Court of Appeal Case No. **B332962**

COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT,
Division Six

DAVID BYRNE, VICKIE CARLTON-BYRNE, JOEL MAHARRY, THOMAS DREW MASHBURN, GERALD SCHWANKE, JOEL MAHARRY, DOUGLAS LABARRE, and LESLIE FERRARO,
Plaintiffs-Appellants,
v.

LESLIE RULE and JON E. DRUCKER.
Defendants-Respondents.

Appeal From the Superior Court of California,
County Of Ventura
The Hon. Benjamin J. Coats
Case No. 2023CUMC8352

RESPONDENTS' BRIEF

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INTRODUCTION

Plaintiffs-Appellants raise three arguments for this Court's consideration on *de novo* review of the Honorable Benjamin F. Coat's order granting defendants' anti-SLAPP motion. First, Plaintiffs claim they brought suit in the public interest and are exempt from the anti-SLAPP statute. Second, Plaintiffs claim the court erred in finding no evidence sufficient to establish any probability of success. Third, Plaintiffs claim the court (and the California legislature) erred in limiting an exclusion to the mandatory fee provision of the anti-SLAPP statute to actions brought under Government Code section 54960 or 54960.1 instead of extending the exemption to any claim arising under the Brown Act including their claims under Government Code section 54963. None of these arguments support reversal of judgment in favor of Ojai City Councilmember Leslie Rule ("Councilmember Rule") or her attorney Jon Drucker ("Attorney Drucker") (collectively "Defendants") and an award of fees and costs in their favor.

Plaintiffs' "public interest exemption" claim arises from a misrepresentation of law. Plaintiffs erroneously claim they had no burden to prove their claim of exemption and that the court could not look beyond the four-corners of the complaint and consider the obvious political motives behind their SLAPP action. Courts are affirmatively obliged to hold Plaintiffs to their burden and consider the entire record when deciding whether Plaintiffs met that burden.

Plaintiffs' offer a disjointed assortment of arguments to conjure some probability of success. Plaintiffs' arguments are rooted in the false assertion that Defendants have admitted to the

"disclosure of attorney client communications" made in closed legislative sessions. [See, *e.g.* Appellant's Opening Brief, 7/31/2024 ("AOB") at 12, 29 & 37.] Plaintiffs further contend that Defendants have seized upon technical defects in the public notices announcing those closed sessions as justification for the disclosure of otherwise privileged and confidential information. [See, *id.* at 37.]

Defendants deny any public disclosure of confidential information. The court found no evidence of any public statement by either Defendant disclosing confidential information. Plaintiffs offer a lengthy analysis of the enactment of the Brown Act in an attempt to establish that a public official can never disclose any information discussed in closed session. That is not the law. Defendants were statutorily entitled to publicly express their opinions about closed sessions and disclose non-privileged information and statements made in closed session pursuant to Government Code section 54963(e)(2) and (e)(3). [See, October 3, 2023 Order at 10 (Appellants' Appendix ["AA"] at AA0361).] Defendants did not disclose information *because* the meetings were illegal and the notices were defective; they disclosed information that was not confidential under any circumstances.

Judge Coats' articulate 10-page order, includes a thorough assessment of Plaintiffs' wholesale failure to provide any competent evidence of any disclosure of confidential information: "Plaintiffs never cite to any specific language in any of Rule's or Drucker's writings or statements that were improper or could support declaratory or injunctive relief." [*Id. at* 6 (AA0357).]

Finally, Plaintiffs claim to be immune from the mandatory fee provision imposed by Code of Civil Procedure section 425.16(c)(1). Plaintiffs' argument is based on Code of Civil Procedure section 425.16 (c)(2) which exempts actions brought under Government Code section 54960 or section 54960.1 from that provision. Plaintiffs' action was not based on Government Code section 54960 or section 54960.1. The trial court was blunt: "[the] complaint clearly states it is brought under Govt Code §54963, which is stated, by the Court's count, ten times in the document." [1/30/2024 Order at 2 (AA0486).]

Plaintiffs' lawsuit is a SLAPP suit in the most glaring form. This Court must affirm the lower court order striking the Complaint and awarding fees and costs.

STATEMENT OF THE CASE

On December 1, 2022, Plaintiffs' counsel, Attorney Sabrina Venskus ("Attorney Venskus"), filed a lawsuit against the City of Ojai (the "City") on behalf of non-profit organization Simply Ojai (The "*Simply Ojai Lawsuit*").[1] That lawsuit challenges "the City's approval of [a low-income housing development]." [Plaintiffs' First Amended Complaint For Declaratory and Injunctive Relief, May 4, 2023 at paragraph 20 (the "Complaint").] [2]

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[1] The Minute Order granting Defendants' request for judicial notice of the *Simply Ojai Lawsuit* is included at page AA0352 of the AA. The caption page of the *Simply Ojai Lawsuit* of which the trial court took notice appears at AA0267.

[2] The Complaint is attached to the AA at pages AA0020-AA0032.

Thereafter, the Ojai City Council designated the *Simply Ojai Lawsuit* for discussion in three closed legislative sessions pursuant to Government Code section 54956.9(d)(1). [Complaint at ¶¶24 & 26 (AA0025); 1/24/2023 Letter from Drucker to Summers ("Drucker Letter 1") at 2; Ex. A to 7/27/2023 Drucker Decl. (AA0058).]

During a public city council meeting on January 24, 2023, Councilmember Rule sought to read into the record a written statement entitled "Sunlight is the best disinfectant." [1/24/2023 Public Statement ("Rule Sunlight Statement") Ex. A to the 7/27/23 Rule Decl. (AA0077).] Councilmember Rule opined that the matters discussed during the closed sessions were not confidential or permissibly discussed in closed session. [*Id.*] Councilmember Rule charged (among other things) that "Venskus had colluded with Mayor Stix to have the City retain an attorney of Venskus' choosing to provide advice ***for*** the City (us) in the very matter that Venskus was litigating ***against*** the City. They further colluded to keep it secret." [*Id.* at 4 (AA0080) (*bolding in original*).] Mayor Stix "made a motion to declare Rule out of order." [AOB at 14.] The Ojai City Counsel formally granted that motion forcing Councilmember Rule to "cease speaking." [City Council Transcript, 1/24/2023 (AA0135 at line 12); Pl. Opp. to Motion to Strike at 7:26-28 (AA0088).]

Councilmember Rule had retained Attorney Drucker to defend her against efforts to prohibit her from making any statements about anything said or done during closed sessions. [7/27/23 Drucker Decl. at 2:5-8 (AA00530).] In his capacity as

Councilmember Rule's attorney, Attorney Drucker Drucker Letter 1. [*Id.*][3] Attorney Drucker wrote and sent a second letter to the entire City Council, the City Manager and the City Attorney on January 26, 2023 ("Drucker Letter 2") [Ex. B to the 7/27/2023 Drucker Decl. (AA070-AA0074*).*] In response to unfounded concerns that Councilmember Rule would publicly release an attorney-drafted memorandum addressing the Development Agreement, Attorney Drucker formally announced Councilmember Rule's willingness "to stipulate to not disclose Ms. Minner's legal memo." [Drucker Letter 2; 7/27/2023 Drucker Decl. at page 3:4 (AA0072).] [4]

Attorney Venskus assembled a group of seven plaintiffs and filed a lawsuit on April 28, 2023, against Defendants. The lawsuit seeks to enjoin Defendants from making statements of any kind about anything discussed in any Ojai city council meeting designated as a "closed session" pursuant to the Brown Act. [Register of Action ("ROA"), Case 2023CUMC008352 (AA0508).][5]

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[3] Drucker Letter 1 is attached in its entirety as Ex. A to the 7/27/2023 Drucker Decl. [AA057-AA0069.]

[4] The Memorandum is entitled "Pending Litigation Challenging the Becker Development Agreement: Consequences and Opportunities Presented by Rescinding the Development Agreement in Response to a Referendum Petition" (the "Development Agreement Strategy Memo.") [See, Ex. A to 7/27/2023 Drucker Decl. (AA0060).] The Development Agreement Strategy Memo addressed the potential for rescinding the development agreement and did not respond to the Simply Ojai litigation. [See, Section I.B.2.(b) *infra*.]

[5] Plaintiffs do not include the original complaint in the AA. The operative Amended Complaint previously defined as the Complaint substituted one Attorney Venskus' plaintiff in place of

On May 15, 2023, the Office of The District Attorney for the County of Ventura gave written notice of its conclusion that each of the three closed sessions about which Defendants had complained had been conducted in violation of the Brown Act. [5/15/2023 Letter re: Demand to Cease and Desist Brown Act violations ("Demand to Cease and Desist"), Ex. A to 8/8/2023 Acree Decl. (AA0110 – AA0114).][6] The entire Ojai City Council was ordered to unconditionally commit in open session to "cease, desist from, and not repeat the violations" identified by the District Attorney. [*Id.* at 1 (AA0110).] The City Council issued an unconditional commitment not to repeat the acknowledged Brown Act violations "substantially in the form mandated by Government Code section 54960.2(c)(1)." [*Id.*]

Defendants filed a special "anti-SLAPP" motion to strike Plaintiffs' Complaint herein pursuant to California Code of Civil Procedure section 425.16 on July 27, 2023.[7]

On August 8, 2023, Plaintiffs filed an opposition and request for $28,622 in sanctions against Defendants and their trial

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one of the original plaintiffs. Plaintiffs did not name the City or any of four other city councilmembers in their purported effort to enforce the Brown Act.

[6] The District Attorney opined that Councilmember Rule's public statements about the illegal meetings were violative of the Brown Act. [*Id.* at 5 (AA0114).] However, the unconditional commitment to Cease and Desist demanded of the City rendered Councilmember Rule's statements moot. Accordingly, the District Attorney did not issue any order specific to Councilmember Rule.

[7] Defendants' moving papers included a notice of motion, motion, and memorandum of points and authorities and declarations of defendants' Rule and Drucker. [ROA (AA0507); Moving Papers (AA0034-AA0081).]

counsel. [ROA (AA0506).][8] Plaintiffs filed objections to the Drucker Declaration on August 9, 2023. [*Id*.]

On August 14, 2023, Defendants filed their reply papers. [*Id*. (AA0506).][9]

On August 30, 2023, Plaintiffs filed supplemental declarations, evidentiary objections, oppositions to evidentiary objections and an opposition to a request for judicial notice advancing a variety of new legal arguments. [See, ROA (AA0505)(listing 8 filings by Plaintiffs on 8/30/2023).]

Defendants' anti-SLAPP motion was heard in open court on September 7, 2023. The Court gave "its oral tentative ruling" to grant the Motion to Strike and invited and heard argument from counsel before taking the matter under submission. [9/7/2023 Minute Order (AA0351).] The court also heard argument regarding evidentiary objections. [Tr. of Proceedings, 1:25-25; 10:1-4; 10:26-27.][10]

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[8] Plaintiffs' papers of 8/8/2023 include an Opposition and Request for Sanctions [AA0082-AA0101]; Atty Acree's Decl. of 8/8/2023 [AA0102-AA0187]; Atty Venskus' Decl. of 8/8/2023 [AA0188-AA0193]; and Councilmember Whitman's Decl. of 8/8/2023 [AA0194-AA0200].

[9] Defendants' Reply papers include a Reply Memorandum [AA0225-AA0234]; a Supplemental Rule Decl. of 8/14/2023 [AA0235-AA0242]; An Obj. to Whitman Decl. [AA0243-AA0256]; An Obj. to Acree Decl. [AA0257-AA0264]; A Req. Jud. Notice [AA0265-AA0267]; and an Opp. To Evid. Obj. to Drucker Decl. [AA0268-AA0271.]

[10] The trial court conducted three hearings in consideration of Defendants' anti-SLAPP Motion and Motion for Fees and Costs [See' 9/7/2023 Minute Order (AA0351); 12/14/2023 Minute Order (AA0453); and 1/24/2024 Minute Order (AA0484).] Although

The trial court issued its ten-page written ruling on October 3, 2023. [10/3/23 Order (AA0352-AA0361).] The trial court: issued evidentiary rulings on each objection; granted Defendants' Request for Judicial Notice; granted Defendants' anti-SLAPP Motion; and found Defendants were "entitled to recovery of their attorneys' fees and costs." [*Id.* (quoted text appears at page 10 (AA0361).]

Plaintiffs timely appealed from the order granting Defendants' anti-SLAPP motion. [10/31/23 Notice of Appeal (AA0367-AA0369).]

Defendants filed a Motion for Attorney Fees and Costs on November 9, 2023. [ROA (AA0503).] Defendants' Motion for Fees and Costs first came for hearing on December 14, 2023. The trial court tentatively ordered the hearing be continued and heard oral argument. [12/14/2023 Minute Order (AA0453).][11] The trial court ordered Defendants' counsel to file supplemental declarations, authorized additional briefing, and continued the hearing on Defendants' motion for fees and costs to January 24, 2024. [*Id.*]

On January 24, 2024, the trial court convened the continued hearing on Defendants' motion for attorney fees and costs. [1/24/2024 Minute Order (AA0484).] The trial court "stated an oral tentative to grant the motion" before hearing argument and taking the matter under submission. [*Id.*]

Plaintiffs never cite to any transcripts, Plaintiffs identified certified copies of Reporter's Transcript of Proceedings on 9/7/2023 and 1/24/2024 in their designation of record.

[11] Plaintiffs elected to proceed without a court reporter on December 14, 2023.

The trial court issued its written order granting Defendants' motion for fees in part on January 30, 2024.[12] [1/30/2024 Order (AA0485-AA0489).]

Plaintiffs-Appellants timely appealed from the Attorney Fees' Order. [2/9/2024 Notice of Appeal (AA0490-AA0495).]

On March 13, 2024, this Court consolidated Plaintiffs' appeal from the 10/3/2023 and 1/30/2024 Orders for "briefing, oral argument, and disposition." [2nd Appellate District Docket entry of 3/13/2024.]

STATEMENT OF FACTS[13]

The court provided a neutral and presumptively accurate summary of facts:

> Plaintiffs' claims concern alleged disclosure by defendants Leslie Rule and John Drucker of confidential information derived from the closed session City Council

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[12] Plaintiffs raised several arguments in opposition to Defendants' motion for fees and costs. The trial court reduced the fees awarded to Defendants from $163,395 to $78,885. [See, 1/30/2024 Order (AA0485-AA0488).]

Plaintiffs raise a single issue of law on appeal: "[w]hether the trial court was permitted to award an attorney fee award against Plaintiffs for their effort to enforce the Brown Act?" [AOB at 10.] Defendants elected not to appeal the reduction in fees. Accordingly, this Statement of the Case does not include a recitation of briefing, declarations, objections or supplemental briefing relating to the fee award.

[13] The "salient facts" upon which the court relied are set forth in the court's 10/3/2023 Minute Order. **This statement of facts is taken verbatim from pages 6-8 of the 10/3/2023 Order.** [AA0357-AA0359].

meetings of December 13, 2022, January 9, 2023, and January 10, 2023. The agenda for each of these closed session meetings stated that there would be a discussion regarding the "existing litigation" titled Simply Ojai v. City of Ojai, et al. (the case was eventually assigned case no. 56-2022-00572740-CU- WM-VTA by the court).

On October 25, 2022, The Ojai City Council approved a development agreement for a low- income housing project with Mayor Betsy Stix casting the only dissenting vote.

In November of 2022 there was an election for City Council of Ojai. Four of the five seats were up for election. The following members were elected: Betsy Stix was re-elected as Mayor; Andrew Whitman was elected as District 3 representative; Rachel Lang was elected as District 2 representative, and Leslie Rule (defendant) was elected as District 1 representative. District 4 was not up for election; the seat continued to be held by Councilmember Suza Francina. (It is worth noting here that Councilmember Whitman submitted a declaration for plaintiffs in opposition to this Anti-SLAPP motion.)

A lawsuit was filed on December 1, 2022, by a group named "Simply Ojai" opposing the development agreement. "Simply Ojai" is represented in the lawsuit

by Sabrina Venskus, one of the attorneys representing plaintiffs in the present matter.

On December 12, 2022, a referendum petition was presented to the City, challenging the Development Agreement. The City Council scheduled a Closed Session for the next day, December 13, 2022, the same day the new city council was seated. The agenda for the closed session meeting stated:

"*Conference with Legal Counsel; Existing Litigation (Gov. Code § 54956.9(d)(1)*.

The City Council finds, based on the advice from legal counsel that discussion in open session will prejudice the position of the City in the litigation.

Case Name: Simply Ojai v City of Ojai, et al.; Ventura County Superior Court Case No. Pending Assignment."

In the public meeting of the City Council, defendant Mr. Drucker spoke, and requested that Mayor Stix recuse herself with respect to the "Simply Ojai" litigation, based on his opinion that Mayor Stix had a conflict of interest. Mr. Drucker's request was denied.

In the closed session, the City Council discussed retaining an attorney to review the development

agreement that had previously been approved by the City Council. This discussion did not pertain to the existing litigation and did not include counsel for the City in that litigation. It concerned retaining a different law firm to review the previously approved development agreement. Mayor Stix recommended a certain law firm for this task. Mayor Stix was asked by councilmember Francina about her connections with the "Simply Ojai" Group, and a colorful discussion of that subject occurred between Councilmembers Whitman, Rule and Francina. None of this discussion concerned the agenda item or involved counsel for the City in the pending Simply Ojai litigation.

The following Monday, Councilmember Rule was informed that the City had retained the attorney recommended by Mayor Stix to review the development agreement.

The City noticed additional closed sessions which were held on January 9 and 10, 2023. Both agendas for these closed session meetings stated:

"Conference with Legal Counsel; Existing Litigation (Gov. Code § 54956.9(d)(1).

The City Council finds, based on the advice from legal counsel, that discussion in open session will prejudice the position of the City in the litigation.

Name of Case: Simply Ojai v City of Ojai, Ojai City Council

Names of Parties or Claimants: Simply Ojai, City of Ojai, Ojai Bungalows, L.P., Green Hawk LLC, The Becker Group, Inc.

Case No. or Claim No. 56-2022-00572740-CU-WM-VTA"

In the January 9, 2023, closed session, the City Council met with the new attorney who was retained at the request of Mayor Stix. The discussion was not limited to existing litigation as identified on the agenda. Instead, there was a discussion of the referendum and possible responses including rescinding the development agreement. The discussion did not pertain to the existing litigation or include the attorney representing the City in that litigation.

In the January 10, 2023, closed session, the City Council again discussed the referendum and development agreement rather than limiting the discussion to the existing litigation as identified on the agenda. The discussion did not pertain to the existing litigation or

include the attorney representing the City in that litigation.

The City Council held an open meeting on January 24, 2023. At the January 24, 2023, regularly scheduled public meeting of the City Council, Ms. Rule presented a written statement to the Council and the public in attendance at the meeting entitled, "Leslie Rule Remarks at Ojai City Council Open Session - Tuesday, 1/24/2023." The statement included some of the foregoing discussions about the development agreement and referendum from the above referenced closed sessions. She did not disclose any confidential information about the existing litigation or discussions with the attorney representing the City in that litigation.

On January 24, 2023, Mr. Drucker wrote a letter to the Ojai City Attorney, Matthew Summers. The letter reiterated the content of Ms. Rule's statement regarding closed session discussions of the development agreement and referendum from the above referenced closed sessions. He included a statement regarding his concerns over conflicts of interest. He did not include any confidential information about the existing litigation or discussions with the attorney representing the City in that litigation. Mr. Drucker verbally

addressed the contents of this letter in open session on January 24, 2023.

On January 26, 2023, Mr. Drucker wrote a letter to the Ojai City Council that, in general, addressed the response of the City Attorney and City Council to Councilmember Rule's alleged disclosures. Again, he did not include any confidential information about the existing litigation or discussions with the attorney representing the City in that litigation.

Ms. Rule's statement and Mr. Drucker's letters were subsequently provided to, and published by, the Ojai Valley News.

[10/3/2023 Order at AA0357-AA0359.]

STANDARD OF REVIEW

The applicable standard of review is well-established:

> We independently review a trial court's decision to grant or deny an anti-SLAPP motion. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325–326 (*Flatley*).) When undertaking that review, " '[w]e consider "the pleadings ... and supporting and opposing affidavits ... upon which the liability or defense is based" ' " (*id.* at p. 326), but "do[ ] not weigh evidence or resolve conflicting factual claims" (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384).

Bowen v. Lin (2022) 80 Cal.App.5th 155, 161.

Any "ruling on an evidentiary objection in connection with a special motion to strike [is reviewed] for abuse of discretion." *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1348 (*citing Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424, 1440, 1444).

A trial court's interpretation of a statute is reviewed *de novo*. *Harustak v. Wilkins (2000)* 84 Cal.App.4th 208, 210.

ARGUMENT

I. Plaintiffs' Lawsuit Did Not Fall Within the Public Interest Exemption to The Anti-SLAPP Statute

Plaintiffs contend their lawsuit falls within the public interest exemption to the anti-SLAPP statute set forth at Code of Civil Procedure section 425.17(b). [See, AOB at 25 (Argument I).] The trial court appropriately and succinctly disposed of Plaintiffs' exemption claim:

> Given the nature of the case, the special interests of the parties, and the lack of supporting declarations submitted by plaintiffs, they have not met their burden of establishing that the narrowly construed exemption of § 425.17(b) applies and this case was brought "solely in the public interest.

[10/3/23 Order at 2 (*emphasis in original*) (AA0353).]

Plaintiffs advance two arguments to support their claim of "legal error." [AOB at 32.] First, Plaintiffs argue "the trial court abused its discretion because *it looked to and relied upon extrinsic evidence* to reach the conclusion that the public interest exemption did not apply." [AOB at 26 (*emphasis added*).] Second, Plaintiffs

seize upon the court's use of the phrase "meet their burden" as if to suggest Plaintiffs had no burden of proof on the issue. [*Id.* at 32.] Both arguments misstate California law.

A. Plaintiffs Did Not Meet Their Burden to Prove A Claim of Exemption

The California Supreme Court is clear: "a plaintiff has the burden to establish the applicability of [a claim of] exemption under CCP §425.17." *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 25. This is no mere pleading requirement; it is a burden of proof. "The plaintiff bears the burden of proof as to the applicability of the exemptions." *Sandlin v. McLaughlin*, (2020) 50 Cal.App.5th 805, 818 (*citing, San Diegans for Open Government v. Har Construction, Inc.* (2015) 240 Cal.App.4th 611, 622 ["*Har Construction*"].

The California Supreme Court has "repeatedly emphasized that the exemptions [to the anti-SLAPP statute set forth in CCP § 425.17] are to be "narrowly construed." *City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 419–420.

Trial and appellate courts alike must examine the entire record when considering a claim of exemption.

> We apply a *de novo* review standard to determine whether the parties satisfied their burdens under sections 425.16 and 425.17. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055, *Save Westwood Village v. Luskin*, (2014) 233 Cal.App.4th 135, 143.) We are not bound by the court's findings and conduct an independent review *of the entire record*. If the trial court's decision is correct

> on any theory, we must affirm the order. (*Robles v. Chalilpoyil* (2010) 181 Cal.App.4th 566, 573).

Har Construction, *supra* 240 Cal.App.4th at 622 (emphasis added.)

Plaintiffs cite *Tourgeman v. Nelson & Kennard* (2014) 222 Cal.App.4th 1447, 1460 ("*Tourgeman*") for the proposition that "a trial court is limited to evaluating the allegations of the complaint; the trial court is not permitted to consider extrinsic evidence to determine whether the public interest exemption applies." [AOB at 26.] Plaintiffs repeatedly represented to the trial court that *Tourgeman* forbids a court from looking beyond "the four corners of the complaint" when analyzing the public interest exemption. [See, Tr. Of Proc. 9/7/2023 at 2:24-25; 3:22-23.] *Tourgeman* says nothing of the kind.

In *Tourgeman,* the court did rely entirely upon plaintiff's complaint and did find the public interest exemption applied. But the court focused exclusively on the complaint *in that particular case* because the procedural posture ensured there was nothing more to consider.

In *Tourgeman*, the plaintiff filed suit, the defendants filed an anti-SLAPP motion, and *Tourgeman* (the plaintiff) voluntarily dismissed the case before the anti-SLAPP motion was even heard. Nevertheless, defendants successfully made a motion for fees. The appellate court reversed the fee award based upon the complaint because there was neither a factual record nor any other record to go on.

The block quote appearing at page 32 of Appellants' Opening Brief is even more telling. *Tourgeman* relied upon *People ex. Rel. Strathmann v. Acacia Research Corp*. (2012) 210 Cal. App. 4th 487, 499 ("*Strathmann*") but omits a footnote explaining why the Court did not consider any evidence other than the complaint in *Strathmann*:

> In any case, no party has cited to evidence in the record (other than the complaint) bearing on whether the lawsuit was brought in the public interest or on behalf of the general public.

Id. at fn.2.

Courts are not "limited to evaluating the allegations of the complaint" or prohibited from considering "extrinsic evidence to determine whether the public interest exemption applies." [*Quoting* Plaintiffs' fallacious argument at AOB at 26.] Courts must review "the entire record." *Har Construction*, *supra* 240 Cal.App.4th at 622. In both *Tourgeman* and *Strathmann,* the complaint was the entire record. Plaintiffs' complaint is not the "entire record" here.

Plaintiffs also suggest the court was somehow bound to consider only the exact words used and "relief requested in the complaint" when evaluating their claim of exemption. [AOB at 28.] Once again, there is no support for Plaintiffs' position. Even in *Tourgeman*, the court acknowledged the need to consider "the nature of the allegations and scope of relief sought in the prayer." *Tourgeman*, *supra*, 222 Cal. App. 4th at 1463 (*citation omitted*).

The requisite evaluation of the fundamental nature of a lawsuit is neither myopic nor constrained. Here, Plaintiffs' Complaint alleges a situation in which Councilmember Rule made public allegations about a conflict of interest between the Mayor of Ojai and Attorney Venskus. Councilmember Rule's colleagues voted to find her "out of order" and ordered her to stop speaking. Now, Attorney Venskus stands before this Court weighing in on a political dispute between competing members of the city council in a naked attempt to ban Councilmember Rule from making specific public allegations against her.

B. Plaintiffs Did Not Satisfy Any of the Three Conditions Required to Invoke The Public Interest Exemption.

The public interest exemption applies only in three narrow situations:

> (b) Section 425.16 does not apply to any action brought solely in the public interest or on behalf of the general public if all of the following conditions exist:
> (1) The plaintiff does not seek any greater relief than or different from the relief sought for the general public or a class of which the plaintiff is a member; (2) The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons; and (3) Private enforcement is necessary and places a

> disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter.

Code Civ. Proc., §425.17(b).

Plaintiffs were required to satisfy all three requirements. Plaintiffs did not satisfy any of them.

1. Plaintiffs' Politically Motivated Lawsuit is Not "Solely" in the Public Interest.

Code of Civil Procedure section 425.17(b)(1)'s exemption applies only to actions premised "***solely*** in the public interest or on behalf of the general public." The exemption is explicitly unavailable to a litigant seeking "any personal relief." *Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 316–317.

Here, the trial court correctly observed that litigation in pursuit of "personal political agendas and motivations" is not solely in the public interest and cannot qualify for the public interest exemption. [10/3/2023 Order at 2 (AA0353).] Plaintiffs do not dispute this finding of law. Instead, Plaintiffs brazenly deny any political motivation.

Plaintiffs raise three arguments to suggest the court improperly attributed political motivations to Plaintiffs: (1) the court erred by noting Plaintiffs' complete failure to offer any supporting declarations sufficient to meet their burden [AOB at 31]; (2) the court must have relied upon the declarations submitted by Councilmember Rule and Attorney Drucker (despite the fact that the court did not cite to either declaration) [*Id.*]; and (3) the court overruled some of Plaintiffs' evidentiary objections

that might have somehow meant something. [*Id.* at 33-37.] Each argument fails.

First, nothing is more relevant to Plaintiffs' failure to meet their burden of proof than the fact that Plaintiffs introduced no evidence at all.[14]

Second, the court did not cite to any of the evidence submitted by Defendants to support the finding that Plaintiffs had not met their burden. Plaintiffs' political motivations are clearly identified in the Complaint. Three plaintiffs are described as active participants in city council meetings. [Complaint ¶¶ 4, 5 & 8 (AA0021-AA0022)]. The Complaint is replete with partisan claims. [See *e.g. id.* at ¶9 (AA0022) (gratuitously stating that Councilmember Rule was elected by a margin of only 17 votes); and ¶ 19 (AA0023)(claiming that the low income housing project Plaintiffs oppose "would result in a **substantial net loss of low income housing units**" [*bolding in original*]. Each closed session Councilmember Rule and Attorney Drucker complained of was convened to discuss the development agreement Plaintiffs oppose and their lawyer, Attorney Venskus, has sued to stop. [*Id.*

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[14] Plaintiffs seize upon the court's reference to "declarations" as if to suggest the court sought testimonial declarations from individual plaintiffs. The procedural rules associated with an anti-SLAPP motion dictate that the shifting burdens of proof essential to bringing or defending against an anti-SLAPP motion will almost always be based on exhibits and other evidence authenticated and provided to the Court through declarations and Requests for Judicial notice. Accordingly, Plaintiffs' failure to introduce declarations supporting the claim of exemption meant that Plaintiffs introduced no evidence of any kind.

at ¶¶ 24-26 (AA0024-AA0025); Request for Judicial Notice (AA0265-276).]

Third, Plaintiffs offer no substantive basis for a challenge to evidentiary rulings. Plaintiffs' four-page argument about evidentiary rulings primarily advances relevance objections. [AOB at 33-36.] Plaintiffs' relevance objections are based on the flawed assertion that a Court cannot consider any evidence beyond the four-corners of the complaint as discussed above. [See, discussion *infra.* at §I.A.]. It is also impossible to understand how the introduction of irrelevant evidence could give rise to anything close to a "miscarriage of justice" sufficient to warrant a reversal on truly the basis of an evidentiary ruling. If the evidence was irrelevant as Plaintiffs now claim, it could not have any effect on the Court's decision.

Unlike other issues, the court's evidentiary rulings are reviewed for an abuse of discretion. *Hall v. Time Warner, Inc.*, *Supra* 153 Cal.App.4th at 1348. It is impossible to evaluate the manner in which the court considered evidentiary issues without honestly describing what the court said about evidence and the evidentiary objections. The court explained its evidentiary rulings in some detail during the September 7, 2023 hearing on Defendants' Motion to Strike. [See, Tr. of Proc. 9/7/2023 at 1-14]. Plaintiffs did not cite to the hearing transcript because the record is awful for Plaintiffs. Plaintiffs' evidentiary proffer was so bad,

Plaintiffs' counsel desperately argued in favor of a lax application of the rules of evidence.[15]

Plaintiffs' political and strategic motivations are undeniable. The Complaint specifically seeks to enjoin Councilmember Rule and Attorney Drucker from disclosing anything that was said or done during closed legislative sessions on December 13, 2022, January 9 and 10, 2023 [Complaint at ¶¶ 25-28 (AA0025-AA0026).] The closed sessions were convened to discuss a lawsuit filed on behalf of "Simply Ojai" "to challenge the City's approval" of a low-income housing development. [*Id*. at ¶ 20 (AA0024).] Plaintiffs' counsel herein, Attorney Venskus, is counsel of record for Simply Ojai in its lawsuit to stop the development.[16] Each of the three written statements Plaintiffs challenge evidence

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[15] Plaintiffs' counsel's arguments in favor of consideration of Plaintiffs' defective evidence is illustrative: Court: "with your declaration, you attached a slew of documents. They're not authenticated." [Tr. of Proc. 9/7/23 at 9:19-21.] Court:"You're submitting a late declaration. It was untimely." [*Id*. at 9-10:28-1.] Court: "What about the transcripts? I mean, that's another issue." [*Id* at 10:26-27.] Court: "I need personal knowledge, don't I?" [*Id*. at 12:12.] Ultimately, Plaintiffs' counsel affirmatively urged the court to adopt a liberal approach to "sort of technical defects with the evidence itself, not substantial problems with the evidence but problems with authentication." [*Id*. at 14:3-5.]

[16] Attorney Venskus's role as counsel for Simply Ojai is established by official court records of which the court took judicial notice. [See, 10/3/2023 Order granting request for judicial notice (AA00352) and Request For Judicial Notice (AA0265-AA0267).] Plaintiffs argue the court abused its discretion by overruling its relevance objection. [AOB at 35.] Plaintiffs relevance objection is based on the Plaintiffs' erroneous assertion that a court cannot look beyond the complaint when evaluating a claim of exemption. [See, discussion *infra* at §I.A.]

the fact that the mayor and Attorney Venskus were conspiring to derail the development, sabotage the City's defense against Attorney Venskus' *Simply Ojai Lawsuit* and to silence Councilmember Rule to keep it all secret. [Rule's Sunlight Statement, Ex. A to 7/26/2023 Rule Decl. (AA0077-AA0080).]

Finally, if the interests of Attorney Venskus' client, Simply Ojai, and her clients' here were not fully aligned, Attorney Venskus could not ethically serve simultaneously as counsel for both clients.

2. Secrecy and Illegal Closed Legislative Sessions Are Not In The Public's Interest.

Plaintiffs contend their lawsuit:

> if successful, will confer on the general public the significant benefit of enforcement of provisions of the Brown Act that were intended to permit a government body to meet confidentially in closed session, and to keep the contents of such closed meetings, such as attorney client privileged communications, from being disclosed which might be injurious to the governing body's citizens. (AA32 [Prayer for Relief, ¶¶i-iii.])

[AOB at 27.]

The court acknowledged the obvious:

> It is ironic that the Brown Act which is intended to ensure openness and encourage participation by the general public in government business, is being used here in an attempt to withhold important information from the public.

[10/3/2023 Order at 9 (AA0360).]

Plaintiffs have cobbled together a five page "analysis" of selective legislative history associated with the Brown Act to support the following assertion:

> the Brown Act attempts to balance the public's interest in open and transparent government, with the legitimate and equally important need of government representatives to conduct some business in closed session in order to protect the public's interest.

[AOB t 20.]

The legislature has created narrow but crucial exemptions to the sweeping requirement of transparency imposed by the Brown Act. However, Plaintiffs' overblown assertions that the Brown Act's very purpose is to "balance" openness with secrecy or that government transparency and secrecy are "equally important" defies logic and law. California courts are clear: "Statutory exceptions authorizing closed sessions of legislative bodies are construed narrowly and the Brown Act "sunshine law" is construed liberally in favor of openness in conducting public business." *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 917.

Plaintiffs advocate for a more suppressive policy. Plaintiffs seek to bar *any* disclosure of "the contents of such closed meetings, *such as* attorney client privileged communications." [AOB at 27 (*emphasis added*).] The phrase "such as attorney client communications" evidences the fact that attorney client communications are just one type of information Plaintiffs seek to

illegally withhold from the public. Plaintiffs seek a limitless ban barring Defendants from revealing *anything* about of closed session meetings to the public. [TR of proc. 9/7/2023 at 30:16-18.]

Finally, The Ventura District Attorney investigated each of the three closed legislative sessions about which Councilmember Rule complained and found each and every session to have been conducted behind closed doors in violation of the Brown Act. [See, Demand to Cease and Desist, Ex. A to 8/8/2023 Acree Decl. (AA0110-AA0114).]

(a) <u>The District Attorney found the closed door discussions of December 13, 2022 to be in violation of the Brown Act.</u>

The District Attorney found:

> the Council discussed retaining an outside law firm to review a previously approved development agreement. The discussion of retaining the outside law firm did not involve retaining the firm to defend the city against the *Simply Ojai* lawsuit. Since the development agreement had previously been vetted and approved by the Council in open session, this discussion exceeded the scope of the existing litigation *(Simply Ojai v. City of Ojai)*)[*sic*.] listed as the closed-session exception.

[*Id.* at 2 (AA0111) (*italics in original*).]

(b) <u>The District Attorney found the closed door discussions of January 9, 2023 to be in violation of the Brown Act.</u>

The District Attorney found:

> the Council met with the outside attorney retained as a result of the December 13, 2022, closed session. The Council and outside attorney reviewed and discussed a legal memorandum titled: *"Pending Litigation Challenging the Becker Development Agreement: Consequences and Opportunities Presented by Rescinding the Development Agreement in Response to a Referendum Petition. "* [*Sic*.] The outside attorney was not responsible for defending the city against the lawsuit listed as the existing litigation (*Simply Ojai v. City of Ojai*) closed-session exception. The title of the discussed memorandum narrowed the subject matter to rescinding the development agreement in response to *a referendum*, not in response to the *Simply Ojai* litigation. The memorandum and related discussion exceeded the scope of the "existing litigation" exception listed as the closed-session exception.

[*Id.* (*italics in original*).]

(c) <u>The District Attorney found the city council's closed door discussions of January 10, 2023 to be in violation of the Brown Act.</u>

The District Attorney found:

> the Council discussed concerns about potential referendum outcomes, and potential conflicts of interests concerning the sourcing of the outside law firm whom the Council met with during closed

> session on January 9, 2023. These discussions exceeded the scope of the "existing litigation" listed as the closed session exception.

[*Id.* at 3 (AA0112).][17]

(d) The City has unconditionally committed to cease and desist.

The Demand to Cease and Desist constituted a formal "demand pursuant to Government Code section 54960.2(a)(1) to cease and desist from and not repeat" the violations enumerated therein. [*Id.* at 1 (AA0110).] The City was directed, under threat of "commencement of an action pursuant to Government Code

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17 Plaintiffs cite a "non-privileged memorandum prepared by the city attorney" for the proposition that the December 13, 2022, January 9 and January 10, 2023 meetings involved discussions relating to the *Simply Ojai Lawsuit*. [See, AOB at 38, 42 and 43.] The non-privileged "memorandum" was actually a response by City Attorney Matthew Summers to the Demand to Cease and Desist finding that each of the closed sessions convened on Attorney Summers' advice was conducted in violation of the Brown Act. The first sentence of the non-confidential "memorandum" provides:

> The City of Ojai received a letter on May 15, 2023 from the Ventura County District Attorney's Office concluding that the City violated the Brown Act by exceeding the scope of its agendized closed session discussion at its December 13, 2022 and January 9 and 10, 2023 City Council meetings.

[6/16/2023 memorandum responding to Demand to Cease and Desist, Ex. B to 8/8/2023 Acree Decl. at 1 (AA0118).]

The City Attorney's self-serving defense of his own erroneous legal advice has no evidentiary value. The "memorandum" was not a contemporaneous report of the meetings, it was not made under penalty of perjury and Plaintiffs failed to provide any declaration from the City Attorney in opposition to the anti-SLAPP motion.

sections 54960(a) and 54960(b)" to "unconditional[ly] commit" to cease and desist and approve its unconditional commitment in open session. [*Id.*] The City Council formally agreed.

Plaintiffs contend Councilmember Rule and Attorney Drucker's public statements have a chilling effect on the types of discussions that occurred behind closed-doors on December 13, 2022, January 9, and January 10, 2023. Those discussions were illegal and the City was forced to agree to cease and desist from those closed-door discussions in the future. Injunctive relief against Councilmember Rule allowing the Ojai City Council to "confidently proceed" with the sort of illegal closed-door meetings the City has been forced to renounce can provide no benefit to any law-abiding citizen.

3. Plaintiffs failed to provide sufficient evidence to satisfy Code of Civil Procedure section 425.17(b)(3).

Code of Civil Procedure section 425.17 (b)(3) limits the invocation of the public interest exemption to situations in which "Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter." *Id.*

Courts require two separate showings: (1) the action must be "necessary" and (2) the action must place a disproportionate burden on plaintiff in relation to the plaintiff's stake in the litigation. See, *e.g. Har Construction*, *supra* 240 Cal.App.4th at 628-630.

Plaintiffs claim their lawsuit is "necessary" because "*no public entity* has taken *any* enforcement action against

defendants to vindicate the important public right and policy contained in § 54963." [AOB at 30 (*emphasis added*).] The Ojai City Council formally granted a motion forcing Councilmember Rule to "cease speaking" during the city council meeting January 24, 2023. [City Council Transcript, 1/24/2023, Ex. C to 8/8/2023 Acree Decl. (AA0135 at line 12); Pl. Opp. to Motion to Strike, 8/8/2023 at 7:26-27 (AA0088).] The City was later required to and did retain a Brown Act expert to conduct a public workshop on transparency. [See, 5/15/2023 Administrative Report, Ex. B to the 8/8/2023 Acree Decl. (AA0116-AA0117).]

As cited above, the Ventura District Attorney's office too conducted a formal investigation into the three closed sessions and Councilmember Rule's statements about those meetings. The District Attorney ordered the City Council to refrain from conducting the very discussions in closed session about which Councilmember Rule and Attorney Drucker complained. [Demand to Cease and Desist, Ex. A to 8/8/2023 Acree Decl. (AA0110-AA0114).][18]

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[18] The District Attorney made a conclusory observation that Councilmember Rule's public statements were violative of the Brown Act, but recommended no action against her. [AA0113-AA0114.] (The determination that the closed sessions were unlawful and could not be repeated, rendered the issue moot.) Importantly, the District Attorney appears to have formed its opinion about Councilmember Rule's statements based on characterizations rather than evidence. While the District Attorney examined and quoted the exact language of each of the City Council's notices of closed sessions it found to have been in violation of the Brown Act, the District Attorney did not quote or cite any statement ever made by Councilmember Rule that it deemed to be violative of the Brown Act. [*Id.*]

It is true that no public entity filed a lawsuit against Defendants. Plaintiffs' cannot credibly claim a private lawsuit is "necessary" because public entities have found no lawful basis for any suit at all.

Code of Civil Procedure section 425.17(b)(3) also requires evidence of a "proportionate financial burden." No court has ever sought to determine the relative monetary value of a "public interest" litigant's costs of litigation and political objectives in regard to Code of Civil Procedure section 425.17. Plaintiffs' effort to support the *Simply Ojai Lawsuit*, halt development of a low income housing project, and muzzle Mayor Stix's political opponent, is inherently destructive of any ability to claim an exemption to the application of the anti SLAPP statute. See, Code of Civil Procedure section 425.17(b)(1) and discussion *infra* at §I.B.1.

II. The Complaint Was Appropriately Stricken Pursuant to Code of Civil Procedure section 425.16(b)(1)

California's anti-SLAPP statute provides that:

> '[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 ... shall be subject to a special motion to strike, unless the court determines ... there is a probability that the plaintiff will prevail on the claim.' (Code Civ. Proc., § 425.16, subd. (b)(1).)

Baral v. Schnitt , *supra* 1 Cal.5th at 381.

Resolution of an anti-SLAPP Motion requires a court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity." *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733. "A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16(e)." Once the anti-SLAPP statute is found to apply, the burden shifts to the plaintiffs to prove that they have a legally sufficient claim ***and*** to prove with "admissible evidence" a "probability" that they will prevail on the claim. *Navellier v. Sletten*, *supra*, 29 Cal.4th at 88. See also, *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821: The plaintiff must establish **"**that the complaint is *both* legally sufficient *and* supported by a sufficient *prima facie* showing of facts to sustain a favorable judgment. *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88, (*citing Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1043) (*emphasis added).*

A. Plaintiffs Strategically Concede Their Complaint Challenges Protected Speech.

The trial court found it:

> abundantly clear that the statements that form the subject of plaintiffs action fall squarely within the protections of CCP § 425.16(e)….Defendants have met their burden under the first prong and the burden shifts to plaintiffs to establish a probability of prevailing on their claim.

[10/3/2023 Order at 4-5 (AA0355-AA0356).] Plaintiffs do not challenge this finding.

Plaintiffs' concession is likely strategic. Defendants' oral and written statements were unquestionably made in legislative sessions, in connection with matters under legislative consideration, on an issue of public concern. But they were much more than that. The statements at issue here do not merely fall within the scope of Code of Civil Procedure section 425.16; they are statements by a councilmember exercising the duties of her office and an attorney in the course of his representation of his client. Councilmember Rule and Attorney Drucker enjoy unique statutory protections that stand as independent impediments to Plaintiffs' ability to establish any probability of success.

1. <u>Councilmember Rule's Statements Were Privileged and not Subject to Injunctive Relief.</u>

The statements made by Councilmember Rule in the discharge of her official duties are presumptively privileged pursuant to Civil Code section 47. Civil Code section 47 provides:

> A privileged publication or broadcast is one made: (a) In the proper discharge of an official duty; (b) in any (1) legislative proceeding …

Id.

Although the legislative privilege does not extend to statements that "violate a requirement of confidentiality imposed by law" (Civil Code section 47(d)(2)(c)), Plaintiffs seek to unlawfully bar Councilmember Rule from public comment on

anything occurring in closed session. Plaintiffs' position is inconsistent with the authority granted by the Government Code authorizing:

> (2) Expressing an opinion concerning the propriety or legality of actions taken by a legislative body of a local agency in closed session, including disclosure of the nature and extent of the illegal or potentially illegal action.
>
> (3) Disclosing information acquired by being present in a closed session under this chapter that is not confidential information.

Gov. Code, § 54963 (e)(2) & (3).

Plaintiffs' overzealous demand for an injunction barring Councilmember Rule from revealing anything said or done in closed session is incompatible with Civil Code section 47; Code of Civil Procedure section 526(b)(6)("An injunction cannot be granted….To prevent the exercise of a public or private office, in a lawful manner, by the person in possession."); and Government Code section 54963 (e)(2) & (3).

2. <u>Claims Against Attorney Drucker Are Barred by Civil Code section 1714.10.</u>

Plaintiffs' Complaint specifically alleges that the actions by Attorney Drucker were undertaken as Rule's attorney. [See, Complaint at 8, ¶ 32 (AA0027).] Plaintiffs remind the Court on appeal that Attorney Drucker "had been hired by Rule as her own personal legal counsel to advise her on the Brown Act and in the dispute regarding whether the closed session information could be lawfully disseminated to the public without the authorization

of the City Council." [AOB at 14.][19] Plaintiffs' admissions evidence a direct violation of Civil Code section 1714.10.

> (a) No cause of action against an attorney for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute, and which is based upon the attorney's representation of the client, shall be included in a complaint or other pleading unless the court enters an order allowing the pleading that includes the claim for civil conspiracy to be filed after the court determines that the party seeking to file the pleading has established that there is a reasonable probability that the party will prevail in the action.

Id.

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[19] Plaintiffs insist, throughout their brief, that if Councilmember Rule is allowed to exercise her statutory right to disclose opinions and non-privileged information obtained in closed session, she could unilaterally disclose privileged information on a whim. Government Code sections 54963(e)(2) & (3) place no condition on the right to express opinions or reveal non confidential material developed in closed session. But ironically, Councilmember Rule went the extra mile, and consulted an attorney before commenting on the closed sessions. In the true spirit of bad-actors bringing a SLAPP suit, Plaintiffs sued her lawyer. Plaintiffs repeated this bad-faith stunt by seeking $28,622 in sanctions against Councilmember Rule, her original lawyer, Attorney Drucker, and then Councilmember Rule and Attorney Drucker's new lawyer, Stephen Johnson in their opposition to Defendants' successful anti-SLAPP motion. [Opp. To Motion to Strike and Request for Sanctions, 8/8/2023 (AA0101).]

Plaintiffs' complete disregard of Civil Code section 1714.10 is so glaring as to render any discussion of "public interest exemptions;" the sufficiency of allegations in an unverified complaint (or this Court's ability to look beyond an unverified complaint); or exemptions to the mandatory fee provisions of Code Civil Procedure section 425, moot. None of those arguments could be made if Plaintiffs had filed the verified complaint or statement that is a prerequisite to an action subject to Civil Code section 1714.10. Plaintiffs ignored the requirement. That one violation alone opened the door to wild, baseless allegations and turned Councilmember Rule's attorney from an experienced, capable officer of the Court versed in facts and ready to defend her, into a defendant frivolously and maliciously forced to mount his own defense.

B. Plaintiffs Failed to Establish Any Probability of Success.

Plaintiffs offer a disjointed array of theories, conclusory claims, and straw arguments in an attempt to suggest some possibility of supporting something. The Complaint seeks only declaratory and injunctive relief. The court identified numerous issues in support of its conclusion that the Plaintiffs have no probability of success. Plaintiffs do not meaningfully challenge any of the dispositive issues upon which the trial court relied.

1. Plaintiffs Failed to Introduce Any Evidence of Any Statement by Councilmember Rule or Attorney Drucker in Violation of The Brown Act.

Plaintiffs "argue" the court was required to accept as true all admissible evidence in their favor. [AOB at 43.] The trial court

expressly applied that very standard. [See, 10/3/2023 Order at 5 (AA0356).] Plaintiffs failed to introduce into evidence a single quote from either defendant purportedly disclosing confidential information.

The court provided a devastating summary of Plaintiffs' wholesale failure to provide any evidence sufficient to establish a probability of success:

> The complaint does not identify any specific statements attributable to defendants Rule or Drucker. It alleges certain statements were contained in "Leslie Rule's Remarks at Ojai's City Council Open Session, Tuesday, 1/24/2023" and the Drucker letter titled "City Council Closed Sessions and the Duty of Disclosure," but again, does not identify the statements alleged to be in violation.

[*Id*. at 6 (AA0357).]

> Plaintiffs never cite to any specific language in any of Rule's or Drucker's writings or statements that were improper or could support declaratory or Injunctive relief.

[*Id.*]

> Plaintiffs do not direct the Court to any particular language in the transcripts that they contend violates the Brown Act disclosure prohibition.

[*Id.*]

Despite Plaintiffs' complete failure to meet their burden of

proof, the court scoured:

> [the transcripts of city council meeting] video excerpts and other evidence in an attempt to discern the language at issue in order to determine plaintiffs' probability of prevailing.

[*Id.*]

The court correctly found none:

> Plaintiffs have not met their burden. There is no competent, admissible evidence here to establish a probability of prevailing. The evidence before the court does not demonstrate a violation of the Brown Act.

[*Id.* at 5 (AA0356).]

Even now, Plaintiffs characterize rather than quote. Plaintiffs repeat the conclusory assertion that "the evidence submitted demonstrates that defendants disclosed direct quotes of discussions between councilmembers from the three closed sessions." [AOB at 36.] But Plaintiffs do not and dare not actually quote any "direct quotes" Defendants disclosed. Plaintiffs generally proclaim that the record includes written statements Defendants made about the closed sessions Councilmember Rule attended. Plaintiffs fail to advise this Court that those written statements were introduced into evidence by Defendants.[20] They are not incriminating; they are exculpatory. Defendants did not

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20 Drucker Letter 12 and Drucker Letter 2 were included as Exhibits A and B to the 7/27/2023 Drucker Decl. (AA0056-AA0074). Rule's Sunlight Statement was included as Exhibit A to the 7/26/2023 Rule Decl. (AA0076-AA0081).

disclose privileged discussions conducted in closed session; they expressed opinions and disclosed words and deeds unrelated to any claim of privileged as expressly authorized by Government Code sections 54963(e)(2) and (3).

While Plaintiffs generalized and then mischaracterized Defendants' statements, the court reviewed every writing and public statement Defendants made. The court appropriately concluded:

> This Court makes the specific finding that the information disclosed by Ms. Rule and Mr. Drucker did not concern existing litigation as identified on the closed session agendas and this information was outside the limited scope of the closed session exceptions for meetings with legal counsel regarding pending litigation.

[10/3/2023 Order at 10 (AA0361).]

2. Government Code section 54963 (e)(2) and (3) authorize public comment about closed sessions.

Plaintiffs framed a single issue for declaratory relief. Plaintiffs' counsel boldly urged the court to "find that everything in a closed session is always confidential." [Tr. of Proc. 9/7/2023 at 22:16-17]. Plaintiffs' counsel further sought an injunction mandating that "council member Rule and Jon Drucker cannot reveal the contents of closed session meetings to the public." [*quoting* Plaintiffs' Counsel Brian Acree, Tr. of Proc. 9/7/2023 at 30:16-18.]

The trial court appropriately rejected Plaintiffs'

misstatement of law:

> Contrary to plaintiffs' apparent belief, Government Code § 54963 does not provide that any disclosure of closed session communications is prohibited. It merely defines the type of information that must not be disclosed outside of closed sessions.

[10/3/2023 Order at 6 (AA0357).]

Government Code section 54963 (e) expressly prohibits:

> any action authorized by subdivision (c) against a person" … from doing any of the following:… (2) Expressing an opinion concerning the propriety or legality of actions taken by a legislative body of a local agency in closed session, including disclosure of the nature and extent of the illegal or potentially illegal action. (3) Disclosing information acquired by being present in a closed session under this chapter that is not confidential information.

[*Id.*]

Plaintiffs devote an entire section of their brief to the proposition that "Defendants' disclosures were not mere statements of opinion." [AOB at 54-55 (*emphasis in original*).] Plaintiffs cite Government Code section 54963(e)(2) (which authorizes the disclosure of opinions) four times. [See, AOB at 54

& 55.] Plaintiffs fail to cite Government Code section 54963 (e)(3) (which authorizes the disclosure of non-privileged information learned in closed session) a single time.

Mayor Stix admitted to facts establishing that she is associated with Simply Ojai. The Mayor acknowledged a close relationship with Attorney Venskus. Mayor Stix admitted in closed session, that she sought for the City to hire a law firm recommended by Attorney Venskus to seek to rescind the city council's approval of the low income housing development rather than defend against Simply Ojai and Attorney Venskus' *Simply Ojai Litigation*. These facts do not relate to a defense. They relate to a conspiracy to rescind the council's prior approval of a low-income housing development.

Similarly, Councilmember Whitman bullied, harassed, and cussed-out Councilmember Rule and another councilmember in closed session.

Astonishingly, neither Plaintiffs, Mayor Stix, Attorney Venskus, nor Councilmember Whitman dispute any of these facts. Plaintiffs insist these are not just Councilmember Rule's opinions; they are facts established in closed legislative sessions, and accurately disclosed by Councilmember Rule and Attorney Drucker. Plaintiffs object to the disclosures *because* they are accurate and true. Though these are facts, they are not even arguably confidential. Government Code section 54963(e)(3) expressly permits Councilmember Rule's public presentation of these facts. Councilmember Rule's civic duties demand she do

nothing less.

The trial court appropriately applied Government Code section 54963(e)(2) and (e)(3) in its 10/3/2023 Order at page 10. The court ruled:

> The Court finds that the plaintiffs cannot establish a probability of prevailing because when the "exceptions authorizing closed sessions of legislative bodies are construed narrowly and the Brown Act "sunshine law" is construed liberally in favor of openness in conducting public business" the disclosures at issue fall under the exceptions for conduct that does not violate the non-disclosure duties under Government Code § 54963(e)(2) (i.e., "Expressing an opinion concerning the propriety or legality of actions taken by a legislative body of a local agency in closed session, including disclosure of the nature and extent of the illegal or potentially illegal action.") and possibly § 54963(e)(3) (i.e., "Disclosing information acquired by being present in a closed session under this chapter that is not confidential information.")

[10/3/2023 Order at 10 (AA0361) (*emphasis added*).]

3. Defendants Were Not Required to Limit Disclosures to the District Attorney and Grand Jury.

Plaintiffs' tortured analysis of Government Code section 54963 (e) is not limited to their complete disregard of section 54963 (e)(3). Plaintiffs also contend that because Government Code section 54963 (e)(1) allows an attendee at a closed session to discuss even privileged information with a District Attorney or Grand Jury, Government Code sections 54963(e)(2) and (3) should be read to limit the disclosure of completely non-privileged information to the District Attorney or Grand Jury as well. [See, AOB at 55.]

Plaintiffs argue that if a participant in a closed meeting could decide for herself what is privileged (and can only be disclosed to the District Attorney or Grand Jury) or is not privileged (and can be disclosed publicly), the "exemption … would completely swallow the rule." [AOB at 55.] They are two distinct rules: an attendee at a closed session can publicly disclose non confidential information and offer opinions about the closed session; disclosures need only be limited to the District Attorney or Grand Jury when the information to be revealed is confidential.

4. Plaintiffs Mischaracterize Confidentiality in the Context of the Brown Act.

Plaintiffs confuse confidentiality within the context of the Brown Act with the attorney-client privilege. The California legislature defines confidentiality much more narrowly. Government Code section 54963(b) expressly provides that "confidential information" must be "specifically related" to "the basis" for the closed session. (*Emphasis added*.)

Government Code section 54957.7 further provides: "In the closed session, the legislative body may consider only those matters covered in the statement establishing the basis for the closed session."

As the last word on closed session confidentiality, section 54956.9(b) provides: "For purposes of this chapter, all expressions of the lawyer-client privilege other than those provided in this section are hereby abrogated. This section is the exclusive expression of the lawyer-client privilege for purposes of conducting closed-session meetings pursuant to this chapter."

The legislative history of which this Court has taken notice confirms that Government Code section 54963 only restricts the disclosure of confidential information: "a person may not disclose confidential information that arises out of that closed session." [APP_MJN002 (bolding added).] Where – as here – a City meets in closed session to discuss pending litigation, " 'confidential information' [is defined] as information that has been acquired by being present in the closed session *and* which consists of: a) a communication concerning pending litigation within the attorney-client privilege…" [*Id.* (*emphasis added*).] The Brown Act, Open Meetings for Local Legislative Bodies, Cal. Attorney General's Office (2023) at 40.[21]

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[21] If otherwise relevant, we consider Attorney General opinions with the understanding that "[a]n opinion of the Attorney General 'is not a mere "advisory" opinion, but a statement which, although not binding on the judiciary, must be "regarded as having a quasi judicial character and [is] entitled to great respect," and given great

Plaintiffs devote twenty-three pages of their brief arguing in favor of an expansive, if not unlimited, definition of "confidentiality" within the context of the Brown Act.

California courts demand the attorney client privilege be strictly and narrowly defined in connection with the Brown Act. When the attorney client privilege is invoked in closed session, it acts "[a]s a barrier to testimonial disclosure, the privilege tends to suppress relevant facts, hence is strictly construed." *Shapiro v. Board of Directors, supra* 134 Cal.App.4th at 182.

California courts explain the urgent need for a narrow application of the attorney client privilege in Brown Act cases:

> Public board members, sworn to uphold the law, may not arbitrarily or unnecessarily inflate

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> weight by the courts. [Citations.]' " *Community Redevelopment Agency v. County of Los Angeles* (2001) 89 Cal.App.4th 719, 727. This is especially true in the context of the Brown Act because "the Attorney General regularly advises many local agencies about the meaning of the Brown Act and publishes a manual designed to assist local governmental agencies in complying with the Act's open meeting requirements." (*Freedom Newspapers, Inc. v. Orange County Employees Retirement System (1993) 6 Cal.4th 821, 829.*) In the end, however, " ' "whatever the force of administrative construction ... final responsibility for the interpretation of the law rests with the courts." ' " (*Sanchez v. Unemployment Ins. Appeals Bd. (1977) 20 Cal.3d 55, 67.*)

<u>Shapiro v. Board of Directors</u> *(2005)* 134 Cal.App.4th 170, 184, fn 17.

> confidentiality for the purpose of deflating the spread of the public meeting law. Neither the attorney's presence nor the happenstance of some kind of lawsuit may serve as the pretext for secret consultations whose revelation will not injure the public interest.

Sacramento Newspaper Guild v. Sacramento County Bd. Of Sup'rs, (1968) 263 Cal.App.2d 41, 58.

Plaintiffs offer thirteen pages of sophistry in an attempt to characterize closed door discussions about a referendum, the strong connection between the mayor and the lawyer suing the city, and the potential and actual hiring of a lawyer recommended by the lawyer suing the City to tank the City's defense in pending litigation as a defense strategy. Plaintiffs strained efforts are entirely inconsistent with the narrow application of privilege demanded by statute and courts alike.

5. Plaintiffs' meritless evidentiary arguments regarding the Whitman Declaration confirm Plaintiffs' political motivations.

The pleadings Plaintiffs submitted in opposition to Defendants' anti-SLAPP motion included a declaration from Ojai Councilmember Andrew Whitman. [8/8/2023 Whitman Decl. (AA0194-AA0200).] Defendants filed formal and detailed written objections to the declaration. [Evidentiary Objections to Whitman Decl. 8/14/2023 (AA0243-AA0256).] Defendants' twenty three objections primarily focused on the fact that Councilmember Whitman's declaration consisted almost entirely of arguments and glaring misrepresentations. Defendants' Reply Brief described and

documented evidence that Whitman had perjured himself. [Reply in Support of Motion to Strike 8/14/2023 at 1:26 (AA0226); 2:6 and 2 fn. 1 (AA0227).]

Two of the "direct quotes" disclosed by Councilmember Rule were made by Councilmember Whitman. On January 24, 2023, Councilmember Rule disclosed the fact that during closed session, Councilmember Whitman barked at one councilmember "***Suza, you're talking through you ass!"*** and told Councilmember Rule "***You're talking horseshit!***" [Rule Sunlight Statement, Ex. A to 7/26/2023 Rule Decl. (*emphasis in original*) (AA0077).] The tenor and tone of Councilmember Whitman's Declaration is not much different.

The court discussed the defective nature of the Whitman Declaration in detail during oral argument on September 7, 2023. The court found the declaration consisted of "a lot of argument" and little fact. [Tr. of Proceedings 9/7/2023 at 1:25-28.] The court noted "it seems like he's briefing me. It's more of a legal argument than a statement of factual assertion. So what do I do with that?" [*Id.* at 16:24-26.] Plaintiffs' counsel offered no suggestion, response, or defense.

In its written order of 10/3/2023, the court expressly sustained every one of Defendants' objections to the Whitman Declaration "except for objection 5a which is overruled," [10/3/2023 Order at 1 (AA0352)], adding later "the Court notes that Mr. Whitman, in his declaration under penalty of perjury, misrepresents the letter from the district attorney…" [*Id.* at 8 (AA0359).]

Plaintiffs now claim the court abused its discretion by sustaining Defendants' objections to the Whitman Declaration. Plaintiffs fail to address *any* of the twenty two objections the court sustained. Plaintiffs fail to cite or address any of the court's discussions regarding the declaration. Instead, Plaintiffs falsely imply the objections involved relevance and lack of foundation. [See, AOB at 44.] In truth, the court primarily focused on the fact that the Whitman Declaration was pure argument and included a clear misrepresentation made under oath.

Plaintiffs contend Councilmember Whitman could have identified confidential discussions that did occur in closed session. The need for such testimony only proves neither Councilmember Rule nor Attorney Drucker actually disclosed any confidential information. Plaintiffs also claim Councilmember Whitman described the chilling effect the disclosures had on future closed sessions. The City was forced by the District Attorney to consent to cease and desist because the meetings violated the Brown Act, not because Councilmember Rule publicly disclosed Councilmember Whitman's abusive conduct.

Plaintiffs' decision to present a superficial challenge to evidentiary rulings regarding the Whitman Declaration demonstrates the political rather than legitimate nature of this lawsuit. Only Councilmember Whitman and his political allies would raise frivolous evidentiary issues on appeal so as to call attention to a devastatingly self-destructive declaration.

III. Plaintiffs' SLAPP Suit Is Subject To A Mandatory Award of Fees

A. Code of Civil Procedure section 425.16 generally mandates an Award of Attorney Fees In Favor of a SLAPP Defendant

"A prevailing defendant on a special motion to strike shall be entitled to recover his or her attorneys' fees and costs." Code Civ. Proc. § 425.16, subdivision (c) (*Emphasis added*). The California Supreme Court holds that this fee-shifting provision is mandatory. "Any SLAPP defendant who brings a successful motion to strike is entitled to mandatory attorney fees." *Ketchum v. Moses*, (2001) 24 Cal.4th 1122, 1131-32.

Such fees compensate defendants for defending against meritless claims brought by a "party seeking to 'chill the… valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.'" *Id.* [*quoting* Code Civ. Proc. § 425.16 subd. (a)]. *Accord*, *Barry v. State Bar of California* (2017) 2 Cal.5th 318, 320 ("Unless the plaintiff establishes a probability of prevailing on the claim, the court must grant the motion and ordinarily must also award the defendant its attorney's fees and costs.")

B. Only Brown Act Actions Brought under Government Code sections 54960 and 54960.1 Are Exempt from The Anti-SLAPP Statute's Mandatory Fee Provisions

Plaintiffs argue "CCP § 425.16(c)(2) expressly bars an award of attorney fee's to defendants who prevail in an Anti-SLAPP motion in Brown Act cases." [AOB at 56.] There is neither "express language" in Code of Civil Procedure section 425.16(c)(2) nor any legal authority for such an assertion. Plaintiffs admit as

much arguing: (1) the legislature *really meant* Code of Civil Procedure section 425.16(c)(2) to immunize any SLAPP plaintiff suing under the Brown Act from a fee award; and (2) Plaintiffs *really meant* to proceed under Government Code section 54960. The court thoroughly addressed and appropriately rejected both arguments.

1. **Code of Civil Procedure section 425(c)(2)'s exclusion of Brown Act actions brought under Government Code sections 54960 and 54960.1 only exclude actions brought under Government Code sections 54960 and 54960.1.**

"The Brown Act was created under a chapter of the Government Code. This chapter shall be known as the Ralph M. Brown Act." Gov. Code, § 54950.5. The Ralph M. Brown Act chapter includes numerous sections and sub sections set forth in the Government Code. Code of Civil Procedure section 425.16 (c)(2) exempts only actions brought under two sections of the chapter from the mandatory fee provision set forth in Code of Civil Procedure 425.16 (c).

The court appropriately began its analysis by quoting Code of Civil Procedure section 425.16 (c)(1) and (2) in its entirely. Section 425 (c)(2), applies, by its express terms, to actions brought under an enumerated list of sections and chapters of the Government Code. The list includes only actions "brought pursuant to Section 11130, 11130.3, 54960, or 54960.1 of the Government Code, or pursuant to Chapter 2 (commencing with Section 7923.100) of Part 4 of Division 10 of Title of the Government Code." Code Civ. Proc. §425(c)(2). [See, 1/30/2024 Order at 1 (AA0485).]

The court then cited to *Bitner v. Dep't of Corr. & Rehab.* (2023) 87 Cal.App.5th 1048, 1059 for the "well-established rule" that "[w]hen a statute omits a particular category from a more generalized list, a court can reasonably infer a specific legislative intent not to include that category within the statute's mandate." [1/30/2024 Order at 2 (AA0486).]

The list of statutes and chapters contained in Code of Civil Procedure section 425.16 (c)(2) omits any reference to the "Ralph M. Brown Act" chapter, generally, or Government Code 54963, specifically. The Court must infer the legislature chose to omit both.[22]

Plaintiffs argue the express statutory reference to Government Code section 54960 and 54960.1 in Code of Civil Procedure section 425.16(c)(2) is meant to exclude fee awards arising from any action under the entire chapter. If the legislature meant to exclude any action under the chapter whatsoever, it would have cited to the Chapter just as it did in regard to actions under "Chapter 2 (commencing with Section 7923.100) of Part 4 of Division 10 of Title of the Government Code."

2. <u>Plaintiffs sued under Government Code 54963 not 54960 or 54960.1</u>

Plaintiffs did not sue under Government Code section 54960 or 54960.1. The court observed "The complaint clearly states it is brought under Govt Code §54963, which is stated, by the Court's

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[22] Importantly, Plaintiffs' request for judicial notice evidence the fact that plaintiffs scoured legislative history to find support for their claims. Plaintiffs certainly cite no legislative history here.

count, ten times in the document." [1/30/2024 Order at 2 (AA0486).]

Plaintiffs now claim their complaint really arises under Government Code sections 54960 and 5490.1. [AOB at 53.] Had Plaintiffs sought relief under either section, the Complaint would have been more frivolous.

Government Code section 54960 applies only to actions against "members of a legislative body" to stop or prevent violations or threatened violations of the Brown Act. Attorney Drucker is not a "member of a legislative body" at all. Moreover, Plaintiffs sought declaratory relief regarding unspecified disclosures Defendants had already made. A declaratory statement about actions already taken would not prevent or stop anything.

Government Code section 549650.1 applies only to actions against "legislative bodies." It does not apply to actions against individual members like Councilmember Rule or other individuals like Attorney Drucker.

CONCLUSION

The Appellants-Plaintiffs presented no evidence in the record to support a finding that they brought this action in the public interest, that Respondents-Defendants violated the Brown Act, or that the trial court's fee award was improper. Respondents-Defendants respectfully request that this Court affirm the decisions of the trial court and confirm Defendants' right to fees and costs on appeal.

Respectfully submitted,

DATED: November 20, 2024 By /s/

Stephen Johnson and Jon Drucker

Attorneys for Respondents

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 11,780 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

DATED: November 20, 2024 By /s/.

Stephen Johnson and Jon Drucker
Attorneys for Respondents