitable estoppel where the party has been induced to refrain from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss. (Lantzy v. Centex Homes (2003) 31 Cal.4th 363, 384.)

In addition, to the extent that the filing of the motion was untimely, the court finds that under the totality of the circumstances presented, it appears appropriate to exercise its discretion to allow the filing of the instant anti-SLAPP motion on the date it was filed and consider the motion on its merits.

Motion to Strike a Portion of the Complaint

The moving papers request that the court strike the entire 1st amended complaint pursuant to the provisions of Code of Civil Procedure, § 425.16, or, in the alternative, "strike those portions of the FAC that describe protected activity" and which plaintiff is not able to provide sufficient evidence to support. (See Defendant's Memorandum of Points and Authorities in Support of Motion, page 8, lines 21-23; and page 27, lines 13-15.) The notice of this motion to strike only states that the motion is directed at striking the entire 1st amended complaint consisting of the 1st and sole cause of action for Whistleblower Retaliation. (See Notice of Motion, page 1, line 26 to page 2, line 1; and page 3, lines 1-9.) The notice does not specify what particular allegations should be stricken in the event that it is inappropriate to strike the entire 1st amended complaint/cause of action as mandated by Rule 3.1322(a).

"A notice of motion to strike a portion of a pleading must quote in full the portions sought to be stricken except where the motion is to strike an entire paragraph, cause of action, count, or defense. Specifications in a notice must be numbered consecutively." (Rules of Court, Rule 3.1322(a).)

Therefore, if defendant establishes that this action involves a protected activity by defendant and there is sufficient evidence supporting a finding of minimal merit to any whistleblower claim made in the 1st amended complaint, the court can not strike the entire 1st amended complaint and also can not strike particular allegations, which have not been specified in the notice of motion.

Anti-SLAPP Motion Step One – Conduct in Furtherance of Defendants' Rights of Petition or Free Speech In Connection with a Public Issue

A Whistleblower Retaliation Cause of Action can be subject to anti-SLAPP motion.

"To be clear, we do not hold that a defendant's motives are categorically off-limits in determining whether an act qualifies as protected activity under the anti-SLAPP statute. We hold only that the plaintiff's allegations cannot be dispositive of the question. In some cases (including this one, as we explain below), whether the defendant's act qualifies as one in furtherance of protected speech or petitioning will depend on whether the defendant took the action for speech-related reasons. Nothing in the statutory scheme prevents the defendant from introducing evidence establishing such reasons. But there is an important difference between permitting the defendant to present evidence of its own motives in an effort to make out its prima facie case of protected activity and treating a plaintiff's allegations of illicit motive as a bar to anti-SLAPP protection, as Wilson would have us do here. ¶ To conclude otherwise would effectively immunize claims of discrimination or retaliation from anti-SLAPP scrutiny, even though the statutory text establishes no such immunity. As originally drafted, "[n]othing in the statute itself categorically exclude[d] any particular type of action from its operation." (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 92, 124 Cal.Rptr.2d 530, 52 P.3d 703.) And although subsequent amendments to the statutory scheme have added exclusions (see Code Civ. Proc., § 425.17; *Simpson Strong-Tie Co., Inc. v. Gore*, *supra*, 49 Cal.4th at pp. 21–22, 109 Cal.Rptr.3d 329, 230 P.3d 1117), there are none for discrimination or retaliation actions. Nor can we infer that failure to include such an exception was a legislative oversight. After all, a meritless discrimination claim, like other meritless claims, is capable of "chill[ing] the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a); see *Ingels v. Westwood One Broadcasting Services, Inc.* (2005) 129 Cal.App.4th 1050, 1064, 28 Cal.Rptr.3d 933 [upholding strike of caller's age discrimination claim against call-in radio talk show].) ¶ Wilson, echoing the Court of Appeal, expresses concern that if the plaintiff's allegations of discriminatory motives are not considered

at the first step of the anti-SLAPP analysis, " 'most, if not all, harassment, discrimination, and retaliation cases [will be subject] to motions to strike.' " (*Wilson*, *supra*, 6 Cal.App.5th at p. 835, quoting *Nam v. Regents of University of California*, *supra*, 1 Cal.App.5th at p. 1189, 205 Cal.Rptr.3d 687.) This result would impose substantial burdens on discrimination and retaliation plaintiffs, who would be compelled to establish the potential merit of their claims at an early stage of the litigation, generally "without the benefit of discovery and with the threat of attorney fees looming." (*Nam*, at p. 1189, 205 Cal.Rptr.3d 687; accord, *Bonni v. St. Joseph Health System*, *supra*, 13 Cal.App.5th at p. 864, rev. granted; see *Wilson*, at p. 835.) ¶ The concern is overstated. We see no realistic possibility that anti-SLAPP motions will become a routine feature of the litigation of discrimination or retaliation claims. The anti-SLAPP statute does not apply simply because an employer protests that its personnel decisions followed, or were communicated through, speech or petitioning activity. A claim may be struck under the anti-SLAPP statute "only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Park*, *supra*, 2 Cal.5th at p. 1060, 217 Cal.Rptr.3d 130, 393 P.3d 905.) Put differently, to carry its burden at the first step, the defendant in a discrimination suit must show that the complained-of adverse action, in and of itself, is an act in furtherance of its speech or petitioning rights. Cases that fit that description are the exception, not the rule. ¶ A brief survey of the case law illustrates the point. For example, in *Martin v. Inland Empire Utilities Agency* (2011) 198 Cal.App.4th 611, 624–625, 130 Cal.Rptr.3d 410, the court denied a government agency's motion to strike an employee's discrimination claim because the claim arose from various actions that had culminated in the employee's constructive discharge, even though the complaint also mentioned statements critical of the plaintiff's performance. In *McConnell v. Innovative Artists Talent & Literary Agency, Inc.* (2009) 175 Cal.App.4th 169,

176–177, 96 Cal.Rptr.3d 1, the plaintiffs sued over the modification of their job duties and subsequent termination in retaliation for their filing lawsuits; that these allegedly retaliatory acts were conveyed in writing did not render them protected. And in *Department of Fair Employment & Housing v. 1105 Alta Loma Road Apartments, LLC* (2007) 154 Cal.App.4th 1273, 1284–1285, 65 Cal.Rptr.3d 469, the plaintiff's disability discrimination claims arose from a landlord's failure to accommodate a disability by giving sufficient time to seek alternative housing, not the unlawful detainer action the landlord filed. ¶ In the relatively unusual case in which the discrimination or retaliation defendant does meet its first-step burden of showing that its challenged actions qualify as protected activity, the burden shifts to the plaintiff. But the plaintiff's second-step burden is a limited one. The plaintiff need not prove her case to the court (*Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at p. 1123, 81 Cal.Rptr.2d 471, 969 P.2d 564); the bar sits lower, at a demonstration of "minimal merit" (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 89, 124 Cal.Rptr.2d 530, 52 P.3d 703). At this stage, " '[t]he court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law.' " (*Sweetwater Union High School Dist. v. Gilbane Building Co.* (2019) 6 Cal.5th 931, 940, 243 Cal.Rptr.3d 880, 434 P.3d 1152, quoting *Baral v. Schnitt* (2016) 1 Cal.5th 376, 384–385, 205 Cal.Rptr.3d 475, 376 P.3d 604; see *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821, 123 Cal.Rptr.2d 19, 50 P.3d 733.) ¶ True, in the absence of discovery, even this reduced barrier could pose particular difficulties for discrimination and retaliation plaintiffs, whose claims depend on assertions of motive that are peculiarly within the defendant's knowledge. But "[c]ourts deciding anti-SLAPP motions ... are empowered to

mitigate their impact by ordering, where appropriate, 'that specified discovery be conducted notwithstanding' the motion's pendency." (*Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 66, 124 Cal.Rptr.2d 507, 52 P.3d 685, quoting § 425.16, subd. (g).) A court exercising its discretion to grant or deny a motion under section 425.16, subdivision (g) should remain mindful that the anti-SLAPP statute was adopted to end meritless suits targeting protected speech, "*not* to abort potentially meritorious claims due to a lack of discovery." (*Sweetwater Union High School Dist. v. Gilbane Building Co.*, *supra*, 6 Cal.5th at p. 949, 243 Cal.Rptr.3d 880, 434 P.3d 1152.) Where a defendant relies on motive evidence in support of an anti-SLAPP motion, a plaintiff's request for discovery concerning the asserted motive may often present paradigmatic "good cause." (§ 425.16, subd. (g).) ¶ With careful attention to the limited nature of a plaintiff's second step showing, and to granting discovery in appropriate cases, courts can mitigate the burden of anti-SLAPP enforcement on discrimination and retaliation plaintiffs, even if they cannot eliminate it altogether. If the Legislature believes the residual burden is unnecessary or excessive, it certainly can adjust the statutory scheme, as it has before. We cannot, however, rewrite the statute to create an exception the Legislature has not enacted. ¶ In sum, we conclude that for anti-SLAPP purposes discrimination and retaliation claims arise from the adverse actions allegedly taken, notwithstanding the plaintiff's allegation that the actions were taken for an improper purpose. If conduct that supplies a necessary element of a claim is protected, the defendant's burden at the first step of the anti-SLAPP analysis has been carried, regardless of any alleged motivations that supply other elements of the claim. We disapprove *Bonni v. St. Joseph Health System*, *supra*, 13 Cal.App.5th 851, review granted, and *Nam v. Regents of University of California*, *supra*, 1 Cal.App.5th 1176, 205 Cal.Rptr.3d 687, to the extent they are inconsistent with this conclusion." (Wilson v. Cable News Network, Inc. (2019) 7 Cal.5th 871, 889–892.)

Defendant argues that the whistleblower cause of action is premised upon defendant's conduct concerning an investigation into complaints from employees of the District Attorney's office complaining that plaintiff harassed, discriminated against, and retaliated against employees and that the investigation was an official proceeding by defendant authorized by law, which, according to defendant, resulted in plaintiff's paid administrative leave during the investigation.

Plaintiff asserts placing plaintiff on administrative time off with pay and forcing him to retire after not being hired as the District Attorney are not protected conduct by defendant. Plaintiff alleges the following in support of his assertion that the leave did not arise from an internal investigation by the County and was instead imposed for illegitimate reasons: the Fair Political Practices Commission (FPPC) asked him if the District Attorney's Office intended to investigate potential unlawful conduct of the County, or if the Office would permit the FPPC to investigate directly; plaintiff drafted a letter to the FPPC that stated it would be a conflict of interest for the District Attorney to conduct the investigation and plaintiff wanted to meet in person with the FPPC investigator; on March 9, 2020, before he was able to respond to the FPPC, defendant placed him on paid administrative time off pending the appointment of a new district attorney; plaintiff was locked out of the DA office building and instructed not to discuss business or personnel affairs with the DA's Office; and plaintiff understood that this was an attempt to prevent him from coordinating with the FPPC investigation and/or to discredit him as a witness.

In Hansen v. California Dept. of Corrections and Rehabilitation (2008) 171 Cal.App.4th 1537 a retired employee of the Department of Corrections and Rehabilitation sued the Department, alleging that an internal investigation conducted against him was retaliatory action prohibited under the whistleblower statute, and also asserted a claim for intentional infliction of emotional distress. An appellate court affirmed the trial court's granting of an anti-SLAPP

motion to strike the complaint finding that the investigation by the Department was an official investigation that was a protected activity by the Department and plaintiff Hansen failed to establish that his claims had even minimal merit. With respect to the protected activity prong, the appellate court stated: "Section 425.16, subdivision (e), clarifies what speech constitutes an " '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....'" Such speech 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).) ¶ Hansen's complaint is based on statements and writings CDCR personnel made during the internal investigation and in securing the search warrant. The search warrant affidavit constituted a writing made before a judicial proceeding. Accordingly, those statements fall under subdivision (e)(1). ¶ Further, the internal investigation itself was an official proceeding authorized by law. (*Green v. Cortez* (1984) 151 Cal.App.3d 1068, 1073, 199 Cal.Rptr. 221.) Thus, the objected-to statements and writings, i.e., the allegedly false reports of criminal activity, were made in connection with an issue under consideration by an authorized official proceeding and thus constitute protected activity under subdivision (e)(2). Although Hansen was never formally charged with misconduct or a crime, communications preparatory to or in anticipation of the bringing of an official proceeding are within the protection of section 425.16. (*Briggs v. Eden*

Council for Hope & Opportunity (1999) 19 Cal.4th 1106, 1115, 81 Cal.Rptr.2d 471, 969 P.2d 564.) ¶ Hansen concedes that the warrant affidavit itself was protected under section 425.16. However, Hansen asserts that CDCR's remaining acts were not. According to Hansen, by conspiring to make, and knowingly making, false reports, CDCR personnel engaged in illegal acts as a matter of law. ¶ Where either the defendant concedes, or the evidence *conclusively* establishes, that the allegedly protected speech or petition activity was illegal as a matter of law, the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff's action. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 320, 46 Cal.Rptr.3d 606, 139 P.3d 2.) However, conduct that would otherwise be protected by the anti-SLAPP statute does not lose its coverage simply because it is *alleged* to have been unlawful. (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 910–911, 120 Cal.Rptr.2d 576.) If that were the test, the anti-SLAPP statute would be meaningless. (*Id.* at p. 911, 120 Cal.Rptr.2d 576.) ¶ Here, Hansen's allegation that CDCR personnel engaged in criminal activity by falsely accusing Hansen of committing criminal acts while knowing those accusations were false was not conceded by CDCR. Rather, CDCR vehemently argues that this was not the case. Further, other than Hansen's bare allegation, there is no evidence that false accusations were knowingly made. Accordingly, Hansen has not demonstrated that CDCR's protected activity is excluded from anti-SLAPP coverage for indisputably illegal conduct. ¶ Since CDCR made a threshold prima facie showing that its acts of which Hansen complains were protected by section 425.16, it is necessary to take the next step in the SLAPP analysis and determine whether Hansen met his burden of establishing a probability of prevailing on his complaint." (Hansen v. California Dept. of Corrections and Rehabilitation (2008) 171 Cal.App.4th 1537, 1544–1545.)

In summary, the plaintiff's allegations cannot be dispositive of the question of protected activity by the defendant, nothing prevents the defendant from introducing evidence establishing protected reasons for the conduct/adverse action taken, and the defendant is permitted to present evidence of its own motives in an effort to make out its prima facie case of protected activity. (Wilson v. Cable News Network, Inc. (2019) 7 Cal.5th 871, 889.)

Plaintiff essentially contends that there was retaliation for a protected activity, his participation in an FPPC investigation; he was subjected to adverse employment actions, which included the paid suspension; and there is a causal link between the two. Plaintiff argues that the purported investigation of employee complaints against him does not form an element of his retaliation claim.

Defendant essentially contends that defendant's legitimate, nonretaliatory explanation for its acts are that the acts occurred during the investigation of employee complaints against plaintiff, which is a protected activity. Defendant admits in the reply that the operative pleading, the 1st amended complaint, omits any reference to the internal investigation of employee complaints against plaintiff and the verified initial complaint alleged in paragraph 44 that the internal investigation was without cause, which is the wrong complained of in this action and an element of plaintiff's case. (Reply, page 8, line 14 to page 9, line 2.) Citing Jeffra v. California State Lottery (2019) 39 Cal.App.5th 471, defendant asserts that the purported internal investigation is inextricably intertwined with the retaliation claim and, therefore, the internal investigation can not be omitted from the 1st amended complaint as it is an essential element of his claim.

Plaintiff Jeffra was an investigator employed by defendant California State Lottery. He asserted a whistleblower retaliation cause of action against the State Lottery. "He alleged defendant engaged in a pretextual investigation, ultimately forcing him to retire, after he filed a

whistleblower complaint with the California State Auditor." (Jeffra v. California State Lottery (2019) 39 Cal.App.5th 471, 474.)

The appellate court found that the alleged pretextual investigation was an inextricable part of the complaint as alleged, it must not be omitted, and even though plaintiff alleged the investigation was pretextual, it was an official investigation by defendant that qualified as a protected activity by defendant pursuant to the provisions of the anti-SLAPP statute. The appellate court held: "As *Wilson* also tells us, "[t]o prove unlawful retaliation, [plaintiff] must ... show [defendant] subjected him to adverse employment actions for impermissible reasons – namely, because he exercised rights guaranteed him by law." (*Wilson, supra*, 7 Cal.5th at p. 885, 249 Cal.Rptr.3d 569, 444 P.3d 706.) Defendant points out that its investigation of plaintiff was the allegedly adverse employment action at the heart of plaintiff's complaint, and we cannot disagree: the investigation was the "wrong complained of" – the adverse action that supplies a necessary element of plaintiff's retaliation claim. And the other adverse actions (plaintiff's administrative leave and his forced retirement) are inextricably tied to the investigation; plaintiff could not omit reference to the investigation and still have a retaliation claim. ¶ Thus, if plaintiff's complaint arises from the investigation – as it surely does, as that is the very wrong complained of – and if the investigation falls within one or more of the four categories of acts protected by the anti-SLAPP statute, defendant has satisfied its initial burden. That is the case here. ¶ Defendant correctly asserts the investigation was protected activity under section 425.16, subdivision (e)(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"). The authorities support the proposition that an internal investigation by a state-created entity is an "official proceeding authorized by law." (See *Hansen v. Department of Corrections & Rehabilitation* (2008) 171

Cal.App.4th 1537, 1544, 90 Cal.Rptr.3d 381 [state entity's internal investigation into allegations that the plaintiff had engaged in misconduct and criminal activity "itself was an official proceeding authorized by law"].) "Although [the plaintiff] was never formally charged with misconduct or a crime, communications preparatory to or in anticipation of the bringing of an official proceeding are within the protection of section 425.16." (*Id.* at p. 1544, 90 Cal.Rptr.3d 381, citing *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115, 81 Cal.Rptr.2d 471, 969 P.2d 564.) ¶ Plaintiff does not suggest otherwise, instead arguing only that "the 'protected' conduct on which [defendant] based its motion, i.e., its 'investigation,' was in fact a sham done in retaliation for the complaints made of waste, abuse and violations of law," and therefore was not activity protected under the anti-SLAPP statute. As we have seen, *Wilson* definitively rejects that view of the anti-SLAPP statute, refusing to "treat[ ] a plaintiff's allegations of illicit motive as a bar to anti-SLAPP protection." (*Wilson, supra*, 7 Cal.5th at p. 889, 249 Cal.Rptr.3d 569, 444 P.3d 706.) Rather, defendant's allegedly impermissible reason for taking the adverse employment action is an issue plaintiff must raise and support at the second step of the analysis. (*Id.* at p. 888, 249 Cal.Rptr.3d 569, 444 P.3d 706.)" (Jeffra v. California State Lottery (2019) 39 Cal.App.5th 471, 482–483.)

Jeffra, supra, is distinguishable. Plaintiff only alleges that there was an FPPC investigation that defendant attempted to prevent him from participating in by placing him on paid administrative time off pending the appointment of a new district attorney, locking him out of the DA office building and instructed him not to discuss business or personnel affairs with the DA's Office, which plaintiff understood was an attempt to prevent him from coordinating with the FPPC investigation and/or to discredit him as a witness.

The court notes that consistent with the 1st amended complaint plaintiff alleged in paragraph 27 of the initial complaint that he was placed on paid administrative time off without any

notification by defendant County as to the reason he was placed on such leave. (Emphasis the court's.) Paragraph 44 of the initial complaint that one of six specified adverse actions taken against him was being placed under investigation without cause. The adverse action of investigation by defendant without cause is not inextricably intertwined with the paid administrative time off claim of adverse action, such that plaintiff entire claim of retaliation must fail if the County investigation allegation is omitted from this case.

However, despite plaintiff's allegations of non-protected conduct by defendant to support the essential elements of the cause of action, the defendant is entitled to raise its explanation for the conduct as protected conduct and if the evidence supports such a claim, the defendant has met its burden of proof of the first step in the anti-SLAPP procedure to show the adverse action was the result of a protected activity by the defendant. (Wilson v. Cable News Network, Inc. (2019) 7 Cal.5th 871, 892.) "…defendant's allegedly impermissible reason for taking the adverse employment action is an issue plaintiff must raise and support at the second step of the analysis. (*Id.* at p. 888, 249 Cal.Rptr.3d 569, 444 P.3d 706.)" (Jeffra v. California State Lottery (2019) 39 Cal.App.5th 471, 483.)

County Counsel Schwab declares in support of the motion: she advises the County on whether to initiate internal investigations in response to employee complaints and whether to place subjects of investigation on administrative leave pending the investigation; on or around November 22, 2019 she received and reviewed a letter sent to the County by the FPPC regarding Scott Vaughn's complaint against Supervisor Uhler; she supervised the drafting and submission of the County's November 27 and December 24, 2019 responses to Mr. Vaughn's allegations; and she was aware Mr. Vaughn submitted previous complaints against Supervisor Uhler containing identical allegations, with most of the complaints being dismissed; she was also aware that Mr. Vaughn's two most recent complaints containing identical allegations

remained open and the California Attorney General's Office was investigating the complaints on behalf of the FPPC; in or around February 2020 she became aware that employees in the District Attorney's Office made complaints against plaintiff; in March 2020 County Executive Officer Leopold, Chief Deputy County Counsel Holt and the Human Resources Director conferred with her about placing plaintiff on paid administrative leave; the County decided to place plaintiff on paid administrative leave on March 9, 2020 to separate him from the complainants while the investigation was pending; and when plaintiff was placed on administrative leave, she was unaware that the FPPC or Attorney General's office had contacted plaintiff regarding Mr. Vaughan's complaints to the FPPC about Supervisor Uhler, or that plaintiff had participated in any way with the investigation into Mr. Vaughan's complaints (Declaration of Karin Schwab in Support of Motion, paragraphs 2-5.)

County Executive Officer Leopold declares in support of the motion: he oversees the County department heads and participates in County Board meetings; he is generally aware when employees are under investigation and when employees are placed on administrative leave; he is familiar with the County's 2020 recruitment to fill the position of District Attorney; ultimately the Board selected Morgan Gire for the position of District Attorney; in March 2020 County Counsel Schwab conferred with him, Human Resources Director Kate Simpson, and Chief Deputy County Counsel Holt regarding placing plaintiff on paid administrative leave due to complaints that had been made against him by employees in the District Attorney's office; he made the decision to place plaintiff on administrative leave on March 9, 2020 to separate him from the complainants while the investigation was pending; when he placed plaintiff on administrative leave, he was unaware that the FPPC or Attorney General's office had contacted plaintiff regarding Mr. Vaughan's complaints to the FPPC about Supervisor Uhler, or that plaintiff had participated in any way with the investigation into Mr. Vaughan's complaints;

the act of placing plaintiff on administrative leave did not change his status as viable applicant with the Board; and the Board wanted to interview him, and, in fact, interviewed plaintiff. (Declaration of Todd Leopold in Support of Motion, paragraphs 2-7.)

Chief Deputy County Counsel Holt declares in support of the motion: in his position he advises the County on whether to initiate internal investigations in response to employee complaints and whether to place subjects of investigation on administrative leave pending the investigation; on March 5, 2020 he met with the Human Resources Director and a member of plaintiff's management team; the employee, who requested to remain anonymous, described the work environment under plaintiff as hostile, making promises to make the pending administrative investigations go away, and expressing concern about the safety of the employee's position in the office if plaintiff was not appointed the next District Attorney; the Human Resources Director conferred with him, County Executive Officer Leopold, and County Counsel Schwab regarding placing plaintiff on administrative leave pending the investigation into complaints against him; County Executive Officer Leopold made the decision to place plaintiff on administrative leave on March 9, 2020 to separate him from the complainants while the investigation was pending; and when plaintiff was placed on administrative leave, he was unaware that the FPPC or Attorney General's office had contacted plaintiff regarding Mr. Vaughan's complaints to the FPPC about Supervisor Uhler, or that plaintiff had participated in any way with the investigation into Mr. Vaughan's complaints. (Declaration of Brett Holt in Support of the Motion, paragraphs 2 and 4-6.)

The above-cited evidence has met defendant's step one burden to establish a prima facie case of protected activity consisting of a protected official action of investigating defendant.

Step Two – Determination as to Whether the Whistleblower Claim Lacks Even Minimal Merit

"The court, without resolving evidentiary conflicts, must determine whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment." (Baral v. Schnitt (2016) 1 Cal.5th 376, 396.); and the court must ""accept as true the evidence favorable to the [nonmoving party] and evaluate the [moving party's] evidence only to determine if it has defeated that submitted by the [nonmoving party] as a matter of law." ' " (*Oasis West*, at p. 820, 124 Cal.Rptr.3d 256, 250 P.3d 1115.)" (Mission Beverage Company v. Pabst Brewing Company, LLC (2017) 15 Cal.App.5th 686, 698–699.)

- Government Code, § 1102.5 Cause of Action

"Fundamental public policy prohibits the retaliatory discharge of employees for whistle blowing in the public interest. (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 670-671, 254 Cal.Rptr. 211, 765 P.2d 373.) Labor Code section 1102.5, subdivision (b), prohibits employers from retaliating against employees for disclosing information to a government or law enforcement agency when the employee has reasonable cause to believe that such information discloses a violation of federal or state statutes or regulations. 'This provision reflects the broad public policy interest in encouraging workplace whistle-blowers to report unlawful acts without fearing retaliation.' (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 77, 78 Cal.Rptr.2d 16, 960 P.2d 1046.)" (Colores v. Board of Trustees (2003) 105 Cal.App.4th 1293, 1301, fn.1.)

"(b) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for providing information to,

or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties." (Emphasis added.) (Labor Code, § 1102.5(b).)

California's general whistleblower statute, Labor Code, § 1102.5(b), reflects the broad public policy interest in encouraging workplace whistle-blowers to report unlawful acts without fearing retaliation. (McVeigh v. Recology San Francisco (2013) 213 Cal.App.4th 443, 468.) "Labor Code section 1102.5, subdivision (b) should be given a broad construction commensurate with its broad purpose (*Green, supra,* 19 Cal.4th at p. 77, 78 Cal.Rptr.2d 16, 960 P.2d 1046)." (McVeigh v. Recology San Francisco (2013) 213 Cal.App.4th 443, 471.)

The Third District Court of Appeal has stated the following with respect to a Section 1102.5 "whistleblower" cause of action: "The elements of a section 1102.5(b) retaliation cause of action require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant provide a legitimate, nonretaliatory explanation for its acts, and (3) the plaintiff show this explanation is merely a pretext for the retaliation. (See *Flait, supra,* 3 Cal.App.4th at p. 476, 4 Cal.Rptr.2d 522; see also *Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1453, 116 Cal.Rptr.2d 602 (*Akers*); *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 68–69, 105 Cal.Rptr.2d 652.)" (Patten v. Grant Joint Union High School Dist. (2005) 134 Cal.App.4th 1378, 1384.) The Third District further stated that the following must be established in order to satisfy the element of a prima facie case of retaliation: "…a plaintiff must show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two. (*Akers, supra,* 95

Cal.App.4th at p. 1453, 116 Cal.Rptr.2d 602.)" (Patten v. Grant Joint Union High School Dist. (2005) 134 Cal.App.4th 1378, 1384.)

- Protected Activities

Citing Labor Code, §§ 1102.5(b) and 1102.5(c) Plaintiff argues that he engaged in protected activities by refusing an unlawful implied quid pro quo offer of a bribe from Supervisor Uhler's spouse and when he prepared to refer an FPPC investigation of Supervisor Uhler and his spouse to the Attorney General's Office.

Defendant argues in reply: the alleged bribe text message can not be reasonably construed to be a bribe; plaintiff refused to produce the purported bribe text message to the County; there was no disclosure to the County and no FPPC investigation of the claimed bribe; and the FPPC investigation was not related to the purported bribe.

"(c) An employer, or any person acting on behalf of the employer, shall 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 or noncompliance with a local, state, or federal rule or regulation." (Labor Code, § 1102.5(c).)

The court also notes that Section 1102.5(b) is also violated where the employer retaliates against the employee when the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency.

Plaintiff alleges the following in paragraphs 8, 9, 11, 12, and 25 of the 1st amended complaint: on January 2, 2020, five days after becoming acting District Attorney, the wife of County Supervisor Uhler sent a text message, which stated, "Hey just a heads up, but spoke with RSO today. I wanted to meet with you when the dust settles maybe in a couple of weeks, and chat with you about The future of your department and mine. Because you know mine is in limbo right now, and I don't know how everything will shake out after a new department head is

hired. I might be looking for a new place to hang my hat. Just wanted to pick your brain."; plaintiff read this message and understood it as an offer of a quid pro quo bribe that if he agreed to hire the Supervisor's wife, he would receive her husband's help in steering the Board to appoint plaintiff the permanent District Attorney; he struggled with how to respond and merely stated "Anytime" and immediately changed the subject; plaintiff effectively took no action in response to the offer of a quid pro quo and thereby refused to engage in illegal behavior; he advised his two Assistant District Attorneys and Chief Investigator about the attempted bribe on the same day; on March 3, 2020 plaintiff received a letter from the FPPC asking if the District Attorney's Office intended to investigate potential unlawful conduct of the County, or if the Office would permit the FPPC to investigate directly; plaintiff drafted a letter to the FPPC that stated it would be a conflict of interest for the District Attorney to conduct the investigation and plaintiff wanted to meet in person with the FPPC investigator; on March 9, 2020. before he was able to respond to the FPPC, defendant placed him on paid administrative time off pending the appointment of a new district attorney; plaintiff was locked out of the DA office building and instructed not to discuss business or personnel affairs with the DA's Office; plaintiff understood that this was an attempt to prevent him from coordinating with the FPPC investigation and/or to discredit him as a witness; and plaintiff's refusal to participate in the attempted bribe is also a protected action.

Plaintiff declares: on January 2, 2020 Tamara Uhler, the wife of Supervisor Uhler, sent him a text less than two weeks before her husband would vote on whether to appoint him to the position of District Attorney that impliedly and unambiguously offered him a quid pro quo; according to District Attorney Scott Owens, she had also asked him for a management position in the DA's Office; the text is attached as Exhibit 1; the text was sent during a time where she and her husband were facing an FPPC investigation for the approximately 28% wage increase

she received form the County for her position as Assistant Director of Child Support Services; he believes he would be the County's District Attorney today had he acted upon and accepted the offer; on February 28, 2020 he was advised that he was the subject of an investigation of a complaint, that his application for DA was moving forward, and he should expect a call for an interview any day; he was not contacted by an investigator regarding any investigation until May 18, 2021, more than one year later and after this lawsuit was filed; he learned on March 3, 2020 that an FPPC investigation was beginning or the FPPC was considering a potential investigation of Supervisor Uhler; it was a conflict of interest for the DA's Office to investigate while Supervisor Uhler was sitting on the Board and determining who would be the next DA; he was also a witness to the attempted bribe and privy to the information provided to him regarding Tamara Uhler's raise by DA Owens; the March 3, 2020 FPPC letter indicated the subject matter of the investigation was Tamara Uhler's wage increase; while serving as Chief Assistant District Attorney he was familiar with the County procedure regarding wage increases like the one received by Ms. Uhler; such increases were normally reviewed and approved by the County CEO, County Counsel, and Human Resources, any criminal investigation of the Uhlers' conduct regarding the wage increase would necessarily involve the County CEO, County Counsel, and Human Resources, all of whom have submitted declarations in support of this motion; and on or around March 9, 2020, before he could respond to the March 3, 2020 FPPC communication about the wage increase investigation, the County placed him on an involuntary paid leave of absence for no stated reason as set forth in Exhibit 8 attached to the declaration. (Declaration of Plaintiff Wilson in Opposition, paragraphs 2, 7, and 8-11; and Exhibits 1 and 8.)

The County correspondence from County CEO Leopold attached as Exhibit 8 to plaintiff's declaration states that he has made the determination that until the Board appointed a new

DA, the proper and efficient administration of the affairs of the County require that plaintiff be placed on administrative leave; and instructs plaintiff not to engage any Placer County staff in any discussion of any business or personnel matter pertaining to the DA's Office, except to cooperate with the Human Resources Department or HR investigator in the investigation he was previously notified of.

Jennifer Miszkewycz declares: sometime before the Board announced it opened the DA position for recruitment plaintiff informed her about the text message from Tamara Uhler, wife of Supervisor Uhler; plaintiff read the text message to her; as read, it inferred that Tamara Uhler might need a job in the DA's office; she was aware when the text was read to her that Ms. Uhler was the Placer County Assistant Director of Child Support Services; the timing of the text message seemed improper given the pending Board announcement of the DA recruitment; without more information, she did not take further action on that message; on March 3, 2020 the DA's Office received an email from the FPPC regarding the investigation of Supervisor Uhler; the email is attached as Exhibit 15; seven days later, on March 10, 2020 CEO Leopold advised the DA's Office that plaintiff was placed on a paid administrative leave and she would be working out-of-class as Chief Assistant DA; between March 10 and March 12, 2020 she corresponded with the FPPC and Attorney General's Office regarding the DA's Office having a conflict of interest concerning the investigation of Supervisor Uhler; County Counsel Schwab contacted plaintiff about the Tamara Uhler text message on March 19, 2020 and she learned that County Counsel Schwab advised plaintiff that he could communicate with her about whether to provide the message to County Counsel Schwab; and plaintiff sent the text message to her and County Counsel Schwab on March 20, 2020, which is attached as Exhibit 20. (Declaration of Jennifer Miszkewycz in Opposition, paragraphs 2, and 5-8; and Exhibit 15 and 20.)

Exhibit 20 states that plaintiff was willing to meet with County Counsel Schwab about the text message, he would share its text and its context, he would not simply give him text message, and he wanted a formal meeting, He also stated his concern that given what has occurred, plaintiff is not sure the DA recruitment can be a fair process

While there may be another explanation as to why plaintiff was placed on leave, the circumstances and timing of the imposition of the involuntary paid administrative leave set forth in the evidence cited above meets plaintiff's burden of proof to submit prima facie evidence that plaintiff's claims that he was engaged in protected conduct of refusal to accept a bribe and that the County's action prevented him from disclosing information to a government or law enforcement agency has at least minimal merit.

- Adverse Action

Defendant argues that placing defendant on paid administrative leave alone is not sufficient to allege an adverse employment action as it did not have a substantial and detrimental effect on his employment; Mr. Gire's prior announcement that should he be appointed District Attorney he would demote plaintiff was not an adverse employment action as plaintiff resigned the day before Mr. Gire was appointed District Attorney; plaintiff was not constructively discharged as he voluntarily retired; and there are no facts to support plaintiff's allegation of a conclusion of law or fact that the County created an overall hostile work environment..

"…to be actionable, an employer's adverse conduct must materially affect the terms and conditions of employment. (See *Akers v. County of San Diego, supra,* 95 Cal.App.4th at pp. 1454–1457, 116 Cal.Rptr.2d 602; *Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 510–512, 91 Cal.Rptr.2d 770.)" (Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.4th 1028, 1051, fn. 9.)

Paid administrative leave can be an adverse employment action. The appellate opinion in Whitehall v. County of San Bernardino (2017) 17 Cal.App.5th 352 held: "Defendant also argues that placing plaintiff on administrative leave was not an adverse employment action because she remained on the payroll. However, plaintiff also had been removed from the dependency case to which she had been assigned as J/D writer prior to being placed on administrative leave. Plaintiff alleged in a declaration in opposition to the County's motion that while on administrative leave and under investigation, she was made aware of the County's intention to fire her. The County's human resources officer acknowledged that she had recommended terminating plaintiff's employment. Two administrative review hearings were conducted to alleged wrongdoing by plaintiff in disclosing confidential information to an unauthorized person. Plaintiff resigned to avoid being fired, so as not to harm her chances of finding employment. ¶ In determining whether a plaintiff suffered an adverse employment action, we employ the same standard of materiality that the California Supreme Court held should be applied to employment retaliation claims made under the California Fair Employment and Housing Act (FEHA). (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1381, 37 Cal.Rptr.3d 113, citing *Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1051, 32 Cal.Rptr.3d 436, 116 P.3d 1123.) In *Yanowitz,* our Supreme Court reasoned that an adverse employment action is one that that materially affects the terms, conditions, or privileges of employment. (*Yanowitz v. L'Oreal USA, Inc., supra*, 36 Cal.4th at p. 1051, 32 Cal.Rptr.3d 436, 116 P.3d 1123.) As the court reasoned, "Retaliation claims are inherently fact-specific, and the impact of an employer's action in a particular case must be evaluated in context. Accordingly, although an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should

take into account the unique circumstances of the affected employee as well as the workplace context of the claim." (*Ibid.*)" (Emphasis added.) (Whitehall v. County of San Bernardino (2017) 17 Cal.App.5th 352, 366–367.)

The Appellate court further held that under the circumstances presented, the trial court appropriately found that a paid administrative leave was an adverse employment action taken against the plaintiff. The court stated: "Federal cases, while employing a slightly different standard, agree that administrative leave may constitute an adverse employment action. (See *Dahlia v. Rodriguez* (9th Cir. 2013) 735 F.3d 1060, 1078, citing *Coszalter v. City of Salem* (9th Cir. 2003) 320 F.3d 968, 975.) Here, plaintiff did not request the administrative leave, and it was not intended as a reward or accommodation to plaintiff, given that the County acknowledged the leave was for the purpose of investigating plaintiff's alleged wrongdoing. Further, we must view the County's conduct in context, and in this case plaintiff's administrative leave coincided with the firing of the original social worker assigned to the case. The trial court correctly found that the act of placing plaintiff on administrative leave was an adverse employment action. ¶ Here, defendant's own evidence in support of its special motion to strike confirmed its intention to fire plaintiff for disclosing to the juvenile court the County's attempt to manipulate evidence in a child dependency action. The administrative leave pending the investigation, which included two hearings, and the fact the decision had been made to terminate plaintiff's employment, establishes the adverse nature of the administrative leave. The court correctly found that plaintiff had established an adverse employment action." (Whitehall v. County of San Bernardino (2017) 17 Cal.App.5th 352, 367.)

Plaintiff alleges: on January 2, 2020, five days after becoming acting District Attorney, the wife of County Supervisor Uhler sent a text message; plaintiff read this message and understood it as an offer of a quid pro quo bribe that if he agreed to hire the Supervisor's wife,

he would receive her husband's help in steering the Board to appoint plaintiff the permanent District Attorney; plaintiff effectively took no action in response to the offer of a quid pro quo and thereby refused to engage in illegal behavior; on March 3, 2020 plaintiff received a letter from the FPPC asking if the District Attorney's Office intended to investigate potential unlawful conduct of the County, or if the Office would permit the FPPC to investigate directly; plaintiff drafted a letter to the FPPC that stated it would be a conflict of interest for the District Attorney to conduct the investigation and plaintiff wanted to meet in person with the FPPC investigator; on March 9, 2020, before he was able to respond to the FPPC, defendant placed him on paid administrative time off pending the appointment of a new district attorney; plaintiff was locked out of the DA office building and instructed not to discuss business or personnel affairs with the DA's Office; and plaintiff understood that this was an attempt to prevent him from coordinating with the FPPC investigation and/or to discredit him as a witness. (1st Amended Complaint, paragraphs 8, 11-13, 17, and 27.)

The court finds that the previously cited evidence indicates that plaintiff was involuntarily placed on paid leave, was ordered to not discuss DA Office business, and he was placed on such leave after he effectively refused to accept an implied bribe on January 2, 2020 and within nine days after he was informed his application to be appointed DA was moving forward and he should expect a call for an interview any day. Taking into account the unique circumstances of the affected employee, the timing of when he received the implied bribe text message, the timing of when he received the FPPC email, when his involuntary leave was imposed, the impending DA recruitment, plaintiff's application being processed and upcoming interview, as well as the workplace context of the claim, the evidence submitted meets plaintiff's burden of proof to submit prima facie evidence that his claim that the paid administrative leave amounts to an adverse employment action has minimal merit.

There being at least one adverse action having been established as having at least minimal merit, the court need not address the other claimed adverse actions as the defendant failed to specify what particular allegations should be stricken in the event that it is inappropriate to strike the entire 1st amended complaint as mandated by Rule 3.1322(a).

- Causal Connection

Defendant argues that there is no causal connection between the alleged protected activities and the adverse action as the plaintiff was notified of the County Investigation on February 28, 2020 and placed on paid leave on March 9, 2020, before he allegedly engaged in the protected conduct; he was not constructively discharged as he voluntarily resigned prior to the appointment of the new DA; and there is a legitimate non-discriminatory reason for placing plaintiff on paid leave..

Plaintiff argues in opposition that he engaged in two protected activities prior to being placed on administrative leave in that he refused to engage in an attempt to bribe him five days after he became interim District Attorney (1st Amended Complaint, paragraph 8.); and on March 3, 2020, six days before his placement on paid leave, he received a letter from the FPPC asking him to investigate unlawful behavior at the County and the placement on leave was designed to prevent him from participating in the investigation. (1st Amended Complaint, paragraphs 11-13.)

In discussing the evidence required to establish the causal link element of a prima facie case of retaliation under Labor Code, § 1102.5(b) an appellate court stated: "We therefore proceed to the third element of plaintiffs' prima facie case, whether a causal link exists between plaintiffs' whistleblowing and their termination. Circumstantial evidence such as proximity in time between protected activity and alleged retaliation may establish a causal link. (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 69, 105, 105 Cal.Rptr.2d 652.)

Here, Kim raised his concerns in writing in August 2012. Hawkins raised them in writing in May 2013. Hawkins's complaint prompted a formal investigation, which concluded in October 2013. Plaintiffs were fired soon thereafter, Hawkins in November 2013 and Kim in December 2013. The closeness in time from the complaints and investigation to the City's firing of plaintiffs establishes the requisite causal link. ¶ Even if we found that a long period elapsed between the protected activity and the terminations, a causal connection between them would still be established so long as the City engaged in a pattern of conduct consistent with a retaliatory intent. (See *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 421, 69 Cal.Rptr.3d 1.) In 2013, after Kim complained about being pressured to change decisions, he was counseled about how he handled two hearings. Then, in August 2013, on a day when Kim called in sick Heinsius made Kim get a doctor's note, which was unusual after just a one-day illness. Similarly, Hawkins had been openly and anonymously complaining about violations of the Vehicle Code since July 2012. Thereafter, he was counseled in January 2013. The jury could have believed that the City's pattern of counseling Kim and Hawkins was part of a retaliatory conduct." (Hawkins v. City of Los Angeles (2019) 40 Cal.App.5th 384, 394

As stated earlier in this ruling, plaintiff alleged that he engaged in protected conduct by taking no action on the text message implied bribe; and within a very short time period of a matter of days plaintiff received a letter from the FPPC asking about coordination of who would investigate the FPPC complaint of potential unlawful conduct at the County, he engaged in protected conduct of drafting a response regarding coordination of the investigation of the FPPC complaint of unlawful conduct at the County that included a statement that he wanted to meet in person with the FPPC investigator, he was placed on paid leave without explanation other than he was on leave pending appointment of a new District Attorney, locked out of his office, and told not to talk about business or personnel matters in the DA's Office; and the

circumstances of the abrupt and inexplicable paid leave led him to understand that it was an attempt to prevent him from coordinating with the FPPC investigation and/or to discredit him as a witness.

The previously cited evidence submitted by plaintiff in opposition sets forth circumstantial evidence of the proximity in time between the protected activities and alleged retaliation by placing him on involuntary leave such that it meets plaintiff's burden of proof to submit prima facie evidence that the claimed adverse action taken against plaintiff was caused by the protected activity. The evidence establishes that the claim of causation has at least minimal merit.

One protected activity regarding the text message occurred in January 2, 2020, which pre-dates the February 28, 2020 communication concerning the employee complaint investigation. The 1st amended complaint does not specify that the investigation caused the adverse employment action of involuntary paid leave. Evidence that there may be a legitimate reason for the involuntary leave, such as the investigation, that pre-dates one of the protected activities is a matter of defense and the evidence does not defeat the evidence submitted by the plaintiff as a matter of law. (Emphasis the court's.)

Causation of one adverse action by plaintiff's protected conduct having been established as having minimal merit, the court need not address the other adverse actions claimed as having been caused by plaintiff's protected conduct as the defendant failed to specify what particular allegations should be stricken in the event that it is inappropriate to strike the entire 1st amended complaint as mandated by Rule 3.1322(a).

In summary, plaintiff has met his step two burden of proof. Plaintiff's admissible evidence sets forth a prima facie showing of facts, which, if proved at trial, would support a judgment in his favor and that his case has at least minimal merit. The evidence submitted by defendant

has not defeated the evidence submitted by the plaintiff as a matter of law. (Emphasis the court's.)

Defendant's anti-SLAPP Motion to Strike the 1st amended complaint is denied.

TENTATIVE RULING # 14: DEFENDANT'S ANTI-SLAPP MOTION TO STRIKE THE 1ST AMENDED COMPLAINT IS DENIED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON

FRIDAY, OCTOBER 29, 2021 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.