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' OPENING BRIEF

Brian Acree* (SBN 202505)
LAW OFFICE OF BRIAN ACREE
5042 Wilshire Blvd., Suite 38524
Los Angeles, CA 90036
Phone: (323) 813-5093
Email: brian@brianacree.com

Herb Fox (SBN 126747)
LAW OFFICE OF HERB FOX
1114 State St., Suite 200
Santa Barbara, CA 93101
Phone: (805) 899-4777
Email: hfox@foxappeals.com

Sabrina D. Venskus* (SBN 219153)
VENSKUS & ASSOCIATES, A.P.C.
603 W Ojai Ave., Suite F
Ojai, CA 93023
Phone: (805) 272-8628
Email: venskus@lawsv.com

Attorneys for Appellants

COURT OF APPEAL SECOND **APPELLATE DISTRICT, DIVISION** 6

COURT OF APPEAL CASE NUMBER: B332962

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 219153
NAME: Sabrina Venskus
FIRM NAME: Venskus & Associates, APC
STREET ADDRESS: 603 West Ojai Avenue, Suite F
CITY: Ojai STATE: CA ZIP CODE: 93023
TELEPHONE NO.: (805) 272-8628 FAX NO.:
E-MAIL ADDRESS: venskus@lawsv.com
ATTORNEY FOR (*name*): DAVID BYRNE, et al.

SUPERIOR COURT CASE NUMBER: 2023CUMC008352

APPELLANT/ PETITIONER: DAVID BYRNE et al.,

RESPONDENT/ REAL PARTY IN INTEREST: LESLIE RULE et al.,

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party *(name*): DAVID BYRNE, et al.

2. a. [X] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest *(Explain):*
(1)	
(2)	
(3)	
(4)	
(5)	

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: 7/31/2024

Sabrina Venskus
(TYPE OR PRINT NAME)

Sabrina Venskus
(SIGNATURE OF APPELLANT OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2017]

Cal. Rules of Court, rules 8.208, 8.488
www.courts.ca.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law

Statutes

INTRODUCTION

This an appeal from an order granting an anti-SLAPP motion striking a complaint filed by several residents of Ojai, seeking to enforce the confidentiality of noticed closed sessions of the Ojai City Council, held to discuss pending and potential litigation. Appellants raise three issues:

1) Whether Plaintiffs' action to enforce the Brown Act (Gov't Code §§54950 et al)[1] on behalf of the public is exempt from a Special Motion to Strike? (Civ. Proc. §§425.16; 425.17.)

2) Whether Plaintiffs established a probability of prevailing on their claim that the Brown Act prohibits disclosure of privileged confidential information obtained from a closed session of the City Council, even if the agenda notices for the closed session were defective?

3) Whether the trial court was permitted to impose an attorney fee award against Plaintiffs for their effort to enforce the Brown Act?

STATEMENT OF APPEALABILITY

On October 3, 2023, the trial court entered an order granting Defendants' Special Motion to Strike. (Appellants' Appendix ("AA") 0352-361). Plaintiffs filed a timely Notice of Appeal of that order on October 31, 2023. (Civ. Proc. §904.1(a)(13); AA0367)

On January 30, 2024, the trial court entered an order granting in part Defendants' Motion for Attorneys' Fees and Costs. (AA485-488.) On February 9, 2024, Plaintiffs filed a notice of appeal of the fee order pursuant to CCP §904.1 (a)(2). (AA490) The fee order is appealable as an order after

[1] All subsequent statutory references are to the Government Code unless otherwise stated.

an appealable final judgment. (*Ellis Law Group, LLP v. Nevada City Sugar Loaf Properties, LLC* (2014) 230 Cal.App.4th 244, 251.) Alternatively, the fee order is appealable pursuant to the collateral order doctrine. (*City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 781-782.)

If this Court agrees that the trial court's order granting the anti-SLAPP motion must be reversed, the attorneys fee order is reversed as well. (*Durkin v. City and County of San Francisco*, (2023) 90 Cal. App. 5th 643, 658.)

THE PARTIES

Plaintiffs David Byrne, Vickie Carlton-Byrne, Gerald Schwanke, Thomas Drew Mashburn, Douglas La Barre, Leslie Ferraro and Joel Maharry are individuals who have lived in Ojai for many years. (AA21-22.) These individuals brought this citizen suit on behalf of themselves and the public. (*Ibid.*) They are the Appellants herein.

Defendant Leslie Rule is a newly-elected City Councilmember for the City of Ojai who won her seat in November 2022. Rule was and is a member of the Ojai City Council during all times relevant to the operative Complaint. Defendant Jon E. Drucker, an attorney, was Rule's agent and legal representative during all times relevant to the operative Complaint, and acted within the purpose and scope of the agency, employment, representation, and/or joint venture with Rule. (AA22.) Rule and Drucker are the Respondents.

STATEMENT OF FACTS

At issue is whether Defendants' disclosure of attorney-client communications and council member-discussions that occurred in closed

session meetings of the Ojai City Council violated the Brown Act. That the disclosures *occurred* is not in dispute. Instead, Defendants argued that the disclosures did not violate the Brown Act's prohibition of the disclosure of confidential closed session information.

In October, 2022, the Ojai City Council approved a Development Agreement for the benefit of an entity named the Becker Group. (AA23 [¶19].) In response, a local non-profit called Simply Ojai filed a lawsuit against the City of challenging the Council's approval of that development agreement. (AA24 [¶20].)

In November, 2022 there was an election for City Council resulting in the majority of the City Council being replaced. Betsy Stix was re-elected as Mayor, and Andrew Whitman, Rachel Lang, and Defendant herein Leslie Rule were newly elected to the Council, joining Councilmember Suza Francina. (AA24 [¶21]). In December, 2022 the new city council was seated. (AA24 [¶21]).

Shortly thereafter a referendum petition requesting that the Development Agreement be put to public vote was presented to the City. (AA24 [¶¶21-22].) Accordingly, one of the first challenges the new City Council faced was how to respond to both a lawsuit alleging that the approval of the Development Agreement was improper and a public referendum seeking to overturn the previous Council's approval of the Development Agreement. (AA121-122, 196 [¶7a].)

After receiving the referendum petition, the City Council held closed session meetings on December 13, 2022; January 9, 2023, and January 10, 2023 ("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. (AA25-26 [¶¶24-29]; AA121-126.)

On January 24, 2023, the City Council held a regularly scheduled public meeting. At that public meeting, newly elected Councilmember 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, 2022 closed session discussion of the need to hire outside counsel to provide advice regarding the development agreement litigation (AA77-78);
>
> 2) A detailed discussion of the January 9, 2023 presentation given by outside legal 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 city council by its attorney for dealing with those issues (AA78-79); and,
>
> 3) A detailed discussion of the January 10, 2023 closed session communications between councilmembers, again including alleged direct quotes from council members' discussions, regarding the hiring of outside legal counsel and whether to place a vote to rescind the Development Agreement on the ballot. (AA79-80; 26 [¶30].)

Rule also attempted to read this statement out loud. (AA197 [¶9]; 103 [¶4]; 131-139.)

The Ojai City Attorney immediately advised Rule to cease disclosing closed session information and informed her that doing so violated the closed session confidentiality provisions of the Brown Act. (AA26 [¶31], 131-139.) He also instructed that Rule could approach the District Attorney, confidentially, about her concerns, but that the law did not permit Rule to decide on her own that she could disclose confidential closed session information. (AA132-134.)

Rule disagreed. (AA134.) The Mayor then made a motion to declare Rule out of order and defer discussion of her letter to closed session. (AA134-35; 26 [¶31].) Rule appealed the Mayor's motion and moved to waive confidentiality for the closed sessions, and that motion failed. (AA26 [¶31], 197 [¶9], 136-137 [Rule's motion to be allowed to continue speaking]; 151-57 [motion to waive the privilege].)

At the same public meeting, attorney Drucker explained to the City Council during public comment that he had been hired by Rule as her own personal legal counsel to advise her on the Brown Act and in the dispute regarding whether the closed session information could be lawfully disseminated to the public without the authorization of the City Council. (AA146, 54 [¶10], 57-68.) Drucker handed out to members of the public in attendance at the City Council meeting, a written letter he prepared on behalf of Rule (hereinafter referred to as "the First Drucker Letter"). (AA53-54 [¶¶10,14], 57-68, 103-104 [¶¶5,6], 146, 148.)

The First Drucker letter contained the same disclosures of attorney-client discussions from the December 18, January 9 and January 10 closed session meetings that appeared in Rule's letter, but provided even more detail, including the exact title of the confidential legal memorandum

prepared by the City's outside legal counsel and a more detailed discussion of the confidential legal memorandum's contents. (AA57-68.)

On January 27, 2023, Drucker issued another letter on behalf of Rule urging the City Council not to discipline Rule for disclosing information from the closed sessions, in which he conceded that "Ms. Rule had already disclosed the [closed session] communications in a public statement," but argued that Rule was within her legal right to do so. (AA55 [¶13], 70-74.) He also argued that Rule was within her legal right to publicly release the full confidential legal memorandum prepared for the City Council by the City's outside legal counsel, which he argued was neither confidential nor attorney-client privileged. (AA70-73, 146.) Both the First and Second Drucker Letters were thereafter disseminated to the public. (AA27 [¶36], 55 [¶14].)

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. (AA28 [¶41], 54 [¶12], 35:21-23, 41:2-6, 42:24-27, 43:8-10, 50:10-16.) Drucker also appeared at City Council meetings, occasionally stating that he was representing Rule and occasionally stating that he was appearing on his own behalf, where he acknowledged that the disclosures were of closed session information. (See AA28 [¶38], 105-06 [¶¶9-12], 167-168, 171-172, 174, 177-178.) Drucker continued to argue that disclosure of closed session information, including the contents of the legal memorandum prepared by the city's attorney, was not unlawful. (AA105-106 [¶¶9-14], 165-166, 169, 172, 175-76, 181-182, 184-185.)

On May 15, the District Attorney of Ventura County sent a letter to the Ojai City Council and Rule advising that the City Council had violated the Notice requirements of the Brown Act for discussing matters in closed session

that were beyond the scope of the agendas for closed session, (AA110-13) and that Rule's decision to publicly disclose closed session confidential and privileged communications on her own volition violated the confidentiality provisions of the Brown Act. (AA113-14.)

The following day, the Ojai City Attorney released a Public Memorandum addressing the issue. (AA103 [¶3], AA118-128.) Noting that some factual statements in the District Attorney's May 15th letter were inaccurate (AA122-126 and fn.3), the City Attorney, having participated in all of the closed session meetings (AA75 [¶4]), disagreed with the District Attorney's determination that the City Council violated the Notice requirements of the Brown Act, but agreed that Rule violated the confidentiality provisions of the Brown Act. (AA121-127.)

The City made a number of attempts to rein in the conduct of the Defendants. For example, the City Manager retained an expert in the Brown Act and government ethics, Anne Ravel, former Chair of the Fair Political Practices Commission and Chair of the Federal Elections Commission, to conduct a workshop for councilmembers and the public regarding government transparency with particular focus on closed sessions. (AA103 [¶3]; AA115-117; AA106 [¶13].) Despite this, nothing dislodged Defendants from their position that they can disclose closed session information whenever they determine, in their own judgment, that it should not be kept confidential. (AA35:21-23, 41:2-6, 42:24-27, 43:8-10, 50:10-16, 105-106 [¶¶9-14], 165-166, 169, 172, 175-76, 181-182, 184-185.) This has made it difficult, if not practically impossible, for members of the City Council to effectively

discharge their official duties because closed session meetings are potentially no longer confidential. (AA28 [¶¶40-41], 199-200 [¶¶16-19].)[2]

PROCEDURAL HISTORY

On May 2, 2023 Plaintiffs filed their operative complaint for declaratory and injunctive relief in Ventura County Superior Court seeking redress on behalf of themselves and the public. The complaint alleged that Defendants' disclosures of confidential closed session information, specifically attorney-client communications between the city's attorneys and the City Council, violated the Brown Act. Plaintiffs, on behalf of the public, sought declaratory and injunctive relief to prevent continuing and future disclosures of such confidential, privileged closed session information. (AA20-32.)

On July 27, 2023 Defendants filed a Special Motion to Strike the Complaint under CCP §425.16 (hereinafter "Anti-SLAPP motion"), along with declarations in support thereof. (AA34-81.) Defendants argued that Plaintiffs' Complaint arose out of Defendants' constitutional rights of free speech and petition and that Defendants' disclosure of closed session information was not in violation of the Brown Act because the notices for the closed sessions were faulty, and therefore the closed-session attorney-client communications were *per se* not confidential and could therefore be publicly disclosed. (AA42-43; 43-44; 49-50.)[3]

---

[2] The trial court sustained objections to these paragraphs of the Whitman Declaration on relevance grounds, which is addressed in Section II.B.1.a.
[3] Defendants also raised other legal issues that ultimately were never reached or relied upon by the trial court in its ruling granting Defendants' Anti-SLAPP motion. (See e.g., AA42-47.)

Plaintiffs filed an opposition to the Anti-SLAPP motion, arguing that the lawsuit was not subject to the Anti-SLAPP statute because it was a case brought in the public interest and therefore exempt under CCP §425.17. (AA90-92.) Plaintiffs also argued that they met both prongs of the Anti-SLAPP analysis. (AA92-97.) For the prong two analysis, Plaintiffs relied upon declarations of Brian Acree (attaching documentary evidence) (AA102-187) and Councilmember Andrew Whitman (AA194-200), as well as documentary evidence submitted with Defendants' Motion papers. Plaintiffs also filed Objections to the Drucker declaration. (AA208-211.)

Defendants filed a Reply, along with a Supplemental Declaration of Leslie Rule in support of the Reply, a Request for Judicial Notice attaching a caption page from a different lawsuit, Objections to the declarations of Brian Acree and Andrew Whitman, and an Opposition to Plaintiffs Objections to the Drucker declaration. (AA225-271.) Plaintiffs then filed objections to Defendants reply declarations, and responses to objections. (AA274-348.)

On September 7, 2023 the trial court held a hearing on the Anti-SLAPP motion. (AA351.) The trial court then took the matter under submission. On October 3, 2023, the trial court granted Anti-SLAPP motion. The trial court concluded that Plaintiffs' complaint did not fall under the public interest exemption of CCP §426.17; that the complaint arose from Defendants' constitutional right to free speech; and that Plaintiffs could not show a probability of success on the Brown Act violation claim. (AA352-361.)

On the public interest exemption, the trial court concluded that the lawsuit was politically motivated and therefore not solely brought in the public interest. (AA353-355.) The court also held that plaintiffs were unlikely to succeed on their Brown Act violation claim, finding that the topics of

discussion in the closed sessions exceeded the scope of the agenda notices for the sessions, and therefore the closed session discussions, including discussions with counsel and the legal memorandum, were "not subject to the exceptions permitting confidentiality of the Brown Act" and could be publicly disclosed by Defendants. (AA357-361.)

Plaintiffs timely appealed the Order. (AA367-369.)

Thereafter, Defendants filed a Motion for Attorney Fees and Costs. (AA370-382.) Plaintiffs filed an opposition as well as objections to the declarations in support of Defendants' fees motion. (AA386-408.) Defendants filed a reply brief along with new declarations and new billing statements. (AA409-435.) Plaintiffs filed objections to these declarations. (AA441-452.) The trial court continued the hearing on the motion to allow Defendants to file supplemental declarations and to allow Plaintiffs to file a sur-reply addressing the new evidence filed by Defendants on reply. (AA453.) The trial court held a hearing on the fees motion and later issued an Order granting defendants' attorneys' fees in the amount of $78,885.00 and costs of $1,065. (AA485-488.)

Plaintiffs timely filed an appeal of the fee motion Order. (AA490-495.)

STATUTORY FRAMEWORK

I. THE BROWN ACT

The purpose of the Ralph M. Brown Act (§§54950-54963) is to "facilitate public participation in local government decisions and to curb misuse of democratic process by secret legislation." (*Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 681.) To achieve this goal, the Brown Act imposes an "open meeting" requirement on local legislative bodies. (§§54953 (a),

54951, 54952 (a)). The Act requires that "an agenda be posted at least 72 hours before a regular meeting and forbids action on any item not on that agenda. [Citations.] The Act thus serves to facilitate public participation in all phases of local government decisionmaking and to curb misuse of the democratic process by secret legislation of public bodies." (*Int'l Longshoremen's & Warehousemen's Union v. L.A. Exp. Terminal* (1999) 69 Cal.App.4th 287, 293.)

However, the Brown Act attempts to balance the public's interest in open and transparent government, with the legitimate and equally important need of government representatives to conduct some business in closed session in order to protect the public's interest. (Appellants' Motion for Judicial Notice ("APP MJN"), APP_MJN003-4 [California Bill Analysis, Assembly Floor, 2001-2002 Regular Session, Assembly Bill 1945, (As Amended August 26, 2002), ("CBA 8/26/02")]["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."]) The Brown Act recognizes a number of categories of topics that are permissible for a legislative body to discuss in closed session, including, among other things, real property negotiations, personnel matters, and pending litigation. (§§54956.7-54956.8, 54956.86, 54956.87, 54956.9, 54957, 54957.6, 54957.8, or 54957.10). Closed sessions to consider "pending litigation" are intended to let a public agency receive the benefit of confidential advice from its attorneys. (See *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 374, 380-381 [recognizing "that public entities need confidential legal advice to the same extent as do private clients"].)

The Brown Act defines "pending litigation" as including 1) litigation that has been "initiated formally" by or against the governing body, 2) circumstances where "there is a significant exposure to litigation against the local agency"; and 3) circumstances where "the local agency has decided to initiate or is deciding whether to initiate litigation." (§54956.9(d).) To hold a closed session meeting, a public agency must briefly describe the reason it is meeting in closed session on its agenda, and may use statutorily provided "safe harbor" item descriptions to do so. (§§54956.9(g), 54954.5.) If the body decides to take certain types of listed actions at the meeting, those actions must be reported out at the next open session meeting of the body. (§54957.1.)

In 2002, in order to prevent the opportunistic "leaking" of information obtained from closed session meetings of a government body, the legislature enacted §54963 of the Brown Act to explicitly forbid the disclosure of "confidential information" from a closed session. (APP_MJN003-4 [CBA 8/26/02]). The statute defines "confidential information" as any "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." (§54963(b).) The statute also describes penalties for persons who unlawfully disclose closed session information, and also provides a procedure for presenting confidential information to a district attorney or grand jury in the event that a person present at a closed session believes that violation of the Brown Act has occurred. (§54963(c),(e)(1).)

There is, importantly for this case, no provision of §54956.9 or §54963 that states, explicitly or impliedly, that the attorney client privilege is waived if a local agency meets in closed session for a proper purpose pursuant to §54956.9(d) but provides a defective notice of the closed session pursuant to

§54956.9(g). In fact, nowhere does the Brown Act state that the penalty a local agency must pay for even a minor infraction of the closed session notice requirements is a waiver of confidentiality and attorney client privilege.

A. Private Enforcement of the Brown Act

The Brown Act contains two statutory provisions permitting citizen enforcement of the Act. Section 54960 provides that the "district attorney or any interested person" may bring an action for declaratory or injunctive relief to prevent actual or threatened violations of the Brown Act. Section 54960.1 also permits interested persons to file lawsuits seeking to invalidate a local entity decision reached in violation of the Brown Act, provided that a notice and cure procedure is followed permitting the agency time to cure the alleged violation.

Plaintiffs' case is a citizen enforcement action brought and authorized under §54960, in which they allege violations of §54963.

Section 54963 was added to the Brown Act in 2002 to provide a statutory remedy to "to penalize those members that sit on a local agency governing board who "leak" confidential information obtained from a closed session hearing." (APP_MJN003 [CBA 8/26/02]). The legislative history reveals that the Assembly version of the bill was particularly concerned about protecting communications "concerning pending litigation within the attorney-client privilege" in defining "confidential information". (APP_MJN002 [CBA 8/26/02]). With respect to who is properly a defendant for an action to enforce this provision, §54963(a) states that "*a person*" may not disclose confidential closed session information without the consent of the legislative body holding the closed session. Section 54963(c) also provides that in addition to the remedies specifically described in the statute,

violations of §54963 can "be addressed by the use of such remedies as are currently available by law." (See also APP_MJN004 [CBA 8/26/02]).

Moreover, when AB1945, the bill which enacted §54963, was introduced, it originally restricted the authority to enforce the protection of confidential, privileged 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 [CBA 8/26/02]). 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 protect the confidentiality of such communications. Accordingly, §54960 allows an action for injunctive and declaratory relief to be brought by a member of the public for a violation of §54863 against "a person" who, without authorization, discloses confidential attorney-client privileged information obtained from a closed session. (See *McKee v. Orange Unified School Dist*. (2003), 110 Cal. App. 4th 1310, 1319 [a citizen of the State of California was an "interested person" within the meaning of the Brown Act, and had standing to sue for violations of the Brown Act]; §54960.)

II. THE ANTI-SLAPP STATUTES

In response to a "disturbing abuse" of the anti-SLAPP statute which had allowed the procedure to be used to undermine public interest litigation, in 2003 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 . . . (1) [t]he plaintiff does not seek any relief greater than or different from the relief sought for the general public . . .(2) [t]he action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit . . .on the general public or a large class of persons [and] (3) [p]rivate enforcement is necessary and places a disproportionate financial burden on the plaintiff . . ."

Whether a lawsuit falls within the public interest exemption of §425.17(b) is "'a threshold issue, and we address it prior to examining the applicability of §425.16.'" (*People ex rel. Strathmann v. Acacia Research Corp.* (2012) 210 Cal.App.4th 487, 498.) Thus, if the action meets the public interest criteria, then the lawsuit is exempt from the Anti-SLAPP statute. If not, the Court is to engage in the two-prong Anti-SLAPP analysis. (*Jarrow Formulas, Inc. v. LaMarche*, (2003) 31 Cal. 4th 728.)

To resolve an anti-SLAPP motion, the trial court engages in a two-step inquiry. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action arises from a protected activity. (City of Santa Monica v. Stewart (2005) 126 Cal.App.4th 43, 71.) The moving party has the burden of showing that the challenged cause of action arises from a protected activity. (*Ibid.*) Second, if the moving party has carried that burden, the court must decide whether the opposing party has demonstrated a probability of prevailing on the challenged cause of action. (*Ibid.*) "The trial court's rulings on both issues are reviewed de novo." (*Ibid.*)

With respect to the second step, the plaintiff enjoys "a degree of leeway in establishing a probability of prevailing on its claims due to the early stage at which the [anti-SLAPP] motion is brought and heard [citation] and the limited opportunity to conduct discovery [citation]." (*Integrated Healthcare*

Holdings, Inc. v. Fitzgibbons, (2006) 140 Cal. App. 4th 515, 530). The second prong 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 v. Schnitt*, 1 Cal. 5th 376, 384-385 [citations omitted].)

STANDARD OF REVIEW

This court independently reviews a trial court's decision to grant or deny an anti-SLAPP motion. (*Bowen v. Lin* (2022) 80 Cal.App.5th 155, 161.)

ARGUMENT

I. PLAINTIFFS ESTABLISHED THAT THE PUBLIC INTEREST EXEMPTION APPLIES; THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' ANTI-SLAPP MOTION.

The threshold issue for this Court to decide is whether the public interest exemption applies. Based upon the allegations contained in the operative Complaint, all elements of CCP §425.17(b) are met. Plaintiffs' complaint was brought both in the public interest as well as on behalf of the general public. (AA 21-22 [¶¶ 2-8].) As explained below, this case 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. (*People ex rel. Strathmann v. Acacia Research Corp. supra*, 210 Cal.App.4th at 498.)

In determining whether the public interest exemption applies, a trial court is limited to evaluating the allegations of the complaint; the trial court is not permitted to consider extrinsic evidence to determine whether the public interest exemption applies. (*Tourgeman v. Nelson & Kennard* (2014) 222 Cal.App.4th 1447,1460["*Tourgeman*"].)

Here, the trial court abused its discretion because it looked to and relied upon extrinsic evidence to reach the conclusion that the public interest exemption did not apply. With one exception, as described below, the trial court did not limit itself to the Complaint's allegations in making its public interest exemption determination.

A. Plaintiffs' action seeks to enforce an important right affecting the public interest, and would confer a significant benefit on the general public or a large class of persons.

As explained above, in 2002, the legislature amended the Brown Act because people were leaking confidential information obtained in closed session yet there was no penalty or remedy contained in the Brown Act to deter and punish such conduct. The legislature was so concerned about the trend toward unauthorized disclosure of closed session confidential communications, that it expressly prohibited *any person, not just a member of the local governing body* from disclosing such closed session communications. (§54963(a).) Legislative history reveals the important public policy underpinning the bill that added §54963, as discussed above and in Appellants' Motion for Judicial Notice, namely, protecting and preserving the public's right to have confidentiality of closed session privileged communications maintained, including a local agency's attorney-client confidences, which are essential to enabling the government body to make the best, most informed decisions for its citizens.

Plaintiffs alleged that they brought the action in the public interest and allege harm due to the unauthorized disclosure of closed session confidential attorney-client privileged information by Defendants. (AA21-22; 24; 26-28; 29; 31 [¶¶2-8, 23; 30-41; 46; 54; 56].) Specifically, the Complaint alleges that Defendants' conduct has created liability exposure to the City by Defendants' disclosure of confidential privileged attorney-client communications and that Defendants have "made it impossible for members of the City Council to effectively discharge their official duties because closed session meetings are effectively no longer confidential." (*Ibid.*)

Further, the Complaint alleges that "members of the duly elected city council cannot now confidently and freely discuss issues in closed session that require confidentiality, nor can they rely on their legal counsel's legal analysis, opinions and strategy to remain confidential attorney-client privileged communications without risking exposure to litigation adversaries or potential litigation adversaries." (*Ibid.*)

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

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. (AA29 [¶46].) "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 "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, decided prior to the enactment of §54963, citing 80 Ops. Cal. Atty. Gen. 231 (Cal.A.G)., ["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."]; see also 105 Ops.Cal.Atty.Gen. 89 (2022), [Under the Brown Act, an individual city council member is not permitted to share information obtained in closed session with their individual support staff]).

Plaintiffs' action is intended to protect the integrity of closed sessions so that the City Council can freely communicate with its legal counsel and thus make the best and most informed decisions on behalf of its citizens. The declaratory and injunctive relief sought in this action will also limit liability exposure to the City by preventing future illegal disclosures of confidential information and attorney-client communications. (AA26 [¶41]). There is no relief requested in the complaint that would confer any other benefit. The action therefore seeks to confer a substantial benefit on a large class of persons, the citizens of Ojai.

B. Plaintiffs do not seek any relief greater than or different from the relief sought for the general public.

The Complaint seeks no greater or different relief for Plaintiffs than for the general public. The Prayer for Relief requests declarations that Rule and Drucker violated §54963 of the Brown Act by disclosing confidential

communications obtained from closed sessions of the Ojai City Council and an injunction prohibiting Rule and Drucker from disclosing any confidential communications obtained from closed sessions of the Ojai City Council. (AA32.)

Plaintiffs allege no particular position, political or otherwise, on the substance or topic of the confidential attorney-client communications that were disclosed by Defendants. (See *generally* AA25-32.) Plaintiffs merely seek relief against two Defendants who have stated on the record that they believe that their disclosures of confidential closed session communications were not violative of the law (see e.g., AA28 [¶41].) There is no greater benefit to Plaintiffs to have all confidential privileged attorney-client communications and other closed session confidential communications stay confidential, than to the citizens of Ojai generally.

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

Private enforcement of the Brown Act's prohibition on disclosure of confidential closed session attorney-client communications is necessary because no public entity has "stepped up" to enforce this important right affecting the public interest. In *Tourgeman, supra,* the Court held that private enforcement was necessary because "no public entity has sought to enforce the rights that Tourgeman sought to vindicate in his lawsuit." (*Id.* at 1464.) Further *Tourgeman* concluded that "the *possibility* that a public entity might bring a lawsuit to vindicate certain rights does not demonstrate that a private plaintiff's action to vindicate such rights was not necessary where, as here, the public entity has not filed such a lawsuit. [internal citations omitted.]" (*Tourgeman, supra,* at 1464-1465.)

Similarly, here, no public entity has taken any enforcement action against Defendants to vindicate the important public right and policy contained in §54963. Defendants maintain that they did nothing wrong and that their interpretation of the law permits them to continue to disclose confidential closed session information whenever they personally deem the City Council has improperly noticed an item on the agenda for closed session. (AA28.)

Finally, the public interest exemption applies because of the disproportionate financial burden on Plaintiffs to protect the public interest. 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 Appellants' individual stake in the matter." (*Roybal v. Governing Bd. of Salinas City Elementary Sch. Dist.* (2008) 159 Cal.App.4th 1143, 1151.)

The *Tourgeman* court compared *Blanchard v. DIRECTV, Inc.* (2004) 123 Cal.App.4th 903, 916, where plaintiffs were unable to demonstrate disproportionate financial burden element because "Plaintiffs seek an accounting to them and restitution to them of moneys they paid to DIRECTV." In contrast, in *Tourgeman*, the plaintiff sought no direct financial benefit from the lawsuit, and so the court concluded the financial burden element was met because "Tourgeman could reasonably have expected to incur significant litigation costs in attempting to prove that respondents violated the [Act] and that injunctive relief was an appropriate remedy to deter future violations." (1465-1466.) Here, too, Plaintiffs seek no personal or financial benefit.

D. The trial court improperly expected and evaluated extrinsic evidence in ruling that the public interest exemption does not apply.

In ruling that the public interest exemption does not apply to Plaintiffs' action, the trial court improperly relied upon evidence submitted by Defendants. (AA52-55; 235-237 [Declarations of Drucker and Rule].) While not specifically citing either of the declarations, the trial court stated:

> "Defendants claim that this is a "political effort to silence a political opponent." (Reply p.6:12-13)." [4]
>
> (AA353)

And,

> "Personal political agendas and motivations may make the public interest exemption inapplicable."
>
> (Id).

The court then ruled:

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

(*Ibid.*[emphasis added])

The trial court thus apparently relied upon Defendants' declarations in concluding that the public interest exemption did not apply, because there

---

[4] Yet, the Reply brief's public interest exemption argument, including page 6, contains not one citation to Defendants' declarations or their Request for Judicial Notice. (See AA229-231.) Page 6 cites Whitman declaration paragraphs, but Defendants objected to those paragraphs (AA253; 255), and the court sustained the objections (AA352), so it is reasonable to assume that the court did not rely on the cited Whitman declaration.

was nothing in Plaintiffs' complaint indicating any political motivations on the part of Plaintiffs, or any political persuasion, party or agenda, one way or the other.

This was legal error.

As the *Tourgeman* Court explained:

> Respondents' suggestion, unsupported by any authority, that Tourgeman was required to make an *evidentiary* showing in order to establish this prong of the public interest exception, is unpersuasive. Whether Tourgeman's action would benefit the public is determined by examining his complaint to determine whether his lawsuit is of the kind that seeks to vindicate public policy goals. (*Strathmann, supra,* 210 Cal.App.4th at p. 499, 148 Cal.Rptr.3d 361 ["the public interest exception is a threshold issue based on the nature of the allegations and scope of relief sought in the prayer"]; see, e.g., *id.* at p. 504, 148 Cal.Rptr.3d 361 [concluding public benefit requirement of section 425.17, subdivision (b)(2) met where qui tam action sought to further objectives of Insurance Frauds Prevention Act (Ins.Code, § 1871 et. seq.)]; *Carpenters, supra,* 124 Cal.App.4th at pp. 300–301, 20 Cal.Rptr.3d 918 [concluding that action that sought to promote objectives of city's prevailing wage policy met public benefit requirement of § 425.17, subd. (b)(2)]). As we concluded above, Tourgeman's *complaint* is of the type that seeks to vindicate public policy goals embodied in federal statutory law. Tourgeman was not required to present *evidence* demonstrating that his action would in fact serve these goals.
>
> (*Tourgeman*, *supra*, 222 Cal. App. 4th at 1463.)

Compounding this legal error was the trial court's mistaken belief that Plaintiffs were required to file "supporting declarations" with their Opposition Brief in order to "meet their burden" that the public interest exemption applies. (AA353.) Acknowledging "[t]here are seven individual plaintiffs in this case and all claim to be bringing the suit "in the public interest." (FAC ¶¶ 2-8" [AA353]), the trial court then observed "none of [the Plaintiffs] have submitted a declaration in support of their claim that the

public interest exemption of §425.17(b) applies." (*Ibid.*) However, had Plaintiffs submitted declarations to establish the applicability of the public interest exemption to their action, it would have been error for the court to rely upon them to determine whether the action was brought in the public interest.

In its ruling, the trial court cited a footnote from *Sandlin v. McLaughlin*, not a Brown Act violation case, as authority for its decision on the public interest exemption. (*Sandlin v. McLaughlin* (2020) 50 Cal.App.5th 805.) The trial court relied on the footnote's reference to the *Sandlin* plaintiff's previous filing of two lawsuits against the defendant and the parties' history as political opponents. (AA353.) But the quoted passage from *Sandlin* is dicta. (*Id*. at p. 823, fn5.)

In *Sandlin*, the Court held that the public interest exemption did not apply because the speech involved was a candidate statement, which is clearly excepted from the public interest exemption under CCP §425.16(d)(2). *Sandlin* did not decide whether Plaintiff's action met the "public interest" criteria. (*Sandlin at* 824.) Unlike the trial court in this case, the *Sandlin* Court did not consider extrinsic evidence in determining whether the public interest exemption applied.[5]

E. The trial court erred in admitting Defendants' evidence.

Even assuming *arguendo* that it was appropriate for the trial court to rely on extrinsic evidence to consider the political motivations of the parties, the trial court erred in admitting Defendants' reply evidence because it

[5] In any event, there is no admissible evidence in the record that Plaintiffs are political opponents of Defendants, or that any of the Plaintiffs have ever previously sued either Defendant.

lacked foundation, was irrelevant and/or contained clearly inadmissible hearsay.

A trial court's rulings on evidence submitted in connection with the appeal of an anti-SLAPP motion are reviewed for abuse of discretion. (Morrow v. Los Angeles Unified School Dist. (2007) 149 Cal. App. 4th 1424, 1444.)

First, the Reply declaration should not have been permitted by the trial court at all. (*Jay v. Mahaffey* (2013) 218 Cal. App. 4th 1522, 1537-1538.) Second, all of Plaintiffs' objections to the Reply declaration should have been sustained (AA310-315), yet all were overruled, with the exception of paragraphs 5, 8 and 9, and Exhibit A of paragraph 3. (AA352.)

Specifically, in ¶¶2,3,4 Defendant Rule claims she knows some (but not all) of the plaintiffs well, although she provides no foundation for this claim, and alleges that she has "seen and heard" some plaintiffs oppose the Development Agreement, which is clearly inadmissible hearsay. (AA235.) As to ¶4, Defendant Rule claims that (1) plaintiffs are political advocates, (2) she knows (by inference) how plaintiffs became clients of their counsel of record, and (3) one of Plaintiffs' counsel's other clients "spearheaded the Referendum." *(Ibid.*) Not only are these statements plainly inflammatory, Rule provides no foundation for any of these allegations. Further, the claim that plaintiffs are "political advocates" is veiled hearsay and/or inadmissible opinion.

For the trial court to admit these statements over Plaintiffs' objections exceeded the bounds of reason. (*Gilbert v. Sykes* (2007) 147 Cal. App. 4th 13, 26 [A declaration supporting an anti-SLAPP motion must be based on personal knowledge and not include hearsay or inadmissible opinions.]; *Morrow, supra*, 149 Cal. App. 4th at 1444–1446 [evidence lacking a proper

foundation excluded in connection with an anti-SLAPP motion].) These statements are also irrelevant to whether plaintiffs are or are not political opponents of Defendants, as it assumes that Defendants are in political opposition to Plaintiffs, which has not been alleged in the complaint or in Defendants' declarations.

Neither are the statements relevant to the second prong of the Anti-SLAPP analysis, that is, whether confidential attorney-client privileged information was disclosed by Defendants without authorization. Paragraph 11 of the Declaration suffers from the same defects. (AA236-237.) These statements contain clearly inadmissible hearsay [e.g., offering alleged statements of non-parties]; they also have no relevance to Plaintiffs' political position with respect to Defendants nor to a violation of §54963. (*Sanchez v. Bezos* (2002) 80 Cal. App. 5th 750, 769-780 [excluding declaration containing inadmissible hearsay].)

As to Defendants' Request for Judicial Notice, it is unclear from the ruling whether the trial court relied upon the *Simply Ojai v. City of Ojai* caption page, which the trial court granted over Plaintiffs' objections. (AA265-267 [RJN]; AA316-318 [Objection]; AA352 [Ruling]). To the extent that the trial court relied upon this material for its public interest exemption determination, this was error as it had no relevance to the issue of whether *Plaintiffs'* case herein was brought in the public interest. (AA316-318.) No Plaintiff in this complaint is a Plaintiff in the *Simply Ojai v. City of Ojai* case. Thus, granting judicial notice was an abuse of discretion.

In sum, the trial court's apparent reliance on Defendants' declarations, Defendants' Request for Judicial Notice, and Plaintiffs' lack of attestations, was an abuse of discretion. Because the Complaint demonstrates that the case was brought in the public interest, meeting all the criteria in CCP

§425.17, the public interest exemption applies to Plaintiffs' action. On that basis alone, this Court should reverse the order granting the anti-SLAPP motion and remand the case. Only if this Court disagrees that the Plaintiffs' action is exempt pursuant CCP §425.17 does this Court need to review the second prong merits of the motion.

II. PLAINTIFFS CARRIED THEIR BURDEN OF DEMONSTRATING THAT DEFENDANTS VIOLATED THE BROWN ACT.

In order to satisfy their second-prong burden, Plaintiffs need only to establish a prima facie case that Defendants had violated the Brown Act by disclosing confidential information obtained from a closed session of the Ojai City Council to persons not entitled to receive it. (§54963; Civ. Pro. §425.16(b)(1).) Plaintiffs did not need to *conclusively* prove that the Brown Act was violated, they only needed to make a showing similar to what would have been required to defeat a motion for summary judgment. (*Baral v. Schnitt*, *supra,* 1 Cal.5th at 384-385.)

As set forth below, the evidence submitted demonstrates that defendants disclosed direct quotes of discussions between councilmembers from the three closed sessions, as well as details of a legal memorandum prepared by the City's attorney and the councilmembers' discussions with the City's legal counsel. (AA57-68, 77-80, 121-126, 195-200 [¶¶5-7, 9-20]). The evidence also shows that the agenda notice for each of the closed sessions stated that the legal basis for the closed session was that the council needed to discuss "pending litigation", specifically the "existing litigation" of *Simply Ojai v. City of Ojai, et al.* (AA121-126.) Plaintiff also submitted evidence that this case was in fact discussed in each closed session. (AA121-126, 195-200 [¶¶5-7].)

Defendants conceded most of these facts in their declarations, but argued that, as a matter of law, the closed session information they disclosed was not "confidential" because the notices for the closed sessions did not identify the correct *type* of "pending litigation" that would be discussed. Defendants argued that the notices should have stated that "exposure to litigation" or the "initiation of litigation" would be discussed in closed session. Defendants argued since the closed sessions had not been properly noticed, the communications that occurred during those sessions were not confidential and could be publicly disclosed.

The trial court agreed, finding that: "The discussions that occurred in closed session which are at issue here were not discussions with legal counsel regarding pending or existing litigation as stated on the agenda. These discussions are not subject to the exceptions permitting confidentiality of the Brown Act." (AA361.) As set forth below, the court's finding was in error.

A. Defendants disclosed confidential information that was acquired from closed sessions.

On December 13, 2022, January 9, 2023, and January 10, 2023, Ms. Rule was present at and participated in closed sessions of the City Council. (AA075 [¶2].) Rule conceded that each of these meetings had been publicly noticed as closed sessions and that the purpose of the meetings was for the Council to obtain legal advice from their attorneys. (*Ibid.*)

As set forth below, Defendants freely admit that they subsequently disclosed to the public information obtained during these closed session meetings and distributed to the public a number of letters describing, in blow-by-blow fashion, the statements made by the council members present for these meetings as well as the discussions with the City Council's legal

counsel, and the strategies, opinions, and legal arguments contained in a privileged, attorney-client memo. (AA75[¶6], 77-81, 54[¶14], 57-74.)

1. Defendants' Disclosures regarding the December 13 Closed Session Meeting

The agenda for the December 13 closed session meeting included the following item:

> 1. Conference with Legal Counsel; Existing Litigation
> (Gov. Code §54956.9(d)(1))
> The City Council finds, based on advice from legal counsel, that discussion in open session will prejudice the position of the City in the litigation.
>
> Case Name: Simply Ojai v. City of Ojai, et al.; Ventura County Superior Court Case No. Pending Assignment
>
> (AA111, 121, 358.)

On December 13, 2022, the City Council discussed in closed session the *Simply Ojai* lawsuit. According to a non-privileged memorandum prepared by the City Attorney, the December 13, 2023 closed session meeting involved a discussion of "answering the lawsuit's writ petition and fighting it, answer the writ petition and admitting the plaintiffs' allegations, doing nothing, or mooting the lawsuit via repealing the ordinance as was then expected to be possible if the then pending referendum petition were to be found to have enough valid signatures." (AA121-123.) As a result of those discussions, the council "provided direction for the City Manager to retain additional counsel to advise the City Council about the options and consequences of those options for the lawsuit, its subject the development agreement, and one option to end the lawsuit — namely by rescinding the ordinance via the referendum." (*Ibid.*)

On January 24, Defendants each released letters that described this closed session meeting in detail, providing a narrative of the discussions during that meeting. (AA58-59, 77-78.) The letters also contained a detailed narrative of an alleged suggestion from Mayor Stix that the Council retain outside counsel to render advice regarding "the development agreement with the Becker Group", which included alleged direct quotes of the council members regarding the reasons for hiring outside counsel to provide advice regarding litigation against the City. (*Ibid.*)

2. Defendants' Disclosures Regarding the January 9, 2023 Meeting

The agenda for the January 9, 2024 closed session meeting included the following item:

> 2. Conference with Legal Counsel; Existing Litigation
> (Gov. Code §54956.9(d)(1))
> The City Council finds, based on advice from legal counsel, that discussion in open session will prejudice the position of the City in the litigation.
> Name of Case: Simply Ojai v. City of Ojai; Ojai City Council
> Names of Parties or Claimants: Simply Ojai, City of Ojai, Ojai Bungalows, L.P.,
> Green Hawk, LLC, The Becker Group, Inc.
> Case No. or Claim No. 56-2022-00572740-CU-WM-VTA
> (AA111, 123, 358.)

During the January 9 meeting, the city council received a presentation from their outside counsel, Heather Minner with Shute Mihaly & Weinberg, LLP. (AA123-125.) Minner gave oral advice and distributed a written memorandum that considered the *Simply Ojai* lawsuit, whether the lawsuit would be mooted if the Council rescinded the ordinance approving the development agreement, and possible consequences and opportunities of exercising that option. (*Ibid.*) The discussion of the referendum option to

moot the lawsuit lawfully included consideration of who might then sue to challenge that decision. (*Ibid.*)

In her public letter, Rule described the presentation by the Council's outside attorney, as well as the potential ligation strategy and defenses the City could pursue if it chose to rescind the development agreement. (AA78-79.) Drucker, who had apparently been provided and reviewed the attorney-client privileged legal memorandum, publicly described the contents of Minner's legal memorandum. (AA60.) Drucker disclosed the title of the memo ("Pending Litigation Challenging the Becker Development Agreement: Consequences and Opportunities Presented by Rescinding the Development Agreement in Response to a Referendum Petition"), and stated that the memorandum contained a discussion of potential litigation against the City that the Becker Group might initiate if the development agreement was rescinded, and described the various legal strategies the City could explore related to the litigation "including buying Becker's properties, exercising eminent domain, changing the zoning, subjecting Becker buildings to historical protection, and imposing rent controls." (*Ibid.*)

3. Defendants' Disclosures Regarding the January 10, 2023 Meeting

The agenda for the closed session which took place the following day on January 10, 2023 included the same description as the notice for the January 9 meeting. (AA112, 125, 358.) At this meeting the Council continued to discuss how to handle the referendum, its impact on the *Simply Ojai* lawsuit, and the prior decision to hire outside counsel to provide advice about those issues. (AA125-126.) Rule and Drucker provided a blow-by-blow description of those closed session discussions. (AA60-61, 79-80.) Defendants also provided a detailed narration, including alleged direct quotes from multiple

other council members, of a discussion regarding the decision to hire outside legal counsel at the December 13, 2023 closed session. (*Ibid*.)

B. The closed session information disclosed by Defendants was confidential as a matter of law.

The trial court analyzed each of the closed sessions described above and concluded for each one that the discussions "did not pertain to the existing litigation and did not include counsel for the City in that litigation." (AA358-359.) The court then analyzed each of the Defendants' disclosures of information from the closed sessions and concluded for each disclosure that it "did not disclose any confidential information about the existing litigation or discussions with the attorney representing the City in that litigation." (AA359.) The court accordingly concluded that the information disclosed was not confidential because "[t]he discussions that occurred in closed session which are at issue here were not discussions with legal counsel regarding pending or existing litigation as stated on the agenda. These discussions are not subject to the exceptions permitting confidentiality of the Brown Act." (AA361.)

1. The trial court's conclusion that the closed session discussions exceeded the scope of the agenda notices was erroneous.

Each of the closed session notices at issue stated that the council would be discussing *Simply Ojai v City of Ojai* in closed session in conference with legal counsel. (AA121, 123, 125, 358.) A discussion of the consequences of rescinding the Development Agreement ordinance was logically related to and in furtherance of the City's objective of defending against the *Simply Ojai* lawsuit. (*Action Apartment Assn., Inc. v. City of Santa Monica*, (2007) 41 Cal. 4th 1232, 1251, [In context of the litigation privilege, the court stated, "To be protected by the litigation privilege, a communication must be "in furtherance of the objects of the litigation."] (citation omitted). This is "part of

the requirement that the communication be connected with, or have some logical relation to, the action, i.e., that it not be extraneous to the action." [citation]).]

The *Simply Ojai* lawsuit was, after all, a suit claiming that the approval of the Development Agreement ordinance was improper, and which sought to overturn the Development Agreement ordinance and all related project approvals. (AA121.) A referendum petition with a qualifying number of signatures seeking to rescind the ordinance had been presented to the City. (AA121, 196 [¶7c].) Rescinding the Development Agreement ordinance, either by referendum or by Council vote, would have mooted the *Simply Ojai* case. (*Ibid.*) It cannot be credibly claimed that meeting to discuss the potential impact of the referendum petition on the *Simply Ojai* litigation, as well as the potential risks that rescinding the Development Agreement ordinance would pose to the City, and the actions the City could take to mitigate those risks, was beyond the scope and logically untethered to a discussion of the *Simply Ojai* litigation. How the City responded to the referendum to rescind the Development Agreement ordinance would, undeniably, impact litigation against the City which was aimed at invalidating the same Development Agreement ordinance.

Further, Plaintiffs submitted evidence that the *Simply Ojai* litigation *was* in fact discussed at the closed sessions. Specifically, Matthew Summers, the Ojai City Attorney, was present at each of the closed sessions and authored a "Public Memorandum" on May 16, 2023 that described some of what was discussed. (AA075 [¶4], 118-128.) Summers stated that at the December 13, 2022 session "the City Council discussed the Simply Ojai lawsuit, including these options: answering the lawsuit's writ petition and fighting it, answer the writ petition and admitting the plaintiffs' allegations,

doing nothing, or mooting the lawsuit via repealing the ordinance as was then expected to be possible if the then pending referendum petition were to be found to have enough valid signatures." (AA121.)

Mr. Summers stated that at the January 9th closed session "the memo and oral advice from Minner discussed in closed session considered the *Simply Ojai* lawsuit, how the lawsuit could be mooted via the referendum if the Council rescinded the ordinance approving the development agreement, and possible consequences and opportunities of exercising that option." (AA124.)

Mr. Summers also described the January 10th closed session as similarly involving a "discussion of the referendum option to moot the lawsuit" and "discussions regarding the hiring of its additional counsel to provide legal advice to the City about one of the then-pending options to moot the pending lawsuit" (AA125.)

In evaluating the probability of success, a court will "accept as true the admissible evidence favorable to" the plaintiff, and "must 'draw every legitimate favorable inference' from the plaintiff's evidence." (*Cuevas-Martinez v. Sun Salt Sand, Inc.* (2019) 35 Cal.App.5th 1109, 1117.) Here, the evidence Plaintiffs relied on should have been credited as true, and all inferences therefrom should have been drawn in Plaintiffs' favor. Thus the trial court's finding that the referendum and development agreement were not discussed in the context of the *Simply Ojai* litigation was incorrect, as was its conclusion that the closed session meetings exceeded the scope of the notices. (AA358, 359, 361.)

a. *The trial court erroneously sustained evidentiary objections to the Declaration of Andrew Whitman.*

Additionally, Plaintiffs submitted a declaration from Andrew Whitman, an Ojai City council member who was present at each closed session. (AA194-200.) Whitman testified about the details of the closed session meetings that had already been made public, what he witnessed regarding the disclosures, the impact on the ability of the council to continue to operate in closed session due to Defendants' contention that closed session discussions could be made public whenever they perceived a notice violation or other violation occurred, and offered to testify *in camera* to the discussions in closed session in procedure similar to what §54960(c)(2)-(5) allows. (AA195-200 [¶¶5-7, 9-20].)

Defendants objected on the grounds of relevance and lack of foundation to nearly every paragraph in this declaration except for paragraphs 1,2, 7b-c, and 9.[6] (AA243-256.) The court sustained all but one of Defendants' objections, overruling an objection to paragraph 7.a. (AA352.)

This was an abuse of discretion. The testimony in paragraphs 5, 6, 7d and 9-30 was clearly relevant to the issues in this case, since it would tend to prove what was discussed in closed session and the impact of the disclosures on the ability of the council to effectively meet in closed session. (AA243-256.) Further, paragraphs 10 and 15 did not contain any out of court statements being offered for the truth of the matter asserted and were not hearsay. (*Ibid*.) Had Mr. Whitman's testimony about these issues been allowed and credited, they would have provided evidence that Defendants had violated the Brown Act, and that the public interest had been harmed as a result.

---

[6] While Defendants objected to paragraph 9, the text they objected to did not actually appear anywhere in Mr. Whitman's declaration. (AA250.) The trial court nonetheless sustained the objection, but since the text does not appear in paragraph 9, it is uncertain what the evidentiary impact of this ruling was. (AA352.)

2. The Closed Session Notices Substantially Complied with the Brown Act

Section 54954.2 requires a local agency to "post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session. A brief general description of an item generally need not exceed 20 words." (§54954.2(a)(1).) Section 54954.5 provides several optional "safe harbor" methods of providing closed session notices pursuant to the Brown Act. (§54954.5). A notice of a closed session will not be found to violate §54954.2 so long as "the closed session items were described in *substantial compliance* with" a "safe harbor" warning described in §54954.5. [emphasis added]. These safe harbor notices are not mandatory, but substantial compliance with the safe harbor notices provisions constitutes compliance with the Brown Act. (§54954.5).

Section 54954.5(c) provides that with respect to "every item of business to be discussed in closed session pursuant to §54956.9," the section of the Brown Act permitting closed sessions to meet with counsel regarding "pending litigation," a safe harbor notice may state "Conference With Legal Counsel--Existing Litigation" if the pending litigation involves an existing case, followed by the name of the case if providing that would not jeopardize service of process or settlement. It may also state "Conference With Legal Counsel--Anticipated Litigation" if the pending litigation involves "significant exposure to litigation," followed by the number of cases, and potentially a brief description, depending on the circumstances, of the facts giving rise to the exposure. The same notice may be provided for "initiation of litigation," followed only by the number of cases.

Importantly, Defendants did not contend that the discussion in closed session did not involve "pending litigation" as the term is defined by §54956.9. They instead argued that the notice for the closed session meeting identified the *wrong type* of "pending litigation" in its safe harbor notice. (AA43:3-10, 53-54 [¶9], 64, 66, 72-73, 361.)

Defendants argued that the closed session discussions on December 13, 2022, January 9, 2023, and January 10, 2023 did not involve "existing" litigation pursuant to §54956.9(d)(1), but rather involved retaining outside counsel and seeking advice regarding "exposure" to litigation pursuant to §54956.9(d)(2) that might result from how the City handled the referendum to rescind the ordinance approving the development agreement. (AA43:3-10, 53-54 [¶9], 64, 66, 72-73.)

How the City *took action in response* to the referendum, by either rescinding the ordinance by vote of the Council or putting the matter up for a public vote, might have resulted in exposure to litigation from the Developer. However, the City had not, at the time of the closed sessions, *actually taken* any action that might have resulted in litigation from the Developer. Accordingly, if the meetings indeed fell under §54956.9(d)(2) as Defendants argued, the notices would also have been governed by the disclosure requirements of §54956.9(e)(1) which provides that when an agency is discussing circumstances "that might result in litigation against the local agency but which the local agency believes are not yet known to a potential plaintiff," that those "facts and circumstances need not be disclosed" in an agenda notice.

Thus, the notice would have simply stated that the Council was meeting in closed session to discuss "pending litigation" related to a

"significant exposure to litigation" but would not otherwise have provided any information other than the number of potential cases. (§54956.9(d)(2), 54954.5(c).) The notice that actually *was* provided similarly stated that the Council was meeting to discuss "pending litigation," but here provided that the discussion related to existing litigation – the *Simply Ojai* lawsuit – which had as its subject matter the validity of the Development Agreement at issue. Ironically, this notice provided the public with *more* information about the subject of the discussion than the safe harbor notice that Defendants argued should have been issued.

Defendants also argued that the closed session should have stated that the council would be discussing "pending litigation" in the nature of the "initiation" of litigation under §54956.9(d)(4), since one of the options presented by the City's outside legal counsel included, allegedly, preemptively or responsively filing suit against the developer as an option for mitigating risks of acting to rescind the Development Agreement ordinance. AA43:3-10, 53-54 [¶9], 64, 66, 72-73.) However, again, a notice of closed session for "pending litigation" regarding a discussion of the initiation of litigation would not provide any information *at all* beyond a statement of the number of cases being contemplated. (§§54954.5(c),54956.9(d)(4).)

Accordingly, even if Defendants were correct that a discussion of the *Simply Ojai* litigation did not encompass a discussion of the consequences of rescinding the Development Agreement and that therefore a slightly different "pending litigation" safe harbor notice should have been used, the notice that *was* used still substantially complied with the Brown Act's requirements since the public would not have been misled about what the City Council was discussing in closed session. (*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.].)

3. Even if the Notices Were Defective, Defects in a Closed Session Notice do not Render Closed Session Discussions not Confidential

Defendants argued, and the trial court agreed, that if the discussions in closed session exceeded the scope of the closed session notices, "[t]hese discussions are not subject to the exceptions permitting confidentiality of the Brown Act." (AA43:3-10, 53-54 [¶9], 64, 66, 72-73, 358-359, 361.) This argument fundamentally misunderstands the plain language of the statutes and public policy behind the Brown Act provisions protecting the confidentiality of closed session discussions of pending litigation with their counsel. Even if the closed session agenda notices in this instance were defective under the Brown Act, that does not per se rescind the confidentiality of the conversations and documents distributed in those closed sessions.

In 1984, the legislature codified a right for a local governing body to meet in closed session by enacting §54956.9. Section 54956.9 begins by stating that:

> *Nothing in this chapter shall be construed to prevent* a legislative body of a local agency, based on advice of its legal counsel, from holding a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the local agency in the litigation.
>
> (§54956.9(a)[emphasis added].)

The Act then provides that litigation shall be considered "pending" when 1) the agency is a party in litigation that has been initiated, 2) facts and circumstances exist which indicate that there may be a "significant exposure" to litigation, or 3) the agency is considering initiating litigation itself. (§54956.9 (d).)

The Act also states that "[*f*]*or purposes of this chapter*, all expressions of the lawyer-client privilege other than those provided in this section are hereby abrogated. This section is the exclusive expression of the lawyer-client privilege for purposes of conducting closed-session meetings pursuant to this chapter." (§54956.9(b) [emphasis added].) Thus, for the purposes of the Brown Act, a local agency can meet in closed session to seek advice from its counsel *only* to discuss one of the listed types of "pending litigation". (§54956.9(c)-(d).)

There is, importantly, *no* provision of §54956.9 that states, explicitly or impliedly, that the attorney client privilege is waived if a local agency meets in closed session to discuss "pending litigation," which is a proper basis for a closed session pursuant to §54956.9(d), but provides a defective notice of the closed session pursuant to §54956.9(g). In fact, *nowhere in the Act* is it stated that the penalty a local agency must pay for even a minor infraction of the closed session notice requirements is a *waiver* of attorney client privilege. Nor would reading such a waiver into §54956.9 be consistent with the purpose of the statute or the public policy in favor of protecting a local governing body's ability to receive and discuss confidential and privileged advice from its legal counsel regarding pending litigation. But that is precisely what the trial court did when it found that simply using the wrong *type* of closed session notice meant that the closed session discussions and

documents were "not subject to the exceptions permitting confidentiality of the Brown Act ". (AA358-359, 361.)

The trial court appears to have done so based on an erroneous interpretation of §54963. Section 54963(a) provides that a person may not disclose to the public confidential information obtained in a closed session. §54963(b) defines "confidential information" to mean "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 under this chapter." The trial court appears to have read into this section words that do not appear in the statute by reading the term "basis" in this section to mean "basis in the agenda notice." That interpretation is not consistent with the plain language of the statute or the legislative history of §54963.

First, the trial court's interpretation ignores the plain language of §54963(b). Section 54693(a) provides that a person may not disclose confidential information obtained from a closed session authorized by one of the nine separate statutory provisions of the Act that provide a "basis" for an agency to meet lawfully in closed session. (See e.g. §§54956.7, 54956.8, 54956.86, 54956.87, 54956.9, 54957, 54957.6, 54957.8, or 54957.10.) In §54963(b) the use of the word "basis" in the phrase "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," means a communication directly related to one of the statutes describing topics that are an appropriate *basis* for holding a closed session. The definition of "confidential information" in the statute thus distinguishes between discussions that are proper *topics* for a closed session, i.e. related to a proper basis for holding a closed session, and those that are not.

There is nothing in the text of, and no discussion in the legislative history of, §54963 that suggests that the definition of "confidential information" was meant to rescind the confidentiality of an otherwise appropriate closed session conversation simply because the agenda notice for the closed session contained a defect. The legislative intent of the §54963 was to "penalize those members that sit on a local agency governing board 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 [CBA 8/26/02].)

In fact, an early version of the bill explicitly defined "confidential information" in part to simply mean "[a] communication concerning pending litigation within the attorney-client privilege." (APP_MJN012 [California Bill Analysis, Assembly Third Reading, AB 1945, (April 22, 2002)].) The bill was later amended to "[s]pecify nine closed session "safe harbor" exceptions where a person may not disclose confidential information that arises out of that closed session". (APP_MJN002 [CBA 8/26/02].) Section 54963(a) lists those nine "safe harbor" closed sessions, which includes §54956.9 "pending litigation" closed sessions. Any communication "that is specifically related" to a "safe harbor" basis for a closed session is "confidential information" pursuant to §54963(b). The "confidentiality" of any communication thus flows from the nature of the discussion itself, and whether it is related to a proper "safe harbor" basis to meet in closed session. Nothing in the statute or the legislative history suggests it flows from the *agenda notice*, nor do those words even appear in the text of either, nor is there a suggestion that the punishment for a defect in an agenda notice is a complete waiver of confidentiality.

While §54956.9(g) does require that a closed session be properly noticed, the Brown Act provides specific remedies for the agency's failure to do so, including seeking injunctive or declaratory relief to determine if a violation occurred and to prevent future violations, or an order to determine that any action taken in closed session is void for failure to follow the requirements of the statutes (54960(a), 54960.1.)

Section 54960(b) and (c) also provide a *very specific* remedy regarding closed session discussions; it provides that if any provision of §54956.9 is violated, a court may "order the legislative body to audio record its closed sessions and preserve the audio recordings for the period and under the terms of security and confidentiality the court deems appropriate." In any future action alleging a closed session violation of the Brown Act, the court may then review the recordings in camera to determine if there is good cause to believe that discussions that were not appropriate for a closed session occurred, and the court may "make a certified transcript of the portion of the recording a public exhibit in the proceeding." (§54960(c).) However, the statute also explicitly states that the procedure described in this "section shall not permit discovery of communications that are protected by the attorney-client privilege." (§54960(c)(5).)

Nowhere in these detailed statutory remedies is it even suggested that waiver of confidentiality and attorney client privilege is an intended penalty under the Brown Act; to the contrary, the procedures go to great length to protect that confidentiality.

Additionally, §54963 itself specifically provides a remedy for persons present in closed sessions who believe a violation of the Act has occurred. The statute provides that it is not a violation of the confidentiality provisions

to make "a confidential inquiry or complaint to a district attorney or grand jury concerning a perceived violation of law, including disclosing facts to a district attorney or grand jury that are necessary to establish the illegality of an action taken by a legislative body of a local agency or the potential illegality of an action that has been the subject of deliberation at a closed session if that action were to be taken by a legislative body of a local agency." (§54963(e)(1).) A "confidential inquiry" would not be necessary if, as ruled by the trial court in this case, a notice violation automatically made the entire contents of a closed session discussion not confidential, regardless of whether it was otherwise a proper discussion for closed session.

Given all of the above, there is no way to read the trial court's interpretation of §54963 in a manner that is consistent with the plain language of the statute, its legislative history, or the Brown Act as a whole. Section 54963 was intended to protect the confidentiality of closed sessions. The trial court's interpretation of this statute turns its purpose on its head, allowing persons to publicly disclose confidential attorney client information whenever they determine, at their own discretion, that even a minor violation of the Act may have occurred, a potentially devastating result for the public entity, and for its citizens. This interpretation would severely weaken closed session confidentiality and attorney client privilege, and discourage the "full and frank communication between attorneys and their clients" that the closed sessions are intended to encourage. (*Roberts v. City of Palmdale*, *supra,* 5 Cal.4th at 380-381.)

Defendants' 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 session. If they believed that topics of discussion were not proper for closed session, they could have approached the district attorney or the grand jury in confidence regarding their concerns. They did *none* of these things. They instead made substantial details of closed session discussions and attorney client privileged communications public in violation of the Brown Act. Both the District Attorney and City Attorney specifically admonished Defendants that this was a violation of the Brown Act. (AA113-114, 126, 131-134.) 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 developer that would be impacted by the City's strategy in dealing with a lawsuit and referendum over the developer's proposed development project. (AA28 [¶40],199-200[¶¶15-20].)

4. Defendants' disclosures were not mere statements of opinion.

Although the court's analysis of the disclosures focused extensively on whether the closed session discussions exceeded the scope of the agenda notices and were thus not "confidential" as the term is defined by the Brown Act, the court also suggested, without any analysis, that the disclosures might simply be an expression of "an opinion concerning the propriety or legality of actions taken by a legislative body" and thus permitted by §54963(e)(2). (AA361.) This finding is incorrect as a matter of law.

Defendants' disclosures far exceeded the expression of opinion contemplated by §54963(e)(2). Defendants' "opinion" was that the City Council had violated the Brown Act. The "nature" of that violation was that the council had discussed topics that were beyond the scope of the closed session notice. The "extent" of the violation was that Defendants believed the violation had occurred at three meetings. The alleged direct quotes of council

members and the detailed narrative of the discussions with legal counsel and the contents of the legal memorandum prepared by the city's attorney were not necessary to express this opinion. In fact, both the District Attorney and the City Attorney found that the "factually detailed disclosure exceeded the limited scope" of the opinion exception. (AA113-114,126.)

Indeed, the exception provided by §54963(e)(2) would completely swallow the rule if it allowed individuals to disclose confidential attorney-client privileged facts, documents and statements from a closed session merely because, in their *opinion*, the privileged communications exceeded the scope of the agenda notice. (*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 134 [exceptions in a regulation should not be read to "swallow the general rule."].)

Also, if a person present in a closed session meeting believes that a violation of the Act occurred in closed session, the statute provides an exception to the rule forbidding disclosure of closed session information that permits them to discuss the details of the closed session confidentially with a district attorney or grand jury. (§54963(e)(2).) There would be no purpose for the legislature to provide this exception if the same details could be made public under the guise of presenting an "opinion" that the Act had been violated. Accordingly, the trial court's conclusion that the disclosure of details of the closed sessions and the attorney client privileged discussions and documents shared therein might have qualified as the simple expression of an "opinion" that the Brown Act had been violated was incorrect as a matter of law.

III. THE ANTI-SLAPP STATUTE DISALLOWS FEES AND COSTS AWARDS IN BROWN ACT CASES; THE TRIAL COURT ERRED IN AWARDING ATTORNEYS' FEES TO DEFENDANTS.[7]

After the trial court granted their anti-SLAPP motion, Defendants filed a motion for attorneys' fees pursuant to CCP §425.16(c) requesting a total of $119,085 in attorney's fees and $1,065 in costs. (AA370-382.) Plaintiffs opposed the motion, arguing, *inter alia*, that Defendants were barred from an award of fees by CCP §425.16(c)(2), which carves an exception for fee awards in cases brought under the Brown Act. (AA390-391; 474-475.)

The trial court granted Defendants' motion in part, ruling that the exception in CCP §425.16(c)(2) did not apply. (AA485-486.) The trial court awarded Defendants $78,885 in fees and $1,065 in costs. (AA488.)

The trial court erred as a matter of law in granting Defendants' Motion for Attorney's Fees because CCP §425.16(c)(2) expressly bars an award of attorney's fees to defendants who prevail in an Anti-SLAPP motion in Brown Act cases.

CCP §425.16(c)(2) provides that attorney's fees shall not be awarded to a defendant if the complaint was brought pursuant to §54960. Section 54960 is the provision of the Brown Act that provides for private citizen suit enforcement. It reads in relevant part that any "interested person may commence an action . . . for the purpose of stopping or preventing violations or threatened violations of this chapter." (§54960(a).)

"This chapter," as used in §54960 refers to Chapter 9, which is the entire Brown Act, constituting sections 54950 through 54963 of the Government Code. (§54950.5 ["This chapter shall be known as the Ralph M.

---

[7] The Court need address this issue only if it otherwise affirms the anti-SLAPP order.

Brown Act."].) Thus, §54960 authorizes citizens to bring a private action for mandamus, declaratory or injunctive relief for violations of the Brown Act.

As the trial court acknowledged, Plaintiffs brought their Brown Act case for violations of §54963. (AA486.) Plaintiffs' First Amended Complaint was an "action" commenced by "interested persons" seeking "injunction, or declaratory relief" alleging a Brown Act cause of action, and therefore was clearly brought pursuant to §54960. CCP §425.16(c)(2) bars an award of fees in actions brought pursuant to §54960. Therefore, Defendants' Motion should have been denied.

Nevertheless, the trial court concluded that because Plaintiffs pled a violation of §54963 of Chapter 9, and CCP §425.16(c)(2) does not specifically list §54963, the fee recovery prohibition in the Anti-SLAPP statute does not apply. (AA486.)

However, that the Complaint does not include the number 54960 does not magically change Plaintiffs' citizen suit from a Brown Act case to a non-Brown Act case. Plaintiffs did not allege a violation of §54960 because there is nothing to violate in that section – it is simply the authorizing provision for "interested persons" (i.e., citizens) to seek judicial relief for violations of substantive provisions located in other sections of the Brown Act, such as §54963.

In essence, the trial court's reasoning holds that the bar in CCP §425.16(c)(2) would only apply if the legislature listed every section in the Brown Act individually, and not just the sections providing for private citizen enforcement of the Brown Act (§§54960 and 54960.1). (AA486.) This interpretation is unreasonable when reading CCP §425.16(c)(2) harmoniously, where the "five Government Code sections which expressly disallow attorney's fees in an Anti-SLAPP motion" (AA486) all pertain to the

citizen suit enforcement mechanisms of the three Acts that are exempt from the Anti-SLAPP fees provision: the Bagely-Keene Act, the Brown Act, and the California Public Records Act ("CPRA"). (See CCP §425.16(c)(2), referring to "Government Code sections 11130, 11130.3, 54960, 54960.1, and Chapter 2 of Part 4 of Division 10 of Title 1 of the Government Code.")

Further, the trial court's overly-narrow interpretation of CCP §425.16(c)(2) would lead to absurd results (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal. 3d 1142, 1165-1166), because the trial court's interpretation would, as a practical matter, render CCP §425.16(c)(2)'s fee prohibition superfluous and void as to any Brown Act cause of action. If nothing else in the Brown Act but §§54960 and 54960.1 were subject to the fee bar in the Anti-SLAPP statute, there would, as a practical matter, be no fee bar at all because the Brown Act's substantive requirements and prohibitions are located elsewhere in the Government Code and are not listed in CCP §425.16(c)(2); no citizen would bring a cause of action for violation of §54960 when it contains no substantive regulatory prohibitions or requirements.

Thus, pursuant to the trial court's reasoning, successful Anti-SLAPP defendants would never be barred from obtaining fees in Brown Act cases, in direct contravention of the purpose of CCP §425.16(c)(2).

In support of its ruling, the trial court misconstrued CCP §425.16(c)(2), stating:

> If the legislature had intended to exclude all actions brought pursuant to "this chapter" (meaning "the entire Brown Act") as argued by Plaintiffs at page three of their sur-reply, it would not have needed to include Govt. Code § 54960.1 (since that is part of "this chapter"), and it would have stated "Chapter 9 commencing with Section 54950," etc. as it did with "Chapter 2, etc. [of the California Public Records Act] referenced above. To interpret the statute as Plaintiffs do defies logic.

(AA486 [underline added].)

The trial court was mistaken; the CPRA and the Brown Act are organized differently. The Brown Act is contained entirely within one chapter: Chapter 9 of Part 1 of Division 2 of Title 5, the Government Code title devoted to local agencies. The CPRA on the other hand has an entire Division of the Government Code devoted to it, located at Title 1, Division 10, and contains 7 parts and 30 chapters. So while "Chapter 9" in the Brown Act refers to the entire Brown Act, the "Chapter 2" of the CPRA that begins at §§7923.100-7923.500, provides the citizen suit enforcement procedures for the CPRA, it is not the entire CPRA.

Prior to the legislature's reorganization of the CPRA which took effect in January 2023, the now "Chapter 2" referred to in CCP §425.16(c)(2) was then-§6259, which provided the citizen suit enforcement procedures for violations of the CPRA. (APP_MJN025.)

Thus, just as Chapter 2 of Part 4 of the CPRA is an authorizing and procedural mechanism for citizen enforcement of the CPRA and contains no substantive regulatory provisions, §54960 of the Brown Act is an authorizing and procedural mechanism for citizen enforcement of the Brown Act, and which contains no substantive regulatory provisions.

The references to the Bagley-Keene Act in §425.16(c)(2) are similar. Like §§54960 and 54960.1 of the Brown Act, §§11130 and 11130.3 are mechanisms by which persons bring a citizens suit for violations of any section of the Bagely-Keene Act, while the substantive regulatory provisions are located in other sections. (See e.g., §§ 11121, et seq.) Just like a defendant who succeeds with an Anti-SLAPP motion in a Brown Act case is not entitled to attorneys' fees, a defendant who succeeds with an Anti-SLAPP motion in a Bagely-Keene Act case is not entitled to attorneys' fees.

Just like the legislature did not list in CCP §425.16(c)(2) every section contained in Article 9 which is the Bagely Keene Act, the legislature did not list in CCP §425.16(c)(2) every section contained in Chapter 9 which is the Brown Act. Nor did the legislature list every section contained in Division 10 which is the CPRA.

Given the congruence of §425.16(c)(2)'s plain language listing only the sections authorizing citizen suit enforcement and associated judicial procedures, it is clear the legislature intended to disallow fees to successful Anti-SLAPP defendants in Brown Act cases. The trial court thus erred as a matter of law in granting Defendants' fees motion.

CONCLUSION

For all of the foregoing reasons, Appellants respectfully pray for a decision and order of this Court that:

1. Reverses the trial court's order granting the anti-SLAPP motion on the grounds that Plaintiff's Complaint is exempt from the anti-SLAPP statute pursuant to CCP §425.17; or,
2. Reverse the trial court's order granting the anti-SLAPP motion on the grounds that Plaintiffs have established a probability of prevailing on their Brown Act cause of action; and,
3. Reverse the order granting attorneys' fees and costs as a matter of course in light of the reversal of the Order, or on the grounds that the cost and fee order is in violation of the exemption set forth in CCP §425.16(c)(2); and,
4. Remand the matter to the trial court for further proceedings in accordance with this Court's decision;
5. Award Appellants' costs on appeal; and,
6. All other relief as this Court may deem fair and equitable.

DATED: 7/31/24

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 13,953 words, as determined by a computer word count.

July 31, 2024

Respectfully submitted,

_____

Sabrina Venskus

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 July 31, 2024, I served the foregoing document described as:

APPELLANTS' OPENING BRIEF

on the interested party/parties below addressed as follows:

SEE ATTACHED SERVICE LIST

/X/ (BY MAIL) I placed the envelope for collection and mailing on the date shown above, at this office, in Ojai, California, following our ordinary business practices. I am readily familiar with this office's practice of collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service in a sealed envelope with postage fully prepaid.

/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 July 31, 2024, at Port Townsend, Washington.

/s/ Rachael Andrews
Rachael Andrews

SERVICE LIST

Stephen C. Johnson, Esq. S.C. Johnson & Associates, LLC 703 Pier Ave., #703 Hermosa Beach, California 90254 Phone: (310) 339-4417 Email: stephen@scjohnsonlaw.com	Attorneys for Defendants Leslie Rule and Jon E. Drucker (Via TrueFiling Only)
Jon E. Drucker, Esq. Law Offices of Jon E. Drucker 111 Topa Topa Street Ojai, California 93023 Email: jdrucker@lawyers.com	Attorney for Defendant Leslie Rule (Via TrueFiling Only)
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)

STATE OF CALIFORNIA California Court of Appeal, Second Appellate District	***PROOF OF SERVICE*** **STATE OF CALIFORNIA** California Court of Appeal, Second Appellate District

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

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **rkimball@lawsv.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF - APPELLANTS OPENING BRIEF	20240731_Byrne v Rule_AOB
MOTION - MOTION (FEE PREVIOUSLY PAID)	20240731_MJN_Exh_Final
NOTICE - ASSOCIATION OF ATTORNEYS	20240731_Ntc Assn of Counsel
APPENDIX - JOINT APPENDIX	VOL 1_AA0001 - AA0308_Final
APPENDIX - JOINT APPENDIX	VOL 2_AA0309 - AA0508_Final
PROOF OF SERVICE - PROOF OF SERVICE	20240731_Proof of Service_Final

Service Recipients:

Person Served	Email Address	Type	Date / Time
Jon E. Drucker Law Offices of Jon E. Drucker	jdrucker@lawyers.com	e-Serve	7/31/2024 5:15:47 PM
Sabrina Venskus Venskus & Associates, A.P.C. 219153	rkimball@lawsv.com	e-Serve	7/31/2024 5:15:47 PM
Stephen Johnson S.C. Johnson & Associates 145210	stephen@scjohnsonlaw.com	e-Serve	7/31/2024 5:15:47 PM
Brian Acree Law Office of Brian Acree 202505	brian@brianacree.com	e-Serve	7/31/2024 5:15:47 PM
Sabrina Venskus Venskus & Associates, A.P.C	venskus@lawsv.com	e-Serve	7/31/2024 5:15:47 PM

Herb Fox 126747	hfox@foxappeals.com	e-Serve	7/31/2024 5:15:47 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

7/31/2024

Date

/s/Sabrina Venskus

Signature

Venskus, Sabrina (219153)

Last Name, First Name (PNum)

Venskus & Associates, A.P.C.

Law Firm