IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

DAVID BYRNE et al.,

Plaintiffs and Appellants,

v.

LESLIE RULE et al.,

Defendants and Respondents.

Court of Appeal No. B332962
(Consl. w/ B335099)

(Super. Ct. No. 2023CUMC008352)

Appeal From an Order
of The Superior Court, County of Ventura
Hon. Benjamin F. Coats, Judge

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Respondents have ignored or failed to rebut most of the arguments, points, and authorities contained in Appellants' Opening Brief ("AOB"). As set forth below, Appellants have demonstrated that 1) the public interest exception to the Anti-SLAPP statute applies in this case, 2) there was ample evidence in the record showing that Respondents illegally disclosed confidential and attorney-client privileged information obtained from closed sessions of the Ojai City Council, and 3) attorneys' fees are not available under the Anti-SLAPP statute for citizen enforcement actions under the Brown Act. For the reasons set forth below, Appellants request that this Court grant the relief they have requested on appeal.

II. RESPONDENTS FAIL TO REBUT THE PUBLIC INTEREST EXCEPTION'S APPLICATION TO THIS BROWN ACT CASE

A. It is Well Settled That Courts Will Not Consider Extrinsic Evidence in Evaluating Whether a Lawsuit Is Excepted From the Anti-SLAPP Statute By CCP § 425.17, subd. (b).

Respondents affirmatively represent to this Court that the controlling case law on the public interest exception in CCP §425.17, subd. (b) holds that a trial court is to consider the "whole record," (Respondents' Brief ("RB") p. 27), yet none of the cases Respondents cite stand for that proposition. Instead, each and every one of these cases reflect Appellants' statement of the law with respect to the impropriety of a trial court relying on

extrinsic evidence to determine whether the public interest exception is met. (See AOB p. 26)

Respondents cite to the Supreme Court's statement in *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal. 4th 12, 25 which reiterates the principle that the Plaintiff carries the burden to establish that the criteria set forth in CCP § 425.17 has been met. (RB p. 25.) From this, Respondents make an inferential leap to conclude that the Court's reference to the term "burden" must mean an evidentiary burden. But Respondents are confused: carrying the burden of meeting the public interest exception's elements is not akin to carrying an evidentiary burden to prove Plaintiff's case.

In addition, *Simpson* involved an ***exemption*** to the Anti-SLAPP statute under Code Civ. Proc., § 425.17, subd. (c)(1), not the ***exception*** to the Anti-SLAPP statute under Code Civ. Proc., § 425.17, subd. (b), the latter being completely beyond the reach of the Anti-SLAPP statute, while the former being potentially subject to the Anti-SLAPP statute, but statutorily *exempted* from it. Respondents conflate these two subdivisions of CCP § 425.17. (See e.g., RB p. 25, citing *Sandlin v. McLaughlin*, (2020) 50 Cal.App.5th 805, 818 [a case involving an exemption under Code Civ. Proc., § 425.17, subd. (c)]; and *City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, [a case involving an exemption under Code Civ. Proc., § 425.16, subd. (e)].)

Respondents also appear to erroneously conflate the need for extrinsic evidence to make a showing of likelihood of success

on the merits (the second prong of the Anti-SLAPP analysis under CCP § 425.16) with the need for extrinsic evidence to make a showing that the lawsuit is safe-harbored from the Anti-SLAPP statute under CCP § 425.17, subd., (b). (See e.g., RB pp. 30 and 31.) The trial court's reliance on extrinsic evidence, or the absence of such evidence, is not a mere evidentiary ruling reviewed for abuse of discretion. Instead, it is a substantive misapplication of the statutory standard for determining whether the complaint is subject to anti-SLAPP analysis, an issue of law that is reviewed *de novo*. (AOB pp. 23-25; 32.)

San Diegans for Open Government v. Har Construction, Inc., (2015) 240 Cal.App.4th 611, the case Respondents primarily rely on for the proposition that a court must look to the "whole record" rather than just the allegations of the complaint, says nothing of the kind, and Respondents provide no pin citation to the case that would support the contention. (RB pp. 25-26). In fact, the Court *explicitly held to the contrary*: "Moreover, the applicability of [CCP § 425.17, subd. (b)] (including the financial burden element) is determined by examining the allegations of the complaint, and does not require the plaintiff to proffer affirmative evidence." (*Id.* at 628.)

Indeed, it is common sense and wise policy to limit the scope of review at the exception determination stage of an Anti-SLAPP motion analysis; otherwise, an exception determination in and of itself becomes an evidentiary battle. The legislature did not contemplate "mini-trials" take place to determine whether a case is not subject to the Anti-SLAPP statute in the first place.

Respondents' tortured reading and analysis of *Tourgeman v. Nelson & Kennard* (2014) 222 Cal.App.4th 1447 (*Tourgeman*) and *People ex rel. Strathmann v. Acacia Research Corp.,* (2012) 210 Cal.App.4th 487 (*Strathmann*) is nearly unintelligible. (RB at pp. 25-27). Respondents admit that the *Tourgeman* Court looked only to the complaint to determine applicability of the public interest exception, but they then attempt to distinguish that case by claiming the Court had "nothing more to consider" but the complaint, as if to suggest that had the Court been in possession of extrinsic evidence it would have considered it. Again, Respondents make inferences that are simply unsupported. (RB p. 26.) Respondents provide no pin citation to the *Touregman* case to support their attempt to distinguish it. Ironically, the Defendant in *Touregman* made the exact same argument that Respondents make here, an argument that was *explicitly rejected* by the Court:

> "Respondents again contend, without citation to authority, that Tourgeman was required to make an evidentiary showing in order to establish [the financial burden prong of the public interest exception], arguing that Tourgeman failed to 'submit any *evidence* of the financial burden this litigation would have imposed on him relative to his stake in the matter.' (Italics added.) We reject this argument. As discussed previously, the applicability of the public interest exception is determined by examining the *complaint*."

(*Tourgeman, supra,* 222 Cal.App.4th at 1466.)

Respondents then commit the same errors in logic with their short discussion of *Strathmann*, interpreting the Court's

footnote 3 to mean that had the Court had extrinsic evidence before it, the Court would have considered it in determining whether the public interest exception applied (RB p. 27), despite the very clear language of the Court:

> To determine whether Strathmann's qui tam lawsuit met [the definitions of "brought solely in the public interest or on behalf of the general public"], ***we rely on the allegations of the complaint*** because the public interest exception is a threshold issue based on the nature of the allegations and scope of relief sought in the prayer. (See *Northern Cal. Carpenters Regional Council v. Warmington Hercules Associates* (2004) 124 Cal.App.4th 296, 300 [20 Cal. Rptr. 3d 918] [concluding action was brought solely in the public interest based on allegations of the complaint].)

(*People ex rel. Strathmann v. Acacia Research Corp.* (2012) 210 Cal.App.4th 487, 499-500 [Emphasis added].)

The *Strathmann* Court held that CCP section 425.17(b) was intended to safe harbor private attorney general actions from the Anti-SLAPP statute, and that because a qui tam lawsuit is, by its very nature, a private attorney general lawsuit, Strathmann's lawsuit excepted from the Anti-SLAPP statute by C.C.P., section 425.17(b), even though he sought to personally recover millions of dollars in penalties in the action. (*Id.* at 501.)

In the recent case *Lindsay v. Patenaude & Felix APC* (2024) 107 Cal.App.5th 335, the Court of Appeal reversed a trial court's order striking the complaint, finding that the Plaintiff's lawsuit satisfied the public interest exception of CCP § 425.17(b). The Court held that a trial court is to review the *complaint* to determine whether the elements of CCP § 425.17(b) have been

met because that is a threshold issue that must be addressed before engaging in the Anti-SLAPP analysis.

The *Lindsay* Court stated:

> This appeal is not the first time this court has been presented with a case in which we have been called upon to interpret the phrase "solely in the public interest or on behalf of the general public" within the meaning of section 425.17, subdivision (b). *Tourgeman* held that, as used in section 425.17, subdivision (b), "'the term "public interest" [refers to] … suits brought for the public's good or on behalf of the public'" and "[t]he term 'solely' … 'expressly conveys the Legislative intent that [the public interest exception] not apply to an action that seeks a more narrow advantage for a particular plaintiff.'" (*Tourgeman, supra*, 222 Cal.App.4th at p. 1460.)
>
> To determine whether [Lindsay]'s lawsuit met those definitions, 'we rely on the allegations of the complaint because the public interest exception is a threshold issue based on the nature of the allegations and scope of relief sought in the prayer.'" (*Tourgeman, supra*, 222 Cal.App.4th at p. 1460.) So doing, we conclude the complaint in this case does not seek an advantage for Lindsay that is "more narrow" (or different in any way) than the advantage it seeks for the putative plaintiff class. Hence it qualifies as an "action brought solely in the public interest or on behalf of the general public" within the meaning of *Tourgeman* and section 425.17, subdivision (b).

(*Lindsay v. Patenaude & Felix APC* (2024) 107 Cal.App.5th 335, 344-345.)

The trial court in the case at bar committed reversible error in considering "the lack of supporting declarations by plaintiffs" (RB p. 24, citing trial court ruling at AA353), as well as

Defendants' declarations and judicially-noticed outside materials, to determine whether Plaintiffs' lawsuit was brought solely in the public interest or on behalf of the general public. (CCP §425.17(b); AOB pp. 31-33.)

Based upon the allegations contained in the operative Complaint, all elements of CCP §425.17(b) were met. Plaintiffs' complaint was "brought solely in the public interest or on behalf of the general public." This Brown Act citizens suit is precisely the type of case the Legislature sought to "safe harbor" from an Anti-SLAPP motion. As a result, the anti-SLAPP motion should have been denied without reaching the merits. (*Strathmann, supra,* 210 Cal.App.4th at 498.)

B. Respondents' Claim That the Brown Act Lawsuit Was "Politically Motivated" Is Not Supported By the Record or Case Law, and, In Any Event, Is a Side Issue.

Respondents claim that Plaintiffs' Complaint demonstrates "political motivation." (RB p. 29.) In support, Respondents cite to paragraphs in the Complaint. (RB p. 30). However, these paragraphs do not state any political position or persuasion one way or another.

For example, Respondents cite to paragraphs 4, 5 and 8 of the Complaint, but these paragraphs simply allege that three of the seven Plaintiffs attend City Council meetings. (AA0021-0022.) As another example, Respondents point to paragraphs 9 and 19, characterizing those allegations as gratuitous statements and stating that all "Plaintiffs oppose" a development agreement.

These speculative claims are unsupported by the record, and demonstrate that politics is in the eye of the beholder. (RB p. 30). There is nothing in the Complaint, on its face or "between the lines," that supports Respondents' theory that this Brown Act lawsuit is "politically motivated."

In any event, arguably, every Brown Act lawsuit could be perceived as politically motivated because local agencies are, by their very nature, political, and matters involving government are inherently "political." That does not mean *ipso facto* that Brown Act lawsuits are "politically motivated." Moreover, Respondents do not explain what "politically motivated" even means, and cite to no case law authority defining that term so as to assist this Court with distinguishing a "politically-motivated" Brown Act lawsuit from one that is not. Respondents do not cite to even one Anti-SLAPP appellate opinion holding that a Brown Act case was not brought solely in the public interest or on behalf of the general public because it was "politically motivated."

Respondents do not meet Appellants' argument that the trial court's implied finding of political motivation was not supported by the Complaint on its face or the extrinsic evidence that was (wrongly) relied upon by the court. (See AOB pp. 33-35.) Instead, Respondents go off into left-field in an effort to distract from the issue at hand. For example, Respondents claim "each closed session Councilmember Rule and Attorney Drucker complained of was convened to discuss the development agreement Plaintiffs oppose." (RB p. 30). This statement is not

supported by the record, which provides no admissible evidence regarding Plaintiffs' positions on the development agreement.

Essentially, Respondents invite this Court to make assumptions as to the positions of Rule and Drucker with respect to the development agreement, and make assumptions about the position of each of the seven individual Appellants on the development agreement. Such speculation is unnecessary. There is no claim in the Complaint and no admissible evidence in the record that Rule and Drucker supported the development agreement or that each Plaintiff opposed it. (RB p. 30). The Court should disregard Respondents' claims as immaterial and unsupported by the record.

Respondents' theory of the motivations behind Plaintiffs' lawsuit apparently arises from Respondents' belief that there was some nefarious wrongdoing going on somewhere, and speculative *ad hominem* attacks on the motives of one of Plaintiffs' attorneys and her clients. (See e.g., RB pp. 32; 33).[1] Appellants have never

[1] The Respondents attempt to distract this Court from the important questions of law raised by this appeal by inserting speculative and personal attacks on the motives of Appellants' attorney Sabrina Venskus. (See, e.g., RB p. 13 ["Attorney Venskus assembled a group of seven plaintiffs and filed a lawsuit…"]; RB p. 28 ["Now, Attorney Venskus stands before this Court weighing in on a political dispute… in a naked attempt to ban Councilmember Rule from making specific public allegations about her"]; RB p. 33 ["…[I]f 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."]). Those attacks are improper and should be disregarded. An attorney should not "disparage the intelligence, integrity, ethics, morals or behavior of… other

taken issue with Respondents' beliefs that some sort of conspiracy was going on between members of the council and one of Plaintiffs' counsel. Nor have Appellants ever taken the position that Respondents' conspiracy theories constitute confidential closed session information. Appellants do not dispute that Respondents were perfectly entitled to state their conspiracy theories to the public, such as those that are set forth in portions of "Rule's Sunlight Statement." (RB p. 33).

In other words, Appellants do not claim that the *entirety* of "Rule's Sunlight Statement" constituted an unlawful disclosure under Government Code section 54963. Rule's restatements about a conspiracy that she believes exists (RB p. 33) are not at issue in this case, and Appellants take no position on them, because they are irrelevant.

What is at issue is the Respondents' unlawful disclosure of *confidential closed session information*, including content of the City Attorney's attorney-client memorandum itself, which was contained within "Rule's Sunlight Statement" and her agent Drucker's letters, and such verbal disclosures at the dais and at

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counsel, parties or participants when those characteristics are not at issue." (*In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1536–1537.) Attorneys must "treat opposing counsel with 'dignity, courtesy, and integrity.'" (*Snoeck v. ExakTime Innovations, Inc.* (2023) 96 Cal.App.5th 908, 922). Unwarranted personal attacks on the character or motives of the opposing counsel, or witnesses are "inappropriate and may constitute misconduct." (*In re S.C.* (2006) 138 Cal.App.4th 396, 412.)

the podium. As discussed at length in Appellants' Opening Brief, unilateral public disclosure of confidential communications obtained from closed session, such as attorney-client privileged communications, is not only unlawful, but can result in extraordinary harm to the City and its citizenry. (See AOB pp. 26-28; 53).

C. Respondents Use A Straw Man Seeking to Distract This Court From the Topic At Issue Involving the Public Interest Exception.

Respondents use a straw man, suggesting that Appellants "seek a limitless ban barring Defendants from revealing *anything* about closed session meetings to the public." (RB p. 35.) This is not Appellants' position. Appellants seek to keep confidential communications obtained from closed session confidential unless the legislative body agrees to waive confidentiality. (See AA0032, [Prayer For Relief consistently referring to "confidential communications obtained from closed sessions" in each paragraph, and not "any and all information obtained from closed session"].)

In no event can a member of a legislative body *unilaterally* decide that the attorney-client confidentiality privilege is waived. Even a court cannot order disclosure of attorney-client privileged material. (Gov. Code §54960(c)(5), [stating that the procedure described in this "section shall not permit discovery of communications that are protected by the attorney-client privilege."]; *Kleitman v. Superior Court* (1999) 74 Cal.App.4th 324, 327, [courts cannot compel discovery about closed sessions].)

If a court cannot do so, certainly an individual councilmember, acting outside the agreement of the legislative body as a whole, cannot do so. Respondents never address this issue. (See AOB pp. 52-54 and generally RB.) Nor do Respondents respond to the Legislative history of Section 54963 and Appellants' arguments about Legislative intent. (AOB pp. 19-23.)

D. The District Attorney's Conclusion that the City Council's Agenda Notices Were Defective Is Not Relevant To the Question of Whether the Public Interest Exception Applies.

Another straw man used by Respondents is that: "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." (RB p. 38).

First, this is not the injunctive relief that Appellants request. As stated in the Complaint, Appellants seek to enjoin Respondents from disclosing to the public confidential information obtained in closed sessions. (AA0032 [injunctive relief].) Second, Respondents spend many pages of their Opposition Brief pasting in portions of the District Attorney's letter, as if it is germane to Plaintiffs' burden to demonstrate the public interest exemption applies. (RB pp. 35-38.) It is not; Respondents' quotations do not bear on whether Plaintiffs' Brown Act lawsuit was "brought solely in the public interest or on behalf of the general public," and therefore are not pertinent to the analysis required.

However one wishes to characterize the District Attorney's conclusions, whether the District Attorney's conclusions were correct or incorrect is not germane to the question of whether Plaintiffs satisfied the CCP § 425.17, subd. (b) criteria to safe harbor the Brown Act lawsuit from the Anti-SLAPP statute.

Respondents have no answer to Appellants' argument that "the ability of the City Council, as a governing body, to confer confidentially with its legal counsel is essential to its ability to properly function, and protect the interests of its citizens, which is an important right affecting the public interest." (AOB p. 27). Respondents ignore the substantial legal authority cited and discussed by Appellants to support this argument. Respondents do not so much as make a half-hearted attempt at distinguishing this legal authority or explain why it is not applicable. (See AOB p.28 and compare generally RB).

Neither do Respondents have anything to say about Appellants' argument that Plaintiffs do not seek any relief greater than or different from the relief sought for the general public. (AOB pp. 28-29, and compare generally RB; see *Lindsay v. Patenaude & Felix APC, supra*, 107 Cal.App.5th at 344, [applicability of the public interest analysis to a given action requires that the action have been "brought solely in the public interest or on behalf of the general public"].)

E. Respondents Provide No Meaningful Response to the Necessity and Financial Burden Criteria of the Public Interest Exception.

Respondents provide no legal authority supporting their claim that Appellants have not met their burden on the final two elements of the public interest exception: necessity of private enforcement and disproportionate financial burden. (RB pp. 38-39.) Neither do Respondents explain why or how the cases cited and discussed in Appellants' Opening Brief do not support Appellants. (AOB pp. 29-30.) While Respondents make mention of a City Council motion involving Defendant Rule's conduct during one meeting, and a public workshop, they utterly fail to explain how those two actions demonstrate that Plaintiffs have not met the necessity and financial burden elements. (RB p. 39).

III. APPELLANTS DO NOT CONCEDE THAT THE CONDUCT AT ISSUE INVOLVED FIRST AMENDMENT SPEECH

Respondents claim, again without citation, that Appellants have conceded that Respondents' disclosure of confidential information was "protected speech" under the First Amendment. (RB pp. 41-42.) Appellants make no such concession. (See generally AOB.)

It is well settled that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." (*Garcetti v. Ceballos* (2006) 547 U.S. 410, 421.) "Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official

communications are accurate, demonstrate sound judgment, and promote the employer's mission." (*Garcetti, supra* at pp. 422-423.) The Supreme Court also noted that First Amendment protection does not vest public employees "with a right to perform their jobs however they see fit." (*Garcetti, supra*, at p. 422.)

The California legislature drafted section 54963 of the Brown Act to prevent the disclosure of information obtained from any closed session of a legislative body that was convened to discuss, among other listed topics, "pending litigation." (AOB pp. 19-22, 50-54.) As discussed in Appellants' Opening Brief, that prohibition was designed to protect the public interest in having a functional government, and to discourage by penalizing those who "leak" confidential information obtained from a closed session hearing, (AOB pp.19-22, 50-54; (Appellants' Motion for Judicial Notice ("APP MJN"), APP_MJN003 [CBA 8/26/02].) Respondents' disclosures of confidential information from a closed session convened to discuss "pending litigation" are therefore not "protected speech" covered by the Anti-SLAPP statute.

A. Respondents' Argument That Their Disclosure of Closed Session Information Was Privileged by Civil Code § 47 Is Contrary to the Express Language of the Statute.

Respondents cite Civil Code § 47 as providing Respondent Rule with a "legislative privilege" to disclose confidential information obtained from a closed session. (RB pp. 42-43.) There are two fatal problems with this argument.

First, Civil Code § 47 explicitly states that the legislative privilege only applies to the "proper discharge of an official duty" and does not apply to any disclosure that "[v]iolates a requirement of confidentiality imposed by law." (Civil Code §§ 47(a), (d)(2)(C).) That is *precisely* what Plaintiffs alleged in their Complaint: that Rule's disclosure of confidential and attorney-client privileged information from closed session violated the confidentiality provisions of the Brown Act, and was thus improper and unlawful. (AA0029-0032.) Respondents attempt to bypass the obvious flaw in their argument by claiming that Appellants are seeking to prohibit comment on "*anything* occurring in closed session" whether the information is confidential or not. (RB pp. 42-43.) That is not the case. The Complaint is clear that Plaintiffs are seeking declaratory relief that Rule violated the Brown Act by "disclosing confidential communications obtained from closed sessions of the Ojai City Council" and injunctive relief preventing any future "confidential communications obtained from closed sessions of the Ojai City Council." (AA0032.) Respondents' argument that the legislative privilege applies in this instance is simply not supported by the law or the record.

Second, section 47(e)(1) limits the privilege to a report of the proceedings of a public meeting that is "open to the public…" Thus section 47 does not protect a report of a legislative meeting that is closed, as was the case for the three meetings at issue here. (AOB pp. 37-41.) Given the above, Respondents' argument

that the disclosures were privileged under Civil Code § 47 should be rejected.

B. Respondents' Argument That Appellants' Suit Against Drucker Is Barred by Civil Code § 1714.10 Is Factually Unsupported and Meritless.

Respondent Drucker claims that Code of Civil Procedure section 1714.10 bars suit against him. (RB pp. 43-45). It does not.

First, section 1714.10 would only apply if Drucker had engaged in conduct that is "consistent with the normal services of an attorney," which is not the case. Second, the statute does not act as a bar against any suit where a showing of probability of success on the merits can be made.

Code of Civil Procedure 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 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.

However, the statute explicitly states 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." (CCP §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," and does not apply when an attorney "has engaged in affirmative misconduct." (*Burtscher v. Burtscher* (1994) 26 Cal.App 4th 720, 727.)

As the court in *Rickley v. Goodfriend* (2013) 212 Cal.App.4th 1136, 1154 phrased it, "[a]ttorneys are expected to stay within the bounds of law in representing their clients and advising about an appropriate course of action.... Counsel who circumvent established legal channels to accomplish a desired result, participating with the client in a scheme to dispossess the other spouse of his or her claimed property or possessory rights, are not performing the 'normal services of an attorney.' Conduct of this sort exposes counsel to a host of tort claims — including a cause of action for attorney-client conspiracy."

CCP § 1714.10 does not apply because Respondent Drucker's conduct falls well outside the normal scope of obligations of an attorney and involves affirmative professional misconduct. An attorney who receives information from a client that the lawyer knows or should know contains or consists of privileged or confidential material has an ethical and professional obligation **not to read, disclose** or make use of such information. (*Clark v. Superior Court (*2011) 196 Cal.App.4th 37; see also 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].) These professional "obligations are immediately triggered when a review of the materials would lead a reasonably competent attorney to conclude the materials are clearly or obviously privileged." (*McDermott Will & Emery LLP v. Superior Court* (2017) 10 Cal. App. 5th 1083, 1118.)

Respondent Drucker was thus personally bound by an ethical obligation to protect attorney-client privileged and confidential information, even of third parties, and violated that obligation when he read the attorney client memorandum obtained from the closed session and when he received from his client other information about the City Council's discussions with its attorneys. (*DP Pham, LLC v. Cheadle*, (2016) 246 Cal. App. 4th 653, 675.) That ethical violation became orders of magnitude worse when Drucker disseminated information from that attorney-client memorandum and attorney-client privileged conversations *over the objections of the city council as an elected body* and "without a waiver from the holder of the privilege." *(Ibid.;* AOB pp.14; AA151-157.)

Drucker was also not ethically permitted to "act as judge and unilaterally make the determination" that the privilege had been waived or that an exception applied that permitted him to proceed to use the information. (*McDermott Will & Emery LLP v. Superior Court*, *supra,* 10 Cal. App. 5th at 1113.) Thus, Respondent Drucker cannot now claim CCP § 1714.10 protection. His actions violated his professional obligations as an attorney,

and thus were outside the scope of ordinary attorney practice. (*Ibid.*) Additionally, Drucker stated that his appearances before the City Council to discuss closed session information in public were on Respondent Rule's behalf and also his own, which again, indicate that his conduct was not that of a normal attorney, and that he had a personal interest in infringing upon the attorney-client privilege held by the City and in disclosing confidential information from its closed session. (AOB p. 15, AA167-168, 171-172, 174, 177-178.).

Finally, even if CCP § 1714.10 did apply here, it would not dispose of the case on the merits. The statute simply requires a showing of a probability of success on the merits in order to be able to proceed. Since Plaintiffs *can* show a probability of success on the merits of their Brown Act case, as set forth in the opening brief and below, the case would proceed. (AOB pp. 36-55, Section IV *infra*.)

IV. APPELLANTS DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS

A. Respondents Concede That They Disclosed Information Obtained From A Closed Session.

Respondents argue, incorrectly, that Appellants failed in their opening brief to identify any specific statement of theirs that revealed closed session information. (RB pp. 45-48.) The essence of this argument appears to be that because Appellants' Opening Brief fails to repeat Respondents' statements disclosing confidential information verbatim, and instead cites to the

evidence in the record of those statements, the briefing is somehow defective. The claim is not true.

There is *ample* evidence in the record, some provided by Respondents themselves, that they disclosed confidential and attorney-client privileged information from the closed sessions. Appellants' Opening Brief cited to Respondents' numerous verbal and written statements in the record revealing closed session information, and explained at length in their Opening Brief why those statements constituted disclosure of confidential information. (AOB at pp. 13-16, 37-41; AA052-081, 102-185, 275-308.) Appellants' discussion and analysis in this regard included citations to the record as well as direct quotes from Respondents wherein they revealed confidential and attorney-client privileged information. (*Ibid.*)

Appellants also provided copies of the transcripts of City Council public hearings where Respondents made this information public, and Respondents *themselves* provided copies of the letters they released publicly disclosing statements made by councilmembers while discussing litigation strategy and also publicly disclosing the strategy itself, including the contents of an attorney client privileged memorandum presented at the closed sessions. (AA52-81, 102-108, 129-185.) Thus, Respondents' argument is puzzling at best, if not spurious.

For example, in her January 24th letter, Respondent Rule recognized the importance of maintaining the confidentiality of closed sessions where pending litigation is discussed:

> A closed session is where a city council can discuss an item that if done in public would be bad for the city. For instance, to confidentially discuss existing litigation in a closed session might be a good idea: it allows a city to discuss lawsuits without tipping off the other side to your legal strategy. (AA47.)

Rule nonetheless spent the next four pages revealing legal strategy in pending litigation, and the details of discussions that occurred between councilmembers and their attorneys regarding pending litigation against the City during three closed sessions. (AA77-80.) The City had been sued for approving a development agreement, and a referendum petition requesting that the same development agreement be put to public vote had just been presented to the City. (AOB p. 12; AA24 [¶20-22].) The three closed sessions Respondent Rule described in detail in her letter were convened to discuss how the City would respond to the lawsuit given these circumstances, and included meetings with the city's legal counsel. (AOB pp. 12-13; AA25-26 [¶¶24-29]; AA121-126.)

Respondent Rule revealed the contents of a presentation to the council in the closed session by their attorney, including specifically that the attorney "gave her take on the defense of a potential lawsuit by the Becker Group. Her options included the City buying the properties or exercising eminent domain to acquire them, changing the zoning, subjecting the buildings to historical protection, and imposing rent stabilization controls, among other things." (AA78-79.) Rule also described in blow-by-blow fashion the conversations in each closed session between councilmembers discussing how to respond to the lawsuit,

including multiple direct quotes from multiple councilmembers. (AA77-80.) Respondent Rule thus revealed an attorney-client discussion of litigation strategy to the public, as well as discussion between councilmembers that were "related to the basis" for the council to meet in closed session, and were thus "confidential" under the Brown Act. (Gov. Code §54963(b); AOB pp. 41-54; Section B, *infra*.)

There is thus substantial evidence in the record that Respondents disclosed information they obtained from closed session meetings of the City Council. Respondents in fact freely concede that they publicly released this closed session information, because they appear to believe, incorrectly, that the closed session information and attorney-client memorandum were not "confidential" under the Brown Act. (AA43:1-10; 53-54 [¶9]; 58-60; 64; 66; 72-73; 361.) As set forth below, Respondents are plainly wrong as a matter of law on this point.

B. Respondents' Contention That the Information Disclosed Was Not Confidential Lacks Merit.

The closed session information disclosed by Respondents included the contents of an attorney-client memorandum, attorney-client discussions, and councilmember statements from discussions regarding the City's response to litigation that had been filed against it and how to address that litigation given the referendum petition that had been approved by voters. (AOB pp. 13-16; 37-40; 52-74; 75-81.). Respondents repeatedly state in their brief that the information described above was not "confidential" under the Brown Act, but do not provide a coherent

argument as to ***why*** that information was not confidential. Respondents' brief is completely devoid of any analysis of the law, the legislative history or any application of the law to the facts of this case that would explain why Respondents believe the information they disclosed was not "confidential."

Respondents also failed in their brief to substantively address *any* of the arguments in Appellants' Opening Brief regarding the history of the Brown Act provisions protecting the confidentiality of closed session discussions and why the information revealed was plainly confidential. Respondents' brief contains no real analysis of the issue of what constitutes "confidential" information under the Brown Act other than a short argument that confidentiality under the Brown Act must be read narrowly and that the Brown Act does away entirely with attorney-client privilege, (RB pp. 52-55), which is incorrect.

Respondents fail to address Appellants' argument that the agenda notices at issue were not defective. (AOB pp. 41-43.) Respondents' argument in the trial court below was that the City had identified the wrong type of "pending litigation" in its agenda notices, and that the City should have used the safe harbor notices for "exposure to litigation" and "initiation of litigation" in addition to the "existing litigation" safe harbor notice. (AOB p. 46; AA43:3-10; 53-54 [¶9]; 64; 66; 72-73; 361.) Appellants made three distinct arguments in their Opening Brief in response.

First, when a party to a lawsuit discusses strategies for dealing with "existing litigation," that discussion may naturally

encompass, as it did here, a discussion of strategic lawsuits the party may bring in response, and may also include a discussion of whether actions taken by the party in response may lead to additional litigation or claims from the opponent or third parties. So long as the strategy discussion is related to the "existing litigation" it is nonetheless proper. (AOB pp. 42-43.) Further, Appellants submitted evidence that the *Simply Ojai* lawsuit and the strategy to respond to it *was* in fact discussed at the closed sessions. (AOB pp. 41-43.) Respondents' brief failed to address this argument.

Second, Appellants' Opening Brief argued that the agenda notices substantially complied with the Brown Act, because even if additional safe harbor notices were required, those notices would not have provided the public with any additional information not already provided in the agenda notices. (AOB pp. 45-48; *Castaic Lake Water Agency v. Newhall County Water Dist*. (2015) 238 Cal.App.4th 1196, 1207 [finding that Water District had substantially complied with the Brown Act despite error in closed session notice, since the error "could not possibly have misled or confused anyone" and the notice was "sufficient to apprise the public" of what was being discussed in closed session].) Respondents failed to address this argument as well.

Third, Appellants argued that even if the City's agenda notices were defective, that did not render the closed session attorney-client discussions not confidential under the Brown Act. (AOB pp. 48-54.) Appellants pointed out that the Brown Act protects the confidentiality of discussions that are "specifically

related to the basis for the legislative body of a local agency to meet lawfully in closed session." (AOB p. 50.) Appellants analyzed the legislative history of section 54963 and showed that the legislature clearly intended to protect discussions in closed session so long as the *topic* was one of the listed proper bases for a closed session. (AOB pp. 48-54.) Appellants showed that there was no language in the statute or legislative history that indicated an intent to punish legislative bodies with a waiver of confidentiality and attorney-client privilege for minor defects in agenda notices, and that in fact the language suggested just the opposite. (*Ibid.*). Respondents also failed to respond to this argument.

Appellants also argued that the trial court had misread the term "basis" to mean "basis for the notice" instead of "basis for a closed session," thereby reading a severe penalty into the Brown Act - waiver of confidentiality- that does not exist at all in the Act's express language and runs contrary to the legislature's stated intent in adopting the statute, as well as every court opinion and attorney general opinion that has addressed the issue of closed session confidentiality. (AOB pp. 48-54.) This severe penalty would harm the public interest for even minor, technical violations of the Act, and, as Appellants argued, there was absolutely no evidence in the legislative history record that the legislature intended such a result. (*Ibid.*) Respondents wholly ignore this line of argument, too.

The one argument Respondents did make regarding whether attorney-client communications are not confidential

under the Brown Act should be rejected because Respondents completely ignore the language of section 54956.9, (the provision they rely on for their argument), as well as the legislative history, the case law and the attorney general opinions regarding Brown Act confidentiality. (RB pp. 52-55, compare AOB pp. 48-54.)

In *Roberts v. City of Palmdale*, (1993) 5 Cal.4th 363 ("*Roberts*") the California Supreme Court specifically answered, in the negative, the following question regarding the meaning of section 54956.9: "Was a 1987 amendment to the Brown Act intended to abrogate the attorney-client privilege as it applies to the communication of written legal advice by a city attorney to a city council?" (*Roberts*, *supra*, at 367.)

> We see nothing in the legislative history of the amendment suggesting the Legislature intended to abrogate the attorney-client privilege that applies under the Public Records Act, or that it intended to bring written communications from counsel to governing body within the scope of the Brown Act's open meeting requirements.

(*Roberts, supra,* at 377.)

What the Brown Act intended to accomplish was to allow assertions of attorney-client privilege and confidentiality for closed session meetings regarding any of the subjects authorized by the Brown Act as being appropriate for closed session. (§54963(a), [specifying that confidentiality applies to any closed session authorized by §§54956.7, 54956.8, 54956.86, 54956.87, 54956.9, 54957, 54957.6, 54957.8, or 54957.10.) One of the subjects the legislature deemed appropriate for closed session

discussion was "pending litigation," and the legislature defined what the term meant and stated that attorney-client privilege would apply to a discussion of this subject in closed session. (§54963(a); §54956.9; AOB pp. 48-54.)

Here, Respondents argued that what was discussed in closed session was "exposure" to litigation and "initiation" of litigation, not "existing" litigation as stated in the agenda notice, and thus the notice listed the wrong type of "pending litigation." (AA42:3-8, 43:3-10, 53-54 [¶9], 63-64, 66.) The problem for Respondents is the very statute they rely on defines "exposure" to litigation and "initiation" of litigation as types of "pending litigation" *that may be appropriately discussed in closed session*. (§54956.9(d)(2),(4).) Since discussion of these subjects can form the proper basis for a closed session pursuant to section 54956.9(d), that means that closed session discussion of these subjects is both confidential and attorney-client privileged under section 54956.9 of the Brown Act.

Respondents argue that confidentiality and the attorney-client privilege provided by the Brown Act must be read "narrowly," and scoff at the idea that the legislature considered proper protection for confidentiality and attorney-client privilege as equally important. (RB pp. 52-55.) However, it was the *Legislature itself* that identified these two interests as equally important: "The Brown Act represents the Legislature's determination of how to strike a balance between public access to meetings of multi-member public bodies on the one hand, and the need for confidential candor, debate, and information gathering

on the other." (APP_MJN003-4, [California Bill Analysis, Assembly Floor, 2001-2002 Regular Session, Assembly Bill 1945, (As Amended August 26, 2002)].) The Supreme Court has also recognized that these two competing interests are equally important:

> Despite the broad policy of the act to ensure that local governing bodies deliberate in public (see §§ 54950, 54953), the act itself incorporates the attorney-client privilege as to written materials distributed for discussion at a public meeting. (§ 54957.5.) *Courts, too, have interpreted the act as broadly preserving the attorney-client privilege for local governing bodies*. . . . These courts recognize that public entities need confidential legal advice to the same extent as do private clients: "'Government should have no advantage in legal strife; neither should it be a second-class citizen. ... " Public agencies face the same hard realities as other civil litigants. An attorney who cannot confer with his client outside his opponent's presence may be under insurmountable handicaps.'"
>
> (*Roberts v. City of Palmdale, supra*, 5 Cal.4th at 373-374 [emphasis added].)

Importantly, there is absolutely nothing in the text or history of the Brown Act that suggests that the legislature considered rescinding the attorney-client privilege as a punishment for defects in agenda notices, nor would such an extreme punishment make sense given the above. (AOB pp. 48-54.) Thus, while it is true that provisions of the Brown Act are intended to be construed broadly to effect the purpose of transparency and public participation, they are not intended to be construed so broadly that they tread on the ability of legislative bodies to seek confidential advice of counsel in order to protect the public's interest. (*Ibid;* APP_MJN003-4, [California

Bill Analysis, Assembly Floor, 2001-2002 Regular Session, Assembly Bill 1945, (As Amended August 26, 2002)].)

Finally, Respondents seem to argue that the quotations and summaries they revealed of councilmember discussions in closed session did not reveal any "confidential" information under the Brown Act. That would be incorrect. For example, several of the quotations from the closed sessions regard the reasons put forward for hiring outside counsel for advice on the lawsuit and its subject, the development agreement, and a spirited debate that ensued on the topic. (AA77-78, 80). These councilmember statements occurred in the context of discussing and debating "pending litigation" and whether the council should retain outside attorneys for advice, and were thus "confidential" under the Brown Act because they were related to a proper statutory basis for the council to meet in closed session. (§54963(b).) The legislature specifically recognized "the need for confidential candor, debate, and information gathering" when it passed section 54963, which is why debate related to "pending litigation" in closed session is provided confidentiality under the Brown Act. (APP_MJN003-4 [California Bill Analysis, Assembly Floor, 2001-2002 Regular Session, Assembly Bill 1945, (As Amended August 26, 2002)].)

This confidentiality allows for "full and frank communication" about topics which are important to the proper functioning of government. (*Roberts, supra,* 5 Cal.4th at p. 380.) If members of legislative bodies fear that their statements in closed session about pending litigation will be publicly disclosed,

it will discourage frank discussion, and defeat the purpose of the confidentiality provisions of the statute. Further, members of legislative bodies whose closed session conversations are publicly leaked in violation of the Brown Act are further put at the disadvantage of being unable to confirm, deny, provide context, or otherwise respond to the statements without themselves violating the Brown Act. (See AA 160:2-10; 162:6-20; 122, 195-196, [¶¶5-6].)

If Respondents believed that misconduct or impropriety had occurred at the closed sessions, the Brown Act provided them with a number of remedies to address that issue, but public disclosure of the content of closed session conversations is not among those available remedies. (AOB pp. 53-54; see Section D, *infra*.)

For the above reasons, Respondents' disclosures of quotations and discussions between councilmembers during the closed sessions violated the Brown Act.

C. Respondents' Argument That Their Disclosures Were Mere Expressions of Opinion Lacks Merit.

Respondents next attempt to recast their disclosures as simply expressing an "opinion concerning the propriety or legality of actions taken by a legislative body of a local agency in closed session." (RB pp. 48-51.) Respondents provide no analysis of facts or law that would support a finding that their disclosures were merely "opinion"; to the contrary, record evidence and case law demonstrate that Respondents' disclosures went *far* beyond mere "opinion."

An "opinion" is commonly understood in the law to be a statement of belief, while "facts" are understood to be the statements of objective reality that underlie and support an "opinion." (See *Milkovich v. Lorain Journal Co*. (1990) 497 U.S. 1, 17-23 [discussing the distinction between "fact" and "opinion" with respect to defamation claims].) In this case, Respondents' "opinion" is that the discussions in closed session exceeded the scope of the agenda notices for the closed sessions. However, Respondents did much more than merely present that opinion. Instead, they made numerous, detailed public disclosures of the "facts" they believed supported their opinion. (AOB at pp. 13-16, 37-41; AA52-81, 102-185, 275-308.) They disclosed, verbatim, what they contended were statements made by Rule's fellow councilmembers and by attorneys for the City in the closed sessions. (*Ibid*.). They publicly disclosed the contents of an attorney-client memorandum provided in the closed session. (*Ibid*.) They publicly disclosed the potential strategy of the City for dealing with litigation that was pending against it that was presented in closed session. (*Ibid*.)

These disclosures were not statements of "opinion," they were statements of *fact* -- assertions of the objective reality of what was actually discussed between councilmembers and their attorneys and the information on legal strategy that was provided in the closed sessions. If a statement of "opinion" pursuant to section 54963(e)(2) was read so broadly as to permit the disclosure of detailed facts of the conversations and attorney-client privileged material from closed sessions, it would

completely vitiate the confidentiality protections created by the statute and defeat the statute's purpose. (*Merced Irrigation Dist. v. Superior Court* (2017) 7 Cal.App.5th 916, 925 [When interpreting a statute "courts must (1) select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and (2) avoid an interpretation that would lead to absurd consequences."].)

Additionally, it is not just Respondents' public disclosures which violated the Brown Act. The Brown Act forbids the sharing of confidential closed session information with anyone not present in the closed session meeting. (§54963(a), *See also* 03 Ops. Cal. Atty. Gen. 604 [finding that "[w]here a member of a city council or county board of supervisors is appointed to sit as that body's representative on the governing board of the Coachella Valley Mountains Conservancy, the appointee may not disclose to his or her appointing authority *or its counsel* information received in a closed session of the governing board." [emphasis added].) It is clear that Rule shared the actual attorney-client memorandum she obtained from the closed session meeting with her agent, Drucker, and possibly others, who were not present at the closed session meeting. (AOB p. 40; AA0060.) Drucker knew the title of the memorandum and who wrote it. (AA0060.) He described in detail the contents of the memorandum and even the strategies for dealing with the litigation that it discussed. (*Ibid*.) Sharing a copy of the attorney-client privileged memorandum outside of the

closed session meeting cannot possibly be described as merely an expression of "opinion."

Finally, the exception in section 54963(e)(2) of the Brown Act that permits "[e]xpressing an opinion concerning the propriety or legality of actions taken by a legislative body of a local agency in closed session" applies, by its own language, only to "actions taken" by the legislative body in closed session. "Actions" taken in closed session are defined by section 54957.1 of the Brown Act as approvals by the legislative body that require a vote, and those "actions" must be reported out to the public after the closed session. Here, Respondents do not contend, nor does the record suggest, that any "action" was taken by the Council in closed session. Thus, contrary to Respondents' suggestion, section 54963(e)(2) would not apply to these disclosures since they were not about an "action" taken in closed session.

D. The Legislature Intended to Provide Citizens with a Remedy to Prevent the Improper Disclosure of Confidential Information by Bad-faith Actors.

There can be no real dispute but that the legislature when it drafted the Brown Act intended to balance the need for transparency and accountability in government with the equally important need for legislative bodies to occasionally meet in private to have confidential discussions, particularly when seeking the advice of legal counsel. We know this because the legislature *explicitly said* that these were the interests it was balancing: "The Brown Act represents the Legislature's determination of how to strike a balance between public access to

meetings of multi-member public bodies on the one hand, and the need for confidential candor, debate, and information gathering on the other." (APP_MJN003-4 [California Bill Analysis, Assembly Floor, 2001-2002 Regular Session, Assembly Bill 1945, (As Amended August 26, 2002)].)

The need for a legislative body to have frank and honest discussions in private with its legal counsel has long been recognized in the law, and has been recognized by the California Supreme Court. (*Roberts v. City of Palmdale*, *supra*, 5 Cal.4th at 373-374.) While many Brown Act cases address the transparency side of the statute, this case involves the equally important side of the statute designed to permit some confidential discussions and debate to be had by legislative bodies, particularly when those discussions involve advice of counsel regarding pending litigation.

The legislative intent of section §54963, which preserves the confidentiality of closed session discussions, was to penalize those who "leak" confidential information obtained from a closed session hearing, not to penalize the local governing body (and the populations they serve) by involuntarily waiving attorney-client privilege as a penalty for minor defects in their agenda notices. (APP_MJN003.) When AB 1945, the bill which enacted §54963, was introduced, it originally restricted the authority to enforce the provisions of the Brown Act related to the protection of confidential or privileged closed-session information to local agencies, but the bill was then amended to remove that restriction and "[a]llow any person, not just local agencies, to

seek injunctive relief" for violations of the confidentiality provisions of the Brown Act. (APP_MJN002,4). Given the importance of maintaining the confidence of attorney-client privileged communications and the damage that can result to the public from their disclosure, the legislature thus reserved a right for the public to bring a citizen suit to protect the confidentiality of such communications.

If Respondents truly believed that the closed session discussions did not comply with the Brown Act and should be made public, the Brown Act provided them with a number of remedies. Respondents' remedy under the Brown Act for what they perceived as a violation of the notice requirements of §54956.9(g) was to bring a judicial enforcement action under §54960 or 54960.1. They could have sought declaratory relief that the statute had been violated, an injunction preventing future violations, and an order to record future closed sessions. They could also have approached the district attorney or the grand jury in confidence regarding their concerns under section 54963(e).

Respondents were aware of these remedies. In fact, Drucker cited the enforcement provisions of the Brown Act at length in both his January 24 and January 26, 2023 letter. (AA62-63, 71.) It thus appears that while Respondents were aware of the remedies available to them under the statute, they simply chose to ignore them in favor of making a public spectacle of revealing closed session attorney-client privileged material, an action which was plainly forbidden by the Act.

The disclosure harmed the City's ability to discuss litigation in closed session and put the City at a disadvantage and at substantial exposure to litigation from a third party or parties that would be impacted by the City's strategy in dealing with a lawsuit and referendum over the development agreement. (AA28 [¶40], 199-200 [¶¶15-20], 275-276[¶4].) As discussed at length above and in Appellants' Opening Brief, Respondents' conduct is *precisely* the type of conduct the legislature was seeking to prevent under the Brown Act. (AOB pp. 22-23; see also Rule of Professional Conduct 4.4; *Clark v. Superior Court*, *supra*, 196 Cal.App.4th 37; *McDermott Will & Emery LLP v. Superior Court*, *supra*, 10 Cal. App. 5th at 1113-1118.) It is also the type of conduct which the legislature empowered affected citizens to bring a court action to enjoin.

V. RESPONDENTS FAIL TO ESTABLISH THAT THEY ARE ENTITLED TO ATTORNEY'S FEES

Respondents do not address most arguments in the Appellants' Opening Brief on the attorney's fees issue.

Respondents claim that "Plaintiffs certainly cite no legislative history here." (RB p. 60). Respondents ignore the legislative history contained in Appellants' Motion for Judicial Notice and the Opening Brief's discussion of this legislative history demonstrating that the legislative intent of CCP section 425.16(c)(2) is to exclude Brown Act, California Public Records Act ("CPRA"), and Bagely-Keene Act citizen suits from the general rule that prevailing defendants in an Anti-SLAPP motion

are entitled to attorney's fees. (AOB pp. 59-60; see APP_MJN025).

Respondents make a confusing attempt at paraphrasing the trial court's mistaken reasoning about CCP § 425.16(c)(2)'s statutory construction. Respondents equate "Chapter 9" which is the entire Brown Act with "Chapter 2 (commencing with Section 7923.100) of Part 4 of Division 10 of Title of the Government Code" which is a citizen suit provision of the CPRA. (RB p. 60.) Respondents are comparing apples to oranges and therefore are making an error in logic.

Appellants addressed that argument in their Opening Brief by explaining that use of the word "Chapter" for the CPRA in CCP § 425.16(c)(2) is not analogous to the use of the word "chapter" for the Brown Act because those two Acts are organized entirely differently in the Government Code. (AOB pp. 58-59.). Respondents do not respond to this argument.

Respondents also do not address that, in light of the Bagley-Keene Act, CCP § 425.16(c)(2) is internally congruent, thus demonstrating that the legislature intended to exclude Brown Act citizen suits from the Anti-SLAPP statute's fee-shifting provision. (AOB pp. 59-60). In fact, Respondents mention only the Brown Act and California Public Records Act, wholly ignoring the Bagley-Keene Act which Appellants discussed in their Opening Brief. (AOB pp. 59-60.)

Respondents claim that this Court in reviewing CCP § 425.16 (c)(2), "must infer the legislature chose to omit" "any

reference to the 'Ralph M. Brown Act' chapter, generally, or Government Code 54963, specifically." (RB p. 60.) Respondents attempt to support this argument by stating, "the [trial] 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." (RB p. 60).

But the rule stated in *Bitner* does not aid Respondents because it does not apply here. The statute at issue here (CCP section 425.16 (c)(2)) does not exclude the "category" of claims Appellants brought their case under – the Brown Act. In other words, Appellants' Brown Act claim is subsumed in the cited citizens suit provision (section 54960), and thus not omitted by the legislature.

Respondents seem to argue that Plaintiffs could not have brought their lawsuit pursuant to section 54960 or 54960.1 because neither would have been applicable to both Defendants, and therefore Plaintiffs did not in fact bring their lawsuit pursuant to section 54960. (RB p. 61.) For example, Respondents argue that section 54960 applies only to "members of a legislative body" and that because Drucker is not a member of a legislative body, in their view relief could not be had against him under section 54960; therefore, Respondents reason, Plaintiffs did not bring their lawsuit against Drucker pursuant to section 54960.

This argument ignores that Drucker was Rule's agent, acting on her behalf. More importantly, and to the point, this argument does not change the fact that the case *was* brought pursuant to section 54960, and not some other citizen suit provision in some other statute; neither does it change the fact that the legislature explicitly intended to exempt Brown Act citizen suits from the fee shifting provisions of the Anti SLAPP statute.

Respondents argue that section 54960 applies "to stop or prevent violations of the Brown Act or future violations of the Brown Act." (RB p. 61). Respondents reason that since Rule and Drucker already made the illegal disclosures, declaratory relief would provide no relief at all, *ergo*, Plaintiffs could not possibly have brought their Brown Act lawsuit pursuant to section 54960. There is a myriad of problems with this line of argument.

Respondents' bald statement that declaratory relief would "not prevent or stop anything" (RB at p. 61), is untrue and unsupported by legal authority or record citation.

Regardless, declaratory relief *is* available to Plaintiffs according to well-established legal authority. 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.) Respondents demonstrate a fundamental disagreement on statutory interpretation that must be resolved by the Court. (*Ibid*; see also *Hoyt v. Board of Civil Service Comm'rs* (1942) 21 Cal. 2d

399, 401 [the interpretation of ordinances and statutes are proper matters for declaratory relief].) Plaintiffs are entitled to seek declaratory relief to liquidate the uncertainty surrounding the parties' interpretation of the Brown Act, a public interest statute. (*Californians for Native Salmon Etc. Ass'n v. Dep't of Forestry*, (1990) 221 Cal. App. 3d 1419, 1429-1430; *Warren v. Kaiser Foundation Health Plan, Inc.* (1975) 47 Cal.App.3d 678, 683 ["Any doubt should be resolved in favor of granting declaratory relief"].)

Circling back to the issue on appeal -- whether CCP section 425.16(c)(2) excludes Brown Act citizen suits from the Anti-SLAPP attorney's fees provision -- the legislature clearly intended that citizen suits alleging a Brown Act violation should not be subject to liability for defendants' attorney's fees.[2] Both Rule and Drucker are defendants in the Brown Act citizen suit. Attorney's fees are not available to them.

VI. CONCLUSION

Because Appellants' action satisfied each of the requirements of the public interest exception to the Anti-SLAPP law, the action was exempt from application of the Anti-SLAPP law and the trial court's order striking Plaintiffs' Complaint should be reversed.

Even if the action was not excepted from the application of the Anti-SLAPP law, Appellants demonstrated likelihood of

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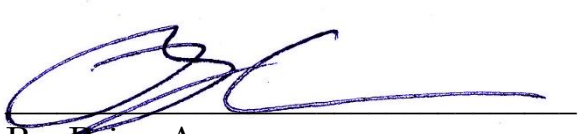
[2] Unless of course the trial court finds that the action was frivolous, which is an extremely high bar, and which the trial court below did not so find.

success on the merits of their Brown Act claim and therefore the trial court's order granting the Anti-SLAPP motion should be reversed. Likewise, the trial court's order granting attorney's fees to defendants should be reversed because whether prevailing or losing, Defendants are not entitled to Anti-SLAPP attorney's fees in a Brown Act citizen suit.

For the reasons set forth above, Appellants respectfully request that the Court grant the relief requested. (AOB p. 60.)

DATED: 2/10/25

LAW OFFICE OF BRIAN ACREE
VENSKUS & ASSOCIATES, APC
LAW OFFICE OF HERB FOX



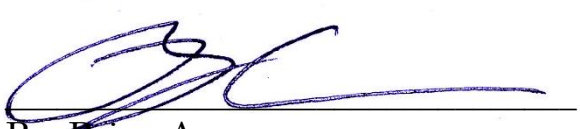
By: Brian Acree
Attorneys for Appellants,
David Byrne, et al.

CERTIFICATE OF WORD COUNT

I certify that, pursuant to California Rules of Court, rule 8.204(c)(1), the foregoing Appellants' Opening Brief is proportionately spaced, has a typeface of 13 points or more, and contains 10,038 words, as determined by a computer word count.

DATED: 2/10/25

Respectfully Submitted,



By: Brian Acree
Attorneys for Appellants,
David Byrne, et al.

PROOF OF SERVICE

I am employed in the County of Ventura, State of California. I am over the age of 18 and not a party to this action. My business address is: Venskus & Associates, A.P.C., 603 West Ojai Avenue, Suite F Ojai, CA 93023. On February 10, 2025, I served the foregoing document described as:

APPELLANTS' REPLY BRIEF

on the interested party/parties below addressed as follows:

SEE ATTACHED SERVICE LIST

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/X/ (BY ELECTRONIC TRANSMISSION) I served the document(s) on the persons listed in the Service List by submitting an electronic version of the document(s) to True Filing through the user interface at www.truefiling.com.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on February 10, 2025, at Port Townsend, Washington.

/s/ Rachael Andrews
Rachael Andrews

SERVICE LIST

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Ventura County Superior Court Attn: Hon. Benjamin F. Coats P.O. Box 6489 Ventura, California 93006-6489	Presiding Judge at Trial Court (Via U.S. Mail Only)

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Case Name: **Byrne et al. v. Rule et al. **C/W B335099****
Case Number: **B332962**
Lower Court Case Number: **2023CUMC008352**

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

2/10/2025

Date

/s/Sabrina Venskus

Signature

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