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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF VENTURA

DAVID BYRNE, VICKIE CARLTON- BYRNE THOMAS DREW MASHBURN; GERALD SCHWANKE; JOEL MAHARRY; DOUGLAS LA BARRE; LESLIE FERRARO, individuals

Plaintiffs,

v.

LESLIE RULE; JON E DRUCKER; DOES 1-10

Defendants

Case No.: 2023CUMC008352

PLAINTIFFS' OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO STRIKE COMPLAINT PURSUANT TO CAL. CIV. PROC. CODE §§ 425.16-425.17 AND REQUEST FOR SANCTIONS IN THE AMOUNT OF $28,622 AGAINST DEFENDANTS LESLIE RULE AND JON DRUCKER AND/OR THEIR ATTORNEYS OF RECORD JON DRUCKER AND STEPHEN C. JOHNSON

[Filed concurrently with Declarations of Brian Acree; Sabrina Venskus; and Andrew Whitman; and Plaintiffs' Evidentiary Objections to Declaration of Jon Drucker

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Dept: 43
JUDGE: Hon. Benjamin F. Coats

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Trial Date: Not set

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I. Introduction

Plaintiffs' action is brought in the public interest and challenges the disclosure by Ojai City Councilmember Leslie Rule, (hereinafter "Defendant Rule") and her attorney, Jon Drucker (hereinafter "Defendant Drucker"), of confidential and attorney-client privileged information the Defendants acquired from confidential closed session meetings of the Ojai City Council ("City Council") in violation of the California Ralph M Brown Act, §54950 et seq. Plaintiffs seek declaratory and injunctive relief.

Defendants now seek dismissal of this action, and sanctions, pursuant to California Code of Civil Procedure ("CCP") section 425.16, a statute designed to discourage strategic litigation against public participation ("anti-SLAPP"). The motion turns the purpose of the statute on its head. Plaintiffs are acting in the public interest, petitioning this Court for relief in order to prevent Defendants from engaging in the illegal conduct of publicly disclosing confidential information to suit their own interests, a practice that has adversely impacted Plaintiffs' and the public's interest in maintaining the proper functioning of the City government.

The California Legislature has addressed the increase in Defendants' type of abuse of the anti-SLAPP statute by codifying exceptions to the statute at CCP section 425.17. These exceptions are designed to prevent Defendants in public interest litigation from using the anti-SLAPP statute as a weapon against their public interest adversaries. Because Plaintiffs' lawsuit meets the criteria for exemption under CCP section 425.17, this action is entirely exempt from the Anti-SLAPP statute. Additionally, fatal to this motion is the fact that illegal conduct of the type described in the complaint is not protected speech or petitioning activity under the Anti-SLAPP statute. Finally, Plaintiffs' complaint is facially sufficient, and Plaintiffs can easily establish the minimal likelihood of success required by the Anti-SLAPP statute.

II. Statement Of Relevant Facts

The facts underlying this case, detailed in paragraphs 18 through 40 of the First Amended Complaint, are not reasonably disputable, and in fact are largely conceded by Defendants. (Motion 2-4.) On October 25, 2022, the then-majority Ojai City Council approved a Development Agreement for the benefit of an entity named the Becker Group. (Plaintiffs' First Amended Complaint ["Complaint"], ¶19.) A local non-profit, Simply Ojai, subsequently filed a lawsuit against the city challenging the approval of that agreement. (Complaint, ¶20.) The next month, there was an election for City Council of Ojai where Betsy Stix was re-elected as Mayor, and Andrew Whitman, Rachel Lang, and Defendant Leslie Rule were newly elected to the Council,

joining Councilmember Suza Francina. (Complaint, ¶21.) In December 2022 the new city council was seated, and shortly thereafter a referendum petition was presented to the City seeking to overturn the Development Agreement approved by the former City Council. (Complaint, ¶¶21-22.) Thereafter, the City Council held closed session meetings on December 13, January 9, and January 10 ("Closed Sessions") where they discussed legal issues related to the approval of the Development Agreement and the resulting litigation and referendum, and the City's options for action regarding those matters. (Complaint, ¶¶24-29.)

On January 24, 2023, the City Council held a regularly scheduled public meeting. At that public meeting, Defendant Leslie Rule disseminated a written public statement that included an extensive and detailed discussion of confidential and attorney-client privileged information she obtained from the Closed Sessions that had occurred earlier, including 1) a detailed discussion, with alleged direct quotes of the councilmembers, regarding the December 13 closed session discussion of the need to hire outside counsel to provide advice regarding the development agreement litigation, 2) a detailed discussion of the January 9 presentation given by counsel hired by the City regarding the referendum and potential and existing litigation against the City over the development agreement, including the legal strategy and various options presented to the council by the attorney for dealing with those issues, 3) a detailed discussion of the January 10 closed session discussion between councilmembers, again including alleged direct quotes, regarding the hiring of outside counsel and whether to place a vote to rescind the development agreement on the ballot. (Declaration of Leslie Rule, Exh. A; Complaint, ¶30.) Defendant Rule also attempted to read this letter out loud. (Declaration of Andrew Whitman ("Whitman Decl."), 9-11; Declaration of Brian Acree ("Acree Decl.") ¶4, Exh. C, pp.2-5.) The City Attorney, Matt Summers, immediately directed Ms. Rule to cease disclosing closed session information, and informed her that doing so violated the closed session confidentiality provisions of the Brown Act. (*Ibid.*) He also explained that if Defendant Rule believed that any conversations in closed session were improper or not protected by the Brown Act's confidentiality provisions, her remedy under the Brown Act was either to approach the District Attorney, confidentially, about her concerns, or bring a court action for violation of the Brown Act and have a court determine if the closed session information should be made public. (*Ibid.*) Defendant Rule vehemently disagreed. (*Ibid.*) The mayor then made a motion to declare councilmember Rule out of order and defer discussion of her letter to closed session, which ultimately passed over Councilmember Rule's objection. (Acree Decl. Exh. C, pp.5, 11-13.) Councilmember Rule also moved to waive confidentiality for the

closed session, and that motion failed. (Whitman Decl. ¶9.)

At the same public meeting, Defendant Jon Drucker handed out to members of the public in attendance a written letter prepared by Defendant Drucker on behalf of Defendant Rule (hereinafter referred to as "the First Drucker Letter").[1] (Drucker Decl., Exh. A; Acree Decl. ¶¶5,6, Exhs. D, E.) Mr. Drucker's letter contained the same disclosures of councilmember and attorney discussions from the December 18, January 9 and January 10 closed session meetings that appeared in Defendant Rule's letter, but provided even *more* detail, including the exact title of the memo prepared by the City's outside counsel and a somewhat more detailed discussion of its contents, indicating that he had been shown the memo. (Drucker Decl., Exh. A, pp, 2-5.) From social media posts before the meeting and the public comments at the meeting, it appeared that some members of the public had been provided with closed session information prior to the meeting. (Acree Decl. ¶8, Exh. G; Whitman Decl. ¶¶8,10.)

On January 27, 2023, Mr. Drucker issued another letter in which he conceded that "Ms. Rule had already disclosed the [closed session] communications in a public statement", but argued that Ms. Rule was within her rights to do so. (Drucker Decl. Exh. B, p. 2.) Disturbingly, he also argued that she was within her rights to publicly release the full legal memo prepared by the City's outside legal counsel, which he argued was neither confidential nor attorney client privileged, but offered that she would voluntarily not do so, presumably so long as the City did not pursue disciplinary action against her for her disclosures. (Drucker Decl. Exh B, pp.3, 10.) Both the First and Second Drucker Letters were posted thereafter to a public website called "Transparent Ojai," and were published in the local newspaper, the Ojai Valley News. (Complaint, ¶36.)

Defendant Rule has since repeatedly insisted that she has the right to disclose any closed session content that she feels is not or should not be protected by the confidentiality provisions of the Brown Act. (Whitman Decl., ¶14, 16, 20.) Defendant Drucker has also appeared at numerous City Council meetings, often stating that he is appearing on his own behalf, where he has acknowledged that the disclosures were of closed session information but has continued to argue that disclosure of closed session information was not unlawful, including the contents of the legal

[1] From page 5 of the letter it appears that Defendant Rule had approached Matt Summers, the City Attorney, before the meeting about publicly disclosing the information contained in her letter, and had been informed by him that the disclosure would violate the Brown Act, and that if she felt the items discussed in closed session were improper, that the Brown Act provided a number of remedies she could pursue other than public disclosure. Defendant Rule chose to ignore his advice and disclosed the information anyway.

memo from the city's outside legal counsel, since in his estimation, the memo is neither confidential nor attorney-client privileged. (Acree Decl., ¶¶9-11, 13, 14.)

The City has made a number of attempts to rein in the conduct of the Defendants. The City Attorney distributed a memo discussing the Brown Act, and the City even retained a nationally-renowned expert on the Brown Act to conduct a workshop for councilmembers and the public regarding Brown Act confidentiality. (Acree Decl. ¶3, Exh B.) The District Attorney of Ventura County also sent a cease and desist letter to the Ojai City Council and Defendant Rule explaining that her public disclosure of closed session communications was in violation of the law. (Acree Decl. ¶2, Exh. A.) Despite this, nothing appears to have dislodged Defendants' opinion that they can disclose closed session information whenever they determine, in their own judgment, that it should not be kept confidential. This has made it impossible for members of the City Council to effectively discharge their official duties because closed session meetings are effectively no longer confidential. (Whitman Decl. ¶¶13, 15-20.)

III. Plaintiffs' Lawsuit is Brought in the Public Interest, and is Therefore Exempt from the Anti-SLAPP Statute Altogether, Requiring Denial of Defendants' Motion

In 2003, the Legislature determined that there had been "disturbing abuse" of the anti-SLAPP statute which had undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of the statute. (CCP § 425.17(a).) The Legislature further found that it is in the public's interest to encourage continued participation in matters of public significance, and that such participation should not be chilled by anti-SLAPP filings. (CCP § 425.17(a).) Accordingly, the Legislature enacted CCP § 425.17, which exempts public interest actions from an Anti-SLAPP motion. CCP § 425.17(b) provides that the Anti-SLAPP statute "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 relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member. A claim for attorney's fees, costs, or penalties does not constitute greater or different relief for purposes of this subdivision.
>
> (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.
>
> (3) Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter."

Plaintiffs' complaint is brought both "in the public interest" and "on behalf of the public," (Plaintiffs' First Amended Complaint ["Complaint"], ¶ 2-8, 56.) As shown below, this instant case

is precisely the type of case the Legislature sought to protect from an Anti-SLAPP motion.

A. Plaintiffs do not seek any relief greater than or different from the relief sought for the general public or a class of which Plaintiffs are members.

The present case is a private attorney general action brought by Plaintiffs seeking to require Defendants to comply with a state law prohibiting the disclosure of confidential information from closed sessions of a government body. (Complaint, ¶¶ 1, 2-8, 56.) The Complaint alleges a cause of action for violation of the Ralph M. Brown Act. The Complaint's prayer for relief seeks no greater or different relief for Plaintiffs than for the general public. Plaintiffs seek injunctive relief to enjoin illegal conduct harming the public's interest in the affairs of local government, declaratory relief, and reimbursement of their attorney's fees and costs.

B. Plaintiffs' action is to enforce an important right affecting the public interest, and will confer a significant benefit on the general public.

Plaintiffs allege they are bringing this action in the public interest and allege harm to the public due to the illegal disclosure of confidential information by Defendants. (Complaint, ¶¶2-8, 52, 53, 54, 56.) The Complaint states, "Plaintiffs have an interest in ensuring, on behalf of the public, that City Councilmember Rule carries out her duties responsibly under law and does not subject the City to additional legal peril or expense." (Complaint, ¶56.)

Plaintiffs' action will confer on the general public the significant benefit of enforcement of provisions of the Brown Act that were intended to permit a governing body to meet confidentially in closed session with their counsel, and to keep the contents of such meetings from being released publicly. The ability of the City Council to confer confidentially with its legal counsel is essential to its ability to properly function, and protect the interests of its citizens. "Protecting the confidentiality of communications between attorney and client is fundamental to our legal system. The attorney-client privilege is a hallmark of our jurisprudence that furthers the public policy of ensuring '"the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense." (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145; *see also Kleitman v. Superior Court* (1999) 74 Cal.App.4th 324, 334, ["We agree with the Attorney General. Disclosure of closed session proceedings by the members of a legislative body necessarily destroys the closed session confidentiality which is inherent in the Brown Act."].)

Plaintiffs' action is intended to lead to the beneficial result of preserving the integrity of City

Council closed sessions and the Council's ability to confer confidentially with its legal counsel. (Whitman Decl. ¶¶13, 15-20.) The action will also limit liability exposure to the City by preventing future illegal disclosures of confidential information and attorney-client communications. (*Ibid*.) There is no relief requested in the complaint that would confer any other benefit. The action therefore seeks to confer a substantial benefit on the general public by seeing to it that Defendants comply with the Brown Act.

C. Private enforcement is necessary and places a disproportionate financial burden on Plaintiffs in relation to Plaintiffs' stake in the matter.

Finally, the public interest exception of CCP § 425.17 applies because of the disproportionate financial burden on Plaintiffs to protect the public interest. Here, private enforcement of the Brown Act by way of relief from this Court is, unfortunately, necessary because Defendants have not been swayed by City staff, independent experts, councilmembers or the District Attorney's opinions. Additionally, the financial burden element is met where "the cost of the claimant's legal victory transcends his personal interest – that is, when the burden of the litigation was disproportionate to the plaintiffs' individual stake in the matter." (*Roybal v. Governing Bd. of Salinas City Elementary Sch. Dist*. (2008) 159 Cal.App.4th 1143, 1151; *see also Woodland Hills Residents Association, Inc. v. City Council* (1979) 23 Cal.3d 917, 941.) Here, Plaintiffs do not seek any damages but only equitable relief for the general public. Plaintiffs will incur a significant financial burden pursuing this case, and the burden of the litigation is completely disproportionate to Plaintiffs' individual stake in this matter. Therefore, Plaintiffs meet each element of the public interest exemption and the Anti-SLAPP motion must be denied.

IV. Defendants' Motion Fails Both Prongs of Analysis for the Anti-SLAPP Statute

Even if the Court determines that the public interest exemption does not apply, necessitating a denial of the Anti-SLAPP motion outright, this Court must deny the motion because it fails the first and second prongs of the Anti-SLAPP analysis.

In deciding an anti-SLAPP motion, a court must 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. If the court finds such a showing has not been made, that ends the inquiry and the motion must be denied. If the court finds the defendant has made this showing, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim and if so, the motion must be denied. (See citations, *infra*.)

Here, Defendants' motion must be denied because they have failed to carry their burden under

the first prong. If this Court disagrees, Plaintiffs can easily demonstrate that the complaint meets the minimal merit requirements under the second prong, necessitating denial of the motion also..

A. Defendants' Conduct is Not Protected Activity

The anti-SLAPP statute is intended to "protect[] a defendant 'from retaliatory action for his or her exercise of legitimate… rights.' " (*Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1366, disapproved on another ground in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.) If the defendant concedes or the evidence conclusively establishes the conduct complained of was not a valid exercise of his or her constitutional rights of free speech, the defendant cannot make a prima facie showing the conduct arises from protected activity within the meaning of the anti-SLAPP statute and the plaintiff has no obligation to show a probability of prevailing on the merits. (*Paul, supra*, at pp. 1366–1367; *Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 459.) In other words, "whether the defendant's underlying conduct was illegal as a matter of law is *preliminary*, and unrelated to the second prong question of whether the plaintiff has demonstrated a probability of prevailing, and the showing required to establish conduct illegal as a matter of law…is not the same showing as the plaintiff's second prong showing of probability of prevailing." (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 320 (emphasis added). In *Flatley*, the court recognized the "grossly unfair burdens to impose on a plaintiff who is himself the victim of the defendant's criminal activity" if a trial court were to rubber stamp a defendant's assertion of speech by the anti-SLAPP statute. (*Id*. at 318.)

Here, the facts of the case are not reasonably disputable. Defendants distributed to the public, the media, and posted on public websites written statements describing in detail the discussions between councilmembers and the content of attorney-client communications that were made in closed session meetings of the Ojai City Council. Defendants do not deny that; in fact, they attach some of those written statements to their declarations in support of their motion. The evidence is therefore clear and undisputed, and the only question is one of law: whether the disclosures of closed session information were "illegal as a matter of law" under the Brown Act. As set forth below, and as both the Ojai City Attorney and Ventura County District Attorney have already opined, the disclosures of closed session information were clearly unlawful.

Closed sessions are not subject to public scrutiny. (See *Kleitman v. Superior Court* (1999) 74 Cal.App.4th 324, 331.) The Brown Act "'was adopted to ensure the public's right to attend the meetings of public agencies. [Citation.]' [Citation.] Accordingly, the Brown Act requires that the legislative bodies of local agencies … hold their meetings open to the public except as expressly

authorized by the [Brown] Act." (*Id.*, at 331, fn. omitted.) The Brown Act expressly authorizes a public agency to meet in closed session regarding a variety of topics, including the consideration of legal matters. (Gov. Code, § 54956.9.)

A legislative body has the right to conduct a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation, initiation of litigation and/or exposure of risk to litigation. (Gov't Code § 54956.9). Communications that are made in closed sessions are confidential and may not be disclosed by members of a legislative body or any other person, except as authorized by law. (Gov. Code § 54963). Disclosure of closed session proceedings "necessarily destroys the closed session confidentiality which is inherent in the Brown Act." (*Kleitman, supra*, at p. 334, citing 76 Ops.Cal.Atty.Gen. 289, 290, 291 (1993), 80 Ops.Cal.Atty.Gen. 231, 239 (1997)).

Defendants freely admit that they intentionally publicly disseminated confidential information obtained from the Closed Sessions, including the content of communications between councilmembers in closed session, as well as communications between the City's legal counsel and the councilmembers. (Rule Decl., Exh. A; Drucker Decl., Exhs.. A, B;; Acree Decl. ¶¶ 5, 11, 13 and Exhs.. D, J, L.) That information was confidential because it related to the type of discussion that Council could properly have in closed session regarding litigation or potential litigation involving the City, including discussion with its counsel. (Gov. Code §54956.9.) The evidence thus conclusively establishes Defendants' disclosures violated the Brown Act (Gov. Code, §§ 54950 et seq.)

Not only is the conduct at issue in this litigation unlawful under civil statute, it comprises a punishable offense as well. Unless a legislative body has collectively authorized the disclosure of confidential information, it is *strictly* prohibited.[2] The importance of maintaining the confidentiality of closed session information is underscored by the weight of the *penalties* assigned for violation of the statutory prohibition against such disclosure. (See e.g., §§ 54963(c)(1) and (3) and Gov. Code § 3060; C.C.P., §§ 1209(a)(5) and 1218.)

Defendants' Motion does not refute with law, logical reasoning, or competent evidence the fact that Defendants disclosed what was "confidential" as a matter of law. Rather, Defendants simply claim in conclusory fashion, providing no analysis and citing no law in support thereof, that

[2] Notably, § 54963 does not provide any provision for exceptions to liability based on the "belief" or intent of the party violating the statute. As such, it is a strict liability statute.

"Rule's statement did not disclose any confidential or privileged material." (Motion, 3:24-25.) The only cited support for this statement (which conspicuously ignores Defendant Drucker's liability) directs the Court to Exhibit A to Rule's Declaration, which is simply the written statement disseminated to the public which contains some of the very confidential information Plaintiffs' cause of action arises from. (Motion, 3:25.)

Accordingly, Defendants' disclosures of closed session information were illegal as a matter of law and, for that reason, not protected by constitutional guarantees of free speech and petition, and therefore not subject to anti-SLAPP protection. Defendants have thus not cleared the first prong because they fail to meet their threshold burden of showing their conduct was protected under the anti-SLAPP statute. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67; "To the extent [the complaint] alleges criminal conduct, there is no protected activity as defined by the anti-SLAPP statute. . . . [S]ection 425.16 cannot be invoked by a defendant whose assertedly protected activity is illegal as a matter of law and, for that reason, not protected by constitutional guarantees of free speech and petition. [Citations.]" (*Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal. App. 4th 435, 445.)

B. As to the Second Prong, Plaintiffs Can Show a Probability of Success On the Merits of Their Claim.

As explained above, there should be no need to reach the second prong of the anti-SLAPP analysis, because Plaintiffs' case is protected by the public interest exception, and the conduct the cause of action "arises from" is not constitutionally-protected speech. However, even if the Court did reach this stage of the analysis, Plaintiffs can show that a legally sufficient claim has been stated demonstrating more than the "minimal merit" needed to pass the second prong of analysis. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384-385.)

The anti-SLAPP statute's second prong of analysis is "a 'summary-judgment-like procedure.' The 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. [C]laims with the requisite minimal merit may proceed." *Baral, supra,* 1 Cal.5th 376, 384-385 [citations omitted]) As set forth below, Plaintiffs can easily demonstrate that their claims meet the requirements of the Anti-SLAPP statute.

1. Defendants Clearly Violated The Brown Act

In order to show that Defendants violated the Brown Act, Plaintiffs must provide evidence on the following elements:

1. Defendants disclosed information that was acquired in a closed session (§54963(a).)

2. The disclosed information was "confidential information." (§ 54963(a) and (b).

3. Defendants disclosed this information to "a person not entitled to receive it." (§ 54963(a).)

All three elements were sufficiently pled. (Complaint, ¶¶43-54 .) Further, Plaintiffs can demonstrate a likelihood of success on the merits concerning these elements, as addressed below.

Notably, Defendants' Motion papers concede the first and third elements, that the information at issue was obtained from a closed session and disclosed to persons not entitled to receive it. (Motion, pp.3-4. Drucker Decl. Exh A, pp.2-5, Rule Decl. Exh. A, pp.1-4.) Plaintiffs can also show a likelihood of success on these two elements even without Defendants' admission. On December 13, 2022, January 9, 2023, and January 10, 2023, Defendant Leslie Rule was present at and participated in closed sessions of the City Council. (Complaint, ¶48; Rule Decl. Exh. A, pp.1-4.)) All of these closed sessions were properly noticed because they were in substantial compliance with the Brown Act. (*Castaic Lake Water Agency v. Newhall County Water Dist.* (2015), 238 Cal. App. 4th 1196, [there was no Brown Act violation by the district or the board because the given notice substantially complied with the act. Although the given notice erroneously cited subdivision (c) of Gov. Code, § 54956.9, instead of subdivision (d)(4), it adequately advised the members of the public that the board would be meeting in closed session with its legal counsel on a particular date].) During all of the above-referenced closed sessions, confidential communications were made related to litigation, privileged and not authorized for disclosure to the public or any other person. (Acree Decl. Exh. B, pp.4-8.) Defendants admit that they disseminated the information in oral and written statements to the public. (Drucker Decl. Exh A, pp.2-5, Rule Decl. Exh. A, pp.1-4.) The Brown Act provides that the public is not entitled to dissemination of closed session communications. (Gov. Code §54963(a).)The City Attorney affirmed that the information was obtained during closed session (Acree Decl. Exh. C, 3:17-5:20) and the City Council's refusal to agree to waive the privilege of confidentiality despite Defendant Rule's requests that they do so demonstrates that the City Council did not authorize the disclosure. (Acree Decl.¶7, Exh. F; Whitman Decl. ¶9). Thus, the first and third elements of a Brown Act violation are met.

Plaintiffs will also succeed on the second element of establishing that the information was "confidential". Defendants' public statements are within the ambit of the definition of "confidential information" in the statute, because they consisted of "a communication made in a

closed session that is specifically related to the basis for the legislative body of a local agency to meet lawfully in closed session." (Govt. Code § 54963(b).) Because the Brown Act section 54956.9 legally allows the City Council to meet in closed session to receive legal counsel's advice and opinions on existing litigation, pending litigation, threatened litigation or anticipated litigation, and this is precisely the "confidential information" that was disclosed to the public by Defendants, the second prong is established by Plaintiffs.

In their motion papers, although not entirely clear, Defendants appear to imply that the information they disclosed was not confidential because the City Council agenda notices for the closed sessions were insufficient. (Motion 3:5-8, 12-14, 24-27.) This implication is without merit and Defendants offer no legal support for it. Defendants apparently believe, wrongly, that any person is free to distribute publicly any information obtained during any closed session that they themselves personally deem to be beyond the scope of the session's agenda notice. (Motion 2:2-4.) When a person believes a matter has not been properly noticed on the agenda, there are specific remedies for that defect provided by the Brown Act[3]; disclosure of closed session communications at a person's whim is not one of them.[4] Any defects in an agenda notice do not "transmute" closed session discussions "into non-confidential information." (Acree Decl. Exh. A, at p. 5; see also *Roberts v. City of Palmdale* (1993) 5 Cal. 4th 363, 380, ["A city council needs freedom to confer with its lawyers confidentially in order to obtain adequate advice, just as does a private citizen who seeks legal counsel, even though the scope of confidential meetings is limited by this state's public meeting requirements."].)

2. Plaintiffs' Claims Against Drucker Are Not Barred

Defendants' motion argues that Civil Code § 1714.10 bars Plaintiffs' claims against Defendant Drucker. Section 1714.10, subdivision (a), provides,

> "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

[3] If Defendants believed that the agenda notices were defective, the Brown Act provides a remedy for this. (See Gov. Code § 54960.1; see also e.g., *Castaic Lake Water Agency v. Newhall County Water Dist.* (2015) 238 Cal.App.4th 1196, 1201-1202 for the legally-authorized manner in which to challenge an improperly-noticed closed session agenda item. Defendants failed to avail themselves of this one and only remedy, and cannot do so now since they are now time-barred. (Gov. Code § 54960.1(c)(4), [15 day statute of limitations to commence action].)

[4] For example, instead of going against the City Attorney's advice and publicly disseminating confidential information in an effort to purportedly question the "propriety" of the City Council's conduct during the closed session, Defendants were limited to the procedure in § 54963(e)(1).

> 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."

The statute further provides that its provisions do not apply "where (1) the attorney has an independent legal duty to the plaintiff, or (2) the attorney's acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney's financial gain." (Civ. Code §1714.10(c).) The statute has been interpreted as only applying when the attorney's conduct is "consistent with the normal services of an attorney". (*Burtscher v. Burtscher* (1994) 26 Cal.App.4th 720, 727.)

Section 1714.10 does not apply because Defendant Drucker's conduct was not "consistent with the normal services of an attorney." An attorney who receives information from a client that the lawyer knows or should know contains or consists of privileged or confidential matters has an ethical and professional obligation not to disclose or make use of such information. (*Clark v. Superior Court* (2011) 196 Cal.App.4th 37, *See Also* California Rule of Professional Conduct 4.4, [Explaining attorney's obligations to not read or disclose inadvertently produced documents that "lawyer knows or reasonably should know" are privileged or work product). Drucker violated his "ethical obligation to protect an opponent's privileged and confidential information, and that of third parties," when he received and disseminated the information over the objections of the City Attorney and City Council and "without a waiver from the holder of the privilege." (*DP Pham, LLC v. Cheadle*, (2016) 246 Cal. App. 4th 653, 675.) Additionally, Drucker could not "act as judge and unilaterally make the determination" that the privilege has been waived or that an exception applies and then proceed to use the information. (*McDermott Will & Emery LLP v. Superior Court* (2017) 10 Cal. App. 5th 1083, 1113.) His obligations were triggered when he received information that was presumptively privileged, as was the case here given the City Attorney's admonishments. *Id.* at 1118. Thus, Drucker cannot now claim section 1714.10 protection when his actions violated his professional obligations as an attorney, and thus were outside the scope of ordinary attorney practice. Additionally, Drucker repeatedly appeared and discussed the disclosure of confidential information at Council meetings "on his own behalf", indicating an interest in the disclosure that went beyond the service of an ordinary attorney client relationship. (Acree Decl. ¶¶9-11, 14,) Finally even if the statute did apply, it does not dispose of the case on the merits, and would simply require Plaintiffs to seek leave to add him as a Defendant if they can show a reasonable probability of success, which they have as established herein.

3. Plaintiffs are not required to join the City or any other party

Defendants argue that Plaintiffs have "no standing to assert claims of 'privilege' on [the City's] behalf." (Motion 7:5-6.) This argument is a red herring and irrelevant as it ignores the fact that Plaintiffs have standing to pursue declaratory and injunctive relief under the *Brown Act*. Defendants are confounding common law claims of privilege breach with statutory claims of illegal disclosure of confidential information obtained from a legislative body's closed sessions. Thus, there is no "real party in interest," or "indispensable party" as Defendants argue. (Motion, at pp. 6-7.) Neither § 54963 or any other provision of the Brown Act requires the joining of the City Council as an "indispensable party." (Motion, at pp. 6-7.) Defendants appear to be confused at best, or disingenuous at worst, in their attempt to concoct a defense that simply does not exist in the law at issue in this litigation.

4. Plaintiffs are entitled to declaratory relief.

Defendants' argument that Plaintiffs are not entitled to declaratory relief is patently meritless. (Motion at pp. 8-9). Declaratory relief is specifically authorized under Brown Act § 54960 for redressing threatened violations of the Act, and is also one of the remedies "currently available by law" for enforcing closed session confidentiality under the Brown Act § 54963(c), since declaratory relief is specifically authorized by C.C.P. §1060, which provides:

> Any person…who desires a declaration of his or her rights or duties with respect to another, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, … and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at the time.

Declaratory relief may be sought to determine the construction of a statute when the parties are in fundamental disagreement over the proper interpretation of the statute. (*Guinn v. County of San Bernardino* (2010) 184 Cal. App. 4th 941, 951.) A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the parties and requests that the rights and duties of the parties be adjudicated by the court. (*Californians for Native Salmon Etc. Ass'n v. Dep't of Forestry*, (1990) 221 Cal. App. 3d 1419, citing *Zeitlin v. Arnebergh* (1963) 59 Cal.2d 901, 908.) Plaintiffs here have adequately pled an actual controversy with Defendants regarding interpretation of the Brown Act. Plaintiffs contend that it is impermissible for Defendants to publicly disclose closed session information without the consent of the City Council or a court order permitting the disclosure. Defendants vehemently disagree. In fact, in this motion, Defendants continue to maintain that their actions were not unlawful. Without declaratory relief from this Court that Defendants have misinterpreted

the Brown Act and violated its provisions, they will continue to engage in similar conduct. (Complaint ¶41; Whitman Decl. ¶20)

Defendants' only support for this argument relies on misquoted and misapplied case law. (See Motion, at pp.8-9.) Defendants *misquote* the California Supreme Court case *Babb v. Superior Court* (1971) 3 Cal.3d 841, 848, as stating: "Declaratory relief operates prospectively and **is not designed to address past wrongs**." (Motion 9:1-2 [emphasis added].) The Supreme Court actually said: "[Declaratory] procedure operates prospectively, and not **merely** for the redress of past wrongs." (*Babb, supra*, 3 Cal. 3d 841, 848, quoting *Travers v. Louden* (1967) 254 Cal.App.2d 926, 931 (emphasis added).) Defendants conveniently failed to provide this Court the full quote of *Travers*, which directly contradicts their argument that declaratory relief cannot redress past wrongs: "The fact that the [declaratory relief] procedure operates prospectively does not create a conflict with the established principle that **redress for past wrongs may be had in a proper action for declaratory relief**." (*Travers, supra*, 254 Cal. App. 2d 926, 931 (emphasis added).)

Defendants also argue that Plaintiffs' request for declaratory relief is "hopelessly vague." (Motion, at pp. 9-10) Plaintiffs pled sufficient facts in their Complaint to identify the type of content that was illegally disclosed - statements and information that were obtained from specific closed sessions.[5] (Complaint, ¶¶ 48-51.)

5. C.C.P., § 526(b)(6) does not prevent this Court from enjoining Defendants from future unlawful conduct.

Defendants argue "CCP §526(b)(6) Bars A Request to Enjoin a City Council Member from Discharging the Duties of Her Office." (Motion, at 9:11-12.) First, this argument does not dispose of Plaintiffs' claim against Defendant Drucker. Second, C.C.P., §526(b)(6)'s prohibition against injunctive relief only applies when the defendant is exercising their office "in a lawful manner." As addressed herein, Rule's conduct is illegal, and as such, this Court may enjoin it.

V. Expense Sanctions Are Appropriate

Pursuant to C.C.P., §§ 425.16(c) and 128.5(c), a plaintiff opposing an Anti-SLAPP motion may request that their attorneys' fees and costs be reimbursed by a defendant if the court

[5] Defendants claim they "have no way of knowing what plaintiffs are actually complaining about." (Motion, 10:26.) This statement strains credulity. Rule was present in the closed sessions and certainly knows full well what information she has disclosed that came from those sessions. Defendants in fact have had this precise issue explained to them multiple times at this point by numerous parties, including both the City and District attorneys. (Acree Decl.¶¶2-4, Exhs. A-C.)

finds that "a special motion to strike is frivolous or is solely intended to cause unnecessary delay," by providing notice of such a request in their responsive pleading. The standard for determining whether a motion is "frivolous" is an objective one: a motion indisputably has no merit where any reasonable attorney would agree that the action is totally meritless. (*Alfaro v. Waterhouse Management Corp.* (2022) 82 Cal.App.5th 26.) Defendants' Anti-SLAPP motion, for the reasons explained above and below, is frivolous.

The entire motion lacks merit. No reasonable attorney would conclude that Defendants' conduct is protected under the Anti-SLAPP statute when at least two different law enforcement entities (the City Attorney and the District Attorney) have specifically determined that Defendants' conduct was a violation of the Brown Act. (Acree Decl. Exh. A, pp. 4-5, Exh. B, p.9), and when Defendants have admitted that they disclosed closed session communications without first availing themselves of the remedies provided under the Brown Act for perceived inadequate City Council agenda notices. Further, it is clear on the face of the complaint that this litigation is exempted from the Anti-SLAPP statute under the public interest exemption, as explained above, as the prayer for relief requests only declaratory and injunctive relief in the public interest. No reasonable attorney could conclude otherwise. (*City of Rocklin v. Legacy Family Adventures-Rocklin, LLC* (2022) 86 Cal.App.5th 713, [Because a theme park was not an enterprise involving constitutionally protected artistic works, a dispute about its construction and operation was not within the artistic work exception to the commercial speech exemption from anti-SLAPP protection. Awarding attorney fees was not an abuse of discretion because any reasonable attorney would agree that the anti-SLAPP motion was totally devoid of merit.].) This motion was simply meant to incur unnecessary expense and intimidate Plaintiffs, who have limited resources, nothing to gain financially from this litigation and have already incurred substantial costs in this matter. Therefore, Plaintiffs should be awarded their fees and costs in the amount of $28,622.17 for having to oppose Defendants' frivolous Anti-SLAPP motion. (Acree Decl. ¶¶15-16, Exh. N; Venskus Decl., ¶¶2-7, Exh. A.)

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Respectfully submitted,
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